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## COMMENTS

### TORTS—LIMITATIONS ON THE RIGHTS OF PRIVACY— PRIVILEGE TO REPORT MATTERS OF PUBLIC INTEREST\*

One would suppose that a new tort emerging full blown from the minds of legal theoreticians and duly certified by the courts would be a model of judicial clarity and precision. But the right of privacy,<sup>1</sup> which started out that way, had been a source of confusion for seventy years when Dean Prosser pronounced it not one protected interest but four.<sup>2</sup> The torts committed in the invasion of these rights of privacy are: Type-I: Physical intrusion upon the plaintiff's seclusion. Type-II: Public disclosure of embarrassing private facts about the plaintiff. Type-III: Publicity casting a false light upon the plaintiff. Type-IV: Commercial appropriation of the plaintiff's name or picture.

This comment is concerned with limitations on the second of these—public disclosure of private facts.

#### I. THE PRIVACY CONTINUUM, PRE-*Hill*

The defendant in every Type-II privacy action has published<sup>3</sup> information about the plaintiff which the plaintiff had not wanted the public to know. Compressed to its analytical essentials, the common law rule has been that such a publication is actionable unless it is "of legitimate public interest."

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\* Dietemann v. Time, Inc., 284 F.Supp. 925 (C.D. Cal. 1968).

1. Maybe it should be called the right-of-privacy-No. 1. It was first advocated by Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890), and was judicially recognized in *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). In three of its four branches this right, protected in tort, might be thought of as "the right not to be publicized." The right-of-privacy-No. 2, by comparison, is a miscellany of specific provisions, penumbras, and emanations found in, cast by, and radiating from the Bill of Rights. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). Right-of-privacy-No. 2 seems to restrict only governmental action.

2. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960). The four can equally well be considered sub-interests since they are surely different manifestations of the individual's single interest in maintaining the dignity of his own personality against intrusion from whatever quarter. See generally Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964).

3. Publication is usually more extensive than in a defamation action. See Prosser, *supra* note 2, at 393 nn.94, 95.

To help with the analysis, let an "event" be thought of as any coherent set of facts concerning the plaintiff.<sup>4</sup> An event may thus consist of something the plaintiff was, something he did, or something that was done to him. The only qualification is that the facts comprising the event belong together so as to make sense. Every imaginable event, every coherent set of facts about the plaintiff, can be assigned to a point on a line representing a continuum of such events. The further left, say, that one goes on the line, the more newsworthy, and therefore less deserving of privacy, are the events found there. Conversely, the further right that an event is located on the line, the less newsworthy and more deserving of privacy it is.

Over the years since Warren and Brandeis wrote their famous article,<sup>5</sup> such an imaginary continuum was created by the courts and then laboriously divided in two. On one side of the judicially drawn bisector which divides this continuum are events which have been adjudged more private than public in nature. Such events are unpublishable. If the defendant does publish a report concerning an event falling on this side of the continuum, the plaintiff will be permitted to recover in a Type-II privacy action.

But on the other side of the bisector lie events which, in some sense, are more public than private. These events might be called newsworthy.<sup>6</sup> The defendant may publish such events with impunity. Thus, the privilege to publish a report of an event falling on the public side of the bisector does not depend on whether the event has been placed far into the privileged zone or only just inside it. The defendant is no more liable for publishing an event which falls barely to the left of the bisector, where public and private are almost in balance, than he is for publishing an event lying far to the left side and thus highly public in nature. Conversely, if an event is more private than public, even if only an iota more, liability attaches to its publication.

Two questions have arisen concerning this right-of-privacy continuum. The first is: Who gets to make the assignment to

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4. An event must be a *true* set of facts. If the defendant publishes falsehood instead of fact, then the plaintiff has a Type-III action for having been placed in a false light. (He may also have a defamation action if the other elements of that tort are present.)

5. Warren & Brandeis, *supra* note 1.

6. As used in this article, "newsworthy" means only this: An event is newsworthy if a court, for whatever reason, has chosen to deem the publication of the event privileged in a Type-II action.

a point on the privacy continuum of an event whose publication is being litigated? And the second: What criteria are used in making this assignment?

