

1-1-1967

## Right of Privacy: Knowing or Reckless Falsity in Publication Required to Sustain Liability under New York Right of Privacy Statute (*Time, Inc., v. Hill*, 87 S. Ct. 534, 1967)

William J. Carl  
*University of Montana School of Law*

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>

 Part of the [Law Commons](#)

---

### Recommended Citation

William J. Carl, *Right of Privacy: Knowing or Reckless Falsity in Publication Required to Sustain Liability under New York Right of Privacy Statute* (*Time, Inc., v. Hill*, 87 S. Ct. 534, 1967), 28 Mont. L. Rev. (1966).  
Available at: <https://scholarship.law.umt.edu/mlr/vol28/iss2/6>

This Legal Shorts is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

RIGHT OF PRIVACY: KNOWING OR RECKLESS FALSITY IN PUBLICATION REQUIRED TO SUSTAIN LIABILITY UNDER NEW YORK RIGHT OF PRIVACY STATUTE. In 1952, James Hill, his wife and five children were seized as hostages by three escaped convicts and held for nineteen hours. The next spring, James Hayes' novel, "*The Desperate Hours*," was published, describing a similar experience. The book was made into a play, and in 1955 an article in *Life* magazine characterized the play as "inspired by the family's experience." Actors from the play were photographed in the house the Hills had been living in at the time. One picture accompanying the text in *Life* showed the son being "roughed up;" Another showed the daughter biting the hand of one of the convicts; a third showed the father throwing his gun through the door after a "brave try" to save his family had been foiled. After their release in the actual incident, Hill had told newsmen that the family had been treated courteously and that there had been no violence. He sued for and was granted damages under the New York right of privacy statutes.<sup>1</sup> *Held*, the trial court erred in failing to instruct the jury that liability could be predicated only upon a showing that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth. *Time, Inc., v. Hill*, 87 S. Ct. 534 (1967).

The right of privacy, "the right to be let alone,"<sup>2</sup> it is said, did not exist at common law.<sup>3</sup> The genesis of the right is commonly traced to an article by Warren and Brandeis published in the *Harvard Law Review* in 1890.<sup>4</sup> Dean Prosser attributes the impetus for the article to the coverage given Mrs. Warren's elaborate soirees by Boston newspapers in the highly personal "yellow journalism" of the day, culminating in Mrs. Warren's irritation over the coverage of her daughter's wedding.<sup>5</sup> Kalven, leading modern critic of the right of privacy, adds:

There is, from my special point of view, poetic justice in the circumstance that so petty a tort should have been spawned by so petty a grievance.<sup>6</sup>

Whether petty in concept or magnificent in scope, this article has engendered a flood of law review articles unparalleled in tort history.<sup>7</sup> Actual decisions in the area, however, number only something over 300 cases.<sup>8</sup>

<sup>1</sup>N.Y. CIVIL RIGHTS LAW §§ 50-51.

<sup>2</sup>COOLEY, TORTS 29 (1st ed. 1879): "The right to one's person may be said to be a right of complete immunity: to be let alone."

<sup>3</sup>Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442, 443 (1902).

<sup>4</sup>Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>5</sup>Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

<sup>6</sup>Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 329, n. 22 (1966).

<sup>7</sup>"... no other tort has received such an outpouring of comment in the advocacy of its existence." PROSSER, TORTS 1051 (1st ed. 1941).

<sup>8</sup>Kalven, *supra* note 6, at 327. See Annot., 138 A.L.R. 22 (1942); 168 A.L.R. 446 (1947); 14 A.L.R.2d 750 (1950).

The new right was presented to a court of last resort for the first time in *Roberson v. Rochester Folding Box Co.*<sup>9</sup> The New York court, in a 4-3 decision, held that the right of privacy did not exist at common law.<sup>10</sup> Relief was refused, since no injury to a property interest as the nominal basis for damages had been shown.<sup>11</sup> The majority gave Warren and Brandeis passing notice, but denied the existence of the right.<sup>12</sup> In the course of its discussion, however, the majority suggested that legislation in this area would be valid.<sup>13</sup> The New York Legislature responded by enacting the statutes under which the instant case was brought.<sup>14</sup>

