PROTECTING PRIVACY
Conflicts Among the Press, the Government and the Right to Privacy

SUPPOSE . . .

. . . your smartphone or cellphone connects to your carrier’s wireless network through a cell tower multiple times a minute, even when you’re not using it. All of this cell-site location information (CSLI) is kept by your wireless carrier for years. After police arrested several men for multiple suspected robberies, they used CSLI to connect the group’s ringleader to the crime scenes. The police obtained 127 days of location data through a subpoena, or court order, as required under the Stored Communications Act, and used the CSLI to track his every move. The ringleader was convicted and sentenced to more than 100 years in prison. Could the government access those data without probable cause—sufficient reason to think a crime was committed based on facts—to obtain a search warrant?

The Fourth Amendment protects against “unreasonable searches and seizures.” Does the Fourth Amendment protect CSLI from warrantless searches? Because people consent to share CSLI with their wireless carriers when they sign up for service, do they forfeit any “reasonable expectation of privacy”? More broadly, how has technology changed society’s understanding of a “reasonable expectation of privacy”? Look for the answers to these questions when you read the discussion of Carpenter v. United States in this chapter and an excerpt of the case decision at the end of the chapter.3

Although libel has been recognized for more than 400 years, the notion that courts or legislatures should protect privacy rights is only about 130 years old.4 In 1890, two Boston lawyers—Samuel Warren and his partner, then-future U.S. Supreme Court Justice
Louis Brandeis—wrote “The Right to Privacy” for the prestigious Harvard Law Review. Warren and Brandeis knew that no statutes shielded people’s private lives, but the lawyers contended that the common law should recognize privacy rights. They argued that human dignity required protecting individual privacy.

In the 20th century, the U.S. Supreme Court formally recognized a constitutional right to privacy. During the seven decades after the Warren and Brandeis article, a few state courts accepted a common law right of privacy, and several other states adopted privacy laws. In recent decades, federal agencies have also started to play a greater role in protecting privacy. Today, the Federal Trade Commission has the power to police companies’ data security practices, and it enforces various laws that address data security and personal privacy.

CONSTITUTIONAL RIGHT TO PRIVACY

Americans have always valued privacy rights. This is reflected in the U.S. Constitution, even though the word “privacy” is not explicitly stated. For example, the framers adopted the Fourth Amendment, protecting “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Founding Father and second President John Adams recalled in his papers that it was the British writs of assistance, or generic court orders, during colonial times that allowed British officers to conduct random searches of shops, warehouses and private homes. President Adams suggested that
public outrage over this practice “helped spark the Revolution itself” and is the reason for the Fourth Amendment.\textsuperscript{10}

The Third and Fifth Amendments also protect different aspects of privacy.\textsuperscript{11} Fifty years ago, in \textit{Griswold v. Connecticut}, the U.S. Supreme Court said the word “liberty” in the 14th Amendment also includes personal privacy—“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”\textsuperscript{12} In \textit{Griswold}, the Supreme Court struck down a state’s ban on the use of birth control, noting that it violated the privacy rights of married people. The Court said in \textit{Griswold} that a right to privacy was implicit in the various amendments previously mentioned, as well as the Ninth Amendment and even the First Amendment’s “freedom to associate and privacy in one’s associations.”\textsuperscript{13}

Most Americans associate the U.S. Supreme Court’s \textit{Roe v. Wade} decision with abortion rights.\textsuperscript{14} In coming to its judgment in \textit{Roe}, the Court also affirmed the qualified constitutional protection for personal privacy established in \textit{Griswold}. Justice Harry Blackmun wrote for the Court:

\begin{quote}
This right to privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.\textsuperscript{15}
\end{quote}
In *Roe*, the Court emphasized that the right of personal privacy is qualified and must be weighed against important state interests in regulation.\(^{16}\)

The earliest U.S. Supreme Court case that explored Fourth Amendment privacy-related protections focused on property and not people. Fourth Amendment cases often hinge on what constitutes a search under the law. Judges issue *search warrants* authorizing law enforcement officers to search locations and seize items. A valid search warrant must be based on probable cause—sufficient information and facts to think a crime was committed based on reliable information and facts.

In 1928, the Court held that an electronic eavesdropping device did not amount to a search under the Fourth Amendment because placing the device did not involve physical entry into the defendant’s home.\(^{17}\) Justice Brandeis dissented, writing that “every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed,” was an unconstitutional search under the Fourth Amendment.\(^{18}\)

In the 1960s, the Court’s approach shifted. In *Silverman v. United States*, the U.S. Supreme Court held that it was a search when federal officers eavesdropped on defendants by using a microphone placed through the wall of a home. This search, the Court held, violated the Fourth Amendment.\(^{19}\) In *Katz v. United States*, the defendant was convicted of illegal betting over a telephone line in a public phone booth. The government recorded his phone conversations without a warrant, which led to his conviction. The Supreme Court threw out that evidence, calling it a Fourth Amendment violation. In his concurrence, Justice John Marshall Harlan II wrote, “[A] person has a constitutionally protected reasonable expectation of privacy,” and “electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment.”\(^{20}\)

Courts have recognized Justice Harlan’s concurrence in *Katz* as the Harlan “reasonable expectation of privacy test.” The test requires that an individual have an actual expectation of privacy and that society is prepared to recognize this as reasonable.\(^{21}\) In a recent case, Chief Justice John Roberts wrote, “Justice Harlan’s concurrence profoundly changed our Fourth Amendment jurisprudence.”\(^{22}\)

Thirty years ago, the Court said a search of a public employee’s desk and filing cabinet did not violate his or her Fourth Amendment rights.\(^{23}\) Courts have said the First Amendment does not bar private employers from examining email messages on an employee’s computer because the company’s interest in preventing illegal activity or unprofessional comments outweighs an employee’s privacy interest.\(^{24}\)

In *City of Ontario v. Quon*, the U.S. Supreme Court held that government employers may see public employees’ text messages sent and received on government-issued equipment if the searches have a legitimate work-related purpose and public employees have been told not to expect privacy.\(^{25}\) The case involved a police officer who used a department-issued pager to communicate with fellow officers. When the city audited officers’ pagers, it found one officer had exchanged sexually explicit text messages with both his wife and his mistress. The officer claimed the city violated his reasonable expectation of privacy. The Court

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1. *Search Warrant*. A legal order by a judge to authorize law enforcement to search locations and seize items. Only issued with probable cause.
said even if the officer did have a reasonable expectation of privacy, the city’s search of his pager did not violate it. Although the Court said its ruling was narrowly applied to the case facts, subsequent cases have applied the ruling to government-issued computers and other communication technologies.26

Today, many challenges to privacy involve communication via new technologies. Recent U.S. Supreme Court cases have tackled questions about how courts should apply decades-old precedents to technology that did not exist at the time of those decisions. For example, the Court held that the government must have a search warrant to use a thermal imaging device on a home because use of this technology constituted a search.27 In United States v. Jones, the Supreme Court unanimously held that physically mounting a GPS transmitter on a car amounts to a search and violates the Fourth Amendment.28

In Riley v. California, a unanimous Supreme Court said law enforcement may not search a person’s cellphone without a warrant. The decision involved convictions of two suspects for criminal activity based on evidence found on their cellphones—one a smartphone, the other a flip phone. The government argued that searching a cellphone found on a person at the time of arrest fell under the “incident to arrest” exception, which allows for a search of a person without a warrant at the time of an arrest. Writing for the Court, Chief Justice Roberts said the “incident to arrest” exception does not apply to a cellphone:

Modern cellphones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. Cellphones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person.29

In Carpenter v. United States (excerpted at the end of this chapter), the Supreme Court in 2018 extended Fourth Amendment protection to cell-site location information (CSLI), produced when your cellphone connects to your carrier’s wireless network through a cell tower.30 As required under the Stored Communications Act, the police obtained a subpoena, or court order, to get months of Timothy Carpenter’s CSLI. Police then used CSLI to connect Carpenter to various robbery crime scenes. He was convicted, largely because of the CSLI.31

Writing for the majority in a 5–4 decision, Chief Justice Roberts said using a subpoena to obtain CSLI is not enough—instead, this constitutes a search under the Fourth
Amendment and requires a search warrant. “The seismic shifts in digital technology that made possible the tracking of not only Carpenter’s location but also everyone else’s, not for a short period but for years and years [is] unlike the nosy neighbor who keeps an eye on comings and goings,” he wrote. Wireless carriers “are ever alert, and their memory is nearly infallible.”

In Carpenter, the Court noted that the case did not fit neatly with existing precedents, specifically two cases decided in the 1970s: United States v. Miller and Smith v. Maryland. The Court held in both cases that an individual has no expectation of privacy in bank and phone company records kept by third parties (e.g., the bank or phone company). Called the third-party doctrine, the concept holds that people who voluntarily give information to third parties, such as banks, phone companies or internet service providers, forfeit any reasonable expectation of privacy.

The Supreme Court rejected the application of the third-party doctrine to CSLI in Carpenter:

We decline to extend Smith and Miller[,] . . . Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection. . . . Although [CSLI] records are generated for commercial purposes, that distinction does not negate Carpenter’s anticipation of privacy in his physical location. . . . [T]he time-stamped data provides an intimate window into a person’s life, revealing not only his particular movements, but through them his “familial, political, professional, religious, and sexual associations.” These location records “hold for many Americans the privacies of life.” . . . [C]ell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier’s deep repository of historical location information at practically no expense.

The Court noted that the decision in Carpenter does not overturn Miller and Smith or the section of the Stored Communications Act that allowed law enforcement to obtain most records with a subpoena. The decision should be applied narrowly to CSLI rather than all third-party records. In four separate dissents, the four dissenting justices disagreed on why the majority was in error. Justices Anthony Kennedy and Samuel Alito argued primarily that the third-party doctrine should apply. Justice Clarence Thomas

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third-party doctrine
A legal concept that holds that people who voluntarily give information to third parties, such as banks or phone companies, forfeit any reasonable expectation of privacy in that information.
said the framers of the U.S. Constitution did not intend privacy to be incorporated into the Fourth Amendment in the way the Court has done so over the years, particularly in its application of the *Katz* “reasonable expectation of privacy.” Justice Neil Gorsuch said property law precedents provide a better avenue for determining privacy concerns with new technologies.

**PRIVACY TORTS**

The dictionary defines privacy as “freedom from unauthorized intrusion” and the “state of being let alone and able to keep certain especially personal matters to oneself.” This common definition of privacy reflects the evolution of privacy law, whether constitutional or based on state statutes. Sixty years ago, William Prosser, a torts expert and law school dean, suggested that states should divide privacy law into four categories: intrusion, false light, appropriation and private facts. Intrusion is defined as physically or technologically disturbing another’s reasonable expectation of privacy. False light is the privacy tort that involves making a person seem to be someone he or she is not in the public eye. Appropriation is generally using a person’s name, picture or voice without permission for commercial purposes. Private facts is publicizing highly offensive, true private information that is not newsworthy or lawfully obtained from a public record. Courts and state legislatures adopted and continue to use Prosser’s categories, but not all states allow plaintiffs to sue for each of the four privacy torts. Additionally, the appropriation tort currently includes two different torts: commercialization and right to publicity.

