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Privacy v. The Press: Inevitable Conflict?

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COMMENTS

PRIVACY V. THE PRESS: INEVITABLE CONFLICT?

Two rights which are basic to a free society are privacy[1] and a free press.[2] There are times when these two basic freedoms have come together in a head-on collision. For example, when a national news story such as Watergate breaks, the press attempts to cover it as thoroughly as possible. Investigative reporting can lead to the periphery of the event and stories are printed about those who would desire to remain anonymous. One who has been catapulted into the spotlight may attempt to return to a "normal" life, but because of the relentlessness of the press, this is impossible. Yet the relentlessness of the press is acknowledged as having been a prime mover in bringing about the end of the Nixon administration.

This article will examine the inadequacy of courts' analyses of this conflict, in particular, the failure to examine the rationale supporting freedom of the press and how this failure affects a fair appraisal of the "right to privacy."

Since 1964 the United States Supreme Court has repeatedly decided cases[3] where plaintiffs have claimed an invasion of privacy by the press. *Time, Inc. v. Hill*[4] presented the situation where a private citizen suddenly became a public figure and despite all attempts to avoid publicity was repeatedly returned to the public eye. In September, 1952, the James Hill family was held hostage by three escaped convicts. They were released unharmed, and in a subsequent interview Mr. Hill emphasized that they had been treated courteously by the convicts. The family did their best to avoid the public spotlight and moved from Pennsylvania to Connecticut. In spite of this, a novel which roughly paralleled their experience was published. The

1. In recognizing the right to privacy the Supreme Court noted that such a right was older than the Bill of Rights. Griswold v. Connecticut, 481 U.S. 479, 486 (1965). In Olmstead v. United States, 277 U.S. 438, 478 (1928), Justice Brandeis' dissent stated that the right of privacy is "the most comprehensive of rights and the right most valued by civilized men."

2. U.S. CONST. amend. I.

3. The first of these cases was New York Times Co. v. Sullivan, 376 U.S. 272 (1964).

4. 385 U.S. 374 (1967).

book was made into a play, and *Life* magazine which was published by Time, Inc. printed a pictorial essay about the play. The article led the reader to believe that the play was a reenactment of the Hill family's experience. Photographs portrayed the son being "roughed up" and the father's foiled attempt to save his family. Hill brought his action under sections 50 and 51 of the New York Civil Rights Law.[5] Although section 50 is entitled "Right of Privacy," the Court noted that "the term nowhere appears in the text of the statute itself."[6] The Appellate Division of the New York Supreme Court had affirmed a jury verdict concerning the liability of Time, Inc.[7] Thus the conflict was presented to the Supreme Court. Hill asserted a statutory right of privacy, while Time, Inc. argued that the statute denied it the constitutional protections of speech and press.[8] The Court rejected Hill's argument and re-

5. The complete text of the N.Y. CIVIL RIGHTS LAW, §§ 50-51 (McKinney 1966) read as follows:

§ 50. Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. Action for injunction and for damages

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed, and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, protrait or picture of any author, composer or artist in connection with his literary, musical or artistic production which he has sold or disposed of with such name, portrait or picture used in connection therewith.

6. 385 U.S. at 381.

7. *Id.* at 379.

8. *Id.* at 376.

manded the case for further proceedings.

In arriving at this decision the Court relied on the standards set out in the leading case of *New York Times v. Sullivan*[9] where the Court held that even when published material about a public official contained false statements or was defamatory, a cause of action for libel did not necessarily exist.[10] The rationale for such a rule was that "freedom of expression upon public questions is secured by the First Amendment" and it "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social change . . . ."[11] The Court then held that a public official could not recover damages for a defamatory falsehood relating to official conduct unless "actual malice" could be proved. "Actual malice" was defined as knowledge that the statement was false or made with reckless disregard of whether it was false or not.[12]

In *Time, Inc.* the Court held that the New York Appellate Court was incorrect in holding that the *New York Times* "actual malice" test applied only when a public official was involved[13] and extended the *New York Times* test to matters of public interest.[14] According to the Court, only if Hill could prove that *Life* had published its report with knowledge of its falsity or in reckless disregard of the truth did he have a cause of action.[15]

The Court examined this statutory "right to privacy" as it had been interpreted by New York courts[16] and noted that because of "constitutional protections for speech and press, decisions under the statute have tended to limit the statute's application."[17] The Court questioned the constitutional validity of a statute which created a cause of action against the press

9. 376 U.S. 254 (1964).

