The Citizen's Right to Privacy: Basis in Common Law

PETER A. LANCE

Peter A. Lance received his A.B. from Northwestern University (1971), his M.S. from Columbia University, where he was Consumer Reports Fellow (1972), and his J.D. from Fordham University School of Law (1978). A former journalist and documentary filmmaker, he has been the recipient of three Emmys, two San Francisco State Broadcast Awards, the Roy W. Howard Award of the Scripps Howard Foundation, the Ohio State Award, and the Gabriel Award. In 1974 he won the Robert F. Kennedy Journalism Award for his production of The Willowbrook case: The people v. the State of New York. *He is co-author of* The Nader report: The workers *(1971), and a novel,* The short, thick man *(1979). Currently, Mr. Lance is a producer for ABC News.*

On the afternoon of September 22, 1975, Sara Jane Moore pointed a .38 caliber revolver at President Gerald R. Ford as he was leaving the St. Francis Hotel in San Francisco. As she pulled the trigger, a man standing nearby knocked her arm downward. The gun discharged, but the bullet missed its mark. President Ford was unharmed. Sara Jane Moore was taken into custody, and Oliver W. Sipple, the 32-year-old ex-Marine who had spoiled her shot, found himself, all at once, a national hero (Note 1).

As the media spotlight focused on Sipple, reporters learned that he was an active member of San Francisco's gay community. Word of his homosexual ties flashed across the country (Note 2). The private life of the

man who saved the President became public, and Oliver W. Sipple filed a $15,000,000 damage suit for invasion of privacy (Note 3).

In essence, the Sipple case represents another face-off in the constant tug-of-war between two important interests in American society: the right of the press to inform vs. the right of the individual to be left alone. Both interests are protected by law; but while the right to publish is grounded firmly in the First Amendment, the right of privacy is somewhat more abstract (Bloustein, 1974). The word "privacy" does not appear in the Constitution, and not until 1965, in the landmark *Griswold* decision, did the Supreme Court elevate the "right to privacy" to constitutional status (Note 4). Since then, the Court has limited the constitutional privacy "right" to "matters relating to marriage, procreation, contraception, family relationships, . . . child-rearing and education" (Note 5). Moreover, since the Constitution protects citizens only from the power of government, not from each other, the constitutional "right of privacy" is relevant only to incursions by the state (Richards, 1977, 1980).

The privacy case of Oliver W. Sipple falls outside the constitutional sphere, yet his cause of action has survived a motion for summary judgment and continues through the California courts. For Mr. Sipple is seeking redress under a privacy theory grounded not so much in the Constitution as in common law (Dionisopoulos & Ducat, 1976; Parker, 1974).

THE RIGHT OF PRIVACY

Legal History

Prior to 1890 there was no legal theory upon which an American citizen whose privacy was breached could recover damages in a court of law. The common law of torts provided a host of remedies for civil wrongs but, like the Constitution, was devoid of any cause of action for invasion of privacy. At the same time, not a single state or federal statute recognized personal privacy as an interest worthy of protection.

Then, sometime in the late 1890s, a prominent Boston matron named Mrs. Samuel D. Warren held a series of elaborate social entertainments at her home. The daughter of Senator Bayard of Delaware, Mrs. Warren was the wife of a paper magnate who had recently given up the practice of law. Her social affairs were immensely popular among the Brahmin elite of Marlborough Street and Beacon Hill, and the object of intense coverage by the Boston press. The *Saturday Evening Gazette* which specialized in "blue blood" items reported on Mrs. Warren's parties in highly personal and embarrassing detail. After the particularly lurid coverage of her daughter's wedding, Mrs. Warren became annoyed and turned to her husband for help. Mr. Warren proceeded to consult his

former partner, Louis D. Brandeis, a man who would not be forgotten by history (Prosser, 1960).

Tort Theory in Common Law

Since there was no recognized legal theory upon which Mrs. Warren might counter the excesses of the "yellow journalist" press, Mr. Warren and Mr. Brandeis set about to devise one. The result was an article published in the *Harvard Law Review* of December 15, 1890 (Warren & Brandeis, 1890). No other single law review piece has had a comparable impact on American law. Almost three-quarters of a century after its publication, William L. Prosser, the dean of contemporary tort law, wrote an article in the *California Law Review* (Prosser, 1960). After painstaking research he identified more than 300 cases traceable to the privacy principles set forth by Warren and Brandeis. Eleven years later, in the fourth edition of his encyclopedic *Handbook of the Law of Torts*, Prosser (1971) noted that privacy-case law had grown by another 100 decisions. Today, largely as a result of the legal scholarship of Warren, Brandeis, and Prosser, the "right of privacy" has become central to the law of torts. It has been recognized by statute or common law in 40 states and the District of Columbia, and it is viewed by a number of First Amendment scholars as the single greatest counterweight to the power of the press (Abrams, 1977).

The *tort* privacy theory therefore runs parallel to the *constitutional* privacy principles set forth in *Griswold* and its progeny. While the constitutional "right of privacy" offers some protection against incursions by the state, the tort theory provides a broader remedy for breaches of privacy by persons or entities outside government. It is upon this latter theory of civil redress that Oliver W. Sipple has mounted his case; or, more accurately, he has mounted it upon *one* of the privacy-tort theories (Prosser, 1971; Prosser & Wade, 1971). As Prosser discovered, the case law which followed the Warren and Brandeis article developed along four separate lines. Today the all-embracing tort known as "invasion of privacy" actually comprises four distinct kinds of invasion of four distinct privacy interests. Roughly defined, the four torts have generally been set forth as follows:

(1) *public disclosure* of embarrassing private facts about the plaintiff;
(2) *intrusion* upon the plaintiff's seclusion or solitude, or into his private affairs;
(3) publicity which places the plaintiff in a *false light* in the public eye; and
(4) *appropriation* for the defendant's advantage of the plaintiff's name, image, or likeness [Prosser, 1960, p. 389].

