NOTES

RIGHT OF PRIVACY vs. FREE PRESS: SUGGESTED RESOLUTION OF CONFLICTING VALUES

Reconciliation of freedom of the press and the right to privacy has evolved hesitantly in an atmosphere of confusion.[1] These two interests, inherent in a democracy, clash repeatedly upon publication of a person's name, history, or likeness. Preservation of individual liberties is of prime importance in a democracy; yet continuance of that democracy necessitates a press which provides sufficient information upon which to base rational self-rule. This conflict, awareness of which was evidenced even in the original writing on the subject,[2] deserves continuous close scrutiny so that a reasonable balance may be achieved.

The tremendous increase in facilities capable of transmitting information created the necessity for legal recognition of an individual's right to be let alone. Coupled with rather devious ethical standards of those in command of such publishing means,[3] this expansion resulted in use of a person's likeness, name, or history, with utter disregard for his desire to avoid the "public eye." Presently, growth of the press continues with the advent of nation wide television as a full fledged partner of the book, radio, newspaper, leaflet, motion picture and magazine.[4]

Meanwhile, the right to privacy has become firmly established in almost all jurisdictions.[5] The gist of an action for an invasion of

1. See Ludwig, *"Peace of Mind" in 48 Pieces vs. Uniform Right of Privacy,* 32 MINN. L. REV. 734, 743 (1948).

2. Warren and Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193, 214 (1890).

3. *Id.* at 196.

4. HOCKING, FREEDOM OF THE PRESS: A FRAMEWORK OF PRINCIPLE 162 (1947).

5. One jurisdiction remains unequivocally adverse to recognition, on any basis, by continued reliance on an old case, Henry v. Cherry and Webb, 30 R.I. 13, 73 Atl. 97 (1909). Other states, including Washington and Massachusetts, have been able to avoid ruling on this point. See Marek v. Zarol Products Co., 298 Mass. 1, 9 N.E.2d 393 (1937); Lewis v. Physicians and Dentists Credit Bureau, 27 Wash.2d 267, 177 P.2d 896 (1947). For a detailed account of the jurisdictions that recognize the right and the basis on which such recognition is afforded see Feinberg, *Recent Developments in the Law of Privacy,* 48 COL. L. REV. 713 (1948); Nizer, *The Right of Privacy,* 39 MICH. L. REV. 526 (1941); Notes, 20 KY. L.J. 184 (1932); 24 NOTRE DAME LAW. 383 (1948-49); 4 U. OF CHI. L. REV. 342 (1936-37); 15 U. OF CHI. L. REV. 931 (1947-48).

privacy is the emotional disturbance produced by unreasonable interference with one's peace of mind. The action is distinguishable from defamation which stresses the effect of a publication upon the outlook of others. Four considerations are generally thought to be relevant in determining the existence of an invasion in the particular case:[6] (1) extent of use, which merely means that the plaintiff must have been sufficiently identified by the name or likeness employed;[7] (2) seriousness of the invasion, which entails evaluation of the degree of embarrassment or discomfort that the challenged publication would arouse in a person of ordinary sensibilities; (3) ends served by the publication, which encompasses the free press limitation of assuring an adequately informed public; (4) medium of publication, which unfortunately remains a determinative element in many cases. The last factor is misleading, and may be eliminated by a more realistic view as to the scope of a free press.

I

Although the conflict between the right to privacy and freedom of the press has been frequently recognized,[8] support is not lacking for the contention that it is a false issue.[9] Of course, freedom of the press is not an absolute;[10] it may be and is qualified by the law of libel.[11] Where recovery is allowed in a privacy action, press freedom has likewise been limited. Yet freedom of the press was early suggested as a basis for denying the very existence of any right to privacy;[12] however, this position assumes the exact question under consideration, does the First Amendment protect the publication in question?

6. See Ludwig, *supra* note 1, at 738; *cf.* Gill v. Curtis Pub. Co., 239 P.2d 630 (Calif. 1952).

7. Krieger v. Popular Publications, 167 N.Y. Misc. 5, 3 N.Y.S.2d 480 (Sup. Ct. 1938) (use of last name 100 times was actionable); Damron v. Doubleday, Doran & Co., 133 N.Y. Misc. 302, 231 N.Y. Supp. 444 (Sup. Ct. 1928) (single use of plaintiff's name in a novel held not sufficient). The number of times the name is employed is not the sole criterion for determining existence of a sufficiently clear identification. For a discussion of this point see Nebb v. Bell Syndicate, 41 F. Supp. 929 (S.D.N.Y. 1941); Swacker v. Wright, 154 N.Y. Misc. 822, 277 N.Y. Supp. 296 (Sup. Ct. 1935).

8. Gill v. Curtis, 239 P.2d 630 (Calif. 1952); Lahiri v. Daily Mirror, Inc., 162 N.Y. Misc. 776, 295 N.Y. Supp. 382 (Sup. Ct. 1937); State v. Evjue, 253 Wisc. 146, 33 N.W.2d 305 (1948).

9. Note, 8 Mo. L. Rev. 74 (1943). Reliance for this proposition is placed upon Grosjean v. American Press Co., 297 U.S. 233 (1936).

