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Volume 6 | Number 1

Article 6

1-1-1973

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Recommended Citation

Allan E. Wilion, *Invasion of Privacy by Intrusion: Dietemann v. Time, Inc.*, 6 Loy. L.A. L. Rev. 200 (1973).
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INVASION OF PRIVACY BY INTRUSION:

*DIETEMANN v. TIME, INC.*¹

The United States Court of Appeals for the Ninth Circuit has handed down the first decision in California allowing recovery for the tort of invasion of privacy based on an intrusion.² In a far reaching opinion, the court held in *Dietemann v. Time, Inc.*³ that under California law a cause of action for the invasion of privacy was established where employees of defendant, by subterfuge, gained entrance to plaintiff's home and without his consent photographed him and electronically recorded and transmitted his conversation, as a result of which he suffered emotional distress. The court dispensed with the necessity of proving publication, the existence of a technical trespass, or special damages.

A.A. Dietemann, a disabled veteran with little education, was engaged in the practice of healing with clay, minerals and herbs, which was characterized by the district court as "simple quackery."⁴ Conducting his activities in his own home, he did not advertise, had no

1. 449 F.2d 245 (9th Cir. 1971).

2. Dean William Prosser has analyzed privacy as being composed of four distinct kinds of invasion, including intrusion, appropriation (*see, e.g.,* *Fairfield v. American Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 291 P.2d 194 (1955)), public disclosure of private facts (*see, e.g.,* *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971)), and false light in the public eye (*see, e.g.,* *Briscoe*). W. PROSSER, *THE LAW OF TORTS* § 117, at 804-14 (4th ed. 1971) [hereinafter cited as PROSSER]; Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389-409 (1960). The California Supreme Court, in *Briscoe*, stated that false light in the public eye is just a euphemism for libel. 4 Cal. 3d at 543, 483 P.2d at 44, 93 Cal. Rptr. at 876. Therefore, since the *Briscoe* decision, there may be only three forms of invasion of privacy in California. Dean Prosser's analysis is embodied in the RESTATEMENT (SECOND) OF TORTS § 652A (Tent. Draft No. 13, 1967). However, Professor Bloustein has suggested a more expansive concept of the right of privacy, extending to any affront to human dignity. *See* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964); Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEXAS L. REV. 611 (1968). Bloustein's privacy tort would seem to allow recovery for such wrongs as battery, assault, false imprisonment, defamation, malicious prosecution, and especially intentional infliction of emotional distress. And *see* Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1124-25 (1962), where the author seems to suggest approaching the right of privacy from the standpoint of the tort of intentional infliction of emotional distress. For further comparison between Prosser and Bloustein, *see* Gross, *The Concept of Privacy*, 42 N.Y.U.L. REV. 34, 46-54 (1967).

3. 449 F.2d 245 (9th Cir. 1971).

4. *Id.* at 245. The facts in the opinion of the court of appeals are quoted verbatim from *Dietemann v. Time, Inc.*, 284 F. Supp. 925 (C.D. Cal. 1968).

telephone, and accepted only contributions for his services.⁵ Dietemann had already come under the scrutiny of law enforcement officials who had themselves on two previous occasions made recordings of conversations in Dietemann's home.⁶ However, despite these recordings, the District Attorney's Office entered into an arrangement with *Life* magazine, a publication of Time, Inc., whereby *Life's* employees agreed to visit Dietemann's home and obtain pictures and further recordings of his activities. The information obtained from the visit would be used as evidence to prosecute Dietemann and could later be used by *Life* for publication.⁷

Two employees of *Life*, Mrs. Jackie Metcalf and Mr. William Ray, went to Dietemann's home on September 20, 1963, where they were admitted by falsely claiming to have been recommended for treatment by a friend. They accompanied Dietemann into his den, where they observed equipment which the district court described as "gadgets." Mrs. Metcalf told Dietemann that she had a lump on her breast, and after looking at some of his "gadgets" and waving his wand, he concluded that she had eaten some rancid butter 11 years, 9 months and 7 days before.⁸

During the examination, Dietemann was photographed by Mr. Ray with a hidden camera. The conversations were transmitted by a radio transmitter hidden in Mrs. Metcalf's purse to a tape recorder in an automobile occupied by another *Life* employee, a member of the District Attorney's Office, and an investigator for the State Department of Public Health. On October 15, 1963, Dietemann was arrested at his home "on a charge of practicing medicine without a license in violation of Section 26280, California Health and Safety Code."⁹ Two weeks later, before Dietemann had entered any plea in the case, *Life* magazine published an article entitled "Crackdown on Quackery,"¹⁰ which depicted Dietemann as a quack, and included one of the pictures taken by Ray on September 20, 1963.¹¹ Dietemann sued the publisher

5. 449 F.2d at 246.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*, quoting *Dietemann v. Time, Inc.*, 284 F. Supp. 925, 927 (C.D. Cal. 1968). The factual narration seems to be erroneous, since § 26280 deals with adulterated or misbranded drugs. CAL. HEALTH & SAFETY CODE ANN. § 26280 (West 1967). However, Dietemann subsequently, on June 1, 1964, entered a plea of nolo contendere to violations of § 26280 and CAL. BUS. & PROF. CODE ANN. § 2141 (West 1967) (practicing medicine without a license), both of which were misdemeanors. 449 F.2d at 247. Dietemann did give out homemade concoctions of various herbs, minerals and clay.

10. *LIFE*, Nov. 1, 1963, at 76.

11. 449 F.2d at 245-46.

of *Life*, alleging that his right of privacy had been invaded.¹²

The United States District Court for the Central District of California, placing itself in the position of the Supreme Court of California considering the matter initially,¹³ concluded that "[t]he publication in *Life Magazine* . . . of plaintiff's picture taken without his consent in his home" constituted an invasion of Dietemann's right to privacy under California law.¹⁴ The court also held that *Life's* employees, acting as agents of law enforcement officials under agreement with the District Attorney's Office, had conducted a search and seizure in violation of the Fourth Amendment,¹⁵ thereby entitling Dietemann to relief under the Federal Civil Rights Act.¹⁶

On appeal, the court was presented with three issues: (1) Whether under California law a cause of action for invasion of privacy was established by proof of the facts alleged by Dietemann; (2) Whether the First Amendment freedom of the press insulated the defendant from liability for invasion of privacy because *Life's* employees acted for the

12. 284 F. Supp. at 928.

13. The complaint claimed diversity jurisdiction under 28 U.S.C. § 1332 (1970). 284 F. Supp. at 926. Under the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64, 72-73 (1938), a federal court, in a diversity action involving an alleged invasion of privacy, will follow the law of the state where the purported invasion occurred in determining whether to grant relief. *Werner v. Hearst Publishing Co.*, 297 F.2d 145, 148 (9th Cir. 1961). See also *Gates v. P.F. Collier, Inc.*, 378 F.2d 888, 892 (9th Cir. 1967), cert. denied, 389 U.S. 1038 (1968); *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845, 846-47 (N.D. Cal. 1939).

14. 284 F. Supp. at 932. Dietemann was awarded one thousand dollars general damages for injury to his feelings and peace of mind. It was also within the discretion of the court to award exemplary damages; however, the court concluded that punitive damages were not warranted since defendant's effort was directed toward elimination of quackery, an evil which the court stated "has visited great harm upon a great number of gullible people." *Id.* at 932-33.

15. *Id.* at 931.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

16. 284 F. Supp. at 932. 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961). The court of appeals stated that "[a]lthough the complaint did not initially cite the Civil Rights Act as a foundation of liability, the district court concluded that a claim for relief had been proved under the Act," and "[o]n appeal plaintiff pressed liability under the Act as an alternative basis for supporting the judgment." 449 F.2d at 247 n.1.

purpose of gathering material for a magazine story which was thereafter published utilizing some of the material gathered; and (3) Whether *Life's* employees were acting as special agents of law enforcement officials, and if so, whether their acts violated the United States Constitution, thereby subjecting defendant to liability under 42 U.S.C. § 1983.¹⁷

The court of appeals, in an opinion written by Judge Shirley M. Hufstedler,¹⁸ held that a cause of action for invasion of privacy was established under California law when *Life* magazine surreptitiously photographed Dietemann in his den and electronically recorded and transmitted his conversation without his consent, thereby causing injury to his feelings and peace of mind. The fact that such activity was done for the purpose of newsgathering did not insulate the defendant from liability, since the freedom of the press guaranteed by the First Amendment¹⁹ does not immunize newsmen from liability for "torts or crimes committed during the course of newsgathering."²⁰ The court did not, however, decide the question of liability under 42 U.S.C. § 1983.²¹ Because the plaintiff had proved a cause of action for an invasion of his privacy and because the First Amendment did not protect the defendant, the court concluded it was unnecessary to consider the Civil Rights Act question and consequently accepted the defendant's disclaimer of any contention that "its employees were acting for or on behalf of the police."²² Judge James M. Carter, in a concurring and dissenting opinion, agreed with the majority's conclusions regarding the viability of the cause of action under California tort law and the failure to reach any issue under the federal Civil Rights Act, but felt the court

17. 449 F.2d at 247. As to the third issue, action apparently was not prosecuted against the state officials, and the question of whether they would be liable to Dietemann under the Civil Rights Act was not presented.

