

July 2015

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Recommended Citation

Giglio, Ernest D. (1979) "Unwanted Publicity, the News Media, and the Constitution: Where Privacy Rights Compete With the First Amendment," *Akron Law Review*: Vol. 12 : Iss. 2 , Article 2.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol12/iss2/2>

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UNWANTED PUBLICITY, THE NEWS MEDIA, AND THE CONSTITUTION: WHERE PRIVACY RIGHTS COMPETE WITH THE FIRST AMENDMENT

ERNEST D. GIGLIO*

ASSUME YOU ARE WAITING in a crowd to view the President of the United States as he leaves his downtown hotel. As the President, naturally surrounded by Secret Service agents, approaches the limousine, a person near you raises a pistol and aims it at the President. Instinctively, you grab the raised arm, thereby thwarting the assassination attempt. By your deed, you have become a national hero and the news media wants to know all about you because you are what is known in the communications industry as "hot news." But in their pursuit of the news story, the media learns that you are a member of San Francisco's gay community, a fact known only to that group. When the print and broadcast media publish the fact of your homosexual preference, your family in Ohio disowns you.

The above situation approximates that of ex-Marine Oliver Sipple,¹ who in 1975 foiled an assassination attempt on the life of President Ford by Sara Jane Moore as he was leaving a San Francisco hotel. The Sipple case graphically illustrates the current and growing tension between one aspect of privacy — the right to be free from unwanted publicity of private facts about yourself — and the formidable freedom accorded speech and press under the first amendment. For his act of heroism, Oliver Sipple paid a high price. Not only did he lose the love and respect of his family, but he had lost control over a piece of information about himself which he preferred to share with some, rather than with everyone. He had been a private person

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¹ *Abrams, The Press, Privacy and the Constitution*, N.Y. Times, Aug. 21, 1977, § 6 (Magazine), at 11-13, 65, 68-71. The author claims that Sipple has filed invasion of privacy suits against several West Coast newspapers. *Id.* at 11. However, a search of the California Reports failed to confirm this assertion. Two explanations are possible: (1) the case has been settled out of court or (2) the case has not been disposed of yet. Sipple's chances of winning such a suit appear dim on the basis of another California case where Michael S. Virgil, a well-known body surfer, sued Time, Inc. for violating his right to privacy by publishing an article in *SPORTS ILLUSTRATED* that contained facts of an unflattering and embarrassing nature about his private life and were not matters of public interest. *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). Only Justices Brennan and Stewart would have granted certiorari.

unknown to the rest of us until his good deed thrust him into the national arena and made him a public figure.²

I. DEFAMATION AND THE PRIVACY TORT

The Sipple case raises some questions again about the present relationship between the increasing concern for privacy and our strong commitment to freedom of speech and press. Before we venture into the judicial quagmire, we should pause to refresh our memories. Privacy is the stepchild of defamation. Defamation, including seditious libel, is at least 300 years old and was well known to the colonists who settled America. The concept was familiar to colonial judges and to the men who framed the Constitution. Privacy, on the other hand, the intrusion of which is independent and distinct from other torts, is a relatively recent concept usually associated with the 1890 article written by Samuel Warren and Louis Brandeis.³ What these two young lawyers had in mind, however, was an expansion of the available common law remedies in effect at the time against physical intrusion (trespass, assault) and proprietary interests (copyright) into a much broader legal right "to be let alone"⁴ as an antidote against the developing technologies of instantaneous photography, mass circulation publications, and mechanical devices capable of spying and snooping. Fearing that the existing torts, which rested primarily upon property rights, carried inadequate legal

² For a discussion of how modernity has blurred the public and private spheres, see H. ARENDT, *THE HUMAN CONDITION*, at 22-78 (1958).

³ Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). This article remains a source of debate among scholars. One issue of contention centers on the reasons which gave birth to the article. Prosser, in his frequently quoted article, *Privacy*, explained that the catalyst for the article was the Boston papers' coverage of the marriage of Warren's daughter in 1890, although Warren's annoyance with the local press had its roots in the publicity given to his wife's parties in the gossip columns. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960), citing Brandeis' biographer, A. MASON, *BRANDEIS, A FREE MAN'S LIFE*, at 70 (1946). Don Pember on the other hand, insists in his *PRIVACY AND THE PRESS*, that Warren's daughter was not married until 1905, fifteen years after publication of the article. D. PEMBER, *PRIVACY AND THE PRESS*, 24 (1972). Pember's view is that the article was essentially a brief of the upper class against the press practice of reporting gossip. *Id.* at 23. After an analysis of four of the eight Boston papers in daily circulation at the time, Pember concludes: "The evidence just does not support their indictment." *Id.* at 40.

The second debate, of more serious concern, relates to the significance of the concept of privacy laid down in the article. Harry Kalven, Jr., characterized the tort as "petty" in his article, Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966). He was rebutted by Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611 (1968). See also Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964), where Bloustein argues that privacy is an unique right rather than four distinct torts under a common name. For a perspective different than that of either Kalven or Bloustein, see Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954), where the author insists that the Warren and Brandeis view of privacy is inadequate to meet the publicity/privacy problems posed by radio, television, motion pictures, and commercial advertising.

⁴ The phrase originated in T. COOLEY, *TORTS*, at 29 (2d ed. 1888), where he wrote: "The right to one's person may be said to be a right of complete immunity: to be let alone."

remedies, Warren and Brandeis advocated a general right to privacy rooted in an "inviolable personality."⁵

Admittedly, their article spawned a great debate in legal literature⁶ but "had little immediate effect upon the law."⁷ Two early twentieth century cases were split on the issue. In *Roberson v. Rochester Folding Box Co.*,⁸ the New York Court of Appeals declined to recognize a common law right to privacy. Three years later, in 1905, the Supreme Court of Georgia explicitly gave the right legal recognition in *Pavesich v. New England Mutual Life Insurance Co.*⁹ For the next three or more decades, some state courts tended to recognize the right by following *Pavesich*, while other courts denied its existence under *Roberson*.¹⁰ Possibly encouraged by the publication of the *Restatement of Torts*¹¹ and the writings of the outstanding tort scholar, Dean Prosser,¹² the number of states that gave legal recognition to the privacy right either by statute or by common law grew to the extent that Prosser could write in 1960 that twenty-six states and the District of Columbia had formally accepted the right and a few other states were considering recognition.¹³ By 1978, all but three states—Nebraska, Rhode Island, and Wisconsin

⁵ Krause, *The Right to Privacy in Germany—Pointers for American Legislation*, 1965 DUKE L.J. 481, 485 n.11 (1965). The author notes that five years after the publication of the Warren and Brandeis article, a German jurist, Otto von Gierke, wrote about a right of personality which was distinct and separate from the more encompassing proprietary right. Attempts to incorporate such a right into the German Civil Code were unsuccessful until after World War II. The West German courts derived a "right of personality" (*Personlichkeitsrecht*) from the West German Constitution arts. I & II (1949). *Id.* at 20. A number of American commentators from various disciplines have related the right of privacy to personality and the development of the self. See, e.g., Bates, *Privacy—A Useful Concept*, 42 SOC. FORCES 429 (1964); Fried, *Privacy*, 77 YALE L.J. 475 (1968); Greenawalt, *Personal Privacy and the Law*, 2 WILSON Q. 67 (1978); Rachels, *Why Privacy is Important*, 4 PHIL. AND PUB. AFF. 323 (1975); J. RAINES, *ATTACK ON PRIVACY* (1974); C. SCHNEIDER, *SHAME, EXPOSURE AND PRIVACY*, at 40-41 (1977); and Wasserstrom, *The Legal and Philosophical Foundations of the Right to Privacy*, (Feb. 1976) (unpublished paper).

⁶ Krause, *supra* note 5, at 503 n.78, reported that THE INDEX TO LEGAL PERIODICALS listed some 440 articles, notes, and comments pertaining to the right of privacy between 1887 (three years prior to the Warren and Brandeis article) and 1964. This author's count, covering the period from 1965 to May 1978, reveals an additional 327 items, making a grand total of 767 citations in the INDEX.

⁷ Prosser, *supra* note 3, at 384.

⁸ 171 N.Y. 538, 64 N.E. 442 (1902).

⁹ 112 Ga. 190, 50 S.E. 68 (1905).

¹⁰ Prosser, *supra* note 3, at 386.

¹¹ RESTATEMENT OF TORTS § 867, at 398 (1939), where it is stated that liability would attach to any person who "unreasonably and seriously interferes with another's interest in not having his affairs known to others. . . ."

¹² PROSSER, TORTS § 107 (1st ed. 1941).

¹³ Prosser, *supra* note 3, at 386-87.

sin¹⁴—had recognized the right of privacy either by statute or by case law.¹⁵

However, Dean Prosser in his famous article on privacy,¹⁶ insisted that there was no distinct or unique right to privacy, but rather that the concept of privacy was a combination of four kinds of invasion, each representing an interference with the "right to be let alone." He identified these four torts as "(1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) Public disclosure of embarrassing private facts about the plaintiff; (3) Publicity which places the plaintiff in a false light in the public eye; and (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."¹⁷ His view still prevails, as witnessed by the most recent tentative draft of the *Restatement (Second) of Torts* which, with minor changes in wording, has incorporated Prosser's numbers two and three above and reads: "(c) Unreasonable publicity given to the other's private life and (d) Publicity which unreasonably places the other in a false light before the public."¹⁸ It is these two types of publicity which most frequently bring to light the competing interests of privacy and the first amendment. The other two types of publicity, intrusion and appropriation, will not be discussed herein since they do not normally raise first amendment problems. Intrusion is regarded as a physical trespass not privileged by the first amendment.¹⁹ Appropriation is akin to a violation of a property right for commercial gain which is also unlikely to raise the counterclaim of constitutional privilege.²⁰

¹⁴ NEB. REV. STAT. § 32-481, 28-1127 (1975), where privacy is mentioned with regard to elections, phone calls and threats. R.I. GEN. LAWS § 9-1-28 and 16-38-5 (Supp. 1977), pertains to unauthorized use of a person's name, portrait or picture and to the use of questionnaires. WIS. CONST. art. I, § 11 (1977), relates to searches and seizures only.