In 2019, 42 states recognized the intrusion tort, while two have rejected it; 34 states recognized the false light tort, and 10 have rejected it; 46 states recognized private facts, and four have rejected that doctrine; and 46 states recognized appropriation torts, while four states have not ruled on the issue. The District of Columbia and the U.S. Virgin Islands both recognize all four privacy torts, while Puerto Rico only recognizes appropriation.

Only living individuals may sue for three of the privacy torts: intrusion, private facts and false light. Like a person’s reputation in a libel case, privacy is considered a personal right. The dead do not have personal rights. Also, businesses, associations, unions and other groups generally do not have personal rights and most often cannot sue for a privacy tort. Only individuals may sue for appropriation in many states. But a few states allow businesses, nonprofit organizations and associations to bring appropriation lawsuits. Additionally, in many states, the right of publicity is extended to heirs.

**INTRUSION**

While many of the U.S. Supreme Court cases discussed earlier focus on the limits to government intrusion, the news media have utilized some of the same techniques to report on issues of public concern. What limits exist for investigative newsgathering techniques that can include, for example, hidden microphones and cameras?
Invasive newsgathering techniques may amount to intrusion upon seclusion.\(^{44}\) (Information-gathering techniques that may be classified as intrusion are discussed further in Chapter 7.) Journalists may be sued for intrusion if they intentionally interfere with another person’s solitude or meddle in the person’s private concerns in a way that would be highly offensive to a reasonable person (the law’s version of an average person). The intrusion may be physical, such as entering someone’s house without permission, or technological, such as using a geolocation device. The intrusion tort is intended to ensure people retain their dignity by preventing unwanted encroachment into an individual’s personal physical space and private affairs. Only New York and Virginia have refused to recognize the intrusion tort.\(^{45}\)

The more technology develops, the more ways intrusion can occur. For example, 41 states have enacted laws addressing a variety of concerns, including privacy protection, with unmanned aircraft systems or drones.\(^{46}\) But even older technology, such as a camera’s telephoto lens, can intrude.

In one case, a woman’s sister-in-law, husband and children visited her home after she disappeared. They swam in the home’s pool, surrounded by a seven-foot-high fence, while a CBS television network cameraman stood on a neighbor’s porch and videotaped them using a telephoto lens. A federal district court permitted the family to sue CBS for intrusion, saying:

> We find that the plaintiffs’ allegations that they were swimming in the backyard pool of a private home surrounded by a seven-foot privacy fence are sufficient to allege both that they believed they were in a secluded place and that the activity was private.\(^{47}\)

Intrusion suits have been brought based on news reporters finding information in public records. Courts have held that there is no reasonable expectation of privacy in public records.\(^{48}\)

**Intrusion on Private Property**

Journalists might obtain information by intentionally entering private property without permission. Anyone who does so has committed intrusion, an act similar to trespass (discussed in Chapter 7). Trespass is both a crime and a tort. A trespasser may be sued for intrusion. Intrusion occurs only if a person has a reasonable expectation of privacy.

For example, people have a reasonable expectation that others will not enter into their private property, such as a house or apartment, without consent. That may not be the case, however, for private land to which the public has access. In a lawsuit involving Google’s Street View feature, which provides searchable panoramic street views, a couple sued Google for intrusion. Street
View showed the couple’s house and swimming pool. The couple claimed the pictures could be obtained only by driving up the private street on which their home is located, a street marked as “Private Road, No Trespassing.” However, no reasonable person would be highly offended by Google’s entry onto the road, the Third Circuit Court of Appeals said, because guests and delivery trucks entered the road and saw what Street View’s pictures showed.49

Ordinarily, there is not a reasonable expectation of privacy on public streets and sidewalks and in public parks where people can be seen or overheard. However, there may be circumstances when people do have a reasonable expectation of privacy in public places. For example, the U.S. Supreme Court upheld a Colorado law that created an eight-foot bubble around individuals entering a health care facility.50 The statute made it illegal to approach within eight feet of a person going into an abortion clinic—the law’s primary focus—to hand out a leaflet, display a sign or interact without the person’s consent. The law applied within a 100-foot radius around a health care facility’s entrance. In *Hill v. Colorado*, the Court said the law was neither content nor viewpoint based. Therefore, the Court did not apply a strict scrutiny standard. The state needed to show only a substantial interest. The Court said Colorado’s interests in public health and in protecting the rights of individuals to avoid unwanted communication met the intermediate scrutiny test. Colorado’s law implies that people entering health clinics have a reasonable expectation of privacy.

Courts may not permit journalists to exceed acceptable means of obtaining information. Following Princess Diana’s death, California passed an anti-paparazzi law.51 The California law said that offensively trespassing to photograph or record a person’s personal or family activities is an invasion of privacy. Another California statute made it a misdemeanor to attempt to photograph or videotape the children of celebrities in a harassing manner.52

Journalists should not assume people involved in a news event occurring on public property do not have a reasonable expectation of privacy. For example, an automobile accident victim reasonably expected discussions with emergency personnel to be private even if medical treatment took place on the side of a public road, a court held.53

It is not always easy to determine whether property is private or public. Taxpayers own government land, but they may not always be permitted on the property. A federal district court ruled that police could arrest reporters entering a naval base without permission to cover protests.54

**Defenses**

Consent is the only defense for an intrusion suit based on trespass in nearly all cases. Newsworthiness is not a defense because publishing is not an element of the tort. The intrusion happens in the newsgathering process. However, the Ninth Circuit Court of Appeals said a story’s newsworthiness may reduce the intrusion’s offensiveness.55 This is important because a plaintiff must prove the intrusion was highly offensive.

### POINTS OF LAW

**INTRUSION BY TRESPASS**

**Plaintiff’s Case**

- A reasonable expectation of privacy
- Intentional intrusion on privacy
- That would be highly offensive to a reasonable person

**Defense**

- Consent
Consent. A person cannot claim a reasonable expectation of privacy if he or she gave consent for someone to be on his or her private property. For example, a restaurant owner allowed a television news crew to videotape a health inspector evaluating the restaurant. After the station ran an unflattering story, the restaurant sued for intrusion. Because a trial jury found that the restaurant owner had given the television crew consent to enter the premises, the appeals court rejected the restaurant’s claim. Consent can also be implied. For example, if a journalist enters private property and the property owner responds to the reporter’s questions, there is implied consent to remain and continue the interview.

False Pretenses. Using false pretenses to enter private property is a long-standing reporting technique. Courts are not in agreement, but generally have said reporters can deceptively gain entry without invading privacy. In one case, a producer for the ABC television network program “Primetime Live” sent seven people, posing as patients and equipped with hidden cameras, to eye clinics owned by Dr. J.H. Desnick. “Primetime Live” used portions of the hidden video recordings in a story it aired suggesting that Desnick’s clinics performed unnecessary cataract surgery. Desnick sued ABC for intrusion and other torts. The clinics were open to anyone who wanted an eye examination, the Seventh Circuit Court of Appeals said. The people posing as patients were allowed into the clinics, just like anyone else. The people posing as patients meant to deceive, but that did not invalidate consent to enter, the court held.

The Seventh Circuit noted that people sometimes use deception to enter private or semi-private premises. For example, a restaurant owner might refuse entry to a food critic known to write harsh reviews. But restaurant critics usually do not identify themselves to the owner when they enter. The court said this deception does not negate the restaurant owner’s consent. The court said this analysis might not apply to someone using false pretenses to enter for no substantive reason, for example someone who pretends to be a utilities meter reader to enter a private home. In contrast, the hypothetical restaurant critic—and the people posing as eye clinic patients—had valid reasons to be on private property, the court said.

In a different case, a photographer dressed in hospital apparel recorded a video of emergency room personnel treating a man who had a bad reaction to a drug. He asked the patient to sign a release form. The photographer said the video would be used to train hospital personnel. The patient signed the release. After the video ran on a cable program, “Trauma: Life in the ER,” the patient sued for intrusion and other claims. A court agreed that the patient had a reasonable expectation of privacy in a hospital emergency room. The court said the photographer’s deception invalidated the patient’s consent.

Entering a home or office using false pretenses may provide grounds for an intrusion suit. At least one court said that combining false pretenses with surreptitious image and audio recording after entering a home was intrusive. To investigate a person practicing medicine without a license, a Life magazine reporter and a photographer claimed to be patients and were admitted to the man’s home. The reporter had a microphone in her purse, and the photographer used a small, concealed camera to take pictures. A federal appellate court ignored the false pretenses question and focused on the surreptitious reporting. The court said people have a reasonable expectation of privacy in their homes. Even though a person might expect a
visitor to repeat what is seen and heard in the house, it is not expected that “what is heard and seen will be transmitted by photograph or recording . . . to the public at large.”\textsuperscript{60} The court added, “The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another’s home or office.”\textsuperscript{61}

Most states have laws making it illegal to pretend to be a law enforcement officer. In some states, it is unlawful to pretend to be any public official.

\textbf{FALSE LIGHT}

\textit{False light} is a first cousin to libel. A misleading story or a YouTube video that represents a person as someone he or she is not may be grounds for a false light suit.\textsuperscript{62} False light often involves the misattribution of a person’s actions or beliefs. Typically, a false light tort does not require a plaintiff to show injury to reputation, although California sees false light and libel as such close relatives that a false light plaintiff must prove reputational injury.\textsuperscript{63} Some state courts say the false light tort is too similar to defamation and refuse to recognize it. They also say false light is so vague it encroaches on First Amendment rights. A number of courts allow a plaintiff to sue for both defamation and false light based on the same facts.

\textbf{Plaintiff’s Case}

Most states recognizing false light require a plaintiff to prove (1) the material was published, (2) the plaintiff was identified, (3) the published material was false or created a false impression, (4) the statements or pictures put the plaintiff in a false light that would be highly offensive to a reasonable person and (5) the defendant acted with actual malice—he or she knew the material was false or recklessly disregarded its falsity.\textsuperscript{64} Only individuals can bring a false light suit.\textsuperscript{65}

\textit{Publication. }The false light tort requires material to have been widely distributed to the public generally or to a large segment of the community.\textsuperscript{66} Generally, communication to a few people does not amount to publication for the false light tort, although courts in a few states allow publication to be proved by dissemination to just one person or a few people.\textsuperscript{67} For these courts, that smaller group must have a special relationship with the plaintiff so the plaintiff would be highly offended if the group saw or heard the publication.\textsuperscript{68}

\textit{Identification. }The plaintiff must prove the material in question was about her or him. The courts of some states, such as California, define identification for false light just as they do for libel. It is sufficient if one or more people say the communication identified the plaintiff.\textsuperscript{69} Most courts hold that because the publication requirement means many people must be exposed to the story, a large segment of the public must reasonably believe the false material refers to the plaintiff.

\textit{Falsity. }Published material supporting a false light suit must be false or imply false information. If the publication is true, it cannot be grounds for a false light suit even if
the material emotionally upsets the plaintiff. Minor errors ordinarily do not make a story sufficiently incorrect to meet the falsity standard.

Some courts hold that true facts can lead to false implications if the defendant intended that result. For example, The New York Times published a story implying that a businessman named Robert Howard might be using an alias and really was another person, Howard Finkelstein, a convicted felon. The story included only true statements: Records showed that Finkelstein used the name Robert Howard; Howard denied he was Finkelstein, yet rumors circulated saying he might be. A jury found that the reporter did not libel Howard because the story did not absolutely say he was Finkelstein. A federal appellate court said the story’s implication that the businessman might be the felon could sustain a false light suit. However, there must be a clear connection between the statements leading to a false light suit and the implied falsehood the plaintiff claims.