18. District Judge Von Der Heydt of the District of Alaska, sitting by designation, joined Circuit Judge Hufstedler in the majority opinion. 449 F.2d at 245.

19. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend I.

20. 449 F.2d at 249. The court felt it unnecessary to consider whether California would adopt Prosser's or Bloustein's analysis of privacy, since it thought the result would be the same in either event. *Id.* at 248 n.1a. Significantly, while the court did not specifically mention RESTATEMENT (SECOND) OF TORTS § 652A (Tent. Draft No. 13, 1967), the factual pattern involved bore a striking resemblance to Prosser's tort of intrusion. The court's reference to cases involving intentional infliction of emotional distress, 449 F.2d at 248, on the other hand, suggests an equal recognition of both Prosser's categorization and Bloustein's expansive theory of invasion of privacy in California. See note 2 *supra*.

21. 449 F.2d at 247.

22. *Id.*

should have decided the question of the defendant's "liability for the acts of its employees, as agents of the police," since Time had relied on the Fourth Amendment in its pleadings and had argued it in the lower court.²³

The doctrine of a legal right to privacy was generated by an 1890 law review article by Samuel D. Warren and Louis D. Brandeis,²⁴ where they defined the right as the individual's "right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."²⁵ The authors discussed two fundamental reasons denoting a need for the common law to develop a cause of action for an invasion of privacy. One was the increased complexity of modern civilization which made man more sensitive to publicity and increased his need for privacy.²⁶ The other was the great improvement in the means of communications which subjected man's private life to public view by those who were pandering to commercialism and to idle and prurient curiosity.²⁷ Warren and Brandeis felt the existing tort law should provide a remedy to protect an individual's privacy from invasions either "by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds."²⁸

23. *Id.* at 250.

24. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter cited as Warren & Brandeis]. For a discussion of the article see Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROB. 253 (1966). See also Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713, 714-15 (1948).

25. Warren & Brandeis, *supra* note 24, at 198 (footnote omitted).

26. *Id.* at 196. Professor Fried discusses the need for privacy in terms of control: The concept of privacy requires . . . a sense of control and a justified, acknowledged power to control aspects of one's environment. But in most developed societies the only way to give a person the full measure of both the sense and the fact of control is to give him a legal title to control. Fried, *Privacy*, 77 YALE L.J. 475, 493 (1968).

See also Gross, *The Concept of Privacy*, 42 N.Y.U.L. REV. 34, 35-36 (1967), who defined privacy as "the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited;" and R. CLARK, *CRIME IN AMERICA* 287 (1970), where it is said:

Privacy is the basis of individuality. . . .

Invasions of privacy demean the individual. Can a society be better than the people composing it?

27. Warren & Brandeis, *supra* note 24, at 196.

28. *Id.* at 206. They also referred to the English case of *Pollard v. Photographic Co.*, 40 Ch. D. 345 (1888), where the plaintiff was granted recovery on a breach of contract and breach of faith theory against a cameraman who was hired to take plaintiff's picture, but then exhibited and sold copies of it. Warren & Brandeis, *supra* note 24, at 208. Warren and Brandeis were suggesting that the courts had recognized the right of privacy previously, but had been protecting it on the basis of property and contractual rights, and under relationships based on confidence. *Id.* at 206-08.

The advances in technology, especially in the field of electronics, have multiplied explosively since 1890, making possible more drastic interferences with privacy.²⁹ The enormity of the abuse that can result from the "frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society"³⁰ is a factor to weigh in considering the present and future development of the right of privacy. In his dissenting opinion in *Lopez v. United States*,³¹ Justice Brennan suggested that "electronic surveillance destroys all anonymity and all privacy."³² Even *Life* had expressed alarm about the growing problem of electronic surveillance. In 1966, *Life* printed an article entitled "Snooping Electronic Invasion of Privacy," which stated:

Despite the protection against invasion of privacy afforded by the Fourth Amendment to the Constitution, bugging is so shockingly widespread and so increasingly insidious that no one can be certain any longer that his home is his castle—free of *intrusion*.

. . . .

Federal agencies and police operatives at least can argue that wire-tapping and bugging are helpful aids in the enforcement of the law. But that justification does not exist for the growing legions of private citizens . . . who find it ridiculously easy to indulge in electronic spying.³³

29. See Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 TEXAS L. REV. 837 (1971); Comment, *Political Surveillance and Police Intelligence Gathering—Rights, Wrongs, and Remedies*, 1972 WIS. L. REV. 175. See also *United States v. Tijerina*, 412 F.2d 661 (10th Cir.), cert. denied, 396 U.S. 990 (1969) (defendants convicted on the basis of police recordings of speeches made in an auditorium). Justice Douglas has stated that "[t]he right of privacy, greatly cherished in the American tradition, is fast disappearing." Douglas, *The Attack on the Right to Privacy*, PLAYBOY, Dec. 1967, at 189.

30. *Silverman v. United States*, 365 U.S. 505, 509 (1961).

31. 373 U.S. 427 (1963).

32. *Id.* at 471; see S. DASH, R. SCHWARTZ & R. KNOWLTON, *THE EAVESDROPPERS* (1959). See also M. BRENTON, *THE PRIVACY INVADERS* (1964); V. PACKARD, *THE NAKED SOCIETY* (1964); 116 CONG. REC. 30797 (1970) (remarks of Senator Ervin); 116 CONG. REC. 39854 (1970) (remarks of Congressman Gallagher). And see Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1189 (1965), where it is stated:

The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others.

33. LIFE, May 20, 1966, at 38 (emphasis added). And see TIME, July 15, 1966, at 38, where in an essay entitled "In Defense of Privacy," it was stated:

The privacy of a citizen's home and thoughts is the greatest distinction of a democracy from a totalitarian state. . . .

. . . Today, just when the affluent society should be on the verge of providing

The right of action for invasion of privacy, which has been recognized in many jurisdictions,³⁴ first appeared in California in *Melvin v. Reid*.³⁵ The California court of appeal in *Reid* declared that the right

every American with as much or as little privacy as he chooses, there is more justified alarm over the state of privacy than at any time in U.S. history.

The threat is twofold. One area involves deliberate efforts to get information about the individual, often by technical means that have become starkly efficient. The problem raised is legal and moral: When is such snooping justified in the interests of society and how should it be controlled?

34. At least 36 states have recognized the right to privacy. PROSSER, *supra* note 2, at 803-04. The tort did not exist at early common law. See *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442, 443 (1902). *But cf.* *DeMay v. Roberts*, 46 Mich. 160, 9 N.W. 146, 149 (1881). The first case in the United States where the highest court of a state gave judicial protection to privacy as a separate right was *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (a case involving the appropriation and use of plaintiff's likeness). The Supreme Court of Georgia stated that the "right of privacy has its foundation in the instincts of nature." *Id.* at 194, 50 S.E. at 69. An excellent discussion of the effect the flexibility of the common law has had on privacy development is contained in *Fergerstrom v. Hawaiian Ocean View Estates*, 50 Haw. 374, 441 P.2d 141 (1968). There defendant's employees had photographed plaintiff next to the new house he purchased, and used the photographs, along with plaintiff's name, in sales brochures, advertisements and television commercials. The court stated that "[t]he common law system would have withered centuries ago had it lacked the ability to expand and adapt to the social, economic, and political changes inherent in a vibrant human society. '[T]he genius of the common law, upon which our jurisprudence is based, is its capacity for orderly growth.'" *Id.* at 376, 441 P.2d at 143, quoting *Lum v. Fullaway*, 42 Haw. 500, 502 (1958). Also see Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966), where it was stated:

It takes a special form of foolhardiness to raise one's voice against the right of privacy at this particular moment in its history. . . . Its development is a bit of legal culture we are all likely to be proud of: it shows that the "eternal youth" of the common law is still green; it is a reflection of civilized sensitivity to subtle harms. . . . *Id.* at 327 (footnote omitted).

