

PRIVACY AND THE PRESS — AN EXAMINATION OF HOW THE SUPREME COURT CONFUSED PRESS FREEDOM AND FALSE LIGHT PRIVACY IN CRITICAL CASES

Alex Alben*

Reporters have a love-hate relationship with privacy. As guardians of the average citizen against powerful institutions, many news organizations fashion themselves as champions of the “little guy,” yet the First Amendment imperative sometimes comes at the cost of individual privacy.

*This article reviews the most salient cases balancing press and privacy rights in the modern era of journalism and concludes that the U.S. Supreme Court, in attempting to articulate concepts that protect journalism, misapplied its own precedents and ended up dramatically impairing an individual’s right of action for “false light” privacy. *Had Time Inc. v. Hill, New York Times v. Sullivan and Gertz v. Welch, come before the court in a different order, we might enjoy much more vibrant privacy rights today, while also securing press freedom.**

The landmark rulings of the 1960’s left a legacy of considerable confusion over application of the libel standard to press outlets covering non-public figures and require a fresh assessment as media has dramatically evolved in the intervening time period. With growing recognition of the way private lives are exposed in social media in the digital age, the tort of false light privacy might find new life if we put it into a proper perspective.

* Alex Alben was named the first Chief Privacy Officer of Washington State in 2015. He is a graduate of Stanford University and Stanford Law School. In his first job he worked as a researcher for Walter Cronkite at CBS News and then for CBS Reports. After law school, he served as an entertainment lawyer for Orion Pictures and Warner Bros, before beginning a tech career in Seattle with senior management positions at Starwave Corp. and RealNetworks, Inc. He currently teaches the privacy law section of the Privacy Law Clinic at the University of Washington School of Law. The opinions expressed in this article are his own.

INTRODUCTION

Newspapers, magazines and broadcast journalists see themselves in the tradition of crusading reporters such as Edward R. Murrow and the pioneering documentaries that CBS Reports began in the late 1960's, exemplified by "Harvest of Shame," which drew attention to the harsh treatment of migrant farm workers in the United States.¹

Yet journalists also deal with an ever-present tension of seeking to expose facts about people who may not want those facts exposed. News organizations frequently weigh the public interest in the story against the privacy of an individual, who is deemed to sacrifice his right to privacy for the purpose of serving the "greater good." When reporters get the story wrong—as they do more frequently than they would like to admit—the stain remains on the public reputation of the person long after the "news value" of the story expires. This is the price, we are told, that we pay for a free society that enjoys the benefit of the First Amendment.

I had a front row seat to the great journalistic tradition of CBS News when I worked for Walter Cronkite during the 1980 Presidential Election campaign and for producer George Crile on a CBS Reports Documentary, "The Uncounted Enemy—A Vietnam Deception," which aired in September of 1981.² Mike Wallace served as the correspondent on "The Uncounted Enemy," frequently testing my research skills to see if we were "getting the story right." I assured him that we were.³

While Mike Wallace was one of my heroes, I frequently winced when I saw him push his microphone in the face of an unexpected target, promptly forced with the choice of running away or answering his tough questions about some alleged malfeasance. The fact that Wallace and his production crew carefully researched each story gave me some solace, but he clearly relished practicing what became known as "gotcha" journalism.⁴

1. *Harvest of Shame* (CBS television broadcast Nov. 30, 1960).

2. *The Uncounted Enemy—A Vietnam Deception* (CBS television broadcast Jan. 23, 1982).

3. General William Westmoreland sued CBS after the documentary aired, claiming libel and seeking \$120 million in damages. A conservative legal foundation funded the General's lawsuit. He eventually settled for no money and a statement from CBS that he had done his duty during the course of the Vietnam conflict "as he saw fit." We felt vindicated, as CBS had opted for a "truth defense" in this case, arguing that we got the facts right about the deceptions authorized by Westmoreland to manipulate military intelligence during the war. Rudy Abramson, *Westmoreland to Drop Libel Suit Against CBS: General, Network to Make Joint Announcement Today on Ending of \$120-Million Legal Action*, L.A. Times (February 18, 1985), http://articles.latimes.com/1985-02-18/news/mn-3110_1_westmoreland-libel (last visited Mar. 2, 2017).