10. Hocking, *op. cit. supra* note 4, at 66.

11. Lahiri v. Daily Mirror, Inc., 162 N.Y. Misc. 776, 781, 295 N.Y. Supp. 382, 388 (Sup. Ct. 1937).

12. Corliss v. Walker Co., 64 Fed. 280 (C.C.D. Mass. 1894).

Freedom of press includes two inseparable elements, the right of the publisher to publish and the right of the people to an adequate press.[13] The clash of the privacy doctrine with freedom of the press focuses attention on the latter aspect of the concept, for if a publication is privileged, it is because it contributes material which enables the public to be well informed. Responsible self-government depends upon a well versed public;[14] an adequate press will furnish to the reader the facts, thoughts, and feelings of the world in order that he may be a cognizant, reflective citizen. In recognition of this basic need,[15] the courts, almost without exception, hold that a publication is privileged if it embraces "news, education, or information."[16] More finely drawn distinctions are discovered in such phrases as "general concern,"[17] "current news,"[18] "legitimate news,"[19] "current interest"[20]

13. In the report of the respected Commission on Freedom of the Press, Hocking points out that: "Inseparable from the right of the press to be free has been the right of the people to have a free press. But the public interest has advanced beyond that point; it is now the right of the people to have *an adequate press.* . . . The freedom of the publisher to publish becomes responsible to a specific public goal. The editors do not thereby lose their primary liberty to write and publish whatever they think; they *may lose the liberty,* if it is such, to *fail* in the task of connecting the minds of their readers with the going currents of fact, thought, and feeling in the world of their membership." HOCKING, *op. cit. supra* note 4, at 169, 170.

14. The necessity of keeping the public informed is emphasized by Thomas Jefferson's statement that: "The basis of our governments being the opinion of the people, the very first object should be to keep that right. The way to prevent [errors of] the people, is to give them full information of their affairs through the channel of the public papers, and to contrive that these papers should penetrate the whole mass of the people." Quoted in LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 62 (1950). See also, LIPPMAN, LIBERTY AND THE NEWS 54 (1920), where it is stated: "Men who have lost their grip upon the relevant facts of their environment are the inevitable victims of agitation and propaganda. The quack, the charlatan, the jingo, and the terrorist can flourish only where the audience is deprived of independent access to information."

15. In considering the value of keeping the channels for information open Justice Shientag wrote: "A free press is so intimately bound up with fundamental democratic institutions that, if the right of privacy is to be extended to cover news items and articles of general public interest, educational and informative in character, it should be the result of a clear expression of legislative policy." Lahiri v. Daily Mirror, Inc., 162 N.Y. Misc. 776, 781, 295 N.Y. Supp. 383, 388 (Sup. Ct. 1937).

16. Donahue v. Warner Bros. Pictures Inc., 194 F.2d 6 (10th Cir. 1952); Gill v. Curtis Pub. Co., 239 P.2d 630 (Calif. 1952); Gautier v. Pro-Football, Inc., 278 App. Div. 431, 106 N.Y.S.2d 553 (1st Dept. 1951).

17. Metter v. Los Angeles Examiner, 35 Cal. App.2d 304, 310, 95 P.2d 491, 496 (1939).

18. Koussevitzky v. Allen, Towne, and Heath, 188 N.Y. Misc. 479, 483, 68 N.Y. S.2d 779, 783 (Sup. Ct. 1947).

19. Berg v. Minneapolis Star and Tribune Co., 79 F. Supp. 957, 959 (D. Minn. 1948).

20. Lahiri v. Daily Mirror, Inc., 162 N.Y Misc. 776, 782, 295 N.Y. Supp. 382, 388 (Sup. Ct. 1937).

and various other mixed classifications,[21] but they are of dubious analytical assistance.

Assuming that published material falls within the above trichotomy, the present day method of determining a legally actionable invasion involves weighing the value to be derived from the information against the degree and character of the intrusion.[22] Historically, this weighing process has had a checkered development. Initially the public figure-waiver concept was utilized.[23] Under this view, an individual waived his right to privacy by becoming a public person, often a public official.[24] The superficiality of this doctrine was illustrated by a California case holding that a woman who jumped from the twelfth floor of an office building had thereby waived her right of privacy.[25] Although this test was long utilized, it is now generally recognized as inadequate.[26]

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21. For additional terms of similar nature see Note, 37 CORNELL L.Q. 502, 504 (1952).

22. Leverton v. Curtis Pub. Co., 192 F.2d 974 (3d Cir. 1951); Gill v. Curtis Pub. Co., 239 P.2d 630 (Calif. 1952); Koussevitzky v. Allen, Towne, and Heath, 188 N.Y. Misc. 479, 68 N.Y.S.2d 779 (Sup. Ct. 1947).

23. In Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911), the court ruled that consent could be implied as well as express, and if one engages in public affairs, he consents by implication to publicity. In an unreported case it was held not actionable to take a photo of a bubble dancer because she had waived her right to privacy by her actions. See Time, Nov. 14, 1938, p. 34.

24. The court in Pavesich v. New England Life Insurance Company, 122 Ga. 190, 200, 50 S.E. 68, 72 (1905) declared: "One who holds public office makes a waiver of a similar character—that is, that his life may be subjected at all times to the closest scrutiny in order to determine whether the rights of the public are safe in his hands." A federal court declared that "[a] statesman, author, artist, or inventor, who asks for and desires public recognition may be said to have surrendered this right to the public." Corliss v. Walker Co., 64 Fed. 280, 282 (C.C.D. Mass. 1894).

The basis for this concept probably stemmed from the earliest writing on the subject, where it was stated that persons seeking public office "have renounced the right to live their lives screened from public observation." Warren and Brandeis, *supra* note 2, at 215.