Kalven was referring to Warren and Brandeis' article when he used the words "eternal youth." *Id.* n.9. They had said:

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 . . . and now the right to life has come to mean the right to enjoy life,—*the right to be let alone*. . . . Warren & Brandeis, *supra* note 24, at 193 (emphasis added).

35. 112 Cal. App. 285, 297 P. 91 (1931). In this case, usually referred to as the "Red Kimono" case, a motion picture was made depicting the life of a woman who had been a prostitute and who had been tried for murder and acquitted some years earlier. *Id.* at 286-87, 297 P. at 91. The court held that the use of incidents from her life was not actionable because those incidents appeared in public records, but that the use of her name in advertising the movie was an invasion of her right of privacy. *Id.* at 290-91, 297 P. at 93. It seems probable that if the case were brought today, the court would also allow recovery for public disclosure of private facts. See text accompanying note 45 *infra*.

A later case which denied recovery for invasion of privacy was *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (1939), where a husband sued

to privacy was implicitly encompassed in article I, section 1 of the California Constitution, which provided:

All men are by nature free and independent, and have certain and 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.³⁶

The court interpreted this section as permitting recognition of "the right to pursue and obtain safety and happiness without improper infringements thereon by others."³⁷ In *Gill v. Curtis Publishing Company*,³⁸ the California Supreme Court affirmed a cause of action for pri-

a newspaper for publishing a picture of his wife who had committed suicide in public. The husband contended that the picture had been stolen from his home. Although the court ruled against him, holding his wife had waived her privacy by committing suicide in public, it would seem that had the husband been able to prove theft by the defendant of the picture from the home, there would have been an invasion of privacy by intrusion.

In *Mau v. Rio Grade Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939), it was held that plaintiff stated a cause of action where he alleged that defendant broadcast an advertising program, dramatizing a holdup and shooting in which he had been a victim, a year after the incident and used plaintiff's name without his consent.

36. 112 Cal. App. at 291, 297 P. at 93, quoting CAL. CONST. art. I, § 1 (1849).

37. 112 Cal. App. at 291, 297 P. at 93. Implication of a right of privacy is no longer necessary since the section was recently amended by an initiative ballot measure in the November 7, 1972, California General Election, elevating the right to express constitutional status. The last phrase of the constitutional provision now reads "and pursuing and obtaining safety and happiness, and privacy." CAL. CONST. art. I, § 1 (emphasis added).

38. 38 Cal. 2d 273, 239 P.2d 630 (1952). Plaintiffs were held to have stated a cause of action by alleging they were sitting on stools in their ice cream parlor in a public market and that defendants, without consent, took their picture in a romantic pose and published it in a magazine with an article disparaging love founded on sexual attraction alone. *But see Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953), where the same court denied recovery to the same plaintiffs for invasion of privacy by another defendant on the basis of the same picture, stressing that the picture had not been "surreptitiously snapped on private grounds, but rather was taken of plaintiffs in a pose voluntarily assumed in a public market place." *Id.* at 230, 253 P.2d at 444. In dealing with cases where the only invasion claimed was the publication of allegedly private facts, as in the second *Gill* case, the courts have often distinguished between activities occurring in open public view and those occurring within public enclosures. But in *Daily-Times-Democrat Co. v. Graham*, 276 Ala. 380, 162 So. 2d 474 (1964), where the plaintiff was photographed in a "fun house" with her dress blown up over her head, and in *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942), where plaintiff was photographed without her consent in a hospital bed, both courts held there was an invasion of privacy. *See also Nader v. General Motors Corp.*, 25 N.Y.2d 560, 567, 255 N.E.2d 765, 769, 307 N.Y.S.2d 647, 653 (1970), where the New York Court of Appeals (applying District of Columbia law) noted there can be no invasion of privacy "where the information sought is open to public view or has been voluntarily revealed to others." However, the court went on to note a person does not automatically make public everything he does

vacancy, expressly adopting the *Reid* court's definition of privacy as "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity . . . [i]n short . . . the right to be let alone."³⁹ Further indications were given in *Britt v. Superior Court*⁴⁰ that intrusion upon the seclusion of an individual would be considered as constituting an invasion of privacy. The court held that the use of a peephole in a man's restroom by the police to observe events occurring in a toilet stall was an illegal search within the Fourth Amendment and also constituted an unreasonable invasion of Britt's privacy, noting that:

[A]uthority to maintain clandestine surveillance of common use public places and persons therein is not the equivalent of license to surreptitiously invade the right of personal privacy of persons in private places. Man's constitutionally protected right of personal privacy not only abides with him while he is the householder within his own castle but cloaks him when as a member of the public he is temporarily occupying a room—including a toilet stall—to the extent that it is offered to the public for private, however transient, individual use.⁴¹

Other cases by the California Supreme Court have demonstrated the growing interest in protecting the individual's right to privacy. In *Carmel-By-The-Sea v. Young*,⁴² the court invalidated the provisions of a disclosure statute which directed every public officer and each candidate to file as a public record a statement describing the nature of his investments and those of his immediate family. The court held that the statute was unconstitutionally overbroad in that it intruded both into relevant and irrelevant private financial affairs. Justice Burke, in writing the opinion for the court, stated:

[W]e are satisfied that the protection of one's personal financial affairs . . . against compulsory public disclosure is an aspect of the zone of privacy which is protected by the Fourth Amendment and which also

by being in a public place. *Id.* at 570, 255 N.E.2d at 771, 307 N.Y.S.2d at 655. And see text accompanying notes 63-66 *infra*.

39. 38 Cal. 2d at 276, 239 P.2d at 632, quoting *Melvin v. Reid*, 112 Cal. App. 285, 289, 297 P. 91, 92 (1931). Mr. Justice Douglas counts the right to travel, religious freedom, and indeed all rights of conscience among the various protected interests included in the right of privacy or the right to be let alone. W. DOUGLAS, *THE RIGHT OF THE PEOPLE* 87-88 (1958). The United States Supreme Court has acknowledged existence of a general right to privacy. *Katz v. United States*, 389 U.S. 347, 350-51 (1967).

40. 58 Cal. 2d 469, 374 P.2d 817, 24 Cal. Rptr. 849 (1962).

41. *Id.* at 472, 374 P.2d at 819, 24 Cal. Rptr. at 851; see 63 COLUM. L. REV. 955 (1963). A recent case has held, however, that there is no reasonable expectation of privacy if the defendant's activities could have been viewed from the public portion of the restroom. *People v. Triggs*, 26 Cal. App. 3d 381, 102 Cal. Rptr. 725 (1972).

42. 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

falls within that penumbra of constitutional rights into which the government may not intrude absent a showing of compelling need and that the intrusion is not overly broad.⁴³

Most recently, in *Briscoe v. Reader's Digest Association*,⁴⁴ the court upheld a complaint alleging that the publication of the past crime of a rehabilitated felon in connection with his name amounted to an unprivileged invasion of privacy.⁴⁵ While the publication of the past crime was constitutionally protected, the California Supreme Court held that the use of plaintiff's name was not. Although *Briscoe* did not involve electronic surveillance, the court clearly enunciated the relationship between the right to privacy and the use of electronic devices:

Acceptance of the right to privacy has grown with the increasing capability of the mass media and electronic devices with their capacity to destroy an individual's anonymity, intrude upon his most intimate activities, and expose his most personal characteristics to public gaze.⁴⁶

43. *Id.* at 268, 466 P.2d at 231-32, 85 Cal. Rptr. at 7-8.

44. 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

45. The court held that *Briscoe* had stated a cause of action, valid against a general demurrer, where, under the facts alleged, a jury could reasonably find that publication of his identity was of minimal social value, that revelation of past criminal record would be grossly offensive to most people, that he had not voluntarily consented to the publicity accorded him in the article, and that a continuing threat that his old identity would be resurrected by the publishing media would be counter-productive to the goals of the correctional process because he had become rehabilitated. *But see* *Kapellas v. Kofman*, 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969), where the court found no cause of action for invasion of privacy to exist where a newspaper publisher printed an editorial comment of repeated misconduct of plaintiff's minor children. The court held the editorial was published in the context of the plaintiff's candidacy for public office, which rendered the past behavior of the children significant and newsworthy, thus falling within the *New York Times* doctrine. See note 69 *infra*. For a more complete discussion of the *Briscoe* case see Note, 60 CALIF. L. REV. 1042 (1972); Note, *Rehabilitation, Privacy and Freedom of the Press—Striking a New Balance: Briscoe v. Reader's Digest Association*, 5 LOY. L.A.L. REV. 544 (1972); Comment, *Torts—Right of Privacy—Effect of Lapse of Time on the Constitutional Privilege*, 24 S. CAR. L. REV. 123 (1972).