4. Many of us have experienced the pain of family members and close friends who were targeted by news stories that hinted at illegal or inappropriate behavior in front page coverage, only for those stories to melt away during subsequent investigation. Typically, the papers do not give the follow-up vindication equivalent front-page attention. In these in-

We have traditionally trusted news organizations to live by a code of ethics and to pursue stories they deem to be *newsworthy*. When the news outlet gets the story wrong, private citizens are cast in a false light and may never recover the damage to their reputation. This has occurred in our country more often than we would like to think, defining the parameters of privacy protection in our country, but with unexpected twists and turns, as the Supreme Court cases discussed in this article reveal.

I. PRIVACY IN FALSE LIGHT—TIME INC. V. HILL

To understand how recognition of “false light” privacy was still-born at the Supreme Court level, we must examine two critical privacy cases—*Time Inc. v. Hill*⁵ and *Gertz v. Welch*⁶—and analyze why the specific fact patterns caused the justices to rule in inconsistent and odd directions. This can only be understood by recognizing the tremendous impact of the court’s 1964 libel ruling in *New York Times v. Sullivan*⁷ and the earlier privacy case *Griswold v. Connecticut*, which broke ground by finding a privacy right in the U.S. Constitution.⁸

The most important case in over 200 years of American jurisprudence involving the privacy rights of private individuals appearing in news stories—*Time Inc. v. Hill*—was argued before the U.S. Supreme Court in 1966 and decided in January of 1967. Had the court recognized the violation of privacy presented before it, our privacy laws would have been strengthened immeasurably for the following generations, serving as a guiding light for the era of digital technology and the host of devices and apps that threaten personal privacy. But by a 5-4 vote, the Court missed the boat. To understand the “what-ifs?” and missed connections of our privacy law, we need to delve into *Time Inc. v. Hill*.

Former Vice President Richard Nixon, then in political exile in a white shoe New York law firm, represented the family of James and Elizabeth Hill.⁹ The Hills had been kidnapped in September of 1952 by three escaped convicts from the federal penitentiary in Lewisburg, Pennsylvania, who invaded their home in the Philadelphia suburbs and held them hostage for 19 hours.¹⁰ Of key significance to the case, the Hills had two teenage daughters—a 15 and a 17-

stances, the damage is done to a person’s reputation and even if the news story is not directly noticed by many people, negative stories tend to be spread through old-fashioned word-of-mouth, eventually reaching that person’s circle of acquaintances.

5. 385 U.S. 374 (1967).

6. 418 U.S. 323 (1974).

7. 376 U.S. 254 (1964).

8. 381 U.S. 479 (1965).

9. Leonard Garment, *Annals of Law, The Hill Case*, NEW YORKER, Apr. 17, 1989, at 90-91.

10. *Time Inc. v. Hill*, 385 U.S. 374, 378 (1967).

year-old—a younger daughter (age 11), and twin boys, age 4.¹¹ After hiding out in the Hill home, the convicts fled to New York.

The Hills reported that the kidnapers had treated them with civility.¹² There were no incidents of violence and the criminals left the family unharmed.¹³ Ten days after departing the Hill home, New York police apprehended the escapees and killed two of them in a shoot-out in the Upper West Side of Manhattan.¹⁴ One detective died in the gun battle.¹⁵

Seeking to avoid publicity, the Hill family moved to Connecticut two months after the event.

