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A Newspaper's Risk In Reporting "Facts" From Presumably Reliable Sources: A Study in the Practical Application of the Right of Privacy

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A NEWSPAPER'S RISKS IN REPORTING "FACTS" FROM PRESUMABLY RELIABLE SOURCES: A STUDY IN THE PRACTICAL APPLICATION OF THE RIGHT OF PRIVACY

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I.

The right of privacy has come of age. Finally, 79 years after Samuel D. Warren and Louis D. Brandeis published their famous article in the HARVARD LAW REVIEW[1], most commentators and about two-thirds of the states recognize its existence. But agreement is difficult to come by in the matter of definition.

An individual does not, as some would contend, have a right to be left alone. As so many students of journalism have learned, people make the news, and involvement in a newsworthy event makes anyone's name — and possibly his photograph — available for publication.

This study is not concerned with all facets of the right of privacy, but only as it pertains to the news media, and in particular, newspapers and news magazines. For our purposes the right of privacy can best be defined as the right of a person to be free from needless embarrassment or harassment through publication of his name, photograph or details of his personal life in a non-newsworthy context.

Many right of privacy cases deal with the publication of false or only partially true information. In this study the only issues to be discussed are those concerned with the publication of true material.

II.

A newspaper's reputation often rests on its ability to print the truth. No publication could continue to stay in business if it fed the reader a steady diet of false information. For these reasons,

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1. Warren and Brandeis, *The Right To Privacy,* 4 HARV. L. REV. 193 (1890).

editors and publishers rarely question the existence and efficacy of the tort remedy of defamation. The scope of defamation has long been a matter of conflict, as recent cases so vividly illustrate,[2] but few would contend that those who publish false and damaging information should not be punished. But the right of privacy is not so easily accepted.

The first amendment to the Constitution guarantees the freedom of the press. Publishers have long interpreted this to mean freedom to print the truth, or, as one large daily proclaims from its masthead, "To Print the News Impartially, Without Fear or Favor."[3] Truth provides an absolute defense to a charge of defamation, and for years newspaper men proceeded under the assumption that if it was true, they could print it. The right of privacy has changed these assumptions.

Truth does not provide a defense to a charge of violation of one's right of privacy. Different definitional elements come into play, such as newsworthiness and the personal status of the complainant. For these and other reasons, the right of privacy is an unusually difficult area for newspapers.

The conflict of basic freedoms here — freedom of the press and freedom of the individual — make it imperative that some legal guidelines be established. There is a natural chilling effect on the media when they learn that they must print the truth — but not all of it.

In any discussion of the right of privacy as it relates to the news media, accommodation must be made for the everyday practicalities of the publishing business, including sources for news, physical facilities and ever-present deadlines. It is in relation to these practicalities that the definition of truth must be studied.

Truth as the layman sees it is only one thing — the facts. But there are three distinct categories of news and news articles which editors believe in good faith to be true. A brief look at these different kinds of truth may make it easier to discuss the risks these publications run when they print "true" material.

A first category includes that which is factual, accurate, exact, a recounting of what happened. Examples include a story about

2. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

3. This motto runs daily and Sunday on the front page of The Chattanooga Times, a morning newspaper published in Chattanooga, Tennessee, by the Ochs family, which also controls The New York Times.

a football game or parade by someone who was a witness to the event, and accounts of legislative or electoral votes. There is no room for doubt or discussion, since what is written is what actually transpired, that and nothing more.

A second area is closely related to the first. This includes true and accurate recountings of inaccurate statements provided by news sources. This would occur when a recognized and widely accepted news source, such as the police blotter or court records, provides a reporter with factually incorrect information, which the newspaper then prints. In these cases, there may be no practical way in which such an incorrect report could be checked.

A third area in which the truth and the facts do not seem to coincide covers the accurate recounting of defamatory and/or untrue statements, such as might occur in a legislative hearing or a speech. Here, the publisher may know to a certainty that the charges or facts in question are not true, yet his account is factual in that it recounts exactly what transpired.

As was hinted at earlier, these categories take on special meaning when they are considered in light of the manner in which newspapers and news magazines are published. An editor's primary concern is that the individual story is factual from the source. Few newspapers would expect a reporter to independently verify information obtained from court records. Such verification would be time-consuming and virtually impossible in many cases. Errors from usually reliable sources should not be charged to the newspapers. The press of the deadlines and the duty to keep the public informed make it imperative that such instances be considered the publishing of truth for the purposes of taking them out of the reach of defamation law and putting them within the ambit only of the right of privacy.

The third category — the accurate reporting of false or defamatory statements — should also be covered under the area of true material. The newspapers have a duty, or at least an obligation, to print accounts of newsworthy events. A newsworthy, albeit defamatory speech should receive the same treatment as any other news event, with the remedy to anyone allegedly injured lying only under the law of privacy.

The legal definition of truth as it now stands is both simple and workable. But it is not all-inclusive. The removal of these cases from the scope of defamation to that of privacy law would

provide for a more orderly development of both torts, while at the same time allowing newspaper editors and publishers to determine their liability for their material on a more certain basis.

Some cases have upheld the rights of newspapers to publish material which would be included in these additions to the definition of truth.

A recent Delaware case supported the right of a newspaper to print information provided it by a recognized source and to remain immune from judgment if the information proved to be incorrect.[4] The Wilmington News-Journal had been given information by a local Internal Revenue Service official concerning the government's seizure of a person's property to satisfy a tax judgment. In addition to being a regular news source for the paper, the I.R.S. employee was charged as a part of his official duties with supplying newspapers with pertinent information. He provided the News-Journal with an incorrect name. The records at the I.R.S. office also listed the name incorrectly. The Delaware Supreme Court upheld the right of the newspaper to publish the story. No evidence of any malice or abuse of the paper's privilege was found.

The Detroit News won a similar case in which a county sheriff gave a reporter the correct name — but wrong address and identification — for a criminal suspect. The court said that plaintiff could prevail only by proving malice.[5]

There are many cases involving the publication of allegedly libelous material contained in a speech or interview. In one old case, for example, *Buckstaff v. Hicks*,[6] the court upheld a $500 libel judgment against the Oshkosh Northwestern which had published an account of a city council meeting during which a state senator had been charged with being drunk "four-fifths of the time." The senator sued. The court noted:

> Now, conceding that such remarks made in good faith were privileged, the privilege did not extend to their publication to the world. . . . The publication is excessive. It must be confined to people to whom the defendant owes a duty to speak, or who have an interest with the defendant in the subject matter.[7]

4. Short v. News-Journal Co., 212 A.2d 718 (Del. 1965).
5. Sherwood v. Evening News Ass'n., 256 Mich. 318, 239 N.W. 305 (1931).
6. 94 Wis. 34, 68 N.W. 403 (1896).
7. *Id.* at 40-41, 68 N.W. at 405.

However, more recent cases have tended to favor the newspapers. In *Rhodes v. Star-Herald Printing Co.*,[8] the court upheld a lower court dismissal of a $998,000 libel suit filed against the Scottsbluff (Neb.) Star-Herald for a news story which dealt with a police search for a missing lawyer. The allegedly libelous matter was contained in an interview with the sheriff who was heading up the search. In ruling on the newspaper's use of this interview the court said, "Such a statement recites facts which the public is entitled to know and falls within the rule of qualified privilege that protects a newspaper in the dissemination of news."[9]

The District of Columbia Court of Appeals similarly refused to impose rigid standards of verification on newspapers in *Washington Post v. Keogh*.[10] The material in question was a column by Drew Pearson. Plaintiff claimed that mere reliance on Pearson's accuracy was grossly negligent. The court took note of the exigencies of the newspaper business and said that a publication would have to check such material as the Pearson column only where there was good reason to suspect falsity. They found no such reason in the column concerning United States Congressman Keogh.

