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Constitutional Law - Freedom of the Press - Right of Privacy - Publication of True Information on the Public Record

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CONSTITUTIONAL LAW—FREEDOM OF THE PRESS—RIGHT OF PRIVACY—PUBLICATION OF TRUE INFORMATION ON THE PUBLIC RECORD—The Supreme Court of the United States has held that a state may not base a cause of action for invasion of privacy on the publication of accurate information obtained from judicial records open to the public, because crime, criminal prosecutions and judicial proceedings are events of legitimate concern to the public which fall within the media's duty of responsible news coverage.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

In August, 1971, seventeen-year-old Cynthia Cohn was raped; she died of suffocation shortly thereafter. Six youths were indicted in Fulton County, Georgia, for her rape and murder. The murder charges were dropped, and in a court proceeding eight months after the incident five of the defendants pleaded guilty to rape or attempted rape. The court accepted the guilty pleas, sentenced the defendants, and set a trial date for the defendant pleading not guilty.¹ Tom Wassell, a general assignment reporter for WSB-TV of Atlanta, was assigned to cover the proceedings and learned the identity of the rape victim from indictments shown to him at his request by the county clerk of courts, who was present in the courtroom. In Wassell's report, televised later that day and the next, he named Cynthia Cohn as the victim of the rape.² A month after the broadcast, Cynthia's father filed a one million dollar damage suit³ against the reporter and Cox Broadcasting Corporation, the owner of WSB-TV. The cause of action was based on a Georgia statute

1. *Cox Broadcasting Corp. v. Cohn*, 231 Ga. 60, 61, 200 S.E.2d 127, 128 (1973).

2. The broadcast's relevant portion began:

Six youths went on trial today for the murder-rape of a teenaged girl. The six Sandy Springs high school boys were charged with murder and rape in the death of seventeen year old Cynthia Cohn following a drinking party last August 18. The tragic death of the high school girl shocked the entire Sandy Springs community. Today the six boys had their day in court. . . . The prosecutor . . . said the girl had apparently drank [sic] a considerable amount of vodka attending a private party. He said the girl was taken to a wooded area and raped. She passed out . . . and the liquids in her stomach were forced upward causing suffocation. . . . [W]hether the rape caused the death, he said, would be difficult to prove. . . . The DA told the court the girl's family felt that a lenient five year sentence would serve justice.

Id. at 62, 200 S.E.2d at 129.

3. *NEWSWEEK*, March 17, 1975, at 66.

which made it a misdemeanor to publish or broadcast the name of a rape victim.⁴ Cohn claimed his right to privacy had been violated by the broadcast of his daughter's name.⁵

The trial court rejected the publisher's defense of privilege under Georgia law and the first and fourteenth amendments, held the statute gave a civil remedy to those injured by its violation, and granted summary judgment as to liability.⁶ On appeal, the Georgia Supreme Court held the statute, which exacted criminal penalties only, did not create a civil cause of action for invasion of privacy; however, the complaint did state a cause of action for invasion of the common law right of privacy, which existed in Georgia independently of the statute.⁷ The case was remanded for a determination of liability because summary judgment was deemed inappropriate.⁸ On a motion for rehearing on whether disclosure of the victim's name was privileged as a matter of public interest, the Georgia Supreme Court held the statute was a declaration of policy by the legislature that a rape victim's name was not a matter of public interest. The court concomitantly sustained the constitutionality of this legislative choice as a legitimate limitation on the right of free expression.⁹ The United States Supreme Court held on appeal¹⁰ that the freedom of expression guaranteed by the first and fourteenth amendments precluded a state from imposing civil liability for publication of accurate information properly obtained from official records open to the public.¹¹

4. GA. CODE ANN. §26-9901 (1972) made it a misdemeanor for any person or news media to publish, broadcast or televise the name or identity of a female who was the victim of a rape or an assault with intent to rape.

5. A prior Georgia ruling recognized that although the right of privacy is personal and does not survive the individual, relatives of the deceased may sue in their own right because unwarranted publicity reflects on them. 231 Ga. at 64, 200 S.E.2d at 131, citing *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930) (parents of child whose medical information was released by hospital to news media). See also Green, *Relational Interests*, 29 ILL. L. REV. 460, 486-87 (1934).

6. 231 Ga. at 60, 200 S.E.2d at 129.

7. *Id.* at 62, 200 S.E.2d at 130. Georgia was the first state to recognize a common law right of privacy. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) involved the appropriation of a personal photograph for advertising purposes.

8. 231 Ga. at 67, 200 S.E.2d at 133.

9. *Id.*

10. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Justice White wrote the majority opinion, in which seven Justices concurred; Justices Powell and Douglas wrote separate opinions and Chief Justice Burger concurred in the judgment without opinion. Justice Rehnquist's position on the privacy issue is unknown because he dissented on jurisdictional grounds. See note 11 *infra*.