It was not until 1905 that the right was recognized by a court of last resort. Then, in *Pavesich v. New England Life Ins. Co.*, involving the unauthorized use of the plaintiff's picture in an advertisement for insurance, it was held that the right of privacy is derived from natural law, and is embraced within the absolute rights of personal security and personal liberty.<sup>15</sup>

*Roberson* and *Pavesich* were followed for the next thirty years, as courts chose to deny or acknowledge the existence of the right of privacy. The *Restatement of Torts* supported it in a section added in 1939.<sup>16</sup> From that time, it has gained increasing recognition until, at present, thirty states and the District of Columbia have recognized the right at common law, and four states have done so by statute.<sup>17</sup> Yet, as late as 1956 the

<sup>9</sup>*Supra* note 3, at 443.

<sup>10</sup>*Ibid.*

<sup>11</sup>*Id.* at 445: ". . . each decision [relied on by Warren and Brandeis] rested either upon the ground of breach of trust, or that plaintiff had a property right in the subject of litigation which the court could protect." See *Prince Albert v. Strange*, 2 De G. & Sm. 652, 41 Eng. Rep. 1171, 1 Mac. & G. 25, 64 Eng. Rep. 293 (1849) (property right and breach of trust); *Pollard v. Photographic Co.*, 40 Ch. D. 345 (1888) (breach of implied contract); *Gee v. Pritchard*, 2 Swans 402, 36 Eng. Rep. 670 (1818) (property right); *Mayall v. Highbey*, 1 Hurl & C. 148, 158 Eng. Rep. 837 (1862) (property right); *Duke of Queensbury v. Shebbeare*, 2 Eden 329, 28 Eng. Rep. 924 (1758) (property right).

<sup>12</sup>*Id.* at 443:

If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations or habits. And, were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone.

<sup>13</sup>*Id.* at 443.

<sup>14</sup>N.Y. Sess. Laws 1903, ch. 132, §§ 1-2. Held constitutional in *Rhodes v. Sperry & Hutchinson Co.*, 193 N.Y. 223, 85 N.E. 1097 (1908), *aff'd*, 220 U.S. 502 (1911). Compare: Act of Feb. 20, 1905, ch. 592, § 5, 33 Stat. 725: "That no portrait of a living individual may be registered as a trade-mark, except by the consent of such individual, evidenced by an instrument in writing. . . ."

<sup>15</sup>*Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). The learned justice relates the Fourteenth Amendment to the ancient commentators, Blackstone, and the common-law scolds and eavesdroppers.

<sup>16</sup>RESTATEMENT, TORTS §867 (1939).

<sup>17</sup>Instant case at 539, n.7. See, in Montana, *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816, 819, quoting the dissent (but not identifying it as such) of the *Roberson* case, *supra* note 3, and the Warren and Brandeis article, *supra* note 4.

state of the law was likened to a "haystack in a hurricane."<sup>18</sup> Even though it had been settled in a preponderance of jurisdictions that the right exists, no settled unifying principle or set of principles had emerged from sixty-five years of litigation.<sup>19</sup> The interest which lies at the root of the right has not been settled<sup>20</sup> other than to find a datum somewhere in the Constitution. For example, it was held in *Griswold v. Connecticut*<sup>21</sup> that the right of privacy was invaded by a Connecticut statute proscribing the use of contraceptives by married couples. Justice Douglas, delivering the opinion of the court, spoke in terms of penumbras formed by emanations from the First, Third, Fourth, Fifth and Ninth Amendments.<sup>22</sup> But three Justices placed the right under "the totality of the constitutional scheme under which we live,"<sup>23</sup> and two under the Due Process clause of the Fourteenth Amendment.<sup>24</sup> Two Justices dissented.<sup>25</sup> As a result, *Griswold* holds that the right of privacy is constitutionally protected, without a majority holding that it operates through any specific provisions or set of provisions.<sup>26</sup>

## II

If Warren and Brandeis gave birth to the right of privacy, it was Dean Prosser who gave it form. In an article simply entitled "Privacy," he undertook to show that decisional law had evolved not one, but a complex of four torts.<sup>27</sup> They were: 1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; 2) public disclosure of private facts about the plaintiff; 3) publicity which places the plaintiff in a false light in the public eye; and 4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.<sup>28</sup> The validity of this classification has been called into question,<sup>29</sup> and no conscious effort seems to have been made to apply it in the instant case.<sup>30</sup> But it stands as the most useful tool of analysis yet devised for dealing with the uncertain dimensions of privacy.

