

# Privacy Rights in an Open and Changing Society

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## ✓ Headnote Questions

- What expectation of privacy do individuals have in American society?
- What kinds of information are private?
- What legal remedies are available for individuals who believe their privacy has been invaded?
- Are any legal remedies available to the news media when they report about private matters?
- Is a right of privacy recognized in the U.S. Constitution?
- Do students have any privacy rights?
- What special privacy issues or concerns do computers and digital technologies raise?

*Privacy.* The word resonates within American society, its citizens often making social and legal claims based on the belief that they have a fundamental right “to be let alone,” as U.S. Supreme Court Justice Louis Brandeis put it in 1928 in *Olmstead v. United States*.

New digital technology — from massive databases and social networks to sophisticated search engines, fitness trackers, and surveillance cameras on streets and in buildings — and new fears ranging from identity theft to terrorist attacks, have combined to make privacy a major concern in today’s world.

With the spread of COVID-19 in the United States and across the world in 2020 and the resulting medical and economic crises, new privacy concerns developed alongside the efforts to bring the virus under control. Several large technology companies, including Google and Apple developed methods to use cell phones, apps, and other devices to assist in the contact tracing and the tracking of individuals with the virus or exposed to those with it. Some companies and government agencies even used drones and surveillance cameras to assist in the maintaining quarantines. While many lauded these efforts to use new digital tools and social media to aid these public health efforts, others understandably raised concerns about privacy and how this personally identifiable information might be used in the future.

In recent years the privacy issue has frequently arisen not only in the context of pandemics and government data collection, but in the context of news media reports related to the pri-

vate lives of celebrities and others.

In 2016, for example, privacy rights, new media, new technologies and celebrity culture collided in court and in the headlines with the \$140 million verdict against Gawker Media, in a case filed by Terry Bollea, better known as Hulk Hogan, over the airing of a brief, grainy sex-tape of Hogan with the wife of one of his best friends. Whatever one may think of Gawker’s penchant for posting outrageous news and gossip, the notion that a celebrity who openly bragged about his sex life could convince a jury he was damaged to the tune of \$115 million in compensatory damages plus another \$25 million in punitive damages, shocked many observers. Just a few months later, Gawker and its chief executive officer would file for bankruptcy and Hogan later settled for a reported \$31 million.

In 2018, another famous celebrity, Olivia De Havilland, met with less luck in her statutory right of privacy, misappropriation of her likeness, and false light privacy claims against the FX Network over a miniseries docudrama that featured — without her permission — an actress playing her for about seventeen minutes and some fictitious dialogue. An appellate court in California rejected the notion that the aging actress could use that state’s privacy law to control non-fictional or fictional entertainment about her history.

There is no question documentaries, entertainment media, the Internet, social media and mobile telephones are affecting societal expectations and legal doctrines regarding privacy. Every year legislators and consumer advocates propose new

laws and litigants file new lawsuits aimed at online services and social media giants and their data collection and sales practices.

In April 2020, the federal appellate court in California breathed new life into a class action lawsuit against Facebook over its use of what is known as "third-party tracking plug-ins." While just about everyone who uses social media knows that sites collect information about the users, much of that information is used for commercial purposes, including the targeting of advertising to the user. What many did not know is that Facebook apparently uses these third-party plug-ins to track its users' browsing even when they are not logged into Facebook. The court allowed the case to go to trial under various privacy claims, California law and federal law.

The outrage of this practice reflects a growing concern about privacy on the Internet. In 2009, for example, more than 90 percent of people surveyed considered online privacy to be an important issue in society. And, in 2013 and to this day, the ubiquitous search engine Google has faced precedent-setting litigation in the United States over wiretapping allegations related to its Street View project, and in Europe over what has become known as the European "right to be forgotten." While many scholars agree that European countries protect privacy to a greater degree than the United States, researchers and some critics have found that even Europe's stricter standards for online publications have flaws.

The frontiers and legal battle lines over privacy continue to evolve — driven in large part by advances in technology. Privacy concerns have arisen in the context of cellular telephones, drones — private as well as government-operated — and the continuing revelations about the activities of the National Security Agency. In 2018, the U.S. Supreme Court decided in *Carpenter v. United States* that police need a warrant to obtain cell phone location data absent certain compelling circumstances and that cell phone users have a legitimate expectation of privacy in that information when it is maintained by the telephone service provider.

The privacy battle took on an increasingly political tone in 2017 when President Donald Trump essentially repealed new online privacy protections adopted by the Federal Communications Commission under the Barack Obama administration. The repeal effectively allowed broadband providers such as Verizon and Comcast to collect and sell their users' online information with fewer restrictions (and without consent), though some providers, no doubt fearing a backlash, said they would not do so.

Privacy is a social concept much older than our modern technologies and as old as the nation, embedded in its beginning, from the first settlers drawn to a new land in search of religious and political freedom in the seventeenth century to revolutionary patriots affronted by England's disregard for the autonomy of their businesses and the sanctity of their homes. The concept of privacy can be found in the liberal theories of Enlightenment philosophers, whose emphasis on individual liberties based on

natural rights inspired the founding fathers' generation as it began to envision a new nation. Indeed, essential elements of privacy are woven into the nation's most hallowed documents.

While privacy as a social value was apparent during the nation's early years, it remained elusive as the basis for legal claims. Only in the last 100 years has it entered the legal mainstream, mainly due to changes in the way Americans live and think. To be understood in an information-driven society — both in social and legal contexts — privacy must be viewed as a value that changes as society tries to balance the rights of individuals with its needs and desires for information. Courts typically consider the customs, mores and conventions of the community.

This chapter looks, first, at the evolution of the concept of privacy. It then focuses on the development of privacy as a legal doctrine and on the four distinct privacy torts: (1) publication of embarrassing private facts, (2) physical and technological intrusion, (3) false light invasion of privacy and (4) commercialization. The chapter addresses related torts as well as constitutional and statutory privacy, both of which place limits on government use of personal information — limits that have important implications for journalists, especially in the era of databases, the Internet, social media and data journalism.

## THE EVOLUTION OF A RIGHT TO PRIVACY

The general concept of privacy was not unknown in English common law, the dominant legal system in Colonial America. Cases dating to the Norman Conquest recognized a value resembling privacy in individuals' property rights. In 1741, the House of Lords, then England's highest court, invoked in *Pope v. Curl* a property-rights doctrine to protect contents of personal letters from unauthorized publication. The case is important in the development of privacy in American law because it acknowledged a property right in individuals' retention and control of personal ideas and information in letters sent to others, not only in the letters themselves.

John Locke, an English philosopher whose writings influenced Thomas Jefferson and other founders, argued that government has a duty to protect fundamental rights such as life, liberty and property. These rights were described in the Declaration of Independence, the Constitution and the Bill of Rights. The Supreme Court, almost 200 years later in 1965, gleaned from the concept of liberty a constitutional right of privacy in *Griswold v. Connecticut*.

In his book *Privacy in Colonial New England*, historian David H. Flaherty explored the precursors to modern privacy. He observed that although privacy as a legal doctrine evolved slowly, its underlying values were expressed in colonial customs. Courts, he said, protected privacy values indirectly by enforcing laws against trespass, by limiting government searches and seizures, by hearing defamation cases and by recognizing privileged communications between wives and husbands. Ironi-

cally, as Flaherty pointed out, there was little physical privacy — in the modern sense — in most homes and public accommodations. Homes often lacked individual sleeping quarters, and families congregated in common beds. Communal sleeping arrangements also were common in public inns. Traces of the practice remained as late as 150 years ago: During his early career as a struggling, small-town lawyer, Abraham Lincoln shared a room and bed above his office with a law partner.

Flaherty noted that the concept of informational privacy was officially recognized during Benjamin Franklin's tenure as postmaster general before the American Revolution. Postmasters were required to swear an oath that they would not knowingly open any letters in their custody.

Values underlying privacy also were apparent as the American Revolution drew near, and they played a central role in the colonists' growing hostility toward British rule. In 1761, Boston lawyer James Otis spoke against the practice of general search warrants violating the sanctity of the home, declaring that a man's house is his castle. On the eve of the Revolution, each colony drew up a list of grievances against British authorities. On each list was concern about general warrants, which authorized government agents to search premises at will without first presenting evidence of a specific violation of the law. After the colonies won independence, James Madison, a major proponent of a bill of rights spelling out individual liberties, introduced a proposal at the Constitutional Convention in 1789 to limit the scope of government searches. That proposal, which established "the right of the people to be secure ... against unreasonable search and seizures," was later adopted as the Fourth Amendment.

