THE INVASION OF PRIVACY OF PUBLIC OFFICIALS IN EARLY UNITED STATES JURISDICTION

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Abstract

The article first investigates the origins of the right to privacy, its principles and scope as well as limitations, focusing on the issue of public officials. In the case of public officials the invasion of the right to privacy is virtually unlimited if exercised by the mass media (i.e. the public), yet is somewhat curtailed if exercised by the government. Underneath the reasoning seems to lie the functional test of the right of the public to know and the rationality and reasonableness of the government to prescribe. There seems to be no time limitation to this rule. As to the issue of who is a public official the definition seems to be rather broad and enshrines practically all individuals in public service, in other words those paid by the taxpayers. Less known are however certain limitations of the right to invade privacy of public officials. The government always has to have narrow, reasonable and rational grounds to invade privacy, well provided for by statutes. Protected seems to be also something that comes close to a property right or if basic moral values are jeopardised. However, moral standards change in time. It is always the wisdom of the courts to determine the scope of the right to privacy of public officials, weighing the issue with the paramount right of the public to be informed.

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Introduction

The issue of the right to privacy (as a relatively new right) is still of considerable interest in Central and Eastern European countries (CEECs). After the fall of the Berlin wall, CEECs became members of the Council of Europe (CE) and thus parties to the European Convention on Human Rights (ECHR), whereby the right to privacy as a new concept was introduced into their respective jurisdictions.

Before the transition period, privacy — although not recognised as a legal right — had been respected mostly de facto by private individuals and the mass media. A free market economy was non-existent and the mass media had special social and political functions with little room for prying into the privacy of individuals. For other obvious reasons, the private lives of public officials were carefully shielded from the public. It was not desirable for the public to know about private activities of their leaders, because inequalities would be revealed, including their portrayal as impeccable individuals, or the possible emergence of abuses of power. In the case of public officials, the right to privacy has been proclaimed as an obvious human right (although not recognised in law) that was supposedly violated only in bourgeoisie societies. On the other hand, privacy from governmental actions was practically non-existent in countries before the transition. Under the pretext of safeguarding the state and society against the class enemy, the secret services were omnipresent and individuals could hardly escape from their surveillance even in their bedrooms.

Consequently, the legal concept of the right to privacy became important and was well received in CEECs once the transition had started, yet it was generally poorly understood. Thus, some common aspects of the right to privacy as developed in western democracies remain in the background. Others, such as the right not to be exposed to noise (music) in public transportation systems, or the right not to receive commercial information (advertisements) in one's own mailbox are not even considered human rights, and much less so on the grounds of involving a right to privacy. The birth of the free press, combined with market forces, caused primarily debate and litigation concerning libel and slander rather than privacy issues. This development seems to be used and possibly misused by public officials in CEECs who — for various reasons — especially cherish their own right to privacy.

For instance, undesirable information on the misuse of power combined with illegal or semilegal activities in the process of privatisation could shed some undesired light on them and at least affect constituencies, if not law enforcement agencies. The press — because of political rather than legal restraints — respects their privacy. But there has never been any proper awareness of the equal right of the public to be informed about the private matters of their political leaders. These are the results of a specific political culture in the CEECs. On the other side — in the United States, for example — the right of the public to be informed infringes upon the right to privacy of public officials to the point of being virtually non-existent. This latter development should be of interest in transitional countries where individual responsibility and political accountability still have to be developed. For this reason, it seems worthwhile to explore what constitutes a right to privacy and its limits in U.S. jurisdictions, especially with regard to public officials, to help an interested public, mass media, legislators, and other political and social actors anticipate developments, reveal dilemmas, and suggest solutions.

The Right to Privacy

There are not many individuals who would deny an individual's right to privacy in contemporary society; yet the law of privacy is of relatively recent origin, emerging at the end of the nineteenth century with a law review article calling for an individual's full protection in person and property — a principle as old as common law. The article was published by two distinguished justices, Samuel Warren and Louis Brandeis (1890). They saw this principle as developing in law from the remedy for trespass (interference with life) to the right to life (protection from battery) and property, and to the recognition of a person's spiritual nature (feelings and intellect). But the authors also stated that since the invasion of privacy subjects men and women to mental pain and distress greater than mere bodily injury, full protection in person demanded a new step: the right to be let alone.[1]

