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NOTES

THE LEGITIMATE INTEREST PRIVILEGE AND THE PUBLIC DISCLOSURE TORT: *Campbell v. Seabury Press*

Plaintiff sought damages for invasion of privacy¹ from the author and publisher of a book entitled *Brother To A Dragonfly*.² While she did not deny that the revelations made in the book were true, plaintiff maintained that they tortiously invaded her privacy by exposing intimacies of her marital and home life to public view. The district court granted summary judgment based on the ground that the disclosures were privileged by the public interest test mandated by the first amendment.³ The Court of Appeals for the Fifth Circuit affirmed⁴ and held that in actions involving publicity given to private life, the first amendment mandates the recognition of the privilege to publish or broadcast facts, events, and information relating to public figures and the privilege to publish or broadcast news or other matters of public interest. *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980).

Before 1890⁵ neither English nor American courts granted relief for tortious interferences with the right of privacy.⁶ While there were earlier cases which had upheld the "right to be let alone,"⁷ for-

1. She also sought damages for libel. The district court, in an unpublished opinion, granted summary judgment on this claim as well. The court of appeals affirmed. 614 F.2d 395 (5th Cir. 1980). The claim for libel will not be discussed further, as it is not the subject of this note.

2. W. CAMPBELL, *BROTHER TO A DRAGONFLY* (1977). The book is a complex work which explores the development and maturation of the religious views of its author, plaintiff's brother-in-law, as influenced by plaintiff's husband.

3. U.S. CONST. amend. I provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

4. The court reasoned that the marital home life of the plaintiff was of public interest. Since the book was an account of the fraternal relationship of plaintiff's husband and his brother, there was a logical connection between her home life and the subject matter of the book. This "logical nexus" was sufficient to allow invocation of the public interest privilege by the author and his publisher.

5. The origins of tortious invasion of privacy are found in an article published that year. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

6. W. PROSSER, *LAW OF TORTS* 802 (4th ed. 1971). *But see* Denis v. Leclerc, 1 Mart. (O.S.) 297 (La. 1811) (plaintiff prevented the publication of a letter that had been sent to a third party).

7. Reviewing earlier cases which protected what was generally termed the "right to be let alone," Warren and Brandeis concluded that there was a "broader principle entitled to separate recognition." RESTATEMENT (SECOND) OF TORTS § 652A. The "right to be let alone" was first recognized in T. COOLEY, *LAW OF TORTS* 29 (1879) (the

mal recognition of the right of privacy did not occur until 1905.⁸ Thereafter, almost every jurisdiction which has considered the question has upheld the existence of the right⁹ on common law¹⁰ or statutory grounds.¹¹

right to one's person may be said to be a right to complete anonymity: to be left alone). See Note, *On Washing Dirty Linen In Public: Privacy and the First Amendment*, 39 LA. L. REV. 1211, 1212 n.3 (1979).

8. Georgia accepted invasion of privacy in *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E.2d 68 (1905), an appropriation and false light case in which the plaintiff prevailed on a claim that an insurance company had used his photograph and fabricated endorsement in an advertisement. While Georgia has been considered the first state to recognize the right to privacy, see W. PROSSER, *supra* note 4, at 803-04, Louisiana should share this honor. In 1905 Louisiana held that the right to privacy prevented the photographs of persons not yet convicted from being placed in a rogues' gallery. See *Schulman v. Whitaker*, 115 La. 628, 39 So. 737 (1905); *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905). The *Itzkovitch* court stated:

We think that the publication of an innocent man's photograph in the rogues' gallery gives rise to sufficient grounds to sustain an injunction. There is a right in equity to protect a person from such an invasion of private rights. Everyone who does not violate the law can insist upon being let alone (the right of privacy). In such a case the right of privacy is absolute.

115 La. at 480-81, 39 So. at 500. The court was not influenced by the earlier cases which had declined to recognize a right to privacy, finding that they "are not germane to the subject which we have . . . given attention." 115 La. at 483, 39 So. at 501.