Values supporting privacy also found expression in the writings of nineteenth-century English philosopher John Stuart Mill. He argued in his influential *On Liberty* that the government should have no say in certain kinds of personal conduct, absent a compelling social interest and impact on others.

### PRIVACY AS A LEGAL RIGHT

Legal claims related to privacy developed slowly during the nation's first century, in part because society was largely agrarian. Land was sparsely settled. This physical distance reduced unwanted contacts and intrusions.

The demographics of American society shifted dramatically with the Industrial Revolution. Technological developments such as the steam engine led to manufacturing-based cities populated by factory workers. Physical distance between people shrank as cities grew, and those in foreign lands began a new flow of immigration. In those crowded cities, the barriers of time and space common to rural settings no longer insulated individuals from unwanted contacts.

Dramatic technological developments in the nineteenth century began to threaten privacy. Alan F. Westin traced them in

*Privacy and Freedom*, a comprehensive study of privacy issues. He noted that several technological developments in the late nineteenth century changed long-standing attitudes toward expression and surveillance. These innovations were the microphone and telephone in the late 1870s, the Kodak camera in the 1880s, and the dictograph recorder in the 1890s.

In 1877, the *New York Times* expressed concern about the effect of new technology on privacy. It called the telephone "a nefarious instrument" with "vast capabilities for mischief" that promised to rob individuals of their personal privacy. Responding to a decision by the city to allow telephone wires to be attached to city lamp posts, the *Times* cautioned:

Every confidential remark made to a lamp-post by a belated Democratic statesman could be reproduced by a telephone connected with any other lamp-post.... Men who had trusted to friendly lamp-posts, and embraced them with the utmost confidence in their silence and discretion, would find themselves shamelessly betrayed, and their unsuspecting philosophies literally reported to their indignant families.

While increased technology spurred the growth of industrial cities and the development of such privacy-altering inventions as the telephone, other innovations — high-speed newspaper presses and advanced photography — spawned an aggressive kind of journalism, a distant cousin to what was espoused by the colonial and revolutionary printers who catered to society's well-read and politically astute. New printing processes reproduced newspapers quickly and cheaply. As a result, a journalism developed that often directed its content at the swelling numbers of city dwellers. The "penny press" era of the mid-nineteenth century later yielded to "yellow journalism," sensationalistic news coverage designed to boost newspaper circulations that reached its peak toward century's end. Newspaper readers, not so interested in the complexities of politics and other public issues, sought information about misdeeds and travails. This new readership, coupled with journalists armed with cameras intruding into new, heretofore private areas, sometimes brought newspaper practices and privacy concerns into conflict.

In 1890, two former law partners and Harvard Law School classmates took issue with newspaper practices and technologies of the day. Louis Brandeis and Samuel Warren, upper-crust Boston lawyers, wrote "The Right to Privacy" for the *Harvard Law Review*. The seminal article would steer the notion of a legal right of privacy toward the mainstream of American law. Attempting to document what they considered a climate of journalistic excess, the authors wrote: "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'" Brandeis and Warren argued that individuals possess certain attributes,

such as sentiments and intellect, over which they have rights akin to personal property rights.

While Brandeis and Warren nudged the issue of privacy onto the social and legal stages, the development of a unified legal theory remained elusive. In the ensuing decades, the legal contours of privacy developed piecemeal and with many variations. Seventy years after "The Right to Privacy" was published, torts expert William Prosser summarized the extent of the common law development of privacy in an article in the *California Law Review*. Titled simply "Privacy," it dealt with tort law and not with constitutional or statutory questions of privacy. After reviewing some 200 privacy-related cases, Prosser identified four separate torts: (1) disclosure of embarrassing private facts about individuals; (2) intrusion, the physical or technological violation of an individual's privacy; (3) false light, the intentional dissemination of highly offensive false publicity about another; and (4) appropriation, or the use of another person's likeness without permission.

## THE PRIVACY TORTS

American law assumes members of society have certain duties toward one another. These duties — derived from customs, mores and values — are often recognized in common law cases and in various statutes; they form the basis of tort law. Under the theory of tort law, when a member of society violates a duty toward another person that results in an identifiable harm, the injured person may recover damages. One class of duties deals with privacy and the harm — usually mental — that results when it is violated. When the news media are involved, courts have balanced individual privacy with other interests, such as the free flow of information about matters of public concern. Since the nature of the harm is usually mental, privacy tort law protects only individuals, not businesses or corporations that exist merely as creatures of law. Businesses and corporations may, though, have claims related to the theft or disclosure of trade secrets and other confidential business information.

Tort law varies from state to state. Any generalizations are based on trends in cases from the various states. Actual application of law in privacy cases may vary from state to state.

### Embarrassing Private Facts

*Definition: The publication of private information that would be highly offensive to a reasonable person and is not a matter of legitimate public concern.*

The common law acknowledges that some information about individuals should remain beyond the reach of neighbors — and the media — and that disclosure normally would lead to unwarranted embarrassment or humiliation. The embarrassing private facts tort rests on several questions, each of which a plaintiff must answer effectively to advance a privacy claim. As

one considers these questions, consider also the facts of the Hulk Hogan dispute with Gawker and the 2016 verdict for \$140 million over the sex tape introduced at the beginning of this chapter. Is a sex tape inherently private and its publication online inherently outrageous? Is there ever any possible news value that might protect the airing of such a tape?

*What is publication?* In libel law, "publication" has a specialized meaning. At a minimum, a libel plaintiff must prove a defamatory communication reached at least one person other than the plaintiff and defendant. Under the embarrassing private facts tort, however, "publication" means "publicity," that is, widespread communication. Publication in a newspaper, magazine or other print medium satisfies this requirement, as does dissemination by broadcast, cable and the Internet.

*Is the information private?* As a threshold, a plaintiff must establish that the information in question is, in fact, private. What happens in public, or appears in public records, normally is not considered private. In *Cox Broadcasting Co. v. Cohn*, the Supreme Court held in 1975 that the news media are not liable for publication of personal information, even if they violate a state statute designed to protect rape victims, if they merely publish information about a plaintiff that is already public. Generally, a person involved in an automobile accident or the victim of a crime, therefore, cannot claim invasion of privacy based on photographs of or stories about the accident. Likewise, a participant in a public rally or parade cannot claim privacy related to those actions.

Even intimate personal information cannot normally be the basis for a privacy claim if it is already widely known, as Oliver Sipple learned after he thwarted an assassination attempt on President Gerald Ford in September 1975. News accounts of Sipple's heroism disclosed that he was homosexual, a fact already well-known in the San Francisco gay community.

Consent is also a factor in determining whether personal information is public or private. While the question of consent will be addressed later in this chapter, it should be noted that a person may not normally provide information knowingly to the news media and later claim an invasion of privacy, although in some instances consent might be effectively withdrawn. One can easily envision the relevance of disclosures made on social networking sites. A person who discloses previously private information on a widely accessible social network may be surrendering a degree of his or her privacy.

*What kind of information might be considered highly offensive to a reasonable person?* To be sufficiently offensive, a private disclosure must outrage the community's notions of decency. Some courts have added the public's legitimate interest in personal information ends when a publication forgoes legitimate news values and amounts to a morbid and sensational prying into private lives. Often, stories dealing with medical conditions, hospital stays or other intimate health matters are most problematic for journalists. As a rule, invasive stories or pic-

tures that deal with physical or mental illness or expose the intimate parts of the body, require particular caution. *The Restatement (Second) of Torts* suggests several problem areas: sexual relations, humiliating illnesses, intimate personal letters, family disputes, details of home life, stolen photos or photos taken in private places, and information from individual tax returns.

A plaintiff must prove the *widespread publicity* of intimately private material that a *reasonable person* would find *highly offensive*, and that the information was *not* related to a *matter of public concern*. In many private-facts cases involving the news media, however, plaintiffs fail because most of what is printed or broadcast is chosen because it is newsworthy.

*What constitutes a matter of public concern?* Even if a plaintiff can establish that disclosure is highly offensive, the likelihood of winning a privacy suit is slim if the plaintiff has become part of a public event or controversy. Information related to traditional news values is likely to deal with matters of public concern. Information about politics, law enforcement, crime, domestic violence, suicide, medical advances and social trends falls within the realm of traditional news.

The 1982 case of Hilda Bridges, who became an unintended celebrity on a very public stage, dramatically underscores the dearth of privacy protection for individuals caught up in news events. She was dragged into a public matter when police officers – and members of the news media – surrounded her apartment when her estranged husband took her hostage and forced her to undress to prevent her from fleeing. During the standoff, he shot himself, and police rushed the apartment. Bridges fled naked and distraught into the street, clutching only a hand towel. *Today* newspaper in Cocoa Beach, Florida, published a revealing photograph, and she sued for invasion of privacy and infliction of emotional distress.