11. Before reaching the merits of the case, the Court faced a significant question regarding its jurisdiction under 28 U.S.C. § 1257 (1970), which provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows . . . (2) By appeal, where is drawn in question the validity of a statute on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity.

Id. The Court first noted the Georgia statute had been "drawn in question" because the Georgia court's characterization of the statute as a declaration of state policy that publication of a rape victim's name was not protected by the first amendment had directly affected the merits of the action. 420 U.S. at 476. The major discussion, however, dealt with the requirement of finality articulated in the statute. In four categories of cases, the Court has treated a state decision as final for purposes of § 1257 and has settled the federal issue involved, despite the pendency of further state proceedings. In the first category are cases in which further proceedings are forthcoming but the outcome is preordained, as where the appellant has no defense other than the federal claim: *Mills v. Alabama*, 384 U.S. 214 (1966) (granting jurisdiction where the defendant was charged with violation of a criminal statute prohibiting election day editorials on a controversial issue). 420 U.S. at 479. In the second are cases in which the federal issue has been decided by the highest state court and will survive regardless of the outcome of future state court proceedings: *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 126-27 (1945) (Nebraska Supreme Court's decision on a federal issue was reviewable despite the fact an accounting was also ordered). 420 U.S. at 480. The third category involves situations where a federal claim has been finally decided by the state court and further proceedings will follow, but later review of the federal issue will be foreclosed by state law which will not permit reconsideration of the federal question: *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) (question of the validity of a statute specifying ownership requirements for pharmacies would not survive on remand, whatever the result of state administrative proceedings); *California v. Stewart*, 384 U.S. 436 (1966) (granting an appeal by the state where a new trial might have resulted in acquittal). 420 U.S. at 481-82. In the fourth category, the federal issue has been decided by the highest state court with further proceeding pending, but a decision by the Court would determine whether any further litigation would be needed at all: *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (granting an appeal of a state ruling upholding a statute and remanding for trial and appropriate relief). 420 U.S. at 484-85.

The Court thought *Cox* had elements of the first, third and fourth categories. *Id.* at 484-86, citing *Mills v. Alabama*, *supra* at 221-22, and *Miami Herald Publishing Co. v. Tornillo*, *supra* at 247 n.6. The Georgia Supreme Court's decision on the federal issue of whether the first and fourteenth amendments precluded states from forbidding publication of the name of a rape victim was final because the question would not be subject to further review by the Georgia Supreme Court. A decision in the publisher's favor would end the litigation; failure to decide the question, however, would force the Georgia press to operate under a ruling that left the constitutionality of the statute in serious doubt. The Court found reaching the merits at this time consistent with the "pragmatic approach it has followed in determining finality." 420 U.S. at 486.

In his dissent, Justice Rehnquist argued for dismissal because the appeal did not present a final judgment or decree. He felt the line of cases beginning with *Radio Station WOW, Inc. v. Johnson*, *supra*, and including *Younger v. Harris*, 401 U.S. 37 (1971) (refusal to issue an injunction on first amendment grounds where no arrests or indictments had been issued, illustrated the need for strict adherence to the finality rule to further harmonious state-federal relations. 420 U.S. at 503-05 (Rehnquist, J., dissenting). More importantly in Justice Rehnquist's view, the standard set forth in *Cox* went beyond established exceptions to the finality rule and created a formless exception with no basis in the language of § 1257 or in the efficient

DECISION OF THE COURT

Justice White, writing for the majority, acknowledged that some form of a right to privacy existed in most jurisdictions. The "tort of public disclosure" in *Cox*, however, conflicted with the press's constitutional right to disseminate truthful information.¹² The first amendment required that truth was a complete defense in defamation actions brought by public officials¹³ and public figures.¹⁴ In regard to private persons, however, the Court had expressly left open the question whether truthful publication could be constitutionally prohibited.¹⁵ This prior hesitation, as well as the significant social values served by the right to privacy, counseled caution in balancing the interests of privacy and a free press.

Rather than address the broad proposition urged by the appellant that publication of truthful matters might never expose the media to liability, regardless of the offensiveness or embarrassment to the ordinary individual,¹⁶ the Court limited its discussion to liability for publication of the name of a rape victim obtained from generally available public records.¹⁷ Because of their limited capability to observe the operations of government firsthand, citizens necessarily rely upon press reports of governmental proceedings. In particular, crime, prosecutions and attendant judicial proceedings are events of legitimate concern which the media is obliged to report completely and accurately.¹⁸ Official records and documents which are

administration of justice. *Id.* at 507. He distinguished *Miami Herald Publishing Co. v. Tornillo*, *supra*, and *Mills v. Alabama*, *supra*, because they involved "core" first amendment considerations of the press's role in free political discourse, as opposed to the comparatively insignificant prohibition on merely reporting the name of a rape victim. 420 U.S. at 508-09. The instant decision, Justice Rehnquist argued, abandoned the principle that the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. *Id.* at 509.

