

§ 652D Publicity Given to Private Life, Restatement (Second) of Torts § 652D (1977)

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Restatement of the Law - Torts | October 2019 Update

Restatement (Second) of Torts

Division Six-A. Privacy

Chapter 28A. Invasion of Privacy

§ 652D Publicity Given to Private Life

[Comment:](#)

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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
(b) is not of legitimate concern to the public. |
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Special Note on Relation of § 652D to the First Amendment to the Constitution.

This Section provides for tort liability involving a judgment for damages for publicity given to true statements of fact. It has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment to the Constitution, as applied to state law through the Fourteenth Amendment. Since 1964, with the decision of [New York Times Co. v. Sullivan](#), 376 U.S. 254, the Supreme Court has held that the First Amendment has placed a number of substantial restrictions on tort actions involving false and defamatory publications. These restrictions are treated in Division Five of this Restatement. See especially §§ [580A](#), [580B](#) and [621](#).

The Supreme Court has rendered several decisions on invasion of the right of privacy involving this Section and [§ 652E](#). The case of [Cox Broadcasting Co. v. Cohn](#) (1975) 420 U.S. 469, holds that under the First Amendment there can be no recovery for disclosure of and publicity to facts that are a matter of public record. The case leaves open the question of whether liability can constitutionally be imposed for other private facts that would be highly offensive to a reasonable person and that are not of legitimate concern.

Pending further elucidation by the Supreme Court, this Section has been drafted in accordance with the current state of the common law of privacy and the constitutional restrictions on that law that have been recognized as applying.

Comment:

a. Publicity. The form of invasion of the right of privacy covered in this Section depends upon publicity given to the private life of the individual. “Publicity,” as it is used in this Section, differs from “publication,” as that term is used in [§ 577](#) in connection with liability for defamation. “Publication,” in that sense, is a word of art, which includes any communication by

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the defendant to a third person. “Publicity,” on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.

Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff’s private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section. The distinction, in other words, is one between private and public communication.

Illustrations:

1. A, a creditor, writes a letter to the employer of B, his debtor, informing him that B owes the debt and will not pay it. This is not an invasion of B’s privacy under this Section.
2. A, a creditor, posts in the window of his shop, where it is read by those passing by on the street, a statement that B owes a debt to him and has not paid it. This is an invasion of B’s privacy.
3. A, a motion picture exhibitor, wishing to advertise a picture to be exhibited, writes letters to a thousand men in which he makes unprivileged and objectionable statements concerning the private life of B, an actress. This is an invasion of B’s privacy.

While the cases to date allowing recovery for the type of invasion of privacy covered by this Section have been confined to the giving of publicity to the private matter, the courts may decide to extend the coverage to a simple disclosure. Under § 652B, prying and intruding into the private affairs and concerns of another may be actionable, and disclosure of the information so obtained will certainly add to the amount of damages. It remains to be seen whether a disclosure not equivalent to the giving of publicity will be actionable when the obtaining of the information was not tortious in character. Statutes regulating disclosure of certain types of information may be relevant in this regard. (Compare § 874A).

b. Private life. The rule stated in this Section applies only to publicity given to matters concerning the private, as distinguished from the public, life of the individual. There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public. Thus there is no liability for giving publicity to facts about the plaintiff’s life that are matters of public record, such as the date of his birth, the fact of his marriage, his military record, the fact that he is admitted to the practice of medicine or is licensed to drive a taxicab, or the pleadings that he has filed in a lawsuit. On the other hand, if the record is one not open to public inspection, as in the case of income tax returns, it is not public, and there is an invasion of privacy when it is made so.

Similarly, there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye. Thus he normally cannot complain when his photograph is taken while he is walking down the public street and is published in the defendant’s newspaper. Nor is his privacy invaded when the defendant gives publicity to a business or activity in which the plaintiff is engaged in dealing with the public. On the other hand, when a photograph is taken without the plaintiff’s consent in a private place, or one already made is stolen from his home, the plaintiff’s appearance that is made public when the picture appears in a newspaper is still a private matter, and his privacy is invaded.

Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man’s life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the

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ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.

Illustrations:

4. While A is walking on the street, B takes a motion picture of a scene and activities on the street, which he exhibits to the public in a newsreel. The picture shows A walking past the camera with a rip in the seat of his trousers. This is not an invasion of A's privacy.
5. Sitting at a sidewalk cafe in a public market, A puts his arm around his wife and kisses her. A reporter from B Newspaper takes a photograph of the incident, which the newspaper publishes under the caption, "Love in the Market." This is not an invasion of A's privacy.
6. A, an undistinguished hardware merchant, is engaged in an adulterous affair with the wife of one of his friends. B Magazine buys from private detectives a picture of the pair in a hotel room in a state of dishabille and publishes it. B has invaded A's privacy.
7. A gives birth to a child with two heads, which immediately dies. A reporter from B Newspaper asks A's permission to photograph the body of the child, which is refused. The reporter then bribes hospital attendants to permit him, against A's orders, to take the photograph, which is published in B Newspaper with an account of the facts, naming A. B has invaded A's privacy.

