

Privacy and Information Security Law

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CLASS 3

Privacy and the Media pt. 1

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Four Types of Media Privacy Incursions

- (1) intrusions and harassment in the course of gathering information;
- (2) the disclosure of truthful information,
- (3) the dissemination of misleading or false information; and
- (4) the appropriation of name or likeness.

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Privacy Related Torts

- Focus on legal remedies for the gathering and dissemination of personal information by media entities

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Parks v. Target

- 11th Cir. 2016
 - D.C. dismissed complaint
 - 11th Circuit affirms
- Parties
 - Rosa Parks estate (Institute)
 - Target

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Parks v. Target

- [I]t is not surprising that authors would write about Parks's story and artists would celebrate it with their works. The commemoration and dissemination of Parks's journey continues to entrench and embolden our pursuit of justice. And it is in the general public interest to relentlessly preserve, spotlight, and recount the story of Rosa Parks and the Civil Rights Movement—even when that interest allegedly conflicts with an individual right of publicity."

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Parks v. Target

- Target
 - Sells 7 books about Rosa Parks
 - Sells a TV movie about Rosa Parks
 - Sells a collage style plaque with Rosa Parks and Dr. Martin Luther King Jr.

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Parks v. Target



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Parks v. Target

- “Stephanie Workman Marrott, the professional artist who designed the plaque, explained that she created it to ‘tell[] a story about civil rights in America . . . [to] describe important aspects of American history and convey a message about those events.’ She added that her decision to ‘include[] the name and image of Rosa Parks, as well as an image of the Montgomery bus and the word “CHANGE,” was in order to tell the story of Rosa Parks and the civil rights movement in a way that would convey an inspirational message about standing up for what you believe is right and what you believe in.”

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Parks v. Target

- Institute sues
 - unjust enrichment, right of publicity, and misappropriation for use of name and likeness

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Parks v. Target

- "In Michigan, the common-law right of privacy protects against four types of invasions of privacy:
 1. **Intrusion upon the plaintiff's seclusion** or solitude, or into his private affairs.
 2. **Public disclosure of embarrassing private facts** about the plaintiff.
 3. Publicity which places the plaintiff in a **false light** in the public eye.
 4. **Appropriation** for the defendant's advantage, of the **plaintiff's name or likeness.**"

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Parks v. Target

- "[The Right of Publicity] guards against the appropriation of 'the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for the purpose of trade.' ... Michigan courts have long recognized that individual rights must yield to the qualified privilege to communicate on matters of public interest."

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Parks v. Target

- "[T]he plaque depicts images and mentions dates and statements related to Parks and the Civil Rights Movement, in an effort to convey a message concerning Parks, her courage, and the results of her strength."

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Parks v. Target

- "The use of Rosa Parks's name and likeness in the books, movie, and plaque is necessary to chronicling and discussing the history of the Civil Rights Movement—matters quintessentially embraced and protected by Michigan's qualified privilege. Indeed, it is difficult to conceive of a discussion of the Civil Rights Movement without reference to Parks and her role in it. And Michigan law does not make discussion of these topics of public concern contingent on paying a fee. **As a result, all six books, the movie, and the plaque find protection in Michigan's qualified privilege protecting matters of public interest.**"

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For Discussion

- When do you think it is acceptable to discuss other people publicly (e.g., in a book or movie) without permission?
- Do you think there should be any limitation on the ability to sell something that features someone else?

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A. Information Gathering

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Intrusion on Seclusion

- One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.
- Restatement §652B

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Intrusion upon Seclusion v. Public Disclosure of Private Facts

- **Intrusion** – the way that the information is collected
- **Public Disclosure** – the way that the information is revealed

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Nader v. General Motors Corp.

Ralph Nader

- Upcoming publication of book "Unsafe at any speed"

What is GM accused of doing?

- (1) aggressive interviews with his friends, (2) excessive public surveillance; (3) attempted women entrapment (4) offensive calls; (5) tapped his phone; and (6) a "continuing" and harassing investigation

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Nader v. General Motors Corp.

Intrusion on Seclusion tort

- Mere gathering of information is not enough
- "Privacy is invaded only if the information sought is of a **confidential** nature and the defendant's conduct was **unreasonably intrusive**."
- No invasion where information sought is in public view or has been voluntarily released to others

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Nader v. General Motors Corp.

