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Mark Schadrack

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## PRIVACY AND THE PRESS: A NECESSARY TENSION

[N]o other tort has received such an outpouring of comment in advocacy of its bare existence.<sup>1</sup>

### I. INTRODUCTION

It has been observed that “[t]he intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man . . . has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual.”<sup>2</sup> In other words, the right of privacy becomes more necessary as technology advances.<sup>3</sup> This insight led Samuel Warren and Louis Brandeis to propose the invasion of privacy cause of action in a landmark law review article they wrote in 1890.<sup>4</sup> Since that time, the right of privacy has been recognized by virtually every state.<sup>5</sup>

Privacy tort law encompasses four separate causes of action.<sup>6</sup> The first form to be recognized by the courts involves the appropriation of the plaintiff’s name or likeness for the defendant’s benefit or advantage.<sup>7</sup> Another form which has been generally recognized involves an intrusion upon the plaintiff’s physical solitude or seclusion.<sup>8</sup> The third form of a tortious invasion of privacy consists of publicity which places the plaintiff

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1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, 802-03 (4th ed. 1971).

2. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

3. See, e.g., *Briscoe v. Reader’s Digest Association*, 4 Cal. 3d 529, 533, 483 P.2d 34, 37, 93 Cal. Rptr. 866, 869 (1971); and Bloustein, *Privacy as an Aspect of Dignity: an Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964): “analysis of the interest involved in the privacy cases is of utmost significance because in our own day scientific and technological advances have raised the spectre of new and frightening invasions of privacy.” *Id.* at 963.

4. Warren & Brandeis, *supra* note 2.

5. William Prosser states that “[i]n one form or another, the right of privacy is by this time recognized and accepted in all but a very few jurisdictions.” W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, 804 (4th ed. 1971). Furthermore, he notes that the Supreme Court has suggested that the decisions in four states denying recognition of the right are to be overruled. *Id.* at 816. This suggestion is based on the applicability of the more recently recognized constitutional right of privacy, see *infra* pp. 6-10, to tort liability.

For a thorough account of the development of privacy tort law see, Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

6. For a discussion of the assertion that privacy consists of a single tort, see Bloustein, *supra* note 3.

7. See, e.g., *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902) (plaintiff’s picture used to advertise flour).

8. See, e.g., *Young v. Western & A.R. Co.*, 39 Ga. App. 761, 148 S.E. 414 (1929) (search of plaintiff’s home without a warrant).

in a false light in the public eye.<sup>9</sup> The fourth form, which is the focus of this Comment, involves the public disclosure of private facts.<sup>10</sup> This latter form of privacy invasion comes into direct conflict with first amendment guarantees, particularly the free speech and free press provisions.<sup>11</sup>

The United States Supreme Court first dealt with this conflict in *Cox Broadcasting Corp. v. Cohn*.<sup>12</sup> However, the Court's narrow holding in that case left open the question of whether the press can ever be penalized for printing the truth.<sup>13</sup> Accordingly, the continued vitality of the public disclosure of private facts tort remains uncertain.<sup>14</sup>

The thesis of this Comment is that the fundamental nature of the right of privacy compels the conclusion that the public disclosure of private facts cause of action will remain a viable tort. It is further suggested that the Supreme Court adopt a balancing approach in this area to accommodate the individual's interest in privacy and society's interest in the free flow of information. Such an approach not only is consistent with developments in the lower courts, but also is supported by Supreme Court cases dealing with various aspects of the right of privacy.

## II. THE TENSION

### A. *The Firstness of the First Amendment*

In *Murdock v. Pennsylvania*,<sup>15</sup> Justice Douglas stated that the first

9. See, e.g., *Peay v. Curtis Pub. Co.*, 78 F. Supp. 305 (D.D.C. 1948) (honest taxi driver's face used in article on cheating propensities of taxi drivers).

Although there has been much overlapping of defamation in false light privacy cases, the privacy cases go considerably beyond the narrow limits of defamation, and have the potential to engulf the entire law of defamation. Prosser, *supra* note 5, at 400-01.

For a complete discussion comparing defamation and privacy in a first amendment context, see Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976).

10. See, e.g., *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931) (movie about plaintiff's past life as a prostitute).

Like defamation, the interest protected by this tort is that of reputation. However, there is a significant difference between the two in that truth is not a defense to the privacy tort. Prosser, *Privacy*, *supra* note 5, at 398.

11. Although the focus of this Comment is on the conflict between privacy and freedom of the press, much of the analysis is also applicable to the conflict between privacy and freedom of speech.