25. Metter v. Los Angeles Examiner, 35 Cal. App.2d 304, 95 P.2d 491 (1939). The court ruled that she had not only waived her right to privacy, but the right to privacy of her husband as well.

The absurd effects of this concept were further evidenced in O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941). O'Brien sued for use of his picture with a calendar advertising beer. The plaintiff was on the All-American football team and was also a member of a youth group which opposed alcoholic beverages. The court declared there was no invasion because "[t]he publicity he got was only that which he had been constantly seeking and receiving" as an All-American. *Id.* at 170.

Another example of overzealous protection afforded to a publication by utilization of this test is to be found in Martin v. F.I.Y. Theatre Co., 10 Ohio Op. 338 (1938).

26. Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir. 1940); see Nizer, *supra* note 5, at 556. Such failure could be expected from a notion which failed to consider the problems involved and thereby unnecessarily foreclosed publication of some material while extending too zealous protection to others.

Implicit in the public interest test, employed by some courts, is the perception that the focus of judicial attention should be directed toward the effect of the publication upon the public rather than upon the individual's supposed intention to waive his right to privacy.[27] This view primarily considered the content and character of the publication, attributing little weight to the individual's position. Nevertheless, definition of the term "public interest" was not without confusion, typical ones being, "[t]hat indefinable quality of interest which attracts attention,"[28] or "[p]ublic interest will vary with the circumstances involved."[29] The weakness of such a one-sided test is apparent since public interest may attach to a publication in the sense that many persons are eager to read it, but it does not necessarily follow that the publication will serve a public interest outweighing the individual distress incurred.[30]

Recent adoption of the mores or public decency test[31] offers hope for improvement in resolution of the basic issues involved. "Public interest," or the end served by the publication is not discarded; it remains as *a* factor—but not the only factor—in determining the result. Cases in this area should, realistically, involve a balancing of the interests by placing on the scales opposite the public interest, the degree and character of invasion incurred by the plaintiff. Judicial expression of this concept is typically phrased in terms of whether the publication in question is repugnant to the social conscience at that time and place.[32]

However, an evaluation of the character and degree of the invasion does not present the most difficult aspect of the balancing process.[33]

27. See Nizer, *supra* note 5, at 556.

28. Associated Press v. International News Service, 248 U.S. 215, 219 (1918). Quoted in Metter v. Los Angeles Examiner, 35 Cal. App.2d 304, 309, 95 P.2d 491, 495 (1939). The *Metter* decision noted, however, that such public interest is not to be confused with mere curiosity.

29. Sweenek v. Pathe News, 16 F. Supp. 746, (S.D.N.Y. 1936) (fat woman exercising).

30. See Note, 74 N.Y.L. REV. 423 (1940).

31. Leverton v. Curtis Pub. Co., 192 F.2d 974 (3d Cir. 1951); Gill v. Curtis Pub. Co., 239 P.2d 630 (Calif. 1952); Koussevitzky v. Allen, Towne, and Heath, 188 N.Y. Misc. 479, 68 N.Y.S.2d 779 (Sup. Ct. 1947).

32. Sidis v. F-R. Pub. Corp., 113 F.2d 806, 809 (2d Cir. 1940).

33. This is readily illustrated by comparing Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931), where the past life of a reformed prostitute was exposed, with Almind v. Sea Beach Ry., 157 App. Div. 230, 141 N.Y. Supp. 842 (2d Dept. 1913), which involved a photo of a woman used to demonstrate the safest way to board a street car. Certainly the former case presents the greater and more embarrassing invasion. Assuming that other factors are equal, clearly the prostitute would deserve recovery before the women boarding the street car. The court, therefore, when confronted with an individual case, can make a reasonably accurate determination of the degree and character of the invasion by reference to common decency.

Impeding satisfactory implementation of the mores test is lack of a realistic determination of the weight to be placed on the other end of the scale. How much public interest is satisfied by the publication? Stated another way, which publications require protection because of the necessity of furnishing an adequate press to the consumer? Whether the material is of legitimate public interest is continuously resolved by stating that it must be news, educational or informational. The question remains, however, what will fulfill the requirement that material be news, educational or informational? Decisions and comments reflect the haziness of the thinking in the attempt to imbue these words with rational content. Compounding this confusion are decisions based largely upon preconceived ideas concerning the medium of publication.

II

Among the irrelevant elements which enter into the cases with persistent decisiveness is the fact-fiction dichotomy. The decision rendered in *Binn v. Vitagraph Co.*,[34] which involved a motion picture portrayal of a sea rescue, has been construed to stand for the proposition that matters of fact are privileged,[35] while fictional material is not.[36] This distinction rapidly became established as a basic element in the law of privacy, despite its incorrect assumption that all matter which is not absolutely factual is of no value to a rational public.[37] Even Warren and Brandeis in the earliest legal writing on the right to privacy gave some indication that the truth or falsity of material

34. 210 N.Y. 51, 103 N.E. 1108 (1913).

35. The fact-fiction distinction is in itself, inaccurately stated. Obviously all factual material will not be privileged. This suggests that if the material is factual it will merit *consideration* of privilege, by weighing the value of the publication against the character and degree of harm incurred by the individual. Likewise, if material is fictional, the possibility of a balancing process is thereby foreclosed. Henceforth the word privilege will denote that the publication merits consideration of possible nonliability by weighing its public value against the harm to the individual.

36. Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y. Supp. 752 (1st Dept. 1919). Plaintiff attorney found the solution to a murder. Defendant's newsreel was filmed during the actual search for corpus delicti. Recovery denied. The court distinguished the case from the *Binn* decision because this newsreel was taken on the actual scene, and could thereby be termed factual. The *Binn* case, in contrast, was produced in the studio and could be termed fictional.

37. The inaccuracy of such an assumption is suggested in Hannegan v. Esquire, 327 U.S. 146, 157-158 (1945), where the court in a case concerning free press and mail classification stated: "What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. . . . From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values."

should not necessarily determine whether the publication should be privileged.[38]

The use of the stereotyped fact-fiction distinction necessitates judicial dodging to avoid its apparent fallacy where the publication obviously serves to enlighten consumers.[39] Accordingly, "mere untruths"[40] are not necessarily considered fiction. Perhaps matter denominated fictional will violate the right of privacy more often than that which is factual, but even an elementary understanding of the learning process should indicate that other considerations concerning the nature of the publication must control. In *Koussevitzky v. Allen, Towne and Heath*[41] the court forthrightly acknowledged that factually inaccurate statements in a biography do not reduce its educational value. Resolution of a similar problem by the Supreme Court of the United States disclosed an even sounder approach with regard to the type of publication which warrants constitutional protection. In rejecting a contention to the effect that the constitutional guarantee of a free press extends only to the exposition of ideas, the Court stated: "The line between the informing and the entertaining is too elusive for the protection of the basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."[42]

Nevertheless, the case law continues to reflect the unwillingness of tribunals to apply this understanding in the privacy area.[43] Although the "news, educational, informational" criteria is a judicial creation, the courts repeatedly display an inability to realize that a well-versed public requires not only news, but material emanating from other modes of expression such as the historical novel, travel stories, plays and tales of famous persons. A superficial approach is also mirrored by writers on the subject: "The question to be decided before the fact-fiction

38. Warren and Brandeis, *supra* note 2, at 218.

39. Garner v. Triangle Pub. Inc., 97 F. Supp. 546 (S.D.N.Y. 1951).

40. *Id.* at 549.

41. 188 N.Y. Misc. 479, 68 N.Y.S.2d 779 (Sup. Ct. 1947). The biography of the famous musician Koussevitzky contained minor untruths about his private life which in the words of the court contained "no so-called revelations of any intimate details which would tend to outrage public tolerance. There is nothing repugnant to one's sense of decency or that takes the book out of the realm of legitimate dissemination of information on a subject of general interest." *Id.* at 784.

The above quote constitutes the most clarified enunciation of the mores test to be found in case materials. The first part refers to the degree of individual harm, while the latter portion recognizes the aspect of public interest.

42. Winters v. New York, 333 U.S. 507, 510 (1948).

43. Donahue v. Warner Bros., 194 F.2d 6 (10th Cir. 1952).

test can be applied is necessarily—is the publication a matter of news interest to the public?"[44] Assuming the publication is of admitted news interest, it evidently would follow that if fiction the article would not be privileged. Such a restricted view, while shielding the individual, certainly does not satisfy the necessity for presenting to the consumer, not only columns of facts and figures, but also the thoughtful reflection and interpretation by others on a subject, event or person.[45]

Assuredly constitutional protection should not be mechanically accorded either all fictional or all factual material. A potentially suitable status for the fictional element within the mores test has been cautiously suggested. "If the facts were enlarged upon so as to go beyond the bounds of decency or propriety they should not be shielded."[46] Simply stated, the proposed analysis constitutes no more than the customary weighing of the interests involved, *i.e.*, the degree of the invasion as opposed to the benefit derived, denying special consideration to the verity of the publication.[47] Accordingly, an actionable invasion of privacy should not be attributable to even a highly imaginative fabrication unless, as could similarly be the case with strictly factual accounts, the material is of no value, or the value to the public is outweighed by serious harm to the individual.

Apperception that privacy is not legally invaded by such fictional publications has been unfortunately limited largely to those appearing in newspapers.[48] It has been cogently pointed out that in publishing articles of diverse types, including fiction, "[t]he press exercises a definite educational function, for, in supplying an assumed demand, it affects the level of public interest for better or for worse."[49] Signifi-

44. Note, 20 FORD L. REV. 100, 102 (1951).

45. The value of such fictional material is voiced in the writings of commentators on the historical novel. "An historical study, though in the form of fiction, may have a positive value as a contribution to knowledge." In the words of William Thackeray: "I take up a volume of Dr. Smollett or a volume of the Spectator, and say the fiction carries a greater amount of truth in solution than the volume which purports to be all true." Henry Seidel Canby wrote: "Sir Walter Scott is dead. Long live Sir Walter Scott! His great discovery that fiction and history are interchangeable is a basic patent, bound to reappear and reappear in the history of literature." Quoted from Donahue v. Warner Bros. Pictures, 194 F.2d 6, 20 (10th Cir. 1952) (dissent).

46. Garner v. Triangle Publications Inc., 97 F. Supp. 546, 550 (S.D.N.Y. 1951).

47. *Cf.* Koussevitzky v. Allen, Towne, and Heath, 188 N.Y. Misc. 479, 485, 68 N.Y.S.2d 779, 784 (Sup. Ct. 1947).