12. 420 U.S. at 488-89.

13. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), the Court held that in a defamation action brought by a public official the plaintiff must prove a false statement was made with either knowledge it was false or with reckless disregard for its truth or falsity. *falsity*.

14. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) extended the *New York Times* rule to persons who were not public officials but were involved in significant public issues or events.

15. 420 U.S. at 490.

16. *Id.* at 489.

17. *Id.* at 491.

18. *Id.* at 492-93, quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947). See *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301 (1974) (stay of restraining order on news coverage in a murder-rape prosecution); *Sheppard v. Maxwell*, 384 U.S. 333, 334 (1966) (a

accessible to the public and contain such information are the "basic data of governmental operations."¹⁹

Truthful disclosure of the name of a rape victim contained none of the indicia of those categories of speech which a state may constitutionally proscribe.²⁰ The Georgia cause of action imposed sanctions on pure expression and invited timidity and self-censorship on the part of the press, which would be torn between fully informing the public, or remaining within the law.²¹ The press's responsibility to report judicial proceedings reflects the public interest in knowing about such events;²² the state manifests its agreement that the public interest is being served and a public benefit derived from dissemination of information contained in official court records by placing them in the public domain. The interest in privacy and its accompanying restrictions are less compelling when the information is already a matter of public record. Since freedom of the press avails people of information they must have to function as citizens, a state may not impose sanctions on the publication of truthful matters contained in official court records which are open for public inspection.²³ Justice White noted that states might protect the interest of

free "press does not simply publish information . . . but guards against the miscarriage of justice . . . [through] extensive public scrutiny and criticism").

19. 420 U.S. at 491-92.

20. *Id.* at 495. The balancing of the state interest and freedom of expression has been the traditional test applied where the expression was coupled with conduct or so-called "fighting words." See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (when "speech" and "nonspeech" are combined, a sufficient governmental interest in regulating the nonspeech element may justify limitations on first amendment freedoms); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (upholding a state statute forbidding words likely to aggravate an average person or likely to cause a breach of the peace).

21. 420 U.S. at 496. See *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); *Speiser v. Randall*, 357 U.S. 513, 526 (1958). These decisions held that the first amendment prohibits a state rule that would be likely to cause self-censorship or suppression of legitimate information the press would otherwise publish.

22. 420 U.S. at 493-94, quoting *RESTATEMENT (SECOND) OF TORTS* §§ 652D, 652B, comment c at 114 (Tent. Draft No. 13, 1967).

23. 420 U.S. at 496. Justice White suggested the states should apply a "balance of interest" test to determine whether the interest of privacy outweighs the interest of the public to know. Such a determination by the states would present a constitutional problem apart from the first amendment where the Court determined a defendant was entitled to sixth amendment protections: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. Public identification of the victim may be necessary for the preparation of a defendant's case; for example, it could aid in finding witnesses who could relate the circumstances of the alleged crime or a matter relative to the defense such as consent in the case of rape. Franklin, *A Constitutional Problem*

privacy regarding such information by avoiding public documentation or restricting public access to governmental records, but he specifically reserved discussion of the constitutional questions raised by such a state policy.²⁴

Justice Powell concurred in the opinion of the Court and its rationale on the specific issue presented by the facts. However, he disagreed with Justice White's assertion that the Court had yet to deal with the question whether truth is a required defense in defamation actions brought by private individuals.²⁵ Justice Powell noted that the rule he announced in *Gertz v. Robert Welch, Inc.*,²⁶ which permitted states to impose a standard other than strict liability in defamation actions by private persons, supplanted the *New York Times Co. v. Sullivan*²⁷ rule of knowing falsehood or reckless disregard for truth as applied to private individuals, and necessarily implied that truth be recognized as a complete defense.²⁸

COMMENTARY ON THE RIGHT OF PRIVACY

There are four recognized classes of actions for invasion of privacy: unreasonable physical intrusion into another's private life; appropriation of another's name or likeness for purposes of trade; publicity which places another in a false light before the public; and

in Privacy Protection: Legal Inhibitions on Reporting of Fact, 16 STAN. L. REV. 107, 137 (1963)[hereinafter cited as Franklin].