12. 420 U.S. 469 (1975).

13. Although the Court stated that the broader question is "whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments," *id.* at 491, it must be recognized that the Court was only speaking in the context of privacy analysis. For instance, the press obviously cannot print truthful matters that would jeopardize national security.

14. See *infra* text accompanying notes 28-29.

15. 319 U.S. 105 (1943).

amendment is in a "preferred position."<sup>16</sup> Numerous Supreme Court Justices and commentators have agreed with this notion of the "firstness of the first amendment."<sup>17</sup> As a result, courts give great weight to a defense based upon the first amendment, and cast a scrutinizing eye upon any claim that may have a detrimental effect on the interests sought to be protected by the first amendment.

Notwithstanding this deference, the first amendment is by no means an absolute defense. Public policy and individual rights have been furthered in certain situations despite their limiting effect upon the first amendment.<sup>18</sup> Thus, the question arises as to whether a person's right not to have private facts about his or her life published is such an important interest as to at least require some sort of balancing approach, or whether it is one of those claims that must yield to the firstness of the first amendment in all instances.

### B. *The Supreme Court Speaks*

The conflict between privacy and the first amendment has been recognized for many years.<sup>19</sup> Until recently, however, the issue was rarely raised in constitutional terms.<sup>20</sup> In 1975, the issue was explicitly raised in *Cox Broadcasting Corp. v. Cohn*.<sup>21</sup> In *Cox*, the identity of a deceased rape victim was obtained by a reporter from court records and was subsequently broadcasted by the media. The victim's father sued the newsman and the television station for invasion of privacy, basing his cause of action on a Georgia criminal statute<sup>22</sup> making it a misdemeanor to publish or broadcast the identity of a rape victim. The Georgia Supreme Court,

16. *Id.* at 115. For criticism of the concept of the first amendment as a "preferred" freedom, see Justice Frankfurter's concurring opinion in *Kovacs v. Cooper*, 336 U.S. 77, 90-96 (1949) (Frankfurter, J., concurring).

17. For example, Justice Cardozo has noted that "one may say that [freedom of speech] is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

18. For a brief survey of relatively recent cutbacks on the primacy of the first amendment, see Goldberg, *The First Amendment and Its Protections*, 8 HASTINGS CONST. L.Q. 5, 5-6 (1980).

19. In 1890, Warren and Brandeis theorized that the privacy right did not extend to prohibition of "matter which is of public or general interest." Warren & Brandeis, *supra* note 1, at 214.

20. Although it has been stated that as of 1973 the first amendment defense had not been raised in a public disclosure case, Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462, 1469 n.36 (1973), at least one earlier case discusses the press' first amendment rights. *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942). Prior to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), however, nearly all cases focused on the press' protection under state law rather than under the first amendment.

21. 420 U.S. 469 (1975).

22. GA. CODE § 16-6-23 (1968) (amended 1982). The statute states in pertinent part:

relying on the statute as a declaration that the identity of a rape victim was not a matter of public concern, held that the statute was constitutional as a legitimate limitation on the right of freedom of expression contained in the first amendment.<sup>23</sup>

The United States Supreme Court reversed, holding that a state may not impose sanctions on those who accurately publish such information.<sup>24</sup> However, upon recognizing the conflict between the right of privacy and the first amendment,<sup>25</sup> the Court carefully limited its holding to the particular facts presented. It stated:

Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, . . . it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.<sup>26</sup>

The Supreme Court's failure to answer the broader question presented in *Cox* has left the public disclosure aspect of privacy tort law in a state of limbo. The cause of action is codified in section 652D of the Restatement (Second) of Torts.<sup>27</sup> However, the section concludes with a

(a) It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium . . . the name or identity of any female who may have been raped . . . .

(c) Any person or corporation violating this Code section shall be guilty of a misdemeanor.

23. *Cox Broadcasting Corp. v. Cohn*, 231 Ga. 60, 200 S.E.2d 127 (1973), *rev'd*, 420 U.S. 469 (1975).

24. 420 U.S. at 491.

25. *Id.* at 489. The Court stated: "Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press." *Id.*

26. *Id.* at 491.

27. The section reads as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.

RESTATEMENT (SECOND) OF TORTS § 652D (1976). A preliminary note in a tentative draft of § 652D states that § 652D was amended to add subsection (b) as a result of the *Cox* case. RESTATEMENT (SECOND) OF TORTS § 652D (Tent. Draft No. 21, 1975).

special note stating that “[i]t has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment.”<sup>28</sup> As noted by the Ninth Circuit, the *Cox* Court’s failure to answer the broader question means that there is still an issue as to whether the public disclosure tort is “to be written out of the law.”<sup>29</sup> Thus, the continued vitality of liability claims for public disclosure invasions of privacy appears questionable, pending further elucidation by the United States Supreme Court.

