The First Amendment Privilege and Public Disclosure of Private Facts

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COMMENTS

THE FIRST AMENDMENT PRIVILEGE AND PUBLIC DISCLOSURE OF PRIVATE FACTS

Defame, v.t. To lie about another.
To tell the truth about another.
Ambrose Bierce
The Devil's Dictionary

"The press is overstepping in every direction the obvious bounds of propriety and of decency," warned Samuel Warren and Louis Brandeis in their famous 1890 law review article, The Right to Privacy. They were concerned not with false or libelous reporting but with the disclosure of true facts about an individual's private life and affairs with which the community had "no legitimate concern." To deal with the subject of their apprehension, Warren and Brandeis developed the invasion of privacy concept into an actionable tort.

Nearly a century later, with the tremendous growth of the mass communications media and its impact on American society, the Warren and Brandeis warning remains timely. Not surprisingly, tort law concerning invasions of privacy has mushroomed in the attempt to keep abreast of the media explosion. Recent decisions by the United States Supreme Court, however, by attempting to shield the press against tort recovery through the broad implementation of the first amendment privilege, have thrown the entire area into a state of uncertainty.

Public disclosure of private facts is one of several causes of action recognized in tort law for invasion of privacy. It arises when there has

2. Id. at 214.
5. The division of invasions of privacy into four distinct causes of action seems to have been first recognized by Prosser. See Prosser, Privacy, 48 Calif. L. Rev. 383

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been "publicity, of a highly objectionable kind, given to private information about the plaintiff, even though it is true that no action would lie for defamation." Because no issue of falsification is involved, allowing recovery against the press for such disclosure has been acknowledged as an area which most directly confronts the guarantees of the first amendment.

In light of the first amendment privilege, the viability of applying a tort remedy for public disclosure of private facts against the media is an issue which has caused significant debate among commentators, and one which has yet to be squarely dealt with by the United States Supreme Court. This article will explore the competing interests of the right of society to a free and unhampered press and the right of the individual to be protected from unwanted and undesirable publicity. An attempt will be made to determine what kind of accommodation, if any, is possible between these rights under the United States Constitution and, if reconciliation is possible, whether the tort remedy for public disclosure of private facts by the press is suitable.

I. PUBLIC DISCLOSURE OF PRIVATE FACTS

Before analyzing the constitutional issues, a brief examination of the traditional tort remedy for public disclosure of private facts is essential. The gravamen of public disclosure, as it will be convenient to label the tort in question, is the revelation of true, private facts concerning a plaintiff. In order to give rise to a cause of action, three requirements must be met: first, the disclosure must be public, which is automatically the case when made by the news media; second, the facts involved must be of a private, confidential nature; third, the subject matter of the disclosure must be one that a reasonable person of ordinary sensibilities would find offensive and objectionable.

Public disclosure must be distinguished both from other forms of invasion of privacy and from defamation. The latter is concerned with the dissemination of falsehoods, while the tort of public disclosure involves the truth. Placing an individual in a false light before the public eye, usually referred

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6. PROSSER § 117, at 809.
10. PROSSER § 117, at 810-11.
to as a "false light" action, is a distinct cause of action for invasion of privacy,\(^\text{11}\) as is that of appropriation, in which an individual's name or image is used for the commercial benefit of another.\(^\text{12}\) Prying into the personal affairs of an individual by such objectionable means as illegally entering a home or electronically eavesdropping on a conversation is actionable under another invasion of privacy tort, known as intrusion.\(^\text{13}\) Should facts ascertained by intrusion subsequently be published, a cause of action for either public disclosure or intrusion could be supported.\(^\text{14}\)

Two major defenses can be asserted in a public disclosure action. The first is that of consent,\(^\text{15}\) in which, for example, one entering into a contract whereby his picture is to be published is foreclosed from asserting that the publication infringes on his right to privacy.\(^\text{16}\) The second defense, based on the right to discuss and report on matters of public interest, is now covered by the first amendment privilege and is discussed below.\(^\text{17}\)

II. THE TRADITIONAL PUBLIC INTEREST EXCEPTION

The conflict of values inherent in encouraging public disclosure and freedom of the press was recognized early in the development of the tort.\(^\text{18}\) Warren and Brandeis dealt with the problem by exempting "matter which is of public or general interest" from liability.\(^\text{19}\) This public interest determination was to be made by looking to the qualified privilege of "fair comment" under the common law rules of defamation.\(^\text{20}\)

Under the Warren and Brandeis view, the public interest exception was to apply primarily to "public figures," who were to be denied recovery to the


\(^{13}\) See PROSSER § 117, at 807-09. See, e.g., Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964) (listening device installed in plaintiff's bedroom).

\(^{14}\) This interrelationship is discussed in detail at pp. 294-96 infra. Of course, no double recovery would be possible.

\(^{15}\) See PROSSER § 117, at 817.

\(^{16}\) Id.


\(^{18}\) See Warren & Brandeis, supra note 1, at 214.

\(^{19}\) Id. "Fair comment," the qualified privilege under common law to discuss matters of public concern, is discussed in PROSSER § 118, at 822-23.
degree that they had renounced their right to privacy.\textsuperscript{21} The intent behind the distinction between public and private figures was to encourage commentary on public officials and candidates for public office.\textsuperscript{22} While the judicial development of public disclosure seems to reflect acceptance of these ideas,\textsuperscript{23} the courts did not limit the public figure classification to officials and candidates. The concept, as developed by the case law, included "a person who, by his accomplishments, fame or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a public personage . . . ."\textsuperscript{24} Included in this group were such luminaries as entertainers,\textsuperscript{25} sports figures,\textsuperscript{26} and war heroes.\textsuperscript{27}

The demarcation of the category, albeit somewhat subjective, was less troublesome to the courts than was a determination of the extent of the publicity to be permitted. Obviously, no cause of action would lie for publicity concerning the source of the public figure's fame or notoriety.\textsuperscript{28} The privilege, however, was held to be broader than this. As one frequently quoted opinion expressed the problem:

Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency. But when focused upon public characters, truthful comments upon dress, speech, habits, and the ordinary aspects of personality will usually not transgress this line.\textsuperscript{29}

\begin{thebibliography}{9}
\bibitem{21} Warren & Brandeis, \textit{supra} note 1, at 215.
\bibitem{22} \textit{Id.} at 216.
\bibitem{23} \textit{See, e.g.}, Werner v. Times-Mirror Co., 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961); Martin v. Dorton, 210 Miss. 668, 50 So. 2d 391 (1951). Invasion of privacy actions by public officials do not appear to be common. It is perhaps more politic for an official to either ignore a story or to deny the truth of the matter and sue for defamation.
\bibitem{24} PROSSER \textsuperscript{2} \textsuperscript{118}, at 923. The definition is adapted from Cason v. Baskin, 159 Fla. 31, 30 So. 2d 635 (1947).
\bibitem{26} \textit{See, e.g.}, Cohen v. Marx, 94 Cal. App. 2d 704, 211 P.2d 321 (Dist. Ct. App. 1949) (suit by unsuccessful prize fighter for derogatory comments broadcast about him by Groucho Marx).
\bibitem{28} \textit{See RESTATEMENT (SECOND) OF TORTS}, Explanatory Notes \textsuperscript{2} \textsuperscript{652F}, comment c, at 128 (Tent. Draft No. 13, 1967) [hereinafter cited as RESTATEMENT.] Tentative Draft No. 21, April 5, 1975, indicates that the comments to the final volume will be substantially the same as the comments to Tentative Draft No. 13. Tent. Draft No. 21, \textit{supra}, at 87.
\bibitem{29} Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), \textit{cert. denied}, 311 U.S. 711 (1940).
\end{thebibliography}
Thus, a public disclosure offensive to the reasonable person and possibly actionable for a private individual would not be actionable for a public figure in most instances.

