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## Privacy in Broadcasting

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## PRIVACY IN BROADCASTING

EUGENE N. ALEINIKOFF†

It takes but little consideration of the words "privacy" and "broadcasting" to recognize their inherently antithetical meanings. Privacy, of necessity, implies the shutting out of the outside world; broadcasting connotes public exposure to the widest extent possible. The issue of privacy in particular and the press in general has been commonly identified as a conflict between the competing interests of a democratic society in the right of the individual to be let alone and the right of the public to be fully informed.<sup>1</sup> Though both are valued and deep-felt liberties, accommodation has often been difficult since long before the intrusion of television into the American way of life.

With the communications revolution in which we are now well engulfed, the legitimate bounds of private confidence and public knowledge increasingly require re-definition. There no longer appears to be any practical way of isolating oneself from continuous and direct outside view—and not just in the reportorial sense. Electronic apparatus has progressed so fast and so far that the "martini olive" radio transmitter has become old-fashioned in the face of laser-beam long-distance "bugging"; parabolic microphones and telescopic cameras are standard equipment to obtain unobtrusive (and often undetectable) television pick-ups. It is clear that nobody should be surprised at being visually or aurally recorded anywhere in public, nor feel secure against eavesdropping in his office, in his home, or even in his own bed.<sup>2</sup>

Similar electronic marvels are occurring every day in broadcasting science, almost too frequently to be noticed. The television wrist watch

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1. The right of privacy has by unanimous consent been accorded its initial conceptualization in a germinal *Harvard Law Review* article entitled "The Right to Privacy," co-authored by Samuel D. Warren and Louis D. Brandeis, 4 HARV. L. REV. 193 (1890). After an initial half-century of comparative neglect, legal comment and discussion has multiplied and increased over the past two decades to the point where general periodical and text citation becomes supererogatory. Two recent books should perhaps, however, be noted: HOFSTADER & HOROWITZ, *THE RIGHT OF PRIVACY* (1964), for lawyers; ERNST & SCHWARTZ, *PRIVACY, THE RIGHT TO BE LET ALONE* (1962), for the lay reader.

2. An extremely knowledgeable, and rather frightening, survey of current and future surveillance devices and techniques is provided in a two-part article by Professor Alan F. Westin in the *Columbia Law Review* entitled *Science, Privacy and Freedom: Issues and Proposals for the 1970's* (pts. 1-2), 66 COLUM. L. REV. 1003, 1205 (1966). See also *Hearings on Invasions of Privacy before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st & 2d Sess., pts. 1-6 (1965-1966); *Hearings on Invasion of Privacy before a Special Subcommittee of the House Committee on Government Operations*, 89th Cong., 1st Sess. (1965).

is no longer far removed from the transistor radio; foreseeable are popular television records selling at prices not much higher than our present phonograph long-playing records. Color television has become commonplace after many years of development; three-dimensional television may well arrive much sooner. Communications satellites are fast enveloping the world, permitting simultaneous and far-flung international broadcasting; home videotape recorders will soon permit retention of missed television programs for later viewing. In short, all broadcasts are rapidly becoming universally and permanently available for the viewing and listening audience.

As privacy has become less private and broadcasting more broad, it is not surprising that privacy suits have finally begun to rival defamation suits against broadcasters in the state and federal courts across the country.<sup>3</sup> Their frequency would probably be even greater were it not for the unbelievable attraction which television appearance seems to hold for most average citizens, and the painstaking care exercised by broadcasters in requiring their production staffs to insist upon personal releases in all but the most clear-cut cases of communications privilege. Despite these efforts, the kind of privacy litigation that may arise is exemplified by the well-publicized proceedings in the New York *Yousoupoff* case.<sup>4</sup>

## I

*Rasputin Re-Interred: Yousoupoff v. CBS.* The *Yousoupoff* case involved two Chicago housewives who had been inspired to write an amateur television script on the Rasputin legend for a local contest. Conceiving of a half-hour vignette of the slaying of Rasputin, the authors did most of their research at the public library. Their script corresponded closely with their reference sources with few embellishments, as they intended to present an authentic historical episode rather than merely a heightened dramatic adaptation for television. Whether the authors believed all of the actual participants to be dead or were unfamiliar with the possible legal risks, Prince Yousoupoff among others was featured by name.