- "In order to sustain a cause of action for invasion of privacy, therefore, the plaintiff must show that the appellant's conduct was truly 'intrusive' and that it was designed to elicit information which would not be available through normal inquiry or observation."

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Nader v. General Motors Corp.

What about the activities?

- Interviewing people – no; information is already known to others
- Women and phone calls – no; not information gathering activities
- Wiretapping – yes
- Observation in public – no unless so overalous

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When has intrusion occurred?

- Examination of a public record?
- Publicly available documents of another?
- Photographs while walking in public?
- Extensive and exhausting monitoring?
- Continued phone calls or other telephone harassment?

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When is an Activity Highly Offensive?

Examples

- Trespasses into places where people have reasonable expectations of privacy
- Wiretapping
- Overzealous surveillance
- Peering into people's home windows
- Illegal accessing of credit card records

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Dietemann v. Time, Inc.

- Background
 - Crackdown on quackery
 - Ruse to gain entrance to D's home
 - Used hidden camera and recording device to record the conversation

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Dietemann v. Time, Inc.

- “[S]urreptitious electronic recording of a plaintiff’s conversation causing [] emotional distress is actionable.”
- Clandestine photography and recording a conversation without consent is an invasion of privacy in CA.

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Dietemann v. Time, Inc.

- 1st Amendment defense for the media?
 - “The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. 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. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.”

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Desnick v. American Broadcasting Co., Inc.

- Background
 - Called for permission to record a fair and balanced segment that would not include undercover surveillance
 - Given permission to record operation and interview people
 - Seven people were sent in with concealed cameras
 - Segment on unnecessary surgery and associated costs

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Desnick v. American Broadcasting Co., Inc.

- “To enter upon another’s land without consent is a trespass. ... [T]here is no journalists’ privilege to trespass. And there can be no implied consent in any nonfictitious sense of the term when express consent is procured by a misrepresentation or a misleading omission.”

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Desnick v. American Broadcasting Co., Inc.

- “The law’s willingness to give effect to consent procured by fraud is not limited to the tort of trespass.”

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Desnick v. American Broadcasting Co., Inc.

- There was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. ... No embarrassingly intimate details of anybody’s life were publicized in the present case. There was no eavesdropping on a private conversation. ... There was no violation of the doctor-patient privilege. There was no theft, or intent to steal, trade secrets; no disruption of decorum, of peace and quiet; no noisy or distracting demonstrations. Had the testers been undercover FBI agents, there would have been no violation of the Fourth Amendment, because there would have been **no invasion of a legally protected interest in property or privacy.** ...”

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Investigative Techniques

- Can investigative techniques give rise to intrusion to seclusion?
- How might the foregoing two cases be distinguished, or are they in conflict?
- What are the competing interests?

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Shulman v. Group W Productions, Inc.

- Background
 - Bad car accident
 - Rescue helicopter included a video camera operator
 - Accident left one of the people recorded as a paraplegic
 - Video recording showed glimpses of her and her voice was recorded as she spoke to the nurse

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Shulman v. Group W Productions, Inc.

- Causes of action for invasion of privacy
 - **Intrusion of seclusion** (from the video taping)
 - **Public disclosure of private facts** (from the broadcast of the video)

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Shulman v. Group W Productions, Inc.

- “[T]he action for intrusion has two elements:
(1) intrusion into a private place, conversation or matter,
(2) in a manner highly offensive to a reasonable person.”

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Shulman v. Group W Productions, Inc.

- ELEMENT 1 - Intrusion
- Accident scene filming – not an intrusion
 - Interior of helicopter and conversations with the nurse – triable issue
 - Objectively reasonable expectation of privacy and degree of privacy with nurse at the accident scene

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Shulman v. Group W Productions, Inc.

- ELEMENT 2 – highly offensive to a reasonable person
- Jury could so find...

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Shulman v. Group W Productions, Inc.

- “[A] general rule of *nonprotection*: the press in its newsgathering activities enjoys no immunity or exemption from generally applicable laws. ...”

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Shulman v. Group W Productions, Inc.

- “[T]he intrusion tort, unlike that for publication of private facts, does not subject the press to liability for the contents of its publications. Newsworthiness . . . is a complete bar to liability for publication of private facts and is evaluated with a high degree of deference to editorial judgment. The same deference is not due, however, when the issue is not the media’s right to publish or broadcast what they choose, but their right to intrude into secluded areas or conversations in pursuit of publishable material.”