¹⁵ Texas was the last state to recognize the right of privacy 83 years after the Warren and Brandeis article by a judicial ruling in *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973). For the historical background which led to the state supreme court ruling, see Comment, *A New Chapter in Texas Tort Law—The Right to Privacy*, 10 Hous. L. Rev. 1176 (1973).

¹⁶ Prosser, *supra* note 3.

¹⁷ *Id.* at 389.

¹⁸ RESTATEMENT (SECOND) OF TORTS § 652D & 652E (Tent. Draft No. 22, 1976).

¹⁹ *Id.* at § 652B. See also *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), where the U.S. Court of Appeals affirmed judgment for the plaintiff on the reasoning that the *Time* reporters had gained entrance into Dietemann's home by subterfuge and that, unknown to the plaintiff, (an alleged "faith healer"), they were recording and transmitting what occurred to a third party, the District Attorney of Los Angeles County. Judge Hufstedler reminded the press that "The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." *Id.* at 249. For a critique of the decision, see Hill, *Defamation and Privacy under the First Amendment*, 76 COLUM. L. REV. 1205, 1282 (1976).

²⁰ RESTATEMENT (SECOND) OF TORTS, *supra* note 18, at § 625C. See also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), where a plaintiff, known as the "Human Cannonball," charged damages for "unlawful appropriation" of his professional property, *i.e.*, his act, by a local television station that replayed his act during its evening program. By a 5-4 vote and on the narrow ground that the case fell within the state's right to publicity law which protects proprietary, rather than reputational interest, the U.S.

It is ironic that the United States Supreme Court has created a constitutional right to privacy against governmental incursion in a line of cases relating to marital relationships,²¹ contraceptives,²² abortion,²³ procreation,²⁴ and possession of obscene material within the home,²⁵ while invasions of privacy by individuals or nongovernmental institutions are left to state statutes and the law of torts for protection. It is when the public disclosure of private facts which the individual seeks to protect from others comes in conflict with the public's right to know under the first amendment that the legitimate, but competing, claims clash. How to reconcile these two genuine concerns without causing serious harm to either individual privacy interests or the community's legitimate interest in being informed about events that affect it presents a considerable challenge to the law today.

II. THE SUPREME COURT ENTERS THE CONFLICT

Until 1964, state statutes and the common law controlled the field of defamation. Since privacy is the progeny of libel, we must examine first how the Court has treated defamation in order to better understand the current dilemma of the tort of public disclosure.

Ever since the decision in *Chaplinsky v. New Hampshire*,²⁶ the Court has explicitly ruled that libel is without constitutional protection. Of course, the tort of privacy also was subject to limitations. Warren and Brandeis admitted to three legitimate constraints that could be imposed upon the right to privacy, including: (1) the publication of material of general interest which normally would be privileged under the law of libel; (2) the public disclosure of personal information if the material was a matter of public record; and (3) the publication of private facts or personal information if the disclosure of such material was done with the individual's consent.²⁷ Hence, in their respective legal spheres, neither first amendment rights nor the privacy tort was held to protect absolute values. What would happen if the two competing but limited rights underlying those values were to conflict?

The Court answered the question in a 1964 decision, *New York Times*

Supreme Court held that Zacchini was entitled to compensation under the state statute. The dissenters questioned whether the consequences of the Court's opinion might not subject the broadcasting media to liability for material presented in their news reports. *Id.* at 580. Should the minority's fears be realized, it is conceivable that the appropriation tort could raise first amendment concerns.

²¹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²² *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

²³ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁴ *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632 (1974).

²⁵ *Stanley v. Georgia*, 394 U.S. 557 (1969).

²⁶ 315 U.S. 568 (1942).

²⁷ Warren & Brandeis, *supra* note 3, at 214-18.

v. Sullivan,²⁸ where it adopted the position that the old common law of strict liability libel, which had developed over the centuries, was now inconsistent with the first amendment guarantees of speech and press when applied to public officials. Not only could erroneous statements be made about the conduct of public officials in performing their duties, but to be awarded damages, the plaintiff had to prove that the statement was printed with "actual malice;" *i.e.*, "with knowledge that it was false or with reckless disregard of whether it was false or not."²⁹ This burden exceeded the traditionally accepted burden for the tort which required proof that the statements were indeed false and that the publication was indeed negligent. Later that term, the Court reaffirmed the standard as requiring proof that the statement was false or made with reckless disregard of the truth in a case involving a local district attorney's critical comments to the press concerning the official conduct of the judges in his district.³⁰ Both holdings were reasonable in light of the particular factual circumstances of each case. In the *New York Times* case, the Court may have had two concerns. First, the Justices may have felt a commitment to the civil rights movement; second, they were possibly apprehensive that the substantial damages³¹ awarded against a paper that had sold only 400 copies in the entire state would serve as a warning to other liberal newspapers of what southern juries had in store for them. In the *Garrison* case, the Court understandably ruled unconstitutional the state's criminal defamation statute because of the threat it posed to dissenting public officials and to the media that subsequently would reproduce the criticisms as a means of promoting public debate.

The effect of the Court's reasoning in *New York Times* is somewhat analagous to its entrance into the obscenity thicket in *Roth v. United States*,³² the Court has spent more than a decade either explaining, modifying, or refining its original decisions. With one foot in the libel field, the Court proceeded to "muddy the waters" with subsequent rulings.

A. *From Public Official to Public Figure*

Two questions were left unresolved by *New York Times*. One concerned

²⁸ 376 U.S. 254 (1964).

²⁹ *Id.* at 280. The Court used the term "actual malice" here to distinguish it from common law malice, which meant spite or ill will. The lower courts, nevertheless, confused the terms. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, at 634-35. n.21 (1978). The confusion reached such proportions that Justice Brennan recommended that trial courts omit reference to the phrase "actual malice" in their instructions to the jury. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 n.18 (1971).

³⁰ *Garrison v. Louisiana*, 379 U.S. 64 (1964).

³¹ The \$500,000 libel judgment awarded *Sullivan*, without having to prove any real pecuniary loss, was 1,000 times greater than the minimum fine provided under the Alabama criminal libel statute and 100 times greater than the fine under the Sedition Act. 376 U.S. at 277.

³² 354 U.S. 476 (1957).

the parameters of the "public official" category and the other related to the meaning of "malice." The two issues were interrelated since under the *New York Times* standard, courts first had to determine whether the plaintiff met the public official classification and second, whether the information reported or printed about the plaintiff met the "actual malice" test.

Justice Brennan, who spoke for the majority in the *New York Times* case, recognized the failure of the Court in that case to provide guidelines as to the outer reaches of the "public officials" category or even to specify the level in the hierarchy of government officials that the Justices had in mind when they created the category. Sullivan, supervisor of the Montgomery, Alabama police department, and Garrison, a district attorney in Louisiana, clearly fell within the public official category. But were public officials restricted only to those elected or appointed to public office? In an attempt to clarify the issue, Justice Brennan wrote in a broadcast defamation case that: "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."³³ This explanation failed to satisfy Justice Douglas. In his concurring opinion, Douglas stated that if what the Court wanted to protect under the first amendment was the open discussion of public issues, then clearly there would be no way for courts to draw the line as to which employees on the public payroll would qualify under the "public official" standard. Conceivably the category was so open-ended that it could include everyone from the clerk-typist to the night watchman. Since the Court had invented the "public official" category, Douglas suggested that it could determine its boundary.³⁴

Taking its cue from the Douglas concurrence in the *Baer* case above, the Court took the opportunity in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, reported together the following year,³⁵ to apply the *New York Times* "public official" classification to defamatory statements printed about the public conduct of public figures, in these cases, a football coach, Butts, and a former general, Walker. The Walker classification is logical on its face. Walker, a retired career officer who had a public record of statements indicating his opposition to integration, was present on the campus of the University of Mississippi during the riots surrounding the enrollment of James

³³ *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). According to L. TRIBE, *supra* note 29, at 636; the term "public official" has come to embrace virtually all persons affiliated with the government, including civil servants, public school teachers, and police officers.

³⁴ 383 U.S. at 89-90.

³⁵ 388 U.S. 130 (1967). Butts' damages award was affirmed but Walker's was reversed. In the opinion of this author, the damages awarded to Butts may have contributed to the demise of the *Saturday Evening Post*.

Meredith as the first black student ever admitted to the University. However, categorizing Wally Butts, coach of the University of Georgia football team, as a public figure is dubious indeed. Did the Justices intend that every coach from college on down to Little League and "Pop" Warner were "public figures" when it came to suing the local newspaper? Did the *Butts* decision imply that anyone in the public eye could qualify as a public figure?

The problem with the "public figure" category is that, unlike the "public official," the former classification is even more vague and open to arbitrary designations. Certain persons are obvious public figures, such as Ralph Nader and Jacqueline Kennedy Onassis. But what about Justice Douglas' examples of a clerk-typist or a night watchman? Both are on the public payrolls, but would that fact alone make them public figures? It is very unlikely. Suppose, however, that either one uncovers damaging evidence against the agency that employs them and passes the information on to their superior. The media somehow manages to obtain that information and publicizes it. Are they now public figures, like Oliver Sipple, inadvertently thrust into the vortex of public controversy?

