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Don R. Pember

Dwight L. Teeter, Jr.

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PRIVACY AND THE PRESS SINCE *TIME, INC. V. HILL*

Don R. Pember* and Dwight L. Teeter, Jr.**

To say that the law of privacy is not a great hallmark of logic and clarity in American law is to indulge in egregious understatement. This area of law continues, to borrow James Thurber's phrase, to be as "disorderly as a whore's top drawer."¹ Fascination with the spasmodic growth of the invasion of privacy tort is evidenced by scores of books.² Part of this abundant interest is perhaps due to privacy law's relative youth; it is less than 100 years old. Also, scholars may have had their interest piqued because it is one of the few areas of law whose striking growth in this century has stemmed largely from common law creation rather than from legislation or statutory interpretation.

At this writing, a right of privacy is recognized in 39 states, as well as in the District of Columbia.³ Most of this recognition is

* Associate Professor, School of Communications, University of Washington; B.A., 1964, M.A., 1966, Michigan State University; Ph.D., University of Wisconsin, 1969.

** Professor, Department of Journalism, and Director of Graduate Studies, School of Communications, University of Kentucky; A.B., 1956, M.J., 1959, University of California (Berkeley); Ph.D., University of Wisconsin, 1966.

1. WRITERS AT WORK: THE PARIS REVIEW INTERVIEWS 86 (M. Cowley ed. 1959).

2. See, e.g., M. BRENTON, THE PRIVACY INVADERS (1964); S. HOFSTADTER & G. HOROWITZ, THE RIGHT OF PRIVACY (1964); A. MILLER, THE ASSAULT ON PRIVACY (1971); V. PACKARD, THE NAKED SOCIETY (1964); D. PEMBER, PRIVACY AND THE PRESS (1972); A. WESTIN, PRIVACY AND FREEDOM (1967).

3. As of 1960, a common law right of privacy was recognized in the District of Columbia and 26 states: Alabama, Alaska, Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, West Virginia. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 386-87 (1960) [hereinafter cited as Prosser]. (Readers unfamiliar with the law of privacy are advised to read Prosser's article in full for an excellent overview.) Since Prosser's survey, the courts of nine more states have adopted the majority view: *Olan Mills, Inc. v. Dodd*, 234 Ark. 495, 353 S.W.2d 22 (1962); *Rugg v. McCarty*, 476 P.2d 753, 755 (Colo. 1970); *Barbieri v. News-Journal Publishing Co.*, 189 A.2d 773 (Del. 1963); *Fergerstrom v. Hawaiian Ocean View Estates*, 50 Haw. 374, 441 P.2d 141 (1968); *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962); *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964); *Apodaca v. Miller*, 441 P.2d 200, 204 (N.M. 1968); *Truxes v. Kenco Enterprises, Inc.*, 80 S.D. 104, 119 N.W.2d 914 (1963); *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973).

The courts of three states have specifically refused to recognize a right of privacy: *Brunson v. Ranks Army Stores*, 161 Neb. 519, 73 N.W.2d 803 (1955); *Henry v.*

judicial; there were only five states with privacy statutes at the end of 1973.⁴ It should be noted, however, that in New York alone, a great number of privacy actions have been initiated under that state's privacy statute, partly because of the statute's 70-year history, but more importantly because New York City is a leading publishing center and the press is a party to the lion's share of privacy lawsuits.⁵

Uncertainty has always been an underlying, if not dominating current in the development of privacy law.⁶ One of the causes of this uncertainty is the amorphous nature of the legal concept, "right of privacy." Although few quarrel with the desirability of a right of privacy, there is noticeable and continuing disagreement over what that right should entail.⁷

In addition, the right of privacy conflicts with many fundamental precepts of our legal, political and economic systems. The requisite openness of a democratic society seems to be the antithesis of a right to be let alone; the most timid or reclusive soul may be stripped of his privacy if he unwittingly becomes enmeshed in a newsworthy event.⁸

Cherry & Webb, 30 R.I. 13, 73 A. 97 (1909); Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956).

The courts and legislatures of seven states have not yet explicitly accepted or rejected a right of privacy: Idaho, Maine, Massachusetts (*but see* Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E.2d 610 (1969), *cert. denied*, 398 U.S. 960 (1970)), Minnesota, North Dakota, Washington, Wyoming. The existence of such a right is also uncertain in Vermont. VT. STAT. ANN. tit. 12, § 5601(6) (Supp. 1972), lists "invasion of the right to privacy" among those torts for which the state may not be found liable; however, no state court decision nor any other statute can be found to suggest a general recognition of the right.

Five remaining states have defined a right of privacy by statute. *See* note 4 *infra*.

4. *See* CAL. CIV. CODE § 3344 (West Supp. 1974); N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1948); OKLA. STAT. ANN. tit. 21, § 839.1 (Supp. 1973); UTAH CODE ANN. §§ 76-4-8,-9 (1953); VA. CODE ANN. § 8-650 (1957).

5. D. PEMBER, *PRIVACY AND THE PRESS* 231 (1972).

6. *See, e.g.,* Davis, *What Do We Mean By "Right to Privacy"?* 4 S.D.L. REV. 1 (1959).

7. *See, e.g.,* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964); Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROB. 326 (1966) [hereinafter cited as Kalven]; Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954); Prosser, *supra* note 3; Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962); Wright, *Defamation, Privacy and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630 (1968) [hereinafter cited as Wright].

8. *See, e.g.,* Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929) (woman spotlighted in news when husband murdered as they walked together); Jacova v. Southern Radio and Television Co., 83 So. 2d 34 (Fla. 1955) (innocent bystander in film of televised police raid). Compare Sidis v. F-R Publishing Co., 113 F.2d 806 (2d Cir. 1940) (former child prodigy again placed in limelight by magazine article after 20 years of anonymity). *See also* text accompanying notes 33-47 *infra*.

Recent public disclosure laws have prompted numerous public officials to resign their posts rather than comply with rigid disclosure requirements which, the officials contend, constitute an invasion of their privacy.⁹

The right of privacy quite obviously collides head-on with freedom of the press.¹⁰ While revelations of the news media are sometimes inaccurate or tasteless, and often appeal to the readers' baser emotions, such revelations are traditionally protected unless defamatory, seditious or obscene.¹¹ Most thoughtful individuals agree that such protection of the press is necessary, even though grievous and unrequited harm may be visited upon individuals' reputations or feelings.¹² When judges have been presented with the opportunity to decide that a subject was not newsworthy, they have generally declined to do so.¹³ This reluctance is due in large part to the recognition that "[e]xposure of the self to others . . . is an essential incident of life in a society which places a primary value on freedom of speech and of press."¹⁴ Most judges who have addressed this privacy issue believe that they, like newsmen, should not be placed in the role of editors, deciding what the public should or should not read, see or hear.¹⁵

9. For example, the Washington Public Disclosure Law, adopted as a citizen initiative (Initiative Measure 276, ch. 1, [1973] Wash. Laws, *codified in* WASH. REV. CODE ch. 42.17 (Supp. 1973)), places a heavy burden of disclosure on elected officials. The Washington State Public Disclosure Commission recently compiled a list of 7,022 public officials in Washington subject to the requirements of the Public Disclosure Act. Of that number, 180 informed the Commission that they were either resigning or allowing their term of office to expire without seeking reelection, so that they would not need to comply with the Act. An additional 2,500 were found to be in noncompliance during 1974. Of the latter group, 159 had failed to respond to either of two Commission mailings as of October 9, 1974. Interview with Cindy Fey, Washington State Public Disclosure Commission, Olympia, Oct. 9, 1974.

The Washington Public Ports Association estimates that, as of October 18, 1974, 30 of its members have resigned their offices or declined to run for reelection rather than comply with the Act's disclosure requirements. Interview with Don White, Washington Public Ports Association, Olympia, Oct. 18, 1974. Similarly, the Washington State School Directors Association estimates that, as of January 31, 1974, 235 of its members had resigned or failed to seek reelection because of the Act's requirements. Interview with Judy McDaniel, Washington State School Directors Association, Olympia, Oct. 23, 1974.

10. Prosser, *supra* note 3, at 401.

11. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

12. See Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107 (1963); Wright, *supra* note 7.

13. See notes 106-10 and accompanying text *infra*.

14. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

15. Pember, *Privacy and the Press: The Defense of Newsworthiness*, 45 JOURNALISM QUARTERLY 14 (1968).

Finally, the American people have yielded much of their personal privacy in return for access to a market place founded upon consumer credit. Most persons in this nation are willing to reveal to a credit manager information about themselves or their neighbors that they would not disclose to their priest or doctor. And what people will not disclose, American enterprise has found ways to discover.¹⁶

In this article, the authors do not propose to discuss the innumerable ways in which one's privacy is invaded or to survey the entire sweep of the law of privacy, but rather attempt to trace briefly its development, with particular emphasis on how the law has affected the mass media since the Supreme Court decided its first privacy case, *Time, Inc. v. Hill*,¹⁷ in 1967. In so doing, we hope to add somewhat to the understanding of this unsettled area of law.¹⁸

I. LEGAL DEVELOPMENT BEFORE *TIME, INC. V. HILL*

A legal right of privacy was first proposed roughly 85 years ago by a socially prominent Boston attorney, Samuel D. Warren. History records that Warren, incensed by the press coverage of his family's social affairs, enlisted the aid of his former law partner, Louis D. Brandeis, to write an article calling for courts to protect the right to be let alone.¹⁹ Published in 1890,²⁰ the Warren-Brandeis essay, "The Right to Privacy," has been acclaimed as the most influential law review article in American history.²¹ However, the impact of the article was not immediate; a right of privacy was not legislatively recognized until the New York legislature enacted America's first privacy statute in 1903.²² Moreover, three quarters of a century later, legal scholars continue to harbor doubts as to the legitimacy of the doctrine as a tort remedy. Professor Harry Kalven recently wrote:²³

16. A. MILLER, *THE ASSAULT ON PRIVACY* 67-89 (1971).

17. 385 U.S. 374 (1967).