Satisfied that such publicity was unwarranted and highly offensive, a Florida jury awarded Bridges \$10,000. An appellate court, however, unanimously set aside the award, ruling that the law had not been properly followed. The jury erred, the court reasoned, because the events happened in public and because crime was a matter of public concern. The judge noted that individual privacy at some point must yield to the public interest, even if embarrassing or distressful.

The result was essentially the same when a bystander at a public event thwarted an attempt to assassinate President Gerald Ford during his visit to San Francisco in 1975. As described earlier, Oliver Sipple's act of heroism drew him into the limelight, illuminating his Vietnam War record as well as his homosexuality. Sipple, well known in San Francisco's gay community before the Ford episode, sued the *San Francisco Chronicle* and other newspapers for invasion of privacy. He argued that while his public actions were newsworthy, his private life was not, and that disclosure of his sexual orientation caused him embarrassment because his homosexuality was not widely known. A

California appellate court held that both his heroism and his homosexuality were newsworthy, noting that his heroic behavior cut against gay stereotypes.

While much of what is newsworthy deals with matters of social and political importance, anything out of the ordinary can lead to newsworthiness. If one commits a public act that results in police intervention, courts have held one cannot expect those acts to be private. Unusual occupations, hobbies, talents and other qualities that attract public attention are newsworthy. Furthermore, newsworthiness normally stands the test of time in privacy actions. Once becomes the object of public attention due to a crime or other newsworthy action, one generally remains a matter of legitimate interest in the public's mind.

What about instances when news accounts reveal private information about public officials or public figures? As a rule, most activities of public persons are newsworthy by virtue of their public status. When the *Miami Herald* disclosed that Democratic presidential contender Gary Hart spent the night with a woman who was not his wife, for example, some critics raised questions about the proper bounds of reporting and the *Herald's* conduct; but no one seriously raised the legal question of privacy because Hart was a candidate for president

**Private Facts and Constitutional Protections.** The media have some protection under the First Amendment when they publish truthful, lawfully obtained information about matters of public concern. Several cases help define the scope of this protection.

In *Cox Broadcasting Corp. v. Cohn*, parents of a teenage girl who was raped and murdered sued an Atlanta television station for broadcasting the girl's name. The suit was based on a Georgia statute that forbade publication of names of alleged rape victims. WSB-TV had obtained the name from records provided at an open court hearing. The Georgia Supreme Court upheld the parents' right to sue, but the U.S. Supreme Court reversed in 1975, focusing on the fact that judicial records revealed the information. It said the onus should be on government to ensure privacy by keeping certain information out of the public domain. The Court added that allegations of crime and the resulting proceedings are matters of legitimate public concern.

Similarly, when the *Florida Star*, a small weekly newspaper, published the name of a rape victim as part of its routine police report, copied from a public bulletin board at the Duval County Sheriff's Department, the Court held in 1989 that the report was protected. The rape victim sued the newspaper, claiming that violation of the state criminal statute barring publication of names of alleged rape victims constituted evidence of breach of duty and that she should be awarded civil damages for invasion of privacy. A jury agreed and awarded her \$100,000. The Supreme Court overturned the verdict, holding that the Constitution prevents states from punishing the news media – even by allowing civil damages – for publishing truthful, lawfully obtained information.

The Supreme Court reaffirmed in 2010 the public nature of public records came in *John Doe v. Sam Reed*. The case was not a press case, but it did involve the public's right to information about individuals. Under Washington's public records act, the names of people who sign citizen petitions calling for a referendum to overturn a state law are available to the public. The petition in question called for a vote on Washington's new law extending some benefits to same-sex couples. The plaintiffs claimed that disclosure of their names would violate their First Amendment rights to free speech and association. The Supreme Court rejected the challenge to the law, which it said served sufficiently important government interests in discouraging fraud, fostering transparency in government and protecting integrity of the state's electoral process. The case was not specifically a privacy case, but privacy interests were obviously close to the core of the plaintiffs' concerns and, yet, were insufficient to strike down that provision of the state's public records law as a general matter.

**Consent as a Defense.** Normally, individuals may not knowingly and willingly disclose personal information and then claim invasion of privacy. As a rule, the more intimate the information, the more important for the reporter to be sure consent was clearly given, either explicitly or implicitly. Consent is explicit when professional communicators ask for and receive permission to use personal information for publication. Consent must come from someone with the authority or legal capacity to provide the information. A friend cannot give consent for the use of private information about a college roommate. A day-care operator cannot independently give consent for children under his or her care, nor can a hospital official give consent when the privacy of patients is involved. Minor children cannot give legal consent. Consent need not be in written form, but written consent is almost always easier to prove in court than oral consent.

Whether a person who explicitly consented can later withdraw the consent is a tricky question in the courts. Some have ruled a person cannot withdraw it later, especially if the person providing information is a newsworthy adult and the journalist uses the private information for legitimate news purposes, but whether such forms of consent or similar agreements amount to enforceable contracts remains a difficult question.<sup>1</sup>

**Implied Consent.** Reporters frequently talk to sources and use the information without specifically asking for permission. Members of the public generally understand the function of re-

<sup>1</sup> In a related, but factually different, context, the Supreme Court has limited the freedom of reporters to change reporter/source agreements that rise to the level of rudimentary contracts. In *Cohen v. Cowles Media*, it said a reporter's promise to keep a source's name private could be treated by states as an oral contract without violating the First Amendment rights of the journalist. Journalists had argued that the source's name was newsworthy and that the ultimate decision to use or not to use newsworthy information should reside with the news media. 501 U.S. 663 (1991).

porters. If journalists identify themselves and sources talk willingly, there should be no problem. Implied consent is problematic, however, if private information is obtained from someone who does not understand that it is likely to be published.

### Intrusion

**Definition:** *The invasion of a person's solitude, either physically or by use of technological devices.*

The fundamental purpose of the tort of intrusion — to protect a person's solitude — can be traced to many of the nation's early values. But the notion of intrusion has gone beyond the traditional legal doctrine of trespass, or physical intrusion, to mechanical and electronic violations of private space. The means by which intrusion occurs have changed from the "instantaneous photography" that so riled Brandeis and Warren to the miniature video cameras that left ABC's *Prime Time Live* reeling, as explained later, from a \$3.5 million verdict in 1996, which, though later reduced to \$2, cost the network dearly in terms of legal fees and credibility. The tort of intrusion, whether physical or technological, deals with the *act of gathering information*, not the content of the information gathered.

**Privacy in Public and Quasi-Public Places.** Under the common law, people in public places have little expectation of privacy with regard to what they do. People engaging in public activities must assume they might be photographed, filmed or recorded. The public sphere almost certainly includes widely accessible Web sites, including many social networks, as well as more traditional, physical spaces.

While people in public places do not forgo all rights to privacy, journalists encounter few problems when they photograph or report about what is reasonably considered public. Photographs taken from public streets or sidewalks typically record only what any passerby would see and thus rarely raise any privacy concerns. Courts have applied similar reasoning to individuals on private property that is customarily open to the public, such as malls, restaurants and businesses. The key issue is typically the presence or absence of any reasonable expectation of privacy.

Courts also have suggested that journalists may be persistent when encountering people in public without invading their privacy, so long as the behavior is not highly intrusive or overzealous. Journalistic behavior that is simply annoying is not necessarily an invasion of privacy, but behavior can become legally problematic when it is menacing or harassing, as has been the case with some paparazzi pursuing celebrities.

**Trespass or Physical and Technological Intrusion.** According to *The Restatement (Second) of Torts*, anyone who enters private property without consent of the owner or possessor commits a trespass. Everyone has seen "No Trespassing" signs posted to

warn unwanted visitors. The common law and statutory law protect private property from intruders and define specific penalties for the crime. Entering private property without permission or staying on it after being asked to leave poses legal dangers for journalists, whose rights are normally no different from those of any other private citizen.

As a rule, a visitor on private property must obtain permission before entry. One must obtain permission from the possessor of the property, be it the owner or someone with contractual control over the property, such as a renter, caretaker or tenant.

Consent may be either explicit or implied. Explicit consent occurs when a visitor asks for and is granted permission. A reporter might request an interview at a residence or at a business office, for example. When the purpose of the visit is obscured, however, or when journalists simply lie about their intentions, the question of trespass is much less clear.