24. Although the Court did not rule on state attempts to limit access to news or information by law or regulations in *Cox*, the Court has previously distinguished the first amendment right of the press to publish information it obtains from the press's more limited right of access to governmental information. See *Pell v. Procnier*, 417 U.S. 817 (1974) (upheld a state regulation prohibiting news interviews with prisoners on the ground the privilege was not given to the public generally); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (news media's first amendment privilege does not include the right to gather news, and a newsman may be compelled to reveal confidential sources to a grand jury); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Court distinguished the constitutional right to publish governmental documents from the asserted right to obtain them). See also *McLaughlin v. Philadelphia Newspapers, Inc.*, 348 A.2d 376 (Pa. 1975) (first amendment not violated by denying newspapers access to impounded court records).

25. 420 U.S. at 497-98 (Powell, J., concurring).

26. 418 U.S. 323 (1974).

27. 376 U.S. 254, 279-80 (1964). See note 14 *supra*.

28. 420 U.S. at 499 (Powell, J., concurring). Justice Douglas also concurred in the judgment but would have based the result on the broader proposition that the first and fourteenth amendments prohibit the use of state law to impose damages for merely discussing public affairs, which he would define as any matter prompting media coverage. *Id.* at 500-01.

unreasonable publicity of another's private life.²⁹ Cox belongs in this last category, which includes publication of accurate facts in editorial or news reporting rather than in advertising space.³⁰ Since the first amendment protects the press, the question of what is legitimate news coverage under this form of privacy action has constitutional dimensions as well. The constitutional dilemma posed by recognition of the tort is rather recent since, unlike defamation, privacy was not recognized as a common law right at the time the Constitution was written. The right evolved from a seminal article, *The Right to Privacy*,³¹ written in 1890 by Warren and Brandeis. Since the proposal of the tort by Warren and Brandeis,³² changing societal values have affected the very concept of privacy. Disclosures that were shocking when the right of privacy was first suggested now appear daily in the most prestigious newspapers. But despite increasing acceptance of the fact that all persons are public figures to some extent within their own communities, the notion lingers that everyone, however notorious, is entitled to a zone of privacy within which no person may wander uninvited.

Since the recognition of the tort of invasion of privacy, courts and commentators have attempted to reconcile these contrary notions, suggesting the following essential elements of a cause of action: the

29. RESTATEMENT (SECOND) OF TORTS §§ 652A-E (Tent. Draft No. 13, 1967). The same categories are suggested in W. PROSSER, LAW OF TORTS § 117, at 804 (4th ed. 1971) and Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) [hereinafter cited as *Privacy*].

30. This category has been described as the mass communications tort of invasion of privacy, since it particularly subjects mass communications to liability. Kalven, *Privacy in Tort Law—Were Warren & Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 333 (1966) [hereinafter cited as Kalven].

31. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter cited as Warren & Brandeis].

32. In 1890, Warren and Brandeis complained the press had "invaded the sacred precincts" of private life, so that "[g]ossip is no longer the resource of the idle . . . but has become a trade, which is pursued with industry as well as effrontery." *Id.* at 195-96. One student of journalism noted this period was marked by technological advances that made mass communications possible for the first time. These advances helped create the period of "yellow journalism" personified by Joseph Pulitzer and William Randolph Hearst. Their mass circulation newspapers used screaming headlines, often in color, faked pictures and fraudulent stories in the guise of news. W. SWINDLER, PROBLEMS OF LAW IN JOURNALISM 245-46 (1955). Despite the relatively infrequent use of these techniques today, commentators disagree on the meaning of the right to privacy and its application to present-day mass communications. Compare Kalven, *supra* note 30, at 327-31, suggesting the right to privacy was simply an idea whose time came and went with "yellow journalism," with Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962), predicting invasion of privacy actions will eventually supplant defamation actions.

disclosure must publicize private affairs in which the public has no legitimate interest or concern;³³ it must be an unwarranted invasion without waiver or constitutional privilege;³⁴ it must cause mental anguish or shame to a person of ordinary sensibilities.³⁵ The right of privacy has generally been considered lost or waived where there is consent to publication, where the person voluntarily places himself in the public limelight, or when the individual is an actor in or subject of a newsworthy event.³⁶ Thus, if the facts disclosed were "newsworthy," the information was subject to the public's right to know—and was not private at all.

It has been difficult to articulate a standard defining newsworthiness or the public interest.³⁷ Warren and Brandeis³⁸ and some

33. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967). See text at notes 48-50 *infra*.

34. *Edmiston v. Time, Inc.*, 257 F. Supp. 22, 26 (S.D.N.Y. 1966) (finding a constitutional privilege to publish reports of judicial proceedings); *Frith v. Associated Press*, 176 F. Supp. 671, 676 (E.D.S.C. 1959) (finding waiver where plaintiffs were the subjects of arrest warrants); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957, 962 (D. Minn. 1948) (privilege to report judicial proceedings).

