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How the States Govern the News Media - A Survey of Selected Jurisdictions

Jon H. Sylvester
Golden Gate University School of Law, jsylvester@ggu.edu

HOW THE STATES GOVERN THE NEWS MEDIA — A SURVEY OF SELECTED JURISDICTIONS

Jon H. Sylvester*

The first amendment to the Constitution of the United States provides, in part, that "Congress shall make no law . . . abridging the freedom . . . of the press." This freedom, however, was not defined by the framers of the Constitution and, because the fourteenth amendment makes this prohibition equally applicable to the states, this task has fallen, to a great extent, to the legislatures and courts of individual states. Despite the absolute language of the amendment, none of these bodies has interpreted freedom of the press to be absolute. The media, particularly the news media, have repeatedly and continuously challenged what they regard as attempts to restrict the exercise of their constitutionally guaranteed freedom.

Section Two of Article III of the Constitution provides for United States Supreme Court jurisdiction over all cases arising under the Constitution. Therefore, state laws impacting upon the operation of the press must, when challenged, pass constitutional muster. Most legal questions involving the press, however, are decided by state courts applying state law. This article surveys and compares the laws of selected jurisdictions on several topics as they impact upon the operations of the print and broadcast media.

Specifically, this article examines the statutory and decisional law of California, the District of Columbia, Massachusetts, New York and Texas to determine the similarities and differences of their laws regarding defamation, invasion of privacy, cameras in the courtroom, shield laws (reporter's privilege), broadcast of recorded conversations, publication of

* The author, formerly a professional journalist, is a graduate of the Harvard Law School and an Assistant Professor of Law at Texas Southern University in Houston. He gratefully acknowledges the capable research assistance of Ms. Carlette D. Moore and the technical assistance of Ms. Doris Frank.

pilfered documents, open records legislation, and open meetings legislation.

These jurisdictions were chosen because of geographical distribution, differing lengths of common law tradition, variety of principle economic activity, and because each contains at least (or, in the case of the District of Columbia, is) one of the country's major (top 10) broadcast markets.

I. DEFAMATION

Media organizations often find themselves on the defensive as targets of lawsuits based on allegations that defamatory statements have been printed or broadcast. These suits frequently involve multi-million dollar damage claims. Perhaps more importantly, the cost of even a successful defense could bankrupt most small publishers and broadcasters. Thus, most ominous among those laws impacting on media operations are the laws related to defamation. Defamation is generally defined as "that which tends to injure reputation, to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."[1] Included within defamation are libel and slander. Generally, libel is written defamation and slander is oral defamation. The law of defamation seeks to balance the individual's right to his or her reputation and the media's right not to be intimidated by baseless (but costly) legal actions, or undue fear of accidental liability.

Each jurisdiction has laws (common, statutory, or both) governing libel and slander. These laws are more alike than they are different because the Supreme Court of the United States has been especially specific in establishing parameters within which state defamation law must operate.

Since 1964, the media have been afforded a qualified privilege in defamation actions brought by public officials. In *New York Times v. Sullivan,*[2] the Supreme Court of the United States set the standard for a successful defamation action by a public official against a media defendant. A public official in such an action must allege and prove that a defamatory publication was made with "actual malice."[3] "Actual malice" is defined as "knowledge that [the publication] was false or . . . reckless disregard of whether it was false or not."[4] To prove actual malice

1. BLACK'S LAW DICTIONARY 375 (5th ed. 1979).
2. 376 U.S. 254 (1964).
3. *Id.* at 280.
4. *Id.*

the plaintiff must show that the "defendant[s] . . . entertained serious doubts[5] as to the truth of [the] publication."[6]

Sullivan was expanded to include public *figures* in *Gertz v. Welch Inc.*[7] The *Gertz* Court recognized two possible classifications of public figures: (1) persons who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes,"[8] or "by reason of their their fame shape events in areas of concern to society at large;"[9] and (2) persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of issues involved."[10] All the jurisdictions surveyed endorse these basic principles.[11] There are distinctions, however, in the application of these principles. For example, some jurisdictions have expanded upon the definition of public official. California courts interpreted the *Gertz* definition of public figure to further require that "the plaintiff must have voluntarily and actively sought, in connection with any given matter of public interest, to influence the resolution of the issues involved,"[12] and his or her position "must be one which would invite public scrutiny and discussion occasioned by the particular charges in controversy."[13] In *Rancho La Costa, Inc., v. Superior Court, County of Los Angeles,*[14] the court called this the "public controversy test."[15]

In the District of Columbia, the "voluntariness" of plaintiff's notoriety is not pivotal, but "a person can be a general public figure only if he is a 'celebrity,' his name a 'household word' whose ideas and actions the public in fact follows with great interest."[16] Texas has also endorsed this definition.[17] In both the District of Columbia and Texas, a person is a limited public figure "if he is attempting to have, or realistically can be

5. Garrison v. Louisana, 379 U.S. 64, 74 (1964).

6. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

7. 418 U.S. 323 (1974).

8. *Id.* at 345.

9. *Id.* at 337 (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967)).

10. *Id.* at 345.

11. Waldbaum v. Fairchild Publication, Inc., 627 F.2d 1287, 1292 (D.C. Cir. 1980), (using District of Columbia law) *cert. denied,* 449 U.S. 898 (1980); Yiamougianni's v. Consumers Union, 619 F.2d 932 (2d Cir.) (using New York law), *cert. denied,* 449 U.S. 839 (1980); Lyons v. New Mass Media, Inc., 390 Mass. 51, 55-56, 453 N.E.2d 451, 455-56 (1983); Foster v. Laredo Newspaper, Inc., 541 S.W.2d 809, 819 (Tex.), *cert. denied,* 429 U.S. 1123 (1976).

12. Franklin v. Benevolent Order of Elks, 97 Cal. App. 3d 915, 929, 159 Cal. Rptr. 131, 140 (1979).

13. *Id.*

14. 106 Cal. App. 3d 646, 659, 165 Cal. Rptr. 347, 355 (1980).

15. *Id.* at 660, 165 Cal. Rptr. at 356.

16. *Waldbaum,* 627 F.2d at 1292.

17. Durham v. Cannon Communications, Inc., 645 S.W.2d 845, 849 (Tex. App. 1982) (quoting *Waldbaum,* 627 F.2d at 1292).

expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants."[18] Massachusetts similarly defined public figure in *Stone v. County Newspaper, Inc.*[19]

If a defamation action is brought by a *private* individual against a media defendant, the standard to be applied is to be defined by the states, "so long as they do not impose liability without fault."[20] Subject only to this limitation, each jurisdiction is responsible for establishing its own standards for defamation actions brought by private individuals against media defendants.

The basic standard adopted in accordance with *Gertz* is that of simple negligence.[21] New York, however, has adopted a stricter standard. The plaintiff must show that "the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."[22] Where a private individual proves liability by simple negligence, he is generally entitled to recover actual damages.[23] Special damages may be recovered if pled, but punitive damages are expressly prohibited.[24]

Expressions of opinion are absolutely protected by the first amendment, irrespective of the defamatory nature of the statements.[25] Each juridiction surveyed is in agreement with this general principle.[26] In New York, the definition of a statement of opinion is somewhat more qualified. Constitutional protection is not afforded statements of opinion which convey the clear implication of underlying facts that would confirm the opinion, but are unknown to the reader or listener.[27]

In each jurisdiction surveyed, members of the news media have a qualified privilege, either by statute or by case law, to make fair comment

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18. *Waldbaum,* 627 F.2d at 1292; *Durham,* 645 S.W.2d at 850.

19. 367 Mass. 849, 866-67, 330 N.E.2d 161, 172-73 (1975).

20. *Gertz,* 418 U.S. at 347.

21. *See, e.g.,* Outlet Co. v. Intern Security Group, 693 S.W.2d 621, 626 (Tex. App. 1984); *Stone,* 367 Mass. at 858, 330 N.E.2d at 167.

22. Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975).

23. *Stone,* 367 Mass. at 861, 330 N.E.2d at 169.

24. *Outlet Co.,* 693 S.W.2d at 626.

25. *Gertz,* 418 U.S. at 339-40.

26. Buckley v. Littell, 539 F.2d 883, 893 (2d Cir. 1976), *cert denied,* 429 U.S. 1062 (1977); Ollman v. Evans, 479 F. Supp. 292-93, (D.C. Cir. 1979), *rev'd on other grounds,* 713 F.2d 838 (D.C. Cir. 1983), *cert. denied,* 105 S. Ct. 2662 (1985); Carr v. Warden, 159 Cal. App. 3d 1166, 1170, 206 Cal. Rptr. 162, 164 (1984).

27. Hutchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), *cert. denied,* 434 U.S. 834 (1977).

or criticism of judicial, legislative or official public proceedings or of anything said in such proceedings.[28] The privilege of fair comment is restricted to true reporting. In addition, Massachusetts courts have held that the privilege is lost where it is shown that the remarks were made with actual malice.[29] The privilege in Texas extends only to fair comment or criticism; false statements of fact are not protected by the qualified privilege and are actionable.[30]

The media are frequently means by which defamatory statements are republished, even though the republishing medium may not actually be responsible for the original publication. In this situation liability is not usually imposed by California courts, unless the publisher had reason to believe the publication was libelous.[31] In *Appleby v. Daily Hampshire Gazette,*[32] the Supreme Judicial Court of Massachusetts held that liability will not lie where the newspaper publisher exercises due care and relies on the accuracy of a story received from a reputable news wire service, even though there was no independant verification of the story before publication.[33] *Appleby* is an exception to the general rule that publication of a defamatory statement subjects the republisher to liability as if he had originally published the defamatory statement.[34]

A. Statutory Defamation Provisions Relating To The Media

All of the jurisdictions surveyed, except the District of Columbia, have statutory defamation provisions that specifically address the news media. California provides the most extensive coverage. Massachusetts and Texas have enacted retraction provisions which permit the retraction or correction of a defamatory statement to be considered in mitigation of damages, provided such retraction or correction is done within a reasonable time after publication of the defamatory statement.[35]

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28. Hoffman v. Washington Post, Co., 433 F. Supp. 600, 603 (D.D.C. 1977); *see also,* Kilgore v. Younger, 30 Cal. 3d 770, 640 P.2d 793, 180 Cal. Rptr. 657 (1982); *Lyons,* 390 Mass. at 51, 453 N.E.2d at 457; Schneph v. N. Y. Times, 36 Misc. 2d 456, 223 N.Y.S.2d 90 (1961); Frank B. Hall & Co. v. Buck, 678 S.W.2d 612, 622 (Tex. 1984); CAL. CIV. CODE § 47 (West 1982); TEX. CIV. CODE ANN. § 73.002(a), (b)(1)(A) (Vernon 1985); N. Y. CIV. RIGHTS LAW § 74 (McKinney 1976).

