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Poteet v. Roswell Daily Record, Inc.: Balancing First Amendment Free Press Rights against a Juvenile Victim's Right to Privacy

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POTEET v. ROSWELL DAILY RECORD, INC.: BALANCING FIRST AMENDMENT FREE PRESS RIGHTS AGAINST A JUVENILE VICTIM'S RIGHT TO PRIVACY

The parents of a fourteen-year-old attempted rape victim brought an action for invasion of privacy after her name was printed by the defendant newspaper. The New Mexico Court of Appeals in *Poteet v. Roswell Daily Record, Inc.*,[1] upheld a summary judgment for the defendant. In direct conflict were the newspaper's first amendment right to free speech and the victim's right to privacy. The courts have generally not articulated a clear standard to accomodate these conflicting rights. New Mexico maintains a policy of confidentiality for most court proceedings under the New Mexico's Children's Code.[2] The *Poteet* case raises the question of whether juvenile victims, as well as offenders, should be protected from publication of their court involvement. This note will address the invasion of a minor's right to privacy by publication of the minor's name,[3] will review New Mexico's policy regarding publication, and will examine alternatives that might guard minors from unnecessary harm and embarrassment.

THE CASE

On December 19, 1975, Renee Poteet was kidnapped by a man

1. 92 N.M. 170, 584 P.2d 1310 (Ct. App. 1978).
2. N.M. Stat. Ann. §32-1-31(B) (1978):
   B. Except in hearings to declare a person in contempt of court and hearings on petitions alleging delinquency of a child previously adjudicated a delinquent child, the general public shall be excluded from hearings on petitions under the Children's Code. Only the parties, their counsel, witnesses and other persons requested by a party and approved by the court may be present at a closed hearing. Those other persons the court finds to have a proper interest in the case or in the work of the court, including members of the bar, may be admitted by the court to closed hearings on the condition that they refrain from divulging any information which would identify the child or family involved in the proceedings. Accredited representatives of the news media shall be allowed to be present at closed hearings subject to the conditions that they refrain from divulging information that would identify any child involved in the proceedings or the parents or the guardians of those children, and subject to such enabling regulations as the court finds necessary . . . .
3. W. Prosser, Law of Torts §117 (4th ed. 1971). This public disclosure of private facts is only one type of an invasion of privacy. Three others are: 1) "the appropriation, for the defendant's benefit or advantages, of the plaintiff's name or likeness," 2) "intrusion upon the plaintiff's physical solitude or seclusion," and 3) "publicity which places the plaintiff in a false light in the public eye." *Id.* at 804, 807, and 812, respectively.

who attempted to rape her. Her alleged attacker was arrested the following day and charged with aggravated assault, kidnapping and assault with intent to commit rape.[4] The Roswell *Daily Record* reported the booking and identified the man by name as Michael Thomasson, a Baptist minister and youth director. The victim's name was not included in the article at the request of the local assistant district attorney. The newspaper's general policy at that time was to withhold publication of the name of any juvenile involved in a criminal matter. At Thomasson's preliminary hearing on January 6, 1976, Ms. Poteet testified about specific details of the assault. A reporter from the *Daily Record* reported the hearing and included Ms. Poteet's name and address in his story.[5]

Ms. Poteet's parents, individually and as her next friend, brought an action against the *Daily Record.* They argued that publication of her name as an attempted rape victim was an invasion of their privacy and that the newspaper was liable for damages suffered by them as a result.[6] The plaintiffs alleged that Renee's name was not newsworthy information and therefore the *Daily Record* did not have a media privilege under which it could print her name without liability.[7] They argued alternatively that the newspaper was estopped from printing the information because it had waived its privilege by its reporters' representations to the district attorney that Renee's name would not be published.[8]

Defendant argued that there was no genuine issue of fact in the case.[9] It cited *Cox Broadcasting Corp. v. Cohn*[10] to support its contention that the information was both newsworthy and privileged because it was contained in the public record. Two New Mexico cases, *Blount v. T.D. Publishing Corp.*[11] and *Hubbard v. Journal Publishing Co.*,[12] were cited to support the contention that matters on the public record are privileged. The *Daily Record* claimed that its

4. Roswell Daily Record, December 21, 1975, at 8.

5. 92 N.M. at 171, 584 P.2d at 1311.