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California Anti-Paparazzi Act

- Liability for “**physical invasion of privacy**”:
- (a) A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another without permission or otherwise committed a trespass, in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.

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California Anti-Paparazzi Act

Liability for “constructive invasion of privacy”:

(b) A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

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California Anti-Paparazzi Act

- Liability for getting someone to violate the law
- No liability under the Act for sale or dissemination of the images and recordings

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Video Voyeurism

- The use of video or photography to capture people naked without their consent
- Upskirt, showering, or undressing

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State Act v. Federal Act

- State acts passed to prevent include example from the state of Washington.
- Federal law was enacted in 2004

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Video Voyeurism Prevention Act

- The use of video or photography to capture people naked without their consent

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Video Voyeurism Prevention Act

- (a) Whoever, in the special maritime and territorial jurisdiction of the United States, having the **intent to capture** an improper image of an individual, **knowingly does so** and that individual's naked or undergarment clad genitals, pubic area, buttocks, or female breast is depicted in the improper image under circumstances in which that individual has a **reasonable expectation of privacy** regarding such body part or parts, shall be fined under this title or imprisoned not more than one year, or both.

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Video Voyeurism Prevention Act

- (b) In this section —
- (1) the term "**captures**," with respect to an image, means videotapes, photographs, films, or records by any means or broadcasts;
- (2) the term "**female breast**" means any portion of the female breast below the top of the areola;
- (3) the term "**improper image**," with respect to an individual, means an image, captured without the consent of that individual, of the naked or undergarment clad genitals, pubic area, buttocks, or female breast of that individual; and

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Video Voyeurism Prevention Act

- (4) the term "under circumstances in which that individual has a reasonable expectation of privacy" means —
 - (A) circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her image was being videotaped, photographed, filmed, broadcast, or otherwise recorded by any means; or
 - (B) circumstances in which a reasonable person would believe that his or her naked or undergarment-clad pubic area, buttocks, genitals, or female breast would not be visible to the public, regardless of whether that person is in a public or private area.
- (c) This section shall not apply to any person engaged in lawful law enforcement or intelligence activities.

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Video Voyeurism Prevention Act

1. What if someone pulls up their shirt, or a friends shirt, on Splash Mountain, and the image is automatically captured by Disney?
2. What if someone's pants fall down in a bar and a picture is taken and shown on the Internet?

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B. Disclosure of Truthful Information

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Publicity Given to Private Life

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

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Four Elements (Another View)

- 1) Dissemination of true information;
- 2) Disseminated information is offensive to a reasonable person;
- 3) Disseminated information is not of public concern;
- 4) Disseminated information is intimate that publication outrages the public's sense of decency

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Who is the Public?

- Public at large or too many people so as to become public
- Not a single person or a small group of persons

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Beaumont v. Brown

- “An invasion of a plaintiff’s right to privacy is important if it exposes private facts to a public whose knowledge of those facts would be embarrassing to the plaintiff.”

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Highly Offensive

- “[A] reasonable person would feel justified in feeling seriously aggrieved by [the public disclosure], that the cause of action arises.”

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Gill v. Hearst Publishing Co.

- “[A]n unauthorized photograph of plaintiffs taken by defendants’ employee while plaintiffs were seated in an affectionate pose at their place of business, a confectionery and ice cream concession in the Farmers’ Market in Los Angeles. This photograph was used to illustrate an article...”

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Gill v. Hearst Publishing Co.

- “[D]efendants’ liability accrues only in the event that it can be said that there has been a wrongful invasion of plaintiffs’ right of privacy.”
- Picture not taken on private grounds, but in a voluntary pose taken in public

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Gill v. Hearst Publishing Co.

- “By their own voluntary action plaintiffs **waived their right of privacy** so far as this particular public pose was assumed, for ‘There can be no privacy in that which is already public.’”

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Privacy in Public

- Matters cease to be private when occurring in public under this tort
- Thoughts on:
 - Google Street View?
 - Photography of public scenes?
 - Video recording of people attending a professional sporting event?

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Daily Times Democrat v. Graham

- Background
 - Fun house blew jets of air up upon exit
 - Graham underwear was exposed
 - Photographer took a picture and put it on the front page of the paper
 - People recognized her in the photo and she was embarrassed

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Daily Times Democrat v. Graham

- “We can see nothing of legitimate news value in the photograph. Certainly it discloses nothing as to which the public is entitled to be informed.”