As we consider the categories one by one, the reader should bear in mind the countervailing interests at work. It may be fairly stated that whatever is added to the field of privacy is taken from the field of free discussion and business enterprise. Thus, in this area of the law there has been continuing conflict between the press and the private person, a conflict which has produced partial victories for both sides.

PUBLIC DISCLOSURE OF PRIVATE FACTS

Setting in Warren–Brandeis Article

Warren and Brandeis forged their privacy theory by extracting principles from existing common law remedies. Piecing together prior decision where relief had been granted for defamation, invasion of property rights, and breach of confidence, they concluded that the law had always supported "the general right of the individual to be let alone" (1890, p. 195). Later, their reasoning would be used to mount lawsuits against a host of defendants, both corporate and individual. But Warren and Brandeis made no secret of the fact that their privacy remedy was being offered primarily as a shield against the press:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column after column is filled with idle gossip which can only be procured by intrusion upon the domestic circle [p. 196].

Prior to the Warren–Brandeis treatise, the traditional remedy for injury to reputation was an action for defamation, which included the torts of slander (by spoken word) and libel (by printed, and later broadcast, matter). A defendant could invariably defeat a libel or slander claim, however, by showing that the defamatory matter uttered or printed was *true* (Prosser, 1971, p. 796). Under the privacy theory advanced by Warren and Brandeis truth was no longer a defense. As they saw it, privacy "implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all" (1890, p. 218).

Thus, in the first case known to rely on the public disclosure theory, a newspaper was enjoined from publishing a picture of an actress clad in tights (Note 6). There was no dispute as to whether the young lady's legs were accurately reproduced. The issue was whether a newspaper could reproduce them without her consent. The court thought not, and the first of four privacy categories was born. Over the years the public disclosure tort grew in several directions.

Growth of Public Disclosure Tort

In 1927 a man named Brents put up a sign in the window of his garage which read:

> Dr. W. R. Morgan owes an account here of $49.67. And if promises would pay an account this account would have been settled long ago. This account will be advertised as long as it remains unpaid [Note 7].

Shocked at the public airing of his indebtedness and lacking a remedy in libel because of the truthfulness of the notice, Dr. Morgan sued Mr. Brents and collected $1,000 for invasion of privacy.

In 1931 the tort was expanded to provide protection for the embarrassing disclosure of facts pertaining to plaintiff's early life. In the 1920s a young prostitute named Gabrielle Darley had been the defendant in a sensational murder trial (Note 8). Once acquitted, she repented, abandoned her life of shame, and married a respectable man named Melvin. For the next seven years she lived a quiet life in polite society among friends who knew nothing of her past. Then a motion picture company released a film called *The Red Kimono*, depicting the true story of Gabrielle Darley and disclosing Mrs. Melvin's current identity. Her new life was shattered, and she went to court. The Fourth District Court of Appeals in California held that the unnecessary use of Mrs. Melvin's name and the revelation of her past to new friends constituted an actionable invasion of her right of privacy.

Eight years later recovery was permitted where a plaintiff's name was used in the radio dramatization of a robbery in which he was the victim (Note 9). At the same time various state courts broadened the public disclosure theory to protect against revelations of embarrassing physical traits. Relief was granted where x-rays of a woman's pelvic region were used in a newspaper (Note 10); where the photograph of a plaintiff's deformed nose was published in a medical journal (Note 11); and where a doctor attempted to use pictures of a patient's facial disfigurement taken while the patient-plaintiff was unconscious (Note 12).

Limits to its Application

The public disclosure tort came to protect a wide range of personal interests, but it was not without limits. First, as Prosser (1960) noted, the disclosure of private facts had to be "a public disclosure and not a private one" (p. 393). In short, for a plaintiff to recover he had to show that he had been the victim of *publicity* in some form (Bloustein, 1964, 1968).

The debtor–creditor cases provide good examples of what the courts meant by "publicity." As mentioned above, the posting of a public notice that a plaintiff did not pay his bills was held to be an invasion of privacy

(Note 7). The same result was found where a plaintiff's debts were published in a newspaper (Note 13) or shouted aloud in the public streets (Note 14). But the mere communication of a plaintiff's indebtedness to his employer or even to a small group of people proved insufficient grounds for recovery (Note 15).

Furthermore, the cases almost uniformly held that the facts disclosed to the public must be *private* facts and not public ones. Thus, matters such as a plaintiff's date of birth or marriage (Note 16), his occupation, and his military service record (Note 17) were held to be outside the scope of the public disclosure tort. Even Warren and Brandeis acknowledged that information contained in public records (1890, pp. 216–217) should be exempt, and in 1975 the United States Supreme Court agreed. In *Cox Broadcasting Corporation v. Cohn* (Note 18), the father of a rape victim sued the parent company of a television station which had disclosed the young girl's name on its evening news program. In rejecting the father's public disclosure claim, the Court per Mr. Justice White held that ". . . the prevailing law of privacy generally recognizes that the interests in privacy fade when the information already appears on the public record" (Note 18, p. 1046).

By the same reasoning courts over the years have denied recovery where plaintiffs were photographed in public places such as streets (Note 19), markets (Note 20), courtrooms (Note 21), and sporting events (Note 22). Again, the thinking has been that there is no harm in "giving publicity to what is already public and what anyone present would be free to see" (Prosser, 1960, p. 395). Of course, where plaintiffs were filmed in private places such as a hospital bed (Note 23) or operating room (Note 12), relief was granted. So also, a cause of action was upheld when hospital orderlies, in a breach of faith, made public the picture of a deformed child, and a newspaper published it (Note 24).

A third limitation on the public disclosure tort was a long-standing requirement that the matter made public be such that it would offend "a reasonable man of ordinary sensibilities" (Prosser, 1960, p. 396; Note 25). Here the pre-eminent case is *Sidis v. F–R Publishing Corporation* (Note 26). William James Sidis was an infant prodigy who had graduated from Harvard at the age of 16, having lectured to noted mathematicians on the fourth dimension as early as at the age of 11. In his late teens Sidis underwent an unusual psychological change. He experienced a revulsion toward mathematics and the publicity which his early accomplishments had brought him. Dropping from public view, he led an obscure life as a bookkeeper, spending his off-hours collecting streetcar transfers and studying the folklore of the Okamakammessett Indians. In 1937 his desire to remain aloof was ruined when *The New Yorker* published an article describing his present whereabouts and activities as part of a regular feature entitled "Where Are They Now?" The account was not unflatter-

ing but the effect on Sidis was devastating, and he brought suit for invasion of privacy.