II. HOW FACT TURNED TO FICTION

Novelist Joseph Hayes, inspired in part by the hostage taking of the Hill family, wrote a novel entitled “The Desperate Hours,” which was published in 1954. The thriller sold well, attracting interest from both Broadway and Hollywood. The play debuted on Broadway in 1955, starring Frederick March as the father of the family and Paul Newman as one of the hostage-takers. That same year, William Wyler directed “The Desperate Hours,” starring Humphrey Bogart as the menacing ringleader of the escapees and Frederick March as the father. All three fictional versions of “The Desperate Hours” are set in Indianapolis, not Philadelphia. The name of the family in these versions was changed from “Hill” to “Hilliard.”

The authors and filmmakers also made liberal detours from the facts of the Hill case. In the dramatic versions,¹⁶ the burly convicts rough up the father and son. They menace the mother and older daughters, although acts of molestation are not shown on screen. The convicts inadvertently kill an innocent trash collector after he notices a strange car in the family’s garage. The play and film come to a dramatic close,¹⁷ with the bad guys machined-gunned to death at the threshold of the home.

Capitalizing on the production of the play, Life Magazine published a photo essay in its February 28, 1955 issue.¹⁸ The article claimed that in the actual event, bank robbers had imprisoned the family. Conflating fact and fiction, Life photographers posed the actors of the upcoming Broadway play, including Paul Newman, in rooms of the old Hill house in Whitemarsh, Pennsylvania. Instead of clarifying that “The Desperate Hours” was only loosely based on the

11. Garment, *supra* note 9, at 91.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 91-92.

17. *Id.*

18. *True Crime Inspires Tense Play*, LIFE, Feb. 28, 1955, at 75.

Hill kidnapping, the article spoke of the “ordeal of a family trapped by convicts,” giving Broadway its new thriller.¹⁹

Enraged by the Life Magazine’s distortions, James and Elizabeth Hill filed suit against Time, Inc., the corporate parent of Life Magazine, in New York State, citing New York’s privacy statute.²⁰ The Hills opted not to include their five children as plaintiffs in the lawsuit, seeking to shield them from the court process and publicity.²¹ The Hills won a jury verdict in state court, affirmed on appeal to the State Appellate Division and then the New York State Court of Appeals. Claiming that such verdicts impinged the freedom of the press, Time took its final appeal to the Supreme Court. At this juncture, Richard Nixon took up the Hill’s case.

III. RICHARD NIXON TO THE RESCUE

Nixon devoted himself to his Supreme Court oral argument, practically memorizing the trial court record and boning up on Constitutional Law regarding privacy and the First Amendment. By all accounts, the energy and intellectual facility displayed by Nixon in service to this case represents one of his finest hours.²² But his efforts did not suffice.

From the perspective of the evolution of American privacy law, *Time Inc. v. Hill* could not have reached the high court at a worse time. In 1965, the court had caused seismic shockwaves by recognizing a “right to privacy” in American law in *Griswold v. Connecticut*.²³ Estelle Griswold, the head of the New Haven chapter of Planned Parenthood had challenged Connecticut’s 19th Century statute forbidding distribution of contraceptives. Carefully planning her protest against a law that failed to accord any degree of privacy to the sex lives of consenting adults, Griswold worked with a doctor to provide birth control to married couples. Police arrested and jailed her. Griswold appealed.

While *Griswold* represents a milestone in the fight for recognition of a Constitutional right of privacy, it also managed to muddle the issue as to the scope of the newly recognized privacy right. Writing for the court, Chief Justice William O. Douglas struck down the Connecticut statute, holding that it violated “the right to marital privacy.”²⁴ Douglas could not point to a specific clause or amendment to the U.S. Constitution in deriving this new privacy right. The word “privacy,” in fact, does not appear in our founding document. Instead, Douglas proposed the following legal metaphor as the basis for the court’s ruling: If one shone a light on the Constitution, it would emanate a

19. *Id.*

20. *Time, Inc.*, 385 U.S. at 380.

21. *Garment*, *supra* note 9, at 93.

