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Prying, Spying and Lying: Intrusive Newsgather and What the Law Should Do About Them

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Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It

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The media's use of intrusive newsgathering techniques poses an increasing threat to individual privacy. Courts currently resolve the overwhelming majority of conflicts in favor of the media. This is not because the First Amendment bars the imposition of tort liability on the media for its newsgathering practices. It does not. Rather, tort law has failed to seize the opportunity to create meaningful privacy protection. Most torts that affect newsgathering protect privacy only incidentally, and the tort of intrusion, which addresses newsgathering more directly, has been interpreted so narrowly that it provides little or no protection from the most common types of media harassment. More pointedly, tort law's failure to signal what types of newsgathering are prohibited makes the protection of privacy more the result of an economic calculus than a legal one. Invading privacy can be highly profitable. Wealthier segments of the media are therefore willing to incur the remote (but significant) risk of legal liability for using intrusive newsgathering techniques. After surveying the economic, philosophical, and practical obstacles to reform, this Article proposes to rejuvenate the tort of intrusion to tip the balance between privacy and the press back in privacy's direction. Working within the framework of traditional tort law, this Article advocates reform of intrusion's doctrinal flaws followed by the adoption of a "newsgatherer's privilege" to protect media intrusions that serve a significant public interest. The newsgatherer's privilege would bring a degree of predictability to the resolution of intrusion cases by specifying the various factors relevant to the determination of whether or not newsgathering has crossed the line into invasion of privacy. The privilege would therefore achieve an appropriate accommodation between privacy and newsgathering without sacrificing the intrusion tort's adaptability to the various forms of prying, spying, and lying used by the media.

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"Investigative reporters . . . are the guard dogs of society, but the trouble with guard dogs is that they sometimes attack with equal fervor the midnight burglar and the midday mailman."[1]

"'Truth is our ultimate goal . . . .'"[2]

1. MICHAEL J. ARLEN, THE CAMERA AGE: ESSAYS ON TELEVISION 172-73 (1981).
2. *See* Khawar v. Globe Int'l, Inc., 54 Cal. Rptr. 2d 92, 107 (Cal. Ct. App. 1996) (quoting Article IV of the Professional Journalists' Code of Ethics). The most recent version of the Code states, under the heading "Seek Truth and Report It," that "[j]ournalists should be honest, fair, and courageous in gathering, reporting and interpreting information." Society of Prof'l Journalists, *Code of Ethics* (last modified Mar. 18, 1998) <http://www.spj.org/ethics/index.htm>.

I. INTRODUCTION

Prying, spying, and lying are tools of the trade to a significant portion of today's "gotcha" journalists.[3] Market pressures require journalists not just to get the story, but to cast it in a dramatic way. Journalists therefore resort to a variety of intrusive newsgathering tools: they adopt false identities and employ hidden cameras, they hound subjects in the streets and stake out their homes, they trail police into the homes of crime suspects and crime victims, and they follow ambulance workers to obtain graphic footage of accident scenes.[4]

Despite the pejorative description, prying, spying, and lying by the media sometimes serve the public interest, and context may be all that separates legitimate newsgathering from unwarranted invasions of privacy. While exposing serious physical abuse of the elderly justifies

3. *See* Susan Paterno, *The Lying Game*, 1997 AM. JOURNALISM REV., May 1997, at 40. Much of the blame for intrusive newsgathering techniques is laid at the feet of the "tabloid" journalists of both the print and television variety. The problem is not confined to them, however. The tabloids are increasingly setting the standard of conduct for all segments of the media. *See generally* Kenneth R. Clark, *Hidden Meanings: Increasing Use of Secret Cameras and Microphones Raises Ethical Questions About TV Journalism*, CHI. TRIB., June 30, 1992, at D1; Christopher Clausen, *Culture Watching: Reading the Supermarket Tabloids*, NEW LEADER, Sept. 7, 1992, at 11; David Lamb, *Into the Realm of Tabloids*, L.A. TIMES, Feb. 13, 1992, at A1.

4. These examples correspond with the three most common categories of intrusion claims against the media, which include "surreptitious surveillance, traditional trespass, and instances where consent to enter into a secluded setting for one purpose has been exceeded by the invitee." Victor A. Kovner & Harriette K. Dorsen, *Recent Developments in Intrusion, Private Facts, False Light and Commercialization Claims*, *in* 3 COMMUNICATIONS LAW 775, 783 (1990). Other examples include relentlessly and obtrusively pursuing a target, *see* Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973), and threatening to harass a target's family unless the target gives an interview to the reporter, *see* Wolfson v. Lewis, 924 F. Supp. 1413, 1432 (E.D. Pa. 1996) (holding that a jury could find that *Inside Edition* reporters ambushed, harassed, and intruded into the lives of the family of a health care executive in order to coerce him into giving an interview); McNutt v. New Mexico State Tribune Co., 538 P.2d 804, 806-07 (N.M. Ct. App. 1975) (discussing plaintiff's allegations that newspaper editor printed their names and addresses because they would not grant an interview). For further discussion of the variety of intrusive methods used by the media, see *infra* Part V.C.

donning a false identity and a hidden camera,[5] the same technique is questionable when used to uncover phony telepsychics,[6] hypnotherapists,[7] a harmless "quack" prescribing herbs to his friends from his home,[8] or the most common "pick-up" lines in a Minneapolis bar.[9] Society expects the media to scrutinize its heroes and villains, but roundly condemns the media when scrutiny crosses the line into harassment and hounding.[10] Moreover, the very same event that justifies coverage when it occurs in a public street may be off limits when it occurs in a private home.[11]

It is no surprise, therefore, that the law encounters difficulty in drawing lines between legitimate newsgathering and unwarranted invasions of privacy. Yet the difficulty of the task does not justify resolving all conflicts between the two in favor of the media, as the law currently seems to do. This is not because the United States Supreme Court has placed insurmountable First Amendment obstacles in the way of punishing media intrusions: newsgathering, unlike news dissemination, receives only limited constitutional protection.[12] But courts seem to place little value on privacy when it comes into conflict with press freedoms.

This Article explores why constitutional law and tort law have struggled (and largely failed) to reach an appropriate accommodation between privacy and press freedoms and ultimately proposes a number of practical solutions for tipping the balance in favor of privacy.[13] In Part II, this Article details the rise of intrusive newsgathering methods, and analyzes the competing pressures for reform of the current system. Part III then demonstrates the doctrinal flaws in both constitutional and

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5. *See 20/20: Victims of Greed* (ABC television broadcast, Oct. 25, 1991). For more extensive discussion of this story, see *infra* Parts IV.C and V.C.

6. *See* Sanders v. American Broad. Cos., 60 Cal. Rptr. 2d 595 (Cal. Ct. App. 1997); Kersis v. Capital Cities/ABC, Inc., 22 Media L. Rptr. 2321 (Cal. Super. Ct. 1994).

7. *See Eye to Eye with Connie Chung: Spellbound* (CBS television broadcast, Dec. 22, 1994).

8. *See* Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971).

9. *See* Paterno, *supra* note 3, at 42.

10. The coverage of Princess Diana illustrates the potential conflict in these positions. According to a WSJ/NBC poll, 56% of respondents thought there was too much coverage of Princess Diana's death. *See generally* Jacqueline Sharkey, *The Diana Aftermath*, 1997 AM. JOURNALISM REV., Nov. 1997, at 18, 22 (citing poll results). At the same time, newspapers and magazines reported huge circulation increases in issues with Diana-related news. *See id.*

11. *See infra* Part V.C.

12. *See* discussion *infra* Part III.

13. Although this Article examines the constitutional law limiting the imposition of tort liability for invasions of privacy, it does not deal with the constitutional right of privacy. Nor does it examine constitutional limits on states' imposition of criminal liability for media misbehaviors.

tort law, which have made the protection of privacy against media intrusions largely illusory.

Part IV focuses on the tort of intrusion upon seclusion. At first glance, intrusion appears to be the most promising tort remedy for intrusive newsgathering behaviors.[14] A newsgatherer will be liable for intrusion where she "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns ... [and] the intrusion would be highly offensive to a reasonable person."[15] Unlike other tort remedies, intrusion is aimed specifically at protecting psychological and spatial privacy and is designed with newsgathering in mind.[16] Moreover, intrusion appears to be the only tort theory available that is both capable of surmounting constitutional obstacles and flexible enough to encompass the wide variety of means by which the media invade individual privacy. Yet, as it turns out, intrusion is currently one of the least effective tort remedies.

This Article argues that intrusion is worth fixing. Both doctrinal and economic analyses suggest that the uncertain scope of protection that intrusion gives to newsgathering is bad both for the media and for the individuals whose privacy they invade. Fixing intrusion is more difficult than it sounds. Part V illustrates this point by exploring the philosophical justifications for protecting privacy in a society committed to candor, openness, and maximizing press freedom. Part V then identifies the contextual nuances of this area of law that make it a difficult one in which to draw lines and make a rights-based approach to privacy impracticable in all but the most egregious cases of media intrusion.

In light of this analysis, Part VI suggests rejuvenating the tort of intrusion, first, by fixing the tort's doctrinal flaws to make privacy protection possible and, second, by crafting a newsgatherer's privilege

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14. *See* discussion *infra* Part IV. The privacy torts are unique in the sense that they are largely the creation of law review articles. The privacy torts originated with Samuel Warren and Louis Brandeis's, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), which has been termed "perhaps the most famous and certainly the most influential law review article ever written." Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 203 (1954). Equally influential was Dean Prosser's division of the privacy tort into four distinct torts: (1) intrusion upon the plaintiff's solitude or seclusion, (2) public disclosure of embarrassing private facts, (3) publicity that places the plaintiff in a false light, and (4) commercial exploitation of the plaintiff's name or likeness. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). Dean Prosser's categorization scheme is integral to discussion of privacy issues and is reflected in the *Second Restatement*. *See* RESTATEMENT (SECOND) OF TORTS §§ 652A-652E (1965) [hereinafter RESTATEMENT].

15. RESTATEMENT, *supra* note 14, § 652B.

16. *See id.* illus. 1, 7 (discussing potential cases against media defendants).

to protect media intrusions that serve a significant public interest. By identifying the factors relevant to whether newsgathering has crossed the line into invasion of privacy, the newsgatherer's privilege would provide a nuanced approach to the problem of simultaneously accommodating privacy and the right to gather news. Moreover, the privilege would give the media guidance in avoiding tort liability that is sorely lacking in current tort law. Perhaps the greatest virtue of the newsgatherer's privilege is that it would work within the framework of traditional tort doctrine to curb intrusive newsgathering. Unlike constitutional solutions, the newsgatherer's privilege would therefore strike the requisite balance between flexibility and predictability in solving the complex problem of intrusive newsgathering.[17]

II. INTRUSIVE NEWSGATHERING ON THE RISE

Prying, spying, and lying by the media are not new techniques.[18] Undercover reporting, in particular, is part and parcel of the noble tradition of investigative journalism.[19] Nellie Bly, who wrote for Joseph Pulitzer's *New York World* in the 1880s and 1890s, gained

17. Many of the articles that deal with newsgathering torts are concerned primarily with the threat tort liability poses to the media, and these articles therefore tend to advocate constitutional "solutions" to the problem. *See, e.g.*, Eric B. Easton, *Two Wrongs Mock a Right: Overcoming the* Cohen *Maledicta That Bar First Amendment Protection for Newsgathering*, 58 OHIO ST. L.J. 1135, 1139 (1997); Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. L.J. 1145, 1147 (1996) [hereinafter LeBel, *Getting the News*]. In this Article, I argue that tort law is better suited to give due weight to both privacy and newsgathering interests and that tort law can balance these interests without violating the First Amendment. In doing so, I attempt to respond to those who see little role for privacy in an open society.

18. In their seminal article creating and defining a tort right to privacy, Warren and Brandeis expressed concern that the press was "overstepping in every direction the obvious bounds of propriety and of decency." Warren & Brandeis, *supra* note 14, at 196. They also were alarmed by the proliferation of "mechanical devices" that posed a threat to privacy. *See id.* at 195. Professor David Leebron suggests that "surreptitious photography and the unauthorized use of photographs seem to have been matters of widespread concern" at the time Warren and Brandeis wrote their famous article. David W. Leebron, *The Right to Privacy's Place in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769, 774 (1991); *see also* James H. Barron, *Warren and Brandeis,* The Right to Privacy, *4 HARV. L. REV. 193 (1890): Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875, 889 (1979) (noting contemporaneous criticisms of the press).

19. As one commentator has noted, "[b]y definition, investigative journalism must involve the invasion of privacy since its aim is to disclose what would otherwise be concealed." Denis McQuail, *The Mass Media and Privacy*, *in* PRIVACY 177, 180 (John B. Young ed., 1978). One journalism textbook describes investigative reporting as follows: "Any good reporting is investigative reporting. But the term has come to mean reporting in depth to reveal public or private behavior that otherwise might go unseen—usually criminal or antisocial behavior, but not always." MITCHELL V. CHARNLEY & BLAIR CHARNLEY, REPORTING 337 (4th ed. 1979).

notoriety as one of the earliest reporters to go undercover to gather news.[20] By pretending to be insane, Bly obtained access to the women's asylum at Blackwell's Island, and her subsequent exposé of the "human rat trap" she found there was a sensation, prompting public debate and reform.[21]

Upton Sinclair's *The Jungle* is another early example of a story obtained by surreptitious means. Although Sinclair originally got a job in the meat-packing industry to uncover unfair labor conditions and to expose "the inhumanity of capitalism,"[22] it was Sinclair's horrific descriptions of the unsanitary food handling practices of the industry that led to federal regulation.[23] Both Sinclair and Bly used false identities to give readers a view from the inside, and this technique gave their stories the impact necessary to galvanize public opinion for change.

Even in Bly's day reporters adopted false identities for less than noble ends. Although Bly went undercover to expose the horrors of insane asylums and prisons, she also went undercover to expose the horrors of life as a chorus girl—most notably, the indignity of being issued ill-fitting tights and ballet slippers.[24]

Today, intrusive newsgathering threatens privacy more ominously than ever before. Media intrusions are on the rise, and new technologies make them more invasive than ever before. Moreover, most commentators agree that the increase in media intrusions is the result of increasing competition for ratings and profits rather than an increasing desire to serve the public interest.[25]

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20. *See* BROOKE KROEGER, NELLIE BLY: DAREDEVIL, REPORTER, FEMINIST at xiii (1994); AUTUMN STEPHEN, WILD WOMEN 190 (1992).

21. *See* STEPHEN, *supra* note 20, at 190-91.

22. JON A. YODER, UPTON SINCLAIR 39 (1975). Sinclair wrote: "I wished to frighten the country by a picture of what its industrial masters were doing to their victims; entirely by chance I had stumbled on another discovery—what they were doing to the meat-supply of the civilized world. In other words, I aimed at the public's heart, and by accident I hit it in the stomach." *Id.* at 40 (quoting Upton Sinclair, COSMOPOLITAN MAG., Oct. 1906).

23. *See* YODER, *supra* note 22, at 40-41, 43-44; James R. Barrett, *Introduction* to UPTON SINCLAIR, THE JUNGLE at xii (1988) (1906) (noting that the passage of the Pure Food and Drug Act was a result of the publication of *The Jungle*).

24. *See* STEPHEN, *supra* note 20, at 190-91.

25. *See* JAY BLACK ET AL., DOING ETHICS IN JOURNALISM 161 (3d ed. 1997); James Boylan, *Punishing the Press: The Public Passes Some Tough Judgments on Libel, Fairness, and "Fraud"*, 35 COLUM. JOURNALISM REV., Mar./Apr. 1997, at 24; David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161, 162 (1998) [hereinafter Logan, *Masked Media*] (linking undercover newsgathering to ratings and profits); Andrew J. McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1009-17 (1995). Note the irony that although more information is available today than ever from public records and other information sources, the use of intrusive newsgathering techniques

The increasingly competitive nature of the media marketplace directly contributes to the rise of intrusive newsgathering.[26] Television news magazine shows, such as *Prime Time Live*, *20/20*, and *Inside Edition*, have proliferated in the wake of the highly successful *60 Minutes*. These shows have learned that prying, spying, and lying are highly profitable,[27] and their success in attracting audiences with dramatic exposés has helped set the standard for print journalists as well. As the number of competitors increases, the media must use ever more aggressive newsgathering methods to compete for audience share. Ambush interviews provide little additional content to a story, but they provide footage that makes the subject look as if she has something to hide.[28] Hidden cameras may be excellent tools for uncovering serious abuses, but the media also use them to make the audience feel privy to catching a subject in the act, whether she has committed a major crime or minor peccadillo.

The point, of course, is to provide audiences with "infotainment." Having conditioned the audience to expect exciting exposés, the media must now deliver news and information packaged as entertainment, or as a more cynical observer might describe it, they must deliver entertainment that pretends to be news.[29] It is therefore no accident that the media's use of undercover investigations peaks during ratings sweeps week, for undercover investigations deliver larger audiences and, with them, larger profits.[30]

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continues to rise. This is because intrusive newsgathering methods help deliver information in a more dramatic and hence more marketable way.

26. *See* C. THOMAS DIENES ET AL., NEWSGATHERING AND THE LAW 593 (1997) (noting that the availability of miniature cameras and the powerful images they produce have arguably increased media's incentives to use intrusive newsgathering techniques); *see also* Clark, *supra* note 3 (quoting former NBC News President Reuven Frank: "Nothing matters anymore, except the competition for audience .... Everybody in the spectrum is fighting everybody else for audience, so you're getting a mushing up of standards. Standards are fine, if they don't lose audience—that's become the marching slogan.").

27. The programs are also inexpensive to produce relative to programs that require talented writers, directors, and actors to acquire ratings points.

28. *See* Kevin F. O'Neil, Note, *The Ambush Interview: A False Light Invasion of Privacy?*, 34 CASE W. RES. L. REV. 72, 77-81 (1983) (explaining that ambush interviews make even innocent subjects look guilty because subjects tend to respond angrily and evasively to suddenly being confronted with reporters' accusations).

29. *See Perspectives*, NEWSWEEK, Oct. 11, 1993, at 19 (quoting Dan Rather as saying, "It's the ratings, stupid .... They've got us putting more fuzz and wuzz on the air ... so as to compete not with other news programs but with entertainment programs ....").

30. *See* John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111, 1118 (1996) (explaining that "competitive pressures among the media have created a frenzy ... to catch a sensational story" by using new technologies).

The competitive nature of the media marketplace is insidious because it puts those media organizations attempting to exercise restraint at a competitive disadvantage, rendering their efforts at restraint meaningless. For example, following Princess Diana's death, a CBS executive was demoted (or at least deprived of responsibility for hard news coverage) because he did not immediately break into regular programming to report the news of her demise.[31] Similarly, *Newsweek*'s initial restraint in the Lewinsky scandal had little effect. Although *Newsweek* had early access to tapes of the conversations between Linda Tripp and Monica Lewinsky, its editors decided to hold the story until they could provide additional verification, because once the story ran, a private person would be thrust into the blinding glare of the public spotlight.[32] Within hours of *Newsweek*'s decision not to run the story, the information appeared on the Internet, courtesy of the *Drudge Report*, a source of instant, largely unedited, and occasionally accurate scandal-mongering.[33] These incidents demonstrate that press restraint and concern for individual privacy receive few rewards in the so-called marketplace of ideas.

A second factor at work in the rise of intrusive newsgathering is the widespread availability of ingenious surveillance technologies. Tiny cameras slightly larger than a lipstick case can be worn inside a jacket or a baseball cap,[34] and miniature recorders can be concealed in a pocket, ready to transmit the words of the target to millions of listeners.[35] A reporter need not even be physically present to

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31. *See* Bill Carter, *A Month Later, the Fallout Hits*, N.Y. TIMES, Oct. 8, 1997, at E8 (reporting that CBS shifted the job responsibilities of Lane Venardos, who was in charge of hard news coverage for CBS, to special events coverage after Diana's death and stating that staff members believed Venardos was "the fall guy" for CBS's failure to "initiate continuing live coverage of the automobile crash that killed Diana until more than an hour after she died").

32. *See* Mark Jurkowitz, *The Drudge Report's Scandalous Scoop*, BOSTON GLOBE, Jan. 15, 1998, at E1 (reporting that after the Drudge Report ran a story on the Lewinsky matter, *Newsweek* released its story on its America Online site, revealing that *Newsweek* knew of allegations of a sexual relationship between Clinton and Lewinsky for almost a year).

33. Roger Bull, *Online and Loving It*, FLA. TIMES UNION, Feb. 27, 1998, at D1 (reporting that Drudge, whose website (www.drudgereport.com) gets more than one million visitors per month, "often breaks news before anyone else gets it, in part because he doesn't always check his facts as well as more reputable media types"); *see also* Jurkowitz, *supra* note 32, at E1 (noting that Drudge concedes that he does not always get his facts straight).

34. *See* McClurg, *supra* note 25, at 1018 (describing a variety of surveillance devices that threaten privacy). Such cameras were used in a number of cases. *See, e.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923, 927 (M.D.N.C. 1997); Kersis v. Capital Cities/ABC, Inc., 22 Media L. Rptr. 2321 (Cal. Super. Ct. 1994).

35. *See* Food Lion v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 816 (M.D.N.C. 1995).

eavesdrop on a subject's conversation: the "shotgun mike" can pick up sounds as far as sixty yards away.[36] Even worse, new surveillance technologies exist that have the potential to destroy what little privacy citizens have left.[37]

It is little surprise then that a growing consensus insists that something be done about intrusive newsgathering. A 1996 poll by the Center for Media and Public Affairs indicated that eighty percent of respondents thought the media invaded individual privacy, and fifty-two percent thought the media abused their First Amendment freedoms.[38] More recent polls show that the public is even more concerned about media invasions of privacy than about political bias in the media, and eighty percent of those polled agreed that the media "often invade[s] people's privacy."[39]

Yet the public's concern about media invasions of privacy is sparked more by current events than by close analysis of the law's failures in this area.[40] The media's rush to judgment of Richard Jewell, the security guard whose name was leaked as a suspect in the Atlanta Olympic bombing, galvanized public opinion against the media.[41] More pointedly, the media's incessant hounding of Princess Diana,

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36. *See, e.g.*, Wolfson v. Lewis, 924 F. Supp. 1413, 1424 (E.D. Pa. 1996) (involving the use of "shotgun mikes").

37. *See generally* Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J. L. & TECH. 383, 386 (1997).

38. *See* Sharkey, *supra* note 10, at 20; *see also* John Hughes, *Solving the Media's Credibility Problem*, CHRISTIAN SCI. MONITOR, Apr. 16, 1997, at 19 (reporting that in a WSJ/NBC poll, only 21% of respondents believed the media were "very" or "mostly" honest, and that in a Gallup poll, only 29% of respondents had a "great deal" or "quite a lot" of confidence in the press).

39. TED J. SMITH II & S. ROBERT LICHTYER, WHAT THE PEOPLE WANT FROM THE PRESS 167 (1997) (discussing poll results).

40. *See* Howard Kurtz, *Public to Press: Just Play Fair; They're Peeved by Intrusiveness and Deception. But Are New Laws the Answer?*, WASH. POST., Sept. 15, 1997, at B4 (listing a number of events that sparked public concern, such as the lying and hidden cameras in ABC's story on Food Lion and Connie Chung's assurances to Newt Gingrich's mother that her negative remarks about Hillary Clinton would be "just between you and me," even though these remarks were later aired).