Journalists have an array of devices that enhance newsgathering, from telephoto lenses, to sensitive listening devices, to miniaturized video cameras. Technological intrusion is as old as the discussion of privacy. As noted, in 1890, Brandeis and Warren were concerned about a new kind of "instantaneous" photography that no longer required willing subjects to remain perfectly still. Today, the culprit likely would be a mini video camera or even a smart phone. As a rule, the use of technology that enhances viewing or listening is legal as long as it does not effectively let the journalist hear or see what normally could not be observed. If a device simply allows a journalist to see or hear what might be witnessed in public, there is no intrusion. People who go into public places — streets, parks and college campuses, for example — enjoy very little privacy, as long as they are not menaced or harassed. That is, the zone of privacy they enjoy is very small compared to the privacy they can expect in their homes or other private places.

Several cases involving the same television network demonstrate how troublesome the question of lawful access to private property and technological intrusion can be. In 1997, a North Carolina jury awarded the Food Lion grocery chain \$3.5 million in damages after ABC's *Prime Time Live* carried a report, afforded by hidden video cameras, that Food Lion relabeled and restocked meat after its expiration date. The judge had allowed the jury to consider fraud and trespass charges against ABC without considering the veracity of the network's report on Food Lion's business practices. The jury based its award on the fact that *Prime Time Live* producers had committed a trespass by obtaining access to Food Lion facilities through fraudulent job applications. Even though an appellate court reduced the Food Lion judgment to \$2 in 1999, the case illustrates the dangers reporters face in a society increasingly wary of certain reporting techniques. These techniques may be worthy of consideration depending a review of local law and when the subject of the story clearly raises a strong public interest and there is no reasonable alternative means of reporting. Much will depend on

the balance struck by a court between any reasonable expectation of privacy and the value of the story. In addition to evaluating the inherent intrusiveness, courts often will consider the actual necessity of the technologically enhanced means of reporting. Even the use of a shotgun microphone to eavesdrop on conversations may raise issues.

Courts will often distinguish between photographing or videotaping an accident victim in public versus doing it in a more private space such as an ambulance or a rescue helicopter.

Relatively new technologies have added to the possibilities and legal concerns. Cell phones that can take and transmit photographs have raised new privacy concerns, prompting businesses — particularly health clubs — to ban them and many states to make illegal video voyeurism when there is a reasonable expectation of privacy. For example, President George W. Bush signed the federal Video Voyeurism Prevention Act of 2004, applicable to improper photographs, film and videotape taken on federal property when an individual has a reasonable privacy expectation.

Similar issues can arise in the context of the paparazzi who photograph celebrities with an intrusive telephoto lens or through trespass or other unlawful means. Google's Street View project and similar efforts have also raised privacy claims over both the collection of incidental information, such as email addresses. As if strangely outfitted cars were not enough to stir privacy advocates, drones, too, may become a regular sight in domestic skies. Whether drones are used by police or other government agencies, by commercial, private ventures or by journalists, the risks to privacy are obvious, and the demands to create rules are just beginning to be voiced.

**Custom and Usage.** While explicit consent requires a request of a property owner or possessor, implied consent occurs in a number of ways under what is called the "custom and usage" doctrine. A degree of access is implied by custom or typical use of private and quasi-private property. It is customary to cross private property to ring someone's doorbell to solicit contributions or sell a product, absent a locked gate, a "No Trespassing" sign or other warning. It is also customary for shoppers and diners to enter stores and restaurants. This access assumes a visitor does not engage in unwanted activities and leaves when asked.

A reporter's entry into private property with government officials raises interesting and complex privacy concerns. Some courts have found this to be a customary and allowable practice, particularly when covering crimes or disasters, while other courts have rejected these arguments and allowed lawsuits at least against the government agents, if not the press.

In *Wilson v. Layne*, the Supreme Court, in 1999, indicated that individuals can win lawsuits on privacy grounds when law enforcement officers take journalists into private homes. The case began when federal marshals and sheriff's deputies from Montgomery County, Maryland, raided the home of Charles and

Geraldine Wilson. Officers were looking for the Wilsons' son, Dominic, on charges that he had violated probation. The early-morning raid was part of "Operation Gunsmoke," a program started in 1992 in which law enforcement agencies routinely invited journalists to accompany them in apprehending fugitives. A reporter and photographer from the *Washington Post* accompanied officers on the raid of the Wilson home. The Wilsons sued the officers for violating their Fourth Amendment rights against unreasonable search and seizure by bringing into the home journalists who had no official role in the search.

Chief Justice William Rehnquist, writing for a unanimous Court, conceded that reporter ride-alongs were common at the time of the raid and that the law governing the practice was uncertain. Nevertheless, he concluded, the presence of third parties with no legitimate law enforcement roles during the execution of a search warrant violated the Fourth Amendment's core interest in residential privacy.

He rejected the argument that the presence of reporters during raids served a legitimate law enforcement purpose and also rejected the argument that the publicity resulting from ride-alongs significantly benefited the government by publicizing efforts to combat crime. The media play an important role by informing the public about law enforcement activities, he wrote, but Fourth Amendment concerns were paramount in the *Wilson* case, not good public relations for the police. Finally, Rehnquist rejected the argument that the presence of journalists could, in some instances, minimize abuse of suspects and protect the safety of officers.

**Recording Conversations with Sources.** Journalists often record conversations with their sources to create verbatim records of complicated information and lengthy direct quotes. In many states, this practice poses no legal problem because the law assumes that an exact account of a conversation can only benefit all parties involved. Parties to a conversation are legally allowed to recount a conversation to others, and the law simply extends this reasoning to allow taped conversations.<sup>2</sup> In some states, however, it is illegal to record a conversation without the consent of *all* parties. The reasoning assumes that if a person knows a conversation is being taped, the person might behave or respond differently. Perhaps the source would be more cautious or guarded in his or her comments or say nothing at all. At least twelve states require that all parties to a conversation know when the conversation is recorded. In cases involving personal contact, a journalist may ask for permission or may assume consent if a tape recorder is in full view and turned on. It is always a good idea to state before the conversation begins that it is being taped. This creates a record of consent. For tele-

phone conversations, one should request consent before taping begins and restate it at the beginning of the conversation. These laws may be subject to challenges in some states, depending on the local law, if applied to all nonconsensual recordings illegal regardless of the absence of any privacy interest.

The Supreme Court, in 2001, addressed the issue of media liability for publication or broadcast of illegal recordings made independently by third parties and then given to journalists. The case began in 1993 when the chief negotiator for a teachers' union sued public affairs radio commentator Frederick Vopper, who broadcast parts of an illegally recorded cellular telephone conversation sent to him anonymously. The suit alleged that he violated Pennsylvania and U.S. wiretapping laws, which invoke civil and criminal penalties for unlawful intercepts. The Third Circuit of the U.S. Court of Appeals, weighing Vopper's First Amendment claims, reversed the lower court and cited the undue burden that the laws placed on the news media.

The Supreme Court agreed in *Bartnicki v. Vopper*, refusing to apply the so-called "general laws doctrine" applied previously in cases involving reporter's privilege, source confidentiality agreements and newsroom searches. The doctrine states that journalists are not immune from content-neutral laws that apply generally in society and do not unduly burden the news media. The Court concluded that the interest in publication of matters of public concern outweighs privacy concerns, noting that participation in public affairs often results in a loss of privacy. It held the news media blameless so long as the journalists had no role in the illegal recording and obtained it lawfully and the content involved a matter of public concern.

### False Light

*Definition: The widespread publication of facts that place a plaintiff in a false light that is highly offensive to a reasonable person and was published with actual malice (at least in stories of public concern).*

*Newsweek's* cover on March 28, 1988, showed a young man, hands clasped behind his head, being frisked by police against a backdrop of flashing patrol-car lights. The headlines read: "The Drug Gangs/Waging War on America's Cities/Anti-Drug Sweep in Los Angeles." On April 25, the photo reappeared on an inside page over the small headline "Correction." A caption explained that the man in the photo was released without being charged and that *Newsweek* did not mean to suggest that the man was being arrested. It is not known what transpired between *Newsweek* editors and the young man, but one might logically ask whether the magazine cover had cast him in a false light.

Had the *Newsweek* case resulted in a lawsuit for false light invasion of privacy, the plaintiff would have had some of the same burdens of proof as a libel plaintiff. Consequently, false-light cases are often filed in tandem with libel actions. A plaintiff must prove identification (not always a given in a fiction-

<sup>2</sup> Federal law permits a party to a conversation to record it, so long as the recording is not for criminal purposes. However, the Federal Communication Commission, under penalty of lost phone service, requires all parties to consent. See 18 U.S.C.A. § 2511 (West Supp. 1996).

alization), falsity, and that the publisher was at fault — that material was published recklessly or with knowledge of falsity.

False-light plaintiffs, however, would not allege loss of reputation. They would argue that being cast in a highly offensive false light caused some other kind of harm. Also unlike libel, a false-light plaintiff must prove widespread publication — publicity — not just the legal publication. Some states have refused to recognize false-light claims, citing First Amendment concerns, the similarity to libel claims and even the doctrinal confusion over what false light really means.