35. RESTATEMENT OF TORTS § 867 (1939); *Privacy*, *supra* note 29, at 390. Commentators question whether the publisher must in fact know or have reason to know of the disclosure's offensiveness. Prosser suggests merely showing offensiveness to the ordinary individual is enough. *Id.* at 396. That standard, however, approximates strict liability without fault, which the Court has disapproved in defamation actions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). See notes 52-58 and accompanying text *infra*. Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713, 715 (1948) suggests serious, unreasonable, unwarranted and offensive interference with another's private affairs involves more than mere publication of facts and information sufficient to outrage a community's notion of decency. See also Kalven, *supra* note 30, at 334.

36. See, e.g., *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 809 (2d Cir. 1940) (former child prodigy's later life as a reclusive bookkeeper was a legitimate matter of public concern); *Neff v. Time, Inc.*, 44 U.S.L.W. 2373 (W.D. Pa. Jan. 27, 1976) (deliberate publication of offensive photograph taken at public event with subject's knowledge and implied consent is privileged); *Frith v. Associated Press*, 176 F. Supp. 671, 674 (E.D.S.C. 1959) (plaintiffs lost their right to privacy because they were subjects of arrest warrants and their photographs were distributed to press at news conference); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957, 961 (D. Minn. 1948) (plaintiff's photograph taken during court recess); *Melvin v. Reid*, 112 Cal. App. 285, 287-88, 297 P. 91, 92-93 (Dist. Ct. App. 1931) (no action where consent is implied by prominence and involvement in news events or public discussion in which the public has a rightful interest).

37. One of the first definitions of "news" explained it as "apparently authentic reports of current events of interest." *Associated Press v. International News Serv.*, 245 F. 244, 248 (2d Cir. 1917), *aff'd*, 248 U.S. 215 (1918); *accord*, *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 312, 95 P.2d 491, 496 (Dist. Ct. App. 1939); *Jenkins v. News Syndicate Co.*, 128 Misc. 284, 285, 219 N.Y.S. 196, 198 (Sup. Ct. 1926). Various attempts to reach a workable standard are discussed in Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722 (1963). For applications of the public

courts³⁹ have asked whether the public needed to know the facts to function in a democratic society. The prevailing view, however, has been derived from a definition by the Supreme Court, that news in its most fundamental sense is what interests people.⁴⁰ Hence, publication of truthful facts concerning persons caught in the vortex of crimes, criminal investigations and prosecutions has generally been found permissible.⁴¹ Moreover, courts have not distinguished between innocent victims of crime and persons who have voluntarily thrust themselves into such newsworthy events.⁴²

interest test see *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (opening of a Broadway play); *Time, Inc. v. Johnston*, 448 F.2d 378 (4th Cir. 1971) (former professional basketball star); *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969) (reputed gambling figure); *Sporn v. Time, Inc.*, 324 F. Supp. 1201 (W.D. Pa. 1971) (religion); *Ragano v. Time, Inc.*, 302 F. Supp. 1005 (M.D. Fla. 1969), *aff'd*, 427 F.2d 219 (5th Cir. 1970) (organized crime); *Bon Air Hotel, Inc. v. Time, Inc.* 295 F. Supp. 704 (S.D. Ga. 1969), *aff'd*, 426 F.2d 858 (5th Cir. 1970) (hotel accommodations for a major golf tournament).

38. *Warren & Brandeis*, *supra* note 31, at 214-15.

39. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 231 Ga. 60, 64, 200 S.E.2d 127, 132 (1973); *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 534-37, 483 P.2d 34, 39, 93 Cal. Rptr. 866, 869-72 (1971); cf. *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942), which held that the medical history of a woman with a rare ailment that made her a starving glutton may have been in the public interest, but publication of her photograph while in a hospital and against her wishes was not.

40. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). Twenty years earlier the Court had decided the first amendment precluded courts from placing value judgments on the quality of or "play" given to news events. *Winters v. New York*, 333 U.S. 507 (1948) (held invalid a statute providing criminal penalties for publications which sensationalized crime news). The rationale may be that while there are vast differences in the quality of newspapers and reporting, it is impossible to agree on what is reasonable and proper in the controversy-filled world of newspaper reporting. *Beane, The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROB. 253, 257 (1966).