29. Seelig v. Harvard Cooperative Soc., 246 N.E.2d 642, 646-47 (Mass. 1969); *See also, Rancho La Costa, Inc.,* 106 Cal. App. 3d at 664, 165 Cal. Rptr. at 358-59 (proof of malice will defeat privilege).

30. Bell Publishing Co. v. Garrett Eng'g Co., 141 Tex. 51, 62-63, 170 S.W.2d 197, 204-05 (1943).

31. Osmond v. EWAP, Inc., 153 Cal. App. 3d 842, 852, 200 Cal. Rptr. 674, 680 (1980).

32. 395 Mass. 32, 478 N.E.2d 721 (1985).

33. *Id.* at 725.

34. *Id.* at 724. *See also,* Ingber v. Ross, 479 A.2d 1256, 1269 (D.C. Cir. 1984).

35. MASS GEN. LAWS ANN. ch. 231 § 93 (West 1985); TEX. CIV. CODE ANN. § 73.003(a)(3) (Vernon 1986).

California prohibits the recovery of all but special damages in a defamation action against a newspaper or radio station, unless the plaintiff shows that he or she gave the newspaper or radio station notice of the libelous or slanderous matter and made a demand for correction within twenty days after plaintiff's first knowledge of the publication or broadcast of the allegedly defamatory matter, and that such correction was not made.[36] In order to recover exemplary damages, the plaintiff must prove actual malice.[37] This provision does not entitle magazines to its benefits.[38]

California has adopted the Uniform Single Publication Act, as has New York.[39] The Single Publication Act precludes a plaintiff from bringing more than one cause of action for publication of an allegedly defamatory statement in one issue of a book, newspaper or magazine or any one broadcast over radio or television, or one presentation of a motion picture.[40] Under the Act, as interpreted by the California courts, "publication of an integrated issue of a mass media writing occurs upon the first general distribution of the material to the public."[41]

In California, Texas and Massachusetts, liability will not be imposed on the operators, owners, agents or employees of radio or television broadcasting stations for the utterance of defamatory statements by others.[42] New York's provision differs from those of Texas and California in that protection is afforded only if the defamatory remarks are made by "any legally qualified candidate for public office . . . ."[43] Additionally, in New York only *cable* television owners, directors or their employees or agents are afforded the same type of protections described above as given in Massachusetts, Texas and California.[44]

California, Texas and Massachusetts statutorily define libel, while the District of Columbia and New York do not.[45]

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36. CAL. CIV. CODE § 48a1 (1982).

37. *Id.* at 48a2.

38. Montandon v. Triangle Publications, Inc., 45 Cal. App. 3d 938, 952, 120 Cal. Rptr. 186, 195 (1975).

39. CAL. CIV. CODE § 3425.1-3425.5 (West 1970); Khaury v. Playboy Publications, 430 F. Supp. 1342 (S.D.N.Y. 1977).

40. CAL. CIV. CODE § 3425.3 (West 1970).

41. Strick v. Superior Court, County of Los Angeles, 143 Cal. App. 3d 916, 922, 192 Cal. Rptr. 314 (1983).

42. CAL. CIV. CODE § 48.5 (West 1982); TEX CIV. CODE ANN. § 73.004 (Vernon 1986); MASS. GEN. LAWS ANN. ch. 231 § 91A (West 1985).

43. N.Y. CIV. RIGHTS LAW § 75 (McKinney 1976).

44. N.Y. EXEC. LAW § 830 (Mckinney 1982).

45. CAL. CIV. CODE § 45 (West 1982); TEX. CIV. CODE ANN. § 73.001 (Vernon 1986); MASS. GEN. LAWS ANN. ch. 231 § 691 (West 1985).

Broadcast defamation confuses and sometimes defies the above-stated generalization that printed defamation is libel, while spoken defamation is slander. The historical basis of this dichotomy was not the form of the publication, but its reach and degree of permanence (*i.e.*, the amount of reputational damage likely to be done by the publication). Therefore, despite the fact that it is spoken, broadcast defamation is treated as libel in the great majority of jurisdictions in the United States.[46] In California, however, defamation by radio or television is statutorily defined as slander.[47] Libel *per se* (libel on its face), with the presumption of damage, is recognized in all of the jurisdictions surveyed.[48] California is the only jurisdiction researched which also has statutory provisions defining slander (criminal and civil) and slander per se.[49] The remaining jurisdictions have common law definitions for slander and/or slander *per se*.[50]

Thus, the decisional law of all jurisdictions surveyed, and the statutory law of the District of Columbia, make special provisions for the news media in connection with actions alleging defamation. These special provisions have the direct effect of protecting the news media, but the purpose of these provisions is to protect the public, for it is a vital assumption of the United States Constitution and the resultant form of government that: "debate on national issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[51] Only the media are in a position to serve as generalized fora for this debate.

II. INVASION OF PRIVACY

A law review article by Samuel D. Warren and Louis D. Brandeis, entitled "The Right To Privacy,"[52] is generally credited as the first con-

46. *See, e.g.*, Matherson V. Marchello, 100 A.D.2d 233, 473 N.Y.S.2d 998 (1984) (holding defamation by radio and television to be libel); Restatement (Second) of Torts § 568A (1977).

47. Arno v. Stewart, 245 Cal. App. 2d 955, 961, 54 Cal. Rptr. 392, 396 (1966).

48. Wortham v. Dunn & Bradstreet, Inc., 399 F. Supp. 633 (1975), *aff'd*, 537 F.2d 1142 (5th Cir. 1976); Buckley v.Littell, 394 F. Supp. 918 (S.D.N.Y. 1975) *aff'd in part, rev'd in part*, 539 F.2d 883 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); Brewster v. Boston Herald-Traveler Corp., 188 F. Supp. 565 (D. Mass. 1960); Washington Annapolis Hotel Co. v. Riddle, 83 U.S. App. D.C. 288, 177 F.2d 732, 736 (1948); Childers v. San Jose Mercury Printing and Publishing Co., 105 Cal. 284, 38 P. 903 (1894) (malice is presumed where the publication is libelous per se).

49. CAL. CIV. CODE § 46 (West 1982); CAL. PENAL CODE § 258 (West 1970) (amended 1983).

50. *See*, Goree v. Cafnes, 625 S.W.2d 380 (Tex. App. 1981) (slanderous per se defined); Inger v. Ross, 479 A.2d 1256 (D.C. App. 1984) (slanderous per se defined).

51. *Sullivan*, 376 U.S. at 270.

52. 4 HARV. L. REV. 193 (1890).

vincing assertion that a cause of action in tort should be recognized for invasion of privacy. This landmark writing generally described the right asserted as the "right to be let alone."[53] From this basic concept have evolved four distinct kinds of common law invasion of privacy torts categorized by Dean William Prosser as follows: "(1) intrusion upon one's physical solitude or seclusion; (2) public disclosure of private facts; (3) publicity that places someone in a false light in the public eye; and (4) appropriation of one's name or likeness for another's benefit."[54]

Texas, California, the District of Columbia and Massachusetts recognize these four kinds of invasion of privacy.[55] New York does not recognize any common law right to privacy. The only privacy action that may be brought in New York falls under New York Civil Rights Law sections 50-51 (1976) (amended 1979), which specifies a cause of action for appropriation of plaintiff's name or likeness for the commercial benefit of another. Even this action is strictly construed by the courts.[56] Among the jurisdictions surveyed, only California has statutes governing all four kinds of invasions of privacy.

A. Appropriation of Plaintiff's Name or Likeness

California's statutory provisions allow, *inter alia,* a cause of action for the appropriation of one's name, photograph or likeness for commercial purposes.[57] Section 3344 of the California Civil Code applies to individuals living at the time the violation occurs. It provides for the assessment of actual and punitive damages against a person who knowingly appropriates another's name, voice, signature, photograph or likeness for commercial purposes without such person's consent.[58] The news media are exempt from the application of section 3344 when the use of the personality's name, photograph or likeness is made in connection with any news, public affairs or sports broadcast or account.[59]

California courts have interpreted section 3344 to require the "de-

53. *Id.* at 193.

54. *Handbook of the Law of Torts* § 117 (5th ed. 1984).

55. Vassilades v. Garfinkel's, Brooks Bros., 492 A.2d 580 (D.C. 1985); Eastwood v. Superior Court, 149 Cal. App. 3d 409, 417, 198 Cal. Rptr. 342, 347 (1983); Gill v. Snow, 644 S.W.2d 222 (Tex. App. 1982).

56. Stephano v. News Group Publications, Inc., 64 N.Y.2d 220 (1984) (use of modeling photograph in shopping tips column not actionable); McGraw v. Watkins, 49 A.D.2d 958, 373 N.Y.S.2d 663 (1975) (in derogation of common law, right of privacy must be strictly construed); Namath v. Sports Illustrated, 80 Misc. 2d 531, 363 N.Y.S.2d 276, *aff'd,* 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975) (freedom of speech and press transcend right of privacy).

57. CAL. CIV. CODE §§ 990, 3344 (West Supp. 1987).

58. *Id.* § 3344(a).

59. *Id.* § 3344(a), (f).

fendant's use of the plaintiff's identity, the appropriation of plaintiff's name or likeness to defendant's advantage commercially or otherwise, lack of plaintiff's consent and a resulting injury," for liability to be imposed.[60] California law requires, additionally, that the defendant knowingly use the plaintiff's name, photograph, or likeness for the purposes of advertising or solicitation of purchases, and there must be a direct connection between the use and the commercial purpose.[61]

New York Civil Rights Law section 50 is limited to use by the defendant for trade or advertising purposes and does not apply to the "publication of newsworthy matters or events."[62] An individual's voice, hairdo, and characteristic clothing or accessories are not covered by section 50, unlike California law, and thus may be legally appropriated in New York, without the consent of the affected individual.[63]

In *Tropeano v. Atlantic Monthly Co.*,[64] the Supreme Judicial Court of Massachusetts referred to *Time, Inc. v. Hill*,[65] as an example of New York's "expansive" interpretation of its privacy statute. The Massachusetts court went on to say that it would not interpret its state's privacy law[66] so broadly — despite the similarity of the language.[67] In practice, however, the application of the statutes is essentially the same. As in the other jurisdictions surveyed, incidental, noncommercial use of a plaintiff's picture is not an actionable appropriation if the picture was used in an informational manner and not for commercial purposes.[68] Nor is there an actionable appropriation when the publication concerns a matter of public interest.[69] Like California law, New York's section 51 provides for recovery of compensatory and punitive damages.[70] But, unlike California law, section 51 also provides for injunctive relief.[71]

Texas and the District of Columbia are similar in that both follow the Restatement (Second) of Torts (1977), section 652C regarding inva-

60. *Eastwood*, 149 Cal. App. 3d at 417, 198 Cal. Rptr. at 347.