<sup>18</sup>*Ettore v. Philco Television Broadcasting Co.*, 229 F.2d 481, 485 (3rd Cir. 1956).

<sup>19</sup>*Id.* at 485: "The state of the law is still that of a haystack in a hurricane, but certain words and phrases stick out. We read of the right of privacy, of invasion of property rights, of breach of contract, of equitable servitudes, of unfair competition; and there are even suggestions of unjust enrichment."

<sup>20</sup>Bloustein, *Privacy as an Aspect of Human Dignity: an Answer to Prosser*, 39 N.Y.U. L. REV. 962 (1964); Prosser, *supra* note 5; Westin, *Science, Privacy and Freedom: Issues and Provosals for the 1970's*, (Part I) 66 COLUM. L. REV. 1003 (1966); (Part II) 66 COLUM. L. REV. 1205 (1966); Kalven, *supra* note 6.

<sup>21</sup>381 U.S. 479 (1965).

<sup>22</sup>*Id.* at 484.

<sup>23</sup>*Id.* at 494; Goldberg, J., Warren, Ch. J., Brennan, J.

<sup>24</sup>*Id.* at 500; Harlan, J.; and at 502, White, J.

<sup>25</sup>Black, J., and Stewart, J.

<sup>26</sup>An excellent collection of articles on *Griswold* is found in 64 MICH. L. REV. 197-288 (1965).

<sup>27</sup>*Supra* note 5, at 389.

<sup>28</sup>*Ibid.*

<sup>29</sup>See Bloustein, *supra* note 20.

<sup>30</sup>But see note 9 in the majority opinion.

In terms of Prosser's analysis, the instant case would seem to be contemplated by 3) above, the "false light" cases. Warren and Brandeis had envisioned a single right, a single guard against affronts to personality. It was to stand with defamation, not to supplant it. But the evolution of the law, in Prosser's analysis, has produced the *false light* category, which suggests that invasion of privacy, as a general tort, has been moving into the area of defamation despite the wishes of its creators. Dean Wade has it thus:

Privacy is now fully established as a legally protected right in the United States. Of the four recognized types of invasion of the right of privacy, the two which are most closely analogous to the right of reputation, as protected by the law of defamation, are "public disclosure of embarrassing private facts about the plaintiff" and "publicity which places the plaintiff in a false light in the public eye." These two differ only in that the first involves a true statement and the other a false statement. The hurt to the plaintiff's feelings, the damage to his sensibilities, is essentially the same in both cases. If the true statement is actionable in privacy, the false statement should be actionable too. A plaintiff's action for invasion of the right of privacy should not be subject to the defense that the communication is true or false, if it is one which could be offensive to a person of ordinary sensibilities. And if a non-defamatory false statement is actionable because it invades the plaintiff's right of privacy, a defamatory statement should be actionable for the same reason.<sup>31</sup>

If privacy actions are to replace defamation actions, it is natural to first allow them to be used alternatively or conjunctively. That step has been taken. In *Pavesich*,<sup>32</sup> use of the plaintiff's picture in an advertisement was held to be both an invasion of privacy and a libel. As to the latter, the court reasoned that since the plaintiff's friends knew he did not own a policy of insurance in the defendant company, they would assume he was lying, either gratuitously or for money, and therefore he would be held in contempt. More recently, *Peay v. Curtis Publishing Co.*<sup>33</sup> involved use of a picture of the plaintiff taxi driver, although she was not identified by name, in an article on Washington taxi drivers which depicted them as "ill-mannered, brazen and contemptuous of their patrons." Damages were awarded on the alternative grounds of invasion of privacy and defamation.<sup>34</sup>

By allowing recovery for violation of privacy where a defamation action will not lie, the courts may be able to avoid traditional defenses,<sup>35</sup> including retraction statutes.<sup>36</sup> If actions may be brought for invasions

<sup>31</sup>Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1120 (1962).

<sup>32</sup>*Supra* note 15 at 81.

<sup>33</sup>78 F. Supp. 305 (D.D.C. 1948).