41. Jewell was the security guard who found the bomb during the 1996 Summer Olympic Games in Atlanta. *See* Bill Rankin, *An Emotional Jewell Recalls 88-day Ordeal*, ATLANTA J. & CONST., Oct. 29, 1996, at A1. Jewell was originally hailed as a hero but was then identified as a suspect in the case. *See id.* After an "88-day nightmare" of almost constant media surveillance and hounding, Jewell was cleared of suspicion by a letter from the United States Attorney. *See id.* Jewell sued several of the media organizations that had reported he was a suspect in the bombing, and he ultimately settled cases against CNN and NBC News. *See* Jay Croft & Bill Rankin, *Jewell Files Suit Against Newspaper*, ATLANTA J. & CONST., Jan. 28, 1997, at C2. He also sued the owner of the *Atlanta Journal and Constitution*, seven reporters for the paper, and its managing editor. *See id.* The *Atlanta Journal and Constitution* was the first newspaper to report Jewell was a suspect. *See id.*

culminating in her death while being chased by paparazzi, prompted an unprecedented level of soul-searching by both the media and the public. Even while the media debated whether or not coverage of Princess Diana went too far, broadcasters were showing funeral preparations and "Diana retrospectives" around the clock.[42] In fact, Diana's death received more coverage than any other single news event since the 1991 coup attempt against Mikhail Gorbachev.[43] Of course, the ultimate irony is that these cases generated public outrage by the very same public that apparently had a ravenous appetite for the information in the first place.[44]

At the same time the public has been clamoring for more privacy protection, the media and its lawyers complain that current law fails to adequately protect their newsgathering activities.[45] If intrusive newsgathering techniques are becoming more common, so too are lawsuits based on the methods reporters use to gather the news.[46] Clever plaintiffs' lawyers are starting to deploy novel theories and to exploit existing tort doctrines in order to sidestep the First Amendment and win victories against the media, although (the brouhaha over the recent *Food Lion* case[47] notwithstanding) such victories are still relatively rare.[48]

New legislation is likely to be forthcoming. In the wake of Princess Diana's death, Representative Sonny Bono, a Republican from California, introduced a bill aimed at paparazzi that would impose criminal fines on journalists who "persistently" follow or chase a person who has a "reasonable expectation of privacy."[49] California State Senator Tom Hayden proposed a "Paparazzi Harassment Act"

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42. Ironically or not, the saturation coverage of Princess Diana's death garnered fantastic ratings.

43. *See* Sharkey, *supra* note 10, at 21 (noting that Diana's death received more coverage than the landing of U.S. troops in Somalia).

44. This seems to be a case of what I call the "stop me before I kill again" syndrome. Although the public ostensibly is upset by the media's unrelenting hounding of celebrities, the fact remains that the media would not engage in such behavior if there were not a market for the privacy-invading information they provide. *See infra* notes 229-237 and accompanying text.

45. *See* Logan, *Masked Media*, *supra* note 25, at 161 n.12 (citing sources).

46. *See* Gail D. Cox, *Privacy's Frontiers at Issue: Unwilling Subjects of Tabloid TV Are Suing*, NAT'L L.J., Dec. 27, 1993, at 1.

47. *See* BLACK ET AL., *supra* note 25, at 164 ("[N]o 'Prime Time Live' story has generated as much public attention and journalistic soul-searching as the reporting on the Food Lion supermarket chain."); *see infra* Part IV's discussion of the *Food Lion* case.

48. *See infra* Part IV.

49. Protection From Personal Intrusion Act, H.R. 2448, 105th Cong. (1997); *see also* Jenifer Joyce, *Lost Photo Opportunities: First Amendment Experts Question Constitutionality of Proposals to Prevent Harassment by Paparazzi*, ABA J., Nov. 1997, at 36-37; Sharkey, *supra* note 10, at 22.

that would impose fines on journalists "threatening, intimidating, harassing, or caus[ing] alarm, harm or the potential of harm to any person who is the subject of media interest."[50] Similarly, California Senate Majority Leader Charles Calderon has drafted a "Personal Privacy Act" that broadly defines intrusions on privacy and alters the law to protect victims of defamation.[51]

Even though these proposals are fraught with constitutional difficulties and therefore stand very little chance of adoption and enforcement,[52] the impetus behind them is likely to generate more refined proposals. Certainly the current state of the law merits reform. Before proposing reforms, however, it is important to understand where the existing law has gone wrong in trying to strike the delicate balance between privacy and First Amendment values.

III. PRIVACY VS. THE MEDIA: WHY THE LAW FAVORS THE LATTER

Any law designed to protect privacy must strike a delicate balance to accommodate both First Amendment values and the realities of life in an open society. Neither constitutional law nor tort law, however, has developed nuanced approaches to the problem of deciding when intrusive newsgathering techniques are justified.

A. Prying, Spying, Lying, and the First Amendment

At the constitutional level, the scope of First Amendment protection for newsgathering remains a contested issue.[53] Despite the unassailable logic of the proposition that gathering news is an essential precursor to publishing it,[54] the media receive far less First

50. Sharkey, *supra* note 10, at 22.

51. *See id.* at 18, 22.

52. *See* Joyce, *supra* note 49, at 36-37.

53. *See* DIENES ET AL., *supra* note 26, at 14 ("The freedom of the press to gather the news, free of excessive governmental interference . . . [is], however, less certain [than the freedom to publish].").

54. *See* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (plurality opinion) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."); *id.* at 728 (Stewart, J., dissenting) ("[W]ithout freedom to acquire information the right to publish would be impermissibly compromised."); *In re* Mack, 126 A.2d 679, 689 (Pa. 1956) (Musmanno, J., dissenting) (asserting that absent a right to gather news, "freedom of the press becomes a river without water"); LeBel, *Getting the News*, *supra* note 17, at 1154 ("News acquisition is a matter of constitutional significance because it is a logically and pragmatically necessary component of the publication of news that serves a vital constitutional function."). James Madison also viewed the right to acquire information as central to the process of democratic deliberation. *See* Letter from J. Madison to W.T. Barry (Aug. 4, 1822), *in* 9 WRITINGS OF JAMES MADISON 103 (S. Hunt ed., 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.").

Amendment protection in gathering news than they do in publishing it.[55] The Supreme Court has grudgingly conceded that "newsgathering is not without its First Amendment protections,"[56] but has simultaneously denied the media First Amendment protection from generally applicable laws that affect the newsgathering process.[57] Lower courts have interpreted the Supreme Court's conflicting pronouncements on newsgathering as authority to do as they wish.[58] Some have cited the Court's decisions as authority for extending First Amendment protection to newsgathering.[59] Others have cited the same decisions as authority for denying it.[60]

1. The Supreme Court's Conflicting Views on Newsgathering

The confusion in the lower courts originates with the Supreme Court's grudging and equivocal pronouncements on newsgathering in

55. Strong First Amendment privileges insulate the media from tort liability based on the publication of private or defamatory information. *See, e.g.*, Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (holding that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order"); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975) (holding that "the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection"); Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (holding that in actions for defamation brought by private figures involved in matters of public concern, plaintiffs may not recover punitive or presumed damages absent a showing of actual malice); New York Times v. Sullivan, 376 U.S. 254, 283-84 (1964) (holding that public officials may not recover for libel unless they show that the defendant made defamatory statements with actual malice). For extended discussion of these developments and how they affect newsgathering, see Logan, *Masked Media*, *supra* note 25, *passim*. *See also* Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 35-49 (1982) (criticizing the lesser protection given to newsgathering).

56. *Branzburg*, 408 U.S. at 707 (holding that the First Amendment does not give reporters a privilege to ignore grand jury subpoenas).

57. *See id.* at 682-83; *see also* Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (stating that "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations"). *Cohen* applied the law of promissory estoppel to the press. *See id.* at 665.

58. Academic commentators tend to oversimplify the Supreme Court's decisions as standing for the proposition that "generally applicable laws limiting newsgathering do not offend the First Amendment." *Cohen*, 501 U.S. at 669; *see also* Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 928 (1992) ("[T]he [Supreme] Court has yet to explicitly afford special protections to the newsgathering process."); Walsh et al., *supra* note 30, at 1118.

59. *See, e.g.*, Desnick v. American Broad. Co., 44 F.3d 1345, 1355 (7th Cir. 1995); Wolfson v. Lewis, 924 F. Supp. 1413, 1416-17 (E.D. Pa. 1996) (framing the issue in an intrusion case as whether the First Amendment protects the use of modern technologies in newsgathering).

60. *See, e.g.*, Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973) (citing *Branzburg* as authority that "[c]rimes and torts committed in newsgathering are not protected"); Dietemann v. Time, Inc., 449 F.2d 245, 249-50 (9th Cir. 1971).

the leading case of *Branzburg v. Hayes*.[61] *Branzburg* is sometimes cited for the proposition that the First Amendment provides no immunity to reporters for torts or crimes committed while gathering the news.[62] The specific issue in *Branzburg*, however, was whether reporters must respond to state or federal grand jury subpoenas about information obtained from confidential news sources.[63] In other words, *Branzburg* was a "reporter's privilege" case. The case was not really about what newsgathering methods are constitutionally protected or even permissible; rather, it was about the obligations of journalists who possess information sought by a grand jury. Moreover, *Branzburg*'s holding was quite narrow. By a margin of one vote,[64] the Supreme Court held that the First Amendment does not protect subpoenaed reporters from testifying before a criminal grand jury about information obtained from confidential sources.[65]

Branzburg is nonetheless a pivotal case defining what types of newsgathering are protected by the First Amendment due to the breadth of its pronouncements about newsgathering. *Branzburg* sets forth two potentially conflicting principles that subsequent cases have never adequately reconciled. The first principle is that "newsgathering is not without its First Amendment protections."[66] If one ignores the curious phrasing, this statement represents an affirmative acknowledgment of a constitutional right to gather news; this right, in

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61. 408 U.S. 665 (1972).

62. *See, e.g.*, *Galella*, 487 F.2d at 995; *see also Branzburg*, 408 U.S. at 691 (stating that reporters may not steal documents or use wiretaps to obtain information in violation of "valid criminal laws").

63. *See Branzburg*, 408 U.S. at 668. *Branzburg* was a consolidation of four different cases. In two of the cases, Branzburg, a reporter for the *Courier-Journal* in Louisville, Kentucky, was subpoenaed to testify before grand juries but refused to reveal the identity of individuals he observed making hashish and using illegal drugs. *See id.* at 668-69. In the third case, a subpoena was issued to obtain information from a television reporter about events and individuals he observed while inside the headquarters of the Black Panthers. *See id.* at 672-73. In the fourth case, a reporter for the *New York Times* refused to respond to a subpoena requiring him "to testify and to bring with him notes and tape recordings of interviews" with officials of the Black Panther Party. *Id.* at 675. In the plurality opinion, Justice White framed the issue in the case as follows: "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." *Id.* at 682.

64. Justice Potter Stewart later suggested that given "Mr. Justice Powell's concurring opinion," the Court rejected the reporters' claims of privilege by a vote of "four and a half to four and a half." Potter Stewart, *Or Of the Press*, 26 HAST. L.J. 631, 635 (1975).

65. *See Branzburg*, 408 U.S. at 690. The Court declined to "interpret[] the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy." *Id.* Although Justice Powell joined in the majority opinion, his subsequent concurrence suggested that he would have extended reporters a testimonial privilege in certain limited circumstances. For a discussion of this strange result, see *infra* note 71.

66. *Branzburg*, 408 U.S. at 707.

turn, presumably might limit a state's authority to impose sanctions on intrusive newsgathering.[67] But the curious phrasing is no accident, for the remainder of the opinion indicates that while a constitutional right may exist, it is quite limited in scope.[68]

This first principle, that newsgathering merits some constitutional protection, is ultimately subordinated to a second, more fundamental principle: The press is subject to the same laws that apply to all citizens, regardless of whether or not such laws place an incidental burden on newsgathering.[69] Or as the Court stated, the press receives "no special immunity from the application of general laws" and "no special privilege to invade the rights and liberties of others."[70] If the general public has a right to use particular methods to gather news, so does the press; if the public does not, then neither does the press.[71]

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67. Of course, the Supreme Court could assert that the First Amendment protects only nonintrusive newsgathering.

68. Even Justice Stewart's dissent, which was joined by Justices Brennan and Marshall, concluded only that "a right to gather news, *of some dimension*, must exist." *Branzburg*, 408 U.S. at 728 (Stewart, J., dissenting) (emphasis added). Subsequent decisions do suggest that, at a minimum, the First Amendment protects routine newsgathering techniques. *See, e.g.*, Houchins v. KQED, 438 U.S. 1 (1978); Nicholson v. McClatchy Newspapers, 223 Cal. Rptr. 58, 64 (Cal. Ct. App. 1986). The court in *Nicholson* stated: "[t]he news gathering component of the freedom of the press—the right to seek out information—is privileged at least to the extent it involves 'routine . . . reporting techniques.'" *Nicholson*, 233 Cal. Rptr. at 64.

69. *See Branzburg*, 408 U.S. at 682. This principle was first recognized in *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937), which held that the Associated Press was not exempt from complying with the National Labor Relations Act, and was further extended in *Cohen v. Cowles Media*, 501 U.S. 663, 669 (1991). *See* discussion *supra* notes 57-58 and accompanying text.

70. *Branzburg*, 408 U.S. at 683 (quoting *Associated Press*, 301 U.S. at 132-33).

71. *See id.* at 684 ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.").

In reaching this conclusion, the Court did not deny the close relationship between newsgathering and news dissemination. However, the Court's acknowledgment of the link between newsgathering and news dissemination is couched in rather limited terms. The opinion states that "without some protection for seeking out the news, freedom of the press could be eviscerated," but the remainder of the opinion suggests that such protection would only apply to serious infringements on the right to gather news. *Id.* at 681.

Implicit in the Court's decision, however, is the notion that forcing the press to comply with generally applicable laws would have relatively little effect on the newsgathering process. The press, after all, has independent incentives to gather news. The relatively minor hindrance to newsgathering posed by being forced occasionally to respond to a grand jury subpoena is more than outweighed by society's interests in law enforcement. Moreover, the press has at its disposal self-help remedies to prevent "harassment or substantial harm." *See id.* at 706. Given this "pragmatic view" of the press, the Court found it unnecessary to work out the exact scope of those protections. *See id.* at 706-08.

The Court did, however, recognize that an exception might be necessary when law enforcement officials use subpoenas for the purpose of harassing the press. Moreover, laws that "single out" or discriminate against the press must meet the highest level of

The logic of the decision therefore contains an internal contradiction.[72] If newsgathering receives some degree of First Amendment protection, as presumably it must due to its integral connection to news dissemination, the press should likewise receive some degree of special immunity from the application of general laws, just as it receives some immunity when publishing the news. Further, presumably even a general law that incidentally barred traditional reporting practices, such as interviewing witnesses to an accident, would violate the First Amendment. Nonetheless, neither in

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constitutional scrutiny. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'n of Revenue, 460 U.S. 575 (1983).

72. The real confusion about the extent of the right to gather news stems from what the dissent generously described as an "enigmatic" concurrence by Justice Powell. *See Branzburg*, 408 U.S. at 709 (Powell, J., concurring). Justice Powell joined in the majority opinion, making him the crucial fifth vote, but he also wrote a separate concurrence to emphasize how "limited" the majority's opinion was. *See id.* at 709-10 (Powell, J., concurring). Powell's concurrence seriously undermines the logic of the majority opinion. Whereas the majority emphasized that the press has no special immunity from generally applicable laws, Powell emphasized that reporters do have constitutional rights. He therefore read the majority opinion as allowing for a balancing of these rights against the government's interest in law enforcement on a case by case basis. *See id.* at 710 (Powell, J., concurring). Powell reasoned that "[any] asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id.* (Powell, J., concurring). Justice Powell seemed to assume that First Amendment interests would only be threatened in rare cases and that his balancing procedure would be unnecessary in the run of the mill cases. This assumption has been belied by the tendency of the press to treat every subpoena case as a serious threat to First Amendment freedoms.

Justice Powell's reading of the majority opinion is misguided. From the majority's perspective, the balance was already tipped because the press must comply with generally applicable laws. Generally applicable laws that merely impose an incidental burden upon the press are not subject to balancing, or indeed to any form of heightened constitutional scrutiny. Even if balancing were appropriate, the majority opinion overwhelmingly favors law enforcement interests over First Amendment interests when reporters are subpoenaed to testify before grand juries.

A further irony of *Branzburg* is that Justice Powell's concurrence ultimately lent weight to the approach of the dissenters, who developed a detailed balancing analysis to deal with "reporter's privilege" cases. *See id.* at 728 (Stewart, J., dissenting). Justice Stewart's dissent explicitly advocated a qualified privilege for reporters who were subpoenaed by grand juries. *See id.* (Stewart, J., dissenting). Although the balancing advocated by Justice Stewart is much more protective than that advocated by Justice Powell, together their opinions represent four votes for a balancing approach. Justice Douglas cast the fifth vote in favor of extending First Amendment protection. In his dissent, Douglas adopted the most protective position of all: absolute immunity from grand jury subpoenas for reporters. *See id.* at 712 (Douglas, J., dissenting). *Branzburg* therefore represents five votes favoring an extraordinarily circumscribed right to gather news (when one considers that Justice Powell joined the majority), and five votes for a more expansive constitutional right (when one adds Justice Powell's concurrence to the dissenting opinions). Justice Powell's concurrence has made Justice Stewart's approach as influential as the majority, leading many lower courts to interpret the case "as creating a federal constitutional privilege." MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 499 (5th ed. 1995).

Branzburg nor its subsequent decisions did the Supreme Court clarify exactly what a constitutional right to gather news might cover.[73]

The Supreme Court's most recent newsgathering case, *Cohen v. Cowles Media Co.*, initially appears to resolve the uncertainty in *Branzburg* by denying that there is any constitutional right to gather news.[74] *Cohen* did not deal with intrusive newsgathering.[75] The issue in *Cohen* was whether the First Amendment permits a plaintiff to recover damages under a state's promissory estoppel law for a reporter's breach of a promise of confidentiality.[76] The Court found the case to be controlled by the second principle of *Branzburg*, namely "that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[77]

Even if promissory estoppel posed an obstacle to the reporter's ability to gather news, it was at most an "incidental, and constitutionally insignificant, consequence of applying to the press a

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73. The two basic principles underlying *Branzburg* have been at issue in at least two separate lines of cases. In cases addressing whether or not the press has a constitutional right of access to prisons or to interview prisoners, the Supreme Court has held that no balancing of First Amendment interests is necessary where state and federal restrictions on access apply equally to the press and to the general public. *See, e.g.*, *Houchins*, 438 U.S. at 16; Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); Pell v. Procunier, 417 U.S. 817, 834-35 (1974).

On the other hand, in cases dealing with access to courtrooms, the Court has recognized that both the press and the public have a constitutional right of access to attend criminal trials. *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) ("[T]he State's justification in denying access [to criminal trials] must be a weighty one."); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (holding that the right to attend criminal trials is "implicit in the guarantees of the First Amendment.").

In these cases, the Court has been careful to say that the press has no greater rights than the general public, even though this statement cannot be literally true. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 17 (Stewart J., concurring). "[T]erms 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." *Id.* (Stewart, J., concurring). Otherwise, there would be no reason to prefer reporters over ordinary citizens in allocating seating at highly publicized trials. In these situations, the Court recognizes that although both press and public are equal, the press is more equal when it comes to trial access. Thus, it seems as if the only time the Court will extend the press' newsgathering rights over and above the rights of the general public is when the press must act as a surrogate for the public due to the necessity of allocating limited resources.

74. 501 U.S. 663, 669 (1991).

75. *See id.*

76. *See id.* at 665.

77. *Id.* at 669. The newspapers attempted to invoke a line of cases that the state may not restrict the *publication* of truthful information lawfully obtained absent a state interest of the highest order, but the Court quickly recast it as a case about newsgathering rather than publication. *See id.* at 668-69. The Court seemed to view the press as seeking special treatment to which it was not entitled.

generally applicable law that requires those who make certain kinds of promises to keep them."[78] The majority largely ignored the first principle of *Branzburg*,[79] and never elaborated on whether the First Amendment places any meaningful limits on a state's ability to restrict newsgathering that invades the rights of its citizens. Thus, even after *Cohen*, the only thing that is clear about newsgathering and the First Amendment is that if the First Amendment protects newsgathering, the scope of its protection is quite limited.

2. Confusion in the Lower Courts

Lower courts have diverged as to how much constitutional protection they accord the media from liability for newsgathering behavior that violates state tort law. Most lower courts addressing such claims refuse to weigh any First Amendment interest in the balance when determining whether intrusive newsgathering behavior is tortious.[80] *Dietemann v. Time, Inc.* is a classic illustration of this approach.[81] In *Dietemann*, the seminal surreptitious surveillance case, two reporters adopted false identities to gain access to the home of a quack doctor. The Court of Appeals for the Ninth Circuit saw no reason why the First Amendment should shield the reporters from the reach of state tort law.[82] In language that has been widely cited and followed,[83] the court emphasized that "[t]he First Amendment has

78. *Id.* at 672.

79. The debate between the majority and the dissenters in *Cohen* was not a debate about whether the enforcement of promissory estoppel law invaded a constitutional right to gather news. The dissenters viewed *Cohen* as infringing on the right to *publish* the news. *See id.* at 674 (Blackmun, J., dissenting). Thus, Justice Blackmun (with whom Justices Marshall and Souter joined) viewed *Cohen* as governed by the principles of *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), and *Smith v. Daily Mail*, 443 U.S. 97 (1979). *See Cohen*, 501 U.S. at 674 (Blackmun J., dissenting). The dissent would have held that applying the state's promissory estoppel law violated the First Amendment's prohibition against punishment of truthful information or opinion. *See id.* at 675-76 (Blackmun, J., dissenting). Justice Souter (joined by Justices Marshall, Blackmun and O'Connor) viewed the case as controlled by the Court's decisions requiring a balancing of the competing interests involved, and ultimately concluded that "the State's interest in enforcing a newspaper's promise of confidentiality [is] insufficient to outweigh the interest in unfettered publication of the information revealed. . . ." *Id.* at 679.

80. I discussed this trend in a slightly different and less developed form in 1992. *See* Lyrissa C. Barnett, Note, *Intrusion and the Investigative Reporter*, 71 TEX. L. REV. 433, 438-41 (1992).

81. 449 F.2d 245, 247 (9th Cir. 1971).

82. *See id.*

83. *See, e.g.*, Belluomo v. KAKE T.V. & Radio, Inc., 596 P.2d 832, 841-42 (Kan. Ct. App. 1979); Le Mistral, Inc. v. CBS, 402 N.Y.S.2d 815, 817 (N.Y. App. Div. 1978) (concerning surreptitious surveillance); Anderson v. WROC-TV, 441 N.Y.S.2d 220, 226 (N.Y. Sup. Ct. 1981) (finding no constitutional privilege protecting against liability for torts

never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."[84]

Applying this logic, the *Dietemann* court found no need to weigh any First Amendment interest in the balance: reporters are subject to tort law to the same extent as other citizens. This logic has influenced many courts, leading them to conclude that there is no need to extend First Amendment protection to immunize newsgathering from the reach of state tort law.[85] Indeed, one court has noted the "apparent hopelessness" of the argument that the First Amendment shields the press from liability for trespass.[86]

In contrast, some courts have read the Supreme Court's decisions as precedent for the opposite proposition—that the First Amendment circumscribes the ability of state tort law to sanction intrusive newsgathering behavior; however, even these courts suggest that the scope of First Amendment protection for newsgathering is limited.[87]

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committed prior to publication); Prahl v. Brosalme, 295 N.W.2d 768, 781 (Wis. Ct. App. 1980) (finding no constitutional right to trespass).

84. *Dietemann*, 449 F.2d at 249; *see also* Thomas Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 332 (1979). *But see* Floyd Abrams, *The Press, Privacy, and the Constitution*, N.Y. TIMES, Aug. 21, 1977 (Magazine), at 67 (arguing that the press should not be liable when otherwise tortious conduct benefits the public).

85. *See* cases cited *supra* note 83. It is worth noting that the cases at least imply that routine reporting techniques are constitutionally protected. *See, e.g.*, Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103-04 (1979); Nicholson v. McClatchy Newspapers, 223 Cal. Rptr. 58, 64 (Cal. Ct. App. 1986) ("[T]he news gathering component of the freedom of the press—the right to seek out information—is privileged at least to the extent it involves 'routine . . . reporting techniques.'"). Presumably many courts would not consider many of the techniques I discuss in this article, including surreptitious surveillance and hounding, "routine," even though, as discussed in Part II, they are becoming increasingly common.