61. *Id.* at 417-18, 198 Cal. Rptr. at 347; Johnson v. Harcourt, Brace, Javonovich, Inc., 43 Cal. App. 3d 880, 894, 118 Cal. Rptr. 370, 381 (1974).

62. N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976).

63. Onassis v. Christian Dior-New York, Inc., 122 Misc. 2d 603, 472 N.Y.S.2d 254 (Sup. Ct. 1984).

64. 379 Mass. 745, 747, 400 N.E.2d 847, 849 (1980).

65. 385 U.S. 374 (1967).

66. MASS. GEN. LAWS ANN. ch. 214, § 3A (West Supp. 1986).

67. *Tropeano*, 379 Mass. at 747, 400 N.E.2d at 849.

68. *Id.*

69. Old Colony Donuts, Inc. v. American Broadcasting Cos., 368 F. Supp. 785, 788 (D. Mass. 1974).

70. N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 1987).

71. *Id.*

sion of privacy.[72] Both recognize an action for appropriation of another's name or likeness for commercial purposes.[73] In Texas, to prove a cause of action for misappropriation, a plaintiff "must show that his or her personal identity has been appropriated by the defendant for some advantage, usually of commercial nature, to the defendant."[74]

B. Public Disclosure of Private Facts

The availability of a cause of action for public disclosure of private facts is particularly problematic for journalists. Such an action differs from one for defamation in that truth is no defense to this invasion of privacy action. Indeed, it is often the very truth of the assertion that makes its revelation especially objectionable. The law does not afford this cause of action, however, to every individual who is the subject of unwanted exposure. Rather, determination must be made based on the information revealed, and the manner and extent of its revelation. In order to recover for "public disclosure of private facts," the disclosure must be communicated to the public generally or to a large number of persons.[75] Furthermore, the facts disclosed must be private facts not already known by the public;[76] and the facts must be highly offensive to a reasonable person and must not be of legitimate concern to the public.[77]

C. False Light

A claim for invasion of privacy based on publicity that places the plaintiff in a false light in the public eye is treated similarly, in most jurisdictions, to a public disclosure action, in that the publication must be highly offensive to a reasonable person.[78] The distinction, however, is that the false light cause of action must be based on a falsehood or "half-

72. *Vassilades,* 492 A.2d at 587; Gill v. Snow, 644 S.W.2d 222, 224 (Tex. App. 1982).

73. *Id.* at 592; Kimbrough v. Coca-Cola/U.S.A., 521 S.W.2d 719, 722 (Tex. App. 1975).

74. National Bank of Commerce v. Shaklee Corp., 503 F. Supp. 533, 540 (W.D. Tex. 1980).

75. *Vassilades,* 492 A.2d at 588; Porten v. Univ. of San Francisco, 64 Cal. App. 3d 825, 828, 134 Cal. Rptr. 839, 841 (1976); Bernstein v. National Broadcasting Co., 129 F. Supp. 817 (D.D.C. 1955), *aff'd,* 232 F.2d 369, *cert. denied,* 352 U.S. 945, (1956).

76. Sipple v. Chronicle Publishing, Co., 154 Cal. App. 3d 1040, 1045, 201 Cal. Rptr. 665, 667-68 (1984); *Bernstein,* 129 F. Supp. at 834.

77. *Sipple,* 154 Cal. App. 3d at 1046, 201 Cal. Rptr. at 668-69. *See also* Sidis v. F-R Publishing Co., 113 F.2d 806 (2d Cir. 1940); *Bernstein,* 129 F. Supp. at 831; National Bonding Agency v. Demeson, 648 S.W.2d 748 (1983); Gill v. Snow, 644 S.W.2d 222, 224 (Tex. App. 1982) (which follows the RESTATEMENT (SECOND) OF TORTS § 652D (1977).

78. Dresbach v. Doubleday & Co., 518 F. Supp. 1285, 1290 (D.D.C. 1981); Fellows v. National Enquirer, Inc., 42 Cal. 3d 234, 238, 721 P.2d 97, 99, 228 Cal. Rptr. 215, 218 (1986); *Vassiliades,* 492 A.2d at 587; Spahn v. Messner Inc., 43 Misc. 2d 219, 250 N.Y.S.2d 529 (1964), *aff'd* 23 A.D.2d 216, 260 N.Y.S.2d 451 (1965), *aff'd* 18 N.Y.S.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966).

truth" that misrepresents the plaintiff's character or behavior.[79]

In Texas, California and the District of Columbia, a false light claim brought by a private individual or a public figure against a media defendant is analogous to a defamation action.[80] Thus, the plaintiff in a false light action is a private individual, a negligence standard is applied and the plaintiff must prove only that the defendant acted with negligence in publishing the statement. However, if the plaintiff is a public figure or official, he or she must satisfy the requirement of actual malice as enunciated in *New York Times v. Sullivan.*[81]

California Civil Code section 48a, which requires a demand for retraction if a plaintiff brings a libel or slander action against a media defendant, is applicable to a false light invasion of privacy claim.[82] Not only does section 48a apply to false light claims, but the defense of truth, the one year statute of limitations applicable to a libel action, and the Uniform Single Publication Act apply as well.[83]

D. Intrusion

Recognition of a cause of action for violation of plaintiff's privacy by intrusion presupposes a physical sphere of legal protection. To this extent, intrustion is conceptually analogous to trespass. The allegation which clearly meets the requirements of a cause of action for intrusion is electronic trespass — *i.e.,* unauthorized wiretapping and eavesdropping.[84] Generally, recovery for intrusion into an individual's solitude or seclusion or his private affairs requires that the intrusion be intentional and highly offensive to a reasonable person.[85]

The media are not immune from suit for violations of this sort.

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79. *Dresbach,* 518 F. Supp. at 1291; Meerpol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974); *National Enquirer, Inc.,* 211 Cal. Rptr. at 824, *rev'd on other grounds,* 42 Cal. 3d 234, 721 P.2d 97, 228 Cal. Rptr. 215 (1986); *Snow,* 644 S.W.2d at 224 (followed RESTATEMENT (SECOND) OF TORTS § 652 E (1977)); *But see,* Arrington v. New York Times, Co., 55 N.Y.2d 433, 434 N.E.2d 319, N.Y.S.2d 541 (1982) (the court, in dicta, expressed its concern that a false light action may restrain the first amendment guarantee of freedom of the press).

80. *Dresbach,* 518 F. Supp. at 1288; Justice v. Belo Broadcasting Corp., 472 F. Supp. 145, 147 (N.D. Tex. 1979); Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 543, 483 P.2d 34, 44, 93 Cal. Rptr. 866, 876 (1971).

81. 376 U.S. 254 (1964). *See also, Eastwood,* 149 Cal. App. 3d at 424, 198 Cal. Rptr. at 351.

82. Johnson v. Harcourt, Brace & Jovanovich, Inc., 43 Cal. App. 3d 880, 893-94, 118 Cal. Rptr. 370, 380 (1974).

83. *National Enquirer,* 42 Cal. 3d at 245-46, 721 P.2d at 104-05, 228 Cal. Rptr. at 223.

84. *See, e.g.,* Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Nader v. Gen. Motors Corp., 25 N.Y.2d 560, 570, 255 N.E.2d 765, 770, 307 N.Y.S.2d 647, 655 (1970) (applying District of Columbia law).

85. Gill v. Snow, 644 S.W.2d 222, 224 (Tex. App. 1982) (adopting RESTATEMENT (SECOND) OF TORTS § 652 B (1977)).

"Privilege concepts developed in defamation cases and to some extent in privacy actions . . . are not relevant in determining liability for intrusive conduct . . . . No interest protected by the First Amendment is adversely affected by permitting damages for intrusion . . . ."[86]

E. Right Of Publicity

It appears most courts have deemed the right to privacy a personal right that does not survive the death of the putative victim. No relational privacy right exists.[87] Some jurisdictions, however, recognize a right of publicity, which is different from and exists independently of a right of privacy. The right of publicity is frequently raised as an issue in privacy cases involving the appropriation of an individual's name or likeness for commercial purposes.[88] The right of publicity is defined as the "right to grant the exclusive privilege of publishing [one's] picture."[89] The right is considered a property right, which is transferable and survives the death of the individual whose right was violated.[90]

A cause of action for the right of publicity generally requires that the individual's name or likeness has a publicity value and that the defendant appropriates it for commercial purposes.[91] For the right to be descendible in California, the individual must have exploited the right during his or her lifetime.[92] New York, however, does not require such previous exploitation.[93]

Although the right to privacy and the right of publicity are separate causes of action in New York, the right of publicity is said to be subsumed in the statutory right of privacy under New York Civil Rights Law sections 50 and 51, irrespective of whether the two actions exist separately.[94] To establish a claim under sections 50 and 51 for a violation of the right of publicity, three elements must be demonstrated:

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86. *Dietemann*, 449 F.2d at 249-50. (*See infra* "PUBLICATION OF RECORDED CONVERSATIONS").

87. Lugosi v. Universal Pictures, 25 Cal. 3d 813, 821, 603 P.2d 425, 430, 160 Cal. Rptr. 323, 328 (1979); Moore v. Charles B. Pierce Film Enter., Inc., 589 S.W.2d 489, 491 (Tex. App. 1979).

88. Southeast Bank, N.A. v. Lawrence, 104 A.D.2d 213, 483 N.Y.S.2d 218 (A.D. 1st Dept. 1984), *rev'd on other grounds,* 66 N.Y.2d 910, 489 N.E.2d 744, 498 N.Y.S.2d 775 (1985).

89. *Id.* at 217, 483 N.Y.S.2d at 221 (quoting Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (per curiam)).