**Highly Offensive.** At a false light trial, the **fact finder**—the jury, if there is one, or the judge—must determine whether the published material would be highly offensive to a reasonable person. There are no definite standards. Defining “highly offensive” is a very subjective task. Some legal scholars try to clarify the term “highly offensive” by using three categories: embellishment, distortion and fictionalization. These are not legal categories, but they can help to recognize a circumstance that could potentially give rise to a false light claim.

A story is embellished when false material is added to otherwise true facts. For example, a series of newspaper columns told a true story of a mother giving up a baby for adoption, the baby being adopted, a court giving the natural father custody four years later and the father hiring a psychologist to help the child adjust to a new home. One column falsely said the psychologist “has readily admitted that she sees her job as doing whatever the natural parents instruct her to do.” A jury could find it highly offensive to a reasonable person to suggest a psychologist would ignore her professional commitments, a court ruled.

Distortion occurs when facts are omitted or the context in which material is published makes an otherwise accurate story appear false. For example, a young woman consented to having a photographer take her picture for his portfolio. A magazine later used the picture to illustrate a story headlined “In Cold Blood—An Exposé of the Baltimore Teen Murders.” The accompanying article said the high murder rate among the city’s African-American teenagers was due to drug abuse and poor economic conditions. Used in other circumstances, the photo might not have led to a lawsuit. This context, however, implied that the young woman was poor, abused drugs or perhaps even was connected to a murder.

Fictionalization is taking real facts and making them fiction. This can result in a false light claim when a person’s name or other identifying characteristics, for example, are part of a largely fictional piece. In one case, a supermarket tabloid newspaper published a picture of 97-year-old Arkansas resident Nellie Mitchell to illustrate a story with the headline, “Pregnancy Forced Granny to Quit Work at Age 101.” The story was a fictional account of an Australian woman who left her paper route at the age of 101 because she became pregnant during an extramarital affair with a rich client. Mitchell, in fact, delivered newspapers in her hometown for nearly 50 years. Mitchell won her false light suit and, after the newspaper’s appeals, was awarded $1 million in damages.
Fault. Decades ago, the U.S. Supreme Court decided two false light cases: 
*Time, Inc. v. Hill* and 
*Cantrell v. Forest City Publishing Co.* Both cases involved private individual plaintiffs, not public officials or public figures, and the Court held that they had to prove actual malice to win.

The Hill family sued Time, Inc., publisher of Life magazine, for a story and photographs about a play’s account of the family’s experience of being held hostage for 19 hours by escaped convicts. The convicts did not harm the Hills, and the family later said they were treated with respect. The play portrayed a fictional Hilliard family held hostage, beaten and verbally abused by escaped convicts. The Hills claimed that the text and accompanying photographs suggested the convicts treated the real Hill family as ruthlessly as the fictional hostages and this put the family in a false light. The Hills sued and won.\(^75\)

The U.S. Supreme Court reversed, saying the jury should have been told that the Hills could win only if they proved actual malice.\(^76\) The First Amendment protects the press from being sued for negligent misstatements when reporting stories of public interest, the Court reasoned.

Seven years after *Hill*, the U.S. Supreme Court again said a private plaintiff had to prove actual malice. In *Cantrell v. Forest City Publishing Co.*, the Supreme Court upheld a jury verdict in the Cantrell family’s favor because the trial judge correctly told the jury to apply the actual malice standard. The case involved a feature in the Cleveland Plain Dealer newspaper about the impact of a bridge collapse on a small community in West Virginia. The article and accompanying photographs featured the Cantrell family and highlighted their abject poverty. The Court said there was sufficient evidence to show that portions of the article were false and were published with knowing falsity or reckless disregard for the truth.\(^77\)

Lower courts are supposed to follow U.S. Supreme Court rulings. Courts in at least 11 states follow the Supreme Court precedents in *Hill* and *Cantrell*, requiring all false light plaintiffs to show actual malice.\(^78\) For example, a court in Tennessee dismissed a case in 2018 because a former “American Idol” contestant could not prove actual malice in his false light claim against E! Entertainment television. The former contestant sued for libel and false light after the network aired an “E! True Hollywood Story” that said that “American Idol” producers disqualified the former contestant because he did not disclose a prior arrest. The docudrama on Paula Abdul also dismissed the former contestant’s claim that he had an affair with her, which she denied. His false light claim alleged that these discrepancies presented him in a false light, but the court said the former contestant presented no evidence to support a showing of actual malice.\(^79\)

Some state courts are divided on requiring private persons to prove actual malice in false light cases. Courts in at least five states and the District of Columbia have applied *Gertz v. Robert Welch, Inc.* (discussed in Chapter 4) to false light cases. They have suggested that the U.S. Supreme Court

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**Points of Law**

**False Light**

**Plaintiff’s Case**

- Publication of
- false facts
- about the identified individual
- that would be highly offensive to a reasonable person
- with actual malice, for both private and public plaintiffs (although a few state courts only require negligence for private plaintiffs)\(^iii\)

**Defense**

- Libel defenses
would apply *Gertz* today if it heard another false light appeal.\(^{80}\) These state courts would require only that a private individual prove negligence in a false light suit, not actual malice.

**Defenses**

Because not all state courts recognize the false light tort, parts of it remain in flux. However, many courts say that if a false light plaintiff proves all elements of his or her case, a media defendant may use the libel defenses discussed in Chapter 5 to defeat the claim.\(^ {81}\) For example, media defendants can utilize the fair report privilege.\(^ {82}\) People with absolute privilege if sued for libel—those involved in judicial proceedings or government meetings, certain public officials and others—also have absolute privilege in false light suits. Truth is also defense in a false light suit. Only a few courts have decided whether opinion is a defense for a false light claim, and they disagree.\(^ {83}\)

More recently, some appellate courts have also applied anti-SLAPP statutes to false light claims. As noted in Chapter 5, anti-SLAPP laws generally allow a defendant to make a motion to strike a lawsuit because it involves a matter of public concern. The plaintiff has the burden to show that they will prevail in the lawsuit, otherwise the suit is dismissed. If a defendant prevails, some anti-SLAPP laws allow them to collect attorney’s fees from the plaintiff.

In 2016, the Ninth Circuit Court of Appeals said California’s anti-SLAPP statute applied to a lawsuit filed against the producers and distributors of the film “The Hurt Locker.” Army sergeant Jeffrey Sarver alleged that the main character in the film was based on him, and he sued for defamation, false light, intentional infliction of emotional distress and other torts.

With respect to defamation and false light, Sarver alleged that the film’s depiction of his work with improvised explosive devices during the Iraq War was false. The Ninth Circuit applied the anti-SLAPP statute to the lawsuit noting that the Iraq War was an issue of public concern.\(^ {84}\) “‘The Hurt Locker’ film and the narrative of its central character Will James spoke directly to issues of a public nature,” the court wrote. Additionally, the film is “speech that was fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life and transform them into art, such as movies.”\(^ {85}\)

**APPROPRIATION**

**Appropriation** includes two different torts: *commercialization* and the *right of publicity*. Most people do not want their names or pictures to be in advertisements because they want to remain private. Generally using a person’s name, picture or voice without permission for commercial or trade purposes is appropriation, an area of privacy tort law that is currently a “hot mess,” according to one privacy law expert.\(^ {86}\) Why? Because the Supreme Court has decided only one appropriation case (*Zacchini v. Scripps-Howard Broadcasting Co.*, discussed later in
this section), and that case predates many of the modern technologies and media platforms to which the Supreme Court has since given First Amendment protection.

State courts take a range of approaches to resolve appropriation cases, often based on whether the alleged appropriation arises in a commercial context (see Chapter 12) or another First Amendment context. The courts often apply strict scrutiny, rather than a balancing of interests, when reviewing cases involving the media (see Chapter 3). However, many courts apply a balancing approach to resolve some right of publicity claims. Before addressing these issues, the next section will define the commercialization and right of publicity torts as well as what plaintiffs are required to prove.

**Commercialization and Right of Publicity**

The appropriation tort that protects people who want privacy is called “commercialization” or “misappropriation.” Commercialization, the word this chapter uses, prohibits using another person’s name or likeness for commercial purposes without permission. No state has refused to allow appropriation suits, though courts in some states have not yet ruled on the issue.

Some people, however, want their names and pictures to be publicized, and they want to control when, how and where their names and pictures will be used for advertising and other commercial purposes. They also want to be paid for giving their permission. Courts often refer to this part of the appropriation tort as the “right of publicity.”

New York state adopted the country’s first appropriation law in 1903. Two years later, Georgia became the first state to recognize appropriation as a common law privacy tort. A federal appeals court judge, Jerome Frank, first used the phrase “right of publicity” nearly 70 years ago. The court ruled that professional baseball players had a right to earn money when their names were used on baseball cards. Courts generally find that everyone has both a right to protect his or her privacy and a right to decide when his or her name or picture may or may not be used commercially by others. The commercial value of a celebrity’s name or picture, though, will be much greater than that of a relatively unknown individual. Courts also have said a right of publicity could be transferred, as a car can be sold, but the right of privacy cannot.

Although both commercialization and the right of publicity prevent the use of someone’s name, picture, likeness, voice or identity for advertising or other commercial purposes without permission, they differ in two important ways. First, commercialization protects an individual’s dignity connected with personal privacy, while the right of publicity protects the monetary value of using well-known individuals’ names and pictures. Second, courts generally consider commercialization a personal right, one that does not survive a person’s death. However, the right of publicity may be considered a property right. In many states, the right of publicity survives death. Just as a person may determine who gets his or her car after he or she dies—through a will or by state law—a person may choose who will control his or her right of publicity after death. In many states, the right of publicity survives death. The right may last for a specific number of years (from 20 to 100 years, depending on the state), as long as the right is used, or, in at least one state, forever.

Recently, a handful of state legislatures have explored efforts to extend or alter the right of publicity after death, or post-mortem. Maryland, Massachusetts and New Hampshire failed post-mortem right of publicity generally refers to a famous person’s ability to control the commercial use of his or her name, picture, likeness, voice and identity after death.
to extend the application of their statutes to 70 years beyond death, but Indiana lawmakers passed an amendment to the state’s existing statute and applied post-mortem publicity rights retroactively. That law excludes people who became famous as a result of a criminal charge or conviction. Federal courts have recently resolved issues of jurisdiction in post-mortem right of publicity cases. For example, a few years ago, the Ninth Circuit Court of Appeals ruled that Marilyn Monroe’s publicity rights died with her more than 50 years ago. Monroe’s legal residence was New York, and New York does not recognize a right of publicity after death. Her estate argued that because she died in California, that state’s post-mortem right of publicity statute should apply. Similar cases have applied the law of the state of primary residence of the celebrity at the time of death.

Legal disputes over post-mortem publicity rights have intensified in recent years. The estates of musicians Prince, Whitney Houston and Michael Jackson have been tied up in court for years over various post-mortem right of publicity issues. Many of the cases center on the taxable value of the post-mortem publicity right to the estate. For example, Michael Jackson’s estate valued his post-mortem image or likeness at $2,105, but the IRS determined the value to be more than $434 million. Comedian Robin Williams bequeathed his post-mortem publicity rights to a charitable organization and restricted the use of these rights for 25 years. Legal experts say this was a creative way for a celebrity to exercise post-mortem control over the digital use of a celebrity’s likeness in a movie or advertisement. It would also prevent the use of Williams’ image as a hologram or some other not-yet-developed digital format.