22. *Id.* at 94-97.

23. 381 U.S. 479 (1965).

24. *Id.* at 479.

shadow or “penumbra,” and in this “penumbra,” lay a right of privacy that derived from the pro-privacy sentiments of the Third, Fourth, Fifth, Ninth and even Fourteenth Amendments.²⁵ Dissenters Hugo Black and Potter Stewart ridiculed this logic.²⁶ They found no right of privacy in the Constitution, much less a “penumbra.”²⁷

Nevertheless, *Griswold* established privacy as law. The problem was that the court failed to anchor the privacy right in the traditional common law traditions of protecting an individual from false reports and allowing people to fight misappropriation of their names and likenesses by commercial actors and the news media.

Nixon touched upon *Griswold*'s unfortunate precedent in a memo to his file, shortly after the first hearing of *Time Inc. v. Hill*.²⁸ He noted that he should have pointed out to the justices “that the right of privacy should be treated like the right to reputation in a libel case as being one of those areas where the state has the power, under the Ninth and Tenth Amendments, to give redress to private citizens where they are injured by other private citizens.”²⁹

Nixon perceived that for privacy law to have broad meaning, it had to be grounded in long-standing state laws that protected individuals. By 1966, New York's privacy statute had held for six decades. Those rights not listed in the Constitution, were reserved to the states by Bill of Rights.³⁰

In tandem, the Ninth and Tenth Amendments could be read to reserve privacy for “the people.” Yet the justices hearing *Time Inc. v. Hill*, were less than a year away from *Griswold*'s acrobatic determination of privacy in some shadow of great Constitutional ideas and several of the justices were eager to move away from its fuzzy logic. Further, eight of the justices who had heard one of the court's most famous press cases of the 1960's, still sat on the court in 1966, with Arthur Goldberg replacing associate justice Abe Fortas. This continuity dramatically shaped the prism through which the court viewed *Time Inc. v. Hill*.

IV. THE DISTORTING IMPACT OF NEW YORK TIMES V. SULLIVAN

Time Inc. v. Hill arrived in the high court's docket within two years of the landmark libel ruling, *New York Times v. Sullivan*, which established the “actu-

25. *Id.* at 484.

26. *Id.* at 507.

27. *Id.* at 528.

28. Garment, *supra* note 9, at 98-99.

29. *Id.* at 100.

30. U.S. CONST. amend. IX. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” This Amendment should be read in concert with the Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

al malice,” or “reckless disregard for truth,” standard in First Amendment cases involving public figures.³¹ The influence of *New York Times v. Sullivan* on the outcome of *Time Inc. v. Hill* cannot be overstated, because it pushed the justices into a very specific and narrow intellectual orbit for considering a privacy case. Rather than separately analyzing the merits of a family’s right to truthful press inquiry and the right of the press to challenge a public figure, the court conflated the two concepts, winding up with pretzel logic that would not be unwound for many years.

In 1960, the New York Times had published a full-page advertisement sponsored by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South.³² Entitled, “Heed Their Rising Voices,” the ad accused the Montgomery, Alabama, police of violating the civil rights of African-Americans.³³ Although not named in the ad itself, the elected City Commissioner of Montgomery, L.B. Sullivan, sued for in Alabama and won a judgment for libel *per se*.³⁴ The court awarded \$500,000 to Sullivan.³⁵ Initially refusing to retract the ad, the Times, as publisher, stood by its content until it eventually retracted it at the request of Alabama’s governor.³⁶

Rising to the occasion to promote both press freedom and the Civil Rights movement, the Supreme Court decided in a 9-0 ruling to overturn the state court’s decision.³⁷ It held that for a public figure, such as Sullivan, to prevail in a defamation case, the news organization must have acted with actual malice in the process of crafting its news story.³⁸ The court found no malice here. Justice Brennan wrote: “The First Amendment protects the publication of all statements, even false ones, about the conduct of public officials except when statements are made with actual malice (with knowledge that they are false or in reckless disregard of their truth or falsity).”³⁹

In *Time Inc. v. Hill*, the Time-Life news organization’s lawyers smartly drafted the momentum of *New York Times v. Sullivan*. They emphasized the First Amendment status of Life Magazine. They admitted that Life may have gotten a few facts wrong, but saw this case as striking another chord for press

31. 376 U.S. 254 (1964).