The first one is easily answered. The courts, not the publishing companies which usually defend Type-II actions, decide whether an event is newsworthy and hence publishable or not. The suggestion<sup>7</sup> may be true that in reality the defendant publishers often usurp this function from deferent courts. Nevertheless, the courts retain the final say and can always reject the publisher's contention that the event published was newsworthy.<sup>8</sup>

The second question is more substantial: What criteria have the courts used in deciding where to place an event on the privacy continuum? The answer seems to be that in almost every case the courts, explicitly or implicitly, have balanced two competing interests. One is the interest of the individual in maintaining his personality inviolate, free from the glare of unwanted publicity, safe from the gawking masses—left alone. Opposed is society's interest in making available for public inspection the details of every event of social significance. The greater the social significance, the greater the interest in publication.<sup>9</sup>

The cases reveal, however, that the courts would rather declare an event automatically newsworthy and hence publishable without having to balance interests overtly, and they do so whenever possible. Balancing is usually dispensed with, for example, if the court can satisfy itself that the plaintiff should not recover because he has impliedly waived his right of privacy. The courts have commonly felt that one "who asks for and desires public recognition"<sup>10</sup> thereby surrenders any claim to Type-II privacy. Public men,<sup>11</sup> voluntary litigants,<sup>12</sup> boxers,<sup>13</sup> perpetrators of a

7. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 336 (1966).

8. Although most courts have regarded the issue as one of law, the decision has sometimes been left to the jury. *E.g.*, *Blount v. TD Publishing Corp.*, 77 N.M. 384, 423 P.2d 421 (1966).

9. A well considered identification of the social interest involved is found in *Jenkins v. Dell Publishing Co.*, 251 F.2d 447 (3d Cir. 1958). In brief it is "the interest of the public in the free dissemination of the truth and unimpeded access to news . . ." 251 F.2d at 450.

10. *Corliss v. E.W. Walker Co.*, 64 F. 280, 282 (C.C.D. Mass. 1894).

11. *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 67 A. 392 (1907).

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

13. *Cohen v. Marx*, 94 Cal. App. 2d 704, 211 P.2d 320 (1949).

hoax,<sup>14</sup> criminals,<sup>15</sup> movie stars,<sup>16</sup> sports figures,<sup>17</sup> wives of famous authors,<sup>18</sup> Grand Exalted Rulers of Grand Lodges,<sup>19</sup> and stripteasers<sup>20</sup> all are said to have elected a course of conduct which naturally brings them before the public eye. By so doing they are regarded as having forfeited the privacy protection enjoyed by "the great mass of citizens who are entitled . . . to be let alone."<sup>21</sup>

The courts began grounding summary judgments for the defendant upon the implied waiver rationale in an era which predated the contemporary emphasis on the value of unfettered speech. A balancing act in that day would have pitted the individual's acknowledged interest in public-be-damned privacy against an anemic version of the social interest served by publication.<sup>22</sup> The courts therefore resorted to basic notions of consent derived from the law of contracts to explain the denial of recovery. Since the plaintiff knew what he was doing when he engaged in attention-getting activity, he could not complain of the predictable publicity. Although the waiver rationale has been condemned as superficial<sup>23</sup> and fallacious,<sup>24</sup> it stubbornly retains favor in the appellate opinions. Its forthright simplicity provides an appealing contrast to the sophisticated, uncertain alternative of balancing interests. It is a hearty specimen of common-sense jurisprudence and deserves to survive, as it surely will.

But when the waiver rationale is not available, the courts must declare some other standard for adjudicating as newsworthy or private the event whose publication is complained of. The most common formulation relied on is some variation of the following: Liability attaches to the publication unless the event published

14. *Smith v. NBC*, 138 Cal. App. 2d 807, 292 P.2d 600 (1956).

15. *Coverstone v. Davies*, 38 Cal. 2d 315, 239 P.2d 876 (1952).

