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Rehabilitation, Privacy and Freedom of the Press—Striking a New Balance: Briscoe v. Reader's Digest Association

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REHABILITATION, PRIVACY AND FREEDOM OF THE PRESS—STRIKING A NEW BALANCE:

BRISCOE v. READER'S DIGEST ASSOCIATION[1]

A cause of action for invasion of privacy has been recognized in California since 1931.[2] Nevertheless, the prima facie case for this action has consistently eluded judicial delineation. In *Briscoe v. Reader's Digest Association*[3] the California Supreme Court recently shed some light on this problem. The *Briscoe* court determined that a former criminal, who alleged that the defendant's publication had unnecessarily identified him by name in disclosing truthful but embarrassing facts about his criminal past, had stated a cause of action for invasion of his privacy.[4] In its discussion, however, the court ignored many of the heretofore well-recognized limitations on the right to privacy and thus augured a radical expansion in this already burgeoning tort remedy.

The factual basis for the *Briscoe* case arose in January, 1968, when Reader's Digest published an article entitled "The Big Business of Hi-

1. 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

2. Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931). In *Melvin*, a reformed prostitute who had been notoriously tried and acquitted for murder seven years earlier, brought suit for invasion of privacy against the defendants who exhibited a motion picture ("The Red Kimono") based on true facts of her past life. In advertising the movie the defendants identified the principal character of the story as Gabrielle Darley (plaintiff's maiden name). After marriage the plaintiff assumed an anonymous and respectable place in the community and had made many friends who were not aware of her past activities. In affirming her right to recover damages for invasion of privacy, the court stated:

> [P]ublication by respondents of the unsavory incidents in the past life of appellant after she had reformed, *coupled with her true name,* was not justified by any standard of morals or ethics known to us and was a direct invasion of her inalienable right guaranteed to her by our [California] Constitution, to pursue and obtain happiness. *Id.* at 292, 297 P. at 93 (emphasis added).

Although the *Melvin* court recognized the existence of the "right to privacy" cause of action in other jurisdictions it refused to denominate the relief it granted to the plaintiff by that name. Instead the court preferred to hold that the plaintiff stated a cause of action under California Constitution article I, section 1:

> Whether we call this a right of privacy or give it any other name is immaterial because it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others. 112 Cal. App. at 292, 297 P. at 93-94.

3. 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

4. *Id.* at 543, 483 P.2d at 44, 93 Cal. Rptr. at 876. See Complaint for Damages No. 944396, Superior Court of the State of California, Los Angeles County, Dec. 10, 1968, counts V, VIII, X, at 2, 3. [hereinafter cited as Complaint No. 944396].

jacking."[5] The five-page article detailed many incidents of truck hijackings throughout the United States. It also reported FBI and local police statistics about hijacking arrests for several years preceding 1968 and outlined preventive programs established by the trucking industry and law enforcement agencies. Dates ranging from 1964 to the time of publication were mentioned throughout the article but none of the thefts noted were themselves dated. As an example of one of the "typical" hijackings, one sentence in the article described an unsuccessful and rather ludicrous hijacking attempt and specifically identified Marvin Briscoe as one of the hijackers.[6] There was no express indication in the article that the hijacking had occurred in 1956, more than eleven years earlier.[7]

Briscoe filed a complaint against Reader's Digest Association, Inc. in the Superior Court of Los Angeles County. He alleged that immediately following the reported criminal incident he had abandoned his life of shame and had become entirely rehabilitated, thereafter living an exemplary, virtuous and honorable life and assuming a position in respectable society.[8] As a result of the article, Briscoe claimed, his friends and 11-year-old daughter had learned for the first time of the unsavory incidents of his criminal past.[9] He was allegedly scorned and abandoned by them thereafter.[10]

Briscoe conceded that the *subject* of the article may have been newsworthy, but asserted that the use of his *name* was not.[11] He further alleged that the use of his name was for the purpose of incurring gains and profits, and that such use willfully and maliciously destroyed his privacy, annoyed and disgraced him, and exposed him to contempt

5. *The Big Business of Hijacking*, READER'S DIGEST, JAN. 1968, at 115 [hereinafter cited as *Big Business*]. This article was a condensed version of an article written by Bill Surface and originally published by the Chicago American Publishing Company in the December 10, 1967 issue of Chicago's American Magazine. The defendant, Reader's Digest, conceded that the prior Chicago publication of the article did not absolve it from liability. 4 Cal. 3d at 533 n.1, 483 P.2d at 36 n.1, 93 Cal. Rptr. at 868 n.1.

6. The article stated:

Typical of many beginners, Marvin Briscoe and Garland Russell stole a "valuable-looking" truck in Danville, Ky., and then fought a gun battle with the local police, only to learn that they had hijacked four bowling-pin spotters. *Big Business, supra* note 5, at 118.

7. 4 Cal. 3d at 533, 483 P.2d at 36, 93 Cal. Rptr. at 868.

8. Complaint No. 944396, *supra* note 4, count VI, at 2.

9. Complaint No. 944396, *supra* note 4, count XI, at 3.

10. *Id.*

11. 4 Cal. 3d at 533, 483 P.2d at 36, 93 Cal. Rptr. at 868.

and ridicule.[12] The above allegations, Briscoe asserted, were sufficient to state a cause of action for damages for invasion of his privacy.

Briscoe also contended that, since the offense had occurred some twelve years before the disclosure and since he had subsequently assumed a place in respectable society, the defendant's failure to insert the date of the hijacking in its article would cause a reader to infer that the crime was of recent vintage, thereby placing the plaintiff in a false light before the public eye.[13] Briscoe claimed that as a direct and proximate result of the publication he had been generally damaged in the sum of $100,000 and demanded exemplary damages in the sum of $1,000,000.[14]

Reader's Digest filed a demurrer which was sustained by the trial court without leave to amend the complaint.[15] Briscoe appealed the judgment of dismissal thereafter entered (without opinion) to the California court of appeal, contending that he had stated facts sufficient to constitute a cause of action for invasion of his privacy, and, in the alternative, that the trial court should have granted him leave to amend the complaint. The court of appeals affirmed the lower court judgment[16] and Briscoe then appealed to the California Supreme Court. In a unanimous decision written by Justice Peters, the supreme court reversed the trial court's judgment and held that Briscoe's complaint stated a cause of action for invasion of privacy.[17]

12. Complaint No. 944396, *supra* note 4, count X, at 3.

13. The plaintiff attempted to factually support this contention by referring to two sentences appearing above the title on the first page of the article: "*Today's* highwaymen are looting trucks at a rate of more than $100 million a year. But the truckers have *now* declared all-out war." *Big Business, supra* note 5, at 115 (emphasis added). The plaintiff contended that a reasonable reader would interpret the words "today" and "now" and the numerous recent dates mentioned in the article as implying recent or current events, and thus import this recentness to the non-dated hijacking committed by the plaintiff. *See* Memorandum of Points and Authorities in Opposition to Demurrer, No. 944396, Superior Court of the State of California, Los Angeles County, April 2, 1969.

14. Complaint No. 944396, *supra* note 4, count XIII, at 3.

15. 4 Cal. 3d at 532, 483 P.2d at 36, 93 Cal. Rptr. at 868.

16. Briscoe v. Reader's Digest Ass'n, Civ. No. 35307 (Calif. court of appeal, filed Aug. 26, 1970, certified for nonpublication). In affirming the trial court, the court of appeal stated:

> It thus appears that the article referred to the theft of a truck which was a matter of *public record*; and the subject of the article (hijacking of trucks) was *newsworthy* and was of interest to the public. It was not alleged that the facts reported in the article were untrue. The complaint did not state facts sufficient to constitute a cause of action for damages for invasion of privacy. The court did not err in sustaining the demurrer. *Id.* at 9-10 (footnote omitted) (emphasis added).

17. The defendant demurred both specially and generally to the plaintiff's complaint. Contrary to California Code of Civil Procedure § 472d, the trial court sustained defendant's demurrer in general terms, without including a statement of the specific

Justice Peters initially recognized the importance of the competing interests involved and the necessity of balancing those interests to determine whether the plaintiff had stated a cause of action. Since in the privacy area the plaintiff's interest (right to privacy) and the defendant's interest (freedom of the press) seem virtually irreconcilable, the balance must be finely drawn. Justice Peters proceeded to carefully analyze and delineate these broad interests in order to discern exactly what needed protection and why. Two fundamental interests were thought to support Briscoe's right to recover damages for invasion of his privacy: (1) the obvious right to privacy itself, and (2) the not so obvious societal interest in the rehabilitation of former criminals.[18] With respect to Reader's Digest, the court narrowed the asserted interest in a free press to a consideration of the defendant's right to identify by *name* a former criminal when reporting the content of his past crime.[19] After finding that the plaintiff had not voluntarily consented to the publicity accorded him,[20] the *Briscoe* court weighed the conflicting interests involved and found that the right of the press in this instance was a qualified right, protected only if the matter complained of was newsworthy and did not reveal facts so offensive as to shock the community's notions of decency.[21] Substantially modifying the criteria set forth in one of its recent decisions to define newsworthiness,[22] the court concluded that a jury could reasonably find that disclosure of Briscoe's criminal identity was not newsworthy[23] (even though his name and criminal status are matters of public record) and that revealing a person's criminal past for all to see is grossly offensive to most people in this country.[24] The prima facie case for this cause of action was apparently held to be a public disclosure of private facts made with reckless disregard for its offensiveness, which disclosure would be highly offensive to a reasonable man in the plaintiff's situation.[25] The relevant factors to be considered by the trier of fact would be:

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grounds therefor. (The record does not reveal a waiver of the requirements of § 472d). The *Briscoe* court assumed that the trial court ruled only on the general demurrer and, in reversing the judgment and remanding the case, directed the trial court "to rule upon the points presented by the special demurrer." 4 Cal. 3d at 544, 483 P.2d at 44, 93 Cal. Rptr. at 876.

18. 4 Cal. 3d at 538-39, 483 P.2d at 40-41, 93 Cal. Rptr. at 872-73.

19. *Id.* at 537, 483 P.2d at 40, 93 Cal. Rptr. at 872.

20. *Id.* at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875.

21. *Id.* at 541, 483 P.2d at 42-43, 93 Cal. Rptr. at 874-75.

22. Kapellas v. Kofman, 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969) (for discussion see text accompanying notes 148-68 *infra*).

23. 4 Cal. 3d at 541, 483 P.2d at 43, 93 Cal. Rptr. at 875.

24. *Id.* at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875.

25. See text accompanying notes 169-230 *infra*.

(1) whether plaintiff had become a rehabilitated member of society, (2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, (3) whether defendant published this information with a reckless disregard for its offensiveness, and (4) whether any independent justification for printing plaintiff's identity existed.[26]

New law was established not only with the *Briscoe* court's resolution of the issue relating to the plaintiff's cause of action for invasion of privacy, but also with regard to the plaintiff's contention that he had alleged a "false light" cause of action. The court viewed the latter as substantially equivalent to a libel claim and hence felt that Briscoe should comply with the California retraction provision, section 48a of the Civil Code.[27] This section provides as a prerequisite to the recovery of general damages that a defendant must fail to retract the allegedly defamatory article after a formal request to do so has been made by the plaintiff.[28] However, in *Morris v. National Federation of the Blind*,[29] the court held that section 48a applies only to publications in newspapers or by radio broadcast, but not to magazines.[30] Nevertheless, and without explanation, the *Briscoe* court extended the operation of section 48a to allegedly libelous magazine publications.

In reaching its decision, the *Briscoe* court engaged in a rambling analysis which fails to disclose a convincing or even a logical rationale. The opinion not only ignored established principles adverse to the results reached, but also neglected to consider the extent of the burden imposed upon the press. Nevertheless, the case is probably the most significant privacy decision in forty years, since it squarely confronts the constitutional considerations currently threatening to engulf portions of the law of privacy. Through a critical analysis of each facet of the opinion, the outlines of a new approach to fulfilling the growing thirst for individual privacy may be perceived.

I. Truthful Disclosure of Private Matters

A. The Right to Privacy[31]

Appropriately, the *Briscoe* court began its discussion by turning to the landmark law review article which many feel gave birth to the legal

26. 4 Cal. 3d at 543, 483 P.2d at 44, 93 Cal. Rptr. at 876.

27. *Id.* at 543, 483 P.2d at 44, 93 Cal. Rptr. at 876.

28. Cal. Civ. Code § 48a (West 1970).

29. 192 Cal. App. 2d 162, 13 Cal. Rptr. 336 (1961).

30. *Id.* at 166, 13 Cal. Rptr. at 338; *accord, In re* Cepeda, 233 F. Supp. 465 (S.D. N.Y. 1964).

31. For a concise but thorough discussion of the origins of the right to privacy in

theory of a right to privacy.[32] The authors of that article, Samuel D. Warren and Louis D. Brandeis, considered the right to privacy to be the individual's "right of determining, ordinarily, to what extent his

this country, *see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 802-04 (4th ed. 1971) [hereinafter cited as PROSSER].

32. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter cited as Warren & Brandeis]. Therein the authors stated:

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. . . . [A]nd now the right to life has come to mean the right to enjoy life,—*the right to be let alone*. . . . *Id.* (emphasis added).

Judge Cooley had first coined the phrase "the right to be let alone" some two years earlier. See T. COOLEY, TORTS 29 (2d ed. 1888).