10. *Id.* at 271.

11. *Id.* at 269. *Quoting* Roth v. United States, 354 U.S. 476 (1957).

12. *Id.* at 279-80.

13. 385 U.S. at 387.

14. *Id.* at 387-88.

15. *Id.* at 388.

16. The law upon which *Time, Inc.* was based was enacted in 1903 as a response to a court decision which held there was no common law right to privacy. The claim in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), was that the defendants had adorned their flour bags with plaintiff's picture without her consent. The court suggested that the legislature could provide that no one should be permitted for his own selfish purpose to use the picture or name of another without consent.

17. 385 U.S. at 382.

for publication of names or pictures of people without their consent. Therefore, the Court emphasized the fact that New York courts had held that truth was a complete defense to actions under the statute,[18] as it is for libel.

The *New York Times* case had applied the "actual malice" standard to a public official. *Time, Inc.* extended it to a newsworthy event. Shortly after the *Time, Inc.* decision, the Court extended the *New York Times* standard to material published about a public figure.[19] Finally, in *Rosenbloom v. Metromedia*[20] the Court stated:

> It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a "public official," "public figure," or "private individual," as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest.[21]

After *Rosenbloom*, it seemed that there was nothing that the press could cover which would not fall into one of the above classifications. In fact, one wonders whether the press reports what is newsworthy or whether that which the press reports becomes newsworthy. If the latter is true, then the "actual malice" standard applies to anything the press chooses to report.

The *Time, Inc.* Court traced the claim of a "right to privacy" to the celebrated article of Warren and Brandeis, entitled *The Right to Privacy*, published in 1890.[22] Therein privacy was simply defined as the "right of the individual to be let alone."[23] In discussing this "right to privacy" the Court, quoting an eminent constitutional scholar, stated that "it has been agreed that there is a generous privilege to serve the public interest in news . . . ."[24] The Court deemphasized the right to privacy and concentrated on the right of the press to report the news without considering whether both rights could be pro-

18. *Id.* at 384.
19. Curtis Publishing v. Butts, 388 U.S. 130, 154-55 (1967).
20. 403 U.S. 29 (1971).
21. *Id.* at 44.
22. 385 U.S. at 381.
23. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).
24. 385 U.S. at 383, n. 7 *quoting* Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 335-36 (1966).

tected. The Court observed that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community,"[25] and refused to tolerate even the slightest invasion of the right of free press. The Court noted that if freedoms of expression are to survive they must have "breathing space."[26] Finally, quoting James Madison, the Court stated: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press."[27] Consistent with the belief that the First Amendment is an absolute, Justices Black and Douglas in their concurring opinions emphasized that the decision did not go far enough in affording First Amendment freedoms proper protection.[28]

During the same period that the Court extended constitutional protection to all discussion involving matters of public or general concern, even if the discussion centered around a private citizen involuntarily thrown into the public eye and even if the publication was false,[29] it evolved the constitutional "right to privacy."[30] In *Griswold v. Connecticut*, the Court stated that "the First Amendment has a penumbra where privacy is protected from governmental intrusion"[31] and that this penumbra First Amendment right could be found in the Third, Fourth, Fifth and Ninth Amendments.[32]

In *Katz v. United States*[33] the Court held that an individual seeking privacy, even in an area accessible to the public, may be constitutionally protected; hence one who occupies a telephone booth considers his words private and the Constitution affords this protection.[34] Nevertheless, the Court did not translate the Fourth Amendment into a general constitutional "right to privacy." The Court emphasized that "the protection

25. 385 U.S. at 388.

26. *Id.*

27. *Id.* at 388-89, *quoting* 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876 ed.).

28. *Id.* at 398-411. *Accord*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 170 (1967) (Black, concurring and dissenting). *See also* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

29. Curtis Publishing Co. v. Butts, 388 U.S. 130, 152 (1967).

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

31. *Id.* at 483.