6. Record, at 2-3, Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 584 P.2d 1310 (Ct. App. 1978).

7. In defamation actions at common law, there existed a qualified privilege (i.e. freedom from liability for publication) of what was called "fair comment" upon the conduct and qualifications of public officers and public employees. W. Prosser, Law of Torts § 118 (4th ed. 1971). In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the United States Supreme Court extended that common law privilege to the publication of public matters of the highest interest and public concern. This is what has come to be known as the media privilege.

8. Record, at 2.

9. *Id.* at 5.

10. 420 U.S. 469 (1975).

11. 77 N.M. 384, 423 P.2d 421 (1966).

12. 69 N.M. 473, 368 P.2d 147 (1962).

general policy of not publishing the names of juvenile victims of sexually related crimes was not sufficient to constitute a waiver of its privilege to print the information. It contended that no employee quoted by appellants had sufficient authority with the newspaper to bind it to a waiver of the right to publish the name.[13]

The newspaper argued that the employees' lack of authority also negated the plaintiffs' estoppel claims.[14] Since a plaintiff must have relied on the defendant's acts or conduct for estoppel to be effective, defendant asserted that there could be no estoppel in this case.[15] There was no allegation or showing in the record that the child or her parents even knew of the employees' statements to the district attorney. In the absence of such knowledge or reliance, estoppel could not operate against the newspaper.[16]

The District Court of Chaves County granted defendant's motion for summary judgment.[17] The New Mexico Court of Appeals affirmed the summary judgment.[18] In so doing, the court relied on the United States Supreme Court's opinion in *Cox Broadcasting Corp. v. Cohn* for the proposition that information which is otherwise private becomes privileged when it is on the public record, and may then be published without liability for invasion of privacy.[19] The court of appeals held that the *Daily Record* had the right to publish the victim's name without liability.[20] The court found no evidence that any of the employees who gave assurances about not publishing the information had authority to bind the newspaper or to waive its privilege to print the information.[21] Nor did the court find any evidence that the plaintiffs knew of or relied on the paper's policy; defendant therefore was not estopped from publishing Ms. Poteet's name.[22] Plaintiffs have not applied for certiorari.

DISCUSSION OF LAW

An individual's right to privacy has long been legally recognized. As early as 1890, Brandeis and Warren argued that an individual's

13. Brief for Appellee at 6-7, Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 584 P.2d 1310 (Ct. App. 1978).
14. *Id.* at 7.
15. *Id.* at 8.
16. *Id.*
17. The court granted the motion for summary judgment because it found no genuine issue of fact in the case. 92 N.M. at 171, 584 P.2d at 1311.
18. *Id.* at 173, 584 P.2d at 1313.
19. 420 U.S. 469, 492-93 (1975).
20. 92 N.M. at 173, 584 P.2d at 1313.
21. *Id.* at 172, 584 P.2d at 1312-13.
22. *Id.* at 172, 584 P.2d at 1312.

right to privacy is covered by common law.[23] New Mexico recognized a cause of action for invasion of privacy in 1962.[24] In *Hubbard v. Journal Publishing Co.*, a minor woman alleged the invasion of her privacy because of a newspaper account of her brother's sexual assault on her.[25] The New Mexico Supreme Court recognized an individual's right to privacy as a legitimate legal right, and defined the limits within which a newspaper may print information without liability for invasion of privacy. The court required that the information be "of public interest" or "on the public record" for the media privilege to attach.[26] If the information was not on the public record, then the information had to be measured by a "newsworthiness" standard[27] to see whether the information fell within the media privilege or was within an individual's right to privacy. Since the information in *Hubbard* was on the official juvenile court records, it was deemed to be within the media privilege and no liability attached to its publication. The case was therefore dismissed by the court.[28]

23. Brandeis & Warren, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). They declared that the principle of the individual having full protection in person and in property is as old as the common law, but, from time to time, it is necessary to redefine the extent of that protection. *Id.* at 194. They pointed to the "right to be let alone," as described by T. Cooley, Law of Torts 29 (2d ed. 1888), and to the development of photography and the newspaper enterprise. *Id.* at 195. Because of these technical advances which facilitated an invasion of one's privacy, Brandeis and Warren found it necessary at that time to state that "the individual is entitled to decide whether that which is his shall be given to the public." *Id.* at 199.