<sup>34</sup>See cases collected in Wade, *supra* note 31. The instant case at 543-544 is distinguished from a libel action:

This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context.

<sup>35</sup>Prosser, *supra* note 5, at 422-423, comments that he foresees the disappearance of the defense of truth, the requirements of special damage in the absence of libel per se, the requirement of any defamatory innuendo at all and the retraction statutes.

<sup>36</sup>REVISED CODES OF MONTANA, 1947, § 64-207.1.

of privacy as an alternative to defamation, and if that weakens the defenses to defamation, what is to mark the limit of acceptable conduct? The instant case supplies part of the answer.

### III

The Hill affair was newsworthy,<sup>37</sup> and the passage of three years had not lessened the right of the press to comment on it.<sup>38</sup> But the report was fictionalized.<sup>39</sup> There is a well-developed doctrine that the right of privacy is invaded if a story is fictionalized<sup>40</sup>—when the plaintiff is put in a false light, as in Prosser's analysis.<sup>41</sup> It is at this point that the right of privacy and libel touch most closely, the important difference being the presence or absence of malice. The instant case stood on this borderline, and it was natural for the Court to find conditions ripe for a marriage of the two actions. To do so, it relied principally on two cases—*Spahn v. Julian Messner, Inc.*,<sup>42</sup> decided by the Court of Appeals of New York in the interval between reargument and the decision in the instant case, and *New York Times v. Sullivan*.<sup>43</sup> In the *Spahn* case, Warren Spahn, a noted baseball pitcher, was seeking an injunction and damages under the New York right of privacy law<sup>44</sup> for the defendant's unauthorized publication of a fictitious biography of his life. The court held that while he is a public personality, and therefore substantially without a right of privacy so far as his professional career is involved, his personality may not be fictionalized and exploited by the defendants. The publication was found to consist of "a host, a preponderant percentage of factual errors, distortions and fanciful passages."<sup>45</sup> The rule of *New York Times v. Sullivan*<sup>46</sup> was rejected on the ground that the case before it dealt neither with public officials nor official conduct, and distinguished the interest of the public in that area from the public interest in reporting events in the life of a private individual. Thus, the New York court found no violation of the freedoms of press and speech guaranteed by the First and Fourteenth Amendments on the basis of the status (private vis-a-vis public) of the plaintiff.

<sup>37</sup>Instant case at 541.

<sup>38</sup>See, e.g., *Cohen v. Marx*, 94 Cal. App.2d 704, 211 P.2d 320 (1950) (pugilist, ten years); *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir. 1940) (infant prodigy, seven years).

<sup>39</sup>Instant case at 545.

<sup>40</sup>In addition to the cases listed in note 9 of the instant case, see *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P.2d 133 (1945); *Strickler v. National Broadcasting Co.*, 167 F. Supp. 68 (S.D. Cal. 1958); *Stryker v. Republic Pictures Corp.*, 108 Cal. App.2d 191, 238 P.2d 670 (Dist. Ct. App. 1951); *Carlisle v. Fawcett Publications, Inc.*, 20 Cal. Rptr. 405 (Dist. Ct. App. 1962).

<sup>41</sup>Note 27, *supra*, and accompanying text.

<sup>42</sup>274 N.Y.S.2d 877, 221 N.E.2d 543 (1966). *Spahn*, ironically, relied in part on *Hill v. Hayes*, 260 N.Y.S.2d 7, 207 N.E.2d 604 (1965), from which the appeal in the instant case was taken.

<sup>43</sup>376 U.S. 254 (1964).

<sup>44</sup>*Supra* note 1.

<sup>45</sup>*Spahn*, *supra* note 42, at 545.

<sup>46</sup>*Supra* note 43.

The Court in the instant case found otherwise. In *Sullivan*,<sup>47</sup> the Court had held in a civil libel action that factual error or content defamatory to official reputation, or both, are insufficient for an award of damages unless actual malice—knowledge or reckless falsity—is alleged and proved. The *Sullivan* test for civil libel was applied to a privacy action in the instant case:

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.