"If I should Die," as the television program was entitled, was produced and broadcast in Chicago over CBS station WBBM in December, 1962, on a partly sponsored basis. It was re-broadcast the following month over the CBS station in New York City—this time without commercial sponsorship. But in New York, the program apparently attracted more notice than in Chicago; for early in 1963, Prince Yousoupoff in-

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3. O'Neil, *Television, Tort Law, and Federalism*, 53 CALIF. L. REV. 421, 441 (1965).

4. *Yousoupoff v. Columbia Broadcasting System Inc.*, 41 Misc. 2d 42, 244 N.Y.S.2d 701 (Sup. Ct.), *aff'd mem.*, 19 App. Div. 2d 865, 244 N.Y.S.2d 1 (1963).

stituted an action against CBS under the New York statute making use of a person's name, portrait or picture for "advertising purposes or for purposes of trade" actionable if without written consent.<sup>5</sup>

CBS's defense was initially two-fold: foremost, that the program fell within the well-established news and information exceptions to the right of privacy; secondarily, that the program was not produced for commercial purposes.

Both parties moved for summary judgment before trial; both motions were denied.<sup>6</sup> The court found the program not dissimilar in content to the Prince's own accounts, and held that use of the dramatic form on the program could not, as a matter of law, convert the information privilege into privacy liability. Hence the plaintiff was not entitled to judgment on the pleadings alone. Nevertheless, the plaintiff might be able on trial to prove that the dramatization tended to "outrage public opinion or decency in respects other than those produced by admitted historical facts" or tended to establish commercial exploitation of the Prince's personal life. Accordingly, the defendant's motion for summary judgment was also denied.

The trial court's opinion was upheld on appeal,<sup>7</sup> and the case went to trial in the fall of 1965. A long three weeks of testimony ensued—most of which was the Prince's examination and cross-examination on what actually happened on that fateful day some fifty years earlier 5000 miles away. Taking their lead from the court's earlier opinions, his lawyers attempted to concentrate on two particulars in which the program had allegedly been both misleading and embarrassing: first, that the Prince lured Rasputin to his palace by promising that his wife would also be present; and second, that the Prince's motivation in killing Rasputin was personal revulsion rather than patriotic fervor. CBS endeavored to refute both contentions from, among other sources, the published writings and public statements of the Prince himself. And these two rather nar-

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5. N.Y. CIV. RIGHTS LAW §§ 50, 51. It is interesting to speculate to what extent the privacy suit against the CBS program was inspired by an earlier successful libel suit by the Prince's wife in England against a feature motion picture on the same subject. *Yousoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, [1934] 50 T.L.R. 581.

6. 41 Misc. 2d at 48-49, 244 N.Y.S.2d at 706-08.

7. The three-judge majority of the Appellate Division held that the moving affidavits did not contain sufficient evidence to determine whether the "broadcast represented a fictionalization of the historic facts or whether the broadcast itself was for commercial purposes." 19 App. Div. 2d at 865, 244 N.Y.S.2d at 1. Two other judges were of the opinion that the plaintiff was entitled to recover since "the immunity granted in respect to informative matter does not extend to dramatized or fictionalized versions of the event reported"—but that the issue of damages nevertheless remained open for trial, so that summary judgment was not an appropriate remedy. 19 App. Div. 2d at 866, 244 N.Y.S.2d at 2. Also note that defendant's motions to dismiss the complaint and for a directed verdict were subsequently denied by the trial court. 48 Misc. 2d 700, 265 N.Y.S.2d 754 (Sup. Ct. 1965).

row points gradually became the focal issues in what had begun as a much broader proceeding.