86. *See* Allen v. Combined Communications, 7 Media L. Reptr. 2417, 2418 (Colo. Dist. Ct. 1981). One should not generalize too much from this statement. As Part III suggests, courts tend to view trespass as protecting a more absolute right than other torts protect.

87. *See, e.g.*, Desnick v. American Broad. Cos., 44 F.3d 1345 (7th Cir. 1995); Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973) (although citing *Branzburg* for the proposition that "[c]rimes and torts committed in newsgathering are not protected," the court found that First Amendment interests should be balanced against plaintiff's rights where there is an "overriding public interest" in the information sought); Wolfson v. Lewis, 924 F. Supp. 1413 (E.D. Pa. 1996); *see also* Scheetz v. Morning Call, Inc., 747 F. Supp. 1515, 1526-27 (E.D. Pa. 1990) (granting defendant's motion for summary judgment in part after balancing the media's right to gather news against the plaintiff's right of privacy); New Kids on the Block v. News Am. Publ'g, Inc., 745 F. Supp. 1540, 1546 (C.D. Cal. 1990) ("gathering information for dissemination to the public" is protected by the First Amendment), *aff'd*, 971 F.2d 302 (9th Cir. 1992); McNutt v. New Mexico State Tribune Co., 538 P.2d 804, 808 (N.M. Ct. App. 1975) (noting that even if plaintiffs suffered "intrusion upon seclusion," the First Amendment bars tort liability where the information published is newsworthy).

The most notable example is *Desnick v. American Broadcasting Cos.*[88] In Desnick's suit based on ABC's newsgathering methods—including surreptitious surveillance and an "ambush interview"[89]—Judge Posner paid homage to the principles of *Cohen*, stating that "the media have no general immunity from tort or contract liability."[90] Yet Judge Posner simultaneously cited *Hustler Magazine v. Falwell*[91] for the proposition that newsgathering merits the same type of First Amendment protection as publication:

> Today's "tabloid" style investigative television reportage [is] conducted by networks desperate for viewers in an increasingly competitive television market .... [A]lthough it is often shrill, one-sided, and offensive, and sometimes defamatory, ... [i]t is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them regardless of the name of the tort, ... and ... regardless of whether the tort suit is aimed at the content of the broadcast *or the production of the broadcast.*[92]

Judge Posner's statements represent the same tension seen in the Supreme Court's newsgathering jurisprudence. On one hand, he asserts that reporters are subject to tort liability for intrusive newsgathering. On the other, he asserts that reporters are entitled to constitutional protection to some as yet unspecified extent. But if newsgathering receives the same First Amendment protection as publication, then it *does* qualify for some degree of immunity from tort liability. Although Judge Posner seems to lean toward providing more First Amendment protection for newsgathering than the *Branzburg* court did, his opinion ultimately gives no more guidance about what a constitutional right to gather news would look like.[93]

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88. 44 F.3d 1345; *see also Wolfson*, 924 F. Supp. at 1413. In *Wolfson, Inside Edition* reporters engaged in sustained, harassing surveillance of the plaintiffs in order to obtain information for a story on the high salaries of U.S. Health Care executives. *See Wolfson*, 924 F. Supp. at 1417. The plaintiffs brought a variety of tort actions based on the reporters' intrusive behavior and also requested injunctive relief. *See id.* In granting plaintiffs an injunction, the district judge explicitly framed the issue as representing "the extent to which the First Amendment protects newsgathering by T.V. journalists using modern technologies." *Id.* Although the opinion concedes that newsgathering is constitutionally protected, it nonetheless views this protection as quite limited and finds that a reasonable jury could conclude that the reporters' "hounding, harassing and ambushing" of the plaintiffs did not "advance the fundamental policies underlying the First Amendment." *Id.* at 1433.

89. *See Desnick*, 44 F.3d at 1348.

90. *Id.* at 1355.

91. 485 U.S. 46 (1988).

92. *Desnick*, 44 U.S. at 1355 (citations omitted) (emphasis added). Note, however, that because Judge Posner had already dismissed plaintiffs' newsgathering claims on nonconstitutional grounds, this statement is dicta.

93. For discussion of whether or not the creation of a broader constitutional right to gather news is warranted, see *infra* notes 274-277 and accompanying text.

Unresolved tensions in the Supreme Court's First Amendment jurisprudence are played out in lower courts, which must strike a balance between newsgathering and privacy interests. States, therefore, remain relatively free to define the legal consequences of intrusive newsgathering in ways that do not give short shrift to privacy interests. As the next section demonstrates, the Supreme Court created an opportunity for tort law to put more restraints on intrusive newsgathering behaviors. Unfortunately, tort law never really seized that opportunity.

B. Tort Law's Flaws

It is clear that the media receive less First Amendment protection in gathering the news than in publishing it. Therefore, tort law is a potentially effective weapon to protect privacy against intrusive newsgathering techniques. Indeed, tort law does a relatively good job of curbing the most serious newsgathering abuses. Rarely does one hear of a journalist engaging in burglary, theft, or even simple trespass in order to get information for a story.[94] Yet tort law promises far more; it promises remedies for a broad range of newsgathering behaviors that invade both property and dignitary interests. Tort law subjects prying journalists to liability (at least in theory) for a variety of torts, including trespass, intrusion, fraud and intentional infliction of emotional distress, and, if recent cases are any indication, the list of available tort theories may be growing.[95] Nonetheless, these torts largely fail to make the fine distinctions necessary to accommodate both individual privacy and the right to gather news, and, inevitably, it is privacy that suffers.[96]

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94. These newsgathering behaviors are both criminal and tortious. Obviously tort law is more effective when it is also backed by a criminal sanction. Even in trespass cases, however, hard issues arise when the owner consents to the entry of a reporter who has adopted a false identity or who has failed to state his or her true purpose for entering the property. *See, e.g.*, *Desnick*, 44 F.3d at 1351-53 (recognizing that the Desnick Eye Center would not have consented to the entry of patients if it had been aware that the defendants were attempting to gather news for a television exposé, but concluding that the consent obtained by fraud in this case was valid because there was no invasion of any of the interests that the law of trespass protects); Food Lion Inc., v. Capitol Cities/ABC, Inc., 951 F. Supp. 1217, 1221-24 (M.D.N.C. 1996) (denying summary judgment because a reasonable jury could find that the defendants were not actually Food Lion employees, but employees of ABC, and therefore were liable for trespass because they acted beyond the scope of the consent given by Food Lion).

95. *See* Logan, *Masked Media*, supra note 25, *passim*.

96. Privacy suffers because most torts that affect newsgathering are (1) not designed specifically to protect personal privacy but to protect other interests, (2) too narrow to address the wide range of media misbehaviors committed while gathering the news, or (3) interpreted in ways that undervalue the importance of privacy. For further analysis of the various torts

1. Trespass

Trespass is relatively effective at protecting plaintiffs from newsgathering that interferes with their interests in private property, at least in certain circumstances. Trespass protects a plaintiff from physical intrusions into the home or other private locations in which the plaintiff has a possessory interest,[97] thereby giving legal sanction to the notion that "a man's home is his castle."

Trespass is effective at preventing reporters from entering homes without permission because liability is relatively certain once the defendant enters private property.[98] Tort law has already made the decision that property interests, at least in this limited sphere, outweigh the interests of others in entering the property for their own purposes, even if they do no harm to the property.[99] No amorphous weighing and balancing of intangible interests need be undertaken.[100]

However, trespass is too limited in scope to provide a general remedy against intrusive newsgathering, and the tort is an ineffective weapon against the rather ingenious ways that reporters gain access to private property.[101] First, trespass is designed to protect property; it only incidentally protects privacy. Trespass protects privacy by creating a physical zone of separation from others; it protects the individual's right to be let alone, but only so long as he is within the boundaries of his own property.[102] As a practical corollary, trespass

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that affect investigative reporters, see John W. Wade, *The Tort Liability of Investigative Reporters*, 37 VAND. L. REV. 301 (1984).

97. *See* RESTATEMENT, *supra* note 14, § 163.

98. *See* LeBel, *Getting the News*, *supra* note 17, at 1159 ("Historically, the tort of trespass to land has been one of the most formalistic causes of action.").

99. *See* RESTATEMENT, *supra* note 14, § 163; *see also* Sandra B. Baron et al., *Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 WM. & MARY BILL OF RTS. L.J. 1027, 1066 (1996) (discussing the relative predictability of trespass claims as compared to tortious interference with contract claims).

100. Some have argued for a privilege to trespass in order to gather newsworthy information. *See* David F. Freedman, Note, *Press Passes and Trespasses: Newsgathering on Private Property*, 84 COLUM. L. REV. 1298 (1984); Deckle McLean, *Recognizing the Reporter's Right to Trespass*, 9 COMM. & LAW, Oct. 1987, at 31; Note, *And Forgive Them Their Trespasses: Applying the Defense of Necessity to the Criminal Conduct of the Newsgatherer*, 103 HARV. L. REV. 890 (1990). These arguments, however, have not made much headway in the courts. *See* cases cited *supra* note 83; *see also* FRANKLIN & ANDERSON, *supra* note 72, at 398 ("Attempts to assert a constitutional defense to a trespass action usually are rejected summarily.").

101. *See* McClurg, *supra* note 25, at 990. "One lesson of modern privacy law in the tort arena is that if you expect legal protection for your privacy, you should stay inside your house with the blinds closed." *Id.*

102. Some cases, for example, refused to grant a wife a trespass action because she had no possessory interest in land. *See, e.g.*, Young v. Western & A.R. Co., 148 S.E. 414, 417 (Ga. Ct. App. 1929).

provides no protection for newsgathering that takes place on public property. Thus, trespass is no protection at all from the relentless hounding and harassment by the press that often makes celebrities and individuals caught up in public controversies prisoners in their homes.[103]

More significantly, even when newsgathering occurs on private property, trespass largely fails to protect privacy from one of the most common types of intrusive newsgathering: surreptitious surveillance.[104] The usual scenario in surreptitious surveillance cases is that a plaintiff consents to the entry of a journalist for a limited purpose that the journalist exceeds, or consents without realizing that the journalist is a journalist. In *Desnick v. American Broadcasting Cos.*, journalists gained information about an ophthalmology clinic by having individuals pose as patients.[105] When the duped doctors sued for trespass, they found their claim firmly rejected.[106] Their trespass action failed because they consented to the entry of the pseudo-patients, even though they would not have consented had they known the patients' true identities.[107] This line of reasoning, which has been followed by a number of courts,[108] prevents trespass actions from being useful against surreptitious surveillance, one of the most common types of intrusive newsgathering,[109] and one that directly affects plaintiffs' privacy in nonpublic locations.[110]

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103. Trespass also offers little protection from electronic as opposed to physical invasions.

104. There are exceptions. *See, e.g.*, Food Lion, Inc., v. Capital Cities/ABC, Inc., 984 F. Supp. 923, 929, 937-40 (M.D.N.C. 1997) (upholding a jury verdict against ABC for its actions involving an exposé of Food Lion which used surreptitious surveillance, though reducing the amount of damages).

105. 44 F.3d 1345, 1348 (7th Cir. 1995).

106. *See id.* at 1352.

107. *See id.* For further discussion of *Desnick*, see *infra* notes 214-222 and accompanying text.

108. *See* Baugh v. CBS, Inc., 828 F. Supp. 745, 746 (N.D. Cal. 1993); *see also* Rand v. NBC, Inc., N.Y.L.J., Apr. 19, 1989, at 22; Walsh, *supra* note 30, at 1127-28 (discussing limits of trespass actions).

109. This same doctrine may also place limits on trespass law's ability to curb a second type of intrusive newsgathering technique that has gained ascendance with the advent of "reality television": ride-alongs. Reporters often accompany police and other emergency personnel to obtain a first-hand portrait of people in crisis situations. No trespass action is available when reporters film events that occur in public, but courts have been more hostile to media defendants who accompany police and emergency personnel into private homes. *See generally* Rex S. Heinke & Susan Scheiber Edelman, *Police and Emergency "Ride-Alongs"—Is Viewer Excitement Worth the Risk?*, ENT. L. REP., Dec. 1995, at 3 (1995); Elsa Y. Ransom, *Home: No Place for "Law Enforcement Theatricals"—The Outlawing of Police/Media Home Invasions in* Ayeni v. Mottola, 16 LOY. L.A. ENT. L.J. 325 (1995). Often, an issue in these cases is whether the occupant of the home effectively consented to the entry of the reporters. *See, e.g.*, Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996); Ayeni v.

2. Intentional Infliction of Emotional Distress

Unlike trespass, intentional infliction of emotional distress does protect the dignity of the individual. Yet intentional infliction does not specifically protect the right to be let alone. In order to make out a case for intentional infliction, a plaintiff must establish that the defendant intentionally or recklessly caused severe emotional distress by engaging in extreme and outrageous conduct.[111]

A key problem with this tort in the newsgathering context is that plaintiffs can rarely prove that the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[112] Abusive newsgathering, whether it takes the form of stalking a target or lying to gain access to a target's most initiative secrets, is so common that it becomes very difficult to argue that it is abnormal, unusual, or beyond the public's expectations of press behavior.

A second problem with suing for emotional distress is that the plaintiff must prove that the distress suffered was "severe."[113] The comments to the *Restatement* definition of intrusion state that a cause of action should be available "only where the distress inflicted is so severe that no reasonable man could be expected to endure it."[114] This requirement can be very difficult to overcome.[115]

Mottola, 35 F.3d 680 (2d Cir. 1994) (holding that plaintiffs could sue government officials who allowed film crew to accompany them on search of private home); Ayeni v. CBS Inc., 848 F. Supp. 362 (E.D.N.Y. 1994) (occupant objected to filming, but assumed film crews were government agents searching her home); Baugh v. CBS, Inc., 828 F. Supp. 745 (N.D. Cal. 1993) (plaintiff allowed filming in her home in the aftermath of a domestic abuse incident only because she assumed the camera crew was filming for the district attorney's office; trial court dismissed case as barred by plaintiff's consent); United States v. Sanusi, 813 F. Supp. 149 (E.D.N.Y. 1992); Rogers v. Buckel, 615 N.E.2d 669 (Ohio Ct. App. 1992); Magenis v. Fisher Broad., Inc., 798 P.2d 1106, 1107-08 (Or. Ct. App. 1990).

110. *See also* Florida Publ'g Co. v. Fletcher, 340 So. 2d 914 (Fla. 1976) (finding implied consent to entry of journalists into private home, the site of a fatal fire, due to the custom of journalists accompanying law enforcement officials to disaster sites). *But see* Green Valley Sch. Inc., v. Cowles Fla. Broad., Inc., 327 So. 2d 810 (Fla. Dist. Ct. App. 1976) (rejecting this "implied consent by custom" defense for reporters who accompanied police on raid at boarding school).

111. *See* RESTATEMENT, *supra* note 14, § 46. *See generally* DAVID A. ELDER, THE LAW OF PRIVACY 27-31 (1991) (discussing differences between intentional infliction and intrusion). Journalists are almost never held liable for negligent infliction of emotional distress. *See* FRANKLIN & ANDERSON, *supra* note 72, at 421-23.

112. RESTATEMENT, *supra* note 14, § 46 cmt. d. The intrusion tort, in contrast, requires only that the defendant's conduct be highly offensive to a reasonable person. *See id.* § 652B.

113. *See id.* § 46 cmt. j.

114. *Id.*

115. *See In re* Medical Lab. Management Consultants, 931 F. Supp. 1487, 1494 (D. Ariz. 1996); Berger v. CNN, 24 Media L. Rptr. 1757, 1762 (D. Mont. 1996); Pemberton v.

First Amendment complications introduced by the Supreme Court are a third problem facing plaintiffs suing for intentional infliction based on intrusive newsgathering techniques.[116] In *Hustler Magazine v. Falwell*, the Supreme Court held that a public figure plaintiff may not sue for intentional infliction of emotional distress without proving that the publisher of the allegedly outrageous statements knew or had reason to know of their falsity and outrageousness.[117] The *Hustler* case arguably should not apply to suits based on newsgathering methods. The publication at issue in *Hustler* was a clearly labelled parody advertisement depicting Reverend Jerry Falwell having sex in an outhouse with his mother.[118] Hence, *Hustler* was based on the content of the defendant's publication rather than the methods used to obtain it. Moreover, the *Hustler* Court explicitly required that plaintiffs suing the media for intentional infliction must prove that the defendant made a false statement of fact, a requirement that makes no sense in regard to the newsgathering as opposed to the news dissemination context.[119] Even if *Hustler* does place constitutional limits on suing for intentional infliction for intrusive newsgathering methods, its holding was limited to public officials and public figures.[120] Thus, private figure plaintiffs are arguably not hindered in bringing suits for intrusive newsgathering under an intentional infliction theory.[121]

Bethlehem Steel Corp., 502 A.2d 1101, 1115 (Md. Ct. Spec. App. 1986) (illustrating extreme facts in an employment case). On the other hand, at least one decision has imposed liability for intentional infliction, but not for intrusion, where the plaintiff was harassed by photographers in a public area. *See* Muratore v. M/S SCOTIA PRINCE, 656 F. Supp. 471, 480-83 (D. Me. 1987), *aff'd in part and vacated in part on other grounds*, 845 F.2d 347 (1st Cir. 1988).

116. *See generally* ROBERT C. POST, CONSTITUTIONAL DOMAINS 119-78 (1995); Paul A. LeBel, *Emotional Distress, the First Amendment, and "This Kind of Speech": A Heretical Perspective on* Hustler Magazine v. Falwell, 60 U. COLO. L. REV. 315 (1989); Rodney A. Smolla, *Emotional Distress and the First Amendment: An Analysis of* Hustler v. Falwell, 20 ARIZ. ST. L.J. 423 (1988).

117. 485 U.S. 46, 56 (1988).

118. *See id.* at 48.

119. *See id.* at 56. One of the key factors in *Hustler* was that the Court did not want to allow the plaintiff to avoid the obstacles of defamation law by simply picking an alternative tort theory. *See id.*

120. *See id.* at 57.

121. Even so, at least four Supreme Court Justices in *Cohen v. Cowles Media*, 501 U.S. 663 (1990), believed that the actual malice limitation should apply even in a suit based on the method the reporter used to gather the story. *See id.* at 677 (Blackmun, J., dissenting). The reporter in *Cohen* obtained the information for his story by promising a source anonymity. *See id.* at 665. After the reporter breached the promise, the source sued. *See id.* The dissenting justices viewed the cases as governed by *Hustler* because enforcing the reporter's promise would have had an effect on his ability to publish the newsworthy information he obtained. *See id.* at 674 (Blackmun, J., dissenting). These justices therefore

Although the holding of *Hustler* is narrow, its rhetoric is expansive. *Hustler* discussed the perils of allowing states to apply "inherent[ly] subjective[]" standards like "'[o]utrageousness' in the area of political and social discourse" because such standards allow juries "to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[122] If this logic is applied broadly, it poses a serious threat to states' ability to impose tort liability, including liability for invasion of privacy, on any form of speech based on its "offensiveness." Regardless, the limitations of tort doctrines, coupled with constitutional uncertainty, make intentional infliction an unimportant remedy in newsgathering cases.

3. Public Disclosure of Private Facts

Unlike trespass and intentional infliction of emotional distress, the tort that punishes public disclosure of private facts[123] is designed to remedy invasion of privacy.[124] This tort (commonly referred to as the "private facts tort") ostensibly provides a remedy for disclosures of true but private information about the plaintiff.[125] The private facts tort, however, is not a viable weapon against media intrusions.[126]

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would have imposed limits on a state's ability to give a citizen recovery for a reporter's breach of a promise to keep his identity confidential. Thus, some caution may be warranted in concluding that *Hustler* does not apply more generally to cases based on newsgathering.

122. *Hustler*, 485 U.S. at 55.

123. This section does not include a separate discussion of libel. Libel protects privacy interests only to the extent that they overlap with reputational interests, which, given that defamatory statements must be false, is minimal. Moreover, of all the torts that affect the media, libel is probably the most difficult for plaintiffs to prove. For a comprehensive treatment of this topic, see David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991) [hereinafter Anderson, *Libel Law*]. Likewise, this section does not include a separate discussion of the tort of false light invasion of privacy, since false light is subject to the same constitutional obstacles as defamation. *See* Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (holding that the Constitution precludes the application of false light "in the absence of proof that the defendant published the report with knowledge of its falsity or reckless disregard of the truth").

124. *See* RESTATEMENT, *supra* note 14, § 652D. This branch of invasion of privacy is included under the heading "Publicity Given to Private Life" but is commonly referred to as the private facts tort or the public disclosure of private facts tort. *See id.*

125. *See id.*

126. *See* DAVID A. ANDERSON, USING PEOPLE 13 (1998) (forthcoming) [hereinafter ANDERSON, USING PEOPLE] ("People who sue for unwelcome media disclosures about their private lives almost always lose .... The law says unwarranted disclosure of private facts is a tort, but in practice the courts almost always accept the defendant's argument that the matter disclosed was already public, was not sufficiently offensive, or was a matter of legitimate public concern."); Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CAL. L. REV. 1133, 1175 (1992) ("Interring the [private facts] tort ... represents no more than the formalizing of a deed already done."); Diane L.

In order to establish a prima facie case under the private facts tort, a plaintiff must show that the defendant publicized "a matter concerning the private life" of the plaintiff and that the matter would be "highly offensive to a reasonable person" and "not of legitimate public concern"[127] (or, as some courts term it, not "newsworthy").[128] This formulation of the tort poses several obstacles to plaintiffs seeking a remedy for intrusive newsgathering. The private facts tort addresses the defendant's dissemination of private information rather than her misconduct in obtaining the information.[129] Not all intrusive newsgathering results in dissemination of private information, and even where it does, the publication of the information (as opposed to the methods used to obtain it) may not be sufficiently offensive to justify the imposition of liability under the tort.[130] Undoubtedly the most troublesome element of the tort, however, is the last one: proving that the information published was not of legitimate public concern.[131]

Courts have had great difficulty in formulating standards for determining what sorts of information are newsworthy or of legitimate public concern. This newsworthiness privilege rests on the premise that the media should not be punished for publishing information typically considered news.[132] Courts have been unable, however, to agree on a definition of "news."[133] Some courts, following the

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Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 293 (1982) (noting that despite the increasing number of claims brought under the private facts tort, "plaintiffs rarely win").

127. RESTATEMENT, *supra* note 14, § 652D cmt. a ("'Publicity' . . . means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."). The tort is primarily aimed at dissemination by the mass media.

128. *See* FRANKLIN & ANDERSON, *supra* note 72, at 348. Although the elements vary slightly by state, the *Restatement* formulation is one of the most common.

129. *See* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 978 (1989) [hereinafter Post, *Social Foundations*] ("[I]ntrusion concerns the physical actions of a defendant, whereas public disclosure involves the dissemination of information.").

130. For example, bugging a professor's office to listen to a conversation with a student about defamation law is highly offensive behavior; publishing the conversation may not be.

131. Some courts treat this as an element that plaintiff must prove; others treat it as a defense or a privilege. *See, e.g.*, Virgil v. Time, Inc., 527 F.2d 1122, 1128 (9th Cir. 1975) (treating it as a privilege).

132. *See* RESTATEMENT, *supra* note 14, § 652D cmt. d; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117 (5th ed. 1984).

133. *See, e.g.*, Jenkins v. Dell Publ'g Co., 251 F.2d 447, 451 (3d Cir. 1958) ("[O]nce the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged."); *see also* David Logan, *Tort Law*

Restatement, recognize that what is newsworthy is "in the last analysis ... a matter of the community mores" and therefore give great deference to jury determinations on this issue.[134]

A more popular approach, however, is to define newsworthiness descriptively.[135] Under this approach, courts "emphasize the public's actual interest in information, not ... what ought to interest the public."[136] Because courts are understandably loath to second guess the media's editorial judgments about what is news, courts routinely defer to media judgments about newsworthiness.[137] In essence, therefore, the media create their "own definition of news,"[138] and as a consequence an individual's privacy receives almost no protection from the public's insatiable demand for information.