90. *Id.* at 219, 483 N.Y.S.2d at 223.

91. Groucho Marx Productions, Inc. v. Day & Night Co., 689 F.2d 317, 322 (2d Cir. 1982); Lerman v. Chuckleberry Publication, Inc., 521 F. Supp. 228, 232 (S.D.N.Y. 1981), *aff'd,* 745 F.2d 123 (2d Cir. 1984), *cert. denied,* 471 U.S. 1054 (1985).

92. *Groucho Marx Productions, Inc.,* 689 F.2d at 322.

93. *Southeast Bank, N.A.,* 104 A.D.2d at 218-19, 483 N.Y.S.2d at 222, *rev'd on other grounds,* 66 N.Y.2d 910, 489 N.E.2d 744, 498 N.Y.S.2d 775 (1985).

94. Brinkley v. Casa Blancas, 80 A.D.2d 428, 439, 438 N.Y.S.2d 1004, 1012 (1981).

"(1) the use of a person's name or photograph; (2) for a commercial purpose; and (3) the failure to procure the person's written consent for such use."[95] These requirements are the same as those for an appropriation action under section 50. Thus, New York protects the right to publicity under the right of privacy.

California is the only jurisdiction among those surveyed which *statutorily* provides a cause of action for the unauthorized appropriation of a deceased personality's name, voice, signature, photograph or likeness.[96] Section 990 of the California Civil Code allows the right to be transferred.[97] However, it must be either an *inter vivos* transfer or a transfer by contract, trust or testamentary document; if it is not, rights under section 990 terminate.[98] Under this California law, consent to publish may be given by the transferee of the right.[99] The cause of action under section 990 must be brought within fifty years of the death of the person whose publicity right is at issue.[100]

Under section 990, consent is not required for the use of a "name, voice, signature, photograph or likeness in connection with any news, public affairs or sports broadcast or account."[101] Also, liability will not be imposed on the employers or owners of the medium used for advertising, including newpaper, radio and television networks, "when any advertisement solicitation in violation of [section 990] is published or disseminated," unless the owner or employee allows such use with actual knowledge of the unauthorized use.[102] Section 990 does not apply to the use of a deceased personality's name, voice, signature, photograph or likeness in "material that is of newsworthy value."[103] No case law exists interpreting section 990, which was enacted in 1984. However, prior to its enactment such a cause of action was not permitted because the right was considered personal, and thus, died with the deceased.[104] Cases subsequent to the enactment of section 990 would probably be decided differently, provided the person bringing the action satisfied the requirements of section 990.

As the foregoing discussion of invasion of privacy indicates, the ju-

95. *Id.* at 440, 438 N.Y.S.2d at 1012.
96. CAL CIV. CODE § 990 (West 1984).
97. *Id.* § 990(b).
98. *Id.* § 990(e).
99. *Id.* § 990(c).
100. *Id.* § 990(g).
101. *Id.* § 990(j).
102. *Id.* § 990(l).
103. *Id.* § 990(h)(2).
104. *Lugosi,* 25 Cal. 3d at 819, 603 P.2d at 425, 160 Cal. Rptr. at 326.

risdictions surveyed are similar in their treatment of invasion of privacy actions. California provides extensive statutory provisions governing invasion of privacy actions and even provides constitutional protection for the right. The remaining jurisdictions do not afford such broad protection. This contrast indicates that Calfornia desires to offer its citizens more protection against invasion of privacy than other jurisdictions or, at least, that the California legislature has chosen to assume this function rather than leaving it to the state's courts.

In the law of invasion of privacy, special protection is again afforded the news media, but only against allegations of commercial exploitation *(i.e.,* appropriation of name or likeness, violation of the right to publicity, or false light portrayal). Here, the policy objective is that the media not be inhibited by fear of endless actions based on the use of names, photographs, and the like in connection with legitimate accounts of newsworthy events. None of the jurisdictions surveyed, however, gives the media any special protection against actions for intrusion, or public disclosure of private facts.

III. CAMERAS IN THE COURTROOM

Representatives of the printed news media have traditionally been allowed access to judicial proceedings. However, since the advent of electronic news coverage, the issue of permitting microphones and cameras to record or broadcast judicial proceedings has been hotly contested. The key issue when film or video coverage of courtroom proceedings is questioned is how to balance the competing interests involved. These interests are the right of the public — as represented by the press — to know, and the right of the defendant to a fair trial, unfettered by potentially prejudicial publicity or by any compromise of judicial integrity.[105]

Of the jurisdictions surveyed, only California and Texas have permanently adopted rules permitting electronic media coverage of judicial proceedings under certain circumstances.[106] New York and the District of Columbia prohibit such coverage when the proceedings involve the actual or potential testimony of witnesses.[107] Massachusetts permits

105. San Jose Mercury News v. The Municipal Court Sunnyvale Cupertino Judicial District of Santa Clara County, 30 Cal.3d 498, 502-03, 638 P.2d 655, 179 Cal. Rptr. 762, 774 (1982); *See also,* Commonwealth v. Border, 15 Mass. App. Ct. 666, 448 N.E.2d 387 (1983); appeal denied, 389 Mass. 1102, 451 N.E.2d 1186 (Mass App. 1983); Application of Hearld Co. v. Marianai, No. 85-195, slip op. (N.Y. 4th Dept. April 5, 1985); Estes v. State of Texas, 381 U.S. 532 (1965).

106. CAL. R. CT. § 980(b) (West Supp. 1986); TEXAS CODE OF JUDICIAL CONDUCT, Canon 3A(7) (1974).

107. N.Y. CIV. RIGHTS LAW § 52 (1976); D.C. CT. RULE 53(b)(1).

electronic coverage of judicial proceedings on an experimental basis.[108]

Canon 3A(7) of the American Bar Association Code of Judicial Conduct is the basis for the Texas rule governing cameras in the courtroom. Texas has adopted Canon 3A(7) in its entirety. Canon 3A(7) establishes a presumptive prohibition against electronic media coverage, but such coverage may be permitted at the discretion of the trial judge.[109] Coverage will be denied if the presiding judge believes the electronic recordings will "distract the participants or impair the dignity of the proceedings."[110] Thus, in Texas, the defendant's right to an impartial trial is the paramount consideration in deciding whether electronic media coverage of judicial proceedings will be permitted.

California courts have taken a similar position. Under Rule 980(b) of the California Rules of Court, the decision whether to allow coverage is completely within the discretion of the trial court judge.[111] The trial judge has the power, in the interest of justice and to protect the rights of the parties, to exclude cameras from the courtroom.[112] Rule 980 provides that coverage will be allowed only upon written order of the court; film or electronic coverage which is not specifically included in the order is not permitted.[113] New York's prohibition of such coverage is also grounded in these interests and in the conclusion, though somewhat more emphatically stated, that the "the risks to the administration of justice outweigh the right of the public to know."[114]

Estes v. State of Texas[115] was a landmark case on the issue of cameras in the courtroom. In *Estes,* the Supreme Court of the United States reversed Texas trial and appellate courts, upholding defendant's claim that he was denied due process, in violation of the fourteenth amendment, by the television and radio broadcast of his trial. The Supreme Court made it clear, however, that its decision in *Estes* was based at least partly on the fact that the defendant had objected, at the time of the trial, to the broadcast of the proceedings. This position is not unlike that taken by Texas courts addressing the issue on two other occasions.[116]

In *Farrar v. State,* a Texas appeals court refused to reverse the con-

108. S.J.C. Rule 3.09, CODE OF JUDICIAL CONDUCT Canon 3A(7).

109. *Id.*

110. TEX. CODE OF JUDICIAL CONDUCT Canon 3A(7)(a) (West 1986).

111. CAL. R. CT. § 980(b) (West Supp. 1986).

112. *Id.*

113. *Id.* § 980(d).

114. Ad Hoc Committee on Cameras in the Courtroom 3, September 6, 1984.

115. 381 U.S. 532 (1965).

116. Bradley v. Texas, 470 F.2d 785 (5th Cir. 1972), and Farrar v. State, 162 Tex. Crim. 136, 277 S.W.2d 114, *cert. denied, sub nom.* Farrar v. Texas, 350 U.S. 854 (1955).

viction of the defendant, where the trial judge had permitted a newspaper photographer to photograph courtroom proceedings.[117] The court emphasized that its decision should not be construed as approving the practice of taking pictures in the courtroom. The conviction was upheld because the defendant had not objected to the photography and no harm was shown.[118]

In *Bradley v. Texas*,[119] the trial judge permitted motion picture and still photography of the proceedings against appellant in her trial for aiding and abetting an offense committed by her husband. The appellant claimed, on this basis, that she was denied due process. Citing *Estes,* the appeals court stated that the coverage was "inherently prejudicial even absent a showing of actual harm to the defendant."[120] However, the court rejected the defendant's due process claim, stating that it was "unable to say that the conclusions of either [lower] court [were] clearly erroneous" and that a remand was unlikely to adduce evidence to the contrary.[121]

Thus, although the Supreme Court in *Estes* reversed Texas trial and appellate courts, it does not appear that Texas is at odds with the holding of *Estes* or Canon 3A(7). Rather, Texas will generally allow coverage where no harm to the defendant is shown and the defendant consents, or at least fails to object. This position, while potentially somewhat more permissive than that taken in California, appears to be in keeping with the dictate of Canon 3A(7).

In Massachusetts, the most recent case on cameras in the courtroom was *Commonwealth v. Burden.*[122] In *Burden,* the court upheld the decision of the superior court permitting television cameras in the courtroom. The trial court had weighed the interests of the defendant in receiving a fair trial against the public's right to know, and concluded that "the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case . . . compromised the ability of the particular jury that heard the case to adjudicate fairly."[123] Thus, the Massachusetts rule tends to favor electronic media coverage of judicial proceedings by requiring the defendant to prove prejudice before prohibiting such coverage.

The public and judicial mood appears to be shifting toward toler-

117. *Farrar,* 277 S.W.2d at 119.
118. *Id.* at 117.
119. *Bradley,* 470 F.2d at 787.
120. *Id.*
121. *Id.* at 788.
122. 15 Mass. App. Ct. 666, 448 N.E.2d 387 (1983).
123. *Id.* at 675, 448 N.E.2d at 395.

ance of cameras in the courtroom. However, such tolerance does not comprise an absolutely protected constitutional right. In California, Texas and Massachusetts coverage will be permitted, at the discretion of the trial judge, if the defendant's right to a fair trial can be accommodated. New York and the District of Columbia, however, do not appear to be following the trend and the courts apparently are not considered the appropriate forum for such change. Thus, the media will have to press their claim of a right to audio-visual coverage of courtroom proceedings on a case-by-case basis.