The Second Circuit Court of Appeals held that Sidis had no cause of action since there was nothing in the magazine story which would have been objectionable to a normal person. A lower federal court had already distinguished the *Sidis* case from *Melvin v. Reid* (Note 8), where the one-time prostitute was allowed recovery. In *Melvin*, the court noted, the plaintiff sustained "an unwarranted attack upon her reputation," whereas Sidis was depicted in "a fair statement of facts relating to him" (Note 26, p. 21). Prosser saw the difference between the two cases in terms of a "mores" test, under which courts were more prone to condemn publicity surrounding "those things which the customs and ordinary views of the community will not tolerate" (1960, p. 397).

INTRUSION ON PRIVATE AREAS

Application of This Tort

The very term "invasion of privacy" suggests some sort of physical violation of the privacy interest. Yet Warren and Brandeis, in focusing their logic on the press, appeared concerned less with the *act* of intrusion and more with its publication and embarrassing effect. In fact, by Prosser's count, the tort of intrusion predated the famous *Harvard Law Review* piece by nine years. The seminal case involved a young Michigan woman named Roberts who lay in the pangs of childbirth one dark and stormy night (Note 27). Her husband summoned the country physician, a Dr. Demay, who was forced to travel a great distance by horseback to reach her. Feeling sick and tired from overwork, Dr. Demay requested the company of a man called Scattergood to carry his lantern, umbrella, and medical instruments. At the Roberts house the two men were admitted, and soon with Scattergood's help the child was delivered. Later, upon learning that Scattergood was a layman, and an *unmarried* layman at that, the shocked Mrs. Roberts brought suit. Observing that "the plaintiff had a legal right to the privacy of her apartment at such a time" (Note 27, p. 162), the court awarded Mrs. Roberts substantial damages without specifying the grounds.

Over the years the tort of intrusion took on a broader legal profile. It came to serve as a remedy for all violations of a plaintiff's rightful physical solitude or seclusion (Ezer, 1961). The protected areas were held to include a plaintiff's home (Note 28), his temporary quarters (Note 29), and even the parcels which he carried into a public store (Note 30). Three separate jurisdictions allowed recovery to the victims of Peeping Toms (Prewett, 1951), and the tort was also used to stop harassing phone calls by creditors (Note 31). Eventually the principle was extended to

forbid non-physical intrusions by means of telephoto lens, wiretap, or microphone (Note 32). It was on this theory that consumer watchdog Ralph Nader was able to collect a $425,000 settlement from General Motors Corporation (GM) after a federal court recognized a prima facie case against the big automaker for intrusion by "unauthorized wiretapping and eavesdropping" (McGarry, 1972, p. 28; Note 33).

Some Limitations Imposed

As the courts acknowledged a wider zone of privacy, they also limited the intrusion tort on three fronts. First, to invoke the remedy, a plaintiff had to demonstrate something in the nature of "prying or intrusion" (Prosser, 1960, p. 391). Hence, noises which disrupted a religious service (Note 34), name-calling, and obscene gestures in public (Note 35) were insufficient to merit relief. The courts also demanded that the privacy intrusion be of the sort which would offend a reasonable man. As a result, a Kentucky judge dismissed the claim of an irate tenant who became incensed when his landlord stopped by to collect the rent on a Sunday morning (Note 36).

The paramount limit on the intrusion tort was the requirement that the area or interest invaded be one which was entitled to privacy. Thus, where the police, acting within their power, subjected a plaintiff to post-arrest fingerprinting, photographing, and search, he had no cause of action (Note 37). Similarly, on the street or in a public place a plaintiff had no right to be left alone. He had no remedy if his picture was taken or even if he was followed about (Note 38). In response to Mr. Nader's claim that GM had him "shadowed," the federal court noted that "mere observation of a plaintiff in a public place does not amount to an invasion of his privacy." Still, the court observed, "under certain circumstances, surveillance may be so 'overzealous' as to render it actionable" (Note 33, p. 563).

Such was the case in 1972 when Jacqueline Onassis, the widow of President John Kennedy, filed a $1,500,000 damage suit against photographer Ron Galella for invasion of privacy, assault, harassment, and intentional infliction of mental distress (Note 39). Galella, self-styled *papparazzo*, made his living by snapping pictures of the rich and famous. His particular approach involved the close shadowing of subjects, capturing them on film at times when they were offguard. One such encounter with actor Marlon Brando resulted in fisticuffs, and Galella sustained a broken jaw.

For some time in the early 1970s Galella concentrated on Mrs. Onassis and her two children. The court record established that the photographer resorted to physical assaults, offensive language, and "incessant surveillance" in order to film the former First Family:

> Outside of movieland, reporters do not normally hide behind restaurant coat racks, sneak into beauty parlors, don "disguises," hide in bushes and theater boxes, intrude into school buildings, and, when ejected, enlist the aid of school children, bribe doormen and romance maids [Note 39, p. 198].

Finding that Galella had "insinuated himself into the very fabric of Mrs. Onassis' life," the court enjoined the photographer to remain a specified distance from the plaintiff and her children. Galella had claimed immunity in the action. He argued that the First Amendment shielded newsmen from any liability for their conduct while gathering the news. The court was not convinced: "Crimes and torts committed in newsgathering are not protected. . . . There is no threat to a free press in requiring its agents to act within the law" (Note 39, p. 987).

As we shall discuss later, the right of privacy has always been balanced by the courts against the right of the press to cover "public figures" and "matters of public interest" (Prosser, 1971, p. 823). At the same time, the intrusion tort, by its very nature, is often accompanied by charges that a defendant trespassed or subjected a plaintiff to mental distress. Thus, while the First Amendment might protect the right of a defendant to *publish* the results of his intrusion, it has generally been held to offer little protection against the act of intrusion itself. The primary case in point is that of *Dietemann v. Time, Inc.* (Note 40).

