

Constitutional Law - Right of Privacy - *Time, Inc. v. Hill*, 87 S. Ct. 534 (1967)

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**Constitutional Law—RIGHT OF PRIVACY—TIME, INC. v. HILL.** In February 1955, *Life* magazine published an article which stated that the Broadway play "The Desperate Hours," based on a novel by Joseph Hayes, was a re-enactment of an actual experience of the James Hill family.<sup>1</sup> James Hill brought an action in the New York courts against author Hayes and Time, Inc. publishers of *Life*. Hill sought damages under New York's "right of privacy" law,<sup>2</sup> contending that the article and its accompanying photographs falsely depicted his family's experience.<sup>3</sup> He obtained a judgment for \$30,000, which was affirmed by the New York Court of Appeals.<sup>4</sup> Time, Inc. appealed to the Supreme Court of the United States, claiming that the New York court's application of the statute had denied Time, Inc. the rights of free speech and press guaranteed by the First Amendment.<sup>5</sup>

The Supreme Court, reversing the New York Court of Appeals, held that constitutional protections for speech and press preclude recovery under the right of privacy statute for "false reports of matters of public interest," in the absence of proof that the report was published "with knowledge of its falsity or in reckless disregard of the truth."<sup>6</sup>

This decision, in resolving the constitutional conflict, has focused new attention on the amorphous "right of privacy." Although the right has been recognized for some time, it is not specifically guaranteed by the Constitution.<sup>7</sup> It was formally stated for the first time in a famous

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subjective impossibility. It is only where, by supervening event, the performance cannot be rendered by anyone that the duty is discharged." SIMPSON, *CONTRACTS*, Section 175 (2d ed. 1965).

1. During September 1952, the Hills were held hostage for 19 hours in their White-marsh, Pennsylvania home by three escaped convicts. The incident received considerable publicity, but Hill resisted efforts by the news media to keep his family in the limelight.

2. New York Civil Rights Law §§ 50-51. Although this statute specifically prohibits only the use of the name or picture of the plaintiff in "trade" or "advertising," the New York courts have construed these terms very broadly.

3. The article included photographs posed by actors in the house where the Hills were imprisoned. These photographs portrayed scenes of violence presented in the play. In reality, the Hills were treated with courtesy and released unharmed.

4. *Hill v. Hayes*, 15 N.Y.2d 986, 207 N.E.2d 604, 260 N.Y.S.2d 7 (1965) (memorandum decision).

5. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I. It has been repeatedly held that this amendment was made applicable to the several states by U.S. CONST. amend. XIV. See e.g., *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

6. *Time, Inc. v. Hill*, 87 S.Ct. 534 (1967).

7. The right of privacy is, however, sometimes referred to as a "penumbral" right implied by the Bill of Rights. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

*Harvard Law Review* article co-authored by Samuel D. Warren and Louis D. Brandeis in 1890.<sup>8</sup> Nevertheless, invasion of privacy is now actionable as a common law tort in thirty states, and four states have right of privacy statutes.<sup>9</sup>

Despite this general acknowledgment of the right of privacy, however, the criteria for recovery under the New York law have never been clearly defined by the courts of that state. Liability has been determined by judicial application of various (and sometimes conflicting) tests. In an early case brought in Federal court under the New York law, it was held that publication of information about a public figure was not actionable, even though the person had attained notoriety involuntarily and the news was "stale."<sup>10</sup> Both this decision and at least one subsequent New York case<sup>11</sup> appeared to stand for the proposition that, in the case of a public figure, no action would lie even though the information published was private and intimate, at least where the information was true.

The corollary to this principle was set forth in a 1947 New York decision which announced that the test of liability was "fictionalization" of the information published. The "fictionalization," to be actionable, had to be "substantial" and "offensive," with the emphasis apparently on "offensiveness."<sup>12</sup>

When the New York courts considered the *Hill* case, the test of fictionalization was applied in allowing recovery, but dicta in the concurring opinion of the Appellate Division stated that truth would not be a defense if the item were not "newsworthy," or if the information

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

9. New York, Oklahoma, Utah, Virginia. The Virginia statute is set forth at VA. CODE ANN. § 8-650 (1950).

10. *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940), in which a former child prodigy brought suit under the New York law for publication of a biographical article and cartoon in the *New Yorker* magazine.