Historically, there has been a notable lack of "privacy" case law from the United States Supreme Court. This can be attributed to the fact that the "power basis" for enforcement of the right gained recognition and momentum exclusively in the common law. Only recently has a portion of the right been traced to the Federal Constitution. In Griswold v. Connecticut, 381 U.S. 479 (1965), the right to privacy against *governmental* invasions was elevated in status to that of a constitutional guarantee. Although four Justices were in agreement as to the importance of the right there were two distinct views as to its primary constitutional source. Mr. Justice Douglas, writing the opinion for the Court, held that a Connecticut statute prohibiting the use of contraceptives violated the appellant's constitutional right to marital privacy. In Justice Douglas' opinion prior Supreme Court cases suggested that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. Under this penumbra theory, various constitutional guarantees—the First, Third, Fourth, Fifth and Ninth Amendments—create zones of privacy. *Id.*

While Justice Douglas relied primarily on his "penumbra theory" as the basis for the right to marital privacy, Justice Goldberg, with whom Chief Justice Warren and Justice Brennan joined, wrote a concurring opinion expressing the belief that the source of the right to marital privacy is to be found in the "language and history of the Ninth Amendment. . . ." *Id.* at 487. Presumably, all of those protected rights found in the "penumbra" of specific guarantees by Justice Douglas would similarly receive like protection within the confines of the Ninth Amendment. To Justice Goldberg, the mere existence of the Ninth Amendment "shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the lists of rights included there not be deemed exhaustive." *Id.* at 492.

The necessary majority for reversal in *Griswold* was obtained by the concurring opinion of Justice Harlan who rejected any approach to the problem other than a Fourteenth Amendment due process approach. Justice Harlan felt that the Connecticut statute infringed the Due Process Clause of the Fourteenth Amendment because it violated the "basic values 'implicit in the concept of ordered liberty' . . . ." *Id.* at 500, *quoting from* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

Recently, in Nader v. General Motors Corp., 57 Misc. 2d 301, 292 N.Y.S.2d 514 (Sup. Ct. 1968), *aff'd on other grounds* 31 App. Div. 2d 392, 298 N.Y.S.2d 137 (1969), *aff'd* 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970), a New York trial court, in denying the defendant's motion to dismiss various causes of action, recognized that "there is presented a constitutional right of plaintiff to privacy—a right to

thoughts, sentiments, and emotions shall be communicated to others."[33] The article further suggested that the design and scope of the law of privacy should be

> to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever their position or station, from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, protected.[34]

The right to recover for invasions of privacy gained gradual acceptance among the states[35] and made its California debut in *Melvin v. Reid*.[36] Although there was no existing statutory authority specifically providing for a right to privacy, the court in *Melvin* found that the California Constitution contained provisions[37] which recognized the right

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be left alone. The right of privacy stands on high ground, cognate to the values and concerns protected by constitutional guarantees (See: 4th, 5th, and 14th Amendments, Fed. Const. . . .)." 292 N.Y.S.2d at 518. There, the constitutional source of the right was interpreted to permit an extension of liability beyond that permitted by the New York privacy statute. *See* PROSSER, *supra* note 31, at 816. Due to the apparent lack of state action, an issue which the court failed to discuss, the decision is questionable. *See, e.g.*, Evans v. Abney, 396 U.S. 435 (1970). As to the possibility of a California constitutional source for the right to privacy, see note 37 *infra*.

33. Warren & Brandeis, *supra* note 32, at 198. Variations on this definition of privacy are numerous. In Westin, *Science, Privacy and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003 (1966), privacy is defined as the right to define one's circle of intimacy, to choose who shall see beneath the quotidian mask. *Id.* at 1023. In a sociological rather than a strictly legal context, privacy is viewed as a "zero-relationship between two persons or two groups or between a group and a person . . . in the sense that it is constituted by the absence of interaction or communication or perception within contexts in which such interaction . . . is practicable. . . ." Shills, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROB. 280, 281 (1966). An invasion of privacy is to be distinguished from defamation in that the former is not an injury "to the character or reputation, but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community." Fairfield v. American Photocopy Equipment Co., 138 Cal. App. 2d 82, 86, 291 P.2d 194, 197 (1955).

34. Warren & Brandeis, *supra* note 32, at 214-15. Initially the authors had a difficult time tracing the right to the common law. 4 Cal. 3d at 533, 483 P.2d at 36, 93 Cal. Rptr. at 868.

35. As of 1971, this right had been expressly rejected in only Rhode Island, Nebraska, Texas and Wisconsin. PROSSER, *supra* note 31, at 804.

36. 112 Cal. App. 285, 297 P.91 (1931) (discussed in note 2 *supra*).

37. CAL. CONST. art. I, § 1 provides:

> All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.

to pursue and obtain safety and happiness without improper infringement by others.[38]

The inevitable clash between the right to privacy and the right to disseminate information to the public was recognized by Warren and Brandeis. They suggested the right to privacy should be inapplicable in matters of "public or general interest."[39] California cases subsequent to *Melvin* recognized this limitation and restricted the interest protected to the right to be free from unwarranted publicity, from the wrongful publicizing of the private affairs and activities of an individual which are outside the realm of legitimate public concern.[40] It was accepted in most jurisdictions that a cause of action for violation of the right to privacy would not lie for publication of legitimate newsworthy items.[41] This defense of newsworthiness, sometimes called a privilege,[42] was considered a question of law within the exclusive province of the judge.[43] Due to the availability of the defense of newsworthiness, recovery was not for the mere invasion of one's privacy, "but for an 'unreasonable' or 'unwarranted' invasion."[44] Presumably, if the disclosure was of newsworthy matter, then it would not be an *unwarranted* invasion of privacy.[45] Included within this defense of newsworthiness was the publication of matters contained in truly public records.[46] A truthful disclosure of facts contained in such records has been consid-

38. 112 Cal. App. at 291, 297 P. at 93. Also see CAL. CONST. art. I, §§ 9 (free speech and press) & 23 (rights reserved by the people) for other possible sources of the right to privacy.

39. Warren & Brandeis, *supra* note 32, at 214.

40. *See, e.g.*, Coverstone v. Davies, 38 Cal. 2d 315, 239 P.2d 876 (1952).

41. *E.g.*, Jenkins v. Dell Publishing Co., 251 F.2d 447 (3d Cir. 1958); Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1113 (1962) [hereinafter cited as Wade].

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

43. *See, e.g.*, Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

> There is practically no discussion of why [the existence of a legitimate public interest] is treated as a matter of law, but it is obvious that the reason is that there are here involved important matters of freedom of speech and of the press; and the courts are not ready to delegate the delicate weighing process here to the jury. Wade, *supra* note 41, at 1116.

44. Wade, *supra* note 41, at 1114.

45. *Id.* at 1121 n.156.

46. There are three categories of records in the area of law enforcement: (1) "The 'raw' investigation files of police agencies"; (2) "the routine records that are the daily grist for the paper mill that characterizes big-city law enforcement agencies: fingerprints, photos, arrest and conviction records"; and (3) "the court records in criminal cases." Karst, *"The Files": Legal Controls Over The Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROB. 342, 365 (1966) [hereinafter cited as Karst]. In criminal cases, only the court records are truly *public* records. *Id.* Hence, in this Note, every reference to "public records" will relate to the records

ered a disclosure of public rather than private facts, therefore making the disclosure privileged.[47] As was stated in *Gill v. Hearst Publishing Co.*,[48] "the 'general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn.' "[49]

In *Briscoe*, neither the existence of the tort nor the definition of the basic interest to be protected was at issue.[50] The issue of the general applicability of the tort to former criminals was quickly disposed of by Justice Peters who felt it axiomatic that the past criminal possesses a right of privacy the same as every other citizen. Thus, the major issues confronting the court were: (1) the newsworthiness of the disclosure of Briscoe's identity, which necessarily brings into question the applicability of the once well-recognized public record defense, and (2) the determination of the prima facie elements of the tort in the absence of any statutory or definitive decisional law on the subject.[51] The second

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of criminal court proceedings "freely available for inspection" by any citizen. *See id.* at 347 & n.23.

47. PROSSER, *supra* note 31, at 810-11.

48. 40 Cal. 2d 224, 253 P.2d 441 (1953).

49. *Id.* at 228-29, 253 P.2d at 443, *quoting* Warren & Brandeis, *supra* note 32, at 215. The *Gill* court also stated that "the right of privacy is determined by the norm of the ordinary man. . . ." 40 Cal. 2d at 229, 253 P.2d at 444.

50. In *Briscoe*, the interest in the right to privacy was considered an *individual* interest. Some commentators have urged that the interests of privacy (and defamation) should be considered *societal* interests,

> lest we slip into an all too frequent error of unduly influencing the balancing process. . . . What we must weigh is *society's* interest in preserving each individual's right to privacy and freedom from defamation against *society's* interest in affording each individual full disclosure and commentary. Wright, *Defamation, Privacy and the Public's Right to Know: A National Problem and a New Approach*, 46 TEXAS L. REV. 630, 633-34 (1968) [hereinafter cited as Wright].

See Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well?*, 46 TEXAS L. REV. 611, 620 (1968) [hereinafter cited as Bloustein]. However, the failure of the *Briscoe* court to consider the societal interest in the right of privacy did not prejudice the ultimate weighing of the competing interests since the societal interest in the rehabilitation of former criminals was considered a major interest favoring Briscoe's position. See text accompanying notes 112-27 *infra*. Of course, in an effective rehabilitative process, anonymity (privacy) is a key ingredient. Consequently, insofar as the success or failure of one's rehabilitation depends on the level of anonymity attained, society's interest in rehabilitation will in effect be an interest in the right of privacy.

51. In addition to the absence of clear guidelines, there is the problem of the inherent infusion of the tort into the questionably separate tort of defamation. *See generally* Note, *The Invasion of Defamation by Privacy*, 23 STAN. L. REV. 547 (1971). When Warren and Brandeis suggested that the right of privacy does not prohibit any publication of matter which is of "public or general interest," they analogized the scope of the right to that area of libel and slander law which deals with the conditional

issue overlaps the first, since the First Amendment right to freedom of the press[52] necessarily injects the newsworthiness factor into any tort defined in terms of publication. The protection afforded by the First Amendment depends upon the precise nature and extent of the defendant's and society's interest in the identification of Marvin Briscoe as a former criminal. As Justice Peters so aptly stated: "The instant case [pits] a rehabilitated felon's right to anonymity against a magazine's right to identify him. . . ."[53]

B. *Freedom of the Press*

Justice Peters, in a prolonged critical analysis of the scope of First Amendment protection of the press, concentrated on the "time" aspect, *i.e.*, the *recentness* of the event to be reported. He concluded first that "the privilege [of the press] extends to almost all reporting of recent events, even though it involves the publication of a purely private individual's *name* or likeness."[54] "Hot news" was deemed subject to greater constitutional protection because public concern is necessarily more immediate and there is a greater possibility for editorial errors

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privilege of fair comment and criticism. Warren & Brandeis, *supra* note 32, at 214. This analogy has caused some courts to misapply standards set forth by courts of greater authority, and the essential distinctions between defamation and privacy have become blurred. Note, *The Invasion of Defamation by Privacy, supra*, at 560. Professor Prosser attempted to define the tort by dividing it into four separate torts under one general right to privacy: (1) *intrusion* into plaintiff's physical solitude or seclusion; (2) public *disclosure* of private facts; (3) placing the plaintiff in a *false light* in the public eye; and (4) *appropriation* of plaintiff's name or likeness for defendant's benefit or advantage. PROSSER, *supra* note 31, at 804-15. The areas of concern in *Briscoe* are Prosser's second and third categories, disclosure and false light.

52. U.S. CONST. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech, or of the press;* or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (emphasis added).

53. 4 Cal. 3d at 534, 483 P.2d at 37, 93 Cal. Rptr. at 869; *cf.* Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 277-78, 239 P.2d 630, 633 (1952) *and* Gill v. Hearst Publishing Co., 40 Cal. 2d 224, 228, 253 P.2d 441, 443 (1953).

54. 4 Cal. 3d at 535, 483 P.2d at 38, 93 Cal. Rptr. at 870 (emphasis added). In Time, Inc. v. Hill, 385 U.S. 374, 383-84 (1967), twenty-two cases are cited wherein the right of privacy was subordinated to the right of the press to publish matters of public interest (a majority of them involving events which had occurred relatively recently).

Truthful commentary on public officials or public affairs enjoys almost absolute immunity regardless of the seriousness of the "invasion of privacy" as public officials are considered to have waived the right to privacy and to have voluntarily subjected themselves to fair comment and criticism. 4 Cal. 3d at 535-36 nn. 5 & 7, 483 P.2d at 37-38 nn. 5 & 7, 93 Cal. Rptr. at 869-70 nn. 5 & 7.

"where deadlines must be met and quick decisions [must be] made."[55] Similarly, the reporting of *recent* criminal activities, including the names of the suspects or the offenders, is within the legitimate province of a free press and hence fully protected by the First Amendment.[56]

Justice Peters carefully distinguished, however, the instant case from such "hot news" situations, noting that the publication concerning Briscoe "compels us to consider whether reports of the facts of *past* crimes and the identification of *past* offenders serve . . . public-interest functions."[57] The court thus made a distinction, which resulted in a methodic shift in sympathy, between the reporting of recent events and the reporting of past events. But even in the latter situations, the court had "no doubt that reports of the *facts* of past crimes are newsworthy"[58] and that Reader's Digest therefore had a right to report the facts of Briscoe's criminal act.[59] However, with respect to the *identification* of Briscoe as the perpetrator, the court felt that the relevant First Amendment interests in publishing the name of the actor in a past event were of lesser importance than those supporting publication of the content of the past crime or the content and name of a person accused of a recent crime.[60] Justice Peters viewed the nature of the public's interest in this type of disclosure as mere curiosity, unless the individual had reattracted the public eye in some independent fashion,[61] or was originally involved in an event so unique that public interest has never wavered from him.[62] In the absence of such uniqueness or

55. 4 Cal. 3d at 535, 483 P.2d at 38, 93 Cal. Rptr. at 870; *accord*, Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 895-96 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971). For a discussion of the *Rosenbloom* case see text accompanying notes 222-29 *infra*.