In November of 1963 *Life* magazine published an exposé entitled "Crackdown on Quackery." The article focused on one A. A. Dietemann, a journeyman plumber who claimed to be a scientist-healer. As noted by the court, Dietemann, "a disabled veteran with little education, was engaged in the practice of healing with clay, minerals, and herbs—as practiced, simple quackery."

Through an arrangement with the Los Angeles County District Attorney's office, two *Life* reporters entered Dietemann's home on September 20, 1963. One of the reporters, a Mrs. Jackie Metcalf, told Dietemann that she had a lump on her breast. Dietemann then placed his hand on her chest and proceeded to wave a wand of some kind over a series of gadgets. He concluded that Mrs. Metcalf had eaten rancid butter eleven years, nine months, and seven days prior to that time. The two reporters surreptitiously recorded the encounter by using a radio transmitter, and photographs were taken with a hidden camera. On October 15, 1963, Dietemann was arrested and charged with practicing medicine without a license. Following the publication of the *Life* story, he filed a suit for invasion of privacy.

A trial court ruled in favor of Dietemann and granted him $1,000 in general damages for "injury to [his] feelings and peace of mind." On appeal, defendant *Time Inc.* raised the First Amendment as a defense, arguing that the hidden camera and recorder were "indispensable tools of

investigative reporting." Writing for the Ninth Circuit Court of Appeals, Judge Shirley Hufstedler disagreed:

> The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office [Note 40, p. 247].

In conclusion, Judge Hufstedler clearly distinguished between the intrusion (which she held merited no protection) and the subsequent publication of the story and photographs (privileged under the First Amendment).

PLACING PERSON IN FALSE LIGHT IN THE PUBLIC EYE

Roots of this Tort

Publicity which places the plaintiff in "a false light in the public eye" is the third type of illegal invasion of privacy (Prosser, 1960, p. 398; Wade, 1962). The roots of this tort extend as far back as 1816 when Lord Byron was successful in enjoining the distribution of an inferior poem falsely attributed to his pen (Note 41). Since then the tort of false light has been invoked in several classes of cases where misrepresentation was the common element.

Following the thrust of Lord Byron's action, a number of cases involved the spurious use of plaintiffs' names. For example, in 1905 a Georgia policyholder sued his insurance company for the unsanctioned use of his picture and name along with a fictitious testimonial in a company advertisement (Note 42). In 1941 a public servant in Oregon brought suit when his name was signed to a telegram urging political action and addressed to the governor (Note 43). There has likewise been a host of suits involving books and articles falsely attributed to various plaintiffs (Note 44).

Another line of cases involved the use of plaintiffs' pictures to illustrate writings with which they had no connection. As we shall see, the "newsworthiness privilege" (Note 45) permitted such use in some instances. But recovery was granted in extreme cases where, for example, the images of innocent plaintiffs were used to set off stories on "dishonest cab drivers" (Note 46), "man-hungry women" (Note 47), "juvenile delinquents" (Note 48), and narcotics dealing (Note 49). In these cases there was also somewhat of an overlap with the appropriation tort which we shall examine later.

A third, more limited, category of false light actions involved the fictionalization of events involving actual identifiable persons. Here, as in *Dietemann*, the key case revolved around an article in *Life*.

Landmark Case

In 1952 three escaped convicts entered the Pennsylvania home of Mr. and Mrs. James J. Hill. For the next 19 hours the Hills and their five children were held prisoner (Note 50). Significantly, they were not molested or treated violently at any time during the siege. A few days after the incident two of the three escapees were killed in a shoot-out with police.

The following year Joseph Hayes (1954) wrote a best-selling novel based on the seizure of the Hills. It was entitled *The Desperate Hours.* The Hills were not mentioned by name in the book, but the author peppered the story of their ordeal with a number of incidents which never occurred. For example, the family in the novel was made to suffer violently at the hands of the convicts. The father and son were beaten and the daughter subjected to verbal sexual insult. Later the novel was adapted as a Broadway play.

In 1955 *Life* published an article about the play, illustrated with pictures shot at the Hill home where the actual drama had taken place. The actors from the play were portrayed under a headline which read: "True Crime Inspires Tense Play." One picture was captioned "Brutish Convict." Another showed an actress in the role of the daughter biting the hand of one of the convicts in an attempt to force him to drop his gun. The caption read "Daring Daughter." This time the Hill family was named, and they filed suit for invasion of privacy. The case of *Time, Inc. v. Hill* went all the way to the United States Supreme Court, and the holding was something of a landmark. While the Court noted the validity of the false light tort, it held that liability could be established only upon the showing of "malice" or "reckless disregard for the truth" (Note 50, p. 382).Thus, the Court recognized a major limitation on the false light tort where media defendants were involved.

In 1974 the Supreme Court held to its rigid standard of proof in *Cantrell v. Forest City Publishing Co.* (Note 51). That case involved a *Cleveland Plain Dealer* story on the family of a bridge-collapse victim. The reporter who wrote the piece interviewed and photographed the children of the victim while their widowed mother was not at home. In the subsequent article he stressed the family's "abject poverty, the children's old, ill-fitting clothes and the deteriorating conditions of their home." The story contained a number of inaccuracies and falsehoods, not the least of which was the distinct implication that Mrs. Cantrell had been present during the reporter's visit. The Cantrells brought suit against the publishing company, arguing that the story placed them in a "false light" and made them the object of pity and ridicule. On appeal the Supreme Court underscored the "actual malice" standard of *Time, Inc. v. Hill* (Note 50), but ruled in the Cantrells' favor. Thus, while false light cases have be-

come more difficult to win, damages are not beyond reach if a plaintiff can show that the offending publisher acted with "actual malice" or "reckless disregard for the truth."