Recently, an Arizona appeals court held that the right of publicity is a property right that can be transferred to a descendant. After the death of Prince in 2016, the Minnesota legislature tried to push through a right of publicity bill that extended post-mortem rights because of concerns about a lack of protection for Prince’s estate. The bill was pulled weeks later after the bill’s sponsor decided it was more prudent to leave the matter for state courts to decide.

Plaintiff’s Case

To win a commercialization or right of publicity case, a plaintiff must prove his or her name or likeness was used for commercial purposes without permission. The plaintiff must also show the commercial use was of and concerning him or her and was widely distributed.

Name or Likeness. Appropriation occurs most obviously when a person’s name, picture or likeness—clearly identifying the person—is used commercially without permission. Having the same name that is used in an advertisement is usually not enough to show identification. Something in the ad must show the ad was of and concerning that plaintiff. A name can sometimes be the primary basis of a claim. For example, Hasbro and Fox News anchor Harris Faulkner recently settled a case in New Jersey after Faulkner accused the toy maker of violating her right of publicity. A New Jersey court refused to dismiss Faulkner’s claim, based largely on the use of her name. Hasbro had named a toy hamster from its “Littlest Pet
Shop” line Harris Faulkner. Legal experts predicted that arguments claiming the hamster looked like Faulkner would probably fail but suggested that Faulkner had a strong claim on a name-based right of publicity.105

It is not sufficient that the commercial use only hints at the plaintiff’s identity or may remind some people of the plaintiff.106 Rather, there must be reasonable grounds for identifying the plaintiff. For example, in a recent case involving the rapper 50 Cent, a court held that his likeness was invoked for commercial purposes when a website posted reproduced and screened photos of the rapper in its masthead. The court said that even though the images were of poor visual quality, visitors to the website could still see that the pictures were of 50 Cent.107

A court in Illinois dismissed a right of publicity case brought by a Guinness World Records record holder against Wendy’s. The fast-food chain ran a kid’s meal promotion that included Guinness-themed toys, one of which was a footbag. An accompanying card listed Guinness facts about the footbag, including this: “How many times in a row can you kick this footbag without it hitting the ground? Back in 1997, Ted Martin made his world record of 63,326 kicks in a little less than nine hours!”108 The court said that the use of Martin’s name on the instruction card did not amount to an endorsement and did not violate Martin’s right of publicity. Rather, the instruction card was part of a product, not an advertisement, and it never suggested that Martin endorsed anything. The Seventh Circuit Court of Appeals upheld the dismissal, noting that the Illinois right of publicity law does not apply to the use of a person’s name when it truthfully identifies a person as an author or performer.109

Generally, courts have held that names and associated information widely available to the public are not protected by right of publicity. For example, the Eighth Circuit Court of Appeals ruled that an online fantasy baseball league operator could use Major League Baseball players’ names and statistics without MLB’s permission.110 The court said the information was widely available in the public domain, making it factual rather than personal to the players.

What about the use of a private person’s name without consent in generic online advertising? Although their names were not used, two plaintiffs in Illinois sued several internet companies that offer online reports about people using information compiled from public records and other sources. The companies, including Intelius, pay internet search engines to advertise their people-search reports. When a user on one of these websites types a person’s name into the search engine, the first and last name of the person being searched will appear in the defendants’ advertisements through an automated process. The defendant companies designed the ads to look like they contained valuable information about the searched-for person, including items like criminal record, divorce record, background checks and bankruptcy. The district court dismissed the right of publicity claim because the advertisements failed to identify the specific plaintiffs in the case, as opposed to identifying anyone who shared their same names.111
Voice. Individuals’ voices are protected against commercial use without consent. Further, advertisers may not use sound-alikes without permission or a disclaimer. For example, singer and actress Bette Midler refused to allow Ford Motor Co. to use her hit recording “Do You Want to Dance?” in a commercial. Ford’s advertising agency then hired a member of Midler’s backup singing group to imitate Midler’s rendition of the song. After the radio commercial aired, a number of people told Midler they thought she had performed in the ad, which failed to say Midler was not the singer. Midler sued Ford and its advertising agency. A federal appellate court said they appropriated part of Midler’s identity.\textsuperscript{112}

Identity. People have characteristics beyond their face or voice that the appropriation tort protects. Game show host Vanna White sued Samsung Electronics for appropriation after the company ran a series of magazine ads showing its products in futuristic settings. A robot standing by a “Wheel of Fortune”-style letter board wore an evening gown, jewelry and a long blond wig. A federal appellate court said the ad appropriated White’s identity, even though it did not use her name, image or voice.\textsuperscript{113}

Actors George Wendt and John Ratzenberger, Norm and Cliff from the television show “Cheers,” brought a similar lawsuit several years later. A company received permission from the studio that owned the “Cheers” copyright to install two animatronic figures resembling Norm and Cliff in airport bars. They did not have consent from the two actors. The animatronic figures resembled Wendt’s and Ratzenberger’s characters in their size, clothing and sitting positions at the bar, but had different faces. Wendt and Ratzenberger sued. A federal appellate court said the figures sufficiently resembled the actors and that Wendt and Ratzenberger could claim appropriation.\textsuperscript{114} The parties settled the case out of court.\textsuperscript{115}

Actors impersonating celebrities in noncommercial or non-advertising situations, such as in a satire or parody, are not appropriating the celebrities’ likenesses or voices. The First Amendment protects such expression.\textsuperscript{116} But the Vanna White case shows that protection does not extend to impersonations in advertisements or other commercial situations. The appellate court specifically rejected Samsung’s contention that the robot ad was meant as a satire.

Two recent court decisions established that computer-generated images and avatars in video games can constitute a portrait under New York’s right of publicity statute.\textsuperscript{117} An avatar is an icon or image that represents a person in a video game or other computer-generated content. New York’s highest court dismissed two cases in 2018 involving the video game “Grand Theft Auto V.” Actress Lindsay Lohan and reality television star Karen Gravano from the show “Mob Wives” both filed lawsuits against the video game maker for images that they said depicted them. Gravano said the game’s character “Andrea Bottino” appropriated her image,
and Lohan argued that two scenes in the game that featured a blonde woman flashing a peace sign and taking a selfie represented her. In both cases, the court said the computer-generated images could constitute a portrait under the law. However, in Gravano’s case, the court said the avatar was not recognizable as Gravano. In Lohan’s case, the court said the character was a generic artistic depiction of “a twenty-something woman without any particular identifying physical characteristics.” Both cases were dismissed.

**Defenses**

Even if a plaintiff can prove that his or her name or likeness was used for commercial purposes without permission, there are several defenses for appropriation.

**Newsworthiness.** Newsworthiness is the most common defense. Media publish newsworthy material despite having a commercial purpose. Courts have defined the word “newsworthy” broadly, and the newsworthiness defense sometimes shows up in unlikely cases. For example, rapper 50 Cent argued that his creation of an explicit sex video directed at rival rapper Rick Ross was newsworthy. A New York state court disagreed, specifically noting that the posting of explicit sex tapes is not newsworthy.

Judges do not carefully analyze content to determine whether it is newsworthy. The U.S. Supreme Court has heard only one appropriation case and rejected a television station’s claim of a newsworthiness defense to a right of publicity suit when a local newscast showed an entertainment act in its entirety without consent or compensation. The television station recorded and subsequently broadcast all 15 seconds of human cannonball Hugo Zacchini’s act, including the most critical part—his flight from the cannon to the net. The Supreme Court said that people who saw the entire act on television were less likely to attend the performance in person and focused on the economic value of his act.

There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news. But, it is important to note that neither the public nor [the television station] will be deprived of the benefit of [Zacchini’s] performance as long as his commercial stake in his act is appropriately recognized.

The television station’s First Amendment rights were not more important than protecting Zacchini’s financial interest in his performance, the Court said.
REAL WORLD LAW

DOES POTENTIAL ILLEGALITY IMPACT NEWsworthINESS?

The Indiana Supreme Court recently considered whether fantasy sports operators need the consent of college athletes when using their names, pictures and statistics in the context of online gambling. Indiana’s right of publicity statute has an exemption for newsworthy material and for reporting on events of public interest. Former college football players sued several fantasy sports companies, arguing that they used the players’ names, pictures and game statistics without consent. Before deciding Daniels v. FanDuel, Inc., the Seventh Circuit Court of Appeals asked the Indiana Supreme Court to decide whether the potential illegality of gambling operations impacts Indiana’s newsworthiness exemption for right of publicity. The Indiana Supreme Court answered that the newsworthiness exemption would include an online fantasy sports operator’s use of players’ names, pictures and statistics, so the Seventh Circuit then terminated the lawsuit.

One legal expert noted, however, that the Seventh Circuit “left open the possibility that . . . the players might still have a claim if there was likely confusion as to sponsorship by the athletes of the fantasy sports sites.”

First Amendment. First Amendment defenses in right of publicity cases are common today, particularly in the context of artistic works such as movies and video games. Over the years, courts have also considered whether commercial products—such as posters, dolls, T-shirts and games—have First Amendment protection. Courts most often have decided posters do not have First Amendment protection. Courts have said the First Amendment protects selling posters with pictures of newsworthy individuals or events, such as a poster with a picture of former San Francisco 49ers quarterback Joe Montana celebrating the team’s 1990 Super Bowl victory. Courts drew a distinction between merchandise exploiting celebrities’ names or likenesses and posters conveying newsworthy information of public interest. Courts found appropriation when posters of singer Elvis Presley, model Christie Brinkley and professional wrestlers were distributed without permission.

The question of First Amendment protection versus right of publicity arises most frequently when a well-known person is used in an artistic work. For example, recently, a federal judge in New York ruled that hip-hop star Pitbull did not violate actress Lindsay Lohan’s right of publicity by including the line “I’m toptoein’, to keep flowin’, I got it locked up, like Lindsay Lohan” in his hit song “Give Me Everything.” Rather, the song is a work of art protected by the First Amendment.

One approach used to resolve this kind of conflict is the artistic relevance test. This test asks whether using a celebrity’s name or picture is relevant to a work’s artistic purpose. If it is, the First Amendment, which applies to artistic as well as journalistic works, may allow using the celebrity’s name without permission. However, consent is needed if the name or celebrity’s likeness is used primarily to give the work commercial appeal. For example, in Italian movie director Federico Fellini’s film “Ginger and Fred,” two cabaret dancers used the nicknames Ginger and Fred because they imitated Ginger Rogers and Fred Astaire. Rogers sued, claiming...
the movie title infringed on her right to use her name for commercial purposes. The Second Circuit Court of Appeals applied the artistic relevance test and said Rogers could not win unless the movie title had no artistic relevance to the film itself or misled consumers about the film’s content. The movie’s title and contents were artistically related, the court held.