Even if a plaintiff could overcome the common law obstacles, the constitutional ones are almost insurmountable. Most commentators agree that the Supreme Court's most recent private-facts decision, *Florida Star v. B.J.F.*, makes it almost impossible for states to impose liability on the publication of truthful information.[139] In *Florida Star*, a

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and the Central Meaning of the First Amendment, 51 U. PITT. L. REV. 493, 548 (1990) [hereinafter Logan, *Tort Law*] (discussing the difficulty of determining newsworthiness).

134. *Virgil*, 527 F.2d at 1129 (observing that the standard is based on the "customs and conventions of the community"); *see also* Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 773 (Cal. Ct. App. 1983) (noting that "the jury was the proper body to answer the question whether the article was newsworthy or whether it extended beyond the bounds of decency").

135. *See* Logan, *Tort Law*, *supra* note 133, at 549; Comment, *The Right of Privacy: Normative-Descriptive Confusion in Defense of Newsworthiness*, 30 U. CHI. L. REV. 722, 725 (1963).

136. Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 196 (1979).

137. *See, e.g.*, Gilbert v. Medical Econs. Co., 665 F.2d 305, 308-09 (10th Cir. 1981) (applying a "reasonable editor" standard of newsworthiness); Anderson v. Fisher Broad. Co., 712 P.2d 803, 814 (Or. 1986) (refusing to second guess media's determination of newsworthiness).

138. *See* KEETON, *supra* note 132, § 117.

139. 491 U.S. 524, 550 (1989) (White, J., dissenting) (arguing that the majority's decision "obliterate[s] one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts"); *see also* David A. Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71, 102-04 (1990) (arguing that a private litigant will almost never be able to establish the constitutional requirements set forth in *Florida Star*); G. Michael Harvey, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2416 (1992); Jacqueline R. Rolfs, Note, *The* Florida Star v. B.J.F.*: The Beginning of the End for the Tort of Public Disclosure*, 1105, 1124-27 (1990).

The Supreme Court has repeatedly evaded the question whether states can constitutionally impose liability on the publication of truthful but privacy invading information. In *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), for example, the Court refused to decide whether "the State may ever define and protect an area of privacy free from unwanted publicity," and instead decided merely that states could not impose liability on the publication of accurate information obtained from open court records. *Id.* at 491. Likewise, in *Florida Star*, the Court sidestepped the larger question whether truthful publication is

rape victim sued after her name mistakenly appeared in the police beat section of a local newspaper.[140] B.J.F. was a highly sympathetic plaintiff. After her name was published, a man called her mother to say he would rape B.J.F. again.[141] As a result, B.J.F. moved from her home and sought psychiatric counseling.[142] Moreover, the newspaper, which obtained her name from an erroneously released police report, published B.J.F.'s name in violation of its own policy of nondisclosure.[143]

The Supreme Court nonetheless denied B.J.F. recovery, holding that where the press "publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . ."[144] Read in context, however, the Court's decision indicates that rarely will privacy be deemed a "state interest of the highest order,"[145] rarely will a private matter fail to be "of public significance,"[146] and rarer still will information be deemed "unlawfully obtained" or not part of the public record.[147] Thus, plaintiffs who wish to attack media intrusions into their private lives would do well to look to other theories of recovery than private facts.

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always constitutionally protected and instead framed its decision narrowly, barring tort liability under the facts of the case. *See Florida Star*, 491 U.S. at 541.

The majority opinion stops short of saying that states may never impose liability for the publication of truthful information. In fact, the Court explicitly acknowledged that "press freedom and privacy rights are both 'plainly rooted in the traditions and significant concerns of our society,'" thereby implying that a strong cultural commitment to privacy prevents its abolition. *Id.* at 533. But the Court's actions speak louder than its words, and the outcomes of its privacy decisions indicate that the Court's commitment to privacy (at least when it conflicts with speech and press freedoms) is at best weak and nebulous. Because other commentators have already diagnosed the many flaws in the private facts tort, I do not attempt to recount them all here.

140. *See Florida Star*, 491 U.S. at 533.

141. *See id.*

142. *See id.*

143. *See id.*

144. *Id.* at 541.

145. In *Florida Star*, the Court conceded that protecting the privacy and safety of sexual offense victims and encouraging them to report sexual offenses were "highly significant interests," but the Court nonetheless found that imposing liability against the newspaper that published B.J.F.'s name was "too precipitous a means of advancing these interests." *Florida Star*, 491 U.S. at 537.

146. The Court found that the news article at issue in *Florida Star* concerned a matter of public significance because "the article generally, as opposed to the specific identity within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities." *Id.* at 537.

147. The Supreme Court found that B.J.F.'s name was lawfully obtained despite the fact that the police department's release of the information violated a Florida statute, *see id.* at 536, and despite the fact that the newspaper violated both the Florida statute and its own internal policies by publishing the information. *Id.* at 533.

4. Other Theories, Novel and Otherwise

Plaintiffs' lawyers have recently been successful in deploying novel theories to circumvent the flaws in more traditional tort doctrines. *Food Lion v. Capital Cities/ABC, Inc.*[148] is a good example of this phenomenon. *Food Lion* was yet another case prompted by an undercover investigation conducted by *Prime Time Live*.[149] Working in conjunction with a union that was attempting to gain a foothold in Food Lion grocery stores, *Prime Time Live* employees falsified their resumes and lied about their identities to get jobs at Food Lion.[150] Once employed, the *Prime Time Live* employees obtained graphic footage of various unsanitary meat-handling practices.

After the *Prime Time Live* investigation aired, Food Lion sued. Food Lion's high-profile legal team initially pursued fourteen different claims against ABC, including wiretapping, racketeering, civil conspiracy, unfair and deceptive trade practices, intentional misrepresentation, deceit, negligent supervision, trespass, fraud, and breach of fiduciary duty.[151] Although the Court dismissed most of these claims before trial,[152] Food Lion was ultimately successful in its fraud, trespass and breach of loyalty claims.[153] The most controversial of these was the breach of loyalty claim. The gist of this claim had little to do with the stomach-turning exposé of Food Lion's practices. Instead, the claim was that the pseudo-employees from *Prime Time Live* were not loyal to their employer, Food Lion. This theory was nothing but a fiction: Food Lion's actual injury was the damaging publicity it received, but Food Lion could not pursue a defamation action because much of the information broadcast by *Prime Time Live* was true.[154]

Nonetheless, this case represents a disturbing trend in newsgathering law. The clever plaintiff's lawyers in *Food Lion*, having seen the difficulty in establishing a viable claim for defamation, invasion of privacy, or intentional infliction of emotional distress based on newsgathering practices, pressed (or twisted) other tort theories into service. By doing so, the lawyers turned the focus from Food Lion's own misconduct and were able to focus solely on the elaborate pattern

148. 887 F. Supp. 811 (M.D.N.C. 1995).
149. *See id.* at 813.
150. *See id.* at 814-15.
151. *See Food Lion*, 887 F. Supp. at 817.
152. *See id.* at 821.
153. *See* Russ Baker, *Damning Undercover Tactics as "Fraud"*, COLUM. JOURNALISM REV., Mar./Apr. 1997, at 28.
154. *See id.*

of deception the ABC employees used to gain access to their stores.[155] Despite the controversy over *Food Lion* and similar cases, however, the question remains whether cases decided on such narrow grounds really have much application to subsequent cases.

IV. INTRUSION: A TORT WORTH FIXING

The tort of intrusion has never lived up to its potential. The intrusion tort is not, as some hoped it would be, "the last effective weapon in [the] fight for privacy."[156] Nor is it the threat to press freedom envisioned by others.[157] Instead, courts have so narrowly limited the tort that it is largely toothless in the face of an increasingly intrusive press. At the same time, this vaguely defined tort remains as an ominous reminder to the press that although liability is unlikely, it is not impossible. As the law currently stands, the intrusion tort is a disaster: it provides neither effective privacy protection nor clear guidelines to the media as to what newsgathering methods are appropriate.

A. Intrusion in Theory

The intrusion tort seems to be ideally suited to deal with the problem of intrusive newsgathering.[158] Intrusion is one of four torts

155. Other theories applied in newsgathering cases include tortious interference and fraud. For cases on tortious interference, see, for example, Risenhoover v. England, 24 Media L. Rptr. 1705 (W.D. Tex. 1996); Triplex v. Riley, 900 S.W.2d 716 (Tex. 1995).

156. Harry S. Raleigh, Jr., Case Comment, *Invasion of Privacy—Unreasonable Intrusion—A Weapon Against Intrusions upon Our Shrinking Right of Privacy*, 47 NOTRE DAME L. REV. 1067, 1077 (1972).

157. *See* Mary Ann L. Wymore, *Modernizing the Law of Privacy: Challenging the Validity of the Intrusion Tort and Presenting Arguments for Its Elimination*, 40 FED. BAR NEWS & J. 375, 378 (1993) (arguing that "[t]he common law tort of intrusion, if unchecked, poses one of the greatest risks to the freedom afforded the press"). Wymore argues that the tort of intrusion should be eliminated because "tortious or criminal activities of journalists while news gathering are better addressed within the rubric of the torts or crimes committed" and intrusion as it currently exists "is duplicative of the privacy tort of public disclosure of private facts." *Id.* at 375. Although Ms. Wymore makes a valid point about the vagueness of the tort posing a threat to the media, the first of her arguments nonetheless fails for the reasons discussed in the section above, namely that the various other torts that may affect newsgathering do so only haphazardly at best. Even if one concedes that the second argument is true (which is questionable, because despite some overlap, intrusion retains independent validity by focusing primarily on the gathering rather than the publication of news), the argument may support doctrinal reform rather than outright abolition of the intrusion tort, particularly if one sees privacy as a value worth protecting. *See also* James E. King & Frederick T. Muto, *Compensatory Damages for Newsgatherer Torts: Toward a Workable Standard*, 14 U.C. DAVIS L. REV. 919 (1981).

158. Several of the illustrations of potentially tortious behavior provided in the *Restatement* deal with media intrusions. *See* RESTATEMENT, *supra* note 14, § 652B illus. 1, 5-7.

that are designed specifically to provide redress for invasion of privacy.[159] Unlike the other three invasion of privacy torts, however, intrusion does not focus on the defendant's *publication* of privacy-invading information.[160] Instead, intrusion is defined broadly enough that it encompasses a wide range of newsgathering behaviors. Intrusion is also capable of surmounting the First Amendment barriers that plague other privacy torts because it focuses on newsgathering rather than publication.

Intrusion is designed to protect an individual's sphere of privacy, whether spatial or psychological,[161] from the obtrusive and obnoxious delving of others.[162] Many courts have adopted the *Restatement* definition of intrusion. Under this definition, both media and nonmedia defendants[163] will be liable for intrusion if they

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159. Although Warren and Brandeis are credited with the idea of imposing tort liability for invasion of privacy, it was Dean Prosser who divided the tort into four distinct categories: (1) intrusion upon the plaintiff's seclusion or solitude, (2) publicity that places the plaintiff in a false light, (3) publication of private facts, and (4) commercial exploitation of the plaintiff's name or likeness. *See* Prosser, *supra* note 14, at 384-88. Prosser's fourfold division has become integral to any discussion of the privacy torts and is reflected in the *Restatement*. Some commentators have questioned the wisdom of Prosser's categorization. *See, e.g.*, Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1006 (1964) (arguing that invasion of privacy should be a single tort designed to protect human dignity); Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 329 (1966) (arguing that the tort's only value is to protect against commercial appropriations).

160. "Publicity" is an element of both the private facts tort and the false light tort. *See* RESTATEMENT, *supra* note 14, §§ 652D-652E (discussing the private facts tort and the false light tort, respectively). The term denotes "that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Id.* § 652D cmt. a. To call commercial appropriation a privacy tort is something of a misnomer, because it is as much concerned with protecting a property-based right to make money by selling one's name or likeness as it is with the plaintiff's emotional well being. *See id.* § 652C cmt. a. Publication is not technically an element of the commercial appropriation tort, which makes a defendant liable for "appropriat[ing] to his own use or benefit the name or likeness of another." *Id.* § 652C. As a practical matter, however, a plaintiff who wishes to sue a media defendant for commercial appropriation will almost always claim that the defendant deprived him of his rights by publishing his name or likeness. *See, e.g.*, Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (holding that the right to use a person's voice is a property right that is protected under California law, and that actor Bette Midler had a cause of action against a company that used an imitation of her voice without her permission, because "[t]o impersonate her voice is to pirate her identity"). Similarly, in *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), Vanna White, the plaintiff, argued that a commercial advertisement using a robot dressed in an evening gown, standing in front of a "Wheel of Fortune" game board, violated her right to publicity. *See id.* at 1397.

161. *See, e.g.*, Phillips v. Smalley Maint. Servs., Inc., 435 So. 2d 705, 711 (Ala. 1983).

162. *See generally* KEETON, *supra* note 132, § 117; ELDER, *supra* note 111, at 15-147.

163. Although this Article focuses on media intrusions, most intrusion cases are aimed at other types of defendants. *See, e.g.*, Carey v. Statewide Fin. Co., 223 A.2d 405 (Conn. Cir. Ct. 1956) (suing debt collector for making harassing telephone calls); Hamberger v. Eastman,

"intentionally intrude[], physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . [and] the intrusion would be highly offensive to a reasonable person."[164] Publication is not an element of the tort.[165]

As defined by the *Restatement*, the intrusion tort has several distinctive features. First, the *Restatement* defines the protected sphere of privacy broadly. This broad definition is consistent with the tort's initial purpose, which was "to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights."[166] As conceptualized, the intrusion tort protects against physical intrusions as well as electronic intrusions and addresses conduct such as wiretapping, bugging with microphones, and peering into windows.[167] More importantly, the intrusion tort recognizes that an individual's privacy interest has a psychological component,[168] and thus a defendant who invades this interest may be liable even for intrusions that occur outside the plaintiff's home or other property in which she has a possessory interest.[169]

Because the intrusion tort defines the right to solitude and seclusion so broadly, it potentially reaches the wide range of newsgathering methods that the media currently employ.[170] Case law

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206 A.2d 239 (N.H. 1965) (suing a landlord for electronic eavesdropping); Sutherland v. Kroeger, Co., 110 S.E.2d 716 (W. Va. 1959) (suing grocery store for searching a shopping bag).

164. RESTATEMENT, *supra* note 14, § 652B.

165. *See id.* § 652B cmts. a, b. *See generally* ELDER, *supra* note 111, at 32-33.

166. Prosser, *supra* note 14, at 392.

167. *See* RESTATEMENT, *supra* note 14, § 652B cmt. b.

168. *See* ELDER, *supra* note 111, at 43 (citing cases recognizing a right to "psychological solitude.").

169. *See* RESTATEMENT, *supra* note 14, § 652B cmt. c. The *Restatement* comments give little guidance as to how substantial an interest an individual has in privacy in a public place. While it makes clear that there is no liability for observing or even photographing a person on a public street, there may still be some matters about the plaintiff that are "private," such as "his underwear or lack of it." *Id.* Further comments indicate that some behavior that is not intrusive initially may become so if "repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that it becomes a substantial burden to his existence . . . ." *Id.* § 652B cmt. d.

170. Indeed, several of the *Restatement* illustrations of actionable intrusions deal with newsgathering by the media. For examples of these, see *id.* § 652B illus. 1 (reporter takes photo of woman in hospital without permission); *id.* § 652B illus. 2 (photographer makes constant harassing phone calls to "a lady of social prominence" that he wants to photograph; arguably, this is not a media defendant); *id.* § 652B illus. 7 (photographer takes picture of woman's skirt blown over her head when exiting a "fun house"). Note that this last illustration comes from *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964), in which the plaintiff successfully sued the newspaper that published the photograph. Some of these illustrations seem mild compared to the type of newsgathering that goes on today.

at least suggests that surreptitious surveillance aimed at an individual's private affairs or targeted to obtain entrance to the private areas of his home or business may constitute an actionable intrusion.[171] Constant and unabated hounding by the media, especially when accompanied by conduct that either endangers the safety of the target or makes use of high-tech eavesdropping devices may also constitute an actionable intrusion.[172] The tort requires only that there be an intrusion; it does not specify what form such intrusion might take. In theory, at least, intrusion seems like the remedy of choice for plaintiffs whose privacy is invaded by intrusive newsgathering methods.

Another reason that plaintiffs might choose the intrusion tort to address intrusive newsgathering is that publication is not an element of the tort. In most cases, intrusion focuses on the methods used to gather information rather than on the publication of the information itself. Thus, the intrusion plaintiff need not prove that the tort withstands the highest levels of constitutional scrutiny traditionally applied to publication-based torts.[173] Instead, intrusion is merely a "generally applicable law" that imposes an incidental burden on newsgathering, and therefore surmounts any First Amendment obstacles it encounters.[174]

Although the intrusion tort broadly defines the right to privacy, the tort places only minor limitations on the media's right to gather news. The tort recognizes that fine distinctions may be required to distinguish an unwarranted intrusion from the "inevitable concomitants of life in an industrial and densely populated society."[175] The right to privacy is not, nor could it be, absolute.[176] Therefore, an intrusion is only actionable if it would be highly offensive to a

171. The most famous example is *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971). *See* discussion *infra* Part III; *see also In re* King World Prods., Inc., 898 F.2d 56 (6th Cir. 1980).

172. *See* Galella v. Onassis, 487 F.2d 986, 998 (2d Cir. 1973) (allowing an injunction, although limiting its scope, against a paparazzi photographer who was hounding and taking pictures of Jacqueline Kennedy Onassis and her children); Wolfson v. Lewis, 924 F. Supp. 1413, 1435 (E.D. Pa. 1996) (enjoining defendants, who followed plaintiffs and filmed them using a camera with a zoom lens and a shotgun mike, from continuing to intrude on the plaintiffs' privacy).

173. *See* discussion *infra* Part III.

174. *See* discussion *infra* Part III.

175. Nader v. General Motors Corp., 255 N.E.2d 765, 768 (N.Y. 1970) (holding that wire-tap surveillance can create a claim for intrusion).

176. *See* Shorter v. Retail Credit Co., 251 F. Supp. 329, 330 (D.S.C. 1966). *See generally* ELDER, *supra* note 111, at 16-17.

reasonable person.[177] Absent unusually obtrusive behavior, a reporter will not be liable for observing or even for photographing matters that occur in public places. Moreover, as newsgathering techniques that were once considered objectionable become more common, it becomes less likely that the public will view them as highly offensive and correspondingly less likely that liability will be imposed for them. Thus, in some sense, the media are able to define the scope of legal protection by its own practices.

B. Intrusion in Practice

Even though the intrusion tort appears to be a potentially effective weapon against intrusive newsgathering, in practice the tort fails to provide a reliable remedy for victims of intrusions. Indeed, the very breadth of the tort may be its undoing.

1. Doctrinal Flaws

One has only to look at the overall success rate of plaintiffs who sue the media to see that intrusion is neither the threat to the press nor the panacea for privacy that some have envisioned. Although intrusive newsgathering methods are becoming more prevalent, victims of paparazzi attacks or undercover investigations rarely sue for intrusion; even when they do sue, their success rate is abysmal. A cursory overview of newsgathering cases reveals that plaintiffs rarely prevail against the media. In fact, most never even get past the hurdle of summary judgment.[178] During the period from 1986-1996, a study by the Libel Defense Resource Center found that defendants prevailed on summary judgment motions in intrusion cases almost ninety percent of the time.[179] Even those plaintiffs who did prevail at trial often found their awards reversed or reduced on appeal.[180] On the surface, therefore, there seems to be a gap between tort theory, which ostensibly provides a right of recovery, and reality, in which most plaintiffs lose—and even more never sue.

But win/loss rates alone do not tell the whole story. One explanation for plaintiffs' losses is that plaintiffs tend to misuse the

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177. *See* RESTATEMENT, *supra* note 14, § 652B; *see also* Miller v. National Broad. Co., 232 Cal. Rptr. 668, 679 (Cal. Ct. App. 1986) (explaining that "numerous factors" go into this inquiry).

178. *See generally* Susan Grogan Faller, *Summary Judgment Without Discovery*, *in* LIBEL DEFENSE RESOURCE CENTER 1997 REPORT ON SUMMARY JUDGMENT (July 31, 1997).

179. *See id.*

180. *See id.*

tort.[181] Because intrusion is so vague, it lends itself to what one might call "kitchen sink" pleading.[182] In other words, plaintiffs tend to plead intrusion along with a host of other tort theories, hoping one of the theories will be successful, even if most are dismissed at an early stage of litigation.[183] Plaintiffs also sue for intrusion in cases in which they appear more concerned with the subsequent publication of the information obtained than with the methods used to obtain that information. Not surprisingly, judges are not favorably disposed at the outset to plaintiffs' intrusion claims. Given that many plaintiffs follow this same strategy,[184] and thus will have the majority of their claims dismissed before trial,[185] the lack of plaintiffs' victories against the media are not inevitably a bad sign for plaintiffs; perhaps it indicates that courts are merely sorting meritless theories from legitimate theories.

This explanation, however, still fails to fully account for plaintiffs' poor track record. When patterns in the court's treatment of actual intrusion cases are examined, it is clear that the lack of plaintiffs' victories is symptomatic of larger doctrinal flaws. The first, and perhaps most important flaw, is that the use of intrusion has been limited by a relatively mechanistic approach to intrusions in public

181. *See* Kovner & Dorsen, *supra* note 4, at 781.

182. "Kitchen sink pleading" may be a rational strategy for individual plaintiffs, because it multiplies the chances that at least one of the theories pleaded will get past pretrial procedural motions and give them a chance to make it to trial against a media defendant. In the long term, however, kitchen sink pleading strategies may desensitize courts to legitimate claims of invasion of privacy and, if nothing else, distort win/loss rates.

183. *See* Logan, *Masked Media*, *supra* note 25, at 169 (discussing this phenomenon).

184. *See, e.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811 (M.D.N.C. 1995) (alleging fourteen different theories against *Prime Time Live* after its undercover investigation of unsanitary conditions at the grocery store chain). These claims were based on the methods *Prime Time Live* used to obtain the story. Food Lion sought leave to amend its complaint to add a defamation claim after the statute of limitations ran out. Food Lion apparently based this claim on the argument that outtakes from *Prime Time Live*'s broadcast suggested that some of the footage was "staged." The judge found that the outtakes did not support a libel action. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc. 165 F.R.D. 454, 457 (M.D.N.C. 1996). *See generally* Baker, *supra* note 153, at 28. Food Lion might have sued for invasion of privacy by publication of private facts, but the constitutional limits on this tort are so severe as to make this strategy extremely difficult. *See* ANDERSON, USING PEOPLE, *supra* note 126 (arguing that the private facts tort is completely ineffectual in combating media abuses and that the Supreme Court must revise its First Amendment jurisprudence in this area before states can impose liability for publication of private facts); Florida Star v. B.J.F., 491 U.S. 524, 541 (1989).

185. The *Food Lion* court dismissed all but the plaintiff's trespass, fraud, civil conspiracy and unfair trade practices theories prior to trial. *See Food Lion*, 951 F. Supp. at 1233.

places.[186] Intrusion, developed specifically to fill the gaps in trespass law, was meant to protect privacy in the absence of a discernible property interest. But most courts refuse to hold defendants liable for intrusions that occur in public places,[187] even though in theory they should do so in cases in which the defendant's actions were unusually obtrusive, highly embarrassing to the plaintiff, or otherwise invasive of reasonable privacy interests.[188] This doctrine has superficial appeal, for individuals only have a limited expectation of privacy in public places. However, applying the "public places" limitation categorically means that persons forego privacy rights in all public places and therefore have no recourse against constant and obtrusive surveillance.[189] With this limitation, intrusion becomes virtually

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186. *See generally* ELDER, *supra* note 111, at 45 (citing cases that refused to hold defendants liable for observing or recording events that occurred in public places).

