

## CHAPTER 29

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### PRIVACY

#### § 424. Introducing Privacy Rights

A degree of privacy is probably required for full human development. It is essential to personal autonomy and liberty and it is treasured, even by the most open and gregarious people, as important to the quality of life, valuable in itself. In addition, the privacy of individuals reflectively asserts a limit on the power of other individuals, corporations, and government entities.

Rights of privacy have been protected by law for a very long time incident to other torts. Tort liability for trespass to land, for example, protected not only against damage to the physical integrity of the land itself but against intrusions upon the possessor's privacy. Common law copyright offered at least some protection against publication of private writings. The Fourth Amendment of the United States Constitution protects against unjustified government intrusions.

Nevertheless, a systematic right of privacy was developed only in the twentieth century. The impetus, or at least the most obvious impetus, was a law review article by Samuel D. Warren and Louis D. Brandeis published in 1890.<sup>1</sup> Brandeis and Warren were mainly concerned at the intrusive press and the resulting gossip. They proposed a new tort to protect privacy against the trashier interests of both the press and its readers.

The New York Court of Appeals rejected any such right a few years later,<sup>2</sup> whereupon the New York legislature enacted a statutory right of privacy, but one covering only the use of the plaintiff's picture in advertising or trade without the plaintiff's consent.<sup>3</sup> In the meantime, other states had begun to recognize a common law right of privacy, at least when the defendant had used the plaintiff's likeness in advertising.<sup>4</sup> Cases that once had been brought on other theories or on no discernible theory at all gradually coalesced around the privacy idea. Most states by legislation or judicial decision have now recognized some form of privacy invasion, but not necessarily all its forms.

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1. Louis D. Brandeis and Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902) (defendant who used plaintiff's picture in advertisements without the plaintiff's knowl-

edge or consent violated no right of the plaintiff).

3. N.Y. CIV. RTS. L. §§ 50-51 (picture used for advertising without consent).

4. Beginning with *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (use of the plaintiff's picture in advertising).

Sometimes it is said that the right of privacy is the right to be let alone, but the phrase does not reflect the varieties of privacy invasion. Scholars eventually posited four forms of privacy invasion (or four different torts), only one of which was rooted in the original advertising scenario. Harper, James, and Gray analyzed privacy as entailing interests in (a) seclusion, (b) personal dignity and self-respect, (c) name and likeness, and (d) sentimental associations.<sup>5</sup> A different set of categories was sponsored by Prosser and the Restatement. As the Restatement puts it, privacy is invaded by (a) an unreasonable intrusion upon the plaintiff's seclusion, (b) the appropriation of the plaintiff's name or likeness, (c) unreasonably giving publicity to the plaintiff's private life, and by (d) publicizing the plaintiff in a false light.<sup>6</sup>

So expressed, the right of privacy leaves a good many problems in its wake. So far as privacy is said to be violated by publication or communication, the free speech considerations that limit liability for defamation may have similar application when the plaintiff switches to the privacy theory.<sup>7</sup> So far as privacy is violated by intrusion, the tort looks much like a specific form of infliction of emotional distress, but again without the stated limits of that tort. And so far as privacy rights turn on commercial use of the plaintiff's name or likeness in an advertisement or the like, the claim is often a commercial claim and dealt with as such.

### § 425. Appropriation of the Plaintiff's Personality

*Gist of the tort.* The early cases establishing privacy as a separate tort were based upon the defendant's use of the plaintiff's name or likeness in commercial advertising.<sup>1</sup> It later became apparent that appropriation of the plaintiff's identity for any purpose would be actionable, whether advertising was used or not.<sup>2</sup> Since the gist of the tort is the appropriation of the plaintiff's identity or reputation, or some substantial aspect of it, no element of falsity is required.

*Dignitary tort vs. property right.* The earliest plaintiffs were mostly private individuals, not public figures. The emphasis was personal and dignitary. The individual had liberty interests at stake; she could associate with others or not according to her personality and preferences; she might be humiliated if people thought she sold her picture for advertising. Later cases adapted this form of privacy invasion to the case of public figures who do not seek privacy but on the contrary seek out opportunities for public exposure and who wish to use their name, likeness, voice or other aspects of "identity" as a property to be sold.<sup>3</sup> In

5. HARPER, JAMES & GRAY § 9.6.

6. Restatement §§ 652A-652E.

7. See § 427.

2. *Hinish v. Meier & Frank Co., Inc.*, 166 Or. 482, 113 P.2d 438 (1941) (signing plaintiff's name to a communication to the governor).

3. The Restatement treats all appropriation cases as "property" cases, although it recognizes that personal feelings and emotional distress of the plaintiff were part of

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1. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Kunz v. Allen*, 102 Kan. 883, 172 P. 532 (1918); *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938).

this form, the claim is sometimes strangely called a right of publicity.<sup>4</sup> The recent appropriation cases of note have been of this kind and are closer to the fields of intellectual property, unfair competition, and trademarks than to the purely dignitary torts.<sup>5</sup> Some courts have apparently rejected the earlier emphasis upon the plaintiff's personal rights and liberties. These refuse to allow a recovery for appropriation of the plaintiff's name or likeness unless the plaintiff was a famous person who could sell her identity for endorsements or the like.<sup>6</sup>

*Intent and appropriation.* The Restatement Second is not specific about the intent required to support the appropriation tort. It requires "appropriation," which perhaps implies that intent to utilize the plaintiff's identity is required.<sup>7</sup> But the Restatement also characterizes the plaintiff's right as one of property, perhaps as if to say that even an innocent taking of that property right in identity is actionable. Some authority might be read to support liability even if the defendant does not intend to appropriate the plaintiff's identity or reap the benefits of her fame.<sup>8</sup> However, the defendant does not appropriate the plaintiff's identity by incidental mention.<sup>9</sup> A public figure may be mentioned in a work of fiction if her identity is not used to tout a product or imply her sponsorship and if the work is clearly not a factual report about the public figure. So fictional work involving Notre Dame and its mention of its President does not offend the rights of either the school or the individual, and even more clearly so if the work is one of criticism or satire.<sup>10</sup>

*Newsworthiness.* In any event, reporting of matters that are newsworthy or of public concern is not an appropriation for which liability is imposed, even though the reported matter increases circulation or profits of the publisher.<sup>11</sup> In privacy law, newsworthiness is a broad concept that

the reason for recognizing the right in the first place. See Restatement § 652C, cmt. a.

4. See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (1998) (expansive definitions of right of publicity).

5. E.g., *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir.1988) (voice imitation); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir.1983) (phrase used to introduce famous television person). See § 460.

6. *Cox v. Hatch*, 761 P.2d 556 (Utah 1988) (Senator Hatch posed for photos with federal postal workers, then used pictures in his political campaign; workers had no claim as their likeness had no intrinsic value).