**False Light and Actual Malice.** In the 1967 case of *Time, Inc. v. Hill*, the Supreme Court held that all false-light plaintiffs — not just public officials and public figures, as in libel actions — must prove actual malice if involved in matters of public concern. The *Hill* case began in 1952 when three escaped convicts entered the home of James Hill near Philadelphia and held his family hostage for a day. The ordeal received sensational play in Philadelphia newspapers and was the inspiration for Joseph Hayes' novel *The Desperate Hours*. It was later the basis for a Broadway play and a film starring Humphrey Bogart. In 1955, *Life* magazine published a story titled "True Crime Inspires Tense Play" that purported to describe what actually happened. *Life* carried photos from the Philadelphia tryouts for the play, including one of the sons being mistreated by a "brutish convict." Another photo showed the daughter biting the hand of an abusive convict. Both photos were embellishments, since the real captors did not harass the family. Arguing that *Life* used the family's name and experience for trade purposes, the Hills sued for invasion of privacy. They won at trial in 1963, but the Supreme Court set aside the damages in a 5-4 vote, applying the new legal rule that false-light plaintiffs involved in matters of public concern must prove actual malice. (A point of interest: The Hills' lawyer was Richard Nixon, later U.S. president.)

Courts are most likely to find disclosures highly offensive in two ways:

1. Fictionalization, which is the embellishment or addition of information to an otherwise factual presentation, a device more common to television or stage dramatizations than to news coverage; and,
2. Distortion, which occurs when elements of a story are deceptively juxtaposed, or when information is omitted, presented out of context or presented in an improper context.

**Fictionalizations.** *Time v. Hill* suggests that when a drama or novel is modeled on real events, false-light problems can arise even when names and other facts are changed. Fictionalization also can pose problems when a real person's name is used, but use of a real name normally will not sustain a privacy action unless the person's identity is also appropriated. Both a name and facts are usually necessary for there to be legal problems.

The fact that the name used in the publication is coincidentally the same as the name of a real person not intended by the publisher or otherwise related or even similar to the character in the published material will not support a false-light privacy claim. A plaintiff must adequately allege a strong resemblance to a fictional character for the claim to proceed in court. Novels, films and television programs often carry disclaimers, advising readers and viewers that their plots and characters are fictional and that any similarities to real people are coincidental. While disclaimers might prove helpful in marginal cases, they are not a fail-safe way to prevent false-light claims.

Fictionalization also can occur in simple news stories when a writer fabricates or exaggerates facts and quotes. While such distortions are deplorable as a matter of ethics, they also can result in legal problems. In *Cantrell v. Forest City Publishing*, for example, the widow of an accident victim successfully sued for invasion of privacy after a reporter for the *Cleveland Plain Dealer* wrote a story that implied he had spoken to the woman at her home. She argued that the story held her and her family up for pity and ridicule, humiliating them and causing mental distress. The Supreme Court in 1973 upheld the verdict, agreeing that the publication knowingly cast the family in a false light by substantial misrepresentations.

To succeed, a false-light plaintiff must prove the alleged misrepresentations were significant. A plainly unbelievable story — one with facts that defy reason and logic — still can be the basis of a successful false-light claim. Minor falsifications, as in libel cases, will not sustain a false-light privacy claim.

**Distortions.** Until the upsurge in so-called TV "docudramas" and "infotainment," news organizations were much more likely to find themselves defending false-light lawsuits over instances involving information out of context or inappropriately juxtaposed with other information. The *Newsweek* example is illustrative. The subject, photographed in a public place in the course of a newsworthy event, would have had little recourse if a photo caption simply had said police frisked him during a drug sweep. However, the use of the photo with the various headlines and cutlines implied that the subject of the photo was a suspect in a drug sweep that was part of the war on drugs.

Courts will closely scrutinize the accuracy and context of any captions or descriptions of the photographs or other artwork appearing with text. The use of file photos and video street scenes is commonplace in most news organizations but can pose problems. Such practices should raise red flags when the subject matter is sensitive or individuals might be identified. Editors should take special care when selecting file photos or footage of auto accidents to illustrate stories on drunken driving or using street scenes for hard-to-illustrate stories on delicate, controversial or possibly embarrassing topics.

### Appropriation

*Definition: The use of a person's name, likeness or image, without permission, for commercial gain.*

Appropriation was one of the first privacy torts to develop, in part, because it resembled property rights — an area of law familiar to nineteenth century courts. But it is also a tort with which courts initially had difficulty because it alleged a mental harm based on unwanted publicity. The field of psychology was not highly developed, and the notion that something as intangible as mental suffering could be quantified for the purpose of monetary damages troubled courts.

Though private people sometimes make claims of commercial appropriation, most claims deal with celebrities trying to protect the commercial value of their names and likenesses — a more recent legal development.

**A Right to Publicity.** Courts consistently have balked at the notion that people who seek public attention could claim a mental harm based on public exposure. While courts are not likely to award public persons damages for mental harm in appropriation cases, they have recognized a property-like right when someone uses the name or likeness of a celebrity or other public person for financial gain without authorization. In some states, people can barter and inherit this right to publicity.

Most commercial appropriation cases involve advertising or related enterprises, where the defendant has attempted to capitalize on a celebrity's name and identity. For example, an enterprising portable toilet business borrowed the phrase "Here's Johnny," Ed McMahon's nightly introduction from *The Tonight Show With Johnny Carson*, to advertise its product. To capitalize on the link, the firm also advertised itself as "The World's Foremost Comedian." Even though neither his complete name nor likeness was used, Carson won his appropriation claim in 1983.

The use of celebrity look-alikes and sound-alikes is common practice in advertising and sometimes results in appropriation lawsuits. Courts typically ask if the impersonation effectively pirated the celebrity's distinctive style or identity. The Ninth Circuit upheld a \$2.5 million judgment for singer Tom Waits, whose raspy voice was imitated in an advertisement for Frito-Lay corn chips. The court held that Waits had a property right "to control the use of his identity as embodied in his voice." Athletes have even raised this issue in the context of videogames using virtual players who are nearly identical in all but exact facial features to their real-life counterparts. While the results have been mixed in the courts, the key issue is generally whether the game developers failed to transform sufficiently each player's identity or likeness in creating the games.

The news media do not violate the right of publicity by using an individual's name or likeness in reporting news or to promote news content, but must be careful not to imply, without

permission, the person somehow is endorsing the content or publication. A key consideration for courts in such cases is whether the so-called news article is just an excuse to use the celebrity's photographs (that is, simply to publish valuable or embarrassing photographs to obtain a commercial advantage) or whether they are incidental to an article of actual news value.

In the only appropriation case it has decided, the Supreme Court in 1977 held that the news exemption did not apply in the case of a performer, the "Human Cannonball," who earned his living being shot from a cannon. Hugo Zacchini's entire performance from cannon to net lasted fifteen seconds. When a TV station broadcast his entire act on a news program, he sued for appropriation and won. The Supreme Court in *Zacchini v. Scripps Howard Broadcasting* refused to block a jury trial on the \$25,000 damage claim despite the program's newsworthiness because broadcasting the entire act so threatened the economic value of the performance.

The use of names and likenesses also can pose problems in literary works, films, television and other forms of communication. Obtaining consent or permission is an important defense, and many studios and producers will do exactly that to avoid claims, in spite of the cost. Most problems are avoided by the use of signed releases or consent forms, but lawsuits still occur over, for example, the breadth or interpretation of those agreements.

**Definition of Commercial.** The potential breadth and definition of what is or is not a commercial use can be a hotly contested issue. Many courts limit these laws to the actual commercial sale or advertising of products or services, thus allowing some films and documentaries without triggering these laws.

### INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The wide berth the First Amendment affords professional communicators makes it difficult for people who feel harmed by the media to succeed in court. Libel law, discussed in Chapter 6, requires plaintiffs to prove that defamatory information is false, and that the publishers of alleged defamations were at fault — that publication resulted from either negligent or reckless practices or with outright knowledge of falsehood. False light invasion of privacy typically imposes similar burdens on plaintiffs, and plaintiffs under the embarrassing private facts tort have little chance of recovering damages when involved in matters of public concern. As a result, lawyers sometimes file other kinds of legal actions, often in tandem with libel or privacy suits, based on general legal doctrines that have largely developed outside the umbrella of First Amendment protections.

One such end-run approach is the tort of intentional infliction of emotional distress, based on something akin to the common law doctrine of malice or ill will. It allows recovery of damages for severe emotional harm or deliberate or reckless conduct that

is deemed outrageous and extreme, a judgment normally determined by the sensibilities of the jury. Private individuals fare better in emotional distress cases.