The jury returned a verdict for CBS—principally, it can be presumed, on the basis of the program's historical accuracy, although perhaps also from a belief that the Prince had suffered no compensable embarrassment from his prominent depiction on the CBS program.

*Fact—Fiction: Spahn v. Messner.* The rationale of the *Yousoupoff* opinions before trial was clearly an adaptation for television of the "fact-fiction" test previously developed in the New York courts with respect to print media. The theory seems fairly simple and straightforward. Factual reports of current or historical events have been considered to be informational and educational, and therefore to override the privacy right of any individual involved. Fictional accounts have been assumed to be aimed at entertainment alone and to be inspired by those commercial motives against which the right of privacy is intended to be a protection. On these assumptions, the judicial inquiry can be limited to determining whether a given publication is factual or fictional in character in order to assess liability.<sup>8</sup>

The fact-fiction formula was consistently applied throughout the proceedings in another recent New York case, *Spahn v. Messner*.<sup>9</sup> Warren Spahn, a pitcher for the then Milwaukee Braves, brought suit against the New York publisher of a juvenile book entitled, appropriately enough, "The Warren Spahn Story." Spahn's argument was that although the book was generally complimentary, it was published without his consent—and although it generally reflected his biography, it contained specific incidents that were either highly sensationalized or substantially untrue.

In the *Spahn* case, the New York courts uniformly held on trial and appeal that, compared with the actual circumstances, there were enough discrepancies to hold the book fictional rather than factual. Consequently, despite the fact that Spahn was admittedly a very public figure whose name and biography might not have been entitled to privacy if accurately publicized, the publisher was held not to be entitled to exemption from the New York right of privacy act. Spahn was therefore awarded an injunction and \$10,000 in damages.

But what was inherently involved in the *Spahn* case was not so much

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8. Origin of the New York fact-fiction distinction has been attributed as far back as *Binns v. Vitagraph Co.*, 210 N.Y. 51, 103 N.E. 1108 (1913). For perceptive analysis and persuasive criticism, see Note, *Right of Privacy v. Free Press: Suggested Resolution of Conflicting Values*, 23 IND. L.J. 179 (1953).

9. *Spahn v. Julian Messner, Inc.*, 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964), *aff'd*, 23 App. Div. 2d 216, 260 N.Y.S.2d 451 (1965), *aff'd*, 18 N.Y.2d 324, 221 N.E.2d 543 (1966), *vacated and remanded*, 87 S. Ct. 1706 (1967).

the right of "privacy" as the right of "publicity"—that is to say, the right of a celebrity to control the commercial exploitation of his personality.<sup>10</sup> The New York courts have been reluctant to recognize any such property right standing on its own, but have been willing at times to find ways to include this type of commercialization within the "purposes of trade" language of the New York Civil Rights Law, so long as true educational and informational publications are not affected. As was said at one stage of the appeals in the *Spahn* case:

It is true, as it ought to be, that a public figure is subject to being exposed in a factual biography, even one which contains inadvertent or superficial inaccuracies. But surely, he should not be exposed, without his control, to biographies not limited substantially to the truth.<sup>11</sup>

Unfortunately, this "fact-fiction" analysis is not always easy to match up in the earlier New York decisions, even when closely contemporaneous. For example, in 1950 a "true" comic book was held to be privileged,<sup>12</sup> although in 1951 an allegedly accurate article in a "true" detective magazine was held subject to possible liability.<sup>13</sup> At about the same time, an admittedly enriched and possibly embarrassing biography of Maestro Koussevitsky was held exempt from injunction,<sup>14</sup> while what was probably a less contrived magazine article on a World War II pilot was held actionable.<sup>15</sup> And in the California courts, it is interesting to contrast two motion-picture cases: *Stryker v. Republic Pictures*,<sup>16</sup> where an ex-marine hero could not prevail against use of his characterization in a movie entitled "The Sands of Iwo Jima," and *Melvin v. Reid*,<sup>17</sup> where a reformed prostitute successfully had sued over use of her notorious past as the plot for a feature film.

