Kentucky Law Journal

Volume 66 | Issue 4 Article 2

1978

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Introduction

The Supreme Court of the United States has frequently been faced with the task of safeguarding freedom of speech and press under the commands of the first amendment. This exercise has been complicated by the continual clash between freedom of expression and some other value, both demanding protection and deserving recognition. The court has had to balance these competing interests in order to reach a solution to the problems created by this conflict. Given the pervasive influence and broad scope of the first amendment,[1] this value conflict has characteristically been resolved by giving priority to freedom of speech and press.[2] For example, in past decisions the Court has protected pornography,[3] defamatory publications,[4] invasions of privacy,[5] politial activity of a potentially disruptive nature,[6] and, at the expense of school administra-

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[1] The primary function of freedom of speech and press is to keep citizens informed so that they may govern themselves effectively. Meiklejohn, *The First Amendment Is An Absolute,* 1961 Sup. Ct. Rev. 245, 254-56. *See also* Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); Thornhill v. Alabama, 310 U.S. 88, 102 (1940); Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher,* 28 Rutgers L. Rev. 41, 42-51 (1974). Freedom of speech also serves a self-fulfillment function, *see* T. Emerson, The System of Freedom of Expression (1970). As such, freedom of expression protects not only each citizen in the transfer of ideas and information, but also preserves society itself through the facilitation of participatory democracy.

[2] *But see, e.g.,* United States v. O'Brien, 391 U.S. 367 (1968); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[3] *E.g.,* Miller v. California, 413 U.S. 15 (1973); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957).

[4] *See, e.g.,* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[5] *E.g.,* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Time, Inc. v. Hill, 385 U.S. 374 (1967).

[6] *E.g.,* Street v. New York, 394 U.S. 576 (1969); Brown v. Louisiana, 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 536 (1965).

tion, symbolic political speech.[7] In all of these cases the Supreme Court has given preference to free expression because the impact of free speech and press on our sociopolitical system of informed self-government is more important than the occasional and isolated harm to an individual or group of individuals.

The conflict between interests and the concomitant need for first amendment protection are probably most apparent when freedom of the press collides with the personal interests protected by the law of defamation and by the law of privacy. To the extent that defamation or privacy judgments are readily available against the media, self-restraint and the consequent reduction of information flowing to the public will result. This subtle, though powerful, restrictive impact would not only impose a direct chilling effect on the press, but would also limit the system of freedom of expression, for free expression depends on the dissemination of ideas and information to facilitate its exercise.[8]

Realizing the potential inhibitory effect on freedom of speech and press, the United States Supreme Court has sought to protect the media from actions which allege defamation[9] and invasion of privacy.[10] During the ten years preceding the Court's 1974 decision in *Gertz v. Robert Welch, Inc.*,[11] plaintiffs were required to show malice on the part of media defendants in order to recover for defamation or invasion of privacy. In *Gertz,* however, the Court permitted a private plaintiff to recover in an action for defamation if media negligence could be shown.[12] Regardless of whether the majority in *Gertz* was at-

[7] Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

[8] *See* Meiklejohn, *supra* note 1, at 255-57.

[9] *See* note 4 *supra* for a sample of such defamation cases.

[10] *See* note 5 *supra* for examples of privacy cases.

[11] 418 U.S. 323 (1974).

[12] Justice Powell's majority opinion stated: "[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347. Although this language did not expressly mention negligence, it left the states free to adopt a standard based on reasonable care and many states accepted the invitation. *See, e.g.,* Helton v. United Press Int'l, 303 So.2d 650 (Fla. Dist. Ct. App. 1974); Cahill v. Hawaiian Paradise Park Corp., 543 P.2d 1356 (Hawaii 1975); Troman v. Wood, 340 N.E.2d 292 (Ill. 1975); Gobin v. Globe Publishing Co., 531 P.2d 76 (Kan. 1975); Jacron Sales Co., Inc. v. Sindorf, 350 A.2d 689 (Md. 1976); Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161 (Mass. 1975); Thomas H. Maloney &

tempting to provide increased protection for the reputation of private persons or was instituting a policy of media control,[13] it is clear that the Court's treatment of defamation will have a substantial impact on actions for invasion of privacy.[14] The interests protected by the law of defamation and by the law of privacy, although different, are similar enough to warrant application of the policies underlying the *Gertz* decision to privacy torts.[15] And certainly if the current Court's intent is to limit media power and influence, privacy law is as fertile a ground for such restraint as defamation.

The impact on privacy law created by the Supreme Court's change in philosophy is conspicuously demonstrated by *Zacchini v. Scripps-Howard Broadcasting Co.*[16] In *Zacchini,* the Court held that the presentation on a television news show of a fifteen-second film of a human cannonball act was not protected by the first and fourteenth amendments from a claim based on appropriation of the right of publicity. The Court clearly characterized the case as a privacy action,[17] and the decision portends, as in the case of defamation, the trend away from first amendment protection for the media in the area of mass publication torts.

Using *Zacchini,* the Burger Court's defamation decisions,[18] and *Cox Broadcasting Corp. v. Cohn,*[19] a privacy decision which protected the publication of material appearing in judicial records, I will examine media publication and reporting in an attempt to assess potential press liability for privacy invasions. In doing so, it is necessary to examine three of Dean

Sons v. V. E. W. Scripps Co., 334 N.E.2d 494 (Ohio Ct. App.), *cert. denied* 423 U.S. 883 (1974); Exner v. American Medical Ass'n, 529 P.2d 863 (Wash. Ct. App. 1974). *See also,* Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569 (N.Y. Ct. App. 1975), in which the New York Court of Appeals apparently adopted a gross negligence standard. *Id.* at 571.

[13] *See* Ashdown, *Gertz and Firestone: A Study In Constitutional Policy-Making,* 61 MINN. L. REV. 645 (1977).

[14] "Invasion of privacy" as used here includes three of Prosser's four categories of privacy actions. *See* note 20 *infra* and accompanying text for these categories.

[15] *See* notes 46-50 *infra* and accompanying text for a comparison of these interests.

[16] 433 U.S. 562 (1977).

[17] *Id.* at 573-74.

[18] Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[19] 420 U.S. 469 (1975).

Prosser's categories of privacy torts: public disclosure, falsification, and appropriation.[20] This analysis is necessary not only because these are different torts with different philosophical and legal foundations, but also because the Supreme Court has tended to view them as distinct in formulating constitutional doctrine applicable to each.[21] Careful examination discloses a trend of diminishing constitutional protection for the press in each of these categories of privacy law. Whether this signals an attempt on the part of the Court to realign competing interests or whether it signals the development of a policy of media supervision, it is clear that the impact of a free press in American society will be reduced if the perceived trend continues.

I. PUBLIC DISCLOSURE OF PRIVATE INFORMATION

Two reasons suggest that a discussion of privacy and the first amendment should begin with consideration of the tort of public disclosure of private facts. First, it is the original and true privacy tort;[22] second, in public disclosure cases the value conflict between freedom of speech and individual privacy is most direct.[23] The publication of entirely truthful material, although facilitating the first amendment goal of an informed

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[20] These are three of the four categories into which Prosser divided privacy actions. See W. PROSSER, THE LAW OF TORTS § 117, at 802-18 (4th ed. 1971); Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389-403 (1960). This scheme has been incorporated into the Restatement (Second) of Torts:

> The right of privacy is invaded by
> (a) Unreasonable intrusion upon the seclusion of another . . .; or
> (b) Appropriation of the other's name or likeness . . .; or
> (c) Unreasonable publicity given to the other's private life . . .; or
> (d) Publicity which unreasonably places the other in a false light.

RESTATEMENT (SECOND) OF TORTS § 652A (Tent. Draft No. 22, 1976).

In the text I make no reference to the "intrusion" aspect of privacy law because I am here concerned with media publication and reporting and not with the manner in which the material is gathered. Certainly, it is possible that a reporter may be subjected to a privacy action for the method of investigation as well as for the subsequent publication. *See* Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Pearson v. Dodd, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969); Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942).

[21] *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573-74 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 489 (1975); Cantrell v. Forest City Publishing Co., 419 U.S. 245, 248-49 (1974); Time, Inc. v. Hill, 385 U.S. 374, 381, 383 n.7, 384 n.9 (1967).

[22] *See* Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[23] *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 489 (1975).

society, may result in unwanted publicity for the person involved. The disclosure may be embarrassing or offensive and thus infringe on individuality and human dignity. The obvious question in such a case is which interest—privacy or freedom of expression—is to prevail.

A. *The Public Disclosure Tort Prior to 1974*

Almost from the inception of the privacy action of public disclosure, a "newsworthiness" privilege was recognized that barred recovery for publication of information in the public interest. Warren and Brandeis, in their vanguard article, acknowledged the privilege,[24] and courts, as they accepted the tort, also recognized the first amendment interest and the newsworthiness defense.[25]

In 1967, the United States Supreme Court, following a lead initiated three years earlier in *New York Times Co. v. Sullivan,*[26] directly applied the first amendment freedoms of speech and press to privacy actions. *Time, Inc. v. Hill*[27] involved a privacy action brought by the plaintiff, James Hill, for false, but nondefamatory, information about the Hill family published in defendant's magazine.[28] The Supreme Court over-

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[24] Warren and Brandeis, *supra* note 22, at 214-15.

[25] *See, e.g.*, Wagoner v. Fawcett Publications, 307 F.2d 409 (7th Cir. 1962); Jenkins v. Dell Publishing Co., 251 F.2d 447 (3d Cir.), *cert. denied*, 357 U.S. 921 (1958); Thompson v. Curtis Publishing Co., 193 F.2d 953 (3d Cir. 1952); Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940); Miller v. National Broadcasting Co., 157 F. Supp. 240 (D. Del. 1957); Samuel v. Curtis Publishing Co., 122 F. Supp. 327 (N.D. Cal. 1954); Berg. v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948); Smith v. Doss, 37 So. 2d 118 (Ala. 1948); Barvieri v. News-Journal Co., 189 A.2d 773 (Del. 1963); Jacova v. Southern Radio & Television Co., 83 So. 2d 34 (Fla. 1955); Waters v. Fleetwood, 91 S.E.2d 344 (Ga. 1956); Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. Ct. App. 1905); Buzinski v. Do-All Co., 175 N.E.2d 577 (Ill. App. Ct. 1961); Jones v. Herald Post Co., 18 S.W.2d 972 (Ky. 1929); Kelley v. Post Publishing Co., 98 N.E.2d 286 (Mass. 1951); Martin v. Dorton, 50 So. 2d 391 (Miss. 1951); Hubbard v. Journal Publishing Co., 368 P.2d 147 (N.M. 1962); Schnabel v. Meredith, 107 A.2d 860 (Pa. 1954); Meetze v. Associated Press, 95 S.E.2d 606 (S.C. 1956); Trukes v. Kenco Enterprises, 119 N.W.2d 914 (S.D. 1963).

