PRIVACY LAW

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Is there any expectation of privacy today? If you came here today and used the tollway, your I-Pass recorded the time you passed and can calculate your speed. In Chicago, intersections have cameras that are used to send out tickets for running red lights or turning on red. When you walked into the CBA building today, your image was recorded. Your cell phone automatically gives your location as you walk. When you visit a website, cookies are placed on your computer. Your every move on the Internet is tracked. On the way home, if you stop at the grocery store and use the discount card, all of your purchases are tracked.

It has been written that

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be left alone."
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> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. . . .
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> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Was this written in response to an Oprah Winfery show? In response to the Don Imus flap?

No, those words were written in 1890 by Samuel D. Warren and Louis D. Brandeis in the *Harvard Law Review* in their article "The Right to Privacy," 4 Harv. L. Rev. 193, that argued for the recognition of a right to privacy.

Sun Microsystems CEO Scott McNealy has said for years, "You have no privacy. Get over it." McNealy is not totally correct. The law finds privacy does exist, but the "expectation of privacy" has diminished.

There is no specific provision in the U.S. Constitution granting a "right of privacy." However, the Supreme Court has crafted a right of privacy, at least as far as governmental intrusion, through the Fourth Amendment search and seizure provisions and the Fourteenth Amendment due process provisions. In *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), the Supreme Court stated:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.
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> We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not

> commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

The right of privacy is the basis for *Roe v. Wade*, 410 U.S. 113 (1971)(abortion) and *Lawrence v. Texas*, 539 U.S. 558 (2003)(sodomy).

In 1989 the United States Supreme Court found that the disclosure of a private citizen's "rap sheet" to third parties constituted an unwarranted invasion of privacy.

> . . . we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."

United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 780 (1989). In that case, a journalist had requested under the Freedom of Information Act (FOIA), 5 USCS 552, that the Justice Department and Federal Bureau of Investigation disclose criminal records of four brothers whose family's company allegedly had obtained defense contracts as a result of an improper arrangement with a corrupt Congressman. The court looked to the exception from disclosure under FOIA of "personnel and medical files and similar files the disclosure of which would constitute an unwarranted invasion of privacy." The court found that a rap sheet is a "similar file" because "rap-sheet information 'is personal to the individual named therein.'"

The court further found that the balancing test required it "to balance the privacy interest in maintaining, as the Government puts it, the 'practical obscurity' of the rap sheets against the public interest in their release." *Id.* at 762. The interest for the family was characterized by the court as "avoiding disclosure of personal matters." The court defined "both the common law and the literal understandings of privacy [to] encompass

the individual's control of information concerning his or her person." Thus, "[p]lainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* at 764. "In sum, the fact that 'an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information." *Id.* at 771.

Today, the language of this decision seems almost quaint. With the Internet, public records not only are not in "practical obscurity" but rather are only a Google search away.

The 1970 Illinois Constitution Art. 1 Sec. 6 grants Illinois citizens "the right to be secure in their persons, houses and other possessions against . . . invasions of privacy. . ." Prior to the specific Illinois Constitution language, the Illinois Supreme Court recognized the right of privacy as:

> a right many years ago described in a limited fashion by Judge Cooley with utter simplicity as the 'right to be let alone.' Privacy is one of the sensitive and necessary human values and undeniably there are circumstances under which it should enjoy the protection of law.

Leopold v. Levin, 45 Ill. 2d 434, 440; 259 N.E.2d 250 (1970). Nathan Leopold, Jr. brought suit for violation of his privacy for the distribution of a novel and related motion picture "Compulsion" that was based on the kidnapping and murder of Bobby Franks for which Leopold and Richard Loeb pled guilty in 1924. Leopold's name was used in advertisements for the book and movie. Leopold argued that the commercial use of his name constituted an invasion of privacy and an exploitation of his name. The court

rejected Leopold's claim for privacy because of the remaining public figure aspect of his crime. More importantly, the court recognized the right of privacy as existing in Illinois. The court then listed the considerations for whether a right of privacy should be found to exist in a particular situation: the liberty of expression constitutionally assured in a matter of public interest, the enduring public attention to the crime, and the continuing status as a public figure. *Id.* In other words, the court applied a balancing test of the conflicting right of the public to know and the right of an individual to privacy.

The right to privacy involves several separate torts, including publicity to private facts, intrusion upon the seclusion of a person, publicly placing a person in a false light, and misappropriation of likeness.

