



Figure 3.1: Hulk Hogan / Kristin Fitzsimmons / Wikimedia Commons / CC PDM 1.0

## Week 3: Defamation, Libel & Invasion of Privacy

### Objectives

After completing this week's work, you should be able to:

- explain key mass media law principles for libel and privacy.
- distinguish situations in which the social and cultural values of privacy law would apply.

Among the ideas you will encounter are

- the concepts, elements, and burdens of proof in the torts of libel and defamation.
- the significance of *New York Times v. Sullivan*, and the concepts of public figure or limited public figure.
- the concept of actual malice and the duties of journalists.
- media defenses of opinion and fair comment.
- reasonable privacy expectations.
- invasion of privacy torts, including intrusion, appropriation, and false light.
- the fine line professional communicators must tread with respect to the concept of privacy.
- the distinctions made in defamation cases involving political figures and celebrities.

## Introduction

More of the definitive course terminology related to media law is revealed this week. We begin by acknowledging that any media professional, journalist or not, can become the target of a [tort](#) simply by failing to exercise reasonable care in the creation and dissemination of information or statements that are later viewed as defamatory. A person can be found [negligent](#), guilty of a [negligent tort](#), and ordered to pay damages, even when there was no intent to defame or damage the plaintiff. This can happen to journalists who are found to be negligent by their:

- reporting as fact information from unreliable, untrustworthy, or noncredible sources
- misreading and misrepresenting the content of pertinent documents
- failing to seek out and confirm story facts with reliable alternative sources
- overall carelessness in the writing, editing, and/or presentation of news content

The test of such negligence is sometimes straightforward. Did you as a journalist undertake your best good-faith effort to collect and confirm the facts of your story? Did you present the content of your story so as not to be misleading to your audience? Fact-checking is imperative.

## *Defamation and Libel*

[Defamation](#) in its written form is called [libel](#), and it is one of the legal problems most often faced by people working in communication professions, be it working for the news media or for companies or organizations. Libel is the publication or broadcast of writings that cause damage to a person's reputation and/or damage

an individual's standing in his or her community. Anyone who writes or speaks about others in the public arena or in any community or organizational context can find themselves the focus of a libel action. People who work as reporters or editors of news media, both public outlets (newspapers, magazines, radio, television) and private (corporate newsletters, association journals, corporate websites, and e-mail, etc.), are equally vulnerable to libel suits. Even making damaging statements about another person in live venues such as meetings can result in defamation cases.

Defamation that is spoken is called [slander](#). The Associated Press Style Book says that “Libel is one side of the coin called ‘defamation,’ slander being the flip side.” In a nutshell, libel is defamation that is published. Slander is defamation that is spoken. Broadcast defamation can be either libel or slander, or both. The learning resources for this week include important landmark media legislation cases, including and especially *New York Times v. Sullivan* (1964), which revolutionized libel law and our understanding of freedom of the press in the United States to this day. Still, as the New York Times Editorial Board points out, a lone U.S. president can affect that understanding through acts that penalize journalists and others, acts that warrant stronger shield laws, as we will discover.

When taken to court for libel, media defendants often lose. That is why insurance premiums for libel protection, known as errors and omissions policies, climb and insurance companies are often eager to force their media clients into out-of-court settlements. Very few cases actually go to trial, as most are dismissed by the courts or settled. Of cases that go to trial, plaintiffs win substantial monetary judgments most of the time. It is important to note that a wronged plaintiff cannot get [injunctive relief](#) or [prior restraint](#), so their remedy is a defamation action. A journalist's reckless disregard for the truth, or knowledge that something is not true yet publishing it anyway, is considered constitutional malice. Here are a few reasons for this trend:

- Since libel and case law are both very complicated, libel cases are usually very complicated.
- Juries either misunderstand or ignore the constitutional and legal protections of the press.
- Sometimes the press is clearly guilty of libel but chooses to proceed with such stories anyway because of their view that it is what the public wants or needs to know.
- Since the press is often a bearer of bad news, juries may want to punish the press.

- Judges and juries tend to easily side with alleged victims of libel by the media because the media is seen as mercenary in its eagerness to publish and broadcast stories, often (to the mind of juries) for direct or indirect financial gain.

Defamation by [malice](#) may be easy to determine. Has the reporter knowingly presented falsehoods as truth with the clear intention of holding the person specifically targeted in a false and negative light so as to do damage to the individual thus targeted? This can include knowingly publishing or broadcasting falsehoods with the intent of self-aggrandizement, personal benefit, and/or profit. As in all areas of the law, the courts consider actual malice reprehensible and award significant punitive damages to plaintiffs.