B. *The Court Expands and Retrenches*

What about the private individual who is neither a "public official" nor a "public figure" as defined by the courts, but who, nevertheless, becomes involved in a news event? The Court had its first opportunity to deal with this issue in *Rosenbloom v. Metromedia, Inc.*³⁶ In *Rosenbloom*, a distributor of nudist magazines who had been arrested for possession of obscene materials, brought a libel action against a radio station that had failed in two of its news broadcasts to describe the seized materials as "allegedly" obscene. A sharply divided Court,³⁷ on the authority of *New York Times v. Sullivan*, refused to allow recovery by the plaintiff. Justice Brennan managed to secure four Justices to join in the judgment by the Court, but only the Chief Justice and Justice Blackmun supported his view that the *New York Times* standard applied to the plaintiff. In an attempt to shift the libel test from the person to the nature of the event, Justice Brennan formulated a "public interest" test:

Whether the person involved is a famous large-scale magazine distributor or a "private businessman running a corner news stand" has no rele-

³⁶ 403 U.S. 29 (1971). The treatment of the *Rosenbloom* case in the lower courts is illustrative of the confusion surrounding the *New York Times* ruling. The federal district court ruled in favor of the plaintiff, finding the *New York Times* standard inapplicable, 289 F. Supp. 737 (1968); while the Third Circuit Court of Appeals, applying the same standard, held in favor of the defendant radio station. 415 F.2d 892 (3rd Cir. 1969).

³⁷ There was no majority opinion. Five members of the Court agreed that the first amendment barred recovery. The judgment of the Court was announced by Justice Brennan in an opinion in which Chief Justice Burger and Justice Blackmun joined. Justices Black and White concurred in separate opinions. Justices Stewart and Marshall joined in a dissenting opinion.

vance in ascertaining whether the public has an interest in the issue. We honor the commitment to robust debate on public issues, which is embodied in the First Amendment by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.³⁸

As a distributor of nudist magazines throughout the Philadelphia metropolitan area, George Rosenbloom must have been astonished to learn that he was of public interest, yet his arrest and the pressure on the station to prepare a "hot news item" for its daily broadcasts brought the station within the rubric of this expanded view of the *New York Times* rule. What the sharply divided *Rosenbloom* Court was saying, in effect, was that the media could make legitimate mistakes under the pressure of meeting deadlines so long as the statements made related to some public interest and there was insufficient proof of any reckless disregard for the truth.

More recently, the Court denied certiorari in a case from the Second Circuit finding a publisher immune even to recklessness charges. In that case, the publication identified the allegedly defamatory material as representing the viewpoint of a responsible organization, the National Audubon Society, and not the personal views of the publisher. In addition, the evidence supported the view that the story was objectively and accurately reported.³⁹ This case led one legal commentator to remark: "Recklessness may not be inferred from a publisher's failure to inquire into a matter's truth or falsity, although a responsible publisher might well have inquired. In the world of *New York Times v. Sullivan*, ignorance is bliss."⁴⁰

The fragile *Rosenbloom* plurality did not last long. In *Gertz v. Welch*,⁴¹ *Rosenbloom* was clearly repudiated as the Court retreated from its application of the *New York Times* standard to libelous actions brought by private individuals. The Court quietly laid to rest Justice Brennan's "public interest" test when it held that Gertz, an attorney, was not a public figure but a private individual. Gertz was representing the family of a youth who had been fatally shot by a police officer. After the state prosecuted and convicted the officer, the youth's family retained Gertz for civil litigation against the officer. The defendant Welch published *American Opinion*, a monthly organ of the John Birch Society. In an article alleging a national Communist conspiracy against local law enforcement agencies, Gertz was accused of being the architect of a conspiracy to frame the convicted police officer. The article also charged

³⁸ 403 U.S. at 43-44.

³⁹ *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2nd Cir. 1977), cert. denied, sub. nom. *Edwards v. N.Y. Times*, 98 S. Ct. 647 (1977).

⁴⁰ L. TRIBE, *supra* note 29, at 638.

⁴¹ 418 U.S. 323 (1974).

Gertz with being a past member of a Communist front organization and a member of the Marxist League for Industrial Democracy.⁴² The article contained a number of inaccuracies, prompting Gertz to file a defamation action against the magazine. The trial judge found that Gertz was neither a public official nor a public figure, but an ordinary citizen. However, since Gertz was unable to prove actual malice on the part of the publication, he could not recover damages.⁴³ In a decision equal in importance to *New York Times v. Sullivan*, the United States Supreme Court reversed. In so doing, the Court narrowed its definition of public figure considerably so as to exclude a reputable member of the legal profession, one who had published his autobiography and had among his clients Jack Ruby and Nathan Leopold.⁴⁴

The basis for the reversal was the Court's formulation of a new libel standard for private individuals. No longer is it necessary for a private citizen to show actual malice in order to recover damages in a defamation action. Unlike the public figure, a private citizen has not voluntarily put himself in the public eye and has no expectation of false comments being publicly made against him. The private citizen also does not have the access of a public figure to the media to effectively rebut the defamatory statements. As the Court stated, "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."⁴⁵ Nevertheless, the Court plainly stated that the first amendment had changed the common law rules pertaining to defamation of private persons. The states can no longer impose "liability without fault"⁴⁶ in order to allow recovery of actual damages;⁴⁷ even a private citizen has the burden of proving

⁴² *Id.* at 325-27.

⁴³ 322 F. Supp. 997 (N.D. Ill. 1970).

⁴⁴ Stanford Professor of Law John Kaplan made this statement in his *TEACHERS' MANUAL* for the W. COHEN & J. KAPLAN text, *BILL OF RIGHTS*, at 46-47 (1977). Strangely, the Court failed to mention Gertz' clients. One possible reason for the Court's failure to do so is that it would have made the determination that Gertz was a private individual more difficult.

⁴⁵ 418 U.S. at 345.

⁴⁶ *Id.* at 347.

⁴⁷ Actual damages may be awarded to a complainant as compensation for the real loss or injury suffered. Actual damages in libel and invasion of privacy cases, although they do not lend themselves to fixed dollar amounts, represent payment for the humiliation, embarrassment or mental anguish suffered. Exemplary or punitive damages are awarded when the wrong committed was aggravated by malice, fraud or oppressive conduct by the defendant and are intended to solace the plaintiff or, in some instances, to punish the defendant for the evil conduct. See *BLACK'S LAW DICTIONARY*, at 466-69 (4th ed. 1951). Negligence refers to the doing of something or the failure to do something which a reasonable person would ordinarily be expected to either do or not do. Negligence is the failure to exercise ordinary care; it is accidental or inadvertent. It is not characterized by recklessness or willfulness. *Id.* at 1184-86. Under the *New York Times v. Sullivan* rule a public official had to prove more than negligence (*i.e.*, malice) in order to recover damages. Under the *Gertz* standard, if the plaintiff is classified by the Court as a private person and can prove negligence, he can recover actual damages. Punitive damages are recoverable only if the plaintiff can show that the defendant knew that the material was false or that the defendant published

that the publisher had been at least negligent. Furthermore, the awarding of punitive damages requires that there be evidence of recklessness or knowledge of falsity on the part of the defendant.⁴⁸ In other words, the constitutional guarantees of speech and press now require a showing of fault in order to hold media defendants liable for defamation. But how high is the fault standard? Does negligence suffice or does there have to be recklessness? One case that had all of the requirements to further compound the judicial confusion was a divorce case containing the ingredients of a Norman Lear soap opera.

C. *Mary Firestone: The "Private" Public Person*

The scenario in *Time, Inc. v. Firestone*⁴⁹ read as follows. In scene one, Mary Firestone is seeking separation from her husband, Russell Firestone, wealthy industrialist, after three years of marriage. Mrs. Firestone files a complaint for separate maintenance in West Palm Beach. Subsequently, her husband files a countersuit for divorce, charging extreme cruelty and adultery. The trial judge grants the divorce due to lack of domestication, since the Firestones apparently are not living together.⁵⁰ On appeal, the Florida Supreme Court upholds the divorce decree, but on the grounds of extreme cruelty.⁵¹ As to the emotional testimony of both parties relating to their extramarital sexual activities, the trial judge dismisses much of this evidence as "unreliable."⁵²

Scene two takes place in the New York office of *Time* magazine where news of the divorce comes over the wire services and an account of the judgment rendered is printed in a New York newspaper. *Time* also has a Miami bureau and a "stringer" who is working on special assignment in the Miami area: both confirm news of the divorce to the New York office. Will *Time* print the story? Based on the four separate sources of information, *Time* prints the following piece under its "Milestones" section:

DIVORCED. By Russell A. Firestone, Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach school teacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month

the statements with a reckless disregard for its falsity. Therefore, under the *Gertz* standard, a public official or a public figure needs to prove malice in order to recover damages; the private individual can receive actual damages by showing merely negligence.

⁴⁸ 418 U.S. at 349.

⁴⁹ 424 U.S. 448 (1976).

⁵⁰ *Firestone v. Firestone*, 263 So.2d 223 (1972).