56. 4 Cal. 3d at 536, 483 P.2d at 39, 93 Cal. Rptr. at 871. Several reasons are cited to support this observation: (1) the public need to know about the circumstances of the crime and the criminal techniques employed in order to cope with future crime; (2) reports may encourage unknown witnesses to come forth with useful testimony and others to come to the aid of the victim; and (3) it will put others "on notice" of the identity of those persons charged with a crime so that they can act accordingly. *Id.*

57. *Id.* at 537, 483 P.2d at 39, 93 Cal. Rptr. at 871.

58. *Id.* (emphasis added). The court reasoned that publication of the incidents of a past crime may prove educational (similar in benefit to reports of recent crimes) and that the public has a strong interest in enforcing the law, *i.e.*, accumulating and disseminating data in an effort to discover the reasons why people commit crime, the methods they use, and the manner in which the criminals are apprehended. *Id.*, 483 P.2d at 39-40, 93 Cal. Rptr. at 871-72.

59. *Id.*, 483 P.2d at 40, 93 Cal. Rptr. at 872.

60. *Id.* Such an identification would usually serve "little independent public purpose. Once legal proceedings have terminated, and a suspect or offender has been released, identification of the individual will not usually aid the administration of justice." *Id.*

61. *Id.*

62. *Id.* at 538, 483 P.2d at 40, 93 Cal. Rptr. at 872. The court cited the St.

infamy, a jury could reasonably find that revelation of plaintiff's identity as a former hijacker was of minimum social value.[63]

In excluding mere curiosity from the First Amendment's protective umbrella, the court apparently adopted Alexander Meikeljohn's theory of the scope of that constitutional guarantee.[64] Quoting Meikeljohn, the court characterized the central purpose of the First Amendment as intended "to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. . . ."[65] Under this theory "the point of ultimate interest is not the words of the speakers, but the minds of the hearers."[66] The interest protected is not the private right to speak but rather the public right to know.[67] What is important is "not that everyone shall speak,"[68] nor that there shall be "unregulated talkativeness,"[69] but that "everything worth saying shall be said."[70] Although the private right to speak may be limited or completely denied because it is "contrary to the common good,"[71] the public right to know "admits of no exceptions."[72]

At one extreme the public right to know could include "the public's concern or curiosity about the private affairs of private individuals."[73] At the other, the public right to know would only include the public's interest in the qualifications and views of political candidates and the "considerations underlying passage or defeat of proposed legislation."[74] Meikeljohn adopted a middle position which includes information within the public's right to know if the "discussion of the given subject

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Valentines Day Massacre and the sinking of the *Titanic* as typical "unique" events. In the RESTATEMENT OF TORTS § 867, comment *c* (1939), considerations similar to those in *Briscoe* are hypothesized:

> [Criminals] are the objects of legitimate public interest during a period of time after their conduct . . . has brought them to the public attention; until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims.

63. 4 Cal. 3d at 541, 483 P.2d at 43, 93 Cal. Rptr. at 875.

64. A. MEIKELJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960) [hereinafter cited as MEIKELJOHN].

65. 4 Cal. 3d at 534-35, 483 P.2d at 37, 93 Cal. Rptr. at 869, *quoting* MEIKELJOHN, *supra* note 64, at 75.

66. MEIKELJOHN, *supra* note 64, at 26.

67. Bloustein, *supra* note 50, at 624.

68. *Id.* at 624, *quoting* MEIKELJOHN, *supra* note 64, at 26.

69. *Id.*

70. *Id.*

71. *Id., quoting* MEIKELJOHN, *supra* note 64, at 57.

72. *Id., quoting* MEIKELJOHN, *supra* note 64, at 20.

73. Wright, *supra* note 50, at 632.

74. *Id.*

matter contributes to the public understanding essential to self-government."[75] If so, the communication of such information is absolutely protected. "If it does not fulfill [that] purpose, the communication may be subject to reasonable limitation in the public interest just like the exercise of any other private right."[76] Under this interpretation of the First Amendment, it is possible that *incidents* might be "newsworthy," in the sense that the information is relevant to the purposes of self-government,[77] while at the same time publication of the *names* of the participants might not be newsworthy, since such publication might serve only to feed the public's insatiable curiosity.[78]

Although Justice Peters' approach to the First Amendment follows nicely that of Meikeljohn, there is no comparable authority in decisional law which supports this thesis, and, in fact, what little case law exists is contrary to such an approach. First of all, case law seems to support the conclusion that "whatever is in the news media is by definition newsworthy, that the press must in the nature of things be the final arbiter of newsworthiness."[79] There is criticism of this point, aimed not at the correctness of the conclusion, but rather at the propriety of the decisions supporting it.[80] Some of the decisions are emphatic in their refusal to distinguish "news for information and news for entertainment."[81] In others,[82] the result impels the conclusion that

75. Bloustein, *supra* note 50, at 625.

76. *Id.*

The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest. MEIKLEJOHN, *supra* note 64, at 79.

77. *See* Bloustein, *supra* note 50, at 625.

78. *Id.* at 626. Professor Bloustein views the decision in New York Times v. Sullivan, 376 U.S. 254 (1964), as a proper application of the Meikeljohn theory. Bloustein, *supra* note 50, at 624. However, in Time, Inc. v. Hill, 385 U.S. 374 (1967), Professor Bloustein felt that the Court "failed to distinguish the issue of the relevance [to the people's right to self-government] of the use of the family name, from the issue of the relevance of information concerning the opening of the play." Bloustein, *supra* note 50, at 626. *See also* Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 966-67 (1968) [hereinafter cited as Nimmer], where the author suggests that the name of the actor may be separated from the event, and publication of the former may not be considered constitutionally protected while the latter is within the public's legitimate right to know.

79. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 336 (1966) [hereinafter cited as Kalven]: "The cases admittedly do not go quite this far, but they go far enough to decimate the tort." *Id.*

80. *E.g.*, Bloustein, *supra* note 50, at 626.

81. Jenkins v. Dell Publishing Co., 251 F.2d 447, 451 (3d Cir. 1958), *cert. denied*, 357 U.S. 921 (1958) (an accurate one-page account with 150 words and several photo-

"[t]o a very great extent the press . . . has succeeded in making its own definition of news, as a glance at any morning newspaper will sufficiently indicate."[83] These decisions are not inconsistent with the Meikeljohn theory because they defer to the media in determining whether the communication involved is news.[84] Rather, the inconsistency lies in their failure to distinguish between news which is necessary to further the purposes of a self-governing people and that which does nothing more than satisfy the people's curiosity. Their failure to make this distinction results in the inability to afford each a different constitutional standard of protection, *i.e.*, to subject the latter category of news to reasonable restrictions while absolutely protecting the former. Instead both are grouped together as simply being newsworthy and afforded almost complete protection in the name of the First Amendment.

The unwillingness of most prior privacy decisions to follow the Meikeljohn theory and divide news into two categories probably explains

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graphs republishing, one year after the event, the story of how the plaintiff's decedent had been kicked to death by a teen-age gang was held to be a matter of public interest). The United States Supreme Court expressed a similar view in Time, Inc. v. Hill, 385 U.S. 375, 388 (1967):

> We have no doubt that the subject of the *Life* article, the opening of a new play linked to an actual incident, is a matter of public interest. "The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press]." *Id., quoting* Winters v. New York, 333 U.S. 507, 510 (1948).

82. *See, e.g.*, Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940). The admitted curiosity about the plaintiff, a former child prodigy whose present life was disclosed without his consent, was still considered "of public concern" even though the plaintiff had intentionally "cloaked himself in obscurity" for over twenty-five years. *Id.* at 809.

83. Note, *The Invasion of Defamation by Privacy*, 23 STAN. L. REV. 547, 556 (1971), *quoting* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 846 (3d ed. 1964). *But see* Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964) (picture showing plaintiff with her dress blown up by air jets in a fun house at a county fair held not to have legitimate news value, since, *inter alia*, there was nothing in the photograph which the public had a right to know); Trammell v. Citizens News Co., 285 Ky. 529, 148 S.W.2d 708 (1941) (malicious notice published in newspaper stating that plaintiff owed one of the defendants money on a grocery account held not a matter of legitimate public interest).

84. " 'News' includes all events and items of information which are out of the ordinary humdrum routine, and which have 'that indefinable quality of [interest] which arouses public attention.' " W. PROSSER, HANDBOOK OF THE LAW OF TORTS 845-46 (3d ed. 1964), *quoting* Sweenek v. Pathe News, Inc., 16 F. Supp. 746, 747 (E.D.N.Y. 1936). Interestingly, in Leavy v. Cooney, 214 Cal. App. 2d 496, 29 Cal. Rptr. 580 (1963), the court rejected the defendant's contention that a motion picture based on a widely publicized criminal case was protected on the ground that the matter was already within the public domain. Since the occurrances depicted followed a script and took place for the first time before a motion-picture camera, the court held that the picture was not in any sense the dissemination of news.

their similarly consistent failure to sever the identification of the actor from the event disclosed.[85] In *Melvin v. Reid*,[86] however, the California court did hold that the identification of the plaintiff in connection with the exhibition of a motion picture about her past life was not newsworthy, even though the actual facts of her past life were deemed newsworthy since they were matters of public record. Although the decision is not clear as to whether it was the use of her maiden name (Gabriel Darley) or the disclosure of her present identity (Mrs. Melvin) which upset the court,[87] the complaint in the case clearly indicates that only her maiden name was disclosed.[88] The court's severance of her name from her prior conduct was accomplished without any apparent recognition of the fact that *both* were matters of public record.

Perhaps the most puzzling aspect of the *Briscoe* decision is Justice Peters' conclusion that the disclosure of Briscoe's name in connection with his past crime, all a matter of *public record*, was of minimal social value. Precedent indicates that, as a matter of law, such information is public rather than private and therefore publication of it should be absolutely protected.[89] The contrary inference in *Briscoe* is that a non-

85. "Nothing so exclusively belongs to a man or is so personal and valuable to him as his name. His reputation and the character he has built up are inseparably connected with it." Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82, 90, 291 P.2d 194, 199 (1955), *citing* State *ex rel.* LaFollette v. Hinkle, 131 Wash. 86, 89, 229 P. 317, 319 (1924). If a man's name is so inseparably connected to the "person" of that man, an incident of his very being, it seems highly fictional and far from reality to separate the two when that person becomes involved in a criminal act, and the incidents of the crime, including as an integral part thereof the identification of the actor, are spread upon the public record. Society does not erase the man's name wherever it appears in the public record after some sufficient period of time has elapsed from the date of the crime.

86. 112 Cal. App. 285, 297 P. 91 (1931).

87. *Id.* at 291, 297 P. at 93; W. PROSSER, HANDBOOK OF THE LAW OF TORTS 836 n.92 (3d ed. 1964).

88. Plaintiff's Complaint, Melvin v. Reid, Civil No. 254102 (L.A. Super. Ct., filed June 8, 1928).

89. "[T]here can be no privacy with respect to a matter which is already public, ordinarily matters embodied in public records are not within the scope of [right of privacy] protection." Werner v. Times-Mirror Co., 193 Cal. App. 2d 111, 117, 14 Cal. Rptr. 208, 212 (1961) (defendant published an article about public events in which the plaintiff played a part some 30 years earlier).

Prior to *Briscoe* it was well-established that:

> The facts disclosed to the public must be private facts, and not public ones. The plaintiff cannot complain when an occupation in which he publicly engages is called to public attention, or when publicity is given to matters such as the date of his birth or marriage, or his military service record, which are a matter of public record, and open to public inspection. . . . The contention that when an individual is thus singled out from the public scene and undue attention is focused upon him, there is an invasion of his private rights, has not been borne out by the decisions. PROSSER, *supra* note 31, at 810-11 (footnotes omitted).

infamous criminal can revert to the privacy of every day life merely by an unspecified uneventful lapse of time. Thus, the lapse of time between the commission of the crime and its subsequent redisclosure is a dominant factor in diminishing the protectability of the publication under the First Amendment. In *Briscoe* the eleven year and one month time span between the crime and the publication of the article was sufficiently long to raise serious doubt about the degree of public interest (other than mere curiosity) in Briscoe's identity as a former criminal, even when used in connection with a truthful report of the facts of his crime.

The clear weight of authority prior to *Briscoe* was that, once a person's activities become a matter of public interest, he could not revert to a private status merely by lapse of time, or that, under the circumstances, the period of time was insufficient to deprive the defendant of the privilege to publish newsworthy material:[90]

> One troublesome question, upon which none of the cases dealing with the Constitutional privilege has yet touched, is that of the effect of lapse of time, during which the plaintiff has returned to obscurity. . . . If it is only the event which is recalled, without the use of the plaintiff's name, there seems to be no doubt that even a great lapse of time does not destroy the privilege [freedom of the press]. Most of the common law decisions have held that even the addition of his name and likeness is not enough to lead to liability. There are, however, two or three decisions indicating that a point may be reached at which a past event is no longer news, and the unnecessary mention of the plaintiff's name in connection with it may afford a cause of action.[91]

If it is assumed that the fact disclosed is a matter of public record, then precedent dictates that the lapse of time between the event and the disclosure has no bearing on the question of invasion of privacy because one of the established pre-conditions to a successful recovery of damages for public disclosure of private matter has not been met, *i.e.*, the privateness of the fact disclosed.[92]

Even where the facts disclosed are not part of a criminal record but rather were once public property, most jurisdictions and especially California have consistently held that mere lapse of time by itself cannot diminish the newsworthiness of those facts, including names, nor strip

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The necessity for revision of Dean Prosser's recent statement as a result of *Briscoe* is obvious.

90. *See* Annot., 30 A.L.R.3d 203, 235 (1970), and cases compiled therein.