187. *See* Dempsey v. National Enquirer, 702 F. Supp. 927, 930-31 (D. Me. 1988); Muratore v. M/S SCOTIA PRINCE, 656 F. Supp. 471, 483 (D. Me. 1987); Pierson v. News Group Publications, Inc., 549 F. Supp. 635, 640 (S.D. Ga. 1982); Gill v. Hearst Publ'g Co., 253 P.2d 441, 444 (Cal. 1953); Gill v. Curtis Publ'g Co., 239 P.2d 630 (Cal. 1952); Nelson v. Maine Times, 373 A.2d 1221, 1223 (Me. 1977). *But see* Summers v. Bailey, 55 F.3d 1564, 1567 (11th Cir. 1995) (stating, in a nonmedia case, that liability can be imposed for "prying" and surveillance in public intended to frighten or torment plaintiff); Holman v. Central Ark. Broad. Co., 610 F.2d 542 (8th Cir. 1979); Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973); Machleder v. Diaz, 538 F. Supp. 1364, 1374 (S.D.N.Y. 1982) (indicating that "unabated hounding" might constitute intrusion, but that "aggressive and possibly abrasive" methods used by reporters would not), *aff'd in part and rev'd in part*, 801 F.2d 46 (2d Cir. 1986); Daily Times Democrat v. Graham, 162 So. 2d 474 (Ala. 1964); Mark v. Seattle Times, 635 P.2d 1081 (Wash. 1981). Professor Andrew McClurg convincingly argues for expanding tort liability for intrusions in public places. *See* McClurg, *supra* note 25. Professor McClurg, however, is concerned with intrusions more generally rather than with media intrusions alone, and when discussing media intrusions, he tends to blur the line between intrusions resulting from publication of private facts (which should more properly be brought as private facts cases and would almost certainly face insurmountable First Amendment obstacles) and intrusions resulting from the methods used to obtain private information (which should be brought as intrusion cases and which would be constitutionally permissible). *See id.*

188. For an extreme example of the mechanistic approach, see Butts v. Capital City Press, Inc., 479 So. 2d 534, 536-37 (La. Ct. App. 1985). On the other hand, some courts have acknowledged that a plaintiff may have a protected zone of privacy even in public places. *See, e.g.*, *Galella*, 487 F.2d at 995; Huskey v. NBC, 632 F. Supp. 1282, 1288 (N.D. Ill. 1986); Nader v. General Motors Corp., 255 N.E.2d 765 (N.Y. 1970). "A person does not automatically make public everything he does merely by being in a public place . . . ." *Id.* at 771.

189. Some have argued that stalking laws may be applied against the media to prevent this kind of behavior. *See, e.g.*, Joyce, *supra* note 49, at 36-37 (reporting that "lawyers say threats posed by aggressive photographers can be addressed by anti-stalking statutes"); Julie Miles Walker, Comment, *Anti-Stalking Legislation: Does it Protect the Victim Without Violating the Rights of the Accused?*, 71 DENV. U. L. REV. 273, 274 n.8 (1993) (citing *Sonya Live: Stalker Laws* (CNN television broadcast June 8, 1992)) (stating that an investigative reporter who seeks out information on a public figure could violate stalking laws); James C. Wickens, Comment, *Michigan's New Anti-Stalking Laws: Good Intentions Gone Awry*, 1994 DET. C.L. REV. 157, 197 (stating that Michigan's anti-stalking statutes have been criticized

synonymous with trespass, and therefore redundant, except perhaps in cases involving electronic or other "non-physical" invasions on private property that do not meet the technical requirements of trespass.

Intrusion's second doctrinal flaw is that courts have blurred the line between intrusion and private facts in some cases by creating a newsworthiness privilege to the intrusion tort.[190] Again, this approach has intuitive appeal when applied to intrusion cases that are based on the defendant's behavior in *publishing* private information. In these types of cases, courts struggle to accommodate both First Amendment values and privacy concerns; applying a newsworthiness defense is probably a step in the right direction.[191] However, some courts have unquestioningly borrowed the "newsworthiness" doctrine from the private facts tort and applied it in intrusion cases that are based not on publication but on newsgathering.[192] In doing so, these courts borrow all the doctrinal problems that plague the private facts tort. The primary problem lies in defining newsworthiness; the concept of newsworthiness is itself so vague that most courts simply defer to the judgments of the media about what is or is not newsworthy.[193]

Certainly, the importance of the information that the press is seeking is sometimes relevant in deciding whether or not an actionable intrusion has occurred.[194] Yet, as currently applied, the newsworthiness inquiry is insufficiently nuanced to deal with the

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because they could be used against news reporters who have been requested to stay away from a victim).

190. *See* Walsh, *supra* note 30, at 1122-23.

191. Of course, another possible approach would be to force plaintiffs to sue for publication of private facts rather than intrusion.

192. *See supra* notes 130-137 and accompanying text.

193. *See* ANDERSON, USING PEOPLE, *supra* note 126. Courts also blur the line between intrusion and private facts when they allow intrusion plaintiffs to recover consequential damages for the publication of information that has been tortiously obtained. *Compare* Costlow v. Cusimano, 311 N.Y.S.2d 92 (N.Y. App. Div. 1970) (denying damages for subsequent publication), *with* Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (allowing damages based on subsequent publication). *See* Walsh, *supra* note 30, at 1132 (discussing division among courts "regarding the appropriate scope of damages to be awarded to a victim of unlawful media conduct where there is subsequent publication"); King & Muto, *supra* note 157, at 935-39. Allowing a plaintiff to recover damages based on subsequent publication arguably threatens core First Amendment values (the right to publish truthful information). The Supreme Court has said that the First Amendment protects publication of truthful information that has been lawfully obtained. *See, e.g.*, Florida Star v. B.J.F, 491 U.S. 524, 541 (1988); Cox Broad. v. Cohn, 420 U.S. 469, 491 (1974). Perhaps, therefore, allowing plaintiffs to recover consequential damages for the publication of information *unlawfully* obtained would not violate the First Amendment. Nonetheless, allowing consequential damages based on publication of intrusively obtained information raises the specter that plaintiffs will employ newsgathering torts to do an "end run" around the limitations placed on publication-based torts.

194. See *infra* Part VI.

complexity of the problem. Requiring that the information sought be newsworthy places almost no limitations on what the press can publish, and when applied in the intrusion context, imposes almost no limitations on how they obtain information to publish. In adopting a newsworthiness requirement, courts establish almost insurmountable doctrinal obstacles to plaintiffs' recoveries and essentially conflate the intrusion tort with the private facts tort.[195]

A related problem stems from the amorphous nature of the right protected by the intrusion tort. Courts are uncomfortable with or even hostile to theories that allow plaintiffs to recover for dignitary injuries.[196] Courts are more comfortable with property-based theories, and therefore it is not surprising that plaintiffs seem to have more success when suing on a property-based theory like trespass.[197] Courts may be particularly hostile to the rather amorphous right of privacy when it conflicts with First Amendment values; even though the First Amendment does not bar liability for newsgathering torts, courts may still be more hesitant than usual in imposing liability on the media.

This may also explain why judges in this area tend to be heavy-handed in taking apparent questions of fact away from juries. Judges may be influenced by the subtle pull of First Amendment values in media cases,[198] even though they do not always refer to these values explicitly.

Coupled with this hostility to dignitary torts, courts also seem to prefer allowing plaintiffs to recover based on narrow theories rather than broad ones. In trespass cases, for example, courts realize that the interest protected is a narrow one, and they need not address broad questions of social policy. They need merely protect a fairly narrow interest in property. This factor may explain why *Food Lion* was allowed to pursue only relatively narrow theories of recovery against ABC. Because the case was resolved on narrow grounds, the judge did not have to make sweeping decisions about the proper balance between privacy and the press, and the ultimate impact of the decision

195. *See* Wymore, *supra* note 157, at 378 (discussing this phenomenon).

196. *See* Jonathan L. Entin, *Privacy Rights and Remedies*, 41 CASE W. RES. L. REV. 689, 692 (1991) ("It is precisely because plaintiffs can recover for psychic injury that some critics are uncomfortable with the privacy tort."); Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 163 (1992) (diagnosing judicial hostility to torts designed to validate dignitary interests); McClurg, *supra* note 25, at 1004 (observing that "[r]eview of the case law discloses a judicial wariness of—if not outright hostility toward—the invasion of privacy torts").

197. *See, e.g.*, Food Lion v. Capital Cities/ABC, Inc., 887 F. Supp. 811 (1996); *see also* Ruth Gavison, *Privacy and the Limits of the Law*, 89 YALE L.J. 421, 424 (1980) ("[P]rivacy is seldom protected in the absence of some other interest.").

198. *See* Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1037 (9th Cir. 1991).

ended up being limited to a narrow set of factual circumstances.[199] Arguably, the *Food Lion* decision only applies when a reporter engages in an elaborate pattern of deception to gain employment with a target and then uses information obtained on the job to the detriment of her employer.

A final doctrinal flaw in the intrusion tort stems from the law's failure to keep pace with the development of surveillance technology. Traditionally, courts have refused to hold that filming a plaintiff is any more objectionable than observing her first-hand or that transmitting her conversation is any more objectionable than repeating it to a third party.[200] There are at least two problems with this line of reasoning. First, to the extent that privacy is defined by social norms, most people find it more objectionable to be surreptitiously filmed or to have a conversation recorded than to have their private conversation repeated by one of the participants. Second, even if the doctrine made sense with regard to simple tape recordings of a conversation to which one is a party, it may not make sense with regard to other types of recording. There are more ways to conduct surveillance than ever before. Shotgun mikes can pick up sound from sixty yards away. Cameras can be hidden in hats; microphones can be strapped under a reporter's clothing. This new technology therefore gives the media the power to invade privacy in ways that current doctrine does not fully apprehend.

Taken together, the doctrinal flaws in the intrusion tort undermine a plaintiff's ability to recover for privacy invasions by the media. Equally important, these doctrinal flaws create a great deal of uncertainty about the scope of the tort's coverage. Plaintiffs find it difficult to determine whether their rights are protected, and the media have no advance notice regarding the types of newsgathering that will subject them to tort liability. Thus, the strength of the intrusion tort—that it is broad enough to cover various types of conduct—may also be its greatest failure.

2. An Illustration

To demonstrate the uncertainty inherent in the intrusion tort, consider a hypothetical involving surreptitious surveillance. Assume that a reporter wants to go undercover with hidden cameras to uncover evidence of unsanitary conditions in the meatpacking industry. The reporter has reliable evidence from employees of the plant that conditions are horrid, but the reporter believes that the story will not

199. *See id.*

200. *See* McClurg, *supra* note 25, at 1042.

garner much attention without pictures. May the reporter go undercover to gather news without fear of tort liability for intrusion? The answer is unclear.[201]

The leading cases on intrusive newsgathering point in different directions. One of the earliest surreptitious surveillance cases is *Dietemann v. Time, Inc.*[202] In *Dietemann*, two reporters for *Life* magazine entered Mr. Dietemann's home under the pretense that they were sent there by friends to obtain his medical assistance.[203] Dietemann, a "disabled veteran with little education," diagnosed the female reporter as suffering from a lump in her breast caused by eating "rancid butter eleven years, nine months, and seven days" prior to their meeting.[204] Meanwhile, the reporters photographed Dietemann and recorded all that went on in his home with the use of a hidden camera and hidden radio transmitter.[205] At trial, Dietemann received $1,000 for invasion of privacy that resulted in "injury to [his] feelings and peace of mind."[206]

On appeal, the Ninth Circuit held that the reporters' actions constituted an actionable invasion of privacy,[207] although the opinion provides little guidance as to the decisive factors in its decision.[208] Judge Hufstedler, writing for the court, observed that the intrusion occurred in the plaintiff's home and that the *Life* reporters used subterfuge to gain entrance.[209] Moreover, the court particularly emphasized that the reporters recorded and photographed Mr. Dietemann without his permission using "hidden mechanical

201. Obviously the answer depends to a certain extent on where the plant is located because tort law varies state by state.

202. 449 F.2d 245 (9th Cir. 1971).

203. *See id.* at 245-46. The reporters apparently found out about Mr. Dietemann's quackery from the police, who were investigating him. *See id.*

204. *Id.*

205. *See id.*

206. Dietemann v. Time, Inc., 284 F. Supp. 925, 932 (C.D. Cal. 1968).

207. *See Dietemann*, 449 F.2d at 250. The court found it unnecessary to decide whether the plaintiff's case should have been decided as an intrusion case, a private facts case, or a more expansive and general right to privacy case. However, at a later point in the opinion, the court explicitly characterized it as involving an "instance[] of intrusion . . . into spheres from which an ordinary man in plaintiff's position could reasonably expect that the particular defendant should be excluded." *Id.* (quoting Pearson v. Dodd, 410 F.2d 701, 704 (D.D.C. 1969).

208. The court refused to extend First Amendment protection to defendants' newsgathering methods. *See* discussion *supra* Part II.

209. *See Dietemann*, 449 F.2d at 249. Note that this behavior would have been acceptable if engaged in by the police. *See* On Lee v. United States, 343 U.S. 747 (1952) (holding that subterfuge used by an undercover agent to record a conversation, in which petitioner made self-incriminating statements, did not violate the Fourth Amendment).

contrivances."[210] Yet the decision does not indicate which of these factors, or which combination of factors, triggered liability. Was it the fact that the intrusion occurred in Dietemann's home, the most protected sphere of privacy? Was it that the reporters used a trick to gain entrance? Or was it merely hostility to new technology and what were, for the times, innovative newsgathering techniques?

The decision suggests that this last factor may have been the strongest in favor of liability. The court conceded that "[o]ne who invites another to his home or office takes a risk that the visitor may not be what he seems . . . ."[211] This language suggests that neither the fact that the subterfuge occurred in Dietemann's home nor the fact that the reporters used subterfuge to gain entrance were the primary factors in its decision. Furthermore, the court stressed that an individual "does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select."[212] If the basis for the decision is solely that the reporters used concealed recording devices, it is of questionable precedential value. Absent statutory prohibition, a party to a conversation may record it without consent.[213]

It is not clear that the use of concealed devices was the sole basis for the decision. Perhaps the reporters' intrusion would not have been actionable without the particular factual circumstances that were present—specifically, the use of subterfuge in the plaintiff's home coupled with the use of secret recording devices. Despite the uncertainty, *Dietemann* at least stands for the proposition that surreptitious surveillance may lead to liability, and the reporter wishing to use surreptitious surveillance in such a situation would be wise to proceed with caution.

On the other hand, several more recent decisions suggest that using surreptitious surveillance in the hypothetical scenario would not subject the reporter to liability. For example, contrast *Dietemann* with *Desnick v. American Broadcasting Cos.*[214] As discussed above, *Desnick* involved an undercover investigation of unnecessary cataract surgeries performed at the Desnick Eye Center, a chain of ophthalmic clinics performing more than 10,000 surgeries per year.[215] To obtain

210. *See Dietemann*, 449 F.2d at 249.
211. *Id.*
212. *Id.*
213. For further discussion of this subject, see Barnett, *supra* note 80, at 444.
214. 44 F.3d 1345 (7th Cir. 1995).
215. *See id.* at 1347; *supra* notes 88-92 and accompanying text.

information for the story, *Prime Time Live* armed seven people with hidden cameras and sent them to pose as patients seeking eye exams.[216] Desnick and two other doctors subsequently sued for trespass and invasion of privacy based on the undercover methods used by *Prime Time Live*.[217]

As noted above, the trespass claim failed because the doctors consented to the entry of the pseudo-patients. In dismissing the trespass claim, Judge Posner stressed that the "patients" entered premises that were "open to anyone expressing a desire for opthalmic services."[218] Moreover, the "patients" filmed professional (as opposed to personal) communications with the doctors and did so in a way that did not disrupt the plaintiffs' business activities.[219] Analogizing the pseudo-patients to restaurant critics, the court ultimately found that the defendants had not interfered with any interests that trespass is designed to protect.[220]

The court used this same logic to dispose of plaintiffs' invasion of privacy claim.[221] Plaintiffs had no viable cause of action for invasion of privacy because the defendant had neither revealed intimate facts about them nor recorded intimate conversations.[222] Thus, the court seemed to indicate that subterfuge and surreptitious recording alone will not transform an encounter in a *business setting* into an actionable invasion of privacy; at least if the subterfuge is not elaborate, the encounter occurs in a part of the business that is open to

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216. *See id.* at 1348.

217. In addition, the plaintiffs sued for defamation, wiretapping, and fraud. *See id.* at 1349-51. The fraud claim is particularly interesting. ABC producers allegedly assured Dr. Desnick that the story would involve neither ambush interviews nor undercover surveillance; they also assured him that the coverage would be "fair and balanced." *See id.* at 1348. Based on these assurances, Dr. Desnick allowed ABC to enter his Chicago office to film an operation and to interview doctors, employees, and patients of the Eye Center. *See id.* Dr. Desnick alleged that the "false promises" used by ABC to gain access to his office amounted to fraud. *See id.* at 1351. Judge Posner rejected this claim, intimating that Desnick could not have reasonably relied on the promises of the *Prime Time Live* producers:

> Investigative journalists well known for ruthlessness promise to wear kid gloves. They break their promise as any person of normal sophistication would expect. If that is "fraud," it is the kind against which potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods.

Id. at 1354.

218. *Id.* at 1352.

219. *See id.*

220. *See id.* at 1353.

221. *See id.* The court treated plaintiffs' complaint as raising both intrusion and private facts claims. *See id.*

222. *See id.*

the public, and the encounter concerns only business rather than personal matters.[223]

How, then, does one explain *Food Lion*? First, it is important to remember that *Food Lion* was *not* resolved as an invasion of privacy case; the jury ultimately found that the defendants had committed trespass, fraud, and breach of loyalty.[224] Second, the court explicitly distinguished *Food Lion* from *Desnick* on the ground that the newsgathering occurred in private areas of the Food Lion stores and involved "secret information."[225] The court also found that the reporters potentially exceeded the scope of Food Lion's consent to enter the property by their subsequent wrongful conduct, thereby making them liable for trespass under North Carolina law.[226] Finally, another key distinguishing feature may have been the extent of the deception *Prime Time Live* used to gain entry to Food Lion. In order to obtain employment at Food Lion, ABC reporters, with the help of a union attempting to unionize the grocery store chain,[227] gave false identities, references, and work histories to Food Lion.[228] One producer even said in her application that she "love[d] meat wrapping," and that she "would like to make a career with the company."[229] The reporters worked for Food Lion for about two weeks, obtaining almost fifty hours of footage using hidden cameras and microphones.[230] Compared to *Desnick*, therefore, the behavior of the reporters in the *Food Lion* case was both more deceptive and perhaps ultimately more intrusive.[231]

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223. Perhaps these same principles help resolve *Sanders v. American Broad. Cos.*, 60 Cal. Rptr. 2d 595 (Cal. Ct. App. 1997) and *Kersis v. Capital Cities/ABC, Inc.*, 22 Media L. Rptr. 2321 (Cal. Super. Ct. 1994). Both were undercover exposés of phony telepsychics. Both occurred on business premises, and both were taped by pseudo employees who were really working for *Prime Time Live*. The *Sanders* court held that the plaintiff had no reasonable expectation of privacy in his workplace, even though the premises were not open to the public. *See Sanders*, 60 Cal. Rptr. 2d at 598.

224. *See* Baker, *supra* note 153, at 29.

225. *See* Food Lion v. Capital Cities/ABC, Inc., 951 F. Supp. 1217, 1223 (M.D.N.C. 1996).

226. *See* Food Lion v. Capital Cities/ABC, Inc. 887 F. Supp. 811, 820 (M.D.N.C. 1995).

227. *See id.* at 814. The United Food & Commercial Workers International Union had been attempting to organize Food Lion employees for more than 10 years. *See id.*

228. *See id.* at 813-16.

229. Amy Singer, *Food, Lies & Videotape*, 19 AM. LAW., Apr. 1997, at 57, 59.

230. *See Food Lion*, 887 F. Supp. at 816.

231. Nonetheless, it is still difficult to know the exact scope of protection from liability a reporter will receive if she chooses to go undercover. In fact, lawyers for *Prime Time Live* initially authorized the undercover investigation of Food Lion. *See* Baker, *supra* note 153, at 28.

Looking at the cases, a media lawyer[232] attempting to advise a client whether or not to use surreptitious surveillance might conclude the following: reporters can go undercover to gather news provided they do not (1) invade the most private realms of a home or business, (2) engage in a pattern of deception that is "too" elaborate, or (3) rely on technology that picks up sights and sounds not available to the ordinary senses. As the next section suggests, a fourth factor may also be at work, although courts do not always make it explicit. Liability is also less likely if the story being sought is of great public importance. If any of these factors are weak, the lawyer's advice to his media clients becomes more problematic.

C. *The Economics of Intrusion*

An argument can be made that the uncertain scope of protection given to newsgathering achieves beneficial results because it forces media defendants to weigh the intrusiveness of their behavior against the importance of the story in deciding whether or not to employ intrusive newsgathering methods. Yet if an appropriate balance is struck, it happens only accidentally. Purely as a jurisprudential matter, serendipity is a questionable basis for law's operation. As a practical matter, the current uncertainty has negative consequences for both the media and those whose privacy they invade.

1. Overdeterrence and Underdeterrence of Intrusive Newsgathering

The current uncertainty in the tort law governing newsgathering, and particularly the law of intrusion, leads to both overdeterrence and underdeterrence of intrusive newsgathering.

In situations where legal liability is uncertain, the question that the lawyer and her media client must ask becomes an economic one. The media's risk of being forced to pay a judgment (or even of being sued) in any given case is miniscule. Nonetheless, litigation costs can run to astronomical figures even if the media defendant ultimately prevails,[233] for as one commentator has noted, "the more complicated the law, the more expensive the legal fees."[234] If the media defendant

232. The media commonly rely on legal counsel to advise them as to whether a proposed newsgathering technique is actionable.

233. *See* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 118-19 (1991) (repeating press arguments that the threat of large pretrial discovery costs have a chilling effect on what information is published). There is some indication that privacy suits have an even greater chilling effect on the media than libel suits. *See* BRUCE W. SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION 427 (1987).

234. RODNEY A. SMOLLA, SUING THE PRESS 250 (1986) [hereinafter SMOLLA, SUING].

does not prevail, damages can run into the millions, an amount large enough to make even the wealthiest media organization think twice about employing questionable newsgathering methods.[235] Another intangible factor that must be considered before approving questionable newsgathering methods is that a lawsuit can interfere with the ongoing business of gathering and publishing information. In the end, the economic equation comes down to whether or not the small risk of being held liable—coupled with the potential for exorbitant litigation costs, a potentially huge judgment if the risk materializes, and the attendant administrative burden of defending a law suit—make pursuing the story with intrusive newsgathering methods worthwhile.[236]

The answer depends partially on the importance of the story. If the story is of great public importance, a media organization is likely to be safe from legal liability in pursuing it. Consider *20/20*'s riveting exposé of abuses in nursing homes in Texas.[237] The images of elderly residents with sores on their bodies, lying in filth, and tied to their beds left an indelible impression on viewers, and the public outrage generated by the story prompted immediate reforms by the Texas legislature. Given the great public importance of the *20/20* story, it seems unlikely that any plaintiff would bring suit, or, even if one did, that any court would find *20/20* liable after performing such a great public service.

There are, of course, other less laudable factors that shape the economic equation of whether to use questionable newsgathering techniques. One reason that *20/20* could afford to take the risk of using hidden cameras is that dramatic exposés lead to high ratings and, consequently, high profits. An exposé on nursing homes may be highly profitable, but so may an exposé on fraudulent telepsychics. If

235. *See id.*

236. Thus, perhaps Professor Kalven was right in speculating that "[t]he right of privacy is preeminently an instance where the law in action may change the significance of the law in the books." Kalven, *supra* note 159, at 339.

