No-Fault Publicity: Trying to Slam the Door Shut on Privacy - The Battle Between the Media and the Nonpublic Persons It Thrusts into the Public Eye

Adam Chrzan*
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I. INTRODUCTION—THE "RIGHT TO BE LET ALONE" IS BORN IN AMERICA

As early as age four, children develop a sense of privacy—the intermittent desire for others to leave them alone.1 This almost primal desire continues to grow throughout each person’s life. Not surprisingly, Americans, as a whole, struggle for that same right in everything they do.2

1. Age 4, at http://www.kidsdirect.net/KD/ages/3-5(4).htm (last visited Nov. 3, 2002). By age four, the attributes of modesty and privacy begin to emerge, and by puberty (age 9), they should have developed a significant desire for privacy. Age 9, at http://www.kidsdirect.net/KD/ages/6-10(9).htm (last visited Nov. 3, 2002).

2. Michael Kelly, 77 North Washington Street, THE ATLANTIC ONLINE, Mar. 2001, at http://www.theatlantic.com/issues/2001/03/march77.htm (citing The Reinvention of Privacy by Toby Lester, which contends that privacy “consistently ranks in the public-opinion surveys as a primary worry.”). Furthermore, privacy bulletin boards have sprung up on the Internet. One, called Privacy, at http://motemind.topcities.com/law/privacy.htm (last visited Mar. 25, 2002), debated how the media might be curbed from invading privacies when technology makes it so easy. “[P]rotecting privacy in the information age is like changing the tires on a
From work to financial matters to the mundane happenings of their everyday lives, Americans want to exercise their right “to be let alone.” Unfortunately, that same collective group also thirsts for the salacious, the shocking, and the striking. The country’s media strives to satiate that hunger with accounts of anything from bizarre car crashes to the sexual miscues of politicians to details of dastardly criminal dealings. When the media attempts to cover these events for its reading public, the right of privacy and the First Amendment clash. While First Amendment law leaves few surprises when it comes to the coverage afforded general-purpose public figures and public officials, the line begins to blur as the subjects of the story move further and further from those regularly in the limelight. All too often, common men, women, or children fall victim to a highly publicized event in which they never intended to participate, as newspapers, magazines, and television news magazines rush for readership and viewers.

This paper will consider how the right to privacy often collides with the public’s right to know. The carnage from that collision often ends in lawsuits that allege emotional pain, suffering, and humiliation, with frequent denials of recovery to the subjects of the stories once the media wields its First Amendment shield. This paper discusses the emergence of privacy, its current status, and its probable future. As this paper focuses on nonpublic people cast involuntarily into a public light, it only tangentially considers...
actions by public figures and officials who do battle with the media over invasion of privacy issues, where the New York Times Co. v. Sullivan standard often applies.  

This paper analyzes how courts decide when media entities go too far when covering less-than-high profile people caught in news events through no fault of their own. They are the average Americans snared in news events: the crime victim, a motorist pinned in her car, the mistress of a politician snared in a scandal, the wife of a late-night talk show host, or a regular Joe wrongly accused of a fatal bombing. 

The roots of privacy lie in common law, for nothing in the United States Constitution promises a person privacy. This enviable right surfaced for the first time when Louis D. Brandeis and Samuel D. Warren penned their famous 1890 Harvard Law Review article, “The Right to Privacy.” Here, the future Supreme Court justice and his law partner coined the oft-quoted phrase, “the right to be let alone,” as they crafted an article in response to

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7. 376 U.S. 254, 279–80 (1964). Generally, this standard imposes upon public figures and public officials the need to show “actual malice” by the news outlet. Id. In other words, the individual has to show the defendant acted with knowledge of the statement’s falsity or with reckless disregard of its truth. Id. 

8. This, in no particular order, would include, most notably: Monica Lewinsky, the figure at the heart of the Clinton scandal; Donna Rice, the woman linked with former presidential candidate Gary Hart during his campaign; and Paula Jones, who claimed sexual harassment by Clinton during his Arkansas governor days. This is not to suggest that any or all of these women are or are not public figures, but merely the author’s attempt to proffer women involved in political sex scandals that drew ink from the press.


10. Ellen Alderman & Caroline Kennedy, The Legacy of Richard Jewell, COLUM. JOURNALISM REV. (Mar./Apr. 1997), available at http://www.cjr.org/year/97/2/jewell.asp. Jewell was accused of the Centennial Olympic Park bombing in Atlanta in 1996. Id. He was cleared, but only after the media characterized him as a suspect in the bombing. Id.


13. Id. at 206. Brandeis took his seat on the country’s high court in 1916. The two were attorneys in the same Boston law firm when they wrote the article, specifically in response to the publication of photographs of Warren’s wife in newspapers without her consent, which the two saw as the advent of what now is referred to as the paparazzi. Id.