48. See note 72 *infra*, and accompanying text.

49. HOCKING, *op. cit. supra* note 4, at 167. The author had previously stated: "The typical news medium of today is a magazine in the original sense—a department store; there is entertainment, criticism of art and music, directory to the passing show, advertising lure and market report. . . . Mingling with this floating gazetteer of current culture and its personnel there is Fictional Bait. . . . In all this the Mind of Time

cantly, the word "press" as here utilized explicitly includes not only the newspaper, but also book, magazine, radio, motion picture, and television;[50] yet similar privilege is not accorded fictionalized material published therein. While much fiction appearing in newspapers should not involve legal liability, many undeserving articles are also afforded the blanket protection granted the newspaper.[51] Hence, extension of the privilege evidently stems from the magic word "news" in newspaper and suggests that it is not accorded on the merits of the particular article, but on the basis of the medium in which it found expression. The foregoing discussion manifests the obvious lacuna in the First Amendment protection accorded fiction which allegedly invades the right of privacy; only judicial abolition of the irrational fact-fiction dichotomy can elevate this area of the law to accord with democratic tradition.

III

In addition to a distinct lack of appreciation for the value of fiction, the courts constantly voice adherence to the proposition that news, educational or informational material should be privileged,[52] but nevertheless refuse to consider the content of a factually informative or educational article as equal in significance to so-called news.[53]

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is being exhibited to Each Mind for such smorgasbord as suits him; as the spiritual aura of the news, it is all news. It is information and the value scheme which enwraps information." *Id.* at 166-167.

50. *Id.* at 162.

51. See notes 73-74 *infra,* and accompanying text.

52. Donahue v. Warner Bros. Pictures Inc., 194 F.2d 6 (10th Cir. 1952); Gill v. Curtis Pub. Co., 239 P.2d 630 (Calif. 1952); Gautier v. Pro-Football, Inc., 278 App. Div. 431, 106 N.Y.S.2d 533 (1st Dept. 1951); Lahiri v. Daily Mirror Inc., 162 N.Y. Misc. 776, 295 N.Y. Supp. 382 (Sup. Ct. 1937).

53. A striking instance of the general unwillingness to afford privilege to patently educational matter is the recent case of Leverton v. Curtis Publishing Co., 192 F.2d 974 (3d Cir. 1951). A ten-year-old child closely missed being struck by a car, and was photographed as she was lifted to her feet. In addition to publication in the next day's newspaper, the picture also appeared twenty months later in an article concerning traffic accidents in the Saturday Evening Post. The court held the picture in the newspaper, but not that in the magazine article, privileged. The decision ostensibly relied on the allegation of the plaintiff that the article imputed an indeterminate degree of negligence to the plaintiff. The opinion indicates, however, that privilege would not have been afforded even if there had been no negligence question in the case. See Note, 40 GEO. L.J. 478 (1952).

The length of time that has elapsed between the original publication and a later one on the same or connected subject was at first thought to be of significance in determining whether the second publication merited privilege. This factor was explicitly not the basis of the *Leverton* decision. The first notable case to clarify this time element was Sidis v. F-R Publishing Co., 113 F.2d 806 (2d Cir. 1940). This famous case concerned a child prodigy who had received extensive publicity as a child, but had become secluded in later life. Twenty-five years after the child's early fame,

Accounts of "current happenings" are said to be of immediate importance and concern to the public, while informational and educational articles are of but "general interest."[54] Presumably, this means greater protection should be afforded to reports of happenings of the last twenty-four or forty-eight hours than to a thoughtful presentation of a particular phase of life, employing as illustrative matter actual occurrences which are clearly true but are some weeks, months or even years old. Realization of the proper function of the press in a free society manifests the obvious fallacy of so narrow an approach.[55]

Basic to the judicial deference accorded news stories is the realization that it is an impossible task to obtain consent to print a news report within the few hours between act and publication.[56] Undoubtedly an attempt could be made in most publications of an educational or informative nature to obtain consent, yet consent, like waiver, is an irrelevant consideration if the article is of educational import.

Demonstrative of judicial dubiosity in scrutinizing alleged educational material are four of the five fact situations which follow. Public exhibition for pornographic purposes of motion pictures of a caesarian operation, after the woman had granted permission to have them shown in medical societies, was held an invasion.[57] In *Barber v. Time,* a woman suffering a disease causing obesity, recovered for publication

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an article concerning the entire life of Sidis appeared. Recovery was denied, the court holding the years elapsed were in themselves no bar to non-liability. Further illustration of this point is shown by contrasting Mau v. Rio Grande Oil Inc., 28 F. Supp. 845 (N.D. Calif. 1939) where plaintiff recovered for an invasion sixteen months after the original publication was held privileged, with Smith v. Doss, 251 Ala. 256, 37 So.2d 118 (1948), where recovery was denied after sixteen years. See Note, 38 VA. L. REV. 117 (1952).

54. Note, 37 CORNELL L.Q. 502, 504 (1952).

55. One case, fifteen years old, stands out as a satisfactory realization of the proper status of factual informational and educational material, but has not been accorded sufficient emphasis. The court, after stating that a free press problem was intimately involved, continued: "Newspapers publish articles which are neither strictly *news* nor strictly *fictional* in character. They are not responses to an event of peculiarly immediate interest but, though based on fact, are used to satisfy an ever present educational need. . . . These are articles educational and informative in character." (emphasis added) Lahiri v. Daily Mirror Inc., 162 N.Y. Misc. 776, 783, 295 N.Y. Supp. 382, 389 (Sup. Ct. 1937). Yet, today the merit of this analysis is substantially questioned. Exemplifying such doubt is one writer who, after discussing the *Lahiri* case, stated: "It is submitted that public interest in such informational and educational articles should *not* be sufficient to extend immunity from liability to the publication of plaintiff's name or picture therein where plaintiff is not a public character." (emphasis added) Note, 37 CORNELL L.Q. 502, 507 (1952). Thus the outdated public figure concept is suggested as a strict limitation on educational and informational material.

