Defamation and Privacy Issues for Photographers

What is 'defamation'?

Defamation, sometimes called "defamation of character", is spoken or written words that falsely and negatively reflect on a living person's reputation.

If a person or the news media says or writes something about you that is understood to lower your reputation, or that keeps people from associating with you, defamation has occurred. Slander and libel are two forms of defamation.

What is defamation?
Generally, defamation is a false and unprivileged statement of fact that is harmful to someone's reputation, and published "with fault," meaning as a result of negligence or malice. State laws often define defamation in specific ways. Libel is a written defamation; slander is a spoken defamation.
What are the elements of a defamation claim?
The elements that must be proved to establish defamation are:

1. a publication to one other than the person defamed;
2. a false statement of fact;
3. that is understood as

    a. being of and concerning the plaintiff; and
    b. tending to harm the reputation of plaintiff.

4. If the plaintiff is a public figure, he or she must also prove actual malice.

Is truth a defense to defamation claims?
Yes. Truth is an absolute defense to a defamation claim. But keep in mind that the truth may be difficult and expensive to prove.
Can my opinion be defamatory?
No — but merely labeling a statement as your "opinion" does not make it so. Courts look at whether a reasonable reader or listener could understand the statement as asserting a statement of verifiable fact. (A verifiable fact is one capable of being proven true or false.) This is determined in light of the context of the statement. A few courts have said that statements made in the context of an Internet bulletin board or chat room are highly likely to be opinions or hyperbole, but they do look at the remark in context to see if it's likely to be seen as a true, even if controversial, opinion ("I really hate George Lucas' new movie") rather than an assertion of fact dressed up as an opinion ("It's my opinion that Trinity is the hacker who broke into the IRS database").

What is a statement of verifiable fact?
A statement of verifiable fact is a statement that conveys a provably false factual assertion, such as someone has committed murder or has cheated on his spouse. To illustrate this point, consider the following excerpt from a court (Vogel v. Felice) considering the alleged defamatory statement that plaintiffs were the top-ranking 'Dumb Asses' on defendant's list of "Top Ten Dumb Asses":

A statement that the plaintiff is a "Dumb Ass," even first among "Dumb Asses," communicates no factual proposition susceptible of proof or refutation. It is true that "dumb" by itself can convey the relatively concrete meaning "lacking in intelligence." Even so, depending on context, it may convey a lack less of objectively assayable mental function than of such imponderable and debatable virtues as judgment or wisdom. Here defendant did not use "dumb" in isolation, but as part of the idiomatic phrase, "dumb ass." When applied to a whole human being, the term "ass" is a general expression of contempt essentially devoid of factual content. Adding the word "dumb" merely converts "contemptible person" to "contemptible fool." Plaintiffs were justifiably insulted by this epithet, but they failed entirely to show how it could be found to convey a provable factual proposition. ... If the meaning conveyed cannot by its nature be proved false, it cannot support a libel claim.

This California case also rejected a claim that the defendant linked the plaintiffs' names to certain web addresses with objectionable addresses (i.e. www.satan.com), noting "merely linking a plaintiff's name to the word "satan" conveys nothing more than the author's opinion that there is something devilish or evil about the plaintiff."
Is there a difference between reporting on public and private figures?
Yes. A private figure claiming defamation — your neighbor, your roommate, the guy who walks his dog by your favorite coffee shop — only has to prove you acted negligently, which is to say that a "reasonable person" would not have published the defamatory statement.

A public figure must show "actual malice" — that you published with either knowledge of falsity or in reckless disregard for the truth. This is a difficult standard for a plaintiff to meet.
Who is a public figure?
A public figure is someone who has actively sought, in a given matter of public interest, to influence the resolution of the matter. In addition to the obvious public figures — a government employee, a senator, a presidential candidate — someone may be a limited-purpose public figure. A limited-purpose public figure is one who (a) voluntarily participates in a discussion about a public controversy, and (b) has access to the media to get his or her own view across. One can also be an involuntary limited-purpose public figure — for example, an air traffic controller on duty at time of fatal crash was held to be an involuntary, limited-purpose public figure, due to his role in a major public occurrence.

Examples of public figures:

- A former city attorney and an attorney for a corporation organized to recall members of city counsel
- A psychologist who conducted "nude marathon" group therapy
- A land developer seeking public approval for housing near a toxic chemical plant
- Members of an activist group who spoke with reporters at public events

Corporations are not always public figures. They are judged by the same standards as individuals.

What are the rules about reporting on a public proceeding?

In some states, there are legal privileges protecting fair comments about public proceedings. For example, in California you have a right to make "a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued." This provision has been applied to posting on an online message board, Colt v. Freedom Communications, Inc., and would likely also be applied to blogs. The California privilege also extends to fair and true reports of public meetings, if the publication of the matter complained of was for the public benefit.

What is a "fair and true report"?

A report is "fair and true" if it captures the substance, gist, or sting of the proceeding. The report need not track verbatim the underlying proceeding, but should not deviate so far as to produce a different effect on the reader.

What if I want to report on a public controversy?

Many jurisdictions recognize a "neutral reportage" privilege, which protects "accurate and disinterested reporting" about potentially libelous accusations arising in public controversies. As one court put it, "The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them."

If I write something defamatory, will a retraction help?

Some jurisdictions have retraction statutes that provide protection from defamation lawsuits if the publisher retracts the allegedly defamatory statement. For example, in California, a plaintiff who fails to demand a retraction of a statement made in a newspaper or radio or television broadcast, or who demands and receives a retraction, is limited to getting "special damages" — the specific monetary losses caused by the libelous speech. While few courts have addressed retraction statutes with regard to online publications, a Georgia court denied punitive damages based on the plaintiff's failure to request a retraction for something posted on an Internet bulletin board. (See Mathis v. Cannon)

If you get a reasonable retraction request, it may help you to comply. The retraction must be "substantially as conspicuous" as the original alleged defamation.

What if I change the person's name?

To state a defamation claim, the person claiming defamation need not be mentioned by name — the plaintiff only needs to be reasonably identifiable. So if you defame the "government executive who makes his home at 1600 Pennsylvania Avenue," it is still reasonably identifiable as the president.

Do blogs have the same constitutional protections as mainstream media?
Yes. The US Supreme Court has said that "in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals and organizations engaged in the same activities."
What if I republish another person's statement? (i.e. someone comments on your posts)
Generally, anyone who repeats someone else's statements is just as responsible for their defamatory content as the original speaker — if they knew, or had reason to know, of the defamation. Recognizing the difficulty this would pose in the online world, Congress enacted Section 230 of the Communications Decency Act, which provides a strong protection against liability for Internet "intermediaries" who provide or republish speech by others. See the Section 230 FAQ for more.

But Section 230 is not a panacea. While the vast weight of authority has held that Section 230 precludes liability for an intermediary's distribution of defamation, one California court has held that the federal law does not apply to an online distributor's liability in a defamation case. The case, Barrett v. Rosenthal, is under appeal to the California Supreme Court (EFF filed an amicus brief in this case).
Can I get insurance to cover defamation claims?
Yes. Many insurance companies are now offering media liability insurance policies designed to cover online libel claims. However, the costs could be steep for small blogs — The minimum annual premium is generally $2,500 for a $1 million limit, with a minimum deductible of $5,000. In addition, the insurer will conduct a review of the publisher, and may insist upon certain standards and qualifications (i.e. procedures to screen inflammatory/offensive content, procedures to "take down" content after complaint). The Online Journalism Review has an extensive guide to libel insurance for online publishers.
Will my homeowner's or renter's insurance policy cover libel lawsuits?
Maybe. Eugene Volokh's the Volokh Conspiracy notes that homeowner's insurance policies, and possibly also some renter's or umbrella insurance policies, generally cover libel lawsuits, though they usually exclude punitive damages and liability related to "business pursuits." (This would generally exclude blogs with any advertising). You should read your insurance policy carefully to see what coverage it may provide.
What's the statute of limitation on libel?
Most states have a statute of limitations on libel claims, after which point the plaintiff cannot sue over the statement. For example, in California, the one-year statute of limitations starts when the statement is first published to the public. In certain circumstances, such as when the defendant cannot be identified, a plaintiff can have more time to file a claim. Most courts have rejected claims that publishing online amounts to "continuous" publication, and start the statute of limitations ticking when the claimed defamation was first published.
What are some examples of libelous and non-libelous statements?
The following are a couple of examples from California cases; note the law may vary from state to state. Libelous (when false):

- Charging someone with being a communist (in 1959)

- Calling an attorney a "crook"
- Describing a woman as a call girl
- Accusing a minister of unethical conduct
- Accusing a father of violating the confidence of son

Not-libelous:

- Calling a political foe a "thief" and "liar" in chance encounter (because hyperbole in context)
- Calling a TV show participant a "local loser," "chicken butt" and "big skank"
- Calling someone a "bitch" or a "son of a bitch"
- Changing product code name from "Carl Sagan" to "Butt Head Astronomer"

Since libel is considered in context, do not take these examples to be a hard and fast rule about particular phrases. Generally, the non-libelous examples are hyperbole or opinion, while the libelous statements are stating a defamatory fact.

How do courts look at the context of a statement?

For a blog, a court would likely start with the general tenor, setting, and format of the blog, as well as the context of the links through which the user accessed the particular entry. Next the court would look at the specific context and content of the blog entry, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the blog's audience.

Context is critical. For example, it was not libel for ESPN to caption a photo "Evel Knievel proves you're never too old to be a pimp," since it was (in context) "not intended as a criminal accusation, nor was it reasonably susceptible to such a literal interpretation. Ironically, it was most likely intended as a compliment." However, it would be defamatory to falsely assert "our dad's a pimp" or to accuse your dad of "dabbling in the pimptorial arts." (Real case, but the defendant sons succeeded in a truth defense).

What is "Libel Per Se"?

When libel is clear on its face, without the need for any explanatory matter, it is called libel per se. The following are often found to be libelous per se:

A statement that falsely:

- Charges any person with crime, or with having been indicted, convicted, or punished for crime;
- Imputes in him the present existence of an infectious, contagious, or loathsome disease;
- Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects that the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
- Imputes to him impotence or a want of chastity.

Of course, context can still matter. If you respond to a post you don't like by beginning "Jane, you ignorant slut," it may imply a want of chastity on Jane's part. But you have a good chance of convincing a court this was mere hyperbole and pop cultural reference, not a false statement of fact.

What is a "false light" claim?

Some states allow people to sue for damages that arise when others place them in a false light. Information presented in a "false light" is portrayed as factual, but creates a false impression about the plaintiff (i.e., a photograph of plaintiffs in an article about sexual abuse, because it creates the impression that the depicted persons are victims of sexual abuse). False light claims are subject to the constitutional protections discussed above.

What is trade libel?

Trade libel is defamation against the goods or services of a company or business. For example, saying that you found a severed finger in you're a particular company's chili (if it isn't true).