24. Hubbard v. Journal Publishing Co., 69 N.M. 473, 368 P.2d 147 (1962).

25. *Id.*

26. *Id.* at 474-75, 368 P.2d at 148-49.

27. The court has subsequently defined items of newsworthiness as

> relatively current events such as in common experience are likely to be of public interest. . . . [R]eports of current criminal activities are the legitimate province of a free press. The circumstances under which crimes occur, the techniques used by those outside the law, the tragedy that may befall the victims—these are vital bits of information for people coping with the exigencies of modern life.

McNutt v. New Mexico State Tribune Co., 88 N.M. 162, 167, 538 P.2d 804, 809 (Ct. App.), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975) (quoting from Jenkins v. Dell Publishing Co., 251 F.2d 447 (3d Cir. 1958)). The court noted that news may serve the two functions of information and entertainment and that both are equally important and vital to the public interest. In *McNutt*, plaintiffs were police officers and their wives who alleged invasion of privacy by a newspaper that printed their names and addresses in a story about a gun battle involving the officers. *Id.*

28. The incident litigated in *Hubbard* occurred in 1962, prior to the 1972 enactment of the Children's Code which closed most juvenile proceedings to the public. Thus, the information about the young boy and his sister was, at that time, open to public inspection. The young girl would not have been subjected to such embarrassment under the current code because her attacker was a juvenile and his hearing would have been closed.

In *Blount v. T.D. Publishing Co.*, the New Mexico Supreme Court affirmed the existence of a legal right to privacy and concluded that the invasion of privacy is a tort for which damages may be recovered.[29] Using the *Hubbard* standard, the court ruled that questions of newsworthiness and privilege are factual questions for a jury to determine whenever the information is not on the public record. On that basis, the court overturned a summary judgment for defendants.[30] The *Blount* court did, however, affirm the rule that when challenged information is a matter of public record, it may be published without liability for invasion of privacy.[31] The court stated that the right of privacy is generally inferior and subordinate to the dissemination of news.[32]

The New Mexico Court of Appeals temporarily abandoned the "newsworthiness" standard in favor of the Restatement of Torts standard,[33] but returned to its newsworthiness standard in *McNutt v. New Mexico State Tribune Co.*[34] The court upheld a summary judgment for defendants in that case because the challenged publication contained information that was public fact and therefore privileged.[35]

Blount, McNutt and *Hubbard* are directly in agreement with recent federal cases dealing with the conflict between an individual's right to privacy and the news media's first amendment right of free press. In *Time, Inc. v. Hill,* the plaintiff alleged an invasion of privacy because details of his and his family's experiences as hostages were

29. 77 N.M. 384, 388, 423 P.2d 421, 425 (1966). A widow and her children alleged invasion of privacy by publication of the details of her husband's murder.

30. *Id.* at 389, 423 P.2d at 426.

31. *Id.*

32. *Id.*

33. Bitsie v. Walton, 85 N.M. 655, 515 P.2d 659 (Ct. App.), *cert. denied,* 85 N.M. 639, 515 P.2d 643 (1973). In this case, a Navajo child brought an action for invasion of privacy because her sketched picture and name were used on Cerebral Palsy Association notecards without her permission. The New Mexico Court of Appeals adopted the Restatement of Torts standard which provides:

> [L]iability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues. These limits are exceeded where intimate details of the life of one who has never manifested a desire to have publicity are exposed to the public . . . .

Restatement of Torts §867, Comment d (1939). The court held in *Bitsie* that, according to this standard, there was no invasion of privacy as a matter of law because there was no evidence that the defendant should have known the publication would be offensive. 85 N.M. at 657, 515 P.2d at 661.