11. *Goelet v. Confidential, Inc.*, 5 App. Div. 2d 226, 171 N.Y.S.2d 223 (1st Dep't 1958), which held that a complaint alleging that defendant magazine presented a sordid article using plaintiff's name and photograph without his consent was insufficient to state a cause of action under the New York Civil Rights Law.

12. *Koussevitzky v. Allen, Towne, & Heath, Inc.*, 188 Misc. 479, 68 N.Y.S.2d 779 (Sup. Ct.), *aff'd per curiam*, 272 App. Div. 759, 69 N.Y.S.2d 432 (1st Dep't 1947), in which an eminent conductor was denied an injunction against publication of an unauthorized biography. See also *Youssouppoff v. Columbia Broadcasting Sys., 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 (1st Dep't 1963), which applied the fictionalization test to a television drama.

was presented solely for the purpose of increasing circulation.<sup>13</sup> The Court of Appeals affirmed this decision "on the majority and concurring opinions" of the Appellate Division.<sup>14</sup>

The most recent New York case, *Spahn v. Julian Messner, Inc.*,<sup>15</sup> also relied upon the fictionalization test in imposing liability. However, while the trial court found the fictionalization "offensive,"<sup>16</sup> the Appellate Division thought it laudatory (although embarrassing).<sup>17</sup> By affirming recovery, the Appellate Division apparently disregarded the earlier criterion of "offensiveness." The Court of Appeals, affirming, rested its decision on the fictionalization test, but (as in the *Hill* case) implied that only "newsworthy" material was protected.<sup>18</sup>

Thus, prior to the Supreme Court decision in *Hill*, recovery under New York's right of privacy law was predicated upon the test of "fictionalization," but, per assorted inferences and dicta, true statements might also be actionable if they were made solely for the purpose of increasing circulation (*Hill*) or if they are found not to be "newsworthy" (*Hill* and *Spahn*).

In none of these New York decisions was the constitutional issue squarely faced.<sup>19</sup> Consequently, the constitutionality of the New York courts' interpretation of the right of privacy statute was before the Supreme Court for the first time. However, several analogous decisions involving freedom of speech and press had previously been rendered

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13. *Hill v. Hayes*, 18 App. Div. 2d 485, 491, 240 N.Y.S.2d 286, 293 (1st Dep't 1963).

14. *Hill v. Hayes*, *supra*, note 4.

15. 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 (1st Dep't 1965), *aff'd*, 18 N.Y.2d 324, 221 N.E. 2d 543, 274 N.Y.S.2d 877 (1966), awarding damages and injunctive relief to a baseball player for inaccurate statements in an unauthorized biography.

16. *Id.*, 43 Misc. 2d at 232, 250 N.Y.S.2d at 542-43. This opinion indicated that an action might lie for the publication of factually correct information also, if the information were sufficiently "private." 43 Misc. 2d at 232, 250 N.Y.S.2d at 543.

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

18. *Supra*, note 15.

19. The Court of Appeals had taken pains to construe and apply the statute in a manner which would avoid constitutional conflicts. In other states, possible conflicts between the right of privacy and the First Amendment had been avoided by findings that the items in question were "trade" or "commerce," rather than "speech," and were thus excluded from the protection of the amendment. In Utah, communications media are excluded from the action of the right of privacy statute, and recovery is confined to cases of advertising or other clearly commercial material. See *Donahue v. Warner Brothers Pictures Distrib. Corp.*, 2 Utah 2d 256, 272 P.2d 177 (1954). The New York decisions, as previously noted, have construed "trade" and "commerce" much more liberally.

by the Court in libel actions. In *Winters v. New York*<sup>20</sup> the Court extended the protection of the First Amendment to materials published solely for their commercial entertainment value.<sup>21</sup> Then, in the leading case of *New York Times v. Sullivan*,<sup>22</sup> the Court held that no state libel law could permit suit by a public official for criticism of his conduct in office, absent actual "malice" on the part of the publisher.<sup>23</sup> In a subsequent decision, the Court made it clear that it was prepared to extend the principle of *New York Times v. Sullivan* in cases where "interests in public discussion are particularly strong."<sup>24</sup> These decisions on freedom of speech and press, although ostensibly confined to the field of libel, had plainly demonstrated that the provisions of the First Amendment were considered paramount to individual rights, in the absence of deliberate falsehood or wanton disregard of the truth.