237. *See 20/20: Victims of Greed* (ABC television broadcast, Oct. 25, 1991). In this instance, going undercover was necessary to spur public outrage and prompt reform. In an award winning series of newspaper articles, reporter Nancy Stancill first exposed the shocking treatment of patients in Texas nursing homes. *See* Nancy Stancill, *Deadly Neglect: Texas and Its Nursing Homes* (pts. 1-5), HOUS. CHRON., July 22-26, 1990, at A1. However, reforms did not ensue until a three-month undercover investigation by *20/20* produced graphic footage of residents tied to their beds, starving and lying in filth. *See* Ann Hodges, *Texas Nursing Home Woes Focus of 20/20*, HOUS. CHRON., Oct. 24, 1991, at 3.

the ratings are high enough, invading privacy is worth the risk, regardless of the public significance of the story obtained.[238]

Another key factor in the decision whether to use questionable newsgathering techniques is the economic strength of the media organization involved. For a rich network like ABC, which makes tremendous profits from its news magazine shows, a 5.5 million dollar verdict like the one in *Food Lion* (reduced to $315,000 on appeal)[239] is a setback. But it does not jeopardize the network's long-term financial health.

Consider, though, the plight of a local television station. While the local station might be able to uncover serious abuses by going undercover, even a small threat of liability may be enough to deter it from doing so. Although the extent of this chilling effect is hard to assess, the Supreme Court has long noted that the threat of large damage awards causes individuals to "steer far wider of the unlawful zone" than is strictly necessary to avoid legal liability.[240] After all, paying the legal fees alone to defend a tort action could jeopardize the financial existence of a small station. Small newspapers and magazines have little extra money to pay legal fees, much less huge judgments.[241] Thus, the message the media receives from a verdict like the one in *Food Lion* is that surreptitious surveillance and other nontraditional types of newsgathering are simply not worth the risk.

2. Creating False Hopes

The law's equivocal protection of newsgathering is not only detrimental to the media, it is also harmful to the public interest. To the extent that current law deters the media from pursuing stories of great public importance, the public's First Amendment "right to

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238. The law's failure to adequately deter unduly intrusive yet highly profitable newsgathering also has negative secondary effects. The media's economic incentive is to constantly push the edge of the envelope to obtain a larger portion of the reading or viewing audience. Intrusions become just another weapon in the war for ratings. Yet the more the media invades privacy, the more the public comes to view these invasions as ordinary and therefore acceptable. The more ordinary intrusive techniques become, the harder it becomes for courts and juries to decide that such techniques are highly offensive to the reasonable person. Thus, the law's failure to deter intrusive newsgathering has a corrosive effect on even the limited right to privacy that the law is designed to protect.

239. *See* Food Lion v. Capital Cities/ABC, Inc., 984 F. Supp. 923 (M.D.N.C. 1997).

240. Speiser v. Randall, 357 U.S. 513, 526 (1958).

241. The chilling effect is compounded in intrusion cases by the fact that courts have never settled on the proper measure of damages. Some courts have held that a plaintiff can recover damages for both the underlying intrusion and the subsequent publication, and others limit damages to those stemming from the intrusion only. *See* King & Muto, *supra* note 157, at 937 (citing cases).

know" and even its health and safety may be jeopardized.[242] To the extent that current law fails to deter the most extreme types of intrusive newsgathering, the right to privacy suffers.

There is a second sense in which the uncertainty in current law is detrimental to plaintiffs. Because the law is so uncertain, plaintiffs may choose to sue for media intrusions when they have no realistic chance of prevailing. Plaintiffs in media cases are typically represented by lawyers working on contingency fees. Unlike the lawyers who tend to represent the media, plaintiffs' lawyers may not be "repeat players" in media litigation and thus may be unduly lured by the prospect of a huge judgment without realizing the remote chances of recovering such a verdict.[243] If plaintiffs' lawyers really studied the statistics on plaintiffs' success rates, they might reasonably decide that the chances of prevailing are too remote to justify suing the media, particularly because the media's lawyers are prepared to vigorously defend against liability to ensure that negative precedents are not established.

Perhaps plaintiffs and their lawyers do understand this phenomenon. After all, the number of suits brought against the press have hardly kept pace with the increasing use of intrusive newsgathering methods.[244] One explanation for this phenomenon might be that plaintiffs have made a realistic calculation of the odds and decided that chances of winning are too small to justify suing. Another explanation is that much of the general public believes (erroneously, at least as a matter of legal theory) that the media are always insulated from liability by the First Amendment.[245] Even if the plaintiffs are celebrities who are capable of hiring the finest attorneys and paying to pursue largely symbolic goals, these plaintiffs may feel

242. *See* LeBel, *Getting the News*, *supra* note 17, at 1153. As Professor LeBel has pointed out, "acquisition of information is often an expensive enterprise." *Id.* It is also a time-consuming one. Although the media's First Amendment interest in gathering news flows from their role as surrogates of the general public, it still may be justifiable to give the media additional protection because the media have both the resources and incentives to invest in the acquisition of socially beneficial information about public and private wrongdoing. *See id.* The media therefore play a watchdog role over and above that performed by government officials. *See id.* at 1154 ("Media activity, particularly in the form of investigative journalism, can be a valuable supplement to official conduct.").

243. On the other hand, plaintiffs' lawyers, who are used to taking huge risks for huge payoffs, may rationally decide that the prospect of a multimillion dollar verdict is worth a gamble.

244. *See* Gavison, *supra* note 197, at 457 (suggesting factors that might explain the "relative rarity of legal actions" for invasion of privacy).

245. *See generally* SMOLLA, SUING, *supra* note 234.

that it is not worth antagonizing the press, upon whom, to a large extent, their celebrity status depends.[246]

Despite the many flaws in the intrusion tort, it still holds out promise as a remedy because it is specifically designed to protect privacy, and it is broad enough to adapt to the constantly changing array of situations that arise in this area. Moreover, as a tort, intrusion is suited to achieving the delicate balance between the public interest in certain information and the interest in preserving individual privacy. Before proposing reforms to the tort, it is important to understand the difficulties the law faces in accommodating privacy and newsgathering.

V. PRIVACY IN AN OPEN SOCIETY

A. Is the Intrusion Tort an Anachronism?

If the law is to provide a more effective remedy for the problem of intrusive newsgathering, it must give the media and their lawyers more concrete guidance as to what newsgathering behaviors are proscribed. Simultaneously, the law must remain flexible enough to encompass the wide variety of intrusive newsgathering techniques. It must be nuanced enough to make fine and highly contextual distinctions between legitimate and tortious newsgathering. Obviously, this is no mean feat. But an even greater obstacle plagues efforts to reform the tort law safeguarding privacy from media intrusions.

Until this point, this Article has proceeded as if increased protection of privacy from media intrusions needed no philosophical justification. Privacy, after all, is a cherished value in American life. Polls suggest that Americans are concerned about encroachments into their private lives,[247] and numerous legal commentators have offered paeans to privacy's virtues and justifications for its legal protection.

Yet as Professor David Anderson has pointed out, not only do Americans cherish privacy, they "also cherish information, candor and freedom of speech."[248] When the two values conflict, it is not clear that privacy should prevail.

This problem is particularly acute because the privacy protected by the intrusion tort is explicitly defined by reference to community

246. *See id.*

247. SMITH & LICHTYER, *supra* note 39, at 118-19 ("A full 80% of the general public think that the news media often invade people's privacy, while less than one in five (17%) think that the media generally respect people's privacy.").

248. ANDERSON, USING PEOPLE, *supra* note 126, at 13.

norms. The realm of solitude protected by the intrusion tort is not merely a zone of spatial or physical access.[249] Instead, as Professor Robert Post has convincingly demonstrated, the realm of privacy protected by the intrusion tort "cannot be reduced to objective facts like spatial distance or information or observability; it can only be understood by reference to norms of behavior."[250]

The boundaries of this realm are transgressed only when a defendant's behavior would be highly offensive to the reasonable person, so the responsibility of deciding whether the defendant has complied with community standards of social deportment falls upon the jury.[251] The reasonable person standard is nothing more than an artificial construct;[252] it is a figment of the legal imagination. This standard nonetheless serves the important function of allowing juries to define certain conduct as "socially unreasonable"[253] in a complex

249. *See* Gavison, *supra* note 197, at 433 & n.40 (defining solitude as protecting physical access). Gavison searches for a "neutral and descriptive" concept of privacy. *See id.* at 424. This neutral and descriptive concept is valuable in helping to understand why the law should protect privacy, but ultimately the law must make a value judgment as to how much privacy should be protected, a point Gavison seems to concede. *See id.* "[I]n the context of legal protection, privacy should also indicate a value." *Id.*

250. Post, *Social Foundations*, *supra* note 129, at 969.

251. This is not to say that there are no other definitions of privacy. Indeed, much ink has been spilled in trying to define this rather amorphous concept or in rejecting the possibility of achieving a workable definition. *See, e.g.*, ALAN WESTIN, PRIVACY AND FREEDOM 7 (1967) (defining privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"); Gavison, *supra* note 197, at 423 (describing privacy as consisting of three related principles—anonymity, seclusion, and autonomy); Richard Posner, *The Right to Privacy*, 12 GA. L. REV. 393 (1978) (analyzing privacy from an economic perspective); Judith J. Thompson, *The Right to Privacy*, *in* RIGHTS, RESTITUTION AND RISK, 117 (1986) (observing that "nobody seems to have any clear idea" about what constitutes the right to privacy); Zimmerman, *supra* note 126, at 364-65 (arguing that the private facts tort is not an effective remedy for invasions of privacy, and that perhaps the problem defies legal solution). Nonetheless, Post's sociological account of privacy best describes the nature of the right protected by the intrusion tort. *See* Post, *Social Foundations*, *supra* note 129, at 959-68.

252. Indeed, a classic exercise set by torts professors for their students is to identify the characteristics of the so-called reasonable person. Professors themselves also indulge in this exercise. *See* Fleming James, Jr., *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1 (1951); *cf.* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 21 (1988) (arguing that the "reasonable man" concept, even if denoted the "reasonable person" concept, implicitly reflects male norms).

253. *See* KEETON, *supra* note 132, at 6. Tort law uses the reasonable person standard in many different contexts. The law of battery, for example, is defined as intentional contact that would be harmful or offensive to a reasonable person. Rarely does one hear calls for the abolition of battery on the ground that bodily integrity is too amorphous a concept to merit protection or that the reasonable person standard is simply too vague to serve as a predicate for legal liability. For definitions of battery and the interests it protects, see Ghassemieh v. Schafer, 447 A.2d 84, 87 (Md. Ct. Spec. App. 1982); Garratt v. Dailey, 279 P.2d 1091, 1093 (Wash. 1955); RESTATEMENT, *supra* note 14, § 19. Likewise, few commentators today question the desirability of providing redress for emotional distress, even though the interest

and constantly changing society.[254] The standard is overtly normative. By determining whether the defendant's behavior was offensive to a reasonable person, the jury defines the realm of solitude that the plaintiff had a right to expect,[255] and in so doing establishes the rules of conduct or "civility rules" by which we constitute ourselves as a community.[256]

Because the intrusion tort is designed to enforce the community's existing civility rules, the tort is highly adaptable to changes in those rules. The adaptability of the tort, however, creates practical problems in enforcing the rights it creates.

First, social norms are notoriously difficult to identify.[257] Although polls indicate that society values privacy, polls neither indicate the weight privacy should be given in any particular factual scenario, nor what interests the concept encompasses. This inherent difficulty gives the realm of privacy protected by intrusion a somewhat amorphous quality, and this quality partially explains the law's failure to adequately protect the right.[258] When faced with a concept as vague as privacy, courts understandably err on the side of the more familiar need for press freedom. This obstacle should not, however, cause the legal community to despair of providing meaningful privacy

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protected is inherently difficult to define. Instead, the debate tends to center on how to protect against emotional distress and what kinds of emotional distress are worthy of protection rather than on whether the tort should exist at all.

254. As Leon Green has argued, this flexibility is precisely the beauty of the concept (although Green was discussing the use of the reasonable person standard in negligence law rather than in the law of privacy). *See* Leon Green, *The Negligence Issue*, 37 YALE L.J. 1029, 1039 (1928); *see also* Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 584-85 (1993) (noting that tort law's flexibility is reflected "in the development of new causes of action . . . to accommodate majoritarian notions of right and wrong . . . in the open-endedness of the elements that comprise a number of tort causes of action . . . and in the recoverability of substantial damages for intangible affronts to dignity").

255. This feature of the intrusion tort has two practical consequences. First, the unduly sensitive plaintiff will not recover even if she has suffered genuine emotional injury due to defendant's behavior. Second, the plaintiff need not prove any actual injury once it is established that the social norms of the community have been transgressed. *See* Post, *Social Foundations*, *supra* note 129, at 964.

256. *See id.* at 963.

257. *See* Lyrissa Barnett Lidsky, *Defamation, Reputation and the Myth of Community*, 71 WASH. L. REV. 1, 20 (1996).

258. Judge Skelly Wright describes the law's failure to "articulate a well defined, fully developed body of law" as understandable in light of the "amorphous quality of the right to privacy." Skelly Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630, 631 (1968); *see* Don R. Pember & Dwight L. Teeter, Jr., *Privacy and the Press Since* Time, Inc. v. Hill, 50 WASH. L. REV. 57, 57 (1974) (noting that "[t]o say that the law of privacy is not a great hallmark of logic and clarity in American law is to indulge in egregious understatement").

protection, as some commentators have suggested.[259] The concept of negligence (or breach) in tort law hinges on whether the defendant behaved as a reasonable person under the circumstances and could also be characterized as somewhat vague and amorphous. Yet it is precisely this feature of negligence law that makes it a workable standard, for as Leon Green has argued, the "number of instances of conduct which could be labelled either as negligent or non-negligent is beyond the limits of any catalog the law can make."[260] Rather than seeking to fashion a precise definition of privacy law, perhaps privacy law, like negligence law, should be content to accept a rough formula that permits juries to reach an accommodation between competing values.

A second, more fundamental problem with how intrusion defines privacy is that social norms are fluid and that they change over time.[261] From a cursory look at American popular culture, one might conclude that Americans do not expect or even desire protection from media intrusions.[262] The media invade privacy because it sells, and Americans have an apparently voracious appetite for stories obtained by intrusive means. The paparazzi photographers who hounded Princess Diana received rich rewards for their efforts, selling their photos for as much as $500,000.[263] The publications that bought the photos were making a wise investment, for these expenditures were almost certain to be recouped in increased sales at the newsstand. Even the coverage of her death, which was extraordinarily extensive, reflected the enormous public interest in the most minute details of her life.

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259. *See, e.g.*, Kalven, *supra* note 159, at 327 (arguing that the privacy torts are of minimal use except for commercial misappropriation).

260. Green, *supra* note 254, at 1029-30.

261. *See* Ronald J. Krotoszynski, Jr., Note, *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 6 DUKE L.J. 1398, 1401 (1990) ("[B]ecause privacy concerns are, in large part, defined in relation to a particular society at a particular point in time, the concept itself if likely to evolve.").

262. If society does not actually value privacy, but merely pays lip service to it, legal remedies are likely to be ineffective. As Thomas Cooley wrote:

> Any standard by which the law can undertake to compel the people to regulate their conduct must be one generally and spontaneously accepted, so that their approving judgment shall accompany the endeavor to enforce conformity. It must not be one that a majority of the people do not habitually observe, because if the majority of the people are law breakers, it is obvious that only some extraneous power could ever enforce the law.

1 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT § 3, at 5 (4th ed. 1932).

263. *See Di's New Boyfriend* (NPR radio broadcast, Aug. 12, 1997).

The appetite for stories obtained by intrusive means seems almost boundless. Undercover investigations of the sort condemned in *Food Lion* commonly run during sweeps week, because the media know that such investigations garner large audiences. "Reality television shows" capitalize on showing people in moments of crisis, thereby affording audiences a titillating form of emotional voyeurism. Even stolen information can find a market as long as it is sufficiently provocative. The thief who stole a videotape of rock guitarist Tommy Lee having sex with his wife, Pamela Anderson Lee, accurately predicted that the tape would sell.[264] In fact, *Penthouse* magazine, also predicting that the public's response to the tape would make the investment worthwhile, purchased the tape.[265]

If the market has buyers of private information, it also has a number of willing sellers. Daytime television is filled with individuals who trot out intimate details of their lives for public consumption. There is no apparent shortage of volunteers for MTV's "The Real World," which films a group of roommates throughout every hour of their daily lives together. The Internet is likewise filled with people willing to reveal the most intimate and disgusting details about themselves.

But the American appetite for private information does not necessarily indicate that Americans accord privacy little or no value. The very same individual who enjoys watching an undercover exposé of a phony telepsychic or the latest pick-up lines in a local bar would probably be outraged if *Prime Time Live* crews came to his workplace and surreptitiously filmed his every move. Few individuals apply

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264. *See* Liz Braun, *And Another Thing*, TORONTO SUN, Apr. 2, 1996, at 39 (reporting the Lee claim that a construction worker stole the tape from their home and then sold the tape to *Penthouse*). *Penthouse* published pictures from the tape in June 1996. *See Pamela Anderson and Tommy Lee v. Penthouse Decision Opens Door on Private Lives*, BUS. WIRE, Apr. 4, 1997. The Lees sued for invasion of privacy and misappropriation. *See id.* The court dismissed the invasion of privacy claim because the Lees previously openly discussed their sex lives, opening this part of their lives to public scrutiny. *See id.* The court dismissed the misappropriation claim because the pictures were used in connection with a newsworthy story. *See id.*

265. The tape was very profitable. The pictures from the tape appeared in Penthouse and the Internet Entertainment Group (IEG) posted the tape on the internet. *See* Romesh Ratnesar, *The Honeymooners*, TIME, Jan. 12, 1998, at 74. The Lees sought an injunction against IEG, but a California Superior Court judge denied the injunction. *See id.* The couple then settled with IEG, although there is apparently a disagreement about the terms of the settlement. *See Pamela Anderson*, CITY NEWS SERV., Mar. 20, 1998 (reporting that Anderson's attorney claims that the terms of the settlement are so vague that they will probably have to go to court to determine what the settlement means). IEG charges $14.95 to watch the tape on the internet. *See id.* IEG has also released a version of the tape on video, which is being sold nationwide and has become the best-selling adult video of all time. *See id.*

Kantian analysis to privacy; we value privacy for ourselves but are still willing to invade, if only vicariously, the privacy of others. Thus, the paradox of privacy—that Americans pay lip service to privacy in polls while simultaneously consuming the privacy of others—might not really be a paradox, but merely a common facet of human nature.

Moreover, those who argue that we no longer value privacy might want to look at the historical evidence.[266] In the sixteenth century, people expected little sexual privacy. Poor families often slept in one room, if not one bed. Kings were accustomed to having others in their bedchambers; indeed, to be appointed to serve the king in his bedchamber was a great honor for nobles of his realm. Today, in contrast, no parent would dream of having sex in front of children, and houses are designed to separate parents' bedrooms from those of their children.[267]

Does this evidence suggest that Americans today value privacy more than their ancestors did? Hardly, when one considers that newspapers today are filled with information (such as the President's sexual assignations) that would have been unthinkable to publish just fifty years ago. Rather, it might be more accurate to conclude that while the nature of privacy has changed, the importance of privacy has not.

B. The Social Value of Privacy

Even a media-saturated society should value the intrusion tort because it protects individuals from having to live every moment of their lives in the blinding glare of public scrutiny. Privacy enables the individual to preserve a sphere in which to develop her ideas and goals,[268] to let her guard down,[269] and to develop relationships of trust

266. Or the cultural evidence. *See* Alan Westin, *The Origins of Modern Claims to Privacy*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 56, 67 (Ferdinand David Schoeman ed., 1984) ("[One] element of privacy that seems universal is a tendency on the part of individuals to invade the privacy of others, and of society to engage in surveillance to guard against anti-social conduct."). Human beings have always had an appetite for private information, particularly when it concerns those in positions of power and authority, for possessing private information about another person is one way of obtaining power over them. *See id.* at 67-68. "People want to know what others are doing, especially the great and the powerful, partly as a means of gauging their own performances and desires and partly as a means of vicarious experience." *Id.*; *see* SUZANNE GARMENT, SCANDAL: THE CULTURE OF MISTRUST IN AMERICAN POLITICS 2 (1991). "[S]candal persists because it is, across eras and nations, utterly irresistible. When we see the public masks slip, we become like those laboratory rats who, when taught to trip a switch stimulating pleasure centers in their brains, keep doing it over and over, to the exclusion of food and sleep." *Id.*

267. *See* ANDERSON, USING PEOPLE, *supra* note 126.

268. *See* Bloustein, *supra* note 159, at 974 (arguing that privacy allows the individual to develop his individuality and that "the gist of the wrong in the intrusion cases is not the

and intimacy.[270] George Orwell graphically depicted the horrors of life lived perpetually in the spotlight: "There was of course no way of knowing whether you were being watched at any given moment. . . . You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized."[271]

For most people, Orwell's scenario remains rather remote. We tend to believe that only celebrities like Princess Diana are subject to being dogged at every turn by the media, and in general we have little empathy for their plight. Celebrities, after all, thrive on publicity, and although they sacrifice a certain amount of privacy in return, they are also able to buy a zone of privacy that is unavailable to the average citizen. How many average citizens have the luxury of owning several houses, flying on a private jet, or vacationing on a private island?

Yet several recent examples indicate that the average citizen's privacy is protected from media intrusions primarily by media disinterest,[272] a tenuous basis at best for privacy protection. Almost any private person can be plunged into the spotlight through forces outside her control. Monica Lewinsky, the White House intern who had an affair with President Clinton, no longer has the freedom to leave her home without undergoing an almost physical assault by reporters. People she considered friends are eager to grant interviews to the media to help journalists dissect every facet of her personality. In helping people involved in the Atlanta Olympics bombing, security guard Richard Jewell undoubtedly never dreamed that he would soon have reporters camped on his lawn and probing every facet of his personal life.[273] Consider also the telepsychics "unmasked" by the undercover investigation of *Prime Time Live*.[274] These individuals did not realize until too late that every moment of their work lives were

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intentional infliction of mental distress but rather a blow to human dignity, an assault on human personality"); Gavison, *supra* note 197, at 446-47 ("[Privacy] is essential for all human activities that require concentration, such as learning, writing, and all forms of creativity.").

269. *See* Gavison, *supra* note 197, at 447.

270. I do not claim to develop a comprehensive theory of how invasions of privacy harm the individual, for this task has been performed admirably by others. *See, e.g.*, Bloustein, *supra* note 159, at 972-93; Gavison, *supra* note 197, at 446; Post, *Social Foundations*, *supra* note 129, at 959-68; Westin, *supra* note 266, at 56-71.

271. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 2 (Martin Secker & Warburg Ltd. 1984) (1949).

272. *See* Gavison, *supra* note 197, at 469.

273. *See supra* note 41 and accompanying text.

274. *See* Sanders v. American Broad. Cos., 60 Cal. Rptr. 2d 595 (Cal. Ct. App. 1997); Kersis v. Capital Cities/ABC, Inc., 22 Media L. Rep. 2321 (Cal. Super. Ct. 1994).

being secretly recorded, to be ultimately broadcast on national television.[275] Instead, they incorrectly assumed that they were protected at least by media disinterest. They were wrong, with dramatic consequences.[276]

These scenarios are disturbing because individuals subjected to intrusive surveillance seem to suffer an almost palpable dignitary harm. But if that were the only basis for protecting privacy, the law might justifiably conclude that individual harm must go without recompense to satisfy the broader societal interest in the gathering and dissemination of information. Yet accommodating privacy and press freedoms is not simply a matter of weighing individual harm against societal benefit. Liberal society is committed to preserving individual freedom, and one of its ideals is to treat each of its citizens with respect and concern. Society in turn benefits when its members are free to pursue their own goals and dreams without undue interference from government or from other citizens.[277]

Paradoxically, protecting privacy may also promote democratic self-governance, one of the core values safeguarded by the First Amendment.[278] Freedom of speech and freedom of the press foster democratic self-governance by encouraging lively and enlightened debate on public issues. Protecting individual privacy from undue intrusions may also foster a richer and more meaningful public dialogue. Protecting privacy allows the individual to establish boundaries between himself and his community, and, in doing so, allows him to establish his individuality.[279] It is his individuality, in turn, that enables him to offer unique and meaningful contributions to the public dialogue.