### III. THE FUNDAMENTAL NATURE OF THE RIGHT OF PRIVACY

Although the Supreme Court has declined to answer the question of whether public disclosure actions may ever withstand first amendment defenses, the fundamental nature of the right of privacy<sup>30</sup> compels the conclusion that the question should be answered affirmatively.

#### A. *Defining the Interest*

It has been stated that “privacy is not given the recognition it deserves as a fundamental value simply because the concept is so difficult to formulate or justify in nonsubjective terms.”<sup>31</sup> Even so, privacy has been defined as encompassing specific individual and societal interests.

Various writers have identified a number of ways that privacy furthers an individual’s interests.<sup>32</sup> These include protecting the individual’s public image, nurturing individuality, permitting emotional release and promoting human relationships.<sup>33</sup> Privacy also serves the more general, societal function of furthering democracy.<sup>34</sup> It does so by drawing a line between the individual and the collective—between self and society. This line allows the development of independent minded citizens, and consequently, fosters “a firmer, better constructed, and more integrated position in opposition to the dominant social pressures.”<sup>35</sup>

#### B. *Public Disclosure and the Constitutional Right of Privacy*

Developments in constitutional law which raise the right of privacy

28. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

29. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1127 (9th Cir. 1975).

30. *See infra* note 39.

31. Bazelon, *Probing Privacy*, 12 GONZ. L. REV. 587, 588 (1977).

32. *See, e.g., id.* at 589-91; A. WESTIN, *PRIVACY AND FREEDOM* 32-39 (1967).

33. Bazelon, *supra* note 31, at 589-91.

34. *Id.* at 591-94.

35. Simmel, *Privacy is not an Isolated Freedom*, in *PRIVACY, NOMOS XIII* 73 (1971). *See also*, Bazelon, *supra* note 31, at 592.

"to the level of a constitutional rule"<sup>36</sup> provide further evidence of the fundamental nature of the right of privacy. Arguably, the Court's recognition of a general constitutional right of privacy elevates the tension to one of constitutional right versus constitutional right.<sup>37</sup> However, it is far from clear to what extent the constitutional right of privacy overlaps the tort right of privacy.

### 1. Emergence of the right

It is somewhat peculiar that our Founding Fathers did not mention the right of privacy in the Constitution.<sup>38</sup> Possibly, they felt that such a right is so fundamental to a democratic society<sup>39</sup> that mentioning it would be meaningless or redundant.<sup>40</sup> Or, more likely, they were simply unaware of the potential for the sophisticated and massive means of communication and information gathering which we have today, and therefore, did not realize the importance of such a right.

Although the absence of an express right of privacy in our Constitution made it difficult for the Supreme Court to recognize such a right, this obstacle was overcome in the landmark case of *Griswold v. Connecticut*.

36. See *infra* text accompanying note 47.

37. It is somewhat ironic that the roots of the right of privacy have been found in the same constitutional provision it conflicts with, namely, the first amendment. See *Roe v. Wade*, 410 U.S. 113, 152 (1973).

38. It is worth noting that some states have incorporated the right of privacy in their state constitutions. See, e.g., CAL. CONST. art. I, § 1.

39. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). See also *Olmstead v. United States*, where Justice Brandeis characterized "the right to be let alone . . ." as "the right most valued by civilized men." 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); and *Time, Inc. v. Hill*, where Justice Fortas stated "[t]here are great and important values in our society, none of which is greater than those reflected in the First Amendment, but which are also fundamental and entitled to this Court's careful respect and protection. Among these is the right to privacy . . ." 385 U.S. 374, 412 (1967) (Fortas, J., dissenting). Even the *Cox* Court noted the significance of privacy in a democratic society when it stated that "the interests on both sides are plainly rooted in the traditions and significant concerns of our society." 420 U.S. at 491.

40. The Supreme Court used similar reasoning in *United States v. Guest*, 383 U.S. 745 (1966), to explain why the right to travel was not mentioned in the Constitution. "[T]hat right finds no explicit mention in the Constitution. The reason [may be] that a right so elementary was conceived from the beginning to be a necessary concomitant of the . . . Union the Constitution created." *Id.* at 758. See also Z. CHAFEE, JR., *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787* at 185 (1956):

Two diametrically opposite interpretations are possible when an important provision in a document is deliberately omitted by the draftsmen of a . . . document. *First*, they left it out in order to get rid of it as objectionable. *Second*, they wanted to keep the provision operative, but considered that its substance was already embodied elsewhere and left it out as superfluous.