16. *Carlisle v. Fawcett Publications Co.*, 201 Cal. App. 2d 733, 20 Cal. Rptr. 405 (1962).

17. *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 274 N.Y.S.2d 877, 221 N.E.2d 543 (1966).

18. *Hemingway v. Random House, Inc.*, 49 Misc. 2d 726, 268 N.Y.S.2d 531 (Sup. Ct.), *aff'd*, 25 App. Div. 2d 719, 269 N.Y.S. 2d 366 (1966).

19. *Wilson v. Brown*, 189 Misc. 79, 73 N.Y.S.2d 587 (Sup. Ct. 1947).

20. *Cabaniss v. Hipsley*, 14 Ga. App. 367, 151 S.E.2d 496 (1966).

21. *Elmhurst v. Pearson*, 153 F.2d 467, 468 (D.C. Cir. 1946).

22. Warren and Brandeis wrote their seminal article on privacy in the context of the "yellow journalism" of the day. Warren & Brandeis, *supra* note 1, at 196; Prosser, *supra* note 2, at 383.

23. Note, *Right of Privacy vs. Free Press: Suggested Resolution of Conflicting Values*, 28 IND. L.J. 179, 182 (1953).

24. Nizer, *The Right of Privacy*, 39 MICH L. REV. 526, 556 (1941).

is of "legitimate public interest."<sup>25</sup> It is true that the courts frequently assign great weight to the objective fact that the public may have a genuine desire to learn about the kind of event involved, thus making it appear that mere public curiosity is the test of newsworthiness. Sometimes the court may even omit the word "legitimate" from the formulation of its standard, thus giving some illusion of objectivity. Nevertheless, it is doubtful whether any court has ever interpreted its function in a Type-II case to be that of a pollster whose job it is to register public opinion.<sup>26</sup> Even the cases which come closest to adopting a purely mechanical criterion for pegging an event on the privacy continuum usually contain an escape clause phrased in clearly normative language.<sup>27</sup> The courts have insisted on confirming for themselves the legitimacy of the public's curiosity, not merely its existence, before pronouncing an event newsworthy.

As noted above, the legitimacy of a given publication has been determined, absent waiver, by weighing the public's interest in learning about the published event against the individual's interest in keeping it to himself. In the tradition of the common law, the courts have insisted on a case-by-case approach to the problem of determining newsworthiness,<sup>28</sup> yet the results at the appellate level have been surprisingly one-sided. In general the courts have been quite reluctant to override the publisher's claim of privilege. Among the events that have been found worthy of publication are: a woman's conduct during the murder of her husband on the street;<sup>29</sup> plump women reducing in a gym with humorous apparatus;<sup>30</sup> performance of the Indian rope

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25. *E.g.*, *Buzinski v. DoAll Co.*, 31 Ill. App. 2d 191, 175 N.E.2d 577 (1961); *Themo v. New England Newspaper Publishing Co.*, 306 Mass. 54, 27 N.E.2d 753 (1940).

26. Were it otherwise, the very fact that publication had been judged profitable by the publisher would almost automatically evidence the popular curiosity necessary to establish the newsworthiness of the event and thus invoke the privilege. *See Note, The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 *CHI. L. REV.* 722, 725 (1963).

27. *See, e.g.*, *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940). "Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency." 113 F.2d at 809. Revelations might thus be so shocking as to deserve liability even though public curiosity would otherwise protect their publication.

28. *See Sweenek v. Pathe News, Inc.*, 16 F. Supp. 746 (E.D.N.Y. 1936); *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P.2d 670 (1951).

