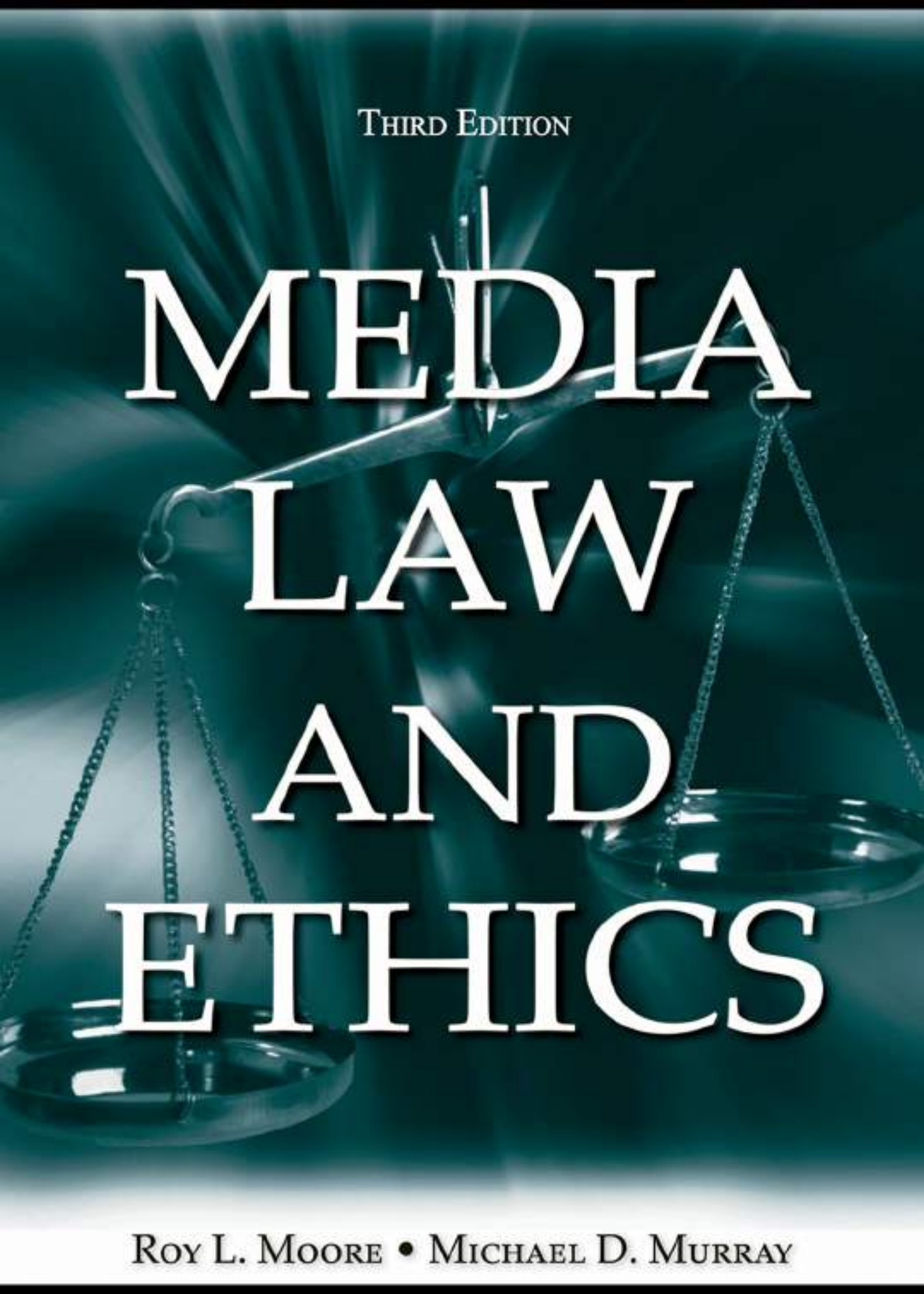
THIRD EDITION
MEDIA LAW AND ETHICS
ROY L. MOORE • MICHAEL D. MURRAY

CHAPTER
10

Right of Privacy

The privacy of all Americans is protected in all our activities. The government does not listen to domestic phone calls without court approval. We are not trolling through the personal lives of millions of innocent Americans.

— President George W. Bush
Weekly radio address on May 13, 2006

The September 11, 2001 attacks on America clearly created an era of heightened security throughout the entire nation. Nevertheless, the collecting of data on private citizens by way of phone record scrutiny became a major issue in summer 2006, when *USA Today* disclosed that the U.S. spy agency, the National Security Agency (NSA), was secretly collecting phone call records of tens of millions of Americans. The fact that the NSA did not get prior approval from a court to pursue electronic surveillance on domestic phone calls in this particular instance gave the George W. Bush White House the unenviable task of attempting to explain how, why, and by whom such decisions were made. The President's explanation of policy was that the USA Patriot Act of 2001 (Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act) had given the government the authority to take unusual security measures to protect its citizens. On the other hand, this challenge came as a follow-up to earlier disclosures that customer records had received scrutiny in other divergent contexts. Most notably, this included passenger records from major airlines including American and Delta and a particular incident in 2003, when the government, anticipating a possible New Year's Eve attack in Las Vegas, put together the records of over a quarter of a million hotel guests and airplane passengers, even though no credible threat of an attack was ever uncovered. The *Las Vegas Review-Journal* reported that air passengers and hotel guests who visited the desert city in Nevada from December 22 to January 1 had their records scrutinized.[1] In a similar vein, requests for customer records from search engines AOL, Yahoo, Microsoft, and Google by the U.S. Department of Justice resulted in all but Google handing over the material.

Using pattern recognition, key words, and other sophisticated techniques, computers can now sift through massive amounts of data and produce personal profiles of consumer interests and tastes, areas that customers have consistently argued to be off limits for purposes of sharing or selling to outsiders.

The *New York Times* reported in late 2005 that President Bush had authorized eavesdropping without warrants by the NSA. The companies involved in those requests including AT&T Inc., BellSouth Corp., and Verizon Communications Inc. all issued statements clarifying that they protected customer privacy and followed the law but refused to provide additional details at that time. Verizon Wireless and T-Mobile USA Inc. denied having ever given material to the NSA and one other major telecommunications company, Qwest Communications International Inc., said that it had refused to turn over records. The next month the Electronic Frontier Foundation alleged in a class action federal lawsuit that AT & T had given the NSA direct access to the records of hundred of millions of voice calls as well as Internet data traffic.

After the public disclosure of the collection of the phone records and soon after he had delivered a university commencement address, the President said, "We're not mining or trolling through the personal lives of millions of innocent Americans." He then reinforced that all efforts were focused on links to terrorists—"Al Qaeda and known affiliates."[2]

President Bush also clarified that the information sought was only related to the phone numbers involved, the time of calls, and their durations, but not the nature of what was said. These data are similar to those that appear on typical cell phone bills each month but were for both land-based and cell phone calls. While experts debated the legality of the process, the President's nominee for head of the CIA at that time, four-star General Michael Hayden, who was also in charge of the NSA when the surveillance program began, provided the Senate Judiciary Committee with his view that the appropriate Senators had been informed of all NSA activities. At that time, Senator Jon Kyl of Arizona, Chair of the Senate's anti-terrorism subcommittee, added: "This is nuts. We're in a war and we got to collect intelligence on the enemy, and you can't tell the enemy in advance how you're going to do it, and discussing all this stuff in public leads to that."[3]

In the aftermath of these disclosures a number of media outlets editorialized about the activity and often tied improvements in technology to growing concerns. Marc Rotenberg, executive director of the Electronic Privacy Information Center in Washington, D.C., noted, "Ten years ago, they wouldn't have compiled such a database because they didn't have the technological tools to use it once they did compile it."[4] General Hayden was quickly confirmed by the U.S. Senate in a 78 to 15 vote as the new CIA head.

Several months prior to the *USA Today* story, media reports revealed that NSA had another program that did involve actual monitoring and recording of phone conversations and e-mail messages without a court warrant—in this case, calls and e-mails within the United States that involved suspected terrorists in other countries. Prior to September 11, the revelation of such projects undoubtedly would have led

to public outrage and extensive criticism from the press. However, General Hayden received mostly praise for his accomplishments at NSA and only a few pointed questions from senators at his confirmation hearing.

The nation's leading cable operators used the occasion of the public disclosure about the NSA project to clarify how Congress, by way of the Cable Communications Policy Act of 1984, explicitly prohibited the collecting or disclosing of customer calling records or any other "personally identifiable information" without prior consent or issuance of a court order. Companies can collect data for customer service purposes but even with a court order, in the area of video programming, a customer must be notified and can contest such a request. Comcast, Time-Warner, and Cox all noted the need for a court order in order for them to turn over such information.[5]

Ironically, the U. S. Senate Committee on Commerce, Science, and Transportation, in February 2006, commended FCC Chairman Kevin Martin for having undertaken statutory authority to protect consumer telephone records. He had appeared previously before the House of Representatives and testified that noncompliance by telecommunications carriers could face strong enforcement action if they violated Section 222 of the Communications Act consistent with the customer proprietary network, which protects the confidentiality of such things as customer calling activity and billing records.[6] At about the same time, former *New York Times* reporter Judith Miller was in federal appeals court in Manhattan fighting over the government's right to access her phone records to discover which sources she called in an effort to assess information about the government's plan to search offices of two Islamic organizations after the September 11 attacks.[7]

An even better indicator of how the concept of privacy has changed in a post-September 11 world is the fact that, according to a Washington Post–ABC News poll taken by the Gallup Organization shortly after the *USA Today* story appeared, almost two-thirds (63 percent) of Americans, including some 44 percent who strongly approved the project, said such efforts were acceptable in the war on terror.[8] According to the editor in chief of the poll, Frank Newport, "The battle of fighting terrorism, in a lot of our research, seems to be more important to the public than what they perceive as violations of their privacy—so far."[9]

In theory at least, Americans continue to place a high value on privacy at a time when privacy rights are being eaten away by court decisions and statutes such as the USA Patriot Act of 2001.[10] The Patriot Act significantly expanded the authority of the government to obtain information and tangible items via warrants as part of an investigation "to protect against international terrorism or clandestine intelligence activities." Patriot Act authority includes library records of individuals even if they are not suspected terrorists, business records, and financial information. In addition, under a Federal Communications Commission order, all cell phones have global positioning system (GPS) chips so 911 calls can be tracked to the locations of particular phones.[11] Modern technologies such as these sometimes make a mockery of the concept of privacy. Coupled with the high value corporations and other business entities attach to personal information, it is not surprising that consumers are now more tolerant of the use of techniques that were once considered obtrusive and

unwarranted and yet still cling to the idea that personal privacy is worth preserving as much as possible. We particularly abhor mass media intrusions and yet have an appetite that is difficult to satisfy sometimes when it comes to celebrity news.

In 1987 former Miami model Donna Rice suddenly acquired unwanted celebrity when the mass media around the country revealed that she had spent a night with presidential candidate Gary Hart in his Washington, D.C. townhouse. The *Miami Herald*, which first broke the story, had secretly stationed reporters outside Hart's residence (but not on his property) to watch him around the clock. More stories followed with specific details about the relationship between Rice and Hart, who dropped his campaign for the Democratic nomination as a result. Although the stories created considerable controversy over whether Hart, who was married at the time, and Rice had been victims of an invasion of privacy, no lawsuits were ever filed. Both individuals heavily criticized the media. In a 1988 article for the publication of the Overseas Press Club of America, *Dateline*, Rice wrote:

> I felt like a piece of chum tossed as bait into shark-infested waters. It was impossible for me to resume my normal life, and I retreated into seclusion. Silence seemed to be my only alternative since I chose not to exploit the situation. . . . My silence was the result of shock, a natural discretion that led me to salvage whatever shreds of privacy I could and a sense of responsibility that I should not impede the political process.[12]

Ironically, several months later Donna Rice once again became an object of controversy when she literally fled the Cincinnati Convention Center, where she had been scheduled to speak on the subject of media exploitation to the annual convention of the Society of Professional Journalists (SPJ). Rice became a "no show" for the panel after she saw that cameras and microphones were poised for the occasion. She issued a written statement that "it was my original understanding that this panel discussion was private and essentially off the record. But when I arrived a few minutes ago and saw the cameras, lights and tape recorders, I realized this wasn't the forum I had anticipated."[13] SPJ officials claimed that Rice had been told the press would be covering the session.

In more recent instances, particularly outside the United States, celebrities have sought protection from an overly aggressive press, arguing that the public's right to know must be balanced with privacy rights. In Great Britain, actors Michael Douglas and Catherine Zeta-Jones sued a publication in 2005 over unauthorized use of their wedding photos when the star couple had arranged an exclusive deal for publication of the pictures with a rival publication. Zeta-Jones and Douglas won their court challenge on the grounds that one publisher had an exclusive confidentiality agreement that the stars had negotiated in advance.[14] That same year, model Naomi Campbell won a direct appeal to the British House of Lords concerning a story and photo related to her attendance at Narcotics Anonymous meetings. A high court ruled in her favor and the publication was required to pay court costs and more than $6,000 in damages.[15]

High technology direct mail companies, called "data cowboys" by technology professor Bryan Pfaffenberger of the University of Virginia, acquire information

about Internet users through "cookies," or software that transfers a code from various Web sites to a user's hard drive.[16] These cookies allow a company to compile data about individual consumers, including the Web sites they visit, computer configurations, and more—all without consumer knowledge. The information is usually sold to advertisers for marketing purposes, just as magazines and organizations sell lists to others for marketing and advertising. Some computer users know how to detect and delete cookies, but most are unaware of the process.

Every time you visit a Web site on the Internet, use a credit card, telephone an 800 or 900 number, write a check, rent a car, register at a hotel, join a club, order merchandise from a catalog or through a TV shopping network, visit a physician, visit an emergency department, stay in a hospital, or even notify the post office of a change of address, your personal privacy has been potentially invaded. Usually no law has been violated. Today's sophisticated computers make it possible for a wide range of government agencies, businesses, and even private individuals to access an incredible amount of personal information, legally and without your consent.

Credit reporting bureaus have drawn considerable flak because they are legally permitted to gather highly sensitive credit information about individuals and businesses and sell that information under certain conditions for a profit to various enterprises. Optical scanners, combined with credit card and check transactions, can compile very detailed information about individual shopping patterns. Some of the largest corporations sponsor point-of-sale data collection systems.

The largest collector of private information is the U.S. government, with the Internal Revenue Service at the top of the collector group. The Census Bureau has records on nearly everyone in the country but is prohibited by federal law from sharing any of this information, except for statistics that do not identify specific individuals. The FBI alone has more than 20 million criminal files and, under Director J. Edgar Hoover, violated the civil liberties it was established to protect.

In one of many out-of-court settlements with individuals over the years, the FBI paid the widow of American Communist Party leader William Albertson $170,000 in 1989 for planting a report on Albertson during the 1960s that falsely accused him of being an FBI informer.[17] Court documents in the case revealed that the agency had tracked Albertson for five years, wiretapped thousands of phone conversations, intercepted mail, and monitored his bank account, all apparently without legal authority.[18]

With identity theft emerging as the nation's top financial crime, special attention is being paid to online access to financial information. However, the heightened awareness to the potential for this type of crime stands in stark contrast to an Annenberg Public Policy Center poll in which nearly half of the 1,500 Internet users surveyed did not know that Web sites can share information about them without their knowledge.[19] Consumer purchasing behavior and personal spending habits are among the most sought-after bits of information online, while privacy policies regarding the use of such information are still under study.

In a National Public Radio interview, Marc Rotenberg, executive director of the Electronic Privacy Information Center and Georgetown University law professor,

pointed to the importance of e-mail privacy. In response to challenges to the service provider Yahoo!, he suggested that in the future, individuals might want to specify in their wills what should be done with their e-mail. Rotenberg encouraged the courts to get involved in this area with the likelihood that in lieu of a formal individual decision, an Internet service provider has the discretion to make the decision on an individual's behalf.[20]

Probably the most serious threat to personal and even corporate privacy is the proliferation of data banks whose information can be readily accessed with a few keystrokes on a computer. Much of the information available about individuals and businesses can be obtained quickly online and locally at no or low cost. Courthouses contain a wealth of public information about personal transactions and ownership—listings of all real estate and personal property, including vehicles and large equipment registered to individuals and companies. You can even ascertain how much a property sold for and its assessed value and license plate numbers of all vehicles. Of course, any lawsuits or other civil or criminal actions taken against or on behalf of persons and organizations are also usually matters of public record. Many state, local, and federal courthouses today have converted their records to computer data that can be readily accessed.

In January 2005, Walt Disney World announced that it would be asking for fingerprint scans from all persons 10 years old and above for theme park admittance. Theme park guests were asked to make peace signs for the scanning of the index and middle fingers in an effort to limit access to persons who purchased tickets or obtained special passes. Almost immediately, privacy organizations including the Electronic Privacy Information Center objected on grounds that guests were not informed as to how long the fingerprints would be retained nor for what other purposes the information might be used. Tied closely to the issue were added concerns regarding surveillance in public places, which included plans for research facilities in which so called living laboratories would offer opportunities to study individual consumer behavior. Citing privacy violations, the theme park fingerprint policy was challenged on grounds that the amount and type of data collected far exceeded traditional security demands for entrance to government facilities or nuclear power plants.[21]

The federal government is the largest repository of personal data files. Over the years, various statutes have been enacted to prevent most agencies from sharing information with other agencies, but there have been a number of largely unsuccessful attempts to permit a linking of computer files. Privacy became a flash point in the aftermath of the September 11 attack on America. There was a heightened sense of awareness to the potential use of new technology to protect nation security interests. However, this was followed by increasing concerns about intrusion and overlapping privacy regulations in the United States and abroad, as noted earlier.[22] The need to acquire intelligence data linked to terrorists was being weighted in this era in which new technology has been advanced along with unprecedented opportunities to acquire personal information in such areas as banking and medical records.

The general public has become better informed about sacrifices individuals were beginning to make in the interest of national security, further complicating the

philosophical issues associated with a patchwork of privacy laws and regulations developing across jurisdictions and applying to such broad areas as medical records, banking, protection from spam, and protection of children from online predators.

Financial experts urge consumers to check their credit reports at least once a year to ensure they are accurate. Mistakes are common. When reports are legitimately shared with creditors and others, some errors can have serious consequences for consumers. Under federal law, credit bureaus are required, upon request, to send free copies to individuals who have been denied credit as results of reports and to allow anyone affected by negative information in a report to insert an explanation of up to 100 words. Consumers can order free copies of their reports once a year from the big three bureaus — Experian, Equifax, and TransUnion. The reports can even be ordered via the Internet.

Caller identification (CID) service has become extremely popular for both land-based and cell phones, but it faced strong criticism in some circles when telephone companies first marketed the service decades ago. To the phone companies who sell the service as a deterrent against obscene and other harassing calls, CID is another customer convenience for increasing revenues. To civil libertarians, the service is an unwarranted invasion of privacy that promises the demise of the anonymous phone call.[23] The phone companies won, civil libertarians lost, and CID is now part of American culture, along with call forwarding, call waiting, and voice mail. Not all consumers are concerned about the privacy issue and see CID as a convenient means of privately screening numbers and preventing harassment calls.

The technology gets more sophisticated each day as the opportunities increase for invading privacy. In a 1997 cover story, *Time* magazine listed 15 everyday events that provide for lessened privacy, including bank machines, prescription drug purchases, phone calls, cellular phones, voter registration, credit cards, sweepstake entries, electronic tolls, mail order purchases, and e-mail.[24] In the same year, a cover story in the *ABA Journal* cited three new technologies that represent even greater threats—magnetic gradient measuring, back-scattered x-ray imaging, and passive millimeter wave imaging. The first technology uses fluctuations in the earth's magnetic field to locate any metals, including weapons, inside a building. The second bounces minimal doses of x-rays off a person's skin to create an image of a body, such as that of a passenger in an airport. The third technology can detect a body's electromagnetic waves as well as any objects on his or her person.[25]

The concept of privacy is a broad issue that actually encompasses a bundle of individual rights that derive from myriad sources—from common law to statutes to the Constitution. Most Western societies have imposed various restrictions to ensure at least some semblance of individual privacy. The First, Fourth, and Fifth Amendments to the Constitution specify certain conditions under which privacy must be reserved. The First Amendment provides for freedom of press, speech, and religion as a means of ensuring that one's political beliefs and expressions may not be suppressed or adversely used by the government. The Fourth Amendment recognizes a right to be protected "against unreasonable searches and seizures," a right that has been broadened over the years, and the Fifth Amendment

guarantees against self-incrimination, prohibiting the government from forcing persons to testify against themselves in criminal actions. Many Western constitutions make similar guarantees, but in some cultures, the concept of privacy has a much different meaning.