46. 4 Cal. 3d at 533, 483 P.2d at 37, 93 Cal. Rptr. at 869. The court observed: Men fear exposure not only to those closest to them; much of the outrage underlying the asserted right to privacy is a reaction to exposure to persons known only through business or other secondary relationships. The claim is not so much one of total secrecy as it is of the right to *define* one's circle of intimacy—to choose who shall see beneath the quotidian mask. Loss of control over which "face" one puts on may result in literal loss of self-identity . . . and is humiliating beneath the gaze of those whose curiosity treats a human being as an object. *Id.* at 534, 483 P.2d at 37, 93 Cal. Rptr. at 869, *citing* Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1023 (1966).

And see Negley, *Philosophical Views on the Value of Privacy*, 31 LAW & CONTEMP. PROB. 319, 320 (1966) where it was stated:

The nature of our social structure as it has developed in the recent past forces us to recognize that the privacy which until now has apparently been casually pre-

California courts have also handed down a series of decisions imposing liability on defendants who have damaged interests analogous to those asserted by Dietemann, based upon the tort of intentional infliction of emotional distress.⁴⁷ The California Supreme Court, in *Alcorn v. Anbro Engineering*,⁴⁸ allowed recovery to a black American when a foreman intentionally disparaged plaintiff's race in a rude, violent, insolent manner and fired him, causing emotional and physical distress. The most recent case, decided just a month after *Dietemann*, is *Golden v. Dungan*,⁴⁹ wherein a husband and wife sued in separate actions for abuse of process and intentional infliction of emotional distress, alleging that defendants maliciously and with intent to inflict extreme mental suffering caused process to be served at plaintiffs' home at midnight in a loud and boisterous manner and that plaintiffs experienced severe emotional suffering as a proximate result of such intentional conduct. The court of appeal held that each complaint stated a cause of action for intentional infliction of emotional distress. Although the *Dietemann* court recognized that cases in the emotional distress area are not direct authority in the privacy field, it relied on them as indicative of the trend in California law expanding the zone of interests the courts will protect.⁵⁰

sumed as an ingredient of moral action can no longer be presumed but must be specified.

47. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965) defines the tort as follows: One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

48. 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970).

49. 20 Cal. App. 3d 295, 97 Cal. Rptr. 577 (1971). See also *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1954); *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970). See generally 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* §§ 9.1-7, at 665-91 (1956); PROSSER, *supra* note 2, § 12, at 49-62; Magruder, *Mental and Emotional Disturbances in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Smith, *Problems of Proof in Psychic Injury Cases*, 14 SYRACUSE L. REV. 586 (1963); Annot., 64 A.L.R.2d 100 (1959).

50. 449 F.2d at 248-49. The District Court of New York has recently held that a cause of action was stated for both invasion of privacy and intentional infliction of emotional distress where a school employee divulged information given to the school in confidence by a pupil. *Blair v. Union Free School Dist.*, 67 Misc. 2d 248, 324 N.Y.S.2d 222 (Dist. Ct. 1971). But see *Wynne v. Orcutt Union School Dist.*, 17 Cal. App. 3d 1108, 95 Cal. Rptr. 458 (1971), where the California court of appeal held that the plaintiffs did not state a cause of action for negligent infliction of emotional distress. Plaintiffs had sued for damages for shock to their nervous systems as a result of their son's teacher's disclosure to the son's classmates that the son had a progressively disabling and ultimately fatal disease. See *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), where the California Supreme Court expanded the zone of interest for negligent infliction of emotional distress and allowed a mother to recover for shock when she saw her child hit by a car.

Intrusion upon solitude has been recognized as a distinct form of invasion of privacy in many jurisdictions other than California.⁵¹ It has been held that unauthorized bugging of a dwelling,⁵² tapping or otherwise listening on a telephone⁵³ or an extension phone,⁵⁴ snooping with binoculars or through windows,⁵⁵ and overzealous shadowing⁵⁶ amount to invasions of privacy by intrusion.⁵⁷ In *Nader v. General Motors Corporation*,⁵⁸ the New York Court of Appeals held that under District of Columbia law the defendant intruded upon Nader's right of privacy by tapping his telephone and shadowing him. The numerous cases prior to *Nader* which allowed recovery for invasion of privacy by intrusion have been summarized in section 652B of Restatement (Second) of Torts, which provides:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable man.⁵⁹

51. This branch of the law of privacy is covered quite completely in Ezer, *Intrusion On Solitude: Herein of Civil Rights and Civil Wrongs*, 21 LAW IN TRANSITION 63 (1961). See also Annot., 11 A.L.R.3d 1296 (1967).

52. *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964); *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958).

53. *Fowler v. Southern Bell Tel. & Tel. Co.*, 343 F.2d 150 (5th Cir. 1965); *LeCrone v. Ohio Bell Tel. Co.*, 120 Ohio App. 129, 201 N.E.2d 533 (1963).

54. *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E.2d 810 (1939); *Commonwealth v. Murray*, 423 Pa. 37, 223 A.2d 102 (1966).

55. *Alabama Electric Co-Op., Inc. v. Partridge*, 284 Ala. 442, 225 So. 2d 848 (1969); *Souder v. Pendleton Detectives, Inc.*, 88 So. 2d 716 (La. App. 1956).

56. *Pinkerton Nat'l Detective Agency, Inc. v. Stevens*, 108 Ga. App. 159, 132 S.E.2d 119 (1963).

57. Invasion of the right to privacy has been defined, in part, by the Ohio Supreme Court as "the wrongful intrusion into one's private activities." *Kane v. Quigley*, 1 Ohio St. 2d 1, 4, 203 N.E.2d 338, 340 (1964). Justice Brennan has suggested the individual's interest in privacy to be "preventing unwarranted intrusion upon the private aspects of his life." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 48 (1970). The same principles have been applied to other forms of intrusion upon seclusion or into private affairs. *Zimmermann v. Wilson*, 81 F.2d 847 (3d Cir. 1936) (unreasonable prying into private bank account); *Rugg v. McCarty*, 476 P.2d 753 (Colo. 1970) (creditor harassing debtor); *Carey v. Statewide Finance Co.*, 3 Conn. Cir. 716, 223 A.2d 405 (1966) (creditor hounding debtor with calls); *Welsh v. Roehm*, 125 Mont. 517, 241 P.2d 816 (1952) (landlord moving into same house with tenant); *Frey v. Dixon*, 141 N.J. Eq. 481, 58 A.2d 86 (1948) (subpoena duces tecum requiring production of books and documents); *Sutherland v. Kroger Co.*, 144 W. Va. 673, 110 S.E.2d 716 (1959) (search of woman's shopping bag in store); cf. *Bednarik v. Bednarik*, 18 N.J. Misc. 633, 16 A.2d 80 (Ch. 1940) (illegal compulsory blood test used to determine parentage), overruled by *Cortese v. Cortese*, 10 N.J. Super. 152, 76 A.2d 717, 721 (1950). See Note, 57 GEO. L.J. 509 (1969); Note, 17 VAND. L. REV. 1342 (1964).

58. 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

59. RESTATEMENT (SECOND) OF TORTS § 652B, at 103 (Tent. Draft No. 13, 1967).

Against this background, and although no similar decision by a California court existed, the court of appeals concluded that the photographing of Dietemann and recording of his conversation, without his consent, in his den (an area in which he was entitled to privacy),⁶⁰ as a result of which he suffered injury to his feelings and peace of mind, were actionable intrusions upon Dietemann's seclusion and solitude.⁶¹

Apparently ignoring the Restatement's proposed offensiveness standard,⁶² the court adopted the "reasonable expectation of privacy" test as first stated in *Katz v. United States*.⁶³ Mr. Justice Stewart, writing for the majority of eight justices in *Katz*, declared that the interceptions of Katz' telephone conversations from a phone booth represented an unreasonable search and seizure of those conversations in violation of the Fourth Amendment.⁶⁴ The term "reasonable expectation of privacy" first appeared in Justice Harlan's concurring opinion in *Katz*, where he stated:

60. 449 F.2d at 249. See PROSSER, *supra* note 2, at 808-09.

61. 449 F.2d at 248-49. Warren and Brandeis felt that invasion of man's privacy by modern enterprise and invention had "subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury." Warren & Brandeis, *supra* note 24, at 196. They went on to say that "[i]f the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation." *Id.* at 213. See also *Fairfield v. American Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 291 P.2d 194 (1955).