Invasion of Privacy

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9 Keys to Avoiding Invasion of Privacy Suits

The best hedge against invasion of privacy suits is knowledge of the law in the jurisdiction in which the photograph or videotape is shot and published or broadcast. However, the line between journalism that is protected by the First Amendment and state law, and journalism that creates liability for invasion of privacy, is rarely clear.

Before taking or publishing a questionable picture, a photojournalist might want to consider several factors:

- Generally, what can be seen from public view can be photographed without legal repercussions. Photographs taken in private places require consent.
- Even if people are photographed in public, beware of the context in which the picture is placed (such as an innocuous photo of recognizable teen-agers in a story about the rise of teen violence). Use caution when utilizing file footage or photographs to illustrate negative stories. Special effects can be used to render the subjects unidentifiable.
- If consent is required, it must be obtained from someone who can validly give it. For example, permission from a child or mentally handicapped person may not be valid, and a tenant may not be authorized to permit photographs of parts of the building not rented by the tenant.
- Consent to enter a home may not be consent to photograph it. Consent exceeded can be the same as no consent at all.

- Although oral consent may protect the press from liability for invasion of privacy, written consent is more likely to foreclose the possibility of a lawsuit. However, a subjects subsequent withdrawal of consent does not bar the publication of the photograph. It simply means that the journalist may not assert consent as a defense if the subject later files suit. In some states the commercial use of a photograph requires prior written consent.
- Permission from a police department to accompany officers who legally enter private property may not immunize journalists from invasion of privacy suits. In most states, authorities may deny photographers access to crime scenes and disaster areas.
- Public officials and public figures, and people who become involved in events of public interest, have less right to privacy than do private persons.
- In some states, using hidden cameras, or audiotaping people without their consent, may invite criminal or civil penalties.
- A photograph may intrude into a persons seclusion without being published. Intrusion can occur as soon as the image is taken.

Invasion of privacy

Invasion of privacy is a legal term essentially defined as a violation of the right to be left alone. The right to privacy is the right to control property against search and seizure, and to control information about oneself. However, public figures have less privacy, and this is an evolving area of law as it relates to the media.

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Development of the doctrine

The development of the doctrine regarding this tort was largely spurred by an 1890 Harvard Law Review article written by Samuel D. Warren and Louis D. Brandeis on *The Right of Privacy*. Modern tort law gives four categories of invasion of privacy:

1. intrusion of solitude.
2. public disclosure of private and embarrassing facts.
3. false light
4. appropriation of identity

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Intrusion of solitude

Intrusion of solitude occurs where one person exposes another to unwanted publicity. In a famous case from 1944, author Marjorie Kinnan Rawlings was sued by Zelma Cason, who was portrayed as a character in Rawlings' acclaimed novel, *Cross Creek*.[1] The Florida Supreme Court held that a cause of action for invasion of privacy was supported by the facts of the case, but in a later proceeding found that there were no actual damages.

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Public disclosure

Public disclosure of private facts arises where one person reveals information which, although truthful, is not of public concern, and which a reasonable person would be offended by the release of.

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False light

This tort encompasses the claim that publicity invades a person's privacy by a false statement or representation that places the person in a false light that would be highly offensive to a reasonable person. For example, posting a picture of a chaste woman on a website that features pictures of porn stars would give rise to a false light claim, even though no claim is made that the woman is, in fact, a porn star.

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Appropriation

Although this is a common-law tort, most states have enacted statutes that prohibit the use of a person’s name or image if used without consent for the commercial benefit of another person.

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Privacy and the Fourth Amendment

Invasion of privacy is a commonly used cause of action in a legal pleading. The Fourth Amendment to the Constitution of the United States ensures that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The amendment, however, only protects against

searches and seizures conducted by the government. Invasions of privacy by persons who are not state actors must be dealt with under private tort law.

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Invasion of Privacy and the Media: The Right "To Be Let Alone"

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I. Introduction.

One man's gossip may be another man's news, but distinguishing between the two is often the key in determining whether the press is guilty of "invasion of privacy."

Whether an article or broadcast is newsworthy, whether the information was gathered in an objectionable fashion, whether truthful information is nonetheless highly offensive -- all are considerations in weighing individuals' claims against the news media. Invasion of privacy is a tort, a civil wrong, which can lead to jury trials and potential claims for compensatory and punitive damages. It also places judges in the unfamiliar and uncomfortable role as "editors" of last resort.

The right of an individual to be free from invasion of privacy can be expressed in several different ways. Sometimes it is called the right "to be let alone." Cooley, Torts, 29 (2d ed. 1888). Often it is seen as a geographical area, "a kind of space that a man may carry with him into his bedroom or into the street." M. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 Law and Contemporary Problems, 272, 279-80 (1966).

Invasion of privacy is a relatively recent addition to American law. Rather than evolving from the English common law, as did libel, invasion of privacy can be traced directly to an influential article by Samuel D. Warren and Louis D. Brandeis, later to be a Supreme Court Justice [Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)]. They argued for the creation of a private remedy -- a lawsuit -- to vindicate privacy rights. Writing before the era of electronic eavesdropping, telephoto lenses, and other modern technology, Warren and Brandeis prophesied that "mechanical devices threaten to make good the prediction that `what is whispered in the closet shall be proclaimed from the housetops'." *Id*. Not surprisingly, American courts today do not look kindly upon the media in these cases. However, the media's exposure to liability can be minimized through a grounding in privacy law.

A two-step process determines whether the press is liable for invasion of a person's privacy:

- First, has the tort been committed -- that is, has the newsgathering or publishing process violated certain legal principles which protect the individual?
- Second, even if there is a technical invasion of privacy, is the press "privileged" under the First Amendment? Just as in libel cases, there may be a sort of "constitutional excuse" granting immunity for some articles or broadcasts which otherwise might lead to damage awards.

It is possible to define four different, though overlapping, forms of invasion of privacy:

1. intrusion upon a person's seclusion or solitude;

2. appropriation of a person's name or likeness;

3. public disclosures of embarrassing private facts; and

4. publicity which places a person in a false light.

There are few ironclad rules in the law, but it is still possible to guard against the risk of unnecessary litigation in each of the four privacy areas.

A. Intrusion Upon Seclusion.

1. *The Home* -- A person's home gets the highest protection from the courts. Entering a house or apartment without permission of the occupant or, in some circumstances, the police, can be an unlawful intrusion.

2. *Photographs and Tape Recording* -- Taking photographs of a person or his property in a private place may be an invasion of privacy. Tape recording a person without his consent may invite damage awards, and, in Florida, also constitutes a crime. Sec. 934.03(2)(d), Fla. Stat. (1995).

B. Appropriation.

1. *Advertising* -- The unauthorized use of a person's name or photograph in an advertisement is the surest way to invite trouble in this area. In Florida, a statute authorizes punitive damage awards for commercial misappropriation. Sec. 540.08, Fla. Stat. (1995).

2. *Property Rights* -- If someone is selling admission to a performance, it may be an invasion of privacy for the press to "give it away" with unauthorized broadcasts or photographs.

C. Private Facts.

1. *Personal Matters* -- Details about a private person's sexual relationships, the contents of personal letters, facts about an individual's hygiene, or other intensely personal matters are off limits to the news media unless events make those details "newsworthy."

2. *Newsworthiness* -- Even truthful accounts are actionable if they contain highly offensive details not of legitimate concern to the public.

D. False Light Publicity.

1. Fabrication -- Inventing quotes or fictionalizing actual events can lead to liability if a person is portrayed in a false light before the public.

2. Photographs out of Context -- Using file photos or film to illustrate a story can imply falsely that a person is involved in a scandalous event.

A more detailed look at invasion of privacy, including the constitutional defense, follows:

II. Categories of Privacy Violations.

A. Intrusion upon Seclusion.

Invasion of privacy by intrusion is defined as follows:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts, Section 652B (1977).

This section discusses invasion of privacy by intrusion, especially as it pertains to the broadcast media and news photographers, by raising certain questions that should be asked in analyzing potential liability for unreasonable intrusion. The section also suggests certain standards of conduct to be followed by reporters and photographers to avoid liability.

The "intrusion" variety of invasion of privacy is related to the common law tort of trespass. The gist of the wrongful act is a physical intrusion into a place where the reporter has no lawful right to be, i.e., peering into windows, tape recording conversations of others without consent, or reproducing private documents without consent. Sometimes the intrusion is not physical, but is accomplished by electronic devices or telephoto lenses. Generally, a reporter or photographer is acting lawfully when in a public area. Yet, this is subject to exceptions too, depending on the offensiveness of the intrusion. *See id.* for illustration. A reporter's liability for intrusion does not depend on the subsequent publication of the information gathered.

In order to determine whether particular conduct falls within this definition, it is useful to ask a number of questions:

1. Was the Document, Recording or Photograph Obtained Illegally Through Affirmative Conduct by the Reporter or Photographer?

Under the First Amendment, the media has the right to gather news from any source by lawful means. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978). The First Amendment does not protect those who commit torts and crimes in the name of newsgathering. In *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), claims of illegal or unethical entry were made against a magazine by a journeyman plumber engaged in the supposed practice of healing with clay, minerals, and herbs. Using the ruse of seeking the healer's services to gain entrance to his office within his home, two magazine reporters secretly photographed and recorded the healer's examination of one of them. In upholding a judgment for damages in favor of the healer, the Ninth Circuit affirmed the existence of a sphere of reasonable privacy expectations, stating that there is no First Amendment interest in protecting the news media from their own calculated misdeeds. Although the issue had not been decided squarely in California, the Ninth Circuit had "little difficulty in concluding that clandestine photography of the Plaintiff in his den and the recorda tion and transmission of his conversation without his consent resulting in his

emotional distress warrants recovery for invasion of privacy in California." Id. at 248. Two factors seemed to guide the federal appeals court in ruling that the reporters were guilty of an unlawful intrusion: (a) the activities all took place in Dietemann's home, an area traditionally deserving the greatest protection; and (b) the reporters gained entry to the home by subterfuge, i.e., posing as patients.

In a more recent case with similar facts, Prime Time Live investigated reports that an eye clinic was performing unnecessary procedures. *Desnick v. Capital Cities/ABC*, 851 F. Supp. 303 (N.D. Ill. 1994). The complaint alleged that the reporters promised not to engage in "surveillance ambush journalism," but the defendants hired "undercover" patients to visit the clinic with concealed audio and video recorders. The plaintiff sued for trespass, intrusion, fraud, breach of contract, and (in an unrelated matter) defamation. The court dismissed each of the invasion of privacy theories, leaving only the breach of contract (for breaking the no-ambush promise) and defamation claims.