This right had not been recognised by common law, and the courts refused to give relief. Thus, the first protection of privacy was given by the New York legislature in 1903, protecting freedom from exploitation and publication for commercial purposes, protecting a kind of property right in the person. In 1904 Utah followed by passing its own statute. But the first judicial decision recognising the right to privacy in the absence of a statute was rendered a year later in Georgia (Pavesich 1905).[2]

Since then this right has been recognised and enforced by the majority of courts in different jurisdictions throughout the United States, although there were at least four jurisdictions at the time in which the courts refused to recognise this right, since it was not recognised by common law.[3]

The California Appellate Court, analysing this problem in the famous Kimono case in 1931, observed: "In practically all jurisdictions in which this right is not recognised, the decisions are based upon the lack of a statute giving the plaintiff the right to protect a likeness or an incident of life, since the ancient common law did not recognise any such right" (Melvin v. Reid 1931, 92). At that time four jurisdictions had passed statutes dealing with privacy while it had been recognised in other jurisdictions by judicial decision.[4] Commenting on the latter, the court found that "A reading of most of the decisions in jurisdictions recognising this right leaves the mind impressed with the lack of uniformity in the reasoning employed by the various jurists supporting it" (Melvin v. Reid 1931, 92).[5] After citing over thirty cases, it defined the right to privacy as "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short, it is the right to be let alone" (Melvin v. Reid 1931, 92). Although there are as many definitions and critics as there are authors, this particular definition will be sufficient for the purpose of this study.

If such right to privacy is recognised and has been invaded, regardless of what it is called (Melvin v. Reid 1931, 93-94) or how it is defined, a remedy must be given. Courts in a need of a definition usually create working definitions on a case-by-case basis. In 1965 the U.S. Supreme Court recognised the right to privacy for the first time as an independent constitutional doctrine (Griswold v. Connecticut 1965, 484). It found that the right to privacy was not expressly guaranteed as a constitutional right, but its various components could be found in the First, Third, Fourth, Fifth, and Ninth Amendment of the Constitution. For the first time the constitutional protection of a right to privacy was clearly recognised. But the deci-

sion was carefully limited to marital privacy in connection with a birth control law. The court did not define the extent and limits of the right.

Today the general principles of such a right to privacy are recognised; they suggest that it is (1) a personal, not a property right; that (2) legal action does not survive, but dies with the person[6]; that (3) an implied or expressed waiver of such a right is valid (Continental 1949); that (4) truth is not a defence, and no special damages may be proven (Smith v. Doss 1948, 120 and Bell case 1966, 88); that (5) a breach of privacy may be laudatory but still actionable (Time, Inc. v. Hill 1967, Spahn v. Messner, Inc. 1965, 221); and that (6) no publication is needed.

The areas of privacy — as discussed by many authors (see Prosser 1960) — have been broken down into four categories: 1. seclusion — freedom from excessive interference in the personal life of an individual, including home, private affairs, and personal thoughts; 2. private facts — the public dissemination of truthful but intensely personal matters; 3. false light — the improper revelation of activities of the private individual set forth in an inaccurate and offensive manner;[7] 4. freedom from exploitation — prevention of the misuse of one's name, picture, or personality for purposes of commerce or trade.[8]

An invasion of privacy may be committed by representatives of the mass media, private persons (individuals and corporations), and governmental agencies. Although there may be many reasons for invasions of privacy, personal and/or political interests without connection to any legitimate objectives of looking into the privacy of public officials in the interest of society and to encourage disclosure of relevant (or irrelevant) facts governing the democratic process often prevail. Since these cases seem to present the overwhelming majority of contested issues and create limits to the right of privacy for public officials, this study deals only with the invasion of privacy of public officials by the mass media and governmental agencies

Limitations on the Right to Privacy

The right to privacy is not absolute. Even the "founders" of the privacy principle recognised that privacy is surrendered "to whatever degree and in whatever connection a man's life has ceased to be private" (Warren and Brandeis 1890, 215). Only fifteen years later, the Supreme Court of Georgia, in a case involving the likeness of a picture, had the opportunity to decide the limitation of the right to privacy for public officials. The court stated:

> *The most striking illustration of a waiver of the right to privacy is where one either seeks or allows himself to be presented as a candidate for public office. He thereby waives any right to restrain or impede the public in any proper investigation into the conduct of his private life which may throw light upon his qualifications for the office or the advisability of imposing upon him the public trust which the office carries* (Pavesich 1905, 72 and 199).