A fight over the Supreme Court nomination of Judge Robert Bork arose over privacy in 1987 when Bork, who was nominated by President Ronald Reagan, responded to questions at his Senate hearing about privacy by saying that he could not find such a right in the Constitution.[26] Bork was and continues to be a proponent of the strict constructionist judicial philosophy that holds that judges should interpret the U.S. Constitution in light of the original intent of the framers. The U.S. Senate rejected his nomination in a 58 to 42 vote, but one of the ironic outcomes of the hearing was the eventual enactment of the Video Privacy Protection Act of 1988.[27] During Bork's nomination, a list of videos he had rented was leaked to the press. There was nothing particularly provocative on the list, but Congress felt compelled to pass legislation banning the "wrongful disclosure of video tape rental or sale records."[28]

Almost two decades later, privacy issues arose in the complex process to fill positions of U.S. Supreme Court Justices by the George W. Bush administration to replace the late U.S. Chief Justice William Rehnquist and Associate Justice Sandra Day O'Connor in fall 2005. The dilemma arose again when Congressional lawmakers questioned whether privacy issues should take on a special status in the post-September 11 era. After a 78 to 22 vote of approval from the Senate in 2005, U.S. Court of Appeals Judge John Roberts was sworn in as the 17th Chief Justice of the United States. The following year another U.S. Court of Appeals Judge, Samuel Alito, replaced Justice O'Connor, after a 58 to 42 vote of approval from the Senate. Both justices were queried about rights to privacy. Both dodged the question of whether such rights could be found in the U.S. Constitution, noting instead the importance of respecting U.S. Supreme Court precedents on the issue.

Some scholars argue we have entered a new age in which information technology now offers instantaneous access to information in formerly protected areas—protected somewhat by previously slow, cumbersome technology. Eugene Volokh, a University of California at Los Angeles law professor and former clerk to Justice Sandra Day O'Connor, has pointed to the need to rethink privacy law in an era in which government documents can be easily and instantaneously retrieved. He points out, for example, how a great deal of personal information has been considered part of the public record, though seldom accessed.[29] Now, at a time when personal information such as birth dates, addresses, and property ownerships can be quickly downloaded and placed in aggregate form, new questions arise regarding the acquisition, storage, and fair and judicious use of such material.

In a study published in 1977, psychology Professor Irvin Altman examined privacy as a generic process and concluded it is present in all cultures but the means of regulating privacy differ considerably.[30] The differences can be dramatic. Among the Mehinacu Indians of central Brazil, houses tend to be placed so that people can be seen as they move around, and housing is communal, with people entering dwellings without announcing themselves; yet there are secret paths and clearings in the

surrounding woods that allow people to get away. In the Balinese culture, families live in homes surrounded by high walls. Entrances to doors are quite narrow, and only family and friends enter the yards without permission. The members of a Moslem sect in Northern Africa known as the Tuaregs wear sleeveless outer garments. The men wear veils and headdresses that permit only their eyes to be uncovered; the veils are worn even when the men sleep and eat.[31]

Judicial Origins of a Right of Privacy

Virtually every treatise or text on the origins of the tort of invasion of privacy in the United States traces its development to an 1890 *Harvard Law Review* article by Boston lawyers Samuel D. Warren and Louis D. Brandeis.[32] Brandeis was appointed 26 years later as an Associate Justice of the Supreme Court of the United States, where he served until 1939. The article—one of the most influential law reviews on invasion of privacy—appeared at the height of the era of "yellow journalism." This was the heyday of editors and publishers such as Joseph Pulitzer, William Randolph Hearst, and Edward W. Scripps, whose newspapers appealed to the masses by reflecting the times.

From the end of the Civil War (1865) to the end of the 19th century, "industrialization, mechanization, and urbanization brought extensive social, cultural, and political changes: the rise of the city, improved transportation and communication, educational advances, political unrest, and the rise of the labor movement."[33] It was inevitable that a sense of loss of privacy would develop, especially among the well-heeled and prominent lawyers like Brandeis and Warren. They no doubt scorned the focus on sensationalism in the newspapers of the time, just as they probably mourned the extent to which a growing population density in the cities meant a decrease in physical privacy or "personal space." Some critics would argue that Warren and Brandeis' description of the Boston newspapers of the time still rings true: "When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance."[34]

In their article, Brandeis and Warren proposed a new tort of invasion of privacy that would today fall into the category of *unreasonable publication of embarrassing private matters*. They did not deal directly with the other three categories of invasion of privacy—*intrusion*, *appropriation*, and *false light*. Libel was already a tort in most jurisdictions at that time, and they drew on principles of libel for their tort of invasion of privacy concept, in which words as well as pictures would be subject to liability and damages would be available for mental anguish and other harm. However, the two authors asserted that, unlike libel, truth should not be a valid defense to invasion of privacy. The focus of the article was more a concern that the private affairs of the prominent and well-heeled not become the subjects of intense media scrutiny. To some extent, this remains the concern today, although invasion of privacy has been broadened to include private individuals (i.e., nonpublic figures)

and other situations, but much of the litigation can be traced to public figures who felt their privacy was violated.

The ideas enunciated by Brandeis and Warren attracted attention among legal scholars, but no court was prepared to recognize a common law right of privacy and no legislature was willing to take the initiative to enact a statute granting such a right. The New York courts had the first opportunity to acknowledge a common law right of privacy, but chose to defer to the legislature. After a lithographed image of her appeared without her consent in an extensive advertising campaign for "The Flour of the Family," an attractive young girl named Abigail Roberson sued the flour company for invasion of privacy. The trial court and lower appellate court ruled Roberson was entitled to damages for the humiliation, embarrassment, and emotional distress she had suffered because of the ads. However, in a 4 to 3 decision in *Roberson v. Rochester Folding Box Company* (1902),[35] the New York Court of Appeals (the highest appellate court in the state) rejected her claim on grounds that (a) no previous precedent had established a right of privacy; (b) if the trial court decision were permitted to prevail, a flood of litigation would inevitably follow; (c) it would be difficult to limit application of such a right, if recognized, to appropriate circumstances; and (d) such a right might unduly restrict freedom of speech and press. The court also implied that creation of such a right was more the province of the legislature than the courts. The court did cite the Brandeis and Warren article but coolly rejected its arguments. In their strong dissent, the three dissenting judges attacked the majority for its failure to recognize privacy as an inherent right.

Both the public and politicians assailed the decision. The New York Court of Appeals decision sufficiently outraged the state legislature to enact a statute the next year (1903) that provided both civil and criminal liability for "a person, firm or corporation that uses for advertising purposes, or the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person."[36] The law included minors such as Roberson in its protection, requiring that consent be obtained from a parent or guardian. The statute did not protect the use of a dead person's name or image, and consent was an absolute defense. A few states still do not recognize a right of privacy for the deceased, but the trend is toward granting a right of publicity even after death. The statute made the offense a misdemeanor, but permitted compensatory and punitive damages in a civil suit. That statutory provision in altered form still survives today, although New York statutes now include other privacy torts such as intrusion.

In 1905 Georgia became the first state to recognize a common law right of privacy. Once again, however, it was not a broad right of privacy but, similar to the right granted in New York, it was limited to commercial use or appropriation. Paolo Pavesich, an Atlanta artist, awoke one morning to find his photograph and a testimonial in a newspaper advertisement for the New England Life Insurance Company. The ad was quite complimentary of Pavesich; it portrayed him as a handsome, successful man touting the virtues of good life insurance. Unfortunately, Pavesich had never given his consent for his picture to appear in the ad and the testimonial had simply been made up by a copywriter.

In *Pavesich v. New England Life Insurance Company* (1905),[37] the Georgia Supreme Court reversed the trial court decision, which dismissed Pavesich's claim for damages. The court rejected the *Roberson* holding (which, of course, was binding only in New York) and bought the arguments advanced by Warren and Brandeis. It was some time before other courts jumped on the privacy bandwagon, but even when they hopped aboard, they limited the right to commercial use. Many courts refused to recognize the tort until the 1930s and 1940s when the commercial value of endorsements became more apparent.

Why did it take so long for courts and legislatures to act? The courts were probably reluctant because they tend to avoid establishing sweeping precedents. Instead, they defer to legislatures because precedents are difficult to overturn but statutes can be changed by simply enacting new legislation. Legislatures likely did not get involved because there was no strong public pressure until incidents such as the *Roberson* case pointed to the need for privacy protection. Pulitzer, Hearst, Scripps and their colleagues gave readers heavy doses of sensationalism, including facts about the private lives of public figures, but they wrote about ordinary people in a positive light except when they were involved in alleged criminal activities. The huge success of the "new journalism" newspapers demonstrated an insatiable public appetite for private information. Finally, the U.S. Constitution and most state constitutions do not enumerate privacy rights other than prohibiting unreasonable search and seizure and self-incrimination. There was simply no overriding concern with privacy at the time they were written.

Why was this right restricted principally to appropriation for so long? Why not include other privacy rights? Physical intrusion was fairly difficult to accomplish because people had no phones to tap, no recording devices, no microphones to hide, and so on, and the tort of trespass was already available to prevent someone from intruding on another's land or physical solitude.

The torts of false light, publicizing private matters, and appropriation all involve publication. The New York Court of Appeals in *Roberson* pointed to a possible explanation for excluding these torts. It noted that any injury Roberson may have suffered was mental, not physical, and that targets of publicity might actually be pleased to get such attention. In other words, Roberson should have been flattered that a company would want to use her image.

What Is the Right of Privacy?

Black's Law Dictionary defines right of privacy as "the right to be let alone; the right of a person to be free from unwarranted publicity."[38] The late William L. Prosser, the foremost authority on the law of torts until his death, delineated invasion of privacy into four separate torts:

1. *Appropriation* of one person's name or likeness for the benefit or advantage of another
2. *Intrusion* upon an individual's physical solitude or seclusion

3. *Public disclosure* of highly objectionable private facts
4. Publicity that places an individual in a *false light* in the public eye[39]

This chapter examines each of these four torts of invasion of privacy. Although each is distinct from the others, they also overlap. It is common for two or more of the torts to arise from the same facts, but each tort is reviewed separately and overlapping characteristics are noted.

Appropriation

Appropriation is by far the oldest form of invasion of privacy recognized at common law, as *Pavesich* demonstrates, but it is the one tort of the four that poses minimal problems for the mass media. The courts have generally held that even though newspapers, magazines, and broadcasters make substantial profits from the dissemination of stories about people from the ordinary person to the millionaire movie star, they cannot be held liable for appropriation so long as the profit-making is incidental to the use. For example, CBS does not have to get the consent of or pay the Dixie Chicks group when "60 Minutes" does a feature on the performers, and NBC need not seek permission of the president when the "Nightly News" covers a presidential press conference. However, the mass media are not relieved of liability for strictly commercial use of a person's name, image, or likeness.

There have been some interesting examples of alleged appropriation. In 1984 Fred Rogers, host of "Mr. Rogers' Neighborhood" on the Public Broadcasting System, convinced Burger King Corporation to pull a 30-second commercial aired around the country. The commercial that cost $150,000 to produce featured a "Mr. Rodney" teaching viewers to say "McFrying" (taking a whack at Burger King's competitor). According to news reports, the ad had appeared about two dozen times on the major commercial TV networks and 30 to 40 times in typical major markets.[40] Mr. Rogers, now deceased, never sued, but the commercials were cut after he complained. About the same time, Eddie Murphy was doing his ghetto version of "Mr. Rogers' Neighborhood" on NBC's "Saturday Night Live." Murphy's skits were some of the most popular segments on the comedy show at that time.

In 1986 Woody Allen received $425,000 in an out-of-court settlement with National Video, Inc., after the video rental franchise firm used look-alike Phil Boroff in an advertisement in 1984. As part of the settlement, Allen dropped suits against Boroff and his agency, Ron Smith Celebrity Look-Alikes. There was no disclaimer and Allen was not mentioned by name in the ad, although two of his movies, *Bananas* and *Annie Hall,* appear alongside two movies, *The Maltese Falcon* and *Casablanca*, featured prominently in past Allen films.[41]

Vanna White of TV's "Wheel of Fortune" game show sued Samsung Electronics of California for $1 million for using what she claimed was her likeness to sell its brand of consumer electronics without her consent. In 1992 the Ninth Circuit U.S. Court of Appeals unanimously dismissed White's statutory claim of appropriation, ruling that her name and likeness had not been used, but a majority of the court

upheld her common law claim for misappropriation of her identity.[42] The United States Supreme Court denied certiorari.

In *Rosa Parks v. LaFace Records* (2003),[43] the Sixth Circuit U.S. Court of Appeals ruled that civil rights icon Rosa Parks had a cause of action against rap duo OutKast for the unauthorized use of her name as the title of a song. Parks, who died in 2005, became a well-known civil rights figure after she refused to give up her seat on a city bus in Montgomery, Alabama, to a white passenger, leading to her arrest and a fine. Her defiance eventually resulted in an organized boycott of the bus company spearheaded by Dr. Martin Luther King, Jr. Many historians trace the start of the civil rights movement to Parks' actions.[44]

Parks claimed the use of her name in the song constituted false advertising under the Lanham (federal trademark) Act and that her right of publicity had been infringed. The federal appellate court reversed a U.S. District Court summary judgment in favor of OutKast. The appellate court said the test was whether the title had "artistic relevance" to the original work or whether it "explicitly misleads as to the source or the content of the work" (citing an earlier precedent).[45] The court rejected the duo's defense that the use was metaphorical and symbolic, noting that OutKast had said in an interview that they had not intended for the song to refer to Parks or the civil rights movement but instead to send a message that other rap artists could not compete with them and thus should "move to the back of the bus," a phrase repeated throughout the song. The court characterized the chorus as "pure egomania" and the title was probably a disguised ad intended only to attract attention. After Parks died, a dispute developed over her estate, including appropriation rights for her name and image. Parks, who was 92 when she died, left the bulk of her estate to a nonprofit organization she started, the Rosa and Raymond Parks Institute for Self Development. Her will was challenged by her nieces and nephews, who eventually reached an out-of-court settlement in 2007.

The same appellate court ruled against golfer Tiger Woods in *ETW Corp. v. Jireh Publishing* (2003)[46] when he sued a publisher for marketing limited edition prints by "America's sports artist" Rick Rush. The prints commemorated Woods' win in the Masters' Tournament in 1997, featuring Woods in three different poses with other famous golfers and the Augusta, Georgia, clubhouse in the background. The court said the prints were not violations of Woods' right of publicity nor the Lanham Act but were instead protected by the First Amendment because they focused on an "historic sporting event" and the artist had added a significant creative component.[47]

Why do sports and entertainment celebrities and other public figures go to great lengths, including litigation, to protect their images from unauthorized commercial exploitation? The simple answer is economics. The amounts of the out-of-court settlements and even jury awards are typically not high, but the long-term potential for earnings from authorized endorsements for some public figures can be very lucrative.

The number of television and film stars and famous athletes who have made commercial endorsements over the years is large, with some figures becoming more famous for their commercials than their career feats. Few celebrities reject the opportunity to sell major brand products and services because the compensation can be quite attractive and the work involved in doing such ads is typically not demanding

or time consuming. A few stars refuse to sell rights in the United States out of concern that their images could be become tainted here, but nevertheless appear in ads in other countries where less stigma may be attached to endorsements. Much of the stigma or perceived loss of professional credibility connected with endorsements has actually disappeared even in the United States as more celebrities hop on the endorsement bandwagon. A more recent trend is for celebrities to lend their voices but not their names or images for commercial use.

Digital imaging now makes it possible to have the images of deceased celebrities endorse products in digitized commercials in which they never appeared when alive. For years, deceased stars have been featured in still photos endorsing products and services, but beginning in the 1990s they began popping up in videos. The deceased celebrities included John Wayne, Humphrey Bogart, and Ed Sullivan.[48] Forty-five states and the District of Columbia now recognize appropriation or misappropriation as a privacy tort. Only Iowa, Montana, North Dakota, South Dakota, and Wyoming have not directly recognized this cause of action. In Oregon, the state supreme court has not adopted the tort, but it has been recognized by the intermediate appellate court. In Alaska, there have been no reported cases since 1926.[49]

Appropriation is not limited to public figures. Private individuals can also recover for appropriation. It is quite rare for such persons to sue and even rarer for them to win awards, but some have prevailed. There are two major reasons for the lack of cases. First, private individuals appear in the media less frequently than public officials and public figures. Second, private individuals have a tough task in demonstrating substantial damages, especially in establishing lost potential earnings. Although the plaintiff in an appropriation case theoretically need only demonstrate (a) commercial use and (b) identification (i.e., that a reasonable person could recognize the image or name used as that of the plaintiff), in reality, some commercial gain must usually be shown to allow recovery of significant damages. Because the market value of commercial use of a private figure's image, name, or likeness is usually severely limited, damages are usually low.

Although only living persons may secure damages for the other types of privacy invasion, appropriation is different. Courts in three states—Georgia, New Jersey, and Utah—have said the appropriation right is descendible (may be passed to heirs). Ten states—California (50 years), Florida (40 years), Illinois (50 years), Kentucky (50 years), Nebraska, Nevada, Oklahoma, Tennessee, Texas, and Virginia (20 years)—have enacted statutes that permit the heirs of a deceased figure to assume and control publicity rights for a time after the person's death. The statutes in five states —Arizona, Massachusetts, New York, Rhode Island, and Wisconsin—either bar the survival of such rights after death or a court in the state has interpreted the statute to impose a ban.[50]

In June 1989, *U.S. News & World Report* readers were surprised when they opened their magazine to find theoretical physicist Albert Einstein gracing an ad for Olympic Wood Preservative. Although Einstein died in 1955, his image and name were licensed by his heirs to a Beverly Hills agency that also licensed Marilyn Monroe (who died in 1962) and even Sigmund Freud (1856–1939).[51] The Little Tramp Character of Charlie Chaplin (who died in 1977) has appeared in IBM commercials, and other deceased notables frequently appear in ads. The length of time during which the right

of publicity is protected after death varies from state to state, with some extending protection as long as 50 years after death. No advertiser should ever assume that protection no longer exists for appropriation after an individual dies because the result of using such an image without consent could serve as an unnecessary and expensive lesson.

Hugo Zacchini v. Scripps-Howard Broadcasting Company (1977)

Only one appropriation case has been decided by the U.S. Supreme Court, although a growing number of cases are meandering through the lower federal and state courts. In *Hugo Zacchini v. Scripps-Howard Broadcasting Company* (1977),[52] a case whose impact on appropriation is not entirely clear, the Supreme Court ruled that a TV station could be held liable for invasion of privacy for broadcasting the entire act of a performer. What was the "entire act"? About 15 seconds of Hugo Zacchini shot from a cannon to a net 200 feet away. Interestingly, the filmed performance was shown during a regular 11:00 p.m. newscast, not as part of an entertainment program. Newsworthiness is a limited defense to three of the four types of invasion of privacy—but not intrusion. Thus, if newsworthiness could have been demonstrated in this case, the result would have been different.

A freelance reporter for WEWS-TV in Cleveland recorded the human cannonball at a county fair despite the fact that on the previous day Zacchini had specifically denied the reporter's request. Reporters had free access to the fair, and the general public was charged an admission fee that included Zacchini's act. Moreover, the commentary by the anchors that accompanied the film clip on the TV station was quite favorable, encouraging viewers to attend the fair and to see the human cannonball's performance.

Zacchini claimed, however, that broadcast of his act without his consent violated his right of publicity and he was entitled to $25,000 in damages for harm to his *professional* privacy. In his suit, the performer took an unusual tack—he contended that by showing the entire act, the station deprived him of potential revenue. As the Supreme Court of the United States noted in its narrow 5 to 4 decision:

> If . . . respondent [the TV station] had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a very different case. . . . His complaint is that respondent filmed his entire act and displayed that film on television for the public to see and enjoy.[53]

The state trial court had granted the station summary judgment in the $25,000 suit, but an intermediate state appeals court reversed the decision. The Ohio Supreme Court reversed again, holding that the station had a First and a Fourteenth Amendment right to broadcast the act as a matter of public interest in the absence of intent to injure the plaintiff or to appropriate his work. The U.S. Supreme Court disagreed strongly with the state supreme court. The Ohio Supreme Court had relied heavily on *Time Inc. v. Hill* (1967),[54] discussed *in the section on false light*, but Justice Byron White, writing for the Supreme Court majority, noted major differences in the two torts involved—false light and appropriation. The majority argued that (a) the

state's interest in providing a cause of action was different for the two, and (b) the two torts differ considerably in the extent to which they restrict the flow of information to the public.

On the first point, the Court noted that false light involves reputation, parallel to libel, but the right of publicity is linked to "the proprietary interest of the individual in his act in part to encourage such entertainment." The appropriate parallel for right of publicity is patent and copyright law, according to the Court. For the second point, the majority asserted that false light victims want to minimize publicity, but the typical plaintiff in a right of publicity case usually wants extensive publicity as "long as he gets the commercial benefit of such publication."[55] In other words, false light plaintiffs want to stay out of the limelight whereas right of publicity plaintiffs want media attention on their terms—that is, with financial compensation.