14. Warren & Brandeis, supra note 3, at 193. The two first speak of the right to life, the right to property, and “a recognition of man’s spiritual nature, of his feelings and his intellect” before uttering the famous phrase. Id. The phrase, in fact, is mentioned often
what at the time they considered the "'yellow journalism'" of tabloids.\textsuperscript{15} But the sentence in which the phrase, "the right to be let alone," lies tells more of the attorneys' thought processes, as they suggest "now the right to life has come to mean the right to enjoy life,—the right to be let alone."\textsuperscript{16}

Warren and Brandeis further suggest newspapers and new technologies "have invaded the sacred precincts of private and domestic life."\textsuperscript{17} They called for courts to consider whether the law recognizes and protects peoples' right to privacy, as "[t]he press is overstepping in every direction the obvious bounds of propriety and of decency."\textsuperscript{18} Ultimately, they asked whether the law existing at that time afforded a principle to protect the privacy of the individual, and, if so, what the nature and extent of that protection was.\textsuperscript{19} They later likened the "right of the individual to be let

throughout the text of this seminal article on privacy rights. \textit{See id.} at 193, 195, 205. The law review article and other literature mentioning it actually suggest that the phrase first was mentioned by Judge Cooley. \textit{Warren & Brandeis, supra} note 3, at 195 (citing \textsc{Thomas M. Cooley, Law of Torts} 29 (1880)).

\textsuperscript{15} \textit{Sguera, supra} note 12, at 206. The two attorneys also considered "new technologies" troublesome to the right of privacy, as they allowed the media to more easily and rapidly gather and disseminate information about people. For example, it had been unlikely that someone could have his or her picture taken without actually "sitting" for it. But, with technological advances, photographs could be "surreptitiously" taken. That, they argued, left people no recourse for damages through contract and trust actions, and now required the protection of tort law. \textit{Warren & Brandeis, supra} note 3, at 211. On another note, the yellow journalism at the time of the article likely differed from today's concept of yellow journalism. Warren and Brandeis spoke of the encroachment of the media into private lives. \textit{Id.} at 196. Today's yellow journalism is generally considered to be tabloids, such as \textit{The National Enquirer} or \textit{The Star}, and has a certain inherent, gossip-like nature.

\textsuperscript{16} \textit{Warren & Brandeis, supra} note 3, at 193.

\textsuperscript{17} \textit{Id.} at 195. All this, the authors suggest, "threaten[s] to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'" \textit{Id.} \textit{See Jane E. Kirtley, It's the Process, Stupid, Colum. Journalism Rev.} (Sept./Oct. 2000), \textit{available at} http://www.cjr.org/year/00/3/kirtley.asp (suggesting that new and technologically advanced video cameras and recording devices allow the press to become more intrusive). Kirtley, a professor at the University of Minnesota's School of Journalism and Mass Communication, was executive director of The Reporters Committee for Freedom of the Press from 1985–1999. \textit{Id.}

\textsuperscript{18} \textit{Warren & Brandeis, supra} note 3, at 196. Further, the authors contend "[t]o satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle." \textit{Id.} In fact, the authors offer a forward-thinking suggestion that, with life growing more complex and intense, the need for "solitude and privacy" are all the more essential to people and society. \textit{Id.}

\textsuperscript{19} \textit{Id.} at 197. The authors contrast the right to privacy with the law of defamation, libel, and slander, which they said dealt only with damage to reputation and injury to a
alone” with the “right[s] not to be assaulted or beaten, . . . imprisoned, . . . maliciously prosecuted . . . [or] defamed,” and said courts could not find the right to privacy based in private property doctrine.

They concluded with suggested elements on which to base a new privacy law. The right to privacy, they theorized, allowed the publication of any matter of “public or general interest.” However, it protected people with whose affairs the community had no legitimate concern, “from being dragged into . . . undesired publicity.” Because this standard rests entirely on the person being written about, Warren and Brandeis said it was impossible to create a hard-and-fast rule banning “obnoxious publications” and suggested any rule adopted must boast “elasticity.” Other elements

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proposed by the two men included a privacy right that ended once the person disclosed the facts publicly or consented to publication, and neither the truth of the matter nor absence of malice provided a defense.26

II. PUBLIC V. PRIVATE—HOW THE COURTS DECIDE

Courts consider invasion of privacy a personal tort, one aimed at protecting an individual’s feelings.27 From this, the concept of four distinct common-law invasion-of-privacy torts evolved: 1) intrusion upon one’s solitude or seclusion; 2) public disclosure of private facts; 3) publicity that places someone in a false light; and 4) appropriation of one’s likeness or name for another’s benefit.28 A majority of states29 and the Restatement (Second) of Torts30 now recognize these torts, the first two of which are discussed in this article. Intrusion on one’s seclusion and publication of private facts seem most applicable when discussing the media’s coverage of the common man in the Twenty-First Century.

While laws exist, application sometimes proves exceedingly difficult, as invasion torts reach different levels for different people. Presidents, governors, and even clerks of small townships all may consider themselves to be public officials, and thus, find almost no assistance in invasion of privacy laws. Entertainers, professional sports figures, and corporate bigwigs fall into the public figure category and hold almost as limited a

privacy as any injury from an oral communication would “be so trifling that the law might well, in the interest of free speech, disregard it altogether.” Id. at 217.

26. Id. at 218. The lack of a defense for truthful disclosures or absence of malice again goes to the heart of the right to privacy. The injury focused upon is not an individual’s character, but that person’s privacy, the authors contended. Id.


30. § 652A–E. This provides for injunctive and monetary relief, in some cases, for press misconduct. Warren and Brandeis looked at remedies and found the key to be money. Even in the absence of special damages, one who essentially injures another’s privacy might expect to pay a hefty sum or face the prospect, in rare cases, of an injunction. Warren & Brandeis, supra note 3, at 217.
claim to a right of privacy. Murkier is the right of privacy for the involuntary public figure, the man who the press, through no fault of the individual, sometimes thrusts into the public eye. The message from courts resounds clearly: what many define as an invasion of privacy often is nothing more than the result of living in a free and open society, a privilege that requires the relinquishment of at least some privacy so that “information and opinion flow freely” and the people can maintain a free and democratic society.