18. The authors have attempted to be objective in preparing this article. The reader is cautioned, however, that, inasmuch as both authors devote much of their professional energy to the study of the mass media, some unintended bias in favor of that industry may surface from time to time.

19. Prosser, *supra* note 3, at 383-84. See also note 67 *infra*.

20. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

21. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 802 (4th ed. 1971).

22. Ch. 132, §§ 1, 2 [1903] N.Y. Laws, *codified as amended* in N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1948). Some lower courts gave tacit recognition to the principle during the 1890's. See Prosser, *supra* note 3, at 385 nn.8-10.

23. Kalven, *supra* note 7, at 337.

The lack of a legal profile and the enormity of the counter-privilege converge to raise for me the question of whether privacy is really a viable tort remedy. The mountain, I suggest, has brought forth a pretty small mouse.

Despite lingering doubts concerning its validity, privacy law has continued to develop. It has evolved to encompass not just a single individual interest, but at least four. One area of privacy law, akin to the law of trespass, protects against intrusions of the solitude of an individual—against wiretapping, bugging and the like.²⁴ The second and only truly unique area of the law of privacy involves the prohibition against publication of private information about an individual; this area has received least support from the courts.²⁵ The third area, similar to the law of defamation,²⁶ involves the prohibition against publication of nondefamatory falsehoods, *i.e.*, material which places an individual in what some legal scholars call a “false light.”²⁷ The fourth area of privacy law protects an individual’s property rights to his own name or likeness, much like the law of literary property protects an individual’s creative works. This area of privacy law was first recognized as a means to halt the unauthorized use of an individual’s name or picture for advertising or trade purposes.²⁸

Thus, the late Dean Prosser suggested that there are really four torts, not just one, within the law of privacy:²⁹

- 1) Intrusion upon an individual’s physical solitude;
- 2) Publication of private information about an individual;

24. See discussion in Part III *infra*. This concept was eloquently embraced by dissenting Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 478 (1927), a case involving government wiretapping:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the [Constitution].

25. See, *e.g.*, *Corliss v. E.W. Walker Co.*, 57 F. 434 (C.C.D. Mass, 1893), *rev'd on rehearing*, 64 F. 280 (1894); *Sidis v. F-R Publishing Co.*, 113 F.2d 806 (2d Cir. 1940); *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956); *Hubbard v. Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147 (1962).

26. Unlike the law of defamation, the law of privacy does not make truth available as a defense, except in those cases involving individuals placed in a false perspective in the public eye. Prosser, *supra* note 3, at 398–401.

27. See discussion in Part V *infra*.

28. See discussion in Part VI *infra*.

29. Prosser, *supra* note 3, at 389.

3) Placement of an individual in a false light in the public eye; and
 4) Appropriation of an individual's name or likeness for commercial gain. This formulation has received widespread judicial approval,³⁰ and is undoubtedly the most complete and concise enunciation of the principles of privacy law. However, Prosser's categories are not mutually exclusive; it is possible to conceive of fact situations simultaneously involving two or more of his categories.³¹

Prosser's attempt to create order, although not a complete success, is better appreciated after one surveys the jurisprudential potpourri created by the state and federal courts. The decisions are confusing and frustrating because the courts arrive at differing conclusions when asked to balance societal and individual interests in privacy actions, absent adequate definition of what those interests entail.³²

A new ingredient was added to the stew when, in *Time, Inc. v. Hill*,³³ the Supreme Court ruled that the first amendment protects publishers who have been sued for invasion of privacy. Borrowing a broad defense established in a series of libel cases beginning in 1964 with *New York Times v. Sullivan*,³⁴ the Court ruled that in certain kinds of privacy suits, plaintiffs must prove malice—and a very special kind of malice, as discussed in the next section—to sustain a cause of action. Although this new ingredient has not unduly confused the law of privacy, neither has it provided meaningful clarification. Nor has it revolutionized the law of privacy as the *New York Times* malice rule revolutionized the law of libel.³⁵

II. THE IMPACT OF *TIME, INC. V. HILL*

It was the publication of nondefamatory falsehoods about the James J. Hill family in 1955 that ultimately led to the 1967 Supreme

30. See, e.g., *Barbieri v. News-Journal Co.*, 56 Del. 67, 189 A.2d 773 (1963).

31. For example, a magazine writer might have used a hidden camera to take secret pictures of the plaintiff, and then published them. In such a case, an action might be maintained under both intrusion and private information. Or a film critic's name might be used as a testimonial for a movie which the critic really disliked. An action based on the advertisement could conceivably be based on both appropriation and false light.

32. Compare, e.g., *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931), with *Sidis v. F-R Publishing Co.*, 113 F.2d 806 (2d Cir. 1940).

33. 385 U.S. 374 (1967).

34. 376 U.S. 254 (1964). See also *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

35. See Kalven, *The New York Times Case: A Note on "The Central Meaning of*

Court decision in *Time, Inc. v. Hill*. The Hill family was living comfortably in suburban Whitemarsh, Pennsylvania, in September of 1952 when their anonymity was shattered by three escaped convicts. The escapees held the Hills and their five children hostage in their own home for 19 hours. During this siege the Hills became the subject of national news attention which intensified when two of the three convicts were killed a few days later in a shoot-out with police.³⁶

In 1953, Random House published Joseph Hayes' novel, *The Desperate Hours*, about a family named "Hilliard" which had been terrorized in its home by escaped convicts. Hayes later transformed his novel into a successful stage play. In 1955, while the Broadway company of "The Desperate Hours" was rehearsing in Philadelphia, *Life* magazine arranged for actors to visit the Hill's former home in nearby Whitemarsh. *Life* posed actors in the house in a number of scenes from the play, and published a story entitled "True Crime Inspires Tense Play." *Life* declared that the play depicted actual events in the life of the Hill family. The story was illustrated with actor-posed photographs, including one representing a son being "roughed up" by one of the convicts and another, entitled "daring daughter," showing the daughter biting a convict's hand in an effort to make him drop his gun. Neither Hayes' novel nor his play completely substantiated *Life's* contention that Hayes' writings were based upon the Hill family's ordeal: Hayes had used a family named Hilliard, not Hill; additionally, the Hills had not actually been harmed by the convicts. Both novel and play did, however, have episodes in which the father and a son were beaten and the daughter "subjected to a verbal sexual insult."³⁷

Suing for invasion of privacy, Hill sought damages under the privacy provisions of New York's Civil Rights Law, which permit recovery if an individual's name or likeness is used for "advertising purposes, or for the purposes of trade" without first obtaining permission.³⁸ Hill argued that the *Life* article gave the impression that the play mirrored the Hill family's captivity, "which, to the knowledge of the defendant . . . 'was false and untrue.'"³⁹ In its defense,

the First Amendment," 1964 SUP. CT. REV. 191; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

36. 385 U.S. at 377-78.

37. *Id.*

38. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1948).

39. 385 U.S. at 378.

Time, Inc. (*Life's* parent corporation) argued that the article was newsworthy, of public interest, and "published in good faith without any malice whatsoever. . . ."40

The New York trial court awarded damages to the Hills, and both the Appellate Division and the Court of Appeals of New York affirmed.⁴¹ However, on appeal to the Supreme Court, the decision was reversed. The Court paid careful attention to the constitutional issues of freedom of the press raised by defendant Time, Inc. It recognized as a threshold proposition that truth would be a complete defense to a lawsuit for invasion of privacy when allegations of nondefamatory falsehood were made.⁴²

Writing for the Court, Justice Brennan then grappled with the more immediate issues involving falsehood or fictionalization. James Hill, he wrote, had become newsworthy and had substantially lost his right to privacy "insofar as his hostage experience was involved."⁴³ Hill, however, could maintain a cause of action if *Life* had either "exploited for . . . commercial benefit," or "fictionalized."⁴⁴ Justice Brennan, guided by his own majority opinion in *New York Times v. Sullivan*,⁴⁵ wrote:⁴⁶

Material and substantial falsification is the test. . . . Factual error, content defamatory of official reputation, or both, are insufficient for an award of damages for false statements unless actual malice—knowledge that the statements are false or in reckless disregard of the truth—is alleged and proved. . . .

The Court then specifically held:⁴⁷

[T]he constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

40. *Id.* at 378–79.

41. 18 App. Div. 2d 485, 240 N.Y.S.2d 286 (1963), *aff'd*, 15 N.Y.2d 986, 207 N.E.2d 604, 260 N.Y.S.2d 7 (1965).

42. 385 U.S. at 383–84.

43. *Id.* at 386.

44. *Id.*

45. 376 U.S. 254 (1964).

46. 385 U.S. at 386–87.

47. *Id.* at 387–88.