⁵¹ *Id.*

⁵² *Id.*

intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, "to make Dr. Freud's hair curl."⁵³

The third scene finds Mary Firestone requesting a written retraction from *Time* alleging that part of the article is false, malicious, and defamatory. *Time* refuses to retract the piece. Scene four finds both parties in court. Will Mary Firestone win against the overwhelming forces of the multicorporation? Will the jury believe that this former school teacher could be adulterous? On television, the outcome more likely would depend on how long the series would last, but in West Palm Beach, Florida, the jury believes Mrs. Firestone and the court awards her \$100,000 in damages.⁵⁴ In the final scene, *Time* appeals the state court judgment to the United States Supreme Court on constitutional grounds, arguing that the ruling violates its rights under the first amendment. Voting five to three, the Supreme Court holds that Mary Firestone is not a public figure,⁵⁵ but a private individual similar to attorney Gertz and remands the case back to the state court for a determination of the magazine's fault under the *Gertz* standard.

Why is Mary Firestone, a woman who married into a family that ranks a cut below the Rockefellers and the Fords, not a public figure for defamation purposes? Writing for the Court, Justice Rehnquist explained:

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 to the forefront of particular public controversies in order to influence the resolution of the issues involved.⁵⁶

Justice Rehnquist determined that Mrs. Firestone did not meet either qualification; and, thus, could not be classified as a "public figure." In reaching this conclusion, Justice Rehnquist made it a point to emphasize that the *Gertz* majority had repudiated the *Rosenbloom* plurality (Brennan, Blackmun and Burger) who would have extended the *New York Times* privilege to defamatory statements about private individuals when such falsehoods were related to the general or public interest. In his concluding remarks, Rehnquist opined that a divorce proceeding is not the kind of public controversy that the Court had in mind when it decided the *Gertz* case.⁵⁷

⁵³ 424 U.S. at 452. The three year time differential is due to the fact that when the divorce proceedings began, the Firestones had been married for three years. The *Time* article was not published until three years later.

⁵⁴ *Id.*

⁵⁵ *Id.* at 453.

⁵⁶ *Id.*, quoting *Gertz v. Welch*, 418 U.S. at 345.

⁵⁷ 424 U.S. at 448.

Once the Court had disposed of the private versus public question, a second issue remained; *i.e.*, the issue of fault. Addressing himself to this question, Justice Rehnquist observed that under Florida law a wife found guilty of adultery could not be awarded alimony, and since Mrs. Firestone had been granted alimony, the divorce could not have rested on the adultery criterion.⁵⁸ The *Time* article, however, described the grounds for the divorce as being "extreme cruelty and adultery," an obvious falsehood. Quoting from the opinion of the Supreme Court of Florida, Rehnquist remarked:

A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of "journalistic negligence."⁵⁹

Justice Marshall's dissent rested, not without some justification, on his judgment that Mary Firestone was indeed a "public figure" within the meaning of *Gertz* and *Butts*. Marshall pointed to the following facts as documentation: Mrs. Firestone was an active member of Palm Beach society, she was a socialite whose name appeared frequently in the local press, she subscribed to a press-clipping service, and she had held press conferences during the divorce proceedings. Unlike the ordinary private person, Mary Firestone had access to the media and belonged to a social group that received constant attention from the print and broadcasting media.⁶⁰

While there is merit to the Marshall dissent, it fails to provide us with criterion for a consistent standard. Indeed the entire Court's application of the public figure standards in defamation cases lacks consistency and gives substance to the charge that the Justices are reaching their determinations on a case-by-case basis. The drawing of judicial lines is not a scientific endeavor, but there should be some thread of logic to a line of cases. The public/private dichotomy enmeshes the Court in making the kinds of determinations that leave it vulnerable to accusations of arbitrariness. Surely, reason alone does not support a judicial determination that in libel actions, a college football coach is a public figure, while a prominent attorney and a noted socialite are private individuals. If the Court persists in utilizing the public/private classification scheme, it is respectfully suggested that it de-

⁵⁸ *Id.* at 458.

⁵⁹ *Id.* at 463, quoting from the lower court's decision, 305 So.2d at 178. One cynical commentator responded to the Rehnquist rationale by writing: "the Firestone majority decided that gossip about the rich and famous is not a matter of legitimate public interest." See L. TRIBE, *supra* note 29, at 645.

⁶⁰ 424 U.S. at 484-85. For commentary on the Supreme Court's decision, see Comment, *Private Defamation: Mary Firestone, Mary Firestone?*, 8 N.C. CENT. L.J. 109 (1976); Note, *Media Liability for Libel of Newsworthy Persons Before and After Time, Inc. v. Firestone*, 5 FLA. ST. L. REV. 446 (1977).

velop a rational principle or set of guidelines which lower courts can apply with some degree of consistency.

D. *The Private "Involuntary" Public Figure*

The *Gertz* decision recognized three categories of public figures. One category includes individuals who have fame and notoriety in the community, as well as those who hold public office, and are considered by the courts to be public persons for all purposes.⁶¹ A second group consists of those persons who have chosen voluntarily to thrust themselves into the public arena in order to resolve issues that affect the political, economic, educational, and social life of the community.⁶² These two categories were reaffirmed by Justice Rehnquist in the *Firestone* case.⁶³ However, *Gertz* made reference to a third category, that of the private individual like Oliver Sipple, who is thrust into the national arena due to circumstances or events over which the person has little or no control. The *Gertz* majority agreed that instances of "involuntary public figures" should be "exceedingly rare."⁶⁴ If the Court was thinking solely of defamation situations, its prediction would withstand critical scrutiny. But if the Justices were thinking at all about "invasion of privacy" suits (and they should have been for reasons which will become obvious shortly), then their prognosis was shortsighted and bears little relationship to the current state of "investigative journalism" and "instantaneous news" where being there first with the news or getting the highest program ratings is the god which all the networks worship.

Had the Court any foresight it might have reached a different conclusion after *Time, Inc. v. Hill*⁶⁵ on how common it is for an individual or a family to become the focus of unwanted publicity. The Hills were an ordinary family living in Pennsylvania, until one day in 1952, when three escaped convicts entered their home and held them captive for nineteen hours. The family was treated decently and released unharmed. The next year Joseph Hayes wrote a novel, *The Desperate Hours*, based on their ordeal. For dramatic effect, the book contained some violence as well as name changes. As frequently is the case, the novel became a play and then a movie.⁶⁶ What raised the legal issues was an article in *Life* magazine, owned

⁶¹ 418 U.S. at 342.

⁶² *Id.* at 351.

⁶³ 424 U.S. at 453.

⁶⁴ *Id.*

⁶⁵ 385 U.S. 374 (1967).

⁶⁶ The Hayes play opened on Broadway, February 10, 1955, with actor Karl Malden as the father and Paul Newman as the leader of the convicts. The family's name had been changed from Hill to Hilliard. See *N.Y. Times*, Feb. 11, 1955, at 20, col. 2. The film version opened later that year with Fredric March as the father and Humphrey Bogart as the gang leader. See *id.* Oct. 6, 1955, at 25, col. 1 for a review of the film.

by Time, Inc., entitled, "True Crime Inspires Tense Play." The article contained photos of the stage cast acting out scenes in the Hills' Pennsylvania home. Mr. Hill felt that he and his family had been falsely portrayed in the article and filed suit under the New York Privacy Law.⁶⁷ After fairly complicated litigation,⁶⁸ the New York courts awarded the Hills \$30,000 for invasion of privacy. The argument of Time, Inc. before the United States Supreme Court was that the article was a subject of public interest privileged under the first amendment and that the piece was written and published without malice. The Court reversed and sent the case back for a new trial.⁶⁹

For our purposes, two important constitutional views emerge from the *Hill* decision. First, the Hills were considered by the Court to be public figures, newsworthy persons, three years *after* the actual event had occurred. The family had sold their home and moved to another state in an attempt to avoid national publicity. Did the Court intend to imply an "involuntary public figure" who has recaptured his privacy can be made "public" again at the pleasure of the media so long as what is printed or broadcast or filmed is accurate? Second, the first amendment was used to limit the scope of the privacy tort. In *New York Times*, the Court had applied the first amendment to libel suits, albeit with certain reservations. In *Hill*, the first amendment privilege was extended to the privacy tort by restricting the recovery of damages for privacy invasion.⁷⁰ Since the Hills were considered by the Court to be public figures, the recovery of damages required a showing of actual malice under the *New York Times* test.⁷¹

More recently, in *Cantrell v. Forest City Publishing Co.*,⁷² a newspaper was sued for depicting the plaintiff in a false light in an article concerning a tragedy that occurred eight months previously. The Cantrells filed a privacy suit against the *Cleveland Plain Dealer* for a follow-up story involving a bridge disaster which killed forty-four persons, including Mr. Cantrell. The story was based on an interview with the family during which time fifty photos were taken. Among other false statements, the article featured comments about Mrs. Cantrell which gave the impression that she had been present during the interview when, in fact, she had not. The parties, and the trial court, proceeded upon the presumption that the action fell under the rubric

⁶⁷ N.Y. CIV. RIGHTS LAW 50-51 (McKinney).

⁶⁸ See 385 U.S. at 379-80.

⁶⁹ 384 U.S. at 378-80.

⁷⁰ *Id.* at 395-96.

⁷¹ The Court admitted that the constitutional question in this case was narrowly limited to the "failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the *Life* article." *Id.* at 397.

⁷² 419 U.S. 245 (1974).

of the *New York Times* actual malice test.⁷³ The Supreme Court agreed with the trial court that the paper had been reckless since the reporter knew there were falsehoods in the story.⁷⁴ The question, of course, is whether the Court would have denied recovery by the Cantrells' had there been no showing of malice, even though the collapse of a bridge is hardly "hot news" eight months later.

