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SYMPOSIUM: THE MEDIA'S INTRUSION ON PRIVACY: PANEL I Protecting Investigative Journalism

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The early part of Professor Smolla's paper is somewhat depressing. It is not the paper itself - it is excellent, interesting and thoughtful. It is the message that he delivers. Professor Smolla vividly and accurately describes both the vast assault on privacy in modern society and a plethora of proposed responses to the problem. [n1] We are experiencing what the futurist Alvin Toffler calls "the Third Wave," the movement from an industrial to an information society. [n2] In such times, as more information about us becomes public, societal concerns over personal privacy inevitably intensify. A natural response is to enact new laws. But, as Professor Smolla recognizes, the problem with new legislation is that it is often an ill-conceived overreaction, threatening other interests and values of equal or greater dimension.

The phenomenon brings to mind a comment of Justice Black, dissenting in Griswold v. Connecticut: [n3] "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." [n4] While I do not agree with Justice Black's rejection of constitutional privacy, I do "like" my nonconstitutional right of privacy. It is an important, vital common law right protecting individual dignity and personal autonomy. But informational privacy is not so sacred or preeminent that I would willingly sacrifice basic First Amendment values of freedom of the press.

Yet Professor Smolla is almost certainly correct that there is a threat of a "cultural backlash" such "that our future laws and public policies on these issues inevitably will be influenced by broader cultural movements regarding privacy." [n5] Thus, as a practical matter, if the press has "no respect for society's interests in privacy[, it] may someday find itself in a society with no respect for the press." [n6] At the very least, therefore, the press would be wise to think twice about "pushing the envelope" when it comes to newsgathering **[*1140]** in the face of legitimate privacy concerns, even when it has a legal right to do so.

When Professor Smolla then started to discuss his reactions to some of the proposed solutions, [n7] I began to feel better - he shared my pain. Like Professor Smolla, I consider the anti-paparazzi legislation to be legislative overkill and violative of the First Amendment. [n8] The laws violate established constitutional principles prohibiting discrimination against particular forms of media. [n9] Further, even if courts conclude that the conduct regulated by the laws is nonexpressive, the laws still significantly burden expression and hence are presumptively unconstitutional. [n10] And, such legislation cannot be justified under the applicable strict scrutiny standard of judicial review. [n11]

These anti-paparazzi laws are not even necessary. The Government already subjects the media to many neutral, generally applicable tort and contract laws protecting privacy. [n12] Unlike the freedom to publish the news, special First Amendment defenses, immunities, or privileges do not protect the right to gather the news. [n13] Perhaps more than Professor Smolla, I am especially concerned that the First Amendment constraints, which protect press publication against claims for libel, disclosure of private facts, and intentional infliction of emotional distress, will be circumvented by use of these newsgathering tort and contract actions. [n14] Plaintiffs who cannot successfully sue the press for the content of what they say instead sue based on the methods used to gather the information. Plaintiffs then seek to recover damages resulting from the publication as consequential damages. In Food Lion, Inc. v. Capital

Cities/ABC, Inc., [n15] the plaintiff sought damages for harm resulting from a broadcast, even though it did not include any libel or other claim based on the broadcast. [n16] While Food Lion was unsuccessful in its claim for broadcast-related damages, [n17] other courts have allowed such damages. [n18] In **[*1141]** short, the newsgathering torts can undermine the constitutional protections established in cases like New York Times Co. v. Sullivan [n19] and Florida Star v. B.J.F. [n20]

Because of my concern, I found Professor Smolla's discussion of the intrusion privacy tort especially interesting and valuable. While courts regularly parse the elements of the intrusion tort, many of the cases turn on a rough balancing of the competing interests in the particular fact context. [n21] First Amendment interests may be included in the balance, but such balancing occurs in a haphazard, uncertain manner. Is it possible to fashion a more principled, analytic framework whereby courts may assess First Amendment concerns more regularly and carefully in applying the intrusion tort? Should there be some First Amendment-based privilege or defense available to the media in particular intrusion contexts, for example, where the plaintiff is a business establishment claiming to serve the public but where the media have good reason to believe that the business acts illegally and causes serious public harm, or a whistle blower situation where the media investigates alleged governmental abuses? [n22]

These are the legal issues I explore briefly in this Commentary. One preliminary matter, however, requires attention. While there may be a general consensus on the social importance of informational privacy, there is an unfortunate tendency to ignore the important social and constitutional values served by investigative undercover journalism. I believe that surreptitious newsgathering is a vital part of journalism and First Amendment press freedom.