32. *Id.* at 257.

33. *Id.* at 256.

34. *Id.* at 262.

35. *Id.* at 256.

36. *Id.* at 260-61.

37. *Id.* at 254.

38. *Id.* at 280.

39. *Id.* It’s interesting to observe that President Nixon’s future first Secretary of State, William P. Rogers, argued the case on behalf of The New York Times. The false facts in the actual “Heed Their Rising Voices,” ad were trivial: the ad claimed that Alabama police had arrested Dr. King seven times, instead of four. And it mistakenly identified the song sung by protestors on the State Capitol steps as “My Country, ‘Tis of Thee,” rather than America’s national anthem.

freedom. They knew that Justice Black, a First Amendment absolutist, would take the bait. Attorney Harold Medina argued that “The Desperate Hours” was constitutionally protected as comment on the news, ignoring the fact that the offending Life Magazine article was a promotion for a Broadway play.

Afforded an opportunity to strengthen his first argument when the case was reheard by the court in October of 1966, Nixon harped on the false light of the Life Magazine “True Crime” story: “The heart of ‘The Desperate Hours’ is a story of violence and bloodshed; that the heart of the Hill incident was the fact that it was distinguished by a lack of violence and bloodshed.”⁴⁰ Nixon pointed to the novelist’s own admission of fictionalizing most of his story.

Justice Black remained unmoved, tangling with Nixon for over ten minutes of oral argument.⁴¹ He sarcastically asked Nixon if Life had the right to sell magazines for profit.⁴² He ignored the testimony of Life’s editors that their decision to reenact the scenes from the work of fiction in the Hill’s abandoned home was an “editorial gimmick.”⁴³ Nixon plaintively asked Black, “[a]re private persons, involuntarily drawn into the vortex of a public issue . . . allowed, in effect, to be used as gimmicks for commercial purposes in a falsified situation?”⁴⁴

Nixon pointed out that Life had 24 senior editors, 41 other managing editors and 208 reporters, yet they failed to fact check the “True Crime” photo essay or even qualify the article with the statement that it was “inspired” by real events.⁴⁵

Despite the consistent behavior of the Hill family to stay out of the lime-light, they had been “drawn into the vortex,” of an entertainment story, if not a news story.

Applying the “actual malice” philosophy of *New York Times v. Sullivan*, key justices on the court preferred to view *Time Inc. v. Hill* as a privacy analog to the earlier libel case. False reporting should be tolerated, according to this rationale, in order to protect the broader principle of press freedom. Further, the case didn’t seem connected to the “marital privacy” right found by the court in 1965 in *Griswold*.

Not surprisingly, the Court ruled on January 9, 1967, to overturn the verdict of the New York State Court of Appeals and to remand the Hill’s case for further proceedings in the lower court,⁴⁶ insisting that in a new trial a jury be instructed on the constitutional principles the court had found in *New York Times v. Sullivan*.⁴⁷ Life magazine, in other words, should be judged by a

40. Garment, *supra* note 9, at 100-101.

41. *Id.* at 103.

42. *Id.* at 103.

43. *Id.* at 103.

44. *Id.* at 103.

45. *Id.* at 103.

46. 385 U.S. 374 (1967).

47. *Id.* at 397.

standard of whether it had acted with “reckless indifference to the truth or falsity” of the statements made about the Hills in the photo essay.

