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## Torts--Right of Privacy--Effect of Lapse of Time on the Constitutional Privilege

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## COMMENTS

### TORTS—RIGHT OF PRIVACY—EFFECT OF LAPSE OF TIME ON THE CONSTITUTIONAL PRIVILEGE

*In a nation built upon the free dissemination of ideas, it always difficult to declare that something may not be published. But the great general interest in an unfettered press may at times be outweighed by other great societal interests. As a people we have come to recognize that one of these societal interests is that of protecting an individual's right to privacy. The right to know and the right to have others not know are, simplistically considered, irreconcilable. But the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other.<sup>1</sup>*

#### I. INTRODUCTION

Prior to 1890 the right of one to recover for a *truthful* reporting of "private" facts or events of his life, both past and present, was virtually non-existent.<sup>2</sup> Such a state of judicial non-recognition of an individual's right to privacy might possibly have still existed today had not Warren and Brandeis converted their personal reactions to a particular newspaper article into a most influential thesis<sup>3</sup> on the rights of the individual to determine "... ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others."<sup>4</sup>

What has evolved in the last eighty years has been labeled "a complex, subtle right, fundamentally concerned with an intangible: the separate identity or the inviolate personality or individuality of a person."<sup>5</sup> Since 1903 there have been a num-

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1. *Briscoe v. Reader's Digest Assn.*, 93 Cal. Rptr. 866, 483 P.2d 34 (1971).

2. PROSSER, *LAW OF TORTS* 829 (3d ed. 1964). There were, however, a few cases which seemed to be "groping" in the direction of privacy and Judge Cooley had spoken of "the right to be let alone."

3. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

4. *Id.* at 198, quoting from *Briscoe v. Reader's Digest Assn.*, 93 Cal. Rptr. 866, 868, 483 P.2d 34, 36 (1971).

5. 5A BENDER'S PERSONAL INJURY 764.1, 764.9 (1967).

ber of cases<sup>6</sup> with a variety of holdings, and it is not surprising that critics have branded the present state of privacy law as "still that of a haystack in a hurricane."<sup>7</sup>

There has been little attempt to affirm this right by statute, and those states<sup>8</sup> that have recognized the right have done so through individual cases.<sup>9</sup> The tort of invasion of privacy is measured by the objective standard of the sensibilities<sup>10</sup> of the ordinary man balanced against the scope of newsworthiness,<sup>11</sup> the constitutional privilege<sup>12</sup> of the press to give more publicity to those who either voluntarily or involuntarily become public figures and to publicize news and matters of general public interest. What is objectionable depends not only upon the mores of the particular community at any given time, but also upon the damage party's status and the defendant's motives.<sup>13</sup>

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6. At least 400 cases so far have been brought on the basis of invasion of privacy. PROSSER, LAW OF TORTS 829 (3d ed. 1964).

7. 5A BENDER'S PERSONAL INJURY 764.1, 764.9 (1967).

8. N.Y. CIVIL RIGHTS LAW §§50-51 (McKinney 1948); OKLA. STAT. ANN. tit. 21, §839-40 (1958); UTAH CODE ANN. 76-4-8, 76-4-9 (1953); VA. CODE ANN. 8-650 (1957). PROSSER at 804.

9. At least 36 state courts have recognized the right to privacy. Only four states have expressly said that it is for the legislature to make any changes in the old common law. These states are: Rhode Island, Nebraska, Texas, and Wisconsin. See PROSSER, LAW OF TORTS 802, 804 (4th ed. 1971).

10. Thus the "thin-skinned" person is afforded no protection unless the publication or actions referring to him would be highly offensive to the ordinary man. The rule in many jurisdictions is that "it is only when the defendant should know that the plaintiff would be justified in feeling seriously hurt by the conduct that a cause of action exists." Annot., 30 A.L.R. 3d 203, 218 (1970).

11. There is no precise legal definition of "newsworthiness." "That which the court deems to be of general interest to the public" is one possible way of considering the term. News can also be considered anything which is out of the ordinary routine and on which the public has focused its attention. See PROSSER, LAW OF TORTS 829, 844 (3d ed. 1964). For a discussion of newsworthiness and the problems surrounding its definition, see also Note, "The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness," 30 U. CHI. L. R. 722 (1963); Moore, *A Study in the Practical Application of the Right of Privacy*, 22 S.C. L. REV. 1 (1970).