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Daily Times Democrat v. Graham

- “Not only was this photograph embarrassing to one of normal sensibilities, we think it could properly be classified as obscene, in that ‘obscene’ means ‘offensive to modesty or decency’; or expressing to the mind or view something which delicacy, purity, or decency forbid to be expressed.”

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Daily Times Democrat v. Graham

- “One who is a part of a public scene may be lawfully photographed as an incidental part of that scene in his ordinary status. Where the status he expects to occupy is changed without his volition to a status embarrassing to an ordinary person of reasonable sensitivity, then he should not be deemed to have forfeited his right to be protected from an indecent and vulgar intrusion of his right of privacy merely because misfortune overtakes him in a public place. ...”

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Can Consent to Media be Retracted?

- “Talking freely to a member of the press, knowing the listener to be a member of the press, is not then in itself making public. Such communication can be said to anticipate that what is said will be made public since making public is the function of the press, and accordingly such communication can be construed as a consent to publicize. Thus if publicity results it can be said to have been consented to. However, **if consent is withdrawn prior to the act of publicizing, the consequent publicity is without consent.**”

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Widely Known v. Limited Disclosure

- “Generally, a fact widely known about a person is not considered private; however, certain limited disclosures of information do not destroy its private nature.”

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Further Dissemination

- “Media entities that further disseminate information already disclosed by another media entity are not liable for public disclosure. ... However, when only partial facts are revealed, the disclosure of more information can give rise to a viable action for public disclosure.”

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Sipple v. Chronicle Publishing Co.

- “It is well settled that there are three elements of a cause of action predicated on tortious invasion of privacy. First, the disclosure of the private facts must be a **public disclosure**. Second, the facts disclosed must be **private facts**, and not public ones. Third, the matter made public must be one which would be **offensive and objectionable to a reasonable person of ordinary sensibilities**. It is likewise recognized, however, that due to the supreme mandate of the constitutional protection of freedom of the press **even a tortious invasion of one's privacy is exempt from liability if the publication of private facts is truthful and newsworthy.**”

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Sipple v. Chronicle Publishing Co.

- “There are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, **become ‘news.’**”

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Newsworthiness Tests

- 1) Leave it to the press
- 2) Customs and conventions of the community
- 3) Nexus test

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Privacy of Public Figures

- The extent of the authority to make public private facts is not, however, unlimited. There may be some intimate details of [a celebrity actress's] life, such as sexual relations, which even the actress is entitled to keep to herself. In determining **what is a matter of legitimate public interest**, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake ...”

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Disclosure of Private Individuals

- Courts going both directions...
 - “[T]he matter about the rare disorder was newsworthy, but the plaintiff’s identity was not of public concern.”
 - “Reporting the true facts about real people is necessary to ‘obviate any impression that the problems raised in the [book] are remote or hypothetical.’”

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Shulman v. Group W Productions

- “[U]nder California common law the dissemination of truthful, **newsworthy material is not actionable as a publication of private facts**. If the contents of a broadcast or publication are of legitimate public concern, the plaintiff cannot establish a necessary element of the tort action, the lack of newsworthiness. ...”

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Shulman v. Group W Productions

- “[C]ourts have generally protected the privacy of otherwise private individuals involved in events of public interest ‘by requiring that a **logical nexus** exist between the complaining individual and the matter of legitimate public interest.’”

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Shulman v. Group W Productions

- “[T]he broadcast video depicting Ruth’s injured physical state (which was not luridly shown) and audio showing her disorientation and despair were **substantially relevant to the segment’s newsworthy subject matter.**”

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Autobiographical Details

- “[A]n autobiographical account related to a matter of legitimate public interest reveals private information concerning a third party, the disclosure is protected so long as there is a **sufficient nexus between those private details and the issue of public concern.**”
- Bonome v. Kaysen

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Breach of Confidentiality Tort

- Protects against nondisclosures of confidential information
- Elements
 1. D owed P a duty of confidentiality
 2. D breached that duty
- In US, generally only applies to professional relationships

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First Amendment Limitations

- Tensions because of liability for publication of truthful information

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Content-Based v. Content-Neutral Regulation

- 1st Amendment analysis looks at whether speech restriction is content based or content neutral.
 - **Content-based** targets particular messages [generally strict scrutiny]
 - **Content-neutral** restricts speech regardless of message [intermediate scrutiny]

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Publication from Court Documents

- “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. ... 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.”
- Cox Broadcasting Corp. v. Cohn

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The Florida Star v. B.J.F.