[26] 376 U.S. 254 (1964). The *Sullivan* Court held that the first amendment required:

> a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80.

[27] 385 U.S. 374 (1967).

[28] *Life* magazine published an account of a play, *The Desperate Hours*, relating

turned the judgment for the plaintiffs and remanded the case, holding that the freedoms of speech and press precluded recovery for false reports of matters of public interest "in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."[29] Although *Hill* was an action based on the publication of false material,[30] courts were quick to recognize the applicability of the policy underlying the decision to the publication of truthful information that was of public interest. Thus the newsworthiness privilege took on constitutional dimensions.[31] The newsworthiness privilege received added support in *Rosenbloom v. Metromedia, Inc.*,[32] a libel case in which the Supreme Court held the knowing or reckless falsity standard applicable to false, defamatory publications concerning matters of public interest regardless of the character of the person defamed. If false, libelous statements concerning matters of public interest were protected, then, necessarily, the disclosure of similar truthful material would also be privileged.[33] Since the "reckless disregard of the truth" standard was, by definition, inapplicable to the publication of truthful material, truthful disclosures were essentially immune from liability.[34]

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it to an incident in which the Hill family was held hostage by some escaped convicts. *Life* described the play as a re-enactment of this incident, and used photographs of scenes staged in the former Hill home for illustrations. James Hill brought an action based on a New York privacy statute; he alleged that the article knowingly gave the false impression that the play was based on the Hill incident. Although on its face the New York statute, N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976) provided a cause of action only for commercial use of a person's name or likeness, the New York courts had interpreted the statute to apply to claims alleging falsification as well. *See* Time, Inc. v. Hill, 385 U.S. at 381-82.

[29] *Id.* at 387-88.

[30] The crux of Hill's claim, however, was based on unwanted public exposure, regardless of whether the material published was accurate or inaccurate. *Id.* at 378.

[31] *See, e.g.*, Man v. Warner Bros., 317 F. Supp. 50 (S.D.N.Y. 1970); Cullen v. Grove Press, Inc., 276 F. Supp. 727 (S.D.N.Y. 1967); Leopold v. Levin, 259 N.E.2d 250 (Ill. App. Ct. 1970); Williams v. KCMO Broadcasting Corp., 472 S.W.2d 1 (Mo. Ct. App. 1971); Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250 (N.Y. 1968); Costlow v. Cusimano, 311 N.Y.S.2d 92 (App. Div. 1970).

[32] 403 U.S. 29 (1971).

[33] *See* Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975). *See also* Kent v. Pittsburg Press Co., 349 F. Supp. 622, 625-27 (W.D. Pa. 1972), where the Court quoted from Justice Brennan's opinion in *Rosenbloom*.

[34] Professor Kalven suggested that the public disclosure tort had been virtually eliminated by the first amendment privilege. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROB. 326, 336 (1966). However, it

B. *The Trend Toward Media Liability for Public Disclosure*

In 1974 the Supreme Court re-examined the first amendment public interest privilege available to the media in libel actions. The plaintiff in *Gertz v. Robert Welch, Inc.*[35] was a prominent Chicago attorney who had been defamed in *American Opinion,* "a monthly outlet for the views of the John Birch Society."[36] Although a matter of public interest was involved, the Court rejected the application of the knowing or reckless falsity standard by the lower courts. A five-Justice majority retreated from the plurality position in *Rosenbloom* and held that the *New York Times* malice standard was not constitutionally required when a private individual, such as Gertz, was defamed.[37] Justice Powell's majority opinion reasoned that a private person, unlike a public figure, neither had access to the media to rebut false statements nor had assumed the risk of publicity, and therefore "the state interest in protecting [such individuals was] correspondingly greater."[38] States were invited to apply a negligence standard in the case of a private plaintiff, whether or not the defamatory statement involved a matter of public interest. "[S]o long as they do not impose liability without fault, the States may define for them-

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should be noted that the media have not entirely escaped liability for undesired publicity. *See* Daily Times Democrat v. Graham, 162 So. 2d 474 (Ala. 1964) (the publication of a photograph of plaintiff with her dress blown over her waist was offensive to community standards of decency); Briscoe v. Reader's Digest Ass'n., 483 P.2d 34 (Cal. 1971) (although a story concerning truck hijacking was newsworthy, the use of plaintiff's name in connection therewith was not necessarily privileged); Melvin v. Reid, 297 P. 91 (Cal. Ct. App. 1931) (the use of plaintiff's true identity without her consent in a motion picture that was based on her past life of infamy not privileged); Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942) (the disclosure of the identity of plaintiff who had a rare disease was not newsworthy even if the disease was newsworthy).

[35] 418 U.S. 323 (1974).

[36] *Id.* at 325. *American Opinion* ran an article entitled "FRAME-UP: Richard Nuccio and the War on Police" as part of an effort to warn the public of an imagined conspiracy to establish a national police force with communist leanings. Nuccio was a Chicago police officer who had been convicted of second degree murder for the shooting death of a Chicago youth. In the course of the article, Gertz, who was representing the dead youth's parents in a civil action against Nuccio, was depicted as being responsible for framing Nuccio with murder, even though he had only minimal connection with the criminal proceedings. He was also falsely accused of, among other things, having a lengthy criminal record and being a "Leninist" and "Communist-fronter." *Id.* at 325-26.

[37] *Id.* at 346.

[38] *Id.* at 344-46.

selves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[39] This holding created the potential for liability based on inadvertent error, and signaled a decline in first amendment protection for the media.[40]

1. *The Applicability of* Gertz *to Public Disclosure Actions*

Regardless of the ultimate policy underlying the *Gertz* opinion,[41] the decision holds much significance for privacy litigation. The five-Justice majority exhibited an inclination to give increased weight to the private interest—in *Gertz,* personal reputation—at the expense of protection for the media and freedom of expression. This was expressed by the majority's willingness to deviate from the established "malice" standard.[42] Most importantly, the articulated rationale for the new balance struck in *Gertz* with reference to libel appears to apply equally well to public disclosure actions. As noted earlier, the Court reasoned that since private individuals had not assumed the risk of media exposure nor had access to the media to rebut false statements, the state interest in protecting their reputations was correspondingly greater than in the case of public persons.[43] Since most public disclosure actions are brought by private plaintiffs, the first argument—lack of assumption of the risk—obviously applies.[44] Similarly, access to the media is usually unavailable following the public disclosure of allegedly private information. Even if access were possible, it would not provide a remedy; the damage in this sense is irreparable since

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[39] *Id.* at 347.

[40] *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976), in which the Supreme Court virtually sanctioned recovery when *Time's* erroneous report that Russell Firestone had been granted a divorce from his wife on grounds of extreme cruelty and adultery was an honest and entirely reasonable misinterpretation of a cryptic judicial decision. *See also* Ashdown, *supra* note 13, at 673-75.

[41] *Compare* Ashdown, *supra* note 13, *with* Robertson, *Defamation and the First Amendment: In praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976).

[42] 418 U.S. at 346. For cases using the malice standard, *see* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Garrison v. Louisiana, 379 U.S. 64 (1964).

[43] 418 U.S. at 344-46.

[44] If a privacy action alleging public disclosure of intimate private facts were brought by a public figure or official, presumably the media defendant would be entitled to the same constitutional protection available prior to *Gertz.*

further comment directed toward the unwanted publicity would only exacerbate the initial disclosure. Thus the *Gertz* majority's two rationales for granting protection to private persons—lack of assumed risk and inability to utilize the media as a remedy—are applicable to public disclosure.[45]

Before concluding that the *Gertz* decision applies with equal force to the public disclosure tort, it is necessary to compare the strength of the privacy interest with that of the reputational interest. The *Gertz* Court spoke of the legitimate state interest in providing a remedy for defamatory falsehood injurious to reputation.[46] The law of defamation protects a relational interest—an individual's relationships with others—by providing a deterrent and a remedy for false, derogatory aspersions that are damaging to reputation. Privacy protects a person's relational interest in much the same way, not by protection from false and unfair statements, but by safeguarding against penetration and public exposure a sphere of privacy surrounding the individual. Although the two torts differ with regard to falsity—the injury in defamation being caused by the creation of false opinions and in privacy cases due merely to the publication of factual information—in both cases the damage is produced by actual and imagined effects on how the plaintiff is viewed by others.[47] Further, in the case of public exposure of private information, there may be additional psychic and emotional harm caused by the media disclosure. There is a threat

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[45] C.F. Beytagh, *Privacy and a Free Press: A Contemporary Conflict in Values*, 20 N.Y.L.F. 453, 480-81 (1975); Comment, *An Accommodation of Privacy Interests And First Amendment Rights In Public Disclosure Cases*, 124 PA. L. REV. 1385, 1404-05 (1976). Both authors conclude that public disclosure actions are on a parity with libel actions insofar as the Supreme Court's analysis in *Gertz* is concerned.

[46] 418 U.S. at 345-46.

[47] Professors Prosser and Bloustein disagree about whether the interest in reputation is affected by public disclosure of private information. Prosser believes that it is, while Bloustein does not. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 978 (1964); Prosser, *Privacy*, 48 CALIF. L. REV. 383, 398 (1960). Although I believe that public disclosure of private information can affect reputation, I view the primary value protected by both defamation and privacy law as the broader relational interest, that is, the interest in relationships with family, friends, associates, and society generally. Professor Bloustein would apparently agree that public disclosure affects this broad relational interest even though it is not entirely distinct from, and probably includes, the reputational interest. *See* Bloustein, *supra*, at 979. *See also* A. WESTIN, PRIVACY AND FREEDOM 38-39 (1967); Fried, *Privacy*, 77 YALE L. J. 475, 483-85 (1968); Comment, *supra* note 45, at 1395-98.

to individuality and an affront to human dignity when a person's private life is made a public spectacle by having the public become an unwanted witness.[48] In this sense, the injury is internalized in the form of emotional conflict regarding self-esteem.

Thus, the interests protected by the public disclosure action are seemingly entitled to as much protection as the Supreme Court in *Gertz v. Robert Welch, Inc.* provided for the reputational interest of a private person. Situations like *Briscoe v. Reader's Digest Ass'n,*[49] where the plaintiff was named as a convicted felon, or that of Oliver Sipple, where Sipple was exposed as a homosexual after thwarting an attempt on the life of President Ford,[50] attest to the fact that privacy invasions can be just as damaging as defamation. The state's interest in providing a remedy for such damage should be equally as great.