The courts also applied the public interest exception to “involuntary public figures,”$^{30}$ private individuals who are involved in “matters of the kind customarily regarded as ‘news.’”$^{31}$ It was recognized that the need of society for news generally outweighed the desire of the individual to be left alone, and no recovery was allowed victims of such press accounts as those disclosing the birth of a baby to a 12-year-old mother,$^{32}$ the grief of a widow who had just watched her husband murdered by hoodlums,$^{33}$ or the identity of those suspected of a crime.$^{34}$

Again, there exists the problem of to what extent publicity concerning such involuntary public figures should be permitted. As with voluntary public figures, the privilege is “not limited to the particular events which arouse the interest of the public.”$^{35}$ Rather, it extends to information concerning the individual’s private life, disclosure of which would be actionable for a private figure.$^{36}$ However, recovery was permitted when the disclosure was found to offend community standards of decency,$^{37}$ or when the court determined that the facts disclosed were not sufficiently “newsworthy” to fall within the privilege.$^{38}$

The public interest exception, embodied by these rather amorphous rules, was thus employed by the courts to protect the media from recovery for public disclosure of private facts until the Supreme Court entered the arena with the mandates of the first amendment.

30. See cases cited notes 32-34 infra.
31. Restatement, Explanatory Notes § 652F, comment e, at 129. The comment explains that “to a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm.” Id. Judicial attempts to define the term have been no more successful. See, e.g., Gallela v. Onassis, 353 F. Supp. 196 (S.D.N.Y. 1972) (“News is real; Gallela promotes the phony.” Id. at 217).
35. Restatement, Explanatory Notes § 652F, comment f, at 130.
36. Id.
37. See, e.g., Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964) (photograph of plaintiff with her dress blown over her waist). The phrase “matters of public interest” was interpreted broadly by the courts, and recoveries were infrequent. See cases cited notes 32-34 supra.
38. See, e.g., Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942) (identity of plaintiff with rare disease not newsworthy even if the disease was newsworthy).
III. THE IMPACT OF THE FIRST AMENDMENT PRIVILEGE

Warren and Brandeis could not have foreseen that 75 years after the publication of *The Right to Privacy*, the “fair comment” exception to defamation, upon which they based the public interest exception to privacy, would be raised from a qualified privilege to a constitutional imperative. In 1964, in *New York Times Co. v. Sullivan*, the Supreme Court held that the first amendment prohibited a public official from recovering in a libel action for statements relating to his official conduct unless they were made with “malice,” that is, with knowledge of their falsity or reckless disregard for whether or not they were false.

In 1967, in *Time, Inc. v. Hill*, the Supreme Court applied this standard to a “false light” privacy action in which private individuals complained that a magazine article about their experience as hostages of escaped convicts inaccurately identified them as the protagonists of a new play which portrayed a similar fictional incident. The basic holding of *Hill*, that false reports of private individuals by the press will be tolerated unless they are published with the requisite malice, is obviously not applicable to the public disclosure of true facts. The idea behind the holding, however, and the foundation for both *Hill* and the *New York Times* line of cases, has great bearing on the subject. The press was protected from the consequences of disseminating falsehoods negligently, as opposed to a requirement of gross negligence or knowledge of falsity, so that it will not be induced to practice self-censorship or shrink from the role it plays in the constitutional system of maintaining the “uninhibited, robust, and wide-open” public debate central to the first amendment. Alexander Meiklejohn, the original proponent

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39. 376 U.S. 254 (1964) (advertisement recounting harassment of Martin Luther King by Montgomery, Alabama officials contained inaccuracies about police action).
of this theory, explained the rationale for this approach: "Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express." Since voter acquisition of these traits can only come about through uninhibited debate, first amendment protection is essential. Under this theory, speech which relates to and aids in self-government is entitled to absolute protection. To facilitate uninhibited debate, false statements made in the course of self-governing speech are protected unless they are made with malice.

The majority opinion in Hill, authored by Justice Brennan, interpreted the concept of self-governing speech broadly, since "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs ...." To afford the press sufficient breathing space to flourish without fear of liability, information concerning any "matter of public interest" must be brought under the first amendment's shield.

holding the press responsible for negligent falsehoods as opposed to malice was described by Justice Brennan as follows:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . "self-censorship" . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

Id. at 279.


45. Professor Meiklejohn expands on the self-governing speech concept in this manner:

The First Amendment does not protect a "freedom to speak." It protects the freedom of those activities of thought and communication by which we "govern" . . . . We, the people who govern, must try to understand the issues which, incident by incident, face the nation. We must pass judgment upon the decisions which our agents make upon those issues. And, further, we must share in devising methods by which those decisions can be made wise and effective or, if need be, supplanted by others which promise greater wisdom and effectiveness . . . . These are the activities to whose freedom it gives its unqualified protection.

Meiklejohn, supra note 44, at 255.


47. Id. at 388.

48. Id. Under the Hill view, even speech which is "entertainment" must come within
Unfortunately, the outer boundary of this protected area is vaguely drawn, reference being made only to the tort standard of an event materially outrageous to community notions of decency.\textsuperscript{40}

Application of the theories put forth in \textit{Hill} to the tort of public disclosure is clear. Disclosures which fall within the area of self-governing speech deserve first amendment protection; this has been recognized by the courts.\textsuperscript{50} Furthermore, the analogy can be made between toleration of falsehoods disseminated by the press to foster self-governing speech and toleration of disclosure of private and embarrassing facts concerning individuals. The full effect of this interpretation of the first amendment, however, cannot be determined so facilely. Is public disclosure swallowed up by the first amendment privilege, as one distinguished commentator has suggested,\textsuperscript{51} or has the traditional public interest exception merely been given a constitutional imprimatur? In order to explore the problem thoroughly, the varying classifications of “public figures” must be determined.