I. The Value of Investigative Journalism

In 1887, Nellie Bly, a reporter at the New York World, feigned mental illness to gain access to the Woman's Lunatic Asylum in New York. [n23] Her **[*1142]** gripping portrayal of patient abuse led to public outrage, a grand jury investigation, and legal reform. [n24] Later, Bly posed as a maid to expose abuses by employment agencies, [n25] as an unwed mother to investigate "trafficking in newborns," [n26] and as a patient to investigate the quality of medical care at city health centers. [n27] When she died, the New York Evening Journal, a competing newspaper, called her "'the best reporter in America.'" [n28] But for others, Bly was a "'self-promoting sensationalizer and an embarrassment to the craft.'" [n29]

In 1904, the Muckraker journalist, Upton Sinclair, went undercover as a meatpacker to expose conditions in the Chicago slaughterhouses. [n30] His findings, documented in The Jungle, [n31] provided the impetus for adoption of federal food and drug legislation. [n32]

Bly and Sinclair established the origins of a form of journalism that often depends on false pretenses, misrepresentation, and fraud to gain entry and on controversial investigative tools such as hidden cameras and recording devices to expose abuses. In the 1960s, the Buffalo News won a Pulitzer Prize for undercover stories on the Erie County welfare department. [n33] In 1972, a reporter for the Chicago Tribune concealed his true identity to secure a position with the Chicago elections board for a series on voting irregularities. This Tribune series won a Pulitzer Prize. [n34] Chicago Sun Times reporters opened a bar, posed as employees and patrons, and used hidden cameras to document public officials seeking bribes. They did not get the Pulitzer, probably because of the highly aggressive journalistic methods used. [n35]

The television newsmagazine 60 Minutes premiered in 1968. [n36] Its aggressive investigative journalism led to a host of other newsmagazines using more aggressive means of surreptitious investigation - Prime Time Live, 20/20, and Inside Edition. I served as a participant at a session dealing with surreptitious newsgathering where one of the other participants was an editor from Prime Time Live, which has been especially active in using hidden cameras. She showed a clip from a broadcast dealing with the conditions and treatment of patients at a private nursing home in Texas. I was physically sick after watching the 15 minute segment. This and other investigative reporting **[*1143]** produced statewide reform of regulations governing public and private nursing homes. [n37]

I could go on, but the message should be clear. Undercover journalism often serves the public interest. In the public sector, it allows the media to perform its role as the eyes and ears of the people, to perform a checking function on government. [n38] Especially at a time when citizens are often unable or unwilling to supervise government, this media role is critical to self-government. [n39] In the private sector, when the government fails in its responsibility to protect the public against fraudulent and unethical business and professional practices, whether because of lack of resources or unwillingness, media exposure of such practices can and often does provide the spur

forcing government action. [n40]

Nevertheless, the techniques of investigative reporting generally, and undercover journalism in particular, are controversial even within journalism. [n41] Many editors and journalists condemn the use of confidential sources, any misrepresentation or lying to get information, and the use of the new snooping technology to probe where eyes and ears cannot go. [n42] Undercover reporting has sometimes been called "stunt journalism." [n43] But it is difficult to believe that many of the stories of public importance of the kind that I have noted could have been published without the use of undercover reporting. Undoubtedly the media can go too far; they can engage in abusive practices, such as a reporter's theft of information from the voice mail of Chiquita Brands International. [n44] But that is true of journalism generally - consider **[*1144]** the recent cases of prominent journalists faking news stories. [n45] In response to perceived media abuses, the legal system must not cripple the ability of the media to perform newsgathering functions.

II. Antipaparazzi Legislation

Like Professor Smolla, I believe that the antipaparazzi laws provide just such an example of legislative overkill. Even putting aside the questionable national interest in federal legislation dealing with this traditionally local problem, the four federal bills [n46] and the California law [n47] violate basic First Amendment principles. They are driven by public reaction to the death of Princess Diana and by the lobbying of a number of celebrities who often seem to want publicity only on their terms. [n48] Perhaps differing from Professor Smolla, it does not seem to me that this antipaparazzi legislation adds significant new substantive standards of liability.

The California law essentially blends the trespass and intrusion torts to protect physical or spatial privacy generally, but not always, when there is a reasonable expectation of privacy. [n49] "Constructive trespass," while using novel terminology, would normally be handled under the intrusion tort. The federal proposals, on the other hand, focus more on stalking, harassment, reckless endangerment, and assault and battery in public areas. [n50] Instead, the antipaparazzi legislation adds severe new remedies such as treble compensatory **[*1145]** damages, disgorgement of profits, equitable relief, and attorney fees. [n51] These remedies are added to those already available through the traditional common law newsgathering torts. And the laws employ these enhanced remedial weapons in a discriminatory manner against the press.