62. RESTATEMENT (SECOND) OF TORTS § 652B, comment *d* at 105 (Tent. Draft No. 13, 1967). The Restatement's offensiveness standard, which is discussed at length in *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), has been criticized as being unworkable and possibly unconstitutional. Note, *Rehabilitation, Privacy and Freedom of the Press—Striking a New Balance: Briscoe v. Reader's Digest Association*, 5 LOY. L.A.L. REV. 544 (1972).

63. 389 U.S. 347 (1967). The *Dietemann* court, quoting from *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969), said it was convinced California would "approve the extension of the tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in plaintiff's position could reasonably expect that the particular defendant should be excluded." 449 F.2d at 249.

In *People v. Krivda*, 5 Cal. 3d 357, 366-67, 486 P.2d 1262, 1268, 96 Cal. Rptr. 62, 68 (1971), the Supreme Court of California affirmed a judgment of dismissal and an order suppressing evidence which police had obtained in a search of defendants' trash. The court stated that, under the circumstances of the case, defendants "had a reasonable expectation that their trash would not be rummaged through and picked over by police officers acting without a search warrant." Certiorari was granted by the United States Supreme Court, which remanded the case for further proceedings since it could not be ascertained whether the decision had been based on federal or California constitutional grounds. *California v. Krivda*, 406 U.S. 904 (1972) *considered on remand sub nom.* *People v. Krivda*, 8 Cal. 3d 623 (1973). See also *State v. Stanton*, 490 P.2d 1274 (Or. App. 1971).

64. 389 U.S. at 353.

[A]n enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy.⁶⁵

Justice Harlan proceeded to develop a twofold requirement for the reasonable expectation of privacy test:

[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."⁶⁶

Using a man's home as an example, Justice Harlan then applied the test:

Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited.⁶⁷

The *Dietemann* court, expressing agreement with other jurisdictions, held that an invasion of privacy based on an intrusion is established without the necessity of proving publication, the existence of a technical trespass, or special damages,⁶⁸ thereby making Time liable merely upon proof of the intrusion.

Time sought to justify the intrusion of its agents by characterizing their actions as investigatorial reporting privileged under the First Amendment's protection of the rights of free speech and freedom of the press.⁶⁹ It relied upon *New York Times Co. v. Sullivan*⁷⁰ to sustain its con-

65. *Id.* at 360 (citations omitted).

66. *Id.* at 361.

67. *Id.*

68. 449 F.2d at 247.

69. *Id.* at 249.

70. 376 U.S. 254 (1964). Summarized, the *New York Times* doctrine is that, absent a showing of actual malice, a public official cannot recover for defamatory falsehoods relating to his official conduct. The United States Supreme Court in *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (involving false light in the public eye), extended the *New York Times* doctrine in defamation to cover actions for invasions of privacy where publication is involved. The Court stated:

[T]he constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth. *Id.* at 387-88.

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), the Supreme Court held that a constitutional privilege applied to a radio station's report of the arrest of a private individual for possession of obscene material. The radio report had characterized Rosenbloom as a "girlie book peddler" and his business as a "smut literature racket." Justice Brennan, in the opinion of the Court, further extended the doctrine to include public events:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The 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 *Id.* at 43.

tention that the First Amendment created a privilege which insulated it from liability for any crimes or torts committed in the process of newsgathering. However, the court disagreed.⁷¹ It has been said that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."⁷² As the California Su-

See Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?*, 18 U.C.L.A.L. REV. 371 (1970), where it is stated:

The *New York Times* privilege has since been extended to defamatory false statements concerning the public conduct of "public figures" and to non-defamatory false statements about persons who are not public figures but who are involuntarily in the public eye. *Id.* (footnotes omitted).

See also Keeton, *Some Implications of the Constitutional Privilege to Defame*, 25 VAND. L. REV. 59 (1972); Note, *Public Official and Actual Malice Standards: The Evolution of New York Times Co. v. Sullivan*, 56 IOWA L. REV. 393, 398-400 (1970).

RESTATEMENT (SECOND) OF TORTS § 652F, at 127 (Tent. Draft No. 13, 1967), provides as follows:

- 1) One is privileged to give publicity to facts concerning another which would otherwise constitute an invasion of his privacy, to the extent that such publicity is given to (news or other) matters in which the public has a legitimate interest.
- 2) The privilege stated in subsection (1) extends to false statements of such facts, unless they are made with knowledge of their falsity, or in reckless disregard of whether they are true.

The Restatement refers to those forms of invasion of privacy where publication is an essential element of the tort. These include, according to Prosser's categorization, false light in the public eye and public disclosure of private facts. See note 2 *supra*.

The public interest concept was mentioned by Warren and Brandeis when they stated that "[t]he right to privacy does not prohibit any publication of matter which is of public or general interest." Warren & Brandeis, *supra* note 24, at 214.

71. 449 F.2d at 249.

72. *Zemel v. Rusk*, 381 U.S. 1, 17 (1964). RESTATEMENT (SECOND) OF TORTS § 652F, comment *k* at 134 (Tent. Draft No. 13, 1967), suggests that the First Amendment privilege "does not protect a defendant from liability for intrusion." The *Dietemann* court pointed out:

Privilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct anteceding publication. 449 F.2d at 249-50, citing *Nimmer, The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 957 (1968).

RESTATEMENT (SECOND) OF TORTS § 652F, comment *b* at 127-28 (Tent. Draft No. 13, 1967) states:

[T]he right of privacy . . . is not complete and unlimited but is subject to the privilege of the press, or of other disseminators of information, to publish matters in which the public has a legitimate interest. At the same time this privilege is in itself not complete and unlimited, and extends only to such matters as do not unduly invade the interest in privacy. Each is a limitation upon the other.

Justice Brennan, writing in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 47-48 (1971), stated:

We have recognized that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community." *Time, Inc. v. Hill*, [385 U.S.] at 388. Voluntarily or not, we are all "public" men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern.

And, in a prior footnote, Justice Brennan pointed out that the Court was "not to be understood as implying that no area of a person's activities falls outside the area

preme Court noted in *Gill v. Curtis Publishing Co.*:⁷³

The right of privacy does undoubtedly infringe upon absolute freedom of speech and of the press, and it also clashes with the interest of the public in having a free dissemination of news and information. These paramount public interests must be taken into account in placing the necessary limitations upon the right of privacy. But if this right of the individual is not without qualifications, neither is freedom of speech and of the press unlimited. The latter privilege is subject to the qualification that it shall not be so exercised as to abuse the rights of individuals.⁷⁴

Therefore, the individual's right to privacy and the greater evils resulting from invasion of privacy outweigh the asserted right of unlimited investigatorial powers of the press. The court of appeals in *Dietemann* felt that although newsgathering was essential to the dissemination of news and protected by the First Amendment, electronic surveillance was not indispensable to such newsgathering,⁷⁵ and said:

We agree that newsgathering is an integral part of news dissemination. We strongly disagree, however, that the hidden mechanical contrivances are "indispensable tools" of newsgathering. . . . The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office.⁷⁶

The line of cases relied on by *Time*, commencing with *New York Times Co. v. Sullivan*⁷⁷ and extending to *Rosenbloom v. Metromedia, Inc.*,⁷⁸ were also clearly distinguishable from *Dietemann* since they in-

of public or general interest." 403 U.S. at 44 n.12.

Recently, a district court, in *Buckley v. Esquire, Inc.*, 344 F. Supp. 1133, 1134 (S.D.N.Y. 1972), refused to extend the *New York Times* doctrine, stating: "[T]o extend the *Times* doctrine to include every aspect of a person's private life is an unfounded extension of the constitutional doctrine."

One author has argued that the right of privacy is an endangered tort which might be swallowed up by the First Amendment privileges accorded the mass media. See Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966); Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267. Even in 1890, Warren and Brandeis noted that "[t]he press is overstepping in every direction the obvious bounds of propriety and of decency." Warren & Brandeis, *supra* note 24, at 196. See also Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

73. 38 Cal. 2d 273, 239 P.2d 630 (1952).

74. *Id.* at 277, 239 P.2d at 633.

75. 449 F.2d at 249.

76. *Id.* (footnote omitted).

77. 376 U.S. 254 (1964).