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

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

trick;<sup>31</sup> public suicide;<sup>32</sup> dissuasion from public suicide;<sup>33</sup> a gambling raid in which plaintiff was an innocent bystander;<sup>34</sup> police treatment of a prisoner;<sup>35</sup> the appearance of a murder victim;<sup>36</sup> the appearance of a murder victim's family;<sup>37</sup> birth of a child to a twelve-year-old girl;<sup>38</sup> and marriage.<sup>39</sup> The cases clearly show that an event whose publication provides background information or diversion in the manner of many feature stories may also qualify as newsworthy just as may articles about events more conventionally deemed "news."<sup>40</sup>

If the plaintiff is to overcome the courts' natural inclination to declare newsworthy whatever appears in the press, he must show an exceptionally strong interest in keeping the event from the public eye. At the least he must show that the publication would have seriously offended a reasonable person in his position.<sup>41</sup> In *Melvin v. Reid*<sup>42</sup> recovery was permitted for the distribution of a film depicting the plaintiff's former life of debauchery. The plaintiff, whose friends were unaware of her past, had mended her ways and was living respectably when the film revealed her identity. The court was clearly impressed by the fact that her rehabilitation could have been fatally damaged by the publication.

The plaintiff in *Cason v. Baskin*<sup>43</sup> was the subject of a character portrayal in the defendant's novel. Although the image conveyed was that of an unusual and colorful personality, the court felt that any public interest in plaintiff's idiosyncracies fell short of legitimacy. The plaintiff's life had been obscure and unnotable until the publication of the character sketch.

31. *Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 295 N.Y.S. 382 (Sup. Ct. 1937).

32. *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (1939). The court added the waiver rationale as an afterthought.

33. *Samuel v. Curtis Publishing Co.*, 122 F. Supp. 327 (N.D. Cal. 1954).

34. *Themo v. New England Newspaper Publishing Co.*, 306 Mass. 54, 27 N.E.2d 753 (1940); *Jacova v. Southern Radio & Television Co.*, 83 So. 2d 34 (Fla. 1955).

35. *Hull v. Curtis Publishing Co.*, 182 Pa. Super. 86, 125 A.2d 644 (1956).

36. *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956).

37. *Jenkins v. Dell Publishing Co., Inc.*, 251 F.2d 447 (3d Cir. 1958).

38. *Meetze v. AP*, 230 S.C. 330, 95 S.E.2d 606 (1956). South Carolina has so far been a model jurisdiction in the privacy tort area though the cases are few. See *Holloman v. Life Ins. Co. of Virginia*, 192 S.C. 454, 7 S.E.2d 169 (1940); *Frith v. AP*, 176 F. Supp. 671 (E.D.S.C. 1959).

39. *Aquino v. Bulletin Co.*, 190 Pa. Super. 528, 154 A.2d 422 (1959).

40. *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 451 (3d Cir. 1958); *Goelet v. Confidential, Inc.*, 5 App. Div. 2d 226, 171 N.Y.S.2d 223 (1958); *Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 295 N.Y.S. 382 (Sup. Ct. 1937).

41. RESTATEMENT (SECOND) OF TORTS § 652D (Tent. Draft No. 13, 1967).

42. 112 Cal. App. 285, 297 P. 91 (1931).

43. 155 Fla. 198, 20 So. 2d 243 (1945).

In *Brents v. Morgan*<sup>44</sup> recovery was allowed when the defendant posted a notice in his place of business announcing that the plaintiff had failed to pay his debts. There was no public interest in such a publication while the plaintiff's interest in preventing it was considerable.

To summarize the privilege as it stood before the 1967 case of *Time, Inc., v. Hill*,<sup>45</sup> no liability accompanied the reporting of an event so long as it was adjudicated newsworthy. Newsworthiness automatically attached to events involving public figures on the theory of waiver and to other events commonly reported in the press and judged on a case-by-case basis by balancing the interests involved. While the plaintiff in a Type-II privacy action often lost since he was either a public figure or a participant in an event of public significance, he usually did get to the jury if he could avoid the pale of those two rubrics.

## II. THE PRIVACY CONTINUUM, POST-*Hill*

In 1967 the United States Supreme Court accorded constitutional protection under the first and fourteenth amendments against Type-II privacy actions<sup>46</sup> to reports concerning "matters of public interest."<sup>47</sup> Although the Justices disagreed on the level of care required to retain the privilege in the case of a false report, there appeared to be unanimity on the ambit of protection for true reports.<sup>48</sup> If a factual publication deals with a "matter of public interest,"<sup>49</sup> the Court apparently will regard it as constitutionally privileged in a Type-II action.<sup>50</sup>

44. 221 Ky. 765, 299 S.W. 967 (1927).