41. See, e.g., *Wagner v. Fawcett Publications*, 307 F.2d 409 (7th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963) (plaintiff was a witness in a murder trial); *Jenkins v. Dell Publishing Co.*, 251 F.2d 447 (3d Cir. 1958) (homicide victim's family identified in a story about a juvenile gang charged with the murder); *Frith v. Associated Press*, 176 F. Supp. 671 (E.D.S.C. 1959) (governor distributed photographs of plaintiffs, for whom arrest warrants had been issued); *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.D.C. 1955), *aff'd*, 232 F.2d 369 (D.C. Cir. 1956) (documentary on plaintiff's trial and subsequent exoneration for murder); *Garner v. Triangle Publications*, 97 F. Supp. 546 (S.D.N.Y. 1951) (plaintiff's murder trial); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948) (plaintiff's suits for divorce and custody); *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

42. In *Nappier v. Standard Life Ins. Co.*, 322 F.2d 502 (4th Cir. 1963) and *Edmiston v. Time, Inc.*, 257 F. Supp. 22 (S.D.N.Y. 1966), female victims of sexual attacks were identified in news stories. *Nappier* upheld S.C. CODE ANN. § 16-81 (1962), a statute similar to that in *Cox*, and granted a cause of action for invasion of privacy, but specifically noted that no constitutional defense had been raised. 322 F.2d at 505. In *Edmiston*, a magazine published an account of the rape trial, titled "A Girl's Reputation," which included blunt remarks by

At times, newsworthiness has been almost presumed when an event has been reported in the public record;⁴³ this does not necessarily mean, however, that the subject was newsworthy or the publication was in the public interest. In two leading California decisions, *Melvin v. Reid*⁴⁴ and *Briscoe v. Reader's Digest Association, Inc.*,⁴⁵ the courts found lack of newsworthiness was the controlling factor in recognizing causes of action for invasion of privacy. The courts minimized the public records factor, because the publication of names of persons involved in crimes years before was only tangentially related to the subject matter or central theme of the stories. The name disclosures were unnecessary and contributed nothing to the public's interest in the reported events.⁴⁶

the trial judge. The court conceded the privilege to publish newsworthy events, including judicial proceedings, could not be unlimited, but declined to allow a cause of action because persons even unwittingly involved in crime became public figures for a time. 257 F. Supp. at 27.

Two other states have rape victims' identification statutes such as those in *Cox* and *Nappier*: FLA. STAT. ANN. § 994.03 (Supp. 1975), amending FLA. STAT. ANN. §§ 794.03-.04 (1965); WIS. STAT. ANN. § 942.02 (1958). The constitutionality of criminal prosecution for violation of such a statute has been challenged only once; the statute was upheld. *State v. Evjue*, 253 Wis. 146, 33 N.W.2d 305 (1948). The publisher, however, was acquitted in a nonjury trial on the particular facts, and the Wisconsin Supreme Court later upheld the acquittal. *State v. Evjue*, 254 Wis. 581, 37 N.W.2d 50 (1949). The story at issue concerned a murder committed during a rape. For a history of the statutes and commentary see Franklin, *supra* note 23, at 121-37.

43. In *Hubbard v. Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147 (1962), an action for invasion of privacy brought by the female victim of a sexual attack was denied on the ground the newspaper was privileged to publish a verbatim account of records which were open to the public. *Id.* at 473, 368 P.2d at 148.

44. 112 Cal. App. 285, 297 P. 91 (Dist. Ct. App. 1931) (plaintiff, a reformed prostitute, was allowed damages for use of her maiden name in a film based on her past life as revealed in the public records of a murder trial in which she was the defendant).

45. 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (plaintiff's true name and involvement in a hijacking eleven years before were used to illustrate hijacking as a national problem in a feature article).

46. *Id.* at 537, 483 P.2d at 40, 93 Cal. Rptr. at 872; *Melvin v. Reid*, 112 Cal. App. 285, 287-88, 297 P. 91, 93 (Dist. Ct. App. 1931). Both cases can be distinguished from *Cox*, since the names published were not part of recent news events. *But see* *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939) (upholding a cause of action for invasion of privacy in a radio dramatization of a robbery shortly after the incident); *Harms v. Miami Daily News, Inc.*, 127 So. 2d 715 (Fla. Dist. Ct. App. 1961) (invasion of privacy from a local columnist's description of plaintiff's telephone voice as "sexy"). Commentators suggest name identification of a person involved in a newsworthy event may not always be necessary for adequate coverage and would therefore unjustifiably expose the individual's private life. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 966-67 (1968) [hereinafter cited as Nimmer]; Franklin, *supra* note 23, at 126-27. In some instances, the name of a rape victim may not be

COX IN LIGHT OF PRIOR SUPREME COURT DECISIONS

The Supreme Court has expressly dealt with the right of privacy twice; both cases involved publicity which placed the plaintiff in a false light before the public.⁴⁷ In *Time, Inc. v Hill*,⁴⁸ the Court considered a statutory cause of action against a publisher who had reported the opening of a Broadway play based on a widely circulated news event in which plaintiff and his family were held hostage by escaped convicts. *Cantrell v. Forest City Publishing Co.*⁴⁹ involved the sufficiency of the evidence to sustain a verdict against a newspaper for a story depicting the poverty of the family of a victim of a bridge collapse. In both cases, the Court applied the *New York Times* defamation standard: if matters of public interest had been reported, the plaintiff had to show publication with knowledge of the falsehood or reckless disregard for the truth.⁵⁰ This standard was appropriate because in both *Hill* and *Cantrell* the publications were false; hence, the law of privacy prior to *Cox* overlapped the law of defamation.⁵¹