The foregoing analysis demonstrates the similarity between libel, as viewed by the Supreme Court in *Gertz,* and the privacy action of public disclosure. This relationship suggests that the same standard—negligence—should be available in a privacy action brought by a private plaintiff against a publisher or broadcaster. Even though a public disclosure privacy claim involves the disclosure of truthful information, the current Court's recognition of privacy claims in other contexts,[51] coupled with the inclination on the part of a majority of the Justices to reconsider the balance between the competing interests involved in mass publication torts,[52] forecasts the development of media liability in the case of offensive disclosures.

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[48] WESTIN, *supra* note 47, at 33; Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?,* 46 TEX. L. REV. 611, 619 (1968); Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy,* 56 CALIF. L. REV. 935, 958-59 (1968).

[49] 483 P.2d 34 (Cal. 1971).

[50] N.Y. Times, Oct. 1, 1975, at 20, col. 1. Sipple filed a $15 million invasion of privacy suit based on this disclosure.

[51] *See* Carey v. Population Services Int'l, 436 U.S. 678 (1977); Sendak v. Arnold, 429 U.S. 6968 (1976) (summary affirmance); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113 (1973).

[52] *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

2. *Limitations on Liability:* Cox Broadcasting

Before examining the form of a potential standard of liability, it is necessary to consider the impact of *Cox Broadcasting Corp. v. Cohn,*[53] which retained for the media an absolute privilege to publish facts appearing in public records. *Cox Broadcasting* involved an invasion of privacy action brought by the father of a rape victim for the disclosure of his daughter's name on a television news report. The disclosure was made in violation of a Georgia statute that prohibited the disclosure of a rape victim's identity.[54] The defendants admitted making the broadcasts but claimed the reports were privileged under both state law and the first and fourteenth amendments. The trial court rejected these constitutional claims and held that the Georgia statute provided a civil remedy for its violation. The plaintiff was granted summary judgment on the issue of liability.[55]

On appeal, the Georgia Supreme Court held that the trial court erred in concluding that the statute provided a civil cause of action, but went on to rule that the complaint stated a cause of action "for the invasion of the appellee's right of privacy, or for the tort of public disclosure."[56] The father was held to have stated a claim for invasion of his privacy because of the broadcast of his daughter's name. Although the Georgia Supreme Court agreed with the trial court that the first and fourteenth amendments did not protect the station as a matter of law, summary judgment was held to be improper since the plaintiff would need to prove that "the appellants invaded his privacy with wilfull or negligent disregard for the fact that reasonable

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[53] 420 U.S. 469 (1975).

[54] 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 or 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.

GA. CODE ANN. § 26-9901 (1977).

[55] 420 U.S. at 474.

[56] 200 S.E.2d 127, 130 (Ga. 1973), *rev'd,* 420 U.S. 469 (1975).

men would find the invasion highly offensive."[57] On rehearing, the court upheld the constitutionality of the anti-disclosure statute and concluded that it was an authoritative declaration that, as a matter of state policy, a rape victim's name was not a matter of public interest or concern.[58]

Although speaking favorably of the right to privacy,[59] the United States Supreme Court reversed, holding that states may not impose sanctions on the accurate publication of information contained in judicial records open to public inspection.[60] The narrowness of the holding in *Cox Broadcasting* is apparent upon consideration of the extent of its applicability. Information appearing in public records, to which the decision apparently applies,[61] is limited. Discounting relatively insignificant public records containing esoteric information, the major public recordations are of police and judicial proceedings (as in *Cox Broadcasting),* real estate transactions, births, deaths, and issuances of licenses and permits. These records represent a minor portion of the total body of information capable of producing undesired publicity.

Although *Cox Broadcasting* was certainly an important recognition of first amendment interests, the Court expressly refused to answer the broad question of whether truthful publications may ever be the basis of liability.[62] Several factors underlying *Cox Broadcasting,* in addition to the implications of *Gertz v. Robert Welch, Inc.,*[63] indicate that when the Supreme Court directly confronts this issue, a negligence-oriented standard will result.

The first and most obvious sign which supports this prognosis is the pro-privacy language used by Justice White, writing for the majority in *Cox Broadcasting:*

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[57] *Id.* at 131.

[58] *Id.* at 134.

[59] 420 U.S. at 488-89.

[60] *Id.* at 491.

[61] Although the precise holding of *Cox Broadcasting* applies to judicial records, the Court spoke several times in broader language, referring to "official records" and "public records." *Id.* at 492, 495. Certainly the Court's rationale—the importance of the news media in reporting on governmental operations if official records are the basic data of those operations—applies to all public records and documents. *Id.* at 492.

[62] *Id.* at 491.

[63] *See* text accompanying notes 35-52 *supra* for a discussion of these implications.

> [P]owerful arguments can be made, and have been made, that however it may be ultimatey defined, there *is* a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity.[64]

After referring to the Warren and Brandeis article,[65] he pointed out that "the century has experienced a strong tide running in favor of the so-called right of privacy," and suggested that there were "impressive credentials" for such a right.[66] The opinion then noted that although *Time, Inc. v. Hill* had "expressly saved the question whether truthful publication of very private matters unrelated to public affairs could be constitutionally proscribed," the Court intended to proceed with caution.[67] In so doing, the majority expressly declined to consider the broad doctrinal issue, deciding the case instead on the narrow ground of a media privilege to publish or broadcast matters of public record. Nevertheless, the Court indicated its receptivity to invasion of privacy claims and signaled that it might take a pro-privacy position when the broad question of media liability for public disclosure of private facts is confronted.[68]

Another factor which suggests the development of liability for truthful publications emerges from the realization that the Supreme Court's decision in *Cox Broadcasting* was virtually dictated by precedent. Justice White cited the Warren and Brandeis privacy article, Tentative Draft No. 13 of the Second Restatement of Torts, Prosser, and nine cases for the common law proposition that publication of information derived from official records is privileged.[69] Thus, even had the Court wanted to sanction the viability of a public disclosure action, the majority would have had to counter a substantial body of precedent. The Court may well have chosen to follow the most efficacious path by recognizing the established precedent and decid-

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[64] 420 U.S. at 487.

[65] *Id.* at 487. See Warren and Brandeis, *supra* note 22.

[66] 420 U.S. at 488-89.

[67] *Id.* at 491. The Court's cautious approach to the interface between privacy and freedom of expression is another indication of the present Court's inclination to balance carefully these two conflicting interests. This suggests that the privacy interest will fare better than it has in the past.

[68] *Id.*

[69] *Id.* at 493, 494 n.25.

ing the case on the narrow ground. It thereby preserved the larger question of whether a remedy exists for public disclosure for a future case where an effort to sanction recovery would not run head-on into settled doctrine.

3. *The Emerging Policy Regarding Press Freedom*

Recognition of a media privilege to publish information contained in public records coincides with the current Supreme Court's philosophy of freedom of the press. The Court's most recent libel decisions, *Gertz v. Robert Welch, Inc.*[70] and *Time, Inc. v. Firestone,*[71] evince a policy to restrict unencumbered media reporting to matters at the core of self-government, that is, material with potential political significance.[72]

This intention to limit protected media coverage to information with sociopolitical impact can best be seen in the Court's private versus public figure dichotomy. In *Gertz,* the Court permitted private persons to recover for the negligent publication of libelous statements, while it retained the knowing or reckless falsity standard of *New York Times v. Sullivan* for public persons.[73] Thus, the press is adequately protected against libel judgments only in the case of publications or broadcasts concerning public officials or figures. The immediate political relevance of information about public officials is obvious, and the Court has defined "public figure" as a person who has present or potential political impact. The Court's latest libel decision, *Time, Inc., v. Firestone,* when dealing with the public figure question, focused on language from *Gertz* that emphasized the individual's influence on public questions:

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves

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[70] 418 U.S. 323 (1974).

[71] 424 U.S. 448 (1976).

[72] *See* Ashdown, *supra* note 13, at 672-90. *See also* Bezanson, *The New Free Press Guarantee,* 63 VA. L. REV. 731 (1977).

[73] *See* text accompanying notes 35-40 *supra* where the Court's establishment of this double standard is discussed.

> to the forefront of particular public controversies in order to influence the resolution of the issues involved.[74]

This dual-level test for determining whether a plaintiff is a public figure—occupying a position of persuasive power and influence or attempting to influence the resolution of a public issue—demonstrates the Supreme Court's intent to restrict media protection from libel claims to material at the heart of freedom of expression.

Cox Broadcasting is consistent with this policy. The Court's rationale for protecting the accurate disclosure of information contained in official records was based on the responsibility of the news media to fully inform the public of governmental operations, the basic data of which are official records and documents.[75] Without question, reports of the proceedings of government are at the core of self-government and are of maximum political relevance, for "[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally."[76]

On the other hand, most public disclosures of information not obtained from public records will fail to have apparent political significance. For example, an article about a former child prodigy,[77] publicity concerning the relatives of a person of public interest,[78] a story about two children who suffocated in a refrigerator,[79] or exposure of the unusual private life of a surfer[80] carry little, if any, immediate political impact. Although the aggregate of such information may be "needed or appropriate to enable the members of society to cope with the exigencies of their period,"[81] the Supreme Court may view this material as directed merely toward reader interest and curiosity, and not as the kind of information which is essential to

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[74] 424 U.S. at 453 (quoting Gertz v. Robert Welch, Inc., 418 U.S. at 345).

[75] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975).

[76] *Id.* at 492.

[77] Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

[78] *See* Smith v. Doss, 37 So.2d 118 (Ala. 1948); Corabi v. Curtis Publishing Co., 273 A.2d 899, 918 (Pa. 1971).

[79] Costlow v. Cusimano, 311 N.Y.S.2d 92 (App. Div. 1970).

[80] Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975).

[81] Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)).

enable persons to govern themselves effectively. Such disclosures would then be entitled to less protection than politically influential matter, opening the way to media liability based on carelessness and insensitivity.

It appears probable that *Cox Broadcasting Corp. v. Cohn* represents the Court's concession to the media in public disclosure cases. Given the Court's view of the appropriate balance to be struck between private rights and freedom of expression, it is likely that *Cox Broadcasting* signifies the media side of this balance. The accurate publication of information taken from public records will be protected, but the press is likely to find itself saddled with potential liability in all other cases of unwanted public exposure.

C. *A Potential Standard for Media Liability*

Assuming the accurate portrayal of this trend, the remaining consideration is the standard which the Supreme Court will adopt to test media liability. Although both case law generally[82] and the Supreme Court's decision in *Gertz* seem to point toward a standard based on negligence, in the case of truthful publications a negligence-offensiveness approach would have

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[82] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In the Georgia Supreme Court's opinion in Cox Broadcasting Corp. v. Cohn, 200 S.E.2d 127 (Ga. 1973), *rev'd*, 420 U.S. 469 (1975), the standard for media liability was whether there was "wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive." *Id.* at 131. In Briscoe v. Reader's Digest Ass'n, 483 P.2d 34 (Cal. 1971), the court held that a plaintiff could recover in a public disclosure action when he could prove "that the publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive." *Id.* at 44.