Protecting privacy further fosters public debate because to the extent society denies citizens protection from media intrusions,

275. *See Sanders*, 60 Cal. Rptr. 2d. at 596; *Kersis*, 22 Media L. Rep. at 2322.

276. Allegedly as a result of the *Prime Time Live* exposure, one of the *Kersis* workers committed suicide. *See* Kersis v. Capital Cities/ABC, Inc., 25 Media L. Rep. 1701, 1702 (9th Cir. 1997).

277. *See* Gavison, *supra* note 197, at 455. "We desire a society in which individuals can grow, maintain their mental health and autonomy, create and maintain human relations, and lead meaningful lives." *Id.*

278. *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 251 (arguing that the First Amendment allows voters to acquire the "intelligence, integrity, sensitivity, and generous devotion" that is necessary for self-governance).

279. *See* Post, *Social Foundations*, *supra* note 129, at 973 ("An individual's ability to press or to waive territorial claims, his ability to choose respect or intimacy, is deeply empowering for his sense of himself as an independent or autonomous person."); Jeffrey Reiman, *Privacy, Intimacy and Personhood*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 266, at 310 ("Privacy is a social ritual by means of which an individual's moral title to his existence is conferred.").

citizens may decide to forego participation in public debate in hopes of preserving a sphere of privacy by virtue of media disinterest if not by legal sanction.[280] Even those citizens who are dragged into public debate by virtue of media intrusions become forced participants in the debate—not as subjects but as objects. These victims may find themselves effectively silenced and unable to make meaningful contributions because the terms of the debate have already been framed by others.[281]

C. *Newsgathering as a Public Good*

If privacy is a public good, so too is newsgathering.[282] In order to strike a proper balance between the two, however, it is important to understand the precise nature of society's interest in newsgathering.

The Supreme Court has refused with good cause to carve out an extensive constitutional privilege to gather news.[283] The first objection to creating such a privilege is largely administrative but nonetheless formidable. If the Court were to create a constitutional privilege to gather news, the Court would have to resolve an issue it has traditionally evaded: who is the press?[284] The Court would be forced

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280. *See* Anderson, *Libel Law*, *supra* note 123, at 531 (arguing that the actual malice rule "deters participation in public life [because] [n]o rational person can fail to take into account the reputational consequences of this rule when deciding whether to run for public office").

281. This point should not be overemphasized. After all, the premise of the "public figure" doctrine in defamation law is that even involuntary public figures have access to channels of communication to combat defamatory statements.

282. There is a necessary tension between these two public goods because the media "are, in a literal sense, in the 'anti-privacy' business." McQuail, *supra* note 19, at 181. Thus the question is not whether the media will be allowed to invade privacy but how much.

283. As a constitutional matter, the Court could choose to balance the state's interest in imposing tort liability for intrusion against a First Amendment right to gather news. *See* LeBel, *Getting the News*, *supra* note 17, at 1145 (arguing that "news*gathering* is a realm of journalistic activity that calls out for constitutional scrutiny—and, if appropriate, constitutional protection—just as much as does news *publication*"). Indeed, the Court has taken a similar approach with defamation and with imposing liability for publication of private facts. *See, e.g.*, Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (plaintiff may not recover under state tort law where defendant publishes truthful information lawfully obtained about a matter of public significance, unless plaintiff is able to show that the state's remedy is necessary to achieve a state interest of the highest order); New York Times v. Sullivan, 376 U.S. 254, 283 (1964) (creating a constitutional privilege for statements that defame public officials, at least when such statements are made without "actual malice"). *See generally* Elaine W. Shoben, *Uncommon Law and the Bill of Rights: The Woes of Constitutionalizing State Common-Law Torts*, 1992 U. ILL. L. REV. 173 (arguing that constitutional scrutiny of state tort law leads to complexity and confusion).

284. *See* Branzburg v. Hayes, 408 U.S. 665, 703-05 (1972) (rejecting a constitutional privilege for reporters to refuse to answer grand jury subpoenas, in part because if the privilege were granted, "it would be necessary to define those categories of newsmen who qualified for the privilege").

to decide whether to continue to accord the "lonely pamphleteer" as much First Amendment protection as the institutional press (for example, the *New York Times* or the *Washington Post*).[285] The emergence of new technologies further complicates the problem of choosing between an institutional definition of the press and a functional definition. These new technologies make each citizen capable of becoming the "lonely pamphleteer" that the First Amendment is designed to protect.[286] If the Court did limit the privilege to the institutional press, the Court would be forced to determine whether the privilege extended only to reputable news media organizations or to tabloids and other entertainment media. This inquiry obviously poses thorny issues for the Court.

Even if these administrative obstacles could be overcome, extending a constitutional privilege to gather news would largely immunize the media from the reach of state tort law. Such immunization would establish the media as a quasi-governmental watchdog with powers equal to or perhaps even superior to those of the police. This prospect is disturbing because it would give the media a source of largely unchecked investigative power. Federal and state constitutions place limits on the investigative powers of the police, circumscribing, for example, their ability to invade private homes. The police are also subject to control by elected officials, and may act only under the auspices of substantive law passed by legislatures. The media, on the other hand, would not be subject to these restraints, and this may explain the Supreme Court's reluctance to accord the media newsgathering privileges over and above those of the ordinary citizen.

Newsgathering does merit some degree of legal accommodation due to its intimate connection to news dissemination. Although the media do not merit the same investigative powers as the police, even nontraditional reporting methods deserve some measure of legal protection due to the special role of the media in modern society. The media are uniquely positioned to safeguard public welfare by exposing crime, corruption and fraud, and the media have both the institutional incentives and resources necessary to gather this information.[287]

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285. *See id.* at 704 (noting the traditional doctrine that the "lonely pamphleteer" has as much right to freedom of the press as a large metropolitan newspaper).

286. Finally, the creation of a constitutional right to gather news would potentially require the government to take affirmative steps to make certain types of information available to the public. Although much information must be made available now under the Freedom of Information Act and other types of public records laws, the increased administrative burden of creating a constitutional right to certain types of information would be tremendous.

287. *See* LeBel, *Getting the News*, *supra* note 17, at 1153.

Media investigations that expose wrongdoers in the private sector are "a valuable supplement to official conduct" because the government has neither the time nor the resources to investigate all private wrongdoing.[288] Media investigations of the public sector help citizens monitor the performance of the official branches of government.[289] Indeed, it is this watchdog function that underlies the description of the press as the Fourth Estate[290] of government.

Newsgathering is an important right, but it is not an absolute one. Although newsgathering helps produce valuable public information, recognition of an extensive right to gather news would seriously threaten the autonomy and freedom of the targets of such investigations. The challenge for tort law, and particularly for the tort of intrusion, is to assess accurately the consequences of tipping the balance between privacy and newsgathering in one direction or the other.

D. Newsgathering and Nuances of Context

Even if tort law were to acquire a richer philosophical understanding of both the privacy right protected by the intrusion tort and the right to gather news, striking an appropriate balance between them would still present practical difficulties. The distinctions between tortious and nontortious newsgathering will continue to hinge on fine nuances of context, and the law will still have difficulty in specifying the distinguishing characteristics of intrusive newsgathering.

Consider, for example, the difficulty the law faces in determining whether or not undercover investigations are unwarranted intrusions. Undercover reporting has an illustrious history in helping to promote social reform. In the modern era, undercover reporting has exposed abuse and neglect of the elderly,[291] children,[292] and the mentally ill.[293]

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288. *Id.* at 1154. To a certain extent, the distinction between the private sector and the public sector is an artificial one. In 1967, the Supreme Court took note of the increasing interaction between government and private industry and the "rapid fusion of economic and political power, [the] merging of science, industry, and government, and [the] high degree of interaction between the intellectual, governmental, and business worlds." Curtis Publ'g Co. v. Butts, 388 U.S. 130, 163 (1967) (Warren, C.J., concurring in the result).

289. *See* Nick D. Williams, *America's Third Force: The Watchdog Press*, *in* THE RESPONSIBILITY OF THE PRESS 169, 170-71 (Gerald Gross ed., 1966).

290. *See, e.g.*, POWE, *supra* note 233.

291. *See 20/20: Victims of Greed*, *supra* note 237.

292. *See* Kathleen Kerr, *Out of This World: In the City's Shadow, the Most Fragile of Kids are Prey to Assaults in a State Hospital*, NEWSDAY, Dec. 6, 1992, at 7 (after trying to gain entry by ordinary means, the reporter resorted to going undercover).

Undercover reporting has also revealed the conditions of slave labor camps[294] and sweatshops,[295] and has unmasked corrupt government officials.[296] This exposure often generates the widespread public outrage necessary to spur rapid reform.

In these cases, the intrusiveness of the means used to gather the story seems justified by the public interest served. Yet these same investigative tools lend themselves to less worthy ends, and what is justifiable in one context may be unjustifiable in another. Compare the *20/20* story on nursing home abuses[297] to the *Life* exposé of Mr. Dietemann's medical quackery in *Dietemann v. Time, Inc.*[298] The use of hidden cameras by *20/20* was apparently essential to galvanize public opinion and spur reform of life-threatening abuses. Indeed, print journalist Nancy Stancill originally broke the story in an award-winning series of articles in the *Houston Chronicle*,[299] but reforms did not ensue until *20/20* documented the abuses in a form the public could not ignore.[300] In *Dietemann*, on the other hand, the *Life* reporters provided titillating details about Dietemann's idiosyncrasies, including a picture of him waving a "wand" over one of the reporters, to give their story audience appeal. Given that Mr. Dietemann's quackery was harming no one and that *Life's* story on medical quackery could easily have been obtained through less intrusive means,[301] it is not at all clear that the press's right to gather information outweighed Dietemann's privacy interest, at least in this context.[302]

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293. *See Prime Time Live: Prisoners of Care* (ABC television broadcast, Aug. 10, 1989).

294. *See* Sarah Henry, *Harry's War*, L.A. TIMES, Nov. 17, 1996, (Magazine), at 12 (describing how Chinese dissident Harry Wu "disguise[ed] himself in a police uniform and Mao-style suits" to shoot "undercover footage of forced-labor camps for '60 Minutes'" and to gather information for a story that appeared in *Newsweek*).

295. *See Dateline NBC: Sweating It Out* (NBC television broadcast, Oct. 20, 1996).

296. *See Prime Time Live: Business as Usual* (ABC television broadcast, Apr. 25, 1991) (reporting on congressmen who used loopholes to have taxpayers pay for vacation in Barbados). For additional examples, see Paterno, *supra* note 3, at 40.

297. *See 20/20: Victims of Greed*, *supra* note 237.

298. 449 F.2d 245 (9th Cir. 1971). *See* discussion *infra* note 81 and accompanying text.

299. *See* Stancill, *supra* note 237.

300. *20/20* produced a three-month, undercover investigation containing graphic footage of residents tied to their beds, starving and lying in filth. *See* Hodges, *supra* note 237, at 3.

301. For example, investigators could have looked to Mr. Dietemann's arrest record.

302. An even more pointed example of the use of hidden cameras for frivolous ends is demonstrated by *Sanders v. Capital Cities/ABC, Inc.*, 25 Media L. Rptr. 1343 (Cal. Ct. App. 1997). In *Sanders*, a reporter for *Prime Time Live* obtained a job as a telepsychic, despite her professed lack of qualifications. *See id.* Once on the job, she surreptitiously recorded and filmed one of her co-workers in the performance of his duties to lend credibility to the *Prime Time Live* exposé of the telepsychic industry. *See id. Sanders* hardly represents the kind of

The importance of context in separating legitimate and illegitimate intrusions also helps explain why the *Food Lion* case is so controversial. On one hand, the unsanitary conditions at Food Lion were clearly a matter of public concern, for Food Lion's practices jeopardized the health and safety of its customers. On the other, the Food Lion story could have been obtained by less intrusive means. *Prime Time Live*'s reporters did not merely enter Food Lion as any other customers would. Instead, working in conjunction with a union that was hostile to Food Lion, the reporters falsified their identities, resumes and work histories and constructed an elaborate network of lies to obtain more than fifty hours of hidden camera footage, some of which was allegedly "staged" to make the story.[303] Under the circumstances, it is not entirely surprising that the jury roundly condemned *Prime Time Live*'s newsgathering conduct.

In cases like *Food Lion*, privacy is violated primarily to boost sales or ratings rather than to serve the public interest.[304] The problem is that the profit motive per se does not invalidate the use of intrusive newsgathering techniques. Some intrusive methods may be essential if the press is to serve its watchdog function and protect the public from government corruption or from serious threats to public health and safety.

Other newsgathering methods present different but equally intractable problems. Some newsgathering methods are unduly intrusive solely because of their location, regardless of the information they uncover. What could justify the media in following paramedics into a private home to film a dying man's agony[305] or following police

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hard hitting journalism that justifies such elaborate patterns of deception, yet Sanders was unable to recover because the court found he lacked an objectively reasonable expectation of privacy. *See id.*

303. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923, 927 (M.D.N.C. 1997). A critical issue in the case is that *Prime Time Live* did not have to go undercover to get the story. *Prime Time Live* spoke to more than 20 witnesses who would have documented Food Lion's unsanitary practices. *See id.* Some of these witnesses were former employees of the grocery store chain, and thus would have been highly credible sources. *See id.* But *Prime Time Live* is a television program, and, as such, its stories need visuals, the more graphic the better. Visuals lend impact to the story, and certainly the footage obtained by *Prime Time Live* was memorable. It is not clear how much weight the law should give *Prime Time Live*'s "need" for visuals; after all, *Prime Time Live* could have done an effective story without them. Even so, the law should not discriminate unthinkingly against television journalists, for as the *20/20* story indicates, television can sometimes be far more effective than print in prompting beneficial reforms. It is precisely cases like *Food Lion* that test the law's ability to make the fine distinctions necessary to protect privacy against the media's voracious demands for information.

304. *See* Paterno, *supra* note 3, at 43.

305. *See* Miller v. National Broad. Co., 187 Cal. App. 3d 1463, 1469 (Cal. Ct. App. 1989) (holding liable a camera crew that followed paramedics into an apartment to film

into a domestic abuse victim's home to film her pain?[306] Although the victims of these tragedies must, of necessity, admit police and paramedics into their homes, the press is not entitled to intrude into the most sacrosanct realms of privacy.

Still other newsgathering methods are problematic only when taken to extremes. While celebrities are subject to more coverage than private citizens, the media's relentless hounding of both Princess Diana and Jacqueline Kennedy Onassis provided the public with little in the way of vital information that could not have been obtained by less intrusive methods. Likewise, media "stake-outs" of the homes of newsworthy individuals, such as Monica Lewinsky and Richard Jewell, rarely bring new information to light, but certainly imprison their targets.[307] Thus, the very same newsgathering methods that serve the public interest in some cases may exact an exorbitantly high price from individual privacy in others.

VI. REJUVENATING INTRUSION

The problem of intrusive newsgathering does not lend itself to easy solutions. Even if society reaches the consensus that privacy is worth protecting, providing a remedy that will cure the uncertainty of current law without unduly sacrificing sensitivity to context is no simple matter.

A. Striking an Appropriate Balance

The need for certainty in this area of law makes a rights-based solution initially attractive. Simple trespass is relatively effective at deterring intrusive newsgathering on private property because it requires no elaborate balancing of competing interests. Trespass works well because it is backed by venerable historical tradition and widespread societal consensus that a man's home is his castle. Once a reporter enters private property without the owner's consent for any reason, whether noble or ignoble, she is liable for trespass. Although a rights-based approach to intrusion cases would provide needed certainty, it is too blunt an instrument to be applied more broadly to the problem of intrusive newsgathering.

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attempts to revive a heart attack victim). *But cf.* Florida Publ'g Co. v. Fletcher, 340 So. 2d 914, 918 (Fla. 1977) (creating a privilege implied from custom to follow police onto private property).

306. *See* Baugh v. CBS, Inc., 828 F. Supp. 745, 750-51 (N.D. Cal. 1993).

307. *See supra* note 41. For another "hounding" case, see Wolfson v. Lewis, 924 F. Supp. 1413 (E.D. Pa. 1996) (issuing injunction against broadcast journalists).

Most of the difficult cases in the newsgathering context occur in public places. These cases do not lend themselves to a rights-based approach because it is difficult to reach consensus about what privacy rights the individual should have in a public setting. Thus, it is impossible to define the protected sphere of privacy with the requisite degree of specificity for a rights-based approach to be viable. A rights-based approach is also unattractive because intrusive newsgathering cases put two rights at stake instead of one. Both privacy and newsgathering are important social values, and any increase in one results in the diminishment of the other.[308]

Consequently, tort law must strike a precarious balance in dealing with media intrusions. The model of balancing used in other privacy torts case is not encouraging. The private facts tort, for example, makes the publication of private facts privileged if the information is newsworthy.[309] As Professor Rodney Smolla and others have convincingly demonstrated, this balancing method is far too simplistic for rights as subtle and nuanced as the rights to privacy and free speech.[310] This method ignores the possibility, for example, that information could be both private and newsworthy simultaneously. Moreover, balancing tests are often criticized because of their unpredictability, and to the extent this criticism is true, it is not clear that a balancing test would be any improvement over the vagaries of existing law.

Ideally, any solution to the problem of intrusive newsgathering would have the certainty of a rights-based approach and the flexibility of a balancing approach. This ideal solution, in turn, would be subtle enough to separate aggressive coverage from harassment and hounding, legitimate surveillance from illegitimate intrusion, and would delineate particular locations as simply off-limits to coverage at all. Although the intrusion tort currently fails to achieve these goals, intrusion is nonetheless tort law's best hope for a meaningful remedy for media intrusions.

Unlike other torts that affect newsgathering, intrusion retains great promise as a remedy because it is tailored to redress privacy invasions, but is still ambitious enough to encompass the variety of

308. Consequential analysis of privacy interests is common in Fourth Amendment jurisprudence, which allows the government to invade individual privacy if it has a good enough reason for doing so. *See generally* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted By Society,"* 42 DUKE L.J. 727 (1993).

309. *See* RESTATEMENT, *supra* note 14, § 652C.

310. *See* RODNEY SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 38-42 (1929).

media intrusions. Unlike recent legislative proposals aimed at curbing intrusive newsgathering, intrusion is also limited enough to overcome constitutional constraints. Even so, intrusion's usefulness in protecting privacy against media intrusions has been undermined by crabbed interpretations of its protections, and courts must remedy this deficit before any further refinement of the tort can be undertaken.

As argued in Part IV, courts must first expand their understanding of the intrusion tort by acknowledging that an individual has a right to be free from invasion of privacy in public places, albeit a very narrow one.[311] *Galella v. Onassis*[312] illustrates how a court can recognize this principle without sacrificing the public's interest in acquiring information about newsworthy events. Ron Galella was a paparazzi photographer who dogged Jacqueline Kennedy Onassis and her children.[313] He bribed doormen and "romanced family servants" to gain information about Mrs. Onassis' comings and goings; he jumped and postured about to photograph her in public places.[314] Moreover, his extreme antics endangered the safety of Mrs. Onassis and her children.[315] Rather than concluding that Mrs. Onassis had no right of privacy in public places, the *Galella* court looked at the practical effect of the defendant's conduct. The defendant managed, through his intrusive conduct, to "'insinuate[] himself into the very fabric of Mrs. Onassis' life.'"[316] Thus, while the court recognized the public interest in coverage of Mrs. Onassis, the court found that Galella had exceeded "the reasonable bounds of newsgathering,"[317] particularly when his "constant surveillance, his obtrusive and intruding presence" was weighed against "the *de minimis* public importance of the daily activities of . . . [Mrs. Onassis]."[318] The court recognized that even in a public setting intrusive newsgathering can be so extreme as to deprive a plaintiff of any semblance of privacy (or even of freedom of movement).

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311. Professor Andrew McClurg has made an extended version of this argument in his article, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, *supra* note 25, at 995. Indeed, the main thrust of his article is that "there is such a thing as 'public privacy' that tort law should recognize and protect." *Id.* I agree with Professor McClurg, but believe that this reform would be only a preliminary step toward providing meaningful protection from media intrusions.

312. 487 F.2d 986 (2d Cir. 1973).

313. *See id.* at 992.

314. *See id.*

315. *See id.*

316. *Id.* at 994 (citation omitted).

317. *Id.* at 995.

318. *Id.*

The second step toward reform of the intrusion tort is for courts to recognize that filming, taping, or recording a target is potentially more intrusive than mere observation. As Professor McClurg has argued, photographing someone's activities is more intrusive than simple observation because once a permanent record is created, the subject is at the mercy of the person who holds the photograph.[319] Additionally, photographing is more intrusive than merely observing because it creates the potential that the subject's image can be transmitted at any time to an unlimited audience, thereby increasing the intrusiveness of the defendant's initial behavior.[320] Photographing may also be more intrusive because it creates the potential that the subject's actions will be exposed to a completely different audience than the one she intended or expected. Individuals typically tailor their behavior to the expected audience, and by denying individuals this opportunity, the defendant violates both their expectations of anonymity and their autonomy in selecting to whom they will reveal parts of themselves.[321]

This is not to say that all filming, recording, or photographing in public places is inherently intrusive. Again, courts must be sensitive to context, for there are relative degrees of privacy even in public places, and certain types of surveillance are more intrusive than others. Thus, courts must consider factors such as (1) whether or not the defendant's use of technology (for example, a shotgun mike) enhanced his normal sensory capacities, (2) whether or not the plaintiff was aware she was being observed or filmed, (3) whether or not the plaintiff was acting in a private capacity or professional capacity, and (4) the exact location of the alleged intrusion.[322] Recognition that technology may transform

319. *See* McClurg, *supra* note 25, at 1042.

320. *See id.* My argument is slightly different than Professor McClurg's. Professor McClurg seems to assume that the subsequent transmission is what makes filming intrusive. I argue instead that the potential for subsequent transmission makes the initial filming intrusive. The distinction is semantic but important. If the invasion of privacy only occurs upon transmission of the plaintiff's image, then the appropriate tort remedy is the private facts tort rather than intrusion. For further discussion of this distinction, see *infra* Part III.B.2.

321. Paradoxically, an individual is capable of feeling (and actually being) completely anonymous when surrounded by strangers. An individual may therefore act differently in front of strangers than he would in front of friends. On the other hand, the individual may act differently in front of friends than he would in front of professional acquaintances.

322. To a certain extent, this inquiry duplicates the "intrusiveness" inquiry that is part of the newsgatherer's privilege this Article advocates. However, the two inquiries serve different purposes. The intrusiveness inquiry requires a court to determine at the outset whether the plaintiff has made a prima facie showing that defendant intruded upon her privacy. Once the court makes this determination, the question becomes whether the defendant should be excused from liability because the defendant's behavior was aimed at

simple observation into intrusion is a necessary step toward privacy protection.

One final reform of the intrusion doctrine is crucial. Courts must resist applying a newsworthiness privilege in intrusion cases.[323] Courts borrowing this privilege from the private facts tort have failed to understand that intrusion, unlike private facts, should be based on newsgathering methods rather than publication.[324] Courts may have been lured into this error by plaintiffs (and commentators) attempting to hold media defendants liable for intrusion by publication. This represents either a misunderstanding of the intrusion tort or an attempt to make an end run around the constitutional limits on the private facts tort.