12. The privilege referred to is the First Amendment guarantee of free speech and press.

13. See 5A BENDER'S PERSONAL INJURY 764.1, 764.26 (1967).

The so-called "balance" between right to privacy and constitutional privilege appears to some<sup>14</sup> to have shifted more favorably toward the privilege to such a degree that these writers fear that the court in its recent pronouncements has attempted to return the right to privacy to its pre-1890 status. The much-heralded case of *Time, Inc. v. Hill*<sup>15</sup> went on record as establishing that in reporting "newsworthy" subjects, matters of public interest, or about public figures, the constitutional privilege extended not only to reporting truthful facts but also to the disclosure of facts in a "false light."<sup>16</sup> The privilege would be withheld only if there was "knowing or reckless falsity" on the publisher's part, the criterion originally established in the defamation case of *New York Times Co. v. Sullivan*.<sup>17</sup> The *Hill* case must be considered in light of the New York statute<sup>18</sup> which admittedly affords little protection to newsworthy individuals and subjects and in light of the scope of this case as falling within "false light" invasion of privacy. This case does not appear to extend the scope of newsworthiness to further aid the mass media,<sup>19</sup> yet it must be acknowledged that the constitutional privilege asserted does present a very real barrier to those persons who assert that

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14. See Pedrick, *Publicity and Privacy: Is It Any of Our Business?* 20 U. TORONTO L.J. 391 (1970). The author states that "the right of privacy in the U.S. is in a state of jeopardy, not because of judicial timidity, but, rather as a result of hyper-activity on the part of our Supreme Court . . ." 20 U. TORONTO L.J. at 397. Mr. Justice Black, however, takes the view that the rights of the mass media are being hampered by restricted First Amendment privileges. *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (concurring opinion).

15. 385 U.S. 374 (1967).

16. Representing the plaintiff in a "false light" is only one of the four types of privacy. The other three types are physical intrusion upon the plaintiff, public disclosure of embarrassing private facts, and appropriation of the plaintiff's name or picture for defendant's commercial advantage.

17. 376 U.S. 254 (1964). In this case the Court precluded recovery by a public official for false and defamatory statements which were made concerning his public conduct unless he could show actual malice or reckless disregard for the truth.

18. N.Y. CIVIL RIGHTS LAWS §§50-51 (McKinney 1948). "This section is limited to use of living person's name or picture without his consent for advertising or business purposes, and does not include use of name or picture as part of or in connection with text itself, or to illustrate text in newspaper or magazine article or book." *People, on Complaint of Stern v. Robert R. McBride & Co.*, 159 Misc. 5, 288 N.Y.S. 501 (1936).

19. See Comment, *Torts—Limitations on the Rights of Privacy—Privilege to Report Matters of Public Interest*, 21 S.C. L. REV. 92, 99 (1968).

they or their actions are not newsworthy, or that they are not public figures who have even less right to privacy than their non-public brothers. The burden, therefore, seems to rest upon the plaintiff to show that he does not come within the constitutional ambit of the First Amendment privileges accorded the mass media.

## II. A POSSIBLE LIMITATION

If critics are justified in their belief that the right to privacy is threatened<sup>20</sup> and if the right is to survive, perhaps the entire concept, or at least some aspect, of newsworthiness must be more strictly construed or limited. Dean Prosser touched on one possible limitation of the constitutional privilege in his *LAW OF TORTS*:<sup>21</sup> "One troublesome question, upon which none of the cases dealing with the Constitutional privilege has yet touched, is that of the effect of lapse of time, during which the plaintiff has returned to obscurity."

The majority of the courts which have dealt with the effect of lapse of time upon the question of the existence of a right of privacy have tended to hold that once a person and his activities have come into the sphere of public interest, he is not entitled subsequently to be regarded as having regained a private status, at least as far as that particular activity is concerned.<sup>22</sup> In *Barbieri v. News-Journal Co.*<sup>23</sup> the Delaware court held that an article referring to the plaintiff as "the last person to feel the lash" did not invade his privacy when the article had a legitimate purpose: the reporting of a proposed bill designating mandatory whippings for certain offenses. The court also pointed out that the article did not "violate the ordinary decencies," nor did it represent commercial exploitation of the plaintiff's life.