The issue of cameras in the courtroom has probably come to be regarded as an exclusively news media-related issue. In other words, there has been no broad-based assertion of any right of private individuals to photograph or otherwise record courtroom proceedings. This is probably because — notwithstanding repeated holdings that the media's right to access is no greater than the public's[124]— the practical reality is that:

> if a television reporter is to convey . . . sights and sounds to those who cannot personally visit [a] place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.[125]

IV. MEDIA SHIELD LAW (REPORTER'S PRIVILEGE)

Among the issues considered in this survey, the matter of so-called "shield laws" is the only one exclusively tailored to specific concerns of the news media. Sometimes, before news media representatives can obtain information from certain types of news sources, they must give assurances that the identities of these sources will not be revealed. Can a member of the news media be compelled to divulge the identity of a confidential news source, or does he or she have a legal privilege *not* to disclose such sources? The answer to this question may depend upon the information sought and the role of the party seeking disclosure.

Only California and New York have statutory provisions which grant members of the news media a privilege not to disclose confidential news sources — and this privilege is qualified.[126] California has gone further than New York, and is the only state that has given the media a

124. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 11-12 (1978).

125. *Houchins*, 438 U.S. at 17 (Stewart, J. concurring).

126. CAL. EVID. CODE § 1070 (West Supp. 1987); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1987).

constitutional right to refuse to disclose their confidential sources of information.[127] Texas and the District of Columbia recognize the privilege, but only under limited circumstances.[128] Massachusetts, on the other hand, generally adheres to the view that there exists no constitutional newsman's privilege, qualified or absolute, to refuse to appear and testify before a court or grand jury.[129] Those jurisdictions that recognize the privilege, either by statute or case law, assert policy bases tied directly to the first amendment.[130]

As with many of the other topics discussed in this article, there are competing interests to be balanced when the issue of disclosure is raised. Therefore, the privilege is qualified. As one structural means of compromising or balancing these interests, the jurisdictions surveyed generally provide protection for members of the news media only against citation for contempt for failure to disclose sources of information. The privilege does not insulate media representatives from other sanctions assessed by the courts.[131] There is no protection where the threat to the fairness of the trial process outweighs the right of the press to gather news.[132] Additionally, where the reporter has information relevant to the defense or the information or source concealed is an essential element of a plaintiff's cause of action, disclosure is compelled.[133] Moreover, if the information or source sought has already been made public, the privilege does not exist.[134] If the news reporter is a party in a libel suit, the courts will generally compel disclosure because the source of information is usually evidentiary proof essential to a plaintiff's cause of action.[135]

Several tests have been outlined to determine whether compulsion is

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127. CAL. CONST., Art I, § 2(b) (1879, amended 1980).

128. Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394 (1973); Dallas Oil & Gas, Inc. v. Mouer, 533 S.W.2d 70 (Tex. App. 1976).

129. *In re* Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971), *aff'd,* 408 U.S. 665 (1972).

130. Anderson v. Nixon, 444 F. Supp. 1195 (D.C. Cir. 1978); C.B.S., Inc. v. Superior Court, 85 Cal. App. 3d 241, 149 Cal. Rptr. 421 (1978); People v. Marahan, 81 Misc. 2d 637, 368 N.Y.S.2d 685 (1975); Dallas Oil & Gas v. Mouer, 533 S.W.2d 70 (Tex. App. 1976).

131. *See* Rosata v. Superior Court, 51 Cal. App. 3d 190, 224, 124 Cal. Rptr. 427, 450 (1975), *cert. denied,* 427 U.S. 912 (1976).

132. *CBS, Inc.,* 85 Cal. App. 3d at 251, 149 Cal. Rptr. at 427; People v. Monroe, 82 Misc. 2d 850, 370 N.Y.S.2d 1007 (1975); Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969), *cert. denied,* 402 U.S. 901 (1971).

133. Herbert v. Lando, 441 U.S. 153 (1979) (applying New York law); *Nixon,* 444 F. Supp. at 1199; *Rosata,* 51 Cal. App. 3d at 218, 124 Cal. Rptr. at 446; Commonwealth v. Corsetti, 387 Mass. 1, 438 N.E.2d 805 (1982).

134. *CBS, Inc.,* 85 Cal. App. 3d at 250, 149 Cal. Rptr. at 426; *Corsetti,* 387 Mass. at 6, 438 N.E.2d at 809; People v. Iannaccone, 112 Misc. 2d 1057, 447 N.Y.S.2d 996 (1982).

135. Herbert v. Lando, 441 U.S. 153 (1979); Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981); Dalitz v. Penthouse Int'l Ltd., 168 Cal. App. 3d 468, 478, 214 Cal. Rptr. 254, 260 (1985); Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969).

appropriate. In Texas, the test is whether the information (1) is relevant; (2) cannot be obtained by alternative means; and (3) is the subject of a compelling interest.[136] In California, the courts must make a factual determination of "(1) the nature of the proceedings, (2) the status of the newspaper as a party or nonparty, (3) alternative sources of information and (4) the relationship of the information to the heart of the claim."[137]

As amended in 1981, New York's shield law provides the broadest protection.[138] Protection is afforded a newsperson's source even if the material or source sought is highly relevant to a particular governmental inquiry.[139] In *People v. Iannaccone,*[140] the court interpreted the amendment to protect both confidential and nonconfidential information imparted to a journalist.[141]

On the other end of the spectrum, Massachusetts provides the least protection, favoring instead the view that the "public has a right to every man's evidence."[142] Thus, any testimonial privilege is to be strictly limited.[143] In keeping with this construction, the Supreme Judicial Court of Massachusetts has found that the state's laws express no legislative policy favoring expansion of the testimonial privileges.[144] Furthermore, that court has stated that the Commonwealth affords no "constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury."[145]

Recently, the Massachusetts Supreme Court was petitioned by the Governor's Press Shield Law Task Force to adopt rules providing for a qualified reporter's privilege.[146] The court denied the petition after analyzing the proposed guidelines, citing detailed reasons for its decision.[147] The court concluded that the common law approach *(i.e.,* a case-by-case balancing of the public interest in every person's evidence against the public interest in protecting the free flow of information) was ade-

136. *E.g.,* Miller v. Transamerica Press, Inc., 621 F.2d 721, 726 (5th Cir. 1980), *cert. denied,* 540 U.S. 1041 (1981).

137. *Dalitz,* 168 Cal. App. 3d at 477-78, 214 Cal. Rptr. at 260 (quoting KSDQ v. Superior Court, 136 Cal. App. 3d 375, 385, 186 Cal. Rptr. 211, 217 (1982)).

138. N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1987).

139. *Id.*

140. 112 Misc. 2d 1057, 447 N.Y.S.2d 996 (1982).

141. *Id.* at 1062, 447 N.Y.S.2d at 999.

142. *In re* Pappas, 358 Mass. at 697, 266 N.E.2d at 299.

143. *Id.*

144. *Id.* at 610 n.8, 266 N.E.2d at 301 n.8.

145. *Id.* at 612, 266 N.E.2d at 303.

146. *Petition for Promulgation of Rules Regarding the Protection of Confidental News Sources and Other Unpublished Information,* 395 Mass. 164, 479 N.E.2d 154 (1985).

147. *Id.* at 167, 479 N.E.2d at 156-59.

quate.[148] It appears unlikely, therefore, that Massachusetts will enact a shield law, as long as the legislature and the courts believe the common law approach adequately protects freedom of the press.

Even when a reporter has a qualified privilege not to divulge confidential news sources or information, the key term is "qualified." The privilege protects a reporter only from citation for contempt; it does not prevent compulsion where the countervailing interests are deemed to outweigh the reporter's right to maintain the confidentiality of his or her sources. Furthermore, there appears to be no trend, in any of the jurisdictions surveyed, toward an extension of the privilege. Hence, New York seems to have taken the most liberal approach in favor of nondisclosure.

The common purpose of these shield laws — limited as they are — is not to keep reporters out of jail, but to keep them from becoming unwitting arms of the police.

V. PUBLICATION OF RECORDED CONVERSATIONS

All the jurisdictions surveyed have statutory provisions which provide criminal penalties for unauthorized wiretapping or eavesdropping.[149] Texas, New York, Massachusetts and California consider an unauthorized eavesdrop or wiretap an invasion of privacy. California's statute specifically states that the legislature intended to proscribe unauthorized interception of communications because of the increasing "threat to the free exercise of personal liberties" and the use of wiretapping and eavesdropping devices to invade the privacy of the citizens of California.[150] In California and New York, criminal penalties may lie for the interception of oral communications by eavesdropping or wiretapping devices based on a theory of invasion of privacy.[151]

Except in California, the penalties under these statutes apply only to unauthorized *interceptions.* No violation has occurred if one of the parties to the conversation consents to the recording.[152] In *Chaplin v. Na-*

148. *Id.* at 168, 479 N.E.2d at 158-59

149. CAL. PENAL CODE §§ 630-32 (Deering 1983 & Supp. 1987); D.C. CODE ANN. §§ 23-542 to -543 (1981); MASS. GEN. LAWS ANN. ch. 272, §§ 99-99A (West 1970); N.Y. PENAL LAW §§ 250.05-.35 (McKinney 1980); TEX. PENAL CODE ANN. § 16.02 (Vernon Supp. 1987).

150. CAL. PENAL CODE § 630 (West 1970). The Massachusetts statute includes similar language. MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1970).

151. CAL. PENAL CODE § 632 (West Supp. 1987); N.Y. PENAL LAW § 250.25 (McKinney 1980); Connin v. Connin, 89 Misc. 2d 548, 392 N.Y.S.2d 530 (1976). In Texas, civil liability is imposed, but not under the theory of invasion of privacy. TEX. CIV. CODE ANN. § 123.002 (Vernon 1986).