The leading media case on intentional infliction of emotional distress unfolded in the 1980s after a dispute between pornography mogul Larry Flynt, publisher of *Hustler* magazine, and the Rev. Jerry Falwell, a prominent Virginia-based TV evangelist. The case was the subject of the movie *The People v. Larry Flynt*. Falwell sued Flynt and *Hustler* for libel, invasion of privacy and intentional infliction of emotional distress after the magazine ran a crude take-off of "The first time ..." advertising campaign of Campari Liqueur. The campaign focused on celebrities who recalled their first experiences imbibing the upscale liqueur. Double-entendre in the interviews gave readers the impression – until the end of the ads – that the celebrities were discussing their first sexual experiences. *Hustler* cast Falwell in one of the "first-time" interviews, reporting that his first sexual encounter was with his mother in an outhouse.

*Hustler* published a disclaimer stating that the page was an advertising parody "not to be taken seriously." The Roanoke, Virginia, jury found in favor of *Hustler* on the libel claim, holding that no reasonable person would believe the parody to be true. The judge dismissed the privacy claim, because only appropriation is recognized as an invasion of privacy action in Virginia, and Falwell's identity had not been appropriated for commercial purposes. But the jury awarded Falwell \$200,000 on the emotional distress claim. The U.S. Court of Appeals for the Fourth Circuit upheld the judgment, reasoning that the actual malice standard for public figures in libel cases did not apply to emotional distress. Flynt appealed to the Supreme Court.

The Court unanimously overturned the lower courts. Citing journalism's long history of social and political caricature, Chief Justice Rehnquist reasoned that allowing public figures to collect damages without proving actual malice would chill social and political discourse. He noted that the essence of political cartooning often focused on "unfortunate physical traits or politically embarrassing events – an exploration often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided." The outrageousness requirement, he noted, was subjective and "would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." To prevail, Rehnquist said, public figures and officials must prove that the communication was false and published with actual malice.

Courts typically will not allow plaintiffs to use emotional distress claims to evade the defenses applicable to defamation claims, particularly if the distress claim merely recasts a defamation claim. The Supreme Court confirmed this rule in a case involving the controversial Westboro Baptist Church of Topeka, Kansas, and its anti-gay protests and pickets at the funerals of U.S. soldiers killed in Iraq and Afghanistan. In 2009, a U.S.

court of appeals reversed, on free speech grounds, a jury verdict in favor of the father of fallen serviceman and his claims for invasion of privacy and intentional infliction of emotional distress. The Supreme Court affirmed in 2011. As in *Hustler Magazine v. Falwell*, it held in *Snyder v. Phelps* that the speech in question plainly related to matters of public, rather than private, concern, even if the context of the speech (the funeral, for example) was particularly hurtful to the family of the soldier. Consequently, the state could apply reasonable time, place or manner regulations<sup>3</sup> but could not under the First Amendment prohibit or punish the picketers on the basis of the content of the speech, even if the jury deemed the setting outrageous.

A variant of intentional infliction of emotional distress is the tort of outrage, which focuses exclusively on the behavior of the defendant. For example, in 1988, personnel from a Florida TV station went to a local police department after officials disclosed that skeletal remains found a year earlier were those of a 6-year-old boy reported missing three years before. A police officer removed the child's skull from a drawer in a laboratory. Images of the skull were broadcast as part of a report on crime. After the boy's family watched a newscast showing a dramatic close-up of the skull, they filed an invasion of privacy and outrage lawsuit. Trial testimony centered on callous comments made during the TV station's newsroom debate over whether to air the close-up footage. A Florida appellate court rejected the privacy claim but held that the newscast easily surpassed the outrageousness requirement.

Plaintiffs also have received damages in some jurisdictions for negligent infliction of emotional distress, which occurs when media behavior exposes individuals to dangers that the media should have reasonably foreseen. For example, a California court in 1975 held a radio station responsible after a young driver was killed trying to keep up with a disc jockey who traveled around awarding prizes. It said that the accident was a foreseeable consequence of the promotion, which encouraged prize-seekers to rush from place to place. Other courts, however, have been unwilling to hold the media accountable for unforeseeable or speculative consequences, such as copy-cat behavior.

## CONSTITUTIONAL AND STATUTORY PRIVACY

The privacy torts do not present the only reasons for special caution when gathering and disseminating information. Constitutional concerns and privacy statutes, which place limits on government, have implications for journalists seeking information under government control. Limits on how government uses personal information indirectly affect journalists. And such lim-

<sup>3</sup> For an interesting examination of such regulations, see *Phelps-Roper v. Koster*, 713 F.3d 942 (8th Cir. 2013) (holding state had a significant interest in protecting privacy of funeral attendees for a brief time and limited area, but striking statute to extent it burdened too much speech by defining covered "funerals" broadly to include processions and other activities).

its on government use of private information — in this information-soaked era with its headlines about government and private enterprise abuses — are politically attractive to politicians and other policy-makers and records custodians.

Constitutional privacy may prove indirectly relevant to news-gathering when individuals use these constitutional arguments to bolster privacy claims against the news media, potentially offsetting the presumption favoring publication of private facts about matters of public concern. Statutory privacy designed to protect individuals from government abuse also provides a rationale — sometimes unwarranted — for withholding information from the public and news media.

### Constitutional Privacy

Over time, the Supreme Court has defined a range of constitutional privacy protections. Although the word “privacy” appears nowhere in the Constitution, the Court has nonetheless recognized a right to be free from unreasonable governmental intrusion and eavesdropping. For example:

- Reasoning that freedom from intrusion is based on a “zone of privacy” around a person, not a specific place, the Court ruled in *Katz v. United States* in 1967 that a government wiretap on a telephone booth was unconstitutional.

- In *NAACP v. Alabama*, the Court in 1958 struck down an Alabama law that required certain organizations, including civil rights groups, to turn over membership rolls to the state. The Court held the rule violated the associational rights of current and potential members of the NAACP, who might not exercise those rights out of fear of government retaliation.

- In *Griswold v. Connecticut*, a case challenging a state law barring dissemination of birth control information, the Court in 1965 fashioned a right of decisional privacy based on the rights implied in the “penumbra” of various amendments to the Constitution. The case laid the foundation for the controversial 1973 *Roe v. Wade* decision that recognized a woman’s right to abortion.

Citing its decisions in *Griswold* and related cases, the Supreme Court, in *Lawrence v. Texas* in 2003, struck down, by a 6-3 vote, a state statute that made consensual sodomy between adults of the same sex criminal. Writing for the majority, Justice Anthony Kennedy articulated a rationale based on respect for the private lives and intimate choices of two Texas men who were arrested in an apartment:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the state is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the state should not be a dominant presence. Freedom

extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

The decision overruled the Court’s contrary 1986 holding in *Bowers v. Hardwick* and prompted a stinging dissent from Justice Antonin Scalia, who, with Chief Justice Rehnquist and Justice Clarence Thomas, questioned the existence of any fundamental constitutional right to engage in homosexual conduct. Thomas added his own dissent in which he questioned the existence of any general constitutional right of privacy.

Most importantly to media professionals, however, has been the recent willingness of the Supreme Court to recognize a constitutional right of informational privacy — the right of individuals to control information about themselves. Concerns about privacy had been raised in several cases addressing government use of computers to gather, store and disseminate information about private individuals.

- In 1976, Justice William Brennan expressed concerns about the effects of new information technologies on privacy. In *United States v. Miller*, the Court held that individuals retained no privacy interest in information voluntarily given to a bank. Cautioned Brennan: “Development of photocopying machines, electronic computers and other sophisticated instruments has accelerated the abilities of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds.”

A year later, the Court acknowledged a right of informational privacy in upholding a New York state practice of compiling and storing in a computer prescription drug records on individuals. Such a practice did not violate individuals’ constitutional right of privacy, Justice John Paul Stevens wrote, so long as strict security was in place to ensure the privacy of the information. He wrote the Court was not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or government files. Justice Brennan, in a concurring opinion, echoed those concerns about the threat of computers to privacy.

- In *Department of Justice v. Reporters Committee for Freedom of the Press*, the Supreme Court reacted to a long-standing concern about the threat that computers pose to personal privacy; it articulated the practical obscurity doctrine in response to a news media request for information contained in a government database. In essence, the Court reasoned in 1989 that computers have obliterated traditional barriers of time and space that once afforded individuals a measure of “practical obscurity” — or distance — from their official past. Because of computers, the Court noted, individuals no longer can move to another place to escape past deeds or count on the passage of time to dim official memories. Following this reasoning, it suggested that informa-

tion compiled in central government computers — even information gathered from various public records — regained a privacy interest when brought together in one place. In fact, the Court reasoned, if the information were indeed public, reporters should have no need to see a government database. Under the reasoning of the *Reporters Committee* case, public-record information about individuals can be shielded from disclosure simply because it exists in a computer database.<sup>4</sup>

The constitutional privacy issue is particularly thorny as to the types of information the government may collect and use with regard to teachers, police officers and other public employees.