Nevertheless, the "fact-fiction" test was readily embraced once again by the highest New York court when it ruled on the final appeal of *Spahn v. Messner* last October. In its opinion, moreover, the New York Court of Appeals pointed to another New York case, *Hill v. Hayes*, then

10. Cf. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 *Nw. U.L. Rev.* 553 (1960).

11. 23 *App. Div. 2d* at 221, 260 *N.Y.S.2d* at 456.

12. *Molony v. Boy Comics Publishers, Inc.*, 277 *App. Div.* 166, 98 *N.Y.S.2d* 119 (1950).

13. *Garner v. Triangle Publications*, 97 *F. Supp.* 546 (S.D.N.Y. 1951).

14. *Koussevitzky v. Allen, Towne & Heath, Inc.*, 188 *Misc.* 479, 68 *N.Y.S.2d* 779 (Sup. Ct.), *aff'd*, 272 *App. Div.* 759, 69 *N.Y.S.2d* 432 (1947).

15. *Sutton v. Hearst Corp.*, 277 *App. Div.* 155, 98 *N.Y.S.2d* 233 (1950).

16. *Stryker v. Republic Pictures Co.*, 108 *Cal. App. 2d* 196, 238 *P.2d* 670 (1951).

17. *Melvin v. Reid*, 112 *Cal. App.* 285, 297 *Pac.* 91 (1931).

pending for some time on appeal in the U.S. Supreme Court.<sup>18</sup>

*Constitutional Considerations: Hill v. Hayes.* Early in January of this year, the Supreme Court finally handed down its decision reversing *Hill v. Hayes*, in *Time Inc. v. Hill*.<sup>19</sup> With one fell swoop, Justice Brennan's opinion for the majority undercut the entire "fact-fiction" hypothesis on first and fourteenth amendment grounds, leaving the New York Civil Rights Law with markedly diminished application.

The *Hill* case involved a 1955 *Life Magazine* feature that compared an admittedly fictional novel, play, and movie—all by Joseph Hayes and called "The Desperate Hours"—with a celebrated incident three years earlier in which escaped convicts held the Hill family captive in their Pennsylvania home for some twenty hours. In reporting on the opening of the play, *Life* went so far as to photograph scenes reenacted by the cast in the actual Hill house (from which the Hill family had in the meantime moved to Connecticut in what may be presumed to have been a search for anonymity); it also described "The Desperate Hours" as reflecting the Hills' unpleasant experience, when in fact there were essential differences (including the family's treatment at the hands of the convicts).<sup>20</sup>

With these adverse aspects of artificiality, commerciality and misrepresentation present, it was easy for the New York courts to uphold the Hills' claim and award substantial damages to the family. *Life's* sensationalized approach was found to be aimed primarily at increased sales of the magazine and advertising for the play, and so was viewed as not serving any bona fide news or public interest purpose legitimately exempt from privacy actions.

Bringing to bear the same principles that guided its decision in *New York Times v. Sullivan*,<sup>21</sup> however, the Supreme Court reversed. Expressly disagreeing with the New York Court of Appeals in *Spahn v. Messner*,<sup>22</sup> the majority opinion is direct and forthright:

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18. *Hill v. Hayes*, 27 Misc. 2d 863, 207 N.Y.S.2d 901 (Sup. Ct. 1960), *aff'd*, 18 App. Div. 2d 485, 240 N.Y.S.2d 286 (1963), *aff'd*, 15 N.Y.2d 986, 207 N.E.2d 604 (1965), *prob. juris. noted*, 382 U.S. 936 (1965), *reargument ordered*, 384 U.S. 995 (1966). For an early evaluation of the New York decisions and thoughtful presentation of the possible constitutional issues involved, see Silver, *Privacy and the First Amendment*, 24 *FORDHAM L. REV.* 553 (1966).

19. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

20. The Hill family incident occurred in the fall of 1952; the Hayes' novel was published in the spring of 1953; the *Life* picture article appeared early in 1955 just before the Broadway opening of the play; the motion picture was released in 1956 after the beginning of the Hill law suit.

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

22. Although the first amendment issue had been pointedly raised on final appeal in *Spahn v. Messner*, the New York Court of Appeals distinguished *New York Times v. Sullivan* on the basis that it was applicable only to suits against public officials for offi-

We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.<sup>23</sup>

Fictional or factual, false or true, commercially or altruistically inspired, therefore, a right of privacy action against a published story, report, article or other account is henceforth constitutionally barred not only if substantially accurate or inadvertently inexact, but even if materially and injuriously incorrect through indisputable lack of research care. Anything more than liability limited to calculated falsehood, the Supreme Court has held, would illegally impair the exercise of the freedoms of speech and press.

## II

In reversing the *Hill* case, the Supreme Court has undoubtedly cleared a wider swath of journalistic freedom for television as well as the rest of the American press. No longer need broadcasters be excessively apprehensive about being able to prove historical or reportorial accuracy to the last detail in order to avoid the appearance of fictionalization or sensationalism. In effect, television has been relieved of the fact-fiction strait-jacket sought to be imposed in the *Yousoupoff* case—always an especially uncomfortable fit for the broadcaster for a variety of obvious reasons.

First, accuracy of character and situation portrayal has never been a reliable standard for distinguishing between entertainment and information. Television fiction usually involves dramatization, but dramatization is not necessarily inconsistent with fact. Television non-fiction is most often presented in a documentary format, but all documentary producers must select between differing interpretations by historians and other experts in presenting what is hopefully an objective program. The *Yousoupoff* case itself indicates the pitfalls that lie in the path of the most conscientious researcher of historical material for television production.

Second, commercial sponsorship is an equally unreliable index upon

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cial conduct. Judge Keating, for the unanimous court said: "The free speech which is encouraged and essential to the operation of a healthy government is something quite different from an individual's attempt to enjoin the publication of a fictitious biography of him. No public interest is served by protecting the disseminator of the latter. We perceive no constitutional infirmities in this respect." 18 N.Y.2d at 329, 221 N.E.2d at 546.

23. 385 U.S. at 387-88. On appeal, the Supreme Court specifically vacated the judgment and remanded the case to the New York Court of Appeals "for further consideration in the light of *Time, Inc. v. Hill*."

which to judge program content or purpose. Television advertising is not limited to amusement programs, and not all unsponsored programs are informational in character. A factual biography of a popular hero may be motivated by greater commercial reasons than a fictional sketch of a lesser figure; a fully sponsored documentary film may be more profitable than a partially sponsored dramatic episode. Besides, even when broadcast on a purely public service basis, almost all programs are surrounded (and perhaps interrupted) by so-called "spot" advertisements not very different from sponsor messages.<sup>24</sup> Commercial television invariably involves considerations of profit; educational television is always non-profit by definition—but certainly neither should be considered susceptible to or immune from privacy claims on that basis alone.

Third, fact and fiction are too often indistinguishable by the television public. The immediate and intimate impact of the television picture, the widely varied nature and format of television programs in adjacent time periods, the ever-expanding range of television production and broadcast techniques, the immense and multifarious television audience, the domestic interruptions and channel-switching that usually attend homeviewing—all these make it difficult for the viewer to determine what programs are "live" or recorded, actual or reenacted, impromptu or scripted, news or history, drama or documentary. The characteristic misimpressions of television viewers about what they see are as notorious as their unending capacity to sit before the television tube.<sup>25</sup>

Last, the fact-fiction line is frequently blurry in television production. Documentary film producers have for some time been exploring new dramatic techniques to re-create historic events and report on current happenings. Dramatic programs have often proved most successful when using documented dialogue verbatim. The combined dramatic-actuality techniques of the latest "cinema-verité" films and "non-fiction" novels are indicative of the way in which television programs too are increasingly becoming intermixtures of fact and fiction, of information and entertainment—even, as the Supreme Court has prophesied, of amusement and propaganda.<sup>26</sup>

In short, the way taken in the *Yousouppoff* case—searching into the

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24. Even fully "sustaining" broadcasts have been found to be commercially inspired. *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490, 493 (W.D. Pa. 1938); cf. Note, *Privacy Invasion by Telecast*, 15 FED. B.J. 186, 188 (1955).