\textbf{A. Public Officials}

Public disclosure of private facts about public officials and candidates for public office presents the least difficulty in this area of the law. The public’s need to know details of the lives of officials and candidates relevant to their fitness for office is crucial to self-government, and much which might be held beyond the bounds of the press for private individuals is undeniably within bounds for candidates and officials.\textsuperscript{52} One court stated in applying the \textit{Hill} standard in a political candidate’s public disclosure action:

\begin{quote}
the ambit of the first amendment since the line between “entertainment” and “information” can be elusive. \textit{Id.} This is in accord with Professor Meiklejohn’s interpretation. \textit{See} Meiklejohn, \textit{supra} note 44, at 257.
\textsuperscript{51} \textit{See} Kalven, \textit{supra} note 8, at 336. For the suggestion that the first amendment privilege should be limited to defamation and not applied to public disclosure at all, see Nimmer, \textit{The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy}, 56 \textit{CALIF. L. REV.} 935 (1968).
\textsuperscript{52} For example, exposure of a long forgotten criminal record which might be actionable concerning a private individual would be privileged as to a public official or candidate. \textit{Compare} Briscoe v. Reader's Digest Ass'n, Inc., 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), \textit{with} Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).
\end{quote}
Because of their public responsibilities, government officials and candidates for such office have almost always been considered the paradigm case of "public figures" who should be subjected to the most thorough scrutiny. In choosing those who are to govern them, the public must, of course, be afforded the opportunity of learning about any facet of a candidate's life that may relate to his fitness for office.\textsuperscript{53}

The attitude expressed is close to the original Warren and Brandeis conception of the public interest exception, making this one area of disclosure in which the advent of the first amendment privilege has effected little change.

There remains a problem, however, of the degree of incursion into the life of a candidate or official which should be allowed. The \textit{New York Times} standard has been held to apply to an official such as the auditor of a county waterworks.\textsuperscript{54} Clearly, such a figure has not renounced his right to privacy to the same degree as has the President of the United States, though both are estopped from recovering for injury incurred through publication of matters relating to their fitness for office. It would be reasonable to assume, however, that the President is subject to revelations having little to do with his fitness for office, perhaps because he is a voluntary public figure to a much greater extent than the auditor.\textsuperscript{55} In dealing with this problem, the California courts take into account "the extent to which the party voluntarily acceded to a position of public notoriety"\textsuperscript{56} in determining whether a news item is privileged in a privacy action.

Another unresolved difficulty is the possible application of the community standard test in actions involving revelations about a public official. It would seem that a disclosure of private facts relating to an individual's fitness for office, no matter how shocking or intimate, would be within the purview of self-governing speech and thus protected. Yet the Supreme Court has declared that "some aspects of the lives of even the most public men fall outside the area of matters of public or general concern."\textsuperscript{57}

\textsuperscript{55} The President is, generally speaking, a public figure as well as a public official, while the accountant is a public figure only to the extent that his office and position in the community make him one.
\textsuperscript{57} Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971). "This is not the less true because the area of public concern in the cases of candidates for public office and of elected public officials is broad." \textit{Id.} at 48 n.16. This issue is examined at p. 295 \textit{infra}. 
B. Voluntary Public Figures

The development of the voluntary public figure classification within the traditional public interest exception to public disclosure has been discussed previously.\(^5\) The impact of the New York Times and Hill standards on this rather amorphous rule does not greatly affect the previous rules. When dealing with a public disclosure suit by an obvious celebrity, such as one involving an account of the business and social career of Howard Hughes, the court will merely utilize the first amendment privilege rather than the public interest exception to label him a public figure and deny recovery.\(^5\) While in such a case the relation between the public disclosure and self-governing speech is not as clear as the situation in which the person involved is in or is seeking public office, the situation is nevertheless well within the ambit of public interest marked by Hill.\(^6\)

More difficult is the determination of the extent of publicity that will be permitted, and the impact of the community standard test. A well-publicized example puts the problem in proper perspective. Jacqueline Kennedy Onassis undoubtedly possesses the qualifications of a public figure. The first amendment privilege as it applies to Ms. Onassis' tort remedy for disclosure can be examined in light of three specific instances. The first, and the only one which has been considered by the courts,\(^6\) concerns the campaign of photographer Ron Gallela to record nearly every moment of Ms. Onassis' waking existence for the edification of the public. In dealing with her invasion of privacy claim against Gallela, the United States District Court for the Southern District of New York easily established that she was "a public figure, whose life has included events of great public concern."\(^6\) Applying the self-governing speech criterion of the first amendment in a balancing test, the court held that matters relating to those events clearly outweighed Ms. Onassis' right to privacy.\(^8\) However, the court stated that

- it cannot be said that information about her comings and goings,
- her tastes in ballet, the food that she eats, and other minutiae which

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58. See notes 23-30 & accompanying text supra.
60. See 385 U.S. at 387-88.
63. Id.
are the sole product of Gallela's three years of pursuit, bear significantly upon public questions or otherwise "enable the members of society to cope with the exigencies of their period." It merely satisfies curiosity.\textsuperscript{64}

The court's use of a balancing test is not consistent with the Meiklejohn interpretation of the first amendment, which determines whether speech is protected solely on the grounds of whether or not it is related to self-government.\textsuperscript{65} The district court's conclusion also runs afoul of the traditional tort rules providing that photographs of individuals in public places are protected because no "private facts" have been disclosed.\textsuperscript{66} This would seem to apply to a public figure like Ms. Onassis.

Whatever fault may be found with the court's reasoning, however, the result it reached seems correct. It is important to note that the situation involved more than mere disclosure. The district court opinion recounts at length the manner in which Gallela pursued his quarry, including instances of assault and battery and intentional infliction of emotional harm.\textsuperscript{67} Such activities are outside the range of first amendment protection even under the broadest standards.\textsuperscript{68} The remedy afforded Ms. Onassis, as modified by the court of appeals, neither awarded damages for the publication of the photographs nor enjoined Galella from taking and publishing such photographs in the future; rather, it was directed at restricting the manner in which future photographs may be taken.\textsuperscript{69}

Even had the district court eschewed the balancing test for application of a strict \textit{Hill} approach, the result should have been the same. Pictures of a famous person going about her daily public activities could seem to come within the "breathing space" allowed the press by \textit{Hill} for fear of choking off more important news.\textsuperscript{70} In this situation, then, the first amendment does not seem to have expanded the traditional rules of the public disclosure tort.

The second example involving Ms. Onassis concerns a recent series of newspaper columns by muckraker Jack Anderson, in which facts about her personal finances and spending habits were disclosed, having been obtained

\begin{itemize}
  \item \textsuperscript{64} Id. at 225.
  \item \textsuperscript{65} See Meiklejohn, supra note 44, at 255. See also Brennan, supra note 44, at 11-12.
  \item \textsuperscript{67} 353 F. Supp. at 216-17.
  \item \textsuperscript{68} See H. Black, A CONSTITUTIONAL FAITH 44-45 (1969). Justice Black, who felt that any law restricting actual speech was completely unconstitutional, did not feel this protection extended to action, particularly of an unlawful nature.
  \item \textsuperscript{69} 487 F.2d at 998.
  \item \textsuperscript{70} See 385 U.S. at 388.
\end{itemize}
from her private financial records. Under traditional tort rules, disclosure of an individual's private records seems to be actionable, whether or not the individual is a public figure. Yet, under the Hill approach a strong argument can be made to include such a disclosure within the breathing space envisioned for the first amendment privilege.