7. Restatement § 652C. See *Tropeano v. Atlantic Monthly Co.*, 379 Mass. 745, 400 N.E.2d 847 (1980) (contrasting incidental use which is not actionable with an effort "deliberately to exploit" the plaintiff's likeness for advertising).

8. See *Kerby v. Hal Roach Studios, Inc.*, 53 Cal.App.2d 207, 127 P.2d 577 (1942) (plaintiff's name was same as fictional movie character; the name was "signed" to printed and suggestive letters advertising the movie; no intent was required, but the case might be a false light case if that matters).

9. *Tropeano v. Atlantic Monthly Co.*, 379 Mass. 745, 400 N.E.2d 847 (1980) (photo of several unidentified people to illustrate [?] "sociological commentary" on the sexual revolution was not effort to sell goods but only an incidental use of the plaintiff's likeness).

10. *University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 A.D.2d 452, 256 N.Y.S.2d 301 (1965), *aff'd*, 15 N.Y.2d 940, 207 N.E.2d 508, 259 N.Y.S.2d 832.

11. *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 480 N.E.2d 349, 490 N.Y.S.2d 735 (1985).

includes much more than hot news,<sup>12</sup> so a magazine article discussing a public figure or a newsworthy or educational topic is free to use names and photographs as much as a newspaper.<sup>13</sup> In the same way, nothing limits the right to publish a biography of a public figure so long as it is not fictionalized or false.<sup>14</sup>

*First Amendment.* Although the First Amendment's protection of free speech requires proof of falsity as a prerequisite to recovery in defamation cases and in some other kinds of privacy cases,<sup>15</sup> no such requirement has been imposed in the appropriation cases. Perhaps that is partly because commercial speech is sometimes given less First Amendment protection and partly because the plaintiff's right in her own identity is treated as a species of property. It is especially easy to think of the plaintiff's right as one analogous to intellectual property when the plaintiff has created a public personality, style, or characteristic performance. In that kind of case, at least, the Supreme Court has held that states may impose liability when the defendant appropriates the plaintiff's entire public performance.<sup>16</sup> Although falsity is probably never required to establish a claim, it appears unlikely that an accurate report on a newsworthy matter or one of public concern could be actionable without a very substantial appropriation indeed.

## § 426. Intrusion upon Private Life

Intrusive invasion of privacy is a rule desert; such rules as there are turn out to be shimmering mirages. The Restatement's illusion of a rule is that an intentional intrusion upon the solitude or seclusion of another or upon her private affairs is subject to liability if the intrusion would be highly offensive to a reasonable person.<sup>1</sup> As this implies, the plaintiff must have a reasonable expectation of privacy in the place, the materials involved, or the subject matter.<sup>2</sup> Something less than an expectation of complete privacy may be sufficient, so long as the limited privacy

12. See *Shulman v. Group W Productions, Inc.*, 18 Cal.4th 200, 955 P.2d 469, 74 Cal.Rptr.2d 843 (1998).

13. E.g., *Rozhon v. Triangle Pubs.*, 230 F.2d 359 (7th Cir.1956).

14. See *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), on reargument after review in the Supreme Court, *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832, 30 A.L.R.3d 196 (1967) (biography protected but fictionalized biography of famous baseball pitcher actionable as use of personality for trade or business). There is a dispute whether right of privacy or publicity survives and passes to the estate of the deceased. Where it does not, even a fictionalized biography of a deceased person is permissible. *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal.3d 860,

603 P.2d 454, 160 Cal.Rptr. 352 (1979). By statute, California treats rights in personality, voice, likeness and so on as property rights that can be transferred at death or otherwise. See CAL. CIV. CODE § 990.

15. See §§ 427 & 428.

16. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (defendant broadcast video of the plaintiff's entire act as a human cannonball, state may impose liability).

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1. Restatement § 652B.

2. E.g., *Cheatham v. Paisano Pubs., Inc.*, 891 F.Supp. 381 (W.D.Ky.1995) (at a large public bikers' event, plaintiff wore clothing that partly revealed her "bottom;" a photograph made at the event was not an intrusive invasion of privacy).

expected excludes the kind of intrusion launched by the defendant.<sup>3</sup> Given a reasonable expectation of privacy, the intentional intrusion that defeats the expectation is itself tortious. If carried out under color of law, the intrusion may violate the standards of the Fourth Amendment or Due Process clause and may be actionable as a civil rights tort under § 1983.<sup>4</sup> Liability does not turn upon publication of any kind. For that reason, liability for intrusion alone would not ordinarily raise free speech considerations that may concern other forms of privacy invasion. In particular, an intrusion upon privacy is not justified by newsworthiness of material that may be gained.<sup>5</sup>

It is almost impossible to sketch the lineaments of the intrusion tort except perhaps to say that the defendant's conduct is often either harassing or has the purpose or potential for obtaining or perpetuating data about the plaintiff. Peeping and eavesdropping are prime examples.

Courts say that intrusive invasion of privacy is independent of any other tort such as trespass, but in fact a number of privacy cases could be resolved under better-defined rules of trespass, battery, Fourth Amendment violation, or the like. No doubt a defendant who enters the plaintiff's home on the basis of a "consent" procured by deceit should be liable on a close analogy to trespass.<sup>6</sup> In 1881, the Michigan Court held that a doctor was liable for bringing an untrained man into the room where the plaintiff was delivering a child.<sup>7</sup> The plaintiff's "consent" was not valid because she had been under the mistaken belief that the man was a doctor or medical student, so recovery could have been justified on a trespass theory as well as any other. A well-known Missouri case is only a little different because the plaintiff was in a hospital room rather than her home; journalists invaded the room over her express objection, photographed her in bed against her will, and published the photograph with a story about her disease. This was said to be an invasion of privacy, but its substantial core is only a technical variation on trespass in which the plaintiff lacked a present possessory interest in the hospital room.<sup>8</sup> Courts have also said that the right to reject medical treatment or

3. See *Sanders v. American Broadcasting Companies, Inc.*, 20 Cal.4th 907, 85 Cal.Rptr.2d 909, 978 P.2d 67 (1999).

4. *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (establishing the principle that officers violate the Fourth Amendment by inviting media representatives to enter the plaintiff's home while officers executed a warrant); see *Sepulveda v. Ramirez*, 967 F.2d 1413 (9th Cir.1992) (male officer watching female parolee urinate for drug test); *York v. Story*, 324 F.2d 450 (9th Cir.1963) (police required nude photos of assault victim); *James v. City of Douglas, Ga.*, 941 F.2d 1539 (11th Cir.1991) (video tape of sexual conduct of the plaintiff seized by police from another person was not logged in as evidence but kept in a drawer and viewed by various

persons). Distinguish false light privacy invasions that are not actionable as constitutional violations. See *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

5. See *Shulman v. Group W Prods., Inc.*, 18 Cal.4th 200, 955 P.2d 469, 74 Cal.Rptr.2d 843 (1998).

6. E.g., *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir.1971).

7. *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881).