After *Time, Inc. v. Hill* was decided, it remained unclear how far this first amendment protection would be extended into the law of privacy.⁴⁸ Four years later in the libel case of *Rosenbloom v. Metro-media, Inc.*,⁴⁹ Justice Brennan explained that after *Time, Inc. v. Hill*, the *New York Times* malice rule should be applied only in “suits for invasion of privacy based on false statements where . . . a matter of public interest was involved.”⁵⁰ This view understates the impact *Time, Inc. v. Hill* has had upon privacy law. The decision has touched a wide variety of cases, including cases involving false statements and those involving true statements. It is safe to say that *Time, Inc. v. Hill* has sensitized judges throughout the country to the first amendment implications of privacy actions which involve the news media.⁵¹ We now turn to the specific effects of *Time, Inc. v. Hill* upon the tort sub-categories described earlier.⁵²

III. THE INTRUDING NEWSMAN

Intrusion, the first of the four torts in privacy law as described by Dean Prosser,⁵³ is quite different from the other three. The tort of intrusion occurs when a person’s privacy is encroached upon by the methods used to gather information about that person. The other three privacy torts listed by Prosser—publication of private facts, putting someone in a false light, and appropriation of a person’s name or likeness—all involve what is done with the information or material once it has been gathered. Some kind of publication is required for a cause of action in the latter three areas of privacy. In the intrusion area, however, a cause of action lies merely if the plaintiff’s solitude or zone of privacy is penetrated. In New Hampshire, for example, a landlord bugged the bedroom of his newlywed tenants, evidently for

48. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). In *Time, Inc. v. Hill*, Justice Brennan carefully explained that the Court was applying the *Sullivan* principles only “in this discrete context,” and did not intend thereby to merge privacy law into the law of libel. 385 U.S. at 390–91.

49. 403 U.S. 29 (1971).

50. *Id.* at 31 n.1.

51. See, e.g., *Holmes v. Curtis Publishing Co.*, 303 F. Supp. 522 (D. S.C. 1969); *Kent v. Pittsburgh Press Co.*, 349 F. Supp. 622 (W.D. Pa. 1972).

52. See text following note 29 *supra*.

53. *Id.*

the enjoyment of hearing the sounds of marital bliss. The products of this surveillance were never published, yet the intrusion had taken place and a cause of action was recognized.⁵⁴

The press has rarely been involved in lawsuits in the intrusion area.⁵⁵ This paucity of cases is caused by several factors. First, the press has generally conducted its information-gathering without the use of surreptitious devices. It has been only recently that a few newsmen have become as comfortable with hidden cameras and microphones as with pencil and paper. Second, persons whose privacy is secretly violated rarely know it. Third, even if they are aware that someone has been snooping, the evidence needed to support a law suit is usually difficult to produce. Finally, a party ordinarily learns that a newsmen has penetrated the so-called zone of privacy only after the information acquired is disseminated by use of mass media. In those cases, it is normally easier for the aggrieved party to maintain an action based on the publication of the material than to pursue legal redress for the intrusion itself.

The case law since *Time, Inc. v. Hill* has consistently recognized the distinction between surreptitious information-gathering as one form of invasion of privacy and the publication of that information as another. In 1968, the Liberty Lobby sued the late columnist Drew Pearson for his publication of some of the organization's secret documents.⁵⁶ These papers had been clandestinely copied by a Liberty Lobby employee and then given to the Pearson. The lawsuit foundered, however, when the plaintiffs were unable to produce any evidence to show that Pearson was involved with the copying or removal of the private papers from the Liberty Lobby offices.

A year later, Pearson was sued again—as was Pearson's associate, Jack Anderson—this time by former Senator Thomas Dodd of Connecticut. In *Pearson v. Dodd*,⁵⁷ the Senator complained that documents from his files had been secretly copied by his own employees and given to the Washington writers. The Pearson-Anderson "Wash-

54. *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964).

55. There were only a handful of press-connected intrusion cases on record prior to *Time, Inc. v. Hill*. See *Peed v. Washington Times Co.*, 55 WASH. LAW REP. 182 (D.C. Sup. Ct. 1927); *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (1939).

56. *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489 (D.C. Cir. 1968).

57. 410 F.2d 701 (D.C. Cir. 1969).

ington Merry-Go-Round” column proceeded to run six stories based on the Senator’s files, damaging Dodd with information which suggested appropriation of campaign funds for personal purposes and consociation with lobbyists for foreign interests.⁵⁸ Dodd contended that the manner in which the material was obtained invaded his privacy.⁵⁹

Writing for the District of Columbia Circuit Court of Appeals, Judge J. Skelly Wright stated that the restrictions on collectors of information do not necessarily bind disseminators of that information. He noted that unlike other areas of privacy law, intrusion does not require publication as one of its essential elements; because the intrusion and publication in *Pearson v. Dodd* were separate acts, committed by different individuals, the publisher should not be held responsible for the acts of the intruders. Judge Wright declared:⁶⁰

If we were to hold appellants liable for invasion of privacy on these facts, we would establish the proposition that one who receives information from an intruder, knowing it has been obtained by improper intrusion, is guilty of a tort. In an untried and developing area of tort law, we are not prepared to go so far.

Insofar as it separates intrusion from publication, Judge Wright’s statement is a fair reading of the past and current status of privacy law. Thus, only when directing or participating in the intrusion itself need the press fear an intrusion action.

The press was held liable for intrusion, however, in a fascinating 1971 case. In *Dietemann v. Time, Inc.*,⁶¹ two *Life* journalists, Jackie Metcalf and William Ray, were doing an investigative report aimed at “medical quacks.” Working in cooperation with the Los Angeles County District Attorney’s office and county police, Metcalf and Ray used a ruse to gain entrance to the home of A. A. Dietemann, a disabled veteran and journeyman plumber who was practicing healing with clay, minerals and herbs.

58. *Id.* at 703.

59. *Id.* at 705.

60. *Id.* Some scholars have expressed alarm over this holding. Professor Fortune of the University of Kentucky College of Law has said that the effect of this case is to suggest that journalists, as long as they do not actively participate in the intruding search for materials, can legally receive the fruits of other’s illegal activity. H. NELSON AND D. TEETER, *LAW OF MASS COMMUNICATIONS* 190–91 (2d ed. 1973). See also Note, 55 IOWA L. REV. 718 (1970).

61. 449 F.2d 245 (9th Cir. 1971).

Metcalf complained to the "doctor" of a lump on her breast. After an "examination," Dietemann told her the lump was caused by some rancid butter she had eaten 11 years, 9 months and 7 days earlier. The interaction between Dietemann and Metcalf was secretly photographed by Ray, who was posing as the "patient's" husband. Also, the conversation was broadcast via a transmitter concealed in Metcalf's purse to state investigators waiting in a car near Dietemann's property.⁶² When Dietemann was arrested about a month later at his home on a charge of practicing medicine without a license, *Life* photographers were on hand to take more pictures. Two weeks thereafter, the magazine published an article, "Crackdown on Quackery," which featured the photographs surreptitiously taken during the examination.⁶³

Dietemann sued Time, Inc. (*Life*), for invasion of privacy, but the magazine countered that the photos were newsworthy—as they undoubtedly were—and hence were protected from any privacy action. But the Ninth Circuit Court of Appeals neatly divided the action into intrusion and publication, and ruled that while the publication might be protected, the manner in which the information and photos were obtained was not. The fact that the photos, which had been obtained improperly, were subsequently published in an article of public interest and importance did not insulate the magazine from an action based on the manner in which they were obtained.⁶⁴ The magazine had contended that the first amendment protects investigative reporting, and that concealed cameras and microphones are indispensable tools of the investigative reporter. Unimpressed by that argument, Judge Hufstедler replied:⁶⁵

Investigative reporting is an ancient art; its successful practice long antedates the invention of miniature cameras and electronic devices. The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of news-gathering.

Dietemann remains sui generis. Since the mass media does not often engage in surreptitious newsgathering, the intrusion doctrine

62. *Id.* at 246.

63. *Id.* at 245-47.

64. *Id.* at 247-50.

65. *Id.* at 249.

should continue to have little effect on its activities. In making editorial decisions, the media need not be concerned with the manner in which information given to them by an independent third party was obtained. This is as it should be; otherwise the media would be saddled with the "impossible burden"⁶⁶ of verifying in each instance the propriety of any intrusion prior to publication.

IV. PUBLICATION OF PRIVATE INFORMATION

A. *The Newsworthiness Defense*

Ironically, the law of privacy has developed rapidly in all areas except that of publication of private information—the area of primary focus in the Warren-Brandeis article.⁶⁷ The immense privilege of "newsworthiness" which courts have erected during the past 70 years has precluded recovery for the publication of private information except in the most outrageous circumstances.⁶⁸

Numerous plaintiffs have, with little success, sought damages for publication of private information in the seven years since *Time, Inc.*

66. Compare "the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait"—a burden which the press need not shoulder under the Constitution. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). The threat that "the legitimate utterance will be penalized" (*Speiser v. Randall*, 357 U.S. 513, 526 (1958)) must be minimized in order that free speech be properly safeguarded.

67. When Warren and Brandeis wrote "The Right to Privacy" (*see note 20 supra*), the kind of conduct they hoped to suppress was that of the snooping, prying newspaper whose columns were filled with bits of gossip about the private lives of the citizens of Boston. Whether in fact the newspapers of Boston were operated in this fashion, or whether this was merely how Samuel Warren perceived the activities of the press, remains unclear. Warren, the driving force behind the article, was a Brahmin socialite and perhaps hypersensitive. *See* D. PEMBER, *PRIVACY AND THE PRESS* 33-42 (1972).

Prosser suggested in his pathbreaking article in 1960 (*see note 3 supra*) that it was the press coverage of the wedding of one of Warren's daughters which excited Warren enough to push a reluctant Brandeis into drafting the plea for a right of privacy; because of Prosser's eminence as a scholar, this story has been republished widely. The facts, however, do not support the late tort specialist, for the first Warren daughter to marry, Mabel Bayard Warren, was wed on November 4, 1905, nearly 15 years after the publication of the law review article. PEMBER, *supra*.