56. See Nizer, *supra* note 5, at 540.

57. Feeney v. Young, 191 App. Div. 501, 181 N.Y. Supp. 481 (1st Dept. 1920).

of her story, accompanied by pictures, in a national magazine.[58] The use of a person's picture to exemplify the safe method of getting on and off a street car was held legally actionable.[59] The Attorney General of New York ruled, in an advisory opinion, that photographs of cancer patients could not be displayed publicly by the department of health, despite their "distinct social value for the general instruction and information of the public."[60] A doctor took photos of a patient which portrayed the deformity caused by a particular infirmity and kept them in his files "for future reasonable use for purposes of medical instruction"; the court found an invasion.[61]

The caesarian movies undoubtedly did constitute an invasion since they were used for pornographic,[62] rather than educational, purposes, but the other four examples evidence varying degrees of judicial ineptitude in balancing of the interests involved. The fat woman case is a close one, since the degree of personal embarrassment appears to substantially offset the public benefit derived. The street-car-boarding picture not only was of unquestioned educational value, but the degree or character of invasion did not violate common decency. The feasibility of obtaining a posed picture might explain the result, but the court proffered no evidence of an awareness of this point.[63] The unwillingness to permit publication of cancer patients' photos despite the "distinct social value" is inexplicable. Similarly baffling is the decision finding a violation in the use of photos for medical instruction. Posing in the latter two cases is, of course, impossible, and the educational value unquestionable.

Here, again, as with the unrealistic fact-fiction analytical tool, almost rudimentary analysis discloses the meagre judicial concern for the proper function of the press in a democratic society. Clarified recognition that a free press problem is involved would undoubtedly

58. 348 Mo. 1199, 159 S.W.2d 291 (1942).

59. Almind v. Sea Beach Ry., 157 App. Div. 230, 141 N.Y. Supp. 842 (2d Dept. 1913).

60. N.Y. REP. ATT'Y. GEN. 374, 375 (1934).

61. 38 Pa. D. & C. Rep. 543, 547-548 (1940).

62. *Cf.* Semler v. Ultem Publications, Inc., 170 N.Y. Misc. 551, 9 N.Y.S.2d 319 (N.Y. City Ct. 1938). A professional model brought the action for publication of her picture in defendant's Silk Stocking Stories magazine. Court held that since the magazine appealed to sex, recovery should be allowed.

63. An additional factor must be considered when movies or photos are used in the educational field. Undoubtedly the possibility of using a posed picture or one with the identifying features obscured should be considered. See Lugwig, *supra* note 1, at 747.

result in the accordance of that grave concern usually exhibited by the courts in considering other challenges to the free press principle.[64]

IV

Inherent in the recent Supreme Court decision holding the moving picture a part of the "press"[65] is an awareness that all forms of communication fulfill an important role in furnishing an adequate press.[66] Nevertheless, the courts are unmindful of this approach when excogitating the effect the media of communication should have in determining the value in the publication of a particular subject-matter, erecting thereby a third obstacle to full realization of the public's condigned claim to be fully informed. Decisions reflect preconceived ideas as to the value of certain media with the result that an article is viewed not on its merits, but with unwarranted regard for the medium in which it found expression. For instance, the courts have been impressed with the fact that some media, notably the comic book,[67] radio[68] and motion picture,[69] are published with the hope of profiting because of the amusing and entertaining content, while the publisher in other media is said to seek only to inform the public. Although categorization of all broadcasts heard over the radio during a day's time as amusement or entertainment stretches credulity,[70] assuming, *arguendo,* this can be done, it does not necessarily follow that educational or informational benefit will not be derived.[71] Manifestly, evaluation of the specific publication constitutes the only proper approach.

Since the report of factual current events is held in high regard, the newspaper receives the most favorable treatment.[72] However, the privilege afforded news stories on the front page often seeps through to protect items on other pages which should not and would not be privileged if expressed in another medium.[73] Of course, educational

64. Lahiri v. Daily Mirror, 162 N.Y. Misc. 776, 295 N.Y. Supp. 382 (Sup. Ct. 1937).

65. Burstyn v. Wilson, 343 U.S. 495 (1952).

66. See HOCKING, *op. cit. supra* note 4, at 162-163.

67. Moloney v. Boy Comics Publishers, 277 App. Div. 166, 98 N.Y.S.2d 119 (1st Dept. 1950) (dissent).

68. Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (N.D. Calif. 1939).

69. Donahue v. Warner Bros., 192 F.2d 6 (10th Cir. 1952); Binn v. Vitagraph Corp. of America, 210 N.Y. 51, 103 N.E. 1108 (1913).