8. *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942); cf. *Froelich v. Adair*, 213 Kan. 357, 516 P.2d 993 (1973) (defendant paid hospital orderly to obtain plaintiff's body tissue from a discarded bandage).

the like is grounded in a privacy right when they could as well have said that forced medical treatment is a battery.<sup>9</sup>

The Restatement's version of this tort requires intent, presumably intent to commit the act that the court considers an intrusion. However, it provides little guidance as to what counts as protected seclusion or private affairs or what conduct that is not already some other tort would offend a reasonable person. The cases clearly allow recovery for intrusive invasions where the defendant commits a virtual trespass, entering the plaintiff's possession or domain by electronic means such as tapping telephones or using other listening devices,<sup>10</sup> and statutes provide an independent ground for relief in the case of wiretapping.<sup>11</sup> But while many of the cases involve close analogies to a trespass, not all of them do. The California Supreme Court has held that if A covertly records his own conversation with B that is also heard by others, the recording itself can violate B's "limited" expectation of privacy and may be actionable. The theory is that although B can have no expectation of confidentiality, she has an expectation that it will not be recorded.<sup>12</sup>

Some forms of the intrusive privacy action appear to be especially like the claim for intentional infliction of emotional distress. In a Washington case,<sup>13</sup> individual county employees retained for their personal use autopsy photos of deceased persons. Relatives were allowed to claim an invasion of privacy although their claim for intentional infliction of emotional distress failed because they were not present when the defendants took or used the photos. Likewise, harassment—repeated and unwanted attentions—may be characterized as an intrusive invasion of privacy rather than as an intentional infliction of emotional distress. A bill collector hounds a debtor,<sup>14</sup> an employer repeatedly broaches sexual questions to an employee,<sup>15</sup> or a stalker repeatedly follows or threatens the object of his obsession;<sup>16</sup> all are subject to liability for invasion of privacy.

Employee rights of privacy vis-a-vis employers has developed into something of a speciality itself.<sup>17</sup> A federal statute now prohibits employers from administering, demanding, or even suggesting a polygraph test to employees and creates a federal cause of action against employers who

9. *In re Schuoler*, 106 Wash.2d 500, 723 P.2d 1103 (1986).

10. E.g., *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964); *Roach v. Harper*, 143 W.Va. 869, 105 S.E.2d 564 (1958).

11. 18 U.S.C. § 2520.

12. *Sanders v. American Broadcasting Companies, Inc.*, 20 Cal.4th 907, 85 Cal. Rptr.2d 909, 978 P.2d 67 (1999).

13. *Reid v. Pierce County*, 136 Wash.2d 195, 961 P.2d 333 (1998).

14. A federal statute now heavily regulates debt collection. 15 U.S.C.A. § 1692.

15. *Phillips v. Smalley Maintenance Servs.*, 435 So.2d 705 (Ala.1983); Cf. *McSurely v. McClellan*, 753 F.2d 88 (D.C.Cir.1985) (wife's pre-marriage relations with others revealed to husband).

16. *Rumbauskas v. Cantor*, 138 N.J. 173, 649 A.2d 853 (1994).

17. See MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* (1995 & 1997 Supp.); Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship* 57 OHIO ST. L.J. 671 (1996).

violate the statute.<sup>18</sup> Drug testing by employers as a condition of employment or by schools and private associations as a condition to participation in sports or other activities,<sup>19</sup> is a different matter. So far as the employer is a governmental entity, the Fourth Amendment forbids unreasonable searches (including drug testing). A search is reasonable when there is reasonable ground for suspicion of wrongdoing and when compelling governmental interests and special needs outweigh privacy concerns. Compelling interests and special needs have been found in a number of cases,<sup>20</sup> but not all.<sup>21</sup>

Private employers are generally constitutionally free to enforce rules requiring employee searches and to discharge employees who do not comply. Even so, states are free to hold that privacy rights trump the employer's right to discharge an employee. Some states have thus held that private employers may not discharge an employee for refusing to accept a suspicionless drug test unless safety issues made such testing reasonable.<sup>22</sup> Other courts and statutes, however, have left little or no room for claims based upon private employer drug testing.<sup>23</sup>

### § 427. Publicizing Private Life

Although truth was a complete defense in latter-day libel actions and under the constitutional decisions the plaintiff is often required to prove falsehood of defamatory statements, these restrictions may be ignored under the Restatement's private facts privacy claim.

*Elements.* As the Restatement states the rule, the "private facts" category of privacy invasion occurs when the defendant publicly discloses a private fact about the plaintiff when disclosure would be highly offensive to a reasonable person and is not of legitimate public concern.<sup>1</sup> The Restatement rule does not require falsity, so the defendant may be held liable for publicizing the truth. The action lies, however, only when there is a "publicity," meaning publication to the public at large or to a substantial group of people.<sup>2</sup> The facts published about the plaintiff must also be "private," which at least means that they must not be generally known.<sup>3</sup>

18. The Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001–2009 (1994).

19. As to testing as a condition of sports see *Hill v. National Collegiate Athletic Ass'n*, 7 Cal.4th 1, 865 P.2d 633, 26 Cal. Rptr.2d 834 (1994) (testing college athletes permissible).

20. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

21. *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).

22. *Twigg v. Hercules Corp.*, 185 W.Va. 155, 406 S.E.2d 52 (1990); see *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81, 609 A.2d 11 (1992); *Edward L. Raymond, Jr.*, Annotation, Liability for Discharge of

At-will Employee for Refusal to Submit to Drug Testing, 79 A.L.R.4th 105 (1991).

23. See ARIZ. REV. STAT. § 23-493.04; *Roe v. Quality Transp. Servs.*, 67 Wash.App. 604, 838 P.2d 128 (1992).

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1. Restatement § 652D. Perhaps "deeply shocking" rather than "highly offensive" would better express the requirement. See *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir.1993).