In *Food Lion Inc. V. Capital Cities/ABC Inc*., 27 Med. L. Rptr. 2409 (4th Cir. 1999), the plaintiff attempted to disguise an invasion of privacy claim as state law fraud, duty of loyalty, and trespass claims. The U.S. Court of Appeals for the Fourth Circuit reversed the trial court judgment that ABC committed fraud and unfair trade practices and that misrepresentation of a resume alone is not grounds for a jury finding of trespass. However, the Court did affirm the jury finding that defendants trespassed against the plaintiff for newsgathering on the job, when the ABC employees were said to have been hired to preserve Food Lion's confidences. Finally, the court affirmed the trial court s refusal to allow Food Lion to recover damages that essentially flowed from a telecast whose truth was not challenged by Food Lion in the litigation.

> Ordinarily, reporters or photographers are liable for intrusion only through their own affirmative acts. Therefore, two well-known columnists who published details of documents that were removed improperly from a senator's office were held not liable to the senator for intrusion when they had no role in obtaining the documents. *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969). Similarly, in *Bilney v. The Evening Star*, 406 A.2d 652, 43 Md. App. 560 (1979), a newspaper was held free of liability for publishing the dismal academic records of six University of Maryland basketball players, where the reporters did not participate in illegally obtaining the players' transcripts. However, the court left unanswered the question whether two student reporters could be held liable for actually obtaining the transcripts for which they were paid $125 by the *Washington Star*. Media liability for publishing materials unlawfully obtained by others may be expanding, however. Recent cases have demonstrated a split among federal circuit courts of appeals on this issue. For example, in *Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999), an unknown person taped cell phone conversations between two union officials. The tapes were delivered to a union opponent, who made them available to the media. Excerpts from the tapes were then broadcast on local radio stations. The union officials sued the media defendants for violation of state and federal wiretap laws. The court held that the First Amendment rights of the defendants prohibited the damages provisions of the

wiretap statutes from being enforced against the press.

Conversely, in *Peavy v. WFAA-TV*, 221 F.3d 158 (5th Cir. 2000), neighbors of a school board official taped hundreds of his cordless telephone conversations and provided them to a WFAA reporter. The tapes were never aired, but an award-winning series of reports based in part on their contents was broadcast. The school board official, after being acquitted of bribery charges, sued the television station. Noting that the reporter had "participated" in intercepting the phone calls (he had, for example, told the couple who recorded the conversations not to edit them), the court held that WFAA and the reporter were potentially liable under the wiretap statute. The Supreme Court has agreed to review the issues raised by these cases and should issue a decision sometime in 2001.

In attempting to predict whether newsgathering efforts are likely to pass muster, it should be remembered that the majority of courts adhere to the view that the First Amendment does not confer a right of access to news sources not available to the public generally. See *Houchins*. A photographer with *WTMJ-TV* in Milwaukee found this out the hard way upon his refusal to leave a crime scene cordoned off to the public. The photographer's claim, following his arrest on disorderly conduct charges for his refusal to leave the scene, that the First Amendment gave him a right of access to the scene was unavailing. *Oak Creek v. Ah King*, 436 N.W.2d 295 (Wis. 1989).

Going even further than *Oak Creek*, the Second Circuit Court of Appeals, in dicta, censured both the government and media for their actions in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995). Treasury Agents agreed to be accompanied by a camera crew from CBS's "Street Stories" in the agents' execution of a search warrant. In fact, the agents asked the crew to film certain footage. The Second Circuit noted CBS' compliance with the requests and called the actions of both government and media "excessive." With the increased use of "ride along" investigations, this case points out the importance that the media maintain its independence from the government not only to minimize liability but also to safeguard its status as a neutral reporter.

2. Has the Newsgatherer Violated a "Sphere of Privacy" from Which the Plaintiff Reasonably Expected the Press To Be Excluded?

The federal court decisions in *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969) and *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) arguably have established a federal right of privacy paralleling state privacy torts but distinct from the federal constitutional privacy right emanating from the fundamental choice concept. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Under this theory, the newsgatherer is liable when he invades a "sphere of privacy" -- such as a person's home as in *Dietemann* -- which the person reasonably believes to be off limits to the news media.

The "sphere" is determined from the plaintiff's viewpoint. In *Dietemann*, the court found that the covert activity of the *Life* reporters in photographing and recording the plaintiff within the confines of his personal residence supported the jury's verdict against the magazine. Conversely, the Eighth Circuit has held that a reporter for a radio station who overheard a commotion when a municipal judge was arrested and jailed for DWI, and who thereafter recorded the commotion made by the judge in the jail, could not be held liable for intrusion. *Holman v. Central Ark*. *Broadcasting Co.*, 610 F.2d 542 (8th Cir. 1979). In granting summary judgment, the court found that the judge's boisterous complaints in the jail were not made with the expectation of privacy or confidentiality. Although the judge's lawyer requested that the reporter not record any statements made by the judge, the appellate court adopted the trial court's findings that the judge knew, as he yelled and cursed at the top of his voice, that the newsman had recording equipment.

In contrast, a federal prisoner sued NBC for invasion of privacy for filming him without his permission while he was alone in the prisoners' exercise cage, wearing only gym shorts. In *Huskey v. National Broadcasting Co.*, 632 F. Supp. 1282 (N.D. Ill. 1986), the prisoner alleged his expectation that the only persons able to see him would be those persons to whom he might be exposed as a necessary result of his incarceration. The prisoner purportedly told a prison guard that he did not want to be filmed and did not consent to being filmed. NBC countered by arguing that filming a person in a publicly visible area "cannot give rise to an intrusion claim." The district court disagreed and refused to dismiss the prisoner's lawsuit because the court was unable to find precedent for NBC's position that *no* area of a prison falls within a prisoner's protected privacy sphere and that its actions were not "highly offensive" as a matter of law. The court found those to be factual issues that could not be decided at the pleading stage of the case.

Another view on the privacy sphere of incarcerated individuals was provided in Jenkins v. Winchester Star, 8 Med. L. Rep. (BNA) 1403 (W.D. Va. 1981). The Winchester Star published a photograph of the plaintiff sleeping in the local jail without his knowledge or permission, but purportedly with the permission of the chief jailer. The plaintiff sought relief for violation of his federal constitutional right of privacy under 42 U.S.C. Sec. 1983. Although the court granted the defendant's motion for summary judgment, it stated that prison inmates retain a limited privacy right which is protected by the U.S. Constitution. The court found, however, that publication of the prisoner's picture was not violative of any federal constitutional right of privacy, although it "might" state a valid claim for libel and invasion of privacy in a state court suit. *Id*. at 1404. *Cf. Houchins v. KQED, Inc*., 438 U.S. 1, 5 (1978).

And in a decision that could curb newsgathering, law enforcement officials were found to violate a search victim s Fourth Amendment rights, as well as his or her privacy rights under 42 U.S.C. Sec. 1983 by inviting the media to "ride along" in conducting the search of a home. *Wilson v. Layne*, 526 U.S. 603 (1999). It is worth noting that a ride along journalist could be exposed to similar liability were a search victim to allege that the police and the journalist acted jointly or conspired in planning an illegal search.

3. Is the Conduct Plainly in the Public View, and the Area Generally Outside the Privacy Sphere?

In *Jacova v. Southern Radio & Television Co.*, 83 So. 2d 34 (Fla. 1955), plaintiff was an innocent customer filmed during a gambling raid on a cigar store. In plaintiff's right of privacy action, the court granted summary judgment to the television station, finding a qualified privilege to broadcast the name or photograph of a person who became an "actor" in a newsworthy event:

> Even though the plaintiff's role of "actor" in an event having news value was not of his own volition -- having been thrust upon him by the investigating officers by mistake -- the fact remains that he was in a public place and present at a scene where news was in the making.

Id. at 40. Similarly, in *Bisbee v. Conover*, 452 A.2d 689 (N.J. App. 1982), the court granted summary judgment in favor of a newspaper that printed an article regarding the sale of a local historic house accompanied by a photograph of the house from the street. The court found that the photograph was taken from a public thoroughfare and merely showed a view available to any bystander. See also *Wehling v. CBS*, 721 F.2d 506 (5th Cir. 1983) (television broadcast showing residence of plaintiff who allegedly defrauded federal government did not invade plaintiff's privacy because it "provided the public with nothing more than could have been seen from a public street").

A St. Petersburg television station was sued after it broadcast a videotape depicting the plaintiff being arrested while dressed in underwear and a T-shirt. The court in *Spradley v. Sutton*, 9 Med. L. Rep. (BNA) 1481 (Fla. 6th Cir. Ct. 1982), found that the embarrassment the plaintiff may have suffered as a result of the broadcast was inadequate to defeat the right of the press to cover the arrest, which was an event of legitimate public concern. Further, the court held that because plaintiff was visible to the public in his underwear when arrested, "[t]here could be no liability for giving further publicity to what [plaintiff] himself . . . left to public view." *Id*. at 1483.

The more difficult cases under the "plain view" doctrine involve situations that skirt the boundaries of the private facts privacy tort and the cause of action for intentional infliction of emotional distress. In *Cape Publications v. Bridges*, 423 So. 2d 426 (Fla. 5th DCA 1982), *rev. denied*, 431 So. 2d 988 (Fla.), *cert. denied*, 464 U.S. 893 (1983), plaintiff had been held hostage by her husband and had been forced to disrobe in an effort to prevent her escape. The plaintiff's husband shot himself and the frightened wife rushed from the building wearing only a dishtowel clutched against the front of her body. Emphasizing the newsworthiness of the event and stating that at some point the public interest in obtaining information predominates over an individual's right of privacy, the court reversed a jury verdict in favor of the plaintiff. Since the case turned on the legitimate public interest of the event, rather than on the fact that Mrs.

Bridges may have been outside the privacy sphere when the photo was taken, it probably fits more neatly into the "private facts" category of privacy litigation in which newsworthiness is the classic defense. In disposing of the *Bridges* case, the court declared:

> It is settled law in Florida that the right of privacy does not necessarily protect a person against the publication of his name or photograph in connection with the dissemination of legitimate news item or other matters of public interest . . .
>
> Although publication of the photograph, which won industry awards, could be considered by some to be in bad taste, the law in Florida seems settled that where one becomes an actor in an occurrence of public interest, it is not an invasion of her right to privacy to publish her photograph with an account of such occurrence.

Id. at 427.

Another case in point was decided by the California Supreme Court in June, 1998. A passenger injured in a motor vehicle accident was found to have no claim for invasion of privacy for television news footage of the passenger pinned in her vehicle at the accident scene. However, the court found that the passenger had a justifiable expectation of privacy inside the air-rescue helicopter that transported her to the hospital and that she had a viable invasion of privacy claim for the broadcast of footage taken in the helicopter. *Shulman v. Group W Prods.*, *Inc.*, 955 P. 2d 469, 74 Cal. Rptr. 2d 843, (Cal. 1998)

Strictly speaking, the newsworthiness of the information sought is not a defense in an intrusion case. For example, if there has been a highly offensive intrusion upon seclusion, the defendant is liable *even if the information gathered is newsworthy*. In close cases, however, the newsworthiness of the subject matter may lead judges to hold that no intrusion has been committed.