COMMERCIAL APPROPRIATION AND EXPLOITATION

Protection of Person's Image

Warren and Brandeis centered their privacy thesis in the right of a plaintiff to be free from damaging disclosures. Yet the bulk of early privacy-case law focused on another interest: the right of a plaintiff to protect his name, image, or likeness from commercial exploitation.

The first recorded case in this sphere concerned one Abigail Roberson, a woman of considerable pulchritude, who found her likeness on thousands of boxes of flour (Note 52). Not having consented to the use of her picture, Abigail Roberson brought suit against the Rochester Folding Box Company. In a 4–3 decision, the New York Court of Appeals held against her. The court could find no legal precedent for granting relief. Outraged at the ruling, the New York legislature enacted what became the first privacy statute in the country, making it both a crime and a tort to appropriate the name or likeness of any person for "trade purposes" without his or her consent (Note 53).

The first judicial acceptance of appropriation as a tort came in *Pavesich v. New England Life Insurance Co.* (Note 42). The 1905 Georgia case concerned a newspaper advertisement featuring an unauthorized picture of Pavesich proclaiming that he had bought life insurance and was the better man for it. Ruling counter to the New York Court of Appeals, the Georgia Supreme Court found a common law right of privacy and reversed a trial court's order dismissing Pavesich's complaint. Prosser came to recognize this precedent-setting case as a basis for the false light tort category as well as the seminal ruling against appropriation.

Whether based on statute or the common law, the holdings in favor of plaintiffs in appropriation actions have been legion. A Los Angeles woman named Marion Kerby recovered when a movie studio promoting the motion picture *Topper Returns* sent out letters signed, "Your ectoplasmic playmate, Marion Kerby" (Note 54). A young Illinois girl collected after her photograph was used to promote the sale of dog food (Note 55), and a North Carolina woman obtained relief when a snapshot of her in a bathing suit found its way into a newspaper ad for a slimming product (Note 56).

As we shall discuss, the courts have traditionally ruled in favor of the media when the privacy interests of "public figures" were in question. Nonetheless, the courts have recognized the right of all persons (even

celebrities) to protect their names and images from "commercial use." For example, Warren Spahn, the famous Milwaukee Braves pitcher, was awarded $10,000 following the publication of his unauthorized and fictionalized biography (Note 57). This book dramatized such matters as Spahn's relationship with his father, his war record, the courtship of his wife, and even his private thoughts while on the pitcher's mound. Although the recovery was granted under New York's Appropriation Statute, the court recognized elements of all four tort categories including public disclosure, false light, and intrusion.

Still, in the interests of the First Amendment, the courts have strictly construed the term "commercial use" where "public figures" have been the subject of coverage in bona fide reports (Prosser, 1971, p. 806; Note 58). In such instances relief under the appropriations tort has generally been denied, even though the media outlets which published the reports clearly were profit-making entities.

Contrasting Decisions

The United States Supreme Court radically altered that view in 1976 in the case of *Zacchini v. Scripps Howard Broadcasting Co.* (Note 59). Billed as a "human cannonball," Zacchini was an entertainer who performed the feat of being shot from a cannon into a net some 200 feet away. His entire performance lasted approximately 15 seconds. In August and September of 1972 Zacchini was hired to present his act at the Geauga County Fair in Burton, Ohio. He regularly performed in a fenced-in area for members of the public who paid an admission fee to enter the fairgrounds. When a local television station videotaped his performance and aired it in its entirety on a newscast, Zacchini brought suit. After a trial court dismissed his complaint, the Ohio Court of Appeals held that the plaintiff had stated a proper cause of action for infringement of common law copyright. One concurring justice found that Zacchini had a healthy appropriation cause of action, based on his "right of publicity." The entire court agreed that the First Amendment did not privilege the television station where the plaintiff's entire act was telecast.

On appeal, the highest court in Ohio agreed with the concurring justice and rested Zacchini's claim on the "right to publicity," but ultimately the court ruled in favor of the media defendant, relying on *Time, Inc. v. Hill* (Note 50). The Supreme Court reversed. In a 5–4 decision Mr. Justice White noted the distinction between *Time, Inc. v. Hill* and the case at bar. *Time, Inc. v. Hill*, he observed, was a false light action in which the First Amendment interest won out over the interest of "reputation." By contrast, he noted, the "right of publicity" in *Zacchini* was a "proprietary interest . . . closely analogous to the goals of patent and copyright law."

In conclusion, Justice White declared that "the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent" (Note 59, pp. 4956–4957).

The common thinking among First Amendment scholars is that *Zacchini* will have limited application because there are very few "entire acts" which can be accommodated within a news broadcast. Still, it is a noteworthy decision, for it reveals something of the Burger Court's priorities when the privacy interest is measured against the media's right to publish.

NEWSWORTHINESS DEFENSE: A LIMIT TO PRIVACY

Warren and Brandeis acknowledged that "the right to privacy does not prohibit any publication of matter which is of public or general interest." Moreover, they insisted that "to whatever degree . . . a man's life has ceased to be private . . . to that extent the protection [of privacy] is to be withdrawn" (1890, pp. 214–215). Thus, without ever expressly mentioning the First Amendment, the fathers of the privacy tort planted the seed for what became the greatest limit on "the right to be let alone"—the "newsworthiness" defense. Over the years that defense served to defeat privacy claims in two of the tort spheres where the press was most often the defendant: public disclosure and false light. Accordingly, most state and federal courts refused to grant relief where actions involved "public figures" or "matters of public interest" (Prosser, 1960, p. 411).

Assessing the case law, Prosser described a "public figure" as "a celebrity—one who by his own voluntary efforts has succeeded in placing himself in the public eye," or "anyone who has arrived at a position where public attention is focused upon him as a person" (1960, pp. 410–411). This category was held to include actors (Note 60), athletes (Note 61), public officers (Note 62), inventors (Note 63), explorers (Note 64), and war heroes (Note 65).