After *Hill*, the Court applied the "actual malice" standard to defamation actions brought by private individuals involved in "matters of general concern."⁵² This extension of the *New York Times* standard was retracted in *Gertz v. Robert Welch, Inc.*⁵³ The Court found the legitimate state interest in protecting the reputations of private persons equalled first amendment values; so long as states do not impose liability without fault, they may use a lesser standard of negligence than knowing or reckless falsity.⁵⁴ *Gertz* criti-

necessary to tell the story. *Id.* at 121. The problem is how and when a publisher can determine whether "adequate coverage" requires the name. *Id.* at 126-27. See notes 65 & 67 and accompanying text *infra*. Name identification would seem crucial in reporting a recent news event, to inform the public of community affairs and to allow witnesses to come forward regarding the incident. A. FRIENDLY & R. GOLDFARB, CRIME AND PUBLICITY, THE IMPACT OF NEWS ON THE ADMINISTRATION OF JUSTICE 42-45 (1967).

47. RESTATEMENT (SECOND) OF TORTS § 652E (Tent. Draft No. 13, 1967).

48. 385 U.S. 374 (1967).

49. 419 U.S. 245 (1974).

50. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

51. Commentators have suggested false light invasion of privacy and injury to reputation are conceptually alike, since both involve publication of a falsehood. *Privacy*, *supra* note 29, at 398-401; Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962). *Contra*, Nimmer, *supra* note 46, at 961-63.

52. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (news broadcast referred to plaintiff as "smut dealer").

53. 418 U.S. 323 (1974).

54. *Id.* at 347.

cized the "matter of general concern" test because it encompassed everything which was newsworthy.⁵⁵ *Cox*, however, retained the "public interest" standard with regard to privacy actions despite the Court's recognition that the public interest was too broad and vague a standard to be meaningful in defamation actions. In *Gertz*, the Court specifically limited its discussion of public versus private figures to situations where a person voluntarily places himself in the public light;⁵⁶ conversely, in invasion of privacy cases a person generally becomes the subject of media coverage through no purposeful act of his own.⁵⁷ Perhaps because privacy and defamation actions serve different functions, the Court did not discuss *Gertz* in *Cox*, but rather relied on the rationale that the public has a legitimate interest in matters contained in open governmental records.⁵⁸ *Cox* did not reach the question of how to determine whether information is in the public interest, since under the public records rationale the state had already done so by making records open or accessible. Since *Hill* indicates the public has a legitimate interest in events other than those concerned merely with the operations of government, the definitional standard of public interest has been left to future cases.

This vacuum may cause confusion in the lower courts. *Cox* leaves open the question whether truth is a constitutionally required defense in a privacy action where the information is accurate but is *not* obtained from a government record open to the general public.⁵⁹

55. 14 Duq. L. Rev. 89, 98 (1975).

56. 418 U.S. at 345.

57. See notes 41 & 42 and accompanying text *supra*.

58. 420 U.S. at 491-92. A more difficult situation may be presented where a news medium uses public records as a starting point for its own investigation of an individual's private life and publishes matter from the public record and its own investigation. Assuming the independent matter is "rationally related" to material on the record, its publication would also be privileged. *Kois v. Wisconsin*, 408 U.S. 229 (1972) (allegedly obscene material was rationally related to protected expressions on scientific matters). See also *Aquino v. Bulletin Co.*, 190 Pa. Super. 528, 535-36, 154 A.2d 422, 427 (1959) (where marriage and divorce records were the basis for a narrative feature story, preventing publication of details would constitute an unwarranted interference with the right of the press to disseminate news).

If, however, *Cox* is narrowly read to permit publication only of material actually on the public record, the service performed by the press in a free society would be seriously diminished. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). When the press can go beyond mere recordation of public records, it can fulfill the expectation values of a free press. See *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.D.C. 1955), *aff'd*, 232 F.2d 369 (D.C. Cir. 1956) (newspaper reporter independently investigating testimony given at a murder trial uncovered new evidence that helped exonerate the defendant).

59. 420 U.S. at 491. This situation may occur in crimes such as rape where the victim is treated at a private hospital.