The third example concerns surreptitiously taken nude photographs of Ms. Onassis that were recently published in an unseemly American magazine. Publication of nude photographs without the consent of the involved party definitely falls within the purview of the traditional tort remedy, and would appear to warrant protection for public figures as well as private ones, since such a revelation is outrageous to the community's notions of decency. Because one would be hard pressed to formulate an argument that such a disclosure has any relation to self-government, the liability of the publisher should not be affected by the rules of first amendment privilege. Also, in most cases it could not be said that a public figure has renounced his right to privacy in this regard.

The Onassis examples demonstrate that the entry of the first amendment into the public disclosure field has hardly been revolutionary, at least in relation to voluntary public figures. The same results inhere whether the constitutional privilege or the traditional public interest exception is applied. More difficult problems arise, however, with respect to involuntary public figures, those private individuals who find themselves unwillingly thrust into the news.

C. Involuntary Public Figures

Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.

72. See RESTATEMENT, Explanatory Notes § 652 D, comment c, at 114. However, exposure of an already public record would not give rise to a cause of action. See note 104 infra.
73. Even if such disclosure may be seen as an abuse of freedom of the press, toleration of such an abuse to protect first amendment values is in accord with the New York Times/Hill toleration of falsehood to this end.
74. HUSTLER, Aug. 1975, at 31-36.
With these words, the Supreme Court established the press’ constitutional privilege to report on the lives of private persons involuntarily caught up in the news.\textsuperscript{77} There have been important developments in this area of first amendment privilege since \textit{Hill} was decided.

In the 1971 libel case of \textit{Rosenbloom v. Metromedia, Inc.},\textsuperscript{78} the \textit{New York Times} standard was held to apply to a private figure involuntarily caught up in the news, in this instance a news dealer arrested for dissemination of obscene materials and later acquitted. Justice Brennan, writing for the plurality, strongly asserted the proposition that the public’s right to know overcame the individual’s right to be let alone:

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.\textsuperscript{79}

The relative fame or anonymity of those involved in issues of public concern was seen as irrelevant to the full constitutional protection given to debate on such matters.\textsuperscript{80} The opinion admitted the possibility that the press might abuse this protection, but this was viewed as a necessary evil which had traditionally been borne by a society “dependent . . . for its survival upon a vigorous free press . . . ”\textsuperscript{81}

Justice Marshall, dissenting, perceived the considerations involved as similar to those in the tort privacy cases, and he viewed with particular concern an interpretation of “matters of public interest” so broad as to preclude protection of the individual.\textsuperscript{82} The plurality responded by emphasizing that the cause of action was not one of invasion of privacy,\textsuperscript{83} coment-

\textsuperscript{77} For the sake of convenience, those people falling into this category will be classified as “involuntary public figures,” although they are sometimes described by the courts as “private figures.” The distinction between “voluntary” and “involuntary” public figures is not always clearly drawn by the courts.

\textsuperscript{78} 403 U.S. 29 (1971). The Court was widely split. The plurality opinion, written by Justice Brennan, was joined by Chief Justice Burger and Justice Blackmun. Justice Black concurred, reiterating his view that the first amendment precludes libel judgments against the press. \textit{Id.} at 57. Justice White concurred on the ground that the \textit{New York Times} rule covered the situation without need for the Court to engage in elaborations of the principle. \textit{Id.} at 80. Justice Harlan dissented in a separate opinion. \textit{Id.} at 62. Justice Douglas did not participate.

\textsuperscript{79} \textit{Id.} at 43.

\textsuperscript{80} \textit{Id.} at 44.

\textsuperscript{81} \textit{Id.} at 51.

\textsuperscript{82} \textit{Id.} at 80. Justice Marshall felt that limiting recovery to actual damages would sufficiently protect the press. Justice Harlan agreed with much of Justice Marshall’s opinion but would have permitted punitive damages in some circumstances.

\textsuperscript{83} \textit{Id.} at 48.
ing that "[w]e are not to be understood as implying that no area of a person's activities falls outside the area of public or general interest."84 This is a reiteration of the idea expressed in Hill that unwarranted disclosure by the media, outrageous to community mores, might be actionable. Again, however, the extent of this protection was not discussed.85

Just a few years later, in Gertz v. Robert Welch, Inc.,86 another libel case, the Rosenbloom public issue approach was expressly repudiated by the Court. In Gertz, the plaintiff was a lawyer who represented a family bringing a wrongful death action against a Chicago policeman. The defendant's publication, an organ of the John Birch Society, accused the plaintiff of being a "Communist-fronter" who had framed the policeman and of helping to plan the riot at the 1968 Democratic National Convention. The Court held that the plaintiff was not a public figure, and that the New York Times standard of malice would only be applied to those who were.87 According to the Court, first amendment values were adequately protected by limiting recovery against the press by private individuals in defamation actions to compensation for actual injury, and by not allowing presumed or punitive damages.88

What impact the Gertz decision might have on actions for public disclosure by private individuals against the media is a question of considerable importance. It is crucial to remember that in Gertz the press was held accountable for falsehoods published about a private figure. Indeed, the distinction drawn between public and private figures stresses the opportunity of the former to rebut incriminating falsehoods.89 This opportunity is irrelevant in an action for public disclosure of private facts in which the plaintiff "gains no relief from a subsequent retraction or correction ... but, on the contrary, suffers additional injury by the repeated exposure."90 The reasoning of Gertz is therefore irrelevant to public disclosure, although it

84. Id. at 44 n.12.
85. The Court's citation to Griswold v. Connecticut, 381 U.S. 479 (1965), in this context gives some indication, at least, that the marital intimacy involved there falls within the area into which the media may be prevented from delving. 403 U.S. at 48. See note 145 & accompanying text infra.
87. Id. at 345-46, 351-52. Although Gertz limited the coverage of the New York Times principle, the Gertz Court gave no indication that it no longer subscribes to the principle itself. See id. at 339-43.
88. Id. at 349-50. The Court thus adopted the views advanced by Justice Marshall in his dissent in Rosenbloom, 403 U.S. at 86.
89. 418 U.S. at 344. The voluntariness of their public status is also stressed by the Court. Id. at 344-45.
does indicate a solicitous attitude on the part of the current Court toward the
private individual victimized by the media. However, the effect of this
apparent attitude on privacy actions has yet to be tested. 91

In Cox Broadcasting Corp. v. Cohn, 92 decided in March 1975, the Court
reviewed for the first time an action alleging public disclosure of private facts,
and applied the first amendment privilege to the media's disclosure of the
name of a rape victim. In previous cases, the interests of like individuals
were viewed as outweighing the rights of the press, and disclosure of the
identity of the victim was sometimes prohibited by statute. 93 In order to
understand the ramifications of Cox Broadcasting, it is necessary to examine
the reasoning of these prior decisions.