These cases should add weight to the suggestion that the definition of truth should be broadened from its present legal meaning to one which would allow courts and juries to weigh truth as the newsman sees it, thereby making professional consideration relevant. Such is frequently the case in medical malpractice suits involving physicians as defendants.

III.

Once truth has been adequately defined, the next step is to determine what risks the newspaper takes in publishing true material. In making decisions in this area, newspaper editors and publishers have long been forced to rely on little but their own good judgment — and faced the prospect of paying out heavy damages if their judgment did not coincide with that of the judge or jury.

With respect to the right of privacy the editor is forced to make two basic decisions on each story: Is the story newsworthy

8. 173 Neb. 496, 113 N.W.2d 658 (1962).
9. *Id.* at 500, 113 N.W.2d at 661. *Cf.* Swede v. Passaic Daily News, 30 N.J. 320, 153 A.2d 36 (1959), and Hartley v. Newark Morning Ledger Co., 134 N.J.L. 217, 46 A.2d 777 (Ct. Err. & App. 1946).
10. 365 F.2d 965 (D.C. Cir. 1966).

and therefore a matter of public rather than private concern? To what degree of privacy is the particular individual involved in this story entitled? The answers to these questions are interdependent. That is, since people are entitled to varying degrees of privacy according to their position and previous activities, events which would be newsworthy when involving a public figure would not be newsworthy at all when a private citizen was involved.

There are few federal cases in this area of the law. Results and rationales differ widely from state to state. Hopefully some common points can be found in the cases, and some common principles by which conduct can be ordered will be evolved. Probably the most troublesome concept is that of newsworthiness.

IV.

Webster's Dictionary defines news very simply as "New information about anything; information previously unknown . . . recent happenings, especially those broadcast over the radio, printed in a newspaper, etc."[11] A simple definition — but in examining newspaper conduct, so circular as to be almost useless. If news is what is printed in a newspaper, then the fact of printing would transform any event — no matter how private or personal it may be — into news. Plaintiffs would be offered no protection by such a rule.

Courts have found it no easy task to set forth a workable definition for news. In *Jenkins v. Dell Publishing Co.*,[12] the Court of Appeals for the Third Circuit attempted at some length to define the scope of news as it relates to a magazine or newspaper. The suit involved a story in one of Dell's detective magazines concerning a man who had been stomped to death by a gang of teenage hoodlums. The magazine article included photographs of the deceased's family. The family sued for invasion of privacy, citing the story itself and the family photograph in particular.

The court defined news as ". . . relatively current events such as in common experience are likely to be of public interest. . . . [I]nformation and entertainment are not mutually exclusive categories." The court went on to point out that "Few newspapers or news magazines would long survive if they did not pub-

11. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 988 (college ed. 1959).
12. 251 F.2d 447 (3rd Cir. 1958).

lish a substantial amount of news on the basis of entertainment value of one kind or another." Cited as examples of news with "entertainment value" were such items as ". . . shocking news . . . sex in the news . . . news which has an incongruous or ironic aspect." The court concluded that ". . . once the character or an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which a publication is privileged."[13]

The *Jenkins* court seemed unable to draw any line between what it termed news for information and news for entertainment. This is a potentially important distinction, since although any item not previously seen is *new* to a reader, some are obviously more important — of greater news value — than others. For example, the detonation of the first Red Chinese hydrogen bomb and the fact that an elderly couple feed squirrels on the green every day may both be new to the reader, but few would argue that they are of equal importance. One item contains more news value, the other more entertainment value. On any given day, *both* items may be on the front page of the newspaper — yet they are as different as two stories could be.

The news-feature distinction is a troublesome one and it seemed to bother the Supreme Court in the recent *Time, Inc. v. Hill* case.[14] It is made more difficult by the fact that rarely — if ever — can a publication claim to have a homogeneous readership. Whether taken on a local or national level it is clear that in any readership sample a significant percentage of the people will be more concerned with the marital exploits of various Hollywood stars than with the day-to-day proceedings of the United States Senate.

Newspapers and magazines are not published solely for the purpose of dissemination of news — they are profit-making enterprises of the private sector. This is not intended as a panegyric to private business; in fact it might be more fair to all concened if newspapers and magazines were published by the government. However, ideal performance cannot be expected from what is by its very nature a mass publication.

A federal district court in Minneapolis recognized this consideration in *Berg v. Minneapolis Star & Tribune Co.*[15] In *Berg*

13. *Id.* at 451.
14. 385 U.S. 374 (1967).
15. 79 F. Supp. 957 (D. Minn. 1948).

the Minneapolis paper gave extensive play to a rather sordid divorce case and in particular to the child custody issues. The newspaper took a photograph of plaintiff and the child involved during a courtroom recess. In the suit plaintiff claimed only an invasion of his right of privacy through publication of the photograph.

The court discussed at some length the fact that divorce cases are of interest to a substantial number of people and stated that when confronted with stories ". . . attaching importance in the news to trivial things and sheer gossip regarding the intimate details of the lives of important and near-important people . . . the courts should not attempt to determine whether the Press is to blame or whether it is merely catering to the present mores of the people."[16] The photograph and story in *Berg* were held to be legitimate news.

However, concern with the trivial and sensational is not always accepted as news. In *Perry v. Hearst Corporation*,[17] the court of appeals vacated a district court judgment dismissing a libel charge against the publisher of a Boston newspaper. The appeals panel suggested that malice could be proved merely from the manner in which the story in question was written, without any showing of personal animus directed at the plaintiff as an individual. The story in question concerned the exhumation of the bodies of two former husbands of a Boston area woman and included several details of her rather checkered personal life. For the most part, the individual, often trivial details of the story were true. Slight inaccuracies of fact were not considered material by the court.

The court noted first that Massachusetts law established that truth is no defense to a publication made with actual malice,[18] and went on to say: "Taking the article as a whole we believe it would be only natural for even reasonable readers to assume that they were being furnished with something more than necrology, or trivia concerning the relict of a routinely posted cadaver, and that they could well conclude that the plaintiff was suspected of having engaged in highly sinister conduct."[19]

The *Perry* case at least provides some outer limit beyond which news publications cannot go. Factual material may be presented

16. *Id.* at 962.
17. 334 F.2d 800 (1st Cir. 1964).
18. MASS. ANN. LAWS ch. 231, § 92 (1956).
19. 334 F.2d at 802.

in such a slanted and sensational manner so as to make the facts belie their own existence. Such distortion of the facts will remove a story from an area under which it would be judged only under privacy standards to one covered by the laws of libel and defamation.

It is possible that the courts will at some time in the future choose to make some distinction between news and feature material based on deadline and time considerations, even if no delineation is drawn between entertainment and information for the purposes of defining news.

The headway or lead time on a news story — the time between the occurrence or discovery of an event and the deadline for its necessary publication — is often only a matter of minutes. The news media — newspapers, radio and television stations and newsmagazines — are extremely competitive. There is no time to check and recheck sources on news stories. The practicalities of the business prevent it. If the source is reliable, the reporter is accurate and the story is of a news rather than feature nature, it should be considered true.

However, in the case of feature material and some exclusive (*i.e.*, non-competitive) news stories, the lead time is sufficient to preclude the acceptance of incorrect data as the truth.

Courts may also consider that news for entertainment is not provided as much first amendment protection as news for information. It is difficult to imagine that the intent of Thomas Jefferson, James Madison and others who helped draft the Bill of Rights was to protect the type of material which appears constantly in the detective, motion picture and other pulp magazines.