The term "public interest" came to have more to do with the public "curiosity" then the public "good." "News" was defined as "that indefinable quality of information which arouses public attention" (Note 66), and banking on the First Amendment, the courts generally acknowledged the press as the final arbiter in such contexts. Thus, a number of people "caught up and entangled in the web of news and public interest" were held to be beyond the protection of the privacy tort, and those who found themselves "public figures for a season," whether they had sought out the limelight or not, could not recover damages against the media (Prosser, 1960, p. 413). This list of plaintiffs included the innocent victims of crime and tragedy as well as eccentrics. William James Sidis, the math–*Wunderkind*-turned-recluse, was among this group (Note 26). In throwing out Sidis' privacy suit, Judge Charles E. Clark concluded that "at some

point the public interest in obtaining information becomes dominant over the individual's desire for privacy" (Note 26, p. 811). As to when that "point is reached," the courts have yet to agree on a uniform test.

THE CONSTITUTIONAL PRIVILEGE

Extension of Press Protection

In the mid 1960s the "newsworthiness" defense was raised to the level of "constitutional privilege" through a series of decisions by the Supreme Court. First acknowledged in the landmark libel involving *New York Times Co. v. Sullivan* (Note 67), the privilege was later extended to the privacy sphere in *Time, Inc. v. Hill* (Note 50).

Prior to the *New York Times* decision, the truth of a matter published was sufficient to defeat any defamation claim, but there was some concern that even the defense of truth would be an inadequate shield for the press as it began to report on the civil rights movement in the South (Abrams, 1977). The fear among some First Amendment scholars was that libel actions brought by southern officials might inhibit coverage of the struggle for equality. It was in this climate that the Supreme Court used the *New York Times* case to expand the umbrella of press protection.

Montgomery, Alabama, Police Commissioner L. B. Sullivan had sued the *Times* for publishing an advertisement containing minor factual errors about police handling of the Freedom Riders Movement. Although he was neither named nor indirectly referred to in the advertisement, Commissioner Sullivan alleged that he had been personally defamed. Since Alabama did not recognize a limited press privilege for good faith misstatements of fact, Sullivan was awarded $500,000 by a trial jury for injury to reputation. The Alabama Supreme Court affirmed the holding.

Reversal by the United States Supreme Court was unanimous:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct, unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not [Note 67, pp. 279–280].

The theory of the holding was that the Constitution is best served by the free discussion of public interest matters.

In 1967 the Supreme Court extended the "constitutional privilege" to include coverage of "public figures" as well as "public officials" (Note 68). Four years later in *Rosenbloom v. Metromedia* (Note 69), a plurality opinion, Mr. Justice Brennan suggested that the "privilege" hinged, not on the status of the party defamed, but on a consideration of whether

the defamatory publication concerned a matter of "public or general interest." Sixteen states followed this rationale. In those jurisdictions, whenever a story in question was deemed to affect "the public interest," liability was limited to a showing by the plaintiff that the media defendant was guilty of "malice" or "reckless disregard." In a sense, this approach harked back to the common law "newsworthiness" defense in the privacy sector.

Its Subsequent Restriction

Then in 1974, a decade after the *New York Times* ruling, the Supreme Court put the brakes on the media's expanding "constitutional privilege" to defame. In *Gertz v. Robert Welch* (Note 70) the Court overruled *Rosenbloom*, limiting the "constitutional privilege" once again to coverage of "public officials" and "public figures."

In recent years the Supreme Court has further narrowed the scope of the media "privilege" by limiting the "public figure" category (Note 71). Still, the impact of the "privilege" upon the law of privacy has been profound. In *Time, Inc. v. Hill* (Note 50), the *Desperate Hours* case, the Court extended the *New York Times* rule to false light privacy actions, and, at the same time, expanded the rule to protect even "matters of public interest." Here the Court did not limit the "privilege" to the coverage of "public officials" or "public figures," as it did in the defamation sphere.

After *Time, Inc. v. Hill*, a plaintiff "linked to . . . a matter of public interest" had to prove "malice" or "reckless disregard" in order to collect against a media outlet which cast him in a false light. Since the public disclosure tort involves the publication of true facts, the *New York Times* "actual malice" rule does not apply. Still, there is a growing controversy among First Amendment scholars as to whether or not the press should have some special protection against the public disclosure cause of action. In *Cox Broadcasting Corporation v. Cohn* (Note 72), the Court recognized the television station's "privilege" to publish the name of a rape victim, but limited its holding to the facts of the case. Thus far, in the balancing test between the privacy interest and the right to publish, the Supreme Court has refused to tip the scales in either direction for public disclosure of private facts.

CONCLUSION

The privacy claim of Oliver W. Sipple hangs on such a balancing test. Sipple, whose heroic act literally thrust him into the public eye, was clearly a "public figure" at the time he saved the President's life. But did his public figure status render his entire life subject to public scrutiny? Did the "public interest" in Sipple extend to his sexual preference? Lawyers

for the *Los Angeles Times* have argued that its coverage of Sipple's background was "responsive to the consistent urging of the homosexual community that news respecting its activities be published," and that "such news would have the effect of dispelling stereotypes . . . respecting those involved in the gay community as being weak or ineffectual" (Note 73, p. 3).

Sipple's attorney has countered by questioning whether his client would have acted "if he had known that saving the life of the . . . President would subject his sex life to the speculation and scrutiny of the national news media" (Note 74, p. 6). In a recent California decision the Ninth Circuit Court of Appeals fashioned a test for public disclosure actions which may control the Sipple case.

> The line is to be drawn when publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public with decent standards would say that he had no concern [Note 45, p. 1129].

The final outcome in the Sipple case may not be known for years. Just what effect, if any, that decision will have on the public disclosure tort is unclear. But one point is certain. If the media defendants are victorious, the credit (or blame) must be shared in part with the men who framed the First Amendment. At the same time, if Oliver W. Sipple prevails, he need look to only three individuals to pay his respects: Samuel D. Warren, Louis D. Brandeis, and William L. Prosser. For the birth and development of the American tort of privacy must surely be laid to them.