No other appropriation case has ever been decided by the U.S. Supreme Court, and even *Zacchini* was not a full-blown or pure appropriation case because it dealt specifically with the *right of publicity*, a tort that some states including Ohio treat somewhat differently from appropriation. States that make a distinction generally do so by confining a right of publicity to celebrities who can demonstrate commercial value of their names, images, or likenesses and require that the public figures have either sold or could have sold such rights. This illustrates, again, why it is much easier for a public figure to recover for appropriation or right of publicity than a private individual. Obviously, a right-of-publicity plaintiff does not have to be a nationally prominent or even a regional celebrity. Zacchini was no media star. In fact, although very few people then knew or now know of him and his act, the Supreme Court permitted him to pursue his appropriation claim.

Zacchini left many questions. Is a right of publicity triggered only by the unauthorized dissemination of an entire work or could this right apply for *substantial portions* of a work, similar to copyright infringement? Does this right survive the death of a person and thus become transferable to heirs? (Although some states, as noted earlier, recognize a right of publicity that survives the individual, this right has not been recognized by the Supreme Court.) Does the right extend to private individuals or is it restricted to public performers or public figures? Would the Court have ruled differently if Zacchini had been shot out of the cannon during a small company reception or if he had simply been an audience volunteer? What if his act had been filmed as part of a public celebration for which the human cannonball had been paid by the local government or a corporate sponsor, but for which the audience was not charged admission?

Although appropriation is virtually unheard of in the U.S. Supreme Court, many cases have been decided in lower federal courts and state courts. Certain names that crop up frequently are most valuable from a publicity perspective. Elvis Presley's name has appeared in several cases. His name has become even more valuable after his death because his popularity has soared and royalties and income from rights have poured into his estate.

The executors of Presley's estate have been aggressive in protecting these rights. As a result, they have been involved in almost a dozen suits against nonprofit and

commercial enterprises that have attempted to cash in on the Elvis name. Three of those cases are reviewed here because they illustrate the complexity and range of application of the right of publicity.

The Elvis Cases

Three days after Elvis Presley died on August 16, 1977, a company known as Pro Arts marketed a poster entitled "In Memory." Above a photograph of Presley was the epithet "1935–1977." The copyright to the photograph had been purchased by Pro Arts from a staff photographer for the *Atlanta Journal*. Five days after it began distributing the poster, the company notified Boxcar Enterprises, the Tennessee Corporation established by Presley and his manager, Col. Tom Parker, for the sublicensing to other companies for the manufacture, distribution, and sale of merchandise bearing the Elvis name and likeness. Two days after Presley's death, Boxcar Enterprises had granted another company, Factors etc., the exclusive license to commercially use the image. Factors told Pro Arts to immediately halt sale of the poster or risk a suit. Pro Arts ignored the warning and filed suit in a U.S. District Court in *Ohio* seeking a declaratory judgment that it had not infringed on Factors' rights. Factors, in turn, successfully sought a preliminary injunction in U.S. District Court in New York to halt any further distribution or sale of the posters and any other Elvis merchandise. On appeal to the U.S. Court of Appeals for the Second Circuit, the lower court injunction was upheld:

> In conclusion, we hold that the district court did not abuse its discretion in granting the injunction since Factors has demonstrated a strong likelihood of success on the merits at trial. Factors possesses the exclusive right to print and distribute Elvis Presley memorabilia. . . . Pro Arts infringed that right by printing and distributing the Elvis Presley poster, a poster whose publication was not privileged as a newsworthy event.[56]

The defendant, Pro Arts, had claimed in district court and in the appellate court that (a) the right of publicity did not survive the death of a celebrity and (b) it was privileged, as a matter of law, in printing and distributing the poster because it commemorated a newsworthy event. The U.S. Court of Appeals handily rejected both arguments. The court noted that the duration of any right of publicity was governed by state law—in this case, New York law—because this was a case involving diversity jurisdiction. (In federal court, *state* law prevails.) Even though the appellate court could find no New York state court cases directly addressing the issue, it cited *Memphis Development Foundation v. Factors, Etc., Inc.* (1977)[57] and *Price v. Hal Roach Studios, Inc.* (1975)[58]—to support its position that the right of publicity did survive a celebrity's death.

In *Memphis Development Foundation,* a U.S. District Court in Tennessee held that Factors etc. (the same company in the case at hand) had been legally granted exclusive rights to capitalize on and publicize Presley's name and likeness, that the right of publicity survives a celebrity's death, and that Factors was entitled to a preliminary injunction to prevent the non-profit Memphis Development Foundation

from giving away eight-inch pewter replicas to anyone who contributed $25.00 or more toward a $200,000 fund to cast and erect a bronze statue of Presley.

Factors did not contest the right of the organization to commission and erect the statue, only the specific right to distribute replicas. It is unlikely that erecting a statue under these conditions for public display with no admission charge would be considered a violation of the right of publicity. Why then would distribution of the replicas at no profit but solely for the purpose of financing the statue be a violation? Non-profit status does *not* automatically grant a corporation a license to essentially deprive an owner or authorized user of profits from a work. The non-profit organization stands in essentially the same stead as a "for profit" enterprise. Deprivation is deprivation, regardless of the worthiness of the cause.

What is the underlying rationale for permitting states to extend a right of publicity beyond a person's death? Harm to the individual's reputation is not at stake because courts have consistently ruled that other rights of privacy—where they are recognized, such as publication of private matters, intrusion and false light—do *not* survive a person's death. Nearly all state and federal courts that have been presented the question have held that an individual cannot be defamed once he or she has died. The answer lies in a judicial doctrine known as *unjust enrichment*. This doctrine, grounded in principles of equity and justice, holds that "one person should not be permitted unjustly to enrich himself at expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated."[59]

The intent of this judicially created doctrine is that an individual or company should not receive a windfall at the expense of another because of an event in which it played no role. Thus the issue is pure and simple economics. Why should Factors etc. be forced to give up its legitimately purchased rights and, undoubtedly, highly lucrative profits for the undeserved and unjust benefit of anyone who chose to cash in on Presley's fame after his death? It could be argued that the death of a celebrity is only another market factor that a company should keep in mind when negotiating the terms of a licensing pact. Why should only one or a limited number of individuals profit from the use of a celebrity's status after his or her death? Why not provide everyone the opportunity to compete equally? There has never been any constitutionally recognized right of publicity either before or after a person's death, whether a celebrity or not, but the decision of whether to grant a right of publicity that survives death is strictly a policy matter in the hands of legislators.

In *Price v. Hal Roach Studios, Inc.*, a U.S. District Court, applying New York law, held that the deaths of comic actors Stanley Laurel and Oliver Hardy did not extinguish any assigned rights of publicity. The court concluded that whereas death is a "logical conclusion" to a right of privacy, there "appears to be no logical reason to terminate" an assignable right of publicity.[60]

On appeal, the U.S. Court of Appeals for the Sixth Circuit in 1980 in a rather brief opinion reversed the U.S. District Court decision. In *Memphis Development v. Factors Etc.* (1980),[61] the federal appeals court held that Presley's right to publicity, even if exercised and exploited while he was alive, did not survive his death and thus

was *not* inheritable. The U.S. Supreme Court refused to hear a further appeal, and four years later Tennessee enacted a statute that granted a right of publicity beyond a person's death.[62] In 1987 in *Elvis Presley Enterprises v. Elvisly Yours,*[63] the Sixth Circuit Court finally recognized a descendible right of publicity but under Tennessee *common law* in line with an earlier Tennessee Court of Appeals decision.[64]

One other case involving the proverbial "King of Rock n' Roll" deserves mention. In 1981 in *Estate of Presley v. Russen*,[65] a U.S. District Court in New Jersey ruled that impersonator Rob Russen violated Presley's right of publicity with his "Big EL Show." Russen argued that he had a First Amendment right to impersonate the celebrity, but the court held that no such right existed because the show was designed to be entertaining rather than informative. Impersonators are rarely sued for infringement because they generally do not fare well, given public fickleness, but the courts are quick to side against impersonators who can be mistaken for the "real thing" or when blatant commercial use is involved in advertising contexts, even if the individual has died.

What about a prominent figure who did not commercially exploit an image during his lifetime? A Georgia court tackled this question in 1982 in *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*[66] The Georgia Supreme Court held that the King Center could be granted an injunction against American Heritage to prevent it from marketing plastic busts of the famed civil rights leader who was assassinated in 1968, even though King had clearly *not* commercially exploited his name or image during his life. Other questions arose regarding the use of King's "I Have A Dream" speech placed in commercial contexts.

In a controversial move in 2006, the King estate put an extensive collection of Dr. King's personal writings and other documents up for auction. However, before the auction could take place, the estate reached an agreement for the sale of the materials, which included drafts of the famous "I Have a Dream" speech, to a group of prominent companies and individuals in Atlanta for more than $32 million. Under the agreement, the collection was eventually transferred to King's undergraduate alma mater, Morehouse College. The $32 million price covered only the right to physically possess the collection, including displaying the materials and making them available to researchers, but it did not include intellectual property rights, including copyright, trademark, and appropriation rights. The estate retained control of those rights, which are undoubtedly worth many times the price paid for the collection itself.

In a legal battle that lasted more than eight years, a three-judge panel of the Missouri Court of Appeals in St. Louis in 2006 upheld a $15 million jury award to former hockey player Tony Twist against Todd McFarlane and his company for the use of the player's name in the comic series "Spawn." The strip features a violent mob boss with the same name as the player. Twist originally sued in 1997 but a $24.5 million award was thrown out by a judge, with the Missouri Supreme Court eventually ordering a new trial, ruling McFarlane had no First Amendment protection in using Twist's name. The second jury handed down the $15 million judgment.[67]

Thus far the cases we have considered involved the use of a person's name or act, but appropriation can occur with other attributes. In 1962, Johnny Carson became the host of "The Tonight Show" on NBC-TV. As the show's popularity grew over the years, the host became synonymous in the public's eye with "Here's Johnny," the introduction used on every show until he retired in 1992. (Various substitute co-hosts bellowed or blurted out the slogan, but permanent co-host Ed McMahon had the edge.) Like other celebrities, Carson licensed ventures over the years from Here's Johnny Restaurants to Johnny Carson clothing. In 1976, Earl Braxton of Michigan founded a company known as Here's Johnny Portable Toilets Inc. The toilets were marketed under the slogan, "The World's Foremost Commodian."

Carson was not amused and filed suit against the company for unfair competition, federal and state trademark infringement, and invasion of privacy and publicity rights. His requests for damages and an injunction to prohibit further use of the "Here's Johnny" slogan were denied by the trial court on grounds that Carson had failed to demonstrate a likelihood of confusion between the toilets and products licensed by the talk show host and that the right of privacy and right of publicity extended only to a name or likeness, not to a slogan.

Carson appealed the trial court decision and in 1983 in *Carson v. Here's Johnny Portable Toilets, Inc.*,[68] the U.S. Court of Appeals for the Sixth Circuit disagreed with the lower court, holding "that a celebrity's identity may be appropriated in various ways. It is our view that, under the existing authorities, a celebrity's legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes." The court then noted that if the company had actually used Carson's name ("J. William Carson Portable Toilet" or the "John William Carson Portable Toilet") there would have been no violation of Carson's right of publicity because his identity as a celebrity would not have been appropriated.

Would "Johnny Carson Portable Toilets" have been an infringement? What about simply "Carson Portable Toilets"? What harm did Carson suffer? Was he deprived of potential revenues from licensed products under his name? Would the general public be so naive as to believe that Carson had endorsed the toilets? Evaluate *Estate of Elvis Presley v. Russen*, discussed earlier, in light of this case. How likely is it that someone would mistake impersonator Russen with the true King of Rock 'n Roll? Don't impersonators and toilet distributors increase interest in a celebrity and potentially stimulate sales of licensed products? The doctrine of unjust enrichment dictates that one person should not be unduly enriched at the expense of another.

Defenses to Appropriation

There are only two viable defenses to either appropriation or violation of the right of publicity: *consent* and *newsworthiness*. Consent is clearly the strongest defense, but newsworthiness is sometimes helpful, depending on the context. Consent, if knowingly offered in good faith, is usually an airtight defense, especially if it has been granted in writing. Oral agreements and even implied consent can be valid but their applicability varies from state to state and with the surrounding circumstances. It is

not necessary that a person be compensated for commercial use of his or her name or persona, but very few celebrities or even private individuals are willing to grant consent *gratis*—money usually talks. Most media outlets have standardized release forms that assure informed consent, but there are traps for the unwary. For example, a person must have legal capacity to sign an agreement or otherwise grant consent. Thus a parent or guardian must usually sign for minors. Another pitfall is to assume that the consent is broad enough to cover all circumstances and all time.

In 1982 singer/actress Cher was awarded more than $663,000 in damages by a U.S. District Court judge in California in a suit against *Forum* and *Penthouse* magazines, the weekly tabloid *Star,* and freelance author Fred Robbins for violation of Cher's right of publicity.[69] Cher had consented to an interview with Robbins under the assumption that it was to be published in *US* magazine. *US* was not interested in the proposed article and paid Robbins a "kill fee" for his work. A "kill fee" is generally paid to a writer for a commissioned work that the publication decides not to use. The writer usually retains the right to submit the work elsewhere. Robbins sold the interview to the *Star,* a tabloid that competes with the *National Enquirer* at the supermarket checkout, and to *Forum*, a sexually oriented discussion magazine owned primarily by Penthouse International, which also owns *Penthouse* magazine.

Both publications carried the interview, but took different approaches in marketing and displaying the story. *Forum* placed ads in more than two dozen newspapers, aired radio commercials, and printed subscription tear-outs that touted, "There are certain things that Cher won't tell *People* and would never tell *US*. So join Cher and *Forum's* hundreds of thousands of other adventurous readers today." The promotions included Cher's name and likeness. The front cover of the *Forum* March 1981 issue that carried the interview included "Exclusive: Cher Talks Straight" in large type. The *Forum* story briefly mentioned Robbins at the beginning, but the format implied that *Forum* had conducted the interview. The *Star* published the interview as a two-part series beginning on March 17, 1981, with the banner headline "Exclusive Series: Cher, My Life, My Husband, and My Many, Many Men."

On appeal, in *Cher v. Forum International, Ltd.* (1982),[70] the Ninth Circuit U.S. Court of Appeals overturned the trial court award of $369,000 against the *Star* on grounds that Cher had not been able to demonstrate that the magazine acted with *actual malice*, as required for false light under *Time v. Hill*.[61] The appellate court, however, upheld a $269,000 judgment against *Forum*. In 1983 the Supreme Court of the United States denied certiorari.

Clear, written consent can work to the advantage of the creator of an intellectual property ultimately involved in commercial use. When she was 10 years old, actress-model Brooke Shields posed nude for photographer Gary Gross, who had paid $450 for the written consent of Shields' mother for virtually unlimited publication rights. The photographs were published but attracted little attention until several years later at which time Shields garnered considerable attention as a fashion model and actress, including appearing nude in the movie *Pretty Baby* about a New Orleans brothel. Shields sought an injunction to halt further publication of the photos, and

the New York Supreme Court ruled in her favor on grounds that the signed agreement could later be revoked because she was a minor at the time.[72] The New York Court of Appeals, the state's highest court, reversed, holding that the privacy statute allowed a parent to grant consent on behalf of a minor. The agreement was valid.[73]

What if an individual signs a broad consent agreement, but major changes are made in the use of the person's name, image, or likeness? What if a professional model is paid to pose for a series of photographs but then the context is severely altered? Two cases illustrate how the courts treat such situations. In 1959, the New York Supreme Court ruled that even though Mary Jane Russell had signed a broad release form that ostensibly granted the Avedon Bookstore all rights to use her picture for advertising purposes, the model could recover damages for subsequent use of her image by another company.[74] Avedon had sold a photo of Russell to a bed sheet company that, in turn, considerably altered the photo and used the new version in a provocative series of ads. The state supreme court held that the extensive alteration negated the agreement because the photo was not the same portrait to which Russell had originally granted consent.

A later case illustrates a similar point. In the early 1980s, aspiring actress Robyn Douglass posed nude with another woman in suggestive poses for a photographer. Douglass signed a standard release form granting *Playboy* magazine the right to publish photos of her but only without the other woman. Later *Hustler* magazine publisher Larry Flynt purchased the photos and, according to court testimony, was verbally assured that the actress had consented to the use of the pictures. When the nude pictures appeared in *Hustler,* Douglass sued the magazine on grounds that her right of publicity had been violated, she had suffered intentional infliction of emotional distress, and she had been placed in a false light because of the nature of the magazine. The Seventh Circuit U.S. Court of Appeals[75] reduced damages awarded by the trial court to the extent to which they were based on emotional distress from appearing in *Hustler* because she had already voluntarily appeared in the buff in *Playboy.* The court also ruled against her on the false light claim, but essentially upheld her right of publicity claim. The appeals court noted that being depicted as voluntarily associated with a magazine like *Hustler* "is unquestionably degrading."[76]

The only other defense to appropriation and right of publicity is *newsworthiness,* but this defense is rather difficult to evoke in a commercial context and rarely works for a media defendant. *Zacchini v. Scripps-Howard*[77] illustrates the dilemma of claiming newsworthiness even when the use is clearly in a traditional news context. Recall that Zacchini's act appeared in a regular newscast on the television station. It was apparently not shown in a promotional segment or used in a direct way to commercially exploit his performance. The only pecuniary gain the station may have gained would have been potentially higher advertising revenues from increased ratings. Such a gain is unlikely, because ratings used to determine ad rates are generally measured over a period of a month, not one show for one night. The Court was concerned that the "broadcast of a film of petitioner's (Zacchini's) entire act poses a substantial threat to the economic value of the performance."[78] The Court noted

that the Ohio statute had "recognized what may be the strongest case for a 'right of publicity'—involving not the appropriation of an entertainer's reputation—but the appropriation of the very activity by which the entertainer acquired his reputation in the first place."[79]

In 1969 *Sports Illustrated* (*SI*) magazine used a photograph of New York Jets quarterback and Super Bowl hero Joe Namath in its subscription promotion. The photo, which had been taken during the Super Bowl in which the Jets had captured the title in spite of being underdogs, was used in ads in the magazine as well as in other periodicals. Namath sued the magazine for appropriation but a New York County Supreme Court held that because the state statute allowed incidental but not direct use of newsworthy photographs even in a commercial context, Namath had no cause of action.[80] The court said that as "long as the reproduction was used to illustrate the quality and content of the periodical in which it originally appeared, the law accords an exempt status to incidental advertising of the news medium itself."[81] Note that the court clearly considered *Sports Illustrated* a news medium, not an entertainment medium, and the photo had been used in earlier stories in the magazine. It was unlikely that someone would see Namath's appearance as his endorsement of the periodical.

What if *SI* had used a photo that one of its photographers had taken but had *not* been published in the magazine? What if *SI* had tried to entice subscribers with a photo it had purchased from a newspaper that had previously published the picture, although the photo had never been in *SI*? The results may have been different because there could be an impression left on potential subscribers that Namath may have endorsed the magazine rather than offering a look at the types of stories that readers would find in its issues.

An earlier case illustrates this idea. In the late 1950s, *Holiday* magazine had published a photo of actress Shirley Booth while she was vacationing at a Jamaica resort. Booth had granted consent for the photo but was outraged months later when the same picture appeared in promotional ads for *Holiday* in other periodicals. Booth sued the magazine for appropriation under the New York statute and won $17,500 in damages from the trial court. On appeal, a New York Supreme Court reversed, holding that such use was incidental and permissible under the statute.[82] *Holiday* was not a "news magazine" in the traditional sense, but the principle established here and reinforced in the later *Namath* case would appear to protect both "non-news" and news media in typical promotional campaigns that tout the kinds of stories the reader can expect to see in that outlet.

Throughout this discussion of appropriation and right of publicity, we have dealt only with commercialization of *human* names, images, and likenesses. Today there are animals whose names and images clearly have commercial value and thus potential rights of publicity. Some of them have been prominent for a long time, and others are just gaining fame. The older cases include Lassie (actually several dogs) and Trigger, Roy Rogers' horse. Although animal names can usually be trademarked to protect use of the name, what prevents someone from marketing a painting or selling a photograph of a famous animal? Probably nothing, although the picture

may be changing. According to one law journal article,[83] the owners of two famous horses, Secretariat and Easy Goer, contributed publicity rights for their horses to a non-profit foundation for equine medical research. To make commercial use of the horses' names, one had to acquire a license and pay a 10 to 15 percent royalty.[84] Some legal scholars argue that a horse is a horse, others contend that certain equine names are so valuable they deserve the protection. The U.S. Supreme Court has not handed down any appropriation decisions since *Zacchini*.