Comment on Clause (a):

c. Highly offensive publicity. The rule stated in this Section gives protection only against unreasonable publicity, of a kind highly offensive to the ordinary reasonable man. The protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens. Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part. Thus he must expect the more or less casual observation of his neighbors as to what he does, and that his comings and goings and his ordinary daily activities, will be described in the press as a matter of casual interest to others. The ordinary reasonable man does not take offense at a report in a newspaper that he has returned from a visit, gone camping in the woods or given a party at his house for his friends. Even minor and moderate annoyance, as for example through public disclosure of the fact that the plaintiff has clumsily fallen downstairs and broken his ankle, is not sufficient to give him a cause of action under the rule stated in this Section. It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises.

Illustrations:

8. A's newspaper publishes in its column of local events the truthful statement: "Mrs. B did her washing yesterday." This is not an invasion of the privacy of Mrs. B.
9. When A's daughter is married, A holds in his home a private wedding, to which only members of the family and a few intimate friends are invited. B Newspaper obtains information from those present and publishes an accurate account and description of the wedding. This is not an invasion of the privacy of A.
10. A publishes, without B's consent, a picture of B nursing her child. This is an invasion of B's privacy.
11. A is about to give birth to a child, and is told that a caesarian operation will be necessary. She agrees to allow B to make a motion picture of the operation for exhibition to medical students for educational purposes. B exhibits the picture to the public in a commercial theater. This is an invasion of A's privacy.

Comment on Clause (b):

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d. Matter of legitimate public concern. When the matter to which publicity is given is true, it is not enough that the publicity would be highly offensive to a reasonable person. The common law has long recognized that the public has a proper interest in learning about many matters. When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.

This has now become a rule not just of the common law of torts, but of the Federal Constitution as well. In the case of [Cox Broadcasting Co. v. Cohn \(1975\) 420 U.S. 469](#), the Supreme Court indicated that an action for invasion of privacy cannot be maintained when the subject-matter of the publicity is a matter of “legitimate concern to the public.” The Court held specifically that the “States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection.” Other language indicates that this position applies to public records in general.

It seems clear that the common law restrictions on recovery for publicity given to a matter of proper public interest will now become a part of the constitutional law of freedom of the press and freedom of speech. To the extent that the constitutional definition of a matter that is of legitimate concern to the public is broader than the definition given in any State, the constitutional definition will of course control. In the absence of additional holdings of the Supreme Court, the succeeding Comments are based on decisions at common law.

Illustration:

12. A state statute prohibits the public disclosure of the name of a victim of rape. In a news broadcast covering a prosecution for rape, a broadcasting company discloses the name of the victim, who had been identified in the indictment. A State decision awarding damages for invasion of privacy is unconstitutional.

Comment:

e. Voluntary public figures. One who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him. So far as his public appearances and activities themselves are concerned, such an individual has, properly speaking, no right of privacy, since these are no longer his private affairs. (See Comment *b*). Thus an actor, a prize fighter or a public officer has no cause of action when his appearances or activities in that capacity are recorded, pictured or commented upon in the press. In such a case, however, the legitimate interest of the public in the individual may extend beyond those matters which are themselves made public, and to some reasonable extent may include information as to matters that would otherwise be private. (See Comment *f* below).

f. Involuntary public figures. 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.” Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed. The same is true as to those who are the victims of crime or are so unfortunate as to be present when it is committed, as well as those who are the victims of catastrophes or accidents or are involved in judicial proceedings or other events that attract public attention. These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them. As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private. (See Comment *g*).

Illustrations:

13. A is tried for murder and acquitted. During and immediately after the trial B Newspaper publishes daily reports of it, together with pictures and descriptions of A and accounts of his past history and daily life

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prior to the trial. This not an invasion of A's privacy.

14. A is run down in the street by an automobile and taken to a hospital. B newspaper publishes an account of the accident, together with a picture of A taken by a reporter after the event. This is not an invasion of A's privacy.

15. A, a girl twelve years old, gives birth to a child. B Newspaper publishes a report of the event, together with a picture of A and her child. This is not an invasion of A's privacy.

16. While A is walking along the street with her husband, he is set upon by thugs and murdered in her presence. B Newspaper publishes an account of the event, with a picture of A. This is not an invasion of A's privacy.