91. PROSSER, *supra* note 31, at 827-28 (footnotes omitted).

92. See note 89 *supra*.

the press of the privilege to accurately recount them. For example, in response to the plaintiff's contention that the lapse of time between the event and the later reporting of the event diminished the defendant's First Amendment protection, the California court of appeal in *Smith v. National Broadcasting Co.*[93] said:

> [I]ncidents which have aroused the public interest, have been fre-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 the 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.[94]

The spirit of this principle was reiterated by the California court of appeal in *Werner v. Times-Mirror Co.*,[95] where the lapse of time was thirty years:

> [O]ne quite legitimate function of the press is that of educating or reminding the public as to past history. . . . [T]he revival of past events that once were news, can properly be a matter of present public interest. . . . [O]nce a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days."[96]

Clearly at the time of *Briscoe* there was ample basis in California law for the proposition that in certain situations some legitimate public purpose is served by recalling the event, irrespective of the lapse of time since the event first generated public interest. Furthermore, none of the California cases since *Melvin* have severed the name of the actor from the event as a convenient method of diluting the publication's First Amendment protection.

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93. 138 Cal. App. 2d 807, 292 P.2d 600 (1956).

94. *Id.* at 814, 292 P.2d at 604.

95. 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961).

96. *Id.* at 118, 14 Cal. Rptr. at 212, *quoting* Prosser, *Privacy*, 48 CALIF. L. REV. 383, 418 (1960). "The [Werner] court's decision that a thirty-year time lag could not transmute a truthful matter public at the time of original publication into a matter presently private followed on substantial current authority." 9 U.C.L.A.L. REV. 862, 869 (1962) (footnote omitted). Similarly, in Carlisle v. Fawcett Publications, Inc., 210 Cal. App. 2d 733, 20 Cal. Rptr. 405 (1962), where the lapse of time was 18 years, the court said:

> The privilege of . . . enlightening the public as to matters of interest is not restricted to current events; magazines . . . may legitimately inform and entertain the public with the reproduction of past events. . . . [M]ere lapse of time does not prohibit publication. *Id.* at 746, 20 Cal. Rptr. at 414.

See also Cohen v. Marx, 94 Cal. App. 2d 704, 705, 211 P.2d 320, 321 (1949) (lapse of time of more than 10 years).

In the leading federal case of *Sidis v. F-R Publishing Corp.*,[97] a former child prodigy, who, loathing public attention, had sought oblivion, claimed an invasion of his privacy by an unvarnished factual account of his life in *The New Yorker* magazine. The article covered the thirty years which he had lived out of the public eye and touched on many personal details. It was held that:

> 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.[98]

Judge Clark, in denying the existence of a cause of action, observed that Mr. Sidis was inescapably public.[99]

In *Barbieri v. News-Journal Co.*,[100] the Delaware supreme court was confronted with a set of facts strikingly similar to those in *Briscoe.* In that case the defendant published an article concerning the last recorded use of the whipping post in Delaware nine years earlier. The plaintiff was named as the criminal involved. Plaintiff Barbieri alleged that he had reformed and had therefore reacquired his right to privacy. The court disagreed and dismissed his complaint:

> [W]e cannot agree to impose upon the public press a legal standard founded on such considerations. There must be something more than the mere publication of *facts of record* relating to a matter of public interest. . . . There is nothing in the articles here complained of which violates the ordinary decencies. . . .[101]

Excluding the disclosure of Briscoe's name from the category of information which the public has a right to know ignores the very reason why society does not erase the criminal's name from the public records once his punishment has been terminated. Our society has reserved the right to know who among us has committed a criminal offense. It is well-established that the returnee rate of those who leave prison is substantial.[102] If, in fact, there is even a 50-percent chance

97. 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

98. *Id.* at 809.

99. *Id. Cf.* Estill v. Hearst Publishing Co., 186 F.2d 1017 (7th Cir. 1951) (picture showing plaintiff as he looked 15 years earlier, when he was a prosecuting attorney, with John Dillinger's hand on his shoulder, did not constitute an invasion of privacy); Samuel v. Curtis Pub. Co., 122 F. Supp. 327 (N.D. Cal. 1954) (lapse of time of two years did not destroy privilege if the picture was originally newsworthy).

100. 189 A.2d 773 (Del. 1963).

101. *Id.* at 776-77 (emphasis added).

102. FBI, UNIFORM CRIME REPORTS—1969, at 35-39 (1970).

that a "rehabilitated" felon will return to a life of crime within a few years after his release from penal custody, reasonable law-abiding men can certainly claim an interest in knowing who among them has a criminal record.

More importantly, the use of names in true reports of the type at issue in *Briscoe* lends a necessary touch of credibility to the article itself. The right of the press to publish news necessarily includes the right to publish believable, authentic news in a literary style of the publisher's own unfettered choice. If the names of past criminals were unavailable for publication, an article similar to that involved in *Briscoe*,[103] educating the public about crime in our nation,[104] could lack the desired authenticity and immediacy needed to stir people to take preventive action. Moreover, the intermittent identification of the actors in a news story reporting crime generally constitutes a common and widely used literary style in the press industry which promotes interesting and readable articles.[105]

Though the scope and tenor of Justice Peters' discussion seems to discount the importance of these interests, it is possible that they were not ignored altogether. In delineating the factual issues toward the end of his opinion, Justice Peters listed as the fourth element for the trier of fact's consideration, "whether any independent justification for printing plaintiff's identity existed."[106] Nowhere in the opinion is it suggested what factors may tend to show such justification. But the interest in publishing believable reports in one's own literary style might provide the requisite "independent justification." The argument would be especially strong when the identity of the particular plaintiff could substantially affect the authenticity of the article.

Justice Peters did not disapprove or overrule the apparently inconsistent California cases on the lapse of time issue, nor did he confront the similarly inconsistent out-of-state decisions. The reason for this inattention probably lies in the fact that in none of the cases, except *Barbieri*, was there involved an identification of a past criminal. The *only* interest asserted in behalf of the plaintiff in each case was the

103. *Big Business, supra* note 5.

104. There can be no doubt that one quite legitimate function of the press is that of educating or reminding the public as to past history, and that the recall of former public figures, the revival of past events that one [sic] were news, can properly be a matter of present public interest. PROSSER, *supra* note 31, at 827. *Cf.* Monitor Patriot Co. v. Roy, 401 U.S. 265, 269 n.2 (1971).

105. Of approximately twenty past crimes that were reported in the article, one-half related the name of the actor in the crime. *Big Business, supra* note 5.

106. 4 Cal. 3d at 543, 483 P.2d at 44, 93 Cal. Rptr. at 876.

nebulous right to privacy, a privacy which was voluntarily relinquished some years earlier, never to be regained merely because of the passage of time. However, when the plaintiff is a former criminal, Justice Peters saw the identification of that plaintiff by name as contradictory to society's interest in the rehabilitative process.[107] Hence, where the plaintiff is a past criminal, the mere lapse of time may provide a basis for a cause of action for invasion of privacy.

Significantly, the interjection of the societal interest in rehabilitation fits neatly within the Meikeljohn theory discussed above.[108] If the identification of Briscoe falls outside the public's right to know as defined by Meikeljohn, it receives only limited protection as a private right under the due process clauses of the Constitution.[109] This is possible since Meikeljohn views the right to a free press as both a public and a private right:

> The right of a private person to publish, unlike the public right to know, is subject to limitation; but the limitation may only be exercised where it bears some reasonable relationship to a valid *public purpose.* In other words, the public right to know those things relevant to the aims of self-government is protected under the first amendment and is absolute and unlimited. There is also, however, a private right to publish that is protected under the due process clause of the fifth amendment and that, like any other private right, is subject to reasonable limitation in the *public interest.*[110]

Since the *Briscoe* court characterized the plaintiff's right to privacy as a private right,[111] that interest standing alone would not be sufficiently *public* to justify a limitation on the defendant's exercise of his private right to publish. However, when the full weight of society's interest in the rehabilitative process is considered as a factor in favor of the plaintiff, there emerges a sufficiently valid public purpose which may operate to limit the right to publish.

C. The State's Interest in the Rehabilitative Process

Competing with the social need for reports on criminal activity by a free press, and militating in favor of protecting the individual's privacy, is the state's interest in the integrity of the rehabilitative process.[112]

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107. *Id.* at 524, 483 P.2d at 43, 93 Cal. Rptr. at 875.
108. See text accompanying notes 64-78 *supra.*
109. Bloustein, *supra* note 50, at 627.
110. *Id.* (emphasis added).
111. See note 50 *supra.*
112. 4 Cal. 3d at 538, 483 P.2d at 40, 93 Cal. Rptr. at 872.

On this issue, Justice Peters relied heavily on *Melvin*, wherein it was stated:

> One of the major objectives of society as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal. Under these theories of sociology it is our object to lift up and sustain the unfortunate rather than tear him down. Where a person has *by his own efforts* rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime. Even the thief on the cross was permitted to repent during the hours of his final agony.[113]

Obviously, as the court pointed out, "[O]ne of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from which he has been ostracized. . . ."[114] This assimilation is held out by the state as one of the rewards available to the rehabilitated felon: an incentive to do well with an expectation of later anonymity.[115] There should be a point in time when a formerly public, now rehabilitated, man is allowed to revert to private life.[116] Justice Peters emphasized that Briscoe had paid his debt to society.[117] Disclosure of Briscoe's past more than eleven years after his criminal blunder must surely have put him in "social jeopardy," thereby greatly increasing his original punishment.[118]

113. 112 Cal. App. at 292, 297 P. at 93 (emphasis added). Consistent with the de-emphasis of Melvin's self-imposed rehabilitation, Justice Peters, in quoting *Melvin*, deleted the words "by his own efforts." 4 Cal. 3d at 539, 483 P.2d at 41, 93 Cal. Rptr. at 873.

114. 4 Cal. 3d at 539, 483 P.2d at 41, 93 Cal. Rptr. at 873.

115. *Id.* This is one of several incentives in the penal system. Another is indeterminate sentencing. CAL. PEN. CODE § 1168 (West 1972). The purpose of indeterminate sentencing is "to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing." *In re* Lee, 177 Cal. 690, 692, 171 P. 958, 959 (1918); *accord,* Grasso v. McDonough Power Equip., Inc., 264 Cal. App. 2d 597, 600, 70 Cal. Rptr. 458, 460 (1968).

116. 4 Cal. 3d at 539, 483 P.2d at 41, 93 Cal. Rptr. at 873.

117. *Id.* at 540, 483 P.2d at 41, 93 Cal. Rptr. at 873.

118. The Fifth Amendment to the United States Constitution commands: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V. To the same effect is CAL. CONST. art. I, § 13. It is suggested that the threat of social ostracism through exposure is akin to being twice put in jeopardy: a punishment which is possibly far worse than that originally imposed by the judicial system and certainly contrary to the theoretical goals of rehabilitation. Moreover, social ostracism may amount to cruel and unusual punishment under the Eighth Amendment. Recently, "cruel and unusual" has been interpreted to include the imposition of mental anguish as well as physical pain. *See* People v. Anderson, 6 Cal. 3d 628, 649-50, 493 P.2d 880, 894-95, 100 Cal. Rptr. 152, 166-67 (1972).

Unfortunately, however, the use of *Melvin* to emphasize the importance of rehabilitation is not convincing. The plaintiff in *Melvin* was not an ex-criminal, supposedly rehabilitated by a public penal system, but an alleged ex-prostitute acquitted on a murder charge who had privately amended her immoral ways.[119] To effectuate this private rehabilitation Mrs. Melvin had changed her name.[120] The defendants in *Melvin* not only disclosed the plaintiff's past misconduct, but went further and divulged her maiden name as well, not for the purpose of authenticity, but apparently for sensationalism.[121] Clearly Mrs. Melvin could have reached the rehabilitative state propounded by Justice Peters in *Briscoe* but for the defendant's adverse publicity. It is equally clear that in *Melvin*, where the plaintiff was never a convicted criminal, but rather a possible participant in victimless breaches of morals, there was a strong societal interest in encouraging complete social rehabilitation. However, it is questionable whether such a complete rehabilitation is truly society's goal when the object of the process is a convicted criminal, whose name and past history are a matter of public record. To Justice Peters the rehabilitative purpose is therapeutic—the product of an increasingly aware and benevolent society.[122] But if the product of our legislators is indicative of the will of the people, the catalyst behind the rheoric of rehabilitation is in actuality social defense and nothing more. For example, the California Constitution provides for the ineligibility of ex-felons to hold public office, serve on juries, or vote.[123] The California Evidence Code specifically provides for the admissibility of a prior felony conviction to impeach the credibility of a convicted felon when he is a witness at trial, notwithstanding the *nature* of the prior conviction.[124] In the federal system, the receipt, possession or transportation of firearms by a convicted felon is unlawful,[125] notwithstanding the constitutional "right of the people to keep and bear Arms."[126] Inasmuch as these "anti-felon" provisions are indicative of the will of the people—the public policy—they illustrate that the true purpose, nature and meaning of society's interest in the rehabilitation

119. 112 Cal. App. at 286, 297 P. at 91.

120. *Id.*

121. *Id.* at 290-92, 297 P. at 92-94.

122. For the view that the protection of individual privacy is important to preserve the "Christian notion of the possibility of redemption" see V. PACKARD, THE NAKED SOCIETY 12 (1964).

123. CAL. CONST. art. XX, § 11.

124. CAL. EVID. CODE § 788 (West 1968). *But see* People v. Beagle, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).

125. 18 U.S.C. APP. § 1201-03 (1970).