68. *See, e.g., Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942) (publication of article, with plaintiff's picture, about a physical ailment for which she was being treated in a hospital); *Daily Times Democrat v. Graham*, 276 Ala. 380, 162 So. 2d 474 (1964) (publication, without consent, of a picture showing plaintiff with her dress blown upward by the wind). *See also* notes 152 & 153 *infra*.

Nothing has happened since *Time, Inc. v. Hill* to alter significantly the nature of the newsworthiness defense, except in California. That state continues to deviate from the norm. *See* text accompanying notes 113-32 *infra*.

v. Hill.⁶⁹ The first amendment considerations raised by the Supreme Court in the 1967 decision have appeared to strengthen the privilege of newsworthiness. Generally, the privilege will protect a publication which is in the public interest, which concerns a willing or unwilling public figure, or which is a report taken exclusively from a public record. The bulk of decisions rendered in the area of publication of private facts since *Time, Inc. v. Hill*, a few of which are discussed below, demonstrate a continuing desire to preserve the newsworthiness privilege.

In *Corabi v. Curtis Publishing Co.*,⁷⁰ a tangled lawsuit which involved libel more prominently than privacy, the Supreme Court of Pennsylvania reversed a judgment granting plaintiff's damage claim for invasion of privacy. In 1963, the *Saturday Evening Post* had published a story, "They Call Me Tiger Lil," in which entertainer Lillian Reis Corabi was connected with a murder and accused of masterminding a complex burglary scheme. So far as Ms. Corabi was concerned, the court held that actual malice could be found on the matter of libel.⁷¹ However, an invasion of privacy verdict in favor of the Corabi children could not be sustained merely because they were identified as the children of a woman to whom the article imputed guilt or deep involvement in several serious crimes. The court stated:⁷²

[A] public figure, such as Lillian Reis Corabi, has no exclusive rights to her own life's story and cannot claim an invasion of privacy if a biography thereof is published. Another may legitimately publish such a biography with or without consent and include therein the names of the members of the subject's family. . . . Hence, the claims of Barbara and Michael Corabi cannot be sustained

In *Williams v. KCMO Broadcasting*,⁷³ the plaintiff and five other youths were filmed by a television news team as the youths were arrested on suspicion of burglary. The news broadcast that evening included scenes of the plaintiff walking with his hands over his head, being searched with his hands on a police car, and being ushered into

69. See, e.g., *Costlow v. Cuismano*, 34 App. Div. 2d 196, 311 N.Y.S.2d 92 (1970); *Kapellas v. Kofman*, 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969).

70. 411 Pa. 432, 273 A.2d 899 (1971).

71. 273 A.2d at 917.

72. *Id.* at 918.

73. 472 S.W.2d 1 (Mo. Ct. App. 1971).

a police car. Plaintiff, although taken into custody, was later released after the police admitted a case of mistaken identity. Holding that the television station was not liable, a Missouri court of appeals insisted that the plaintiff must show a “serious, unreasonable, unwarranted and offensive invasion of private affairs” before recovery might be allowed.⁷⁴ The *Williams* court reasoned:⁷⁵

In the case at bar, plaintiff was involved in a noteworthy event about which the public had a right to be informed and which the defendant [television station] had a right to publicize. This is true even though his involvement therein was purely involuntary and against his will.

The court conceded that the plaintiff may have been embarrassed, but refused to find that the infliction of such embarrassment was an actionable invasion of his privacy.

In *Kent v. Pittsburg Press Co.*,⁷⁶ the name of a man who was being released from prison was mentioned in a story about penal reform in defendant’s newspaper. James Henry Kent had won a new trial after more than a quarter century behind bars and the state chose not to re prosecute him. There was but a single incidental reference to Kent in the story; nevertheless, he sued the newspaper for invading his privacy. The court determined that the penal reform article was clearly in the public interest and newsworthy, and held that *Pittsburgh Press* was not liable.⁷⁷ Quoting Justice Brennan in *Rosenbloom v. Metro-media*,⁷⁸ the *Kent* court stated:⁷⁹

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not voluntarily choose to become involved. The public’s primary interest is in the event; the public focus is on the conduct of the participant and the content, effect and significance of the conduct, not the participant’s prior anonymity or notoriety.

Finally, in *Costlow v. Cuismano*,⁸⁰ a New York court ruled that a story about the death of two children who suffocated when they

74. *Id.* at 4.

75. *Id.* at 5.

76. 349 F. Supp. 622 (W.D. Pa. 1972).

77. *Id.* at 627.

78. 403 U.S. 29 (1971) (a libel case). See text accompanying note 49 *supra*.

79. 349 F. Supp. at 627.

80. 34 App. Div. 2d 196, 311 N.Y.S.2d 92 (1970).

trapped themselves in a refrigerator was of interest to the public and consequently newsworthy. The plaintiff parents argued that the sensational style of the article rendered it not newsworthy. But the court, in its per curiam opinion, rejected this contention, holding that the manner in which the article was written was not "relevant to whether the article [was] protected by constitutional guarantees of free speech."⁸¹ The *Costlow* court noted⁸² that in *Time, Inc. v. Hill*, concurring Justice Harlan had proposed that the press be held to standards of "reasonable care" in newsgathering, and "fair comment" in reporting;⁸³ the court then observed that a majority of the Supreme Court "implicitly rejected his standard, perhaps because it would force the courts to act as wide-ranging critics of the manner of exposition used by the press."⁸⁴

At least two cases are counter to the trend of preserving the newsworthiness privilege. In *Nappier v. Jefferson Standard Life Insurance Co.*,⁸⁵ the Fourth Circuit Court of Appeals held that the factual identification of rape victims was an invasion of privacy. This occurred, however, only because the South Carolina legislature had made an exception to the privilege of newsworthiness by enacting a statute prohibiting the publication of names of rape victims.⁸⁶

In a more recent case, *Smith v. Goro*,⁸⁷ author Herb Goro prepared a book entitled *The Block*, in which he attempted to depict the living conditions on a slum block in the Bronx by use of photographs and statements from the people who live and work there. Goro was hired to prepare the book by a foundation with the hope that a graphic description of the living conditions would generate some social change in the area. This was indicated to the residents by Goro while preparing the book, and they agreed to cooperate with him. After the book was published, however, 23 residents of the area sued for inva-

81. 311 N.Y.S.2d at 95.

82. *Id.*

83. 385 U.S. 374, 409 n.6 (1967).

84. 311 N.Y.S.2d at 95.

85. 322 F.2d 502 (4th Cir. 1963). Compare *Cox Broadcasting Corp. v. Cohn*, 231 Ga. 60, 200 S.E.2d 127 (1973), appeal docketed, 42 U.S.L.W. 3412 (U.S. Jan. 15, 1974), wherein the father of a deceased rape victim brought an invasion of privacy cause of action based upon a Georgia nonpublication statute. GA. CODE ANN. § 26-9901 (1972).

86. S.C. CODE ANN. § 16-81 (1962).

87. 66 Misc. 2d 1011, 323 N.Y.S.2d 47 (Sup. Ct. 1970).

sion of privacy on grounds that the use of their pictures and names was unauthorized, and that the statements attributed to them in the book were either fictional or had been obtained through fraud and misrepresentation.

The *Goro* court denied plaintiffs' motion for an injunction to stop the sale of the book. However, the court also denied Goro's motion to dismiss, in which he alleged that the book represented a clearly newsworthy subject, *i.e.*, the plight of those living in the ghetto. While admitting that the constitutional guarantee of freedom of the press protects factual reporting of newsworthy persons and events, the court stated that a similar protection may not exist for reports of private individuals where "there was nothing particular about the lives of these plaintiffs that separated them from their fellows as peculiar subjects of public interest so as to preclude their right of privacy."⁸⁸ The court added that "no case has been cited or found which supports the view that a writer may seek out such people and write about them and by that fact alone make them . . . persons of public interest."⁸⁹

B. *The Involuntary Public Figure Doctrine*

Although the *Goro* court was quite correct in suggesting that one cannot actively seek out an otherwise private person and make him a public figure, nonetheless, after *Time, Inc. v. Hill*, one is generally free to publicize events—and the people engaged in those events—where the occurrences themselves thrust the otherwise private person into the public arena. Many jurisdictions, including New York, have adopted this legal concept of the "involuntary public figure."⁹⁰ The Kentucky Supreme Court first enunciated the concept in 1929:⁹¹

There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence.

88. 323 N.Y.S.2d at 51.

89. *Id.* at 51–52. For further discussion of this case, see text accompanying notes 102–12 *infra*.

90. See, *e.g.*, 323 N.Y.S.2d at 50–51, and cases cited therein.

91. *Jones v. Herald Post Co.*, 230 Ky. 227, 229, 18 S.W.2d 972, 973 (1929).

In *Rosenbloom v. Metromedia, Inc.*,⁹² the United States Supreme Court adopted a similar rule for libel cases. Prior to that 1971 decision the Court had determined that the first amendment malice rule applied only to plaintiffs who were public officials⁹³ or public figures⁹⁴—persons who had on their own initiative thrust themselves into the vortex of public affairs. The *Rosenbloom* Court also attempted to define the legal consequences of the “creation” of a public figure from a private citizen through publicity—what some people call bootstrapping—that is, by pulling a private individual into the public spotlight with defamatory publicity. In an eminently logical decision a plurality of the *Rosenbloom* Court suggested that the individual’s prior fame or anonymity was not the important issue. Rather, the key issue was the public interest in the occurrence or event.⁹⁵ Private people who became involved, willingly or unwillingly, in events of public or general concern would henceforth be required to prove actual malice in order to recover damages in defamation suits.