Sometimes, song titles do not relate to a song’s lyrics. For example, the rap duo OutKast recorded a song titled “Rosa Parks.” Parks, a major figure during the civil rights movement, refused to give her seat to a white person and move to the back of the bus, as city law in racially segregated Montgomery, Ala., then required. Her defiant act touched off boycotts, sit-ins and demonstrations throughout the South. Applying the Rogers test, a federal appellate court concluded that a jury could find that the title “Rosa Parks” had no artistic relevance to the lyrics, despite the chorus repeatedly using the phrase “move to the back of the bus.” The use of Rosa Parks’ name in the title of a profane and sexually explicit song was misleading, the court held, because the song was not about her.

Instead of the Rogers artistic relevance test, more courts today apply the transformative use test to decide whether a challenged work has First Amendment protection against a right of publicity suit. The California Supreme Court proposed the transformative use test to distinguish protected artistic expression about celebrities from expression that encroaches on the right of publicity in a case involving the Three Stooges. The First Amendment protects a work that adds enough new elements to the original to transform it. Changing the original by giving it a new meaning or a different message justifies First Amendment protection. Transformative works may be satires, news reports, fictional works, social criticism or video games.

In the California Supreme Court case, an artist created a charcoal sketch of the Three Stooges, transferred the sketch to T-shirts and lithographs and sold thousands. A company owning the Three Stooges’ publicity rights sued. The California court acknowledged the conflict between the artist’s First Amendment right to express himself and the right of celebrities to protect their property and financial interests in their images. The court concluded, “When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass,” the celebrity’s rights outweigh First Amendment protections. The court found that the Three Stooges drawing was a “literal, conventional” depiction of the three men, with no discernible transformative elements. Because the drawing did not transform the Three Stooges’ pictures, it had no First Amendment protection.

Courts have heard several cases that test the application of the transformative use test to athletes and video games. The earliest and most prominent cases settled for $60 million after a lengthy appeals process in the Ninth Circuit Court of Appeals. They involved three college athletes who filed class action lawsuits against the video game company Electronic Arts, the National Collegiate Athletic Association and the Collegiate Licensing Company (now known as IMG College Licensing). Class action lawsuits are filed by individuals acting on behalf of a larger group with a common legal interest. A decade ago, Ed O’Bannon, the star of UCLA’s 1995 championship basketball team, and Sam Keller, former quarterback from Arizona State University and the University of Nebraska, argued in a U.S. district court in California that EA’s NCAA-themed video games violated their right of publicity because their likenesses were
used without compensation. The players noted that the video games depicted every distinctive characteristic of them except their names. At the same time, former Rutgers quarterback Ryan Hart made the same claim in a U.S. district court in New Jersey.

In both cases, EA argued that its First Amendment rights trumped the players’ right of publicity. Although the facts in both cases are nearly identical and both courts applied the transformative use test, the two courts came to different decisions. In California, the court applied the transformative use test and held that EA’s use of Keller was not transformative and did not deserve First Amendment protection. In New Jersey, the court ruled in favor of EA and criticized the California decision, which it suggested “[i]logically . . . consider[ed] the setting in which the character sits . . . yet ignore[d] the remainder of the game.” The Third Circuit Court of Appeals eventually reversed the New Jersey district court’s summary judgment decision. Both cases settled out of court with agreements to pay millions of dollars to the student athletes named in the class action suits.

On the heels of the settlements, 10 former college football and basketball players filed a similar right of publicity lawsuit in federal court against major broadcast companies, athletic conferences and licensors. Former Vanderbilt University football player Javon Marshall was the lead plaintiff in the lawsuit, which sought damages for the misappropriation of the names, images and likenesses of college athletes in broadcasts and advertisements without their consent. In 2016, the Sixth Circuit Court of Appeals affirmed a Tennessee district court ruling, which dismissed the case and noted that a common law right of publicity does not exist in that state.

Recently, the NCAA appealed the Ninth Circuit’s decision in the O’Bannon case to the U.S. Supreme Court, arguing the case was wrongly decided, but the Supreme Court declined to hear it. The NCAA’s interest in the ruling stemmed from additional claims that the organization’s rules violate antitrust laws by not allowing student athletes compensation for the use of their names and likenesses.

Soon after the college athlete lawsuits, a group of former NFL players sued EA for the alleged use of their likenesses and identities in the “Madden NFL” video games. The video game gave users the ability to play as a historic football team, which the former NFL players said went beyond the NFL’s licensing agreement with EA and violated their right of publicity. On appeal to the Ninth Circuit, the court rejected EA’s transformative use and artistic relevance arguments and returned the case to the district court. In 2018, the district court denied EA’s motion to dismiss the case, but did decide that the case could not continue because the former NFL players did not constitute a class under the Federal Rules of Civil Procedure. These general rules govern all civil proceedings in the U.S. district courts, and they require a sizable number of people to share a common legal issue to constitute a group for a class action claim.

Nonetheless, courts still generally apply the transformative use test to affirm First Amendment rights in lawsuits that involve movies, television and video games. In 2018, a court in California applied the transformative use test to protect a television miniseries, “Feud: Bette and Joan,” inspired by the real-life, old Hollywood rivalry between actors Bette Davis and Joan Crawford. Actor Olivia de Havilland sued the series creators and producers...
for depicting her as a character. The court rejected de Havilland’s argument that by creating a character based on a real person the expressive work implied her endorsement of the work. The state appeals court concluded that the work was transformative and protected by the First Amendment, “which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art.”

A few years ago, the Weinstein Co. prevailed in a lawsuit brought by legendary soul singer Sam Moore who said the film “Soul Men” violated his right of publicity because it told his life story. A federal appeals court applied the transformative use test and said the film added “significant expressive elements,” so it was protected on First Amendment grounds.

The transformative use test also provides protection for artists. Nearly two decades ago, the California Supreme Court used the test to rule that a comic book artist transformed images of two musicians, Johnny and Edgar Winter. The California Supreme Court said, “An artist depicting a celebrity must contribute something more than a ‘merely trivial’ variation” of the celebrity’s image. The artist “must create something recognizably ‘his own’” for a court to find “significant transformative elements” in the artist’s work.

Another way to balance the First Amendment and the right of publicity is the predominant use test. The question is whether a person’s name or image is used more for commercial purposes or substantive expression. The Missouri Supreme Court applied this test in ruling that a comic book creator named a character “Antonio ‘Tony Twist’ Twistelli” more to sell the comics than for free speech purposes. In the comic, Twistelli was portrayed as an organized crime leader. A real Tony Twist, a former professional hockey player, sued for misuse of his name. A jury awarded $15 million in damages, and the state’s high court affirmed the ruling.

Courts have long held that the First Amendment protects using celebrities’ names in biographies and fiction, including movies and television programs. Although this was part of appropriation law long before the California Supreme Court used the transformative use test, the reasons are similar. Books, news stories, movies and television programs add transformative elements by putting the names in a context. For example, a movie called “Panther,” combining fact and fiction, portrayed several members of the Black Panther Party, a political group active in the 1960s and 1970s that promoted black power and social activism. Bobby Seale, a prominent member of the Black Panthers, sued. A federal district court rejected Seale’s appropriation claim, saying the First Amendment protected using his name in the film.

Some celebrities, such as the now-deceased wealthy recluse Howard Hughes, have tried to limit who may write their biographies. But no person, or deceased person’s relative, has the right to prevent anyone from writing about another’s life.

Ads for the Media. Another First Amendment–based appropriation defense holds that mass media may run advertisements for themselves without consent when using the names and likenesses of public figures if those figures were part of their original content. Courts recognized this defense when a magazine, Holiday, ran ads for itself in two other publications. One ad urged people to subscribe, and the other ad suggested advertising agencies place their clients’ ads in Holiday. Both ads included pictures of actress Shirley Booth that Holiday had
published in one of its issues. Booth sued under New York’s appropriation law. The state’s highest court said that in order to stay in business and to use its First Amendment rights, the magazine had to attract subscribers and advertisers. Illustrating the magazine’s contents and quality by showing what it publishes did not violate Booth’s rights, the court concluded.154

Holiday magazine won the suit in part because it did not suggest Booth endorsed the magazine. However, a men’s magazine’s advertisement for itself used a picture of the actress and singer Cher that had accompanied a published interview with her. A cartoon balloon over Cher’s head included the words, “So join Cher and FORUM’s hundreds of thousands of other adventurous readers today.” Cher sued, saying the magazine had implied her endorsement of the magazine without permission. A federal appellate court agreed with her.155

More recently, former Chicago Bulls star Michael Jordan sued a grocery store chain based on a magazine ad in which Jewel Food Stores congratulated him for being inducted into the Basketball Hall of Fame. The Seventh Circuit Court of Appeals found that because the grocery store’s logo was prominently featured along with its marketing slogan and then linked in the ad text to Jordan, it constituted image advertising. The case was remanded to the lower court, but the Seventh Circuit said a First Amendment defense would not apply in the case.156

**Consent.** The best appropriation defense is consent. That is why professional photographers use releases—contracts prepared by lawyers and signed by all parties involved—when taking pictures for advertisements or other commercial use. Oral consent can be a defense, but proving it can be difficult if the plaintiff claims she or he did not give permission. Also, the law does not allow certain people to give consent, such as minors and those who are not mentally or emotionally capable of agreeing. And consent is limited to the agreement’s terms. Consent to use a picture in an ad throughout 2020, for example, does not allow its use in 2022. Similarly, if a person gives consent to use a picture in a smartphone ad, the picture cannot be used to advertise shoes. If a person gives sweeping consent—to use a picture at any time in the future in any advertisement—a court likely will hold that the agreement is more limited than indicated.

Consent most often is explicit; a person agrees to allow his or her name to be used. But consent may also be implied. For example, a man sued the owner of a smartphone app that would send the user’s contacts a text message invitation to join the app. The invitation included the user’s name so people invited to join could see who sent the message. The man argued that including his name in the text message invitation exceeded the scope of his consent. The app did not allow him to view the text message invitation before the app sent it. A court in Illinois held that because the man decided to use the app to send the text messages, a reasonable user would understand his name was necessary for the invitation process to work.157

**Incidental Use.** The use of a person’s name or likeness may be incidental to a work’s primary purpose. Incidental use typically arises in appropriation claims and not right of publicity. A court could rule that a person’s name or likeness was used so briefly that the purpose was not to make a profit or gain commercial benefit. For example, a name applied to a fictional terrorist in a comic book appeared in 1 of 116 panels spanning 24 pages. A person who said the comic book applied his name to the terrorist sued under New York’s appropriation law.
A federal district court said the name's use was incidental to the comic book's primary purpose and could not sustain a privacy suit. Similarly, if a photograph of a large crowd of people is used in an advertisement, it is unlikely one person in the group could claim successfully that her picture is being used for commercial purposes.

In a recent case, an Ohio couple sued Amazon.com and others for false light and appropriation for the use of their engagement photo on the cover of a self-published novel. The novel was a satirical, erotic account of a married woman's fascination with New England Patriots player Rob Gronkowski, titled “A Gronking to Remember.” The court observed that the novel was alleged to be “less than tasteful” and “offensive.” The book was the butt of jokes on late-night talk shows before the 2014 Super Bowl and received some national media attention. The author of the self-published novel argued that his use of the photo on the cover was incidental. The district court disagreed.

This argument confuses and misstates the issue in this case—it would be relevant if the plaintiff in the case were Rob Gronkowski, a public figure. The incidental use doctrine applies, however, only to persons with celebrity or other notorious status—which plaintiffs did not have.