78. 403 U.S. 29 (1971). See also *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Garrison v.*

volved torts directly related to the sensitive area of publication—either defamation or the invasions of privacy which include publication as an essential element.⁷⁹ The *Dietemann* court was not concerned with the publication of the article in *Life* magazine, but rather focused its attention on the newsgathering methods used by *Life* to obtain the information for the story subsequently published.⁸⁰ The tort was completed with the obtaining of the information by intrusive means—surreptitious photography and recording. The cause of action for invasion of privacy by intrusion exists even if there is no publication of the information obtained. Publication and the concomitant privilege of a free press have no relevance to a tortious intrusion.⁸¹ The rationale

Louisiana, 379 U.S. 64 (1964); *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908) (where the court denied recovery for defamation without a showing of malice).

79. For a discussion of the distinction between defamation and privacy, see *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817, 824 (D.D.C. 1955), *aff'd*, 232 F.2d 369 (D.C. Cir.), *cert. denied*, 352 U.S. 945 (1956). See also *Wade, Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1094 (1962); *Wright, Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEXAS L. REV. 630, 634 (1968), the latter noting:

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.

The two torts—defamation and privacy—protect different interests. “The right of privacy concerns one’s own peace of mind, while the right of freedom from defamation concerns primarily one’s reputation.” *Fairfield v. American Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 86, 291 P.2d 194, 197 (1955); *accord*, *Themo v. New England Newspaper Publishing Co.*, 306 Mass. 54, 27 N.E.2d 753 (1940).

80. 449 F.2d at 249-50. The district court had rested its decision on the publication, pointing out:

Although Prosser in his article appears to say that intrusion without publicity may constitute an invasion of privacy, the California courts seem to require publication. 284 F. Supp. at 929 (citations omitted).

81. In *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969), the court stated:

Unlike other types of invasion of privacy, intrusion does not involve as one of its essential elements the publication of the information obtained. The tort is completed with the obtaining of the information by improperly intrusive means.

Similarly, the New York Court of Appeals in *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970) pointed out that privacy was one’s right to keep knowledge about oneself from exposure to others, the right to prevent “*the obtaining of the information by improperly intrusive means.*”

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In order to sustain a cause of action for invasion of privacy, therefore, the plaintiff must show that the appellant’s conduct was truly “intrusive” and that it was designed to elicit information which would not be available through normal inquiry or observation. *Id.* at 567, 255 N.E.2d at 769, 307 N.Y.S.2d at 652-53, quoting *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Cir. 1969).

In *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 102, 2 S.E.2d 810, 817 (1939), the court observed: “Publication or commercialization may aggravate, but the individual’s right to privacy is invaded and violated nevertheless in the original act of intrusion.”

for the constitutional privilege of the press seems to be the legitimate public interest in publication of newsworthy material. This rationale does not, however, stretch so far as to condone intentional or reckless invasions of privacy by the press.⁸² Time admitted "*that the intrusion [in Dietemann] was conducted primarily for its benefit.*"⁸³ Such deliberate intrusions for newsgathering purposes are in flagrant disregard of an individual's right to privacy.

The court of appeals did not reach the issue of whether the acts of *Life's* employees violated the United States Constitution, thereby subjecting it to liability under 42 U.S.C. §1983.⁸⁴ Further, on appeal Time disclaimed any contention that its employees were acting under the authority of the police.⁸⁵ The court accepted the disclaimer and by doing so avoided considering "the impact of the Fourth and Fourteenth Amendments on the relationship between the exclusionary rules in criminal cases and substantive law in a private tort action."⁸⁶ The district court had held that the activities of *Life's* employees, acting as agents of law enforcement officials, did not constitute a reasonable

RESTATEMENT (SECOND) OF TORTS § 652B, note at 103 (Tent. Draft No. 13, 1967) points out that "[invasion of privacy by intrusion] is very definitely a distinct form of the tort which does not depend upon publicity."

82. Privileges or exemptions should not be facilely extended judicially except out of the necessities of the strongest public policy or by reason of constitutional mandates. *Spahn v. Julian Messner, Inc.*, 23 App. Div. 2d 216, 220, 260 N.Y.S.2d 451, 455, *motion to dismiss appeal denied*, 16 N.Y.2d 1082, 213 N.E.2d 696, 266 N.Y.S.2d 405 (1965).

Even Warren and Brandeis in their article made statements that lead one to conclude that the malice or reckless disregard criteria set forth in *New York Times* should not afford a defense to invasion of privacy:

The invasion of privacy that is to be protected is equally complete and equally injurious, whether the motives by which the speaker or writer was actuated are, taken by themselves, culpable or not. . . . Warren & Brandeis, *supra* note 24, at 218.

83. 449 F.2d at 252 (Carter, J., concurring and dissenting) (citation omitted).

84. *Id.* at 247. See note 16 *supra*.

"[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (Brandeis, J., concurring), *citing Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 191 (1909).

85. 449 F.2d at 247.

86. *Id.* at 249 n.3. *Mapp v. Ohio*, 367 U.S. 643 (1961), incorporated the scope of the Fourth Amendment within the Due Process Clause of the Fourteenth Amendment, and held that all evidence obtained by searches and seizures in violation of the United States Constitution is inadmissible in a state criminal trial. Justice Clark, writing for the Court, went on to say that the Fourth Amendment protects "[t]he right of privacy, no less important than any other right carefully and particularly reserved to the people." *Id.* at 656. Dietemann did not assert the Fourth Amendment in the criminal proceedings against him. 284 F. Supp. at 931.

search or seizure within the confines mandated by the Fourth Amendment.⁸⁷

Although many courts have considered a man's home to be his castle,⁸⁸ society permits police to enter under well-defined circumstances with a warrant,⁸⁹ or without a warrant where there is probable cause to believe a felony is being committed.⁹⁰ The United States Supreme Court has considered cases with factual patterns similar to *Dietemann* where it was argued that the police conduct violated the Fourth Amendment. In *Hoffa v. United States*⁹¹ the Court held that the defendant's misplaced trust, even though obtained by deceit, could not constitutionally invalidate information received through the process of implanting an electronic receiver on an informer.⁹² The *Hoffa* case arose out of efforts to tamper with a jury during Hoffa's trial on charges related to misuse of union funds. Edward Partin, the chief government witness and the only one linking Hoffa to the attempted bribes, volunteered as a close personal friend of Hoffa to inform the authorities of any illegal activities at the forthcoming trial. The Court dismissed Hoffa's claim that Partin's evidence had been obtained in violation of his Fourth Amendment rights. Justice Stewart, writing for the ma-

87. 284 F. Supp. at 931.

88. *See, e.g.*, *Silverman v. United States*, 365 U.S. 505, 511 (1961):

At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.

And in *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951), *aff'd*, 343 U.S. 747 (1952), the court said:

A sane, decent, civilized society must provide . . . some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

89. *See, e.g.*, *Johnson v. United States*, 333 U.S. 10, 14 (1948), where it was observed:

Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

90. *See, e.g.*, *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932), where it was said:

The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy.

For a discussion of the necessity of probable cause for issuance of a warrant, see Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687-88 (1961).

The common law has always recognized a man's house as his castle. . . . Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity? Warren & Brandeis, *supra* note 24, at 220. 91. 385 U.S. 293 (1966).

92. *Id.* at 302-03.

majority, stated that because Partin "was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence," Hoffa was obviously "relying upon his misplaced confidence that Partin would not reveal his wrongdoing."⁹³ More recently, in *United States v. White*,⁹⁴ the Court held that the absence of a search warrant or court authorization⁹⁵ did not invalidate electronic surveillance by federal agents of conversations between the defendant and an informer on whom a transmitter had been placed because the defendant had consented to the informer's presence, and the informer had agreed to the eavesdropping.⁹⁶

The *Dietemann* court of appeals recognized that "[o]ne who invites another to his home or office takes a risk that the visitor . . . may repeat all he hears and observes when he leaves."⁹⁷ But, explicitly refusing to consider any Fourth Amendment implications, the court concluded:

[H]e does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it the visitor may select.⁹⁸

93. *Id.* at 302; see *Katz v. United States*, 389 U.S. 347, 352 (1967); *Lewis v. United States*, 385 U.S. 206, 211 (1966); *Lopez v. United States*, 373 U.S. 427, 438-39 (1963); *On Lee v. United States*, 343 U.S. 747, 751 (1952). See also Comment, *The Supreme Court: 1966 Term*, 81 HARV. L. REV. 112, 125, 186, 192 (1967); Note, *Judicial Control of Secret Agents*, 76 YALE L.J. 994, 1009-14 (1967).

94. 401 U.S. 745 (1971).