Crime, on the other hand, is always of general concern. Yet is the identification of a rape victim a proper exercise of the free expression privilege under the first amendment or is it an invasion of privacy? In *Cox Broadcasting Corporation v. Cohn*,⁷⁵ station WSB-TV was sued by the father of a murder-rape victim under a Georgia statute⁷⁶ which makes it a misdemeanor to publish or broadcast the name or identity of a rape victim. The reporter had obtained the name of the victim from the trial indictments against the defendants. The state courts upheld the statute as a reasonable restraint on the exercise of free expression, but the United States Supreme Court reversed, eight to one, with only Justice Rehnquist dissenting. Justice White, writing for the Court, said that the Court did not have to reach the privacy claim since the television reporter had based his newscast on notes taken at the court proceedings. White observed that court records are open to the public and that the commission of a crime and its subsequent prosecution are newsworthy events which are properly within the responsibility of the media.⁷⁷ To foreclose the prospects of damage recovery for invasion of privacy in future similar situations, White explicitly held that privacy interests are diminished, if not abolished per se, if the information disclosed is already a matter of public record and if the privacy right conflicts with the constitutional mandate under the first amendment for a vigorous press.⁷⁸

These cases indicate that in any direct confrontation between the first amendment privilege and privacy interests, the latter will most frequently lose out where the facts are true or the errors are made without malice. Yet the

⁷³ *Id.* at 249-50.

⁷⁴ *Id.* at 253-54.

⁷⁵ 420 U.S. 469 (1975).

⁷⁶ GA. CODE ANN. § 26-9901 (1972).

⁷⁷ 420 U.S. at 491-92. One commentator opined that the decision left unclear whether the name of a rape victim is newsworthy or a matter of public interest per se or whether publication of the victim's name is restricted to official court records. See Comment, *Right of Privacy Versus Freedom of the Press—The Press Cannot be Restrained for Reporting Facts Contained in Official Court Records*, 24 EMORY L.J. 1205, 1223 (1975). See also *Oklahoma Pub. Co. v. District Ct.*, 430 U.S. 308 (1977); where, *per curiam*, the Court reversed a ruling of the state supreme court which had upheld an order of the district court enjoining the press from publishing the name or picture of a minor child involved in juvenile proceedings on first amendment grounds.

⁷⁸ 420 U.S. at 494-95.

Hills, Cantrells, and Mr. Cohn's daughter were all victims who became newsworthy due to events over which they had no control. Surely a reasonable argument could be advanced that all three had suffered enough and were morally, if not legally, entitled to be left alone. Does a hostage have a right to be able to forget the past? Does a rape victim have a right not to have her humiliation publicized beyond judicial records and the courtroom? Does a family have a right not to be reminded in the media of the loss of a loved one? Apparently, the current state of constitutional law mandates that if the event, story, or material published or broadcast is "newsworthy," it cannot, under the first amendment, become an invasion of privacy regardless of whether the individual involved is a public official, public figure, or private citizen.

E. *Privacy and the Newsworthy Defense*

The privacy cases previously discussed tend to support the view that when privacy interests clash with the first amendment guarantees of speech and press, the Court generally relegates the privacy value of the individual to a position secondary to the community's right to be informed. So long as the law places great weight on the constitutional standard of "newsworthiness" in privacy cases, it really does not matter whether the public disclosure is true or false except when the plaintiff can prove recklessness.

Defamation, and instances when the media represents an individual in a false light, tend to overlap and are often commingled. As a consequence, privacy has not been given its rightful due by the courts. Defamation relates to reputational interests, which is why, for the past century at least, truth has been a defense to the charge. If the falsehoods are proven, damages are awarded because the defamed individual has suffered humiliation and has lost esteem in the community. As Iago said to Othello: "Who steals my purse steals trash . . . But, he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed." In contrast to defamation, the public disclosure of accurate personal information involves more than reputation. The heart of the privacy wrong lies in those values related to the human spirit: self-esteem, dignity, and liberty in the sense of control over information about oneself.⁷⁹

Currently, the law relegates these values to second class status when public disclosure is a matter of general or public concern. Resolving these conflicting values depends upon what determinant is used for the newsworthy standard. One possibility is to allow the news media to set its own standards.⁸⁰ This appears to be the view accepted by the courts, since whatever is printed or broadcast (short of libel or slander) becomes "news" and is

⁷⁹ See notes 2 and 5 *supra*.

⁸⁰ See text accompanying notes 121-128 *infra*.

automatically privileged under the first amendment. Such a sweeping standard makes it extremely difficult to recover damages under an invasion of privacy action. A second alternative would be to allow contemporary community "mores," similar to "contemporary community standards" in obscenity cases,⁸¹ to determine newsworthiness. In a privacy action this would put the matter squarely upon the jury to determine initially whether the material complained of is what the community wants to read, see, and hear. It is hard to predict how privacy interests would fare under this kind of "Russian roulette" approach. It certainly would play havoc with publishers and broadcasting stations, forcing them to speculate on how a jury might decide on a particular news story. A third option, one which Warren and Brandeis proposed in their 1890 article,⁸² would be to allow privacy recovery regardless of whether a mass audience exists for gossip, personal intimacies, and material that tends to appeal to the baser instincts. Under this option, privacy interests would receive maximum protection. However, adherence to this standard comes very close to news censorship and would likely place the courts, especially at the appellate level, in the position of sitting as a judicial board of censors.

None of the positions above is acceptable or feasible. A standard of newsworthiness is needed that is compatible with the value of privacy regardless of the persons involved. Both Prosser⁸³ and the courts admit to allowing the public official and public figure a much smaller zone of privacy than that accorded to the private citizen. This distinction between the public and private figure leads to much difficulty, however. The Hills and the Cantrells, for example, fall within that "gray zone;" arguably neither public nor private figures. I propose that even undisputed public figures such as Ralph Nader and Jacqueline Kennedy Onassis are entitled to be free from unwanted publicity and from the constant pressure of living in a society where the Constitution permits the media to disclose every private fact about their

⁸¹ See, e.g., *Roth v. United States*, 354 U.S. 476, 489 (1957); *Miller v. California*, 413 U.S. 15, 30-31 (1973); *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).

⁸² Warren & Brandeis, *supra* note 3. The authors described the journalism of their day in these terms:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in columns of the daily papers to occupy the indolent, column upon column is filled with gossip, which can only be procured by intrusion upon the domestic circle

⁸³ Prosser, *supra* note 3, at 410, defined a public figure as a celebrity, including in his list: actors, entertainers, professional athletes, famous inventors and explorers, war heroes, child prodigies and a broad category of public officers; i.e., anyone who had achieved some degree of reputation by appearing before the public. Prosser's definition has limited applicability in privacy cases since it does not address itself to individuals like the Hill family, the Cantrells, Cohn, and Sipple who involuntarily become newsworthy figures.

daily activities. To support this proposal, it is helpful to examine some of the more critical cases concerning privacy.

During his investigation into the automobile industry in the preparation of his book on auto safety, Ralph Nader filed suit against General Motors charging, among other things, invasion of privacy.⁸⁴ Nader maintained that the corporation had hired people to keep him under constant surveillance, to gather information regarding his political, social, racial and religious views and his sex activities, to entrap him in embarrassing circumstances by having women solicit him for immoral purposes, and to make obnoxious and harrasing phone calls.⁸⁵ Although two lower courts denied General Motors' motion to dismiss the invasion of privacy charge,⁸⁶ the Court of Appeals of New York agreed only that the corporation had committed a tortious intrusion into Nader's privacy by their unauthorized bugging and wiretapping.⁸⁷ They were unsympathetic to the invasion of privacy charge regarding all of Nader's other allegations, remarking: "Privacy is invaded only if the information sought is of confidential nature and the defendant's conduct was unreasonably intrusive."⁸⁸ Without the physical intrusion through the illegal electronic surveillance, the New York Court of Appeals was of the opinion that that intrusion into Nader's privacy including his right to be left alone by private investigators, snoopers, soliciting women, was annoying and inconvenient, but certainly not actionable.⁸⁹

Some years after the assassination of President Kennedy, Mrs. Kennedy married a Greek tycoon, Aristotle Onassis. As a socialite, the former wife of a United States Senator who later became President, and a member of the Kennedy clan, Mrs. Onassis was no stranger to publicity. However, unlike many other public figures and celebrities who often ignore publicity, Mrs. Onassis drew the line against unwanted interference with her freedom and intrusion into her privacy. The result was *Galella v. Onassis*,⁹⁰ where the facts of the case parallel, but far exceed, the circumstances that led Warren and Brandeis to write their article on privacy more than seventy years before.

⁸⁴ *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

⁸⁵ *Id.*

⁸⁶ 57 Misc.2d 301, 292 N.Y.S.2d 514 (Sup. Ct. 1968), *aff'd*, 31 App. Div. 2d 392, 298 N.Y.S.2d 137 (1969).

⁸⁷ 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647.

⁸⁸ *Id.* at 568, 255 N.E.2d at 765, 307 N.Y.S.2d at 647. Reportedly, the suit was settled out of court for \$425,000. See Greenawalt, *supra* note 5, at 70.

⁸⁹ 25 N.Y.2d at 568, 255 N.E.2d at 769, 307 N.Y.S.2d at 653.

⁹⁰ 353 F. Supp. 196 (S.D.N.Y. 1972).