34. 88 N.M. 162, 538 P.2d 804 (Ct. App.), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975).

35. *Id; see* note 26 *supra.*

published.[36] Although the United States Supreme Court decided the case based on the defense of truth in a libel action,[37] it nevertheless used the "newsworthiness" standard to determine whether the public interest was served by publication of the challenged information.[38] The holding implied that the media's interest and the individual's interest must be balanced to determine whether the defendant was liable for publication. The Court emphasized the importance of protecting the first amendment's guarantee of a free press.[39]

The Supreme Court continued to emphasize the importance of the free press in *Cox Broadcasting Corp. v. Cohn.*[40] In that case a father alleged invasion of privacy when his daughter's name was broadcast after she had been killed during a rape attack. In denying plaintiff a cause of action, the Court was reluctant to formulate a rule that would "make it very difficult for the press to inform their readers about the public business" or that would "invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be put into print and that should be made available to the public."[41]

In *Cox,* the Court did not decide which of the competing interests should be accorded more weight. Instead, it focused on a narrower issue:

> Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, . . . it is appropriate to focus on the narrower interface between press and privacy that this case presents . . . , [namely, where the information in question is found on the public record].[42]

The Court held that any so-called "private" information on the public record is information of public interest to which media privilege immediately attaches.[43]

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36. 385 U.S. 374, 377-78 (1967).

37. *Id.* at 383-86. The Court considered that defense because the challenged publication was allegedly false.

38. *Id.* at 388-89. This was the same "newsworthiness" standard later used by the New Mexico Court of Appeals in *Poteet.* 92 N.M. at 172, 584 P.2d at 1312.

39. 385 U.S. at 388-89.

40. 420 U.S. 469, 472-74 (1975).

41. *Id.* at 496.

42. *Id.* at 491.

43. *Id.* at 493-94. The *Cox* decision is not without its critics, however. At least one commentator has noted that the *Cox* decision "ultimately evades the important first amendment issue presented in that case." Hill, *Defamation and Privacy under the First Amendment,* 76 Colum. L. Rev. 1205, 1207 (1976). Judge Sutin commented in *Poteet* that "*Cox* is not held in high esteem." 92 N.M. at 178, 584 P.2d at 1318. In spite of these criticisms, however, *Cox* remains good law.

Under consideration in *Cox* was a Georgia statute which made it a misdemeanor to publish a rape victim's name.[44] The Court ignored the statute's implicit purpose of ensuring the privacy of rape victims,[45] and focused instead on the state judicial practice of placing victims' names on public court records.[46] The Supreme Court held that the state may not impose sanctions on the publication of truthful information contained in official court records.[47]

Modern right-to-privacy law thus recognizes an individual's right to privacy. The courts have, however, carved out a special exception to that right which permits publication of otherwise private information found on an official court record.

NEW MEXICO POLICY, APPLICATION AND ALTERNATIVES

The court of appeals' opinion in *Poteet* is supported by both United States and New Mexico Supreme Court authority.[48] Even so, the *Poteet* court characterized the case as an "unfortunate incident," and lamented that it had "no alternative but to affirm the trial court's granting of summary judgment."[49] The court implied that the name of a 14-year-old sexual assault victim should not be published, but did not find that the facts of the present case allowed it to afford such protection under the law.[50]

In his concurring opinion, Judge Sutin recognized the great harm the young woman and her parents had suffered in the form of sexual innuendos and harassing phone calls, which finally forced the Poteets to move out of the state.[51] Although the appeal in *Poteet* did not fall within the provisions of the New Mexico statute requiring anony-

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44. Ga. Code Ann. § 26-9901 (1972).

45. Ga. Code Ann. § 26-9901 (1972) provides:

> It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name and identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

46. 420 U.S. at 495.

47. *Id.*

48. *E.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Hubbard v. Journal Publishing Co., 69 N.M. 473, 368 P.2d 147 (1962).

49. 92 N.M. at 173, 584 P.2d at 1313.