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as these are to health government. \* \* \* Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.<sup>48</sup>

While the Court agreed that *calculated* falsehood should find no immunity in either case, it thought negligence too elusive a standard, placing the press in the unhappy situation of having to guess how a jury might assess their degree of care.<sup>49</sup> The law is now explicit: *in public comment upon newsworthy persons, an action for invasion of privacy will lie only if there is proof of knowing or reckless disregard of the truth.* There is no action for negligence short of reckless fictionalization. The other torts Prosser found within the “right to be let alone” would not seem to be affected by the decision. The court intimated no view on “intrusion.”<sup>50</sup> The “public disclosure of private facts” tort assumes that the event reported is in the private sector of the life of even a newsworthy person, and is inapposite here.<sup>51</sup> No tort of appropriation is involved, although the statute under which the action was brought and its origin shown above indicate it was founded on the idea of appropriation.<sup>52</sup> Therefore, under Prosser’s analysis, it cannot be said that the *Sullivan* rule in civil defamation actions<sup>53</sup> has been applied to all elements of the right of privacy; it has been applied to only one of four identified types of invasion of that interest. *Sullivan* extended the guarantees of the First Amendment to defamation; the instant case extends them to one segment of privacy actions. The stage may now be set for the absorption of defamation as a part of the larger law of privacy.

<sup>47</sup>*Ibid.*

<sup>48</sup>Instant case at 542.

<sup>49</sup>Which prompts the inquiry whether “reckless disregard of the truth” is easier for the jury to distinguish from gross, but not reckless, negligence.

<sup>50</sup>Instant case at 541, n.9.

<sup>51</sup>Instant case at 539, n.7.

<sup>52</sup>*Supra* note 14, and instant case at 538-539.

<sup>53</sup>Note, *Privilege to Defame: The United States Supreme Court Has Established a New and Important Area of Constitutional Law*, 26 MONT. L. REV. 110 (1964). Applied to criminal libel by *Garrison v. State of Louisiana*, 379 U.S. 64 (1964).

## IV

To recapitulate:

- 1) The right of privacy exists as a complex of four distinct torts;
- 2) Privacy actions have been used with or as alternatives to defamation actions; and
- 3) The constitutional guarantees of freedom of speech and the press apply equally to defamation and "false light" privacy actions, both requiring knowing or reckless falsity on the part of the defendant.

The next logical step, perhaps taken invisibly by the instant case, is the absorption of defamation by the right of privacy. *Griswold*<sup>54</sup> seems to indicate that the most likely course for the Court to take is the balancing of one constitutional right against another—freedom of speech and press against the equally fundamental right of privacy. Balancing at this point seems to favor the former. In the instant case, six of the nine justices favor a strong or absolute priority of claims for freedom of the press over the competing claims of privacy. It thus seems safe to say that the Court is not going to move far from its present position in the foreseeable future. This one aspect of the right of privacy may swallow defamation in due course, but the tests of defamation seem destined in turn to swallow this segment of the right.<sup>55</sup>

## V

There is a grim irony in this story of a man who wanted the right "to be let alone." To assert that right, he has stood in the judicial spotlight for eleven years, through a trial and five appeals,<sup>56</sup> only to find himself thrown back for further proceedings. Should he prevail, his vindication of his right of privacy, which affects us all, must seem a Pyrrhic victory. In any event, the right of privacy as heretofore conceived seems much narrower.

WILLIAM J. CARL.

---

WATER LAW: RECOGNITION OF A PUBLIC WATER RIGHT.—Respondent DePuy mandamused the Fish and Game Commission to relicense his artificial fish ponds.<sup>1</sup> The appellant then instituted an action for a mandatory injunction to compel the respondent to build a fishladder on his

<sup>54</sup>*Supra* note 21.

<sup>55</sup>In a manner reminiscent of the Gingham Dog and the Calico Cat.

<sup>56</sup>155 N.Y.S.2d 234 (1956); 207 N.Y.S.2d 901 (1960); 216 N.Y.S.2d 497 (1961); 240 N.Y.S.2d 286 (1963); 15 N.Y.2d 986, 207 N.E.2d 604 (1965); and instant case.

<sup>1</sup>REVISED CODES OF MONTANA, 1947, § 26-306 (Hereinafter REVISED CODES OF MONTANA are cited R.C.M.) provides for the licensing of artificial lakes and ponds. The ponds in question had been licensed before and although there had been some slight