*Sidis v. F-R Publishing Corp.*<sup>24</sup> also falls into that category of cases which hold that once a person has gained the status of a "public figure" he retains that status even after a lapse of years and an attempt to stay out of the public view.

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20. See Note 14, *supra*.

21. PROSSER, *LAW OF TORTS* 802, 827 (4th ed. 1971).

22. See *Annot.*, 30 A.L.R. 3d 203 (1970).

23. 56 Del. 67, 189 A.2d 773 (1963). See also *Branson v. Fawcett Publications*, 124 F. Supp. 429 (E.D. Ill. 1954); *Cohen v. Marx*, 94 Cal. App. 2d 704, 211 P.2d 320 (1949).

24. 113 F.2d 806 (2d Cir. 1940).

THE NEW YORKER magazine published an article on one-time child prodigy Sidis which compared the brilliant future that had been predicted for him in his youth with Sidis' present non-inspiring, anonymous life. Although the article was not lurid or unfavorable to Sidis, he regarded it as an invasion of his privacy. Unfortunately he failed to persuade the court, which took the view that since Sidis' brilliance was so widely acclaimed in his youth, it would be only natural for the public to be greatly interested in the accomplishments (or lack of accomplishments) of his later life.

So far only a few cases have indicated that there may come a time or point beyond "which a past event is no longer news, and the unnecessary mention of the plaintiff's name in connection with it may afford a cause of action."<sup>25</sup> The most well-known case in this category is *Melvin v. Reid*,<sup>26</sup> in which defendants had produced a movie based on the plaintiff's murder trial and scandalous life as a prostitute several years after she had been acquitted and rehabilitated. The three major factors justifying her right to recovery were the commercial exploitation of her past life-style, lack of legitimate purpose in publicizing the plaintiff's activities and the plaintiff's rehabilitation. Had the defendants merely based their movie on incidents from the plaintiff's life without using her name, then quite possibly she would not have had a cause of action.<sup>27</sup> The court did not hold that a time lapse in itself was sufficient to keep the movie from being newsworthy, but that the combination of time lapse, rehabilitation, and commercial exploitation did affect the newsworthiness privilege. Had the story been published in a respectable journal and with a legitimate purpose, the result at that time may have been different.<sup>28</sup>

In a more recent case, *Wagner v. Fawcett Publications*,<sup>29</sup> the lapse of two months between the murder of plaintiff's daughter and the publication of an article about the murder

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25. PROSSER, LAW OF TORTS 802, 827-828 (4th ed. 1971).

26. 112 Cal. App. 273, 297 P. 91 (1931). The court did not base its decision on the right of privacy, but rather on a section of the New York Constitution which "guaranteed to citizens the right of procuring and obtaining safety and happiness." Annot., 30 A.L.R. 3d 203, 269 (1970).

27. Annot., 30 A.L.R. 3d 203, 269 (1970).

28. Note, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. R. 722 (1963).

29. 307 F.2d 409 (7th Cir. 1962).

was held sufficient to limit the newsworthiness privilege, according to the original opinion of the Seventh Circuit Court of Appeals. The court later reversed that decision and found for the defendant, stating that the case was current, since legal proceedings were still taking place. This case is significant in that it did recognize the detrimental effect of time lapse on newsworthiness, even though the final result was unfavorable to the plaintiff. Despite this federal court's acknowledgement of the effect of passage of time on the right to publish items of public interest, the rule has still remained in force that a lapse of time will not operate to take away the privilege to report on what was once a matter of public interest. The recent case of *Briscoe v. Reader's Digest Association*,<sup>30</sup> however, may represent a change of judicial thinking on the effect of lapse of time on the newsworthiness privilege.