The *Rosenbloom* Court’s adoption of the involuntary public figure rule, however, was effectively if not expressly overturned in *Gertz v. Robert Welch, Inc.*⁹⁶ Petitioner Elmer Gertz, a well-known and highly visible civil rights attorney and author, brought a libel action against respondent publisher for describing him variously as a “communist-frontier,” “Leninist,” “Marxist” and “Red.” In reversing a judgment for respondent,⁹⁷ Justice Powell, writing for a majority of the Court, held that to maintain a libel action private persons who do not seek punitive damages need only prove negligence—not actual malice—on the part of the publisher.⁹⁸ *Gertz* thus substantially restricts the availability of the first amendment defense to publishers in libel actions.

The validity of *Gertz* may be questioned, however. The *Gertz* Court’s classification of petitioner as a “private person” cannot be jus-

92. 403 U.S. 29 (1971). The Court in *Rosenbloom* affirmed the court of appeals’ reversal of a \$250,000 judgment for petitioner-pornography dealer, levied against respondent-broadcaster who identified petitioner as a “smut merchant” and “girlie-book peddler.”

93. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

94. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

95. 403 U.S. at 44.

96. 94 S. Ct. 2997 (1974).

97. Plaintiff Gertz obtained a jury verdict in his favor, but the trial court rendered judgment for the defendant notwithstanding the verdict. *Id.* at 3002.

98. *Id.* at 3010–11.

tified. Gertz was a member of numerous boards and commissions in Illinois, had published several books on civil rights matters, had frequently been honored by civil rights groups and had represented some rather famous clients, including Nathan Leopold and the publishers of Henry Miller's *Tropic of Cancer*. His publishing record belies the notion that he was a poor, helpless, private individual who could not gain access to the press. Gertz was a public figure in every sense of the term as defined by the Supreme Court in *Curtis v. Butts*.⁹⁹ The *Rosenbloom* rule should not have been at issue in the case.

At this juncture, it is difficult to assess the impact of *Gertz* upon privacy law. However, at least two observations suggest that its impact will be negligible.¹⁰⁰ First, *Time, Inc. v. Hill* dealt with nondefamatory publication, whereas *Gertz* dealt with that which was defamatory. Only nondefamatory publication is at issue in an unadulterated privacy action, since the presence of defamation invokes libel principles.

Second, the involuntary public figure rule in privacy law is grounded in some fifty years of precedent, up to and including *Time, Inc. v. Hill*.¹⁰¹ It is not to be assumed that *Gertz* would overturn such well-established doctrine without squarely confronting it. It appears, then, that the vitality of *Time, Inc. v. Hill* persists with respect to privacy actions untainted by libel claims, despite the holding in *Gertz*.

Assuming the continued vitality of the involuntary public figure doctrine, one troubling question remains: How do courts decide who is or is not a "public figure?" The question can be placed in proper perspective by analyzing the decision in *Smith v. Goro*.¹⁰² That case, previously discussed,¹⁰³ involved the publication of interviews con-

99. 388 U.S. 130 (1967). "Public figures" are persons "whose views and actions with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of 'public officials' with respect to the same issues and events." *Id.* at 162.

100. The overruling of the "involuntary public figure" concept in *Gertz* was justified by two primary considerations: the relative inaccessibility of the mass media to an otherwise private individual seeking to rebut defamatory statements, and the strong state interest in protecting the reputation of the individual. 94 S. Ct. at 3009-10. These are, interestingly, precisely the considerations found inapposite in *Time, Inc. v. Hill* because the statements therein were nondefamatory. 385 U.S. at 390-91. The *Gertz* majority quoted that portion of *Time, Inc. v. Hill* which found inapposite the above considerations. 94 S. Ct. at 3005 n.6. In so doing, it implicitly recognized the impropriety of too easily analogizing between the law of libel and that of privacy.

101. See *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W.2d 972 (1929).

102. 66 Misc. 2d 1011, 323 N.Y.S.2d 47 (1970).

103. See text accompanying notes 87-89 *supra*.

ducted with New York City slum dwellers. Ruling on defendants' motion to dismiss,¹⁰⁴ the court found an invasion of the slum dwellers' privacy because there was no occurrence or extraordinary event which thrust those people into the public spotlight; in short, the publication was not "newsworthy" because the people were not "public figures."¹⁰⁵

The newsworthiness defense, however, is triggered by the presence of public interest alone. To be sure, it is often a particular occurrence which triggers the public interest; but that need not always be so. The lives of persons who are poor, ill-housed, ill-fed and ill-clothed—as well as those who, by contrast, live in opulence—are traditionally "newsworthy;" society is, for whatever reasons, interested in such conditions. Courts have conceded that an almost endless variety of topics have public interest: stories and pictures about suicide,¹⁰⁶ divorce,¹⁰⁷ criminal activity,¹⁰⁸ preteenage motherhood¹⁰⁹ and women exercising¹¹⁰ are just a few of the vast number of subjects placed within the legitimate ambit of the American public interest.

The inherent difficulty in predicting what is or is not "newsworthy"—and therefore protected—publication suggests that the best way to prevent legitimate dissemination of private information is simply to refuse to speak to representatives of the mass media. But the person who grants an interview to a newsperson has little cause to complain when the information provided is subsequently published. The real problem in many privacy actions, such as that in *Goro*, is not that private information has been published, but that the plaintiff does not like the way the story was written, or thinks the information placed the plaintiff in an unfavorable light. The privacy action is actually a disguised libel action, which would not pass muster if cast as the latter.

The standard public interest—or "newsworthiness"—test, which has been used in the vast majority of privacy adjudications

104. In considering the motion to dismiss, the court accepted plaintiff's pleaded facts as true.

105. 323 N.Y.S.2d at 52.

106. *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (1939).

107. *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948).

108. *Bremmer v. Journal-Tribune Publishing Co.*, 247 Iowa 817, 76 N.W.2d 762 (1956).

109. *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956).

110. *Sweenek v. Pathe News, Inc.*, 16 F. Supp. 746 (E.D. N.Y. 1936).

in the past 65 years, is a highly functional one. First, it provides a wide range of freedom of expression, which has always been valued in our democratic society. Second, it is easy to administer. The judge does not have to wear the cloak of social censor, evaluating (and thereby structuring) the reading interests and behavioral habits of the population.¹¹¹

Use of the public interest test does not vitiate the right of privacy. Everything that is done in private in the home, office, car or other similarly private place should remain private. In order for the press to obtain information about such private activities, an intrusion which would constitute an invasion of privacy must be made. On the other hand, affairs conducted in public, such as shopping trips, dinner at a restaurant, attendance at a concert or a class are hardly private events. They are conducted in public. They may be personal but they are not private.¹¹²

111. The effect of the "social policy" test applied in California is just the opposite. See text accompanying note 126 *infra*.

112. The recent and famous case of *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), is illustrative of this point. Galella, a free-lance photographer who describes himself as a "paparazzo" (a pest more annoying than a gadfly), has for some time produced a substantial income by taking and selling photographs of Jacqueline Onassis and her children. The secret service agents guarding the ex-first family finally became so exasperated with Galella's obtrusive behavior that they caused his arrest and detention. Following acquittal from criminal charges, Galella sued Onassis and the agents for false arrest, malicious prosecution, and interference with trade. Defendant Onassis counterclaimed for injunctive relief from Galella's offensive tactics. The complaint against the agents was dismissed (*id.* at 991 n.1), as was the complaint against Onassis. 353 F. Supp. 196 (S.D. N.Y. 1972). Granting defendant Onassis' counterclaim for injunctive relief, the trial court found Galella guilty of "harassment, intentional infliction of emotional distress, assault and battery, commercial exploitation of defendant's personality, and invasion of privacy." 487 F.2d at 994. Evidence showed that Galella had

intentionally physically touched Mrs. Onassis and her daughter, caused fear of physical contact in his frenzied attempts to get their pictures, followed defendant and her children too closely in an automobile, [and] endangered the safety of the children while they were swimming, water skiing and horseback riding. . . . *Id.* On appeal the Court of Appeals for the Second Circuit affirmed, but modified the terms of the injunction. *Id.* at 998-99. The court noted that Mrs. Onassis was properly found to be a "public figure"; yet it went on to state:

Nonetheless, Galella's action went far beyond the reasonable bounds of news gathering. When weighed against the *de minimus* public importance of the daily activities of the defendant, Galella's constant surveillance, his obtrusive and intruding presence, was unwarranted and unreasonable. . . . *Id.* at 995. This language suggests a "social value" balancing approach such as that used in California (see text accompanying notes 113-33 *infra*); yet one suspects that the grant of injunctive relief was most probably based on the likelihood of future assault and battery, intentional infliction of emotional distress, and the like, rather than upon invasion of privacy. This position is substantiated by the court's

If, in the *Goro* case, the plaintiffs did in fact refuse to cooperate with Goro and he obtained the information surreptitiously, then perhaps there was an intrusion and an action could have been maintained on that basis. Or if the book placed the plaintiffs in a false light, this could have been the basis for the action. Either of these approaches is more reasonable than attempting to argue that a story about the lives of ghetto residents is without public interest.