Another fundamental constitutional right not mentioned in the Constitution is the right to vote in state elections. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966).

cut.<sup>41</sup> There, the Court struck down a Connecticut statute that forbade both the use of contraceptives and the aiding and abetting of such use. Writing for the majority, Justice Douglas stated that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>42</sup> The first, third, fourth, fifth and ninth amendments to the Constitution, he wrote, contain "[v]arious guarantees [that] create zones of privacy," and the right to privacy in the marriage relationship lies within one of these zones.<sup>43</sup> Justice Douglas concluded that the state statute at issue violated the right of marital privacy and thus was unconstitutional.<sup>44</sup>

Arguably, the Court's recognition of a constitutional right of privacy in *Griswold* makes it practically impossible for the Supreme Court to abolish the public disclosure cause of action. In other words, if the public disclosure aspect of privacy has achieved constitutional dimension, it may not be taken away by anything short of a constitutional amendment. However, it has not yet been settled whether the Supreme Court has given the public disclosure aspect of privacy constitutional stature.<sup>45</sup> Nonetheless, language in *Griswold* and post-*Griswold* cases provides strong evidence that it has already done so.

## 2. Nondisclosural privacy

Referring to the Court's recognition of a constitutional right of privacy in *Griswold*, Justice Black pointed out that the Court was "exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule."<sup>46</sup> Thus, arguably the Court recognized the constitutional right of nondisclosural privacy<sup>47</sup> as early as *Griswold*, since the central thesis of the article referred to by Justice Black was based on nondisclosural privacy.<sup>48</sup>

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41. 381 U.S. 479 (1965). For a sample of the scholarly analysis that followed *Griswold*, see Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965).

42. 381 U.S. at 484.

43. *Id.* at 484-85.

44. *Id.* at 485.

45. See *infra* text accompanying notes 57-58.

46. *Griswold v. Connecticut*, 381 U.S. 479, 510 n.1 (1965) (Black, J., dissenting).

47. Various commentators and lower courts have used the term "nondisclosural privacy" when discussing constitutional recognition of a person's right not to have private matters published or disseminated. Therefore, the same term will be used throughout this section as a synonym for public disclosure of "private facts" privacy.

48. In *Cox Broadcasting Corp. v. Cohn*, the Court stated that "the central thesis of the . . . article by Warren and Brandeis . . . was that the press was overstepping its prerogatives by



In *Whalen v. Roe*,<sup>49</sup> the Supreme Court provided direct evidence of a recognition of nondisclosure privacy<sup>50</sup> when it stated the following: "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. *One is the individual interest in avoiding disclosure of personal matters*, and another is the interest in independence in making certain kinds of important decisions."<sup>51</sup> Toward the end of the opinion, however, the Court confused things by disclaiming recognition of at least one specific instance of privacy.<sup>52</sup> In its "final word about issues we have not decided," the Court stated that it did not decide any constitutional questions that might be presented by unwarranted disclosure of information in government computer banks.<sup>53</sup>

Notwithstanding this, it is difficult to conclude that this narrow statement disclaims the Court's suggestion of a broad right of nondisclosure privacy earlier in its opinion.<sup>54</sup> Justice Brennan came to a similar conclusion in his concurring opinion,<sup>55</sup> stating that "[t]he Court recognizes that an individual's 'interest in avoiding disclosure of personal matters' is an aspect of the right of privacy, . . . but holds that in this case, any such interest has not been seriously enough invaded by the State."<sup>56</sup>

Although a majority of the federal courts interpret *Whalen* as recognizing a constitutional right to nondisclosure,<sup>57</sup> the Sixth Circuit came to a contrary conclusion in *J.P. v. DeSanti*.<sup>58</sup> In that case, a group of juveniles sought to enjoin compilation and dissemination of their "social histories."<sup>59</sup> After concluding *Whalen* "does not . . . create a general

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publishing essentially private information and that there should be a remedy for the alleged abuses." 420 U.S. 469, 487 (1975).

See also, Prosser *supra*, note 5, at 392: "[T]he article of Warren and Brandeis was primarily concerned with the . . . public disclosure of embarrassing private facts [cause of action] . . ." Dean Prosser notes that the article was prompted as a result of the press prying into the social affairs of Mr. Warren's family. *Id.* at 383.