In 1948, the Wisconsin Supreme Court upheld the validity of a statute
prohibiting disclosure of a rape victim's identity. 94 The court viewed the
slight restriction on the press as justified by the competing interest of
protecting the sensibilities of the victims and encouraging their cooperation
with the police. The court rejected as frivolous the assertion that the name
of the victim was newsworthy by stating that “[a]t most the publication of
the identity of the female ministers to a morbid desire to connect the details
of one of the most detestable crimes known to the law with the identity of
the victim.” 95

In Hunter v. Washington Post, 96 a 1974 civil action brought as a result
of disclosure of a rape victim's name, the Superior Court of the District of

light" action, the defendant newspaper published an "interview" with the plaintiff, the
widow of a disaster victim; the interview had never taken place. An eight-man majority
decided against the publisher. Since no objection had been made by the parties to jury
instructions based on the Hill standard, the Court declined to reach the issue of whether
this was the proper standard of liability for private individuals in "false light" actions.
At any rate, the presence of malice clearly made the case an unsuitable vehicle for the
Court to apply an approach along the lines of Gertz to privacy actions.
94. State v. Evjue, 233 Wis. 146, 33 N.W.2d 305 (1948). The fact that the victim's
future standing in the community might be imperiled by such a disclosure helped weigh
the balance in this direction. Id. at 161, 33 N.W.2d at 312. The court reasoned that
if a parking violator wanted to avoid public exposure, a rape victim certainly would. (It
may be suggested that an unfortunate social attitude is reflected in the comparison
of a rape victim with a scofflaw.) Ironically, the Wisconsin courts do not recognize tort
recovery for invasion of privacy. Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925
(1956).
95. 233 Wis. at 161, 33 N.W.2d at 312. Apparently another judge saw the publication
as a less heinous offense and refused to convict Evjue. See State v. Evjue, 254 Wis.
581, 37 N.W.2d 50 (1949).
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Columbia took a similar approach. The Hill standard was understood as protecting a truthful publication "if it is newsworthy (of public or general interest) and if it does not shock the community notion of decency."97 The court found it unnecessary to reach the community decency issue, since it held that the identity of the victim was not newsworthy as a matter of law.98 Gertz was seen as sanctioning this result since "[the plaintiff] was not a public official or a public figure, but rather a helpless victim of a heinous crime."99

Not surprisingly, the Supreme Court of Georgia had employed a like analysis in Cox Broadcasting100 in finding for the plaintiff. The constitutional issue presented was disposed of summarily, with the court holding that the identity of a rape victim was not sufficiently a matter of public interest to make disclosure of her identity warrant first amendment protection.101 The United States Supreme Court reversed the lower court,102 resolving the issue on the fact that the defendant broadcaster's reporter had learned the name of the deceased rape victim from court records which were available for public inspection. The majority, through Justice White, refused to decide "whether the state may ever define and protect an area of privacy free from unwanted publicity in the press."103 Rather, the holding was based on the traditional tort rule that no public disclosure action would lie for exposure of public records.104 This rule was viewed as particularly apt with relation to court proceedings in which "the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."105

Two concurring opinions revealed broader notions among the members of the Court concerning public disclosure. Justice Powell felt that Gertz

97. Id. at 1567. This is an adoption of the California view. See Briscoe v. Reader's Digest Ass'n, Inc., 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (en banc), discussed at pp. 287-89 infra.
98. Id. Evjue was cited for this proposition.
99. Id.
101. Id. at 68, 200 S.E.2d at 134 (on motion for rehearing).
103. Id. at 491.
105. 420 U.S. at 492.
resolved the issue in *Cox Broadcasting* by holding truth to be a defense to a private person's defamation action, since the interests of the individual protected by the libel action in *Gertz* and the disclosure action in this case were so similar. Justice Douglas, the Court's sole proponent of the absolutist theory of the first amendment, reiterated his position that damages cannot be imposed upon the press for mere discussion of public affairs, with public affairs being given the broad, self-fulfilling definition of anything the media decides to cover.\textsuperscript{107}

The *Cox Broadcasting* decision makes sense in terms of tort law in its use of the public records exception, and also seems consonant with the Meiklejohn analysis of the first amendment. Obviously the courts are an important part of the American system of government, and information about what goes on in them is necessary for meaningful self-government. But it is important to explore whether the result should be the same if the victim's name is not procured from public records. Under the rationale of *Hill*, the crime victim's identity is news, and thus its publication is protected. In light of this, it must be questioned whether peculiar social attitudes toward the crime of rape limit the right of the press to report it. Certainly the desire of the victim to avoid embarrassment is understandable, but this interest cannot be said to be stronger than that of the innocent person suspected of criminal activity who is identified by the media, disclosure of whose identity was permitted even before the advent of the first amendment privilege.\textsuperscript{108}

In their use of a balancing test, both the District of Columbia court in *Hunter* and the Georgia court in *Cox Broadcasting* relied strongly on *Briscoe v. Reader's Digest Association*,\textsuperscript{109} a 1971 decision by the Supreme Court of California which presents another illustration of legitimate and sympathetic interests in conflict with the first amendment privilege. In *Briscoe*, the plaintiff had been convicted of truck hijacking, served time in prison and apparently led a quiet, law-abiding existence upon release. Eleven years after the actual commission of the crime, the plaintiff was associated with the hijacking incident in an article in Reader's Digest, allegedly causing his family, friends and business associates to desert him. Justice Peters held that even though the subject of the article was newsworthy as a matter of law,

\begin{itemize}
  \item \textsuperscript{106} Id. at 497-500. The majority opinion also noted the similarity of the problem in *Cox Broadcasting* to allowing truth as a defense in libel. Id. at 490 n.19.
  \item \textsuperscript{107} Id. at 500-01.
  \item \textsuperscript{108} For an example of this double standard, see Washington Post, Sept. 2, 1975, § A, at 13, col. 5.
  \item \textsuperscript{109} 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).
\end{itemize}
the identity of the participant was not.\textsuperscript{110} Such a result was seen as consistent with the \textit{Hill} standard, since the plaintiff's name was perceived as outside the range of self-governing speech. In addition, the court stated that such a disclosure could fit into the community notions of decency category enunciated in \textit{Hill}.\textsuperscript{111} Moreover, the interests protected by preventing this kind of revelation were not limited to those of the individual involved since the state has a strong interest in allowing rehabilitated criminals to function productively in society.\textsuperscript{112}

It has been suggested that the \textit{Briscoe} approach may be adopted by the United States Supreme Court when it faces the issue of public disclosure and the first amendment.\textsuperscript{113} Whether the California court's view truly protects first amendment values as articulated by the Meiklejohn theory must be examined. Several difficulties present themselves. First is the possibility that the vitality of \textit{Briscoe} has been undermined by \textit{Cox Broadcasting}. The name of a convicted criminal is a matter of public record. Since the disclosure of the contents of a public record was held to come within the first amendment privilege, a question is raised as to whether the age of the record should diminish the privilege.\textsuperscript{114}