70. See HOCKING, *op. cit. supra* note 4, at 165.

71. See note 42 *supra,* and accompanying text.

72. See Nizer, *supra* note 5, at 542.

73. In Colyer v. Fox, 162 App. Div. 297, 146 N.Y. Supp. 999 (2nd Dept. 1941), a portrait of the plaintiff, a professional entertainer in the specialty of high diving, was

and informational articles appear in newspapers, but consideration, as a privileged publication, should be based solely on merit. Exemplifying extreme application of customary practice, two New York cases found that regardless of content, publication of any name or picture in a *single* issue of a paper was not an invasion of privacy.[74]

Furthermore, preconceived conceptions, while unduly favoring the newspaper, have cast distrust upon other modes of communication. Illustrative of the inability to discard prejudice towards various types of publication are cases involving radio and motion pictures. Initially even newsreels, because of the similarity to motion pictures, were skeptically regarded as a means of news presentation,[75] although today such incredulity has been dispelled.[76] Yet motion pictures remain subject to judicial disapprobation as a mode of disseminating informational and educational matter.[77] A recent comment approves of declaring "strictly factual" reports an invasion when presented in a motion picture or radio drama. "In such cases, the clear purpose of the presentation is

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published in defendant's newspaper, The New York Police Gazette, together with four other pictures of women vaudeville performers. All these pictures were grouped under the title: "Five of a kind on this Page. Most of them adorned the Burlesque Stage; all of them are favorites with the bald headed boys." The court ruled for the defendant, undoubtedly impressed with the fact that the Gazette was a newspaper, at least in name.

The effect of publication within the pages of a newspaper is also evidenced by the court's condonation of absurdly incorrect representations. The attribution to the plaintiff of a ridiculously incongruous heroic statement was not legally actionable, Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929). See also Thayer v. Worchester Post Co., 284 Mass. 160, 187 N.E. 292 (1933), where a deliberate alteration was held privileged where publication was made in a newspaper. A deleted photo of a woman with her chauffeur was used in connection with a story of her husband's alienation of affections actions against her. The photo had originally pictured the woman, her husband, and two others as well as the chauffeur. A usual weighing of the interests in these three illustrations should have produced decisions favorable to the plaintiffs.

74. McNulty v. Press Pub. Co., 136 N.Y. Misc. 833, 836, 241 N.Y. Supp. 29, 32 (Sup. Ct. 1930); Moser v. Press Pub. Co., 59 N.Y. Misc. 78, 109 N.Y. Supp. 963 (Sup. Ct. 1908).

75. See Nizer, *supra* note 5, at 544.

76. A newsreel taken of plaintiff, while plaintiff and police tried to solve a murder mystery, was held not to be an invasion. Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y. Supp. 752 (1st Dept. 1919). A motion picture newsreel picturing corpulent women exercising to reduce was held not to be a violation. Sweenek v. Pathe News, 16 F. Supp. 746 (D.C. 1936). *But cf.* Blumenthal v. Picture Classic, 235 App. Div. 570, 257 N.Y. Supp. 800, *aff'd without opinion,* 261 N.Y. 504, 185 N.E. 713 (1933). A sight seeing film depicting plaintiff selling bread on New York streets was held to be an invasion.

77. The leading case involved the reconstruction of a ship wreck, featuring the acts of the plaintiff, who was a wireless operator. Court declared an invasion, stating: "The defendant used the plaintiff's alleged picture to amuse those who paid to be entertained." Binn v. Vitagraph Co. of America, 210 N.Y. 51, 103 N.E. 1108, 1111 (1913); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931) (true past life of prostitute was portrayed); Redmond v. Columbia Pictures Corp., 277 N.Y. 707, 14 N.E.2d 636 (1938) (pictures of professional golfer's trick shot).

to amuse rather than inform, and the immunity from liability is properly withheld."[78] This approach typifies an unwillingness to cope with the real issues.

Emphasis on the purpose of the publisher has thus found acceptance in many cases, although some courts, by stressing the individual's conscious purpose in viewing a movie or listening to a radio program, have chosen a less undesirable means of evaluating the challenged publication.[79] To meet the issue squarely, however, requires determining whether the drama or movie does inform or educate; the motive of the publisher, as well as that of the recipient, is immaterial. The basic question—is the value of the movie or drama, when weighed in relation to the individual harm, sufficient to permit publication without liability—can most satisfactorily be resolved by disregarding the mode of expression.

V

Two recent cases stand as examples of judicial success and failure in this area of the law; embodied in one is approval of the invalid analysis which harasses this field, while the other offers hope for a rational solution.

Warner Brothers produced a motion picture depicting the life of Jack Donahue, one of the immortals of show business, which incorporated some factual deviations.[80] In a suit based upon a Utah privacy statute,[81] the Court of Appeals for the Tenth Circuit held for the plaintiff, concluding that the statute[82] "is content to forbid appropriation . . . for purposes of trade, as distinguished from matters educa-

78. Note, 37 CORNELL L.Q. 504 (1952).

79. The Martin v. New Metropolitan Fiction, Inc., decision characterized the test as, "one of *purpose*, viewing the matter from the standpoint of the reaction of the viewer rather than from the person who uses the plaintiff's name or likeness." 139 N.Y. Misc. 290, 292, 248 N.Y. Supp. 359, 361 (Sup. Ct. 1931).

80. Donahue v. Warner Bros. Pictures Inc., 194 F.2d 6 (10th Cir. 1952).

81. UTAH CODE ANN. §§ 103-4-8 (1943). These sections provide that anyone who uses for advertising purposes or for purposes of trade the name, portrait or picture of a person, if such person is living, without first having obtained the written consent of such person, or, if such person is dead, without the written consent of his heirs or personal representatives, shall be guilty of a misdemeanor. The person whose name, portrait or picture is used, or his heirs, may bring an action for damages. The *Donahue* case was the first based on this statute.