### The Freedom of Information Act

Since the Great Depression, government's appetite for information has grown steadily, hitting full stride with the Great Society programs of the 1960s that coincided with the growth of systems analysis — a management technique that depended on vast amounts of data. To balance governmental need for information, much of it personal, statutes were passed to ensure that government gathered information only for specific purposes and that it be used only for those purposes. One of the first such statutes was the federal Freedom of Information Act, passed in 1966 to ensure maximum access to records of federal executive agencies. While the act espouses openness, it also attempts to balance access with competing values. The result was nine exemptions, several of which raise privacy concerns as grounds for withholding information. (The federal Freedom of Information Act is discussed in Chapter 17.)

Exemption 3 applies to records specifically exempted by other federal statutes. For a statute to qualify under the exemption, it must establish criteria or types of matters for withholding and allow no discretion by agency personnel. Laws governing numerous agencies, including the Internal Revenue Act, which handles personal income tax records, fall into this category. The exemption also covers the Census Bureau, the Consumer Products Safety Commission and the Federal Trade Commission.

Exemption 6, which applies to personnel, medical and similar files, shields information that would "constitute a clearly unwarranted" invasion of privacy. Implicit in this language is the understanding that a balancing process must occur to determine whether withholding is warranted. The "similar files" wording has been applied to a range of information.

Exemption 7 covers disclosure of certain law enforcement records, including disclosures that would invade privacy. In the *Reporters Committee* case, the Court recognized privacy inter-

ests in certain compilations of criminal records — even records that were public at their original source. For example, if a record is contained in a central government database, such as an FBI computer, it might be considered private. The same record at a courthouse in the jurisdiction where the crime occurred would be public. The court said that since the privacy/access balance typically favors withholding records when they are contained in computer compilations, courts don't need to engage in case-by-case balancing with the public interest in disclosure. The simple determination that a record is in a computer compilation was sufficient to withhold it, the court reasoned.

In 2004, the Supreme Court ruled in *Favish v. Office of Independent Counsel*, a case that directly raised privacy and FOIA issues, including the question of the privacy interests of family members of a deceased person. It grew out of requests for photographs taken during the investigation into the death of Vince Foster, a former deputy counsel in the Clinton White House. In 1993, he was found dead in a park in Washington, D.C. The National Park Service, the FBI, committees of the House and Senate, and the Office of Independent Counsel independently investigated. All concluded that his death was a suicide, but rumors and doubts lingered. The District of Columbia Court of Appeals, in 1999, denied the records request of Accuracy in Media, a media watchdog organization, which had requested the photographs from the National Park Service. Allan Favish, a lawyer who had participated in that litigation, renewed the request in California by serving it upon the Office of Independent Counsel, seeking 150 photographs.

The office released more than 100 photos but withheld several for reasons at first not clearly articulated. Favish later dropped twenty-one photos from his request. Eventually the office relied upon the privacy language of Exemption 7. The district court ruled for Favish on one photo and certain issues regarding the quality of the photos but withheld ten to protect the privacy interests of Foster's family. The Ninth Circuit Court of Appeals reversed the district court's ruling and held that, though the privacy interests of the family were a valid consideration, they had to be weighed against the public interest in the investigation. Because the court of appeals did not have the photos in question, the case was remanded to the district court for further analysis and the required balancing of the privacy and access interests. On remand, the district court ordered the release of five photos and withheld, on privacy grounds, the other five. The Ninth Circuit affirmed. In 2004, the Supreme Court reversed the appellate court and held that under the FOIA surviving family members have a right to personal privacy regarding the photographic images of the scene of a close relative's death. The Court said such privacy interests outweighed, under the FOIA, the public's interest in disclosure.

In 2011, in *FCC v. AT&T*, the Court in an 8-0 decision emphatically held that corporations, while protected under the Fourth Amendment from unreasonable searches and seizures,

<sup>4</sup> See *Bursac v. Souzzi*, 37 Media L. Rep. (BNA) 1109 (N.Y. Sup. Ct. 2008) (applying the *Reporters Committee* reasoning to New York's state public records law and ruling that a county official who posted the plaintiff's photograph on a "wall of shame" Web page following her arrest for driving while intoxicated must remove the posting even though the arrest was a matter of public record).

are not shielded under the personal privacy language of Exemption 7 (c) from FOIA requests for documents they provided to government because corporations do not have personal privacy rights and the exemption protects only the privacy of individuals, not businesses.

### **The Privacy Act of 1974**

The Privacy Act was meant to create a "Code of Fair Information Practices" to regulate government agencies. The Senate report on the legislation noted that one purpose of the act was "to promote government respect for the privacy of citizens" by ensuring that executive branch agencies follow certain rules regarding the gathering and disclosing of information. The Privacy Act is most likely to affect requests for information that is not clearly covered by the legislation. In such cases, custodians of records tend to be very cautious because the Privacy Act imposes penalties on custodians who release protected information. Withholding information that should be disclosed, on the other hand, may violate the federal Freedom of Information Act, but that legislation poses no penalties for wrongly withholding information.

### **Other Privacy Concerns**

A number of other federal and state statutes raising privacy concerns can erect barriers to information gathered and kept by government and, in some cases, private institutions. A few key examples are discussed below.

**Driver's Privacy Protection Act.** Driver's license records have long been a source of useful information for journalists, more so in recent years with the growth of computer-assisted reporting. In 1991, for example, the *Miami Herald* used a computer analysis of state Division of Motor Vehicle records to show that many drunken drivers were being put back on the road. In 1997, however, federal legislation began limiting access to such records. The law, passed in 1994, was partly in response to the slaying of California actress Rebecca Schaeffer by a fan who located her address through driver records obtained through a private investigator. The intent of the law is to inhibit stalkers and anyone else who might harm an individual after linking a name with an address. The federal legislation contains a provision that allows states to disclose such information if they enact a provision notifying drivers that they have an option to withhold personal information.

Several states challenged the law, arguing that Congress had overstepped its authority in attempting to regulate a state practice. The Seventh and Tenth Circuits of the U.S. Court of Appeals upheld the law. The Fourth Circuit, however, sided with South Carolina, which argued the law was unconstitutional because state driver's license information constituted internal

state activity and lay beyond the scope of congressional jurisdiction. The Supreme Court, in *Condon v. Reno*, reversed in 2000 the Fourth Circuit. The unanimous opinion by Chief Justice Rehnquist held that the release or sale of drivers' license information constituted interstate commerce, thereby giving Congress regulatory authority.

**The Buckley Amendment.** Enacted as the Family Educational Rights and Privacy Act, or FERPA, the Buckley Amendment requires educational institutions receiving federal money to keep certain student records private. Directory information such as names, addresses and majors is not covered. Academic records, including non-criminal disciplinary records, are. Before 1992, the Department of Education advised institutions that campus crime records should be considered student disciplinary records — a position that frustrated many media organizations, particularly campus newspapers. A 1992 amendment, however, states that crime reports are not educational records and cannot be withheld as disciplinary records.

**Rape Shield Laws.** Whether to publish the name of a rape victim is a controversial topic, both legally and ethically. Rape shield laws were designed to encourage victims to come forward by preventing the additional trauma of publicity. Some courts have upheld such laws. In Florida, however, the state supreme court, in 1994, upheld a ruling that the state's law was unconstitutional in a case spawned by the William Kennedy Smith rape trial. The court relied heavily on *Florida Star v. B.J.F.*, which held the news media should not be punished for publishing truthful, lawfully obtained information about matters of public concern absent a state interest of the highest order.

**Juror Shield Laws.** Much has been said and written about protecting jurors' privacy, particularly since the Rodney King police brutality and the O.J. Simpson murder trials. Since the Supreme Court's 1984 ruling in *Press-Enterprise v. Superior Court*, jurors' selection and identity have been presumptively public matters. But after the King and Simpson cases, and the Timothy McVeigh trial in the Oklahoma City bombing, the tide began to change. Citing privacy, judges appear to be routinely impaneling anonymous juries, a practice once reserved for the trials of organized crime kingpins when juror safety was a factor; and some states have passed laws expressly allowing the practice.