In addition, the \textit{Briscoe} court balanced social values to define what is "newsworthy" and hence protected.\textsuperscript{115} Although lip service was paid to the Meiklejohn theory, the court was sufficiently concerned with the competing interests presented that self-governing speech was defined restrictively and arbitrarily. Press coverage of crime was afforded first amendment protection, but an exception was carved out for the identity of rehabilitated criminals. Even assuming arguendo that such a disclosure constitutes an abuse of the first amendment privilege, the breathing space envisioned in \textit{Hill} is nevertheless designed to protect the press from the consequences of such inadvertent abuse when reporting on matters important to self-government.\textsuperscript{116} Although the court conceded the need for predictability in first amendment interpretation in order to avoid a chilling effect on the press, no definite standard enabling editors and reporters to avoid liability was estab-

\textsuperscript{110} \textit{Id.} at 541, 483 P.2d at 43, 93 Cal. Rptr. at 875.
\textsuperscript{111} \textit{Id.} at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{See} H. Zuckman, \textit{Mass Communications Law in a Nutshell}, 97 (unpublished manuscript).
\textsuperscript{114} No distinctions concerning the age of the public record seem to have been made by courts applying the traditional tort rule. \textit{See generally} \textit{Prosser} \textsection 118, at 830-33.
\textsuperscript{115} As to the contradiction inherent in applying a balancing test under the Meiklejohn theory, see p. 281 & note 65 \textit{supra}.
\textsuperscript{116} \textit{See} 4 Cal. 3d at 537, 483 P.2d at 37-39, 93 Cal. Rptr. at 871-72.
lished beyond the equivocal, subjective concepts of newsworthiness and community notions of decency.\textsuperscript{117}

The \textit{Gertz} decision indicates that the Supreme Court is satisfied that limiting allowable damages will sufficiently counter a chilling effect on freedom of the press when the competing interest is the reputation of a private individual. But it must be emphasized that \textit{Gertz} dealt with "false statements of fact" which are of "no constitutional value."\textsuperscript{118} Disclosure of truth is generally protected by the first amendment and would seem to deserve much greater latitude. Perhaps the broad public interest privilege envisioned in \textit{Rosenbloom}, which protected "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous,"\textsuperscript{119} would be more suited to public disclosure.

The \textit{Rosenbloom} standard would probably protect the freedom to disclose Briscoe's name, but it would also leave many problems unresolved. Efforts by the courts to determine the meaning of "matters of public or general concern" or "news" have hardly been satisfactory,\textsuperscript{120} and the concept of a community notion of decency remains equally vague.\textsuperscript{121} Furthermore, the basic issue of how to protect the competing interest of privacy would require resolution. The first amendment is surely not a license to "intrude upon [an individual's] most intimate activities, and expose his most personal characteristics to public gaze."\textsuperscript{122}

\section*{IV. The Right to Privacy}

A determination must be made of which values are included in the

\textsuperscript{117} Id. at 541-43, 483 P.2d at 43-44, 93 Cal. Rptr. at 875-76.
\textsuperscript{118} 418 U.S. at 340. The Court stated:
Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interests in "uninhibited, robust, and wide-open" debate on public issues.
\textsuperscript{119} Id. at 339-40.
\textsuperscript{121} The problems with a test based on community notions of decency derive from the difficulty of discerning what they are and from the rapidity with which they seem to change. As Professor Kalven points out, what were flagrant breaches of decency to Warren and Brandeis would go unnoticed today. See Kalven, \textit{supra} note 8, at 328-30.
\textsuperscript{122} Briscoe v. Reader's Digest Ass'n, Inc., 4 Cal. 3d 529, 533, 483 P.2d 34, 37, 93 Cal. Rptr. 866, 869 (1971).
concept of privacy, and whether the right to privacy as protected by the tort of public disclosure is, like freedom of the press, a constitutional right. Since Warren and Brandeis described the right to privacy as part of "the more general right of the individual to be let alone," the question of the basic values which modern tort privacy is designed to protect has provoked great disagreement among commentators.124

Dean Prosser, in his initial delineation of the four branches of tort privacy, viewed public disclosure as essentially an extension of defamation, protecting against harm to reputation.125 This hypothesis evoked a strong response from Professor Bloustein, who perceived all four branches of the tort as protecting the single interest of "inviolable personality."126 Tying public disclosure up with the terminology of defamation, he argued, failed to recognize its uniqueness in protected personal dignity, a concept he viewed as having strong constitutional underpinnings.127

Writing several years later, Prosser acknowledged the possibility of a constitutional base for the law of tort privacy.128 Discussing the famous case of Griswold v. Connecticut129 in which the Supreme Court afforded the constitutional right to privacy an independent status, together with two

123. Warren & Brandeis, supra note 1, at 205.
124. See authorities cited note 8 supra. The problems of defining tort privacy are also discussed in Wright, Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach, 46 TEXAS L. REV. 630, 630-32 (1968).
125. Prosser, supra note 5, at 398.
127. Id. at 979-82. Professor Bloustein described vividly the possible consequences of lack of personal privacy:

The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.

The conception of man embodied in our tradition and incorporated in our Constitution stands at odds to such human fungibility. And our law of privacy attempts to preserve individuality by placing sanctions upon outrageous or unreasonable violations of the conditions of its sustenance. This, then, is the social value served by the law of privacy, and it is served not only in the law of tort, but in numerous other areas of the law as well.

Id. at 1003.
128. Prosser § 117, at 816.
129. 381 U.S. 479 (1965) (state law prohibiting distribution of contraceptives declared invalid).
decisions which foreshadowed *Griswold*, he noted that although no reference to tort law had been made in these cases,

[...] they suggested nonetheless that the Constitutional right, thus declared to exist, must have some application to tort liability; and that the decisions in four states denying any recognition of the right are to be overruled, as well as the limitation to commercial appropriation contained in the statutes of four other jurisdictions.

Prosser optimistically asserted that extension to tort liability had already begun in the courts. Two of the decisions he cited for this proposition involve disclosure. In *York v. Story*, which predates *Griswold*, the United States Court of Appeals for the Ninth Circuit held that a federal civil rights action could be based on the constitutional right to privacy. The plaintiff, a young woman, complained to the police about an assault and was required to pose in the nude for a police photographer. The photographs, which had nothing whatsoever to do with legitimate police procedure, were subsequently circulated throughout the police department. This activity was held to be a deprivation of a constitutional right under color of state law. While the court was unable to perceive the situation in terms of a traditional fourth amendment search, it had no doubt that such an abuse of privacy was protected by the due process clause of the fourteenth amendment.

Although *York* appears to support the contention that public disclosure has a constitutional base, a caveat is in order. First, the press was not involved, which eliminates any question of a countervailing first amendment privilege. More important, the wrong was perpetrated by state officers, bringing the case directly within the scope of the Supreme Court privacy cases, which deal specifically with the prevention of government interference. Thus, *York*’s validity may extend no further than its specific facts.