2. Restatement § 652D, cmt. a.

3. See RODNEY A. SMOLLA, LAW OF DEFAMATION § 10.04; cf. Barbara Moretti, Outing: Justifiable or Unwarranted Invasion of Pri-

Because this action always entails communication to others, it runs squarely into the issue of free speech and the First Amendment. The Restatement's version of the rule attempts to stay within the limits of the First Amendment by restricting liability to publications that are not newsworthy or of legitimate public concern, since truthful communications on matters of public concern and matters involving public figures appear to be constitutionally protected.<sup>4</sup> One thinker has gone so far as to say that the "shocking character of the disclosure" is a sufficiently good basis for liability, even in the light of First Amendment considerations.<sup>5</sup>

*Wrongfully obtained information.* Some cases that may be thought to support the Restatement's broad liability are actually much narrower. Those cases impose liability for revelation of private facts when the defendant obtained the private information by wrongful means such as trespass, deceit, betrayal, or breach of confidence.<sup>6</sup> Such cases do not seem to raise First Amendment or common law free speech issues because the information itself is obtained by wrongdoing. A number of cases imposing liability can be justified on the ground that the published information was itself obtained by wrongdoing. In *Dietemann v. Time, Inc.*,<sup>7</sup> journalists got into the plaintiff's den by deceit and secretly photographed and recorded events, then published. The tort was the deceitful intrusion, but the proximate damages included harm resulting from publication. In *Barber v. Time, Inc.*,<sup>8</sup> journalists forced their way into the plaintiff's hospital room over her protests and then by trickery photographed her and published the photograph. In the famous *Sidis* case,<sup>9</sup> a former child prodigy turned into an obsessive recluse who valued privacy above all was the subject of a *New Yorker* profile that subjected him to merciless treatment. The court went off on a newsworthiness issue, but if the interviewer had gained entry into Sidis' room and mind by deceit and breach of confidence, liability of the interviewer would have been entirely appropriate. Such cases need not turn on such subjective criteria as the shocking nature of the disclosure or the private quality of the facts. Liability would be appropriate because the informa-

vacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation, 11 CARDOZO ARTS & ENT L.J. 857 (1993) (arguing that although the fact of dating a person is not a private fact to heterosexual persons, it should be considered private as to gays and lesbians because it goes to core identity).

4. See § 420 (reflecting the rule that even defamatory publications are protected if true and related to public figures or matters of public concern).

5. Alfred Hill, Defamation and Privacy under the First Amendment, 76 COLUM. L. REV. 1205, 1258 (1976).

6. *Humphers v. First Interstate Bank of Oregon*, 298 Or. 706, 696 P.2d 527 (1985)

(doctor's breach of confidence in disclosing child's identity was actionable as breach of confidence, not as privacy invasion); *MacDonald v. Clinger*, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982) (similar); *Horne v. Patton*, 291 Ala. 701, 287 So.2d 824 (1973) (medical information in breach of confidence); *Doe v. Roe*, 93 Misc.2d 201, 400 N.Y.S.2d 668 (1977) (therapist's book made her patient recognizable).

7. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir.1971).

8. *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942).

9. *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806 (2d Cir.1940).



tion was gained by a wrong to the plaintiff.<sup>10</sup>

*Rightfully obtained information.* Other cases, however, have gone far, far beyond liability for publishing wrongfully obtained information. The most notable and extreme cases once held the defendant liable for publishing truthful information gleaned from records open to the public. In *Melvin v. Reid*,<sup>11</sup> the defendants made a movie in which true incidents of the plaintiff's life and her involvement in a murder trial were shown and her real name was used so that she could be identified. Although the court conceded that the defendants could use the incidents from the public record, it thought it was "unnecessary" and uncharitable to give the plaintiff's name. On this ground it held that the plaintiff stated a cause of action. The California Supreme Court reached a similar result when a magazine article truthfully identified the plaintiff as a person who committed a hijacking and shooting eleven years earlier. Like the *Melvin* court, the California Supreme Court made its editorial judgment a rule of law—the publication of the plaintiff's name, it thought, would serve little public purpose and emphasized that the plaintiff had rehabilitated himself.<sup>12</sup>

*Newsworthiness/public concern.* Cases like these raise serious constitutional questions first because they decide what the public has a right to know—in these particular cases, about crimes and criminals—and second because they penalize publication of the truth. Courts do, however, recognize that newsworthy events are matters of public concern and that the defendant may publicize those events even when they relate to private persons who are involuntarily involved in them. For example, a television broadcaster may provide a videotaped report of an auto accident showing the victims<sup>13</sup> or even a frantic woman covered only with a dishtowel escaping from her husband's attack.<sup>14</sup> The freedom to report truthfully on newsworthy events or matters of public concern does not depend upon the plaintiff's preexisting public figure status, and in that respect it differs from the false defamatory report. Newsworthiness, moreover, is a shorthand expression rather than a precise description; the term is defined broadly to include many matters of public interest

10. Distinguish *Pearson v. Dodd*, 410 F.2d 701 (D.C.Cir.1969) (publishers, who did not obtain information by trespass or betrayal and did not authorize such conduct, nevertheless published the information; publishers not liable). In *Shulman v. Group W Prods., Inc.*, 18 Cal.4th 200, 955 P.2d 469, 74 Cal.Rptr.2d 843 (1998), however, the court held that the jury could find an intrusive invasion of privacy but that the defendant would not be liable for publishing information obtained in the intrusion. Professor Hill suggested that if the intrusion turned up the plaintiff's current criminal activity the plaintiff might have no privacy interest the law would protect. Alfred Hill, *Defamation and Privacy under the First Amendment*, 76 COLUM. L. REV. 1205, 1282

(1976). Equally, some intrusive behavior—surveillance in public places, for example—that would invade privacy when conducted by a business rival may not invade privacy at all when conduct by an investigative reporter. See *Id.* at 1284–85.

11. *Melvin v. Reid*, 112 Cal.App. 285, 297 P. 91(1931).

12. *Briscoe v. Reader's Digest Ass'n, Inc.*, 4 Cal.3d 529, 483 P.2d 34, 93 Cal.Rptr. 866 (1971).

13. *Shulman v. Group W Prods., Inc.*, 18 Cal.4th 200, 955 P.2d 469, 74 Cal.Rptr.2d 843 (1998).

14. *Cape Publications, Inc. v. Bridges* 423 So.2d 426 (Fla.Dist.Ct.App.1982).

that are by no means news, including educational and entertaining materials, and the quotidian details of life involving births, deaths, personal heroism and tragedy.<sup>15</sup>

Broad as the newsworthiness defense may be, however, it does not necessarily provide clear rights for speakers and publishers or clear protections for privacy. Perhaps it is not even capable of definition.<sup>16</sup> For example, Oliver Sipple, otherwise a private citizen, obstructed an effort to shoot former President Gerald Ford and became famous for it. Two days later, a columnist publicly revealed that Sipple was a homosexual. Sipple suffered various humiliations, some at the hands of his own family, but his privacy claim was rejected, in part because his sexual preference was regarded as newsworthy. "Newsworthy" turned out to be a matter of the publisher's subjective motive. The court thought that the publisher's purpose to dispel false ideas about gays by using Sipple's life as an example showed that the publisher had no motive based upon sensational prying, and that, for the court, seemed to make the story newsworthy as a matter of law.<sup>17</sup> On the other hand, revelation that a student body president involved in a dispute with a college was a transsexual was thought not to be newsworthy as a matter of law,<sup>18</sup> and some argue that private sexual matters are seldom or never newsworthy.<sup>19</sup> Both speech and privacy represent fundamental values sometimes given constitutional protection. Whether newsworthiness or public concern is a concept capable of sufficient development to protect either remains to be seen.