In essence the court noted two limitations of the right to invade privacy: proper investigation, and conduct of private life which may throw light on qualifications for holding public office. The court extended the right from candidates for public office to public officials themselves. "One who holds public office makes a waiver of a similar character, that is, that his life may be subjected at all times to the closest scrutiny in order to determine whether the rights of the public are safe in his hands;

but beyond this the waiver does not extend" (Pavesich 1905, 72 and 200). Undoubtedly the decision was heavily based on the reasoning advanced by Warren and Brandeis (1890, 216) who argued that "The matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office ... and have no legitimate relation to or bearing upon any act done by him in a public or quasi-public capacity." In both instances the line between private and public, the right to privacy and the right of invasion would be — after careful examination of the facts on a case-by-case basis — quite easy to draw, were it not for the phrases "conduct of private life throwing light" and "quasi-public capacity". They suggest a broadening of the right to invade privacy as proposed later by the U. S. Supreme Court: "appears to the public to have substantial responsibility" (Rosenblatt v. Baer 1966, 85).

By 1931 the courts had generally recognised two exceptions to the right to privacy; namely that (1) it does not exist for individuals who by their prominence have dedicated their life to the public and thereby waived the right to privacy. There can be no privacy in that which is already public; and that (2) it does not exist in the dissemination of news and news events. Neither does it exist in the discussion of events of the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit, as in the case of a candidate for public office (Melvin v. Reid 1931, counts 5 and 6 of the general principles and cases cited at 92).

Invasion of the Right to Privacy by the Mass Media

The mixture of these elements resulted in what is now called "the public official rule,"[9] and is found in New York Times v. Sullivan (1964), a leading case. In it the U.S. Supreme Court — for the first time — determined the extent to which the constitutional protections of speech and press limit the state's power to award damages in a libel action brought by a public official against critics of his official conduct. The court weighed the two interests involved and concluded: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on the government and public officials" (New York Times v. Sullivan 1964, 270). The statements may even be defamatory unless proven to be made with "actual malice," that is, knowledge of falsity or reckless disregard for the truth (New York Times v. Sullivan 1964, 279-80). Recognising the higher right of the people to criticise public officials, who in turn also have a "conditional" privilege to utter defamatory statements (New York Times v. Sullivan 1964, 282), the court recognised that the freedom of speech and debate about public officials is crucial for a democratic process of government. If we would paraphrase the dilemma of choice between a free and responsible press, the court has undoubtedly expressed a preference for the free press.

This case invited an analogy to privacy. Thus, in 1965 The Supreme Court of New York was challenged to decide if the libel rule in New York Times v. Sullivan extends to a privacy case at bar. It held that the "only effect and impact" of the New York Times case was that "absent actual malice, a public official criticised for his official conduct can no longer sue for libel in any court." (Youssoupoff 1965, 757).

Recognising that the case did not deal with a public official, the court stated in dicta: "Excess of power and the misconduct of public officers can only be remedied by a public aroused through information imported to them by unfettered sources of news freely permitted to comment ... The right of private citizen to live in self-imposed seclusion free from the prying eye of television is of equal importance to that of the right of television to report and fairly comment on the actions of public officials" (Youssoupoff 1965, 758).

Basically, the court is saying that it would deny public officials the right to privacy merely by virtue of their office. Yet this would probably have gone too far. In dealing with this issue the U.S. Supreme Court recognised the distinction between private and official conduct (New York Times v. Sullivan 1964, 301-302 and n. 4), but gives no specific guidelines for determining what constitutes which conduct. In the same year, the U. S. Supreme Court addressed this issue again, distinguishing between official and private reputation in a libel action. Not speaking of purely private libels, it invoked the theory of (the rightful) interests of the public, recognising "that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned" (Garrison v. Louisiana 1964, 72 n. 8). More specifically, the court stated: "The public official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything that might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also effect the official's private character" (Garrison v. Louisiana 1964, 77).

The proper line between official and private conduct seems to be drawn where the conduct of an official is of public and general interest. This should not be confused with mere curiosity (Metter v. Los Angeles Examiner 1939, 494) or — paraphrasing Justice Douglas — with the question of a public issue rather than a public official (Rosenblatt v. Baer 1966, 91). In the case of a public issue, a public official has no right to privacy. Whether a public issue is involved will be determined on a case-by-case basis with regard to facts and in light of the social and political requirements of the time in question.

Invasion of the Right to Privacy by the Government

The foregoing discussion of invasion of privacy "by the public" or "for the public" excludes the government as yet another source of issues involving invasion of privacy. Nearly every public official is also an employee, regardless of distinctions between elected and appointed officials. Creech said (1966) that "Notwithstanding the American public's long-standing interest in privacy, it is disturbingly common in our society for employers — both private and governmental — to make searching inquiries into the actions, habits, associations, and thoughts of their employees."