50. *Id.*

51. *Id.* at 173, 584 P.2d at 1313 (Sutin, J., concurring); Record, at 2-3.

mous appeal of juvenile cases,[52] Judge Sutin believed that the family name could have been deleted, and suggested that the appeal could have voluntarily been brought under an anonymous name.[53] He felt that anonymity was especially important in this case, because the opinion would be reported and used in the future by judges, lawyers and others involved in right-to-privacy questions. Through these uses, Ms. Poteet's name and her involvement in the incident would become as well, or perhaps better, known than through the original newspaper article itself.[54]

New Mexico's failure to prevent publication of a juvenile victim's name under such circumstances is contrary to the policy expressed in several of its statutes. For instance, New Mexico Children's Court proceedings are ordinarily closed,[55] thereby protecting the juvenile offender from publicity of his court involvement. A child's privacy is further ensured by the New Mexico statute which provides that a juvenile offender's name must not appear on the record on appeal from the children's court.[56] Given New Mexico's strong policy of protecting the privacy of juvenile *offenders,* it seems logical to expect that, at least in some circumstances,[57] juvenile *victims* be accorded the same protection.

Under the *Cox* rule, the media privilege will attach to any information of public interest. To keep otherwise private information from being classified as of public interest, it is necessary to keep it off the public record. Keeping the juvenile victim's name off the public record might be accomplished by requiring closed hearings and trials in certain cases. Judge Sutin suggested that the New Mexico Supreme Court simply adopt a rule of evidence barring disclosure of a minor

52. N.M. Stat. Ann. §32-1-39(A) (1978). This statute provides:
Any party may appeal from a judgment of the court to the court of appeals in the manner provided by law. The appeal shall be heard by the court of appeals upon the files, records and transcript of the evidence of the children's court. *The name of the child shall not appear in the record on appeal* (emphasis added).

53. 92 N.M. at 173-74, 584 P.2d at 1313-14.

54. *Id.*

55. N.M. Stat. Ann. §32-1-31(B) (1978).

56. N.M. Stat. Ann. §32-1-39(A) (1978). The policy followed by the Roswell *Daily Record* was to refrain voluntarily from publishing the juvenile victim's name as well as to abide by the statutory restriction regarding publication of a juvenile offender's name. Record, at 9-10 (affidavit of Morris Stranger). This policy of protecting juveniles and maintaining confidentiality is not unique to New Mexico. *See, e.g.,* Cal. Welf. & Inst. Code §676 (West) (1972) & Cal. Juv. Ct. R. 1311; Colo. Rev. Stat. §§19-1-107(2), (6) (1973) & Colo. R. Juv. P. 17(e).

57. Such circumstances would include cases where the juvenile is a victim of rape, child abuse or other crimes which are embarrassing and damaging to the reputation of a young victim.

victim's name during any trial or hearing.[58] The information would, however, be subject to the "newsworthiness" test as a question of fact for the jury.[59]

CONCLUSION

The real dilemma in cases such as *Poteet* lies in the conflict between the constitutionally-guaranteed right of the free press and an individual's legally-recognized right to privacy. The United States Supreme Court held, in *Cox Broadcasting Corp. v. Cohn,* that a state may not penalize the press for publishing otherwise private information which is found in the public record. Thus the tension between a minor victim's right to privacy and the right of the press to publish a name found on the public record will be resolved only when the minor victim's name is not placed on that record. The sad result in *Poteet* will recur in similar situations unless judicial procedures are changed to ensure that a young victim's name does not appear on official court records. This change could most easily and directly be effected by an evidentiary rule restricting the introduction of a minor victim's name in any hearing or trial. The New Mexico Supreme Court should consider making such a minor but vital change in the New Mexico Rules of Evidence.

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58. 92 N.M. at 176-77, 584 P.2d at 1315-16 (Sutin, J., concurring). Judge Sutin also suggested a legislative change which would require written consent by the parents before the press could disclose the child victim's name. 92 N.M. at 175, 584 P.2d at 1314. A statute similar to that proposed by Judge Sutin was held to be constitutional in Time, Inc. v. Hill, 395 U.S. 374 (1967). Such a provision would, however, present practical problems for the press in locating parents and procuring the required consent before publication.

59. *See* text accompanying notes 29-39 *supra.*