Still, it has rarely been argued that value judgments should play any role in the implementation of Constitutional rights. The judges in the *Berg* and *Jenkins* cases were probably right in their conclusion that the entertainment-information distinction was not a valid one for them to make.

News involving criminal activities seems to fall somewhere between the two categories. Certainly there is an informational aspect to such data, but it cannot be gainsaid that a primary reason that criminal activities are reported in such detail in many publications is that a substantial number of people find such information titillating. The detective magazines have built a multi-

million dollar business out of publicizing in as lurid a manner as possible murders, rapes and assaults which may have happened as many as 25 years ago. Even such respected newspapers as The New York Daily News built their circulations through extensive coverage, both in words and pictures, of major criminal cases.

Courts, however, have long taken a dim view of criminals or criminal suspects who file suits against the media, charging either defamation or invasion of their right of privacy. Two reasons seem likely.

One is that most matters concerning criminal activities become matters of public record as soon as a suspect has been arrested. Although for roughly 75 years private individuals have been litigating with newspapers in an effort to keep some matter of public record private, it is almost universally accepted now that the news media have the right to print such data. In few other areas of news is there such full public disclosure. Between the booking, preliminary hearing, trial and any past criminal record, there is little about a person which can remain private.

A second reason for the courts' hesitancy to hold for the plaintiff in such suits is that the criminal or criminal suspect has forfeited a portion of his right of privacy through his wrongdoing. In a moralistic sense, they do not believe that such a plaintiff deserves any consideration from the legal system which he has flouted. A Washington court said substantially this in the old case of *Hodgeman v. Olsen*.[20] Here a prisoner objected to the state's distributing his photograph, taken upon his admission to the prison. The court noted that the state could not maliciously distribute the photographs with intent to injure the plaintiff, but it added: "[T]he relation to the public of one who has been convicted of crime is such as to forfeit whatever right of privacy he may be said to have ever possessed. This is true at least to the extent that the protection of society requires such forefeiture."[21]

Involvement, even peripherally, in criminal activities may bring on a great deal of humiliation, embarrassment and loss of privacy, but courts have long been prone to find that public disclosure of such activities was more important than the individual privacy involved.

A complicated case involving such issues was *Beyl v. Capper Publications*.[22] The Topeka Daily Capital published a story con-

20. 86 Wash. 615, 150 P. 1122 (1915).
21. *Id.* at 624, 150 P. at 1126.
22. 180 Kan. 525, 305 P.2d 817 (1957).

cerning the breaking of a large, multi-state grain theft ring. Included was an interview with the state's attorney general and an old police photograph of the prime suspect. The photograph had been taken several years earlier when the suspect was involved in a very minor offense. The plaintiff objected to certain statements made by the attorney general, and to the use of the photograph. He was later convicted on charges arising out of the theft scheme. The court said:

> The rule is well established that it is within the qualified privilege of a newspaper to publish in good faith as current news all matters involving open violations of law which justify police interference, and matters in connection with and in aid of the prosecution of inquiries regarding the commission of crime, even though the publication may reflect on the individuals concerned and tend to bring them into public disgrace.[23]

At least one court has gone further than the *Beyl* case, stating that the public has a right to be informed about all phases of police activities. In *O'Neal v. Tribune Company*,[24] the court affirmed a $2,000 judgment for a nursery school operator (the plaintiff, victorious in the trial, appealed, asserting a grossly inadequate verdict) who claimed she had been damaged by sensationalized stories appearing in the Tampa Times and Tampa Tribune. The Florida court said the public has a "right" to be informed as to ". . . open violations of law or public misconduct which justifies police interference, and matters in connection with and in aid of the prosecution of inquiries regarding the commission of a crime. . . ."[25]

There is one comparatively minor area in which some states have made the legislative judgment that although certain data concerned with criminal misconduct may indeed be newsworthy, it will be illegal to publish it. This is the identification of rape victims.

Four states have statutes prohibiting the publication of the names of rape victims — Florida, Georgia, South Carolina and Wisconsin.[26] Cases involving these statutes are rare, most likely

23. *Id.* at 526-27, 305 P.2d at 819.
24. 176 So. 2d 535 (Fla. 1965).
25. *Id.* at 547. The verdict against the newspaper was sustained because the stories "did not conform to the important requirements of fairness and accuracy." *Id.* at 549.
26. FLA. STAT. ANN. § 794.03 (1965); GA. CODE ANN. § 26-2105 (1953); S.C. CODE ANN. § 16-81 (1962); WIS. STAT. ANN. § 942.02 (1958).

because newspapers and other media in the states involved tend to obey the law voluntarily. However, when a close case in South Carolina reached the courts recently, the court ruled against the rape victim. The court was willing to accept a violation of the spirit if not the letter of the statute, possibly because of the traditional reluctance of courts to agree to the suppression of any news connected with a crime.

The case, *Nappier v. Jefferson Standard Life Insurance Co.*,[27] involved two young women who travelled around to various South Carolina schools for the State Health Department, presenting a puppet show extolling the virtues of regular dental care. The women were widely known as the "Little Jack Girls," after the name of their puppet. A Florence, S. C., television station broadcast film of the girls' station wagon — with "Little Jack Girls" printed prominently on its side — and commented in the newscast that it was the vehicle in which the rape victims were riding. The court said: "[T]he defendants have not identified the plaintiffs sufficiently in the allegations of the complaint to allege a cause of action for damages for the violation of their right of privacy."[28]

Many newspapers withhold such information voluntarily in order to prevent such victims from being needlessly embarrassed. There appear to be no cases in the 46 states without such statutes in which a rape victim has prosecuted an invasion of privacy suit against a newspaper or any other news media.

Probably the most difficult problem in defining newsworthiness is the determination of the length of time for which any given item will be considered news. After a certain period of time some items—automobile accidents, for example—must drop from the category of news into another even less well-defined category.

As a hypothetical example, consider the following situation: During the early 1930's a young man becomes involved in a rum-running ring on the Florida east coast. He, along with the others in the scheme, is apprehended. After a lengthy trial in which many sordid details, both of the plot and of the personal lives of those involved, are revealed, the young man is convicted. After serving a five-year term in federal prison, he is released. He moves to Denver, starts a small dry cleaning business, and after

27. 213 F. Supp. 174 (E.D.S.C. 1963).
28. *Id.* at 176.

25 years completely remakes his life. No one in Denver knows about his prison record, and he is elected president of the Chamber of Commerce and a deacon in his church. Unfortunately, he becomes involved in a minor traffic accident and a new reporter for a local newspaper, recognizing the man's name, dredges up the stories on his past and publishes the damaging information as an addendum to a brief story on the wreck. Has the man's privacy been violated?

The question has no easy answer. Initially, it must be pointed out that all the relevant information is a matter of public record. In theory, any citizen could discover for himself all that the newspaper published. Nothing was manufactured or obtained from personal sources.

The material would also meet any standards of public interest. There is no doubt that a great number of people, indeed, almost every reader of the newspaper, would find the news of this man's past interesting and, to some degree, entertaining. And, although in fact a rehash of facts which had all been previously published, it would be news — in any sense of the word — to the people in Denver.

The only way that our putative plaintiff would seem to be able to win his case in court would be if the court decided to make a value judgement on the worth of certain news, *i.e.*, that no valid Constitutional purpose was served by allowing these details to be published. But courts have traditionally shied away from such determinations[29] and there is no indication that the decision would be any different here.

Two recent cases have presented this question of the lapse of time and news value, and both were decided in favor of the newspapers.