If the rights of the public were discussed in New York Times v. Sullivan, the right of the state to infringe on privacy rights was first curtailed in Griswold v. Connecticut (1965) when the constitutional doctrine of the right of privacy was first recognised. The distinction between right and privilege[10] — later called the doctrine of unconstitutional conditions — gained another dimension, which the states and the federal government attempted to diminish by promoting statutes. It

is now the general rule that eligibility for public employment cannot be on condition of a surrender of constitutional rights (e.g., privacy) unless it is shown that (1) restraints rationally relate to the enhancement of the public service; (2) benefits which the public gains by restraints outweigh the resulting impairment of constitutional rights; and (3) no alternatives less subversive of constitutional rights are available (Bagley 1966, 501-02 and 411).

The Utah Supreme Court commented in 1968: "A survey of the laws dealing with conflicts of interest leads the court to a conclusion that the problem is of great complexity arising in some degree from the varied treatment of the problem by the several states. It would appear that there is little uniformity in either the constitutional or statutory provisions dealing with the problem" (Brockbank v. Rampton 1968, 377).

In short, the federal government and most states have passed complex and often confusing legislation in an attempt to discourage possible conflicts of interest between the right of a public official to be let alone and the need of an informed electorate demanding impartiality. The result has been a plethora of litigation. Therefore, Congress passed the "Privacy Act of 1974" protecting individuals and employees from acts of federal agencies, based on a Senate report (No. 93-1183). Although the law leaves much to be desired, the recognition of the problem and the attempt to cope with it on a legislative level are of great importance.

Narrow Interpretation of Statutes on Privacy

Besides the federal statute on privacy, state statutes have also been passed in the absence of the recognition of such rights by the courts.[11] The state statutes do not vary substantially and are basically intended to protect what may be called, freedom from exploitation. The following case study examines only enactments of the New York legislature.

Relevant sections of the statute are located in New York's Civil Rights Law (Sections 50, 51 and 52). The publication of the name or portrait for advertising purposes, for purposes of trade, without the consent of the individual concerned is characterised as a misdemeanour. As relief, and injunction, actual and exemplary damages may be granted. Furthermore, section 52 prohibits televising, broadcasting, or taking motion pictures of proceedings in which the testimony of witnesses by subpoena or other compulsory process is or may be taken. Read broadly the statute applies to everyone, including public officials, protecting what could be called a kind of property right.

However, the courts have interpreted the statute narrowly. They reasoned that since there is no common law protection against legal, nonlibelous, or nonfraudalent mention of one's name, the statute should be strictly construed. Thus, sections 50 and 51 do not apply to anyone who takes an office, whether in government or an outside organisation, since such a person is deemed to have agreed to any reasonable public use of, or reference to, his name and title (Wilson v. Brown 1947, 589).[12] While the court's use of the words "reasonable use of" indicates a loose construction, it later implicitly stated that a person exposes his name, picture, and title for purposes of trade by virtue of his position. The court, as usual, denied the right to privacy to the public official at bar, and interpreted the intent of the statute as "to protect private rights and to prevent invasion of the individual and personal right

to privacy; one who holds a well-known official position cannot object when his name is mentioned solely in connection with that position" (Wilson v. Brown 1974, 588). The court said — in essence — that if the person, in connection with his position, has no private rights, they should at least be limited to the use of one's name. The court does suggest, however, that in the case of an offensive implication, the law may be interpreted to disassociate the public official from the individual who holds office and allow a suit for damages to his private, personal, and individual rights. But it does not indicate the circumstances required for such an action.

Time Limitation

The court in Wilson v. Brown (1974, 589) said: "Persons who accept high positions ought not to be so tender about the mention of their names; they must bear the white light that beats upon the throne. If they want peace and privacy they should stay out of public life; if they object to having their names legitimately mentioned they need only resign and they will quickly subside into happy obscurity."