25. Television lawyers are still haunted by the Orson Welles "Martian invasion" radio broadcast and the spate of lawsuits that followed almost thirty years ago. Hence the usual network practice, through subtitles and superimpositions, introductions and explanations, to explain the nature of programs, segments or sequences which might possibly be subject to misunderstanding.

26. *Winters v. New York*, 333 U.S. 507, 510 (1947).

murky past for minute details surrounding myth-like events—seems at best to have been a slippery road through swampy land. Far firmer footing has now been provided by the Supreme Court in the *Hill* case: Legal liability has been constitutionally limited to intentional or reckless falsification of fact.

It is interesting to note, moreover, that subjecting the privacy right to constitutional limitations represents not just the views of the five-judge majority of the Supreme Court. Even the dissenters in the *Hill* case did not disagree with the interposition of a constitutional barrier around inaccurate reports so long as reasonable journalistic efforts are made, irrespective of possible harm to private individuals. Justice Harlan would apparently be willing to premise liability on “negligence” alone; Justice Fortas, with whom Justices Warren and Clark agreed, in taking issue with the majority about whether the *Hill* jury’s findings amounted to “recklessness,”<sup>27</sup> also indicated an underlying predilection in favor of press over privacy.

Going further than the majority opinion, moreover, Justices Douglas and Black in their concurring opinions saw the interests of a free press precluding any privacy suit irrespective of purposeful falsification, intentional injury, or outright malice. Justice Black viewed the privacy right as judge-made and certainly not in a class with basic constitutional freedoms; Justice Douglas, who first explicitly enunciated a constitutional right of privacy in the Connecticut birth control opinion,<sup>28</sup> simply saw no individual privacy in connection with a public event.

For none of the nine Supreme Court Justices, then, has the emphasis on the fact-fiction test in the *Youssouf* and *Spahn* cases been justifiable. Whatever the right of “privacy” or “publicity” may be, it cannot lead to legal recovery for the use of an individual’s name, picture, or biography in print or through the air waves in the absence of proven malicious intent or undoubted “recklessness” in the false publication of damaging material of public interest. In a communications media such as television, which is subject to such intense public scrutiny and close federal regulation, a finding of intentional or reckless mendacious harm should be rare indeed.<sup>29</sup>

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27. It is apparently in the hope of proving such “recklessness” in the *Life* article that former Vice-President Nixon, who argued for the Hill family before the Supreme Court, has announced his intention to seek a new trial in the New York courts. N.Y. Times, Jan. 11, 1967, p. 14, col. 2.

28. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

29. O’Neil, *Television, Tort Law and Federalism*, 53 CALIF. L. REV. 421, 464 (1965): “Under the general rubric of ‘public interest,’ the FCC undoubtedly has power to consider flagrant violations of state tort law in appraising the performance of a licensee.”

## III

The *Hill* case need not, however, be construed to have banished all considerations of privacy from broadcasting. In refusing to invalidate the New York statute altogether, for example, the Supreme Court has permitted its continued application to the unauthorized use of an individual's name or picture for product endorsement or other advertising use.<sup>30</sup> Since no public informational purpose is served and private profit alone is concerned, commercial endorsements can properly be statutorily required to be dependent on personal permission. Even for Justices Douglas and Black, there would appear to be no constitutional inhibition on as much absolute liability for trade advertising as absolute freedom for press content is required by constitutional mandate. The omnipresent television commercial, therefore, continues to be a potential source of privacy suits.

