Torts—Right of Privacy—Public Figure Test as Determinative of Right to Recovery—[Federal].—The plaintiff was the subject of a brief biographical sketch and cartoon printed without his consent in the defendant's *New Yorker* magazine. The article truthfully stated that the plaintiff had been a well-known child prodigy who for the past twenty years had been leading an unobtrusive life as a clerk. Recovery of damages was sought for violation of the plaintiff's right of privacy, under the New York Civil Rights Law,[1] and under the common law of those jurisdictions which recognized the right of privacy[2] and in which the magazine was circulated. Upon appeal from an order dismissing the action,[3] *held*, that the article was not published "for purposes of trade" within the meaning of the New York statute, and that there is no cause of action in those jurisdictions which recognize the right of privacy because the plaintiff was a public figure. Judgment affirmed. *Sidis v. F-R Publishing Corp.*[4]

To define the extent of a person's right to be left alone, authors and courts recognizing such protection have resorted to certain formulae,[5] the most popular being the "public figure" test, purportedly applied in the instant case. If the person whose name or picture is published without consent is not a "public figure," recovery seems to be allowed in all cases.[6] The court in the instant case concluded that the plaintiff was a "public figure" and as such had no right to damages for the unauthorized publication of his biography. No attempt was made to define and analyze the "public figure" concept.

A consideration of the types of public characters, in connection with the cases, seems to yield a workable test of what constitutes a "public figure." A person may arouse public interest either by choice or through a combination of circumstances beyond his control. If a person voluntarily seeks the approval or patronage of the public, it may be said that he submits his life to public scrutiny to any extent necessary for the public to determine whether it is desirable to bestow upon him the approval or patronage he

[1] N.Y. Cons. Laws (McKinney, 1916) c. 6, § 50; N.Y. Cons. Laws (McKinney Supp., 1940) § 51. There was no right of privacy in New York prior to the statute. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

[2] The classic discussion is Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). See also Green, The Right of Privacy, 27 Ill. L. Rev. 237 (1932); Moreland, The Right of Privacy Today, 19 Ky. L. J. 101 (1931); Lisle, The Right of Privacy (A Contra View), 19 Ky. L. J. 137 (1931). In several states the right of privacy has developed by extending existing legal doctrines. Cases cited in notes 6, 19, and 20 infra. In California the constitutional guarantee of personal happiness (Cal. Const. art. 1, § 1) was held to grant a right of privacy. Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931).

[3] Answer to the plaintiff's third count, alleging malicious libel under the laws of nine states recognizing such wrong, was postponed until disposition of the defendant's motion on the first two counts. A majority found the facts necessary to support the third claim to be sufficiently different from those relied on to support the other two claims to make the dismissal order appealable. Clark, J., dissenting on this point, feared that the holding would disturb rules against splitting causes of action. Sidis v. F-R Publishing Corp., 113 F. (2d) 806, 811 (C.C.A. 2d 1940).

[4] 113 F. (2d) 806 (C.C.A. 2d 1940).

[5] 40 Col. L. Rev. 1283 (1940), noting the principal case.

[6] Blumenthal v. Picture Classics, Inc., 235 App. Div. 570, 257 N.Y. Supp. 800 (1932), affirmed without opinion 261 N.Y. 504, 185 N.E. 713 (1933); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927); Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905).

desires.[7] Since such a person normally enters public life to profit politically, socially, or financially from his position, it seems that a subsequent decision to withdraw should not entitle him to draw a veil over all his life by invoking the right of privacy. The publication of those acts of his which were directly or indirectly connected with his past life in a public capacity ought to be privileged, although the mere fact that he was once a "public figure" should not deprive him of the right to keep his private life secret during subsequent retirement.[8]

The person who involuntarily becomes a public figure presents a more complex problem. Through his relation to some newsworthy event or through his own personal characteristics, an individual may become the subject of public interest without any effort or intent on his part. The publication of facts or pictures in connection with current news[9] is generally held to be privileged because of the supposed social benefit involved.[10] Similarly, educational and informative articles are permissible.[11] Such articles may include "stories of distant places, tales of historic personages and events, the reproduction of items of past news, and surveys of social conditions."[12] Publications in professional magazines restricted to closed groups such as medical associations are permitted when such publication is for advancement of science.[13] In a sense the individual involved is a "public figure" as to that particular group.

If the involuntary "public figure" does not capitalize upon the situation which has placed him in the public eye, he should have the privilege of escaping public attention in all respects except as to the particular instance which aroused the public interest.

[7] Warren and Brandeis suggest that liability should lie for the publication of matters "which concern the private habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi-public capacity." Warren and Brandeis, op. cit. supra note 2, at 216.

[8] "Some things all men are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation." Warren and Brandeis, op. cit., supra note 2, at 216.

[9] In Blumenthal v. Picture Classics, Inc., 235 App. Div. 570, 257 N.Y. Supp. 800 (1932), the defendant, who was engaged in producing motion pictures, sold a travelogue depicting the plaintiff selling bread in a New York City street. In a three-to-two decision the court allowed recovery, finding that the particular scene in which the plaintiff appeared in the motion picture was a close-up, front view of her, and was intended to show her alone in the act of vending goods. The court held that the picture was used for trade purposes and came within the protection of the Civil Rights Law. The dissenting opinion stressed that the plaintiff appeared only incidentally as part of the street scene, hence in relation to a news item.