49. 429 U.S. 589 (1977) (state recordation of identity of people who obtain certain drugs does not violate right of privacy).

50. For a similar conclusion see Note, *A Constitutional Right to Avoid Disclosure of Personal Matter: Perfecting Privacy Analysis in J.P. v. DeSanti*, 71 GEO. L.J. 219 (1982), and Comment, *The Constitutional Right to Withhold Private Information*, 77 NW. U.L. REV. 536, 541 (1982).

51. 429 U.S. at 599-600 (emphasis added).

52. *Id.* at 605-06.

53. *Id.*

54. See *supra* text accompanying notes 49-51.

55. 429 U.S. at 606 (Brennan, J., concurring).

56. *Id.* (Brennan, J., concurring) (quoting majority opinion, 429 U.S. at 599).

57. Note, *supra* note 50, at 231.

58. 653 F.2d 1080, 1089 (6th Cir. 1981).

59. Probation officers of the Juvenile Court of Cuyahoga County in Ohio customarily com-

constitutional right of nondisclosure,"<sup>60</sup> the court reversed the district court's grant of an injunction.<sup>61</sup> However, the court expressly stated that "[our] opinion does not mean that . . . there is *no* constitutional right to nondisclosure of private information."<sup>62</sup> Thus, even the Sixth Circuit hesitates to deny the existence of a limited constitutional right of nondisclosural privacy.

Finally, it should be noted that the Supreme Court reaffirmed its position in *Whalen* in a subsequent case. In *Nixon v. Administrator of General Services*,<sup>63</sup> former President Nixon claimed a violation of his constitutional privacy rights due to an act of Congress<sup>64</sup> directing that the General Services Administrator take custody of Nixon's presidential tapes and papers.<sup>65</sup> During the course of its discussion of the privacy claim, the Court repeated the nondisclosure language from *Whalen* by stating that "[o]ne element of privacy has been characterized as 'the individual interest in avoiding disclosure of personal matters.'"<sup>66</sup> The Court went on to state that although it agreed that even the President "[is] not wholly without *constitutionally protected privacy rights* . . . any intrusion must be weighed against the public interest."<sup>67</sup>

As the foregoing suggests, it appears that the Supreme Court has recognized a constitutional right of nondisclosure. What is even clearer is the growing importance of nondisclosural privacy in America, both as a constitutional right and as a common law right. However, the Supreme Court has refused to set up a framework for vindicating this right when it clashes with the first amendment.

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pile histories of those brought before the court. The histories contain information from the complaining parties, the juveniles themselves, their past records in the court, their parents and school records. They also include any information on record pertaining to other members of the family and any other information that the probation officer feels is relevant. Written consent from the juveniles or their families is not a prerequisite to compilation of the information and access to the records is not available to the juveniles or their families.

60. *Id.*

61. *Id.* at 1091.

62. *Id.* at 1090.

63. 433 U.S. 425 (1977).

64. See Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 (1982).

65. 433 U.S. at 455.

66. *Id.* at 457 (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

67. *Id.* at 457-58 (emphasis added).

## IV. TOWARD A BALANCING APPROACH

A. *Supreme Court Treatment*

## 1. Matter of public concern

The facts in *Cox Broadcasting Corp. v. Cohn*<sup>68</sup> appeared to present a paradigm for privacy recovery. There are few facts more personal to an individual than the fact that one has been raped. Furthermore, it is difficult to argue that the identity of a rape victim has any news value.<sup>69</sup> Yet, the *Cox* Court held that the first and fourteenth amendments prohibit states from penalizing the press for printing such information when it is otherwise available to the public as part of a public record.<sup>70</sup> Thus, one might be tempted to conclude that the public disclosure cause of action never can survive a first amendment defense. However, the rationale in *Cox* compels a different conclusion.

By shifting its focus away from the intrinsic nature of the information,<sup>71</sup> and basing its holding on the fact that the information was part of a judicial record, the Court created a clear exception to privacy recovery.<sup>72</sup> The Court noted that "[w]ith respect to judicial proceedings . . . the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."<sup>73</sup> Therefore, "judicial proceedings . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."<sup>74</sup> As of this writing, the position of the Supreme Court has not changed in this regard since it rendered its opinion in *Cox*. If a certain item can be deemed a "matter of public concern" there appears to be a

68. 420 U.S. 469 (1975).