See also Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940), where, although denying recovery on the facts before it, the court indicated that "[r]evelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency." *Id.* at 809. This standard was cited by the United States Supreme Court in Time, Inc. v. Hill, 385 U.S. 374, 383 n.7 (1967), when discussing the possibility of imposing liability on truthful publications. Professor Alfred Hill favors use of this "Sidis principle" to test media liability for unwanted publicity. Hill, *Defamation And Privacy Under The First Amendment*, 76 COLUM. L. REV. 1205, 1258-69 (1976).

In addition to the cases mentioned above, Professor Hill believes that the occasional judicial pronouncements that liability may be predicated on unreasonable publicity which is not newsworthy or of legitimate public interest are consistent with *Sidis*. He also believes that these formulations are often combined with language that suggests that the *Sidis* unconscionability standard is really being applied. *Id.* at 1261-62, nn. 267, 268, 271.

to be combined with some form of public interest test. Even though the Court in *Gertz* dispensed with the concept of public interest as an exclusive benchmark of media liability, the publications there involved were false and defamatory. Where the published statements are truthful and accurate, the public need for and interest in the material is greater. However, the broad public interest concept of *Time, Inc. v. Hill*[83] would leave present media immunity intact. *Gertz, Firestone,* and *Cox Broadcasting* have signaled a desire to narrow the public interest concept to encompass only material relevant to self-government.[84] Public disclosures within this strict delineation of newsworthiness will be protected, but those outside this realm which are offensive to the reasonable person or to notions of common decency[85] may be subject to liability in the future. In other words, what may be expected in the area of unwanted public exposure is a standard of media liability based on (1) whether the disclosure is of "legitimate public interest," *i.e.,* material with sociopolitical importance relevant to self-governance; if it is not, (2) whether the disclosure is unreasonable and offensive to common standards of decency.[86]

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[83] In *Hill,* the Court spoke of the public interest as "embrac[ing] all issues about which information is needed or appropriate to enable the members of society to cope with exigencies of their period." 385 U.S. at 388 (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)), and stated that "[t]he line between the informing and the entertaining is too elusive for the protection of [freedom of the press]." *Id.* (quoting Winters v. New York, 333 U.S. 507, 510 (1948)).

[84] *See* text accompanying notes 70-81 *supra* for the development of this trend. The Court apparently intends to provide complete protection only to material with potential political impact.

[85] *See* Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 44 (Cal. 1971); Cox Broadcasting Corp. v. Cohn, 200 S.E.2d 127, 131 (Ga. 1973), *rev'd,* 420 U.S. 469 (1975).

[86] *See* Bloustein, *supra* note 1, at 56-65. Professor Bloustein favors the application of the Meiklejohn theory of freedom of expression to the public disclosure situation. Under Professor Meiklejohn's analysis, information needed to facilitate the public's self-governing function would be absolutely privileged. Material unnecessary for fulfillment of the governing function and directed only to reader interest and curiosity would be subject to regulation under a fifth amendment due process-reasonableness approach. *Id.* Presumably, under the fifth amendment, the states would be free to impose liability on the press if the standard employed were reasonable. This is very similar to the approach taken by the Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), in regard to defamation. *See also* Beytagh, *supra* note 45, at 498-500. Professor Beytagh would permit:

> recovery of actual damages in a privacy action where there has been an unconsented-to public disclosure of information that an individual might reasonably desire to keep confidential, where that information is irrelevant

As noted earlier, the Supreme Court has recognized information contained in public records to be relevant to the governing function of the public and has provided the press with immunity for its dissemination.[87] Other than official records and disclosures about public officials and figures,[88] it is difficult to isolate material which serves a governing purpose. Reports concerning ostensibly private persons involved in public issues might be one example[89] and information regarding crime another, but outside these areas the connection between a particular disclosure and the public's governing function may be hard to establish.[90]

It has been suggested that unless a person is in a position to affect the lives of others, and therefore of sociopolitical interest, his identity should not be revealed by the media in connection with a potentially embarrassing story,[91] even if the story itself is of sociopolitical relevance.[92] The name of the individual

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to any legitimate media reflection of the public interest in the dissemination of newsworthy matter and is offensive to ordinary sensibilities.

Id. at 499. In Comment, *supra* note 45, at 1411-16, the author suggests that the press might incur liability for disclosures of "core privacy interests" (sexual activities, health, distant past) unless the court determines that the information is of "legitimate public interest." This standard approaches the problem in reverse, but the determination—legitimate public interest and offensiveness—is essentially the same.

A test similar to the one mentioned in the text was also suggested in Briscoe v. Reader's Digest Ass'n, 483 P.2d 34 (Cal. 1971), where the court stated that "a truthful publication is constitutionally protected if (1) it is newsworthy, and (2) it does not reveal facts so offensive as to shock the community's notions of decency." *Id.* at 42-43. *See also* RESTATEMENT (SECOND) OF TORTS § 652D (Tent. Draft No. 22, 1976).

[87] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

[88] *See* text accompanying note 74 *supra* for a discussion of "public figure." Public officials have the ability to affect directly public decisions; public figures have the power to affect indirectly those decisions through the influence they exert.

[89] The definition of public figure which the Supreme Court adopted in *Gertz* and *Firestone* included persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)).

[90] For example, in the archetypal case of Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied,* 311 U.S. 711 (1940), it is difficult to characterize the disclosure of the unproductive life of a former child prodigy as information relevant to a governing purpose. *See also* the text accompanying notes 78-80 *supra* for other similar cases.

[91] *See* Cox Broadcasting Corp. v. Cohn, 300 S.E.2d 127, 133-34 (Ga. 1973), *rev'd,* 420 U.S. 469 (1974); Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 40 (Cal. 1971); Beytagh, *supra* note 45, at 498-99; Nimmer, *supra* note 48, at 962.

[92] *See* Bloustein, *supra* note 1, at 58-61.

involved is said to serve no additional informative function which is essential to self-government. It is the event that is newsworthy, not the individual. Regardless of whether one believes that the story of the wasted genius of a child prodigy is important, it can be forcefully contended that the identification of the squanderer is unnecessary to the lesson. Similarly, although reports about past criminal acts are of legitimate public interest,[93] it may be that the naming of the former felon serves no additional public purpose.[94] Once the encounter with the criminal process has ended, identification of the ex-offender will not aid the administration of justice. Exposure and identification interfere with the goal of rehabilitation, and, it may be argued, serve no public interest other than to satisfy reader curiosity.[95] Even under a broad concept of public interest, at least one court has taken the position that although a story may have some news value, the identity of the person involved does not.[96] Certainly, under a restricted version of

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[93] As stated by the Supreme Court of California in Briscoe v. Reader's Digest Ass'n., 483 P.2d 34, 39-40 (Cal. 1971):

> We have no doubt that reports of the facts of past crimes are newsworthy. Media publication of the circumstances under which crimes were committed in the past may prove educational in the same way that reports of current crimes do. The public has a strong interest in enforcing the law, and this interest is served by accumulating and disseminating data cataloguing the reasons men commit crimes, the methods they use, and the ways in which they are apprehended.

[94] I refer here to the identification of persons as past criminals, *i.e.*, those who have committed a crime a number of years earlier. Identification of adults currently charged with the commission of a crime serves the public interest by putting others on notice that the named individual is suspected of having committed a crime and by encouraging eye witnesses and character witnesses to testify.

[95] *See* Briscoe v. Reader's Digest Ass'n, 483 P.2d 34 (Cal. 1971); Melvin v. Reid, 297 P. 91 (Cal. Dist. Ct. App. 1931). *But see,* Barbieri v. News-Journal Co., 189 A.2d 773 (Del. 1963); Leopold v. Levin, 259 N.E.2d 250 (Ill. 1970), both denying recovery for such a disclosure. It appears that the question of liability for disclosure of past criminal acts may have been settled by *Cox Broadcasting.* Since information regarding former crimes is a matter of public record, presumably publication of such material is protected. It may be that the Court meant to draw no lines in the area of public records and therefore the disclosure of any information contained therein is protected. This, however, ignores the fact that the disclosure of the identity of a person who has committed a crime many years earlier serves no apparent governing function, and thus is antithetical to the Supreme Court's rationale in *Cox Broadcasting.* The *Cox Broadcasting* majority failed to deal adequately with the situation created by the disclosure of stale information unrelated to governmental operations. This issue will have to await further adjudication.

[96] Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942) (the name and photograph of

public interest which limits newsworthiness to material relevant to the self-governing process, the identification of individuals has even less significance.

Even if a news item necessitates the identification of the person involved, an unnecessary, embarrassing, and offensive disclosure accompanying the story may be irrelevant to the governing function of the reading public. For example, is it important to disclose that a person responsible for thwarting an assassination attempt on the President of the United States is a homosexual?[97] Similarly, in a news article about body surfing and the proficiency of a particular participant, it may be unnecessary to expose bizarre incidents in the subject's life.[98]

D. *The Threat to Freedom of Expression*

Closely examined, however, the foregoing cases illustrate the problem created by attempting to impose liability on the media for alleged privacy invasions. The press is already exposed to liability for defamation.[99] Any effort to subject the media to privacy liability where the published material is truthful and accurate is likely to prove much more devastating to freedom of expression. The basis of liability in a libel action brought by a private person—a negligent failure to discover inaccuracy—is something relatively ascertainable by a publisher or broadcaster through investigation. However, in the case of public disclosure, where liability is not based on truth or falsity but on the nebulous concepts of sociopolitical relevance and offensiveness, the chilling effect on publication will be severe. Even if certain types of information can be isolated as being generally offensive and embarrasing to reasonable per-

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a woman suffering from an unusual disease was not in the public interest). *See also* Cox Broadcasting Corp. v. Cohn, 200 S.E.2d 127 (Ga. 1973); Hunter v. Washington Post, 102 Daily Wash. L. Rep. 1561 (D.C. Super. Ct. 1974) (both cases holding the publication of the name of a rape victim not to be in the public interest). In addition, three states other than Georgia have statutes prohibiting such disclosures. *See* FLA. STAT. ANN. §§ 794.03, 794.04 (West 1965 & Supp. 1974-75); S.C. CODE § 16-81 (1962); WISC. STAT. ANN. § 942.02 (West 1958). These later cases and statutes are constitutionally invalid in light of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

[97] *See* N. Y. Times, Oct. 1, 1975, at 20, col. 1.