The first part of this dictum is still true. The second part is no longer the rule, and in light of the famous child prodigy case — Sidis v. F-R Pub. Corporation — decided in 1940, it probably was not the rule even then. The court discussed the right of the public to know an event legitimately connected to public figures, public character, and public concern. The court reasoned that thirty years after certain events a newspaper could not be prevented from publishing the truth about a person, however intimate, revealing, or harmful the truth may be (Sidis v. F-R Pub. Corporation 1940, 807-8). An action for invasion of privacy (in 1951) was brought when an "embarrassing" picture[13] of a former public prosecutor was published 15 years after the original event. Again the court combined notions of public official and public interest and declared: "Regardless of the circumstances under which the picture was taken, ... he was at that time a public official and, as such, ... he became one of the figures in a story of considerable public interest at that time. That being the case, we think it cannot be said that the republication of that story constitutes any invasion of his private rights. It is the unwarranted publicising of a person's private affairs and activities which furnishes the basis for the cause of action" (Estill v. Hearst Publishing Co. 1951, 1022).

The court said that what was once of public interest may be published later and that a person has lost his privacy for all times (except maybe for his "private affairs") regarding the period when he was a public official. The Sidis case questioned the rule that one regains his right to privacy upon resigning from a public position.[14] In Melvin v. Reid (1931) and Werner v. Times-Mirror Co. (1961) — decided by the same court and defended on the same grounds of public record and public interest — the decisions went in opposite directions concerning the public official issue. Thus, the former case protects only private individuals and not public officials unnecessarily exposed many years after an event.

Who is a Public Official?

The next question was to determine who qualifies as a public official thereby waiving his right to privacy by virtue of holding public office. The U. S. Supreme Court in New York Times v. Sullivan (1964, 283 n. 23) did not determine the extent of ranking individuals as "public official" or otherwise specify inclusive categories.

Nor did the justices determine the boundaries of the "official conduct" concept, although they did distinguish between private and official conduct (New York Times v. Sullivan 1964, 301-2). Two years later, however, the court — on hearing a libel and slander case involving a former county supervisor — decided the issue of public official (Rosenblatt v. Baer 1966). The court stated that the answer cannot be assumed by reference to state law standards where definitions are given for administrative purposes rather than constitutional protections (Rosenblatt v. Baer 1966, 84) and held that "the public official designation applies, at the very least, to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for, or control over, the conduct of government affairs" (Rosenblatt v. Baer 1966, 85).

This definition can be broadly interpreted as setting only a minimum standard since governmental affairs can encompass nearly all social actions. The court distinguished between person and subject matter (the particular conduct in question) by saying: "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy" (Rosenblatt v. Baer 1966, 87).

The court indicated that besides the official conduct of the person in question, the public has also (in certain instances) a rightful interest in the private conduct of persons holding public office (see supra Garrison v. Louisiana 1964, 77). The court did not further define these instances and never decided whether a public official was involved, but held that it is for the trial judge, in the first instance, to determine whether the evidence shows the respondent to be a public official (Rosenblatt v. Baer 1966, 88; but see Douglas concurring at 88-91).

State court decisions characterise a variety of professions and positions as being within the public officials category. In 1967 The Supreme Court of New York decided that a supervisor of a Branch Post Office fell within this category. It relied on the New York Times case holding that "He is an administrator in a government agency taking care of public business and is paid by public funds, and his official conduct is a matter of public interest and concern." (Silbowitz v. Lepper 1967, 459).[15] In the same year, the Appellate court of Illinois decided two cases. It characterised a suburban juvenile officer as a public official, carefully noting that he was also a police sergeant, second in command to the chief of police and acting in his absence (Suchomel 1967, 176).[16] In the second case, the court relied on Rosenblatt v. Baer (1966), holding that the lowest ranked patrolman was not a public official (Coursey 1967, 168).[17] This case was overruled by the state Supreme Court a year later (1968, 841), but it reflects the problem of a broad definition. In 1968 the Illinois Appellate Court ruled in two additional cases and concluded in one instance that "one is a public official if he ... is carrying out a function of government or is participating in acts relating to matters in which the government has a substantial interest" (Doctors 1968, 376).[18] This ruling represented a broadening of the public official rule, similar to the rightful interest of the public in the conduct of public officials, but leaving aside the issue of distinction between private and official conduct. The court also held that an operator of a nursing home falls within this descriptive definition. In the other case, the court held that an architect of a public building falls under the public official rules (Turley case 1968).[19]

In 1969, the Missouri Court of Appeals held that a deputy marshal was a public official since "the range of official activities, personal and official actions taken by

him, were probably more direct concern to the persons residing within his jurisdiction than were the doings of the Director of the F.B.I" (Rowden v. Amick 1969, 857).[20] The court elaborated on the category of public officials, citing the governor, the mayor, members of the police, the bar, the clergy and the Supreme Court and all candidates for these offices. The court did not attempt to distinguish between personal and official actions. But it is important to note that this was a libel and slander case, and the ruling was based on the rationale that society expects the highest moral standards in the private and official conduct of its outstanding members. The court could reach a different result in an action for invasion of privacy. Such distinction would be appropriate.