69. The fact that a person has been raped arguably has news value because it is something society must be aware of in order to protect itself. However, broadcasting the identity of the victim does not provide society with any additional useful information, especially when balanced against the possible adverse effects publishing such information may have on victims and their relatives. Although possibly more news is sold when such information is included, it is difficult to imagine the Court will ever allow the concept of "value" to be reduced to dollars and cents accruing to a particular business.

70. 420 U.S. at 491, 497.

71. Although the Court characterized the information as "part of a judicial record," it could have just as easily characterized it as "the specific identity of a rape victim." However, had it done this, it would have been extremely difficult to justify printing such information as being a matter of public concern. Stated differently, the Court is able to justify the printing of certain information, depending on how it initially characterizes that information.

72. Woito and McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?* 64 IOWA L. REV. 185, 232 (1979).

73. 420 U.S. at 492 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

74. *Id.*

constitutionally based defense to public disclosure recovery.<sup>75</sup>

The *Cox* Court's rationale for its holding implies a willingness to penalize the press for truthful publications that are *not* matters of public concern. Indeed, the Court encouraged the states to fashion appropriate laws to meet privacy interests such as those raised by the facts in *Cox*.<sup>76</sup> It directed the states that

[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.<sup>77</sup>

Furthermore, instead of striking down the Georgia statute on which the plaintiffs in *Cox* relied,<sup>78</sup> the Court merely held that it was not applicable where the private information it seeks to protect is part of a judicial record.<sup>79</sup>

To summarize, by creating a "matter of public concern" exception to privacy recovery, the Supreme Court has essentially admitted that there *are* instances where the press can be penalized for printing the truth. However, simply stating what is not considered private matter gives very little guidance to the lower courts. Nonetheless, the Court's earlier discussions about newsworthiness indicate it is willing to develop a more comprehensive framework for dealing with the tension between the right of privacy and the first amendment.

## 2. Newsworthiness

The Supreme Court implicitly recognized "newsworthiness" as a prerequisite to the first amendment defense almost a decade before *Cox* in *Time, Inc. v. Hill*.<sup>80</sup> In that case, Hill and his family were held hostage in their home by three escaped convicts and were ultimately released unharmed. Plaintiff Hill expressly stated to newsmen that there had been no violence and that nobody was molested. A novel about a hostage incident depicting considerable violence appeared later, and was subsequently made into a play. In the "fictionalized" version of the incident "the father and son are beaten and the daughter [is] subjected to a verbal

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75. However, it is worth noting that in a later case the Court uses the language "matter of public significance" to describe its holding in *Cox*. *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)).

76. 420 U.S. at 496.

77. *Id.*

78. *See supra* note 22.

79. 420 U.S. at 491.

80. 385 U.S. 374 (1967).

sexual insult.”<sup>81</sup> The defendant published an account of the play, relating it to the Hill incident by describing the play as a re-enactment and using photographs of scenes staged in the former Hill home as illustrations.

Alleging the article gave a knowingly false impression that the play depicted the actual incident, Hill sued for damages under a New York statute which provided a cause of action where an individual's name or picture is used by another without consent for purposes of trade or advertising.<sup>82</sup> Anticipating a clash between the statutory right of privacy and first amendment rights, the Court requested counsel to discuss the following questions on reargument:

- (1) Is the truthful presentation of a newsworthy item ever actionable under the New York statute . . . ? If so, does appellant have standing to challenge that aspect of the statute?
- (2) Should the *per curiam* opinion of the New York Court of Appeals be read as adopting the following portion of the concurring opinion in the Appellate Division?

“However, if it can be clearly demonstrated that the newsworthy item is presented, not for the purpose of disseminating news, but rather for the sole purpose of increasing circulation, then the rationale for exemption from section 51 no longer exists . . . . In such circumstances the privilege to use one's name should not be granted even though a true account of the event be given—let alone when the account is sensationalized and fictionalized.”<sup>83</sup>

Justice Keating's opinion in *Spahn v. Julian Messner, Inc.*,<sup>84</sup> answered these questions prior to reargument. The Hill Court stated that the opinion in *Spahn* made it “crystal clear” that “truth is a complete defense in actions under the statute based upon reports of newsworthy people or events.”<sup>85</sup> The Court then proceeded to state that “[t]his limitation to newsworthy persons and events does not of course foreclose an interpretation of the statute to allow damages where ‘[r]evelations may be so intimate and so unwarranted in view of the victim's position as to

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81. *Id.* at 378.

82. See N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976). Although the text of the statute appears to proscribe relief only in appropriation cases, the Hill Court noted that “[t]he New York courts have . . . construed the statute to operate much more broadly.” 385 U.S. at 381.