*Public information.* The Supreme Court of the United States has considered the First Amendment's impact in a series of cases in which the media lawfully obtained information about the plaintiff from public records and then publicized it. In each of the cases so far, the media's right to publish the information was upheld. Some of the claims for the plaintiff are especially sympathetic. In two, the plaintiffs were rape victims. Revealing names of rape victims will often compound the grievous injury; and it may at times also endanger the victims further. In the first case, *Cox Broadcasting Corp. v. Cohn*,<sup>20</sup> the Court held that the state could not prohibit publication of a rape victim's name when the name was obtained by the media from an indictment available for inspection. Part of the reason was that the press served as a kind of

15. See the good list in RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 10.04 [2][b].

16. The term itself is not treated as a mere description of what the public wants to know, but a normative term standing for the court's willingness to protect the publication. See *Shulman v. Group W Prods., Inc.*, 18 Cal.4th 200, 955 P.2d 469, 74 Cal. Rptr.2d 843 (1998). Willingness to protect the publication does not, however, appear to turn upon any objectively determinable fact and often permits the court to wade around in the defendant's supposed motivations.

17. *Sipple v. Chronicle Publ'g Co.*, 154 Cal.App.3d 1040, 1049, 201 Cal.Rptr. 665, 670 (1984).

18. *Diaz v. Oakland Tribune, Inc.*, 139 Cal.App.3d 118, 188 Cal.Rptr. 762 (1983).

19. See John P. Elwood, Note, *Outing, Privacy, and the First Amendment* 102 *YALE L.J.* 747 (1992).

20. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).

agent for individual members of the public who would have a right to inspect public records for themselves. Public scrutiny was particularly important as a means of helping to guarantee fair trials.

The Court later went beyond trial records. It has said that media may publish the names of juveniles charged with a crime when the names are obtained by listening to police band radio and may publish rape victims' names obtained from police reports (as distinguished from trial records). When "a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."<sup>21</sup>

*Restricting access to public information.* These Supreme Court decisions recognize two potential conditions in which a truthful report of public records might be actionable. First, if there is a state need of the highest order, the state might forbid publication of records that are otherwise open to public access. Second, the state might restrict public access to records. The first instance is hard to imagine in the light of the second, and the second raises a new realm of concern. If government can be carried out secretly by invoking privacy rights of individuals, government will not be open or democratic. This point has led to concerns when courts or legislatures seal or expunge records, although their purpose is always said to be laudable.<sup>22</sup>

*Statutes.* State and federal statutes provide a mixed response to these concerns, some guaranteeing access to public records and meetings, others providing for various degrees of privacy for individuals named in governmental records. For instance, the federal Freedom of Information Act<sup>23</sup> provides a detailed scheme for obtaining information from the federal government, but creates a number of exemptions to protect privacy. The federal Privacy Act<sup>24</sup> on the other hand purports to require government agencies to protect privacy, but not where freedom of information requires disclosure. Other state and federal statutes address particular situations,<sup>25</sup> sometimes with a privacy orientation, sometimes with a disclosure orientation, but often with lapses and litigational possibilities.<sup>26</sup> In some cases the privacy orientation may be

21. *The Florida Star v. B.J.F.* 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (police report) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979) (police radio)).

22. See Franklin & Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 *HOFSTRA L. REV.* 733 (1981). In some cases even those litigating against a person may be denied access to relevant arrest records, see *State ex rel. Herget v. Circuit Court for Waukesha Co.*, 84 Wis.2d 435, 267 N.W.2d 309 (1978), but this may deny due process in some instances. Cf. *Davis v. Alaska*, 415

U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

23. 5 U.S.C.A. § 552.

24. 5 U.S.C.A. § 552a.

25. E.g., *The Family Educational Rights and Privacy Act of 1974*, 20 U.S.C.A. § 1232g (penalizing educational institutions receiving federal funds if they do not follow privacy rules of the statute, which generally protects student educational records from disclosure).

26. See *Bauer v. Kincaid*, 759 F.Supp. 575, 112 A.L.R. Fed. 671 (W.D. Mo. 1991).

deadly, as where statutes forbid disclosure of the plaintiff's AIDS condition to those who are at risk for exposure.<sup>27</sup>

*Rejecting the tort.* All in all, the privacy invasion tort most closely related to the Brandeis and Warren proposal has proved to be a serious problem. Neither adjudications nor statutory solutions have proved entirely satisfactory. Not surprisingly, commentators have argued against this form of the privacy right.<sup>28</sup> New York, with a statutory right of privacy limited to appropriation cases, rejects the private facts version of privacy invasion.<sup>29</sup> Oregon has held that publication about the plaintiff is not actionable "unless the manner or purpose of defendant's conduct is wrongful in some respect apart from causing the plaintiff's hurt feelings,"<sup>30</sup> and a plurality decision in Indiana agreed, noting that emotional injuries from disclosure were not worse than other emotional injuries, so that the plaintiff should recover, if at all, for intentional infliction of emotional distress.<sup>31</sup> North Carolina flatly rejected the private facts tort with the observation that at best it was constitutionally suspect.<sup>32</sup> Such decisions leave potential for liability when the defendant is a wrongdoer in some respect other than in publishing the truth, as where he breaches confidence or obtains information wrongfully, and where he intentionally inflicts severe emotional distress. Otherwise, the intrusion tort rather than the publicity tort may come closer to the core privacy value.

### § 428. False Light

*Elements.* The fourth privacy tort recognized by the Restatement and conventional wisdom is the false light tort. The tort is established only if the plaintiff proves that (a) the defendant publicized a matter about the plaintiff to a substantial group of persons or to the public; (b) the matter put the plaintiff in a false light; (c) the false light would be highly offensive to a reasonable person; and (d) the defendant knew of the falsity or acted in reckless disregard whether the matter was false or not.<sup>1</sup>

*False light and defamation.* The tort theoretically goes beyond defamation because the objectionable false light is not necessarily a defamatory one, only false and offensive. For example, a false light claim was established when a newspaper feature article made false statements

27. See *Doe v. Marselle*, 236 Conn. 845, 675 A.2d 835 (1996) (approving potential liability under an AIDS-confidentiality statute for disclosure made to the discloser's own sons who were at risk from the plaintiff's AIDS).

28. Diane L. Zimmerman, *Requiem for a Heavyweight: a Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

29. *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 480 N.E.2d 349, 490 N.Y.S.2d 735 (1985).