REFERENCE NOTES

1. *Los Angeles Times*, September 23, 1975, I, 1, 2, 3.
2. *Los Angeles Times*, September 25, 1975, I, 1, 34; September 26, 1975, I, 3, 23; September 27, 1975, I, 23.
3. *Oliver W. Sipple v. The Chronicle Publishing Company*. Superior Court of the State of California for the City and County of San Francisco, Docket No. 695–989.
4. *Griswold v. Connecticut*. U.S., 1965, 381, 479.
5. *Paul v. Davis*. 96 S. Ct. 1155, 1166 (1976).
6. *Manola v. Stevens*. N.Y. Sup. Ct., 1890; *The New York Times*, June 15, 18, 21, 1890.
7. *Brents v. Morgan*. 221 Ky. 765; 299 S. W. 967 (1927).
8. *Melvin v. Reid*. 297 Pac. 91 (1931).
9. *Mau v. Rio Grande Oil, Inc.* 28 F. Supp. 845 (N.D. Cal. 1939).
10. *Banks v. King Features Syndicate*. 30 F. Supp. 352 (S.D.N.Y. 1939).
11. *Griffin v. Medical Society*. 11 N.Y.S. 2d. 109 (Sup. Ct. 1939).
12. *Clayman v. Bernstein*. 38 Pa. D & C 543 (C.P. 1940).
13. *Trammell v. Citizens News Co*. 148 S.W. 2d. 708 (1941).
14. *Biederman's of Springfield, Inc. v. Wright*. 322 S.W. 2d. 892 (1959); *Tollefson v. Price*. 430 P. 2d. 990 (1967).

15. *Timperley v. Chase Collection Service.* 77 Cal. Rptr. 782 (1969); *Harrison v. Humble Oil & Ref. Co.* 264 F. Supp. 89 (D.C.S.C. 1967); *French v. Safeway Stores, Inc.* 430 P. 2d. 1021 (1967).
16. *Meetze v. Associated Press.* 95 S.E. 2d. 606 (1956).
17. *Stryker v. Republic Pictures Corp.* 238 P. 2d. 670 (1951); *Continental Optical Co. v. Reed.* 86 N.E. 2d. 306 (1949).
18. *Cox Broadcasting Corporation v. Cohn.* 95 S. Ct. 1029 (1975).
19. *Humiston v. Universal Film Mfg. Co.* 178 N.Y.S. 752 (1919).
20. *Gill v. Hearst Pub. Co.* 253 P. 2d. 441 (1953).
21. *Berg v. Minneapolis Star & Tribune Co.* 79 F. Supp. 957 (1948).
22. *Gautier v. Pro-Football, Inc.* 304 N.Y. 354 (1952).
23. *Barber v. Time, Inc.* 159 S.W. 2d. 291 (1942).
24. *Bazemore v. Savannah Hospital.* 155 S.E. 194 (1930).
25. *Reed v. Real Detective Pub. Co.* 162 P. 2d. 133 (1945). *Davis v. General Finance & Thrift Corp.* 57 S. E. 2d. 225 (1950). *Samuel v. Curtis Pub. Co.* 122 F. Supp. 327 (N.D. Cal. 1954).
26. *Sidis v. F-R Publishing Corporation.* 113 F. 2d. 806 (2d. Cir. 1940), affirming 34 F. Supp. 19 (S.D.N.Y. 1938).
27. *DeMay v. Roberts.* 46 Mich. 160, 9 N.W. 146 (1881).
28. *Young v. Western & A. R. Co.* 148 S.E. 414 (1929).
29. *Newcomb Hotel Co. v. Corbett.* 108 S.E. 309 (1921); *Byfield v. Candler.* 125 S.E. 905 (1924).
30. *Sutherland v. Kroger Co.* 110 S.E. 2d. 716 (1959).
31. *Carey v. Statewide Finance Co.* 233 A. 2d. 405 (1966).
32. *Rhodes v. Graham.* 37 S.W. 2d. 46 (1931) (wiretap); *McDaniel v. Atlanta Coca-Cola Bottling Co.* 2 S.E. 2d. (1939); *Roach v. Harper.* 105 S.E. 2d. 564 (W. Va. 1958) (microphone).
33. *Nader v. General Motors Corporation.* 25 N.Y. 2d. 560 (1970).
34. *Owen v. Herman.* 11 W. & S. Pa. 548 (1841).
35. *Lisowski v. Jaskiewicz.* 76 Pa. D & C 79 (C.P. 1950); *Christie v. Greenleaf.* 78 Pa. D & C 191 (C.P. 1951).
36. *Horstman v. Newman.* 291 S.W. 2d. 567 (1956).
37. *Voelker v. Tyndall.* 75 N.E. 2d. 548 (1947); *McGovern v. Van Riper.* 54 A. 2d. 469; *Norman v. City of Las Vegas.* 177 P. 2d. 442 (1947); *Walker v. Lamb.* 254 A. 2d. 265 (1969).
38. *Chappell v. Stewart.* 33 A. 542 (1896); contra: *Pinkerton Detective Agency v. Stevens.* 132 S.E. 2d. 119 (1963).
39. *Galella v. Onassis.* 353 F. Supp. 196 (S.D.N.Y. 1972); affirmed in part: 487 F. 2d. 986 (1973). Originally, Galella brought suit in federal district court asking $1.3 million in damages from Mrs. Onassis, her two children, and three Secret Service agents assigned to protect them. Galella alleged false arrest and malicious prosecution and sought to enjoin their interference with the practice of his trade. The district court dismissed Galella's complaint and denied his motion to dismiss Mrs. Onassis' countersuit.
40. *Dietemann v. Time, Inc.* 449 F. 2d. 245.
41. *Lord Byron v. Johnston.* 2 Mer. 29, 35 Eng. Rep. 851 (1816).
42. *Pavesich v. New England Life Insurance Co.* 50 S.E. 68 (1905).
43. *Hinish v. Meier & Frank Co.* 113 P. 2d. 438 (1941).
44. *D'Altomonte v. New York Herald Co.* 154 App. Div. 453 (1913); *Hogan v. A. S. Barnes & Co.* 114 U.S.P.Q. 314 (Pa. C.P. 1957).
45. *Virgil v. Time, Inc.* 527 F. 2d. 1122 (1975), cert. den. 44 U.S.L.W. 3670 (May 24, 1976).
46. *Peay v. Curtis Pub. Co.* 78 F. Supp. 305 (D.D.C. 1948).