45. 385 U.S. 374 (1967).

46. Although the Court limited *Hill* on its facts to actions brought under N.Y. CIVIL RIGHTS LAW §§ 50-51 (McKinney 1948), the New York cases are freely cited in other jurisdictions. Prosser, *supra* note 2, at 385-86.

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

48. For an unraveling of the opinions see Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267 (1967).

49. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court afforded a limited privilege to publications concerning public officials in libel actions. In *Hill* the Court appeared to extend the same privilege when invasion of privacy was complained of instead of libel and also to expand the ambit of the privilege to cover reports concerning "matters of public interest." But in the subsequent cases of *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *AP v. Walker*, 388 U.S. 130 (1967), the Court reverted to the public officials rationale, broadening it to cover "public figures." Justice Harlan for the Court seemed to reaffirm the rationale used in *Hill*, nevertheless. 388 U.S. at 155 n.19. For detailed analyses see generally Haimbaugh, *The Second Front: Free Expression Versus Individual Dignity*, 9 WM. & MARY L. REV. 126 (1967); Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267 (1967).

50. The privilege also obtains in a Type-III (false light) action, which drew all the lightning in *Hill*.



It is hard to say just how, or if, this part of the rule in *Hill* was intended to depart from the common law rule.<sup>51</sup> In wording the sanction to cover matters of public interest, the Court did leave out the requirement commonly found in the pre-*Hill* opinions that the public's interest be "legitimate." If the omission of that word from the traditional common law formulation of the privilege was purposeful, then the publication of an event of any social significance may now be immune from Type-II liability.<sup>52</sup> If, instead, the individual's interest in privacy, which used to be represented by the notion of legitimacy as a limitation on the public's interest, was meant to be incorporated by implication in the concept of the public interest, then the new constitutional privilege to report the newsworthy is probably identical to its common law predecessor.<sup>53</sup> Until further clarification arrives, it seems best to assume that the common law privilege to publish events of legitimate public interest has been constitutionalized intact. An event adjudged private and therefore unpublishable before the decision in *Hill* is probably still unpublishable.<sup>54</sup>

*Dietemann v. Time, Inc.*,<sup>55</sup> is an amalgam of privacy torts Type-I and Type-II, physical intrusion and public disclosure of private facts. Two employees of the defendant publishing company used a ruse to gain the plaintiff's confidence, persuading him that a female employee sought his healing services. The plaintiff was in fact a quack and the employees intended to obtain a photograph of him at work. The photograph<sup>56</sup> was

51. The Court's opinion paid no attention to this important question. Since the *Hill* case involved a false publication, the Court was more interested in how much protection to accord falsity than in how to assess newsworthiness.

52. In other words, only a publication "utterly without redeeming social importance" would fail to find the privilege. See *Roth v. United States*, 354 U.S. 476, 484 (1957).

53. It would not be very surprising if the Court were to view the individual's interest in privacy as merely one component of the public interest. This approach has been taken in at least one pre-*Hill* opinion: *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 239 P.2d 630, 634 (1952).

54. Some state courts have taken a less sanguine view: "We assume, without deciding, that some remnant of existing law still applies to commonly recognized invasions of privacy." *Hamilton v. Crown Life Ins. Co.*, 423 P.2d 771, 772 (Ore. 1967). Another court remarked that the previously unsettled state of privacy law "was as nothing, now that 1967 and *Time v. Hill* . . . have arrived." *Weeren v. Evening News Ass'n*, 379 Mich. 475, 152 N.W.2d 676, 680 (1967).

55. 284 F. Supp. 925 (C.D. Cal. 1968).