82. The Utah and Virginia privacy statutes are based on the New York statute, N.Y. CIVIL RIGHTS LAW §§ 50-52, under which much litigation has arisen. The N.Y. Act was passed in 1903 to remedy the unpopular decision of Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). The Virginia statute is yet to be construed. See Note, 38 VA. L. REV. 117 (1952).

tional, informative, or purely biographical in nature."[83] "Purposes of trade"[84] reflects judicial emphasis on the purpose of the publisher; the fact therefore, that it was a motion picture appears to have borne considerable weight. Admittedly such statutes are narrow in scope,[85] but the court should not attempt to broaden them by ignoring the fundamental free press limitation on the right of privacy. Furthermore, in resting its decision on the stereotyped fact-fiction test, the court refused to perceive that minor deviations of fact do not preclude educational value in a biographical publication.

In the second case,[86] plaintiff was the widely acclaimed hero of a plane crash in New York City. Several months later, a comic book printed a true account of the entire episode with some *very* minor factual deviations. The majority of the court, not impressed with slight inaccuracies or with the contention that comic books are not usually concerned with informative or educational material, held that there was no invasion. The minority was typically moved by irrelevant considerations, as evidenced by the statement that "where the prime purpose of the publication is amusement for trade purposes, as a matter of law, the purpose is commercial."[87] Of course, not all or even a sizeable proportion of comic books impart educational matter, but, as this decision emphasizes, the governing factor is the value of the article itself rather than the medium in which it is published.[88]

Judicial evolution of standards by which the courts seek to reconcile freedom of the press with the right to privacy has been attended by an exaggerated concern for this comparatively new tort. Possibly the

83. Donahue v. Warner Bros. Pictures Inc., 194 F.2d 6, 13 (10th Cir. 1952).

84. See Nizer, *supra* note 5, at 547. These statutes, which afford recovery if the publication is found to be published for "purposes of trade," add negligible assistance to the court's determination of the particular case. Obviously, in our society, the publisher of almost every publication derives pecuniary benefits to some degree. The decision must, therefore, rest on other grounds, with the "purpose of trade" attached after such result is reached.

85. These statutes limit the right of privacy to situations where publication of name or likeness occurs. Other jurisdictions, recognizing this right on other grounds, have broadened the right of privacy to include various other situations. Voelker v. Tyndall, 226 Ind. 43, 75 N.E.2d 548 (1947) (fingerprinting by police) (recovery denied); Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1932) (wire tapping); Engleman v. Caldwell, 243 Ky. 23, 47 S.W.2d 971 (1932) (name calling).

86. Molony v. Boy Comics Publisher, Inc., 277 App. Div. 166, 98 N.Y.S.2d 119 (1st Dept. 1950).

87. *Id.* at 173, 98 N.Y.S.2d at 126 (dissent).

88. Nevertheless the validity of the holding in Molony v. Boy Comics, Inc., 277 App. Div. 166, 98 N.Y.S.2d 119 (1st Dept. 1950) is denied by one writer. "The minority holding, however, in considering the question of the medium of the publication employed by the defendant seems to have reached the more logical conclusion." Note, 20 FORD L. REV. 100 (1951).

context in which the right originated, a journalistic era characterized by extreme callousness for the feelings of the individual, accounts for the continued overzealous protection of an individual's privacy. Certainly, continued adherence to the fact-fiction concept, unwillingness to recognize educational material, and emphasis on the purpose of the publisher or the recipient cloud and confuse the proper determination of a given publication's value. Accordingly, any attempt to achieve a judicious balance between a free press and the right to be let alone would be well served by discarding these concepts.[89] Indeed, the tremendous variety of fact situations suggests that the test should be broad and possess a certain flexibility.[90]

DIMINISHING APPLICABILITY OF THE ANTITRUST LAWS IN REGULATED INDUSTRY: CONGRESS, THE COURTS, AND THE AGENCIES

Members of commerce and industry have allegedly been plagued with uncertainty as to their rights and liabilities under the Sherman and Clayton Acts.[1] This obscurity is at times even more prevalent in segments of the economy which are also subject to regulation by federal administrative agencies. Whereas the antitrust laws, which remain applicable in some degree to such industries, forbid restraints of trade by various types of concerted activity and combinations of ownership which result in undue economic power,[2] several regulatory agencies have, either

89. "To determine in advance of experience the exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare would be a difficult task." Warren and Brandeis, *supra* note 2, at 214.

90. Implicit in any mechanical consideration of the problems involved is an unwillingness to examine each case upon its own merits. Or as Mr. Justice Holmes stated: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." Dissent in Hyde v. United States, 225 U.S. 347, 384, at 391 (1911).

1. See Callman, *The Essenee of Antitrust*, 49 COL. L. REV. 1100 (1949); Handler, *Anti-trust—New Frontiers and New Perplexities*, 6 RECORD 59 (1951). But see Bennett, *Some Reflections on the Interpretation of the Sherman Act Since the Emergency*, 8 FED. B.J. 317 (1947).

2. 26 STAT. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1946). The Clayton Act was enacted to supplement the Sherman Act by halting practices tending toward restraint of trade or commerce. 38 STAT. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1946); see EULER, MANUAL OF MONOPOLIES AND FEDERAL ANTI-TRUST LAWS (1929).

Mere existence of a regulatory statute does not impliedly render inapplicable the Sherman or Clayton Acts; the antitrust laws are superceded by specific statutes only to the extent of repugnancy between the two. United States v. Borden Co., 308 U.S. 188, 198-199 (1939). An indictment charging a criminal violation of the antitrust laws