Constitutional Law - Personal Civil and Political Rights - Whether, after Acquittal or Release without Conviction, Retention or Identification Data in the Files of a Local Police Department Constitutes an Invasion of an Individual's Right of Privacy

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It is submitted, however, that there is another side to the policy lying behind this problem that must be considered. If the government seeks to protect national security, it must procure the finest personnel available, to further the advancement of atomic research. Such prospective personnel certainly would not be encouraged to engage in activities which require loyalty clearances, if those clearances could be revoked on a basis of faceless-informer evidence. The possible hardship involved may discourage many who might otherwise be willing to make a career of public employment.

Opposed to the position of the government is the case of the individual who stands under suspicion of disloyalty. The harm to him is substantial; he may lose his employment, his social status may suffer, he may suffer financially, and his family may be subjected to hatred and ridicule. With such serious consequences involved, the government should not be permitted to make unfounded charges, shielded by considerations of national security. There is always a danger that a faceless-informer will come forth, prompted by spite or malice, secure in the knowledge that his real motives cannot be revealed by confrontation or cross-examination on the witness stand.

There is a conflict of interests, thus presented, which places national security on one side and the right of the individual on the other. The benefit to the country as a whole must be balanced against the possible hardship on the individual under suspicion of disloyalty. A nation cannot allow full freedom and immunity to those who are reasonably suspected of engaging in subversive activities against it, or its destruction from within might certainly follow. When and if a real danger to national security is demonstrated, the rights of the individual must give way, even to the point of hardship.

D. J. NOVOTNY

CONSTITUTIONAL LAW—PERSONAL CIVIL AND POLITICAL RIGHTS—WHETHER, AFTER ACQUITTAL OR RELEASE WITHOUT CONVICTION, RETENTION OF IDENTIFICATION DATA IN THE FILES OF A LOCAL POLICE DEPARTMENT CONSTITUTES AN INVASION OF AN INDIVIDUAL'S RIGHT OF PRIVACY—Until the decision in the case of Kolb v. O'Connor, Illinois Appellate Courts

\[1\] 14 Ill. App. (2d) 81, 142 N. E. (2d) 818 (1957).
had not squarely met the problem as to whether an individual has a right to the return of identification data held by the police after acquittal of a criminal charge or release without conviction. In that case, six plaintiffs joined to bring suit against the chief of police of Chicago for a declaratory judgment entitling them to the removal of their photographs and fingerprints from the files of the Chicago police department or, alternately, to the return of such records. The trial court denied the defendant's motion to strike the plaintiff's petition and ordered the defendant to file his answer. The defendant elected to stand upon his motion and, after judgment was entered against him, took an appeal to the Appellate Court for the First District of Illinois. That court reversed the decision in an opinion which held that the retention of the records in question was neither contrary to Illinois statutory law nor such an invasion of the plaintiff's right of privacy as to justify granting the relief sought.

In 1890, Warren and Brandeis published an article that has since become the classic exposition of the right of privacy. The authors advocated the existence of a 'right to be let alone' independent of a proprietary, fiduciary or contractual basis. Initial judicial acceptance of the right of privacy in the United States by an appellate court came in 1905 when the Supreme Court of Georgia handed down its noteworthy opinion in the case of Pavesich v. New England Life Insurance Company. In the half century since the Pavesich case, the vast majority of American jurisdictions have aligned themselves with the Georgia holding. Illinois, a

2 All six plaintiffs had originally been arrested on felony charges. Five had been tried and acquitted, and the sixth had been released without trial.

3 Ill. Rev. Stat. 1957, Vol. 1, Ch. 38, § 708(e), provides for the filing of such identification data with the Illinois Department of Safety, and for the return of such records in the event the defendant is found not guilty. The court, however, held that this statute does not apply to local police departments.

4 The defendant also maintained on appeal that there had been an improper joinder of parties plaintiff. In view of its decision in respect to the other issues involved, the court found it unnecessary to rule on this objection.


6 Warren and Brandeis, op. cit. p. 195. The authors acknowledged that Judge Cooley had coined the phrase in Cooley, A Treatise on the Law of Torts (Callaghan and Co., Chicago, 1888), 2d Ed., p. 29.

7 In the leading English case of Gee v. Pritchard, 2 Swans. 402, 36 Eng. Rep. 670 (1818), the court, per Lord Eldon, granted an injunction restraining the publication of private letters. Unfortunately, Lord Eldon, as a concession to defendant's counsel in the course of argument, remarked in passing that equity would extend its protection only to property, as distinguished from personal rights. This dictum soon became well entrenched as is evidenced by Hoyt v. Mackenzie, 3 Barb. Ch. 320 (N. Y.), 49 Am. Dec. 178 (1848), wherein the court of equity refused to take jurisdiction to restrain the publication of private letters where there was no value to the author as literary property. Even at law, in the case of Roberson v. Rochester Folding Box Co., 171 N. Y. 540, 64 N. E. 442 (1902), the court held that damages were not available for the unauthorized publication of a photograph in the absence of injury to the body, reputation, or property.