56. To insure a sensational picture, the female employee complained of a lump in her breast. The resulting photo showed the plaintiff, one hand on the agent provocateur's ailment and the other waving a wand to and fro before a number of bottles containing diagnostic aids. *LIFE*, Nov. 1, 1963, at 76.

taken surreptitiously and published as part of an eleven page exposé of quackery. In awarding a judgment for \$1,000<sup>57</sup> the court rejected the contention that the plaintiff, by engaging in a criminal act, had implicitly consented in advance to publicity upon being found out. Nor was he a public figure at the time the picture was taken.<sup>58</sup> But although it successfully disposed of these arguments, the court failed to consider the extent of the public interest involved in the exposure of quackery. If the plaintiff's suit had been based solely on public disclosure of private facts, the clear public interest involved almost certainly would have sufficed to invoke the privilege to publish. Yet the court, although freely citing and quoting from Type-II cases, seems to have grounded liability more upon the physical intrusion involved in taking the picture than upon its publication.<sup>59</sup> It was the subterfuge used in gaining entrance to the plaintiff's home and taking his picture there without his knowledge or consent that seems to have been decisive in persuading the court to permit recovery.<sup>60</sup>

Had the court wished to create a privilege for Type-I (intrusion) cases similar to that prescribed in *Hill* for Type-II (disclosure) cases, it could easily have done so.<sup>61</sup> But for the time being, at least, we are still legally protected in our homes from the photographers of crusading magazines.<sup>62</sup>

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57. It has been said of the privacy action that "the victim that society had in mind when it created the means of redress was not the one who used the remedy." Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW AND CONTEMP. PROB. 326, 339 (1966).

58. "[T]he defendant, by directing attention to one who is obscure and unknown, cannot himself create a public figure." W. PROSSER, TORTS § 112, at 845 (3d ed. 1964).

59. Nevertheless, the court refers to "the publicity required under California law." 284 F. Supp. at 932. Publication is no part of the tort of intrusion. Not only did the court fail to distinguish between the two branches of the right of privacy here claimed to have been invaded, but it went on to assert that liability could be predicated on the old Civil Rights Act, 42 U.S.C. § 1983 (1964). Plaintiff's counsel seems not to have raised this issue. The court found the requisite state action in the fact that Life was in cahoots with the District Attorney's Office, which later prosecuted for quackery. So three separate bases for liability were advanced by the court: physical intrusion, public disclosure of private facts, and illegal search redressable under 42 U.S.C. § 1983 (1964).

60. The principle is similar to that behind the exclusionary rule in criminal cases. See *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961).

61. Perhaps this: Physical intrusion upon the plaintiff's privacy is actionable unless the plaintiff is engaged in a matter of legitimate public interest.

62. In *Cullen v. Grove Press, Inc.*, 276 F. Supp. 727 (S.D.N.Y. 1967), the defendant was given permission to film the plaintiff, a guard at an institution for the criminally insane, as he conducted a search of a nude inmate. Defendant broke his promise to edit the film so as to show only the inmate's upper extremities, then advertised the film in a lurid and sensational

Yet the facts in the *Dietemann* case pose a dilemma confronting courts in the privacy area generally. Moving on one front the United States Supreme Court has at least constitutionalized, and perhaps expanded, the common law privilege to report what is newsworthy. The press is surely safer, in practical fact, to pry-and-publish now than it was before *Hill*, while the individual's tort protection against invasion of his privacy has become correspondingly more precarious.

But simultaneously the Court has moved to expand the bounds of privacy when government is the intruder.<sup>63</sup> One hand shoves the throttle while the other jams the brake.

In *Dietemann* a publishing company, the very one victorious in *Hill*, collaborated with an arm of the state government, like the loser in *Griswold*, to intrude upon the privacy of one who happened to be committing a criminal act. The spirit of *Griswold* was chosen over the spirit of *Hill*, and the plaintiff recovered his judgment. But the dilemma inherent in distinguishing between powerful agencies unfriendly to privacy by mechanically dividing them into official and unofficial will need to be faced more squarely in the future. *Dietemann*, who was convicted after all the publicity, would doubtless consider *Time, Inc.*, the equal of many a local government.

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manner. The court ignored the breach of faith and held the publication privileged since conditions in the institution were of legitimate public interest. Perhaps the public employment of the plaintiff serves to distinguish this situation from the one in the principal case.

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