30. *Anderson v. Fisher Broad. Companies, Inc.*, 300 Or. 452, 469, 712 P.2d 803, 814 (1986) (Linde, J.).

31. *Doe v. Methodist Hosp.*, 690 N.E.2d 681 (Ind.1997).

32. *Hall v. Post*, 323 N.C. 259, 372 S.E.2d 711 (N.C. 1988).

### § 428

1. Restatement § 652E.

about the plaintiff's poverty and her stoic attitude following the death of her husband in a disaster.<sup>2</sup> Likewise, a false light claim was made out when a television program, by splicing shots, falsely depicted the plaintiff as a hunter who shot wild geese on the ground rather than in flight.<sup>3</sup> Possibly, but not certainly, these are cases in which defamation could not be established.

On the other hand, many of the false light cases appear to be cases of defamation or infliction of emotional distress under another name. Where the defamation claim requires derogatory content that would lower the plaintiff in the esteem of others, the false light privacy claim requires that the content would be highly offensive to a reasonable person. If a reasonable person would find the publication highly offensive, it is quite likely that the content is also defamatory under contemporary definitions. Not surprisingly then, the Supreme Court, after holding that defamation under color of state law violated no constitutional rights, held that false light publicity violated none either.<sup>4</sup>

*False light as element of damage resulting from other torts.* Sometimes conduct that in fact puts the plaintiff in a false light is actionable for entirely different reasons, so that the false light is merely one element of damages resulting from some other tort. In a Minnesota case,<sup>5</sup> the plaintiff alleged that a photo-developer retained a copy of a photo showing the plaintiff and another person in a shower together, then circulated the photo to others. The plaintiff alleged that as a result, some people questioned her sexual orientation. The court concluded that no false light claim would be permitted but remanded for trial to determine the plaintiff's intrusion and appropriation claims. In an Oregon case, the defendant signed the plaintiff's name to a petition sent to the governor. The court held the claim actionable, but as fraud and an appropriation of the plaintiff's name, not as a false light tort.<sup>6</sup>

Perhaps most of the cases of false light are cases of defamatory communications, appropriation of name or likeness, intrusive invasion of privacy followed by publication of matters wrongfully gained in the intrusion, or some other tortious activity. In all of these cases the plaintiff would be entitled to recover for the harms done by placing her in a false light, even if there were no separate false light tort. Consequently, a serious question is raised whether the false light tort is a helpful addition to the armory or merely another piece of baggage that gets in the way. In addition, the false light claim always involves publication or publicity and hence is either entitled to some kind of constitutional and common law free speech protection or else is merely an evasion of those constitutional protections.

2. See *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed.2d 419 (1974) (in effect reinstating a jury verdict).

3. *Uhl v. Columbia Broad. Systems, Inc.*, 476 F.Supp. 1134 (W.D.Pa.1979).

4. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

5. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn.1998).

6. *Hinish v. Meier & Frank Co., Inc.*, 166 Or. 482; 113 P.2d 438 (1941).

*Rejecting the false light tort.* With these considerations in mind, the highest courts of at least two states have flatly rejected any false light tort.<sup>7</sup> Others doubted that the tort should be recognized and so far refused to do so<sup>8</sup> or suggested special impediments to it.<sup>9</sup> The Supreme Court of Arizona, on the other hand, has insisted that even when the plaintiffs allege that the publication accused them of incompetence in office, illegal activities, misuse of public funds, and police brutality, all clearly defamatory, the plaintiff could assert the false light tort and would not be limited to a defamation action.<sup>10</sup> One potential advantage in retaining the false light claim is that it can be and has been used to avoid some of the more arcane and complex rules of defamation.<sup>11</sup> That hardly seems to be a justification for the false light claim, however, when it would be more clear and more just to abolish the undesirable defamation rules.

*Constitutional constraints.* In any event, where the false light tort is recognized the Constitution imposes limits in the interest of free speech, just as it does in libel cases. Under the rule for defamation cases, the plaintiff who is a public official or public figure must prove knowing or reckless falsehood and do so by clear and convincing evidence.<sup>12</sup> A more lenient rule applies to libel cases brought by private figures; in that case, the plaintiff is required to show "some fault" such as negligence and can recover only actual damages.<sup>13</sup> The Supreme Court handed down its initial false light privacy decision before the more lenient rule for private plaintiffs had been announced and consequently required a knowing or reckless falsehood without regard to the plaintiff's status as a private figure.<sup>14</sup> Because of the parallel to libel cases, it may well be that a negligent falsehood would suffice in a false light claim by a private person,<sup>15</sup> provided that such a plaintiff could only recover actual dam-

7. *Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 312 S.E.2d 405 (1984); *Cain v. Hearst Corporation*, 878 S.W.2d 577, 579 (Tex.1994) (false light tort rejected because "it largely duplicates other rights of recovery," and because "it lacks many of the procedural limitations that accompany actions for defamation, thus unacceptably increasing the tension that already exists between free speech constitutional guarantees and tort law").

8. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn.1998); cf. *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475 (1986) (plaintiff could not evade defamation statute of limitation by casting claim as one for false light privacy). See Russell G. Donaldson, Annotation, False Light Invasion of Privacy—Cognizability and Elements, 57 A.L.R.4th 22 (1988).

9. See *Colbert v. World Pub. Co.*, 747 P.2d 286, 292 (Okla.1987) (linking the tort to intentional infliction of emotional distress and requiring a knowing or reckless falsehood).

10. *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781 (1989).

11. See, e.g., *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F.Supp. 1359, 1373 (N.D.Ill.1990) (Illinois' innocent construction rule and distinction between per se and per quod defamation avoided by false light privacy claim). But other courts have carried over the per quod rules of defamation to privacy claims as well. *Fellows v. National Enquirer, Inc.*, 42 Cal.3d 234, 721 P.2d 97, 228 Cal.Rptr. 215, 57 A.L.R.4th 223 (1986).

12. § 417.

13. § 417.

14. *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

15. Such a rule has been applied. See *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir.1984) (Texas law before Texas rejected false light claims altogether). To complete the parallel, the plaintiff would be limited to a recovery of actual damages in such a case.

ages.<sup>16</sup> The Supreme Court has implied that the question is open for consideration.<sup>17</sup> However, states may require the plaintiff to prove not merely negligence but a knowing or reckless falsehood even when a private person sues, and some, in line with the Restatement's rule, have done so.<sup>18</sup>

16. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir.1993).

17. *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed.2d 419 (1974).