Most cases resulting in statements on who falls within the rule of a public official concern libel and slander, but there is no reason for differences in privacy cases. Yet there were two instances involving this issue which showed another, interesting dimension of actions based on invasion of privacy. The fact pattern of both cases was nearly the same involving the filming of a correctional institution with official permission. After a public showing of the films an action for defamation and invasion of privacy was instituted based on scenes dealing with the treatment of inmates. The first case (Cullen v. Grove Press, Inc. 1967) was decided in 1967 following the Time, Inc. v. Hill rule — the correction officers were considered public employees, and the film was considered to be of legitimate public interest and thus protected by the first and fourteenth amendments. In the second case two years later, the invasion of privacy suit concerning public officials was dismissed; but the court upheld the injunction saying: "The Commonwealth has standing and a duty to protect reasonably, and in a manner consistent with other public interests, the inmates from any invasion of their privacy substantially greater than those inevitably arising from the very fact of confinement" (Commonwealth v. Wiseman 1969, 615). The court allowed a showing of the movie to a specialised or professional audience. In the absence of a legitimate public interest the court, in fact, sustained an action for invasion of privacy by public officials when — at the same time — the privacy issue of a third party with considerable interest arose. This decision comes close to the balancing of interests when the government is involved.

Limits of the No-Privacy Rule for Public Officials

In 1964 the Supreme Court of Florida recognised an interesting aspect of the right to privacy for public officials. In an action brought to compel the Secretary of State of Florida to place Richard M. Nixon on the state's presidential primary ballot against Nixon's explicit instructions. The court held that "an unauthorised use of a person's name in this respect is recognised as a violation of his right of privacy" (Battaglia v. Adams 1964, 197). The court recognised that the right of privacy does not necessarily protect a person against the publication of his name or photograph in connection with matters of public interest. "But this does not mean that a person's name can be used without his consent and against his wishes in the situation here present, any more than it could be used without his consent for advertising or charitable or other purposes for which the sponsorship of a well-known public personage is sought" (Battaglia v. Adams 1964, 198 but see supra Wilson v. Brown 1974, 589). Holding that Nixon had not waived his right to privacy, the court noted

"that in this area — the political arena — a person's right to manage his own political campaign and to say when and where he shall stand for office has been recognised as a personal right; ... and it appears to be generally held that, in the absence of statutory inhibition, a candidate has a natural or inherent right to resign at any time and to have his name deleted from the ballot" (Battaglia v. Adams 1964, 198). This is a clear and reasonable rule of law.

In 1966 the Kentucky Court of Appeals ruled on another issue regarding public officials (Bell). An action for defamation and invasion of privacy was brought against a newspaper that reported that a police judge had been delinquent in payments of personal and property taxes, as disclosed by public records. The court held there was no actionable invasion of privacy, and summary judgement for defendant was affirmed. The court, however, made an important distinction between the Morgan case (Brents v. Morgan 1927) and the case at bar saying: "the Morgan case dealt with the publication of a private debt owing by the plaintiff (a private individual), while in this case we are concerned with the right of the public to know whether or not its elected public officials pay the taxes they administer" (Bell 1966, 88). Yet while stressing "the closest scrutiny" of a public official's life "for the purpose of determining whether the rights of the public are safe in his hands," the court also relied on Melvin v. Reid (1931) by holding that what is revealed in the public record (e.g., delinquent taxes) ceases to be private and that republishing such a record is not an actionable invasion of privacy (Bell 1968, 88). Although the court used both arguments, in view of Garrison v. Louisiana only the "closest scrutiny" argument would bar an action based on disclosure of debts affecting the moral character (compare supra Garrison v. Louisiana 1964, 77).

In a 1970 case (City of Carmel 1970) the State of California had enacted a law requiring financial disclosure by public officials of their and their families' significant financial and business holdings. The court held that the statute was overly broad and constituted an unconstitutional invasion of the right to privacy, but made it clear that a more narrowly drawn statute might be upheld. The court recognised some protection of the right to privacy for public officials and to strengthen public confidence at all levels of government, the legislature must pass a new and narrower statute.