Rather, the couple argued that the novel’s author appropriated their engagement photo “for his own commercial benefit.” On appeal, the Sixth Circuit Court of Appeals held that the couple was not able to demonstrate the commercial value of their image to the corporate defenders in the case and granted Amazon and the other publishers summary judgment.

**PRIVATE FACTS**

A court first recognized the private facts tort in 1927. Journalists and others can be sued for the private facts tort if they publish truthful private information that is not of legitimate public concern and is highly offensive to a reasonable person. The private facts tort is intended to protect a person’s dignity and peace of mind by discouraging the publication of intimate facts. If intimate private facts are publicized, a jury may award monetary damages to compensate for the resulting emotional injury. Courts recognize a First Amendment defense to a private facts lawsuit.

**Publicity**

A private facts plaintiff must prove that the defendant publicized intimate information. Publicity in the private facts tort is not the same as publication in a libel suit. In libel, publication to a third party, someone other than the plaintiff and defendant, is sufficient. For the private facts tort, most courts require widespread publicity. Revealing intimate information in the media will meet the definition of publicity. Some courts hold that revealing private facts to small groups of people who have a special relationship with the plaintiff is sufficient. This could include the plaintiff’s fellow workers, church members, colleagues in a social organization or neighbors.
Intimate Facts

Intimate facts are those that a person would not want the community to know. Private facts suits, for example, could relate to a person’s financial condition, medical information or domestic difficulties. Often, private facts suits concern sexual activities. The question before a court hearing a private facts case is: Would it outrage the community’s notions of decency if the intimate information were published?

Not all facts about a person are private. Information in a public record, such as a court filing or an arrest record, is public information. Facts are not private if a person made them public. Information told to a few close relatives or friends remains private, and a person may define his or her own circle of intimacy, according to courts. But if a person reveals intimate facts publicly, the private facts tort does not limit the media from publishing the information.

For example, a friendship between two high school girls deteriorated into a bitter feud. The first girl accused the second of being pregnant, and that girl teased the first about her Jewish heritage, seeking psychological counseling and having plastic surgery. The second girl’s family self-published a book about the feud. The book included school, police and legal documents connected with the situation. The first girl sued for private facts, among other torts. She claimed the book included “1) excerpts and summaries from her Myspace.com webpage; 2) three statements related to her Jewish ancestry; 3) her enrolment [sic] at [a university]; 4) two statements regarding Plaintiff’s decision to seek professional psychological care or counseling; 5) Plaintiff’s transfer from one high school to another under a superintendent’s agreement; and 6) two statements regarding plastic surgery on Plaintiff’s nose.” The court held that categories 1, 2, 3 and 5 were not private. The plaintiff wrote on her Myspace page that she sought psychological help and agreed that she could not conceal what she posted there. As to plastic surgery, the court said it “questions whether this matter is truly private: cosmetic surgery on one’s face is by its nature exposed to the public eye.”

Can a victim of revenge porn win a private facts lawsuit? Websites featuring nonconsensual pornography, commonly known as revenge porn, allow people to post sexually explicit videos or nude pictures of others without their consent. The owner of the pioneering revenge porn site IsAnybodyUp.com said at the site’s peak he was earning $10,000 a month in advertising revenue based on 30 million reported page views. That site is no longer active, but the owner of a different site modeled after it says he makes $3,000 a month, with some of that money coming from fees he charges people to remove pictures or videos from the site.

Legal experts say a private facts lawsuit is hard to win in revenge porn cases because often the victim initially shared the explicit image with someone, usually a friend or sexual partner. Many courts have found that the act of voluntarily sharing the image makes it no longer private. Many organizations, like the Cyber Civil Rights Initiative, are fighting revenge porn
INTERNATIONAL LAW
GLOBAL DATA PROTECTION REGULATION IN THE EU

Recently, the European Union implemented a new framework for consumer data protection. The Global Data Protection Regulation (GDPR) significantly changed how companies handle consumer privacy and gave EU citizens the right to control their own data. Data privacy experts have hailed the GDPR as one of the most powerful data privacy laws in the world. The GDPR requires companies to explain how they store and use consumers’ personal data, allows people to request that companies delete their personal data and allows people to object to their personal data being used for direct marketing purposes (such as personally tailored ads on the internet).\footnote{vii}

The GDPR expands the concept of the “right to be forgotten.” An EU Court of Justice (in essence, a “supreme court” for the European Union) decision about a decade ago required Google to unlink articles from its searches that people claimed are irrelevant or no longer accurate.\footnote{viii} Since 2014, this “right to be forgotten” has resulted in more than three million URL delisting requests to Google, which has approved about 55 percent of those.\footnote{ix}

by appealing to state legislatures. In 2019, 43 states, the District of Columbia and one territory had laws that criminalized revenge porn.\footnote{179}

**Legitimate Public Concern**

A plaintiff cannot win a private facts lawsuit if the information is newsworthy or of legitimate public concern. The media help determine what is newsworthy through their reporting behaviors. Courts give the media considerable leeway to determine what is newsworthy. Stories about crimes, suicides, divorces, catastrophes, diseases and other topics may include intimate information people do not want published. If newsworthy, these private facts cannot be the basis of a successful private facts suit.\footnote{180}

Many courts have said the First Amendment will not protect the publication of highly intimate facts unless they are of public concern. In defining newsworthiness, the court distinguished between information the public is entitled to know and facts publicized for a morbid or sensational reason. For example, a Sports Illustrated story included information about Mike Virgil, who bodysurfed at the Wedge, a public beach near Newport Beach, Calif., considered one of the world’s most dangerous places for bodysurfing. To illustrate the surfers’ daredevil attitudes, the story reported that Virgil put out a cigarette on his tongue, dove headfirst down a flight of stairs to impress women, ate spiders and jumped off billboards. Virgil spoke with the Sports Illustrated reporter but withdrew his consent to the story before publication and then sued the magazine for publishing private facts.\footnote{181}

The federal appeals court sent the case back to the trial court to decide whether public concern about surfing at the Wedge justified revealing intimate details of Virgil’s life.\footnote{182} The trial court held that the personal information in the article, for example eating spiders, was embarrassing but not sensational. The facts helped describe people who bodysurfed at the Wedge, the court said in ruling for Sports Illustrated.\footnote{183}
Several courts have taken a slightly different approach to defining newsworthiness about people involuntarily put in the public eye. These courts determine whether there is a logical connection between the news event and the private facts. Well-known people are inherently more newsworthy than others. Even celebrities, though, have a right to keep private those facts that would be highly embarrassing if publicized.

For example, in part based on a private facts claim, actress Pamela Anderson Lee and rock musician Bret Michaels successfully prevented distribution of their sex tape. More recently, former professional wrestler Hulk Hogan, whose real name is Terry Bollea, sued Gawker Media for reporting on and showing excerpts of a sex tape that showed him having sex with the wife of a friend, Todd Clem, who is a radio shock jock named Bubba the Love Sponge. Clem made the recording and gave Gawker the tape; the media outlet did not pay for it. Bollea sued Clem and his wife for invasion of privacy and settled out of court after Clem acknowledged that Bollea did not know his sexual encounter was being recorded. Bollea also sued Gawker for invasion of privacy, seeking $100 million in damages.

Initially, the case focused on whether issuing an injunction to prevent the publication of the tape was appropriate under the First Amendment. In ruling on the injunction, the judge wrote that Hogan’s public discussions—with TMZ, on the Howard Stern show and in his autobiography—about his many affairs showed that the subject was not truly private and that reporting on the sex tape was a matter of public concern.

When Bollea’s privacy lawsuit went before a jury, he argued that his celebrity status as Hulk Hogan should not deprive him of privacy protections, that he did not know the sexual encounter was being recorded, that Gawker did not seek his permission to publish the video and that Gawker was not a journalist but rather was acting solely for its own commercial gain. The jury found in favor of Bollea, determining that the publication of the sex tape was offensive and not a matter of legitimate public concern. It recommended awarding $140 million in both actual and punitive damages, an award later upheld by a judge. Privacy law experts say it is more common for juries, rather than judges, to determine newsworthiness, which has recently resulted in larger jury verdicts in privacy cases.

Nick Denton, Gawker’s CEO, appealed the Bollea verdict and later declared personal bankruptcy, as did Gawker Media. In late 2016, Gawker and Bollea settled the invasion of privacy lawsuit for $31 million, ending the appeals process. Ultimately, the new owner of Gawker.com shut down the site and took down all of the other articles involved in the litigation. Many legal experts suggest that Gawker and Denton might have prevailed on appeal based on First Amendment grounds but that the legal fight would be too costly after the revelation that billionaire Peter Thiel, the founder of PayPal, was financing Bollea’s lawsuit.
Recently, sports broadcaster Erin Andrews won $55 million in damages from a stalker and from a hotel owner and management group after she was the victim of unlawful videotaping. Andrews’ serial stalker secretly recorded her in adjacent hotel rooms and leaked nude videos of Andrews, which went viral. The stalker went to prison, and a jury awarded Andrews damages for invasion of privacy and other torts.190

In 2017, New York Giants defensive end Jason Pierre-Paul settled an invasion of privacy suit with ESPN after reporter Adam Schefter tweeted photos of Pierre-Paul’s hospital records from a 2015 hand injury. ESPN argued that its reporting was newsworthy, and while a federal judge dismissed Pierre-Paul’s claim that the tweet violated Florida’s medical privacy statute, she allowed the privacy claim to move forward.191

Newsworthiness can be a defense to a private facts suit. In the past, media defendants had the burden of showing that the facts were of legitimate public interest, and some courts continue to put the newsworthiness burden on the defendant. Other courts require the plaintiff in a private facts suit to prove that the intimate facts were not newsworthy. In one example, a newspaper reported that a student body president was transgender.192 Toni Diaz, born Antonio Diaz, underwent sex reassignment surgery before entering a community college. Elected student body president, she charged school administrators with mishandling student funds. A local newspaper columnist wrote of Diaz, “Now I realize, that in these times, such a matter is no big deal, but I suspect his female classmates in P.E. 97 may wish to make other showering arrangements.” Diaz, who had told only close relatives and friends of her operation, sued the paper and columnist.

A court ruled that Diaz, as plaintiff, had to prove the private facts were not newsworthy because putting the burden on the media could lead to self-censorship. The court ruled that Diaz could show it was not newsworthy to publish remarks about her gender and that her gender had no connection with her ability to be student body president.

When a news media outlet publishes a mug shot (the police photo of an arrested person’s face), it is considered newsworthy and not a violation of privacy. Mug shots are usually considered public records, not private facts. In the past few years, dozens of for-profit mug shot websites have emerged, posting publicly available mug shots for widespread viewing. Some of the websites charge people money to have their mug shots removed.193 Several states have passed laws prohibiting companies that publish mug shots from charging fees to remove or correct information.