[98] *See* Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), *cert. denied,* 425 U.S. 998 (1976).

[99] *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Welch, Inc., 418 U.S. 323 (1974).

sons,[100] and therefore recognizable as such by a potential publisher, the real problem lies in determining what information is of legitimate public interest in terms of relevance to the self-governing function. It is probable that much accurate material, relevant to self-government, will be voluntarily suppressed by the media to avoid the risk of litigation and judgments for unwanted publicity.

For example, in *Virgil v. Time, Inc.*,[101] *Sports Illustrated* ran an article about body surfing and the daring nature of body surfer Ron Virgil. The complained-of segments of the story mentioned bizarre and masochistic incidents in Virgil's life (extinguishing lighted cigarettes on his body and diving head first down a flight of stairs). Such disclosures are important to the self-governing process because they reveal personality characteristics which may lead to a particular type of physical or mental behavior. Regarding Oliver Sipple, the ex-marine who saved former President Gerald Ford from an attempted assassination, the disclosure of Sipple's homosexuality is certainly information with social and political significance; it exposes readers to a factual account of the behavior of a homosexual which is contrary to some popular views regarding homosexuals. Such information may have a moderating effect on public attitudes toward homosexuals—a group which has been subject to both social and legal persecution. Yet regarding both Virgil and Sipple, it is unlikely that the disclosure would have been made were it subject to a later judicial determination regarding its importance to the public's self-governing function. The lack of certainty and predictability engendered by such a standard would limit personal disclosures to matters involving public officials, the only group unquestionably of public interest.

Additionally, one can presume that under a standard of relevance, the press would not risk identifying the individual involved in a potentially embarrassing and objectionable story unless the person were a government official or otherwise had potential political impact.[102] Only then could a publisher or

[100] *See* Comment, *supra* note 45, at 1411 (1976), in which the author characterizes information regarding sexual activities, health, and the distant past as involving "core privacy interests" which the press should reasonably know an individual desires to keep private.

[101] 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).

[102] *See* note 74 and accompanying text *supra* for the definition of "public figure"

broadcaster be certain that the disclosure would be related to an informative purpose. Such a restricted state of "press freedom" would not only reduce the number and kind of individuals about whom information would be available, it would also reduce story impact. If a publisher were unsure of the capacity of his subject to affect public affairs or public decisions, the entire story,[103] or at least the identity of the person involved, would surely be withheld. This decision would eliminate from public consideration information about many individuals some of whom may be in a position to affect the public interest and the lives of others.[104] Furthermore, an article or news item published without disclosing the names of the participants would lose much of its impact and reliability in the eyes of the reader. Reader interest would consequently be diminished. The reading and listening public is interested in information about "real live people," and without such material a portion of the audience is likely to "tune-out." Thus, even if the story itself, without the names of those involved, is of governing significance, a percentage of the public will not be exposed to it because of its lack of readability. As a result, freedom of the press will not have fulfilled its function, and freedom of expression and self-government will be the ultimate losers.

There is no doubt that certain disclosures that name individuals are embarrassing and offensive and result in unwanted publicity. It may even be that in some cases publishers realize that good taste and propriety suggest withholding stories or names, but nevertheless use a personalized treatment as a tool to sell the information involved. This is one of those sensitive areas where two libertarian values both demand recognition, and where the result of the conflict must depend on the relative significance accorded the competing interests. Although protection from the public disclosure of private information is an understandable desire, freedom of expression under the first amendment is a much more compelling interest considering its pervasive impact on society and on our sociopolitical system.

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adopted by the Supreme Court.

[103] If the identity of the pivotal figure in a news story cannot be disclosed for fear of privacy liability, the story may not be worth publishing.

[104] Examples include teachers, school officials, religious leaders, little-known actors, literary figures, business people and industrialists.

Hopefully, the private right will continue to yield to the public interest. However, recent Supreme Court decisions regarding mass publication torts indicate that such may not be the case.

II. FALSIFICATION

The Supreme Court's decision in *Time, Inc. v. Hill*[105] substantially protected the press from privacy actions which alleged the publication of false, but nondefamatory,[106] statements. In *Hill,* the Court held that a plaintiff was not entitled to "redress [for] false reports of matters of public interest" unless it could be shown "that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."[107] It would seem, however, that *Hill* was implicitly overruled by *Gertz v. Robert Welch, Inc.*[108] in which the Court moved the focus of the constitutional privilege away from the concept of public interest back to the character of the party defamed and sanctioned the use of a negligence standard in the case of private individuals.

Since the torts of defamation and of invasion of privacy by means of false statements have received identical treatment with respect to constitutional protection for media defendants,[109] it appears that the states are now free, in light of *Gertz,* to impose a negligence standard for false reports about private individuals, with the knowing or reckless falsity standard remaining applicable in the case of public plaintiffs.[110] The only thing which might militate against this conclusion would be the view that a person's privacy interest in preventing and redressing the publication of false statements about himself is not as significant as his interest in reputation. However, close examination reveals three distinct kinds of harm created

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[105] 385 U.S. 374 (1967).

[106] If the statements about the plaintiff are both false and disparaging, the correct action is defamation and not the privacy action of falsification. The plaintiff should not be able to skirt the requirements for defamation by giving his action a "privacy" label. *See* RESTATEMENT (SECOND) OF TORTS § 652E, Comment e. (Tent. Draft No. 22, 1976).

[107] 385 U.S. at 387-88.

[108] 418 U.S. 323 (1974).

[109] *Compare* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) and New York Times v. Sullivan, 376 U.S. 254 (1964), *with* Time, Inc. v. Hill, 385 U.S. 374 (1967).

[110] *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

by the publication of false statements, all of which overlap with the relational-reputational interest in varying degrees, thus indicating the propriety of applying similar standards of liability.

First, many false publications are derogatory and humiliating, and therefore do actually injure reputation. An excellent example is *Berry v. National Broadcasting Co.*[111] in which the NBC news program "First Tuesday" depicted the plaintiff, who had been acquitted of the murder of an Indian, as being the beneficiary of a double standard of justice. If this type of report can be established as false, it is certainly defamatory as well since it suggests that the subject may have been guilty of homicide.[112] It is irrefutable that the constitutional principles applicable to defamation will apply to this class of case.[113]

Second, there are inaccuracies which, although noninjurious to reputation, are offensive because they are misleading. *Spahn v. Julian Messner, Inc.*[114] provides an example. In a purported biography, *The Warren Spahn Story,* the author manufactured various aspects of the major league pitcher's relationship with his father, falsely depicted Spahn as a war hero, fictionalized his courtship and marriage, invented dialogue, and indulged in a fanciful exposure of Spahn's inner thoughts. Although none of this material was disparaging, this type of publication injured the subject's relational interests (his rela-

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[111] 480 F.2d 428 (8th Cir. 1973).

[112] For other "false light" cases which are also defamatory, *see* Cantrell v. Forest City Publishing Co., 484 F.2d 150 (6th Cir. 1973), *rev'd,* 419 U.S. 245 (1974) (inaccuracies and untruths which unfairly portrayed the plaintiffs as untidy and poor); Varnish v. Best Medium Publishing Co., 405 F.2d 608 (2d Cir. 1968), *cert. denied,* 394 U.S. 987 (1969) (article in *The National Enquirer* implied that the plaintiff-husband was insensitive and lacked care and understanding for his wife who had killed their three children and herself); Leverton v. Curtis Publishing Co., 192 F.2d 974 (3d Cir. 1951) (child unfairly portrayed as careless pedestrian); Strickler v. NBC, 167 F. Supp. 68 (S.D. Cal. 1958) (defendant's dramatized version of an emergency aboard a commercial airliner presented a commander in the United States Navy in a fashion unfavorable and embarrassing to him); Goldberg v. Ideal Publishing Corp., 210 N.Y.S.2d 938 (App. Div. 1960) (views on sexual freedom falsely ascribed to plaintiff-rabbi); Bennett v. Norban, 151 A.2d 476 (Pa. 1959) (plaintiff wrongfully accused of shoplifting, although case is somewhat unclear as to privacy theory on which plaintiff was proceeding).

[113] *See* Nimmer, *supra* note 48, at 964-65. *See also* RESTATEMENT (SECOND) OF TORTS § 652E (Tent. Draft No. 13, 1967).

[114] 250 N.Y.S.2d 529 (Sup. Ct. 1964), *aff'd,* 260 N.Y.S.2d 451 (App. Div. 1965), *aff'd,* 211 N.E.2d 543 (N.Y. 1966), *vacated and remanded,* 387 U.S. 239 (1967).

tionship with family, friends, acquaintances, and society generally) by creating an inaccurate perception in the mind of the reader.[115] In addition, such fictionalization invades privacy by purporting to enter the sphere of privacy that surrounds the individual, and in this sense can create internal psychic harm.

The final form of falsification is offensive not because it is false, but simply because it invades the plaintiff's solitude. In this sense, it is identical to public disclosure of private information. For instance, in *Time, Inc. v. Hill,*[116] even though the information was false, there would have been no less harm to the Hill family had the information in the *Life* magazine article been true. After being held hostage by escaped convicts in their Pennsylvania home, the family had moved to Connecticut to escape the public spotlight. James Hill's complaint was grounded on the intrusion into their newly acquired privacy, and not on the fictionalization contained in the *Life* article.[117] As such, this form of "false light" case, in addition to causing internal mental distress, affects the relational interest by exposing the subject to public scrutiny.[118]

Even though the latter two forms of falsification do not directly injure reputation,[119] they are closely related and poten-

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[115] *See also* Fairfield v. American Photocopy Equip. Co., 291 P.2d 194 (Cal. Dist. Ct. App. 1955) (plaintiff listed as one of "thousands of leading law firms" using defendant's machines, when actually the plaintiff had returned the machine as unsatisfactory); Hinish v. Meier & Frank Co., Inc., 113 P.2d 438 (Ore. 1941) (plaintiff's name signed to political telegram without his consent); Dattaglia v. Adams, 164 So.2d 195 (Fla. 1964), (right to privacy prevents unauthorized use of presidential candidate's name on primary ballot).

[116] 385 U.S. 374 (1967).

[117] Since Hill chose to sue in the New York courts under §§ 50-51 of the N.Y. CIV. RIGHTS LAW, he was forced to rely on the fictionalized aspects of the *Life* article. Although "Right of Privacy" is the caption of §§ 50-51, the text of the statute only covers the commercial appropriation of a person's name, portrait, or picture without consent. Prior to the *Hill* action, however, the New York courts had construed the statute to apply to falsification as well. *See* Spahn v. Julian Messner, Inc., 211 N.E.2d 543, 545 (1966), *vacated and remanded*, 387 U.S. 239 (1967) and the New York cases cited by the Supreme Court in Time, Inc. v. Hill, 385 U.S. 374, 384-85 n.9 (1967).