Justice Brennan, writing again for the majority, saw the Hill family as collateral in the bigger issues of civil society.⁴⁸ Brushing aside the harm done to private citizens by the media, Brennan found that: “[t]he risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and the press.”⁴⁹

The critical and persuasive reasoning of *N.Y. Times v. Sullivan* rests on the fact that Mr. Sullivan, an elected official, had sought public life and, in fact, courted controversy by prosecuting and persecuting civil rights protesters. The glare of publicity had cast its shadow on the Hill family—to use Justice Douglas’s metaphor—but they had only existed as public figures for a transient period in the popular press. All of their subsequent actions—moving from their Philadelphia home, refusing press interviews, declining to be paid to tell their story—speak to their desire to lead private lives. While no one would challenge a newspaper reporter’s right to rehash the story several years later, *Life*’s entertainment department had in fact hijacked the old news in an effort to promote the sensational new play, “The Desperate Hours.” In this effort, they not only blended fact with fiction, but presented fictional incidents from the play as having transpired in the Hill’s home. The Hills, as a result, not only lost their battle to live in peace, but also lost the thread of facts that occurred during their nineteen hours of their captivity.

Thus, the court missed an important opportunity to extend the nascent “right of privacy” recognized in *Griswold v. Connecticut* and apply the privacy concept to an individual’s or family’s inherent right to escape the microscope of prying media outlets, especially when those outlets falsify facts in order to create a more compelling story or publicize a work of fiction.

V. THE PENDULUM SWINGS BACK IN *GERTZ V. WELCH*

Time Inc. v. Hill had an important echo. Seven years after the ruling, the court took up a privacy case in *Gertz. v. Welch*.⁵⁰ In this instance, the lawyer for a victim of a police shooting claimed that the hysterically anti-communist John Birch Society, had defamed the victim in an article in “American Opinion,” the Society’s official publication.⁵¹ Among other things, the Society wrote that by defending a victim of a Chicago police shooting, Elmer Gertz was part of a conspiracy to discredit local police forces around the country, paving the way for the federal government to impose a national police force and establish a dictatorship. Gertz opted to test this Birch Society fantasy in court.

48. *Id.* at 388.

49. *Id.*

50. 418 U.S. 323 (1974).

51. *Id.* at 325-26.

Distinguishing *N.Y. Times v. Sullivan*, the Supreme Court held that Gertz could bring a claim, because he was not a public figure and had not “thrust himself into the vortex of this public issue . . .”⁵² Private individuals, therefore, should not have to prove “actual malice” on the part of the press. “States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.”⁵³

When the case was retried in the District Court, Gertz won \$400,000 in damages.⁵⁴

Looking at the two cases side-by-side, the distinction the Supreme Court drew between the Hills and Elmer Gertz makes no sense. If anything, Gertz’s profession as a trial lawyer and his decision to take on a high-profile case, thrust him into the public eye. By contrast, the Hill family did everything possible to escape publicity after their involuntary 19-hour brush with fame. Yet our highest court determined that Gertz could bring a case under state law and sue for actual damages, while the privacy-seeking Hill family had to meet the high bar of the “actual malice” standard in a false light privacy case.

CONCLUSION AND LESSONS LEARNED

Had the four landmark privacy and press cases of the ten-year span from 1964-74 arrived at the Supreme Court in a different order, we might enjoy much more expansive privacy rights in our country, while also protecting press freedom when it comes to publishing critical articles—and advertisements—about public figures. In the only non-media case of this quartet, the court in *Griswold v. Connecticut* proclaimed a nebulous privacy right anchored in the marital bedroom, but failed to define or even confine the parameters of this new privacy right or explain what it might mean in other contexts.

The first media case, *N.Y. Times v. Sullivan*, created a broad zone of press freedom, allowing newspapers and magazines to publish anything that fell short of truly reckless reporting. Coming after *N.Y. Times v. Sullivan*, the Hill family case suffered and justice miscarried. One wonders what might have been, had *Hill* come first, followed by *Griswold* and then *Sullivan*. The recognized zone of privacy in our country—and those that follow our example—might have been much broader and more meaningful. *Gertz v. Welch* recognized that an individual—even one participating in a highly publicized court trial with national implications—still could bring a valid false light case grounded in state

52. *Id.* at 352.