The case arose when a free-lance photographer, Ronald Galella (a self-proclaimed *paparazzo*),⁹¹ brought suit against Mrs. Onassis and three Secret Service agents assigned to protect her children. Galella charged false arrest, malicious prosecution, and interference with his profession. Galella sought injunctive relief and \$1.3 million in damages. Mrs. Onassis filed a countersuit seeking \$1.5 million in damages in addition to injunctive relief from Galella, who, she claimed, invaded her privacy, harrassed and assaulted her and her children, and inflicted emotional distress on them. The district judge initially denied summary judgment to both parties, but five months later the judge dismissed Galella's complaint and awarded injunctive relief to Mrs. Onassis on the basis of the photographer's conduct since the original judgment.⁹² In awarding permanent injunctive relief to the defendant, the judge cited twelve pages of Galella's activities before and since the initial litigation. The illustrations were culled from the more than 4,000 pages of trial record. The evidence against this *paparazzo* far exceeded the so-called "yellow journalism" of the late nineteenth century. Galella's tortious conduct lived up to his metaphorical description as an "annoying bug" as he hid behind bushes in Central Park and behind coat-racks in New York's most exclusive restaurants and then suddenly, leaping out and taking photos of Mrs. Onassis and the children, successfully captured on film their startled and frightened faces.⁹³ Admittedly, Galella was a photographer with imagination, and aspiring journalists might admire his chutzpah for his inventiveness, clever disguises, and creative deceptions, but is this the kind of free expression by the media protected under the first amendment even against a public figure's sense of privacy? The district judge in replying negatively to the question, echoed Meiklejohn's view that the framers of the amendment intended it to relate to matters of self governance.⁹⁴ The fact that Jacqueline Onassis is a public figure is indisputable, but the judge drew a distinction between the activities of public figures that relate to public affairs and the Galella brand of journalism that merely satisfies public curiosity: "[I]t cannot be said that information about her comings and goings, her tastes in ballet, the food that she eats, and other minutiae . . . bear significantly upon public questions or otherwise 'enable the members of society to cope with the experiences of their period.'"⁹⁵

The judge granted permanent injunctive relief, setting distance guidelines that Galella must follow in photographing the Onassis family in

⁹¹ Galella described himself as "the world's only American paparazzi." *Id.* at 216. *Newsweek* defined *paparazzo* as an "annoying bug." *Id.*

⁹² 353 F.Supp. at 235.

⁹³ For a description of Galella's activities, see *id.* at 207-219.

⁹⁴ *Id.* at 225, citing Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 12 (1965).

⁹⁵ *Id.* at 225.

public.⁹⁶ Galella appealed the ruling,⁹⁷ which was affirmed by the United States Court of Appeals. On the apparent rationale that the original distance guidelines set for Galella bordered on prior restraint, the appeals court modified considerably the distances the photographer was required to maintain.⁹⁸ The modification had the effect of substantially diluting the purpose of the original injunction. Without much explanation or justification, the court of appeals majority substituted its own distance guidelines for those of the lower court, thereby rendering Mrs. Onassis' victory shallow, indeed. Under the modification, Galella was free, as before, to prowl around the Onassis home at will, to be fairly close to Mrs. Onassis and to be near the children except in their school or play areas. Even an amateur photographer, without sophisticated equipment, could secure closeup pictures from distances of twenty-five to thirty feet. The modification was arbitrary and at odds with the trial evidence.⁹⁹ It would not prevent Galella from interfering with the family's privacy nor with their freedom of movement. The majority opinion carries the first amendment privilege to the brink of absolutism. It is lacking in both historical support and in giving rightful recognition to the importance of privacy to the human personality, whether that of a public figure or private person.

Where does the law of privacy stand today? Public figures such as Nader and Jacqueline Onassis have virtually no privacy so long as there is no physical intrusion or unreasonable conduct by the news media. Private persons who become newsworthy, like the Hills and Cantrells, lose all right to privacy unless the media gets the facts wrong and then prints or broadcasts those falsehoods with malice. The lesson of the *Cohn* case is that whenever a private individual becomes part of an official court record, or per-

⁹⁶ Depending on the circumstance, Galella was to keep a distance of 50 to 100 yards from the Onassis family. 353 F. Supp. 196, 241. See note 98, *infra*.

⁹⁷ Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973).

⁹⁸ The various distances that Galella was required to maintain are set out below:

DISTANCES GALELLA IS REQUIRED TO MAINTAIN	AS PROVIDED IN DISTRICT COURT INJUNCTION	AS MODIFIED BY COURT OF APPEALS MAJORITY
From home of Mrs. Onassis and her children	100 yards	No restriction
From children's schools	100 yards	Restricted only from entering schools or play areas
From Mrs. Onassis personally	50 yards	25 feet and not to touch her
From children personally	75 yards	30 feet

Id. at 1001.

⁹⁹ See *id.* at 1001-04 (concurring opinion of Judge Timbers).

haps any other official record, he automatically becomes newsworthy and surrenders his privacy right. The line of Supreme Court cases from *New York Times* to *Firestone* reveals judicial inconsistency in determining who is a public figure or a private person in defamation cases. This confusion has carried over into the privacy area. One legal scholar noted that the lack of guidance from the Supreme Court has allowed the lower courts to treat the constitutional limitations on the public disclosure of private facts disparately.¹⁰⁰ His study revealed that state and appellate courts were, in effect, applying five different standards in privacy invasion cases.¹⁰¹ This is the reason why the time has come to examine proposals that are intended to reconcile the competing privacy interest of individuals with the precious guarantees of free expression under the first amendment.

III. RECONCILING THE PRIVACY TORT WITH THE FIRST AMENDMENT

No attempt will be made here to present an exhaustive review of all the proposals advanced to resolve the conflict between the privacy tort and the first amendment. Each could be an article in its own right. I will sketch out, however, three distinctly different remedies which may be loosely characterized as: (1) the strict liability model patterned after the British scheme; (2) the first amendment privilege model advocated by the news media; and (3) the accommodative model which, in theory, seeks to accord equal weight to both interests.

A. *The British Model of Strict Liability*

Although much of the British common law, including seditious libel, crossed the Atlantic and became incorporated into American common law, we are reminded that "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press . . ."¹⁰² A comparative perspective must take into account two significant differences between the nations. First, unlike the United States, the British do not have a first amendment which explicitly guarantees constitutional protection to speech and press against governmental infringement. Secondly, the British have repeatedly rejected a statutory right of privacy, although certain privacy interests are protected under a variety of common law torts relating to property rights. Succinctly stated, the British have tended to follow Prosser more than Warren and Brandeis.

A perusal of British literature supports the view that broadcasting media

¹⁰⁰ Comment, *First Amendment Limitations on Public Disclosure Actions*, 45 U. CHI. L. REV. 180, 190 (1977).

¹⁰¹ The author identified the five standards as: (1) Public Interest, (2) Defendant's Motives, (3) Consent, (4) Offensiveness, and (5) the California approach which is unique. *Id.* at 191-202.

¹⁰² *Bridges v. California*, 314 U.S. 252, 263-64 (1941).

and especially the press are less free there than in the United States.¹⁰³ Several commentators¹⁰⁴ have stated flatly that under British law, it would have been impossible for the press to duplicate the role played by *The Washington Post* in the Watergate scandal. The restraints on the British press, in addition to libel, include subjection to the laws of trespass, slander, breach of confidence, copyright and also prosecution for contempt of court for any violations of Parliamentary privilege or the Official Secrets Act.¹⁰⁵ However, these restraints have not inhibited certain British publications from engaging in sensationalism and irresponsible journalism in bringing to the public's attention the kinds of private matters that raise first amendment/privacy questions in the United States.¹⁰⁶ When an Englishman takes offense at the news media for unwanted publicity or the disclosure of private information, he often rests his legal case on proprietary grounds; English courts take a dim view of those who would violate the old adage that "an Englishman's home is his castle."¹⁰⁷

During the past two decades, three unsuccessful attempts have been made to enact a general bill on the right to privacy. In 1961 the bill had been introduced into the House of Lords while the bills in 1967 and 1969 originated in the House of Commons.¹⁰⁸ There also have been a series of governmental commissions since World War II in response to a general concern over the privacy issue and a lack of media self-restraint. The publication of a report by British Jurists¹⁰⁹ favoring privacy legislation along with the introduction of still another privacy bill, spurred the govern-

¹⁰³ See, e.g., THE GRANADA GUILDHALL LECTURES, THE FREEDOM OF THE PRESS (1974); A. THOMPSON, BIG BROTHER IN BRITAIN TODAY (1974); C. SEYMOUR-URE, THE PRESS, POLITICS AND THE PUBLIC (1968); and M. JONES, PRIVACY (1974).

¹⁰⁴ Evans, *The Half-Free Press* in THE FREEDOM OF THE PRESS, *supra* note 103, at 23; Street, *Could English Law Cope?*, 124 NEW L.J. 796 (1974); D. MADGWICK and T. SMYTHE, THE INVASION OF PRIVACY, at 149 (1974).

¹⁰⁵ Evans, *supra* note 104, at 43. Generally speaking, only libel, slander, trespass (intrusion), copyright, and breach of confidence (off-the-record conversations) involve the public disclosure of private information. Parliamentary privilege is similar to our congressional immunity and the Official Secrets Act is directed at civil servants who pass on to a third party, government information without official sanction. The British news media could become involved under the Act if it asks for or receives such information. See A. THOMPSON, *supra* note 103, at 32-33.

¹⁰⁶ For illustrations ranging from the publication of photographs of a demented girl running nude in the street to a dead girl hanging from a wrecked airplane, see Pedrick, *Publicity and Privacy: Is It Any of Our Business?*, 20 U. TORONTO L.J. 391, 393 (1970).