PUBLICITY TO PRIVATE FACTS

The Restatement of the Law, Second, Torts Sec. 652D Publicity Given to Private Life, states:

> 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
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> (a) would be highly offensive to a reasonable person, and
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> (b) is not of legitimate concern to the public.

This tort is for the disclosure of a true fact about a person and thus is different than torts for defamation which involve false statements.

Publicity does not mean publication in a newspaper or on television. Publicity means "communicating the matter to the public at large or to so many persons that the matter must be regarded as one of general knowledge." *Roehrborn v. Lambert,* 277 Ill. App. 3d 181, 184, 660 N.E.2d 180 (1995). However, this rule has been extended to

include persons with whom the plaintiff "has a special relationship" so that the publicity requirement may be satisfied by disclosure to a small number of people. "[T]he rationale behind the rule that disclosure to a small number of people may satisfy the publicity requirement, is that disclosure to a small group may be just as devastating to the person." *Wynne v. Loyola University of Chicago,* 318 Ill. App. 3d 443, 453, 741 N.E.2d 669 (First Dist. 2000). However, publication to a single person is not enough. *Robins v. Conseco Financial Loan Co.*, 656 N.W.2d 241 (Minn. App., 2003)

The issues of what is highly offensive and what is not of legitimate public concern are factual determinations and are frequently intertwined. In finding what is of legitimate public concern, Illinois courts have said:

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

Green v. Chicago Tribune Company, 286 Ill. App. 3d 1, 10, 675 N.E.2d 249 (First Dist, 1st Div., 1996). In *Green*, a photographer for the *Chicago Tribune* took pictures of Green's son as he was being treated for a bullet wound in the emergency room of Cook County Hospital. After her son died, Mrs. Green declined to talk to a *Tribune* reporter. Meanwhile, the *Tribune* photographer took additional pictures of her son in a private room. When Mrs. Green entered the room and spoke to her deceased son, the reporter took down her statement. The pictures and statement were used in the *Tribune*. The court found that the hospital room was not a public area. Moreover, the recording of her

statement was not authorized. In fact, Mrs. Green had specifically declined to comment. In finding that the plaintiff had pled facts sufficient to public disclosure of private fact, the court wrote:

> . . . the publication concerned an extraordinarily painful incident in plaintiff's life, when she first set eyes on her minor son after he had been shot to death. Further, reasonable people could differ and could find that the Tribune's publication was not a minor or moderate annoyance, especially since the photograph of Calvin it published on January 1 was taken while Tribune staffers prevented plaintiff from seeing Calvin, and its quotation from plaintiff's grief-stricken statements to Calvin came after plaintiff expressly told the Tribune reporter she wanted to make no public statement about her son's death. Because reasonable people could differ as to these facts, we believe a jury could find the Tribune's January 1 publication highly offensive to a reasonable person. Plaintiff therefore has pleaded facts sufficient to assert the third prong of the public disclosure of private facts tort.

286 Ill. App. 3d at 12.

In *Johnson v. K Mart Corporation,* 311 Ill. App. 3d 573, 723 N.E.2d 1192 (First Dist. 2000), K Mart hired private investigators to pose as janitors at a distribution center to discover who was stealing merchandise. Every few days they would send a report as to what the employees were discussing. The reports were sent to management and not to the general public. The court found there was publication. The reports "included such things as employees' family matters, health problems, and sex lives." 311 Ill. App. 3d at 579. In reversing summary judgment against plaintiffs, the court said "the facts at issue were clearly private," were obtained through deception, and were given to the employer. "We believe that an issue of fact exists regarding whether a reasonable person would find it highly offensive that these personal matters were made public to his employer."

INTRUSION UPON SECLUSION

Another count in *Johnson* alleged intrusion upon seclusion. While the Illinois Supreme Court never has ruled specifically that the tort exists in Illinois, several of the appellate courts have found the tort to exist. For an intrusion upon seclusion, the Johnson court found the elements are (1) an unauthorized intrusion or prying into plaintiff's seclusion; (2) an intrusion that is offensive or objectionable to a reasonable person; and (3) the intrusion must cause anguish and suffering. 311 Ill. App. 3d at 578. The court found that while the plaintiffs voluntarily gave personal details to the investigators, the means used to induce the disclosures were deceptive.

> A disclosure obtained through deception cannot be said to be a truly voluntary disclosure. Plaintiffs had a reasonable expectation that their conversations with "coworkers" would remain private, at least to the extent that intimate life details would not be published to their employer.

Id.