Two years earlier the California Supreme Court had ruled in a case (Dodd v. Pearson 1968) involving the theft and publication of papers owned by a senator. The court held that there was no invasion of privacy, since the right "does not extend to matters of public interest, or to persons properly in the public eye, at least as to matters other than features of their intimate life ... the publications relate to his activities as a high ranking public officer, namely, Senator of the United States in which the public has an interest" (Dodd v. Pearson 1968, 105).

This argument resembles Douglas's public issue, although reasonableness or proper investigation ceases to be an issue. The court did not rule on how the documents were obtained (they had not been stolen by the publisher) and obviously reasoned that the actual publication was the more important issue.[21] This decision reflects the attitude of publishers, who, according to Lewis (1976, 33), take the following position in matters of great public interest: "Of course, there can be irresponsible leaks, and unlawful ones. But in our system disclosure can also be the last resort against abuse of power. Secrecy insulates authority. Americans should never forget that officials who demand secrecy are also asking for a form of unaccountable power."

A year later the Supreme Court of California again ruled on the issue of invasion of privacy involving a public official. The complaint — inter alia — alleged invasion of privacy regarding a public official's minor children, whose delinquency raised the question of their parent's ability to hold office (Kapellas v. Kofman 1969). The court relied on the public official and privileged publication rule and the fact that the information was copied from the police blotter. The court reasoned that as long as an action by a third party affects (or should affect) the ability of a public official in his office, the information is relevant to the public and rejected an invasion of privacy argument. This finding is remotely analogous to the court's reasoning in another case, that there is no right to privacy in what is the object of an investigation by a public officer (Metter v. Los Angeles Examiner 1939). Whatever concerns official conduct or is of concern for the official's conduct, has no right to privacy.

In Lieu of a Conclusion

Subsequently the U.S. Supreme Court decided several cases, which constituted a departure from the ten-year trend of protecting the privacy of private individuals. As seen above, the court allows for the possibility of protecting the private life (or aspects thereof) of the public official. In Kelly v. Johnson (1974) the Court decided that the requirements of the Suffolk County Police Department regarding length of hair are constitutional. In Doe (1975) it upheld an existing state statute prohibiting homosexual acts even by consenting adults in private.[22]

According to newspaper reports and the 44 United States Law Week, the Court decided the first case on the grounds of the reasonableness of the prescribed ordinances and the second one on grounds that the state statute was rational and therefore constitutional. In these cases, the court merely followed previous decisions in balancing the interests of the government and the right to privacy. It upheld specific and narrow statutes, which protect specific government interests.[23] As a general rule, the courts will — in cases in which the government is involved — look at the statutes, balance the interests, and uphold statutes that are narrow, specific, and reasonable. If the public is involved, the courts will also balance its interests, but look for broader interests and reasonableness. In both instances, however, the courts will protect such basic elements of human existence as the nude body, marriage, the sanctity of home and family life.[24] They seem to have been protecting basic morality, yet moral standards tend to change in time through history.

The following observation remains correct: "It is apparent that the right of privacy is constitutionally protected. It is the when and how which create the problem" (Roberts v. Clement 1966, 848). The Supreme Court of Utah commented on the same issues some ninety years ago:

> *It may be said that to establish a liberty of privacy would involve in numerous cases the perplexing question to determine where this liberty ended, and the rights of others and of the public began. This affords no reason for not recognising the liberty of privacy, and giving to the persons aggrieved legal redress against the wrongdoer, in a case where it is clearly shown that a legal wrong has been done. It may be that there will arise many cases, which lie near the borderline that marks the right of privacy, on the one hand, and the right of another individual or of the public, on the other. But this is true in*

> *regard with numerous other rights, which the law recognises as resting in the individual. In regard to cases that may arise under the right of privacy, as in cases that arise under other rights where the line of demarcation is to be determined, the safeguard of the individual, on the one hand, and of the public, on the other, is the wisdom and integrity of the judiciary* (Pavesich 1905, 72).

This statement is true today, and there can be no doubt that privacy disputes will continue to be the subject of much litigation in United States. In Europe, especially in CEECs, judicial decisions are still at an early stage, although continental European courts do not have the same liberties as those in common law legal systems. Although this presentation may be of some use to European legislatures and the general public concerned about the limits of the right to privacy for public officials, it goes without saying that each jurisdiction will have to apply its own moral standards and notions of decency to protect the dignity of the human being in public office. But it will also have to consider the public's right to democracy and accountability concerning the conduct of public officials. The latter seems to be of paramount importance in evolving democracies.