The Supreme Court's footnotes have also explicitly left the door open to further consideration of two other regions of the privacy area: (1) the extent of permissible protection of "intimate personal details of an embarrassing nature,"<sup>31</sup> and (2) the unlicensed publication of recorded material surreptitiously obtained.<sup>32</sup> While both are somewhat related in their emphasis on personal integrity, differences in immediacy and import might well lead to different approaches by state courts without fear of constitutional transgression.<sup>33</sup>

The appropriate extent of the private life of a public figure in our society is almost as ill-defined as the appropriate limits on public exposure of a private individual. The Kennedy-Manchester dispute earlier this year points up how innately subjective is the judgment of what is personal and what is historical about a public official; scandal-sheet exploitation of crime victims and others involuntarily in the news is not easy to distinguish from standard stories in our daily newspapers and weekly magazines. As pointed out in the *Hill* opinion, most law suits in which the issue has been raised give lip-service to the principle of personal pri-

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30. Sections 50 and 51 of the New York Civil Rights Law were, of course, specifically aimed at unauthorized advertising use when enacted in 1903. In *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 444 (1902), the New York Court of Appeals had refused protection against use of the plaintiff's picture in defendant's advertisement on the ground that no privacy right existed absent state legislative enactment.

31. 385 U.S. at 383 n.7.

32. *Id.* at 384 n.9.

33. Emphasizing the importance of similar footnote reservations by the Supreme Court in *New York Times Co. v. Sullivan* is *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966).

vacy, but then hold for the defendant on the ground of public privilege.<sup>34</sup>

Outside of the *Hill* case's perimeters encompassing "newsworthy people and events," however, it would not be unreasonable to insist upon responsible reporting in this connection. For so long as responsible reporting includes the twin requirements of professional research of content and reasonable relationship of subject-matter, there should be neither undue restriction on publication nor too broad an invasion of privacy.<sup>35</sup> Such a standard would also exclude liability for the coincidental use of a private name and address in a broadcast or an article, or for the incidental inclusion of a bystander in a film or photograph,<sup>36</sup> without in any way inhibiting recourse by a truly injured individual to the remedies for defamation, unfair competition, or copyright infringement.<sup>37</sup>

Secret surveillance—aural or visual—is in a rather different category. To subject a private individual in person, without his knowledge or consent, to an almost limitless television or radio audience, "live" or by recording, is surely an unjustifiable violation of privacy unless an indisputable and unequivocal "news" item is involved. The Federal Communications Commission last year promulgated regulations against the use of radio and television devices for eavesdropping purposes,<sup>38</sup> the un-

34. The best known example is *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940), dismissing a privacy action against a *New Yorker* magazine profile about the disappointing adulthood of a child genius.

Some courts have tended to be more sympathetic towards subjects of reprinted photographs rather than merely of written text—either where originally unauthorized or taken without consent for news purposes valid at the time. *Leverton v. Curtis*, 192 F.2d 974 (3d Cir. 1951); *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P.2d 133 (1945); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942); see Note, *The Right of Privacy in News Photographs*, 144 VA. L. REV. 1303 (1958).

35. Cf. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 927 (1963); see also Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107, 146 (1963). Note that the requirement of "reasonable relationship and relevancy," even where the report is concededly factual, has already been suggested by commentators and courts. *Silver, Privacy and the First Amendment*, 24 FORDHAM L. REV. 553 (1966); *Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 295 N.Y. Supp. 382 (Sup. Ct. 1937). As to the standard of professional research required to avoid liability, Justice Harlan's opinion in *Curtis Publishing Co. v. Butts and Associated Press v. Walker*, 87 S. Ct. 1975 (1967), is indicative of the probable judicial approach.