The 1968 case of *Dietemann v. Time, Inc.* was an action governed by state tort law brought in federal court under diversity jurisdiction. The

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131. Prosser § 117, at 816.
132. Id.
133. 324 F.2d 450 (9th Cir. 1963), cert. denied, 376 U.S. 939 (1964).
134. 324 F.2d at 455. Prosser viewed the case as involving intrusion, Prosser § 117, at 816, but the facts would easily support a cause of action for disclosure.
136. 284 F. Supp. 925 (C.D. Cal. 1968), aff’d, 449 F.2d 245 (9th Cir. 1971).
The defendant publisher had reporters enter plaintiff's home on a ruse, in order to investigate his practices as a self-styled healer. As a result, a photograph of the plaintiff, to which he had not consented, was published in *Life* magazine. The court held that the defendant's claim of first amendment privilege was met and disposed of by the plaintiff's constitutional right to privacy, since these rights were entitled to equal weight.137

Again, this holding can only be accepted as supporting Prosser's proposition with qualifications. The appeals court's affirmation does not deal with the constitutional implications of privacy, stressing instead the tort of intrusion.138 Furthermore, the district court, in reaching the constitutional issue, may well have been influenced by the cooperation the defendants received from government agents, who used the reporters to further their investigation into the plaintiff's pseudo-medical activities.

Dean Prosser's position notwithstanding, the more common view among the courts seems to be that the right to privacy protected by tort law and the constitutional right to privacy are not the same thing.139 The constitutional right appears limited to freedom from government intrusion.140 Moreover, even with state action present, the right remains limited in its operation to the most intimate personal affairs.141

The hesitancy of lower courts to extend constitutional privacy beyond these limits is understandable in light of the Supreme Court decisions which have interpreted the right solely as a restriction on government interference with the lives of citizens.142 Furthermore, the independent right to privacy which was first developed in *Griswold* appears to be restricted to the protection of activities analogous to the use of contraception involved in that

137. 284 F. Supp. at 929.
138. 449 F.2d 245 (9th Cir. 1971).
139. As expressed in one opinion: "It misses the heart and spirit of the *Griswold* case to casually infer an intent to adopt into the Constitution the entire body of the tort law right to privacy." Travers v. Paton, 261 F. Supp. 110, 113 (1966). But see Time, Inc. v. Hill, 385 U.S. 374, 415 (1967) (Fortas, J., dissenting) (privacy protected by tort same as that recognized as constitutional right); Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 654 (D.C. Cir. 1966) (values protected by tort privacy "cognate" with those protected by the Constitution).
141. See Rosenberg v. Martin, 478 F.2d 520 (2d Cir.), cert. denied, 414 U.S. 872 (1973); Baker v. Howard, 419 F.2d 376 (9th Cir. 1969). Certainly there is no intimation that the constitutional and tort privacy are the same in *Cox Broadcasting*.
Public Disclosure of Private Facts

case. Another possible constitutional foundation for the right to privacy, however, has been advanced and deserves mention: the idea that privacy has first amendment underpinnings, since the concept of self-governing speech is unworkable unless the private individual is free to express ideas without fear of public exposure.

The essential similarity among the values protected by the constitutional right to privacy and the intrusion and disclosure branches of invasion of privacy tort law is evident. As Professor Bloustein developed the analogy: "The threat to individual liberty is undoubtedly greater when a policeman taps a telephone than when an estranged spouse does, but a similar wrong is perpetuated in both instances." It should be emphasized that not all tort privacy plaintiffs are vindicating this kind of wrong. The complaints of Briscoe and the rape victims appear to fall outside the spirit of any constitutional right to privacy, while that involving Jacqueline Onassis' nude photographs clearly fits within it, as would the interference with her confidential papers and records. If such an unwarranted interference by the government may be remedied, a remedy should likewise be enforced against a private individual similarly interfering with another's privacy, and the invasion of privacy torts provide the means to do it. The question which remains is whether such interests can be protected without violating the guarantees of the first amendment.

145. Bloustein, supra note 126, at 975. The need to analogize these two strains of privacy law are recognized in Beaney, The Griswold Case and the Expanding Right to Privacy, 1966 Wis. L. Rev. 979, 994-95.
146. Government interference with the right to privacy is remedied by damages in civil actions, see York v. Story, 324 F.2d 450 (9th Cir. 1963), cert. denied, 376 U.S. 939 (1964), and the exclusionary rule in criminal actions, Mapp v. Ohio, 367 U.S. 643 (1961).
V. ACCOMMODATING THE RIGHT TO PRIVACY AND THE FIRST AMENDMENT

It has been established that the tort of public disclosure of private facts protects legitimate interests, some of which are at least consonant with those protected by the Constitution. It has also been asserted that in order for the press to perform its role in the constitutional system most effectively, it must be given a wide berth for expression. In some instances, as with the unconsented to publication of nude photographs of an individual, there will be no clash between freedom from disclosure and the first amendment's aims of self-governing speech. In the more common case, however, the matter disclosed will fall at least arguably within the category of self-governing speech and thus be entitled to first amendment protection. It is this situation, in which self-governing speech and the preservation of the individual's zone of privacy conflict, that has so troubled the courts and commentators.

Unfortunately, the formulation of a predictable and consistent test seems impossible. A balancing of the competing interests does not sufficiently protect first amendment values. The cryptic, subjectively interpreted terminology of "public figures," "newsworthiness" and "community notions of decency" provides a potential straightjacket for vigorous freedom of the press. Also, the excision of an individual's name from a news item to protect the privacy interest, as is often suggested, does not provide a meaningful resolution. Forcing editors to decide daily the names of which individuals should be deleted from news stories because of possible tort liability is an obvious way to induce self-censorship by the press. Yet, an effective, predictable method may conceivably be devised to protect privacy and ensure freedom of the press.

Pearson v. Dodd involved a situation similar to, and one of the same protagonists as, the Onassis financial records case. Columnists Drew Pearson and Jack Anderson published the contents of private documents taken from the private files of then Senator Thomas Dodd. Judge Wright, writing for the United States Court of Appeals for the District of Columbia, viewed

147. See p. 281 supra.
148. See, e.g., Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (Ct. App. 1931) (identity of reformed prostitute privileged even if murder trial she had been involved in was newsworthy). This is also suggested by Professor Bloustein. Bloustein, supra note 8, at 623-24.
149. Nor does excising identity from a news item have any effect on problems with public figures. The problem is particularly acute in a "hot news" situation, in which the paramount interest lies in getting the news to the audience as quickly as possible.
the *publication* of papers with such obvious political implications as privileged even under the traditional public interest exception. However, a cause of action for *intrusion*, rather than disclosure, was viewed as meeting no such obstacle. One who intrudes unlawfully on a plaintiff's solitude is liable regardless of any public interest in what he may learn as a result. The court's interpretation of what is within the purview of intrusion should also be noted: the plaintiff should be protected from such an invasion of privacy in any area in which it would not be reasonably expected, just as an individual is protected from such interference by the government under the fourth amendment.

The court's approach in *Dodd* makes two very important points. First, intrusion does not directly conflict with the first amendment privilege of freedom of the press. Whatever the reach of the first amendment concerning the gathering of news, it is clear that its protection does not attach to crimes and torts committed in the process. Second, it is obvious that the tort of intrusion, rather than public disclosure, is much better designed to remedy a violation of the right to privacy; the analogy between a private "intrusion" and a governmental "search" seems reasonable.