Notes:

1. Interestingly enough the authors realised at that time, when the "(p)leisure industry" had barely developed, that the press was overstepping the obvious bounds of propriety and decency, that gossip had become a trade which — in newspapers — crowded out space available for matters of real interest to the community and occupied the minds of individuals.

2. Due to editorial requirements all cases are listed separately at the end of this article in alphabetical order. The text contains only the name of the case (or a shortened version), followed by the year and, if necessary, page numbers.

3. These were Nebraska (Brunson 1955), Rhode Island (Henry 1909), Texas (Milner 1952) and Wisconsin (Judevine 1936). A few jurisdictions have not yet decided on this issue; they are: Colorado, Hawaii, Idaho, Maine, Massachusetts, Minnesota, Nevada, New Mexico, North Dakota, Tennessee, Vermont, Washington, and Wyoming. Either no cases can be found or the courts decided the case on other grounds depending on the complaint and its allegations, e.g., when action is brought for libel, slander, and invasion of privacy. Sometimes the courts pass over this issue but expressly pretermit the issue; e.g., Kapellas v. Kofman (1969, 921 n. 16): "Since the complaint contains a specific cause of action for libel, the privacy count, if intended in this light, is superfluous and should be dismissed."

4. New York Civil Rights Law, sec. 50, 51, 52; Oklahoma Statutes Annotated, sec. 21-839, 840; Utah Penal Code, sec. 76-4-8, 9; Code of Virginia Civil Remedies, sec. 8-650.

5. The case was based on breach of contract, trust of confidence, property right, law of libel.

6. An exception is the Utah statute recognising the right to sue by heirs or representatives of the deceased. See n. 4, supra.

7. This area comes close to defamation, libel and slander, and raises problems that are mentioned in n. 3, supra. An indication of the general attitude of courts is the citation of New York Times v. Sullivan (1964) — a libel and slander case — as a leading case in privacy rulings dealing with public officials, the courts refer to the "New York Times rule" and draw an analogy.

8. This is the main area protected by state statutes.

9. A simplified expression for the limited privacy right (if such a right exists at all) for public officials. Most authors do not investigate this particular issue and merely assert the "recognised rule" that there is no privacy for public officials, or they paraphrase the well-known statement that "One who holds public office subjects his life to the closest scrutiny for the purpose of

determining whether the rights of the public are safe in his hands" (Bell 1966, 88). Note that for the purpose of determining the privacy right of public officials Time, Inc. v. Hill (1967) does not help. In this case "involving a variant of the right to privacy dealing with 'fictionalisation', the U. S. Supreme Court found that the Constitution — on its face — establishes a qualified privilege for newsworthy publications. The Court expressly did not address the question whether the Constitution prescribes the imposition of any liability for the truthful publication of such matters in all cases." (385 U.S. 383 & n. 7, 384) as noted in Kapellas v. Kofman 1969, 922 n. 19.

10. Protected rights of public office and unprotected privilege of public employment.

11. See n. 4 supra and accompanying text.

12. The name of a religious ruler was used on a dance invitation.

13. Plaintiff was in a friendly embrace with Dillinger, former public enemy number one.

14. In this case matters of an individual's present life were published and compared with the time he had been a "famous child."

15. Libel and slander case.

16. Libel and slander case.

17. Libel and slander case.

18. Libel and slander case.

19. Libel and slander case.

20. Libel and slander case.

21. In Alderman v. U.S. (1969) the court held that evidence unlawfully obtained (eavesdropping) could not be introduced against the accused in a criminal trial. Since the distinction between criminal and civil trial is not important, the court in the above case must have weighed the interests and decided according to the end result.

22. Note also that it declined to review a case involving the prosecution for homosexual acts, in Enslin v. North Carolina (1975).

23. It is apparent that in one case the reputation of the government is involved (hairstyle) and in the other the concern for moral delinquency of its citizens.

24. Decisions mentioned above should be compared with other subsequent decisions to determine if there has been a departure from the ten-year trend. See, e.g., Fitzgerald v. Porter Memorial Hospital (1975) or Citizens for Parental Rights v. San Mateo County Board of Education (1975). But so far the traditional nucleus of the society (the family) has been protected. In Doe (1975, 1202) the lower court mentioned both the Judaic and the Christian law. And in York v. Story (1963, 455) the court said: "We cannot conceive a more basic subject of privacy than the naked body." However, in view of the 1999 developments involving President Bill Clinton and his aid, Monica Lewinsky, the courts might reverse even this stand.

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