While it is well established that the media are subject to neutral tort, contract, and criminal laws of general applicability, [n52] the First Amendment still prohibits laws that are not neutral. Laws that discriminate against particular forms of expressive activity or against the press are presumptively unconstitutional. [n53] As the Supreme Court warned: "Laws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State.'" [n54]

The antipaparazzi laws, by focusing only on taking photographs and making sound recordings when done for commercial purposes and on the defendant photographer's profits, [n55] clearly target the press. Liability for photographing or recording the same event will depend on whether the photographer is a private individual or a for-profit photojournalist whose work is intended for public distribution. Statements made at legislative hearings by proponents of these laws leave no doubt that the press is the focus of the antipaparazzi legislation. [n56]

[*1146] The taking of photographs or the making of sound recordings is not itself speech. Further, in spite of Professor Smolla's argument to the contrary, the sale or trade of a photo or recording is probably not a form of expression. If it were, the regulation of the sale would be content-based regulation. [n57] It can be argued, therefore, that the laws are content neutral regulations of nonexpressive conduct subject only to O'Brien intermediate review. [n58]

Nevertheless the antipaparazzi legislation singles out press photography and sound recording for significant and discriminatory burdens. Even if such acts do not themselves constitute speech, they are protected means of newsgathering vital to press publication. [n59] If the photographs and sound recordings cannot be made, they cannot be published. As the Supreme Court said in Arcara v. Cloud Books, Inc., [n60] laws are subject to heightened scrutiny "although directed at activity with no expressive component, [if they] impose a disproportionate burden upon those engaged in protected First Amendment activities." [n61] Because media speech-related activity is significantly and disproportionately burdened, the antipaparazzi laws should be treated as presumptively unconstitutional, subject to strict scrutiny review. [n62]

[*1147] Whatever the theory of presumptive invalidity, the government cannot satisfy strict scrutiny. It cannot show that the anti-paparazzi laws are necessary to achieve a compelling government interest in protecting

informational privacy. Even assuming that nonconstitutional privacy interests are sufficiently compelling to override the First Amendment concerns, Professor Smolla's analysis of the operation of the legislation persuasively demonstrates that the laws are not narrowly tailored. [n63] The uncertainty regarding the scope of their coverage and the vagueness of some of the statutory language produces a significant chilling effect on newsgathering. Further, less burdensome alternatives exist in the varied state laws already used in the newsgathering context.

When filing a newsgathering suit, plaintiffs will commonly plead trespass, fraud and misrepresentation, intrusion, violation of state and federal wiretap laws, breach of contract, breach of fiduciary duty, and even civil RICO and constitutional tort (for example, for ride-alongs with police). Although newsgathering is constitutionally protected, [n64] the First Amendment protects it much less than press publication. [n65] Newsgathering is treated as an **[*1148]** ancillary right; the nonexpressive conduct is protected only as a means of assuring the freedom to publish. [n66] Unlike litigation involving libel or disclosure privacy, there is no First Amendment privilege or defense available against application of neutral generally applicable tort and contract laws. [n67]

These existing tort and contract laws provide a formidable source of protection for legitimate privacy interests. There are gaps, but the diffuse nature of the informational privacy right makes this inevitable. Nor does the fact that the reach of these remedies is limited by the First Amendment mean that they are ineffective. In Galella v. Onassis, [n68] for example, the court employed harassment law as a basis for enjoining the paparazzo Ron Galella from his hounding of Jacqueline Kennedy Onassis and her children. [n69] State stalking and assault and battery laws are also used in such a harassment context. In Wolfson v. Lewis, [n70] the court similarly enjoined journalists from Inside Edition, who were engaged in an investigation of high executive salaries at U.S. Healthcare, from "harassing, hounding, following, intruding, frightening, terrorizing or ambushing [the plaintiffs] or their children." [n71] The court focused on the use of a van with tinted glass, hidden cameras, and shotgun mikes aimed at executive Richard Wolfson, his pregnant wife, and their children. [n72] **[*1149]** And, the court held ABC liable in Food Lion for similar newsgathering torts. [n73]

And yet, the First Amendment has a role to play; newsgathering is an essential part of freedom of the press. As Professor Smolla indicates, the tough issue is how the First Amendment works and what limits it imposes.