32. *Id.* at 484. The Court also cited numerous past decisions which had recognized a right to privacy. *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

33. 389 U.S. 347 (1967).

34. *Id.* at 352.

of a person's general right to privacy—his right to be let alone by other people—is . . . left largely to the . . . States."[35] What these decisions make clear is that although a constitutional right to privacy exists, it protects the individual from governmental, rather than private invasions of this right. Privacy, which is recognized as a constitutionally protected fundamental freedom when the government is the invader, has been relegated to a second-rate right when the press is the invader.

Just when it seemed clear that the Court would allow publication of anything about a public figure or a newsworthy event which was not published with "actual malice," *Gertz v. Welch*,[36] appeared. In that case, a Chicago policeman shot and killed a youth. The family of the youth retained Gertz, an attorney, to represent them in civil litigation against the policeman. Although Gertz had only a remote involvement in the prosecution of the policeman, he was attacked as the architect of the police officer's "frameup" by Robert Welch, Inc., which publishes the *John Birch Society* magazine.[37] The article also labeled Gertz a "Leninist" and "Communist fronter."

The Supreme Court reversed the trial and appellate courts' decisions that the *New York Times* rule applied to these facts.[38] The Court repudiated its extension of the *New York Times* standard to issues of "general or public interest" regardless of whether the individual was a public figure or an anonymous citizen[39] for the following reasons: First, public officials have a better opportunity to repudiate false statements. Secondly, one who involves himself in public life must accept certain necessary consequences, one of which is that the public is concerned with anything that might touch on fitness for office. Finally, the media is entitled to assume that public figures and officials have voluntarily exposed themselves to defamatory falsehoods.[40]

The *Gertz* Court emphasized that strict liability for defamatory statements was not permissible and held that where the defamatory statement "makes substantial danger to reputa-

35. *Id.* at 350-51.
36. 418 U.S. 323 (1974).
37. *Id.* at 326.
38. *Id.* at 332.
39. *Id.* at 346-47.
40. *Id.* at 344-45.

tion apparent" liability could be imposed.[41] It stated that the inquiry would be different if the statement did not make the substantial danger apparent and cited *Time, Inc.* as an example of a situation where the published material may not have made substantial danger to reputation apparent.[42] The question in *Time, Inc.*, however, was not whether the published material made substantial danger to reputation apparent, but rather whether actual malice was present. It would seem that a plaintiff would have a better chance of proving that publication made substantial danger to reputation apparent than of proving "actual malice." The reasoning of *Gertz* raises the question of whether a *Time, Inc.* case would be decided today differently than it was in 1967 by applying the "substantial danger" rather than "actual malice" standard.[43]

Commonwealth v. Wiseman[44] does not fall within the ambit of the libel and slander cases, but rather is based on an invasion of the right to privacy. The controversy centered around the showing of a documentary filmed at the Massachusetts Correctional Institute for insane criminals. The filmmaker had obtained prior permission from the Superintendent of Institutions to make the film, but when the Superintendent saw the finished product he objected on the grounds that the film "constituted an invasion of the privacy of the inmates shown in the film."[45] The trial and appellate courts agreed.

> The Commonwealth has standing and a duty to protect reasonably, and in a manner consistent with other public interests, the inmates from any invasions of their privacy substantially greater than those inevitably arising from the very fact of confinement.[46]

41. *Id.* at 347-48. The "substantial damages to reputation" standard had been used by Justice Harlan in Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) but the plurality had not accepted this standard.

42. *Id.* at 348.

43. In Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974), the Court stated that the District Judge had instructed that liability could be imposed only if the statements printed in the newspaper were made with knowledge of their falsity or in reckless disregard of the truth. *Supra* at 249-50. The Court went on to note that the case did not present the issue of whether a state may constitutionally apply a more relaxed standard of liability for publication of false statements under a "false light theory of invasion of privacy." *Supra* at 250. Thus the Court has again opened up another possibility of narrowing the application of the *New York Times* standard.

44. 356 Mass. 251, 249 N.E.2d 610 (1969), *cert. denied*, 398 U.S. 960 (1970).