95. Wiretapping and other interceptions of wire or oral communications are regulated by 18 U.S.C. §§ 2510-20 (1968), which sections contain provisions for authorization of such interceptions in proper cases. See Comment, *The Fourth Amendment, Electronic Eavesdropping and the Invasion of Privacy*, 17 S. DAK. L. REV. 238, 248 (1972), where it is suggested that "[t]he evils of permitting non-judicially approved electronic surveillance strike at the very foundations of our democracy." Mr. Justice Stewart, in *Katz*, stated that electronic surveillance by police, under strict protective limitations, is constitutional:

[I]t is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. 389 U.S. at 354.

And see *Berger v. New York*, 388 U.S. 41, 59-60 (1967), where the Court delineated the guidelines for court authorized electronic surveillance.

96. See Greenawalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189 (1968). See also Comment, *The Fourth Amendment, Electronic Eavesdropping and the Invasion of Privacy*, 17 S. DAK. L. REV. 238 (1972).

97. 449 F.2d at 249. See, e.g., *United States v. White*, 401 U.S. 745, 751 (1971). The notion of assumption of the risk seems to have made its first appearance in the dissent of Justice Brennan in *Lopez v. United States*, 373 U.S. 427, 465 (1963).

98. 449 F.2d at 249.

The court, applying the reasonable expectation of privacy test, correctly concluded that Dietemann's home was a sphere from which he could reasonably expect to exclude eavesdropping private citizens, newsmen or otherwise.⁹⁹ Dieteman did not open his home to the public, nor did he invite *Life's* employees in their capacity as newsmen.¹⁰⁰ But it seems clear that had the *Dietemann* court reached the Fourth Amendment agency question, it would not have agreed with the district court. Rather, the court of appeals would have been compelled to find that the activities of *Life's* employees were reasonable searches and seizures which did not violate Dietemann's Fourth Amendment rights. Justice Stewart, in the majority opinion in *Katz*, expressed it well when he said:

Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.¹⁰¹

The right of privacy must yield under certain circumstances where there is probable cause for a search or seizure. Reasonable police intrusion is not prohibited by the Fourth Amendment and is a risk inherent in our society.

Judge Carter, in his separate opinion in *Dietemann*, also did not discuss whether there had actually been a violation of Dietemann's Fourth Amendment rights. However, he did feel the effect of the Fourth Amendment on the cause of action for invasion of privacy by intrusion should have been considered by the court since Time had relied extensively on Fourth Amendment cases in its brief on appeal.¹⁰² The real issue is whether liability may be imposed on state officials or their agents for an invasion of privacy when the actions were constitutionally permissible under the Fourth Amendment as reasonable searches and seizures. Even if the court had found no violation of

99. *Id.* For discussion of the reasonable expectation of privacy test, see notes 63-66 and accompanying text *supra*.

100. 284 F. Supp. at 929-30.

101. *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967).

102. Judge Carter's opinion points out that, even if the court had decided that under state tort law one could not be held liable for intrusion where the intrusion was reasonable under the Fourth Amendment, the entrance and invasion of privacy was *not* justified under the Fourth Amendment if there was no benefit to police officers and if the sole intention of the hookup between the police and the defendant was to immunize Time from liability. He pointed out emphatically that no benefit should be recognized in this case, since the police had all the information they needed.

Here Time, through its publication *Life*, realizing it could not unilaterally invade Dietemann's house and privacy, sought the protection of cooperation with state

Dietemann's rights under the United States Constitution, Judge Carter pointed out that states have the power to control and remedy a state intrusion on a person's privacy by imposition of civil liability.¹⁰³ A state has the power to restrict the activities of its law enforcement officials and to provide protection for the right of privacy. As Judge Carter noted, this fact was recognized in *Katz*, where the Supreme Court stated that "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and his very life, left largely to the law of the individual States."¹⁰⁴ The states can restrict the power of their law enforcement officers to a greater extent than the restrictions imposed by the Supreme Court.¹⁰⁵

An additional issue raised by *Dietemann* is the interplay of the Fourth Amendment and the recent recognition of the right to privacy as a federal constitutional right when governmental action is involved. Although the United States Constitution does not refer to a general right of privacy, it has been recognized as an adjunct to specific constitutional provisions.¹⁰⁶ Justice Brandeis, dissenting in *Olmstead v.*

officials. The officials, recognizing their duty not to publicly expose the results of police investigations, accepted the services of Life. Each thereby achieved jointly which [sic] neither could have achieved separately. 449 F.2d at 252.

103. 449 F.2d at 251. Judge Carter also discussed the conflicting interests involved in a decision as to whether a state may allow such a cause of action. In *Wolf v. Colorado*, 338 U.S. 25 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961), the rejection of the application of the federal exclusionary rule to state court proceedings was supported by the existence of civil liability for any abuse of search and seizure guarantees by state officials. See Comment, *Wolf v. Colorado and Unreasonable Search and Seizure in California*, 38 CALIF. L. REV. 498, 509 (1950).

104. 449 F.2d at 251, quoting *Katz v. United States*, 389 U.S. 347, 350-51 (1967).

105. Chief Justice Warren Burger has long advocated eliminating the exclusionary rule and replacing it with civil action against the individual law enforcement official. In *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Court fashioned a private cause of action for civil liability against federal officials who violate the commands of the Fourth Amendment. On remand of *Bivens*, the court of appeals, in an opinion written by Judge Medina, held that the F.B.I. agents had no immunity to protect them from damage suits charging violations of constitutional rights. 456 F.2d 1339, 1342-43 (2d Cir. 1972). However, the court held that it is a valid defense to such charges to allege and prove that the officials acted in good faith and with a reasonable belief in the validity of the arrest and search. *Id.* at 1347-48; cf. *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *rev'd in part sub nom.* *District of Columbia v. Carter*, 93 S. Ct. 602 (1973). See also Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); Note, *The Constitution as Positive Law: Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 5 LOY. L.A.L. REV. 126 (1972).

106. In the early case of *Boyd v. United States*, 116 U.S. 616 (1886), it was noted that privacy was a sacred right:

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then

United States,¹⁰⁷ stated as follows:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.¹⁰⁸

The Supreme Court in *Griswold v. Connecticut*¹⁰⁹ recognized a constitutional right of marital privacy which a state could not invade by a law prohibiting the use of contraceptives. Justice Douglas, in an opinion announcing the decision of the Court, described the right of privacy as a variety of interests consisting of complex conceptualizations whose facets are reflected in the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.¹¹⁰ He also observed that the “specific guarantees in the Bill of Rights have penumbras, formed by emanations from these guarantees that help give them life and substance.”¹¹¹ Noting

before the court. . . . [T]hey apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property. *Id.* at 630.

In *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905), the first high court allowing recovery for invasion of the right of privacy based the right on the constitutional guarantees of life, liberty, and happiness. *See Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817, 830 (D.D.C. 1955), *aff'd*, 232 F.2d 369 (D.C. Cir.), *cert. denied*, 352 U.S. 945 (1956), where the court discussed the right of privacy as within the constitutional guarantees of personal liberty and security. *See also Griswold, The Right to be Let Alone*, 55 *Nw. U.L. Rev.* 216 (1960), where the author felt the right of privacy to be an underlying theme of the Bill of Rights. 107. 277 U.S. 438 (1928).

108. *Id.* at 478, *quoted with approval in Stanley v. Georgia*, 394 U.S. 557, 564 (1969), and *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (Goldberg, J., concurring). *See also Dykstra, The Right Most Valued by Civilized Man*, 6 *UTAH L. Rev.* 305 (1959).

109. 381 U.S. 479 (1965).

110. *Id.* at 484.

111. *Id.* “[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.” *Id.* at 483; *see Poe v. Ullman*, 367 U.S. 497, 516-22 (1960) (Douglas, J., dissenting). *See also Dixon, The Griswold Penumbra: Constitutional Charter For an Expanded Law of Privacy?*, 64 *MICH. L. Rev.* 197, 205-06 (1965).

The First Amendment has been said to encompass notions of privacy. *Gibson v. Florida Legis. Invest. Comm.*, 372 U.S. 539, 570 (1963) (Douglas, J., concurring); *Uphaus v. Wyman*, 360 U.S. 72, 107-08 (1959) (Brennan, J., dissenting).