C. *California's Social Value Test*

The California courts stand alone in employing a "social value" test to analyze publications involved in privacy suits. The social value test originated in 1931 with the famous, although overrated, case of *Melvin v. Reid*.¹¹³ The lawsuit involved a prostitute, Gabrielle Darley, who had been tried for, and acquitted of, murder charges in 1918. After her acquittal she reformed her life, married a man named Melvin and began living an "exemplary, virtuous, honorable, and righteous life."¹¹⁴ Several years after her trial, a motion picture company released a film, "The Red Kimono," which was advertised as being based on the true story of plaintiff's life as a prostitute and accused murderess. Ms. Melvin's maiden name was used throughout the film.

In the privacy action which followed—the first such action in the state—a California court of appeals ruled that the publicity was actionable, but the court's opinion was most curious. The California court rejected the argument that a right of privacy was inherent in California common law.¹¹⁵ Instead, the court grounded the action in a state constitutional provision which guaranteed to citizens the right to pursue and obtain safety and happiness. Writing for the *Melvin* court, Judge Marks held that although the events of Ms. Melvin's past life were clearly in the public record and hence newsworthy,

later holding that "[a]ny further restriction on Galella's taking and selling pictures of defendant for news coverage is, however, improper and unwarranted by the evidence." *Id.* at 998. Thus, it appears that Galella would be free to continue his newsgathering, so long as he does not commit or attempt to commit tortious or criminal acts in the process.

113. 112 Cal. App. 285, 297 P. 91 (1931).

114. 297 P. at 91.

115. *Id.* at 93.

the use of her maiden name in connection with those events was protected.¹¹⁶

Two factors seemed to tip the scales in favor of the plaintiff. First, the film was purely a commercial venture, a profit-making exercise.¹¹⁷ Second, given plaintiff's successful self-rehabilitation from a shameful life, the court could find little social utility in a film which resulted in negating much of the plaintiff's efforts to regain a respected position in society.¹¹⁸

The social value test was utilized by the California Supreme Court in *Kapellas v. Kofman*.¹¹⁹ The *Kapellas* action was based on an editorial in the *Alameda Times-Star* which questioned the suitability of Inez Kapellas' candidacy for public office. The editor noted that Ms. Kapellas had several children and that the children had been in scrapes with the law in the past. The editorial asked if it might not be better if Ms. Kapellas spent her time raising her family instead of running for office. After considering the editorial's social value, the California court determined that it was newsworthy and rejected the invasion of privacy claims of Ms. Kapellas and her children.¹²⁰

The social value test was next applied in *Briscoe v. Reader's Digest Association*,¹²¹ decided by the California Supreme Court in 1971. Fifteen years earlier, Marvin Briscoe and a friend hijacked a truck which they thought contained valuable cargo, but which actually contained only four bowling-pin spotters, items which the hijackers could hardly resell. After a gun battle with local police, Briscoe was captured, tried and sent to prison. In 1967, Bill Surface wrote a story, "The Big Business of Hijacking," for Chicago's *American* magazine. Reprinted in the *Reader's Digest* in 1968, the story included a reference to Briscoe's bowling-pin-spotter misadventure and mentioned his gunfight with police before being captured. However, the article did not note that the event had taken place 11 years earlier.

In Briscoe's complaint, he stated that since his release from jail, he had led an exemplary life and had rehabilitated himself socially, and

116. *Id.*

117. This finding alone would be sufficient to dispose of the case in plaintiff's favor under the doctrine of commercial appropriation. See note 170 *infra*.

118. 297 P.2d at 93.

119. 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969).

120. 459 P.2d at 922-24, 81 Cal. Rptr. at 370-72.

121. 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

that the adverse publicity had damaged him. He contended that as a result of the article's appearance in *Reader's Digest*, his 11-year-old daughter—as well as his friends—heard of his past for the first time, and thereafter “scorned and abandoned him.”¹²² Relying upon *Melvin*, Briscoe contended that while incidents from his past life were newsworthy, the use of his name was not. *Reader's Digest's* demurrer was sustained by the trial court, apparently on the basis that the material Briscoe found objectionable was newsworthy.¹²³ But the Supreme Court of California, citing *Melvin*, reversed the lower courts and held that Briscoe had stated a cause of action sufficient to require a trial on the merits. The court reasoned:¹²⁴

Plaintiff is a man whose last offense took place 11 years before, who has paid his debt to society, who has friends and an 11-year-old daughter who were unaware of his early life—a man who has assumed a position in “respectable” society. Ideally, his neighbors should recognize his present worth and forget his past life of shame. But men are not so divine as to forgive the past trespasses of others, and plaintiff therefore endeavored to reveal as little as possible of his past life. Yet, as if in some bizarre canyon of echoes, petitioner's past life pursues him through the pages of *Reader's Digest*, now published in 13 languages and distributed in 100 nations, with a circulation in California alone of almost 2,000,000 copies.

In a nation built upon the free dissemination of ideas, it is always difficult to declare that something may not be published. But the great general interest in an unfettered press may at times be outweighed by other great societal interests. As a people we have come to recognize that one of these societal interests is that of protecting an individual's right to privacy. The right to know and the right to have others *not* know are, simplistically considered, irreconcilable. But the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other.

The court in *Briscoe* obviously gave more weight to the interest of the state and the plaintiff in his rehabilitation and anonymity than to the public interest in reading an unbowdlerized account of a public trial which occurred more than a decade earlier. In remanding the

122. 483 P.2d at 36, 93 Cal. Rptr. at 868.

123. *Id.*

124. 483 P.2d at 41–42, 93 Cal. Rptr. at 873–74 (footnotes omitted).

case for trial, the supreme court directed the lower court to determine whether or not Briscoe had become a rehabilitated member of society, to consider whether identification of Briscoe as a former criminal would be highly injurious and offensive to a reasonable man and to consider whether the use of Briscoe's name was justified.¹²⁵

By adopting the social value approach to adjudication of privacy actions, the California judiciary assumes a censorship role, deciding what the public should read, see or hear in light of the likelihood of damage to the reputation of an individual by publication.¹²⁶ Other jurisdictions, fearful of falling into the trap of "social engineering," have wisely declined to adopt such a policy. For example, in *Barbieri v. News Journal Co.*, the Delaware Supreme Court dismissed plaintiff's reliance on *Melvin* as follows:¹²⁷

With deference to the California Court of Appeal, we must express a serious doubt whether [the] basis of the decision—the unnecessary and indelicate use of plaintiff's name—is a sound one on which to sustain an action for invasion of privacy. Such a rule would in reality subject the public press to a standard of good taste—a standard too elusive to serve as a workable rule of law. . . .

The Court of Appeals for the Second Circuit in *Sidis v. F-R Publishing Co.*¹²⁸ similarly resisted the temptation to pass judgment on the value or utility of a publication. William James Sidis, in 1910, had been an 11-year-old prodigy who lectured to eminent mathematicians. Graduated from Harvard University at 16, Sidis received considerable

125. 483 P.2d at 44, 93 Cal. Rptr. at 876.

Despite the sweep of the supreme court opinion, Briscoe did not win his case on remand. Attorneys for *Reader's Digest* removed the case to the United States District Court for the Central District of California, where the judge granted, without opinion, a motion for summary judgment on behalf of the magazine. H. NELSON & D. TEETER, *LAW OF MASS COMMUNICATIONS* 199 (2d ed. 1973).

126. It is noteworthy that throughout the history of the law of privacy, most judges have deftly evaded the twin-horned dilemma of attempting to define public taste or to evaluate the social utility of a publication. Those are uncomfortable, dangerously sharp horns at best. Suppose that a candidate for public office in California has in his or her past an unsavory event—a prison term perhaps—but rehabilitation has occurred. Is the publication of such information an invasion of privacy? Or is there an overriding public interest in revealing the candidate's background? Or would it depend on the magnitude of the "stain" and the importance of the office? If such a person is in high office in private industry, rather than in public office, should that individual receive more protection than a public servant? A business executive makes decisions which, like those of public officials, can affect the lives of many citizens.

127. 56 Del. 67, 189 A.2d 773, 776 (1963).

128. 113 F.2d 806 (2d Cir. 1940).

publicity. More than 20 years after his graduation, *New Yorker* magazine published a "Where Are They Now?" article about Sidis and other child prodigies. Sidis, however, wanted only to be left alone. He had become reclusive, lived in an ill-appointed room on the south side of Boston, and worked in obscurity as a clerk.¹²⁹ Despite the plaintiff's desire to be left alone, Judge Clark, writing for the court, found for *New Yorker* magazine:¹³⁰

Regrettably or not, the misfortunes and frailties of neighbors and "public figures" are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.

Federal courts in California already seem a bit uncomfortable with the social value approach. For example, in *Goldman v. Time, Inc.*,¹³¹ involving a *Life* magazine story about two young Californians who were living in a cave on the island of Crete, the court found the social value test to be merely one aspect of newsworthiness. The court created a considerable presumption for the defendant:¹³²

[T]he right of the public to know, and of the media to tell, is so deeply entrenched in the American conscience that a great deal of latitude must necessarily be afforded the media in its selection and presentation of news.

In *Goldman* the court measured the newsworthiness of the article by determining the degree of public interest in the activities of disenfranchised, young American expatriates, rather than by attempting to determine the social value of the published report. Whether the social value approach is ever adopted beyond California's borders, or whether the state's new privacy statute¹³³ will nullify the home-grown common law rule, remains to be seen.

129. *Id.* at 807. One legal scholar has contended that this nondefamatory publicity, which Sidis wished desperately to avoid, most certainly hastened Sidis' early death. Prosser, *supra* note 3, at 397.

130. 113 F.2d at 809.

131. 336 F. Supp. 133 (N.D. Cal. 1971).

132. *Id.* at 138.