9. RESTATEMENT (SECOND) OF TORTS § 652A. *Contra Yoeckel v. Samonig*, 272 Wis. 430, 75 N.W.2d 925 (1956) (Wisconsin does not recognize an action for invasion of privacy). Wisconsin, however, is one of only four states which explicitly rejects tortious invasion of privacy, and "recent surveys show the right to be recognized in all but a very few jurisdictions." Comment, *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PENN. L. REV. 1385, 1386 n.7 (1976). For a discussion of the adoption of invasion of privacy in Louisiana, see generally F. STONE, *TORT DOCTRINE* § 191 in 12 LOUISIANA CIVIL LAW TREATISE 247 (1977); Comment, *The Right of Privacy in Louisiana*, 28 LA. L. REV. 469 (1968).

10. See, e.g., *Afro-Publishing Co. v. Jaffe*, 366 F.2d 649 (D.C. Cir. 1965); *Travers v. Paton*, 261 F. Supp. 110 (D. Conn. 1966); *Roach v. Harper*, 105 S.E.2d 564 (W. Va. 1958).

11. See e.g., *Association for the Preservation of Freedom of Choice, Inc. v. Emergency Civil Liberties Committee*, 236 N.Y.S.2d 216, 37 Misc. 2d 599 (1962).

It is certain in Louisiana that tortious invasion of privacy is an action which has a statutory foundation. In *Jaubert v. Crowley Post Signal, Inc.*, 375 So. 2d 1386 (1979), the supreme court found that "[w]here an individual has . . . a right [to privacy] . . . other members of society have a corresponding duty not to violate that right. A violation constitutes a breach of duty, or fault, and may be actionable under C.C. 2315, which provides that '[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.'" *Id.* at 1388-89.

There is also the possibility that the action for tortious invasion of privacy has a constitutional foundation. The Louisiana Constitution of 1974 provides express recognition of the right to privacy in article I, section 5: "Every person shall be secure in his person, property, communications, houses papers and effects against unreasonable searches, seizures, or invasions of privacy." However, a constitutional privacy right

One type of invasion of privacy involves giving publicity to

may be limited to protection from invasions by the state. The court in *Jaubert v. Crowley Post Signal, Inc.*, 368 So. 2d 475 (La. App. 3d Cir. 1978), cert. granted, 371 So. 2d 617, rev'd, 375 So. 2d 1386 (La. 1979), granted the action for tortious invasion of privacy constitutional status when it awarded damages for the publication on the front page of the newspaper, of a photograph which depicted plaintiff's residence and which was captioned "[o]ne of Crowley's stately homes, a bit weatherworn and unkept, stands in the shadow of a spreading oak." The court revealed that it was "faced with two competing forces of constitutional rights, i.e., the individual's right of privacy and freedom of the press." 368 So. 2d at 477. On certiorari, the Louisiana Supreme Court reversed, holding that there is "no right to privacy attache[d] to material in public view." 375 So. 2d at 1391. As to the third circuit court of appeal's finding that the right to privacy had constitutional status, the court stated that "[i]n deciding the case before us, it is not necessary that we reach the broad question of the extent to which freedom of the press may be limited by an ordinary citizen's right to privacy." *Id.* at 1390. However, the court did address the matter:

The right of privacy under discussion here is one which protects the individual against private action and is grounded in tort. It should be distinguished from the constitutional right to privacy which the United States Supreme Court, in a line of cases, has found to emanate from certain provision of the Bill of Rights and to protect, from governmental invasion only, those personal rights which are deemed fundamental or implicit in the concept of ordered liberty. Schopler, Annotation, The Supreme Court's Views as to the Federal Legal Aspects of the Right to Privacy, 43 L.Ed. 2d 871 (1975). The Louisiana Constitution of 1974, Art. I, § 5 . . . reference to a right to privacy represents a change from the language of earlier constitutions. A review of Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts leaves open the question of whether the section was intended to provide constitutional protection against private conduct. Generally, the provision seems to have been drafted as a counterpart to the United States Constitution's Fourth Amendment prohibition against governmental searches and seizures and other forms of "authoritarian intrusion." Transcripts, Vol. VI, 1072. However, in The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1 (1974), Professor Hargrave concluded that the protection afforded by the provision is not limited to state action because this phrase "no law shall . . ." is conspicuously absent and because the provision does not appear among those sections dealing with procedural rights in criminal cases. He predicted that the provision would be a fertile field for future developments in the law of torts. At least one delegate was also of the opinion that "this proposal protects a person not only from state action but also from private action." Transcripts, Vol. VI, 1076. In *Trahan v. Larivee*, 365 So. 2d 294 (La. App. 3d Cir. 1978), writ denied, 1979, the court found that Art. I, § 5 would prohibit the disclosure of certain city employee performance reports; but in that case the reports were in the custody of the City of Lafayette, so that disclosure might have been seen as state action.