18. See *Pfannenstiel v. Osborne Publ'g Co.*, 939 F.Supp. 1497 (D.Kan.1996) (pre-

dicting Kansas law to this effect and citing a number of cases); *Colbert v. World Publ'g Co.*, 747 P.2d 286 (Okla.1987); ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER AND RELATED PROBLEMS* § 10.3.6.2 (2d ed. 1994 & 1998 Supp.) (reviewing cases on all positions).

## CHAPTER 29

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### PRIVACY

#### § 424. Introducing Privacy Rights

**Page 1198**

**Add at end of Note 7:**

7. ... In addition to constitutional protections for free speech, the anti-SLAPP statutes, ostensibly protecting the right to petition government, may be invoked in privacy claims, as in, e.g., *Stern v. Doe*, 806 So.2d 98 (La. App. 2001).

#### § 425. Appropriation of the Plaintiff's Personality

**Page 1199**

**Add new text and footnote at end of carryover paragraph:**

In 2001, however, the Supreme Court of Colorado took care to recognize that while some cases of appropriation might involve rights of public figures, others would be harmful even to utterly private persons. The latter, the court said, could have a claim with damages for distress even if their name or identity had no commercial value.<sup>6.05</sup>

6.05. *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995 (Colo. 2001). If the defendant's publication were commercial, the court added, it might not have the constitutional protection afforded to other publications, for example, the freedom to publish newsworthy materials. "Commercial publication" and "right of publicity" are not necessarily legally identical categories, but as a matter of fact use of celebrity names seems likely to involve commercial speech unless newsworthiness itself makes the speech noncommercial.

**Page 1200**

**Add new text and footnote at end of last paragraph in section:**

Presumably, noncommercial speech would receive full protection from privacy law and the constitution, so that, for example, truthful publications of public concern could not by themselves count as an invasion of privacy.<sup>16.05</sup>

16.05. See *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995 (Colo. 2001).



## § 426. Intrusion upon Private Life

Page 1200

**Add at end of Note 2:**

2. ... It is said that the plaintiff must have an actual, subjective expectation of privacy as well, but this is shown by objective facts. See *Medical Lab. Management*

*Consultants v. American Broadcasting Companies, Inc.*, 306 F.3d 806 (9th Cir. 2002).

**Add new text and footnotes immediately following footnote 2 in text:**

Except as her conduct or consent might show otherwise, the plaintiff has expectations of privacy in her home and in even public places that provide privacy protection like dressing rooms. An employee might even have some limited expectation of privacy in the workplace, but here perhaps only with respect to personal as opposed to business information.<sup>2.03</sup> On the public street, the plaintiff might have an expectation of privacy as to a whispered conversation with a companion, but has no reasonable expectation of privacy as to her person.<sup>2.04</sup> The plaintiff might also have an expectation of privacy in certain data, such as her social security number, even though that data is often illicitly obtained,<sup>2.05</sup> but to investigate the plaintiff by seeking public records or information already known to individuals may not be in itself an intrusive invasion.<sup>2.10</sup> Nor is it an invasion of privacy to read the plaintiff's private computer files if the plaintiff has no expectation of privacy in those files, as might be the case if, by custom in the business or by his own consent, he expects the employer defendant to monitor his computer.<sup>2.15</sup>

**2.03.** See *Medical Lab. Management Consultants v. American Broadcasting Companies, Inc.*, 306 F.3d 806 (9th Cir. 2002).

**2.04.** E.g., *Johnson v. Stewart*, 854 So.2d 544 (Ala. 2002) (surveillance of plaintiff in public places not actionable); *Stern v. Doe*, 806 So.2d 98 (La. App. 2001) (young man arrested for truancy, pockets emptied while television camera rolled, no expectation of privacy); cf. *Hornberger v. American Broadcasting Cos., Inc.*, 351 N.J.Super. 577, 799 A.2d 566 (2002) (police officers' conversation while searching car after removing occupants, no expectation of privacy even though they had expectation that conversa-

tion would not be recorded, dismissing privacy claim).

**2.05.** See *Remsburg v. Docusearch, Inc.*, 149 N.H. 148, 816 A.2d 1001 (2003) (firm doing computer information searches found social security number for person as requested by client, there is expectation of privacy in light of legal and contractual constraints on releasing the SSN).

**2.10.** *Myrick v. Barron*, 820 So.2d 81 (Ala. 2001).

**2.15.** *TBG Ins. Servs. Corp. v. Superior Court*, 96 Cal.App.4th 443, 117 Cal.Rptr.2d 155 (2002).

**Substitute decision on appeal for cases cited in Note 3:**

3. *Sanders v. American Broadcasting Companies, Inc.*, 20 Cal.4th 907, 85 Cal. Rptr.2d 909, 978 P.2d 67 (1999). The limited expectation in *Sanders* was an expectation that, although personal matters were freely revealed in conversation, the plaintiff could have reasonably "expected" enough privacy that his remarks would not be recorded. In a similar situation in *Medical Lab. Management Consultants v. American*

*Broadcasting Companies, Inc.*, 306 F.3d 806 (9th Cir. 2002), the court concluded that the plaintiff had no limited expectation of privacy that would bar recording. That expectation would not be reasonable because Arizona law governing that diversity case was construed to permit secret recordings by persons present at the conversation as distinct from interceptions.

**Page 1201****Add at end of Note 4:**

4. . . . The Supreme Court has also held that violation of the federal Family Educational Rights and Privacy Act (setting privacy standards concerning student records

for institutions receiving federal funds), creates no enforceable right under § 1983. *Gonzaga University v. Doe*, 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002).

**Revise first full sentence in carryover paragraph to read as follows:**

Given a reasonable expectation of privacy, the intentional and highly offensive intrusion that defeats the expectation is itself tortious.

**Add at end of Note 5:**

5. . . . cf. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (trespassing journalists liable for trespass but not for damages arising from publication). However, the California Supreme Court has suggested that an intrusion for

the purpose of gathering news for the media might not qualify as “highly offensive” in some circumstances. *Sanders v. American Broadcasting Companies, Inc.*, 20 Cal.4th 907, 919, 85 Cal.Rptr.2d 909, 978 P.2d 67 (1999).

**Add in Note 8 preceding Froelich citation:**

8. . . . *Sanchez-Scott v. Alza Pharmaceuticals*, 86 Cal.App.4th 365, 103 Cal.Rptr.2d 410 (2001) (drug salesman with physician during plaintiff’s breast examina-

tion without revealing his identity as a salesman, trial court erred in dismissing complaint). . . .

**Page 1202****Add text and notes following Note 10 in first full paragraph as follows:**

. . . . or by secretly videotaping a woman changing clothes in a dressing room where privacy is reasonably expected;<sup>10.05</sup> and statutes provide an independent ground for relief in the case of wiretapping<sup>11</sup> or intentional interception of cell phone calls.<sup>11.05</sup>

**10.05.** See *American Guarantee & Liability Ins. Co. v. 1906 Company*, 273 F.3d 605 (5th Cir. 2001).

Such vicarious consent would protect the parent from a civil suit by the other party.