152. People v. Lasher, 58 N.Y.2d 962, 447 N.E.2d 70, 460 N.Y.S.2d 523 (1983); D.C. CODE

tional Broadcasting Co.,[153] a nationally prominent movie actor and film producer brought invasion of privacy actions against a newspaper columnist and radio commentator, Gardner, and a broadcasting company, NBC. The plaintiff alleged injury based on a series of syndicated articles written by Gardner, and on two of his weekly radio programs broadcast by NBC.[154] One broadcast involved the publication by the radio station of a telephone conversation between Gardner and the plaintiff's butler. The conversation had been tape recorded without the butler's knowledge.[155] The other broadcast involved a recording of a telephone conversation Gardner had with the plaintiff.[156] Both recordings were made without plaintiff's consent.

The court concluded that the plaintiff's invasion of privacy claim should fail because no common law right of privacy was recognized in New York,[157] and plaintiff did not meet the requirements of New York Civil Rights Law sections 50 or 51 because the radio broadcasts did not use the recording of plaintiff's voice for the "purposes of trade" within the meaning of the statute.[158] The court stated that "the dissemination of news or the reporting of matters of public interest has been held not to be for trade purposes, while fiction or fictionalized information has been held to fall within the New York statute."[159] Thus, in New York an action for invasion of privacy under sections 50 and 51 must be based on fiction or fictionalized information and not news or the reporting of matters of public interest.

More fundamentally, the court distinguished *Chaplin* from cases in which "third parties" had intercepted and/or recorded confidential communications between others, saying "[i]t is unthinkable that the revelation of the content of a telephone conversation by one of the parties to it violates any legally protected right of privacy."[160]

Despite the apparently broad coverage of the above-referenced prohibitions on wiretapping, the District of Columbia, Massachusetts, New York and Texas adhere to the "one party rule," as delineated in *Chaplin*. Thus, in these jurisdictions, the consent of the journalist who

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ANN. § 23542(b) (2); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1970); TEX. CIV. CODE ANN. § 123.001 (Vernon 1986).

153. 15 F.R.D. 134 (S.D.N.Y. 1953) (applying New York law).

154. *Id.* at 136.

155. *Id.*

156. *Id.*

157. *Id.* at 139.

158. *Id.*

159. *Id.* at 138.

160. *Id.* at 141.

electronically records an interview without the knowledge or consent of the interviewee is enough to defeat the interviewee's claim that the recording was a criminal act.

The California statute is a conspicuous exception to the general rule. The California Penal Code provides, in relevant part, that:

> Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication . . . shall be punished by a fine not exceeding two thousand five hundred dollars . . . or imprisonment in the county jail not exceeding one year . . . or by both that fine and imprisonment . . . [for the offender's first violation of this statute].[161]

The wording of the statute is similar to those in the other jurisdictions, except the consent of *all* parties is required. In *People v. Wyrick,*[162] this provision withstood a constitutional challenge for alleged vagueness. The statute was interpreted as making it criminal for one party to record a confidential telephone conversation without the consent of the other party.[163] This interpretation has been repeatedly confirmed.[164]

The above-cited cases, and the statute itself, make clear that this provision applies only to "confidential" communications. "Confidential communication" is defined as "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering . . . ."[165] The California courts have interpreted this provision to require that at least one party to the conversation had a reasonable expectation of privacy at the time of the recording.[166] Based as it is on an invasion of privacy rationale, this statutory provision prohibits recordation in and of itself; no subsequent publication is necessary to complete the offense. This is also true of invasion of privacy by intrusion in the other jurisdictions surveyed.[167] Not surprisingly, the prohibition does not extend to the making of notes or a subsequent stenographic summary of one's recollections.[168]

The California journalist may find refuge in one of two fairly narrow

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161. CAL. PENAL CODE § 632(a) (West Supp. 1987).

162. 77 Cal. App. 3d 903, 144 Cal. Rptr. 38 (1978).

163. *Id.*

164. People v. Suite, 101 Cal. App. 3d 680, 161 Cal. Rptr. 825 (1980); Warden v. Kahn, 99 Cal. App. 3d 805, 161 Cal. Rptr. 471 (1979).

165. CAL. PENAL CODE § 632(c) (West Supp. 1987).

166. People v. Newton, 42 Cal. App. 3d 292, 116 Cal. Rptr. 690 (1974), *cert. denied,* 420 U.S. 937 (1975).

167. *See, e.g.,* Pearson v. Dodd, 410 F.2d 701, 704 (D.C. Cir.), *cert. denied,* 395 U.S. 947 (1969).

168. *Wyrick,* 77 Cal. App. 3d at 907, 144 Cal. Rptr. at 41.

statutory exceptions to the general prohibition against electronic recording. It is not illegal to record a conversation — without the consent of the other party to the conversation — if the recording is done pursuant to the direction of a law enforcement official acting within the scope of his or her authority.[169] Nor is it illegal to secretly record a confidential communication — even on one's own initiative — for the purpose of obtaining evidence regarding extortion, kidnapping, bribery, any felony involving violence against a person, or the making of phone calls intended to annoy.[170]

While these statutory exceptions will sometimes be crucial, the general reality is that, in the interest of protecting its citizens' privacy, California law deprives journalists of an important tool available to news people in all the other jurisdictions surveyed. The California courts are aware that in so doing, the state's legislature has gone further than is required either by the United States or the California Constitution.[171]

Two provisions of federal law are also particularly relevant in this regard. The United States Code makes it unlawful to intercept and divulge the contents of a telephone conversation.[172] Unlike the California statute, however, this provision has been interpreted as comporting with the above-described "one-party rule." Therefore, if one party to a telephone conversation does the recording, or if one party to the conversation consents to its recordation by a third party, there is no violation.[173] Additionally, any party to a recorded telephone conversation may publish it for his or her own benefit.[174]

A second relevant federal regulation is imposed on broadcasters by the Federal Communication Commission. FCC regulations provide that:

> Before recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast.[175]

Finally, it is worth emphasizing that in all the jurisdictions surveyed, the legality of the recordation is a matter entirely separate from

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169. CAL. PENAL CODE § 633 (West Supp. 1987).

170. *Id.* at 633.5.

171. *See* People v. Cooks, 141 Cal. App. 3d 224, 190 Cal. Rptr. 211 (1983), *cert. denied*, 464 U.S. 1046 (1984).

172. 18 U.S.C. § 2511 (1982).

173. *Id.*

174. *Id.*

175. 47 C.F.R. § 73.1206 (1987).

the invasion of privacy, if any, resulting from the subsequent publication of the recorded information.

IV. PUBLICATION OF PILFERED DOCUMENTS

The celebrated "Pentagon Papers" cases[176] come readily to mind in any discussion of journalists' publication of pilfered documents. Those cases, however, had far less to do with the publication of pilfered documents than with the classic but narrow doctrine of prior restraint.[177]

Of greater concern to the news media is the reality that the publication of pilfered documents may result in (1) charges of larceny, and (2) civil and/or criminal invasion of privacy actions as well as (3) possible charges of receipt of stolen property by the publisher. If government documents are pilfered, there may be increased penalties attached to certain of these charges and claims, if proven.

Each of the jurisdictions surveyed has at least one statutory provision regarding larceny.[178] These statutes vary in their precise definitions and classifications of larceny and in their delineation of applicable penal sanctions. Generally, however, each defines larceny as the trespassory taking of the property of another with the intent to deprive the owner, more or less permanently, of the possession, use and/or enjoyment of the property so taken. Each jurisdiction defines "property" so as to include documents, *e.g.*, "any article, substance, or thing of value."[179]

The "taking" aspect of the crime has been variously defined by statute and case law, but none of the jurisdictions surveyed requires a hostile confrontation in order to satisfy this requirement. The Texas statute, for example, provides that the taking of property without the owner's consent — or the consent of a person legally authorized to act for the owner — is larceny.[180] It further states that consent is not valid if it is induced by deception or coercion, given by a person the defendant knew was not legally authorized to act for the owner, or given by a person who by reason of youth, intoxication, mental disease or defect, was known by the defendant to be unable to make a reasonable disposition of the property.[181]

The journalist or publisher who, as a third party, knowingly receives

176. New York Times Co. v. United States, 403 U.S. 713 (1971).

177. *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931).

178. CAL. PENAL CODE §§ 487, 492 (West 1970 & Supp. 1987); D.C. CODE ANN. § 22-3811 (1986); MASS. GEN. LAWS ANN. ch. 266, § 25 (West Supp. 1986); N.Y. PENAL LAW § 155.05 (McKinney Supp. 1987); TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 1987).

179. N.Y. PENAL LAW § 155.00 (McKinney Supp. 1987).

180. TEX. PENAL CODE ANN. § 31.01(4) (Vernon Supp. 1987).

181. *Id.*

stolen documents may be guilty of a criminal offense in any of the jurisdictions surveyed. In some jurisdictions larceny is defined broadly enough to include such a third party.[182] Other jurisdictions have separate statutes providing penalties for the knowing receipt of stolen property.[183]

What if the journalist or publisher does not take and retain the document, but merely photocopies and returns it? This course of action does not fit within the technical definition of larceny, but the law does afford sanctions. First, there are the various causes of action for invasion of privacy (most likely among these are intrusion and public disclosure of private facts). In addition, if the document contains information qualifying as a "trade secret," there are a range of statutory provisions prohibiting the taking of the information itself — not merely the document physically embodying the information.[184] The following definition of "trade secret" is typical: "the whole or any part of any scientific or technical information, design, process, procedure, formula, or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes."[185]

Cases applying these laws to facts arising out of the practice of journalism are few. In *People v. Kunkin,*[186] the court held that there was enough evidence to show that published documents had been stolen, but not enough evidence to infer that the publisher knew or should have known the documents were stolen.[187] An invasion of privacy issue was not raised in *Kunkin,* but presumably an action would lie in this situation if the publication of the document would invade the privacy of a person identified in the publication.

Kunkin illustrates that a publisher may be charged with and convicted of receipt of stolen goods, if he or she knew or should have known the documents were stolen. This conclusion would probably be the same in other jurisdictions depending upon how their penal statutes define the receipt of stolen goods. Furthermore, except in New York, where the tort of invasion of privacy is restricted, there may also be an action for invasion of privacy.

In California, as in the District of Columbia, if the pilfered docu-

182. *See, e.g.,* TEX. PENAL CODE ANN. § 31.03(a) (Vernon Supp. 1987).

183. *See, e.g.,* CAL. PENAL CODE § 496(1) (West 1970 & Supp. 1987).

184. *See, e.g.,* TEX. PENAL CODE ANN. 31.05(b) (Vernon 1974); MASS. GEN. LAWS ANN. ch. 266, § 30(4) (West 1970).