45. *Id.* at ___, 249 N.E.2d at 613.

46. *Id.* at ___, 249 N.E.2d at 615.

The court held that while the film could not be shown to the general public, it could be shown to legislators, doctors, students and others dealing with social problems and custodial care.[47] It also modified the trial court's order by allowing Mr. Wiseman to alter the film for possible commercial distribution.

The court distinguished this case from cases such as *Time, Inc.* on the ground that they permitted publication of newsworthy events where the public interest in reasonable dissemination of news was treated as more significant than the interest of the individual to privacy.[48] The court did not deal with the question of whether the conditions at the correctional institute were a newsworthy event and therefore was not forced to balance the right to privacy with the media's First Amendment right to present the film.

Although a "right to privacy" has been recognized as having constitutional dimensions, it has not been viewed as a general right and when it has collided with the freedom of the press, the press has prevailed. As a result of such a resolution of the conflict, a number of problems have not been adequately addressed. The first stems from the Court's comparison of libel and slander cases to the invasion of privacy cases.[49] Truth is a defense in the former, but there appears to be no reason why that should be the case in the latter. Application of the *New York Times* standard totally disregards the fact that truth is often more offensive than defamatory statements.[50] A lawyer examining *New York Times* and its progeny would find nothing to help the client who has been catapulted into the public eye with the concomitant result of publication of long dormant, true information. The published material may or may not have anything to do with the event which threw the individual into the spotlight but is titilating and therefore, for some reason, publishable. For example, does the trial of Patricia Hearst entitle the press to publish any material it feels may interest the public? Or does the fact that Lynnette Fromme attempted to assassinate the President mean that a national newsmagazine has a right, guaranteed by the First Amendment, to pub-

47. *Id.* at ___, 249 N.E.2d at 618.

48. *Id.* at ___, 249 N.E.2d at 617.

49. Time, Inc. v. Hill, 385 U.S. 374, 384, n. 9 (1967). *See* Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

50. Lusky, *Invasion of Privacy: A Classification of Concepts*, 72 COLUM. L. REV. 693, 697 (1972).

lish photos of Ms. Fromme in the nude?[51]

The second problem is that even when the case is a libel case, the Court has failed to analyze the rationale of the freedom of the press. Or where the Court has attempted analysis, it has failed to specifically address whether the *New York Times* standard should be applied when an invasion of privacy is claimed. The rationale for freedom of the press is based, in part, on a belief that a free press facilitates the search for truth and concomitantly, is a means of securing governmental honesty.[52] In *Curtis Publishing Co. v. Butts*, the Court stated:

> The guarantees of freedom of speech and press were not designed to prevent the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seem absolutely essential . . . .[53]

Yet the meaning of the right to a free press has not remained the same throughout our Constitutional history and has meant different things to different men sitting on the Court at the same time.[54]

One of the earliest of the precedent-setting free press cases,[55] *People v. Croswell*,[56] provides one court's concept of the meaning of the First Amendment and is of assistance to the modern legalist in searching for the balance between privacy

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51. *Time*, Sept. 15, 1975, at 11.

52. J. MILTON, AREOPAGITICA, in THE TRADITION OF FREEDOM 1, 28 (Mayer ed. 1957); *See* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J. concurring) (holding overruled); Brandenburg v. Ohio, 395 U.S. 444 (1969), wherein it was stated that the First Amendment freedoms were an institutionalization of the belief "that the final end of the state was to make men free to develop their faculties . . . ." The founders "believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth." *See also* Hastie, *Free Speech: Contrasting Constitutional Concepts and their Consequences*, 9 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 428, 432 (1974). *But see* DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 190 (1972).

53. 388 U.S. at 150.

54. The First Amendment has not always limited the government so that it could make "no law . . . abridging the freedom of . . . the press." *See e.g.*, the Sedition Act, 1 STAT. 596 (1798). In addition, opinions on how the amendment should be applied differ. *Compare* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Justice Brennan writing for the court) *with* the concurring opinion of Justice Black in that same case. *Id.* at 293.

