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DISCUSSION OF RECENT DECISIONS

Constitutional Law—Freedom of Speech and of the Press—Right of Privacy—The Press May Publish Any Matter of Public Interest Unless With Knowledge of Its Falsity or in Reckless Disregard of Its Truth.—In the case of Time, Inc. v. Hill, —— U.S. ——, 87 Sup. Ct. 534 (1967), the United States Supreme Court was confronted with the question of whether publishing a “fictionalized” version of an incident which made a private citizen an involuntary subject of public interest constituted an invasion of his right of privacy. The Court held that reports concerning newsworthy persons and events are in the public interest and are protected by the first amendment guarantees of freedom of speech and press unless they are published with knowledge of their falsity or in reckless disregard of their truth.

In 1952, the plaintiff, James J. Hill, and his family, were held hostage in their suburban home for nineteen hours by three escaped convicts. After the convicts departed, the plaintiff stressed to newsmen that the convicts had not mistreated or harmed either him or his family in any way. Shortly thereafter, the family moved to another state and discouraged all efforts to keep them in the public spotlight. The next year, inspired by the original newspaper accounts of this ordeal, James Hayes wrote a novel entitled The Desperate Hours, which depicted a similar experience to that suffered by the plaintiff, but in this version the family suffered violence at the hands of their captors. Later, this book was made into a play of the same title and, in conjunction with the play, the defendant, Time, Inc. published an article in its Life magazine entitled “True Crime Inspires Tense Play.” Although the plaintiff had never been named in the book or play, the defendant stated that the public could now see the re-enacted story of the “desperate ordeal of the James Hill family.” The article also included pictures taken at the plaintiff’s former house with actors from the play posing in scenes showing the violence of the convicts.

The plaintiff brought an action against the defendant under the New York right of privacy statute,1 asserting that the article gave the impression that the play mirrored the family’s experience, which the defendant knew to be false and untrue. The State Supreme Court, Trial Term, held for the plaintiff, and the Appellate Division2 affirmed the Trial Term as to liability but remanded the case for a new trial as to damages. On remand, the Trial Term reduced the damages and entered judgment for the plaintiff, where-

1 McKinney’s Consol. Laws ch. 6, §§ 50-51 (1903). These statutes, labeled “right of privacy,” state that the use of the name, portrait or picture of any living person for trade or advertising purposes without the written consent of such person is a misdemeanor and the injured party may seek injunctive relief and compensatory damages, as well as exemplary damages, if the defendant “. . . knowingly used such a person’s name, portrait or picture. . . .”

DISCUSSION OF RECENT DECISIONS

upon the New York Court of Appeals\(^3\) affirmed. The Supreme Court of the United States, in a six to three decision, set aside the judgment and remanded the case for a new trial.\(^4\)

In the trial court, the jury was instructed that a verdict for liability under the statute\(^5\) could rest only on a finding that the defendant had so altered or changed the facts concerning the plaintiff's relationship to the play that the article was a "fictionalized" version for trade purposes rather than for dissemination of news. The court also instructed the jury that an award of punitive damages was justified if they found the defendant had falsely connected the plaintiff to the play "knowingly or through failure to make reasonable investigation," adding that a finding of ill will or personal malice was not necessary if they found a reckless or wanton disregard of the plaintiff's rights. On appeal, the United States Supreme Court concentrated its attention on whether the instructions were in accord with the constitutional safeguards of the first amendment.

The concept that individuals have a right of privacy was given impetus by Samuel D. Warren and Louis D. Brandeis in their famous article\(^6\) in the Harvard Law Review. Since that time, recovery for tortious interference of privacy has been recognized at common law in thirty states plus the District of Columbia, and by statute in four other states.\(^7\)

Independent of statute, the law of privacy comprises four distinct kinds of invasions, each involving different interests of the plaintiff. Thus, the invasion of the right of privacy is not one tort but a complex of four. These include an intrusion on the plaintiff's solitude which would be offensive to the reasonable man, a public disclosure of private facts of a highly objectionable kind about the plaintiff, a presentation of the plaintiff in a false light in the public eye, and an appropriations of the plaintiff's name or likeness by the defendant for his own benefit or advantage.\(^8\)

Previous to the recognition of the torts relating to the protection of the right of privacy of individuals, however, the first amendment of the Constitution provided that Congress (and later the States, through the fourteenth amendment) could pass no law abridging the right of freedom of speech and of the press. This constitutional guarantee was soon found not to be absolute, but rather the states were empowered to punish abuses thereof.\(^9\)

New York was first to pass a statute\(^10\) to protect the right of privacy

\(^5\) Supra note 1.
\(^6\) Warren and Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193 (1890).
\(^7\) See Prosser, Torts 831-32 (3d ed. 1964).
\(^8\) Id. at 833-51.
\(^10\) McKinney's Consol. Laws ch. 6, §§ 50-51 (1903).
of its citizens. Although it specifically provides that appropriation and use of another's name, portrait or picture without his consent, for advertising or trade purposes, is a tort and misdemeanor, the New York courts have given the statute a much broader application to include a general right of privacy.\(^{11}\)

The New York courts, however, have also recognized that there must be some restrictions on this right of privacy.

One of the clearest exceptions to the statutory prohibition is the rule that a *public figure*, whether he be such by choice or involuntarily, is subject to the often searching beam of publicity and that, in balance with the legitimate public interest, the law affords his privacy little protection.\(^{12}\)

Even when dealing with public figures, however, the press is bound by certain standards regarding truth. In *New York Times Co. v. Sullivan*,\(^ {13}\) a public official in Alabama brought a libel action against the defendant newspaper for publishing a civil rights movement advertisement which criticized the administration of justice in Montgomery, Alabama. The Supreme Court reversed the Alabama state decision in favor of the plaintiff, holding that the Alabama court failed to apply the necessary safeguards for freedom of speech and press. The Court said:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.\(^ {14}\)

Thus, the Supreme Court held that the Constitution delimits a state's power to award damages for libel in actions brought by public officials against critics of their official conduct.

In *Garrison v. State of Louisiana*,\(^ {15}\) the Court further recognized and explained the standard in the *New York Times* case and held that a state could not punish false statements concerning public officials unless they were made with knowledge of their falsity or in reckless disregard of their truth.

After these decisions, the New York courts adopted a narrow construction of the *New York Times* and *Garrison* decisions. In *Spahn v. Julian Messner, Inc.*\(^ {16}\) a well known professional baseball pitcher brought


\(^{12}\) *Id.* at 328, 221 N.E.2d at 545 (Emphasis added).

\(^{13}\) 376 U.S. 254, 84 Sup. Ct. 710 (1964).

\(^{14}\) *Id.* at 275, 84 Sup. Ct. at 726 (Emphasis added).

\(^{15}\) 379 U.S. 64, 85 Sup. Ct. 209 (1964).

\(^{16}\) 18 N.Y.2d 324, 221 N.E.2d 543 (1966).

Editor's Note: Subsequent to this issue going to press, *Spahn v. Julian Messner, Inc.* has been vacated and remanded to the New York Court of Appeals, — U.S. —, 87 Sup. Ct. 1706 (1967), in light of *Time, Inc. v. Hill*. 
DISCUSSION OF RECENT DECISIONS

an action for invasion of his privacy under the New York right of privacy statutes for the publication of a fictionalized biography. The New York Court of Appeals held the plaintiff entitled to relief and distinguished the *New York Times* case on the grounds that *Spahn* concerned a private individual, not a public official. While recognizing that comment on a public figure may be privileged, the court held that this privilege does not include the use of a person's name, picture or portrait in a "fictitious" report or article.\(^{17}\)

When the *Hill* case came up on appeal from the New York courts, which awarded the plaintiff (a private individual) relief for the "fictionalized version of his ordeal," the Supreme Court ruled:

> We hold that the 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*.\(^{18}\)

Thus, the net effect of the *Hill* decision was to apply the test in the *New York Times* case, which was a libel action brought by a public official, to cases where private individuals, who are the involuntary subjects of public interest, seek redress from false accounts about their experiences. The Court denies this result, but herein lies the failing of the *Hill* decision. As the Court stated:

> We find applicable here the standard of knowing or reckless falsehood not through blind application of *New York Times v. Sullivan*, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context. It therefore serves no purpose to distinguish the facts here from those in *New York Times*.\(^{19}\)

From the *Hill* case and its forerunners in precedent, it is clear that the Supreme Court has never found independent value in false publications, but has protected them solely to give "breathing space" to the truth, recognizing that erroneous statements are inevitable in free debate. In application though, this principle has been limited in cases involving public officials, where the public requires information on the truth even if such is contained in half-truths and misinformation.\(^{20}\)


\(^{19}\) Id. at ——, 87 Sup. Ct. at 543.

Breathing space regarding comment on public officials, however, is quite different from comment on private citizens who are the involuntary subjects of public interest. As Mr. Justice Harlan stated, dissenting in part:

... [T]here is a vast difference in the state interest in protecting individuals like Mr. Hill from irresponsibly prepared publicity and the state interest in similar protection for a public official. ... Mr. Hill came to public attention through an unfortunate circumstance not of his making, rather than his voluntary actions and he can in no sense be considered to have “waived” any protection the State might justifiably afford him from irresponsible publicity.21

When dealing with the guarantees of the First Amendment, it is necessary to find sufficient public interest to justify the invasion of the privacy of individuals. The identity of the individuals and their connection with society is crucial to this determination and it would be useful if at least three distinct classes of persons were recognized for this purpose.

Public officials, elected or appointed to serve the public, should enjoy the least protection of privacy due to the effect of their actions on the public and the trust reposed in them by their constituency. For these persons, the standard in the New York Times case of “knowingly false or in reckless disregard of the truth” is justifiable to establish a test of liability for those who publish articles concerning them.22

Next are the private individuals who, by their fame, mode of living, or occupation, voluntarily place themselves in the public spotlight and thus are open to reasonable public scrutiny. These individuals require more protection from irresponsible publicity than public officials and an affirmative duty should be placed on those who publish articles about them to make a reasonable search for the truth. If an article is shown by the plaintiff to be false, the defendant should be held liable if he fails to prove there was such a reasonable search.

The third class of persons, the involuntary subjects of public attention and interest, like the plaintiff in the Hill case, require the greatest protection of their right of privacy. Those who publish articles about such persons should be held to a standard of absolute truth, with liability to follow upon proof by the plaintiff of false statements.

21 Supra note 18, at —, 87 Sup. Ct. at 552-53.
22 Dictum in Pauling v. News Syndicate Co., 335 F.2d 659 (1964), indicates one court’s view that the right to comment, unless the comment was made knowingly false or in reckless disregard of the truth, may in the future be extended to allow comment on any person involved in public issues whether he be a public official or not. The court stated at p. 671:

The “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” now applied to confer immunity on “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,” 376 U.S. at 270, 84 Sup. Ct. at 721, may some day be found to demand still further erosion of the protection heretofore given by the law of defamation. (Nobel prize winning biochemist).
Regardless of the merits of these suggestions, it is clear that while the standard in the *New York Times* case of knowing or reckless falsehood may be reasonable when dealing with public officials, such a requirement, which is tantamount to a finding of malice, is clearly too severe to apply to persons who are the involuntary subjects of public interest. Often such individuals, as the plaintiff here, already have suffered greatly from circumstances which gave them prominence in the public eye and, therefore, should not be exposed to additional invasions of their privacy by false reports of their tribulations without a suitable means of redress.

Private citizens, as Judge Cooley observed in 1888, have "the right to be let alone" and that right should not be jeopardized by a standard which equates the rights of privacy of one who seeks the public spotlight with one who purposely walks in its shadow.

RICHARD A. BRAUN

**CONSTITUTIONAL LAW—SELF-INCrimINATION—Refusal of Attorney to Produce Demanded Financial Records and to Testify in a Disciplinary Proceeding on Ground That the Records and Testimony Would Tend to Incriminate Him Not Ground for Disbarment.**—In the case of *Spevack v. Klein*, 385 U.S. --, 87 Sup. Ct. 625 (1967), the United States Supreme Court was asked to decide whether an attorney's refusal to produce demanded financial records and to testify in a disciplinary proceeding on the basis that the records and his testimony would tend to incriminate him was ground for disbarment. The Court held that the self-incrimination clause of the fifth amendment had been absorbed in the fourteenth and protects lawyers as well as other individuals and could not be watered down by imposing disbarment as a price for asserting it.

The case arose out of a proceeding to discipline the petitioner, a member of the New York Bar, for professional misconduct. Of the various charges made against him, the one surviving was his refusal to honor a subpoena duces tecum demanding that he produce certain financial records pertaining to cases involving contingent fee compensation which, under a New York Court Rule, he was under a duty to preserve. Not only did the

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23 Cooley, Torts 29 (2d ed. 1888).

1 Rule IV(6) of the Rules of the Appellate Division, Second Department of the Supreme Court of New York states:

Attorneys for both plaintiff and defendant in the case of any such claim or cause of action [claims or actions for personal injuries, property damage, wrongful death, loss of services resulting from personal injuries and claims in connection with condemnation or change of grade proceedings] shall preserve, for a period of at least five years after any settlement or satisfaction of the claim or cause of action or any judgment thereon or after the dismissal or discontinuance of any action, the pleadings and other papers pertaining to such claim or cause of action, including, but not limited to, letters or other data relating to the