133. CAL. CIV. CODE § 3344 (West Supp. 1974) provides as follows:

§ 3344. Use of another's name, photograph, or likeness for advertising or solicitation purposes

(a) Any person who knowingly uses another's name, photograph, or likeness.

V. NONDEFAMATORY FALSEHOODS

The greatest impact of *Time, Inc. v. Hill* has been in the area of privacy law which may be termed "publication of nondefamatory

in any manner, for purposes of advertising products, merchandise, goods or services, or for purposes of solicitation of purchases of products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount no less than three hundred dollars (\$300).

(b) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.

(1) A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.

(2) If the photograph includes more than one person so identifiable, then the person or persons complaining of the use shall be represented as individuals rather than solely as members of a definable group represented in the photograph. A definable group includes, but is not limited to, the following examples: a crowd at any sporting event, a crowd in any street or public building, the audience at any theatrical or stage production, a glee club, or a baseball team.

(3) A person or persons shall be considered to be represented as members of a definable group if they are represented in the photograph solely as a result of being present at the time the photograph was taken and have not been singled out as individuals in any manner.

(c) Where a photograph or likeness of an employee of the person using the photograph or likeness appearing in the advertisement or other publication prepared by or in behalf of the user is only incidental, and not essential, to the purpose of the publication in which it appears, there shall arise a rebuttable presumption affecting the burden of producing evidence that the failure to obtain the consent of the employee was not a knowing use of the employee's photograph or likeness.

(d) For purposes of this section, a use of a name, photograph or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for purposes of advertising or solicitation.

(e) The use of a name, photograph or likeness in a commercial medium shall not constitute a use for purposes of advertising or solicitation solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the complainant's name, photograph or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for purposes of advertising or solicitation.

(f) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television stations, billboards, and transit ads, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that such owners or employees had knowledge of the unauthorized use of the person's name, photograph, or likeness as prohibited by this section.

(g) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

falsehoods.”¹³⁴ *Time, Inc. v. Hill*, as described earlier in this article,¹³⁵ involved publication of untruthful but nondefamatory statements about the James J. Hill family. Justice Brennan’s majority opinion, while somewhat inexplicit, applied an existing definition of “actual malice” (borrowed from libel law) to the tort of invasion of privacy.¹³⁶ In essence, Brennan’s opinion was that in privacy actions involving untruthful publications on subjects of public interest, plaintiffs must henceforth prove that defendants’ untruthful statements were made with knowledge or reckless disregard of their falsity.¹³⁷

*Holmes v. Curtis Publishing Co.*¹³⁸ was one of the first lower court rulings to apply the new first amendment rule announced in *Time Inc. v. Hill*. *Holmes* involved the often-sued and now-defunct magazine, the *Saturday Evening Post*. James Holmes complained that the *Post* had published an unauthorized photograph of him, taken by a *Post* photographer, while Holmes gambled at the Monte Carlo Club on Grand Bahama Island, Bahamas. The picture was captioned “High-Rollers at Monte Carlo have dropped as much as \$20,000 in a single night,” and was used to illustrate a story claiming Mafia influence in the Bahamas. The caption added, “The U.S. Department of Justice estimates that the Casino grosses \$20 million a year, and that one-third is skimmed off for American Mafia ‘families.’”¹³⁹ Holmes claimed that the caption put him in a false light.

The *Holmes* court characterized Mr. Holmes as an innocent tourist who unwittingly became the subject of a photograph whose caption may have given rise to false inferences about his character. After lamenting the rather unsettled state of privacy law following “the recent Supreme Court decisions in the field,”¹⁴⁰ the court decided that Holmes would have to satisfy the *New York Times* malice rule and prove that the picture and caption were published with knowledge of their falsity or with reckless disregard for the truth.¹⁴¹ Subsequent to

134. Prosser, *supra* note 3, at 398–401 (1960). Dean Prosser termed this category “false light,” but there really is much more involved than merely placing an individual in a false light.

135. See text accompanying notes 28–45 *supra*.

136. 385 U.S. 374, 386–88.

137. *Id.*

138. 303 F. Supp. 522 (D.S.C. 1969).

139. *Id.* at 523.

140. *Id.* at 524.

141. *Id.* at 527.

the ruling, plaintiff Holmes voluntarily abandoned his action.¹⁴²

In *Corabi v. Curtis Publishing Co.*,¹⁴³ the Pennsylvania Supreme Court added another dimension to the burden of proof to be borne by a plaintiff. Once again, the *Saturday Evening Post* sat in the defendant's seat—this time for the publication of an article entitled “They Call Me Tiger Lil,” a story noted earlier in this article about an entertainer who allegedly masterminded a burglary.¹⁴⁴ Lillian Corabi sued in Pennsylvania for both libel and invasion of privacy. The magazine argued that under *New York Times* and *Time, Inc. v. Hill*, the burden was on the plaintiff to prove the falsity of the material as well as malice. The court rejected defendant's argument, holding that the defendant still must prove truth; if it cannot, the burden falls on the plaintiff to prove only malice, not falsity as well.¹⁴⁵

But as discovered in libel cases, proving malice alone is no light burden for a plaintiff. In *Kent v. Pittsburgh Press Co.*,¹⁴⁶ the court ruled that malice was not shown merely by demonstrating that the truth might have been discovered if the reporter had conducted a more thorough investigation. As noted earlier,¹⁴⁷ *Kent* involved 67-year-old James Henry Kent who had been released from prison after 27 years of incarceration. Kent had won a new trial and the state had chosen not to re prosecute him. In the course of describing certain prisoners and their crimes, reporter Jack Grochot had written of Kent:¹⁴⁸

Standing [in the reception room] was 67-year-old James Henry Kent, dressed in a gray gabardine suit and waiting patiently for his final release papers—he was getting out after 27 years. He too had taken a life.

In response to plaintiff Kent's argument that if the reporter had investigated the matter more fully, he would have discovered the facts, the court stated:¹⁴⁹

142. The plaintiff agreed to a nominal settlement prior to trial. Telephone interview with attorney for defendant, A. T. Smythe, Buist, Moore, Smythe & McGee, Charleston, S.C., Oct. 25, 1974.

143. 441 Pa. 432, 273 A.2d 899 (1971).

144. See text accompanying notes 70–72 *supra*.

145. 273 A.2d at 917.

146. 349 F. Supp. 622 (W.D. Pa. 1972).

147. See text accompanying notes 76–79 *supra*.

148. 349 F. Supp. at 623.

149. *Id.* at 626. The court cited *St. Amant v. Thompson*, 390 U.S. 727 (1968),

Obviously if Grochot had checked the court records relating to Kent, he could have discovered the reason for his release. Obviously too, however, he had no reason in the circumstances to entertain *any* doubts, quite apart from serious doubts, as to the matter of Kent's release.

Thus, the plaintiff bears a heavy burden but, as *Varnish v. Best Medium Publishing Co.*¹⁵⁰ demonstrates, not one that makes a successful action impossible. *Varnish* involved the publication, in the *National Enquirer* newspaper, of an article describing the suicide of a young mother who had taken her own life after killing her three children. In the story, the mother was pictured as stable and happy, one who had no apparent reason for suicide. The *Varnish* court applied the *New York Times* malice rule, reasoning that while the scope of public interest had yet to be clearly defined, a murder-suicide was clearly within that scope. Yet, even using the *New York Times* rule, the court found for plaintiff holding that he had met the requisite burden of proof by showing that evidence, ignored by the defendant, demonstrated that Ms. Varnish had been despondent and depressed. Mr. Varnish also showed that the *National Enquirer* had published only a portion of the suicide note, and that the entire note explained the dead woman's motives more fully. The reporter on the story admitted at trial that he had access to all the true facts in the case and that his depiction of Ms. Varnish as the "happy mother" was merely his own presumption. The court ruled that minor inaccuracies and even fictional dialogue would not alone defeat the privilege granted to newsworthy reports, but that based on the record of this case a jury could find the substantial falsity required to defeat the newsworthiness privilege. Judge Lumbard added that the use of only a part of the suicide note, when the reporter possessed the entire note, could well be sufficient evidence to support a jury finding of reckless disregard for the truth.¹⁵¹

Among reported cases since *Time, Inc. v. Hill*, the decision in *Varnish* stands virtually alone. Yet it suggests that, as in the law of libel,

in discussing the issue of whether or not the reporter had a "reckless disregard for truth." In *St. Amant*, a libel action, a political candidate relied upon an individual's unverified affidavit to expose certain financial transactions of questionable propriety allegedly conducted by his political opponent. Although the allegations proved to be false, the Court declined to find a showing of reckless disregard. *Id.* at 730-31.

150. 405 F.2d 608 (2d Cir. 1968), cert. denied, 394 U.S. 987 (1969).

151. *Id.* at 612.

privacy law seems able to handle what one might term the atrocious case. In libel, the law would not tolerate Ralph Ginzburg's fantasies about Barry Goldwater and awarded the Arizona Senator damages.¹⁵² Similarly in privacy, the sensational and fictional account of a murder-suicide fell outside the bounds of first amendment protection.¹⁵³

VI. APPROPRIATION

If there is certainty in any area of privacy law, it is in the area of appropriation. Use of an individual's name or likeness for commercial gain, without consent, is an invasion of privacy.¹⁵⁴ In the years since *Time, Inc. v. Hill*, a refreshing frankness has crept into the case law in this area. More and more courts seem willing to acknowledge that plaintiffs who sue for appropriation deserve damages not because they suffered some kind of severe mental distress but because the defendant used something which belonged to the plaintiff—his name or likeness—without compensation.