36. With respect to name coincidences, compare *Krieger v. Popular Publications, Inc.*, 167 Misc. 5, 3 N.Y.S.2d 480 (Sup. Ct. 1937), with *Swacker v. Wright*, 154 Misc. 822, 277 N.Y. Supp. 296 (Sup. Ct. 1935). With respect to picture inclusions, compare *Blumenthal v. Picture Classics, Inc.*, 235 App. Div. 570, 257 N.Y. Supp. 800 (1932), *aff'd*, 261 N.Y. 504, 185 N.E. 713 (1933), with *Buzinski v. DoAll Co.*, 31 Ill. App. 2d 191, 175 N.E.2d 577 (1961), and *Jacova v. Southern Radio & Television Co.*, 83 So. 2d 34 (Fla. 1955).

37. That those types of actions also are subject to constitutional standards has been indicated with respect to defamation in *New York Times Co. v. Sullivan*, and with respect to unfair competition in the twin cases *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), and *Compo Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

38. FCC RULES, Part 2, Subpart H, § 2.701, and Part 15, Subpart A, § 15.11, and Subpart E, § 15.220, 31 Fed. Reg. 3400 (1966) (effective April 8, 1966).

authorized interception and divulgence of wired or wireless communications had long previously been prohibited by federal statute.<sup>39</sup> Local action against electronic eavesdropping has been taken by both state courts and state legislatures.<sup>40</sup> It seems essential to the democratic process that any identifiable results of such invidious activity should be kept off the broadcast air as well.

The *Hill* decision, it is submitted, does not mean that the right of privacy no longer prohibits the undesirable use of radio and television tapes, films, or other recordings without consent in all but the clearest newscasting circumstances. True, where outright commercial use is not involved, the concept of consent might be rather flexible: in most cases, it should be implied from awareness without objection or exposure without reservation;<sup>41</sup> once given, it should be considered irrevocable and subject only to restrictions expressed at the time;<sup>42</sup> and it should normally be assumed to be a condition of appearance at public gatherings or places so long as no undue emphasis is made or confidentiality breached.<sup>43</sup> But the personal option to refuse to be the subject of scrutiny or recording must always be carefully safeguarded if the right of privacy is to be meaningful in our society in the future. Here the privacy right more closely reflects the considerations of *Griswold v. Connecticut* than those of *New York Times v. Sullivan*, and it is to be hoped that the distinction will be appropriately marked by the Supreme Court when the earliest opportunity arises.

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39. Federal Communications Act of 1934, ch. 652, § 605, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1964).

40. FCC Report and Order, Docket No. 15262, at 3 (Feb. 25, 1966).

41. *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953); cf. *Cohen v. Marx*, 211 P.2d 320 (Cal. App. 1950); see *Sweenek v. Pathe News*, 16 F. Supp. 746 (E.D.N.Y. 1936); *Continental Optical Co. v. Reed*, 25 Ind. App. 643, 86 N.E.2d 306 (1949). But see *Durgom v. Columbia Broadcasting System, Inc.*, 29 Misc. 2d 394, 214 N.Y.S.2d 752 (Sup. Ct. 1961) (citing explicit New York statute requiring written consent).

42. *Jenkins v. Dell Publishing Co.*, 143 F. Supp. 952 (W.D. Pa. 1956), *aff'd*, 251 F.2d 447 (3d Cir. 1958), *cert. denied*, 357 U.S. 921 (1958); cf. *Sinclair v. Postal Tel. & Cable Co.*, 72 N.Y.S.2d 841 (Sup. Ct. 1935); *Dahl v. Columbia Pictures Corp.*, 12 Misc. 2d 573, 166 N.Y.S.2d 708 (Sup. Ct. 1957), *aff'd mem.*, 183 N.Y.S.2d 992 (App. Div. 1959). But see *Garden v. Parfumerie Rigaud, Inc.*, 151 Misc. 692, 271 N.Y. Supp. 187 (Sup. Ct. 1933).

43. *Peterson v. KMTR Radio Corp.*, 18 U.S.L. WEEK 2044 (Cal. Super. Ct., July 26, 1949); cf. *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1951); *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953).

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