185. TEX. PENAL CODE ANN. § 31.05(a)(4) (Vernon 1974).

186. 9 Cal. 3d 245, 507 P.2d 1392, 107 Cal. Rptr. 184 (1973).

187. *Id.* at 255-56, 507 P.2d at 1399-1400, 107 Cal. Rptr. at 191-92.

ments are government documents, the penalties are different. The receipt of criminal records or information from such records by an unauthorized person is a misdemeanor under California Penal Code section 11143.[188] However, the statute exempts publishers, editors, reporters and other persons connected with or employed by a radio or television station, newspaper, magazine, or other periodical publication.[189] This exemption was challenged in *McCall v. Oroville Mercury Co.*,[190] where the plaintiff argued that section 11143 was applicable to media members. The case involved a newspaper's publication of certain excerpts from Justice Department records. The plaintiff contended that the records were unlawfully obtained based on section 11143. The court, however, held that section 11143 exempted all members of the news media, and not just those who were subject to contempt citations for failure to disclose sources of information.[191]

The publication of pilfered documents may bring into conflict the public's right to know and the rights of the individual or — in the case of government documents — the state's interest in the security of the state or its citizens. If the documents taken are government documents, the content of the published documents is material. If the documents pose a threat to a state's security or to its citizens, the interests of the state may override the public's "right to know."[192] However, if there is no threat to either the state's security or its citizens, then the right of the public to know will be given deference.[193]

VII. OPEN MEETINGS LEGISLATION

Each of the jurisdictions surveyed statutorily requires government or quasi-government meetings to be open to the public.[194] California is unique among the jurisdictions surveyed in that it has one statute for legislative bodies of local agencies and another for state bodies and public agencies.

Generally, it is the public policy of each of these jurisdictions sur-

188. CAL. PENAL CODE § 11143 (West 1982).

189. See MEDIA SHIELD LAW discussion, *supra.*

190. 142 Cal. App. 3d 805, 191 Cal. Rptr. 280 (1983).

191. *Id.* at 808, 191 Cal. Rptr. at 283.

192. New York Times Co. v. United States, 403 U.S. 713, 735-37 (1971) (White, J., concurring) (publication of military or classified information property subject of criminal prosecution).

193. United States v. Nixon, 418 U.S. 683, 706 (1974) (absent claim of military, diplomatic, or sensitive national security secrets, President must produce documents for court's inspection).

194. CAL. GOV'T CODE §§ 54950-61 (West 1983); *id.* §§ 11120-31 (West 1980); D.C. CODE ANN. § 1.1504 (1981); MASS. GEN. LAWS ANN. ch. 39 § 23 A-C (West 1985); N.Y. PUB. OFF. LAW §§ 100-104 (McKinney Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon 1970).

veyed that state bodies, public agencies and the legislative bodies of local agencies are to conduct their meetings openly so that the public can be informed, and to prevent secrecy in public policy deliberations and decisions.[195]

The cited statutes specifically exempt certain meetings from their application.[196] The cases in these jurisdictions are in agreement that the exemptions are to be narrowly construed to afford maximum access and to fulfill the purposes of the statutes.[197]

Several types of meetings are closed to the public in all the jurisdictions: meetings concerning state security; meetings concerning the appointment, dismissal or employment of a public employee or to hear complaints or charges against such employee; discussions regarding pending or current litigation involving the public agency; and meetings regarding the administration of examinations for licenses. Since the exemptions are to be narrowly construed, the mandates of the acts must be strictly followed. Violation of the statutes may result in criminal sanctions and invalidation of actions taken during a closed session in violation of the statute.[198]

Media organizations have on several occasions instituted actions to enforce the provisions of an Open Meetings Act. In these instances the courts must decide whether the meeting is required to be open to the public, or falls under one of the exemptions, and whether the press has rights greater than those afforded the general public under the statute.

In Texas, the leading case on this topic is *City of Abilene v. Shackleford.*[199] In *Abilene,* the issue was whether the press had a right to chal-

195. Ghiglione v. School Comm. of Southridge, 376 Mass. 70, 378 N.E.2d 984 (1978); Orange County Publications v. Council of Newburgh, 60 A.D.2d 409, 401 N.Y.S.2d 84, *aff'd,* 45 N.Y.2d 947, 383 N.E.2d 1157, 411 N.Y.S.2d 564 (1978); CAL. GOV'T CODE §§ 11120, 54953 (West 1983); N.Y. PUB. OFF. LAW § 100 (McKinney Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon 1970 & Supp. 1986).

196. CAL. GOV'T CODE § 11126 (West 1980); D.C. CODE ANN. §§ 1-1506 (1981); MASS. GEN. LAWS ANN. ch. 39 § 23B (West 1985 & Supp. 1986); N.Y. PUB. OFF. LAW §§ 105, 108 (McKinney Supp. 1987); TEX. REV. CIV. STAT. ANN. art. 6252-17 § 2 (Vernon 1970 & Supp. 1987).

197. Register Div. of Freedom Newspapers v. Orange County, 158 Cal. App. 3d 893, 907-08, 205 Cal. Rptr. 92, 100 (1984) (exemptions are permissive not mandatory; disclosure not prohibited but nondisclosure is permitted in certain circumstances); Daily Gazette Co. v. Town Bd. of Coblesskill, 111 Misc. 2d 303, 304, 444 N.Y.S.2d 44-46 (1981) (exemption); *Ghiglione,* 376 Mass. at 72-73, 378 N.E.2d at 987 (closed sessions permitted). *See also,* Holden v. Bd. of Trustees of Cornell Univ., 80 A.D.2d 378, 440 N.Y.S.2d 58 (1981) (Open Meetings Law to be given broad and liberal construction to achieve legislative purpose).

198. CAL. GOV'T CODE § 11130.7 (West Supp. 1987); MASS. GEN. LAWS ANN. ch. 39 § 23B (West 1985 & Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 6252-17 § 4 (Vernon 1970 & Supp. 1987).

199. City of Abilene v. Shackelford, 572 S.W.2d 742 (Tex. App. 1978), *rev'd on other grounds,* 585 S.W.2d 665 (Tex. 1979).

lenge violations of the Open Meetings Act. The appeals court held that the press could not challenge an alleged violation of the Act because the press was not an "interested person" within the meaning of the Act, since the plaintiffs did not allege or prove that they suffered special injury as a result of the meeting being closed.[200] Furthermore, the appeals court stated that "representatives of the 'news media' have no constitutional or other right of special access to information not available to the public generally."[201]

The Texas Open Meetings Act was amended in 1980 to provide that an "interested person" included "bona fide members of the news media."[202] Thus, the principal issue in *Shackleford* has been statutorily resolved. However, the interpretation of the amended provision has resulted in litigation.

In *Board of Trustees v. Cox Enterprises, Inc.*,[203] a newspaper brought an action alleging violations of the Open Meetings Act by the Austin School District Board of Trustees. The court interpreted the Act to mean that the legislature intended to grant standing to members of the news media without requiring a showing by them of a special interest apart from that of the general public.[204] Thus, the media have a right not granted to the public.

Most open meeting statutes require that notice of meetings open to the public be placed in a conspicuous place with strict requirements as to content, location, date and time of such notice.[205] In California, notice of a special or emergency session is to be given at least 24 hours prior to such session.[206] Under California Government Code sections 11125.5 and 54956.5, which cover emergency and special sessions, members of the local news media, print and broadcast, who request that notification be given, are to be notified by the presiding officer of the public body or a designated person, by telephone, at least one hour prior to the emergency meeting.[207] Closed sessions are not permitted if the meeting was called pursuant to these code provisions.[208] Notice is also required to be given

200. *Id.* at 747 (citations omitted).

201. *Id.*

202. TEX. REV. CIV. STAT. ANN. art. 6252-17 § 3 (Vernon Supp. 1987).

203. 679 S.W.2d 86 (Tex. App. 1984).

204. *Id.* at 88.

205. CAL. GOV'T CODE §§ 11125, 54954.1 (West 1983 & Supp. 1987) (which requires notice to be mailed to property owners who request such notice); MASS. GEN. LAWS ANN. ch. 39 § 23B (West 1985); N.Y. PUB. OFF. LAW § 104 (McKinney Supp. 1987) (which requires notice to be given specifically to the news media to the extent practical).

206. CAL. GOV'T CODE §§ 11125.5, 54956, 54956.5 (West Supp. 1987).

207. *Id.*

208. "It would be a violation of the Ralph M. Brown Act (§ 54950 et seq.) for a member of a city

when a public body meets in closed session.[209] However, the notice requirement of the Texas Open Meeting Act does not apply to meetings not open to the public (*e.g.*, executive sessions).[210] The agenda and other writings of the public meetings, but not closed sessions, are to be made available to the public in California.[211] Minutes may be kept, but are not required and are not subject to disclosure.[212]

The extensive nature of the provisions of the open meetings statutes of California, New York, Massachusetts and Texas indicate that these states seek to insure that public meetings remain public. The statutes are strictly construed so as to effectuate their purpose to keep the public informed of the inner workings of a state's governmental bodies. However, although the news media play a crucial role in keeping the public informed, only Texas affords the media rights superior to those afforded the general public.

VIII. OPEN RECORDS LEGISLATION

Like the open meetings legislation of the jurisdictions surveyed, the open records legislation of these jurdictions is extensive. In each case, however, the latter substantially mirrors the Federal Freedom of Information Act.[213] The primary policy basis for these statutes is the proposition that citizens have a right to know the processes of governmental decision making.[214] In California the policy of the Open Records Act is also to insure individual privacy.[215] Thus, the interests sought to be balanced — the public's right to know against an individual's right to privacy in his affairs — are incorporated into the legislative provisions of California's Open Records Act.[216]

The main issue presented when an open records act is challenged is whether the records sought to be disclosed are "public records." Most

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council to hold a series of closed discussions with citizens having matters of business pending before them together or convey information regarding those matters where the discussions are held on successive dates and are so planned to insure that a quorum of the council will not be present at any given meeting." 65 Ops. Att'y Gen. 63 (1962).

209. CAL. GOV'T CODE §§ 11126.3, 54956.9 (West Supp. 1987).

210. *Cox Enters.*, 679 S.W.2d at 92.

211. CAL. GOV'T CODE §§ 11125.1, 54957.5 (West 1983 & Supp. 1987).

212. *Id.* § 54957.2; Perryman v. School Comm. of Boston, 17 Mass. App. 348, 456 N.E.2d 748, 752 (1983).