8 122 Ga. 190, 50 S. E. 68 (1905).

9 See cases noted in 31 Chicago-Kent Law Review 261.
DISCUSSION OF RECENT DECISIONS

relative late-comer on the scene, espoused the right of privacy in 1952, when the question was first presented to an appellate court in the case of *Eick v. Perk Dog Food Company*. In that case, the plaintiff's picture was used without her express or implied consent as the subject of an advertising campaign and such unauthorized publication to the general public by private individuals was deemed to have been an invasion of privacy.

Three years prior to the Kolb case, an Illinois Appellate court was presented with a similar question involving police records. In the case of *Poyer v. Boustead* the plaintiffs had been arrested for violation of a city ordinance and, after being placed in jail, were fingerprinted and photographed. Before their case for violation of the ordinance went to trial, the plaintiffs instituted suit to enjoin the police from transmitting the data to other law enforcing agencies. The court held that the plaintiffs, who based their cause of action upon an Illinois statute, were not entitled to an injunction prior to the determination of their guilt or innocence. The Poyer case, however, did establish that the right to take fingerprints and photographs of arrested persons as a means of detecting and apprehending criminals was within the police power of the state and did not infringe upon the constitutional rights of such persons.

In resolving the issue in the case of *Kolb v. O'Connor*, the appellate court apparently took the position that the retention of photographs and fingerprints was a privileged invasion of the right of privacy. If the right of privacy is to mean anything at all, it cannot be denied that any unauthorized exhibition of a person's photograph and fingerprints is an invasion of this right. Consequently, one is led to the conclusion that

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11 14 Ill. App. (2d) 81, 142 N. E. (2d) 818 (1957).
13 Ill. Rev. Stat. 1957, Vol. 1, Ch. 38, § 708(e), which provides for the return of identification of persons acquitted of felony charges, did not apply to plaintiff's cause of action wherein there was no allegation nor determination that plaintiffs were not guilty. In the case of Maxwell v. O'Connor, 1 Ill. App. (2d) 124, 117 N. E. (2d) 326 (1953), a proceeding was instituted in the criminal court to compel the return of identification data upon acquittal pursuant to the Ill. Rev. Stat., op. cit., wherein the court held that the relief sought was more in the nature of a civil remedy for an invasion of a right of privacy, for which the criminal court lacked jurisdiction.
14 In the case of State v. Tyndall, 225 Ind. 360, 74 N. E. (2d) 914 (1946), an injunction was denied in an action brought to compel police officers to surrender or destroy the record of identification after acquittal of a misdemeanor charge. An appeal to the United States Supreme Court was dismissed for want of a substantial federal question: 333 U. S. 834, 68 S. Ct. 601, 92 L. Ed. 1118 (1948).
15 14 Ill. App. (2d) 81, 142 N. E. (2d) 818 (1957).
the action of the defendant was treated as a privileged invasion rather than that the defendant's acts, in themselves, were insufficient to amount to an invasion. This hypothesis is strengthened when one considers the public interest which is involved. That such files as are here involved are a great aid in the apprehension of criminals and the suppression of crime is a matter of common knowledge. When one remembers that the right of the individual must yield to the common good, it is not hard to conclude that there is ample reason for creating a privilege such as is herein suggested. It should be emphasized, however, that the question of an unlimited exhibition by the police to the general public was not before the court, nor was it given any consideration.

Despite the admitted advantage to the cause of law enforcement, one cannot help but pause for a moment over the plight of an innocent individual caught in the mesh of such a rule. As long as his picture remains on file, such person is in constant jeopardy of being erroneously selected as the culprit by some overwrought victim of, or imperspicacious witness to, a criminal act. Not only is such a person constantly faced with the latent possibility of being called upon for a precise account of his whereabouts at any given time, but he is also subject to the embarrassment and humiliation of knowing that his photograph, along with those of criminals and other suspected persons, is being exhibited to persons who might know him.

The decision in the instant case cannot be described as extraordinary, or even unexpected. The legal rationale of the court is not open to serious adverse criticism, especially in view of the uniformity of the decisions in other jurisdictions and of the summary treatment accorded the question when first presented to the United States Supreme Court. Nevertheless, because of the disquieting situation in which an innocent person may find himself, legislation to ameliorate this condition would seem advisable. If a mandate for the return of such data, as has been imposed elsewhere, is not thought desirable, then a law requiring that the files of innocent persons be segregated, with appropriate identification, from those of convicted criminals is the least that can be recommended.

MRS. R. CRANDELL

16 State v. Tyndall, 225 Ind. 360, 74 N. E. (2d) 914 (1946), which, upon appeal to the United States Supreme Court, was dismissed for want of a substantial federal question: 333 U. S. 834, 68 S. Ct. 601, 92 L. Ed. 1118 (1948).

17 For example, New York requires that all fingerprints and photographic records of a person be returned to him when a criminal proceeding is determined in his favor unless there is a previous conviction or another criminal action pending against him: McKinney's Cons. Laws of New York Ann., Penal Law, § 516.