While it is easy to define actual malice, it can be challenging to prove. How does one "prove" the intent of another person? The Supreme Court has placed additional hurdles on plaintiffs in such cases, though not with public figures:

- The plaintiff must prove actual malice by presenting clear and convincing evidence.
- The actual malice must have been established by the plaintiff's case and evidence with convincing clarity.

Finally, people attempt to use libel law as a weapon to strong-arm the press, and as an attempt to influence public opinion. These kinds of cases are known as strategic Lawsuits Against Public Participation or [SLAPP suits](#). SLAPP legal actions are brought against the media with a specific aim to harass the press, thereby manipulating the public agenda.

## *Right to Privacy*

The Associated Press Stylebook contends that, "the right of privacy creates liability for the publication of facts that are true, and thus raises particular concerns under the First Amendment." Thus, we often hear the phrase '[invasion of privacy](#)' used in the media. The legal foundations of the right to privacy have grown steadily from the late 1800s to the present day. Along the way, technology has continued to challenge this growing body of privacy case law. Contemporary privacy laws, and the court's efforts to enforce them, can be viewed as encompassing four basic areas:

1. protection of identities (name, likeness) for commercial purposes
2. prevention and prosecution of intrusion upon an individual's "solitude"

3. protection of private information and the prosecution for the misappropriation and unauthorized dissemination (publishing) of private information
4. publication of material that puts the individual in a "[false light](#)"

Most people assume that a right to privacy is a simple and right concept that is foundational to all democracies and is guaranteed under the U.S. Constitution. The concept of privacy is actually a complex legal issue. Privacy law involves innumerable social and cultural values. Even the basic definition of privacy is an ongoing challenge for both legislators and the courts. For invasion for privacy and publication guidelines, consult that section in the AP Style Book.



Figure 3.2: Fingerprint technology helps provide a secure defense against identity theft. / "File:Fingerprint-2904774 1920.jpg" / geralt / CC0 1.0

One of the fastest-growing and pervasive criminal activities today is identity theft (see Figure 3.2). The law is struggling to catch up with new controls over how easy it is for third parties to collect information about unsuspecting individuals and how this information is gathered, stored, and made available to others without the individual's knowledge or consent. This body of law, focused on the issue of [appropriation](#), is reportedly the oldest of privacy torts. Laws against appropriation protect an individual's name, likeness, and personal private information (employment and medical records, financial records, etc.) from exploitation without prior consent of the individual. Commission of an appropriation tort can be viewed as theft of any elements that make up an individual's private identity and personal history. This theft can be as basic as a person's name or image (likeness).

We should all have the right to consent for use of our personal image, especially for commercial purposes. [Consent](#), sometimes called a [release](#), is a written authorization agreeing to allow someone to have legal access to, and usage of, our

name, likeness, and/or private information about us, for any number of purposes. Consent should be in writing, may not be provable after the fact, and we are expected to receive full consideration for our consent. This consideration may be tangible, such as money, but it can be other things of value, including goods or services, access to services (bank accounts or credit cards), discounts (frequent-flyer perks), free professional subscriptions, discounted internet access, or the like. But it can also be one dollar.

An important aspect of privacy invasion is intrusion, one area of communication law that working journalists sometimes find themselves up against. Any bona fide journalist can collect any information they wish for their story, but only if they do not break any laws in the process of collecting information. Even if the information has been acquired using technically legal methods—using a photographic telephoto lens, for example—the courts decide in each case whether the alleged victim of intrusion was allowed to "enjoy a reasonable amount of privacy."

How the courts apply a legal concept of [reasonable](#) privacy depends on the relative status of the claimant's life and lifestyle. Taking a picture with a telephoto lens of a victim of sexual assault would be judged differently than taking a picture with a telephoto lens of the wife of a famous actor arguing with her husband. In the former example, the individual has the right to expect a significant degree of privacy. In the latter example, the fame of the actor-husband would likely overshadow privacy limits of the wife.

With few exceptions, the courts have taken the position that there is no privacy in public places. The "reasonable enjoyment of privacy" that you can expect to enjoy in your backyard is hardly comparable to the level of privacy you can expect to have in a public park or in your local shopping mall. Moreover, if you voluntarily elect to talk to a journalist, or call in to a talk-radio program, you should presume that you have effectively given up some of your right to privacy, which is like a common occurrence today when making a phone call and told at the other end that it is being electronically recorded. One key in determining a reasonable level of privacy rights is the context and environment within which the claimed intrusion has occurred.

Finally, while the federal government and most states have enacted laws and regulations to limit methods used in collecting data, methods lag behind the technology. While we look more closely at such privacy concerns in Weeks 5 and 6, we can also see some matters here in review of wealthy celebrity and high-profile business characters such as Hulk Hogan and Peter Thiel, respectively, their motives, and final outcomes in *Bollea v. Gawker Media LLC* (2012).