4. Is the Newsgatherer Guilty of Overzealous Surveillance or Shadowing -- Conduct That May Amount to an Exception to the Rule That Conduct Clearly Within the Public View Is Not Actionable?

In the famous *Galella v. Onassis* litigation -- "*Galella I*," 353 F. Supp. 196 (S.D.N.Y. 1972), *rev'd* in part, 487 F.2d 986 (2d Cir. 1973) and "*Galella II*," 533 F. Supp. 1076 (S.D.N.Y. 1982), a freelance photographer sued Jackie Onassis for false imprisonment. She, in turn, counterclaimed for intrusion. The photographer's motion to dismiss the counterclaim was denied on the basis that the photographer had hounded Mrs. Onassis relentlessly by photographing her at point-blank range on sidewalks, tennis courts, and riding trails and by hiding in cloakrooms and bribing employees of businesses patronized by Mrs. Onassis.

The plaintiff twice was found in contempt of a restraining order and a permanent injunction was issued prohibiting him from photographing Mrs. Onassis or the Kennedy children from less than 50 yards and

prohibiting him from approaching within 100 yards of their New York apartment. The court in "*Galella II*" noted that "systematic public surveillance" of another could be construed as a plan to intrude on another's privacy. Stating that crimes and torts committed in newsgathering are not protected by the First Amendment, the court found that the plaintiff's constant surveillance and intrusive presence were unwarranted and unreasonable when weighed against the de minimis public importance of the daily activities of Mrs. Onassis. "*Gallela II*," 533 F. Supp. at 1105 (quoting "*Galella I*," at 487 F. 2d at 995-96).

A reporter's trespassing upon private property, without more, will not trigger potential liability under the Onassis case. In its 1993 decision in *Howell v. New York Post Co.*, 612 N.E.2d 699 (.Y.), *aff'd in part*, 619 N.E.2d 650 (N.Y. 1993), the New York Court of Appeals held that a reporter's trespassing to photograph the plaintiff, who was outdoors, from a distance did not remotely approach the standard of *Onassis*-type liability. However, in April 1996, a federal trial judge in Pennsylvania applied Florida privacy law (because the underlying events occurred there) to *Onassis*-like facts and entered an injunction against two "Inside Edition" journalists. Citing the Florida Supreme Court's decision in *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944), the federal judge found that the defendants were probably liable on the plaintiff's intrusion claim -- justifying injunctive relief -- for hounding business-managing family members. See *Wolfson v. Lewis*, 924 F. Supp. 1413 (E.D. Pa. 1996).

5. Has the Defendant Violated Florida's "Interception" Statute Which Prohibits Eavesdropping, Taping, and Bugging Without Consent?

In *Shevin v. Sunbeam Television Corp.*, 351 So. 2d 723 (Fla. 1977), the Florida Supreme Court rejected a television station's claim that newsgathering should be accorded special First Amendment protection when the station challenged Sec. 934.03(d), Fla. Stat., which prohibits interception of certain communications. The statute provides criminal penalties for unlawful electronic eavesdropping, which includes the tape recording of telephone conversations without all speakers' consent and the surreptitious recording of face-to-face conversations. In upholding the constitutionality of the interception statute, the court stated that the "First Amendment is not a license to trespass or to intrude by electronic means into the sanctity of another's home or office." *Id*. at 727. Likewise, the fact that the person subjected to the intrusion reasonably is suspected of committing a crime is no justification for the intrusion. *Id*.

The *Shevin* court rejected the argument that the statute infringed First Amendment "newsgathering rights," stating that "[n]ews gathering is an integral part of news dissemination, but hidden mechanical contrivances are not indispensable tools of news gathering." *Id*.

In contrast to *Shevin, in Gardner v. The Bradenton Herald*, 413 So. 2d 10 (Fla. 1982), the Florida Supreme Court found a related statute, Sec. 934.091, Fla. Stat., to be an unconstitutional prior restraint. That statute provided criminal penalties for those who prematurely published or broadcast the identity of any person notified pursuant to statute that a wire or oral communication to which he was a party had been intercepted. The same argument can be made for the unconstitutionality

of Sec. 934.03(c), Fla. Stat., as it relates to the publication by a media defendant of the contents of an intercepted oral or wire communication which it legally obtains.

In *Cassidy v. ABC*, 377 N.E.2d 126 (Ill. App. Ct. 1978), the court considered an intrusion claim against a broadcaster for eavesdropping in violation of an Illinois statute. The plaintiff was an undercover police officer who was filmed making an arrest of a prostitute in her working quarters. Affirming a summary judgment for the broadcaster, the court held that no cause of action for intrusion exists against one who gathers news concerning the discharge of public duties by a public official.

6. Has the Plaintiff Consented to the "Intrusion"?

Photographs are often the subject of privacy litigation. In *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976), the trial court granted summary judgment in favor of the Florida Times Union for publishing a photograph of the "silhouette" of a teenager's body lying on the floor after a fatal fire. The teenager's parents sued the newspaper for invasion of privacy. The court noted that the fire marshal had invited the news media onto the premises and had requested specifically that the photographer take a picture of the silhouette.

The Florida Supreme Court, finding that implied consent can arise from custom, usage, or conduct, and that the news media customarily enter upon private property where a disaster has occurred, held that the trial court properly granted summary judgment. The court also noted that there was no one at the scene who objected to the photographer's entry. Id. at 918. *Cf. Wood v. Fort Dodge Messenger*, 13 Media L. Rep. (BNA) 1614 (Iowa Dist. Ct. 1986) (no invasion of privacy where television stations and newspapers entered plaintiffs' farm to photograph 167 dead cattle with express and implied consent of sheriff and farm's caretaker).

The Florida Supreme Court did not determine Fletcher on the basis that the press had a constitutional right to be present at the disaster scene. Indeed, the United States Supreme Court has declared that "[n]ewsmen have no constitutional right to the scenes of crime or disaster when the general public is excluded." *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972).

In *Machleder v. Diaz*, 538 F. Supp. 1364 (S.D.N.Y. 1982), *aff'd in part*, *rev'd in part on other grounds*, 801 F.2d 46 (2d Cir. 1986), CBS named the manufacturer of chemical products in a report on the dumping of chemical wastes. The cameraman stood at the front door of plaintiff's place of business and photographed an area eight to ten feet inside the building, which was illuminated by the camera's lights. The cameraman also confronted one of the plaintiffs outside the building, and after being refused an interview, followed the company president back to his office where the reporter was invited inside by the president's son. In granting summary judgment for CBS, the court noted that the president of the company was confronted in a semipublic area visible to the public and that the questioning did not amount to "hounding." The court found that an implied consent to trespass existed since the defendants were never told to leave and even were invited into the offices by the president's son.

The results in *Fletcher and Machleder* should be compared with *Green Valley School, Inc. v. Cowles Florida Broadcasting, Inc.*, 327 So. 2d 810 (Fla. 1st DCA 1976). In *Green Valley*, the appellate court overturned summary judgment in favor of a media defendant which, at the request of the state attorney, trespassed on a private school's property while the state attorney conducted a search pursuant to a warrant. The court rejected the argument that the trespass was consented to by the state attorney on the ground that a law enforcement official is not empowered to invite people to participate in intrusions. Likewise, the court rejected the broadcaster's argument that the "common usage and custom" of the media permitted the intrusion. See also *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995).

In contrast to *Fletcher and Machleder*, however, the state attorney in *Green Valley* began the searches at 11:30 p.m. by rousing the headmaster and students from their beds, verbally harassing them, and ransacking the premises. Id. at 813-14. Further, the media defendants in *Green Valley* arguably breached the peace by inserting glaring lights into dormitory rooms. It is apparent that the carefully planned search in *Green Valley* is inherently dissimilar to the "great disaster" situation outlined in *Fletcher* and is not governed by the same considerations of immediacy as *Fletcher*. The cases are thus reconcilable.

Television cameras, by their very nature, can be considered "intrusive" in a nonlegal sense, and their use often can lead to litigation. In *Lal v. CBS*, 551 F. Supp. 356 (E.D. Pa. 1982), *aff'd*, 726 F.2d 97 (3d Cir. 1984), a university professor charged with failing to maintain a house he leased to five students brought an action for intrusion. The local CBS affiliate had photographed the house without the plaintiff's knowledge and broadcast the tape on the evening news. Although the plaintiff's complaint sounded in trespass and libel, the factual allegations could have been drafted to set forth a claim for intrusion. Nevertheless, the court granted summary judgment in favor of the station, correctly focusing on the fact that the broadcaster had obtained permission to enter the property from plaintiff's tenant and finding that the broadcaster could rely on the tenant's right to give permission.

In *Stafford v. Hayes*, 327 So. 2d 871 (Fla. 1st DCA 1976), a lobbyist sued a Tallahassee television station after its newsman photographed the lobbyist in a bar following the evacuation of the State Capitol due to a bomb threat. In affirming summary judgment for the station, the court noted that the television crew entered the bar to record the convivial atmosphere enjoyed by the state workers after being evacuated from their offices. Since the plaintiff was an "actor" in a newsworthy occurrence of public interest, the court held that the defendants were privileged to broadcast the videotape which included the plaintiff.

> By contrast, in *Le Mistral v. CBS*, 61 A.D.2d 491, 402 N.Y.S.2d 815 (1978), the court upheld a jury verdict in favor of a restaurant on an intrusion claim. The CBS film crew had, in the words of the trial court, "burst into the plaintiff's restaurant in noisy and obtrusive fashion, and following the loud commands of the reporter," photographed the patrons dining. CBS, guilty of trespass through the admission of its own employees, took the position that it entered the restaurant in the course of newsgathering after the restaurant was cited for sanitation code

violations.

The *Stafford* and *Le Mistral* cases can be distinguished in that the owner of the bar in Stafford consented to the presence of the film crew. It could be argued that the patrons in *Le Mistral*, as opposed to the restaurant owners, could not have maintained an action for intrusion since they had no legitimate expectation of privacy in a public restaurant.

Generally, intrusion exposure can be eliminated if the following statements are true:

a. the newsgatherer neither illegally obtained the information, recordings, film, or photographs, nor acted in a "highly offensive" manner in obtaining the material;

b. the subject matter is newsworthy -- more specifically, it is of legitimate public interest; and

c. the newsgatherer did not enter, physically or by any other means, the "privacy sphere" where the subject of the newsgathering efforts reasonably would not expect to find him; or

d. even if a highly offensive intrusion otherwise would have been committed, the plaintiff or his agent consented to it.