Intrusion

The tort of intrusion bears many similarities to the tort of *trespass*, which at common law is basically unlawful interference with an individual's personal possessions (personalty) or real property (realty). Even accidental or unintentional interference can be the basis for a trespass claim because injury is generally considered to have occurred simply because the person has intruded on the property, even if there is no actual physical harm. In a similar vein, intrusion is the only one of the four torts of invasion of privacy that does *not* require publication. The fact that the intrusion occurred, regardless of any dissemination of information obtained as a result, is sufficient to constitute harm. Publication can increase damages, but the tort then most likely becomes the publication of private matters coupled with intrusion. If a reporter eavesdrops on the private conversations of the local mayor by illegally bugging her phone and publishes a story about the conversations he overheard in which the official conducted drug deals, the reporter could clearly be held liable for wiretapping (intrusion) but may be able to avoid liability for the stories because they are newsworthy. In most circumstances, the reporter can even be held liable for invasion of privacy for disclosing illegally obtained information.

How does intrusion occur? Is there a difference in liability between wiretapping a phone and using a telephoto lens from a public street to catch two people making love on a couch in their own home or between a surreptitious recording by a reporter of interviews with her sources versus videotapes shot while standing on private property without consent? Each situation is different, depending on factors, including the particular jurisdiction in which the alleged intrusion occurred.

The rules regarding intrusion are intricate, complex, and inconsistent. Some basic rules are universal, but beyond these axioms, the road can be treacherous. It is clearly illegal to wiretap a phone, except one's own, without consent of the owner and usually of any and all parties to the conversation or without a court order (if you are a law enforcement official). Even court orders can be granted only on a showing of *probable* cause, which requires reasonable grounds to suspect that an individual is committing or is likely to commit a crime. The basic test under the Fourth Amendment, according to the courts, is whether the apparent facts and circumstances in the situation would lead a reasonably prudent person to believe that a crime had occurred or was about to occur. Mere suspicion, without some supporting evidence, is not sufficient to justify search and seizure or the issuance of a warrant. The courts have permitted warrantless searches and seizures under special circumstances such

as when a police officer witnesses a crime or when obtaining a warrant is impractical (e.g., when an officer is pursuing a fleeing felon). Traditional intrusion by the government such as surreptitious recording, wiretapping and eavesdropping always requires a court order or warrant, but there is no requirement that the government notify the individual until formally charged.

Dietemann v. Time, Inc. (1971)

Journalists on their own never have court authority to commit intrusion, no matter how justified the ends may be. If they are working with authorities, they may or may not be legally permitted to intrude on an individual's privacy. The most cited case on journalistic intrusion is *Dietemann v. Time, Inc.* (1971).[85] The Ninth Circuit U.S. Court of Appeals reached its decision in the case on a narrow set of facts involving primarily California common law and the First Amendment. (The federal courts had jurisdiction. This was a diversity case.) In its November 1, 1963, edition, *Life* magazine carried an article entitled "Crackdown on Quackery," which characterized A. A. Dietemann as a quack doctor, and included two photographs taken secretly at his home about five weeks earlier. The magazine editors had reached an agreement with the Los Angeles County District Attorney's office to send two reporters posing as husband and wife to the home armed with a hidden camera and microphone that transmitted conversations to a tape recorder in a parked car occupied by another magazine staff member, an assistant district attorney, and a state Department of Public Health Investigator.

The purpose of the reporters' visit was to obtain information for use as evidence to prosecute Dietemann for practicing medicine without a license, but the investigators had agreed that the magazine could use the information for a story. The district court described the plaintiff (Dietemann) as "a disabled veteran with little education . . . engaged in the practice of clay, minerals, and herbs—as practiced, simple quackery."[86] The two *Life* journalists did not identify themselves as reporters, but instead pretended to be potential clients. The female reporter asked the quack doctor to diagnose a lump in her breast. After examining her, Dietemann concluded that she had eaten some rancid butter 11 years, 9 months and 7 days earlier. One of the secret photos published by the magazine was of the plaintiff with his hand on the upper portion of the reporter's breast. The trial court and the appeals court emphasized that Dietemann was a journeyman plumber who claimed to be a scientist, not a doctor, and that he "practiced" out of his home. He did not advertise, had no telephone, and did not charge a fee for his services, although he accepted "contributions." He was ultimately convicted for practicing medicine without a license after pleading *nolo contendere* to the charges. (The story was published in *Life* before his conviction.)

The U.S. District Court awarded the plaintiff $1,000 in general damages for invasion of privacy, and the U.S. Court of Appeals upheld that judgment. The appellate court rejected the magazine's argument that the First Amendment immunized it from liability for its secret recordings on grounds that tape recorders are "indispensable tools of investigative reporting." According to the majority opinion, "The First

Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering."[87]

But weren't the journalists acting, in effect, as agents of the police because they had consent of the district attorney's office, cooperating with the D.A. and the health department? The court cleverly skirted this issue by holding that because the plaintiff had proven a cause of action for invasion of privacy under California law and because the defendants could not shield their actions with the First Amendment, the latter issue was moot.

Legal scholars and courts have split among themselves on the importance of *Dietemann*. Some courts have basically rejected the holding or diluted its impact by distinguishing the case as involving a narrow set of circumstances; other courts, probably the majority, cling to the principle that "the First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. [footnote omitted] It does not become a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime."[88] Although all courts and legal scholars would agree that the First Amendment is not a license to intrude, there are major differences over the definition of intrusion. This court was very careful to separate the physical act of intrusion from publication, which is definitely in line with the traditional meaning of intrusion. In other words, no publication is required for intrusion. However, publication can substantially enhance damages, as the appellate court held in permitting the plaintiff to seek damages for additional emotional distress as a result of the publication. This presents a win–win situation for the plaintiff and a lose–lose one for the defendant because the defendant is not allowed to claim a publication privilege for intrusion and the plaintiff can ask for additional damages from publication.

Pearson v. Dodd (1969)

Most courts would likely still rule as the Ninth Circuit Court did in 1971—that *Dietemann's* holding has become more limited to the circumstances in the case, which included the private home setting, misrepresentation of identification by the journalists, and the direct use of eavesdropping devices by reporters. In fact, even this court circumscribed the case by footnoting that its facts were different from those of *Pearson v. Dodd*[89] decided two years earlier by the U.S. Court of Appeals.

In *Pearson*, the U.S. District Court for the District of Columbia granted a partial summary judgment for Senator Thomas Dodd of Connecticut for conversion against syndicated newspaper columnists Drew Pearson and Jack Anderson but denied a judgment for intrusion. The appeals court reversed the judgment for intrusion and affirmed the denial of the judgment for *conversion*. Conversion is an old tort that lies in the unauthorized control over another's property so the rightful owners are deprived of their rights of possession. Unlike theft, normally a criminal action, conversion is a civil action and the owner can be granted damages in addition to return of the property. The higher court ruled there was no basis for Dodd's claims.

The facts of the case are similar to those that can occur in some investigative stories, especially those involving the misdeeds of politicians. Two former employees of the U.S. senator secretly entered his office, removed confidential documents from his files, made photocopies, and returned the originals without consulting with their ex-boss. The documents, which contained details of alleged misdeeds of the politician, were then turned over to Pearson and Anderson, who used the information to write six syndicated newspaper columns that offered their "version of . . . [Dodd's] relationship with certain lobbyists for foreign interests, and gave an interpretative biographical sketch of . . . [his] public career."[90]

The columnists admitted that they knew the documents were purloined, but claimed, in defense, that they had not actually participated in securing them. Two members of Dodd's current staff had gone with the ex-employees during some of the visits, but Anderson and Pearson had apparently played no role other than publishing the information. The journalists also argued that Dodd had no cause of action for invasion of privacy even for publication of the private information because it was in the public interest. The appellate court agreed, holding that the columnists could not be held liable for damages for invasion of privacy from the publication or for intrusion. In a majority opinion written by Circuit Judge J. Skelly Wright, the court said:

> If we were to hold appellants liable for invasion of privacy on these facts, we would establish the proposition that one who receives information from an intruder, knowing it has been obtained by improper intrusion, is guilty of a tort. In an untried and developing area of tort law, we are not prepared to go so far.[91]

Of course, Pearson and Anderson did more than listen. They spread the information throughout the country, with resulting considerable harm to the senator's career and reputation. The information, however, "was of obvious public interest," according to the decision. The court also rejected Dodd's claim of conversion because the "documents were removed from the files at night, photocopied, and returned to the files undamaged before office operations resumed in the morning . . . [Dodd] was clearly not substantially deprived of his use of them."[92]

The key defense in this case was the lack of participation by defendants in intruding on the plaintiff's privacy. Neither Pearson nor Anderson nor anyone directly associated with them was involved in obtaining the documents from Dodd's office. There was, however, a difference in *Dietemann*: reporters carried eavesdropping devices into the plaintiff's home.

Bartnicki v. Vopper (2001)

In a case bearing some similarities to *Pearson*, the U.S. Supreme Court held in *Bartnicki v. Vopper* (2001)[93] that the First Amendment protected the broadcast of a recording of an illegally intercepted cell phone conversation that had been sent anonymously to a radio commentator who had played it on his show. Applying intermediate scrutiny, the Supreme Court noted the case involved "the repeated intentional

disclosure of an illegally intercepted cellular telephone conversation about a public issue. The persons who made the disclosures did not participate in the interception, but they did know—or at least had reason to know—that the interception was unlawful."[94] The case involved a call made to a local teachers' union president by a union negotiator to discuss the status of collective bargaining talks. In the recording the union president said, "If they're not going to move for three percent, we're going to have to go to their, their homes [of school board members] . . . to blow off their front porches, we'll have to do some work on some of those guys."

The recording was initially carried on the commentator's program. He had received it from the head of a local taxpayers' group opposed to the union's demands. He testified that he had found the tape in his mailbox. Other media outlets including a local newspaper publicized the contents of the tape. The parties to the cell phone conversation sued the commentator and the head of the taxpayers' group in a civil suit for damages based on invasion of their privacy. They claimed the disclosure violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[95] generally banning the willful interception of wire, electronic, and oral communications as well as the disclosure of such communication by anyone who knows or has reason to know of the illegal interception.

According to the majority opinion, privacy interests must be "balanced against the interest in publishing matters of public importance." In this case, the Court said "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."[96] The Court specifically cited both *New York Times v. Sullivan* and *Florida Star v. B.J.F.* in its reasoning.

In 2006 in *Boehner v. McDermott*,[97] a panel of the U.S. Court of Appeals for the D.C. Circuit ruled 2 to 1 that Representative James McDermott (D-Wash) did not enjoy First Amendment protection when he violated the same statute at issue in *Bartnicki* by disclosing a tape recording of a cell phone conversation that had been sent to him by a Florida couple who intercepted the call via a police radio scanner. In the recording, U.S. House Majority Leader John H. Boehmer (R-Ohio) and other Republican Party leaders discuss how then House Speaker Newt Gingrich (R-Ga.) might be willing to accept a reprimand and fine if the House Ethics Committee would forgo a hearing on ethics violations.[98] The majority opinion in the appeal reasoned that Rep. Boehner, the defendant in the case, clearly knew the couple had illegally intercepted and recorded the call and thus the tape had not been lawfully obtained, even though Boehner had played no role in the interception.

The court cited *Bartnicki*, noting that the tape in that case had been legally obtained. McDermott argued that *Bartnicki* meant that anyone who received such a copy had First Amendment protection. However, according to the appellate court:

> The eavesdropping statute may not itself make receiving a tape of an illegally-intercepted conversation illegal. . . . But it does not follow that anyone who receives a copy of such a conversation has obtained it legally and has a First Amendment right to disclose it. If that were the case, then the holding in *Bartnicki* is not "narrow" as the Court stressed, but very broad indeed. On the other hand, to hold

that a person who knowingly receives a tape from an illegal interceptor either aids and abets the interceptor's second violation (the disclosure), or participates in an illegal transaction would be to take the Court at its word. It also helps explain why the Court thought it so significant that the illegal interceptor in *Bartnicki* was unknown . . . and why the Court distinguished this case on that ground. . . . [cites and footnotes omitted][99]

Florida Publishing Company v. Fletcher (1976): Implied Consent

In an often-cited Florida Supreme Court decision in 1976, *Florida Publishing Company v. Fletcher,*[100] the state supreme court ruled that an "implied consent" based on the "doctrine of common custom and usage" prevented Mrs. Klenna Ann Fletcher from recovering damages for trespass, invasion of privacy, and wrongful infliction of emotional distress. Fletcher's 17-year-old daughter died alone in her home when a fire of unknown origin gutted the house. In Florida, as in many states, fire marshals and police permit reporters and news photographers to follow them as they conduct their investigations. A photographer for the *Florida Times-Union* took a picture of a "silhouette" that remained on the floor of the house after Fletcher's body had been taken away. The photo was taken at the request of a fire marshal who had run out of his own film and needed another picture. A copy of the photo was turned over to the investigators for their files, but the picture was also published with others from the fire in the newspaper.

Unfortunately, Cindy Fletcher's mother, who was out of town at the time of the death, first learned of the tragedy and its suspicious circumstances (possible arson) when the photos and a story appeared in the paper. Her suit for invasion of privacy (intrusion) was dismissed by the trial court, which granted summary judgments for the defendants on two counts, one for a combined trespass and invasion of privacy and another for wrongful infliction of emotional distress. An intermediate state appellate court held that Fletcher should have been able to pursue the trespass claim at trial.

The Florida Supreme Court ruled against Fletcher on all three counts, and the U.S. Supreme Court denied certiorari.[101] The state supreme court reasoned, as did the trial court judge, that "it is common usage, custom and practice for the news media to enter private premises and homes to report on matters of public interest or a public event."[102] The court emphasized that the photographer's entry was at the invitation of investigators, but that "implied consent would, of course, vanish if one were informed not to enter at that time by the owner or possessor or by their direction."[103]

The court was imposing three requisite conditions before the media can be relieved of liability. First, there must be a standing agreement or at least general public acceptance that journalists are permitted to enter private premises in such situations. Second, the matter must be of public interest or a public event. Finally, the owner or other person(s) entitled to possession of the property (such as a renter or lessee) must either not be present at the time to object or be present but not object.

This decision was by a state supreme court. It establishes no precedent in other jurisdictions; the holding has been favorably cited by other courts, but never upheld by the U.S. Supreme Court.

Some aspects of this decision are unclear. The Florida Supreme Court did not indicate whether all three of the conditions must always be present. What if the owner objected but there was a strong public interest to be served and authorities had granted consent? What if the owner granted consent but the investigators objected? Could an event be so public or could the public interest be so strong as to override the objections?

Ethical Considerations

Beyond legal questions, however, are a number of ethical concerns in such situations. Assuming the newspaper knew that Fletcher had not been notified of her daughter's death (which was unclear from the court's decision), should it have published the pictures and the story? What if the pictures had included the body, not just a silhouette?

Newspaper and magazine reporters often draw the ire of the public and occasionally the courts when they are perceived to intrude on privacy. But the most intense criticism has been directed at photographers and electronic journalists, thanks to the images the public has seen of obtrusive microphones thrust into the faces of the families of victims of tragedies or the prying eye of the still photographer focused on the victim's body. Sensationalized news constitutes a relatively small proportion of news coverage, but courts and the public pay greater attention to the unusual. Some of these potential intrusions lead to litigation, whereas others merely lead to irate phone calls and letters to the editor.

In 1985, the Associated Press distributed a photo obtained from a member newspaper in California that showed the parents and two brothers of a young boy's family in intense mourning just as the boy's body is pulled from the area where he had drowned. The picture was particularly shocking because the body appeared prominently in the foreground of the uncropped version. Public criticism was vehement, including a bomb threat and more than 500 irate phone calls.[104]

When a Pan American jet exploded in mid-air over Lockerbie, Scotland in 1988, killing all 270 people aboard, the U.S. news media immediately converged on Syracuse, New York, because 35 of the passengers were students from Syracuse University. According to one account, the press coverage was intrusive. At a campus memorial service, "Photographers jammed the aisles and balconies with bulky TV equipment, and they triggered blinding strobe lights and noisy motor drives on still cameras. The service was more like a press conference than a prayer vigil."[105] Several reporters called friends and family of the dead within hours; they resorted to interviewing students as they walked on campus, snapping their photos as they succumbed to grief. These scenes of supposedly private mourning appeared nationwide, countless times in the newspapers and on television.

Was there an invasion of privacy by the media in either of these situations? From a legal perspective, the answer is *absolutely not*. Both were public events.

The drowning occurred in a public area, in plain view of anyone. The accident was newsworthy, of course, and there was no reasonable expectation of privacy. The plane explosion was of legitimate public concern, but didn't individuals attending the memorial service expect some privacy? Perhaps, but by permitting the media to cover the service, the university was effectively waiving the right to assert a claim of intrusion, including the presence of cameras. Interestingly, university public relations personnel reportedly provided journalists around the globe with detailed information about when and where the memorial service would be held. By the second service, reporters and photographers were confined to the balconies.[106]

Two of the major codes of ethics connected with the media deal specifically with privacy: (a) the *Society of Professional Journalists Code of Ethics* (Appendix A) and (b) the *Radio–Television News Directors Association Code of Broadcast News Ethics* (Appendix E). The *National Press Photographers Association Code of Ethics* and the NPPA *Digital Manipulation Policy* (Appendix B) do not include direct references to privacy. The SPJ Code, which was revised in 1996, deals with privacy in two sections. Under "Seek Truth and Report It," the code declares that *journalists should*:

> Avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public. Use of such methods should be explained as part of the story.[107]

Under "Minimize Harm," the SPJ Code says that *journalists should:*

> Recognize that private people have a greater right to control information about themselves than do public officials and others who seek power, influence or attention. Only an overriding public need can justify intrusion into anyone's privacy.[108]

The previous SPJ Code said simply: "The news media must guard against invading a person's right to privacy." There are other statements in the new code that touch on privacy: "Show good taste. Avoid pandering to lurid curiosity." Journalists are also told in that section ("Minimize Harm"): "Be cautious about identifying juvenile suspects or victims of sex crimes."

When and how does a journalist know that "traditional open methods" will not work? What is an "overriding public need"? How much stronger are the privacy rights of private people than public officials and public figures? Are rights confined to limits specified under the law, or are there limits defined by ethical standards broader than the legal standards dictating that certain kinds of intrusion (or other forms of invasion of privacy) may be legal but *unethical*? The RTNDA code is more general than the SPJ code, noting that members will "respect the dignity, privacy and well-being of people with whom they deal."[109]

Public Places

One principle regarding expectation of privacy rings loud and clear from the courts —individuals who appear in public places, whether they are public or private

figures, can expect substantially less privacy than when they are in private settings. The difficulty for the media is distinguishing between public versus private domain. Suppose a television reporter is assigned by the news director to cover alleged health code violations by local restaurants. The reporter is handed a list of establishments cited by the city health services administration. She selects one from the list and enters unannounced with cameras rolling. The result is chaos: waiting customers leave in anger, patrons dash off without paying, and others hide behind napkins or under tables. Can she be held liable for intrusion?

An incident similar to this led to a jury verdict in favor of a restaurant for $1,200 in compensatory damages and $250,000 in punitive damages. On appeal, the compensatory damages stood, but the case went back for retrial on the punitive award, which the judge ultimately dismissed.[110] In 1972, a reporter for Channel 2 TV (owned by CBS) in New York not only paid a surprise visit with cameras rolling and lights bright, but continued to record the ensuing confusion after the manager asked the crew to stop. Although the diner received only $2,500, probably less than court costs and attorneys' fees, the New York Supreme Court (Appellate Division) rejected CBS' claim of First Amendment protection. Citing *Dietemann v. Time,*[111] the court reiterated that the First Amendment has never been interpreted to grant journalistic immunity from crimes and torts committed during news gathering.

It is interesting to note that the action was for trespass, not intrusion, because, in line with the Restatement (Second) of Torts,[112] most courts have held that corporations and businesses do not have a right of privacy. But the consequences of trespass can be just as severe as those for intrusion, as this case illustrates and the famous Food Lion case demonstrated in the 1990s.

In early 1992 ABC-TV's "Primetime Live" sent producers Lynne Neufer Dale and Susan Barnett to work undercover at three Food Lion stores in North and South Carolina. During three days, the producers recorded more than 40 hours of videotape with cameras hidden in their wigs and battery packs and other equipment strapped to their bodies.[113] On November 5, 1992 ABC aired a 25-minute story based on its investigative work that included accusations that the grocery chain engaged in unsanitary practices such as selling repackaged, out-of-date meat washed in bleach, cheese gnawed by rats, decaying produce, and contaminated fish. The producers had been able to get behind the scenes at Food Lion stores by getting hired with doctored résumés. They did not reveal to Food Lion that they were journalists.

Food Lion got wind of the program before it was broadcast and convinced a North Carolina trial court judge to issue an order banning the network from showing any excerpts from the videotapes taken with the secret cameras. However, ABC was able to continue with the segment after convincing a federal court judge to overturn the state court restraining order. Food Lion, headquartered in Salisbury, North Carolina, had about 1,100 stores in 14 states at the time.