- Background
 - Publishing a name of a rape victim from a publicly released police report
 - Publication violated an internal policy at the paper
 - Significant further effects on the victim

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The Florida Star v. B.J.F.

- “[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”

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The Florida Star v. B.J.F.

- Three considerations
 - Information was lawfully obtained
 - “punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act.”
 - Timidity and self-censorship

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The Florida Star v. B.J.F.

- “We hold [] that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order ...”

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Revenge Porn

- Nonconsensual disclosure of a sexually explicit image or video of a person.

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§647 of CA Penal Code

- (4) (A) Any person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation **by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private**, the person distributing the image knows or should know that **distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.**

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§647 of CA Penal Code

- (B) A person **intentionally distributes an image** described in subparagraph (A) when he or she personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image.
- (C) As used in this paragraph, "**intimate body part**" means any portion of the genitals, the anus, and in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or clearly visible through clothing.

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§647 of CA Penal Code

- (D) It shall not be a violation of this paragraph to distribute an image described in subparagraph (A) if any of the following applies:
- (i) The distribution is made in the course of reporting an unlawful activity.
- (ii) The distribution is made in compliance with a subpoena or other court order for use in a legal proceeding.
- (iii) The distribution is made in the course of a lawful public proceeding.

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Missouri

<http://www.kmbc.com/news/woman-fights-for-revenge-porn-laws-after-ex-posted-nude-photo-online/25649360>

<http://www.avvo.com/legal-answers/is--revenge-porn--illegal-in-missouri--1570411.html>

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Missouri Bill

1. A person commits the crime of revenge pornography if he or she, knowing that he or she is not licensed or privileged to do so, purposely and knowingly:

- (1) Observes another person exposing intimate parts or engaging in a sexual act, without that person's consent or under circumstances in which a reasonable person would not expect to be observed;
- (2) Photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in a sexual act, without that person's consent and under circumstances in which a reasonable person would not expect to be observed; or
- (3) Discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in a sexual act, unless that person has consented to such disclosure.

2. The offense of revenge pornography is a class D felony.

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Missouri Bill

3. It shall be a defense to any prosecution of the provisions of subsection 1 of this section if he or she is engaged in lawful law enforcement duties, lawful medical practices or treatment, certain legal proceedings, or the reporting of unlawful conduct, or the individual consents to the disclosure of the images in a public or commercial setting.

4. For the purposes of this section, the following terms shall mean:

- (1) "Disclose", transferring, publishing, distributing, exhibiting, advertising, or offering;
- (2) "Intimate parts", the naked genitals or pubic area of any individual or the areola of an adult female;
- (3) "Sexual act", penetration of the female sex organ by the male sex organ, whether or not an emission results, or any act involving the genitals of one person and the mouth, tongue or anus of another person.

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Missouri Bill (not passed)

House and Senate Joint Bill Tracking

Bill Number / Keyword / Sponsor (State)

Search: revenge pornography

Session: 2014 Regular Session

Search Years prior to 2009

2 Results

Bill	Description
1. HB1203	REVENGE PORNOGRAPHY (5066H.02) Engler (114) Creates the crime of revenge pornography Last Action: 2/24/2014 - VCS Voted On Pass (H) Actions History Amendments Roll Calls
2. HB1334	REVENGE PORNOGRAPHY (4275H.02) Barnes (56) Creates the crime of publishing pornography for revenge Last Action: 2/10/2014 - Hearing Cancelled (H) Actions History Amendments Roll Calls

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Current Issue

Oakland County woman gets \$500K in revenge porn case

Katherine Stafford, Detroit Free Press 7:32 p.m. EDT August 25, 2016

GOVERNMENT & POLITICS FEBRUARY 22, 2016 12:03 PM

Kansas House approves 'revenge porn' bill

CNN Money 10:48 AM CST Jan 16, 2014

Mo. House panel considers 'revenge porn' bill
Measure would prohibit posting explicit pics online without consent

Published: 10:48 AM CST Jan 16, 2014

Will Hillary Clinton be the one to crack down on revenge porn?

By Jane Manning O'Connell @janeocnn

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Program Completed

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