There is a basic conflict between the newsgathering functions of the press and the privacy interests, at least in a nonlegal sense, of the subjects of inquiry. However, there are still methods by which the press can reduce its risks of litigation and liability. Such self-protective measures often can be reduced to the use of common sense and the exercise of good taste.

Robert Giles, former executive editor of the *Rochester Times-Union*, has written some ground rules for reporters who cover disasters and human tragedies such as those that occurred in *Fletcher*. Giles cautions reporters against breaking and entering in search of pictures or n interview; he advises reporters to show a sense of feeling and to make sure the survivors and relatives of victims understand that what has happened is news. He tells his reporters to be good listeners and establish a trust with those persons interviewed. Finally, he warns against the temptation of running with the pack, particularly good advice where others seem oblivious to invading privacy rights. Goodwin, Groping for Ethics in Journalism 223 (1983). These suggestions should be followed not only to avoid lawsuits, but also to improve the quality of journalism practiced by the reporter. By employing common sense and a measure of ethics, the skillful reporter will be able to acquire the same, or better, information than the reporter who is insensitive to intrusion issues.

B. Appropriation of Name or Likeness.

The Restatement (Second) of Torts Section 652C (1977) defines appropriation of name or likeness as follows: "One who appropriates to his own use or benefit the name or

likeness of another is subject to liability to the other for invasion of his privacy."

The appropriation category of invasion of privacy prevents others from using a person's name or identity for commercial gain. Ordinarily, the news media do not run afoul of this form of the tort. However, as the examples below show, seemingly innocuous news coverage or advertisements can lead to lawsuits.

The United States Supreme Court has had occasion to consider only one appropriation case, and that decision left the Court divided and the news media confused. In *Zacchini v. Scripps Broadcasting Co.*, 433 U.S. 562 (1977), the Court ruled that the First Amendment did not immunize a television station from liability for its unauthorized broadcast of a 15-second "human cannonball" performance. Hugo Zacchini performed at an Ohio county fair and refused permission to have his act filmed by a television reporter. The reporter filmed the act anyway, and it was shown on the late news along with a highly favorable voice-over description. Despite what appeared to be a free advertisement for the act, Zacchini sued, seeking $25,000 in damages. Zacchini's theory was that the station had appropriated his professional property without consent. In allowing the case to go to a jury, the Supreme Court ruled, 5-4, that the newsworthiness of the event did not immunize the television station. "The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance," Justice Byron White wrote for the majority. 433 U.S. at 575.

The *Zacchini* decision raises more questions than it answers. What if a newspaper photographer had asked permission to take a still photograph of the act, but that request too had been denied? If the photographer took rapid sequence photos, would the newspaper be liable if it published a page of pictures showing the entire flight of the human cannonball? Rather than provide the answer, *Zacchini* opens a Pandora's box of new legal problems not previously thought to exist in what Justice Lewis Powell called "ordinary daily news" coverage. See 433 U.S. at 580 (Powell, J., dissenting).

For there to be potential liability for "appropriation," it is generally necessary that a publication use a person's name or identity in a profit-making enterprise. *Zacchini* seems to be an exception to that rule, since the broadcast was done in a purely news context. The Court's theory was that the broadcast may have deprived Zacchini of profits from his own performance.

The usual appropriation case occurs in the unauthorized use of photos in advertisements. In football player Joe Namath's suit against *Sports Illustrated, Namath v. Sports Illustrated*, 352 N.E.2d 584 (N.Y. 1976), the magazine used a Super Bowl photo of the quarterback to advertise subscriptions in other Time, Inc. publications. The photo originally had been used with a sports story and was a legitimate "news" picture. The advertisement did not imply that Joe Namath endorsed *Sports Illustrated*. Such a use would have been a clear misappropriation of his name. Rather, the advertisement merely implied that readers can see Namath's photo and read articles about him in the magazine. The court considered that to be a proper use of the photo.

Generally, a legitimate news use of a person's identity will insulate the publication from liability for appropriation. The Court of Appeals for the Sixth Circuit in *Lusby v. Cincinnati Monthly Publishing Corp.*, 17 Media L. Rep. (BNA) 1962 (6th Cir. 1990), stated that "something more than incidental publication or likeness" is necessary to support an "appropriation" privacy claim. In particular, the "defendant must have appropriated something of value beyond the value each person places on his own name or likeness." The Lusby court found the plaintiff's contention that a photograph of him with six wedding dolls (in connection with an article about litigation) was not an invasion of privacy by appropriation of name or likeness. In *Nelson v. Maine Times*, 373 A.2d 1221, 2 Media L. Rep. (BNA) 2011 (Me. 1977), a newspaper published a photo of a Penobscot Indian boy

in a pastoral setting. The newspaper did not receive permission to photograph the child, whose mother sued for invasion of privacy. However, the photograph was not of direct commercial benefit to the newspaper. Accordingly, the Maine Supreme Judicial Court found there was no actionable invasion of privacy. *Id*. at 2013-14. The same result was obtained in *Brooks v. ABC*, 737 F. Supp. 431 (N.D. Ohio 1990), where an investigative TV report was deemed similar to a newspaper or magazine article on newsworthy matters and, therefore, was not actionable.

Even illustrations used to accompany articles can lead to liability. In *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978), *Playgirl* magazine published a drawing of a nude black man seated in the corner of a boxing ring. The man clearly resembled former heavyweight champion Muhammad Ali. *Playgirl* was found liable for appropriating Ali's likeness without his consent. The court held: "[Ali] has established a commercially valuable proprietary interest in his likeness and reputation, analogous to the goodwill accumulated in the name of successful business entity." *Id*. at 729.

Although the case does not discuss the issue, it seems clear that had the portrait shown Ali wearing boxing trunks, he scarcely would be able to complain of appropriation. As a public figure, his likeness and name obviously could be used with legitimate news and feature articles. However, there was no legitimate news value to a depiction of Ali's nudity, and to the extent that the nude portrait would offend many persons, this case probably qualifies as a hybrid of appropriation and publication of private facts.

Slogans and other identity features also have been accorded protection from this form of invasion of privacy. When a Michigan corporation marketed "Here's Johnny" portable toilets, talk show host Johnny Carson sued for unfair competition, trademark infringement, invasion of privacy, and right to publicity. *Carson v. Here's Johnny*, 698 F.2d 831 (6th Cir. 1983). The court dismissed the copyright and trademark claims on the ground that Carson failed to establish a likelihood of confusion that Carson was connected with the product. However, the court upheld the claims for exploitation of Carson's slogan on the ground that the corporation had appropriated Carson's identity, notwithstanding the fact that neither his "name or likeness" was used. To the same effect is the July 1992 decision by the Ninth Circuit Court of Appeals in *White v. Samsung Electronics America, Inc.*, 20 Media L. Rep. (BNA) 1457 (9th Cir. 1992. Although the Ninth Circuit affirmed the dismissal of the "Wheel of Fortune" hostess's statutory misappropriation claim (California Civil Code Section 3344(d)), the court ruled that a jury should decide her common law claim for misappropriating her identity. Despite a robot appearing in the challenged advertisement, instead of an actual likeness of Vanna White, the court allowed that part of her lawsuit to proceed to trial.

A celebrity's attempt to control the use of her name or likeness was the issue in *Cher v. Forum International*, 692 F.2d 634 (9th Cir.), *cert. denied*, 462 U.S. 1120 (1982). Cher gave an interview with the understanding that it would be used for a specific publication. However, at her request, the article was not printed in that publication. The author instead sold the interview to a different publication which used her name and picture in its own advertising. Cher sued, claiming misappropriation of her right to publicity. The Ninth Circuit upheld a judgment against the publication, finding that it knowingly exploited the interview by publishing advertisements implying that the entertainer had endorsed the publication.

The Ninth Circuit found differently, however, in a recent case brought by singer/songwriter Wood Newton for the use of the name, "Wood Newton," in the television show, "Evening Shade." *Newton v. Thomason*, 22 F.3d 1455 (9th Cir. 1994). The court found that (i) Newton had consented to the use of the name, despite his refusal to sign a consent agreement, and (ii) the use did not establish the commercialism required for a misappropriation claim.

In *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), the Ninth Circuit reversed the trial court's dismissal of actress-singer Bette Midler's suit against an automobile company and its advertising agency for imitating Midler's voice in a commercial. Unsuccessful in its attempt to hire Midler herself to sing in the commercial, the advertising agency hired a former backup singer for Midler to imitate Midler's singing voice. The song performed appeared on a Midler album. While the trial court described the defendants' conduct as that "of the average thief," it held that the imitation of Midler's voice did not amount to a violation of the federal copyright law. However, the Ninth Circuit found that what Midler did have was a California common law property right in not having her distinctive voice deliberately imitated, and that entitled her to bring an appropriation-based "invasion of privacy" claim to trial. *Id*. at 462.

Cases also have arisen from the discussion of one person in the biography or fictionalized biography of another. In *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994), the Fifth Circuit Court of Appeals rejected the misappropriation complaint by a former undercover narcotics officer -- convicted of committing crimes in the course of his work -- against his former spouse/colleague for her fictionalized account of her (and his) experiences. A similar claim against CBS for its dramatization in "Top Cops" of an officer's murder was held non-actionable by the Third Circuit Court of Appeals. *Lamonaco v. CBS, Inc.*, 22 Media L. Rep. 1831(3d Cir. 1994). (In a recent blow to the media, the Third Circuit Court of Appeals held that -- unlike defamation claims -- a misappropriation claim survives the death of the aggrieved. *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994)).

> In Florida, a statute prevents using a person's name, photograph or likeness "for purposes of trade or for any commercial or advertising purpose . . ." without the person's consent. Sec. 540.08, Fla. Stat. (1993). The statute exists in addition to the common law tort of appropriation and provides for an award of punitive damages. However, the statute contains exceptions for "any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes." Sec. 540.08(3)(a), Fla. Stat. (1993).
>
> In the only reported Florida case interpreting the statute, a newspaper was found not to have violated the appropriation statute when it reported that a woman arrested in Texas was the "Florida Citrus Queen" some 23 years before. See *Westphal v. Lakeland Ledger Publishing Co.*, 361 So. 2d 841 (Fla. 2d DCA 1978). In another, Miller v. Twentieth Century Fox Int'l Corp., 29 Media L. Rep. 1087 (M.D. Fla. 2001), the Court found the defendant-television producer not to be liable for airing footage of the plaintiffs in front of a Daytona Beach motorcycle club which allegedly made the plaintiffs guilty of criminal conduct "by association" with the club's leader. There was no evidence in either case that the publication or broadcast was commercially motivated, and both involved reports that were communicated in the public interest.