In 1993 the company sued (a) the network, (b) its parent company (Capital Cities/ABC at that time), (c) senior investigative producer Ira Rosen, (d) executive producer Rick Kaplan, and (e) the two producers (Dale and Barnett) for civil fraud,

trespass, and breach of loyalty. The civil fraud claim was based on the fact that the two producers lied on their résumés and failed to give their true identities. The trespass claim was related to the fact that the two gained access to nonpublic work areas under false pretenses. The breach of loyalty claim related to the presumed commitment an employee makes to act in good faith on behalf of an employer.

After the report aired, Food Lion's sales dropped and its publicly traded stock fell sharply, and the company said it was forced to close 84 stores and fire 3,500 employees. At the trial in U.S. District Court in Greensboro, North Carolina, the grocery store chain asked for $2,432.35 in actual damages, including wages it had paid to the two producers during their employment at Food Lion. It sought up to $2.5 billion in punitive damages. The food chain chose not to challenge the accuracy of the report in court nor to sue for libel, but outside the courtroom it claimed there were program inaccuracies. The 12 jurors never saw the actual "PrimeTime" segment, although Food Lion's attorneys did show them several hours of out-takes from the hidden cameras.[114]

On December 30, 1996 the jury returned a verdict in favor of Food Lion, awarding the company $1,402 in actual damages, representing the amount the food chain had paid to train the two producers.[115] On January 22, 1997 the jury determined that Capital Cities/ABC Inc. should pay $4 million and ABC Inc. $1.5 million in punitive damages. The jury assessed the executive producer of the program $35,000 and the senior producer $10,750 in punitive damages.

In light of the U.S. Supreme Court decision in *BMW v. Gore*[116] a year earlier, it was inevitable that the award would be reduced or overturned. The punitive damages were almost 4,000 times the actual damages—far out of line with the 500-to-1 ratio that the Supreme Court had found unacceptable in *Gore*. In August 1997, U.S. District Court Judge Carlton Tilley lowered the punitive damages to $315,000 on the ground that the ratio of actual to punitive damages was excessive. Two months later, Food Lion agreed to accept the reduced award, but ABC filed an appeal with the U.S. Court of Appeals for the Fourth Circuit. Two years later, the Fourth Circuit reversed "the judgment to the extent it provides that the ABC defendants committed fraud and awards compensatory damages of $1,400 and punitive damages of $315,000 on that claim." The court affirmed "the judgment to the extent it provides that Dale and Barnett breached their duty of loyalty to Food Lion and committed a trespass" and awarded total damages of $2.00 on the latter claims.[117]

Even when they appear in public places, individuals certainly do not give up all rights of privacy. The classic illustration of this is *Galella v. Onassis* (1973),[118] in which Jacqueline Kennedy Onassis successfully sought an injunction restricting Ron Galella's attempts to photograph her and her children. The celebrity photographer routinely staked out Onassis by keeping a constant watch on her movements and those of her children. Galella was usually careful to take his pictures only in public places such as sidewalks and schools. However, according to the court, he once came uncomfortably close to Onassis in a power boat while she was swimming, often jumped and postured while taking pictures of her at a theater opening, customarily bribed doorkeepers, and even romanced a family servant so he would know family

movements. Galella was detained and arrested on a criminal complaint by Secret Service agents in an incident involving John Kennedy while he was bicycling in Central Park. After his acquittal on the charges, Galella sued the agents and Onassis for false arrest and malicious prosecution. Onassis denied any role in the arrest and countersued Galella for invasion of privacy, assault and battery, harassment, and intentional infliction of emotional distress.

A U.S. District Court granted a temporary restraining order that forbade Galella from "harassing, alarming, startling, tormenting, touching [Onassis] . . . or her children . . . and from blocking their movements in the public places and thoroughfares, invading their immediate zone of privacy by means of physical movements, gestures or with photographic equipment and from performing any act reasonably calculated to place the lives and safety of the defendant [Onassis] . . . and her children in jeopardy."[119]

Within two months, the "paparazzo" (as Galella called himself, which literally meant "annoying insect," according to the Court of Appeals) was back in the District Court for violating the order. The U.S. District Court granted a new order, as a result, that required the photographer to keep 100 yards from the Onassis apartment in New York and 50 yards from Onassis and her children.[120] The order also prohibited surveillance. After a six-week trial consolidating Galella's claims and Onassis' counterclaims, the U.S. District Court dismissed the celebrity photographer's claim and granted a broad injunction that included a provision keeping Galella from approaching within 100 yards of the Onassis home, within 100 yards of either child's school, and within 75 yards of either child or within 50 yards of Onassis.

The U.S. Court of Appeals for the Second Circuit modified the trial court's order by cutting the zone of protection to 25 feet, banning the photographer from touching Onassis, forbidding him from blocking her movement in public places and thoroughfares, and engaging in "any conduct which would reasonably be foreseen to harass, alarm or frighten" Onassis. The appeals court also enjoined Galella from "(a) entering the children's schools or play areas; (b) engaging in action calculated or reasonably foreseen to place the children's safety or well-being in jeopardy, or which could threaten or create physical injury; (c) taking any action which could reasonably be foreseen to harass, alarm, or frighten the children; and (d) from approaching within thirty (30) feet of the children."[121] The Appeals Court applied a balancing test:

> Of course legitimate countervailing social needs may warrant some intrusion despite an individual's reasonable expectation of privacy and freedom from harassment. However the interference allowed may be no greater than that necessary to protect the overriding public interest. Mrs. Onassis was found to be a public figure and thus subject to news coverage.[122]

It is important to realize that Galella's actions were extreme. It was difficult for the family to go anywhere in public without facing the photographer's flashing lights and clicking cameras. The freelancer made considerable sums from his sales of the

photos and continued to do so even after the unfavorable decision. The Court of Appeals noted that, as modified, the order still fully allowed Galella the opportunity to photograph and report on Onassis' public activities and that "any prior restraint on news gathering is minuscule and fully supported by the findings."[123] Unfortunately, the court order did not halt Galella's surveillance. Nine years later he was found in contempt of court for repeated violations of the order and had to pay a $10,000 fine.[124] According to press reports, he finally relented and focused his efforts on other celebrities.

The Onassis case is still the exception. According to the general rule, at least as recognized by most courts, individuals have little claim to invasion of privacy on grounds of intrusion when they appear in public. However, a claim may exist on grounds such as false light or appropriation.

Photojournalists around the world appear to have become more sensitive to how they cover celebrities after Princess Diana's death. A great deal of public scorn was heaped upon them after it became apparent that the photographers pursuing the Mercedes in which she rode may have played a role in the accident or that they displayed more concern with getting a photo of the crash than trying to assist the individuals in the car. Whether this reaction to the criticism will translate into permanent changes in the way such photographers do business remains to be seen, but the incident pointed out extremes of the profession.

A good illustration of how the general rule regarding public places is in *Cefalu v. Globe Newspaper*,[125] in which a Massachusetts Court of Appeals upheld a trial court's summary judgment in favor of the *Boston Globe*. Angelo Cefalu claimed the newspaper had libeled him and invaded his privacy by publishing a photograph of individuals, including him, lined up to collect unemployment benefits in a state office building. The photographer obtained consent of the public information officer who announced to people standing in line that the photographer was taking a picture from the rear and that anyone who did not wish to be in the picture could face the front or step out of line.

Unfortunately, Cefalu did not hear the announcement, and his face is one of the few in the picture that is recognizable. He was in the line, not to pick up a check for himself, but to serve as a translator for a non-English-speaking friend. The photo was published in April 1973 without complaint from Cefalu, who, according to the court, even displayed the photo in his home. However, in September 1974, the paper selected the photo from its file for a feature story on unemployment. The captions for each photo were similar; no one's name or other identification was mentioned. In upholding the trial court's summary judgment in favor of the newspaper, the appellate court noted that publication of the photo was not actionable:

> The notion of right of privacy is founded on the idea that individuals may hold close certain manuscripts, family photographs, or private conduct which is no business of the public and the publicizing of which is, therefore, offensive. *The appearance of a person in a public place necessarily involves doffing the cloak of privacy which the law protects.*[126]

Private Places

Under the Fourth Amendment to the U.S. Constitution, "The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[127] In the past decade, especially in the past few years, the U.S. Supreme Court has broadened the authority of the government to conduct searches without warrants within the limits of the Fourth Amendment. In 1991, the Court ruled 6 to 3 that police who suspect contraband is hidden in a car may legally search the vehicle and any closed container inside.[128]

The decision effectively overturned a series of earlier rulings by the Court that held that police, under most circumstances, had to obtain a search warrant to open a closed container such as luggage. A week earlier, the Court held that once a driver had given authorities consent to search a car, they could also open containers in the vehicle. In both cases, the majority favorably cited the 1925 case of *Carroll v. United States*,[129] in which the Court had upheld a search without a warrant of an automobile being driven on a highway so long as there was probable cause. The rationale was that any contraband (in this case, liquor) could be quickly moved during the interim in which a search warrant was sought. Under the leadership of Chief Justice John Roberts, the U.S. Supreme Court has narrowed individual rights under the Fourth Amendment, as illustrated in *Hudson v. Michigan* (2006).[130] The case involved the execution of a search warrant by Detroit police at a private residence for suspected illegal narcotics and weapons. When officers executed the warrant, they did not follow the knock-and-announce rule, which requires police under the Fourth Amendment to knock on the door of a home first, identify themselves, and then indicate their purpose for entering before executing a warrant or making an arrest without a warrant. The state admitted that it had not followed the rule in the case but claimed that the evidence police seized and that was ultimately used to convict the defendant did not have to be suppressed because of the violation. The U.S. Supreme Court agreed, holding that the social costs had to be weighed against deterrence and that the social costs considerably outweighed deterrence. The social costs, according to the Court, included the risks that dangerous criminals would be set free, that police officers could be harmed and that evidence could be destroyed. The justices acknowledged privacy issues were involved but said they were considerably outweighed by social costs. According to the Court, "[T]he rule has never protected one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests violated here have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable."[131]

The Fourth Amendment protects individuals only against governmental intrusion, *not* against intrusion by nongovernmental entities such as private corporations and news media. The trend is toward granting government greater latitude in gaining access to what were formerly considered to be private places, but federal and

state statutes have continued to bolster the rights of citizens to be free of intrusion from nongovernmental entities. It is ironic that the only U.S. Supreme Court decision recognizing a general constitutional right of privacy involved governmental intrusion, yet intrusion has been granted greater legitimacy by courts at the same time that nongovernmental intrusion is more restricted.

Griswold v. Connecticut (1965)

In *Griswold v. Connecticut* (1965),[132] the Court ruled that a state statute forbidding the use of contraceptives and the dissemination of birth control information even to married couples was unconstitutional because it infringed on a right to marital privacy. The Connecticut law provided a fine of up to $50 and/or up to 60 days in prison for a violation. The test case arose after a member of the state Planned Parenthood League and a physician were arrested and fined $100 each for giving information about contraceptives to married couples. In striking down the statute, the majority opinion written by Justice Douglas found that "specific guarantees in the Bill of Rights . . . create zones of privacy."[133] The sources for these emanations, according to the Court, include the First Amendment right of association, the Third Amendment ban against the quartering of soldiers in a private home without consent during peacetime, the Fourth Amendment guarantee against unreasonable search and seizure, the Fifth Amendment self-incrimination clause, and, finally, the Ninth Amendment, which provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[134]

This constitutional right of privacy against governmental intrusion is by no means absolute, of course, as demonstrated in decisions by the U.S. Supreme Court such as (1) *Bowers v. Hardwick* (1986)[135] upholding a state statute forbidding consensual homosexual activity even in a private home, (2) *Webster v. Reproductive Health Services* (1989),[136] a 5 to 4 decision upholding a Missouri statute placing restrictions on abortion that appeared to circumvent the Court's 1973 holding in *Roe v. Wade*[137] recognizing a woman's to have an abortion under guidelines established by the Court, and (3) *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992),[138] a 5 to 4 decision in which a bitterly divided Court reaffirmed *Roe v. Wade* but with a new test and with new limitations.

In *Planned Parenthood*, the plurality opinion said that although a woman still has the constitutional right to decide whether or not to have an abortion, states could impose restrictions such as requiring a woman to wait 24 hours before undergoing an abortion and to be informed about abortion risks and alternatives. The Supreme Court did strike down the portion of the Pennsylvania statute being tested that required a woman to tell her husband of her intent to seek an abortion. Instead of the traditional strict scrutiny test, the test for determining the constitutionality of abortion restrictions, according to the Court, should be whether they impose an "undue burden" on a woman's right of choice. Only two justices—Blackmun, who wrote the majority opinion in *Roe*, and Stevens—voted to apply the original "strict

scrutiny" test of *Roe*. The four remaining justices said *Roe* should be overturned. As privacy rights against governmental intrusion erode, privacy parameters against intrusion by others are expanding.

Changing times or new societal attitudes can lead to changing opinions from the U.S. Supreme Court. In 2003 the Court overturned its decision in *Bowers*, holding in *Lawrence v. Texas* (2003)[139] that a state statute criminalizing "deviate sexual intercourse" between individuals of the same sex was unconstitutional. In a majority decision written by Justice Kennedy, the Court held that the statute violated the liberty and privacy protections of the due process clause of the Fourteenth Amendment. Justice O'Connor concurred in the judgment but on the ground that the law violated the equal protection clause of the same amendment. If this case had been heard by the current Supreme Court, the decision would most likely still have gone the same way, although by a 5 to 4 instead of a 6 to 3 vote. Justice Kennedy was joined in his opinion by Justices Stevens, Souter, Ginsburg, and Breyer, who remain on the Court. Two of the dissenters, Justices Scalia and Thomas, are also still on the Court. Chief Justice John Roberts replaced Chief Justice Rehnquist and Justice O'Connor has been succeeded by Justice Samuel Alito. Roberts and Alito would likely have joined Scalia and Thomas, had they been on the Court at the time.

In *Lawrence*, the Court made it clear that the statute was clearly unconstitutional because it attempted to illegally control an intimate relationship that consenting adults possessed the liberty in which to engage and that the statute served no legitimate governmental interest that could justify intrusion into the personal and private lives of citizens. The two men involved in the case were convicted and fined $200 each for criminal conduct after they were observed engaging in anal sexual intercourse when police officers entered an apartment in response to a reported weapons complaint.

In 1986 Congress passed the Electronic Communications Privacy Act, which provides:

> (1) Except as otherwise specifically provided in this chapter any person who (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral or electronic communication . . . shall be punished . . . or shall be subject to suit.[140]

An offense can be punished by a fine of up to $10,000 and/or imprisonment of up to five years.[141] Anyone found guilty of manufacturing, distributing, possessing, or advertising such devices can be fined up to $10,000 and/or imprisoned for up to five years.[142] Most states have similar statutes because the federal statutes, under the Constitution, can regulate the transmission of interstate or foreign communications or communications affecting foreign commerce. Federal laws cannot regulate communication that is purely intrastate. There are numerous exceptions under the law, including law enforcement officials with a court order and monitoring by the Federal Communications Commission to enforce the Communications Act of 1934.

Participant Monitoring

One very important exception is consensual or participant monitoring, as specified in Section 2511:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state.[143]

Prior to the 1986 Electronic Communications Privacy Act, this provision included "injurious purpose" with criminal and tortious acts. (The original act was passed in 1968 as the Omnibus Crime Control and Safe Streets Act.) These two words were deleted, however, in the 1986 act, primarily in response to a 1984 Sixth Circuit U.S. Court of Appeals decision in *Boddie v. the American Broadcasting Companies*.[144] That case arose when ABC's "20/20" carried a story entitled "Injustice for All" by correspondent Geraldo Rivera, which investigated allegations that an Ohio judge granted leniency to female criminal defendants who had sex with him. Rivera interviewed Sandra Boddie, an unwed mother of four, who had received a lenient sentence from the judge, James Barbuto, although she claimed she had not had sex with him. The interview was recorded with a hidden video camera and microphone.

When excerpts of the interview were broadcast, Rivera alleged that a friend of Boddie had sex with the judge on behalf of Boddie. Boddie sued the network and Rivera 19 months later for libel, false light, and civil violation of the federal statute. The trial court judge dismissed the eavesdropping claim, and a jury ruled there had been no libel or invasion of privacy. The Sixth Circuit U.S. Court of Appeals sent the case back to the trial court, ruling that the wiretapping claim had been improperly dismissed. Before the case was retried, Congress passed the 1986 act with revisions designed to permit surreptitious recording for news gathering under participant monitoring.

When retried, the district court judge dismissed Boddie's suit on the grounds that the 1986 revision simply clarified, rather than changed, previous law and that Congress had not meant for "injurious purpose" to include news gathering. Boddie appealed, and the U.S. Court of Appeals for the Sixth Circuit affirmed the dismissal on grounds that the "injurious purpose" language was vague, holding that the trial court judge had erred when he dismissed Boddie's claims on the basis that the 1986 revisions had clarified the old law.[145]

Although the Court of Appeals decision is binding only in the Sixth Circuit, it recognizes the right of news organizations as well as the public to secretly record conversations in person, via telephone, or by other means when they are parties to the conversation or when they have consent of *one* of the parties. The appellate court made it clear that "even though the statute is not explicitly aimed at speech, uncertainty about its scope is likely to inhibit news gathering and reporting."[146]

Although the trial court and the appellate court agreed that the case should have been dismissed on different grounds, both decisions reveal an undercurrent that should concern journalists. By erroneously ascribing the basis for the dismissal to clarification in the 1986 revision, the district court was indicating that, had Congress chosen to broaden the statute to include claims, Congress would have been permitted to do so. In other words, Congress would not have violated the First Amendment.

This situation is particularly troubling in light of the legislative history of the Act, which shows that Senate sponsors and supporters of the revision expressed on the record that permitting civil damages under the wiretap statute would violate the First Amendment. Even the appellate court decision strikes a discordant note because the court also refused to dismiss the claim on grounds that the "injurious act" language specifically violated the First Amendment but instead clung to the notion of *constitutional vagueness*. The higher court gave no indication that an authorization of civil suits would violate the Constitution.

Only 13 states—California, Delaware, Florida, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, Pennsylvania, and Washington—now specifically prohibit recording of a conversation unless all participants have consented.[147] Ten states—Alabama, California, Delaware, Georgia, Kansas, Maine, Michigan, New Hampshire, South Dakota, and Utah—ban the use of secret cameras in a private place.[148]

Journalists and others who secretly record conversations by phone or other means risk criminal and civil penalties in those jurisdictions. *The rule in these states is that you must have consent of all parties before recording.* Even in the other 37 states and for interstate calls under the federal rules, there are other risks. Although the Communications Act of 1934, in its current form, makes no mention of secret recordings by broadcasters, the Federal Communications Commission, which regulates broadcasting as well as common carriers such as telephone companies, still has rules that require telephone companies to cancel a customer's service when the person records phone conversations without notifying all parties with an audio tone or "beep." In addition, all radio and television stations must inform any participant if a *telephone* conversation is being recorded for broadcast. The later rule does not require that an audible tone be transmitted, but instead that the participants must be given reasonable verbal notice at the time.

One of the false assumptions of most computer users is that by pressing or clicking the delete button, they are actually deleting a file. All that is accomplished with this step is simply freeing up the space on the hard drive or disk so that it can be written over, if needed. In other words, hitting "delete" tells the computer that it can put something else in that space if the need arises later, not that the file is erased. Most computer users are also not aware that computer servers routinely back up files, making deleted files available. A cottage industry has as emerged in which computer experts retrieve deleted files as part of the discovery process. As Attorney Chad A. McGowan concluded in a *Georgia Bar Journal* article, "Counsel should not overlook deleted files on an opponent's computer systems because it is possible

those files can be recovered. The files marked as deleted might just contain the telltale memo, e-mail or piece of correspondence necessary to prove your client's case."[149] The threat of e-mail discovery is driving more corporations to negotiate settlements in lawsuits rather than face the time and expense of discovery.

Most states now use digitalized photos for driver licenses, raising privacy concerns about police misuse and even commercial exploitation because the photos are stored the same way as other electronic records. Thus anyone can gain access to an individual's picture just as easily as getting her address, unless such records were not made part of the public record. The National Press Photographers Association has a *Digital Manipulation Policy* (see Appendix B), that includes specific guidelines for dealing with digital images.

Cellular and cordless phones continue to be a major privacy concern even though it is illegal to intercept conversations on either type of phone without a court order. Many people who use these devices do not realize they are nothing more than radio transmitters. A federal statute bans anyone from selling or manufacturing a radio receiver capable of intercepting cellular phone conversations, but many broadband receivers had already been sold before the law took effect. It is also simple to modify a cellular phone so it can pick up other telephone conversations. In the famous O.J. Simpson Bronco chase in Los Angeles in summer 1994, police were monitoring Simpson's cellular conversations.

The radio conversations of police, firefighters, ambulance drivers, etc. can be overheard by anyone who owns a scanner or similar device, but Section 605(a) of the Federal Communications Act prohibits interception and divulgence of such transmissions.