In *Bell v. Courier-Journal and Louisville Times Company*,[30] the police judge of Bedford, Ky., brought suit against the Louisville papers over a story which the Courier-Journal had printed about his efforts to reduce traffic charges and collect fines immediately rather than go through the procedure of a jury trial. At the end of the story the reporter had added that the judge was, according to tax records, behind in payment of his property tax. Judge Bell alleged that the inclusion of the tax matter was

29. *See* Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948), and Jenkins v. Dell Publishing Co., 251 F.2d 447 (3rd Cir. 1958).
30. 402 S.W.2d 84 (Ky. 1966).

malicious and an "unlawful invasion of his right of privacy." The court noted that truth was no defense to an allegation of invasion of privacy, but added that the republishing of a matter of public record was not "an actionable invasion of the right of privacy."[31]

The tax matter here predated the traffic court squabble and clearly had no connection at all with it. In its decision the court decided to approach the case only through the public records issue. No discussion was devoted to whether the tax data was of and by itself newsworthy. Also important in this case was the fact that Bell was a public official and criticism of and comment upon his actions was thought by the court to be covered under *New York Times Co. v. Sullivan*.[32]

However, in *Barbieri v. News-Journal Company*,[33] the Delaware court did consider the newsworthiness issue. Barbeiri had been the last person in the state to undergo lashing as a criminal penalty when the United States Supreme Court decided to hear a case challenging the punishment as unconstitutional. The Wilmington Morning News published a story concerning the suit, and added that Barbieri had been the last to "feel the lash." He sued for invasion of privacy, claiming that both he and his family had been injured by the article. The story appeared nine years after the lashing, and in the interim he had married, raised a family and, as the court said, "led an exemplary life."

The court upheld the newspaper's right to publish the information and said: "But we do not agree that the lapse of time, in itself, recreates, or reinstates, a plaintiff's prior right of privacy, because the right of the press to republish the unpleasant facts still exists if those facts are 'newsworthy', *i.e.*, if they still are of legitimate public concern."[34]

The Court of Appeals for the Seventh Circuit did at one time—albeit briefly — attempt to place a time limit on newsworthiness. In *Wagner v. Fawcett Publications*,[35] Mrs. Wagner brought suit against the defendant magazine publishers who had published a rather sensationalized article about her daughter's murder. The court of appeals upheld the lower court at first, holding that the lapse of a few months time had made the story no longer current, and thus no longer newsworthy. However, the court soon with-

31. *Id.* at 88.
32. 376 U.S. 254 (1964).
33. 189 A.2d 773 (Del. 1963).
34. *Id.* at 775.
35. 307 F.2d 409 (7th Cir. 1962).

drew its first opinion and substituted a second, in which it held for Fawcett.[36] In its revised opinion the court noted that the case was still on appeal, and therefore still current.

In an earlier federal court case, *Leverton v. Curtis Publishing Co.*,[37] the third circuit faced this same problem, and attempted to take a middle course. A $5,000 plaintiff's judgment was approved in *Leverton*, which involved the use by *The Saturday Evening Post* of a photograph taken some 20 months prior to the *Post's* publication. The picture, of a young girl who had just been struck by an automobile, was taken in Birmingham, Ala., and received nationwide circulation at the time through Associated Press. *Post* used the photograph to illustrate a story on careless pedestrians who are injured through their own fault. There was no indication that the Leverton girl had been at fault when she was injured.

The court was careful not to hold that mere lapse of time would make a once-newsworthy event un-newsworthy. Citing the Restatement of Torts, § 867, for the proposition that one who is the subject of a striking catastrophe is the object of legitimate public interest, the court went on:

> It could be easily agreed that the plaintiff in this case, because she was once involved in an automobile accident does not continue throughout her life to have her goings and comings made the subject of newspaper stories. That, however, is a long way from saying that the occasion of her once becoming a subject of public interest cannot be brought again to public interest later on.... [T]his particular plaintiff, the legitimate subject for publicity for one particular accident, now becomes a pictorial, frightful example of pedestrian carelessness. This, we think, exceeds the bounds of privilege.[38]

It appears, therefore, virtually impossible to draw any sort of a line in time which will adequately separate the newsworthy from the non-newsworthy. The problem may best be covered by basing decisions in the area on the newsworthiness of the individual rather than on the incident itself.

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36. *See* Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722 at 726-27 (1963).
37. 192 F.2d 974 (3rd Cir. 1951).
38. *Id.* at 977-78.

The use of material found in public records[39] has long been a matter for discussion in the courts. Newspapers resort to public records every day as sources for articles. Hospital reports, voter registration lists, and the day-to-day records of a multitude of other governmental agencies are literal necessities for adequate news coverage of any locality.

The argument in favor of allowing the news media unfettered use of public records is a compelling one. In theory any person could go to the place at which the records are kept and see the material for himself.[40] Since most people have neither the time nor inclination to visit the police station each morning to check on the arrests from the previous night, why should not the news media be able to publish this data for the convenience of everyone?

Opponents of unregulated publication of public records contend that the standard should be one of news value, not news availability. It is no justification for publication, it is argued, that an item is available to representatives of the newspaper.

Early cases, including one memorable opinion by Mr. Justice Holmes,[41] refused newspapers the right to publish all public records and remain immune from liability. To cite one example, in *Ilsley v. Sentinal Co.*,[42] the court said, "There is, however, no right in the public to know that A charges B with unworthy or criminal conduct, even in court, as a fact by itself; that is mere gossip or scandal."[43]

In more recent decisions courts almost invariably allow the publication of matter taken from public records.[44] The Illinois Supreme Court overturned a $150,000 judgment which a restaurant owner had obtained against a Peoria newspaper in *Lulay v. Peoria Journal-Star, Inc.*[45] The plaintiff claimed damage from

39. *See* Bell v. Courier-Journal and Louisville Times Co., *supra* note 30 and accompanying text.

40. In actual practice, employees in charge of public records may be extremely reluctant to allow anyone not "authorized," *i.e.*, newsmen and public officials, to inspect the records. Also, the average citizen would not have the slightest idea where such records might be found.

41. Cowley v. Pulsifer, 137 Mass. 392 (1884).

42. 133 Wis. 20, 113 N.W. 425 (1907).

43. *Id.* at 25, 113 N.W. at 426. *Cf.* Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 61 N.E.2d 5 (1945); Kimball v. Post Publishing Co., 199 Mass. 248, 85 N.E. 103 (1908); Nixon v. Dispatch Printing Co., 101 Minn. 309, 112 N.W. 258 (1907).

44. *Cf.* Lulay v. Peoria Journal-Star, Inc., 34 Ill. 2d 112, 214 N.E.2d 746 (1966); Lybrand v. The State Co., 179 S.C. 208, 184 S.E. 580 (1936).

45. 34 Ill. 2d 112, 214 N.E.2d 746 (1966).

an article in the Journal-Star which told of his efforts, finally successful, to obtain a health license after many violations. The court said: "The right to speak and print about such actions of government is well established; denial of this right would be a serious infringement on both State and Federal constitutional guarantees for free speech and press."[46]

Although the Constitutional guarantee of freedom of the press would seem to require that the news media be permitted to publish any and all items of public record without possible tort liability, considerations which become relevant in a discussion of who should have a right of privacy may override some of the Constitutional aspects of the problem. For example, all factual data in adoption proceedings are usually a matter of public record. However, such material is frequently of a highly personal nature, and public disclosure in the press should be considered in most cases a tortious invasion of the individual's privacy.

V.

The second of the two mutually dependent questions which a publisher must ponder when making a decision in the privacy area is, to what degree of privacy is the particular individual involved in this story entitled? The determination of the newsworthiness of any given event cannot be made in a vacuum. The fact of a person's birth or death may or may not be newsworthy.