Whenever involuntary or limited-purpose public figures attack the press for invading privacy, the Fourth Estate (i.e., the press) often asserts a claim of newsworthiness, supported by the public’s right to know. And courts generally seem to side with the press’s constitutional First Amendment right instead of John Q. Public, who holds no such constitutional privilege. That generalization fails to curb a considerable amount of litigation over claims of privacy invasion against the media. The issue, in many cases, focuses on a person’s status and whether the invasion went beyond the public’s right to know, thus making it an unwarranted intrusion. For example, publishing intimate details of the president’s sex exploits fails to cross the threshold of privacy invasion because it is said the public has a right to know the moral, ethical, and personal dealings of the person it elected to run the country. Publishing the same details of a nonpublic person’s sexual relations steps over that line. The comments in the Restatement (Second) of Torts offer

31. THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, supra note 27, available at http://www.rcfp.org/handbook/viewpage.cgi?0201. People who fall into one of these classes voluntarily expose themselves to scrutiny and essentially waive any right to privacy, at least in matters linked to their ability to perform their public duties or perform in public. Id.

32. Id.

33. Sguera, supra note 12, at 214, 221. This has been true since, and probably prior to, the adoption of the First Amendment in 1791. The amendment protects a journalist’s right to collect and disseminate, but does not give him complete civil or criminal immunity. Id. at 222.


35. See Deborah Potter, The President, the Intern, and the Media: Journalism Ethics Under Siege, at http://www.poynter.org/research/me/me_seige.htm (Feb. 16, 1998). However, that right does not mean the profession advocates the publication, though it may make it more likely due to increased competition, technological advances and changing ethics. Id.

36. See STUDENT PRESS LAW CENTER, INVASION OF PRIVACY LAW, at http://www.splc.org/legalresearch.asp?id=29 (last visited Mar. 11, 2002). Courts say a person suing must show the information was sufficiently private or not already in the public domain, sufficiently intimate, and highly offensive to the reasonable person. The news organization defense then becomes one of newsworthiness. Id.
some of the best examples of trying to carve out a definition for voluntary and involuntary public figures.\textsuperscript{37}

Clearly, some individuals—voluntary public figures—place themselves in the public eye by engaging in public activities, by assuming prominent roles in society, public office, or institutions, or by submitting their work or themselves for public judgment.\textsuperscript{38} These individuals hold little in the way of recourse when the press records their appearances or activities in their capacity as a voluntary public figure.\textsuperscript{39}

The difficulty of defining an involuntary public figure persists. For example, those who commit crimes, even though they do not seek publicity and actively try to avoid it, become "persons of public interest," entitling the media to inform the public of their deeds.\textsuperscript{40} Victims of crime, victims of accidents and catastrophes, and those involved in other "events that attract public attention" also fall into this category.\textsuperscript{41} Also ensnared in the net of involuntary public figures might be an acquitted murder defendant, a twelve-year-old girl who gives birth to a child, or a customer whose image is televised after being caught in a store raided by police looking for criminal activity.\textsuperscript{42} The key to all of these: newsworthiness.\textsuperscript{43}

There are individuals who become involuntary public figures simply because of the people with whom they associate, regardless of whether that association is within their control. People linked with a public figure or public official can expect their dealings, whether official or unofficial, to often be fair game for the press.\textsuperscript{44} For instance, Monica Lewinsky's affair with then-President Bill Clinton created such a stir and so affected the country's affairs that there was no question that it fell within the ambit of

\textsuperscript{37} RESTATEMENT (SECOND) OF TORTS § 652D cmt. e, f (1976).
\textsuperscript{38} § 652D cmt. e. These individuals might include an actor, a prizefighter, or a government official. Id. Some argue that once a person enters the spotlight, they are public forever. Howard Kurtz, Questions of Privacy, WASH. POST, Apr. 23, 1992, at D1 (noting an incident involving Ron Nessen, former President Gerald Ford's press secretary, whose twenty-five-year-old love letters to his ex-wife were published by The Washingtonian after Nessen left his position).
\textsuperscript{39} § 652D cmt. e.
\textsuperscript{40} § 652D cmt. f.
\textsuperscript{41} Id. In most cases, these people have not sought the public eye, but have been involuntarily thrust into it, through no fault of their own.
\textsuperscript{42} Id. illus. 13–17.
\textsuperscript{43} § 652D cmt. g.
\textsuperscript{44} One news story suggested that some individuals are "dragged into the spotlight through an accident of birth or circumstance. Would anyone care that a college student named John Zaccaro Jr. was busted for cocaine if his mother wasn't [former presidential candidate Walter Mondale's' running mate] Geraldine Ferraro?" Kurtz, supra note 38.
newsworthiness. As Paul M. Barrett wrote three years ago in the *Washington Monthly*, "[w]hile there is no law against repeatedly having adulterous oral sex with the president of the United States, a woman who does it in and around the Oval Office might reasonably be expected to anticipate that word could get out, causing her some loss of privacy."

Donna Rice also struggled with her newfound fame after the press exposed her romantic liaison with Democratic presidential contender Gary Hart. In interview after interview, she questioned the integrity of the press in creating public figures out of private individuals. "I don’t think that the media has a right to make a private person a public person," she told Barbara Walters during a *20/20* interview in 1987. The following year, the media hammered Rice when she reneged on a promise to be a panelist at the 1988 Society of Professional Journalists’ National Convention. She reportedly wanted to tell news types how the press rocked her life after the Hart affair.