Several plaintiffs have also filed various privacy-related lawsuits against these websites. A federal court in Pennsylvania dismissed one lawsuit but left open the question of whether mug shot websites constitute a form of a news report.194 In 2017, a district court in Illinois decided in a right of publicity claim that Mugshots.com and its second website, Unpublisharrest.com, which removed listings from Mugshots.com for a fee, were commercial enterprises not entitled to First Amendment protection.195
Some private facts plaintiffs have argued that the passage of time may mean that information is no longer of legitimate concern to the public. Either the plaintiff was newsworthy many years before the media published the intimate information, or the private facts relate to events that happened long ago. Courts have rejected this contention, saying that newsworthiness does not disappear over time.¹⁹⁶

**First Amendment Defense**

One way to balance privacy interests against First Amendment interests is to focus on the source of the information. Should the press lose a private facts suit if the intimate information came from a **public record**? The U.S. Supreme Court has said the First Amendment protects publishing truthful information of public significance lawfully obtained from public records, unless punishing the media would serve a compelling state interest. Court decisions have not held that the First Amendment always will protect publishing truthful information taken from public records,¹⁹⁷ but the Supreme Court has not yet found a compelling state interest that overrides the press’s First Amendment rights.

In *Florida Star v. B.J.F.*, for example, the Supreme Court held that the First Amendment protected a newspaper that published the name of a rape victim, reasoning that violent crime is a publicly significant topic.¹⁹⁸ A woman identified as B.J.F. reported to a Florida sheriff’s department that she had been robbed and sexually assaulted. The sheriff’s department prepared an incident report that identified B.J.F. by her full name and placed the report in its pressroom, which was open to the public. An inexperienced reporter for The Florida Star saw the report, and the paper published a brief story on the case, including B.J.F.’s full name. This was contrary to the paper’s policy of not naming rape victims. B.J.F. sued the sheriff’s department and The Florida Star under a state law making it illegal for media to publish the name of a sexual assault victim. The sheriff’s department settled before trial, and B.J.F. won her case against the newspaper, a result that was upheld by a Florida appellate court.¹⁹⁹

The newspaper appealed the case to the U.S. Supreme Court, which reversed, holding that the First Amendment protects a newspaper that publishes truthful information lawfully obtained from public records, provided no compelling state interest requires otherwise.²⁰⁰ Although protecting the identity of a sexual assault victim could serve a compelling state interest, the Court said, three factors worked against that conclusion. First, the government itself supplied the information. Second, the state law forbidding names from being published had no exceptions, even if the community already knew the victim’s name. Third, the state law applied only to the media, allowing others to disseminate a victim’s name. Under these circumstances, the Court said, the right to a free press outweighed the state’s interest in preventing publication of B.J.F.’s name.

Information in government records available to the public cannot be considered private. Facts presented in public meetings also are not secret. Unless a judge seals a record, making it unavailable, court records are public. A private facts suit cannot be based on intimate information contained in publicly accessible records.
Some government records are not publicly accessible and may not be considered public records in a private facts lawsuit. Similarly, not all publicly accessible places are “public.” Publishing a picture and a conversation obtained by entering a private hospital room may not be protected even if the hospital generally is open to the public.\textsuperscript{201}

**Lawfully Obtained.** In three other decisions, the U.S. Supreme Court ruled that where the press had legally obtained truthful information from public records, it was not liable for publishing private facts. Nearly 50 years ago in *Cox Broadcasting Corp. v. Cohn*, excerpted at the end of this chapter, the Court said for the first time that truthful information lawfully obtained from a public record could not be the basis of a private facts lawsuit.\textsuperscript{202} The case involved the rape and murder of a 17-year-old girl in Georgia. At a court proceeding some months after the crime, a reporter covering the incident learned the name of the victim from indictments filed against six defendants and reported it. The victim’s father sued the television station for broadcasting the name. He won at trial and again on the television station’s appeal to the Georgia Supreme Court. But the U.S. Supreme Court reversed, noting that the First Amendment protects the press against a private facts tort if the information is obtained from generally available public records.

In a separate case originating in Oklahoma, news media violated a juvenile court judge’s order by publishing the name and picture of an 11-year-old boy charged with second-degree murder for shooting a railroad employee. Reporters were in the courtroom when the juvenile appeared, and the court put his name on the public record. Photographers took pictures as the minor left the courthouse. The Supreme Court said the press had lawfully obtained information available to the public and held that the First Amendment prohibits punishing the press for revealing information taken from public records.\textsuperscript{203}

In another case, newspaper reporters who were monitoring a police scanner in West Virginia responded to a crime scene and learned from witnesses and investigators the name of a 14-year-old boy charged with killing a classmate. State prosecutors obtained an indictment against the press for publishing the boy’s name in violation of a state law. The Supreme Court, however, ruled in favor of the newspaper, reasoning that the First Amendment protects news reports where journalists have lawfully obtained truthful information from publicly available sources. The Court said protecting the minor’s privacy was not a compelling reason to restrict the freedom of the press.\textsuperscript{204}

The Supreme Court has also held that the First Amendment sometimes protects publication of private information even where it was not lawfully obtained—so long as the media were not involved in illegally acquiring the information. In *Bartnicki v. Vopper* (discussed further in Chapter 7), the Court said the media were not liable for publishing an intercepted cellphone conversation between two labor negotiators. Punishing the media for publishing information they obtained without acting illegally would not further a compelling government interest, the Court said.\textsuperscript{205}
Today, people's concerns about privacy persist alongside an additional threat from marketers, data brokers and other businesses that amass personally identifiable data. Data brokers collect, store and sell billions of pieces of personal data that cover nearly every U.S. consumer. In addition, courts have allowed websites and advertisers to put cookies—technology that tracks what websites people visit—on computers. Many smartphone applications send users' sensitive information to advertisers and third-party data collectors.

A few years ago, the Federal Trade Commission issued a substantive report about consumer privacy protection and called on companies to adopt its recommended best practices. The FTC is the chief federal agency that protects consumer privacy and enforces federal privacy laws. The FTC report suggested that at all stages of product development, companies build in consumer privacy protections, including consumer data security, limited data collection and retention, and procedures to promote data accuracy. The report also recommended giving consumers the option to control how they share their information and the ability to choose a "Do Not Track" mechanism, and the FTC encouraged companies to strive toward transparency in how they collect and use consumer information. Current federal and state privacy laws do not sufficiently protect American consumers, according to the FTC. The burden of understanding websites' privacy policies is with online users who must affirmatively try to ensure their own privacy.

The FTC issued a report on data brokers to educate the public about how these companies use, maintain and disseminate the personal data they collect. The report noted that none of the nine major data brokers obtained their data directly from consumers. Instead, the data originated from both public and private sources, online and offline. Information collected included Social Security numbers, interest in health issues, voter records, viewed news reports, social media posts, information from travel websites and transaction data from retailers.

Data brokers analyze and repackage the information they collect for sale for marketing or risk mitigation purposes and/or for people searches. The FTC said consumers could benefit from the data these brokers collect and analyze but found little transparency in the industry. Additionally, the report said these brokers unnecessarily store consumer data indefinitely, which can increase security risks for consumers (e.g., increased risk of identity theft).

Recently, the U.S. Supreme Court ruled in favor of a people search engine in *Spokeo, Inc. v. Robins*. Spokeo's
that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

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. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance, as in others, reliance must rest upon the judgment of those who decide what to publish or broadcast.

Appellant Wassell based his televised report upon notes taken during the court proceedings and obtained the name of the victim from the indictments handed to him at his request during a recess in the hearing. Appellee has not contended that the name was obtained in an improper fashion or that it was not on an official court document open to public inspection. Under these circumstances, the protection of freedom of the press provided by the First and Fourteenth Amendments bars the State of Georgia from making appellants’ broadcast the basis of civil liability.

Reversed.

CHIEF JUSTICE WARREN BURGER concurs in the judgment.

JUSTICE LEWIS POWELL, Jr., concurring, with whom JUSTICE WILLIAM DOUGLAS joins.

JUSTICE WILLIAM DOUGLAS, concurring in the judgment.

I agree that the state judgment is “final,” and I also agree in the reversal of the Georgia court. On the merits, the case for me is on all fours with New Jersey State Lottery Comm’n v. United States. For the reasons I stated in my dissent from our disposition of that case, there is no power on the part of government to suppress or penalize the publication of “news of the day.”

JUSTICE WILLIAM REHNQUIST, dissenting.

Because I am of the opinion that the decision which is the subject of this appeal is not a “final” judgment or decree, as that term is used in 28 U. S. C. § 1257, I would dismiss this appeal for want of jurisdiction.

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**Carpenter v. United States**

SUPREME COURT OF THE UNITED STATES

138 S. Ct. 2206 (2018)

CHIEF JUSTICE JOHN ROBERTS delivered the Court’s opinion:

This case presents the question whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user’s past movements.

There are 396 million cell phone service accounts in the United States—for a Nation of 326 million people. Cell phones perform their wide and growing variety of functions by connecting to a set of radio antennas called “cell sites.” Although cell sites are usually mounted on a tower, they can also be found on light posts, flagpoles, church steeples, or the sides of buildings.

Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several
that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

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. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance, as in others, reliance must rest upon the judgment of those who decide what to publish or broadcast.

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Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several...
times a minute whenever their signal is on, even if the owner is not using one of the phone’s features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater the concentration of cell sites, the smaller the coverage area. As data usage from cell phones has increased, wireless carriers have installed more cell sites to handle the traffic. That has led to increasingly compact coverage areas, especially in urban areas.

Wireless carriers collect and store CSLI for their own business purposes, including finding weak spots in their network. . . . In addition, wireless carriers often sell aggregated location records to data brokers, without individual identifying information of the sort at issue here. While carriers have long retained CSLI for the start and end of incoming calls, in recent years phone companies have also collected location information from the transmission of text messages and routine data connections. Accordingly, modern cell phones generate increasingly vast amounts of increasingly precise CSLI.

In 2011, police officers arrested four men suspected of robbing a series of Radio Shack and (ironically enough) T-Mobile stores. . . . The suspect identified 15 accomplices who had participated in the heists and gave the FBI some of their cell phone numbers; the FBI then reviewed his call records to identify additional numbers that he had called around the time of the robberies.

Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and several other suspects. That statute, as amended in 1994, permits the Government to compel the disclosure of certain telecommunications records. . . . Federal Magistrate Judges issued two orders directing Carpenter’s wireless carriers—MetroPCS and Sprint—to disclose (CSLI) . . . during the four-month period when the string of robberies occurred. . . . Altogether, the Government obtained 12,898 location points, cataloging Carpenter’s movements—an average of 101 data points per day.

Carpenter was charged with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. Prior to trial, Carpenter . . . argued that the Government’s seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion.

At trial . . . FBI agent Christopher Hess . . . produced maps that placed Carpenter’s phone near four of the charged robberies. In the Government’s view, the location records clinched the case. . . . Carpenter was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison.

The Court of Appeals for the Sixth Circuit affirmed. The court held that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers. Given that cell phone users voluntarily convey cell-site data to their carriers as “a means of establishing communication,” the court concluded that the resulting business records are not entitled to Fourth Amendment protection. . . .

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The basic purpose of this Amendment . . . “is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” . . . For much of our history, Fourth Amendment search doctrine was “tied to common-law trespass” and focused on whether the Government “obtains information by physically intruding on a constitutionally protected area.” More recently, the Court has recognized that “property rights are not the sole measure of Fourth Amendment violations.” In [Katz], we established that “the Fourth Amendment protects people, not places,” and expanded our conception of the Amendment to protect certain expectations of privacy as well. . . .

[The Fourth] Amendment seeks to secure “the privacies of life” against “arbitrary power.” . . . [A] central aim of the Framers was “to place obstacles in the way of a too permeating police surveillance.”