As a way of illustration and introduction to this area, birth and death provide useful examples. The ordinary birth of a baby is not in itself considered a newsworthy event. It happens every day. However, this same event, when it happens to involve a person who is newsworthy, becomes an item of news, *e.g.*, the births of the children of President and Mrs. Kennedy. A birth can also become newsworthy because of the facts which surround it — if it involves quintuplets, or happens on a crowded subway car.

The ordinary death of a person is newsworthy only as a matter of record. But the death of a General Eisenhower will dominate the news for several days. If the circumstances of death are unusual or violent, the event is newsworthy no matter who is involved. A plunge from the top of the Empire State Building or the choking to death of a bride on a piece of her wedding cake would put the names of even the most mundane people in the news.

46. *Id.* at 114, 214 N.E.2d at 747-48.

This area of the personal scope of privacy is much more difficult than the factual determination of newsworthiness because of the infinite variety of people and their personalities. Publicity which would make one person ill from shock and embarrassment would be found enjoyable by another.

An historical rule in torts law is that one takes his plaintiffs as they are — the "thin-skull" rule. However, before this principle comes into operation, some negligence on the part of the alleged tortfeasor must be shown. An ordinary, non-negligent act by a reasonably prudent man cannot make that man liable for injury inadvertantly caused some highly-sensitive person. For instance, a girl wearing a mini-skirt would not be liable if some high-principled member of the D.A.R. fainted in shock upon seeing the girl so scantily clad.

This same rule applies in the area of invasion of privacy, but it becomes difficult to apply when the negligence of the publisher must be established. As earlier examples pointed out, courts have held that news includes items either interesting or informative, under very broad definitions of those words. The media arguably have a first amendment right to publish any item of news. Can the publishing of such matter ever be negligent? Probably not, but courts, in affirming plaintiff's judgments, will frequently hold that the item in question was not newsworthy and avoid the issue of negligence entirely.

Although courts do not often look to the individual's personal sensitivity, plaintiffs in privacy cases are usually placed in one of three broad categories — public officials, public figures, and everyone else. The basic presumption behind these classifications is that people whose occupation or outside activities place them frequently in the public eye should be more accustomed to — and therefore less bothered by — publicity.

The Supreme Court has made use of these distinctions in the *New York Times Co. v. Sullivan* and *Curtis Publishing Co. v. Butts*[47] cases, both of which involved not privacy, but defamation and libel. Precise boundaries for the categories are difficult to determine.

In the *New York Times* case the Court does not provide a detailed definition of a public official, apparently assuming that none was needed, the term defining itself. Mr. Justice Brennan

47. 376 U.S. 254 (1964); 388 U.S. 130 (1967).

speaks only of judges and other government officials, such as elected city commissioners.

The Court in its *Butts* decision, which joined cases concerning Coach Wally Butts and Gen. Edwin Walker, set out the two ways in which a person can become included in the public figure classification. Mr. Justice Harlan notes that Butts, who was head football coach and athletic director at the University of Georgia, "may have attained that status by position alone." Harlan is not willing to go so far with Gen. Walker, who had been a troop commander in West Germany involved in the dissemination of right-wing political literature to his soliders. He states that Gen. Walker attained the status "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy."[48]

As a study of several relevant cases will demonstrate, the classification of individuals and the determination of their personal rights is not an easy matter, and the courts are far from agreement.

VI.

Any case study of the individual's right to privacy should begin with the now-famous case of *Sidis v. F-R Publishing Corp.*[49] William James Sidis was the subject of a brief biographical sketch in THE NEW YORKER magazine. More than 30 years before the NEW YORKER article was published, Sidis had been a renowned child prodigy, no doubt a public figure whose activities would have been newsworthy. In the intervening years, however, Sidis had made every attempt to drop from public view. As the court noted, "[H]e has sought to live as unobtrusively as possible."[50] Sidis claimed that his right of privacy had been violated by the article, which although not unfavorable, opened up his life, all his foibles and eccentricities, to the public. The court held in favor of the magazine.

48. Curtis Publishing Co. v. Butts, 388 U.S. 130 at 155 (1967). Butts had been charged with conspiring with University of Alabama football coach Paul "Bear" Bryant to fix an earlier football game between the two schools. The SATURDAY EVENING POST had obtained all its information from a source who claimed to have heard the two coaches plotting the fix through some mix-up in the telephone system as he was making a call. The Associated Press had charged in an A-wire release that Gen. Walker had led opposition to the United States marshals at the University of Mississippi during the school's riots when James Meredith was first admitted there.

49. 113 F.2d 806 (2d Cir. 1940).

50. *Id.* at 807.

Circuit Judge Clark stated that Sidis was still a public figure, despite his attempts to the contrary, since people might wonder whatever became of him. In an extremely lucid and valuable opinion, Clark attempted to set out a rough privacy standard which could be applied to public figures:

> We express no comment on whether the newsworthiness of the matter printed will always constitute a complete defense. 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. Regrettably or not, the misfortunes and frailties of neighbors and "public figures" are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books and magazines of the day.[51]

The *Sidis* case is particularly important in the area of privacy, since at a fairly early point in privacy-news media litigation it set forth a convincing argument which would make it difficult for a person included in the public figure category ever to win a judgment against an offending publication.

In fact, any judgment granting damages for invasion of privacy is rare. But a search of relevant case material has failed to discover a single instance in which a public figure has collected damages from any one of the news media for the publication of an item or facts which were entirely true.

As was noted in the *Jenkins* and *Berg* cases,[52] the matter of taste and sensitivity rarely enters into a court's consideration of an article. This is particularly true in cases involving public figures. In *Goelet v. Confidential, Inc.*,[53] a sensational divorce case involving public figures — the court neglected to specify exactly who in its report — plaintiff claimed that the story in CONFIDENTIAL violated his privacy by overplaying what were essentially trivial facts. The court said: "[D]etailed reports of the piquant facts in matrimonial litigation and the colorful escapades

51. *Id.* at 809.
52. *Supra,* notes 12 and 15 and accompanying text.
53. 5 App. Div. 2d 226, 171 N.Y.S.2d 223 (1958).

and didoes of well-known persons . . . are part and parcel of the reading habits of the American public. We cannot undertake to pass judgment on those reading tastes."[54]

The inherent and inescapable circularity of this entire field was clearly pointed out by a United States district court in *Branson v. Fawcett Publications.*[55] In *Branson* the plaintiff was a race car driver who had been involved in a spectacular collision three years before the suit was begun. A photograph of the accident received wide circulation through the news services soon after it occurred. TRUE CONFESSIONS magazine used the photograph with an unrelated story. The court turned down plaintiff's privacy claim, ruling that he was a public figure, but added this disturbing dictum: "No doubt one who is a public figure, whether he seeks the public eye or not, waives the right of privacy to all newsworthy publications."[56] According to a literal reading of this statement, public figures have no right of privacy when it comes to newsworthy material.

But that is the same as no rule at all. If an accurate definition for newsworthy data can be formulated, then no one would have a right of privacy as it related to a newsworthy article. And that would leave public figures and everyone else in the same position.

One does not even need to be a public figure himself in order to fall within the ambit of the rules courts use for public figures in privacy litigation.