"You can’t have an affair with a presidential candidate and not expect to be made a public figure," *Cincinnati Post* reporter Sarah Sturmon said, after Rice ditched the Right to Privacy panel at the last minute.

Clearly, Rice does not stand alone. Other women caught in the web of political scandal have shot themselves in the foot when trying to stay out of the public eye. They include Jessica Hahn, who invited reporters to her

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45. *Id.* Ironically, in his *Washington Post* article, Kurtz suggests that news organizations contend their reportage of politicians’ extramarital affairs focused on whether the affairs affected the politicians’ public performances. That changed in 1987, when *The Miami Herald* uncovered the Gary Hart-Donna Rice affair during his bid to become the Democratic nominee for president. The justification for reporting on Hart turned on his dare to reporters to tail him. *Id.*


50. *Id.*

51. *Id.*
house to detail the trauma of her affair-gone-public with television evangelist Jim Baker, and Fawn Hall, who testified before Iran-Contra investigators about her secretarial duties with Oliver North.\textsuperscript{52}

In some cases, just being the spouse of someone famous triggers the involuntary public figure standard.\textsuperscript{53} A United States court of appeals held, more than twenty-five years ago, that the wife of entertainer Johnny Carson fell into the public domain simply because she was married to Carson, a public figure.\textsuperscript{54} "One can assume that the wife of a public figure such as Carson more or less automatically becomes at least a part-time public figure herself," the court said.\textsuperscript{55}

A Restatement (Second) of Torts definition of "news" also provides help. News, it states, falls "within the scope of legitimate public concern," and often is defined by publishers and broadcasters acting "in accordance with the mores of the community."\textsuperscript{56} "Authorized publicity" of an individual includes accounts of those involved in homicides and other crimes, arrests, police raids, suicides, marriages and divorces, natural disasters, and drug deaths, as well as "many other similar matters of genuine, even if more or less deplorable, popular appeal."\textsuperscript{57} With definitions such as these, it is not surprising that almost anyone who steps outside his or her house (and even those who do not)\textsuperscript{58} may fall prey to the press’s push to place people in the

\textsuperscript{52} Friedman, \textit{supra} note 47.


\textsuperscript{54} Carson v. Allied News Co., 529 F.2d 206, 210 (7th Cir. 1976).

\textsuperscript{55} \textit{Id.} Johnny Carson was a party to the suit, which was framed as a libel action against \textit{National Insider}, a tabloid periodical. \textit{Id.} at 208. It was dismissed on summary judgment in favor of Allied News. Co., the defendant. Joanna Holland joined her husband in the suit. \textit{Id.}

\textsuperscript{56} \textit{RESTATEMENT (SECOND) OF TORTS} § 652D cmt. g (1976).

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} Cantrell v. Forest City Publ’g Co., 484 F.2d 150 (6th Cir. 1973). \textit{The Cleveland Plain Dealer}, in a follow-up story about a bridge collapse, visited a family whose husband and father had died in the 1967 tragedy. \textit{Id.} at 152. A reporter and photographer came into the family’s house, when the mother was gone, and spoke with the children. \textit{Id.} The court held the item was newsworthy, appearing only nine months after the initial story. \textit{Id.} at 154. "The
public eye. Accident victims,\textsuperscript{59} crime victims,\textsuperscript{60} and even criminals\textsuperscript{61} stand defenseless against press decisions to publicize their plights.

There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion... So where a person... by the particular character of his conduct or activities has acquired, or has had thrust upon him, public notoriety, he relinquishes the right to live that segment of his life which has thus engaged the public interest absolutely free from public scrutiny.\textsuperscript{62}

Here, courts show they are loath to dispatch the First Amendment's underpinnings.

III. BALANCING PRIVACY AND FREE SPEECH

In the purest sense, the battle over privacy pits freedom of the press against freedom \textit{from} the press.\textsuperscript{63} "We [are] dealing with that most fragile of merchandise, the facts about another human being," \textit{People} magazine founding Managing Editor, Richard Stolley, told a writers' workshop in 1995. "[P]rivacy... involves a collision between the First Amendment, freedom of the press, and the Fourth and Fourteen[th] amendments[,] which have been interpreted to mean freedom from the press."\textsuperscript{64}

Courts across the country strike differing measures for how far they will allow the press to carry its First Amendment privilege. Privacy cases began

\textsuperscript{59} Shulman v. Group W Prod., Inc., 955 P.2d 469 (Cal. 1998).
\textsuperscript{60} Poteet v. Roswell Daily Record, Inc., 584 P.2d 1310 (N.M. Ct. App. 1978). \textit{See also} Bloch v. Ribar, 156 F.3d 673, 676, 687 (6th Cir. 1998) (affirming dismissal of privacy claim against sheriff who released rape victim's intimate and "extremely humiliating" details of her assault).
\textsuperscript{62} \textit{Id.} at 603 (citing Stryker v. Republic Pictures Corp., 238 P.2d 670 (Cal. Ct. App. 1956)).
\textsuperscript{63} Richard Stolley, Speech at National Writers' Workshop, Hartford, Conn. (Apr. 1, 1995). Stolley, in 1974, became the founding editor for \textit{People} magazine and is credited with inventing the term "personality journalism." \textit{Id.}
\textsuperscript{64} \textit{Id.} Stolley suggests the turning point in publishing private facts is when the "private facts become so newsworthy that their publication is justified." \textit{Id.} For \textit{People} magazine's "personality journalism" that was a fine line. "In one sense, every story we did was an invasion of somebody's privacy," Stolley told the workshop. \textit{Id.}
to find their way into the courts regularly in the 1960s, 1970s, and the 1980s, although the *New York Times Co. v. Sullivan*\(^{65}\) and *Hustler Magazine v. Falwell*\(^{66}\) cases, for example, saw the courts support the First Amendment and impose heavy burdens of proof on those who sued.\(^{67}\) In fact, First Amendment scholar Alexander Meiklejohn, in response to the *Sullivan* decision, proclaimed it was a time for “dancing in the streets.”\(^{68}\) Anthony Lewis suggests that the First Amendment boasts tremendous power in the privacy-publicity battle.\(^{69}\) “But despite all those legal trappings, those grounds for recovery of damages, lawsuits for violation of the right to privacy, have not often proved fruitful.”\(^{70}\) Lewis cites the case of *Sidis v. F-R Publishing Corp.*\(^{71}\) as proof courts often side with the media in privacy-invasion cases.\(^{72}\)