[118] *See* text accompanying notes 47-50, *supra,* where this interest is discussed with respect to the public disclosure test.

[119] Some commentators have, however, viewed the falsity situation as virtually indistinguishable from defamation. See Prosser, *supra* note 14, at 398-401; Kalven, *supra* note 34, at 340. If the Supreme Court adopts this view of falsification, which it may have done in *Zacchini, see* note 121 *infra,* then *Gertz* would clearly dictate the result in future false light cases.

tially just as injurious since both relational and privacy interests suffer from such publications. Consequently, the analysis and holding of *Gertz v. Robert Welch, Inc.* applies to the privacy-falsification tort regardless of the form it takes. The Supreme Court, under Chief Justice Earl Warren, likened the "false light" situation to defamation,[120] and there is no reason to suspect that the Burger Court will do otherwise.[121] In fact, by granting certiorari in *Cantrell v. Forest City Publishing Co.*,[122] a "false light" case,[123] at least four Justices were apparently ready to conform *Hill* to *Gertz*. However, during consideration of the case, the Court evidently became aware that it was unnecessary and superfluous to change the constitutional standard in order to grant the particular relief sought. The plaintiff had not objected to the knowing or reckless falsity instruction given by the district judge,[124] and was complaining only of the

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[120] In *Hill*, the Supreme Court applied the *N. Y. Times Co. v. Sullivan* libel standard to privacy-falsification, stating:

> We find applicable here the standard of knowing or reckless falsehood, not through blind application of *New York Times Co. v. Sullivan*, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context.

385 U.S. at 390-91 (1966).

[121] In Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977), when comparing falsification to the appropriation of the right to publicity, the Supreme Court stated that "[t]he interest protected in permitting recovery for placing the plaintiff in a false light is clearly that of reputation, with the same overtones of mental distress as in defamation." *Id.* at 573.

[122] 419 U.S. 245 (1974). The *Cantrell* action was based on an article appearing in the Sunday Magazine of defendant's newspaper, the *Cleveland Plain Dealer*. The story dealt with the aftermath of a bridge disaster in which Margaret Cantrell's husband, Melvin, was among 44 persons killed. The article was intended to illustrate the impact of the bridge collapse on the lives of the people in the area, and it portrayed the Cantrells as destitute and despondent. The story contained inaccuracies and fabrications, the most prominent of which was the allegation that Mrs. Cantrell, during the reporter's visit to her home, had been wearing the same mask of non-expression she wore [at her husband's] funeral." *Id.* at 248.

[123] *Cantrell* can also be viewed as a public disclosure case. Although the defendant's article contained inaccuracies and untruths, the gravamen of the action appeared to lie in the exposure of the Cantrells' life style, living arrangements, and emotional state.

[124] *Id.* at 249-50.

court of appeals' reversal of the judgment that had been won under that standard. Consequently, after stating that it was not presented with the question of the continued validity of *Time, Inc. v. Hill,*[125] the Court examined the case in terms of the *Hill* test, and concluded that the district judge had correctly interpreted and applied the knowing or reckless falsity standard.[126] The case was therefore remanded to the court of appeals with directions for it to enter a judgment affirming the district court. It appears that the Supreme Court's handling of *Cantrell* was dictated by expedience and procedure, rather than the failure of a majority of the Justices to agree on the substantive issue involved.[127] Thus, while the *Gertz* analysis and holding have yet to be applied to privacy-falsification cases, such an application can be anticipated.

III. APPROPRIATION—THE "RIGHT TO PUBLICITY"

Since its origin, the tort for wrongful appropriation of one's name or likeness has been given a privacy label.[128] Although the tort does occasionally protect a privacy interest,[129] its primary

[125] The Court did, however, cite *Gertz v. Robert Welch, Inc.* for the proposition that the continued vitality of *Time, Inc. v. Hill* was in doubt. *Id.* at 250-51.

[126] *Id.* at 251-53.

[127] *Compare Cantrell with* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), in which petitioner Elmer Gertz, after losing in the lower courts based on an application of the *N. Y. Times* malice test, directly confronted the Supreme Court with the continued validity of Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). With the record in such a posture, the case was ripe for the rejection of *Rosenbloom* in order to grant petitioner Gertz the desired relief.

[128] W. PROSSER, THE LAW OF TORTS § 117, at 804 (4th ed. 1971); Prosser, *Privacy,* 48 CALIF. L. REV. 383, (1960). Note also that the New York statute permitting recovery for the unauthorized use of a person's picture for commercial purposes is captioned "Right of Privacy." N. Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976). For a discussion of proposed changes in the New York statute, *see* Greenwalt, *New York's Right of Privacy—The Need for Change,* 42 BROOKLYN L. REV. 159 (1975).

[129] The unauthorized use of the name or likeness of a private individual is objectionable primarily because it invades the subject's privacy. The injury is psychological in nature and is produced by exposure and embarrassment. *E.g.,* Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902) (use of plaintiff's likeness to advertise defendant's flour); Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905) (plaintiff's photograph used to advertise defendant's insurance.)

It has been suggested that the New York "appropriation" statute, enacted one year after the *Roberson* decision, was intended to provide protection for this privacy interest. *See* Paulsen v. Personality Posters, Inc., 299 N.Y.S.2d 501, 508 (Sup. Ct. 1968).

function has been to provide a remedy for the misappropriation of a proprietary interest involving the "right to publicity."[130] Appropriation cases customarily involve the unapproved use of a public personality's name or likeness for some trade or commercial purpose. In such a case, the plaintiff complains not of a privacy invasion, but objects to the commercial exploitation of his identity, something which has pecuniary value. Since appropriation actions usually take this form, they have only occasionally involved media defendants and the first amendment privilege.[131]

A. *Zacchini v. Scripps-Howard Broadcasting Co.*

The first case on record directly to consider the conflict between the public's "right to know" and the individual's "right to publicity" in the context of a news presentation was *Zacchini v. Scripps-Howard Broadcasting Co.*[132] In 1972 Hugo Zacchini was performing his "human cannonball" act at the Geauga County Fair in Burton, Ohio. A free lance reporter for the Scripps-Howard Broadcasting Company attended the fair

[130] The unauthorized use of the name or likeness of a public figure for commercial benefit involves no invasion of privacy because the person is already "public," and thus has waived his or her right to be free of publicity. In addition, it is unlikely that a celebrity suffers embarrassment or humiliation from the additional exposure. Such an unapproved use does, however, involve the misappropriation of a pecuniary interest—the right of a public personality to commercially utilize his fame. A number of courts have recognized the distinction between invasion of privacy and this latter proprietary claim. *See, e.g.,* Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied,* 346 U.S. 816 (1953) (first court to characterize the interest as the "right to publicity"); Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970); Price v. Hall Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975); Lugosi v. Universal Pictures Co., 172 U.S.P.Q. 541 (Cal. Super. Ct. L.A. Cty. 1972); Palmer v. Schonhorn Enterprises, Inc.,232 A.2d 458 (N.J. 1967). *See also* Nimmer, *The Right of Publicity,* 19 LAW & CONTEMP. PROB. 203, 222 (1954); Comment, *The Right of Publicity—Protection for Public Figures and Celebrities,* 42 BROOKLYN L. REV. 527, 528-39 (1976); RESTATEMENT (SECOND) OF TORTS § 652C, comment at 17 (Tent. Draft No. 22, 1976).

[131] *See* Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973) (unauthorized use of photograph of Cary Grant by Esquire Magazine); Man v. Warner Bros., Inc., 317 F. Supp. 50 (S.D.N.Y. 1970) (motion picture of rock music festival); Gautier v. Pro-Football, Inc., 107 N.E.2d 485 (N.Y. 1952) (television halftime of professional football game); Current Audio, Inc. v. RCA Corp., 337 N.Y.S.2d 949 (Sup. Ct. 1972) (interview with Elvis Presley included on a phonograph record). All of these cases involved alleged commercial exploitation by a media defendant.

[132] 433 U.S. 562 (1977).

carrying a movie camera. Zacchini asked that his act not be filmed, and the reporter acquiesced at that time. However, the reporter returned the following day and videotaped a fifteen-second film clip of the performer's feat, which was aired during a newscast on defendant's television station that evening. Zacchini then brought an action for damages alleging "an 'unlawful appropriation of [his] professional property'." After summary judgment for defendant in the trial court, the Ohio Court of Appeals reversed, holding that the "complaint stated a cause of action for conversion and for infringement of a common law copyright," and that the first amendment provided no defense to the taking of the plaintiff's property.[133]

The Ohio Supreme Court disagreed with the court of appeals' characterization of the action as one of conversion and infringement of a common law copyright,[134] and instead grounded Zacchini's claim on appropriation of his right to publicity. Although it concluded that this proprietary interest was entitled to legal protection,[135] the court held that the first amendment provided a privilege to broadcast matters of legitimate public interest unless the actual intent was to appropriate the performance for some private use or to injure the performer.[136] The court determined that no such intent was shown and that the performance in question was clearly a matter of legitimate public interest and reversed the court of appeals. In response to the plaintiff's argument that the telecast infringed his rights by showing his entire performance, the court stated that it could formulate no fixed standard based on the quantity of material presented without unduly restricting the "breathing room" which freedom of the press required.[137]

The United States Supreme Court granted certiorari and reversed the decision of the Ohio Supreme Court. After straining somewhat to reach the first amendment issue,[138] the Court

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[133] *Id.* at 564.

[134] 351 N.E.2d 454, 456-57 (Ohio 1976).

[135] *Id.* at 458-60.

[136] *Id.* at 461.

[137] *Id.*

[138] The Supreme Court concluded that the first amendment was an issue because the Ohio Supreme Court had based its opinion on the decisions of the United States Supreme Court interpreting and applying the first amendment. 433 U.S. at 566-68. Although it is clear that the Ohio Supreme Court's consideration of the privilege

analogized the claim to those based on copyright and patent law and held that the first amendment did not protect respondent's broadcast of petitioner's "entire act."[139]

> Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.[140]

B. *The Distinction Between Falsification and Appropriation*

The error made by the Ohio Supreme Court was not its interpretation and application of *Time, Inc. v. Hill* to the publicity case before it; the mistake was rather in its reliance on *Hill* at all, a decision apparently discredited by *Gertz v. Robert Welch, Inc.*[141] and *Time, Inc. v. Firestone.*[142] Although Justice White's majority opinion in *Zacchini* did not openly indicate any disenchantment with *Hill,* it distinguished that case in an unconvincing style. First, the majority noted that the state's interests in providing a cause of action in "false light" cases, such as *Hill,* were different from those involved in "right of publicity" cases. Justice White wrote that " '[t]he interest protected' in permitting recovery for placing the plaintiff in a false light 'is clearly that of reputation, with the same overtones of mental distress as in defamation.' "[143] On the other hand, "the State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment," much like the interests behind patent and copyright law.[144] This distinction

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question was based on federal law, it is not clear whether implementation of the first amendment interest took the form of a Federal Constitutional privilege or a substantive limitation on the state common law right. If the latter, the United States Supreme Court had no jurisdiction to adjudicate the case, even though federal considerations may have been involved in delimiting the state cause of action. The safer course would have been for the Court to remand for clarification. *See id.* at 582-83 (Stevens, J., dissenting).