83. 385 U.S. at 382-83 n.6 (quoting 384 U.S. 995 (1966) (order for reargument)).

84. 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966).

85. 385 U.S. at 383.

outrage the community's notions of decency.'<sup>86</sup>

The foregoing suggests an attempt by the Supreme Court to limit the press to publicizing only newsworthy matters, more precisely, newsworthy matters that are not outrageous. However, the Court subsequently avoided any discussion of newsworthiness in *Cox*, and developed the ad hoc exception of "matter of public concern."<sup>87</sup> Whether newsworthiness encompasses the "matter of public concern" exception remains to be seen. What *is* clear, though, is that it is time for the Supreme Court to develop a more comprehensive guideline for weighing individuals' privacy rights against the press' first amendment rights.

### B. Circuit Court Decisions

Although the Supreme Court has not explicitly adopted a balancing approach to address the conflict, the Ninth and Tenth Circuits have taken the initiative by using language from *Cox*. They have concluded that "newsworthiness" is equivalent to the "matter of public concern" exception created in *Cox*.

In *Virgil v. Time, Inc.*,<sup>88</sup> plaintiff Virgil asked not to be mentioned in an article on body surfing when he found out that certain information about his nonsurfing life was going to be published.<sup>89</sup> Despite his objections, the information was published and he subsequently brought suit claiming a violation of his right of privacy.

Recognizing that the Supreme Court "refused to reach [the] broad question 'whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments,'"<sup>90</sup> the Ninth Circuit proceeded to rephrase the issue as whether the tortious violation of privacy should be written out of the law.<sup>91</sup> Con-

86. *Id.* at n.7 (emphasis added) (quoting *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir. 1940)).

87. See *supra* text accompanying note 26.

88. 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).

89. The following excerpts appeared in the article:

Virgil's carefree style at the Wedge appears to have emanated from some escapades in his younger days, such as the time at a party when a young lady approached him and asked where she might find an ashtray. 'Why, my dear, right here,' said Virgil, taking her lighted cigarette and extinguishing it in his mouth. . . .

' . . . I quit my job, left home and moved to Mammoth Mountain. At the ski lodge there one night I dove headfirst down a flight of stairs—just because. Because why? Well, there were these chicks around. I thought it would be groovy. . . .'

Cherilee [plaintiff's wife] says, 'Mike also eats spiders and other insects and things.'

*Id.* at 1124 n.1 (quoting Kirkpatrick, *The Closest Thing to Being Born*, SPORTS ILLUSTRATED, Feb. 22, 1971).

90. *Id.* at 1127 (quoting *Cox Broadcasting v. Cohn*, 420 U.S. 469, 491 (1975)).

91. 527 F.2d at 1127.

cluding that it should not, the *Virgil* court held that publishing private facts is not protected by the first amendment, absent the privilege of newsworthiness.<sup>92</sup>

The court reasoned that allowing the first amendment privilege to extend to all true statements "would seem to deny the existence of 'private' facts."<sup>93</sup> In other words, "[t]he extent to which areas of privacy [would] continue to exist . . . would . . . be based not on rights bestowed by law but on the taste and discretion of the press."<sup>94</sup>

The standard of newsworthiness adopted by the *Virgil* court is based on the "of legitimate concern to the public" language in section 652D of the Restatement (Second) of Torts.<sup>95</sup> Thus, the Ninth Circuit appears to equate the term "newsworthy" with the phrase "matter of public concern."<sup>96</sup>

The *Virgil* court additionally stated that whether the public has an interest in knowing private facts about a person who engages in body surfing presented factual questions regarding the state of community mores.<sup>97</sup> Because it concluded that such questions were not properly considered by the district court, the case was remanded.<sup>98</sup>

The Tenth Circuit subsequently adopted a similar definition of "newsworthy" in public disclosure privacy cases. In *Gilbert v. Medical Economics Co.*,<sup>99</sup> a physician brought suit against the publisher of an

92. *Id.* at 1128.

93. *Id.*

94. *Id.*

95. *Id.* at 1129. The court quoted the following language from comment f of the Restatement as determining the scope of the privilege:

In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.

*Id.*

96. It has been suggested that the privilege to publish matter which is of public interest is less expansive than the privilege to publish anything that is newsworthy. See Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722, 724 (1966).