126. U.S. CONST. amend. II.

of past criminals is strictly preventive. It is not the public policy of the State of California to return the past criminal to society as if he had no opprobrious past, but rather to prevent his return to that criminal element which exists in every community. In short, society "forgives without forgetting"[127] and guards the right to do so zealously. In this light it is doubtful whether the rehabilitative interest in a case like *Briscoe* has as much importance in the ultimate balancing of competing interest as Justice Peters would have one believe. In the absence of a positive correlation between the possibility of disclosure and Briscoe's tendency to return to the criminal element, the societal interest in the rehabilitative process would seem to be an irrelevant factor in the weighing process.

In summation of his discussion on rehabilitation, Justice Peters pictured the defendant, Reader's Digest, as an immense communicative vehicle which would allow "the past" to pursue Briscoe:

> [A]s if in some bizarre canyon of echoes, petitioner's past life pursues him through the pages of Reader' Digest, now published in 13 languages and distributed in 100 nations, with a circulation in California alone of almost 2,000,000 copies.[128]

It is too late in the day to contend that the power position of the defendant should be an irrelevant consideration in the ultimate determination of the existence of tort liability in California. The socio-economic status of a defendant has become an increasingly dominant factor in California tort law.[129] In 1970 Justice Tobriner stated that the California Supreme Court was tending toward a jurisprudential approach which looks to the *status* of the defendant and the *harm* done to the plaintiff as primary considerations in the determination of the plaintiff's right to recover.[130] As early as 1968 one writer observed:

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127. Karst, *supra* note 46, at 369, wherein the author uses this phrase to characterize California legislation purportedly allowing a convicted criminal to clear his record and make a fresh start.

128. 4 Cal. 3d at 540, 483 P.2d at 42, 93 Cal. Rptr. at 874.

129. *See* Barrera v. State Farm Mut. Auto. Ins. Co., 71 Cal. 2d 659, 456 P.2d 674, 79 Cal. Rptr. 106 (1969); Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). Each of these cases emphasizes the socio-economic status of the defendant. In each, traditional legalisms which would normally operate against the plaintiff are easily overcome, due in part to a realization that as between the plaintiff and the defendant, the latter is better able to bear the loss.

130. Tobriner, *The Demise of the Concept of Duty of Defendant*, Los Angeles Metropolitan News, Jan. 9, 1970, at 1-2. Justice Trobriner explained:

> Our current crowded and computerized society compels an interdependence of its members which inevitably brings changes in the law that governs it. The

> [T]ort liability is increasingly moving away from the fault principle—which, itself, has lost the moral connotation of former centuries—and . . . to an ever-increasing extent, *status-like* insurance is substituted for the individual responsibility flowing from the tortious act. . . . The growth of the new status versus individual freedom means that legal liability again results more and more from a given position—as employer, land owner, consumer, worker—rather than from the exercise of the free will by an independent individual.[131]

However, past California "status liability" tort cases, unlike *Briscoe*, did not involve a competing interest of constitutional dimensions.[132] The existence of constitutional considerations would seem to militate against the defendant's status playing such a dominant role in developing a vehicle for the imposition of liability. It is essential that the court fairly weigh the competing interests with an open mind and a minimum of presupposed preferences, so that liability will not be imposed at the expense of what may be our most vital social need—a free press. It is no doubt due to these considerations that Justice Peters did not rely on the "status liability" approach, but instead carefully balanced the competing interests involved, keeping in mind the fact that "[t]he right to know and the right to have others *not* know are, simplistically considered, irreconcilable."[133]

D. The Qualification of the Right To Disseminate News

In the wake of its impassioned dissertation on society's interest in the rehabilitation of Briscoe, the court declared that, although it was always difficult to withhold publication of any news items, "the great

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> open spaces of a frontier America that permitted physical and economic freedom, a *laissez-faire* economy and a *laissez-faire* law, have been replaced by apartment houses, skyscrapers, and a complexity of legal rules. The very fact that people are pressed together in closely packed communities necessarily forces changes in their legal relationships. . . .
>
> In our integrated industrial state, the courts have become less sensitive to the action of the tortfeasor and more sensitive to the injury to the tort victim. The increase in danger to the individual from the incidents of technology, and the new emphasis upon the protection of the individual, have combined to shift the inquiry from the nature of the wrong committed to the nature of the harm done. . . . .
>
> These developments are symbols of deeper trends. They show a philosophical turning of the courts to the concept of status. Status rights and obligations are those which arise from the inherent relationships of the parties; they are measured by the reasonable expectations of the plaintiff as to the performance of the product or the conduct of the defendant in the life situation, they arise from the *position*, or *status*, of the party rather than from his voluntary act. *Id.*

131. W. FRIEDMANN, LAW IN A CHANGING SOCIETY 372 (abr. ed. 1964) (emphasis added).

132. Compare *Briscoe* with the cases cited in note 129 *supra.*

133. 4 Cal. 3d at 541, 483 P.2d at 42, 93 Cal. Rptr. at 874.

general interest in an unfettered press may at times be outweighed by other great societal interests."[134] Without further hesitation or discussion, Justice Peters promptly elevated Briscoe's right to privacy, presumably coupled with society's interest in the rehabilitative process, to the position of such a "great societal interest."[135] Thus, having rejected an absolute protection for the press,[136] the court faced the task of devising a standard which would adequately delimit the boundaries within which the news media would be protected.

A parallel was initially drawn to *Time, Inc. v. Hill*,[137] wherein the United States Supreme Court was similarly concerned with balancing the right to a free press against the right to privacy.[138] The Court in

134. *Id.* at 540, 483 P.2d at 42, 93 Cal. Rptr. at 874.

135. *Id.* at 540-41, 483 P.2d at 42, 93 Cal. Rptr. at 874. *But see* note 32 *supra* for the proposition that the right to privacy is itself a constitutional right. In this view *Briscoe* involves a conflict between two constitutional rights—the right to privacy and the right of a free press—if state action is found to be involved in the Reader's Digest publication.

136. Absolute protection of the press under the guise of the First Amendment has been urged by Justices Black and Douglas but has never been adopted by the Supreme Court. The concurring opinion of Justices Black and Douglas in New York Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (footnote omitted), expressed the view that "[a]n unconditional right to say what one pleases about public affairs is . . . the minimum guarantee of the First Amendment." The *New York Times* case concerned a city commissioner of public affairs who brought a defamation action against the New York Times concerning publication of a full-page paid advertisement describing racial discrimination in Montgomery, Alabama, against black students and leaders who were protesting segregation. The Court specifically held unconstitutional an Alabama defamation law that penalized honest, factual inaccuracies without requiring a showing of "actual malice." The *New York Times* Court defined actual malice as knowledge that a statement is false or reckless disregard of whether it is false or not. *Id.* at 279-80. The views of Justices Black and Douglas as expressed above closely parallel the Meikeljohn theory of the First Amendment. See text accompanying notes 64-78 *supra*. Since, as discussed earlier, the *Briscoe* court took the disclosure of Briscoe's name out of the realm of the public's right to know, it is not surprising that the defendant's interest in the dissemination of news would be deemed "qualified." See text accompanying notes 108-11 *supra*.

Justice Black's absolutist view of the First Amendment was again expressed in his concurring opinion in Time, Inc. v. Hill, 385 U.S. 374, 398-99 (1967). He said that even limitations on freedom of speech when the speech is characterized as

> "malicious" and particularly "reckless disregard of the truth" can never serve as effective substitutes for the First Amendment words: ". . . make no law . . . abridging the freedom of speech, or of the press. . . ." Experience, I think, is bound to prove that First Amendment freedoms can no more be permanently diluted or abridged by this Court's action than could the Sixth Amendment's guarantee of right to counsel.

137. 385 U.S. 374 (1967).

138. *Time* involved a "private" plaintiff who scrupulously avoided publicity but was nevertheless placed in a "false light in the public eye" by a magazine article connecting his family with the content of a new play. This play was patterned after a front-page news story, but with additional fictionalized and sensationalized elements about

Time construed the New York privacy statute as not including a cause of action for invasion of privacy where the alleged invasion was the truthful and factual reporting of newsworthy people or events.[139] Justice Peters, however, seized upon a passing footnote comment in *Time* as an example of an important limitation on the right to publish truthful newsworthy material. The footnote included an observation that the fact that the material published may be newsworthy will not "foreclose an interpretation . . . to allow damages where 'Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency.' . . ."[140]

In his haste to fashion a limitation upon the right of the press to disclose true facts which are a matter of public record and in an obvious effort to attach Supreme Court authoritativeness to this "offensiveness" qualification, Justice Peters failed to note that the *Time* Court extracted its footnote comment from *Sidis v. F-R Publishing Corp.*[141] An examination of *Sidis* reveals that the statement is clearly dictum. Even though the *Sidis* court characterized the publicity thrust upon the former child prodigy as a "ruthless exposure of a once public character,"[142] it denied him relief. The reason for the denial lies at the heart of the cause of action for invasion of privacy based on a truthful public disclosure of private facts—the facts disclosed *must* be private.[143] In *Sidis* it was found that the plaintiff was inescapably public.[144] The *Briscoe* court, on the other hand, apparently discarded the heretofore well-recognized public record category of non-private facts and by implication decided that the identification of Marvin Briscoe as a former criminal, taken from his criminal record, would be a public disclosure of a *private* fact.

It is only when the condition of privateness is met that the offensive-

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the plaintiff's family being held hostage within their home by three escaped convicts. *Time* was a suit for invasion of privacy, not defamation, yet many recent defamation cases have relied substantially on the *Time* view of "public interest" in determining the applicability of the *New York Times* standard. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Konigsberg v. Time, Inc., 312 F. Supp. 848 (S.D.N.Y. 1970); Arizona Biochemical Co. v. Hearst Corp., 302 F. Supp. 412 (S.D.N.Y. 1969); DeSalvo v. Twentieth Century-Fox Film Corp., 300 F. Supp. 742 (D. Mass. 1969).

139. 385 U.S. at 381-83.

140. *Id.* at 383 n.7, *quoting* Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940). The *Time* Court has used this footnote in its opinion as an exception to the absolute defense of "truthfulness" in privacy actions under New York's Civil Rights Statutes.

141. 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940). For an additional discussion of *Sidis* see text accompanying notes 97-99 *supra*.

142. 113 F.2d at 807.

143. PROSSER, *supra* note 31, at 810.

144. 113 F.2d at 809.

ness of the disclosure takes on its relevancy. Offensiveness operates as a limitation on the maintenance of this kind of privacy action. The offensiveness of the disclosure becomes not only relevant but necessary to the successful imposition of liability.[145] Justice Peters combined the elements of private fact and offensiveness in concluding that a "truthful publication is constitutionally protected if (1) it is *newsworthy* and (2) it does not reveal facts so *offensive* as to shock the community's notions of decency."[146] As worded, this statement seems to require that all published material meet *both* limitations in order to invoke First Amendment protection. Interpreted quite literally, if the Reader's Digest article was newsworthy, but was also offensive to the reasonable man, then the constitutional protection would be withdrawn. However, Justice Peters later defined newsworthiness in part by the offensive character of the article. If the article would be shockingly offensive to the reasonable man in the plaintiff's situation, then it is not newsworthy. This approach avoids the constitutionally suspect result of withdrawing protection from a defendant who published an admittedly newsworthy article. Thus, the pivotal element in the *Briscoe* test is the degree of offensiveness. The *Time* emphasis on the newsworthiness limitation[147] was supplanted in *Briscoe* by a primary emphasis on the offensiveness limitation.

E. Newsworthiness Defined

Since the California Supreme Court's recent definition of "newsworthiness" in *Kapellas v. Kofman*[148] failed to expressly mention the offen-

145. The final limitation is that the matter made public [private facts] must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities. . . . The ordinary reasonable man does not take offense at mention in a newspaper of the fact that he has returned home from a visit, or gone camping in the woods, or given a party at his house for his friends. It is quite a different matter when the details of sexual relations are spread before the public eye, or there is highly personal portrayal of his intimate private characteristics or conduct. PROSSER, *supra* note 31, at 811-12 (footnotes omitted).

As can be seen from the above statement of the "general rule" the private nature of the matter disclosed is determined apart from its offensiveness. This is exemplified by the "once public, always public" principle previously discussed. However, it has been suggested that this principle is only an exception and that generally the public or private nature of the subject matter depends upon its offensiveness. 9 U.C.L.A.L. REV. 862, 869 (1962).

146. 4 Cal. 3d at 541, 483 P.2d at 42-43, 93 Cal. Rptr. at 874-75 (emphasis added). This "offensiveness" qualification on the right to disseminate news has been considered by a number of privacy cases prior to *Briscoe*. Annot., 30 A.L.R.3d 242-44 (1970).

147. 385 U.S. at 387-88.

148. 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969). In *Kapellas* the plaintiff was a woman who ran for public office in the City of Alameda, California.

siveness element, the *Briscoe* court proceeded to determine the newsworthiness of the Reader's Digest article through an elastic application of three factors considered in *Kapellas*.[149]

The court concluded as to the first *Kapellas* factor, "the social value of the facts published,"[150] that a jury could find that publication of plaintiff's identity was of "minimal social value."[151] The rationale for this conclusion was that Reader's Digest had "no independent reason whatsoever for focusing public attention on Mr. Briscoe . . . at this time," that "[a] jury could certainly find that Mr. Briscoe had once again become an anonymous member of the community," and that "[o]nce legal proceedings have concluded, and . . . the individual has reverted to the lawful and unexciting life led by the rest of the community, the public's interest in knowing is less compelling."[152]

The second *Kapellas* factor considered was " 'the depth of the article's intrusion into [the] ostensibly private affairs' " of plaintiff Briscoe.[153] Not surprisingly it was observed that "a jury might find that revealing one's criminal past for all to see is grossly offensive to most people in America. Certainly a criminal background is kept even more hidden from others than a humiliating disease. . . ."[154] The emphasis here was placed on the harm done by such a revelation: "ostracism, isolation, and the alienation of one's family."[155] The offensiveness of the intrusion, rather than its depth, was weighed.