¹⁰⁷ See, e.g., T. LEA, PRIVACY AND THE PRESS, at 1-5 (1947), which concerns the famous *Daily Mirror* case of the 1940's and A. THOMPSON, *supra* note 104, at 132-33, where the judge awarded damages of 1,000 £ against a photographer who had taken pictures at the wedding of a bride whose father had been murdered recently. The photographer proceeded to sell the pictures to the press.

¹⁰⁸ M. JONES, *supra* note 103, at 11.

¹⁰⁹ PRIVACY AND THE LAW, BRITISH SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, at 3 (1970); where it was concluded that a new statutory tort of "infringement of privacy" was necessary in England.

ment to establish yet another commission under the Rt. Hon. Kenneth Younger.¹¹⁰ The Younger Committee spent two years studying the issue, collecting data, polling citizens, but it arrived at the same conclusion as in the past; *i.e.*, the British did not need a law recognizing a general right to privacy.¹¹¹

Only a few of the Committee's findings can be stated here. The Younger Committee conducted a survey of public attitudes towards privacy as part of its larger study.¹¹² The pertinent survey results indicated that (a) the survey respondents do not consider privacy as important an issue as inflation, unemployment, strikes, etc.;¹¹³ (b) when compared with social issues such as race relations, freedom of speech and press, and equal rights for women, protecting privacy was of the first concern;¹¹⁴ (c) only one per cent of the respondents indicated that their privacy had been violated by the press,¹¹⁵ while an even smaller number thought it had been violated by the broadcast media.¹¹⁶

The Committee tried its hand at defining privacy but reached the conclusion that it was virtually impossible to reach a consensus as to a general "right to be let alone" which could serve as a workable basis for legal protection.¹¹⁷ Therefore, rather than affirm the conclusion of the British Jurist report or lend support to the pending privacy bill, the Younger Committee recommended a series of specific proposals aimed at strengthening the existing oversight committees, the Press Council and the Programmes Complaints Commission which deals with broadcasting.¹¹⁸ While it may be an oversimplification of the study's findings, it does appear that the members of the Younger Committee found that Great Britain, utilizing existing statutes and recognized common law torts, was protecting privacy interests as effectively as the Continent and the United States where a right of privacy was legally recognized.¹¹⁹

¹¹⁰ YOUNGER COMMITTEE, REPORT OF THE COMMITTEE ON PRIVACY (1972).

¹¹¹ *Id.* at 9.

¹¹² For the results of the complete survey report, *see id.*, App. E at 228-272.

¹¹³ *Id.*, App. E at 230-31.

¹¹⁴ *Id.*

¹¹⁵ YOUNGER COMMITTEE REPORT, *supra* note 110, at 37.

¹¹⁶ *Id.* at 57.

¹¹⁷ *Id.* at 10.

¹¹⁸ *Id.* at 13-14. Although it is not our concern in this article, the reader should know that the Younger Committee studied a wide variety of subjects related to privacy and made recommendations in its report regarding banks and credit agencies, computers and technical surveillance, employment records, and questionnaires, student records and teacher personnel files, medical records, and the licensing of private detectives. *Id.* at ch. 3.

¹¹⁹ *Id.* at 25-30; the Committee compared the British situation to the status of privacy in France, Germany, and the United States.

Has this brief and superficial foray into British law reaped an empty harvest for our purposes? Not entirely, because buried within the heart of the Younger Committee's report lies the seed of an idea that could possibly aid us in resolving our dilemma. In discussing the press and the broadcast media and their primary function to inform the public, the Committee drew a fine distinction between news which is "of public interest," *i.e.*, designed to entertain or satisfy curiosity, and news which is "in the public interest," *i.e.*, designed to enhance knowledge, oversee government, and report on matters of educational and moral interest to the community.¹²⁰ This model will be discussed more fully herein.

B. *The First Amendment Privilege Model*

During the period when Justices Douglas and Black were on the Supreme Court, they shared the view that the first amendment freedoms held a "preferred position" in the constitutional scheme.¹²¹ Without this preferred position, the rest of the Bill of Rights is ineffective and without meaning. Although the "preferred position" doctrine never gained majority support on the Court, it remains appealing to journalists and broadcasters who think of all the extra "breathing space"¹²² they would enjoy by its adoption.

To convince the public and judges of the importance of the speech and press privilege, the news media support their position by quoting figures such as Thomas Jefferson and David Brinkley. How can one respond to Jefferson's remark that, "When the press is free and every man able to read, all is safe,"¹²³ or to Brinkley's rhetorical question: "[I]s our democracy going to be overthrown someday by CBS, or is it more likely to be overthrown by somebody in the White House?"¹²⁴ Jack Nelson, Washington bureau chief for the *Los Angeles Times*, has gone on public record as ad-

¹²⁰ *Id.* at 47.

¹²¹ Justice Douglas, writing for the Court in *Murdock v. Pennsylvania*, explicitly stated: "Freedom of press, freedom of speech, freedom of religion are in a preferred position." 319 U.S. 105, 115 (1942). In a more recent case, he wrote: "The press has a preferred position in our constitutional scheme, . . . to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people." *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting). Justice Black read the first amendment in absolute terms, but in his dissent in *Dennis v. United States*, he hoped that some "later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society." 341 U.S. 494, 581 (1951). The origin of the preferred position doctrine dates back to Chief Justice Stone's famous footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

¹²² *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1962); the Court first referred to the term in relation to awarding to associations the "breathing space" that is required for first amendment freedom to survive.

¹²³ Quoted in Bingham, *Responsibilities of a Free Press*, in *THE ESSENTIALS OF FREEDOM*, at 106-07 (1960).

¹²⁴ *AMERICAN ENTERPRISE INSTITUTE ROUNDTABLE, FREEDOM OF THE PRESS*, at 72 (1972).

vocating an almost absolute privilege to the press under the first amendment.¹²⁵ Another journalist scholar, in the preface to a book on the press and the developing right of privacy, posed this question to the reader: "Which is more important, the protection given to society by a free and unfettered press, or the peace of mind given to the individual by *rigid* protection of the right to privacy."¹²⁶ Should one still remain skeptical after all the rhetoric, we are assured that journalism is a more responsible profession today than it was in 1890, as witnessed by the growth of professional graduate schools, professional organizations, and the creation of a code of ethics.¹²⁷

I have no doubt that the strongly held beliefs of the press emanate from the highest intentions, but adoption of the first amendment privilege doctrine is so sweeping in scope as to virtually overwhelm the most legitimate counterclaim of privacy interests. Journalists, like other professionals, compose an interest group anxious to retain as many special privileges as possible. The slightest restriction placed upon their freedom is viewed as a threat; the growing concern over privacy in general and public disclosure in particular, is perceived as an infringement. Moreover, the news media tends to view the privacy/public disclosure issue in terms of either/or, as if the values involved were diametrically in opposition to each other. The question is framed in such a way as to polarize the issue, placing the value to society of a vigorous and free press to expose the Watergates and the "Koreagates," in opposition to a vaguely defined interest of the individual to retain sole control of private facts because the disclosure of this knowledge, which may be true, might prove embarrassing.

Framed in such a manner, it is a convincing argument. Presently, it is both difficult and unpopular to disagree with the media, which is basking in the glory of the Watergate aftermath. However, a majority of the press initially accepted, without challenge, the White House version of the break-in. Also, the scandal was exposed mainly due to the efforts of two reporters supported by a courageous editor and publisher. As the former president of the New York Bar Association aptly stated: "By and large, it is only the rare journalist who *really* believes in the public's right to know. The rest

¹²⁵ *Id.* at 18.

¹²⁶ D. PEMBER, *supra* note 3, at xi. (emphasis added). Later in the preface, Pember describes the objective of his study as being "to help those members of society not directly involved with law to understand better the limitations and restrictions placed upon mass media by the law of privacy." *Id.* at vii.

¹²⁷ Franklin, *A Constitutional Problem in Privacy Protection: Legal Implications on Reporting of Fact*, 16 STAN. L. REV. 107, 146 (1963).

are usually content to sit back and read the wire-service tickers or the handouts from public information officers."¹²⁸

Neither freedom of expression nor privacy are philosophic abstractions or absolute rights. In their respective spheres, they represent values which are essential to a free people in a free society. An operational principle is needed to discover the proper weighing of these legitimate, competing claims so that neither interest is unreasonably diminished.

C. *The Accommodative Model*

In an attempt to avoid the strict liability approach on one hand, and the virtually unfettered news privilege position on the other hand, two remedies have been advanced to balance the privacy tort when it comes in conflict with the first amendment privilege: (1) injunctive relief, and (2) right to reply. A third remedy, a balancing of the public benefit with the social utility is proposed.

(1) Injunctive Relief

It may be recalled that Warren and Brandeis suggested that injunctive relief, used sparingly, might be a proper remedy for particular kinds of privacy invasions.¹²⁹ More than eighty years later, a legal commentator recommended that the Warren and Brandeis suggestion be applied to situations where substantial harm or injury is likely to occur and where there is no public issue involved.¹³⁰ The author was of the opinion that an injunction, narrowly drawn, may be a proper and just remedy to prevent either "false-light" publications or media publicity of embarrassing personal facts about the individual.¹³¹

Two problems can be foreseen with the utilization of injunctive relief in an invasion of privacy case. The more serious reservation is the lurking spectre of judicial censorship over the news media. Although overzealous judges exercising prior restraint over local newspapers and broadcasting stations would likely run afoul of the Constitution and be corrected on appeal, the mere threat of the injunction with its subsequently long and costly litigation would be enough to produce the "chilling effect" that the

¹²⁸ W. Seymour, Jr., *The Public's Right to Know—Who Decides What the Public Should Be Told?*, 29 REC. OF N.Y. CITY B.A. 625, 627-28 (1974) (emphasis in original).