C. Publication of Private Facts.

The Restatement (Second) of Torts Section 652D (1977) provides that:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Just as in the "intrusion" and "appropriation" areas, the news media can be held liable for damages for truthful publication. In the "private facts" area, the offending article or broadcast exposes to public view certain highly offensive

matters that are not considered newsworthy. In order for an offended plaintiff to prevail, he must prove both that the publication was "highly offensive to a reasonable person" and that the matters were not "of legitimate concern to the public." *Id*. The latter requirement gives the news media what might be called the "newsworthiness defense." However, the legitimate concern of the public in a matter is not presumed by the matter's publication. Thus, a plaintiff may prove that an article is lacking in newsworthiness despite its publication.

To a certain extent, all categories of invasion of privacy overlap, either with each other, or in the case of false light publicity, with the separate tort of defamation. Publication of private facts often is the final step in an invasion of privacy by intrusion. If "intrusion upon seclusion" is seen as a physical act in which a person's personal sphere is invaded, the tort may be completed at that point, and the plaintiff is entitled to a damage award even in the absence of publication. The plaintiff may have suffered no damages, however, unless publication is made, bringing to light whatever embarrassing facts were photographed, recorded, or learned.

By contrast, a "publication of private facts" case is not complete until, as the phrase suggests, the private facts are exposed to the public. A "private facts" case can be defended successfully by showing either that the material was not highly offensive or that it was newsworthy. Stated another way, even the highly offensive treatment of a subject will not render the news media liable for damages if it can be established that the material was newsworthy.

One of the first "private fact" cases occurred when a former child prodigy sued the *New Yorker* magazine for an article describing him as a middle-aged eccentric who had failed to live up to his youthful success. As a boy, William Sidis had been a mathematical genius and had graduated from Harvard University at the age of 16. Under the title, "Where Are They Now?", the *New Yorker* reported that Sidis was an obscure clerk who lived alone and collected old streetcar transfers. Charging that these were private facts, Sidis sued for invasion of privacy.

In *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940), the Second Circuit found the article to be both newsworthy and lacking in highly offensive details. The case is important for two propositions. The first is that the passage of time does not necessarily deprive the public of legitimate interest in a newsworthy person or event. Although it had been 27 years since newspapers wrote about the child prodigy, a report on what he had become was not considered mere "popular curiosity." The court observed:

> And even if Sidis had loathed public attention at that time, we think his uncommon achievements and personality would have made the attention permissible. Since then, Sidis has cloaked himself in obscurity, but his subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise, was still a matter of public concern. The article in The New Yorker sketched the life of an unusual personality, and it possessed considerable popular news interest.

Id. at 809.

The second important point made in *Sidis* is that there is no liability unless the personal, embarrassing facts are "highly offensive." Sidis clearly was embarrassed by the story which essentially portrayed him as a failure, an eccentric, and a recluse. Yet, details of his personal habits likely would not have offended most persons in society:

> Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency. But when focused upon public characters, truthful comments upon dress, speech, habits, and the ordinary aspects of personality will usually not transgress this line. Regrettably or not, the misfortunes and frailties of neighbors and "public figures" are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.

Id.

In *Wasser v. San Diego Union*, 191 Cal. App. 3d 1455 (Ct. App.), *rev. denied*, 236 Cal. Rptr. 772 (1987), Wasser, a high school teacher, sued the newspaper for invasion of privacy for printing a story about a lawsuit between the teacher and his principal concerning an allegedly libelous teacher evaluation written about Wasser by the principal. In the article about the lawsuit between teacher and principal, the newspaper published the fact of Wasser's earlier acquittal of a murder charge involving his estranged wife. Since his acquittal, Wasser both had instituted and defended lawsuits related to the death of his wife. Various newspapers had reported several of Wasser's lawsuits following his acquittal of the murder charge.

The court granted summary judgment for the newspaper on Wasser's invasion of privacy claim. Wasser had conceded the truthfulness of the news article but contended that the statement concerning his acquittal was no longer newsworthy. The court found that the newspaper had not violated Wasser's privacy because the material contained in the newspaper article was already public, having been printed in seven news articles over eleven years. Moreover, the court found that the passage of time since the acquittal had not ended Wasser's status as a public personage for the purpose of the murder story partly because Wasser's series of lawsuits, which all bore some relationship to the death of his wife, had maintained the public interest in him. The court noted the legitimate function of the press in reminding the public of past history and former public figures, which can be matters of present public interest.

While there are few clear rules, there are some guidelines as to which "private facts" normally should not be subjected to public view. The following list contains several trouble areas which give rise to potential liability:

1. sexual relations;
2. family quarrels;
3. humiliating illnesses;
4. intimate, personal letters;
5. details of home life;
6. photographs taken in private places;
7. photographs stolen from a person's home; and
8. contents of income tax returns.

Restatement (Second) of Torts Section 652D, comments (b), (g) (1977). Likewise, it can be stated generally that matters of public record are not considered private facts and may be published freely:

1. a person's birth date;
2. the fact that a person is married;
3. military record;
4. admission to the practice of any trade or profession;
5. occupational licenses;

6. pleadings filed in a lawsuit;
7. arrest reports;
8. police raids;
9. suicides;
10. divorces;
11. accidents;
12. fires;
13. natural disasters; and
14. homicide victims.

Id.

1. The First Amendment and Private Facts.

Generally, the "private facts" category of invasion of privacy concerns truthful articles or broadcasts. If the embarrassing, private facts were published falsely, a libel action or a "false light" privacy case would be the appropriate legal vehicle.

The news media have taken the position that there can be no civil liability for publishing truthful information, no matter how embarrassing or damaging it might be to the individual. However, the Supreme Court so far has refused to extend First Amendment protection to immunize the press from lawsuits based on truthful, but embarrassing, publication. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975); see also *Taylor v. KTVB, Inc.*, 525 P.2d 984 (Idaho 1974); *Cape Publications v. Hitchner*, 549 So. 2d 1374 (Fla.), appeal dismissed, 493 U.S. 929 (1989). Should the Court do so, this category of invasion of privacy would be all but eliminated.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Supreme Court had the opportunity to declare that all truthful publications were protected constitutionally from damage actions. In that case, an invasion of privacy suit was brought by the father of a girl who had been raped and murdered. A television reporter learned the victim's name from a court indictment which was open to public inspection. The plaintiff sought a jury trial for damages on the ground that his "zone of privacy" was invaded by the allegedly offensive broadcast. The television station and various news organizations which filed *amicus curiae* briefs sought a ruling that all truthful accounts are protected constitutionally.

Rather than creating blanket immunity for truthful accounts, the Court ruled only that the First Amendment does not permit a damage action for invasion of privacy when the truthful report was obtained from open judicial records:

> We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the First and Fourteenth

> Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.

Id. at 494-95.

In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the United States Supreme Court struck down a Massachusetts statute that prohibited press access to rape trials of minor victims. The Court's opinion suggests that a claim under the private facts branch of privacy might lie, under certain circumstances, for publication of the names of victims of sex crimes.

Various courts presented with privacy claims based on information from other than public records nonetheless have relied on *Cox Broadcasting* to establish constitutional protection if the publication contains accurate information relating to public figures or is otherwise a matter of public concern. This "public interest" privilege has been found to prevent a suit brought by a private person if there is a "logical nexus" between that person's conduct and the matter of legitimate public interest. See *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980); see also *Gilbert v. Medical Economics Co.*, 665 F.2d 305 (10th Cir. 1981); *Bichler v. Union Bank*, 715 F.2d 1059, vacated, 718 F.2d 802 (6th Cir. 1983). The "public interest" privilege is far from absolute, however, and courts will evaluate critically the "logical nexus" requirement. See, e.g., *Vassiliades v. Garfinckel's Brooks Bros.*, 492 A.2d 589 (D.C. App. 1985).

While judging the connection between the complaining individual and the matter of legitimate public interest is fact-dependent, the analysis has been designed to give wide berth to free press rights. In the most closely watched privacy suit in recent memory, *Shulman v. Group W Productions, Inc.*, 955 P. 2d 469 (1998), the California Supreme Court considered whether a defendant who broadcast footage of a victim's traumatic experience and comments at an accident scene and in an emergency helicopter invaded the victim's privacy. Emphasizing that the analysis of a claim for wrongful publication of private facts should produce predictable answers, the Court held, consistent with its view of the First Amendment, that the test for newsworthiness of private facts is whether the relevance of the disclosure is "greatly disproportionate" to a matter of legitimate public interest. And in holding that the disclosure of the plaintiff's private, medical facts and suffering was substantially relevant to the newsworthy subject of the broadcast (the rescue and medical treatment of accident victims), the Court cited a First Amendment restriction on privacy claims worth remembering, "Liability for disclosure of private facts is limited to the extreme case, thereby providing breathing space needed by the press to properly exercise effective editorial judgment."

Despite the difficulty of applying the public interest privilege, it offers strong constitutional protection for the news media. The Ninth Circuit has ruled that once a truthful article is deemed newsworthy, it would violate the First Amendment to return a

damage award in favor of the offended plaintiff. In *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), the court gave constitutional force to the newsworthiness defense contained in the Second Restatement of Torts, which states:

> In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.

Id. at 1129 (quoting Restatement (Second) of Torts Section 652D, comment h).

The *Virgil* case illustrates how a seemingly innocuous feature story can lead to expensive litigation. *Sports Illustrated* magazine prepared a profile of Mike Virgil, an expert body surfer. At first, Virgil cooperated with the magazine. Later, he attempted to revoke his consent to the interviews already given. The story portrayed Virgil as a showoff who, on various occasions, put out a cigarette in his mouth, dived down a flight of stairs to impress some women, purposely injured himself so he could collect unemployment compensation and go surfing, ate spiders, and bit off the cheek of a man in a gang fight.

When the case was returned by the Ninth Circuit to the trial court, *Sports Illustrated* won a summary judgment on the grounds that the facts were newsworthy and were not so highly offensive as to invade Virgil's privacy. The court found the strange details of Virgil's life neither morbid nor sensational:

> In fact, they connote nearly as strong a positive image as they do a negative one. On the one hand, Mr. Virgil can be seen as a juvenile exhibitionist, but on the other hand he also comes across as the tough, aggressive maverick, an archetypal character occupying a respected place in the American consciousness. Given this ambiguity as to whether or not the facts disclosed are offensive at all, no reasonable juror could conclude that they were highly offensive.

Virgil v. Time, Inc., 424 F. Supp. 1286, 1289 (S.D. Cal. 1976).

A more difficult question arises when a newspaper publishes the name of the victim of a sex crime and the name was gathered from sources not in public records. A jury in Jacksonville returned a large verdict against a small weekly newspaper for the truthful publication of the name of a rape victim who reported the crime to the police. The newspaper learned the woman's name from reviewing police reports and inadvertently -- and against its own newsroom policy -- failed to delete the woman's name. Although the plaintiff relied on the Florida statute barring

publication of the name of a rape victim rather than traditional invasion of privacy concepts, the lawsuit still must be considered a privacy case.

The U.S. Supreme Court, in a landmark June 1989 decision that overturned the jury verdict against the newspaper, held that damages cannot be awarded against a party publishing truthful information obtained by lawful means "about a matter of public significance" unless doing so serves a state interest of the highest order. See *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989). The Florida statute which gave rise to the lawsuit and prohibits the disclosure of a rape victim's name, even when lawfully obtained, was found not to meet the constitutional criteria.

Public entities increasingly excuse refusal of access to public records by citing their fear of liability for disclosure of private facts within public records. In *Doe v. New York City*, 15 F.3d 264 (2d Cir. 1994), the Second Circuit Court of Appeals addressed the invasion of privacy claims against New York City for its announcement in a press release of the settlement of a discrimination claim -- arising out of Doe's HIV positive condition -- brought by Doe. Although Doe was not named in the release, he was identifiable. Such settlements usually are a matter of public record, but the city agreed to confidentiality in Doe's case. Overruling the district court, the Second Circuit held that an individual has a constitutional right of privacy in medical information and that, therefore, its disclosure could form the basis of an invasion of privacy cause of action. The case was remanded for trial.

2. Florida Cases Involving Private Facts.

The Florida Supreme Court first recognized the tort of invasion of privacy in the 1944 case, *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944). A Florida census taker who was described in a book as an "ageless spinster" sued the author for invasion of privacy. *Id*. at 247. The court recognized the principle that public figures give up certain rights to privacy:

> It is true that a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public legitimate interest in his doings, his affairs, and his character, may be said to have become a public personage, and to that extent thereby relinquishes at least a part of his right of privacy. There may be a limited scrutiny of the "private life" of any person who has achieved, or who has thrust upon him, the status of a "public figure."

Cason v. Baskin, 30 So. 2d 635, 638 (Fla. 1947) (citations omitted).

Invasion of privacy by publication of private facts could be accomplished, according to the Florida Supreme Court, only when "the community has no legitimate concern" in those facts. *Id*. More recent Florida cases continue to recognize the

existence of the newsworthiness defense to this form of invasion of privacy:

1. (1) In a 1989 decision, the Florida Supreme Court held that a newspaper publisher could not be liable for damages for disclosing the contents of a confidential Department of Health and Rehabilitative Services report mistakenly released by the trial judge's secretary to a reporter after the conclusion of a child-abuse trial. The report, containing allegations of child abuse that were the subject of the trial, was confidential under Sec. 827.07(15), Fla. Stat. In reversing the trial court's finding that the contents of the report were not of legitimate public concern (a prerequisite to filing a lawsuit based on publication of "private facts"), the Florida Supreme Court found that criminal prosecutions are by their very nature "without question events of legitimate concern to the public" and emphasized that the published information was obtained lawfully and legitimately in the public domain. *Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374 (Fla. 1989);

2. (2) Florida's Third District Court of Appeal in 1993 denied recovery to a woman who claimed that a television news broadcast invaded her privacy by revealing her name change that occurred when she got divorced. The name change was a matter of public record. *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501 (Fla. 3d DCA 1993). *Accord Florida v. Johnson*, 22 Media L. Rep. (BNA) 1058 (Fla. Palm Beach Cty. Ct. 1993) (mayor's publication of names of persons arrested for solicitation of sexual activity -- found in public record -- not actionable invasion of privacy); accord *Florida v. Mackie*, 22 Media L. Rep. (BNA) 1060 (Fla. Palm Beach Cty. Ct. 1993) (same);

3. (3) It did not invade a widow's right of privacy to publish a factual account of the murder of her husband, according to a trial court decision in Duval County in *Nelson v. Globe Communication Corp.*, 2 Media L. Rep. (BNA) 1219 (Fla. 4th Cir. Ct. 1977);

4. (4) A newspaper article about a drug treatment program did not invade a woman's privacy when it published the factual statement that she had attempted to escape from the program's custody in *Stevenson v. Nottingham*, 4 Media L. Rep. (BNA) 1585 (Fla. Cir. Ct. 1978), *aff'd*, 371 So. 2d 604 (Fla. 2d DCA 1979);

5. (5) However, there was no newsworthiness in a newspaper advertisement stating "Wanna Hear a Sexy Telephone Voice? Call _____ and Ask for Louise." The listed number was the correct telephone number for one Louise Harms, who successfully maintained a privacy lawsuit against a newspaper in *Harms v. Miami Daily News, Inc.*, 127 So. 2d 715 (Fla.

3d DCA 1961);

6. (6) A newspaper published an article describing plaintiff's involvement in an altercation that took place in a public office. The information for the article was gleaned from the public records. The court in *El Amin v. Miami Herald*, 9 Media L. Rep. (BNA) 1079 (Fla. Cir. Ct. 1983), held the publication was not actionable;

7. (7) A witness who testified at a murder trial had no claim for invasion of privacy against writers of a song that implied her participation in the murder. While she was not a voluntary participant in the trial, she nonetheless was involved in an event of public interest, and her claim was precluded by the decision of a federal appeals court in *Valentine v. CBS*, 698 F.2d 430 (11th Cir. 1983); and

8. (8) Florida appellate courts have relied upon the Cox decision. The Second District Court of Appeal denied a claim by a rape victim against a television station that broadcast her testimony. *Doe v. Sarasota-Bradenton Television*, 436 So. 2d 328 (Fla. 2d DCA 1983). Accord Williams v. New York Times, 462 So. 2d 38 (Fla. 1st DCA 1984).

9. (9) A contract right to publish does not necessarily extinguish a plaintiff s invasion of privacy claim against the publisher. In *Facchina v. Mutual Benefits Corp.*, 27 Med. L. Rptr. 2168 (Fla. 4th DCA 1999), the plaintiff entered into a contract with defendants which gave defendants the right to use his photograph for advertisements regarding the purchasing of life insurance policies. Plaintiff alleged that defendant published his picture in such a way that the ad to imply that he was homosexual and afflicted with AIDS. The appeals court held that "a person may have a contractual right to publish the likeness of another without breaching a contract giving him the right to publish, but may still abuse that right and publish in such a manner as to violate the subject s personal, privacy interests." The insurer-publisher essentially exceeded the scope of the plaintiffs consent to appropriate his name and likeness for commercial gain in violation of 540.08 of the Florida Statutes and invaded the plaintiff s privacy by publishing private facts.

But one 1991 Florida state court decision, while finding a traditional publication of private facts claim legally insufficient, offers a specter of another variety of invasion of privacy liability for publication of private facts. In *Armstrong v. H & C Communications, Inc.*, 575 So. 2d 280 (Fla. 5th DCA 1991), the Florida Fifth District Court of Appeal used a modern-day application of the ancient "outrage" claim as a means to avoid the hurdles to a traditional publication of private facts invasion of

privacy claim. The case arose from a broadcast by an Orlando area television station of a video tape of a missing child's skull on the 6:00 news. Relatives of the missing child sued the station. Not surprisingly, the traditional publication of private facts claim was found insufficient as a matter of law because the subject matter was deemed to be of legitimate public interest (a finding that triggers First Amendment protection of suits aimed at publication of true, but "private," facts). What makes the Fifth District's decision anomalous is that, despite its findings that the subject matter was of legitimate public interest, the court allowed the "outrage" claim to survive by holding that proof of publication of anything that could be found by a jury to be "outrageous" (which is only one of several requirements for a publication of private facts/invasion of privacy claim) could entitle a claimant to civil damages.

"Private facts" may come into play beyond the confines of civil lawsuits based upon invasion of privacy. In an important 1988 decision, the Florida Supreme Court found that a litigant's interest in preventing the disclosure of private facts is normally not sufficient to justify closure of judicial proceedings involving that person. A Panama City newspaper contested the closure of the divorce proceedings of Dempsey Barron, a Florida senator. The trial court, finding that there was "private" civil litigation in Florida, had closed the proceedings to the public and sealed the court file to prevent the disclosure of certain sensitive information affecting one of the parties. The intermediate appellate court reversed, ordering the court files opened to the public. In so doing, the appellate court found that the provision of the Florida Constitution precluding governmental intrusion into private lives did not create a right to private judicial proceedings. *Florida Freedom Newspapers, Inc. v. Sirmons*, 508 So. 2d 462, 463 (Fla. 1st DCA 1987). The Florida Supreme Court affirmed the decision, but noted that the Florida constitutional right to privacy could form a basis for closure under appropriate circumstances. *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (1988). Such circumstances include, inter alia, complying with public policy as set forth in the constitution, statutes, and case law; protecting trade secrets or a compelling governmental interest (e.g., national security, confidential informants); and avoiding injury to innocent third parties. The court further noted that "it is generally the content of the subject matter rather than the status of a party that determines whether a privacy interest exists and closure should be permitted," and emphasized that a privacy claim may be negated if the subject matter concerns a position of "public trust" held by the individual seeking closure. *Id*. at 118.

A Florida trial court extended the Barron reasoning dangerously far in finding that the family members of murder victims have a disclosural right of privacy in even records which are public. *Florida v. Rolling*, Case No. 91-3832 CF A (Fla. 8th Cir. Ct. Jul. 27, 1994). However, Florida's Third District Court of Appeal squarely rejected the disclosural right in *Doe v. American Lawyer Media*, L.P., 639 So. 2d 1021 (Fla. 3d DCA 1994).

> And in 1993 Florida's Fourth District Court of Appeal, following the lead of the United States Supreme Court in The Florida Star, affirmed the Palm Beach County Circuit Court's October 24, 1991 order in *State v. Globe Communications Corp.*, 622 So. 2d 1066 (Fla. 4th DCA 1993), striking down as unconstitutional Sec. 794.03, Fla. Stat., which prohibits the publication of a rape victim's name. Although the decision is not binding on state courts outside Palm Beach County, it is instructive. Unlike the situation in *The Florida Star* case, the publisher in the Globe case had no public records source for the information; it was obtained through community sources. The court held that because the information was truthful, of legitimate public interest, and was in "the public domain" at the time of publication, publishing the victim's name could not be prohibited lawfully.

D. False Light Publicity.

The Restatement (Second) of Torts Section 652E (1977) provides that:

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

Creating a false image for an individual may constitute an invasion of privacy. This is the one area of invasion of privacy where publication is not truthful. Rather, the offended person is placed in a false light through misleading descriptions, confusion of the person's identity with another, fictionalization of actual events, or photographs taken out of context.

While libel, slander, and false light publicity each require that false statements be made or implied about an individual, a false light privacy claim has special features. First, invasion of privacy by false light publicity does not require that the individual be defamed, that is, held up to scorn and ridicule. It is enough that he is given unreasonable and highly objectionable publicity that attributes false characteristics, conduct or beliefs to him. For example, calling a liberal Democrat a "conservative Republican" may not be defamatory, but it does place the politician in a false light before the public. In addition "false light" claimant generally need prove only nominal or minimal damages, whereas a defamation plaintiff must allege and prove special damages (e.g., mental anguish, damage to reputation). Finally, the challenged material must not be published merely to a third person, as in defamation, but *publicized*; that is, published to the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.

In *Fudge v. Penthouse*, 840 F.2d 1012 (1st Cir. 1988), four elementary school students were photographed with their thumbs down in objection to being separated from their male classmates at recess because of fighting. Later, a photograph and a story headlined "Little Amazons Attack Boys" appeared in *Penthouse* magazine. A brief editorial comment followed the article, stating: "In the battle of the sexes, we'd certainly score this round for the girls." In the same issue of the magazine, "amazon" was defined as "a sexually aggressive and insatiable female whose desires can only be quelled and satisfied" through the use of mechanical devices. In addition to alleging libel, plaintiffs alleged that the article presented them in a false light by implying their consent to *Penthouse's* use of the photograph and story, failing to note the girls' objection to the recess

segregation, implying association with and endorsement of the magazine's views, and implying that the girls were masculine and dominating.

Addressing plaintiffs' false light claim that the article and photograph implied the plaintiffs' consent to *Penthouse's* use of the material and their endorsement of the magazine's editorial views, and, therefore, an "association between the plaintiffs and *Penthouse*," the First Circuit found that the photograph and article were described clearly in the magazine as having been "culled from the nation's press," thereby negating any inference that the magazine obtained the material from the plaintiffs. *Id*. at 1019. Further, the court noted that the magazine's editorial which followed the news article was attributed expressly to the magazine's editor and was in a different typeface from the body of the article, and, therefore, was not capable of bearing the implication that the plaintiffs had become associated with *Penthouse* by endorsing its views. *Id*.

In *Braun v. Flynt*, 726 F.2d 245 (5th Cir.), *cert. denied*, 469 U.S. 883 (1984), plaintiff sued *Chic*, a hard-core men's pornographic magazine, for false light invasion of privacy. Plaintiff was an amusement park employee who performed a novelty act with Ralph, the Diving Pig. The amusement park sold a postcard depicting Ralph diving toward the plaintiff, who was shown in the pool extending a bottle to the pig. *Chic* had obtained the consent of the amusement park's management to use of the photograph by misrepresenting the true nature of the magazine. Plaintiff successfully contended that the ordinary reader automatically would form an unfavorable opinion about the character of a woman whose picture appeared in *Chic*. Even if, as *Chic* contended, no reader would assume the plaintiff to be unchaste or promiscuous on the basis of her picture's publication, the court noted that the jury could have found that the publication of the picture implied the plaintiff's consent to the publication or her approval of the opinions expressed in *Chic*. In affirming the liability verdict against the magazine, the court noted that either finding would support the verdict that the publication placed the plaintiff in a false light highly offensive to a reasonable person. Further, the appellate court found the trial court correct in admitting the entire magazine into evidence rather than just the photograph so that the jury could be placed in the position of the ordinary reader in evaluating whether the publication placed the plaintiff in "false light." *Cf. Dempsey v. National Enquirer*, 702 F. Supp. 927 (D. Me. 1988) (content of *National Enquirer* such that highly objectionable association between that publication and plaintiff would not be made automatically by ordinary reader).

Photographs often provide the news media with problems in this area. Using generic or stock television film to illustrate crime or corruption stories can lead to lawsuits. See *Jacova v. Southern Radio & Television Co.*, 83 So. 2d 34 (Fla. 1955). Newspapers and magazines which use file photos out of context also invite false light publicity litigation. See, e.g., *Fils-Aime v. Enlightenment Press*, 133 Misc. 2d 559, 507 N.Y.S.2d 947 (N.Y. App. Div. 1986) (suit for invasion of privacy where newspaper article on child pornography was accompanied by old photograph of plaintiff originally used by newspaper to illustrate story on beginning of school year).

1. The First Amendment and False Light Publicity.

The constitutional defense to damage actions is a comparatively recent event in First Amendment law. In 1964, the Supreme Court ruled in *New York Times v. Sullivan*, 376 U.S. 54 (1964) that a public official may not recover damages for a defamatory falsehood relating to his official conduct unless he proves with convincing clarity that the statement is made with actual malice. The Court defined actual malice as the

knowledge that the statement is false, or the "reckless disregard" of its truth or falsity. Later decisions expanded the defense to include libel actions brought by "public figures." *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 388 U.S. 130 (1967). A plurality of the Court in 1971 appeared to extend the First Amendment protection to any article or broadcast of public interest or concern, regardless of the public figure status of the plaintiff. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). However, the expansion of First Amendment protection was short-lived. In 1974, a majority of the Court rejected Rosenbloom and held once again that the constitutional privilege applies only to cases involving defamation of public officials or public figures. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

The Supreme Court first applied the constitutional defense to a privacy action in *Time, Inc. v. Hill*, 385 U.S. 374 (1967). James Hill filed a lawsuit against *Life* magazine for reporting that the Broadway play, "The Desperate Hours," was a factual presentation of an incident involving the Hill family. The Hills had been held captive in their home by three escaped convicts. The play sensationalized the incident and added physical violence that had not occurred. While the article did not ridicule the family and thus was not defamatory, the article's suggestion that the play was factual arguably placed the Hills in a false light before the public inasmuch as all of the incidents in the play did not take place.

A jury awarded Hill $75,000 in damages. The sum later was reduced to $30,000, and the Supreme Court reversed that judgment in its entirety upon the ground that the First Amendment provided a constitutional defense:

> Sanctions against either innocent or negligent misstatement would represent a grave hazard of discouraging the press from exercising the constitutional guarantees.
>
> ' ' '
>
> But the constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential function. We held in *New York Times* that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct.
>
> ' ' '
>
> We find applicable here the standard of knowing or reckless falsehood, not through blind application of *New York Times Co. v. Sullivan*, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals.

385 U.S. at 389-90. *Accord, Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (rejecting false light claim of convicted former undercover narcotics agent against his former spouse/colleague's account in the book and movie "Rush"). See also *Lamonaco v. CBS, Inc.*, 21 Media L. Rep. (BNA) 2193

(D.N.J. 1993), *aff'd*, 27 F. 3d 557 (3d Cir. 1994) (false light claim cannot be raised by family members).

2. Negligence Is Not Enough.

The courts have held that "a plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion." *Moldea v. New York Times*, 22 F.3d 310 (D.C. Cir. 1994); accord *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). And in some respects, the First Amendment protections against invasion of privacy claims are greater than against defamation claims.

Simple negligence or carelessness on the part of the writer will not be sufficient to hold the publication liable. Unless there is proof of reckless or knowing falsity, the publication cannot be held liable for false light invasion of privacy where the subject matter of the article is one of public interest. To this extent, therefore, the news media have more protection in a false light invasion of privacy case than they do in a defamation action. The First Amendment serves as a defense in defamation cases where the plaintiff is a public official or public figure. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Yet, the defense applies in privacy actions in all cases involving matters of public interest whether the plaintiff is a private or a public person.

Inasmuch as the Supreme Court recently has narrowed the category of persons considered public figures, it may be well for news media lawyers to attempt to characterize lawsuits as false light privacy cases, rather than libel lawsuits, when that is possible. Two decisions released the same day in 1979 by the Supreme Court appear to require that a person "thrust himself or his views into public controversy to influence others . . ." in order to be considered a public figure. In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), a research scientist who was well-known in his field, but was not known generally, was considered to be a private person for purposes of his libel suit against a U.S. senator. Likewise, *Wolston v. Readers Digest Association*, 443 U.S. 157 (1979) determined that a person involved in an espionage probe and convicted of contempt of court was not a public figure. He had not "engaged the attention of the public in an attempt to influence the resolution of the issues involved." *Id*. at 168.

Once the constitutional privilege is found to apply, the news media defendant generally will win the case, whether for libel or invasion of privacy. A plaintiff faces an extraordinary task in proving with "convincing clarity" that the writer either knew the falsity of his statements, or recklessly disregarded the truth. While it is difficult to prove actual malice, i.e., knowing or reckless falsity, it is not impossible. The surest path to trouble in either a libel or privacy case is for a wrier to invent details and events. When a reporter described the appearance of a woman he had never seen and misrepresented her family's poverty and the conditions of her home, the Supreme Court determined that false light invasion of privacy was proven with actual malice. See *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974). The Court reasoned that the writer must have known of the falsity of his account because he fabricated much of the account. *Id*. at 253.

3. Confusion in Florida Courts

The enduring problem with the false light publicity claim is that it duplicates a defamation claim. Not surprisingly, a number of states -- Georgia, Mississippi, North Carolina, and Texas to name a few -- have renounced false light as a viable theory of recovery.

Although the debate continues, Florida courts have been guided by the Supreme Court's recognition of the tort in *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976). In the decision, the Supreme Court addressed a false light claim, and held that falsity is the lynchpin of the claim. Still, considerable confusion has been spawned by Florida courts wrestling with a claim aimed at an unflattering message and cast as false light publicity or false light invasion of privacy.

Most recently, in December 2003, a Pensacola circuit court jury returned an $ 18 million compensatory damages verdict against Pensacola's News-Journal (*Anderson v. Gannett Co., Inc*.) in what the plaintiff argues is false light invasion of privacy by the newspaper. Although the newspaper article at issue is a true rendition of events, the trial judge allowed the case to be decided by a jury through a ruling that falsity need not be proved as an element of a false light claim. The judge relied upon the Second District Court of Appeal's 2001 decision in *Heekin v. CBS*, 789 So.2d 355. In starting a veritable chain reaction of incorrect rulings on the proof requirements for false light claims, the Second District in Heekin misread *Cason v. Baskin*, 155 Fla. 198 (1944), a "private facts" invasion of privacy case, in concluding that truth is not a defense to a false light claim. The Pensacola paper plans to appeal the false light liability and damages verdict to ensure that plaintiffs targeting publication on a false light theory do not evade the applicable common law and constitutional rules protecting the press in these cases.

III. Conclusion.

Just as in libel cases, invasion of privacy litigation often can be avoided by adequate prepublication counseling. Even more so than with libel, potential invasion of privacy problems can be overlooked by writers and editors. A seemingly sympathetic or favorable story often can lead to an invasion of privacy action. For example, a newspaper's expos of a county home was scathing in its attack upon conditions there, but was sympathetic to the patients. Despite the sympathetic coverage, an 18-year-old patient sued the Des Moines Register on the "private facts" theory for reporting that she had been sterilized against her will. The Iowa Supreme Court affirmed a summary judgment in favor of the newspaper on the ground that the information was available in public records and was newsworthy. *Howard v. Des Moines Register*, 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980). News articles or broadcasts accompanied by photographs of persons either uninvolved or only tangentially involved in the subject matter of the publication frequently lead to false light litigation. Until such time as newsgathering rights and truthful publication are immunized from liability -- and that day is not near -- caution is the byword when treading near the zone of personal privacy.

ABOUT THE AUTHORS

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