[139] *Id.* at 574-75.

[140] *Id.*

[141] 418 U.S. 323 (1974).

[142] 424 U.S. 448 (1976). For an analysis of this change in attitude, see text accompanying notes 35-52 *supra.*

[143] 433 U.S. at 573.

[144] *Id.*

involves not only a rather narrow view of the falsification tort,[145] it also presupposes that the proprietary interest is entitled to greater deference than is personal reputation, an assumption of arguable validity. Such an evaluation is especially questionable in light of the holding in *Gertz* that the state's interest in providing redress for harm to reputation is sufficient to allow a private individual to recover from a negligent media defendant.

The Court further distinguished the two torts in terms of the degree to which they interfered with the availability of information. Justice White stated that in false light cases the only way to protect the interests involved is to attempt to minimize publication of the harmful material, whereas in the case of the right to publicity there is no limitation on publication. "The only question is who gets to do the publishing."[146] Thus, liability could be imposed without interfering with the supply of information. However, viewing the question of publication from the perspective of potential dissemination, the Court seems mistaken. In disseminating information to the public, the question of "who" often dictates the extent of distribution. It seems clear that the news media have a far greater potential distribution and audience than the live performance itself or advertisements of the performance. Thus, focusing exclusively on public exposure, there may be a reduction in publication depending upon "who gets to do the publishing."

C. *The Proprietary Interest of Zacchini*

Although the majority spent a good deal of time in an attempt to distinguish prior defamation decisions and *Time, Inc. v. Hill*[147] from the "right to publicity," the thrust of the *Zacchini* opinion centered on the proprietary or commercial interest involved and its similarity to copyright and patent

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[145] *See* text accompanying notes 111-18 *supra* for discussion of three separate, although related, interests protected by the false light tort.

[146] 433 U.S. at 573.

[147] *Id.* at 574. In addition to specifically distinguishing *Time, Inc. v. Hill,* the Supreme Court also stated that its defamation decisions, *New York Times, Rosenbloom, Gertz,* and *Firestone,* furnished no substantial support for the Ohio Supreme Court's privilege ruling since the defamation decisions "all involved the reporting of events; in none of them was there an attempt to broadcast or publish an entire act for which the performer ordinarily gets paid." *Id.*

protection. The Court felt that "[t]he broadcast of a film of petitioner's entire act pose[d] a substantial threat to the economic value of that performance," and that the "same consideration under[lying] the patent and copyright laws" required protection of petitioner's right to publicity as "an economic incentive for him to make the investment required to produce a performance of interest to the public."[148]

The majority's reliance on patent and copyright law, however, appears misplaced. As the Court mentioned, the policy underlying the protection of literary works and scientific inventions is the encouragement of creative activity for the benefit of the public. Legal protection for authors and inventors is viewed as a necessary impetus to the full realization of creative efforts, of which the public is the beneficiary.[149] Such stimulation of creativity and ingenuity takes two basic forms—an economic incentive and the egoistic desire for recognition.[150] The latter rationale was certainly not involved in *Zacchini* since the newscast identified the "great Zacchini" as the performer, and the presentation was accompanied by favorable commentary.[151]

The primary stimulus provided by the patent and copyright laws, and the one on which the Supreme Court relied, is economic: the right to exploit one's creations. Justice White's majority opinion continually referred to respondent's interference with the commercial value of petitioner's performance. However, when the facts of the case are examined, it is clear

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[148] *Id.* at 575-76. In emphasizing the policy behind the patent and copyright laws, the Court noted:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Id. at 576 (quoting Mazer v. Stern, 347 U.S. 201, 219 (1954)).

[149] *See* Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180, 1186 (1970).

[150] To the economic rationale of copyright law, Nimmer adds a privacy interest—the desire of an author "to create a work merely as an act of self-expression, intending it for himself alone, or for only a selected and limited group of others." He notes that the law has respected this interest through the concept of common law copyright. *Id.* at 1186-87. *See also* Estate of Hemingway v. Random House, Inc. 244 N.E.2d 250 (N.Y. 1968).

[151] 433 U.S. at 564 n. 1. (1977).

that there was no economic benefit gained by the television station nor any economic damage to Zacchini. Although a television station realizes advertising revenue and is operated for profit, it cannot be contended that the defendant station earned any additional commercial benefit from its fifteen-second film clip of Zacchini's act,[152] "The report was part of an ordinary daily news program," and "is a routine example of the press fulfilling the informing function so vital to our system."[153] The majority's reference to unjust enrichment and its citation of cases of unauthorized commercial broadcasts of sporting events and other performances from which the broadcaster kept the profits[154] are totally inapposite.

The Court's concern with the threat to the economic value of the plaintiff's performance is also unfounded. Since persons attending the fair were not charged a separate admission fee to see Zacchini's performance,[155] it is likely that he received a flat fee from the fair's sponsors for his appearance. Assuming such an arrangement, Zacchini suffered no harm from the broadcast even if it caused a decrease in the size of his audience or in general fair attendance.

Even assuming that Zacchini's remuneration was dependent on total fair admissions, it is doubtful that he was financially damaged. If some members of the public who would have attended the fair primarily to witness the human cannonball act did not do so due to the telecast of the performance, any such decline in attendance was surely more than offset by resondent's free advertising and the resulting increased public

[152] Courts have repeatedly held that although news is published for profit, the presentation of a newsworthy event is not a publication for a "trade purpose." *See* Gautier v. Pro-Football, Inc., 107 N.E.2d 485, 488 (N.Y. 1952); Sarat Lahiri v. Daily Mirror, Inc., 295 N.Y.S. 382, 390 (Sup. Ct. 1937); Humiston v. University Film Mfg. Co., 178 N.Y.S. 752, 756 (App. Div. 1919). *See also* W. PROSSER, THE LAW OF TORTS 806-07 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 652C, comment d at 19, (Tent. Draft No. 21, 1976).

[153] 433 U.S. at 580 (Powell, J., dissenting).

[154] *Id.* at 576. Citing an article by Professor Kalven, the majority opinion stated:

> The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.

Id. (quoting Kalven, *supra* note 34, at 331).

[155] *Id.* at 563.

interest in Zacchini's act. This favorable result appears even more likely in light of the fact that the newscast contained stimulating commentary and concluded with the statement: "[the act] is a thriller . . . and you really need to see it in person . . . to appreciate it."[156] In addition, the film clip and commentary were aired by a station in Cleveland, a metropolitan area twenty miles from the little town where the plaintiff was performing. Thus due to the increased exposure gratuitously provided by the defendant, the economic value of the performance was undoubtedly increased rather than decreased.[157] Anytime a member of the news media chooses to make a presentation of a particular event or performance, the publication or broadcast will customarily take the form of free advertising and publicity. Such gratuitous exposure will not only increase the immediate economic value of the act, but will also help to build long term reputation, thus producing future economic benefits for the player or performer. Any unjust enrichment seems to have fallen on Zacchini.

The *Zacchini* decision may be the best indication yet of the current Supreme Court's restrictive attitude toward the press.[158] In both analysis and holding, the opinion betrays an

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[156] *Id.* at 564 n. 1.

[157] The majority itself seems to have recognized this fact. Justice White stated in a footnote:

> It is possible, of course, that respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live. In these circumstances, petitioner would not be able to recover. But petitioner has alleged that the broadcast injured him to the extent of $25,000, . . ., and we think the State should be allowed to authorize compensation of this injury if proven.

Id. at 575 n.12.

[158] *But see,* the Supreme Court's recent decision in Zurcher v. Stanford Daily, 46 U.S.L.W. 4546 (U.S. May 31, 1978) (No. 76-1484), where a 5-3 majority approved the search of a newspaper office for evidence of crime even though no one on the newspaper's staff was under investigation or was suspected of criminal activity. Such a practice was sanctioned under the fourth amendment by virtue of demonstration of probable cause and the acquisition of a search warrant. The Court reversed the Ninth Circuit's affirmance of the district court's determination that freedom of the press required a subpeona duces tecum, rather than a warrant, for a search of a newspaper office. The majority concluded that first amendment interests were adequately protected by requiring courts to apply fourth amendment warrant standards with "particular exactitude" in this class of cases.

This decision is likely to have a significant limiting effect on freedom of the press and on the concomitant flow of information to the public. First, and most dramati-

approach lacking sensitivity to freedom of the press and may result in further inhibitions[159] on publication and broadcast.

D. *The Intent of the Publisher*

Given the *Zacchini* majority's reliance on the policy underlying the patent and copyright laws in terms of the need to protect the commercial value of one's creations, a more sensitive and sensible approach would have been to adopt the test suggested by Justice Powell in dissent and used by the Ohio Supreme Court and other courts. That standard, rather than focusing on the quantity of what was published, *e.g.*, "entire act," focuses on the intent of the publisher or broadcaster. If such intent is commercial exploitation, the privilege to publish newsworthy matter is forfeited. In his dissenting opinion, Justice Powell argued:

> [The Court] should direct initial attention to the actions of the news media: what use did the station make of the film footage? When a film is used, as here, for a routine portion of a regular news program, I would hold that the First Amendment protects the station from a "right of publicity" or "appropriation" suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation.[160]

This is essentially the standard that had been applied by the Supreme Court of Ohio in finding for the defendant:

> The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer.

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cally, press access to sources of confidential information is likely to be reduced or eliminated since confidentiality can no longer be guaranteed. Second, members of the news media will themselves suppress stories for fear of newsroom searches. Finally, reporters, in an effort to protect sources, may destroy their notes and certain information in their files. This could have a devastating effect in the case of a libel suit where such information is needed for documentation. So considered, the Stanford Daily case is likely to have a pronounced debilitating effect on the press, significantly reducing media coverage and reporting.

[159] Other possible inhibitions are discussed in sections I and II of this article.

[160] 433 U.S. at 581 (Powell, J., dissenting).