**11.** . . . State statutes may also create a civil action under similar conditions. See *Flanagan v. Flanagan*, 27 Cal.4th 766, 41 P.3d 575, 117 Cal.Rptr.2d 574 (2002); *Kroh v. Kroh*, 152 N.C.App. 347, 567 S.E.2d 760 (2002). In *Kroh*, the court held that the statute only included aural recordings, not soundless videotape. Consent of a “party” to a recorded conversation is a defense. The *Kroh* court also held where children were parties to the recorded conversation, the parent who recorded a conversation they had with the plaintiff, could “vicariously consent” on behalf of her children, provided she had a good faith, objectively reasonable ground for believing that in so doing she was acting in the children’s best interests.

**11.05.** See *Flanagan v. Flanagan*, 27 Cal.4th 766, 41 P.3d 575, 117 Cal.Rptr.2d 574 (2002) (cell phone calls covered by state statute; expectation of privacy or confidentiality arises without proof that victim also reasonably expected that contents of call would not be later divulged).

**12.** . . . but cf. *Hornberger v. American Broadcasting Cos., Inc.*, 351 N.J.Super. 577, 799 A.2d 566 (2002) (reasonable expectation of privacy, not reasonable expectation that conversation won’t be recorded); cf. *Flanagan v. Flanagan*, 27 Cal.4th 766, 41 P.3d 575, 117 Cal.Rptr.2d 574 (2002) (expectation of privacy or confidentiality arises without proof that victim also reasonably expected that contents of call would not be later divulged).

**Add new text and footnote in last sentence of second full paragraph following n. 16 as follows:**

... telemarketers repeatedly call the homes of victims;<sup>16.05</sup> . . . .

**16.05.** *Irvine v. Akron Beacon Journal*, 147 Ohio App.3d 428, 770 N.E.2d 1105 (2002), appeal denied, 96 Ohio St.3d 1491, 774 N.E.2d 765 (2002); see *Charvat v. Dispatch Consumer Servs., Inc.*, 95 Ohio St.3d 505, 769 N.E.2d 829 (2002) (under federal statute, consumer placing name on do not call list terminates caller's former privilege derived from established business relationship). The federal statute, called the Tele-

phone Consumer Protection Act or TCPA, 47 USCA § 227 gains what strength it has from FCC rules based on it. See 47 C.F.R. § 64.1200. In the courts of appeal, it has been upheld against challenges on free speech grounds. See *Missouri v. American Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003). State statutes may also create some limited privacy rights against telemarketers.

## § 427. Publicizing Private Life

### Page 1203

**Add new footnote in first sentence of second paragraph as follows:**

.... when the defendant publicly discloses a private fact about the plaintiff<sup>0.05</sup>

**0.05.** Where A and B are related, disclosure of facts about one might conceivably invade privacy of the other by indirection, but if such claims are to be entertained, caution is required. In *Livsey v. Salt Lake County*, 275 F.3d 952 (10th Cir. 2001), the court rejected a wife's claim of privacy invasion based upon a public statement her husband had died as a result of an autoerotic

adventure. The statement "revealed no information about Norma Livsey or her marital relationship as such, only an opportunity for some prurient readers to speculate about that relationship." But cf. *Reid v. Pierce County*, 136 Wash.2d 195, 961 P.2d 333 (1998) (no public revelation but family had privacy interest in autopsy photos).

### Page 1204

**Add new text and footnote at end of first full paragraph:**

In addition, disclosure of private names and addresses of abortion providers in a way that constitutes a threat to their life may be actionable under a federal statute and may pass constitutional muster on the ground that threats are not protected speech.<sup>5.05</sup>

**5.05.** *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition*

*of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

**Add at end of Note 6:**

**6.** But cf. *Lightman v. Flaum*, 97 N.Y.2d 128, 736 N.Y.S.2d 300, 761 N.E.2d 1027 (2001) (rabbis' disclosure to husband of statements made by wife were not actionable under statute conferring evidentiary

privilege not to disclose, and not actionable as breach of fiduciary confidence where the existence of that duty would turn on interpretation of religious doctrine).

**Add new footnote in third sentence of second paragraph as follows:**

Such cases do not seem to raise First Amendment or common law free speech issues because the information itself is obtained by wrongdoing.<sup>6.05</sup>

**6.05.** However, the fact that information was wrongfully obtained does not auto-

matically lead to liability where the defendant's wrongdoing is deemed collateral.

*Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir. 1995). In such a case, some authority has even invoked the First Amendment to protect against liability for damages resulting from publication. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (journalists obtained jobs on false pretenses

in order to expose unwholesome food handling; liability for trespass and breach of fiducial duty, but liability could not include damages resulting from publication). As to liability for publishing information wrongfully obtained by another where the information is of public concern, see *Bartnicki v. Vopper*, below note 10.05.

### Page 1205

#### Add new text and footnote at end of carryover paragraph:

However, when the information is obtained illegally by a third person, then published by the defendant who knows of the illegal act but who is in no way responsible for it, the defendant is constitutionally protected from liability, provided the information is of public concern.<sup>10.05</sup>

**10.05.** *Bartnicki v. Vopper*, 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001).

#### Add new text and footnote at end of first full paragraph:

Even a publication that associates photographs of unnamed little league members with victims of a coach's molestation, may be actionable under California law as a wrongful revelation of a private fact.<sup>12.05</sup>

**12.05.** *M.G. v. Time Warner, Inc.*, 89 Cal.App.4th 623, 107 Cal.Rptr.2d 504 (2001).

### Page 1206

#### Add at end of Note 15:

**15.** . . . cf. *Riley v. Harr*, 292 F.3d 282 (1st Cir. 2002) (private fact that was seemingly not in itself newsworthy was nonetheless

less protected because it was substantially relevant to the matters of public concern reported).

#### Add at end of Note 16:

**16.** . . . The Restatement specifically grounds public interest or newsworthiness in current mores or conventions. See Restatement Second § 652D, cmt. h. Such a

test, if applied to publications of public concern, would seem to fall far short of the constitutional requirements of free speech.

#### Add at end of Note 20:

**20.** . . . *Cox* was applied in *Uranga v. Federated Pubs., Inc.*, 138 Idaho 550, 67 P.3d 29 (2003) to protect publication of a

statement that had been inserted in a court file by an unknown person forty years earlier.

### Page 1207

#### Add at end of Note 21:

**21.** . . . See also *Uranga v. Federated Pubs., Inc.*, 138 Idaho 550, 67 P.3d 29 (2003) (40-year-old unsworn statement in-

serted in court file by unknown person and not part of any pleading was protected).