17. The police raid a cigar store upon suspicion that gambling activities are conducted there. By prior arrangement with the police, the A Broadcasting Company sets up a television camera and broadcasts the raid. B, who has entered the store to buy a cigar, is caught in the raid, and the television broadcast shows him being questioned by the police. This is not an invasion of A's privacy.

g. News. Included within the scope of legitimate public concern are matters of the kind customarily regarded as "news." To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm. Authorized publicity includes publications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, a rare disease, the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal.

h. Private facts. Permissible publicity to information concerning either voluntary or involuntary public figures is not limited to the particular events that arouse the interest of the public. That interest, once aroused by the event, may legitimately extend, to some reasonable degree, to further information concerning the individual and to facts about him, which are not public and which, in the case of one who had not become a public figure, would be regarded as an invasion of his purely private life. Thus the life history of one accused of murder, together with such heretofore private facts as may throw some light upon what kind of person he is, his possible guilt or innocence, or his reasons for committing the crime, are a matter of legitimate public interest. (See Illustration 13 above). On the same basis the home life and daily habits of a motion picture actress may be of legitimate and reasonable interest to the public that sees her on the screen.

The extent of the authority to make public private facts is not, however, unlimited. There may be some intimate details of her 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, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure. Some reasonable proportion is also to be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given. Revelations that may properly be made concerning a murderer or the President of the United States would not be privileged if they were to be made concerning one who is merely injured in an automobile accident.

Illustrations:

18. A is tried for sedition. B publishes in his newspaper the fact that during the trial A is employed as a waiter in a Washington hotel where he might possibly overhear conversations of government officers while they are dining. This is not an invasion of A's privacy.

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19. A is an infant prodigy, who at the age of twelve lectures to leading mathematicians on the fourth dimension. On arriving at adolescence he develops an abnormal dislike for publicity, abandons his mathematical pursuits, obtains employment as an obscure clerk and leads a very secluded life. Twenty years later B Magazine seeks him out and publishes an article on his life history, disclosing his present whereabouts, employment and manner of life, and such matters as his collection of street car transfers and his interest in the lore of an Indian tribe. This is not an invasion of A's privacy.

20. A is run down and injured in an automobile accident. A reporter from B Newspaper, investigating the accident, discovers that A is living with a man who is not her husband. B Newspaper publishes that fact in its account of the accident. This may be but is not definitely an invasion of A's privacy.

i. Members of family. Legitimate public interest in one who has become a public figure, whether voluntarily or involuntarily, is not necessarily limited to the individual himself. It may, to some reasonable extent, include the members of his family or even others who have been closely associated with him, although there is nothing else about them to attract public attention.

Illustrations:

21. A's son is arrested for participation in an illegal automobile race on the public highway. B Newspaper publishes an account of the arrest, with a picture of A, and a statement that he has refused to be interviewed concerning the arrest. This is not an invasion of A's privacy.

22. A mysteriously disappears. He is believed to have been murdered, and another man is tried for his murder and acquitted. Many years later A dies in California, and his body is brought to his former home for burial. B Newspaper publishes an account of the disappearance, the trial, and the return of the body, together with a depiction of the surviving members of A's family. This is not an invasion of the privacy of the family.

j. Education and information. The scope of a matter of legitimate concern to the public is not limited to "news," in the sense of reports of current events or activities. It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.

Illustration:

23. A, a Hindu, is a professional magician. B publishes in his newspaper an article on the Indian rope trick, and illustrates it with a picture of A. A's privacy has not been invaded.

k. Lapse of time. The fact that there has been a lapse of time, even of considerable length, since the event that has made the plaintiff a public figure, does not of itself defeat the authority to give him publicity or to renew publicity when it has formerly been given. Past events and activities may still be of legitimate interest to the public, and a narrative reviving recollection of what has happened even many years ago may be both interesting and valuable for purposes of information and education. Such a lapse of time is, however, a factor to be considered, with other facts, in determining whether the publicity goes to unreasonable lengths in revealing facts about one who has resumed the private, lawful and unexciting life led by the great bulk of the community. This may be true, for example, when there is a disclosure of the present name and identity of a reformed criminal and his new life is utterly ruined by revelation of a past that he has put behind him. Again the question is to be determined upon the basis of community standards and mores. Although lapse of time may not impair the authority to give publicity to a public record, the pointing out of the present location and identity of the individual raises a quite different problem.

Illustration:

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24. A is a noted bandit and murderer, condemned to execution. B, the warden of the prison in which A is confined, allows himself to be photographed with his arm around A's shoulder. Immediately afterward A escapes, and is later shot down and killed by the police. The picture of A and B is published in newspapers in connection with accounts of the escape. Fifteen years later, in one of a series of articles on the criminal career of A, C Newspaper republishes the picture. B's privacy has not been invaded.

25. See Illustration 19 above.

26. Jean Valjean, an ex-convict who was convicted and served a sentence for robbery, has changed his name, concealed his identity, and for twenty years has led an obscure, respectable and useful life in another city far removed. B Newspaper, with the help of Police Inspector Javert, ferrets out Jean Valjean's past history and publishes it, revealing his present identity to the community. As a result Jean Valjean's life and career are ruined. This may be but is not definitely an invasion of privacy of Jean Valjean.

l. Damages. On damages recoverable and whether suit can be maintained without proof of actual injury, see [§ 652H](#).