The third and last *Kapellas* factor considered by the *Briscoe* court was " 'the extent to which the party [plaintiff] voluntarily acceded to a

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A local newspaper ran a story concerning her competence as the mother of her six children, specifically mentioning the police records of three of her children for minor violations of the local laws. The Supreme Court of California dismissed her cause of action for invasion of privacy, in part because the court found that the item was newsworthy. *Id.* at 35-39, 459 P.2d at 921-24, 81 Cal. Rptr. at 369-72.

149. *Id.* at 36, 459 P.2d at 922, 81 Cal. Rptr. at 370, where the court said:

> In determining whether a particular incident is "newsworthy" and thus whether the privilege shields its truthful publication from liability, the courts consider a variety of factors, including [1] the *social value of the facts* published, [2] *the depth of the article's intrusion* into ostensibly private affairs, and [3] the extent to which the party *voluntarily acceded* to a position of public notoriety. (emphasis added).

150. *Id.*

151. 4 Cal. 3d at 541, 483 P.2d at 43, 93 Cal. Rptr. at 875.

152. *Id.* at 541-42, 483 P.2d at 43, 93 Cal. Rptr. at 875.

153. *Id.* at 541, 483 P.2d at 43, 93 Cal. Rptr. at 875, *quoting Kapellas*, 1 Cal. 3d at 36, 459 P.2d at 922, 81 Cal. Rptr. at 370.

154. 4 Cal. 3d at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875; *see* Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942).

155. 4 Cal. 3d at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875.

position of public notoriety.' "[156] Justice Peters concluded that the plaintiff "in no way . . . voluntarily consented to the publicity accorded him here,"[157] because he made every effort to have others forget that he once hijacked a truck.[158] This is a significant modification of the third *Kapellas* factor. The inquiry should have been whether the plaintiff's entry into the public arena was of his own volition, not whether he voluntarily acceded to this *kind* of publicity. Obviously Briscoe would not want the facts of his prior crime published. However, Briscoe's crime must have been intentional.[159] Consequently, he clearly entered voluntarily into the public arena when he committed the hijacking.[160] For example, in *Smith v. National Broadcasting Co.*[161] it was said:

> [W]here a person intentionally places himself in the public eye, or by the particular character of his conduct or activities has acquired, or has had thrust upon him, public notoriety, he relinquishes the right to live that segment of his life which has thus engaged the public interest absolutely free from public scrutiny.[162]

The *Briscoe* court utilized *Kapellas* as its sole authority in defining newsworthiness and concluded that a jury could find that Briscoe's identification as a former hijacker was *not* newsworthy.[163] However, Justice Peters' discussion of newsworthiness should also have included a fourth important factor considered in *Kapellas*. This factor, as stated in *Kapellas*, concerns the public nature of the material:

> If the information reported has previously become part of the "*public domain*" or the intrusion into an individual's private life is only slight, publication will be privileged even though the social utility of the publication may be minimal. On the other hand, when the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned, especially if the individual willingly entered into the public sphere.[164]

This public domain factor has been a familiar limitation in the area

156. *Id.* at 541, 483 P.2d at 43, 93 Cal. Rptr. at 875, *quoting Kapellas*, 1 Cal. 3d at 36, 459 P.2d at 922, 81 Cal. Rptr. at 370.

157. 4 Cal. 3d at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875.

158. *Id.*

159. *See* Complaint No. 944396, *supra* note 4, count V, at 2.

160. *See* Coverstone v. Davies, 38 Cal. 2d 315, 323, 239 P.2d 876, 880 (1952).

161. 138 Cal. App. 2d 807, 292 P.2d 600 (1956).

162. *Id.* at 812, 292 P.2d at 603; *accord* Stryker v. Republic Pictures Corp., 108 Cal. App. 2d 191, 194, 238 P.2d 670, 672 (1951).

163. 4 Cal. 3d at 541, 483 P.2d at 43, 93 Cal. Rptr. at 875.

164. 1 Cal. 3d at 36, 459 P.2d at 922, 81 Cal. Rptr. at 370 (citations and footnote omitted) (emphasis added).

of privacy,[165] and the significance of its absence from Justice Peters' opinion has already been discussed. Generally it is said that " 'there can be no privacy in that which is already public.' "[166] The reason for the court's apparent turnabout in *Briscoe* is unclear, except that the inclusion of this element would have effectively barred any recovery by Briscoe.[167] Plaintiff Briscoe himself conceded that the published activity (his crime) and his name were matters of public record.[168] Once again the significance of the societal interest in rehabilitation becomes apparent. That is, a possible explanation for the court's inconsistency in applying the public record limitation might lie in the absence of the rehabilitation interest in *Kapellas* and its existence in *Briscoe*. Hence, it is possible that the California Supreme Court has not rejected the public record category of facts for all privacy cases. Arguably, only where the societal interest in rehabilitation of former criminals is threatened with frustration will facts which are a matter of one's criminal and public record be looked upon as private.

II. THE PRIMA FACIE CASE

Justice Peters concluded the weighing process by re-emphasizing the societal interests at stake.[169] In addition to the right of privacy and the right of publication, the court specifically included the right to rehabilitation, saying that "[a] jury might well find that a continuing threat that the rehabilitated offender's old identity will be resurrected by the media is counter-productive to the goals of [the penal system]."[170] Noting that " 'the balance is always weighted in favor of free expression,' "[171] lest First Amendment rights be chilled with uncertainty,[172] Justice Peters delivered the general holding of the court, requiring "a plaintiff to prove, in each case, that the publisher invaded his privacy with *reckless disregard* for the fact that reasonable men would find the invasion *highly offensive.*"[173]

165. *See* PROSSER, *supra* note 31, at 810-11.

166. Smith v. National Broadcasting Co., 138 Cal. App. 2d 807, 812, 292 P.2d 600, 603 (1956), *quoting* Melvin v. Reid, 112 Cal. App. 285, 290, 297 P. 91, 93 (1931); *accord*, Gill v. Hearst Publishing Co., 40 Cal. 2d 224, 230, 253 P.2d 441, 444 (1953).

167. See note 89 *supra.*

168. Appellant's Opening Brief at 3, Court of Appeal, Second Appellate District, State of California, 2nd Civ. No. 35307.

169. 4 Cal. 3d at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875.

170. *Id.*

171. *Id., quoting* Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 (D.C. Cir. 1968).

172. 4 Cal. 3d at 542-43 n.18, 483 P.2d at 43-44 n.18, 93 Cal. Rptr. at 875-76 n.18.

173. *Id.* at 542-43, 483 P.2d at 44, 93 Cal. Rptr. at 876 (footnote omitted) (empha-

The courts have consistently refused to delineate the prima facie case necessary for recovery for invasion of one's privacy. This reluctance has engendered much criticism. Professor Kalven has voiced a typical frustration:

> To begin with, the tort has no legal profile. We do not know what constitutes a prima facie case, we do not know on what basis damages are to be measured, we do not know whether the basis of liability is limited to intentional invasions or includes also negligent invasions and even strict liability.[174]

The *Briscoe* court managed to avoid assigning any "clear profile" to the tort by distributing numerous partial definitions throughout the opinion, several of which are contradictory. However, spurred on by its own expressed distaste for "ad hoc" balancing,[175] the court constructed a few guideposts that apparently lead to a prima facie case containing the following elements: (1) a public disclosure, (2) of private facts, (3) which disclosure would be highly offensive to a reasonable man in the plaintiff's situation and (4) which was made with reckless disregard for its offensiveness. These four elements which Briscoe must prove to prevail are the end result of the court's balancing process *i.e.,* its quantitative and qualitative analysis of all the facts and the delineation of the interests to be weighed.

At first blush, this prima facie case does not expressly disclose the specific criteria to be used in determining the "newsworthiness" of the published matter. But elements two and three together should be understood as encompassing the three factors taken from *Kapellas* and the rehabilitation and offensiveness factors as developed in *Briscoe.*[176] A favorable jury finding for the plaintiff, respecting the four elements of this prima facie case, would necessarily result in a factual determination of the non-newsworthiness of the material at issue.[177]

The third prima facie element, the disclosure's offensiveness to the reasonable man, reflects the depth of the article's intrusion into the pri-

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sis added). It must be assumed that the *Briscoe* court inserted the words "reckless disregard" in an attempt to satisfy the *New York Times* "actual malice" standard. In *New York Times,* actual malice was defined as "knowing falsity or reckless disregard for falsity." The *Briscoe* court replaced the word "falsity" with the word "offensiveness." See text accompanying notes 199-207 *infra.*

174. Kalven, *supra* note 79, at 333. An interesting retort to this statement was made by Mr. Bloustein, who expressed a contrary view on the definitiveness of the privacy tort: "The reason Kalven fails to see the profile of the tort is that he does not want to see it." Bloustein, *supra* note 50, at 618.

175. 4 Cal. 3d at 542-43 n.18, 483 P.2d at 43-44 n.18, 93 Cal. Rptr. at 875-76 n.18.

176. *Id.* at 541-43, 483 P.2d at 43-44, 93 Cal. Rptr. at 875-76.

177. 1 Cal. 3d at 36, 459 P.2d at 922, 81 Cal. Rptr. at 370 (1969).

vate affairs of the plaintiff.[178] In its discussion of this factor, the *Briscoe* court specifically concluded that "a jury might find that revealing one's criminal past for all to see is grossly offensive to most people in America."[179] Moreover, as will be shown, if this element is satisfied (if the jury finds the facts disclosed were "highly" offensive), then it could very easily follow that prima facie element number four (published with a reckless disregard for its offensiveness) would also be satisfied.

Closely related to the second prima facie element (private facts) seems to be the recognition of the defendant's right to assert an independent justification for printing the plaintiff's name. No explanation of the meaning or effect of this right in any particular case was given. Clearly, if Briscoe directly or indirectly consented to the publicity, this would provide the requisite independent justification for disclosure.[180] Moreover the necessitous nature of the disclosure may be an independent justification for identifying Briscoe by name.[181] Necessity may exist where the authenticity of the article depends upon identification by name or where Briscoe, or any similar plaintiff, has a single and central importance to the material.

A. Offensiveness

This limitation upon the press to print only material which is not so intimate and unwarranted as to be offensive to the community's notions of decency was endorsed by privacy cases previous to *Briscoe,*[182] and noted by authorities in the field of tort law.[183] The offensiveness qualification, however, applies only to intimate or private facts.[184] The *Briscoe* opinion presupposes that Briscoe's identity as a convicted felon, though a matter of public record, is such an intimate and private fact. If it is the extent of notoriety given Briscoe's criminal record in *Reader's Digest* which the court abhors, as compared with that normally attributed to court records, then the defendant clearly has intruded deeply into the plaintiff's affairs. However, in *Gill v. Hearst Publishing Co.*,[185]

178. *Id.*

179. 4 Cal. 3d at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875.

180. Indirect consent might be supplied by the current commission or suspicion of a crime. *See id.* at 536, 483 P.2d at 39, 93 Cal. Rptr. at 871.

181. See text accompanying notes 103-06 *supra.*

182. Annot., 30 A.L.R.3d 242-44 (1970).

183. *See, e.g.*, PROSSER, *supra* note 31, at 802-04.

184. See text accompanying notes 141-46 *supra.*

185. 40 Cal. 2d 224, 253 P.2d 441 (1953). In this case the defendants published a photograph of the plaintiffs in *Harper's Bazaar* magazine in October, 1947. The

a photograph which extended knowledge of a particular incident to a somewhat larger public than had actually witnessed it did not constitute an invasion of the plaintiffs' privacy.[186]

The *Briscoe* court continually emphasized that revelation of a criminal past was highly offensive to most people,[187] and went on to assert that the "publisher [had] every reason to know, *before* publication, that identification of a man as a former criminal will be highly offensive to the *individual involved.*"[188] Thus the reasonable man called for is one who is in the plaintiff's situation. The same conclusion can be drawn from the court's direction that the trier of fact determine whether identification of Briscoe as a former criminal "would be highly offensive and injurious to the reasonable man."[189] Justice Peters' inclusion of the word "injurious" negates any apparent inconsistency. Injury to the non-plaintiff hypothetical reasonable man, or the community as a whole, seems totally irrelevant in this area, especially when the difficulties inherent in ascertaining such injury are considered. However, injury to the individual plaintiff is, of course, relevant and probably ascertainable. Hence, "highly offensive and injurious to the reasonable man" means a reasonable man in circumstances similar to those of the plaintiff, *i.e.*, the reasonable former criminal whose privacy has been allegedly invaded.[190] This interpretation of offensiveness could require very little proof by the plaintiff for compliance. A showing of damage resulting from the publication, which damage might be naturally fore-

photograph showed the plaintiffs seated in an affectionate pose at their place of business in an ice cream concession in the Los Angeles Farmers' Market.

186. *Id.* at 230, 253 P.2d at 444. The court refused plaintiffs' cause of action for invasion of privacy, finding that they voluntarily assumed the pose in a public place, and thus waived their right of privacy as to this pose. The court said: "The photograph of plaintiffs merely permitted other members of the public, who were not at plaintiffs' place of business at the time it was taken, to see them as they had voluntarily exhibited themselves." *Id.*

187. *E.g.*, 4 Cal. 3d at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875.

188. *Id.* at 543 n.18, 483 P.2d at 44 n.18, 93 Cal. Rptr. at 876 n.18 (emphasis added in part).

189. *Id.* at 543, 483 P.2d at 44, 93 Cal. Rptr. at 876.