### III. BRISCOE V. READER'S DIGEST ASSOCIATION

In 1956 Marvin Briscoe and another man hijacked a truck, an action which resulted in a criminal record for Briscoe which was, of course, a matter of public record. Briscoe thereafter formed a new and respectable life for himself among people who knew nothing of his criminal record. Eleven years later READER'S DIGEST published an article on hijacking in which Briscoe's name and the circumstances (but not the date) of his crime were recounted. As a result of this adverse publicity, Briscoe was scorned by both his friends and his eleven-year old daughter, who was also unaware of her father's past. He brought suit against the defendant Association for invasion to his privacy, conceding that publication of the *facts* of his crime and the particular subject of the article may have fallen within the "newsworthy" category, but that his *name* did not. A demurrer to plaintiff's complaint was sustained without leave to amend and the plaintiff brought an appeal to the California Supreme Court.

Considering the present state of the law of privacy and the fact that Briscoe's crime was a matter of public record, one might reasonably assume that the court would once again proclaim the superiority of the First Amendment rights and inform Briscoe that by his own actions he became a figure whose past actions and name were and still are newsworthy,

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30. 93 Cal. Rptr. 866, 483 P.2d 34 (1971).

and that to preclude the media from alluding to matters and persons of public record would result in a further stifling of their constitutional rights. Surprisingly enough the court affirmed Briscoe's right to bring a cause of action. In its opinion the court made pronouncements which could serve both to clarify and to limit the privilege, and the fact that this case presents a lapse of time question which is considered in light of the constitutional privilege is significant in itself. Those cases which had previously differed from the general rule as to effect of lapse of time were decided before the First Amendment rights of free speech and press were expressly made applicable to privacy tort law.

The court acknowledged that the "right to keep information private was bound to clash with the right to disseminate information to the public,"<sup>31</sup> and that in order to decide the case before it they would have "to consider the character of these competing interests."<sup>32</sup> As to the rights to be accorded to the press the court stated the following:

'Freedom of discussion \* \* \* must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. \* \* \* . . . The scope of the privilege thus extends to almost all reporting of recent events, even though it involves the publication of a purely private individual's name or likeness.'<sup>33</sup>

Thus the court stressed the power of the privilege as it extends to recent matters and made it quite clear that any plaintiff suing under the privacy tort for publication concerning current events or names will find it very hard to rebut the presumption that the publication is privileged. The court then considered the question of whether or not reporting the facts and names of *past* crimes and offenders would "serve the same public interest functions"<sup>34</sup> as served by reporting of recent crimes and concluded that reports of the facts of crimes committed in the past could indeed be considered newsworthy in both a deterrent and educational sense. As to reports of the *names* of past offenders, however, the court expressed doubt as to the interests functions which would be served:

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31. *Id.* at 869, 483 P.2d at 37.

32. *Id.*

33. *Id.* at 870, 483 P.2d at 38.

34. *Id.* at 871, 483 P.2d at 39.



However, identification of the *actor* in reports of long past crimes usually serves little independent public purpose. Once legal proceedings have terminated, and a suspect or offender has been released, identification of the individual will not usually aid the administration of justice. Identification will no longer serve to bring forth witnesses or obtain succor for the victims. Unless the individual has reattracted the public eye to himself in some independent fashion, the only public "interest" that would usually be served is that of curiosity.<sup>35</sup>

This statement does not mean that all reports of the names of people once involved in newsworthy events could serve no public purpose, since there are some private citizens in whom the public interest never wavered, just as there are some events which are so imprinted upon the public memory that all aspects of those events remain public. The determination of the category into which a persons falls is for the *trier of fact*, according to the *Briscoe* court. Thus the court here refused to hold as a matter of law that once newsworthy, always newsworthy.

As in *Melvin v. Reid*<sup>36</sup> the factor of rehabilitation played an important part in the court's decision that *Briscoe* had a cause of action. California has an indeterminate sentence law which enables an offender to "minimize" his term of imprisonment by rehabilitation, and to allow the mass media at will to bring up his past might destroy the effectiveness of the indeterminate sentence law and the emphasis on rehabilitation.<sup>37</sup> The court sympathized with those who attempted to forget the mistakes of the past and make new and useful lives for themselves:

The masks we wear may be stripped away upon the occurrence of some event of public interest. But just as the risk of exposure is a concomitant of urban life, so too is the expectation of anonymity regained. It would be a crass legal fiction to assert that a matter once public never becomes private again. Human forgetfulness over time puts today's "hot" news in tomorrow's dusty archives. In a nation of 200 million people there is ample opportunity for all but the most infamous to begin a new life.<sup>38</sup>

To justify its vindication of *Briscoe's* cause of action the court resorted to making value judgments on the worth of the news in question, a determination from which courts have tra-

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35. *Id.* at 872, 483 P.2d at 40.

36. 112 Cal. App. 285, 297 P. 91 (1931).

37. *Briscoe v. Reader's Digest Assn.*, 93 Cal. Rptr. 866, 873, 483 P.2d 34, 41.

38. *Id.*

ditionally shied.<sup>39</sup> The jury, the court concluded, could reasonably find that the plaintiff's name was not newsworthy, since (1) its addition to the article served little social value, (2) Briscoe had done nothing to reattract the public eye, (3) most people would consider it grossly offensive to have their past criminal record reported, and (4) society's interest in rehabilitating the criminal should not be sacrificed without good reason.<sup>40</sup> In keeping with First Amendment rights, the plaintiff would in each case have to prove that the "publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive."<sup>41</sup>

*Briscoe* differed from *Melvin v. Reid*<sup>42</sup> and *Wagner v. Fawcett Publications*<sup>43</sup> first because it was decided with the constitutional privilege in mind. Secondly, in both *Melvin* and *Wagner* there existed some aspect of commercial exploitation and very little legitimate purpose for publishing the article and producing the movie. The *Briscoe* publication, on the other hand, was acknowledged by the court to have served a legitimate function.

### III. CONCLUSION

The argument that the right to privacy is an endangered tort, one which will in time be "swallowed up"<sup>44</sup> by the increasingly liberal First Amendment privileges accorded the mass media, may be a valid one. The California court's fear of such a result in *Briscoe v. Reader's Digest Association* could have been a precipitative factor in the court's decision to uphold the cause of action of a man whose past activities had placed his name on public record. It is too soon to know what real effect or impact this decision will have on the conflict between the individual's right to privacy and the public's right to the free dissemination of information concerning events of public interest, but it is obvious that the case's holding did nothing to restrict the constitutional privilege with respect to

39. Moore, *A Study in the Practical Application of the Right of Privacy*, 22 S.C. L. REV. 1, 13 (1970).

40. 93 Cal. Rptr. at 875, 483 P.2d at 43.

41. *Id.* at 876, 483 P.2d at 43.

42. 112 Cal. App. 285, 297 P. 91 (1931).

43. 307 F.2d 409 (7th Cir. 1962).

44. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROB. 326 (1966).

current events and names. The court reiterated the requirement that if one is to recover for invasion of privacy he must prove that the publisher exhibited "reckless disregard for the fact that reasonable men would find the invasion highly offensive."

The case did, however, deal with lapse of time and its effect on the scope of protection offered by the doctrine of newsworthiness, and the fact that the court did *not* extend the privilege of the media to all publications of past newsworthy events and names may be just as or even more noteworthy than the fact that it recognized that the lapse of time could and does have a great effect on newsworthiness of the use of a name. Other important aspects of the case include the use of value judgments to determine newsworthiness, the fact that the trier of fact is to determine the newsworthiness in a situation such as this, and the awareness that there may be more than one conflict of interest involved which should bear on the final determination (e.g., rehabilitation interests and goals v. right to free press and speech).

As one writer put it, "There is only one way properly to strike a balance between the First Amendment freedoms of speech and press and the common law protections of privacy, name and reputation—very carefully."<sup>45</sup> That also seems to be the view of the *Briscoe* court. Whether the pronouncements of that court will serve to further the cause of individuals in other right to privacy suits remains to be seen. It is possible that this case will be "distinguished" to such an extent that it will have no real effect on the privacy-privilege conflict. But, as previously mentioned, it will still have much impact due to the fact that it considered a situation which had not previously been decided with regard to the First Amendment rights, and it decided in favor of the plaintiff rather than using it as a means to enlarge the media's privilege.

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45. *Constitutional Law of Defamation and Privacy: Butts and Walker*, 53 CORNELL L. REV. 649 (1968).