> It might also be the case that the press would be liable if it recklessly disregarded contract rights existing between the plaintiff and a third person to present the performance to the public but that question is not presented here.[161]

Under such a standard, Zacchini would have been entitled to recover if, instead of merely presenting his act as part of a newscast, the station had run the film of Zacchini each evening prior to news time, accompanied by commentary saying, "Stay tuned for the eleven o'clock news." Such use would clearly have amounted to commercial appropriation and would have required the station to reimburse Zacchini for the value of his performance as so used.

A standard based on the intent of the broadcaster has twin virtues. It not only implements the policy underlying patent and copyright law by providing a remedy for commerical piracy, it also safeguards the first amendment interest by protecting the dissemination of newsworthy material to the public. As such, this approach of focusing on the publisher's intent has been utilized in other appropriation cases.[162]

For example, in *Gautier v. Pro-Football, Inc.*,[163] a case factually similar to *Zacchini*, the plaintiff, a well-known animal trainer, sued under the New York appropriation statute for the telecast of his act which he had performed during halftime of a professional football game. The broadcast was made without Gautier's consent and was therefore in violation of his contract with the program sponsors. The New York Court of Appeals stated that "[w]hile one who is a public figure or is presently

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[161] 351 N.E.2d 454, 461 (Ohio 1976).

[162] *See, e.g.*, Grant v. Esquire, Inc. 367 F. Supp. 876 (S.D.N.Y. 1973) (first amendment did not entitle defendant to appropriate Cary Grant's likeness for use as a model in its magazine); Palmer v. Schonhorn Enterprises, Inc., 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967) (recovery granted to professional golfers for the appropriation of their names and biographies which defendant had used as part of a game he manufactured; the court recognized that a public figure might be the proper subject of news or an informative presentation, but that the privilege did not extend to commercialization); Rosemont Enterprises, Inc. v. Urban Sys., Inc., 340 N.Y.S.2d 144 (Sup. Ct.), *modified*, 345 N.Y.S.2d 17 (App. Div. 1973) (defendant's marketing of its "Howard Hughes Game" amounted to act of appropriation and not the dissemination of news concerning the achievements of Howard Hughes); Current Audio, Inc. v. RCA Corp., 337 N.Y.S.2d 949 (Sup. Ct. 1972) (first amendment bars right of publicity claim concerning an interview with Elvis Presley included on a record, referred to as "talking magazine," that disseminated information of public interest).

[163] 107 N.E.2d 485 (N.Y. 1952).

newsworthy may be the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information."[164] The court held, however, that even though the performance fell between two commercials, the act itself was not used for advertising or trade purposes and thus the broadcast was privileged.[165]

Even though most appropriation decisions focus on the question of commercialization, as did *Gautier,* the sensitivity of courts to first amendment considerations is reflected by the decisions in *Man v. Warner Bros., Inc.*[166] and *Paulsen v. Personality Posters, Inc.*[167] Both of these cases held the use of the plaintiff's act or likeness to be privileged under the first amendment in spite of the commercial exploitation involved.

E. *Problems with the* Zacchini *Standard*

The test employed by the *Zacchini* majority is not only insensitive to the interest underlying freedom of the press, it is also both over and underinclusive in terms of its economic rationale. A standard based on whether a person's "entire act" was broadcast fails to focus adequately on the commercial values involved: it includes some cases lacking the element of commercial exploitation and it ignores others where there is

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[164] *Id.* at 488.

[165] *Id.* It should be noted that the action in *Gautier* was based on § 51 of the NEW YORK CIV. RIGHTS LAW. This statute provides no remedy unless a person's name, portrait, or picture is used "for advertising purposes or for the purposes of trade." However, given the court of appeals' concern for the first amendment interest, it is likely that its decision would not have been different under the common law concept of appropriation.

Regarding jurisdictions with appropriation statutes, it should be emphasized that the Zacchini "entire act" formula will not expose television newscasts to liability for the presentation of a film clip of an event or performance unless such telecast is "for the purpose of advertising" or "for trade purposes." *See* CAL. CIV. CODE § 3344 (West Supp. 1977); N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976); OKLA. STAT. ANN. tit. 21, § 839.1 (West Supp. 1977); UTAH CODE ANN. §§ 76-4-8, -9 (1953); VA. CODE § 8-650 (1950).

[166] 317 F. Supp. 50 (S.D.N.Y. 1970) (a musician who played "mess call" on his flugelhorn at the Woodstock rock music festival was denied recovery although his performance was included in a commercial motion picture of the event).

[167] 299 N.Y.S.2d 501 (Sup. Ct. 1968) (a comedian, a mock presidential candidate, was denied recovery for the appropriation of his photograph on a large poster together with the words "FOR PRESIDENT".)

such economic appropriation. *Zacchini* is an example of the former class, and any commercial use of less than an entire performance is an example of the latter.[168]

The major vice of the *Zacchini* opinion lies not so much in the application of its analysis to the facts but rather in the uncertainty it creates for the news media. What is, or is not, an "entire act?" As suggested by Justice Powell:

> I doubt that this formula provides a standard clear enough even for resolution of this case . . . .
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> Although the record is not explicit, it is unlikely that the "act" commenced abruptly with the explosion that launched petitioner on his way, ending with the landing in the net a few seconds later. One may assume that the actual firing was preceded by some fanfare, possibly stretching over several minutes, to heighten the audience's anticipation: introduction of the performer, description of the uniqueness and danger, last-minute checking of the apparatus, and entry into the cannon, all accompanied by suitably ominous commentary from the master of ceremonies. If this is found to be the case on remand, then respondent could not be said to have appropriated the "entire act" in its 15-second newsclip—and the Court's opinion then would afford no guidance for resolution of the case. Moreover, in future cases involving different performances, similar difficulties in determining just what constitutes the "entire act" are inevitable.[169]

Self-censorship produced by the "chilling effect" of *Zacchini* might well be significant. Anytime a news editor is presented with film coverage of an event which raises doubts about whether it constitutes an "entire act," coverage is likely to be abbreviated to still pictures and verbal descriptions. This possibility is especially acute regarding sporting events. Is a television station privileged to show a film of a baseball player hired to hit home runs, hitting a home run; a football player running eighty yards for a touchdown; a boxer knocking out his

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[168] *See* cases cited in note 162 *supra* for several examples of exploitation. Note that the Supreme Court did not foreclose the imposition of liability where less than an "entire act" was broadcast. The holding, however, was limited to the facts presented. See the Court's language in the text accompanying note 140 *supra*.

[169] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 579 and n.1 (1977) (Powell, J., dissenting).

opponent in the tenth round; a cowboy riding a bull in a rodeo; a ski jumper flying through the air to win a ski jump; or an ice skater's performance? Such questions are especially troublesome in light of the commercial value attached to the identity of many athletes. The examples of potential liability are not, however, limited to the arena of sport, and in any case where news coverage is reduced, "[t]he public is then the loser."[170] Whenever a member of the news media feels legally inhibited from presenting film coverage of an event or performance, the public will be left with something less than "the kind of news reportage that the First Amendment is meant to foster."[171] This fear led the Ohio Supreme Court to conclude:

> The press, if it is to be able to freely report matters of public interest, must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. No fixed standard which would bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the "breathing room" in reporting which freedom of the press requires.[172]

In summary, the majority in *Zacchini* inadequately distinguished the privacy tort of falsification, unfortunately focused on Zacchini's proprietary interest instead of the publisher's intent, and used a standard of liability which signals a dramatic reduction in press freedom. One thing further should be mentioned. It may be that the Court's philosophy of freedom of the press, when viewed in regard to mass publication torts, has again reared its head in *Zacchini. Gertz, Firestone,* and *Cox Broadcasting* indicate a view of the first amendment which focuses on the concept of legitimate public interest and which provides protection against media torts only if the publication or broadcast is of matter serving a self-governing function, *i.e.*, material with sociopolitical content. This policy may have influenced the majority in *Zacchini,* leading it to conclude that a media presentation of a public performance was not entitled

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[170] *Id.* at 581 (Powell, J., dissenting).

[171] *Id.*

[172] Zacchini v. Scripps-Howard Broadcasting Co., 351 N.E.2d 454, 461 (Ohio 1976).

to protection. Regardless of the general public interest in an act like Zacchini's, it is not relevant to a governing purpose. "The line between the informing and the entertaining"[173] may no longer be nearly so elusive.

CONCLUSION

The Supreme Court's recent defamation decisions indicate a restrictive approach toward freedom of the press, at least as far as mass publication torts are concerned. The privacy actions also appear destined to follow this trend. *Time, Inc. v. Hill* has apparently been overruled by *Gertz,* thereby permitting a private plaintiff to recover for nondefamatory falsification based on a showing of media negligence. Although *Cox Broadcasting v. Cohn* held a media report of information obtained from judicial records to be privileged against a public disclosure claim, this result is not inconsistent with the Court's emerging policy in this area. The Court in *Cox* emphasized the importance of media reporting on governmental operations as such operations are revealed through public records. Such a rationale is certainly consistent with the Court's apparent philosophy of limiting "free" press to the reporting of matters serving the informing function essential to self-government. In a future public disclosure case not involving public records, the Court is likely to sanction liability based on a standard combining "legitimate public interest" and "offensiveness." If this possibility materializes, it has the potential to be much more devastating to freedom of the press than does liability for defamation. Defamation contains an inherent safeguard for a publisher through the requirement that the statements be false. This allows the press a degree of self-protection through verification. However, in the case of public disclosure, the inapplicability of the defense of truth leaves withholding of publication as the only sure defense. Such self-censorship is the probable result unless the publisher is certain that the story is relevant to the governing function. This restraint will have the effect of screening out much information of unquestioned accuracy, some of which may be useful to survival in a complex society

[173] Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (quoting Winter's v. New York, 333 U.S. 507, 510 (1948)).

and, consequently, sociopolitically important.

The most recent example of the Supreme Court's attitude toward media reporting in relation to publication and broadcast torts is *Zacchini v. Scripps-Howard Broadcasting Co.* Although in *Zacchini* the Court claimed to have chosen the commercial or proprietary interest over the interest in a free press, they made this determination in a case where there was neither an intent to injure or appropriate a property interest nor an injury to this interest in fact. Additionally, the value of the right to publicity would not customarily be reduced by a media news broadcast. Implicit in the decision is a re-emergence of the Court's philosophy of free press in relation to mass publication injuries—limiting privileged media reporting to matters at the core of self-government. The decision is difficult to justify in other terms. If Zacchini had no claim for invasion of privacy because his act was both public and newsworthy, it appears anomolous to hold that he nevertheless had a claim based on the "right to publicity" for the telecast of a news program that showed a fifteen-second film of his performance for a non-commercial purpose, and which, no doubt, provided substantial economic benefit to him.