But the media’s collective belief that the First Amendment would shield it from legal action for its newsgathering techniques began to fizzle in the 1980s and 1990s.\(^{73}\) Cases marching into the courts forced those courts to begin weighing the press’s invasion against the public’s right to know.\(^{74}\) Courts struggled with this delicate balance, giving ground to plaintiffs suing the media. “[T]he virtually absolute status of the [First] Amendment somehow doesn’t seem to make as much sense to [the courts] in 1990 as it

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69. Anthony Lewis, Goodwin Seminar Speech, Shepard Broad Law Center, Nova Southeastern University, Ft. Lauderdale, Fla. (Apr. 11, 2002). Lewis authored the book *Gideon’s Trumpet*.
70. *Id.*
71. 113 F.2d 806 (2d Cir. 1940). Sidis was a child prodigy who, after having his storied childhood chronicled by the press, dropped out of sight. *Id.* at 807. A story in the late 1930s detailed Sidis’s current status as living alone in a run-down building in Boston. *Id.* He sued for invasion of privacy and lost, as the Second Circuit refused to grant “all of the intimate details of private life an absolute immunity from the prying of the press.” *Id.* at 809.
72. Lewis, *supra* note 69.
did in 1791," explained Jane Kirtley, executive director of the Reporters Committee for Freedom of the Press.75

_Time, Inc. v. Hill_76 marked the first true case of privacy versus a free press when the United States Supreme Court considered the privacy-invasion claim of a family held hostage for nineteen hours by three prison escapees.77 The harrowing experience was turned into a play approximately two years after the incident.78 *Life* magazine, in a feature on "The Desperate Hours," ran photos and a story of the incident, triggering a new round of severe emotional trauma for the Hill family.79 The Court, in a 5-4 decision, set aside a $30,000 judgment James Hill had won in a lower court.80 Justice Brennan's majority opinion found "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."81 A dissenting Justice Harlan countered that the inherent dangers of a free press included "a severe risk of irremediable harm to individuals involuntarily exposed to [publicity] and powerless to protect themselves against it."82

These two Hill views boldly drew the battle lines for the free press-versus-privacy debate that continues in this country today. The media acts as a watchdog for a country looking for information on which to base opinion, decision, and debate.83 Too much control over publications, and the danger clearly becomes exactly what the free speech clause seeks to eliminate: a chilling effect on the press and a society that suffers from

75. Id.
76. 385 U.S. 374 (1967).
77. Id. at 378.
78. Id. The Hill family sued under the New York privacy statute, N.Y. CIV. RIGHTS LAW §§ 50–51. Id. n.1. The statute requires first obtaining written consent of a person before their name, portrait, or picture is used for commercial purposes. Id.
80. Id. at 379, 398.
81. Id. at 388.
82. Id. at 410 (Harlan, J., concurring in part and dissenting in part).
83. When the press oversteps its bounds and "roams into our cherished private-sphere, it seems to turn dangerous and predatory. And then we Americans turn on the press." Kevin P. Quinn, *America*, Apr. 20, 1996, at 28 (book review).
stifled discourse on key issues in its communities.\textsuperscript{84} Too little, and we risk the same result.\textsuperscript{85}

Some scholars argue the media risks far more than litigation when digging into people's past and present; they risk reputation. Again, the press must balance its attempts to please both types of reader: those looking for news and shocked at privacy invasions, and those thirsting for salacious, down-and-dirty details that offer little news value. Often, those readers are one and the same.\textsuperscript{86}

IV. THE CASE FOR INVOLUNTARY PUBLIC FIGURE

Case law in privacy-invasion claims is a mixed bag, with courts using different standards to reach a multitude of conclusions. Almost as varied as the final rulings are the facts relied on in each case to reach the end result. But before this article examines the cases involving privacy claims, two instances, neither of which resulted in any type of litigation, stand for how unwanted media publicity can wreak havoc with those involved in the story.