In *Boyd v. United States*, 116 U.S. 616, 630 (1886), the Court identified the Fourth and Fifth Amendments as protecting “the sanctity of a man's home and the privacies of life.” *See also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Many commen-

that they were dealing with "a right of privacy older than the Bill of Rights," the Court held the law forbidding the use of contraceptives unconstitutional.¹¹² As Justice Goldberg stated in his concurring opinion, in which Chief Justice Warren and Justice Brennan joined, the right of privacy "is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'"¹¹³ Justices Harlan and White, in separate concurring opinions, applied the flexible due process approach of the Fourteenth Amendment, also finding the right of marital privacy to be a fundamental one.¹¹⁴ Therefore, despite disagreement over the proper approach, the Supreme Court has recognized some forms of privacy as fundamental constitutional rights.¹¹⁵

The question remains whether a person may be subjected to an intrusion amounting to a search and seizure, reasonable under the

tators have urged a broad construction of the Fourth Amendment to protect privacy. However, according to William Beaney, the right of privacy might be on more solid ground if it were premised on privacy being a part of the liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. Beaney, *Constitutional Right to Privacy*, 1962 SUP. CR. REV. 212 (1963). And see Bergstrom, *The Applicability of the 'New' Fourth Amendment to Investigations by Secret Agents: A Proposed Delineation of the Emerging Fourth Amendment Right to Privacy*, 45 WASH. L. REV. 785 (1970).

Justice Goldberg, concurring in *Griswold*, concluded that the Ninth Amendment "lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments." 381 U.S. at 493 (citation omitted). See also Ringold, *The History of the Enactment of the Ninth Amendment and Its Recent Developings*, 8 TULSA L.J. 1 (1972); Kutner, *The Neglected Ninth Amendment: The 'Other Rights' Retained By the People*, 51 MARQ. L. REV. 121 (1968); Bertelsman, *The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights*, 37 U. CIN. L. REV. 777 (1968). "The reference in the Ninth Amendment to rights retained by the people rather than those granted by the government serves as a direct philosophical link to the concept expressed a few years earlier in the Declaration of Independence that men are 'endowed by their creator with certain inalienable rights.'" Fields, *Privacy "Rights" and The New Oregon Criminal Code*, 51 ORE. L. REV. 494, 499 (1972).

112. 381 U.S. at 486.

113. *Id.* at 494, quoting *Poe v. Ullman*, 367 U.S. 497, 521 (1960) (Douglas, J., dissenting). Justice Goldberg also noted the Due Process Clause of the Fourteenth Amendment, and stated that it "protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" 381 U.S. at 487, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). See also Pound, *The Fourteenth Amendment and the Right of Privacy*, 13 W. RES. L. REV. 34, 54-55 (1961); cf. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

114. 381 U.S. at 499, 502.

115. The district court had held that *Life*, working in conjunction with law enforcement officials, violated Dietemann's federal constitutional rights, and based its decision on *Griswold*, stating "that although freedom of speech and freedom of press are constitutional guaranties, so is the right of privacy." 284 F. Supp. at 929.

Fourth Amendment, and nevertheless obtain relief under 42 U.S.C. § 1983 for violation of his privacy. A violation of the Civil Rights Act occurs when an individual is deprived of constitutional rights by persons acting under "color of state law."¹¹⁶ While many invasions of privacy would ordinarily not involve a search or a seizure within the meaning of the Fourth Amendment,¹¹⁷ an "intrusion" seems by its very name to fall into that category. Therefore, unless the general right to privacy is embodied in a constitutional provision which is stricter than the Fourth Amendment, no recovery would appear possible. In *Dietemann* there was no violation of the Fourth Amendment because the "search and seizure" was not unreasonable,¹¹⁸ and since *Griswold*, the constitutional right of privacy has not been expanded beyond those rights considered fundamental. But two years before *Griswold* was decided, the Court of Appeals for the Ninth Circuit in *York v. Story*¹¹⁹ upheld a cause of action under section 1983, stating that plaintiff's constitutional right of privacy had been invaded, and that "such acts constituted an arbitrary intrusion upon the security of her privacy, as guaranteed to her by the Due Process Clause of the Fourteenth Amendment."¹²⁰ The *York* decision, when coupled with

116. See Note, *Federal-State Relations and Section 1983*, 24 S. CAR. L. REV. 101, 103 (1972); Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. REV. 839 (1964). In *Screws v. United States*, 325 U.S. 91 (1945), a southern sheriff acting under color of state law beat a Negro until he died. And see W. LOCKHART, Y. KAMIZAR, & J. CHOPER, *CONSTITUTIONAL RIGHTS AND LIBERTIES* 1019-20 (3d ed. 1970), for a discussion of how far the "color of law" portion of section 1983 should be extended. The California Supreme Court, in *Stapleton v. Superior Court*, 70 Cal. 2d 97, 447 P.2d 967, 73 Cal. Rptr. 575 (1968), held that where a private party willfully participates in a joint activity with a state agent, the constitutional prohibitions apply to both. Therefore, in California, where a private party joins and acts with a state officer, he acts "under color of state law." Also see *United States v. Price*, 383 U.S. 787, 794 (1966).

The Fourth Amendment does not apply to searches by private individuals. *Burdeau v. McDowell*, 256 U.S. 465 (1921); see *Sackler v. Sackler*, 33 Misc. 2d 600, 224 N.Y.S.2d 790 (Sup. Ct. 1962), *rev'd*, 16 App. Div. 2d 423, 229 N.Y.S.2d 61, *aff'd*, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964); *cf.* *People v. Botts*, 250 Cal. App. 2d 478, 482, 58 Cal. Rptr. 412, 415 (1967). The decision which led to the Fourth Amendment, *Entick v. Carrington*, 19 St. Trials 1030, 1066 (1765), enunciated the view that there is an absolute right of privacy against all intruders, official and private.

117. For instance, those invasions involving the elements of publication, such as false light in the public eye and public disclosure of private facts.

118. See text accompanying notes 91-96 *supra*.

119. 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

120. *Id.* at 456 (emphasis added). Police officers had taken nude photographs of a woman who had come to the police station seeking aid, and then circulated them

Griswold, points the way toward an expanding right of privacy as a necessary check on the police and on society's increasing demands for the subordination of individuals to a highly technological and computerized society. However, as has been noted previously,¹²¹ exactly where in the constitutional scheme the right to privacy stands is a subject of disagreement.

Nevertheless, California is recognizing a growing right to privacy. That privacy itself is felt to be of constitutional dimensions, if not more fundamental, is evidenced by the recent initiative ballot measure adopted by the California voters.¹²² Privacy in California is not merely protected against state action, but is considered an inalienable right which may not be violated by anyone. This right of privacy must not be swallowed up by overindulgence of the rights to freedom of speech and of the press. The *Dietemann* decision, allowing recovery for intrusion on the right of privacy without requiring proof of a trespass, special damages or publication,¹²³ should afford a needed weapon for

among other police personnel. Whether the action of the officers would have constituted a prohibited search or seizure was not considered by the court.

In *Monroe v. Pape*, 365 U.S. 167 (1961), police officers broke into plaintiff's home at night, without a warrant, and forced him to stand naked in the middle of the living room while they searched the house. The Supreme Court allowed recovery under section 1983, holding that the illegal search was a violation of plaintiff's constitutional rights, and stated:

It is abundantly clear that one reason the [Civil Rights Act] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. *Id.* at 180.

See Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969). And see *Baker v. Howard*, 419 F.2d 376, 377 (9th Cir. 1969) (per curiam), where the court, citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), and *York v. Story*, 324 F.2d 450, 454-55 (9th Cir. 1963), said: "Under some circumstances there can be such a gross abuse of privacy as to amount to an abridgement of fundamental constitutional guarantees."

121. See notes 109-15 and accompanying text *supra*.

122. See note 37 *supra*. California is not the only state to include privacy in a constitutional provision. See, e.g., *State v. Kantner*, 493 P.2d 306, 314 (Haw. 1972) (Levinson, J., dissenting), which discusses Hawaii's recent constitutional revision elevating the right to be free from invasions of privacy to constitutional stature equal to the right against unreasonable searches and seizures.

123. Notwithstanding that publication is not an essential element of plaintiff's case, it was indicated by the *Dietemann* court of appeals that the publication after the tortious intrusion might be an additional element for consideration in assessing damages. The court said:

No interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired. Assessing damages for the additional emotional distress suffered by a plaintiff when the wrongfully ac-

the preservation and protection of the individual's privacy in today's society with its ever-increasing ability to intrude on seclusion and solitude.

Allan E. Wilton

quired data are purveyed to the multitude chills intrusive acts. It does not chill freedom of expression guaranteed by the First Amendment. A rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him without any countervailing benefit to the legitimate interest of the public in being informed. The same rule would encourage conduct by news media that grossly offends ordinary men. 449 F.2d at 250.