**Computer Privacy.** Journalists depend increasingly on information contained in computer databases, the World Wide Web and other computer-based sources. Indeed, going online is allowing journalists greater speed and access to more information. Many significant news stories are based on an analysis of government databases. Most laws dealing with computer privacy are designed to place limits on government. The Computer Matching and Privacy Act of 1988, for example, limits the ability of gov-

ernment to routinely cross-reference information in various government databases. The Electronic Communications Privacy Act of 1986 made the interception of computer communications a crime, and the Computer Crime Act of 1986 made it unlawful to access or disclose certain records in computer form. Many of the laws, reflecting some of the constitutional and statutory concerns discussed previously, treat computerized information as more threatening to privacy than similar information in paper files. Such laws can be vague or over-inclusive in ways that inhibit legitimate journalists.

The computer/privacy debate also has begun to focus on private-sector information practices. In 2000, after conducting a series of Web site surveys, the FTC abandoned its long-standing policy supporting self-regulation. Instead, it announced support for federal legislation to protect online consumers, much to the dismay of the Online Privacy Alliance, an informal industry coalition that included some of the biggest online companies. FTC officials recommended that Congress establish standards regarding online information collection. More recent controversies have focused on the search information, email and personal identifiers retained by companies such as Google (including YouTube) and various cellular telephone providers.

In 2014, the Pew Research Center published a study that indicated most people are generally not worried about the collection of their search information and receipt of targeted advertising if that's the price for getting certain online services at no cost, though many also indicated some concerns about tracking geographic locations through mobile devices.

A growing privacy concern involves the posting of diary entries and other information by individuals on online social networking sites such as Facebook and LinkedIn. Many students and others have found that once information is posted and widely shared, the expectation of privacy lessens. Employers, government agencies and others have used these sites to gather information about individuals. In 2007, Facebook triggered substantial public criticism with its Beacon advertising program that transmitted users' online purchasing information to their friends on the social network. Facebook ultimately changed the program, added an opt-out feature, and apologized to its users. Of course, these issues with Facebook, Twitter and other social media sites as well as search engines continue to arise here and elsewhere in the world as the technology changes.

Social media sites, search engines, business interests and individual consumers have increasingly engaged in online conduct that may erode or at least alter societal expectations and norms regarding personal privacy. Facebook's various privacy policies and controversies, Google's retention of search histories and user information, cell phone tracking capabilities, and even cable companies and other companies that can read, block or track certain types of messages all stand to change traditional notions about what is private and what is not.

In 2012, Facebook entered into a \$9.5 million settlement with

a class of its members who had sued over the site's Beacon program (started in 2007) that effectively gathered and disseminated information about Facebook members' online activities without their consent. In addition to the payment, which went to attorney's fees and to set up a new foundation dedicated to user education and protection of online identities, Facebook agreed to end the Beacon program.

The conflict over what privacy rules or laws apply to the online collection of personal information by commercial sites is likely to continue as new government agencies enter this arena and as more people look for ways to control their own data.

In a reminder that the world is shrinking, Google in 2014 hit the so-called "right to be forgotten" wall in Europe when the European Court of Justice ruled that it must comply with local law on such a right and thus will have to remove, after a process, certain items from its search results. The results are potentially dramatic not only for the giant search engine's business model, but for fundamental notions of public access to information as well, showing once again that on privacy matters Europe and the United States are two related, but very different legal worlds.

**Health Insurance Privacy.** The privacy rules under the Health Insurance Portability and Accountability Act of 1996 took effect in 2003. They do not directly apply to the media, but they do affect many businesses, including hospitals. They probably are more likely to refuse to release information about patients or even to confirm that an accident victim has been admitted. In addition, the law may influence the tone and direction of future privacy legislation.

The HIPAA rules limit the use and disclosure of individuals' health information by doctors, hospitals, health-care clearinghouses, insurance plans, their business associates, and many employers who provide health care or coverage. For example, employers may not use the information to make personnel decisions, and any covered entity may only disclose the information for purposes related to treatment, payment and health care operations, unless the individual has provided a clear, voluntary authorization permitting disclosure. The rules also require that each covered business adopt privacy procedures and train a designated privacy official to assure compliance.

The rules do not provide for private lawsuits seeking enforcement but do provide for investigations by the Department of Health and Human Services, which can then seek civil and criminal penalties for violations. Examples of exceptions allowing disclosure, even without authorization by individuals, include public health investigations, law enforcement, emergencies and national security; but there is no exception for any reports to journalists — even for the release of limited information concerning admission and discharge dates of patients.

The law and its consequences took on new importance with the 2014 reporting on the Ebola story, causing journalists to at-

tempt to balance patient privacy with needed reports to the public. Hospitals were typically advised that they could release general information without patient names in an effort to keep people informed about possible risks of exposure.

A recurring problem with HIPAA has been the level of misunderstanding of the law by health care providers that fear claims over disclosures and therefore err on the side with holding too much information — even from close family members of patients. If family members experience these problems, journalists are certain to fare even worse.

### **Privacy After September 11, 2001**

The terrorist attacks that took place on September 11, 2001, have had a far-reaching impact on society, laws and notions of privacy. These matters are still evolving. Interestingly, some government officials responsible for security matters have recently argued that privacy can no longer be equated with anonymity in terms of personal information and private communications. They contend that government must have greater access, particularly to certain telecommunications and financial information, to guard against terrorist and criminal acts and that the focus of privacy advocates should be on the creation of legal safeguards limiting the permissible uses of that information by government.

The USA PATRIOT Act increased federal authority in a number of ways. It relaxed restrictions on the sharing of information between domestic law enforcement agencies and intelligence agencies, enhanced the government's subpoena power to obtain and inspect email records of suspected terrorists, expanded bank record-keeping requirements to track transactions and money laundering, and permitted roving wiretaps of suspected terrorists. More than 300 pages long, the law received virtually no debate or congressional oversight before its passage. The sense of urgency and fear following the attacks and the fact that the law included a provision for its sunset in five years facilitated its quick enactment.

Not long after his reelection in 2004, President George W. Bush began urging renewal of expiring PATRIOT Act provisions as well as expansion of certain powers of government to obtain records without judicial approval. After months of negotiations with Congress and amid media reports of secret government wiretapping of international telephone calls, a compromise was reached in 2006. The act was renewed with a few modifications limiting some government powers to obtain routine library records and providing people served with terrorism-related subpoenas the right to challenge the nondisclosure and gag order requirements of the subpoenas. The renewal, though, made permanent most of the PATRIOT Act's provisions.

In 2008, President Bush and Congress squared off and then compromised regarding a major expansion of government's power to conduct surveillance, including a significant revision of the

thirty-year-old Foreign Intelligence Surveillance Act and its rules governing the liability of telecommunications companies that facilitated secret and possibly illegal government wiretaps after the 2001 terrorist attacks. As part of the compromise, Congress included in the new law immunity for the telecommunications companies that had cooperated with the government in conducting warrantless wiretaps, a hotly contested issue that led to prompt but unsuccessful legal challenges. In 2011, President Obama signed a four-year extension of the PATRIOT Act as previously amended. But in 2015 the law and the practice of collecting in bulk data about the telecommunications of Americans hit a legislative and judicial snag as key provisions of the act were challenged and then expired for lack of a legislative deal on revisions and an extension.

During the coming years, the pressure to invest government with new powers and to use computer technology and the Internet to track and prevent terrorism will continue to be strong. The results may include not only a contraction of the privacy rights of individuals, but also a contraction of sources of information available to journalists. The controversies that arose in 2013 and 2014 as a result of Edward Snowden's disclosures of data-mining by the National Security Agency only made more obvious the potential impact of new technology on what once seemed to be settled notions of privacy. While many continue to debate the exact nature of the NSA's data collection and the impact of the Snowden revelations on national security, there is no doubt that the furor over the NSA will fuel privacy debates, new guidelines and a fresh look at government surveillance. In 2018, for example, the NSA announced it had purged hundreds of millions of records logging phone calls and texts that it had gathered from domestic telecommunications companies since 2015, apparently because the collection include files it was not allowed to receive.

### **SUMMARY**

Despite assaults on their privacy from various quarters — and perhaps in part because of those assaults — Americans remain strong in their belief in the right to be let alone. Privacy concerns are manifested in constitutions, statutes and common law cases that attempt to balance individual rights with competing values, including the right of the news media to publish and the right of the public to be informed. It is to be expected that the rights of individuals and of a free and vigorous press often will clash. The balance has generally tilted toward the press because of the bedrock principle that a democratic society works best when information flows freely.

Journalistic excesses are not lost on the public, whose declining opinion of journalism has been reflected in some polls. The results of declining confidence can be seen in the outcome of some court cases. Lack of public confidence in the news media also can embolden politicians to pass laws limiting press free-