53. *Id.* at 345-46. The majority opinion in *Gertz* Court, coincidentally, was written by Justice Lewis Powell, a Richard Nixon appointee. One wonders whether the President could have anticipated that Powell would do much to rectify the result that Nixon, as lawyer, failed to obtain in *Time Inc., v. Hill*.

54. *Attorney Awarded \$400,000 Libel Judgment in Landmark Case*, UPI ARCHIVES, Apr. 22, 1981.

law, but by 1974, the court was forced to distinguish the Sullivan standard and essentially ignore the inconsistency with *Hill*.

Today's media landscape has changed dramatically from the era of dominant city newspapers and the three national news networks of the 1960's when three of these four cases were decided. Where it was unusual in the Walter Cronkite era for an entertainment executive to meddle with a network news operation, today entire news programs—such as the Today Show and other morning fare—are run by people more skilled with attracting specific demographics than covering complex stories. In its era, *Time Inc. v. Hill* stood out as an example where the entertainment department of a magazine manipulated a news story to promote a Broadway play that it wished to highlight.

Today, the lines between entertainment and news are blurred even more, making it difficult for both reporters and courts to understand the primary mission of a so-called news organization. In fact, our media landscape is characterized by millions of potential publishers who have instant access to a global audience, creating a situation where most stories are never fact-checked, but “go viral” when they captivate the Internet audience of the moment.

Attorneys and judges must take extra care to put *Time v. Hill* into perspective when framing false light privacy cases. While recent well-publicized cases, such as the Peeping Tom video of Erin Andrews⁵⁵ and the distribution of Hulk Hogan's sex tape,⁵⁶ involved unwanted exposure of a truthful incident, we should not abandon the more subtle cause of action for distribution of a video or news article that not only deals in private facts, but changes those facts to serve the editor's agenda. Courts should reinforce *Gertz* and build arguments around the private torts that exist in many states for privacy in the false light. False light matters, whether motivated by an over-eager public relations executive or a careless lack of fact checking. In a time currently marked by controversies over “fake news,” this distinction will become more important than ever.

While the roadmap for false light privacy is far from clear, distinguishing the “actual malice” standard and analyzing the roots of the Supreme Courts logic—or lack thereof—in *Time v. Hill*—should put society in a better place to

55. CBS, “Jury Awards Big Payout to Erin Andrews in Nude Video Suit,” (Mar. 7, 2016, 8:41PM), <http://www.cbsnews.com/news/jury-awards-erin-andrews-55million-in-nude-video-suit>. The court awarded a combined \$55 million against the “Peeping Tom” stalker, Michael David Barrett and the Nashville Marriott Hotel, where the incident took place.

56. Nick Madigan & Ravi Somaiya, *Hulk Hogan Awarded \$115 million in Privacy Suit against Gawker*, N.Y. TIMES, <https://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html/> (last visited Feb. 12, 2017). The jury parsed the awarded into \$55 million for damages and \$60 million for emotional distress. The verdict led to bankruptcy filings by Gawker's publisher, Nick Denton, and the sale of Gawker to Univision. Roger Yu, *Gawker Sold to Univision for \$135 Million in Bankruptcy Auction*, USA TODAY, <http://www.usatoday.com/story/money/2016/08/16/gawker-sold-univision-135m/88873898/> (last visited Feb. 11, 2017).

balance both press freedom and individual privacy. The freedom to conduct our lives in private, after all, has been recognized as a fundamental human right, underpinning our other Constitutional freedoms of speech and association.⁵⁷

57. See: The **Universal Declaration of Human Rights**, a **declaration** adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris.