

Privacy and the Media 2

Disclosure, Newsworthiness, and Appropriation

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Restatement of Torts

- § 652A General Principle

(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

(2) The right of privacy is invaded by

- (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or
- (b) appropriation of the other's name or likeness, as stated in § 652C; or
- (c) unreasonable publicity given to the other's private life, as stated in § 652D; or
- (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.

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Publicity Given to Private Life

- Rest. 2d of Torts § 652D

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.

- **Without conflict with the First Amendment.**

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- *Gill v. Hearst Publ. Co.*
- *Daily Times Democrat v. Graham*
- *Miller v. Motorola, Inc.*
- *Sipple v. Chronicle Publ. Co.*
- *Shulman v. Group W. Prod'ns, Inc.*

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Disclosure

- Public disclosure
- of Private facts
- Highly offensive to the reasonable person
- Not of legitimate concern to the public

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Publicity

- Disclosure to a friend?
- Disclosure to family?
- Disclosure to company?
- Is it a numbers test? Should it be?

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Not of legitimate public concern

- Who decides what's "legitimate public concern"?
- Is identification a matter of public concern?

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First Amendment

- Does "newsworthiness" cover the First Amendment requirements?

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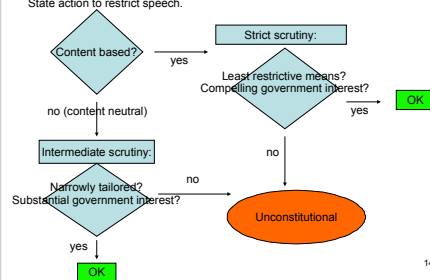
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Congress shall make no law ...
abridging the freedom of speech,
or of the press....

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First Amendment scrutiny

State action to restrict speech.



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- May truthful publication ever constitutionally be subject to liability?

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- *Cox v. Cohn*: “whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public [judicial] records”

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- Fla. Stat. § 794.03 (1987) makes it unlawful to ‘print, publish, or broadcast ... in any instrument of mass communication’ the name of the victim of a sexual offense.”

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- *Florida Star*: “Where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order”

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Hypo:

- Many states, including New York, prohibit government disclosure of Social Security numbers. Suppose that to protect individuals against identity theft, New York passes a new law prohibiting anyone from publishing another individual's Social Security number (SSN).
- The New York Post finds the publicly filed court papers from Donald and Ivana Trump's divorce and publishes excerpts, including SSNs. The Donald sues. Does the Post have a Constitutional defense?
- The National Enquirer digs through Martha Stewart's trash and finds a bill with her SSN. It prints the SSN among “things we found on the curb.” Martha sues. Does the Enquirer have a Constitutional defense?

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Appropriation

- Rest. 2d of Torts § 652C
 - 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.

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Appropriation

- NY Civil Rights L. §§ 50 - 51
 - A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait, or picture of any living person without having first obtained the written consent of such person... is guilty of a misdemeanor.
 - Any person whose name, portrait, picture or voice is used within this state for advertising purposes, or for the purposes of trade without the written consent first obtained ... may maintain an equitable action ... and may also sue and recover damages for any injuries sustained by reason of such use.

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- Does right of publicity conflict with the First Amendment?

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- *Finger v. Omni*: "The 'newsworthiness exception' should be liberally applied...; judicial intervention should occur only in those instances where there is 'no real relationship' between a photograph and an article or where the article is an 'advertisement in disguise.'"

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The Gubernator



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Hypos

- A flattering photograph of the Dean is used on the front of a Wheaties box, suggesting that if you eat Wheaties, you'll be able to run a marathon.
- An unflattering photograph of the Dean is used above a newspaper article about overworked lawyers.
- Is either appropriation?

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- Thomas McCarthy "While the appropriation branch of the right of privacy is invaded by an injury to the psyche, the right of publicity is invaded by an injury to the pocketbook."

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