190. PROSSER, *supra* note 31, at 811. *See also* Wade, *supra* note 41, at 1111. It would be inconsistent and incredulous if the offensiveness determination required is in terms of its effect on the community rather than on the individual plaintiff. Briscoe is a convicted felon who must resume his existence in society subject to a plethora of state and federal anti-felon statutes (see notes 123-27 and accompanying text). He is subject to the continued scrutiny of the police and probation officials, and is forever within the limited view of the public eye. Thus, it seems incongruous that the community would, on the one hand, condone the policy allowing Brisco's qualified reassimilation into society and, on the other hand, be "highly" offended by the revelation of his criminal record.

seeable, would seem to suffice in many instances, absent a showing by the defendant that the plaintiff actually enjoyed the publicity or that the plaintiff is supersensitive.[191]

Even though offensiveness is a familiar limitation in the law of invasion of privacy, never has that term been applied so broadly as in *Briscoe*. It is generally agreed that the question of whether the disclosure would be offensive to a person of ordinary sensibilities is one for the jury to decide,[192] unless it is clear that the jury could reach only one reasonable result.[193] Prior to *Briscoe*, offensiveness meant "indecent," "lurid," or "vulgar."[194] *Briscoe's* own source for this element, *Time, Inc. v. Hill,* refers to revelations so unwarranted in view of the victim's position as to "outrage the community's notions of decency."[195] A perusal of past privacy decisions both in California and elsewhere will show that it is not the communication itself which is to be tested for its offensiveness, but rather the *manner* of the disclosure.[196] If the truthful disclosure tends to humiliate, not by the mere unembellished statement of truth but by its context, or is designed to appeal to prurient interest, then the communication's offensiveness should be a question for the jury.[197]

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191. The law is not for the protection of the hypersensitive, and all of us must, to some reasonable extent, lead lives exposed to the public gaze. PROSSER, *supra* note 31, at 811.

192. *E.g.*, Strickler v. National Broadcasting Co., 167 F. Supp. 68 (S.D. Cal. 1958); Aquino v. Bulletin Co., 190 Pa. Super. 528, 154 A.2d 422 (1959); Wade, *supra* note 41, at 1115-16.

193. Wade, *supra* note 41, at 1116.

194. *See* Annot., 30 A.L.R.3d 203, 242-44 (1970).

195. 385 U.S. at 383 n.7.

196. *See, e.g.*, Gill v. Hearst Publishing Co., 40 Cal. 2d 224, 253 P.2d 441 (1953), holding that a picture of a husband and wife in an affectionate pose at their open-air place of business was not objectionable in itself, but that the trial court should have permitted an amendment to the complaint to show that the picture was used in an uncomplimentary context. This same photograph was used by the defendant in Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 239 P.2d 630 (1952), where its publication was held to be an invasion of privacy primarily because it was used to illustrate an article characterizing love at first sight as being based 100 percent on sex.

197. *See, e.g.*, Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964) (picture showing plaintiff in a public place with her dress blown up by air jets at a fun house); Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 239 P.2d 630 (1952) (see note 196 *supra*); Harms v. Miami Daily News, Inc., 127 So. 2d 715 (Fla. App. 1961) (newspaper publishing the statement: "Wanna hear a sexy telephone voice? Call —— and ask for Louise."); Myers v. U.S. Camera Publishing Corp., 9 Misc. 2d 765, 167 N.Y.S.2d 771 (N.Y. City Ct. 1957) (publication of nude photograph); Semler v. Ultem Publications, Inc., 170 Misc. 551, 9 N.Y.S.2d 319 (N.Y. City Ct. 1938) (publication of a picture of the plaintiff, a professional model, on the same page with a risque story); Aquino v. Bulletin Co., 190 Pa. Super. 528, 154 A.2d 422 (1959) (pic-

In *Briscoe*, however, the nonsensationalized statement of true facts from a public record, which constituted only one sentence out of a five-page article,[198] was felt to contain a sufficient degree of offensiveness to be the basis for a jury question. Such a broad definition of the offensiveness concept greatly expands the tort of invasion of privacy.

B. Publication With Reckless Disregard for The Disclosure's Offensiveness

It is essential that the fourth prima facie element be analyzed to determine whether the burden it places on the California press is consistent with burdens imposed by standards developed by the United States Supreme Court. This element presents the question whether Reader's Digest published the truck hijacking article "with a reckless disregard for its offensiveness."[199] Nowhere in Justice Peters' opinion is it expressly indicated where this "reckless disregard" standard originated.[200] Apparently, the *Briscoe* court intended to utilize the *Time* test of "reckless or wanton disregard of the plaintiffs' rights."[201] *Time* also was an invasion of privacy case.[202] It concerned the defendant's knowing or reckless failure to make a reasonable investigation into the true incidents of an ordeal suffered by the plaintiff and his family three years prior to its unveiling in *Life* magazine.[203] The nondefamatory article falsely reported that a new Broadway play correctly portrayed the plaintiff's horrifying experience.[204] The *Time* standard permits an objective verification of the defendant's attempt to publish true facts. However, *Time* is inapposite to *Briscoe*. In *Briscoe* falsity is not part of the plaintiff's theory of recovery. Consequently a stand-

ture of a girl in front of a theater with her arms around a man, illustrating a fictionalized account of events in plaintiff's life, including matters of public record).

198. *But cf.* Fignole v. Curtis Publishing Co., 247 F. Supp. 595 (S.D.N.Y. 1965), where the court held that a mere one-sentence reference to the plaintiff in a 3½ page article could not be the basis for a privacy action under a New York statute.

199. 4 Cal. 3d at 543, 483 P.2d at 44, 93 Cal. Rptr. at 876.

200. Justice Peters did state that Briscoe's complaint fulfilled this requirement by alleging that the Reader's Digest identification of him by name was malicious and willful. *Id.* at 543 n.19, 483 P.2d at 44 n.19, 93 Cal. Rptr. at 876 n.19. *See* 9 U.C.L.A. L. REV. 862, 870-71 (1962), which suggests that ill motive should be a relevant consideration in privacy cases involving a time-lag question. *But see* Warren & Brandeis, *supra* note 32, at 218, where it was said: "Personal ill-will is not an ingredient of the offence [invasion of privacy], any more than in an ordinary case of trespass to person or to property."

201. Time, Inc. v. Hill, 385 U.S. 374, 395 (1967).

202. See note 138 *supra.*

203. 385 U.S. at 395-96.

204. *Id.* at 377.

ard requiring the plaintiff to prove "knowing or reckless falsity" is likewise inappropriate to a situation involving an allegedly damaging but nevertheless true report. The *Time* court emphatically rejected elusive standards which would make it difficult, and perhaps impossible, for the news media to utilize objective means of protection:

> We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, *particularly as related to non-defamatory matter.* Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.[205]

In light of the particular facts involved, the *Time* "knowing or reckless falsity" test is consistent with the avoidance of elusive standards. However, "reckless disregard for its offensiveness" is not the same non-elusive standard as "reckless disregard for its truth or falsity." "[C]arelessness simply cannot, as a matter of logic, play the same role in most privacy cases that it plays in defamation cases."[206] In situations similar to *Briscoe,* involving an allegedly unwarranted but nondefamatory and truthful disclosure of one's name in connection with his criminal past, there are no "steps" or means whereby a publisher prior to publication can determine the material's offensiveness. Without the availability of such objective measures, a jury's determination that the material published was in fact highly offensive to the reasonable man in the plaintiff's situation would place on the press an "intolerable burden" of proving that the material was not published in reckless disregard for its offensiveness. Once a determination is made that the

205. *Id.* at 389 (emphasis added): *cf.* the comment of Mr. Justice Brandeis, in his concurring opinion in Whitney v. California, 274 U.S. 357, 375-76 (1927):

> Those who won our independence believed . . . that *public discussion is a political duty*; and that this should be a fundamental principle of the American government They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed. *Id.* (footnote omitted).

206. Bloustein, *supra* note 50, at 616.

material published was highly offensive to a reasonable man in plaintiff's situation, the focus of inquiry narrows to a consideration of *why* the material was published. The publisher can offer no explanation or reason for publishing the highly offensive material except his own self-serving testimony that at the time of publication he believed the material was not highly offensive. The only available protection for the publisher is an accurate subjective prediction of the material's offensiveness to a jury called upon to "second guess" his determination.[207]

Before *Briscoe* it might have been assumed that California followed the Restatement rule which provides for liability only where the defendant-publisher knew or should have known that the disclosure would be offensive to persons of ordinary sensibilities.[208] However, only one California federal district court decision discussed the matter in these terms,[209] and most of the cases which involved offensiveness did not concern themselves with the question whether the defendant knew or should have known of the publication's offensive character.[210] One commentator views privacy as an intentional tort, in which motive and knowledge of the publication's offensiveness become irrelevant.[211] Arguably, the recklessness standard propounded in *Briscoe,* standing alone, is nothing more than a standard which requires a plaintiff to show that the defendant knew or should have known that the disclosure would be highly offensive. But coupled with *Briscoe's* expansive definition of offensiveness, it is difficult to see how any publisher in a situation like that of Reader's Digest can escape liability.[212]

It appears that the *Briscoe* decision has established that kind of "elusive" standard specifically rejected in *Time.* The deficiencies inherent in such a standard stem not only from its imposition of an in-

207. The elusiveness of such a standard is illuminated by the following analysis of *Briscoe* "recklessness": (1) In *Briscoe,* recovery for invasion of privacy is permitted if, assuming satisfaction of all other elements of the prima facie case, the plaintiff shows that the defendant made the disclosure with reckless disregard for its *offensiveness*; (2) however, since in *Briscoe* an invasion of privacy is essentially defined as a truthful disclosure of private facts which is *highly offensive to a reasonable man* in plaintiff's situation, then (3) the recklessness standard re-stated merely requires that the plaintiff show and the jury find that the disclosure was made with a reckless disregard of whether it invaded the plaintiff's privacy or not!

208. RESTATEMENT OF TORTS § 867, comment *d* (1939).

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

210. Annot., 30 A.L.R.3d 203, 217 n.8 (1970).

211. Bloustein, *supra* note 50, at 616.

212. In the court's own words: "However, there is little uncertainty here. A publisher does have every reason to know, *before* publication, that identification of a man as a former criminal will be highly offensive to the individual involved." 4 Cal. 3d at 543 n.18, 483 P.2d at 44 n.18, 93 Cal. Rptr. at 876 n.18.

tolerable burden on the press but from its consequential encouragement of self-censorship. The United States Supreme Court, in determining the validity of statutes prohibiting the distribution of constitutionally unprotected material, has consistently held unconstitutional those statutes which were vague and indefinite.[213] The unconstitutionality of such statutes, unlike vague statutes not involving freedom of expression, is rooted not so much in their denial of due process as in their contravention of the First Amendment.[214] More specifically, the First Amendment infirmity lies in the statute's tendency to compel self-censorship by the disseminator and thereby unnecessarily restrict the free flow of news and other reading matter to the public.[215] Since in a situation analogous to that in *Briscoe* the defendant-publisher will be able to offer nothing more than his possibly irrelevant belief in the non-offensiveness of the publication as a defense to a charge that he recklessly published highly offensive material, no publisher will know with reasonable certainty whether he will or will not be liable at some future time. This burden of omniscience will surely encourage protective self-censorship. Standards which leave the press doubtful as to whether it could successfully defend a lawsuit or which create "fear of the expense of having to do so" are wholly inconsistent with the First Amendment.[216]

The decision in *Briscoe*, or more precisely the prima facie case derived therefrom, results paradoxically in allowing greater protection for defamatory falsehoods than for nondefamatory *truthful* publications.[217]

213. *E.g.*, Smith v. California, 361 U.S. 147 (1959); Winters v. New York, 333 U.S. 507 (1948).

214. *See* Winters v. New York, 333 U.S. 507, 509-10 (1948).

215. Smith v. California, 361 U.S. 147, 153-54 (1959). In *Smith*, the absence of a scienter requirement in a criminal statute prohibiting the retail distribution of obscene books rendered the statute constitutionally defective. The statute did not give the bookseller reasonable standards for determining when he had violated its provisions. Because of this type of vagueness,

> [t]he bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. *Id.* at 154.

Self-censorship was also a primary consideration in New York Times Co. v. Sullivan, 376 U.S. 254, 278-79 (1964).

216. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

217. " 'To allow a standard based on factors outside the publisher's control—that of community notions of decency—only when the revelations turn out to be true is to provide truth with less certain First Amendment protection than is offered falsity.' " Note, *The Invasion of Defamation by Privacy*, 23 STAN. L. REV. 547, 558 n.84 (1971), *quoting* 83 HARV. L. REV. 1722, 1726 (1970).

One writer has suggested that defendants in privacy actions deserve less First Amendment protection than those accused of publishing falsehoods. Nimmer, *supra*

In *New York Times Co. v. Sullivan*,[218] it was held that a public official could recover damages for a defamatory falsehood only upon a showing that the defendant-press published the false material with "knowledge that it was false or with reckless disregard of whether it was false or not."[219] When this same standard was applied in *Time*, there was no significant change in the burden placed on the nation's press since falsity was again a major issue, though the matter published was non-defamatory and recklessness related to the defendant's efforts to publish the truth.[220] In light of such authority the *Briscoe* court, superficially within constitutional norms, established "recklessness" as the applicable standard in actions seeking recovery for a nondefamatory, truthful invasion of one's privacy. But when reckless disregard relates to an illusory and fluctuating concept of "offensiveness to the reasonable man in the plaintiff's situation," the elusiveness of such a standard in contrast to that of "reckless disregard for truth or falsity" increases the burden placed on the press by decreasing the protection of truthful publications in relation to the protection afforded defamatory falsehoods. In *New York Times* the Court considered that sanctions against either innocent or negligent misstatements would present a grave hazard of discouraging the exercise of constitutional guarantees. Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expenses involved in a successful defense tend to result in statements which " 'steer far wider of the unlawful zone.' "[221]

The United States Supreme Court recently reaffirmed its intention to hold the press to a standard significantly less burdensome than the *Briscoe* standard in *Rosenbloom v. Metromedia, Inc.*[222] where it said:

> In libel cases . . . we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate. These dangers for freedom of speech and press led us to reject

note 78, at 959-67. The author reasons that the damage to reputation caused by defamation may actually be cured by more speech whereas more speech would only increase the harm caused by a truthful invasion of privacy. Hence, the deleterious effect of an invasion of privacy by truthful disclosure is apt to be permanent and therefore should be more strongly deterred by permitting the injured plaintiffs to more easily satisfy their claims. *Id.* at 961.