Robert O'Donnell leaped into the national spotlight in 1987, after he slunk down a narrow well pipe in Texas to save an eighteen-month-old girl. He garnered hero status, appeared in a parade, made numerous television appearances, and collected a White House salute.\textsuperscript{87} Then the limelight waned, O'Donnell's marriage fell apart, and an addiction to prescription drugs led to his dismissal from the fire department.\textsuperscript{88} In April 1995, four days after watching rescue workers try to save survivors from the bombed


\textsuperscript{85} See Alexandra Varney McDonald, \textit{Hazy Future for Hidden Cameras}, A.B.A. J., Oct. 1999, at 31. Los Angeles free speech attorney Neville L. Johnson is quoted within the article as saying that with a lack of privacy "the ultimate victim will be the First Amendment because people will be more circumspect and closed in discussion[]. . . . deter[ring] what the First Amendment seeks to promote: the free and robust exchange of ideas." \textit{Id.}

\textsuperscript{86} Kurtz, \textit{supra} note 38. Kurtz quotes Todd Gitlin, a sociology professor at the University of California, Berkeley: "Everyone is both a voyeur and a citizen . . . . The voyeur is reading with eyeballs bugging out, while the citizen is saying 'These abominations are sinking lower once more.'" \textit{Id.} Kurtz also notes in his story that a Boston radio show host, "pissed off" at \textit{USA Today}'s story of tennis star Arthur Ashe's AIDS illness, offered a $1,000 reward to listeners who could supply "dirt" on the newspaper's top editors. \textit{Id.}


\textsuperscript{88} \textit{Id.} In fact, an O'Donnell book deal fell through and a cameo appearance in a movie was cut from the final version. \textit{Id.}
Chrzan Federal Building in Oklahoma City, Oklahoma, O’Donnell used a shotgun to kill himself. Hero status imparted by press coverage can devastate, experts say. “Becoming a hero is like living in a balloon that is blown up and deflated,” said Chuck Niedzialkowski, a counselor who specializes in disaster-related mental health work. Firefighters involved in the September 11, 2001 World Trade Center tragedy echo those sentiments. “It was difficult getting used to the recognition,” New York City firefighter Don Dillon said. “We weren’t ready for it. We didn’t expect it.”

Thomas Baiter “died” in the World Trade Center attack but lived to tell about it. Newspapers and the Internet listed Baiter, who was employed on the ninety-sixth floor, as dead, and forced him to spend days informing family and friends that he was not. The miscue by the media did not devastate Baiter’s life, but in his eyes, it constituted an “annoying” invasion of privacy. So each intrusion differs, and each person, whether directly or indirectly touched, is affected in a different way.

Looking at case law involving privacy paints a disjointed portrait of where courts stand with media intrusion actions. Some things remain constant. For instance, generally, no intrusion is actionable when a person is in public and in plain view. Three young boys sued Playboy after a picture of them taken with a Springfield, Ohio policewoman, helping them with their bicycle, ran with a nude pictorial of the officer in May 1982. The boys contended the innocent photograph destroyed their right of privacy and humiliated and disgraced them. Citing the Restatement (Second) of Torts, the trial court found, showed the children and the policewoman on a public sidewalk “in plain view of the public eye,” and

89. Id. He reportedly told his mother, “[w]hen those rescuers are through, they’re going to need lots of help . . . for years.” Id.

90. Andreatta, supra note 87. This is the same fate that seemed to strike James Hill’s wife after Life magazine ran its piece on the play recounting their hostage experience. Mrs. Hill suffered a nervous breakdown. Lewis, supra note 69.

91. Andreatta, supra note 87.


93. Id.


96. Id. at 11.


plaintiffs could not show the activity was solely a matter of private concern.  

Richard Jewell, the security guard initially pegged as a hero in the 1996 Summer Olympics bombing at Centennial Park in Atlanta, sued several news organizations after media reports prematurely dubbed him a suspect in the bombing.  Jewell, in a suit against the Atlanta Journal-Constitution, asserted he was a private individual. The court, in affirming the trial court's holding, found that Jewell was a "voluntary limited-purpose public figure," and cited the Gertz v. Robert Welch, Inc. standard:

Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures.... More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Jewell argued he never assumed a role of special prominence in the bombing issue and never thrust himself into the controversy. The trial court, which was affirmed on appeal, held that Jewell granted numerous interviews and a photo shoot, and thus rendered himself a public figure for this situation.

99. *Id.*


101. Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175 (Ga. Ct. App. 2001). The suit actually was a libel action, although it offers a working definition of limited-purpose public figures. The appellate action combined three cases. *Id.* at 178. The one referred to here is Case No. A01A1565, in which the lower court denied his partial motion for summary judgment. *Id.* at 182.

102. *Id.* at 183.


104. Atlanta Journal-Constitution, 555 S.E.2d at 183 (quoting Gertz, 418 U.S. at 342, 345)

105. *Id.* at 183.

106. *Id.* at 185. The appellate court noted Jewell was "prominent enough" to hire a media coordinator to field press inquiries and schedule appearances. *Id.* at 184.
Thrusting oneself into the public eye, even unwittingly, places a person within the press's reach. In *Smith v. National Broadcasting Co.*, a Los Angeles man's report of the escape of a black panther created fear and turmoil in and around the city. Three months later, after the fervor died down and Smith's life returned to normal, an NBC radio station broadcast a reenactment of the black panther hunt based on Smith's report and his subsequent arrest for filing a false police report. Smith sued for invasion of privacy, and a California appellate court held he had brought the invasion on himself. "By his participation in what ultimately proved to be a baseless report... plaintiff became stamped with the imprint of public notoriety and renounced his right of privacy... for '[t]here can be no privacy in that which is already public.""