In *Carlisle v. Fawcett Publications, Inc.*,[57] the former husband of movie actress Janet Leigh brought suit against the publishers of MOTION PICTURE magazine after they printed a sensationalized account of his brief, unhappy marriage to Miss Leigh more than 20 years earlier. The court was not pleased with the content or style of the story in question, or of others in the magazine. It noted at one point, "Some cynic has said: 'Widespread literacy is not an unmixed blessing.' "[58] In overruling Carlisle's claim the court noted: "[P]eople closely related to . . . public figures in their activities must also to some extent lose their right to the privacy that one unconnected with the famous or notorious would have."[59]

54. *Id.* at 229-30, 171 N.Y.S.2d at 226.
55. 124 F. Supp. 429 (E.D. Ill. 1954).
56. *Id.* at 433.
57. 201 Cal. App. 2d 733, 20 Cal. Rptr. 405 (1962).
58. *Id.* at 736, 20 Cal. Rptr. at 407.
59. *Id.* at 747, 20 Cal. Rptr. at 415. See also Koussevitzky v. Allen, Towne & Heath, 188 Misc. 479, 68 N.Y.S.2d 779 (1947).

Two reasons are usually advanced for denying the same degree of privacy to public officials and public figures that is granted to everyone else. One is the theory that by dint of his public position the public figure has become more inured to publicity and is less likely to suffer any emotional or physical harm from seeing his activities reported in the news media. The second is that the public is more interested in the activities and personal lives of public figures than ordinary people.

A separate justification is often put forward in the case of public officials. The public is said to have placed some sort of trust in these officials, both elected and appointed, and it is thought that thorough reporting of their activities will better enable the public to determine how the government is being run, and if the officials are the type of person to whom such trust should be given.

In an article in the SOUTHERN CALIFORNIA LAW REVIEW,[60] Irwin O. Spiegel suggests a definition for a celebrity (a term he uses in place of public figure) which would make no distinction between public officials and public figures. He would include in such a category any "person engaged in a public calling."

Other commentators have stated that after the *Sidis* decision, the only standard left by which privacy could be determined would be one of decency.[61] Spiegel agrees with this as far as public figures are concerned, but defines decency in specific terms:

> In our generation, however, there appears to be uniform cultural agreement that certain activities are of an inherently private nature, particularly those concerning intimate sexual relationships . . . If the celebrity stands in the position of a private citizen when performing domestic roles in private surroundings, he unquestionably has a right to privacy in those performances of an intimate sexual nature.[62]

Just as courts almost invariably find that criminal activities are newsworthy, persons convicted of a felony or misdemeanor, and even those peripherally involved in criminal activities face a near-impossible task in attempting to convince a court that they should not be always treated as public figures.

60. Spiegel, *Public Celebrity v. Scandal Magazine—The Celebrity's Right To Privacy*, 30 S. CAL. L. REV. 280 (1957).
61. *See* Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107 (1963).
62. Spiegel, *supra* note 60, at 290, 299.

The *Barbieri* case[63] held that the passage of time and the efforts of a convicted felon to remove himself from the public figure category were unavailing. A federal court in South Carolina dismissed a complaint in privacy filed by a man whose police "mug shot" had been distributed by the Associated Press, saying that with the issuance of a warrant and his arrest, he became a public figure.[64]

A Connecticut federal district court reached similar conclusions in *Hazlitt v. Fawcett Publications*,[65] which involved a stunt car driver charged with murder. The court said:

> Indeed, even if the plaintiff here were not deemed a public figure by occupation, his involuntary catapault to temporary notoriety because of his involvement in a homocide left him without right to object to fair news accounts of the homocide and of his arrest and trial and without right to object to mention of his occupation in that connection.[66]

But in *Mau v. Rio Grande Oil*,[67] the court found that the plaintiff, who had been the victim of a robbery, had a cause of action for invasion of his privacy. Mau claimed that he lost his job as a chauffer because he became physically agitated after the C.B.S. radio program "Calling All Cars" broadcast a reinactment of the robbery in which he was involved. The court found that Mau had a "right to be left alone," and that this right had been violated by the broadcast.

Mau, who may have become a public figure through his unwilling participation in the robbery, provides an introduction to the most difficult question in the area of the scope of personal privacy: How much privacy does the non-public individual have?

If the news media are allowed to determine for themselves what is and what is not newsworthy, very little will be left of individual privacy. Criminal lawyer Louis Nizer has written that "one's private life is a precious possession which cannot be wrested from him."[68] Some zone must be defined so that the term "private life" will continue to have some meaning.

63. *Supra*, note 33.
64. Frith v. Associated Press, 176 F. Supp. 671 (E.D.S.C. 1959).
65. 116 F. Supp. 538 (D. Conn. 1953).
66. *Id.* at 545.
67. 28 F. Supp. 845 (N.D. Cal. 1939).
68. Nizer, *The Right of Privacy—A Half Century's Developments*, 39 MICH. L. REV. 526 at 560 (1941).

Barber v. Time, Inc.,[69] is a comparatively early case in which a plaintiff collected money damages for the publication of an article which was neither malicious nor defamatory and which was true in all respects. Unfortunately, courts have not been willing to follow the lead of the Missouri court which, according to one commentator, "clearly differentiated between the legitimate news value of the event and the news value of identifying unwilling actors in the event."[70] *Barber* involved a young woman who had become stricken with a rare disease which caused her to have an insatiable appetite. TIME published the article under a headline reading "Starving Glutton," and carried a photograph of her, made against her wishes while she was in a hospital bed. The court noted:

> Certainly if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition (at least if it is not contagious or dangerous to others) without personal publicity. . . . While plaintiff's ailment may have been a matter of some public interest because unusual, certainly the identity of the person who suffered this ailment was not.[71]

It is difficult to disagree with this court, but it is also difficult to carry its reasoning too far. Certainly this woman's name was not a necessary element of TIME's story. It would have been just as interesting and newsworthy had it spoken of simply "a young woman in a St. Louis hospital." But similarly, many minor news items, published each day in virtually all newspapers, would be equally newsworthy if the names of the unwilling participants were omitted.

For example, many stories about minor traffic accidents do not need to have the names of those involved included. Arrests and convictions for public drunkenness, drug use, lascivious carriage and similar offenses may be newsworthy only in that readers are entertained by reading about the personal sins of others. But each of these cases would be covered by the privacy doctrine surrounding criminal activities and those involved in them. The identification of wrongdoers in the news media is thought by many law enforcement officers to deter the commission of many

69. 348 Mo. 1199, 159 S.W.2d 291 (1942).
70. Franklin, *supra* note 61, at 116.
71. 348 Mo. at 1207, 159 S.W.2d at 295.

minor offenses.[72] Those involved as innocent participants in such situtations, *e.g.*, the motorist whose automobile is hit by a drunken driver, should have little about which to complain since their participation is a matter of public record, and a court would be hard pressed to find that a plaintiff had suffered any harm from the disclosure that his automobile was involved in a collision which was not his fault.

The key distinction which should be drawn is one of embarrassment. The news media should not be given a proscriptive right to embarrass people whose involvement in an activity is not in itself newsworthy.

A case involving such issues is *Daily Times Democrat v. Graham*[73]. The plaintiff here, Mrs. Graham, won a $4,166 judgment against a local newspaper which published on its front page a photograph of her, taken just as she emerged from a carnival fun house, with her skirt blown up by a blast of air. The Alabama Supreme Court seemed to take a similar attitude toward individual privacy as the Missouri court in *Barber*. It stated that the mere fact that an activity or incident is public, open to view by anyone present, does not mean that a photograph of such activity or incident may be published. It stated that the photograph in question "Certainly . . . discloses nothing to which the public is entitled to be informed," and added: "To hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at the moment to be part of a public scene would be illogical, wrong, and unjust."[74]

Mrs. Graham had done absolutely nothing which would entitle the newspaper to publish her photograph. She had not been involved in any newsworthy event and had done nothing to draw attention to herself. She merely happened to be coming out of the fun house at the same time that a newspaper photographer decided that it was a propitious time to take a picture of someone. Mrs. Graham was the someone. Almost any other

72. Conversations with Capt. J. E. Weese and Patrolman Fred Mullins, Tennessee Highway Patrol, summer 1968, Hamilton County Courthouse, Chattanooga, Tennessee. Both of these law enforcement officers sought out newspaper reporters frequently to see that stories were published concerning the disposition of traffic cases. Both Weese, a district commander, and Mullins considered the publishing of such information an integral portion of their deterrent law enforcement activities.