We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools. . . .

In Riley, the Court recognized the “immense storage capacity” of modern cell phones in holding that police officers must generally obtain a warrant before searching the contents of a phone. . . .

The case before us involves the Government’s acquisition of wireless carrier cell-site records revealing the location of Carpenter’s cell phone whenever it made or received calls. This sort of digital
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data—personal location information maintained by a third party—does not fit neatly under existing precedents. Instead, requests for cell-site records lie at the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake.

The first set of cases addresses a person’s expectation of privacy in his physical location and movements. [W]e [have] considered the Government’s use of a “beeper” to aid in tracking a vehicle through traffic. . . . The Court concluded [in Knotts] that the “augment[ed]” visual surveillance did not constitute a search because “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” . . .

This Court in Knotts, however, was careful to distinguish between the rudimentary tracking facilitated by the beeper and more sweeping modes of surveillance. . . . Significantly, the Court reserved the question whether “different constitutional principles may be applicable” if “twenty-four hour surveillance of any citizen of this country [were] possible.”

Three decades later, the Court considered more sophisticated surveillance of the sort envisioned in Knotts and found that different principles did indeed apply. In United States v. Jones . . . the Court decided the case based on the Government’s physical trespass of the vehicle. At the same time, five Justices agreed that related privacy concerns would be raised by, for example, “surreptitiously activating a stolen vehicle detection system” in Jones’s car to track Jones himself, or conducting GPS tracking of his cell phone. Since GPS monitoring of a vehicle tracks “every movement” a person makes in that vehicle, the concurring Justices concluded that “longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy—regardless whether those movements were disclosed to the public at large.

In a second set of decisions, the Court has drawn a line between what a person keeps to himself and what he shares with others. We have previously held that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” . . . As a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections.

This third-party doctrine largely traces its roots to Miller. While investigating Miller for tax evasion, the Government subpoenaed his banks, seeking several months of canceled checks, deposit slips, and monthly statements. The Court rejected a Fourth Amendment challenge to the records collection. For one, Miller could “assert neither ownership nor possession” of the documents; they were “business records of the banks.” For another, the nature of those records confirmed Miller’s limited expectation of privacy, because the checks were “not confidential communications but negotiable instruments to be used in commercial transactions,” and the bank statements contained information “exposed to [bank] employees in the ordinary course of business.” . . .

Three years later, Smith applied the same principles in the context of information conveyed to a telephone company. . . .

The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person’s past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring we considered in Jones. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled. At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of Smith and Miller. But while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when Smith was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person’s movements.

We decline to extend Smith and Miller to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in Jones or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter’s wireless carriers was the product of a search. . . .

A person does not surrender all Fourth Amendment protection by venturing into the public sphere. . . . Prior to the digital age, law enforcement might have
pursued a suspect for a brief stretch, but doing so “for any extended period of time was difficult and costly and therefore rarely undertaken.” For that reason, “society’s expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual’s car for a very long period.”

Allowing government access to cell-site records contravenes that expectation. . . . [L]ike GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier’s deep repository of historical location information at practically no expense.

In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in Jones. . . . A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor’s offices, political headquarters, and other potentially revealing locales. . . . Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.

Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable. . . . Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone. . . .

Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government’s view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.

The Government and Justice Kennedy contend, however, that the collection of CSLI should be permitted because the data is less precise than GPS information. . . .

While the records in this case reflect the state of technology at the start of the decade, the accuracy of CSLI is rapidly approaching GPS-level precision. As the number of cell sites has proliferated, the geographic area covered by each cell sector has shrunk, particularly in urban areas. In addition, with new technology measuring the time and angle of signals hitting their towers, wireless carriers already have the capability to pinpoint a phone’s location within 50 meters.

Accordingly, when the Government accessed CSLI from the wireless carriers, it invaded Carpenter’s reasonable expectation of privacy in the whole of his physical movements.

The Government’s primary contention to the contrary is that the third-party doctrine governs this case. . . .

The Government’s position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter’s location but also everyone else’s, not for a short period but for years and years. Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible. There is a world of difference between the limited types of personal information addressed in Smith and Miller and the exhaustive chronicle of location information casually collected by wireless carriers today. The Government thus is not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information. . . .

The Court has in fact already shown special solicitude for location information in the third-party context. In Knotts, the Court relied on Smith to hold that an individual has no reasonable expectation of privacy in public movements that he “voluntarily conveyed to anyone who wanted to look.” But when confronted with more pervasive tracking, five Justices agreed [in Jones] that longer term GPS monitoring of even a vehicle traveling on public streets constitutes a search. Justice Gorsuch wonders why “someone’s location when using a phone” is sensitive, and Justice Kennedy assumes that a person’s discrete movements “are not particularly private.” Yet this case is not about “using a phone” or a person’s movement at a particular time. It is about a detailed chronicle of a person’s physical presence compiled every day, every moment, over several years. Such a chronicle implicates privacy concerns far beyond those considered in Smith and Miller. . . . Cell phone location information is not truly “shared” as one normally understands the term. In the first place, cell phones and the services they provide are “such a pervasive and insistent part of daily
life” that carrying one is indispensable to participation in modern society. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond power ing up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily “assume[ ] the risk” of turning over a comprehensive dossier of his physical movements.

We therefore decline to extend Smith and Miller to the collection of CSLI. Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter’s claim to Fourth Amendment protection. The Government’s acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.

Our decision today is a narrow one. . . . We do not disturb the application of Smith and Miller or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. As Justice Frankfurter noted when considering new innovations in airplanes and radios, the Court must tread carefully in such cases, to ensure that we do not “embarrass the future.”

Having found that the acquisition of Carpenter’s CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. . . .

At some point, the dissent should recognize that CSLI is an entirely different species of business record—something that implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers. When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents. . . .

This is certainly not to say that all orders compelling the production of documents will require a showing of probable cause. The Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations. We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party.

Further, even though the Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual’s cell-site records under certain circumstances. . . .

As a result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency. . . .

We decline to grant the state unrestricted access to a wireless carrier’s database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government’s acquisition of the cell-site records here was a search under that Amendment.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ANTHONY KENNEDY, with whom JUSTICE CLARENCE THOMAS and JUSTICE SAMUEL ALITO join, dissenting.219
This case involves new technology, but the Court’s stark departure from relevant Fourth Amendment precedents and principles is, in my submission, unnecessary and incorrect, requiring this respectful dissent.

The new rule the Court seems to formulate puts needed, reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases, often when law enforcement seeks to prevent the threat of violent crimes. . . .
The Court has twice held that individuals have no Fourth Amendment interests in business records which are possessed, owned, and controlled by a third party. This is true even when the records contain personal and sensitive information. So when the Government uses a subpoena to obtain, for example, bank records, telephone records, and credit card statements from the businesses that create and keep these records, the Government does not engage in a search of the business’s customers within the meaning of the Fourth Amendment.

... Cell-site records, however, are no different from the many other kinds of business records the Government has a lawful right to obtain by compulsory process. Customers like petitioner do not own, possess, control, or use the records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to lawful compulsory process.

In concluding that the Government engaged in a search, the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases. In doing so it draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other. According to today’s majority opinion, the Government can acquire a record of every credit card purchase and phone call a person makes over months or years without upsetting a legitimate expectation of privacy. But, in the Court’s view, the Government crosses a constitutional line when it obtains a court’s approval to issue a subpoena for more than six days of cell-site records in order to determine whether a person was within several hundred city blocks of a crime scene. That distinction is illogical and will frustrate principled application of the Fourth Amendment in many routine yet vital law enforcement operations.

It is true that the Cyber Age has vast potential both to expand and restrict individual freedoms in dimensions not contemplated in earlier times. . . .

Here the only question necessary to decide is whether the Government searched anything of the Carpenter’s when it used compulsory process to obtain cell-site records from Carpenter’s cell phone service providers. This Court’s decisions in Miller and Smith dictate that the answer is no, as every Court of Appeals to have considered the question has recognized. . . .

Based on Miller and Smith . . . it is well established that subpoenas may be used to obtain a wide variety of records held by businesses, even when the records contain private information. Credit cards are a prime example. State and federal law enforcement, for instance, often subpoena credit card statements to develop probable cause to prosecute crimes ranging from drug trafficking and distribution to healthcare fraud to tax evasion. . . . Subpoenas also may be used to obtain vehicle registration records, hotel records, employment records, and records of utility usage, to name just a few other examples.

. . . . In my respectful view the majority opinion misreads this Court’s precedents, old and recent, and transforms Miller and Smith into an unprincipled and unworkable doctrine.

The Court appears . . . to read Miller and Smith to establish a balancing test. For each “qualitatively different category” of information, the Court suggests, the privacy interests at stake must be weighed against the fact that the information has been disclosed to a third party. When the privacy interests are weighty enough to “overcome” the third-party disclosure, the Fourth Amendment’s protections apply.

That is an untenable reading of Miller and Smith . . . .

[The Court maintains, cell-site records are “unique” because they are “comprehensive” in their reach; allow for retrospective collection; are “easy, cheap, and efficient compared to traditional investigative tools”; and are not exposed to cell phone service providers in a meaningfully voluntary manner. But many other kinds of business records can be so described. Financial records are of vast scope. Banks and credit card companies keep a comprehensive account of almost every transaction an individual makes on a daily basis. “With just the click of a button, the Government can access each [company’s] deep repository of historical [financial] information at practically no expense.” And the decision whether to transact with banks and credit card companies is no more or less voluntary than the decision whether to use a cell phone. Today, just as when Miller was decided, “it is impossible to participate in the economic life of contemporary society without maintaining a bank account.” But this Court, nevertheless, has held that individuals do not have a reasonable expectation of privacy in financial records. . . .

Technological changes involving cell phones have complex effects on crime and law enforcement. Cell phones make crimes easier to coordinate and conceal, while also providing the Government with new
investigative tools that may have the potential to upset traditional privacy expectations. How those competing effects balance against each other, and how property norms and expectations of privacy form around new technology, often will be difficult to determine during periods of rapid technological change. . . . Congress weighed the privacy interests at stake and imposed a judicial check to prevent executive overreach. The Court should be wary of upsetting that legislative balance and erecting constitutional barriers that foreclose further legislative instructions. . . . The Court’s decision runs roughshod over the mechanism Congress put in place to govern the acquisition of cell-site records and closes off further legislative debate on these issues.

The Court says its decision is a “narrow one.” But its reinterpretation of Miller and Smith will have dramatic consequences for law enforcement, courts, and society as a whole. . . .

The Court’s decision also will have ramifications that extend beyond cell-site records to other kinds of information held by third parties, yet the Court fails “to provide clear guidance to law enforcement” and courts on key issues raised by its reinterpretation of Miller and Smith. . . .

This case should be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy. Here the Government did not search anything over which Carpenter could assert ownership or control. Instead, it issued a court-authorized subpoena to a third party to disclose information it alone owned and controlled. That should suffice to resolve this case. . . .

These reasons all lead to this respectful dissent.
[W]ithout freedom to acquire information, the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist.

—U.S. Supreme Court Justice Lewis Powell

When President Donald Trump and other state and federal government officials blocked users from access to their tweets and social media pages, lawsuits followed.

Jaap Arriens/NurPhoto via Getty Images