One famous intercepted cellular phone call was that of U.S. House Speaker Newt Gingrich in 1996. A Florida couple taped the call between Gingrich and Republican leaders and then shared it with the ranking Democrat on the House Ethics Committee. A transcript of the call, which had been picked up on a radio scanner, was published in the *New York Times*, the *Atlanta Journal-Constitution*, and *Roll Call*, a Capitol Hill newspaper.[150] The couple entered into a plea bargain with federal officials, agreeing to pay a $1,000 fine in exchange for being charged only with illegally intercepting a cellular phone call.[151]

In *Vernonia School District 47J v. Acton* (1995),[152] the U.S. Supreme Court upheld the constitutionality of an Oregon public school district's Student Athlete Drug Policy (SADP) that authorized random urinalysis drug testing of students in athletic programs. The case began when a student refused to take the test and was not allowed to play football. He and his parents sued on grounds that the policy violated his Fourth and Fourteenth Amendment rights and the state constitution. The U.S. District Court denied the claims, but the Ninth Circuit U.S. Court of Appeals reversed, holding the policy violated federal and state constitutions.

In a 6 to 3 decision, the Court held that the policy was constitutional. The Court said such testing does constitute a "search" under the Fourth Amendment, but that its "reasonableness is judged by balancing the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate government interests."

The justices reasoned that children in the temporary custody of the state have less of a legitimate expectation of privacy and that the deterrence of drug use is sufficiently important to override privacy interests in the situation: "Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's Policy is reasonable and hence constitutional."[153]

In 1997 the U.S. Supreme Court struck down as unconstitutional a Georgia statute requiring candidates for certain public offices to certify that they had taken a urinalysis drug test at least 30 days before they qualified for nomination or election and that the result was negative. In *Chandler v. Miller* (1997),[154] the Court held in an 8 to 1 opinion that such a required test did not fall within the limited category of constitutionally permissible suspicionless searches such as what was permitted in *Vernonia School District 47J*. The Court noted, "Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."[155] Georgia failed to show such a special need.

The Court was not as concerned with how the test was administered as it was with the fact that no special need was demonstrated. Noting that the state allowed the candidate to take the test in the office of his or her own physician and that the results are provided to the candidate first, the Court did not find the testing process particularly invasive. The justices were not convinced that the requirement would deter unlawful drug users from seeking office, pointing out that the candidate could schedule the test date and thus abstain for a pretest period to get a negative result. The state also presented no evidence that there was a drug problem among elected state officials, the Court said: "The need revealed, in short, is symbolic, not 'special,' as that term draws meaning from our case law."[156] The Court concluded:

> We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable' —for example, searches now routine at airports and at entrances to courts and other official buildings. [cite omitted] But where, as in this case, public safety is not genuinely in jeopardy, the *Fourth Amendment* precludes the suspicionless search, no matter how conveniently arranged.[157]

The majority opinion noted that it was expressing no opinion on whether a state could impose a requirement that candidates certify they were in good health based upon a medical examination, a point Chief Justice Rehnquist, in dissent, did not find convincing: "It is all but inconceivable that a case involving that sort of requirement (medical examination) could be decided differently than the present case; the same sort of urinalysis would be involved."[158]

The formal need for and understanding of privacy was reinforced by the U.S. Congress in 2002. An ombudsman-like position was created to uphold the Privacy Act. Initially, some watch dog groups expressed concern that a Homeland Security chief privacy officer would be nothing more than a rubber stamp for the government's

anti-terror initiatives. But the person placed in charge, O'Connor Kelly, was subsequently credited for implementing training programs for government managers and negotiating an information sharing agreement with the European Union, which already had strong privacy protections. O'Connor had previously been employed as legal counsel for an Internet company, Double Click, Inc. As Homeland Security's chief privacy officer, she was credited for delaying use of a program called Secure Flight, which attempted to gain information on airline travelers using commercial air databases.[159]

Impact of Codes of Ethics

None of the major codes of ethics directly mentions surreptitious monitoring or recording, and the journalistic community appears divided on the propriety of common investigative reporting techniques that the public, by and large, considers improper, such as misrepresentation, sifting through an individual's trash, and accepting or using documents stolen by someone else without the cooperation of the media organization. The Society of Professional Journalists Code of Ethics (Appendix A) does say under "Seek Truth and Report It" that journalists should "avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not reveal information vital to the public."

Is it ethical for journalists to hound controversial figures wherever they go and to write about and photograph personal tragedies with cameras, notepads and microphones at hand? There were many tragic and telling moments captured on film and in print during the Vietnam War, some of which are said to have altered public support of the war such as the picture of the naked Vietnamese girl screaming as she flees a napalm attack and the photo of the south Vietnamese soldier shooting the captured Viet Cong soldier through the head. In spite of severe restraints imposed by the military on the press during the Persian Gulf War in 1991, some of the stories and photos published were graphic and poignant. *Detroit Free Press* photographer David Turnley won accolades for one of the war's "most memorable" pictures—an American soldier sobbing after he discovers that the body in a bag in the helicopter ferrying him to a hospital is his friend.[160] In 1993 CNN videos and photos of the desecration of an American soldier's body by Somali citizens immortalized in the film "Black Hawk Down" intensified public pressure to remove U.S. troops from Somalia. *USA Today* carried a front-page photo of that scene.

The war in Iraq has seen its share of privacy controversies, including a Pentagon clamp-down on photos of coffins in official custody carrying the bodies of soldiers killed in the war. The restriction was enacted after the publication of photos of flag-draped coffins being transported in Iraq for transport to the United States. The U.S. military itself made photos available of the lifeless face of Abu Musab al-Zarqawi, the leader of the terrorist organization Al-Qaeda in Iraq, when he was killed in 2006 by bombs dropped by U.S. warplanes. However, in general, the war in Iraq did not generate nearly as much graphic coverage in the mass media as previous wars, although videos of beheadings of Americans and other citizens, including the

murder of *Wall Street Journal* reporter Daniel Pearl in Pakistan in 2002, were readily available on the Internet.

Defenses to Intrusion

There is only one sure-fire defense to intrusion: consent. In those 37 states that permit participant monitoring, the consent needs to come from only one participant, which can include the individual actually making the recording. What if a call to one of the other 13 states comes from one of the 37 states? Would the law of the participant monitoring state prevail or the law of the other state apply? In *Kearney v. Salomon Smith Barney* (2006),[161] the Supreme Court of California answered that question for that state. Applying California's choice-of-law rules, the California high court said the state had a "strong and continuing interest in protecting the privacy of its residents" and thus could ban secretly recorded phone conversations between its citizens and out-of-state callers. The case arose when a national brokerage corporation was sued for secretly recording its telephone calls to California customers. The company made the calls from Georgia, which permits such taping so long as one party consents. The California Supreme Court indicated that Georgia did "have a legitimate interest in protecting its companies from unexpected liability based on past actions that were lawful in Georgia," and thus upheld the dismissal of claims for damages and restitution by the lower court.

Even in those 13 states that require consent of all parties, a form of implied consent can sometimes be invoked, as illustrated in *Florida Publishing Co. v. Fletcher* and *Cassidy v. ABC*. Because publication is not required for intrusion to occur, *newsworthiness* and *privilege* are not available as defenses for the intrusion itself, although they may provide protection for a defendant for publication of the information. A reporter who illegally obtained documents indicating that the local police chief has been involved in drug trafficking would probably not face a suit for disclosing information but might be charged with criminal offenses and possibly have to pay civil damages for the intrusion. Ethically, journalists should avoid secret recording and monitoring unless (a) the information is being obtained via a strictly legal means, (b) there is no other effective way of obtaining the information, and (c) publishing the information would definitely serve the public interest.

Publication of Private Matters

This third tort of invasion of privacy goes by several names. The basic elements are the same. They include publication of private matters and public disclosure of private facts. No one's life, even a U.S. President's, is entirely an open book. In general, the more prominent the individual, the less protection that person enjoys from unwanted publication of private affairs. This tort has three basic elements as indicated in the Restatement (Second) of Torts: "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter published is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate public interest."[162]

Publication

The first element, *publication*, is generally easy for a plaintiff to demonstrate and is usually not in dispute. Unlike libel, which requires that the defamatory information be communicated merely to a third party, public disclosure of private facts must be fairly widespread because this is a tort of publicity, not simply communication. Thus embarrassing facts jotted in a reporter's notebook would not be sufficient to meet the publication requirement nor would an internal memo about a worker that is circulated among supervisors. An in-house newsletter for employees and a gossip column in a small weekly newspaper would satisfy the criterion.

Offensiveness

The second element, *offensiveness*, has been defined differently in different jurisdictions and is often litigated. A critical aspect is that the published facts must be highly offensive, not simply embarrassing, to the reasonable person. This determination is always a jury question (i.e., fact) in a jury trial because jurors in a community are presumed to judge as reasonable people, just as in obscenity cases, whether contemporary community standards are violated. The courts have been strict in applying the standard, much to the chagrin of the public, which tends to view more of a person's private life as worthy of protection.

In 1987 when U.S. Court of Appeals Judge Robert Bork was unsuccessfully nominated as a U.S. Supreme Court justice, a small weekly newspaper in Washington, D.C., *City Paper*, somehow obtained a list of movies that he had rented from a local video store. The newspaper published the list along with a story that attempted to explore the "inner workings of Robert Bork's mind . . . revealed by the videos he rents." The Senate Judiciary Committee, which initially reviews Supreme Court nominees, was outraged, as was the majority of Congress, and enacted the Video Privacy Protection Act of 1988,[163] popularly known as the "Bork law." This statute provides civil damages but *no criminal penalties* against "video tape service providers" (presumably stores, although the wording is vague) that disclose "personally identifiable information concerning any consumer." Anyone "aggrieved" by the "wrongful disclosure of video tape rental or sale records" may recover actual damages of at least $2,500 and punitive damages for intentional disclosure. The law has had no adverse impact on the press thus far, and it is unclear whether any entity other than rental stores is covered. In fact, there have apparently been no suits yet against anyone for violating the statute. The law may very well be unconstitutional prior restraint, but it epitomizes the gap between zones of privacy versus those dictated by legislation. It is highly unlikely that a court would consider public disclosure of one's video preferences offensive, but Congress was ready to carve out this area of privacy.

In 1989 a deranged and disgruntled former employee at Standard Gravure Corporation wounded 13 and killed 8 workers at the plant with a Chinese-made AK-47 assault rifle in a shooting spree before taking his own life with a pistol. The next day the *Louisville Courier-Journal* published a front-page photograph of one of the

murder victims sprawled on the floor. The photo did not identify the victim, but part of his face was visible. The newspaper was besieged with public criticism for publishing the controversial picture, which it sold to *Newsweek* and other publications. Editor David Hawpe defended his paper's use of the picture, noting that the decision came after extensive discussion with other editors. "We did think about the impact such a picture might have on the family and friends of the victim," according to Hawpe. "The photo did what I wanted it to do by showing the reality of what assault weapons are capable of. A less graphic photograph would not have been as effective."[164]

The family of the victim sued the paper for invasion of privacy and intentional infliction of emotional distress, but a Kentucky Circuit Court judge dismissed the suit on grounds that the photo was newsworthy, that the family had no basis for a claim because dead individuals have no right of privacy under state law (other than appropriation) and that publication of the photo did not constitute extreme and outrageous conduct necessary for proving intentional infliction of emotional distress. A Kentucky Court of Appeals upheld the dismissal, the Kentucky Supreme Court declined to review, and the Supreme Court of the United States denied certiorari.[165]

The public was similarly upset a month earlier when a video and still photos taken from it appeared in the media, showing a man alleged to be U.S. hostage Lt. Col. William Richard Higgins dangling from a gallows. The tape was released by pro-Iranian extremists who said they had tried and executed the U.S. officer, who was captured while serving in a U.N. observer group. During the recent Iraq War, the release of videos of the decapitations of civilians has caused even greater alarm.

Cox Broadcasting Corp. v. Martin Cohn (1975)

Most states have statutes prohibiting the publication of rape victims' names, but a decision by the U.S. Supreme Court in 1975 in *Cox Broadcasting Corp. v. Martin Cohn*[166] declared a Georgia statute unconstitutional that made it a misdemeanor to publish or broadcast the name or identity of any female who may have been raped or against whom a rape may have been attempted. The law violated the First and Fourteenth Amendments because it permitted civil liability against a television station that accurately reported the name of a rape victim it had obtained from a public record. In August 1971, 17-year-old Cynthia Cohn was gang raped and murdered. Five of the six youths who had been indicted in the case pled guilty to rape or attempted rape after murder charges were dropped. The sixth defendant pled not guilty and was bound over for trial later. While he was covering the proceedings, a reporter for WSB-TV in Atlanta, where the crime occurred, obtained the victim's name from the indictments, which were available as public records. In the evening newscast, the reporter used Cynthia Cohn's name in a report about the proceedings, and the report was rebroadcast the next morning. Cohn's father filed suit against the station, claiming that his right to privacy had been invaded by disclosure of his deceased daughter's name. A state trial court granted summary judgment in favor of Martin Cohn and ordered a jury trial to determine damages. The Georgia Supreme

Court ruled that the trial court had erred in construing a civil cause of action based on the criminal statute but that Cohn could sue under a common law right of privacy. On appeal, the U.S. Supreme Court reversed:

> In placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be one of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.[167]

Although the Georgia Supreme Court escaped the issue of the constitutionality of the state statute by holding that it did not provide a civil cause of action, the U.S. Supreme Court held, in effect, that the statute did create such a cause of action and was a violation of the First and Fourth Amendments. To prevent the press from being punished either in a civil or criminal suit, the Court had to go further, by holding that a constitutional privilege existed to give the media the right to publish truthful information obtained from public records. Thus this decision covers a broad range of information, not simply rape victim names. The Court did *not* say that rape victims' names could not be protected, but that such information could be published with impunity once it had become public record.

Florida Star v. B.J.F. (1989)

Fourteen years after *Cox Broadcasting v. Cohn*, the Supreme Court of the United States decided another case involving the publication of a rape victim's name. There are several parallels between the two cases but there were two major and interesting differences. The name in the 1989 case was accidentally published and was not in a court record. B.J.F. (the Court used only her initials to respect privacy) reported to the Duval County, Florida, sheriff's department that she had been robbed and sexually assaulted by an unknown man. The department issued a report based on her information and placed the report, as it routinely did for reported crimes, in the press room, accessible to anyone. The report included the victim's full name. A reporter-trainee for the *Florida Star*, a weekly newspaper that serves Jacksonville with a circulation of about 18,000, used the information to write a story for the "Police Reports" section of the paper:

> [B.J.F.'s full name] reported on Thursday, October 20, she was crossing Brentwood Park, which is in the 500 block of Golfair Boulevard, enroute to her bus stop, when an unknown black man ran up behind the lady and placed a knife to her neck and told her not to yell. The suspect then undressed the lady and had sexual intercourse with her before fleeing the scene with her 60 cents, Timex watch and gold necklace. Patrol efforts have been suspended concerning this incident because of a lack of evidence.[168]

Like most newspapers, the *Florida Star* had a written internal policy against publishing the names of sexual offense victims. B.J.F.'s name had been accidentally published. The report was one of 54 police reports that appeared that day in the paper. The victim sued both the *Star* and the sheriff's department for negligence. Prior to trial, the department settled out of court by agreeing to pay B.J.F. $2,500 in damages. After a day-long trial at which the woman testified that she had suffered emotional distress from threatening phone calls and other incidents as a result of the story, a jury awarded her $75,000 in compensatory damages and $25,000 in punitive damages. A state appeals court upheld the decision, and the U.S. Supreme granted certiorari. In *Florida Star v. B.J.F.* (1989), the Supreme Court ruled 5 to 4 in favor of the newspaper but disappointed most journalists by refusing to extend First Amendment protection:

> Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability under 794.03 [the Florida statute] to appellant [the *Star*] under the facts of the case.[169]

The Court based its decision on *Cox v. Cohn* (1975) and two other cases, *Oklahoma Publishing Co. v. Oklahoma County District Court* (1977)[170] and *Smith v. Daily Mail Publishing Co.* (1979).[171] *In Oklahoma Publishing Co.* the Court held in a *per curiam* opinion that a trial court judge's order prohibiting the press from publishing the name and photo of an 11-year-old boy charged with murder was unconstitutional prior restraint because the hearing at which his name was revealed was open to the public. In *Smith*, a West Virginia statute was unanimously declared unconstitutional because it imposed criminal penalties for publishing, without permission from a juvenile court judge, the identity of a juvenile offender even when the information was lawfully obtained. *Smith* was a narrow decision. There was no question of unlawful access to court proceedings, privacy or of prejudicial publicity. In such a situation, the Court said "state officials may not constitutionally punish publication of the information absent a need to further a state interest of the highest order."[172] In neither *Smith* nor *Florida Star* had the state demonstrated such an interest. In the latter decision the Court said it could "not rule out the possibility that, in a proper case, imposing civil sanctions for publication of a rape victim might be so overwhelmingly necessary to advance these interests [privacy of victims of sex offenses, physical safety of such victims and encouraging victims to report offenses without fear of exposure] as to satisfy the [*Smith v.*] *Daily Mail* standard."[173]

Two situations, both of which occurred in 1991, illustrate the complexity of the issue of whether rape victims' names should be made public. In the first, Palm Beach (Florida) County Circuit Court Judge Mary Lupo issued a gag order in the trial of

30-year old William Kennedy Smith, a nephew of Massachusetts Senator Edward Kennedy. Smith was charged with second-degree sexual battery and misdemeanor battery in connection with the alleged rape of a young woman at his family's Palm Beach estate. The gag order itself was not highly unusual in such a case even though it barred all participants in the case, including all potential witnesses, from discussing the case outside the courtroom. What were unusual were the events that eventually led to the restrictive order. Before Smith was ever charged, several newspapers and NBC News identified the 29-year-old woman who had filed charges against him. The alleged victim was named first in a London tabloid newspaper and then in the U.S. tabloid the *National Enquirer*. The newspapers also published her photograph, which was broadcast shortly thereafter by NBC television.

Although most news organizations have either written or unwritten policies against publishing the names of victims of sexual assault, several newspapers including the *New York Times* identified the woman. The Associated Press and newspapers such as the *Miami Herald* did not use the woman's name.[174] However, many of the news organizations that have such a policy do permit disclosure of the identity when individuals choose to make their names public.

The *Des Moines* (Iowa) *Register*, which did identify the Palm Beach alleged rape victim, won a Pulitzer Prize a week earlier for a five-part series on the rape of Nancy Ziegenmeyer, who gave consent for her name to be published so people would understand how rape brutalizes victims and should not be treated as just another crime. Ziegenmeyer decided to tell her story after the editor wrote a column arguing that withholding the names of rape victims added to the stigma of the crime.[175]

After Smith was acquitted of the rape charge, his accuser went public to criticize the jury's verdict and gave interviews on several national talk shows. Nearly all of the news media in the country then revealed her name—Patricia Bowman. Interestingly, the *Globe*, the Florida-based tabloid that was among the first media outlets to publish the name of Smith's accuser, was charged with violating Florida's statute barring the publication of rape victims' names. Palm Beach County Judge Robert Parker ultimately ruled that the law was unconstitutional on its face and as applied by prosecutors and dismissed the charge.[176]

The second occurrence attracted little media attention but may have been a significant development on this issue. In a highly unusual move, the U.S. Supreme Court identified a rape victim in a court decision. In a 7 to 2 opinion written by Justice Sandra Day O'Connor, the Court held in May 1991 that a defendant in a rape case may be barred under some circumstances from introducing evidence at trial of a previous sexual relationship with the victim. That decision, which had no direct bearing on First Amendment law, was nevertheless overshadowed by the identification. Justice O'Connor refused to indicate whether her action was intentional or an oversight, but no efforts were made to convince the news media to omit the name. In a more recent highly publicized rape case, charges against NBA star Kobe Bryant were dropped after allegations of sexual activity were made against his accuser.

If victims of sexual assaults should have their names kept confidential, what about the victims of other crimes? Should the name and address of a man who fell

into an investment scam be revealed? What about the name and address of a woman who was robbed in front of a restaurant? Crime stories have been a staple of news since the penny press of the 1830s. However, except in sex offenses, victims of crimes have routinely been named in reports. In fact, many newspapers, such as the *Florida Star*, routinely carry a police blotter or summary log that is often one of the widest read sections, according to readership surveys.