[10] "There are some times, however, when one whether willing or not becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence." Jones v. Herald Post Co., 230 Ky. 227, 229, 18 S.W. (2d) 972, 973 (1929); Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y. Supp. 752 (1919).

[11] Sarat Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 295 N.Y. Supp. 382 (S. Ct. 1937).

[12] Ibid.

[13] See Feeney v. Young, 191 App. Div. 501, 181 N.Y. Supp. 481 (1920) (privilege abused, subjecting publishers to liability); Banks v. King Features Syndicate, Inc., 30 F. Supp. 352 (N.Y. 1939); cf. Wadlow v. Humberd, 27 F. Supp. 210 (Mo. 1939).

It may be argued that once he has succeeded in removing himself from the attention of the public, the unprovoked reiteration of those instances should not be privileged.[14] In any case, the publication of material concerning the life of the individual wholly unconnected with the aspect of his life that is of public interest, either at the time of the interest or later, exposes facts in which there is no public concern.[15]

Under the analysis of the right of privacy here presented, recovery turns on the court's finding of a present public interest in the plaintiff. The concept adopted by the court seems to have been that the plaintiff's early activities, a justifiable subject of public interest, began a story which could only be completed with an account of his subsequent history.[16] If this is a correct interpretation of the facts, recovery may have been rightly denied. It may be suggested, however, that the *New Yorker* engaged in a "bootstrap-lifting" venture in that its publication created the public interest by which it justifies its acts. A distinction might here be taken between public interest sufficient to privilege a publication, and mere public curiosity.[17] The terms are not co-extensive, and publications justified under the first may not be under the second.

A further element in the principal case which should make recovery more probable is the fact that the biographical sketch was published in a magazine which was sold for profit.[18] In most cases where there has been recovery for the violation of a right of privacy, the objectionable matter was used in some way to produce or augment financial gain,[19] although in a few situations it superficially appears that recovery has been allowed where no pecuniary advantage was contemplated by the defendant.[20] Under the

[14] Mau v. Rio Grande Oil Co., 28 F. Supp. 845 (Cal. 1939); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931).

[15] Warren and Brandeis, op. cit. supra note 2.

[16] 26 Wash. U. L. Q. 136 (1940), noting principal case.

[17] It must be stated that the New Yorker Magazine in fulfilling its self-assumed role of critic of human foibles has not set itself up as a scientific journal of sociological research.

[18] Binns v. Vitagraph Co., 210 N.Y. 51, 103 N.E. 1108 (1913).

[19] The most common cases under the right of privacy involve the use of one's picture for advertising purposes: Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Foster-Milburn v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909); Munden v. Harris, 153 Mo.App. 652, 134 S.W. 1076 (1911); Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918). An analogous situation is found in motion picture cases where use is for profit and is not privileged within the "public figure" test. Blumenthal v. Pictures Classic, Inc., 235 App. Div. 570, 257 N.Y. Supp. 800 (1932); Binns v. Vitagraph Co., 210 N.Y. 51, 103 N.E. 1108 (1913); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931). Cf. Martin v. New Metropolitan Fiction Co., 137 Misc. 290, 248 N.Y.Supp. 359 (1931), rev'd 237 App. Div. 863, 260 N.Y. Supp. 972 (1932), holding that increased circulation of the magazine on account of the article it contained does not fulfill the statutory requirement that it be published for trade purposes. The result reached in the Martin case is justified according to the "public figure" test but the reasons given seem fallacious. The publication concerned a public act of a person who involuntarily became a currently public figure. Therefore, it is privileged.

[20] In Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927), the plaintiff was debtor of the defendant. The defendant displayed a large sign in his window stating the plaintiff's indebtedness. The court allowed recovery on right of privacy notions. Here the defendant may be said to have hoped to collect the debt by displaying the sign, and thus to have had a pecuniary motive.

In Blumenthal v. Picture Classics, Inc., 235 App. Div. 570, 257 N.Y. Supp. 800 (1932), the plaintiff's picture was used along with other scenes to form an amusing travelogue. Upon

New York Civil Rights Law[21] it is essential that the use be for commercial purposes. In this respect the law is not strictly a codification of what the common law right of privacy is supposed to be, for it stresses not the effect upon the subject, which theoretically is the sole basis of recovery, but rather the pecuniary benefit to the defendant resulting from the publication.[22]

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analysis it appears that the use was for profit. In the Brents case and the Blumenthal case the plaintiffs were not public figures in any sense of the word—thus they should be protected. Where no profit was involved an injunction was granted to restrain an officer from posting in the rogues' gallery pictures of an innocent man, but no damages were given. Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905).

[21] Kline v. Robert M. McBride & Co., 170 Misc. 974, 11 N.Y.S.(2d) 674 (S. Ct. 1939). "This section was designed to stop the merchandising in the channels of trade of a portrait of a person who occupies a position in which there is monetary advantage in publishing the same."

[22] Harper, Torts § 277 (1938); Cooley, Torts § 135 (Haggard 4th ed. 1932).