73. 276 Ala. 380, 162 So. 2d 474 (1964).

74. *Id.* at 383, 162 So. 2d at 478.

photograph of the fair would have illustrated the newspaper's feature story about it as well or better than the one of Mrs. Graham with her skirt blown up embarrassingly far. There was no necessity — practical or otherwise — which required the publication of that particular photograph.

But a federal court in Louisiana ruled in another case, *Mahaffey v. Official Detective Stories, Inc.*,[75] that a magazine's disclosure of embarrassing and apparently unnecessary information was non-actionable. The *Mahaffey* case involved a story in one of the ever-present detective magazines about the murder of plaintiff's son. The son had been murdered in Houston and his parents resided in Louisiana. None of the parents' friends knew of the true circumstances of the youth's death, but instead had been told that he was killed in an automobile accident. The court admitted that the plaintiffs had been "hurt" by the publication of the story, but added: "The publication of a newsworthy event of public interest is privileged."[76] Unlike the two previous cases, the plaintiffs in *Mahaffey* could not sustain their cause of action because the court found newsworthiness in the disclosure of the embarrassing facts.

A recent California case has placed physical limits on privacy, creating an actual zone in which personal activities may be carried on without interference by the news media. No appeal record of the case has been found, but plaintiff obtained a $1,000 judgment in the district court in *Dietemann v. Time, Inc.*[77] Plaintiff was a "physician" operating a reducing clinic in California. LIFE magazine published an in-depth article on such clinics, using reporters operating under assumed names and with concealed cameras for source material. The article was published before any formal charges had been filed, or any other legal action had been taken against the plaintiff. The plaintiff did not allege that the article and accompanying photograph were inaccurate in any way; he simply asserted a violation of his right of privacy. The court was unsympathetic with Dietemann's activities — terming them "simple quackery" — but upheld the verdict anyway. The court stated: "If one had a meeting in his house for political or other purposes, unless such meeting was open to the public it does not follow that the activities are in the public view, permitting pictures to be taken

75. 210 F. Supp. 251 (W.D. La. 1962).
76. *Id.* at 253.
77. 284 F. Supp. 925 (C.D. Cal. 1968).

and published without knowledge and consent. Such a conclusion would completely destroy the right of privacy."[78]

In *Annerino v. Dell Publishing Co.*[79] the court based its opinion on both grounds, embarrassment and solitude. The case involved an article in INSIDE DETECTIVE concerning the murder of plaintiff's husband. The publishers had used her photograph as an illustration. The Illinois court reinstated her cause of action and said:

> It is further conceded that there are many invasions of privacy that the courts have decided are lawful and for which the invaders may not be punished, particularly where the invasions are justified as a *proper exercise* of freedom of the press. . . . However, this rule is not a license by which various press media may overstep the bounds of propriety and decency and thereby justify an invasion of the solitude of the individual.[80]

The court is saying, then, that when a person is embarrassed, the offending publication has stepped over into that person's zone of privacy.

The most recent federal case in this field of privacy, the news media and the truth is *Varnish v. Best Medium Publishing Co.*[81] The appellate court in *Varnish* sets forth some rules, which if taken literally, will make it virtually impossible for plaintiffs to win on a privacy claim in the second circuit, traditionally the situs of many such cases.

Plaintiff in *Varnish* alleged a violation of his right of privacy by an article published in The National Inquirer, a weekly sensationalist newspaper run along much the same lines as the detective magazines. The article told of the suicide of plaintiff's wife and her concurrent murder of their three children. The article quoted portions of the wife's suicide note and included comments from several neighbors and friends. The root of plaintiff's claim was that the article made his wife appear to be a model housewife, when in fact she was mentally disturbed and had not enjoyed a happy home life. In brief, the court found that Varnish's privacy had been violated by the article and the publisher's reckless disregard of the truth.

78. *Id.* at 930.
79. 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958).
80. *Id.* at 208-09, 149 N.E.2d at 762 (emphasis by the court).
81. 405 F.2d 608 (2d Cir. 1968).

It was not so much the decision but rather the way in which it was rendered which is important. The court stated that "a proper balancing of the public interest in freedom of expression and the individual interest in privacy" requires that in order to sustain his cause of action in privacy the plaintiff must prove both "intentional or reckless falsity *and* offensiveness to persons of ordinary sensibilities."[82] Judge Lumbard ruled out any recovery for privacy invasions caused by true stories if the above statement is taken at face value. But at another point in the opinion he said, "[M]inor inaccuracies and fictionalized dialogue alone will not defeat the privilege granted to truthful publications of public interest."[83] Here he implied that no privilege is given truthful publications which are not in the public interest.

Judge Hays, who dissented in the 2-1 decision, thought the proper standard to be applied was of the "limits of decency." He added: "The news media must be allowed wide leeway in deciding what they will report and how they will report it."[84]

But another federal court, the district court for the District of Columbia, has also stated that absolute protection will be given to truthful publications, in *Clark v. Pearson.*[85] The plaintiff was a former United States Congressman who charged that an article by columnist Drew Pearson libelled him by allegations that he accepted payoffs. The Washington Post was also named as a defendant. Although the suit was based in libel, the court's statements on truth are unqualified. The court declared, "[T]he law does not afford any protection against the disclosure of truth, no matter how unpalatable or disagreeable it may be; no matter how unnecessary its revelation; and no matter what the motive or purpose of the disclosure may be."[86]

Taking the *Varnish* and *Clark* opinions at face value, there is precious little protection left for the individual, whether he be a public figure, or just an ordinary citizen. Courts on both the state and federal levels have failed to come up with any concrete concepts defining the scope of privacy which is to be afforded the individual. Almost anything which happens is in the public interest if that is taken to mean that some portion of the public is interested in or entertained by an account of it.

82. *Id.* at 613 (emphasis added).
83. *Id.* at 612.
84. *Id.* at 613.
85. 248 F. Supp. 188 (D.D.C. 1965).
86. *Id.* at 191.

Several cases, though, set forth the principle that the individual has a right not to be needlessly embarrassed. The distinction between public figures and others would be that certain stories which would embarrass an ordinary person would be taken as a matter of course by a public figure. For example, actress Sally Kirkland, who has appeared nude in several recent New York plays,[87] would probably not have a cause of action if photographed with her skirt blown up by a gust of wind. Mrs. Graham[88] did have such a cause of action. Embarrassment is not itself a clear standard, but it appears to be the only one which courts are willing to accept.

VII.

The basic question which the publisher must answer or have answered for him is simple. Prof. Harry Kalven, Jr. has stated it thus: "[*W*]*hat less than every such unconsented-to reference* is prima facie tortious"?[89] It is the answer which is complex.

Clearly, some distinction must be made between public figures and others. Whether or not they desire or enjoy it, many persons are necessarily going to be subject to continual publicity throughout their lives. Some will have sought this publicity, either directly or indirectly; for example, by becoming a candidate for public office a person is indirectly seeking publicity. His primary objective may be election to that office, but publicity will accompany election — and many times will not end with defeat. A flagpole sitter or motion picture actress frequently seeks publicity directly.

For whatever reason, these public figures will be in the news. Their activities will be constantly watched. In the case of public officials, any deviation, no matter how slight, from accepted norms of conduct will be a matter for fair comment. John Doe may date whomever he wishes, but a prime minister may have to go into seclusion if he chooses to spend his spare time with a Christine Keeler-type companion.