Language in *Gertz* which was cited by Justice Powell in *Cox*⁶⁰ suggests truth should be a defense.⁶¹ *Cox* itself would support the view that information in which the public has an interest should be protected.⁶² That position corresponds with lower court decisions which developed the newsworthiness standard to determine whether there was sufficient public interest to warrant an invasion of privacy.⁶³ The fundamental problem with the public interest or newsworthiness criteria, however, is that neither judges nor newsmen can accurately guess what will be "news" on a given day.⁶⁴ The Court admitted this difficulty and its first amendment implications in *Miami Herald Publishing Co. v. Tornillo*,⁶⁵ when it said decisions regarding publication and treatment of public issues were matters of editorial judgment and control.⁶⁶ Thus, although public interest

60. 420 U.S. at 499 (Powell, J. concurring), quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

61. Justice White's dissent in *Gertz* would have required that publishers prove the truth of the defamatory statement. He criticized the Court's disapproval of liability without fault, on the theory that anyone who publishes a statement that is false is never without fault in a meaningful sense. 418 U.S. at 388-92 (White, J., dissenting). Thus, in the area of defamation, Justices White and Powell agree that truth is a required defense.

62. 420 U.S. at 490.

63. See notes 36 & 37 and accompanying text *supra*.

64. A sample of newspapers from a given locale reveals each has an individual idea of what constitutes a "newsworthy" event or fact. These differences, which would frustrate courts attempting to second-guess editorial news judgment, were outlined in *Jenkins v. Dell Publishing Co.*, 251 F.2d 447 (3d Cir. 1958) in an attempt to define "news":

A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. Still others are entertained by news which has an incongruous or ironic aspect. Much news is in various ways amusing and for that reason of special interest to many people. . . .

This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society.

Id. at 451. One commentator has concluded that the best definition of "newsworthy" is what is in the media, and that the press by necessity must be the final arbiter. Kalven, *supra* note 30, at 336.

Another aspect of mass communications illustrates the impracticality of judicial review of news editing. An editor's decision to publish, particularly in daily news media, must sometimes be made within minutes of publication; a judicial determination of newsworthiness would be made over a prolonged period. As a result, it has been suggested that public opinion and the consciences of newspaper publishers act as sufficient safeguards against occasional abuses of privacy by the mass media without the need for a judicial or legal remedy. Z. CHAFEE, *GOVERNMENT AND MASS COMMUNICATIONS* 137 (1947).

65. 418 U.S. 241 (1974).

66. *Id.* at 258; accord, *Mills v. Alabama*, 384 U.S. 214 (1966) (state could not impose criminal sanctions on the publication of material that did nothing more than urge voters to support a referendum on election day).

is a convenient catchall, it does not help the press or the courts to determine what is a public issue.

CONCLUSION

By confining the issue in *Cox* to whether a privacy action may be maintained where truthful information was obtained from an open government record, the Court has left unanswered questions for the media and the public. The media may ask whether it may rely upon the accuracy of public records or the truthfulness of public officials purporting to convey information in the records.⁶⁷ Moreover, *Cox* said nothing regarding the press's right to develop its own investigation to disclose additional facts not in the record. A more fundamental problem for advocates of a vigorous press is the Court's qualified invitation to legislate against public documentation on the state level.⁶⁸ If states should respond with restrictive legislation, they may protect privacy at the expense of informing the public of the nature and extent of crime in their communities.⁶⁹ On the other hand, if the public interest standard is construed broadly, the public's appetite for news may be satisfied at the expense of the individual's desire for privacy.⁷⁰

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67. This problem may be without real significance if the information is in the public record and the publication accurately reflects the record. The key to a claim for invasion of privacy in cases such as *Cox* is unwarranted disclosure of private facts by the defendant; since the matter on the public record has already been disclosed, the publisher does nothing more than disseminate the record. *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817, 833 (D.D.C. 1955), *aff'd*, 232 F.2d 369 (D.C. Cir. 1956). See also RESTATEMENT (SECOND) OF TORTS § 652D, comment *c* at 114 (Tent. Draft No. 13, 1967).

68. 420 U.S. at 496. A number of states deny public access to records and proceedings regarding juvenile crime. See, e.g., GA. CODE ANN. § 24-2432 (1971).

69. States could conceivably reconstruct rape laws so that certain proceedings would be closed to the public. For example, preliminary hearings could determine whether placing the victim's name on a public record would result in substantial certainty of further harm to the victim, at least in the time before the defendant is brought to trial. *But see* note 46 *supra*. See also *State v. Evjue*, 253 Wis. 146, 161-62, 33 N.W.2d 305, 312 (1948).

70. There is an alternative basis for invasion of privacy where the press by false impression, misrepresentation or simple trespass intrudes on private lives in an attempt to gather news. See *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (Dist. Ct. App. 1939) (allegations that a reporter broke into plaintiff's house to obtain a picture of a suicide victim which was subsequently published). Such a rationale may be applicable where news reporters physically intrude on the privacy of an individual after he has evidenced a desire to be let alone. In such cases, the actionable grounds would not be publication per se, as suggested by Warren & Brandeis, *supra* note 31, at 218, but would be publication plus action. Cf. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). See also Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713, 715 (1948).