In a very unfortunate twist on privacy rights and potential press abuse in November 2006, a crew from the award-winning *Dateline NBC* television series "To Catch a Predator" was situated outside of the North Texas home of an individual identified as part of its "sting operation," along with local police seeking his arrest, when the accused killed himself. Louis "Bill" Conradt, Jr. had been a Texas prosecutor caught in the pedophile sting operation in Murphy, Texas and was identified as having solicited sex from someone he thought was a 13-year-old boy, but turned out to be police authorities. In July 2007, Conradt's sister announced she had retained legal counsel, Baron Associates of Brooklyn, NY. Her attorney, Bruce Baron, indicated that his client could, due to *Dateline's* involvement in the situation, pursue several legal courses of action against NBC–Universal, including, among other things, wrongful death, violation of the decedent's civil and constitutional rights, extreme emotional distress, and the loss to his estate in "compensatory and punitive damages exceeding $100 million." NBC noted that so far—at least at that time, there had not been a lawsuit filed on behalf of Conradt's estate and the company would vigorously defend itself against such a suit, if one were forthcoming. But at the same time, some media-related sources pointed out that Conradt had never actually met with any young boys and that the NBC program's relationship with police and, to some extent, another external organization—"Perverted Justice"—amounted to a form of entrapment, via the Internet. The partnership of the police with such outside entities and, particularly, members of the press can often raise red flags, although the performance of the *Dateline NBC* series was complicated by its relatively high rate of success in helping to catch sexual predators using the Internet, individuals operating previously "under the police radar" who might otherwise go undetected.[177]

Briscoe v. Reader's Digest (1971)

Sometimes the individuals *who commit crimes* cry foul. A 1971 case, *Briscoe v. Reader's Digest*, is typical of the dilemma news media face in identifying people who have been convicted of past crimes. Marvin Briscoe, who with an accomplice had hijacked a truck in 1956, was convicted and then rehabilitated. Eleven years later *Reader's Digest* published a story entitled "The Big Business of Hijacking," which included this sentence in its report on how truckers were fighting back against thieves: "Typical of many beginners, Marvin Briscoe and Garland Russell [his accomplice] stole a 'valuable-looking' truck in Danville, Ky., and then fought a gun battle with the local police, only to learn that they had hijacked four bowling pin spotters."[178]

No mention was made of when the incident took place. Briscoe sued for willful and malicious invasion of privacy as a result of this publication of what he contended were "embarrassing private facts about plaintiff's past life." A California Superior Court dismissed the case in favor of *Reader's Digest*, but on appeal, the Supreme Court of California reversed, holding that Briscoe could recover damages if he could demonstrate the magazine invaded his privacy with reckless disregard for facts a reasonable person would find highly offensive:

> First . . . a jury could reasonably find that plaintiff's identity in connection with incidents of his past life was in this case of minimal social value. . . . Second, a jury might find that revealing one's past for all to see is grossly offensive to most people in America. . . . Third, in no way can plaintiff be said to have voluntarily consented to the publicity accorded him here. He committed a crime. He was punished. He was rehabilitated. And he became for 11 years, an obscure and law abiding citizen. His every effort was to forget and have others forget that he had once hijacked a truck.[179]

Notice the court's intense concern with promoting rehabilitation by protecting the privacy of those who have become good citizens. The discordant note in this decision and those that followed in the U.S. Supreme Court is that a news medium could be punished for publishing truthful information contained in a public record. *Florida Star v. B.J.F.* points in this direction, as does *Cox v. Cohn*.

Would the decision have been different if the magazine mentioned the year? Briscoe would still have suffered, as he pointed out in his complaint, because his 11-year-old daughter and friends and acquaintances were not aware of his criminal history. Is it ethical to publish the name of someone who is rehabilitated? At what point should a media outlet no longer identify a convicted criminal? One year? Five years? Immediately after release from jail? Should the period of time vary with the crime or the sentence? It is not unusual for newspapers, magazines, and the electronic media to cover the releases of notorious criminals after they have served their terms. Does this serve the "compelling interest" of society, at least as perceived by this court, "in rehabilitating criminals and returning them as productive and law-abiding citizens"?[180] Does the public's need to know override this interest and the interest of individuals in protecting the privacy of their past?

When the *Briscoe* case went back to the trial court, it was removed to the U.S. District Court for the Central District of California. The federal trial court issued a summary judgment in 1972 in favor of the magazine, holding that the information was newsworthy, that it was published without malice or recklessness, that it was not an invasion of privacy, and that it was thus protected by the First Amendment. Judge Lawrence T. Lydick pointed out in his opinion that Briscoe had actually been imprisoned in Kentucky until December 1961, that on his release he was placed on federal probation until December 1964 and on state parole until February 1969, almost a year after the article appeared. The judge also indicated that his name and exploits were clearly remembered by the people in his hometown even at the time of the new trial.

Virgil v. Time (1975)

A few years later the Ninth U.S. Circuit of Appeals dealt with another unusual invasion of privacy case arising in California. In *Virgil v. Time* (1975)[181] the court held that a 1971 story in *Sports Illustrated* containing embarrassing facts about a body surfer's private life could claim First Amendment protection only if the information was shown to be newsworthy and of legitimate public interest. The story focused on surfing at the Wedge, a beach near Newport Beach, California, considered the most dangerous place in the world for body surfing. Mike Virgil, who had a reputation for being the biggest daredevil of surfers at the beach, was among the individuals described and was quoted in the 11-page article. Among the quotes attributed to Virgil are:

> I quit my job, left home and moved to Mammoth Mountain. At the ski lodge there one night I dove headfirst down a flight of stairs—just because. Because why? Well, there were these chicks all around. I thought it would be groovy. Was I drunk? I think I might have been. Every summer I'd work construction and dive off billboards to hurt myself or drop loads of lumber on myself to collect unemployment compensation so I could surf at the Wedge. Would I fake injuries? No, I wouldn't fake them. I'd be damn injured. But I would recover. I guess I used to live a pretty reckless life. I think I might have been drunk most of the time. . . . [in discussing his aggressiveness as a child] I bit off the cheek of a Negro in a 6-against-30 gang fight. They had tire irons with them.[182]

The article quoted Virgil's wife as saying, "Mike also eats spiders and other insects and things." According to the story, "Perhaps because much of his time was spent engaged in such activity, Virgil never learned how to read." A photo caption read, "Mike Virgil, the wild man of the Wedge, thinks it possible his brain is being slowly destroyed."[183]

While Virgil admitted in his complaint alleging invasion of privacy by the magazine that he had willingly talked with the reporter, he claimed that he "revoked all consent" when he learned the article contained negative statements about him. He had learned about the references to "bizarre incidents in his life that were not directly related to surfing" from a staff member who had telephoned him and his wife to verify information. At that time, Virgil told the checker that he did not want to be mentioned in the story and that he wanted the article stopped. Despite Virgil's opposition, *SI* published the story. The surfer filed suit. At trial the U.S. District Court denied Time, Inc.'s motion for summary judgment, and the trial court's decision was upheld on appeal to the Ninth Circuit, which then remanded the case back to the trial court. The U.S. Supreme Court denied certiorari on further appeal.[184] The district court ruled in favor of *Sports Illustrated* on grounds that the information in the story was newsworthy. The court did question whether the specific details about Virgil, such as diving down stairs and eating insects, were of legitimate public interest but concluded that this information helped the reader understand the frame of mind of people who are involved in high risk sports.[185]

Defenses to Publishing Private Matters

There are three basic defenses to publicizing private matters, none of which offers absolute protection: consent, privilege, and newsworthiness. As *Virgil v. Time* illustrates, *consent* can be revoked if done so reasonably. Virgil had willingly talked with the *Sports Illustrated* reporter and had disclosed embarrassing facts, but the court had no problem with his claim that he revoked his consent prior to publication by telling the checker that he wanted the story halted because he had discovered that the portrait would not be so flattering. As with the other torts of invasion of privacy, the consent must be voluntary and either explicit or implicit. The individual who is granting the consent must possess the legal and mental capacity to do so.

Journalists should clearly identify themselves when interviewing potential sources and make it clear, whether by phone or in person, that the information may be used in a story. They should **never** promise an interviewee that nothing negative will be used or that the story will take a particular approach. A practice in some news organizations is to have a copy editor check quotes and facts with sources to make sure information is accurate. Unfortunately, this can lead to situations such as the one in *Virgil v. Time* in which an important source may have second thoughts and then attempt to revoke consent. On the other hand, this approach is an effective way of documenting consent. If it appears controversy may arise and lead to a possible suit, the reporter or editor should get consent in writing or, at the very least, have an independent witness or tape recorder at hand.

Privilege, whether constitutional or under common law, is usually the strongest defense, as demonstrated in the *Florida Star* decision. *Constitutional privilege* simply means *First Amendment protection*. *Florida Star v. B.J.F.* made it clear that truthful information from public records does not enjoy absolute privilege because a state could conceivably demonstrate that prohibiting disclosure would further a state interest. The Florida statute has the fatal flaw that it applied only to an "instrument of mass communication," thus singling out the press for punishment. The statute also failed constitutional muster because it imposed a negligence per se standard, which did not permit findings on a case-by-case basis to determine whether a reasonable person would find the information highly offensive. Because the government has the burden of demonstrating state interest, a defendant remains relatively free to publish information from a public record made in good faith.

A common law privilege exists in some jurisdictions for publishing public records, but *Cox Broadcasting* and *Florida Star* make privilege unnecessary because the Court recognized a constitutional privilege in both cases that provided as much protection. Although some journalists and legal scholars are concerned that the Court did not broaden the sweep of the First Amendment to include all information in public records, the protection provided under *Florida Star* should be sufficient to permit anyone to publish truthful information lawfully obtained from a public record under almost any circumstances, including negligence, with impunity.

Newsworthiness is similar to common law privilege and is recognized as common law. It extends beyond public records and public proceedings to include matters

that are of public interest. The U.S. Supreme Court has avoided directly confronting the question of whether newsworthiness itself is a viable defense to the publication of private matters, but state and lower federal courts have tackled this issue and recognized this defense. One of the earliest cases involved a child prodigy who became famous in 1910. He lectured to distinguished mathematicians on "four-dimensional bodies" at age 11 and graduated from Harvard when he was 16. William James Sidis subsequently avoided publicity, but was the unwilling subject of a brief biographical sketch and cartoon in 1937 in *The New Yorker*. Information was also published about him in a story in the magazine four months later, and an advertisement appeared in the publication to announce the first story.

According to the Second Circuit U.S. Court of Appeals in *Sidis v. F-R Publishing Corp.* (1940),[186] the initial article, which said Sidis had a "certain childlike charm," was "a ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of private life."[187] The sketch was part of a regular feature in the magazine that described current and past personalities, with the latter appearing under the title, "Where Are They Now?" The Sidis piece was subtitled "April Fool" (Sidis was born on April 1) and described how the math genius was now "an insignificant clerk" who collected streetcar transfers and lived in an untidy room.

The Court of Appeals affirmed the District Court's dismissal of the invasion of privacy and malicious libel suit Sidis filed against the magazine, holding that even though the plaintiff had "cloaked himself in obscurity," his private life since he sought seclusion was nevertheless "a matter of public concern. The article in *The New Yorker* sketched the life of an unusual personality, and it possessed considerable popular news interest."[188] However, the court noted that it was not deciding whether newsworthiness was always a complete defense.

The approach taken by this court, although now more than 50 years old, is still being taken by other courts. Newsworthiness is not a high and mighty concept that requires a demonstrated *need* for the public to know but instead can be framed in the context of what people want to know. The Sidis story served no noble cause—people were just curious about the status of someone who once enjoyed the limelight.

Many newspapers and magazines carry sidebars or vignettes recalling events from the past under such titles as "25 Years Ago Today" highlighting old news. Often, the individuals whose names appear in these stories are shocked and some have sued for invasion of privacy. These items are different from the *Reader's Digest* story about Briscoe because they make clear the date of the event, and they are different from the Sidis article because they do not focus on one person and they do not indicate current status. Yet they can expose an individual to unwanted publicity. Nearly all cases involving this type story have been decided in favor of the mass media.

In 1976, the *Des Moines* (Iowa) *Sunday Register* published a long investigative feature about alleged illegal activities at a county home, including deaths from scalding baths, sterilization of young women residents who were mentally disabled, and improper shipments of prescription drugs. The article mentioned that an 18-year-old woman named Robin Woody had been sterilized in 1970 with consent of her

mother. It included quotes from an interview with the psychiatrist for the Jasper County Home, who characterized Woody as an "impulsive, hair-triggered, young girl."[189] The feature gave other details of the sterilization and noted that Woody had been discharged from the home at the end of 1971 and her mother did not know where she was living. Although the newspaper did not know at the time the article was published, Robin Woody had become Robin Howard and, according to her petition to the court, had "led a quiet and respectable life and made friends and acquaintances who were not aware of her surgery."[190]

Robin Howard sued the newspaper and its reporter for disclosure of the information, but the Iowa District Court issued a summary judgment in favor of the defendants on the grounds that the article was "newsworthy and was not shockingly offensive or distasteful and was not a sensational prying into Plaintiff's private life for its own sake."[191] The trial court noted that newsworthiness was the most compelling reason for its decision.

On appeal, the Iowa Supreme Court upheld the district court's summary judgment. The appellate court concluded that the plaintiff's name and the details of her sterilization had been obtained from public records (working files in the governor's office provided by an administrative assistant at the request of the reporter) and that the fact of the sterilization was a public rather than a private fact and a matter of legitimate public concern. According to the court:

> In the sense of serving an appropriate news function, the disclosure contributed constructively to the impact of the article. It offered a personalized frame of reference to which the reader could relate, fostering perception and understanding. Moreover, it lent specificity and credibility to the report. In this way the disclosure served as an effective means of accomplishing the intended news function. It had positive communicative value in attracting the reader's attention to the article's subject matter and in supporting expression of the underlying theme.[192]

The court was not willing to say it was necessary for the newspaper to name names, but said the *Register* had the right to treat identity as a matter of legitimate concern.

In 1975 ex-marine Oliver Sipple knocked a gun out of the hand of Sara Jane Moore just as she was attempting to fire a second shot at President Gerald Ford in San Francisco. His heroic act attracted extensive national media attention. The *San Francisco Chronicle* and other publications revealed that Sipple was a homosexual, a fact he had not disclosed to family members in the Midwest, although he was well-known and active in San Francisco's gay community, having marched in several gay parades. When Sipple sued for invasion of privacy, a California trial court judge granted summary judgment for the *Chronicle*. The California Court of Appeals upheld the lower court decision on grounds that Sipple's sexual orientation was public, not private, in this case and that this information was newsworthy.[193]

According to the court, even though Sipple probably did not realize the consequences of his act at the time, his effort nevertheless attracted legitimate media attention that was "not limited to the event that itself arouses the public interest."[194]

The court also contended that the coverage of his homosexuality arose from "legitimate political considerations, i.e., to dispel the false public opinions that gays were timid, weak and unheroic figures and to raise the equally important political question whether the President of the United States entertained a discriminatory attitude or bias against a minority group such as homosexuals."[195]

State and federal courts are sometimes uneven in their application of the newsworthiness defense, as illustrated by two cases in 2005. In the first case, a U.S. District Court judge issued a summary judgment for the defendants in an Oklahoma civil case in which *Harper's Magazine* and one of its photographers was sued for publishing pictures of an open casket at the funeral of a National Guard member killed in Iraq.[196]

The judge said the First Amendment protected the magazine's right to publish photos of the funeral because it was public and newsworthy. The judge acknowledged a right of privacy enjoyed by the family, but held that the public right to know should prevail. Almost 1,200 people attended the event, including the state's governor and members of the press, including the photographer, who had been invited as well. The family had claimed in its lawsuit that three privacy torts had occurred: appropriation, publication of private facts, and intrusion. The court dismissed all three as well as other claims, including intentional infliction of emotional distress and false representation.[197]

In the second case, the U.S. Court of Appeals for the D.C. Circuit ruled that the D.C. Freedom of Information Act and the Drivers Privacy Protection Act of 1994 (discussed in the next chapter) protected the disclosure of the addresses of drivers who had been ticketed after cameras had caught them running red lights in Washington, D.C. According to the three-judge panel, the plaintiff in the case had failed to demonstrate that any public interest would be served with the release of the information.[198]

Student Privacy Rights

Under the Family Educational Rights and Privacy Act of 1974 (FERPA), also known as the Buckley Amendment, elementary and secondary schools as well as colleges and universities that receive federal funding face the potential loss of such funding if they release students' educational records. The original purpose of the Act was to grant students and parents the right to restrict access to students' educational records without written consent. The Act has been amended over the decades to allow public and/or government access to specific types of information, including decisions involving students disciplined for sex offenses and violent acts. The Campus Sex Crimes Prevention Act, which took effect in 2002, requires convicted sex offenders already registered in their states to notify colleges and universities to which they apply and attend of their convictions. The statute also requires higher education institutions to make public how students, staff, and faculty can access information about sex offenders on their campuses.[199] Some records, including law enforcement, employee, and alumni records, are not covered by FERPA.[200]

In 2002 the U.S. Supreme Court handed down two cases, just months apart, dealing with FERPA. In the first case, *Owasso Independent School District No. I-011 v. Falvo*,[201] the Court held in a unanimous decision (with Justice Scalia concurring) that peer grading and students calling out peers' grades in the classroom do not violate FERPA. The Court ruled such information did not constitute education records defined by the Act as "records, files documents, and other materials" with information directly related to a student that "are maintained by an educational agency or institution or by a person acting for such agency or institution."[202] The Court reasoned that even if one assumes that a teacher's grade book is an education record, there is no score until the teacher actually records the grade and thus peer grades, including calling out scores, are not "maintained" per se.

In *Owasso* the U.S. Supreme Court noted that it assumed but was not deciding whether FERPA provided private parties with the right to sue for violations, but exactly four months later the Court ruled that a university student whose records were improperly disclosed by the institution had no right under FERPA to sue to enforce the statute and thus could not recover damages for any violations. In *Gonzaga University v. Doe* (2002),[203] the Court reversed a jury award of compensatory and punitive damages against Gonzaga, a private institution in Washington state. The university was sued by an individual whose affidavit certifying good moral character to teach in a public elementary school was denied when he was a student after his teacher certification specialist began an investigation. The teacher had overheard two students discussing allegations that the plaintiff had engaged in sexual misconduct. At the time of the suit, the state required every new teacher to have a certificate of good moral character from the institution from which he or she graduated.[204] According to the Court, the remedy for such FERPA violations was a cutoff of federal funds, as provided in the statute, not civil damages.

In the aftermath of the April 16, 2007 murders on the campus, Virginia Tech officials said they were reviewing the impact of state and federal privacy laws on communication within the university, including between counseling services and academic affairs. Privacy laws had prevented campus police from knowing whether the assailant Seung-Hui Cho had been hospitalized for mental illness, as he had been ordered to by a local judge.

The Internet has created some interesting privacy dilemmas in recent years for high school and college students, especially in the use of MySpace.com, a commercial social networking service. The service began in 2004 and only two years later was purchased by News Corp., the media conglomerate that also owns Fox television and radio, for $580 million in cash. At the time of the purchase the Web site already had more than 80 million members, primarily teens and college students, although some parents and other adults are also members. There is no charge for creating an account on the Web site, which is supported by advertising. The basic idea of MySpace and similar services such as FaceBook.com, Friendster, and 360 (owned by Yahoo) is to provide individual sites on the Web service so members can share information with each other, including photos, videos, personal preferences and other details.[205] Among the problems with such services is that the sites are available

for viewing not only by friends but by school authorities, law enforcement, and even sexual predators.[206] Other Web sites such as Blip TV, Google Video, Vimeo, and YouTube are popular with college students because they allow users to post video clips as well. Some of these postings as well as those on student blogs have attracted the attention of college officials concerned about the depiction of illegal behavior such as underage drinking and public indecency. In 2006 two 17-year-olds were charged with setting 17 fires in Maryland after they bragged about their crimes on their sites on MySpace.com.[207]

Identity theft has become a serious problem in this country, and college campuses have not been immune from the problem. In 2006 Lexis-Nexis and IBM announced a joint effort with universities and law enforcement agencies around the country to establish a new center to focus on identity theft.[208] According to media reports, more than 20 million individuals had suffered identity theft from 2003 to 2006.[209] Even Lexis-Nexis experienced a security breach in which data on more than 300,000 citizens were stolen.[210] About the same time, the University of Kentucky revealed that data on some 1,300 current and former employees, including social security numbers, had been accidentally made public on the Internet for almost three weeks before the error was discovered. [211] The previous year ChoicePoint said it may have accidentally sold personal information on 140,000 citizens to criminals who had pretended to be legitimate businesses. One of the publicized and largest thefts of data involved a laptop computer that was stolen in 2006 and eventually recovered months later with the Department of Veteran Affairs personnel records of more than 26.5 million individuals.[212] Apparently, no records were used to commit identity theft, but the department came under heavy fire from members of Congress and the public.