In *Jacova v. Southern Radio and Television Co.*, the plaintiff was not a criminal, but claimed he appeared as one on television, after a videotape taken during a police raid on a Miami Beach cigar shop aired on the evening news. Jacova entered the shop as a customer and, after the gambling raid, ended up being filmed while talking with a law officer. The footage ran with a voice over that, Jacova claimed, made it appear that he was being arrested. The Supreme Court of Florida ruled that broadcasters had a qualified privilege to use the name or picture of someone "who has become an 'actor' in a newsworthy event." The court then tackled the question of when a person becomes an actor in a public event and cited a New York court's dicta:

One traveling upon the public highway may expect to be televised, but only as an incidental part of the general scene. So, one attending a public event such as a professional football game may expect to be televised in the status in which he attends. If a mere spectator, he may be taken as part of the general audience, but may not be picked out of a crowd alone, thrust upon the screen and unduly fea-

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108. *Id.* at 602.
110. 83 So. 2d 34 (Fla. 1955).
111. *Id.* at 35.
112. *Id.*
113. *Id.*
114. *Id.* at 37.
Where, however, one is a public personage, an actual participant in a public event, or where some newsworthy incident affecting him is taking place, the right of privacy is not absolute, but limited.\(^{115}\)

The Florida high court then found the airing of the plaintiff's picture was not an unreasonable or unwarranted invasion of privacy.\(^{116}\)

Courts show little sympathy to crime victims, who carry almost no protection from press publicity. After an assailant shot Susan Barker and murdered her companion, and before the killer was caught, a newspaper published her name and address.\(^{117}\) Barker sued for invasion of privacy, but the court sustained dismissal of the case, finding Barker had been thrust into the public eye in an event that was of legitimate public concern and logically connected with the publication of her name and address.\(^{118}\) "The right of the individual to privacy is limited by the public's right to have a free dissemination of news and information."\(^{119}\) A similar case involved the publication of a fourteen-year-old sexual assault victim's name after its release during a court hearing.\(^{120}\) The plaintiff argued the publication was not newsworthy and therefore not privileged.\(^{121}\) The appellate court affirmed summary judgment for the defendant newspaper, finding the incident was one of public record, making it newsworthy and "privileged as a matter of law."\(^{122}\)

The public records defense becomes a potent weapon for the press in publication of private or embarrassing facts. In *Wolf v. Regardie*,\(^{123}\) the plaintiff tried to thwart a story on his development projects in a Washington, D.C. business magazine.\(^{124}\) The story dealt with details of Wolf's business dealings that he wanted kept private.\(^{125}\) An appellate court affirmed summary judgment against Wolf, finding that public records such as the tax

\(^{115}.\) *Jacova*, 83 So. 2d at 37 (emphasis added) (citing Gautier v. Pro-Football, Inc., 107 N.E.2d 485, 489 (N.Y. 1952) (holding that broadcast of the plaintiff's animal act at halftime of pro football game was part of entire public sporting event and, thus, was not invasion of privacy).

\(^{116}.\) *Id.* at 40.


\(^{118}.\) *Id.* at 425. The court found Barker was an involuntary public figure. *Id.* at 424.

\(^{119}.\) *Id.* at 425.


\(^{121}.\) *Id.*

\(^{122}.\) *Id.* at 1313.


\(^{124}.\) *Id.* at 1215.

\(^{125}.\) *Id.*
ledgers, court files, and government records research in gathering information for the story provided a shield for the press.126

Likewise, six members of the University of Maryland basketball team sued a local newspaper after it ran a story in November 1977 about the youths either being placed on academic probation or recently being removed from it.127 The appellate court affirmed summary judgment for the newspaper, holding the basketball program and its players’ scholastic status “was of significant public interest and concern,”128 and that since the players had “sought and basked in the limelight, . . . [they] will not be heard to complain when the light focuses on their potentially imminent withdrawal from the team.”129

While many courts seem stingy with invasion of privacy claims by private individuals, other tribunals find room to reign in press actions. Strapped to a backboard in a medical transport helicopter, Ruth Shulman never thought her comment about wanting to die would be broadcast to the nation.130 Her words, captured by a microphone worn by a nurse aboard the helicopter, along with footage captured by a camera operator on board the helicopter, aired on the television show On Scene: Emergency Response.131 Shulman sued for invasion of privacy, and the defense argued the accident happened on a public roadway and could be seen by anyone driving by.132 The Supreme Court of California found that the First Amendment protected the defendants in covering a news event within the public’s view, even if the facts broadcast about Shulman were private.133 But the court also concluded a jury should be able to decide whether Shulman reasonably could have expected her conversation with medical workers to be private.134

Arguably, the last thing an injured accident victim should have to worry about while being pried from her wrecked car is that a television producer may be recording everything she says to medical personnel for the possible edification and entertainment of casual television viewers. . . . In short, the state may not intrude into the

126. Id. at 1221.
128. Id.
129. Id. at 660.
131. Id. at 475.
132. Id. at 477.
133. Id. at 497.
134. Id. at 491.
proper sphere of the news media to dictate what they should publish and broadcast, but neither may the media play tyrant to the people by unlawfully spying on them in the name of newsgathering.  

Here, this court seemed torn in trying to play the balancing act—not wanting to disturb First Amendment privileges but still seeing a need to protect people from an almost incomprehensible form of intrusion.

Another rude invasion came early one morning at the Maryland home of Charles Wilson. Wilson and his wife were in bed when police entered their home looking to serve a warrant on the couple’s son.  

A Washington Post reporter and photographer were riding along with police and, though the Wilson’s son was not home, the photographer did snap a shot of Wilson clad only in his underwear with an officer’s gun pointed at his head. The United States Supreme Court found that media “ride-alongs,” long a publicity vehicle for police departments, violated privacy rights protected by the Constitution’s Fourth Amendment. Wilson’s victory was moral not monetary, as the high court affirmed the Fourth Circuit’s dismissal of the suit because the law was unclear, at the time of the raid, as to whether police ride-alongs were violative of the Fourth Amendment.

In another invasion case, felon Arnold Huskey sued NBC for invasion of privacy after the network filmed him without his permission in the exercise yard of the penitentiary in Marion, Illinois. The network contended that Huskey, as a prisoner, was a limited-purpose public figure who lost all rights to privacy while incarcerated, and that he was in a publicly visible area when recorded. The district court, in finding that Huskey’s conviction and imprisonment were matters of public interest, ruled that his time in prison and the prison itself were not.

The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a mor-

135. Shulman, 955 P.2d at 494, 497. Specifically, the court held that summary judgment in favor of the defense on Shulman’s intrusion claim was proper, and allowed her to proceed on the publication of private facts claim. Id. at 497.


137. Id. The photograph never ran in the newspaper. Id. at 608.

138. Id. at 614 (citing U.S. CONST. amend. IV).

139. Id. at 614–15.


141. Id. at 1286.

142. Id. at 1292.
bid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.\footnote{Id. at 1288. The court denied NBC’s motion to dismiss for failing to state a proper cause of action. Id. at 1296.}

Here, the court appeared to merge a reasonable-man standard, along with the mention of decency when finding for Huskey.\footnote{Huskey, 632 F. Supp. at 1288.}

\section*{V. THE PRESS PRESSES ON INTO THE FUTURE}

With lawsuits coming fast and furious, and costing exorbitant amounts of money to defend, the press faces possibly its biggest challenge yet: trying to curb civil actions against it while struggling to retain all of the privileges the First Amendment affords.\footnote{See generally Walsh et al., supra note 4; Sguera, supra note 12.} The press may actually be fighting itself when it comes to this. “We had a lot of debate inside the paper about this,” Dick Rogers, the San Francisco Examiner’s metro editor, was quoted as saying four years ago.\footnote{Kenneth Howe, A Delicate Balancing Act, S.F. CHRON., Apr. 15, 1999, at A1.} “And I don’t have a glib answer for when you do and when you don’t write a story about a person pushed into the public eye.”\footnote{Id.} The answer to the press’s dilemma may be self-policing and self-restraint, some press experts say. “There is a real primal aspect to privacy,”\footnote{Id.} Ellen Alderman, co-author of two privacy books, said. “And I think the public expects the press to draw a line somewhere, even where the law doesn’t.”\footnote{Id.}

The question still exists: how far can the press go? Some say as far as is necessary to inform the public. “What right do we have, in the purest sense, not telling people something?” asked Kathy Pellegrino, recruitment editor for the Sun-Sentinel in Fort Lauderdale, Florida. “It becomes a balancing test. Not so much a legal question, but is it the right thing to do?”\footnote{Kathy Pellegrino, Goodwin Seminar Speech, Shepard Broad Law Center, Nova Southeastern University, Ft. Lauderdale, Fla. (Jan. 24, 2002).}

\footnotesize\begin{itemize}
\item \footnote{Id. at 1288. The court denied NBC’s motion to dismiss for failing to state a proper cause of action. Id. at 1296.}
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\item \footnote{Id.}
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\end{itemize}
The solutions include self-censorship and industry ethics guidelines.\(^{151}\) The guidelines pose a problem, and some say they will backfire, leading to litigation by individuals using the new policies against the press.\(^ {152}\)

VI. CONCLUSION

Courts increasingly walk a narrow line in refereeing the age-old battle between freedom of the press and freedom from the press, as media outlets push the envelope with new technology, new competition, and new topics on which to report. The world is so different today than it was more than a century ago when Warren and Brandeis penned their right to privacy article. There is more news, more information, and more people who yearn, demand, need, and require that news function in an open and free society. The press plays a vital role in the free-flow of information and must continue to do so, even when it damages the lives of private citizens. To be sure, there remain some areas that must be off limits to publicity. For example, the details of the life of a citizen not involved in a general news event, where no greater good for society lies in publishing the information, ought to remain protected. But this exclusionary category shrinks each day. Additionally, this country’s foundation of free speech and free press can never be usurped—not even by the right to privacy.

As the press furrows out fresh news stories for its readers, the subjects of those news accounts become increasingly more litigious. Courts sometimes make matters worse with their broad interpretation of “newsworthiness” and shifting definitions of “limited” or “voluntary” public figures. Ultimately, the burden of curbing privacy invasions must rest with the press itself, as courts will be and should be unwilling to eviscerate the First Amendment to save the thin skin of those who end up, through no fault of their own, in newsworthy events. This creates a stalemate in the clash between the right to privacy and the right to know.

We must leave the press to police itself—to do the right thing—to be, as Warren and Brandeis said of the right to privacy, “elastic.”\(^{153}\) And when, as they theorized in 1890, the press oversteps its bounds, we can rely on the public, the very entity by which the press survives, to rebel and force the press back in line.

\(^{151}\) Howe, supra note 146.

\(^{152}\) Id. (quoting Jane Kirtley, executive director of The Reporters Committee for Freedom of the Press).

\(^{153}\) Warren & Brandeis, supra note 3, at 215.
It has been that way for more than 100 years and it will continue in that vein for centuries to come. People choose to live in the “land of the free.” Inherent in that choice is the acceptance of a reduced level of privacy, one needed for the greater good of society.