In *Benitez v. KFC National Management Co.*, 305 Ill. App. 3d 983 (Second Dist. 1999), the court found a cause of action for intrusion upon seclusion where employees punched holes in the ceiling tiles to observe women in the women's rest room. In *Acuff v. IBP, Inc.*, 77 F. Supp. 2d 914, the court found an intrusion upon seclusion where a camera placed in the nurse managers' office to catch a thief also recorded medical examinations of patients. But in *Schiller v. Mitchell*, 357 Ill. App. 3d 435, 828 N.E.2d 323 (Second Dist. 2005), there was no intrusion upon seclusion where a neighbor focused a camera on the plaintiff's garage entrance and recorded 24 hours a day. The court said:

> [T]he complaint alleged merely that the camera was aimed at plaintiffs' garage, driveway, side-door area, and backyard. The complaint does not explain why a passerby on the street or a roofer or a tree trimmer could not see what the camera saw, only from a different angle. We conclude that

> plaintiffs have not pleaded facts that satisfy the privacy element of the tort of intrusion upon the seclusion of another.

357 Ill. App. 3d at 441.

FALSE LIGHT INVASION OF PRIVACY

The tort of false light invasion of privacy occurs where a person gives publicity to matter concerning another that places the person before the public in a false light if (a) the false light in which the other was placed would be highly offensive to a reasonable person and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. *Lovgren v. Citizens First National Bank of Princeton,* 126 Ill. 2d 411, 418, 534 N.E.2d 987 (1989).

For example, in *Kolegas v. Heftel Broadcasting Corp.*. 154 Ill. 2d 1, 607 N.E.2d 201 (1992), the court found a false light invasion of privacy when a radio announcer on a call-in show stated that the person who called in must have been married in a "shotgun wedding" when he was not and said that the mother and son had unusually large heads as a result of neurofibromatosis when they did not. The court said the plaintiffs did not waive any expectation of privacy when one of them called the radio station and acknowledged the disease.

> Kolegas' public statement that his wife and son were afflicted with the disease did not automatically give the defendants the right to make or broadcast statements depicting the plaintiffs in a false light. The false light in which the plaintiffs were portrayed to the public was clearly the result of the defendants' actions.

154 Ill. 2d at 19.

UNAUTHORIZED APPROPRIATION OF LIKENESS

There also is a cause of action for unauthorized appropriation of likeness. In *Eick v. Perk Dog Food Company*, 347 Ill. App. 293, 106 N.E.2d 74, the Illinois appellate court found,

> A person may not make an unauthorized appropriation of the personality of another, especially of his name or likeness, without being liable to him for mental distress as well as the actual pecuniary damages which the appropriation causes.

347 Ill. App. at 300. In *Eick*, plaintiff's picture was used without her consent for a dog food advertisement. She was not a public figure and had not given her consent. The court found that her complaint "states a good cause of action for violation of plaintiff's right of privacy by defendants' unauthorized use of her picture for advertising purposes." *Id.* at 306.

In *Ainsworth v. Century Supply Company*, 295 Ill. App. 3d 644, 693 N.E.2d 510 (1998), a cable television operator and a tile supplier were sued for appropriating the likeness of a tile layer. He had consented to his video appearing in an informational video, but he objected to his likeness being included in a commercial.

> Century first contends that, by consenting to appear in the instructional video, plaintiff also consented to appear in its television commercial. Century's reasoning is clearly flawed, as it amounts to the assertion that, by consenting to eat apples with dinner, one has consented to eat oranges. The fact that both are fruit does not make them indistinguishable. Likewise, the fact that plaintiff consented to appear in the instructional video that was to be available to Century's customers does not mean that his consent extended to his appearance in a television commercial, broadcast to the television-watching public.

Id. at 650.

In *Ainsworth*, 693 N.E.2d 510, the court found an appropriation of likeness when an informational tape became a commercial. The court found that for purposes of a motion to dismiss, plaintiff did not have to show damages because of "the venerable principle that the law will presume that damages exist for every infringement of a right." 693 N.E.2d at 514. More importantly, the court found that since the defendant did not attempt to secure plaintiff's consent to use the videotape, the court concluded "that plaintiff has demonstrated the existence of evidence from which the finder of fact could infer that Century acted with malice or reckless indifference to his rights." *Id.* at 515.

OTHER PRIVACY PROTECTIONS

In addition to the four torts outlined above, privacy rights are available under the Illinois Right of Publicity Act, 765 ILCS 1075/1 *et seq.* There also are federal statutes dealing with the release of medical and financial information. Children have additional protection under the Children's Online Privacy Protection Act of 1998.