There are distinct ethical and personal differences regarding publicity in the positions of those who seek publicity itself and those who have it thrust upon them. However, value judgments

87. "Sweet Eros", et al.
88. *See* Daily Times Democrat v. Graham, *supra* note 73 and accompanying text.
89. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 at 333 (1966) (emphasis by Prof. Kalven).

in such an area are so subjective as to be useless. No legal distinctions should be drawn between the two types of public figures.

In determining who is a public figure the news media have control. Since a public figure is one who has been brought into the public view through his activities or occupation, the news media can to a large extent control who is and is not a public figure. If publicity is lavished upon someone he becomes, ipso facto, a public figure. But the publicity and identity are actually inseparable. The media have no practical reason to publicize someone who is not noteworthy.

Many public figures have obtained fame on a nationwide or even regional basis. But often reference will have to be made to the local community in which an individual resides. The mayor of Pontiac, Michigan, may not be a public figure nationally, but he is locally, and therefore he is placed on an equal status with Secretary of Housing and Urban Development George Romney.

It would be discriminatory to allow local newspapers to publish certain facts about the mayor, and to hold publishers in other cities liable for the identical publication. The equal protection clause of the fourteenth amendment prohibits such differentiation.

Non-public figures should not be subjected to the same scrutiny and searching publicity as public figures. But certain details about anyone's life can be published if they are newsworthy. The broad scope which courts have given newsworthiness makes decisions in this area difficult, but it is safe to say that individuals cannot be selected at random for intimate publicity. This is not to say that causes of action arise whenever a newspaper publishes a photograph of a crowd at a sports event, but only that a newspaper has no right to pick a name from a telephone directory and then proceed to publish a detailed, factual biography, including criminal record and past marriages, if any.

Involvement in a single news event could conceivably transform a private citizen into a public figure, aside from criminal activity; *e.g.*, the soldiers and marines who raised the flag on Iwo Jima during World War II. But the usual case would be that the person would become a limited public figure, solely for the purposes of reporting on the newsworthy event in which he was involved. The victim of an auto accident will not become a public

figure in general, but only in relation to the accident. He will, however, be open to future comment regarding the accident.[90]

And involvement in a newsworthy event may give rise to publicity about previous involvement in other such events. Witness the case of *Werner v. Times-Mirror Company*,[91] in which a former city attorney brought suit against the Los Angeles newspapers for an article recounting his rather checkered past. The article was triggered by plaintiff's third marriage. The California court quoted with approval a section from a similar case:

> It is characteristic of every era, no less than of our contemporary world, that events which have caught the popular imagination or incidents which have aroused the public interest, have been frequently revivified long after their occurrence in the literature, journalism, or other media of communication of a later day. These events, being embedded in the communal history, are proper material for such recounting. It is well established, therefore, that mere passage of time does not preclude the publication of such incidents from the life of one formerly in the public eye which are already public property.[92]

After determining whether an individual is or is not a public figure, the publisher must then decide if the event or events in question are newsworthy. One commentator has made an interesting observation on the use of the newsworthiness standard. If "newsworthy" is used simply as a descriptive term, then it may have engulfed the tort of invasion of privacy. For example, it will be difficult to prove that any item which has been published was not interesting, and if it was not, then why should the plaintiff be allowed to collect?[93]

Prof. Kalven takes much the same attitude. He notes that *New York Times Co. v. Sullivan*[94] may have given the news privilege Constitutional protection, and if it has, he observes, the privilege may have swallowed the tort. Kalven also observes that the tort has proved to be a poor way to protect the individual's right of privacy, with those actually injured often unable

90. *See* Barbieri v. News Journal Co., *supra* note 33 and accompanying text.
91. 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961).
92. *Id.* at 118, 14 Cal. Rptr. at 212, *quoting from* Smith v. National Broadcasting Co., 138 Cal. App. 2d 807 at 814, 292 P.2d 600 at 604 (1956).
93. *See* Comment, *supra* note 36, at 725.
94. *Supra*, note 2.

to bring suit because they are public figures, and the cases getting to court being exceptionally trivial.[95]

It has been suggested that courts have not been able to decide whether the term "newsworthy" merely indicates widespread public interest, or if it incorporates a value judgment, referring to the fact that a certain publication has merit and that the public's interest is praiseworthy.[96]

In any case, the term is not easily defined. Certainly news must embrace both the entertaining and informative — and some people are bound to find anything put before their eyes entertaining. Since the scope of legitimate news cannot be narrowly drawn, publishers will be forced to retreat to a consideration of that hazy zone of privacy — freedom from unnecessary embarrassment — placed around individuals.

Newsworthiness, like the designation of public figures, cannot be determined on other than objective standards. It would be both impossible and unfair to begin weighing factors such as the publication's own standards, its reading audience, and the norms of the region in which it is distributed in order to arrive at a determination of the newsworthiness of an individual article. Publications differ widely. They run the gamut from the stodgy to the sensational, from The New York Times and THE NEW REPUBLIC to ROGUE and ILLUSTRATED DETECTIVE. It would be constitutionally impermissible to hold the Times liable for publishing material which ILLUSTRATED DETECTIVE could publish with impunity.

The standard of newsworthiness which of necessity must be used is therefore a rather base one, a lowest common denominator. News is both information and entertainment, and substantial numbers of persons are entertained by material many others would find disgusting.

At least one writer has suggested that different standards be used by courts in determining newsworthiness. He set forth a number of relevant factors:

> As the size of the community in which the incident occurs increases, the less newsworthy the name but the less harmful the publication because fewer of the persons who read the story are likely to know the particular plaintiff, and here gossip and rumor are not significant considerations. Even here a neighborhood paper

95. *See* Kalven, *supra* note 89.
96. *See* Comment, *supra* note 36, at 725.

> might be treated differently from a statewide organ. These considerations of community size and media coverage are unwieldy analytic devices and the results of their use will be difficult to predict. . . . The nature of the individual item and its intrinsic importance, rather than its classification as a public record, should perhaps be controlling.[97]

The use of such considerations might seem valuable, especially in an area such as privacy, which is bound up with the individual and his personal freedoms. But the principle of equal protection of the laws has become an integral part of our system, and the utilization of such factors does not make for equal protection.

The clash of values here is not an unequal one — the society's right to know opposed to the individual's right to privacy — but rather a conflict between society's interest in the widest possible dissemination of the news and society's interest in protecting the privacy of all individuals.[98]

The Supreme Court is steadily moving towards a broader application of the first amendment rights to the news media.[99] The Court may eventually reach agreement on the position taken by Mr. Justice Black — that the words of the first amendment, ". . . make no law . . . abridging the freedom of speech, or of the press . . .," mean precisely what they say: no law.[100]

In the end, the individual's right of privacy may be unprotected by the courts. He will have to look to the publishers and rely on their self-restraint and self-regulation. Most courts agree that there is a right of privacy, but few agree on what it is. The only principle on which the courts have been able to reach some semblance of agreement is that the individual has a right to be free from unnewsworthy embarrassment in the media.

Courts have not yet been forced to wrestle with the fact that the plain, unsensationalized truth, the facts of someone's activities, can be damaging to that individual in a very real way. If industry self-regulation is to be the solution, the courts will have abdicated their responsibility.

97. Franklin, *supra* note 61, at 119-121.
98. *See* Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEXAS L. REV. 630 (1968).
99. *See* New York Times Co. v. Sullivan, Curtis Publishing Co. v. Butts, and Time, Inc. v. Hill, *supra* notes 2, 14.
100. Time, Inc. v. Hill, 385 U.S. 374 at 398 (1967) (concurring opinion).