Using recovery for intrusion as a remedy for invasions of privacy by the news media, while retaining the press' immunity to suits for public disclosure, is a judicial technique which can protect first amendment values more effectively than the approaches previously considered. This method avoids complicated tests which could hamstring self-governing speech, while assuring greater predictability in the area. In addition, it avoids the entire "public figure" and "news" morass. That something definitely within the public interest, and thus part of self-governing speech, is disclosed by an intrusion is of no relevance to the subsequent cause of action. Moreover, public figures and officials would not be entitled to lesser protection because of their status, any more than the fourth amendment would be of diminished application to them on that account. On the other hand, whether the concept of intrusion protects privacy as well as it protects the first amendment requires further examination.

The surreptitious taking of nude photographs of Ms. Onassis would clearly

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151. Id. at 706.
152. Id. at 705. The court went on to state that the manner in which the information is obtained is irrelevant to a public disclosure action, an assertion of dubious validity. Id.
153. Id. at 704.
155. See, e.g., *Dietemann v. Time, Inc.*, 449 F.2d 245, 248-49 (9th Cir. 1971); p. 291 supra.
be actionable as an intrusion. One no doubt has a reasonable expectation of privacy on one's private Greek island. Additionally, the procurement of Ms. Onassis's private financial records would clearly fall under the purview of *Pearson v. Dodd* as an unprotected intrusion. The *Briscoe* and *Cox* cases, on the other hand, exhibit no facts conducive to a cause of action for intrusion. However, it is significant that the plaintiffs in these cases were seeking redress essentially for damage to reputation and embarrassment, rather than for a violation of a right akin to constitutional privacy. While the claims presented were not insignificant, as exemplified by the great damage alleged in *Briscoe*, such interests must nevertheless yield to first amendment rights, which are paramount in allowing our constitutional system to function. Of course, public disclosure of facts obtained by intrusion may cause loss of personal dignity and grave humiliation to the plaintiff, but this should go only to the issue of damages. Rather, it is the breach of the "zone of privacy" erected by the individual, necessary for his psychological well-being, and vital to our social and governmental order, that is the basis of the action. It would not be impossible, however, for the interests of the individual, such as those involved in *Briscoe* and *Cox*, to be protected in a manner not so directly antagonistic to the first amendment. For example, procedures by the police and the judicial system to insure the anonymity of rape victims could be undertaken.

It would be frivolous to assert that this approach is not free from problems. For example, in *Dodd*, the defendants were held not liable for intrusion because while they knew that the documents had been removed without authorization, they did not themselves remove them, such knowledge

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156. See p. 287 supra.
157. See Emerson, supra note 144, at 548-50. Professor Emerson would limit disclosure actions to those areas covered by the constitutional right of privacy set out in *Griswold*. **Id.** at 556-57. However, he notes that the values he discusses are better protected by the prevention of the ascertainment of private information than by its dissemination. **Id.** at 548.
158. Making such records private would mean that a cause of action would lie if they were wrongfully obtained or revealed. **See** Henry v. Looney, 65 Misc. 2d 759, 317 N.Y.S.2d 848 (Sup. Ct. 1971) (mistakenly arrested plaintiff's surname expunged from police records; records sealed by the court). It would also be possible for a court to enjoin release of information wrongfully obtained, though this would seem to raise problems of prior restraints. **Commonwealth v. Wiseman**, 356 Mass. 251, 249 N.E.2d 610, **cert. denied**, 398 U.S. 960 (1970). It should be pointed out that although these methods would not have aided Briscoe, he did have the possibility of a "false light" action, although it had been incorrectly pleaded. 4 Cal. 3d 529, 543, 483 P.2d 34, 44, 93 Cal. Rptr. 866, 876 (1971). It has been reported that the *Briscoe* case was removed to federal court on remand, which granted defendant's motion for summary judgment. Pember & Teeter, *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57, 81 n.125 (1974).
being alone insufficient to satisfy the tort of intrusion. Presumably, a cause of action would lie against the person who actually took the documents, either for intrusion, or, if the perpetrator were an employee with access to the documents, for breach of contract. Admittedly, not every such wrong could be effectively remedied by one of these causes of action. However, it seems to cover most of the situations in which the individual's "zone of privacy" is breached, and the value of eliminating complicated rules restricting first amendment rights outweighs the concern for an occasionally dissatisfied plaintiff.

Moreover, this approach does not seem to conflict with the traditional attitude of the courts toward recovery for public disclosure against the press. Two examples from the Restatement (Second) of Torts can be used to illustrate this lack of conflict:

A gives birth to a child with two heads, which immediately dies. A reporter from B newspaper asks A's permission to photograph the body of the child, which is refused. The reporter then bribes hospital attendants to permit him, against A's orders, to take the photograph, which is published in B newspaper with an account of the facts, naming A. B has invaded A's privacy.

A, a girl twelve years old, gives birth to a child. B newspaper publishes a report of the event, together with a picture of A and her child. B is privileged to do so.

Certainly, the distinguishing factor in these cases is the manner in which the press went about getting the news. In a number of cases, recovery for public disclosure against the press could have been just as easily based on intrusion or some other cause of action.

The concern here is not with the history of public disclosure in the courts, but with its future. An attempt has been made to demonstrate the infringement upon first amendment rights that occurs by allowing such recovery against the news media, and the futility of trying to compile a set of rules

159. 410 F.2d 701, 705. Nor was a cause of action for conversion stated. Id. at 706-07.
160. Restatement, Explanatory Notes § 652D, illustration 8, at 115. The example is based on Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930), and is used to illustrate the degree of privacy the tort is designed to protect.
that would permit the action but prevent a concomitant chilling effect on the press. To circumvent this dilemma, it is proposed that a right to privacy cognate with that protected by the Constitution be preserved against the press' unwarranted invasion by the tort action of intrusion, which poses no threat to the guarantees of the first amendment. In this fashion, perhaps, freedom of the press and the right to privacy, two of the strongest foundations of American constitutional democracy, can effectively and harmoniously perform their respective functions.

Samuel Soopper

Author's note: While this article was being prepared for publication, the Supreme Court once again addressed the problem of libel and the first amendment. In Time, Inc. v. Firestone, 44 U.S.L.W. 4262 (U.S., March 2, 1976), the Court found that the socially prominent wife of a Firestone tire company heir was not a public figure. Accordingly, she was not required to prove that the press' inaccurate account of a court order from her highly publicized divorce proceeding was made with actual malice before damages for libel could be allowed. By so ruling, the Court increased the restrictions of the New York Times doctrine, first announced in Gertz, by further limiting the category of public figures to which the doctrine applies. The Court viewed the press' freedom to report on judicial proceedings as adequately protected by Cox Broadcasting.

The distinction made by the Firestone Court between true and false accounts by the press indicates once again that the restriction of the first amendment privilege in the area of libel is due to the lack of constitutional protection afforded the false statements involved there. Thus, the inference is clear that this restriction of the press protection will not extend to instances involving public disclosure of private, true facts. See discussion pp. 284-85, 289 supra.