47. *Martin v. Johnson Pub. Co.* 257 N.Y.S. 2d. 409 (Sup. Ct. 1956).
48. *Metzger v. Dell Pub. Co.* 207 Misc. 182, 136 N.Y.S. 2d. 888 (Sup. Ct. 1955).
49. *Thompson v. Close-Up, Inc.* 277 App. Div. 848, 98 N.Y.S. 2d. 300 (1950).
50. *Time, Inc. v. Hill.* U.S. 1967, *385*, 374.
51. *Cantrell v. Forest City Publishing Co.* U.S., 1974, *419*, 245.
52. *Roberson v. Rochester Folding Box Co.* 171 N.Y. 538 (1902).
53. New York Sess. Laws, 1903, ch. 132, sec. 1–2. Now as amended in 1921, N.Y. Civil Rights Law, sec. 50–51. Held constitutional in *Rhodes v. Sperry & Hutchinson Co.*, 193 N.Y. 223 (1908), affirmed, U.S. 1911, *220*, 502.
54. *Kerby v. Hal Roach Studios.* 127 P. 2d. 577 (1942).
55. *Eick v. Perk Dog Food Co.* 106 N.E. 2d. 742 (1952).
56. *Flake v. Greensboro News Co.* 195 S.E. 55 (1938).
57. *Spahn v. Julian Messner, Inc.* 18 N.Y. 2d. 324; 274 N.Y.S. 2d. 877 (1966).
58. *Colyer v. Richard K. Fox Pub. Co.* 162 App. Div. 297 (1914); *Booth v. Curtis Pub. Co.* 223 N.Y.S. 2d. 737, affirmed 11 N.Y. 2d. 907 (1962).
59. *Zacchini v. Scripps Howard Broadcasting Co.* 45 U.S.L.W. 4954–4959 (1977).
60. *Paramount Pictures v. Leader Press.* 24 F. Supp. 1004 (1938); *Chaplain v. National Broadcasting Co.* 15 F.R.D. (S.D.N.Y. 1953).
61. *Ruth v. Educational Films.* 184 N.Y.S. 948 (1920).
62. *Martin v. Dorton*, 50 So. 2d. 391 (1951) (sheriff); *Hull v. Curtis Pub. Co.* 125 A. 2d. 644 (1956) (policeman).
63. *Corliss v. E. W. Walker Co.* 64 Fed. 280 (Mass. 1894).
64. *Smith v. Suratt.* 7 Alaska 416 (1912).
65. *Stryker v. Republic Pictures Corp.* 238 P. 2d. 670 (1951).
66. *Sweenek v. Pathe News.* 16 F. Supp. 746, 747 (E.D.N.Y. 1936).
67. *New York Times Co. v. Sullivan.* U.S., 1964, *376*, 254.
68. *Curtis Publishing Co. v. Butts.* U.S., 1967, *388*, 130. *Associated Press v. Walker.* U.S., 1967, *388*, 130.
69. *Rosenbloom v. Metromedia.* U.S., 1971, *403*, 29.
70. *Gertz v. Robert Welch.* U.S., 1974, *418*, 323.
71. *Time, Inc. v. Firestone.* U.S., 1976, *424*, 448.
72. *Cox Broadcasting Corporation v. Cohn.* U.S. 1975, *420*, 469.
73. *Oliver W. Sipple v. The Chronicle Publishing Co.* Docket No. 695–989; Notice of Motion by Times, Mirror and Chandler for Summary Judgment and Memorandum of Points and Authorities in Support Thereof; January 2, 1976.
74. *Oliver W. Sipple v. The Chronicle Publishing Co.* Docket No. 695–989; Opposition of Motion for Summary Judgment per John Eshleman Wahl.

REFERENCES

Abrams, F. The press, privacy, and the constitution. *The New York Times Magazine*, August 21, 1977.

Bloustein, E. J. Privacy as an aspect of human dignity: An answer to Dean Prosser. *New York University Law Review*, 1964, *39*, 962–1007.

Bloustein, E. J. Privacy, tort law, and the constitution: Is Warren and Brandeis' tort petty and unconstitutional as well? *Texas Law Review*, 1968, *46*, 611–629.

Bloustein, E. J. The first amendment and privacy: The Supreme Court justice and the philosopher. *Rutgers Law Review*, 1974, *28*, 41–96.

Dionisopoulos, P. A., & Ducat, C. R. *The right to privacy.* St. Paul: West, 1976.

Ezer, M. J. Intrusion on solitude. *Law in Transition*, 1961, *21*, 63–76.

Hayes, J. *The desperate hours.* New York: Random House, 1954.

McGarry, C. *Citizen Nader.* New York: Saturday Review Press, 1972.

Parker, R. B. A definition of privacy. *Rutgers Law Review*, 1974, *27*, 275–296.
Prewett, B. Crimination of Peeping Toms and other men of vision. *Arkansas Law Review*, 1951, *5*, 388–389.
Prosser, W. L. Privacy. *California Law Review*, 1960, *48*, 383–423.
Prosser, W. L. *Handbook of the law of torts* (4th ed.). St. Paul: West, 1971.
Prosser, W. L., & Wade, J. W. *Cases and materials on torts.* Mineola, N.Y.: Foundation Press, 1971.
Richards, D. A. J. Unnatural acts and the constitutional right to privacy: A moral theory. *Fordham Law Review*, 1977, *45*, 1281–1348.
Richards, D. A. J. The jurisprudence of privacy as a constitutional right. In W. C. Bier (S.J.) (Ed.), *Privacy: A vanishing value?* New York: Fordham University Press, 1980.
Wade, J. W. Defamation and the right of privacy. *Vanderbilt Law Review*, 1962, *15*, 1093–1125.
Warren, S. D., & Brandeis, L. D. The right to privacy. *Harvard Law Review*, 1890, *4*, 193–220.