In early appropriation cases, the courts identified the right of privacy as only a personal right, failing to recognize that the plaintiff was in fact compensated for appropriation of a property right.¹⁵⁵ This oversight was substantially corrected in 1953 when Judge Frank of the Second Circuit suggested that in most appropriation cases, at issue is not a right of privacy, but rather a "right of publicity"—that is, the right to control the commercial exploitation of oneself.¹⁵⁶ Despite the lucid insight of Judge Frank, and despite some eloquent scholarly

152. *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970). Senator Barry Goldwater was awarded \$1 compensatory and \$75,000 punitive damages in this libel action based upon magazine articles published immediately prior to the 1964 presidential election.

153. *Varnish v. Best Medium Publishing Co.*, 405 F.2d 608 (2d Cir. 1968).

154. This is the oldest of the four areas of privacy law. Early cases in the area of appropriation are collected in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902); in the year following that decision, New York's privacy statute—the first legislative recognition of a legal right to privacy—was enacted to provide relief in appropriation cases. See note 22 and accompanying text *supra*.

155. See, e.g., *Pavesich v. New England Mutual Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). In that case the Georgia Supreme Court ruled that the use of plaintiff's picture and name in a testimonial advertisement constituted an invasion of his privacy. Putting the plaintiff on public display was humiliating, the court suggested; however the court failed to consider plaintiff's claim that he had been deprived of a property right for which he should have been compensated.

156. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

pleas in law reviews for recognition of the "right of publicity,"¹⁵⁷ the myth that appropriation involves a right of privacy dominated privacy law for nearly twenty more years.

During the last few years, however, many courts have concluded that Judge Frank's concept is correct. In two cases involving professional athletes, *Palmer v. Schonhorn Enterprises, Inc.*,¹⁵⁸ and *Uhlaender v. Henricksen*,¹⁵⁹ a New Jersey state court and a federal district court in Minnesota respectively ruled that well-known athletes have a property right in their identities. In the first case, golfers Arnold Palmer, Gary Player, Doug Sanders and Jack Nicklaus sued a game manufacturer who had used their names without their consent. Judge Horn of the New Jersey Superior Court wrote in *Palmer*: "Perhaps the basic and underlying theory is that a person has the right to enjoy the fruits of his own industry free from unjustified interference."¹⁶⁰ In the second case, Ted Uhlaender represented several hundred major league baseball players in an action against another game manufacturer. The *Uhlaender* court held that, "a celebrity has a legitimate proprietary interest in his public personality."¹⁶¹ The court added that the celebrity's "identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property."¹⁶²

In *Canessa v. J. I. Kislak, Inc.*,¹⁶³ a New Jersey court held that even a private individual—in this instance a homeowner who found his family's names and pictures on advertisements for the real estate company that sold him a house—enjoys a property right in his identity. The court found that "however little or much plaintiff's likeness and name may be worth, defendant, who has appropriated them for his commercial benefit, should be made to pay for what he has taken. . . ."¹⁶⁴

Two courts in New York have purportedly rejected this property right concept in recent appropriation cases. In *Paulsen v. Personality*

157. See, e.g., Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954); Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U.L. REV. 553 (1960).

158. 96 N.J. Super. 72, 232 A.2d 458 (1967).

159. 316 F. Supp. 1277 (D. Minn. 1970).

160. 232 A.2d at 462 (citations omitted).

161. 316 F. Supp. at 1282.

162. *Id.*

163. 97 N.J. Super. 327, 235 A.2d 62 (1967).

164. 235 A.2d at 65.

Posters, Inc.,¹⁶⁵ the court rejected the concept, yet gave a semblance of credibility to the emerging right of publicity by isolating it from the traditional right of privacy. The lugubrious-faced comedian Pat Paulsen, in the midst of his sportive 1968 campaign for the Presidency, sued a poster company which had printed and sold a large picture of Paulsen with the words "For President" across the bottom. There was a good deal of conflicting evidence about how the publisher obtained the picture in the first place, and the court refused to hold the defendant liable. Citing *Time, Inc. v. Hill*, the *Paulsen* court noted that there were serious first amendment questions involved in the case: "When a well-known entertainer enters the presidential ring, tongue in cheek or otherwise, it is clearly newsworthy and of public interest. . . ."¹⁶⁶ The court recognized that what Paulsen sought was not protection for his privacy. That was the last thing Paulsen wanted: "What such a figure really seeks is a type of relief which will enable him to garner financial benefits from the pecuniary value which attaches to his name and picture."¹⁶⁷ The court acknowledged that this was called the right of publicity, a right which had been accorded some limited judicial recognition. But, it added, "the courts of this state have evidenced no inclination to adopt or follow such construction within the context of Section 51 [of the New York privacy statute]."¹⁶⁸

Man v. Warner Bros.,¹⁶⁹ like *Paulsen*, involved the deliberate publication of an entertainer's picture without his consent. In 1969 professional musician Frank Man stepped on stage during the four-day Woodstock Music Festival in Bethel, New York, and played "mess call" on his flügelhorn. Producers of the film "Woodstock" included Man's 45-second appearance in their film, and the musician sued on the ground that his likeness had been appropriated for a commercial film without his consent and without payment. The court rejected Man's claim, reasoning that the defendants' profit motive and commercial exploitation of the film "does not negate their right to depict a

165. 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968).

166. 299 N.Y.S.2d at 507.

167. *Id.* at 508.

168. *Id.*

169. 317 F. Supp. 50 (S.D. N.Y. 1970).

170. *Id.* at 52. *But see* *Fergerstrom v. Hawaiian Ocean View Estates*, 50 Hawaii 374, 441 P.2d 141 (1968); *Negri v. Schering Corp.*, 333 F. Supp. 101 (S.D. N.Y. 1971) (plaintiffs successful where name or likeness used in advertisement or for purely commercial purposes). In cases in which a clear commercial interest devoid of any public interest is *not* shown, plaintiffs are less often successful. *See, e.g.*,

matter of public interest"¹⁷⁰ The court then stated:¹⁷¹

[T]here was no invasion of any "right of privacy." Plaintiff, a professional entertainer, gave his show before a vast audience His grievance here is not the invasion of his "privacy"—privacy is the one thing he did not want, or need, in his occupation. His real complaint, and perhaps a justified one, but one we cannot redress in this suit brought under the New York "Right of Privacy" statutes, is that he was not paid

The right of publicity doubtless will continue to grow. But whether it will grow as a separate right, as suggested by Judge Frank, or displace the appropriation area of privacy law remains to be seen. Although now, even in the area of appropriation, first amendment language is creeping into opinions where it would not have been found prior to *Time, Inc. v. Hill*,¹⁷² there is no measurably greater protection of the press today than there was at the turn of the century.

VII. CONCLUSION

The lack of cataclysmic change in privacy law since *Time, Inc. v. Hill* can be explained by the fact that the first amendment rule directly impacts only one of the four areas of the invasion of privacy tort: publication of private information. Also, the "new" first amendment defense is in many ways closely akin to the defense of newsworthiness, which has long existed in the law of privacy. The law of libel, by comparison, went through far more revolutionary changes following *New York Times Co. v. Sullivan*, primarily because the rule struck directly at the vast majority of libel actions.

Roughly 75 years after Warren and Brandeis wrote their article, one may regret that those worthy gentlemen ever set pen to paper. It may now be desirable, as some have suggested,¹⁷³ to merge the law of

Rand v. Hearst Corp., 31 App. Div. 2d 406, 298 N.Y.S.2d 405 (1969); Pagan v. New York Herald Tribune, Inc., 32 App. Div. 2d 341, 301 N.Y.S.2d 120 (1969); Murray v. New York Magazine Co., 27 N.Y.2d 406, 267 N.E.2d 256, 318 N.Y.S.2d 474 (1971).

171. 317 F. Supp. at 53, quoting Chief Judge Desmond concurring in *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485, 489 (1952).

172. See, e.g., *Rand v. Hearst Corp.*, 31 App. Div. 2d 406, 298 N.Y.S.2d 405 (1969); *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968); *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970).

173. Prosser, *supra* note 3, at 401.

privacy and libel into a single tort. For example, the nondefamatory falsehood area of privacy law might be merged with the law of libel. The intrusion element of privacy law could be melded into trespass, and the appropriation area could be mixed with the law of literary property or contracts. Publication of private information could become an element, perhaps, of the even newer tort of intentional infliction of mental distress.¹⁷⁴ Such reworking of the law would, of course, eliminate much of the “law of privacy” in all jurisdictions except those few with privacy statutes. This would be desirable as a means of ordering the haphazardly created congeries of rulings we refer to as the law of privacy.

A merger of the law of privacy and libel, however, seems more unlikely as time passes and as each of the four areas of privacy law is defined with increasing particularity by its “own” case law. The privacy of individuals—variously defined from jurisdiction to jurisdiction—will continue to be protected in four-fifths of the states. Yet, with both the first amendment defense as construed by the Court in *Time, Inc. v. Hill*, and the traditional defense of newsworthiness, journalistic freedom should be well protected in actions based on private information or nondefamatory falsehoods. Only the most outrageous circumstances will enable a plaintiff to penetrate the media’s defenses. Thus, using a name or picture for commercial gain will continue to be actionable in nearly all cases. If reporters maintain traditional means of investigative reporting and eschew hidden cameras, microphones, bugs and similar surreptitious devices, the mass media can avoid exposure to actions claiming unlawful intrusion. Perhaps the only additional protection necessary to preserve the health and vitality of journalistic freedom of expression is to quarantine the unworkable, aberrant social policy approach within California’s borders and thus prevent infection of the remainder of the nation.

174. *Id.*