218. 376 U.S. 254 (1964).

219. *Id.* at 280.

220. 385 U.S. at 394-96 (1967).

221. 376 U.S. at 279, *quoting* Speiser v. Randall, 357 U.S. 513, 526 (1958).

222. 403 U.S. 29 (1971).

> the *reasonable-man* standard of liability as "simply inconsistent" with our national commitment under the First Amendment when sought to be applied to the conduct of a political campaign. . . . The same considerations lead us to reject that standard here.[223]

The facts in *Rosenbloom* are similar to those in *Briscoe* in that both plaintiffs were private parties who sought damages against a large "news media" publisher. Rosenbloom was one of a number of distributors of nudist magazines who was arrested for selling obscene literature. In reporting his arrest, the respondent radio station at first failed to use the words "allegedly obscene" but later described the seized books as "allegedly" or "reportedly" obscene. After his arrest Rosenbloom instituted a suit in federal district court claiming that the materials seized were not obscene and asking for an injunction restraining the local authorities from interfering with his newsstand business. The radio station also reported this latter development, forgoing mention of Rosenbloom's name, but referring to the initiators of the suit as "girlie book peddlers" and the materials as "smut or filth."[224] Following Rosenbloom's acquittal on the charge of selling obscene literature, he filed a second action in district court against the radio station seeking damages for libel. The trial court found for the plaintiff, but the court of appeal reversed, holding that Rosenbloom had failed to prove that the stories were broadcast with "actual malice."[225] The Supreme Court affirmed the court of appeal's decision.[226] The reasoning and language of the *Rosenbloom* Court emphasize the deficiency of the *Briscoe* standard:

> [T]he vital needs of freedom of the press and freedom of speech persuade us that allowing private citizens to obtain damage judgments on the basis of a jury determination that a publisher probably failed to use reasonable care would not provide adequate "breathing space" for these great freedoms. Reasonable care is an "elusive standard" which "would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait."[227]

The Court specifically stated that "[t]he public's primary interest is in the *event*; the public focus is on the conduct of the participant and the *content*, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."[228] The court of appeal had noted that

223. *Id.* at 50 (citation omitted) (emphasis added).
224. *Id.* at 32-35.
225. *Id.* at 40.
226. *Id.* at 57.
227. *Id.* at 50, *quoting* Time, Inc. v. Hill, 385 U.S. 374, at 389.
228. *Id.* at 43 (emphasis added).

"the fact that plaintiff was not a public figure cannot be accorded decisive importance if the recognized important guarantees of the First Amendment are to be adequately implemented."[229] In other words, the Court was seemingly unconcerned with the status or personage of the plaintiff. The primary consideration was the newsworthiness of the subject matter, *i.e.*, the content. Thus, Briscoe's status as a private person and rehabilitated felon would carry little weight with the Court if it felt that criminal records were within the public domain "per se" and of sufficient public or general interest to make them available for public comment.

Though these past and recent Supreme Court decisions did not specifically concern a "recklessness" standard, but rather "negligence" or "reasonable care," neither did the cases involve a strict privacy situation. The United States Supreme Court's rejection of a negligence or reasonable care standard where the issue was the truthfulness of the facts reported was founded upon the belief that the press should not be required to guess what a jury would consider as a proper publication. The press must be able to objectively protect itself from allegations of recklessness. Without the availability of objective proof, the press can never be certain of the propriety of its publication and will forever be subject to the whims of a jury's determination of the subjective motives of the publisher.

III. Disclosures Which Place the Plaintiff in a False Light in the Public Eye

As noted earlier, the *Briscoe* court stated that a "false light"[230] cause of action "' is in substance equivalent to . . . [a] libel claim, and should meet the same requirements of the libel claim . . . including proof of malice . . . and fulfillment of the requirements of section 48a [of the Civil Code] . . . .' "[231] Section 48a of the California Civil Code provides that a plaintiff seeking damages for "the publication of a libel in a *newspaper*, or of a slander by *radio broadcast* . . ." may only recover special damages[232] "unless a correction be demanded and

229. Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 896 (3d Cir. 1969).

230. "False light" is a form of invasion of privacy. Generally it consists of a disclosure, not necessarily defamatory, which places the plaintiff in a "false light before the public eye." PROSSER, *supra* note 31, at 812-14.

231. 4 Cal. 3d at 543, 483 P.2d at 44, 93 Cal. Rptr. at 876 (citations and footnotes omitted), *quoting Kapellas*, 1 Cal. 3d at 35 n.16, 459 P.2d at 921 n.16, 81 Cal. Rptr. at 369 n.16 (1969).

232. CAL. CIV. CODE § 48a(1) (West 1970) (emphasis supplied).

be not published or broadcast . . ." in the manner provided by the Code.[233]

In *Werner v. Southern California Associated Newspapers*,[234] the California Supreme Court held that the protection afforded by section 48a could be constitutionally limited to newspapers and radio broadcasters.[235] This limitation was considered justifiable by the fact that these media are engaged in the *immediate* dissemination of news, unable to always verify the accuracy of their stories, and that such enterprises are particularly well situated to publish effective retractions.[236] In *Morris v. National Federation of the Blind*,[237] a California court of appeal was directly confronted with section 48a's applicability to magazines. No special damages were alleged and the defendant contended that since no demand for retraction was made, no general damages could be recovered.[238] Recognizing that no California decision had specifically determined the provision's applicability to magazines,[239] the court, relying on *Werner*, found the legislative purpose of section 48a to be the protection of those who disseminate " 'news while it is new.' "[240] These immediate disseminators of news have unique time limitations and consequently require special protection. It was further noted that the "exculpatory effect of a retraction is limited to one published within three weeks of demand therefor, a requirement which would often be impossible of fulfillment by a magazine published monthly."[241] Thus, unlike *Briscoe*, the court declined to extend the

"Special damages" are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other. . . . *Id.* § 48a(4)(b).

233. *Id.* § 48a(1).

234. 35 Cal. 2d 121, 216 P.2d 825 (1950).

235. *Id.* at 125-33, 216 P.2d at 827-33. A television (visual radio) broadcast is included within the meaning of the term "radio broadcast" as used in section 48a. CAL. CIV. CODE § 48.5(4) (West 1970).

236. 35 Cal. 2d at 125-33, 216 P.2d at 827-33; *accord* Field Research Corp. v. Superior Court, 71 Cal. 2d 110, 113-14, 453 P.2d 747, 750-51, 77 Cal. Rptr. 243, 246-47 (1969).

237. 192 Cal. App. 2d 162, 13 Cal. Rptr. 336 (1961).

238. *Id.* at 165, 13 Cal. Rptr. at 338.

239. *Id.* While in Harris v. Curtis Publishing Co., 49 Cal. App. 2d 340, 353-54, 121 P.2d 761, 768-69 (1942), the court assumed section 48a applies to magazines, it did not discuss the point. Another decision, Shumate v. Johnson Publishing Co., 139 Cal. App. 2d 121, 129-30, 293 P.2d 531, 537-38 (1956), implied that the statute did not extend to magazines.

240. 192 Cal. App. 2d at 165, 13 Cal. Rptr. at 338.

241. *Id.* at 165-66, 13 Cal. Rptr. at 338.

If a correction be demanded within said period [within 20 days after knowledge of the publication or broadcast] and be not published or broadcast in substantially

application of section 48a beyond its literal terms.[242]

The very recent case of *Ryffel v. Press Arts, Inc.*[243] effectively illustrates one problem raised by extending application of section 48a to magazines. In *Ryffel*, four plaintiffs, members of a rock and roll group, brought suit charging, *inter alia*, that the defendant's magazine placed them in a false light in the public eye when a "publicity photograph" of the plaintiffs was published in an allegedly obscene magazine called *The Rebel Breed.*[244] Since the plaintiffs never demanded a retraction pursuant to section 48a, and had stipulated that they would not seek special damages,[245] the defendant moved for summary judgment on the ground that no relief could be granted.[246] The trial court granted the defendant's motion because (1) no special damages were available due to the stipulation and (2) no general or punitive damages were recoverable due to the plaintiffs' lack of compliance with section 48a (citing *Briscoe*).[247] The case belatedly demonstrates the wisdom of excluding magazines from the operation of section 48a, since the magazine in which the photograph appeared was a "one time" publica-

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as conspicuous a manner in said newspaper or on said broadcasting station as were the statements claimed to be libelous, in a *regular issue* thereof *published or broadcast within three weeks* after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages. . . . CAL. CIV. CODE § 48a(2) (West 1970) (emphasis added).

242. 192 Cal. App. 2d at 166, 13 Cal. Rptr. at 338-39.

Briscoe is not the first California decision to transgress the literality of section 48a. Despite its express limitation to newspaper libel and radio slander, section 48a was held applicable to a false light privacy action in Werner v. Times-Mirror Co., 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961). Even if it is assumed that false light is equivalent to defamation since the harm is primarily a loss of reputation, such an extension is unwarranted as a matter of statutory construction. *See* 9 U.C.L.A.L. REV. 862 (1962). However, there is another more fundamental reason for contending that retraction statutes should be inapplicable to false light privacy actions in general. The underlying rationale for a retraction provision is that "[w]here the injury is to reputation, the important consideration is . . . that the cure for injury due to speech should not be abridgment of that speech but rather 'more speech.'" Nimmer, *supra* note 78, at 961. But an untrue disclosure of an embarrassing private fact may constitute an invasion of privacy without injuring the subject's reputation. *Id.* at 963. In the absence of a reputational injury, "when publication invades privacy the injury arises from the mere fact of publication, and further speech cannot remedy the injury." *Id.* at 961. In *Briscoe,* however, this second argument was not available, since the "false light" caused by the defendant's publication was allegedly the implication that the crime was of recent vintage. Hence, the nature of Briscoe's alleged injury is clearly the destruction of his *reputation* as a reformed law-abiding citizen.

243. No. C-943197 (L.A. Super. Ct., filed Nov. 18, 1968).

244. *Id.* The magazine was printed only for the month of August, 1968.

245. *Id.*

246. *Id.*

247. *Id.* The case was dismissed, on this basis, on December 8, 1971.

tion: even if the plaintiffs had requested a retraction, the magazine could not have supplied it.

IV. CONCLUSION

There are many facets of *Briscoe* which in effect contract the permissible scope of news dissemination and at the same time expand the category of truthful disclosures which can constitute an unwarranted invasion of privacy. This alone would not make the decision generally significant to privacy law if it were possible to limit *Briscoe* to its particular facts. But there is no apparent reason why the analysis of this court should be so restricted. The only factor which could cause hesitation in applying the court's reasoning in other privacy contexts is that of "rehabilitation." However, the rehabilitation concept need not be limited to the former criminal who has allegedly rejoined society. The rehabilitated plaintiff in a privacy action could analogously be a once public figure who has since intentionally sought and successfully assumed a life of privacy. Society may have an interest in protecting such self-indulged reformation. Thus for privacy law in general *Briscoe* may be cited for five basic propositions:

First. The express application of the Meikeljohn theory to truthful disclosures of "private" facts lessens the scope of published matter absolutely protected by the First Amendment compared to the vague newsworthiness standard of past privacy decisions. Whether this theory is thought of as recognizing two classes of newsworthy information differing only in their degree of constitutional protection or as merely defining newsworthiness in terms of the "public's right to know" is of no moment. The relative ease in application of this theory will certainly invite its increased use, with *Briscoe* appearing as primary authority.

Second. The implied rejection of the public record doctrine also radically expands the class of disclosures which may constitute an invasion of privacy. Instead of the blind application of the "once public always public" fiction, *Briscoe* calls for a more realistic approach to the private versus public fact question. The test is not what the public has the *power* to know but rather what the public has a *right* to know as defined by Meikeljohn.

Third. Due to the rejection of the public record doctrine and given the flexible concept of rehabilitation mentioned above, the mere lapse of time between the public event and its disclosure takes on new importance in privacy law. The uneventful lapse of time would now appear to be of almost controlling significance in determining whether

the plaintiff is "rehabilitated," absent any evidence to the contrary. Lapse of time should also have important evidentiary significance to a jury called upon to determine the offensive character of the disclosure, as well as the recklessness of the defendant charged with responsibility for its publication. And, for the judge, the greater the lapse of time, the less likely the disclosure would fall within the realm of the "public's right to know."

Fourth. Notwithstanding the fact that the manner and context of the disclosure is in no way lurid, indecent or sensationalized, as those words are commonly understood, *Briscoe* makes it clear that a jury could still find that the mere fact of disclosure was highly offensive to a reasonable man in the plaintiff's situation. With this new definition of "offensiveness" one is hard pressed to imagine a truthful disclosure of a truly private fact which would not be offensive to a plaintiff who has sought to stay out of the public eye.

Fifth. If the published fact was truly a private fact not within the public's right to know, then the mere fact of publication itself might be sufficient to show the defendant's recklessness. His only available defense appears to be either a good faith belief in the public nature of the fact or a belief that the public has a right to know that which was published. But recklessness is an objective standard, to be measured against the standard of the reasonable man. Hence, the subjective state of mind of the defendant at the time of publication is irrelevant to the characterization of his conduct.

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