97. 527 F.2d at 1131. The court stated:

Among the questions presented here are: Whether (and, if so, to what extent), private facts respecting Virgil, as a prominent member of the group engaging in body surfing at the Wedge, are matters in which the public has a legitimate interest; [and] whether the identity of Virgil as the one to whom such facts apply is matter in which the public has a legitimate interest.

*Id.* (footnote omitted).

98. *Id.*

99. 665 F.2d 305 (10th Cir. 1981).

article, claiming that publication of her personal problems and incidents of malpractice constituted a tortious invasion of her privacy. Although the plaintiff ultimately was denied recovery, the *Gilbert* court nonetheless noted that "the right of the individual to keep information private must be balanced against the right of the press."<sup>100</sup> The court relied on language from the comments to section 652D and stated that "it is clear . . . that the first amendment protects the publication of private facts that are 'newsworthy,' that is, of legitimate concern to the public."<sup>101</sup>

### C. *The California Approach*

The California Supreme Court has adopted a three-part test to determine whether published matter is newsworthy. In *Briscoe v. Reader's Digest Association*,<sup>102</sup> the Reader's Digest Association published an article which disclosed that Mr. Briscoe had once hijacked a truck. As a result of the publication, Mr. Briscoe's eleven year old daughter and his friends learned about the incident for the first time. Thereafter, they scorned and abandoned him.

Mr. Briscoe sued the publisher, claiming it had invaded his right of privacy by disclosing embarrassing private facts about his past life.<sup>103</sup> After acknowledging that newsworthy matter is constitutionally protected, the court stated that in determining whether printed matter is newsworthy, "[w]e consider '[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.'"<sup>104</sup>

The California Supreme Court held that a jury could reasonably find that the plaintiff's identity as a former hijacker was not newsworthy,<sup>105</sup> and consequently, remanded the case to the trial court.<sup>106</sup> Applying the three-part test, the court first concluded that a jury could find the published incident was of minimal social value, since the legal proceedings had terminated and Mr. Briscoe had reverted to a lawful lifestyle.<sup>107</sup>

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100. *Id.* at 307.

101. *Id.* at 308 (citing *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967)).

102. 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

103. The article was published approximately 11 years after the hijacking incident, but nothing in the article indicated how long ago the incident occurred. *Id.* at 532, 483 P.2d at 36, 93 Cal. Rptr. at 868.

104. *Id.* at 541, 483 P.2d at 43, 93 Cal. Rptr. at 875 (quoting *Kappellas v. Kofman*, 1 Cal. 3d 20, 36, 459 P.2d 912, 922, 81 Cal. Rptr. 360, 370 (1969)).

105. *Id.* at 541, 483 P.2d at 43, 93 Cal. Rptr. at 875.

106. *Id.* at 542, 483 P.2d at 44, 93 Cal. Rptr. at 876.

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



Next the court stated that a jury may find that revealing a person's criminal past for all to see is grossly offensive to most people, due to the potentially harmful consequences of such a revelation.<sup>108</sup> Finally, the court held that the plaintiff did not voluntarily consent to the publicity which he received.<sup>109</sup>

As the foregoing demonstrates, various lower courts have developed and refined their own balancing approaches to deal with the tension between privacy and the press. Yet, due to the Supreme Court's failure to weigh these competing interests, the validity of lower court approaches remains unsettled.

## V. CONCLUSION

The importance of a free press and free speech in American has been recognized from the beginning of our democracy, whereas the importance of privacy rights was not recognized until much later. Nonetheless, the importance of privacy rights continues to grow as technology advances. Urbanization coupled with innovations in communication and information-seeking devices elevates the right to be let alone to the level of necessity.

Notwithstanding this, the Supreme Court has refused to expressly answer the question of whether the press may ever be penalized for disclosing highly private facts about an individual. In doing so, the Court arguably answered the question affirmatively by implying that only matters of public concern are constitutionally protected. Even so, whether the public disclosure aspect of privacy will continue to have meaning still remains an open question.

It cannot be denied that a direct conflict between the right of privacy and the first amendment exists. However, eliminating the tension will not solve the problem. Rather, what is needed is a balancing approach that takes into consideration the opposing rights and interests.

These fundamental rights create a tension that is necessary to our form of government, much in the same way that the tension created by the opposing ends of the violin string is necessary for that instrument to play beautiful music. Must we be reminded that if one of the forces becomes nonexistent the music stops altogether?

*Mark Schadrack*

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108. *Id.* at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875. The court emphasized the resultant ostracism, isolation and alienation of Mr. Briscoe's family in this case. *Id.*, 483 P.2d at 43, 93 Cal. Rptr. at 875.

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