¹²⁹ Warren and Brandeis, *supra* note 3, at 219. Unfortunately, the authors failed to elaborate on the "limited class of cases" they had in mind.

¹³⁰ Comment, *Right of Privacy—Availability of Injunctive Relief for Invasion of Privacy*, 39 MO. L. REV. 647 (1974).

¹³¹ *Id.* at 658.

first amendment was intended to prevent.¹³² The *Onassis* case is a graphic illustration of the second problem. When a lower court issued the injunctive relief Mrs. Onassis prayed for, it was substantially modified by the Second Circuit Court of Appeals.¹³³ I suspect that appellate court judges, in particular, are very reluctant to impose an infringement on the press or the broadcasting media that would lay them open to an appeal on constitutional grounds. In my judgment, Warren and Brandeis were correct in their prediction that privacy could be protected by utilization of the injunction only in a few, exceptional cases.

(2) Right to Reply

Another attempt to avoid the all-or-nothing tort damages remedy is the suggestion, proposed in regard to defamation rather than privacy, that the injured party be granted the right to reply to the accusations and that the publisher or broadcaster be given the opportunity to publicly retract.¹³⁴ It is proposed here as an alternative to litigation in privacy cases. It should be remembered that Justice Brennan's opinion, in the now repudiated *Rosenbloom* case, seemed to invite such a remedy: "If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern."¹³⁵ Justice Brennan was inviting the states to open up the marketplace of discussion by enacting right to reply laws. Ironically, the state of Florida had a law which required newspapers to give equal space to a political candidate whom the paper had attacked. Tornillo, a candidate for public office, was subjected in an article in the *Miami Herald* to hostile criticism and requested an opportunity to reply to the charges. A unanimous Court rejected the right to reply doctrine as it applied to the press on the rationale that editors and publishers cannot be compelled under the first amendment to publish that which "'reason' tells them should not be published."¹³⁶ Although the Court admitted that press responsibility was laudatory and a

¹³² See *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965), where the phrase was used by the Court in a different context. When applied to the first amendment, however, the phrase refers to protecting the freedoms guaranteed by the amendment from the threat of sanctions in addition to the actual imposition of sanctions. Reportedly, the cost of defending a libel action begins at \$20,000 and could reach \$100,000. See L. TRIBE, *supra* note 29, at 642 n.25.

¹³³ *Supra* note 98 and accompanying text.

¹³⁴ Fleming, *Retraction and Reply: Alternative Remedies for Defamation*, 12 U. BRIT. COL. L. REV. 15, 31 (1978).

¹³⁵ 403 U.S. at 47.

¹³⁶ *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 214, 256 (1976). The law the Court invalidated had been enacted in 1973. FLA. STAT. § 104.38 (1973).

desirable goal, it neither was mandated by the Constitution nor could it be achieved by legislation.¹³⁷

Ignoring constitutional issues for the moment, the right to reply doctrine is an unlikely remedy for public disclosure situations, since the facts that are made public may be true. The right to reply fails in privacy cases because it rests on the presumption that a "good dose of truth" can overcome the original publicity. While this presumption is perhaps without basis in fact because the truth doesn't always catch up with the lie, a right to reply at least affords the defamed individual an opportunity to reduce, if not erase, any injury done to reputation. However, the harm done in privacy cases involving disclosure of embarrassing, often true, facts about the individual lies in the mental anguish suffered. As one astute legal scholar put it: "Once the cat is out of the bag, it cannot be put back."¹³⁸

(3) The Public Benefit/Social Utility Test

There is a third remedy which I lay before the reader with the expectation that if it has merit, it will be more fully explored by other scholars. The privacy tort has suffered from its historical entanglement with defamation. This entanglement should be severed by the courts once and for all. The line of cases from *New York Times* to *Firestone* is indicative of the problems faced by the Court in its unsuccessful attempt to establish clear standards, cognizable to the lower courts, between the three major classifications: public official, public figure, and the involuntary individual, such as Oliver Sipple, who is thrust into the midst of public controversy or who becomes "newsworthy" due to events over which the individual has no control. It is submitted that in invasion of privacy cases, these distinctions should be abolished.

It is here where we may profit from the work of the Younger Committee. That body made a significant distinction, which our courts generally have failed to make in privacy cases, between activities, events, and news that are "of public interest" and matters that properly lie "in the public interest."¹³⁹ The media should report information of a personal or private nature only if it demonstrably serves a bonafide public benefit or is of social utility to the community. Legislatures should establish specific standards to assist the news media in determining which kinds of private information warrant public disclosure under the public benefit/social utility test. Under the Younger Committee's standard, for example, it may be legitimate in some instances for the news media to identify the victim of

¹³⁷ *Id.* at 256.

¹³⁸ L. TRIBE, *supra* note 29, at 651.

¹³⁹ YOUNGER COMMITTEE REPORT, *supra* note 110, at 47.

a rape. One such circumstance occurred in the Joan Little case, where the sexual assault was related to the murder charge. However, even in a case like *Cohn*, I do not believe it is necessary for the nation to know the name of the rape victim, since such identification, although a matter of public record, does not benefit the community but does cause pain and anguish to the victim and/or the victim's family.

The Younger Committee standard would also allow public figures to carry on a private life, albeit one more greatly restricted than that of the private citizen. Public advocates like Ralph Nader and public figures like Jacqueline Kennedy Onassis have a legitimate right to be "let alone" if privacy is to have any meaning in terms of the self. The public does not have an absolute right to know, under the first amendment, all the private activities of such individuals. However, should an elected or appointed official be an alcoholic, disclosure of such personal information is warranted, because it may bear directly on the exercise of his official functions. The constituency of the elected official has a right to know this information, since the public must be enabled to weigh its significance in fulfilling its governing role. The appointed official may not be performing to his capability, or the individual's misconduct and the action or inaction taken may reflect on the administration in power. Although embarrassing to the individual to have such information made known to the world, it is not only reasonable, but desirable, for the media to make it known if the people are ultimately to be the governors. A news event, such as a disaster or a crime, should without question be covered by the media. However, the courts ought to impose a time limit on follow-up stories to such events unless there is prior consent. Families such as the Hills and Cantrells should not be newsworthy forever.

Finally, each state should create the equivalent of the British Press Council and Programmes Complaint Commission to process complaints from individuals who believe their privacy has been invaded by the news media.¹⁴⁰ Of course, the alleged harm will have been done, but such an administrative body can still make a worthy contribution to protecting privacy interests. For example, suppose a determination is made that the media was wrong in publishing or broadcasting the information. The administrative body could be empowered to take the following steps: (1) request that the adjudication report be made public, leaving it to the people to decide on the credibility of the publication or broadcast station;

¹⁴⁰ *Id.* at 44. The Younger Committee discovered in its study of the British Press Council over a one year period that the Council processed 370 complaints relating to privacy invasions. Of these, 267 either were withdrawn or not pursued by the complainant, 34 were rejected after an initial screening and 31 more were disallowed by the full Council. Consequently, 38 complaints were adjudicated with 13 being decided in favor of the complainant and 25 being rejected as without merit. . . .

(2) admonish the media wrongdoer if an invasion occurred but was judged to be not serious enough to warrant a public confession as in (1) above; and (3) in the event there is litigation, the jury and the judge could take into account the failure of the news media to print the adjudicating report, and should the plaintiff be successful, punitive as well as actual damages should be awarded.

Undoubtedly, the above proposals will be construed by the media as harsh, if not unconstitutional. The first amendment, however, does not require that the public has an absolute right to know everything. Unless the media exercise greater restraint on public disclosure of private facts, and unless the media come to accept the fact that privacy is also an important value in a free society, the recourse may eventually be some form of censorship. In attempting to balance these competing interests, a future Court may decide that privacy is more important than certain kinds of public disclosures currently protected by the first amendment privilege and impose a narrowly defined form of prior restraint. To avoid this odious prospect, it is respectfully submitted that the news media adopt as part of their code of ethics the British distinction between news "of public interest" and news that is "in the public interest." The former, by satisfying curiosity, discredits the profession, while the latter provides the community with the information it needs to have and yet pays homage to the dignity of the human personality.

CONCLUSION

It is ironic that while recent legal history records the emergence of a constitutional right to privacy, the Supreme Court, in a line of cases from *New York Times* to *Firestone*, has restricted the common law tort of privacy. The legal issues are particularly complex and admittedly difficult to reconcile when the public disclosure tort comes in conflict with first amendment privileges. Expansion of the privacy tort need not necessarily impose an unreasonable burden on the news media, provided the Supreme Court distinguishes between defamation and privacy invasion and establishes and applies to the latter wrong its own legal principles.

The Court seems perfectly willing to accord legal protection to privacy from governmental encroachment and interference. However, it has tended to overlook the fact that in contemporary society the invaders of privacy are not only agents of the state, but institutions of the private sector. We are constantly being required to provide personal information about ourselves to banks and credit agencies, employers, schools and colleges, hospitals, etc. Additionally, we are faced by the increasing desire of the news media to fill each page of every newspaper and each minute of every broadcast.

This insatiable appetite for information, not to mention the rivalry between print journalism and the broadcast media, has led the news media to seek out and publish information about individuals that may do no more than to satisfy our curiosity or appeal to our baser instincts, rather than to inform and enlighten us. In the future, the news media could be one of our greatest enemies, should they persist in diminishing our sense of self-worth by not respecting our reasonable expectations for privacy.