213. Freedom of Information Act of 1967, Pub. L. 90-23, § 552, 81 Stat. 54 (1967).

214. CAL. GOV'T CODE §§ 6250, 9070 (West 1980); D.C. CODE ANN. §§ 1-1521 (1978); MASS. GEN. LAWS. ANN. ch. 66 § 10(b) (West 1986); N.Y. PUB. OFF. LAW § 84 (McKinney Supp. 1987); TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1987).

215. CAL. GOV'T CODE § 6250 (West 1980).

216. *Id.* § 6255.

statutes define the term "public records."[217] Statutory silence or ambiguity regarding the definition of "public" is clarified by the case law of each jurisdiction. In California, the definition of public record is expanded by case law to cover "every conceivable kind of record that is involved in the governmental process and . . . any form of record keeping instruments as it is developed. Only purely personal information unrelated to the conduct of the public's business is exempt."[218] These statutes provide for written guidelines on accessibility,[219] in addition to delineating which records are public.[220]

New York is unique among the jurisdictions surveyed in that its Open Records Act establishes a committee, which is to include at least two representatives of the news media, to furnish any agency or person with advisory opinions, guidelines or other appropriate information regarding the Act and to promulgate rules and regulations regarding implementation of the Act.[221]

Analogous to the open meetings legislation, the open records legislation provides that certain enumerated records are not public and are, therefore, exempt from disclosure.[222] The public policy of each of the jurisdictions surveyed favors disclosure. The exemptions are narrowly construed to effectuate this policy.[223] Moreover, since there is a statutory presumption favoring disclosure, the burden falls on the person claiming an exemption to prove entitlement to that exemption.[224]

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217. CAL. GOV'T CODE § 6252(d) (West 1980); D.C. CODE ANN. §§ 1-1152 (1978); MASS. GEN. LAWS ANN. ch. 66 § 3 (West 1969); N.Y. PUB. OFF. LAW § 86.4 (McKinney Supp. 1987); TEX. REV. CIV. STAT. ANN. art. 6252-17a § 2(2) (Vernon Supp. 1987).

218. San Gabriel Tribune v. Superior Court, 143 Cal. App. 3d 762, 774, 192 Cal. Rptr. 415, 422 (1983) (quoting 58 Ops. Cal. Att'y Gen. 629, 633-34 (1975)).

219. CAL. GOV'T CODE § 6253 (West Supp. 1987); D.C. CODE ANN. §§ 1-1522 (1978); MASS. GEN. LAWS ANN. ch. 66, § 10 (1851) (amended 1982); N.Y. PUB. OFF. LAW §§ 86-88 (McKinney Supp. 1987); TEX. REV. CIV. STAT. ANN. art. 6252-17a §§ 4, 5 (Vernon Supp. 1987).

220. CAL. GOV'T CODE § 6254.7, 6254.8 (West 1980 & Supp. 1987); D. C. CODE ANN. §§ 1-1526 (1978); MASS. GEN. LAWS ANN. ch. 66, § 10 (West 1980); N.Y. PUB. OFF. LAW § 89 (McKinney Supp. 1987); TEX. REV. CIV. STAT. ANN. art. 6252-17a § 6 (Vernon Supp. 1987).

221. N.Y. PUB. OFF. LAW § 89 (McKinney Supp. 1987).

222. CAL. GOV'T CODE § 6254 (West 1981) (amended 1984); D.C. CODE ANN. §§ 1-5424 (1981); MASS. GEN. LAWS ANN. ch. 4, § 7, (West 1986); N.Y. PUB. OFF. LAW § 87 (McKinney Supp. 1987); TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1987).

223. *San Gabriel Tribune,* 143 Cal. App. 3d at 779, 192 Cal. Rptr. at 426; Attorney Gen. v. Assistant Comm'r of the Real Property Dept. of Boston, 380 Mass. 623, 404 N.E.2d 1254, 1255 (1980); Washington Post Co. v. New York State Ins. Dept., 114 Misc. 2d 601, 452 N.Y.S.2d 163, *rev'd,* 94 A.D.2d 648, 462 N.Y.S.2d 208, *rev'd,* 61 N.Y.S.2d 557, 263 N.E.2d 604, 475 N.Y.S.2d 263 (1984); Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. Ct. App. 1984).

224. *San Gabriel Tribune,* 143 Cal. App.3d at 779, 192 Cal. Rptr. at 426; Attorney Gen. v. Assistant Comm'r of the Real Property Dept. of Boston, 380 Mass. 623, 404 N.E.2d 1254 (1980); Westchester Rockland Newspapers, Inc., v. Kimball, 50 N.Y.2d 575, 408 N.E.2d 904, 430 N.Y.S.2d

As previously indicated, there are competing interests to be served where disclosure is sought. The courts seek to balance the public's need for the information at issue and the individual's right to privacy.[225] None of the statutes surveyed requires the disclosure of records, if such disclosure would constitute an unwarranted invasion of privacy.[226]

In Massachusetts the right to know prevails, unless disclosure would publicize "intimate details of a highly personal nature."[227] An unwarranted invasion of privacy in Texas is defined as disclosure of that "(1) which contains information highly objectionable to a reasonable person and (2) is not of legitimate concern to the public."[228] This is the same standard applicable to an invasion of privacy action for public disclosure of private facts.[229]

At least two jurisdictions have held that the right to access is afforded to the general public, including the media.[230] However, the media have failed in their attempts to obtain greater access to records than that afforded the general public.[231]

In each jurisdiction, if an agency denies access to the requested records on the basis that they are exempt, it must follow strict guidelines detailing specific reasons why the records fit within the exemption claimed.[232] In Texas and Massachusetts, the Attorney General is required to make an independent determination whether disclosure is re-

574 (1980); MASS. GEN. LAWS ANN. ch. 66, § 10(c) (West Supp. 1986); N.Y. PUB. OFF. LAW §§ 66, 89(5)(e) (McKinney Supp. 1987).

225. *In re* National Broadcasting Co., 653 F.2d 609 (D.D.C 1981); Hastings and Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 375 N.E.2d 299 (1978); Teachers Pension Ass'n v. Teachers Retirement System of the City of New York, 98 Misc. 2d 1118, 415 N.Y.S.2d 561, *aff'd*, 71 A.D.2d 250, 422 N.Y.S.2d 389 (1979); Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 at 550 (Tex. App. 3 Dist. 1983).

226. CAL. GOV'T CODE § 6254(c) (West 1980); D.C. CODE ANN. § 1.1524(a)(3)(C) (1981); MASS. GEN. LAWS ANN. ch. 14, § 7 (West 1986); N.Y. PUB. OFF. LAW § 87 (McKinney Supp. 1987) (which enumerates specific disclosures that would constitute unwarranted invasions of privacy); TEX. REV. CIV. STAT. ANN. art. 6252-17(a) § 3(a)(9) (Vernon Supp. 1987).

227. *Assistant Comm'r of the Real Property Dept of Boston*, 380 Mass. at 623, 404 N.E.2d at 1256 (quoting Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 385 N.E.2d 505 (1979)).

228. *Hubert*, 652 S.W.2d at 550 (quoting Indus. Found. of the South v. Texas Indus. Accident Bd., 540, S.W.2d 668, 685 (Tex. 1976) *cert. denied*, 430 U.S. 931 (1977)).

229. *See supra* notes 52-55 and accompanying text. *See also*, Pottle v. School Comm. of Braintree, 395 Mass. 861, 482 N.E.2d 813 (1985).

230. *In re* Estate of Hearst, 67 Cal. App. 3d 777, 782 136 Cal. Rptr. 821, 823 (1977); Texas Indus. Accident Bd. v. Indus. Found., 526 S.W.2d 211 (Tex. App. 1975) *cert. denied*, 430 U.S. 931 (1977).

231. *In re* Estate of Hearst, 67 Cal. App. 3d at 785, 136 Cal. Rptr. at 826; *see also* Heard v. The Houston Post Co., 684 S.W.2d 210, 213 (Tex. App. 1984).

232. CAL. GOV'T CODE § 6256 (West 1980 & Supp. 1987); D.C. CODE ANN. ch. 66 §§ 1-1524 (1981); N.Y. PUB. OFF. LAW § 89(3) (McKinney Supp. 1987); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7 (Vernon Supp. 1987).

quired before the court may do so, when the custodian of agency records denies access.[233]

In *City of Houston v. Houston Chronicle Publishing Co.*,[234] the court had occasion to interpret the Texas Open Records Act. The court concluded that the Act required a decision from the Attorney General if "(1) the City considers the information to be within one of the statutory exceptions to disclosure, and (2) there has been no previous determination as to the status of the information.[235] Consequently, the court required disclosure because the courts had previously determined the information sought by the *Houston Chronicle* to be public.

Although each jurisdiction has enacted its own open records act, the provisions of each are similar in most respects. Likewise, the cases are in agreement as to the interpretation of these statutes. Disclosure is favored unless the records fall within a strictly defined exception or the interests in nondisclosure far outweigh those in disclosure.

IX. CONCLUSION

State courts and legislatures make a great many decisions regarding laws that impact directly upon the day-to-day operations of the print and broadcast media. For most of the topics examined in this article, there are distinctions among the laws of the jurisdictions surveyed. These distinctions simply reflect the differing results of the same interest-balancing processes carried out by different courts and legislatures. Such distinctions as there are would not appear readily explicable in terms of regional or general historical differences among the jurisdictions.

On the other hand, the clear and dominant *similarities* in the laws of the various jurisdictions result from the fact that, in these matters, one side of the interest-balancing scale is always occupied by the first amendment, and the Supreme Court has established clear, though not rigid, standards by which allegedly infringing laws are tested.

Among the first amendment issues the Supreme Court has not yet resolved is the question whether the media should enjoy greater rights than those afforded the general public. Those who believe the media are essentially agents of the public and that "press rights" are, at best, derivative, may be inclined to answer emphatically "no."

But the agency notion and the practical realities of modern telecommunications technology suggest that the public's effective right to know

233. MASS. GEN. LAWS ANN. ch. 66, § 10(b) (West Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7 (Vernon Supp. 1987).

234. 673 S.W.2d 316 (Tex. Ct. App. 1984) ("Chronicle II").

235. *Id.* at 318.

is only as great as the media's right to access. Thus, special protection for the media is, in fact, simply a means (probably the only effective means) of insuring meaningful protection for the rights of the general public.