Defendants who invade a plaintiff's privacy by *publishing* information about her are liable to her under the private facts tort, not intrusion. The *Restatement* explicitly excludes publication from the elements of intrusion, and indeed the lack of a publication or publicity requirement is a critical distinction between the torts of intrusion and private facts.[325] Attempting to use the intrusion tort as a remedy for publication-based intrusions rather than newsgathering intrusions fundamentally changes the nature of the tort, and courts have quite rightly closed off this avenue of attack. If an intrusion action is based solely on the defendant's publication of private facts, the intrusion action threatens news dissemination and is therefore subject to the full panoply of First Amendment protections that apply in private facts cases.

If, on the other hand, the plaintiff bases her case on newsgathering rather than publication, newsworthiness is not a relevant inquiry. Although tort law should consider the media's justifications for using various newsgathering methods, newsworthiness, a doctrine borrowed from the private facts tort, has already proved too uncertain to provide any practical limits on media behavior.[326]

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uncovering a significant threat to the health, safety or financial well being of others *and* that the defendant's conduct was no more intrusive than necessary to obtain this information.

323. *See supra* notes 156-246 and accompanying text.

324. *See, e.g.*, Cox Communications, Inc. v. Lowe, 328 S.E.2d 384 (Ga. Ct. App. 1985); Costlow v. Cusimano, 311 N.Y.S.2d 92, 95 (N.Y. App. Div. 1970); Haynik v. Zimlick, 508 N.E.2d 195 (Ohio 1986); *see also* Walsh, *supra* note 30, at 1126 (arguing that the newsworthiness analysis should not be employed in cases of newsgatherer wrongdoing because it "obscures the simple but powerful principle that newsgatherers are not immune from laws of general applicability").

325. *See* RESTATEMENT, *supra* note 14, § 652D cmt. a.

326. Professor McClurg is more of an optimist on this score than I am. *See* McClurg, *supra* note 25, at 1078-79.

B. *Creating a Qualified Tort Privilege to Protect Newsgathering*

In addition to the doctrinal changes discussed above, courts or legislatures should adopt a qualified privilege[327] to protect newsgatherers whose potentially intrusive behavior serves the public interest.[328] Under this privilege, a newsgatherer should prevail in an intrusion action if she can establish two elements. First, the newsgatherer must show that she had probable cause to believe that the plaintiff's conduct posed a significant threat to the health, safety, or financial well-being of others. Second, the newsgatherer must show that her methods were not substantially more intrusive than necessary to obtain documentation of plaintiff's wrongdoing. Unlike current law, this privilege would delineate a sphere of protected newsgathering activity, thereby giving newsgatherers and their targets advance notice of how courts will balance their competing interests.

1. To Whom Does the Privilege Apply?

The privilege this Article advocates is justified by the role of the media in uncovering serious abuses that threaten public health and safety. As discussed in Part V.C, the media are not only watchdogs of government. The media also play an important watchdog role in the so-called private sector, and if they are to continue monitoring wrongdoing in the private sector, their information gathering activities must receive some protection.[329] Although the institutional media primarily fulfill this important monitoring function, it is not limited to them. Free-lance journalists, academic researchers, public interest organizations and others also gather information designed to uncover serious threats to public health and safety. Thus, the privilege advocated here should apply to anyone who performs the same type of monitoring activities as the institutional media.

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327. Courts have developed a number of qualified privileges to protect defendants from defamation liability. The common law, for example, created a privilege as early as 1808 to protect criticism of literary, artistic, or musical works, as long as the critic presented the facts on which his criticism was based fairly and accurately. *See* Carr v. Hood, 170 Eng. Rep. 983 (1808). *See generally* FRANKLIN & ANDERSON, *supra* note 72, at 221-24 (discussing common law privileges as applied in defamation actions).

328. Although this privilege potentially could be applied to other torts besides intrusion, I leave discussion of that issue for other commentators.

329. *See* Kent R. Middleton, *Journalists and Tape Recorders: Does Participant Monitoring Invade Privacy?*, 2 HASTINGS COMM. & ENT. L.J. 287, 323 (1979) (arguing that "[m]uch activity ... which was once exclusively part of the private sector, is now so intertwined with government and the public welfare that it must be subject to public scrutiny fully as much as government activity").

2. Probable Cause/Significant Threat

The privilege only extends protection to newsgatherers in limited circumstances. Once the plaintiff has established a prima facie case of intrusion, the defendant newsgatherer must establish that she is eligible for the privilege. By placing the burden on the defendant to establish that she is eligible for the privilege, the privilege implicitly confirms that privacy will not automatically give way to newsgathering interests any time the two conflict. The first element the defendant must establish is that she had probable cause to believe that the plaintiff was engaged in behavior that posed a significant threat to the health, safety, or well-being of others. This element is necessary to prevent defendants from engaging in "fishing expeditions;" a defendant should not get the benefit of the privilege if she happened fortuitously to stumble upon evidence of plaintiff's wrongdoing.

The probable cause standard advocated here would be analogous to the probable cause standard applied in malicious prosecution cases. Probable cause "is a reasonable ground for belief in the guilt of the party"[330] that the newsgatherer is investigating. Probable cause is an objective standard:[331] the newsgatherer must establish the reasonableness of her belief that the plaintiff was engaged in behavior that posed a significant threat to public health, safety, or financial well-being of others.[332] To satisfy this standard, the newsgatherer must present the evidence she relied upon in determining whether or not to use intrusive newsgathering methods. This evidence will establish probable cause if it came from a credible source or other reliable evidence.[333] Mere speculation that the plaintiff was engaged in wrong-

330. KEETON, *supra* note 132, § 119, at 876. I previously argued for a similar privilege to protect reporters who use surreptitious surveillance. *See* Barnett, *supra* note 80, nn.131-171 and accompanying text. I have since come to believe that the privilege I advocated there was too narrow (because it applied only to surreptitious surveillance), too broad (because it would permit reporters to use subterfuge to gain access to anyone engaged in potentially harmful conduct), and insufficiently nuanced to provide adequate protection for privacy and newsgathering. I also believe that the privilege I advocated there had some serious procedural limitations. The privilege I advocate here is both more ambitious and more workable.

331. *See, e.g.*, Ray v. City Bank & Trust Co., 358 F. Supp. 630, 638 (S.D. Ohio 1973); Masterson v. Pig 'N Whistle Corp., 326 P.2d 918, 926 (Cal. Dist. Ct. App. 1958).

332. *See* RESTATEMENT, *supra* note 14, § 662 cmt. c.

333. Requiring courts and juries to make this determination would not be unduly burdensome. The law already requires a similar determination in defamation law. A central issue in many defamation cases is whether a media defendant printed a defamatory statement with actual malice. "Actual malice" is a term of art—a defendant's actual malice is established by showing knowing or reckless disregard of the falsity of the statement at issue. *See* New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood

doing will not be enough to constitute probable cause.[334] The probable cause requirement will therefore deter irresponsible and unreflective uses of intrusive newsgathering techniques and reward those newsgatherers who act with due consideration for the privacy of their targets.

The significant threat requirement presents a somewhat higher obstacle to establishing the privilege. This privilege protects the reporter only when she is engaged in gathering information about conduct that poses a significant threat to public health, safety, or financial well-being. The privilege is deliberately narrow in scope. By requiring that the threat to others be significant, the privilege tries to draw a relatively clear line between uses of intrusive newsgathering that directly serve the public interest and uses that are merely provocative or titillating (albeit profitable). Thus, physical abuse of the elderly in nursing homes or children in day care clearly poses a significant threat to the health and safety of its victims. On the other hand, while documenting the fact that telephone psychics do not have the power to foresee the future is interesting and could save gullible souls some money, this story hardly safeguards the public against a significant threat to its well-being.[335]

Some will no doubt respond that the scope of the privilege advocated here is too narrow because it excludes from its purview stories that interest the public but that do not fall neatly into its definition of "significant threat." Broadening the privilege, however, threatens to undermine its usefulness by making it so vague as to be meaningless as a guide to protected conduct or a bulwark against privacy invasion.

Consider, for example, the suggestion that the law should protect newsgathering that produces information that is "newsworthy" or "of

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relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."). Actual malice is established by showing that a "defendant in fact entertained serious doubts as to the truth" of the information she published. St. Amant v. Thomson, 390 U.S. 727, 731 (1968). A defendant acts with actual malice, for example, "where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call," or where he purposefully avoids finding out the truth. *Id.* at 732; *see also* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989). The standard I advocate here is more objective than the actual malice standard.

334. *See* KEETON, *supra* note 132, § 119, at 876 (noting that probable cause may not be based on "[u]nfounded suspicion and conjecture").

335. I am assuming here that relatively few individuals will fritter away enormous sums of money on phony telepsychics, although I do not have proof of this assumption. The analysis would obviously change if the newsgatherer could prove the contrary. Note, also, that my analysis would not bar the media from uncovering phony telepsychics through traditional means.

legitimate public concern." Courts routinely apply the legitimate public concern standard to determine whether the media's *publication* of private facts is actionable,[336] and some courts[337] and commentators[338] apply the same standard to newsgathering cases. The application of the legitimate public concern standard in private facts cases gives little comfort to advocates of privacy. Due to the vagueness of the standard, courts routinely give great deference to media determinations that information is of public concern in private facts cases.[339] Such deference is perhaps understandable given the strength of society's interest in avoiding judicial censorship of what information should be published.[340] But the result of this deference is devastating to privacy, leading many to conclude that broad interpretations of the legitimate public concern or newsworthiness standard have effectively "decimate[d] the tort."[341]

The legitimate public concern standard should not likewise become a broad shield for intrusive newsgathering. The right to gather news, while important, merits less protection than the right to publish.[342] Although society receives enormous benefits from the media's newsgathering activities, the right to gather news must not be extended so broadly that the media become a self-appointed investigative body subject to no constitutional limits, even those to which the police are subject. The legitimate public concern standard is too uncertain to put any meaningful restraints on the media. Moreover, the legitimate public concern standard fails to give advance guidance as to what newsgathering activities are protected. It is thus neither an effective deterrent to media intrusions nor an effective guide to what conduct will avoid liability.

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336. *See, e.g.*, RESTATEMENT, *supra* note 14, § 652D.

337. *See supra* notes 127-134 and accompanying text.

338. *See* McClurg, *supra* note 25, at 1078-79 (arguing that in intrusion cases, courts should consider whether the information acquired involved a "matter of legitimate public interest").

339. *See* Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 443 n.101 (1996) (citing private facts cases).

340. *See* Zimmerman, *supra* note 126, at 353. *But cf.* Mintz, *supra* note 339, at 443 ("[C]ourts cannot possibly allow the press, the largest class of defendants under [the private facts] tort, to establish the terms of virtual immunity from liability. Such an abdication mocks this privacy interest . . . .").

341. *See* Kalven, *supra* note 159, at 336; *see also* Mintz, *supra* note 339, at 442-43.

342. *See supra* note 283 and accompanying text.

3. Intrusiveness

The second showing that the defendant must make before being entitled to the newsgatherer's privilege is somewhat more complicated than the first. The defendant must establish that her investigative methods were not significantly more intrusive than necessary to gather credible information of her target's wrongdoing.[343] Even where intrusive newsgathering is justified by the importance of the information sought, the extent, duration, or means used can transform a legitimate use of intrusive newsgathering into an illegitimate intrusion. By requiring the defendant to prove that her conduct was no more intrusive than necessary, the intrusiveness inquiry gives a plaintiff some degree of protection against overly aggressive intrusions into her private life.

Because the perceived intrusiveness of defendant's conduct will vary with the circumstances of the individual case, it is impossible to specify the precise factors that make a defendant's conduct unduly intrusive. It is nonetheless possible to make useful generalizations, and as these generalizations become part of case law, they have the potential to bring needed predictability to the application of the newsgatherer's privilege.

In some contexts, almost any attempts to gather information about the plaintiff will be unduly intrusive. As a general proposition, the individual deserves greater protection from intrusions into his home than he does from intrusions into his workplace or his activities outside the home.[344] Traditionally, the home has been "the center of

343. Professor McClurg argues that the "magnitude of the intrusion," including factors such as its duration, extent and the means used, should be considered in determining whether plaintiff has established an actionable intrusion. *See* McClurg, *supra* note 25, at 1063. This Article takes a different approach, arguing instead that these are factors the defendant must establish to obtain the benefit of the newsgatherer's privilege. As envisioned, the privilege would only come into play after the plaintiff alleged facts from which a reasonable jury could conclude that the defendant invaded a plaintiff's protected sphere of solitude or seclusion and that the invasion would be highly offensive to a reasonable person. The privilege assumes that even if the defendant has invaded the plaintiff's sphere of solitude or seclusion in a manner highly offensive to a reasonable person, the defendant's conduct should nonetheless be shielded from liability where it is aimed at obtaining documentation of serious wrongdoing and where it is obtained in a manner that is appropriate to the magnitude of the wrongdoing. The burden of arguing that the magnitude of the intrusion was no greater than warranted should fall on the defendant, not the plaintiff, the target of defendant's intrusive conduct. This difference is not merely semantic. Placing the burden on the defendant clearly expresses a presumption in favor of privacy protection.

344. *See generally* Slobogin & Schumacher, *supra* note 308. One of the goals of Slobogin and Schumacher's empirical investigation was to determine what "types of factors people consider in evaluating the intrusiveness" of police conduct. *Id.* at 732. Although the authors were concerned with privacy in the Fourth Amendment context, their findings confirmed that citizens tend to have the greatest expectations of privacy with regard to their

the appropriately private sphere,"[345] and both tort and constitutional law have extended strong protections against intrusions into the home.[346] As a practical matter, therefore, almost any form of information-gathering by the media that targets an individual in his home will be unduly intrusive.

A harder question is posed by intrusions that occur outside the home, which may be one reason why many courts have abdicated responsibility for protecting individuals from intrusions in public places.[347] Some public places are more private than others. An individual has little expectation of privacy while walking down a public street, eating in a public restaurant, or shopping in a department store, but has a great expectation of privacy while occupying a public toilet or a public dressing room.[348] Distinguishing between these two situations is important, because the level of intrusiveness of a defendant's information-gathering activities will vary depending on the strength of the plaintiff's privacy interest.

More difficult distinctions arise in connection with media intrusions into the workplace. Even here, however, it is possible to make useful generalizations. Workplace interactions traditionally have been characterized by a certain degree of institutional formality and social distance.[349] In the workplace setting, people tend to deal with one another at arm's length; they do not expect the same level of intimacy and trust in relationships with co-workers or employers as they expect in relationships with family and friends.[350]

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homes and their persons and tended to regard investigative activities aimed at these locations as highly intrusive. *See id.* at 739. Thus, for example, the searches perceived as most intrusive included (in descending order) a body cavity search, monitoring a target's phone for 30 days, reading a personal diary, searching a bedroom, and drawing blood from the target in the workplace. *See id.*

345. RICHARD C. TURKINGTON ET AL., PRIVACY: CASES AND MATERIALS 4 (1st ed. 1992) (citing proponents and critics of this principle).

346. Trespass law and Fourth Amendment law are noteworthy examples.

347. *See supra* note 160 and accompanying text.

348. *See* TURKINGTON, *supra* note 345, at 270.

349. *See* Middleton, *supra* note 329 at 323. *But see* ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK (1997) (observing that many workers see work as a refuge from home life and that their most meaningful relationships may be formed at work).

350. *See* Pauline T. Kim, *Privacy Right, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 702 (1996) (noting that an individual's expectations of privacy are different in employment relationships than in other relationships because "[e]mployment falls at some mid-point on the spectrum of social relationships. It is characterized neither by the distant formality of a chance encounter with a stranger, nor by the intimacy found between close friends or lovers."). Courts have recognized this principle in the Fourth Amendment context. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656, 671 (1989). The "'operational realities of the workplace' may render

This generalization, however, should not obscure the fact that workers (and their employers) deserve some degree of protection from intrusions by outsiders, including the media, at least in certain circumstances. A distinction must be drawn between intrusions that occur in businesses that are open to the public and businesses that are not. Certainly businesses that are open to the public and individuals that serve the public directly have little expectation of privacy. Indeed, serving customers involves almost constant interactions with strangers, who have their own private agendas and desires. As Sissela Bok has observed, many businesses that serve the public are already subject to monitoring by persons posing as ordinary customers.[351] Restaurants are frequented by critics and health inspectors who customarily do not divulge their true identities.[352] In the medical profession, social scientists routinely pose as patients to obtain valuable information about the quality of patient care.[353] Landlords may be monitored to ensure that they do not discriminate against potential tenants, and monitoring is likewise common in the banking and car repair industries.[354]

Even in industries where surreptitious surveillance is not so pervasive, those who serve the public always takes a risk that customers, patrons, clients, or patients may not be what they seem. Given the relatively low expectation of privacy in these situations, a reporter's conduct will almost never be unduly intrusive so long as she merely patronizes the business as any other customer would, even though she does not reveal the fact that she is a reporter.[355]

A different situation arises, however, when a reporter gains access to nonpublic areas of a business. Trespass law provides a useful analogy. A person who enters a grocery store as a customer or even one who accompanies a customer is not a trespasser. But when the same person wanders into a stock room or areas of the store that are not open to the public, the person becomes liable for trespass.

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entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts." *Id.* (citing O'Connor v. Ortega, 480 U.S. 709, 717-18 (plurality opinion) (recognizing that employees may have a reasonable expectation of privacy in the workplace, but noting that the "expectation of privacy must be assessed in the context of the employment relation" including the "operational realities of the workplace")).

351. *See* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 201 (1978).

352. *See id.*

353. *See id.*

354. *See id.*

355. *Cf.* LeBel, *Getting the News*, *supra* note 17, at 1158. "What matters most in this scenario is that my conduct would have been equally observable by someone who was not a reporter." *Id.*

Likewise, a reporter who merely observes what any other customer could observe should not be liable for intrusion, but the reporter's investigation may be unduly intrusive when it crosses into private areas of a public business.[356] In private areas of the business, the business and its employees expect to be free from constant scrutiny, and this expectation merits some degree of protection.

A related factor in the determination of intrusiveness is what means the reporter used to gain access. As argued extensively above, photographing or recording the plaintiff is potentially more intrusive than merely observing him. Likewise, relying on an elaborate ruse to gain access to the plaintiff as the reporters did in *Food Lion* may also increase the intrusiveness of the media's newsgathering tactics. In assessing the intrusiveness of the means used to gather information about the plaintiff, courts also should consider whether the reporter reasonably could have obtained the information through less intrusive means. This factor, however, must be applied with some degree of sensitivity. Just because a story could have been obtained by less intrusive means does not mean that it would be practical to do so. Moreover, as the *20/20* example illustrates, seeing is sometimes believing. The very same story may have much less impact or credibility when it is printed in a newspaper than when it is captured on tape. Thus, courts should not be overly rigid in forcing reporters to show that the story was not obtainable through less intrusive means, but should instead consider whether the means used contributed significantly to the credibility or impact of the resulting story.

4. How the Privilege Works

Throughout the history of the common law, judges have created privileges to protect important societal interests. Judges could just as easily adopt the newgatherer's privilege advocated here as a means of achieving an appropriate balance between privacy and newsgathering rights. Alternatively, legislators could enact a newsgatherer's privilege, an option that in some ways would be preferable to judicial adoption because it would immediately reform the law for an entire state.

Once adopted, the newsgatherer's privilege could be used to dispose of newsgathering cases before trial in many instances. If *20/20* were sued for its story on nursing home abuses, for example, *20/20* would be able to establish, based on the *Houston Chronicle*'s earlier story, that it had probable cause to believe that serious abuses of

356. *See generally* Middleton, *supra* note 329, at 323.

elderly residents were taking place in Texas nursing homes. *20/20* also would be able to show that sending reporters into a state nursing home with hidden cameras was not unduly intrusive in light of the gravity of the harm and the fact that the reporters merely observed what any other visitor could have observed. It could also show that the "less intrusive" *Houston Chronicle* story had failed to garner sufficient attention to prompt public reform. Thus, the judge could easily grant summary judgment in favor of *20/20* on this set of facts because, even if the plaintiff were able to make out a prima facie case of intrusion,[357] no reasonable jury could find that *20/20*'s conduct was unwarranted under the newsgatherer's privilege.

In those cases that could not be resolved before trial, the privilege would have the salutary effect of focusing the jury's attention on the relevant factors separating legitimate newsgathering from unwarranted invasion of privacy. In the *Food Lion* case, for example, it is certainly arguable that the story could have been obtained by less intrusive means without a serious loss of impact or credibility.[358] *Food Lion*, therefore, would not have been an appropriate case for granting summary judgment in favor of the media defendant ABC. By instructing the jury to apply the newsgatherer's privilege, however, the jury's attention would remain focused on the relevant factors separating legitimate newsgathering from actionable intrusion, and perhaps the decision would be made on a more reasoned and less emotional basis.

Not every media defendant should get the benefit of the privilege. Where no reasonable juror could conclude that a defendant had established entitlement to the privilege, the judge should refuse to give the defendant the benefit of the privilege at trial. If a media defendant obtained access to a private residence under false pretenses in order to secretly film the plaintiff's personal idiosyncrasies, or if the defendant posed as a college student as part of an exposé of the most common pick-up lines in a bar, no reasonable jury could find that the plaintiffs' activities posed a significant threat to the public's health, safety, or financial well-being. Thus, assuming these plaintiffs were able to establish a prima facie case of intrusion, the case should go the jury, who would then decide whether or not the defendant invaded the plaintiff's privacy. In this situation, the defendant newsgatherer would get the same treatment as any other litigant.

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357. The privilege advocated here also could be applied when the media (or nonmedia defendants serving the same function) are sued for other torts (for example, trespass, intentional infliction of emotional distress, etc.) based on their newsgathering conduct.

358. *See supra* note 303 and accompanying text.

VII. CONCLUSION

Both the right to privacy and the right to gather news are important social values. When these two values collide, one may only be expanded at the expense of the other.

This Article urges tort law (particularly the tort of intrusion) to strike a new balance between privacy and newsgathering. Striking this balance is no easy task. It requires courts to make fine distinctions between legitimate newsgathering and unwarranted invasions of privacy, while also requiring sensitivity to the fragility of the social consensus supporting increased privacy protection and the economic realities of the media business.

Tort law, at least in theory, is capable of this degree of sensitivity. After all, tort law routinely sorts out such nebulous issues as the value of pain and suffering, the authenticity of emotional distress, and the "reasonableness" of a defendant's behavior. Yet tort law largely has failed to do more than pay lip service to privacy when it conflicts with First Amendment values. Moreover, the one tort that is designed specifically for this purpose, intrusion, has been undercut by crabbed doctrinal interpretations of its scope and judicial insensitivity to the interests it protects, forcing both plaintiffs and defendants to engage in a dangerous guessing game about the breadth of the gap between the law in the books (which ostensibly protects privacy) and the law in action (which does not).

If the intrusion tort is to shield plaintiffs from prying, spying, and lying by the media, courts must interpret the tort more expansively. Courts must acknowledge that citizens are entitled to a modicum of privacy even in public places, and must modernize the intrusion tort to respond to the threat posed by high-tech surveillance methods. Doctrinal reform is only a preliminary step toward balancing privacy and newsgathering.

The second step toward meaningful reform is the adoption of the qualified newsgatherer's privilege advocated by this article. Adoption of the privilege would benefit both the media and the individuals whose privacy they violate. This privilege would protect newsgatherers who uncover threats to public health, safety, or financial well-being, at least where their newsgathering methods are not substantially more intrusive than necessary. By clearly delineating a sphere of protected newsgathering activity, the privilege would send a clear message to media lawyers and their clients about how to avoid liability and would therefore deter the most egregious forms of intrusive newsgathering.

The privilege would also lead to more rational and more predictable decisions in the newsgathering area by focusing analysis on the relevant factors separating unwarranted media intrusions from legitimate newsgathering. Finally, and perhaps most significantly, the privilege would mediate between society's simultaneous yet conflicting commitments to privacy and disclosure.