In *Time, Inc. v. Hill*,<sup>25</sup> the Supreme Court was faced with a direct and unprecedented conflict between freedom of speech and press and the developing right of privacy. Although the opinion in the *Hill* case denies "blind application" of the principle of *New York Times v. Sullivan*, the decision in *Hill* is basically an extension of the constitutional reasoning of the *Times* case to the area of right of privacy, and a rejection of the less stringent "fictionalization" criterion of the New York courts.<sup>26</sup> The Court states that ". . . sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees,"<sup>27</sup> but "sanctions against calculated falsehood will not impair the function of these constitutional provisions."<sup>28</sup> The Court then announces that ". . . the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."<sup>29</sup>

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20. 333 U.S. 507 (1948).

21. "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right." *Id.* at 510.

22. 376 U.S. 254 (1964).

23. Followed in a subsequent libel action, *Garrison v. Louisiana*, 379 U.S. 64 (1964).

24. *Rosenblatt v. Bauer*, 383 U.S. 75 (1966), at 86. See also *Pauling v. News Syndicate Co.*, 335 F.2d 659 (2d Cir. 1964), *cert. denied*, 379 U.S. 968 (1965).

25. *Supra*, note 6.

26. Note, however, that the Court did *not* declare the New York right of privacy statute unconstitutional. The reversal was based solely upon the failure of the trial judge to give an instruction on the requirement of a finding of knowing or reckless publication of false material.

27. *Time, Inc. v. Hill*, *supra*, note 6, at 543.

28. *Ibid.*

29. *Ibid.*, quoting from *Garrison v. Louisiana*, *supra*, note 23 at 75. It should be noted

Thus the Supreme Court in its opinion makes it evident that the primary consideration is the encouragement of a free press as guaranteed by the First Amendment, and that the right of privacy, although recognized,<sup>30</sup> is subordinate to the rights of freedom of press and speech.

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**Constitutional Law—CONTEMPT BY PUBLICATION.** During a pre-trial hearing for a writ of habeas corpus, counsel for Donald Chambers, charged with first degree murder, noticed the presence of William Prime. Prime was employed as a reporter for the petitioner, Phoenix Newspapers, Inc. Fearing prejudicial pre-trial publicity, Chamber's counsel requested the court to enjoin all persons from disclosing what had transpired at the hearing. Although the court so ordered, the petitioner published an account of these proceedings, and the court ordered the petitioner to appear and show cause why it should not be held for contempt.

Phoenix Newspapers initiated an action in the Supreme Court of Arizona<sup>1</sup> to prohibit the Superior Court of Maricopa County, Arizona, from proceeding with the contempt hearing. In granting the prohibition the court based its decision upon the guarantees of a free press and public trial contained in Article 2 of the constitution of Arizona.<sup>2</sup> It ruled that a court cannot directly limit a newspaper's right to inform the public of what had transpired in open court.<sup>3</sup>

Where the Constitutional guarantees of freedom of the press<sup>4</sup> come into conflict with the right of an accused to a fair and speedy trial by an impartial jury,<sup>5</sup> there arises a problem of interpreting the courts'

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that the narrow holding of *Time, Inc. v. Hill* limits the effect of the decision to "reports of matters of public interest," a theme which appears repeatedly in the libel cases cited above. The term "public interest" is construed very broadly by the Court, however, and is not limited to comment upon public affairs or the expression of political ideas, nor is "timeliness and importance" necessary to the enjoyment of the constitutional protection. *Time, Inc. v. Hill*, *supra*, note 6, at 542.

30. A recent decision has restricted the power of government to interfere with the individual's right of privacy. See *Griswold v. Connecticut*, *supra*, note 7.

1. *Phoenix Newspapers, Inc. v. Superior Court*, 418 P.2d 594 (Ariz. 1966).

2. ARIZ. CONST. art. 2 § 6, which provides that "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." It is further provided in § 11 that "Justice in all cases shall be determined openly, and without unnecessary delay."

3. *Phoenix Newspapers, Inc. v. Superior Court*, *supra* note 1.

4. U.S. CONST. amend. I.

5. U.S. CONST. amend. VI.