55. Justice Jackson dissenting in Beauharnois v. Illinois, 343 U.S. 250, 295 (1952), described *Croswell* as "the leading state case."

56. 3 Johns. Cas. 337 (1804), reprinted in 1 N.Y. Common Law Rep. 717.

and press. Croswell had been convicted of libel for printing an editorial that accused Thomas Jefferson of paying another to call "Washington . . . a traitor, a robber, and a perjurer . . . ."[57] The question on appeal was whether truth was a defense, and the court found that it was.[58] The court stated that liberty of the press "consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy or individuals."[59] A government which allows a free press is fulfilling the obligation which Madison described in the *Federalist No. 51*, as the obligation "to control itself." This decision, which has been viewed as a great victory for the press,[60] recognized some limitations on a free press.

The *Croswell* court viewed the protection to be accorded the press in terms of the need for a free press. A return to the concept of publishing "truth, with good motives, and for justifiable ends" may be impossible because of the difficulty of defining "good motives" or "justifiable ends." Yet this very standard, coupled with the reasoning of the *New York Times* case and its companion, *Garrison v. Louisiana*,[61] could protect the right to a free press and the private citizen from having his privacy invaded in the name of the First Amendment. Justice Brennan stated that "speech concerning public affairs is more than self expression; it is the essence of self government . . . [and therefore] should be uninhibited robust and wide open."[62] Thus the *New York Times* standard should operate when the material published concerned "public affairs," but a more stringent standard should apply when the material concerned a private citizen. The standard would require not only that the published matter be true but that it pertain to events which threw the individual into the public eye and that it satisfy some public need for the published material. But if the published material appears on a public record, there can be no claim of invasion of privacy.[63] Similarly no claim of privacy should be made when consent to publish has been obtained.[64]

57. 3 Johns. Cas. at 338, 1 N.Y. Common Law Rep. at 717.

58. *Id.* at 394, 1 N.Y. Common Law Rep. at 735

59. *Id.* at 393-94, 1 N.Y. Common Law Rep. at 735.

60. Forkosch, *Freedom of the Press: Croswell's Case*, 33 FORD. L. REV. 415 (1965).

61. 379 U.S. 64 (1964).

62. *Id.* at 74.

63. Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975).

64. Beytagh, *Privacy and a Free Press*, 20 N.Y.L.F. 453, 498 (1975). *See also* Neff v. Time, Inc., 44 L.W. 2373 (1976).

Consent could be either express or implied as, for example, where one had consented to publication of a photograph by one's posing for it.

Of course, such a standard would draw courts into the morass of determining what is and is not relevant and necessary. But, the standard is not invalid merely because a difficult question is presented or because the solution is just as difficult. The individual does have a constitutionally protected right to privacy. Respecting this right when the government invades, while refusing to do so when the press invades is illogical. The right exists, therefore courts must attempt to protect it and must cease evading the issue with statements such as "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community."[65] Whose idea of a "civilized community"? Reasonable restrictions upon the exercise of First Amendment rights are permissible.[66] The Court has held that laws which regulate conduct within the power of the state or federal government but do not directly infringe upon First Amendment rights can be upheld if the effect on these rights is minor in relation to the need for controlling the conduct.[67]

Therefore, this author suggests that the right to privacy cannot be ignored where it conflicts with the right to a free press. Society's need for a free press must be balanced with the individual's right to privacy. It is extremely difficult for publishers and the courts to determine what is "relevant" or "necessary," but the attempt must be made in order to protect the individual. To say that the determination of what is or is not relevant is too fine a line to draw ignores the fact that courts make just as difficult decisions every day. When faced with a free press issue, courts should look beyond the language of the *New York Times* case and conform their decisions to the rationale of the right to a free press. In so doing, the free press shall be protected; matters of public concern will be published without threat of liability; and undue invasion of the individual's right to privacy will cease.

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65. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967). *See* Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

66. *E.g.*, Citizens Publishing Co. v. United States, 394 U.S. 131 (1969); Near v. Minnesota, 283 U.S. 697 (1931).

67. *E.g.*, Cantwell v. Connecticut, 310 U.S. 269 (1940); NAACP v. Button, 371 U.S. 415 (1963).