Health Insurance Portability and Accountability Act of 2003 (HIPAA)

On April 14, 2003, a new federal medical privacy law known as the Health Insurance Portability and Accountability Act (HIPAA)[213] took effect. The statute does not directly apply to journalists or the news media. It regulates only entities that bill or are paid for medical services or that transmit electronic payments including health insurance plans, medical facilities, and health care professionals. HIPAA bans entities affected from disclosing, unless a patient consents, "personally identifying information such as names, addresses or specific medical condition."[214] The statute says that hospitals and other medical facilities must specifically ask patients whether they want information about them made public. If a patient does not agree that the information can be publicly disclosed, the facility cannot even disclose the person's condition or even indicate whether the person is dead or being transferred.[215] This means, for example, that a hospital generally cannot give the media a patient's name, although it presumably can confirm whether a particular individual is hospitalized as well as the person's general medical condition, age range, and home state or region.[216] As attorneys Andrew Mar and Alison Page Howard point out on the Web site for the First Amendment Center at Vanderbilt University, the Act "does not apply to every entity that has a health-care function." [217] In addition, as they note, "Health-care information the media obtains independently is not subject to HIPAA

and may be published or broadcast freely, subject to limitations and internal policies on printing information about minors or the deceased."[218]

On paper, at least, HIPAA does have teeth. Under the statute, the U.S. Department of Health and Human Services (HHS) has the authority to levy fines of up to $100 for civil violations with a maximum fine of $25,000. Criminal violations carry a fine of up to $250,000 and 10 years in prison.[219] According to a *Washington Post* story three years after the Act took effect, in spite of more than 19,000 complaints filed, the federal government had prosecuted only two criminal violations and imposed no civil fines.[220]

False Light

In this age of docudramas and fictionalized accounts of public and private events, from the sad stories of Marilyn Monroe to the tragic shooting of James Brady (presidential press secretary, wounded along with President Ronald Reagan), it may be surprising to some that the tort of false light is alive and well. The Restatement (Second) of Torts defines false light as:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[221]

Thus false light shares elements of both publicizing private matters and libel but is still different from both. Whereas the information must be false and must be published with reckless disregard for the truth or knowing the information was false (what the Supreme Court of the United States characterized as "actual malice" from *New York Times v. Sullivan* until it retreated from this term in 1991), it need not be defamatory. Only two false light cases have been decided by the U.S. Supreme Court, and although both were hailed as significant decisions, they only began to draw the boundaries of this amorphous, hybrid tort.

False light law suits typically originate with individuals involuntarily attracting media attention that distorts or fictionalizes their lives or the events in which they were involved. Generally, they are private people who want no media attention, even if sympathetic or positive. Each of the two Supreme Court decisions illustrates the false light trap.

Time Inc. v. Hill (1967): Extending Actual Malice Rule to False Light

The first, *Time Inc. v. Hill* (1967),[222] arose when *Life* published an article in February 1955 entitled "True Crime Inspires Tense Play," with the subtitle, "The ordeal of a family trapped by convicts gives Broadway a new thriller, 'The Desperate Hours.'" The feature described how three years earlier the James Hill family had been held

prisoners in their home outside Philadelphia by three escaped convicts. It went on to note that Joseph Hayes' novel, *The Desperate Hours*, had been inspired by the family's ordeal and the story had been reenacted in a Broadway play.

The *Life* piece characterized the play as an "expertly acted . . . heart stopping account of how a family rose to heroism in a crisis." The magazine staff photographed the play while it was running in Philadelphia and took some of the actors and actresses to the house where the Hills lived at the time of the incident for pictures. (The Hills no longer lived in the house.) The two pages following the text included an enactment of the beating of the son by one of the convicts, called a "brutish convict," and the "daring daughter" biting the hand of one of the thugs to force him to drop his gun. Another photo showed an actor portraying the father throwing a gun through the door after a "brave try" to save his family fails. While it was true that James Hill and his wife and five children were held hostage in their Whitemarsh, Pennsylvania, home by three convicts for 19 hours, the family was released unharmed and members told reporters afterward that the convicts had treated them courteously, had not molested them, and had not been violent. Two of the convicts were killed later in an encounter with police, and the Hills moved to Connecticut where they tried to avoid press attention.

Several months later, a novel appeared with a fictionalized account of the event in which a family of four is held hostage by three escaped convicts. The convicts in the novel beat the father and son and verbally assaulted the daughter. The play was based on the book. James Hill sued for invasion of privacy in New York, claiming that the magazine had used the family's name for trade purposes (i.e., appropriation), the article was a "fictionalization" as prohibited under New York's privacy statute, and the article portrayed the family in false light. A jury awarded him $50,000 in compensatory and $25,000 in punitive damages. On appeal, the Appellate Division of the New York Supreme Court ordered a new trial but upheld the jury's verdict of liability. At the new trial on damages, the Appellate Division (a trial court despite the name) awarded Hill $30,000 in compensatory damages and no punitive damages. (In effect, the judge—a jury trial was waived—reduced the damages to $30,000.) The New York Court of Appeals, New York's highest court, affirmed.

The United States Supreme Court reversed the decision of the New York Court of Appeals in an opinion written by Justice Brennan: "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."[223]

The Court extended the actual malice rule of *New York Times v. Sullivan* (1964)[224] to include false light when the matter was one of public interest. In its 5 to 4 decision, the Court ruled that the content of the *Life* article was a matter of public interest and remanded the case back to the state appellate court. The Court also dismissed the claim that the article was published for trade purposes, noting that the publication of books, newspapers, and magazines for profit does not constitute trade purposes. After 11 years of litigation, James Hill dropped his suit.

Cantrell v. Forest City Publishing Co. (1974)

Seven years after *Time v. Hill*, the U.S. Supreme Court decided the second and, thus far, last of the false light cases. *Cantrell v. Forest City Publishing Co.*[225] was the ideal case to clarify *Time v. Hill*. Ten days before Christmas in 1967, 44 people, including Melvin Cantrell, were killed when the Silver Bridge spanning the Ohio River at Point Pleasant, West Virginia, collapsed. Joseph Eszterhas, a reporter for the *Cleveland* (Ohio) *Plain Dealer*, wrote a prize-winning feature about the funeral of Cantrell and the impact of his death on his wife and children. Five months later, the reporter and a photographer visited Point Pleasant for a follow-up. The two stopped by the Cantrell home and talked with the children for about an hour while Margaret Mae Cantrell, Melvin Cantrell's widow, was away. The photographer, Richard Conway, took 50 pictures.

The result was the lead feature, "Legacy of the Silver Bridge," in the August 4, 1968, Sunday *Plain Dealer Magazine*. The story focused on "the family's abject poverty; the children's old, ill-fitting clothes and the deteriorating condition of their home."[226] The photos and text were used, as with the original piece, to demonstrate the effects of the disaster on the community. Unfortunately, the article contained several inaccuracies and false statements, including the following paragraph:

> Margaret Cantrell will talk neither about what happened nor about how they are doing. She wears the same mask of nonexpression she wore at the funeral. She is a proud woman. Her world has changed. She says that after it happened, the people in the town offered to help them out with money and they refused to take it.[227]

The reporter had never talked with Ms. Cantrell because she was not home at the time. Thus these statements were apparent fabrications. According to the Court, there were other misrepresentations in the descriptions of the family's poverty and "the dirty and dilapidated conditions of the Cantrell home."[228] Ms. Cantrell filed a diversity action against the reporter, photographer, and newspaper in the U.S. District Court for the Northern District of Ohio, alleging that the story made the family the object of pity and ridicule and caused "outrage, mental distress, shame and humiliation."[229] The federal trial court jury awarded Cantrell $60,000 in compensatory damages for false light. The district court judge dismissed Cantrell's claim for punitive damages, supposedly on the ground that no common law malice had been demonstrated. The judge did rule that Cantrell could recover actual or compensatory damages if she could convince the jury that the misrepresentations and false information had been published with "actual malice," as enunciated by the Supreme Court in *Time v. Hill*.

Since the landmark *New York Times v. Sullivan* decision in 1964, there has been considerable confusion over the difference between *common law malice* (evil intent arising from hatred, revenge, or ill will) and *actual malice* (reckless disregard for truth or knowledge of falsity). In its 1991 decision in *Masson v. The New Yorker Magazine, Inc.,* the U.S. Supreme Court suggested abandoning the term *actual malice* and said that the courts should instead refer to *knowing* or *reckless falsehood*. *Cantrell v. Forest City Publishing Co.* illustrates this wisdom.

On appeal, the Sixth Circuit U.S. Court of Appeals reversed the trial court decision because it interpreted the judge's finding that Cantrell had not presented sufficient evidence that the publication "was done maliciously within the legal definition of that term" to mean that there was no actual malice. The intermediate appellate court held that the defendants' motion for a directed verdict in their favor should have been granted under the *Time v. Hill* standard for false light actions. But the U.S. Supreme Court noted: "Although the verbal record of the District Court proceedings is not entirely unambiguous, the conclusion is inescapable that the District Judge was referring to the common law standard of malice rather than to the *New York Times* 'actual malice' standard when he dismissed the punitive damages claims."[230] Therefore, the Supreme Court reversed the Court of Appeals, holding that:

> The District Judge was clearly correct in believing that the evidence introduced at trial was sufficient to support a jury finding that the respondents, Joseph Eszterhas and Forest City Publishing Co. had published knowing or reckless falsehoods about the Cantrells. [The Court indicated in a footnote here that "there was insufficient evidence to support the jury's verdict against the photographer Conway" because his testimony that his photos were fair and accurate depictions was not challenged and there was no evidence that he was responsible for the inaccuracies and misstatements in the article.] There was no dispute during the trial that Eszterhas who did not testify must have known that a number of the statements in the feature story were untrue.[231]

The Court characterized the reporter's implication that Cantrell had been at home during the visit and his description of her "mask of nonexpression" as "calculated falsehoods," justifying the jury decision that he had portrayed the family "in a false light through knowing or reckless untruth."[232] A major question that remained unanswered at the time of the *Cantrell* decision was the impact of *Gertz v. Welch* (1974) on the false light tort: "whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false light theory of invasion of privacy, or whether the constitutional standard announced in *Time v. Hill* applies to all false light cases."[233]

The question is still unanswered because all of the parties accepted the *Time v. Hill* standard and thus the Supreme Court did not have to deal with this issue. One fact is clear, however: a solid 8 to 1 majority reaffirmed the position in *Time v. Hill*, which had been decided by a thin 5 to 4 margin. Only Justice William O. Douglas dissented: "It seems clear that in matters of public importance such as the present news reporting, there must be freedom from damages lest the press be frightened into playing a more ignoble role than the Framers visualized."[234] The message of *Cantrell* is clear: actual malice can be demonstrated in false light cases.

It is instructive to compare the editorial decision making in the two false light cases. In *Time v. Hill*, the *Life* article was prepared under the direction of its entertainment editor. The director of the play, which was based on the fictionalized account in the book, suggested that the editor generate a story, and about the same time, the editor met a friend of the book's author, Joseph Hayes, who told the editor

in a casual discussion that the book had been based on a real incident. The entertainment editor contacted Hayes, who confirmed the connection and arranged for the editor to see the former Hill home.

As the Court pointed out, "Neither then nor thereafter did Prideaux [the editor] question Hayes about the extent to which the play was based on the incident."[235] Prideaux's file for the story included news clippings with details about the incident, including the lack of violence, as well as a *New York Times* article by Hayes indicating that the book was a composite of stories about incidents in various locales. The first draft of the *Life* feature did not mention the Hills by name except in the caption for one photo. The draft mentioned that the play was a "somewhat fictionalized" account of the Hill incident, and a research assistant assigned to check the accuracy of the story inserted a question mark over the words, "somewhat fictionalized." When the draft was reviewed by a copy editor, he changed the first sentence to focus on the Hill incident, using the family's name, deleted "somewhat fictionalized," and added the statements that the novel was "inspired" by the incident and that the play was a "re-enactment."

In the *Cantrell* case, the Supreme Court offered little detail on the editorial review process other than that the story was the reporter's idea but was approved by the editor. But the justices obviously were convinced that the reporter had fabricated key points in the story and that falsehoods and misrepresentations had escaped scrutiny of the editorial process. The Court agreed with the lower appellate court that the photographs did not cast the family in a false light.

The circumstances under which the photographer and reporter entered the home to talk with the children while the mother was gone are unclear, but apparently no suit was filed for intrusion or publication of private matters. Could a case have also been built for these torts?

Defenses to False Light

As with the other torts of invasion of privacy, consent is a defense, but individuals rarely agree to have false information published about them. But if it can be demonstrated by preponderance of the evidence that the person had the legal capacity to grant consent and did so voluntarily and in good faith and did not revoke such consent, a suit for false light would theoretically fail. Jurors and judges, like anyone else, tend not to believe, however, that plaintiffs would consent to publication of falsehoods about themselves. Because journalists have an ethical and sometimes legal obligation to be accurate and truthful, jurors and judges are usually not sympathetic when a reporter or editor touts consent as a defense to publishing falsehoods. Consent can be a two-edged sword as a defense. By claiming consent, the journalist is admitting an ethical abrogation.

Newsworthiness is also a weak, if not impossible, defense. Alone, it simply does not work. However, newsworthiness can be a viable defense in conjunction with constitutional privilege. As the Court indicated in *Time v. Hill* and reiterated in *Cantrell v. Forest City Publishing Co.*, plaintiffs suing the media for publishing false information on matters of public interest must demonstrate actual malice (reckless or knowing falsehoods) before recovering for false light. If the subject matter is newsworthy, even if the information is false, actual malice must be shown.

Unfortunately, the scope of this constitutional privilege remains unclear to this day because the Court has never determined whether a state could institute a lower standard such as negligence in a matter involving a private individual.

The majority opinion raised this question without answering it, indicating that the Court may someday respond. With a solid coalition of conservative justices on First Amendment issues now on the Supreme Court, it is highly likely that the Court would apply the *Gertz* holding for libel to false light cases, thus permitting states to lower the standard to negligence for private individuals. In fact, when such a case arrives at the Court, the vote could be 9 to 0.

One question has never been tackled by the U.S. Supreme Court, but the Court's response could have a major impact on false light and even libel: is there a constitutional privilege (even limited) to publish false information from the public record when such falsehoods are published without actual malice? *Florida Star v. B.J.F.* and *Cox v. Cohn* dealt only with truthful information in public records, and *Cantrell v. Forest City Publishing Co.* and *Time v. Hill* dealt with false information not in public records. It is very difficult to predict how the Court would deal with this issue or even if the Court will consider such a case. Journalists must be diligent and avoid publishing false information even if the information is published in good faith. Negligence is easy to demonstrate and this may eventually become the point at which liability occurs in false light cases.

False light has not been recognized as a tort in every state, although the vast majority do so, either by statute or at common law. The list recognizing such claims continues to grow, including the Ohio Supreme Court in 2007. States that still do not recognize this tort include Minnesota, Virginia, and North Carolina.

Summary and Conclusions

As the concern of citizens over governmental and corporate snooping intensifies and as communication technologies advance faster than legislation can respond to limit their potential to invade privacy, journalists can expect more suits for invasion of privacy. Because of the September 11, 2001 attacks and the resulting heightened concern with preventing global terrorism, Americans have become, according to University of Minnesota Professor Jane Kirtley, "schizophrenic" about the role of the press. Kirtley was responding to a 2006 national poll for the Pew Research Center for the People and the Press.[236] Of the 2,000+ participants, half believed that the news media harm national security interests when they publish stories such as those about the secret program in which the federal government checked the bank records of U.S. citizens it suspected had ties to foreign terrorists. In the same poll, almost two-thirds of Americans felt the stories "told citizens something they should know about."[237] An earlier poll had found similar results when the public was asked about the secret program approved by President Bush that allowed the National Security Agency to conduct warrantless eavesdropping on phone calls and e-mail messages of Americans suspected of having ties to foreign terrorists.[238]

When privacy issues pop up related to new technologies, it is not unusual for cell phones to be targets. This pervasive technology seems particularly vulnerable to intrusions on privacy, as demonstrated in a legal experiment by a phone security company. After the company purchased 10 used cell phones on eBay, its software experts had little difficulty reviving a wide variety of sensitive data on each of the phones. The data included bank account numbers, passwords, and e-mails that the former owners undoubtedly assumed had been deleted. In fact, the company found enough information on those 10 phones to equal 27,000 pages of printouts.[239] Flash memory, an inexpensive technology, makes cell phones convenient to use but also susceptible to intrusion.

Where do the mass media fit into this picture? Of the four torts of invasion of privacy—intrusion, appropriation, publicizing private matters, and false light—the latter two pose the greatest potential liability for the mass media. Statutory and constitutional laws regarding intrusion have been well delineated by legislatures and the courts, although some of the newer technologies such as cell phones present interesting challenges.

Federal law prohibits the manufacture, import, and sale of radio receivers that can pick up cell phone conversations, and yet there are still older receivers that were sold before the Act took effect that can intercept calls. It is also relatively easy, although illegal, for someone to modify a general coverage radio receiver so it can pick up cellular phone calls. Calls on cordless phones are even easier to intercept. Most news rooms have scanners that legally receive police, fire, and other public services, but listening to cell phone conversations is verboten.

How much bite federal and state laws have on eavesdropping with the use of newer technologies remains to be seen, but reporters and editors fortunately are rarely involved in intrusion suits. Journalists sometimes do lawfully acquire from third parties cell and land phone recordings that may have been illegally made but may contain especially newsworthy information. Journalists in such cases generally cannot be prosecuted nor held liable for possessing and disseminating such recordings if they played no role in acquiring them in the first place, as the U.S. Supreme Court held in *Bartnicki v. Vopper.* However, as the federal appeals court indicated in *Boehner v. McDermott*, this principle does not grant a blanket First Amendment license to disclose such information.

One area where intrusion has already created problems is computer technology, particularly the Internet. It is quite easy for an individual or a corporation to compile information based upon a consumer's visits to Web sites, without the person having any knowledge of snooping, which is often perfectly legal. The compilation of electronic databases that contain highly personal information and that can be quickly accessed also poses some serious threats to individual privacy. Journalists are already seeing a backlash as abuses of such information appear, even though they may not have been directly involved in such abuses.

One of the newer technologies that has more recently attracted considerable attention is radio frequency identification (RFID). According to an *ABA Journal* article:

> RFID is one of dozens of new technologies unleashed in the past half decade. Although few companies go so far as to implant RFID devices in employees, many institutions and individuals are using biometrics such as facial or iris recognition, fingerprint scans and satellite navigation technology to keep track of employees, children and even the elderly.[240]

The article noted further that although "many Americans embrace new technologies for their convenience and the promise of greater security, some legal experts worry that the law is not keeping pace with the introduction of ever-more invasive and pervasive technologies with potential for abuse, fraud or identity theft."[241]

This point has not been lost on the U.S. Supreme Court, as demonstrated in *Kyllo v. United States* (2001).[242] In that decision, the Supreme Court held that police use of a thermal imaging device from a public street to track down an indoor marijuana manufacturing operation without a search warrant violated the Fourth Amendment ban on unreasonable searches and seizures. However, as one writer notes:

> . . . Experts now say the decision may be less protective of privacy rights in the home than it first seemed. In *Kyllo*, the majority also held that a reliance on technology that is in 'general public use,' or that only replicates what a naked-eye observer could see from a public vantage point, is not a search—even when the location being viewed is the interior of a home. [243]

What implications does this have for the mass media? If history is any indication, the mass media can expect broader protection under the First Amendment for disclosing information that has been obtained through the use of technologies that are in general public use, so long as there are no specific legal restrictions on such use. Cell phone cameras represent one illustration of this idea. Because of the proliferation of this technology, it is rare that any major public event, even an unexpected one, is not photographed or video recorded by a lay witness. Our expectation of privacy at newsworthy events has undoubtedly lessened, as a result.

Appropriation has generally not been a major problem for journalists because the celebrities of the world are well rewarded by corporations for the commercial use of their names, images and likenesses. Unless the situation approaches that of *Zacchini v. Scripps-Howard Publishing Co.,* it is highly unlikely that a plaintiff will be successful in a suit for appropriation in a news context. Consent is always the best insurance when a potential commercial context appears because newsworthiness is not a defense to appropriation.

Publication of private matters and false light will continue to be troublesome for the press. A conservative supreme court is unlikely to broaden the constitutional privilege for these two torts and indeed can be expected to further restrict that and other defenses such as newsworthiness and even consent, which is a weak shield anyway. When dealing with private matters, journalists should make sure a strong public interest is to be served and, whenever possible, that they are dealing with public figures or public officials. Obviously, all news stories and features cannot focus on public people, but reporters and editors must be wary of the traps when private

individuals are involved because legislatures, the courts, and the public (from which those reasonable persons—the jurors—are drawn) firmly believe that privacy for ordinary citizens is being quickly eroded and that the mass media are responsible for some of this erosion. The events of September 11, 2001 may have made the public more tolerant of governmental intrusion on the private lives of citizens, but journalists should not count on this tolerance translating to broader First Amendment protection for the press.

Finally, the boundaries of false light are obscure but likely to become clearer in the future, especially if this still relatively new area of privacy becomes a hotbed of litigation. False light requires no defamation but merely harm to an individual as a result of the publication of false information, which can include fictionalization. Thus a suit that might be unsuccessful as a libel case could strike gold under false light.

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