Id. at 1388-89 n.2. This discussion may imply that the right to be free from tortious invasions of privacy has a constitutional foundation. Additional support for this view is found in footnote 2 of the *Jaubert* decision, where the court, finding that "[a]n actionable invasion of privacy occurs only when the defendant's conduct is unreasonable," stated that "Article I, § 5 of the 1974 Constitution provides protection against unreasonable . . . invasions of privacy" and referred to note 2 of the decision, discussed above. *Id.* at 1389 n.4.

private life.¹² In *Melvin v. Reid*,¹³ the leading case¹⁴ awarding damages for public disclosure of private facts,¹⁵ plaintiff, a reformed prostitute, successfully recovered when a motion picture revived past events of her life. Since the *Melvin* decision, publicity given to private life has received widespread recognition and is considered to be one of the four actions which may cast a defendant in damages for invasion of privacy.¹⁶

12. RESTATEMENT (SECOND) OF TORTS, § 652A:

(1) One who invades the privacy of another is subject to liability for the resulting harm to the interests of the other.

(2) The right of privacy is invaded by . . .

(c) unreasonable publicity given to the other's private life, as stated in § 652D.

§ 652D provides that:

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 a legitimate concern to the public.

13. 122 Cal. App. 285, 297 P. 91 (Dist. Ct. App. 1931).

14. An earlier case, *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 867 (1927), involved a defendant cast in damages for posting a notice in his window stating that plaintiff would not pay his debts.

15. The essential common law elements of an action for public disclosure of private facts are (1) publicity given to private life, (2) which is of no public concern, and (3) which would cause shame and humiliation to a person of ordinary sensibilities. *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.C.D.C. 1955), *aff'd* 232 F.2d 369 (D.C. Cir.), *cert. denied*, 352 U.S. 945 (1956). A "mores test" is commonly applied to determine if the publicized matter is "highly offensive to a reasonable person." W. PROSSER, *supra* note 6, at 812. Under this test, the ordinary views and customs of the community are examined to decide if the publicity would be regarded generally as highly objectionable. *Id.* Malice is usually not required, and motive for the publication is irrelevant. See *Cunningham v. Securities Investment Co. of St. Louis*, 278 F.2d 600 (5th Cir. 1960), *rehearing denied*, 281 F.2d 439 (5th Cir. 1960); *Dawson v. Associated Fin. Services Co. of Kansas, Inc.*, 215 Kan. 814, 529 P.2d 104 (1974); *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964); *Lewis v. Physicians and Dentists Credit Bureau*, 27 Wash. 2d 267, 177 P.2d 896 (1947); *Lucus v. Ludwig*, 313 So. 2d 12 (La. App. 4th Cir.), *cert. denied*, 318 So. 2d 42 (La. 1975); *Tooley v. Canal Motors, Inc.*, 296 So. 2d 453 (La. App. 4th Cir. 1974); *Wheeler v. P. Sorensen Mfg. Co.*, 415 S.W.2d 582 (Ky. App. Ct. 1967); *Fairfield v. American Photocopy Equip. Co.*, 291 P.2d 194 (Dist. Ct. App. 1955).

16. The Restatement of Torts provides the following definitions for each of the four types of invasion of privacy actions:

§ 652B. Intrusion upon Seclusion.

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 person.

§ 652C. Appropriation of Name or Likeness

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

§ 652D. Publicity Given to Private Life

The privilege for public disclosure of matters of public interest developed concomitant with the invasion of privacy action.¹⁷ The origins of the privilege are found in an analogy drawn to the privilege of "fair comment" available in common law defamation actions.¹⁸ The public interest, or newsworthiness, privilege has been widely, if not universally, accepted.¹⁹

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.

§ 652E. Publicity Placing Person in False Light.

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS 652B, C, D & E (1977). See also W. PROSSER, *supra* note 6, at 389-92.

Louisiana has recognized each of these types of invasions of privacy: (1) Intrusion—*Love v. Southern Bell Tel. and Tel. Co.*, 263 So. 2d 460 (La. App. 1st Cir. 1972) (plaintiff's home was entered by some of his fellow employees); (2) Appropriation—*McAndrews v. Roy*, 131 So. 2d 256 (La. App. 1st Cir. 1961) (plaintiff's photograph was used in a "before and after" advertisement for defendant's health club); (3) Public Disclosure—*Lambert v. Dow Chemical Co., Inc.*, 215 So. 2d 673 (La. App. 1st Cir. 1968) (plaintiff's medical photographs were used in an employee safety campaign by his employer); (4) False light—*Tooley v. Canal Motors, Inc.*, 296 So. 2d 453 (La. App. 4th Cir. 1974) (plaintiff, a lawyer, complained because a radio advertisement indicated that he was selling used cars).

It is clear from *Jaubert v. Crowley Post Signal, Inc.*, 375 So. 2d 1386 (La. 1979), *rev'd*, 368 So. 2d 475 (La. App. 3d Cir. 1978), that Louisiana's invasion of privacy action is not available in any case not described by the four categories. The award of damages for the publication of a photograph of plaintiff's house on the front page of a local newspaper accompanied with a caption indicating that the house was not being properly maintained was reversed because the court concluded that the actions of defendant did not interfere with one of the four recognized "privacy interests." 375 So. 2d at 1390-91.

17. Warren and Brandeis recognized the privilege in their 1890 article. Warren and Brandeis, *supra* note 5, at 214.

18. Warren and Brandeis concluded that "the right to privacy does not prohibit the publication of any matter which is of public or general interest." *Id.* at 214.

19. See, e.g., *Cordel v. Detective Publ., Inc.*, 307 F. Supp. 1212 (E.D. Tenn. 1968), *aff'd*, 419 F.2d 989 (6th Cir. 1969); *Garner v. Triangle Pub.*, 97 F. Supp. 546 (S.D.N.Y. 1951); *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970); *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956); *Gill v. Hearst Pub. Co., Inc.*, 253 P.2d 441 (Cal. 1953); *Mahaffey v. Official Detective Stories, Inc.*, 210 F. Supp. 251 (W.D. La. 1962); *Meetze v. Associated Press*, 95 S.E.2d 606 (S.C. 1956); *Buzinski v. Doall Co.*, 31 Ill. App. 2d 191, 175 N.E.2d 577 (Ct. App. 1961).

The public interest privilege was adopted in Alabama, the state from which the in-

Supreme Court involvement in the invasion of privacy area has granted the public interest privilege constitutional significance. The Supreme Court's initial decision in the privacy field, *Time, Inc. v. Hill*,²⁰ involved an action brought under New York law,²¹ which allowed recovery for public disclosure of matters of public interest when the disclosures were false.²² The Court ruled that the "constitutional protections of speech and press preclude the application of the New York statute to redress false reports on matters of public interest in the absence of the proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."²³

The *Hill* decision, which involved an application of the public interest privilege to "false light" cases, was extended to cases involving public disclosure of private facts in *Cox Broadcasting Corp. v. Cohn*.²⁴ The Court held that the father of a deceased rape victim could not constitutionally maintain a privacy action against defendants for their public disclosure of the victim's name during televi-

stant case arose, in *Smith v. Doss*, 251 Ala. 250, 253, 37 So. 2d 118, 120 (1948), wherein the court stated:

[T]he right of privacy does not prohibit the broadcast of matter which is of legitimate public or general interest. . . . "It does not exist . . . in the ordinary dissemination of news and events, nor in connection with the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit."

20. 385 U.S. 374 (1967). A play was written about the experiences of a family held hostage in its home by escaped convicts. This dramatization, later adapted into a novel, did not mention the name of the family. An article appeared in *Life* three years later, claiming that the play and novel were reenactments of the experiences of the Hill family. The article was supplemented by pictures of the actors from the play posing in scenes from the drama taken at the Hill's former home. *Id.* at 377-78. The play depicted the terrorized family as victims of tremendous physical abuse. In fact, the Hill family had made it clear that they were well-treated by their captors. *Id.* at 378. The "false light" in which Hill and his family were placed was the basis of the suit.

21. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1948) (originally enacted as ch. 132, [1903] N.Y. LAWS 308).

22. The New York courts have construed the statute well beyond its terms to allow recovery for fictionalized public disclosure of newsworthy facts. See *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 328, 221 N.E.2d 543, 545, 274 N.Y.S.2d 877, 879 (1966), *vacated and remanded*, 387 U.S. 239, *on remand*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046 (1969).

23. 385 U.S. 387-88. The "knowledge of falsity or reckless disregard for the truth" formulation is the malice standard first articulated by the Court in *New York Times Co. v. Sullivan*, 376 U.S. 274 (1964), where the Court held that a public official could not maintain a libel action for the defamatory remark related to his official conduct without proving that the statement was made with knowledge that it was false or with a reckless disregard of the statement's falsity.

24. 420 U.S. 469 (1975).

sion coverage of the trial of the alleged rapists. The Court based its decision on the right of the press to report matters, such as crimes and judicial proceedings, which are "without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report."²⁵

In the instant case, *Campbell v. Seabury Press*,²⁶ plaintiff's claim for relief was dismissed in a per curiam opinion. Employing the assumption that *Hill* and *Cohn* stand for the proposition that "the first amendment mandates a constitutional privilege applicable to those torts of invasion of privacy that involve publicity,"²⁷ the Fifth Circuit Court of Appeals squarely held that the privilege for matters of public interest was constitutionally required in *all* cases of public disclosure of public facts. Campbell's view of a constitutionally required, broad public interest privilege²⁸ mirrors the jurisprudence of other jurisdictions.²⁹ However, *Campbell* assumes a more expansive posture than the previous decisions rendered by the United States Supreme Court in the invasion of privacy arena.³⁰ Furthermore, this expansion is unwarranted and represents a grave threat to the existence of the public disclosure action.

The *Campbell* court, citing *Time, Inc. v. Hill*³¹ as requiring that the public interest privilege be available as a limitation on liability in all privacy suits, followed the interpretation commonly made by lower courts.³² However, a careful reading of the decision illustrates that this interpretation is overly broad.³³ It has been observed that

25. *Id.* at 492 (emphasis added).

26. 614 F.2d 395 (5th Cir. 1980).

27. *Id.* at 397.

28. In fact, the decision holds that there are "two distinct" privileges required by the first amendment, one for the publication of information about public figures and the other for information in the public interest. But, as Dean Prosser has observed, the privileges have become "practically so merged as to be inseparable." W. PROSSER, *supra* note 6, at 823.

29. As of 1963 no public disclosure case had raised the first amendment as a defense protecting the rights of the press to disclose publicly private facts. Comment, *Privacy in the First Amendment*, 82 YALE L.J. 1462, 1469 n.36 (1973). However, several jurisdictions now place the public interest privilege upon a constitutional foundation. *E.g.*, *McNutt v. New Mexico State Tribune Co.*, 88 N.M. 162, 538 P.2d 804 (1975); *Taylor v. KTVB, Inc.*, 96 Idaho 202, 525 P.2d 984 (1974).

30. It has been correctly observed that, "[n]o Supreme Court decision squarely [addresses] the question of the standard of protection afforded by the first amendment for truthful public disclosure of private facts." Comment, *First Amendment Limitations on Public Disclosure Actions*, 45 CHI. L. REV., 180, 182 (1977).

31. 385 U.S. 374 (1967).

32. See note 29, *supra*.

33. "Because state law required that recovery be based on falsity, the Court . . . could only take into account the plaintiff's interest in reputation. Hill's other privacy

"[t]he combination of the circumstances [of the case] with the Court's refusal to intimate any views about the public disclosure tort³⁴ suggests that the lower courts and commentators [as well as the court in *Campbell*] have found more guidance in *Hill* than is warranted."³⁵

In finding that the "constitutional privilege clearly applies to the tort charged in this action: the public disclosure of private facts,"³⁶ the *Campbell* court relied upon *Cox Broadcasting Corp. v. Cohn*.³⁷ This interpretation of *Cohn*, however, is also unwarranted, for the decision is not as broad as its language implies. The Court was willing to find unconstitutional the sanctions imposed against the press in *Cohn* because there was no substantial privacy interest in information already on the public record. This leaves unsettled the question of what the constitutional limitations on the privacy action should be in cases where the interest against public disclosure is *great*. Moreover, the Court specifically declined to address the question of the compatibility of the tort with the first amendment.³⁸

The overly expansive interpretation of *Cohn* and *Hill* reflects a failure by the *Campbell* court to consider *Gertz v. Robert Welch, Inc.*³⁹ In a suit for damages in the related area of libel, the Supreme Court in *Gertz* held that states validly may impose liability on those who publish defamatory remarks without regard for the publisher's malice toward the victim when the victim is a "private," as opposed to a "public," figure, so long as the states do not impose liability without fault. In so holding, the plurality opinion of *Rosenbloom v. Metromedia*,⁴⁰ which held that "all discussions and communications involving matters of public or general concern" triggered the protec-

interests, however, may well have been affected also: his individuality interests in preventing disclosure of at least partially private information." Comment, *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PENN. L. REV. 1385, 1402 n.106 (1976). Thus, given the proper factual setting, balancing the interests will result in giving greater protection to a plaintiff in an action for public disclosure of private *truthful* facts than in an action for disclosure of private facts in a *false* light. See Minner, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied*, 56 CAL. L. REV. 935, 961 (1968). But see W. PROSSER, *supra* note 6, at 817-18; Warren and Brandeis, *supra* note 5, at 216.

34. The court specifically withheld deciding the question of constitutional privilege in matters of publicity given to private life when the publicity involves matters "so intimate and so unwarranted in view of the victim's position as to outrage the community's notion of decency." 385 U.S. at 383 n.7.

35. Comment, *supra* note 30, at 184.

36. 614 F.2d at 397.

37. 420 U.S. 469 (1975).

38. *Id.* at 491.

39. 418 U.S. 323 (1974).

40. 403 U.S. 29 (1971).

tion from liability provided by the knowledge of falsity or reckless disregard standard,⁴¹ was severely criticized, if not overruled.

The *Gertz* decision makes it clear that the constitution does not require rigid application of the public interest standard in defamation cases. In matters where private individuals are defamed, the mere fact that the subject of the publication was of public interest has no magic significance as far as constitutional protections for the press are concerned. Rather, the interest of the individual in preserving his reputation must be balanced against the press' right to inform the public.⁴² However, the *Campbell* court has found that the first amendment requires that in privacy cases the public interest privilege must be automatically available, without regard for the privacy interest at stake. In fact, the *Campbell* court held that "[t]he ambit of protection offered by the . . . privilege often encompasses information relating to individuals who either have not sought or have attempted to avoid publicity."⁴³ While it generally is conceded that the interests protected by the state in defamation and invasion of privacy actions are different,⁴⁴ the justification for the *Campbell* court's failure to follow the retrenchment from the absolute public interest standard represented in *Gertz v. Robert Welch, Inc.*⁴⁵ is not so apparent as not to warrant explanation.⁴⁶

The *Campbell* decision is especially disquieting because, in addition to the unwarranted expansion and departure from previous

41. *Id.* at 44.

42. 418 U.S. at 343.

43. 614 F.2d at 397.

44. Defamation generally concerns one's interest in reputation, while privacy concerns peace of mind. See *Kelly v. Johnson Pub. Co.*, 325 P.2d 659 (Cal. App. 1958). A better view is that the action for invasion of privacy is designed to promote emotional stability. See *Time, Inc. v. Hill*, 385 U.S. at 412-15 (1967) (Fortas, J., dissenting); Bloustein, *Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 970-71 (1964). The confines of the interest against public disclosure have been set at publicity given to details of one's sexual activities, health, and distant past, for nothing else is "genuinely damaging." See Comment, *supra* note 33, at 1411.

45. 418 U.S. 323 (1974).

46. See Comment, *supra* note 33, at 1402-06, where it is argued that:

[T]he broad public interest test of *Time, Inc. v. Hill* is no longer viable in the public disclosure cases. Rather, to be congruent with current constitutional doctrine, a test for the permissibility of recovery in public disclosure cases must incorporate two stages. First, the precise individual interest being protected by the state must be important enough to survive initial scrutiny by a court. Second, even where this interest rises to the threshold level of legitimacy, there must be a further inquiry to determine whether there is a legitimate public interest which requires protection for the press.

Id. at 1406. But see Comment, *supra* note 30, at 186-87.

Supreme Court privacy decisions that *Campbell* represents,⁴⁷ the holding makes it difficult, if not impossible, to find a place for the public interest privilege and the public disclosure tort as well. Depending upon who is defining "public interest," sole reliance upon the newsworthiness test, as required by the *Campbell* holding, will result in either a lack of protection of individual interests or a lack of protection for the press. Unless the courts strike the proper balance between the individual's right to be free from invasions of privacy and the right of the press to inform the citizenry, a test making all matters of public interest privileged will erode seriously the protection afforded against media "overstepping," which is at the root of the tort,⁴⁸ since in most cases the press itself determines what is of public interest.⁴⁹

The obstacle represented by the *Campbell* decision to striking the proper balance between press and citizenry becomes almost insurmountable because the privilege of newsworthiness never has been limited to news in the sense of "current events."⁵⁰ Rather, the traditional formulation "extends to all information concerning interesting phases of human activity and embraces all issues about which information is needed or appropriate so that an individual may cope with the exigencies of their period."⁵¹ Thus, the cost of protecting the media is the evisceration of the public disclosure action.⁵² It was precisely this result which caused the leading critic of

47. Some courts have held that the newsworthiness defense does not have constitutional status. See *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 541, 483 P.2d 34, 43, 93 Cal. Rptr. 866 (1977) (limited reading given to *Hill*); *Commonwealth v. Wiseman*, 356 Mass. 251, 261, 249 N.E.2d 610, 617 (1969), cert. denied, 398 U.S. 960 (1970) (*Hill* distinguished as a case where the public interest *outweighed* the privacy interest).

48. Warren and Brandeis, *supra* note 5, at 196.

49. One writer has noted that

[W]hen newsworthiness is defined in terms of demonstrable public interest in the particular facts disclosed, courts will not ordinarily review a publisher's decision that a particular story is newsworthy. . . . Publishers generally print only what they believe to be of interest to their readers, and judges are wisely hesitant to second-guess their publisher's business judgment[s]. . . . There are no standards by which judges can quantitatively assess the popular interest in a particular news item.

Comment, *supra* note 30, at 192. This was exactly the sentiment expressed by the court in *Cantrell v. Forest City Pub. Co.*, 484 F.2d 150, 156-57 (6th Cir. 1973), *rev'd on other grounds*, 419 U.S. 245 (1974): "The judgment of what is newsworthy must remain primarily a function of the publisher. . . . Only in cases of flagrant breach of privacy . . . should a court substitute its judgment for that of the publisher."

50. W. PROSSER, *supra* note 6, at 825. In *Hill*, the Court found that "we have no doubt that the subject of the Life article, the opening of the new play linked to an actual incident, is a matter of public interest." 385 U.S. at 388.

51. 614 F.2d at 397.

52. An example of the precise effect of the constitutionally required public in-

the invasion of privacy tort to claim that the first amendment privilege to publish what is newsworthy is "so over-powering as virtually to swallow the tort."⁵³

Assuming that the first amendment requires a public interest privilege and that it be strictly applied in all actions for public disclosure of private facts, the result in *Campbell* is correct. Rigid application of the public interest standard was employed to find that a woman, who had maintained complete anonymity throughout her life, had marital and homelife intimacies which were of public interest simply because there was a "logic nexus"⁵⁴ between the intimacies and the life of her brother-in-law. Predictably,⁵⁵ the court refused to interfere with the publisher's determination that the life of the brother-in-law was of public interest, despite the fact that the autobiography is a *self*-proclamation of its author's status as a civil rights leader.

If the result in *Campbell* is a product of the proper application of the facts of the case to its holding, the future of the invasion of privacy action for public disclosure of private life is bleak.⁵⁶ *Campbell* plainly serves to underscore the necessity of finding a more attractive alternative method of reconciling the public disclosure ac-

terest privilege can be found in *McNutt v. New Mexico State Tribune Co.*, 88 N.M. 162, 538 P.2d 804 (1975). A newspaper published the names of five police officers who had been involved in a gun battle with a group known as the "Black Berets." The names and addresses of the police officers and the wives were disclosed because the police had refused to cooperate with the newspaper in discussing the incident. After the officers began to receive threatening phone calls, the officers brought suit for invasion of privacy. The court of appeal of New Mexico affirmed the trial court's grant of summary judgment. A constitutionally required privilege for matters of public interest was recognized. The court, refusing to speculate on whether or not the names and addresses were newsworthy, found that the newspaper could take advantage of the privilege because "[i]t is the usual practice in newspaper accounts to identify persons by giving their names and addresses . . ." 88 N.M. at 167, 538 P.2d at 809.

53. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 336 (1966).

54. 614 F.2d at 397. It cannot be denied that the life of the plaintiff and the defendant-author were *logically connected*. But then, it is difficult to imagine any person who is not *logically connected* to someone of public interest.

55. See note 49, *supra*.

56. The *Campbell* case represents an attempt by the plaintiff to vindicate a *very strong* privacy interest. Marital privacy has long been recognized as one of the strongest of the privacy interests. RESTATEMENT (SECOND) OF TORTS § 652D (sexual relations are normally entirely private matters, as are family quarrels); W. PROSSER, *supra* note 6, at 829 (private sexual relations are still not in the public domain). *Griswold v. Connecticut*, 381 U.S. 479, (1965), provides judicial recognition of the right against governmental intrusion into marital privacy. If the right to marital privacy could not overcome the public interest privilege in *Campbell*, it is unlikely that there will be a factual setting which can.

tion with the first amendment,⁵⁷ or of simply abandoning the action⁵⁸ as one that is incompatible with first amendment guarantees.⁵⁹

Robert Elton Arceneaux

Rhode Island v. Innis: A HEAVY BLOW TO THE RIGHTS OF A SUSPECT IN CUSTODY; AND NO "CHRISTIAN BURIAL" TO EASE THE PASSAGE

Defendant, Thomas J. Innis, was arrested on January 17, 1975, in connection with an armed robbery that had occurred earlier the same morning. He immediately was advised of his *Miranda* rights¹ by the arresting officer and was given the same warnings a few moments later when other policemen arrived on the scene. The defendant indicated that he wished to have a lawyer, was placed in a car with three police officers, and was en route to the station house when the officers began conversing among themselves: "there's a lot of handicapped children running around in this area,

57. Bloustein argues persuasively that the Meikeljohn theory, which was the basis for the Supreme Court's holding in *New York Times v. Sullivan*, and which the Court misapplied in *Time, Inc. v. Hill*, is the solution to the problem of balancing the right to privacy with the right to free speech. The Meikeljohn theory, as explained by Bloustein, provides that the right to free speech under the first amendment only attaches to matters which contribute to the public's understanding essential to self-government. In other words, the only issues of legitimate public interest are those with which the voters must deal. Were the courts to apply this theory in deciding what is newsworthy, there would be protection for the press and room for the right against public disclosure of private facts as well. See Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 624-28 (1968). See generally Comment, *supra* note 30; Comment, *supra* note 33.

58. Some have argued that this may be the proper course of action. Compare Kalven, *supra* note 49, with Bloustein, *supra* note 57.

59. Despite the *Campbell* decision, there may still be a right to privacy when the publisher of the private facts is not a member of the "institutional press." In *Norris v. King*, 355 So. 2d 21 (La. App. 3d Cir. 1978), *cert. denied*, 439 U.S. 995, *rehearing denied*, 439 U.S. 1122 (1978), the court awarded damages when a laundromat owner posted posters of plaintiff, who had stolen from defendant's coke machines, in an attempt to warn others that they would be caught if they repeated plaintiff's actions. The court did not address itself to the line of cases which have been interpreted as requiring a public interest privilege. Instead, the court merely found that those cases were not applicable, since defendant was not a member of the news media. 355 So. 2d at 24-25. However, it has been argued that the distinction between members of the institutional press and ordinary citizens for the purpose of application of the public interest privilege may be invalid. See Note, *supra* note 7, at 1221-22.

1. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).