III. Newsgathering and the First Amendment

The cases suggest that the courts often balance the competing interests on a case-by-case basis in determining whether the media have gone too far in invading personal privacy values. In People for the Ethical Treatment of Animals v. Bobby Berosini Ltd., [n74] for example, the court said it was necessary to consider the degree of intrusion, the context, the conduct and circumstances surrounding the intrusion, the motive and objectives of the defendant, the setting, and the reasonable privacy expectations of the plaintiffs in determining whether the conduct was actionable. [n75] Sometimes First Amendment considerations are overriding; sometimes they are not. [n76]

Professor Smolla writes about Food Lion. [n77] Compare it to a case where First Amendment concerns significantly influenced the court - Desnick v. ABC, Inc. [n78]

Desnick Eye Center has twenty-five offices in the Midwest which specialize in cataract surgery, especially on the elderly. [n79] Prime Time Live contacted Dr. Desnick requesting permission to film his business for use in a forthcoming program on cataract surgery by large businesses. [n80] Desnick claims that he consented based on promises that the proposed program would not focus on his firm, that it would not involve undercover surveillance or ambush interviews, and that it would be fair and balanced. [n81] While ABC filmed and interviewed at a Desnick clinic in Chicago, seven persons serving as test patients carried hidden cameras into Desnick eye clinics in Wisconsin and Indiana. [n82] The broadcast, focusing on "the big cutter," Dr. James Desnick, suggested he might be doing unnecessary cataract surgery for high fees. [n83] It also included film clips of a machine that Desnick said measured glare but which ABC suggested might be rigged. [n84] Desnick Eye Center sued **[*1150]** for defamation as well as for trespass, intrusion, violation of federal and state electronic recording laws, and fraud. [n85]

In his opinion for the court, Judge Posner for the Seventh Circuit rejected the newsgathering claims. [n86] He dismissed the trespass and the intrusion claims by focusing on the privacy interests that the torts are designed to protect. [n87] Because the media's misrepresentations applied only to the purpose of the entry, there was no nonconsensual interference with the ownership or possession of the property. The Desnick offices were generally open for business; the filming and recording did not involve any confidential communications; there was no invasion of personal places; no intimate details were revealed; there was no violation of the doctor-patient relationship; and the media presence was peaceful, not disruptive. [n88]

Judge Posner ended his opinion with a statement that is worth considering:

Today's "tabloid" style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market, constitutes--although it is often shrill, one-sided, and offensive, and sometimes defamatory - an important part of that market. It 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 we add, regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast. If the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it... then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly. [n89]

This quote fairly states my views. First Amendment values must be considered in applying the intrusion torts or any of the other newsgathering tort or contract claims. [n90] Judge Posner achieves this end by evaluating the elements of the common law tort with consideration for the First Amendment values they implicate. His opinion is reminiscent of the intermediate form of First Amendment scrutiny known as the O'Brien test - the restriction must be substantially related to important privacy interests. [n91] While this infusion of constitutional principles into common law torts is not an unusual judicial practice, neither is it a typical judicial response. [n92]

[*1151] Professor Smolla suggests an alternative more bright-line approach, using rules and standards. [n93] In his view, the First Amendment should not simply inform the application of the common law, it should serve as a substantive limitation on the intrusion tort, as it does on the libel or private facts tort. His article is extremely valuable in identifying the relevant issues that could be used in fashioning such a constitutional privilege. I tend to agree with the broad protection he endorses for newsgathering in public places, at least absent any extraordinary circumstances. I would note, however, as the California Supreme Court's recent decision in Shulman v. Group W Productions, Inc. [n94] indicates, that it is not always evident what will qualify as a public place. [n95] I also tend to agree that, even in more private places, the press should not be liable for intrusion if it breaks no other law and the information relates to an important matter of public concern. At the very least, the First Amendment should limit recoverable damages to those caused by the newsgathering itself; damages for the resulting broadcast should not be allowed as parasitic damages. However one personally resolves these difficult issues where privacy and First Amendment newsgathering concerns intersect, I believe Professor Smolla has provided a thoughtful and provocative analysis worth careful consideration.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressGeneral OverviewCriminal Law & ProcedureSearch & SeizureExpectation of Privacy

FOOTNOTES:

n1. See Rodney A. Smolla, Privacy and the First Amendment Right to Gather News, 67 Geo. Wash. L. Rev. 1097, 1098-106 (1999).

n2. See Alvin Toffler, The Third Wave (1980).

n3. 381 U.S. 479 (1965) (recognizing a fundamental constitutional right of privacy extending to the use of contraceptives by married persons).

n4. Id. at 510 (Black, J., dissenting).

n5. Smolla, supra note 1, at 1097, 1100.

n6. Id. at 1138.

n7. See id. at 1106-38.

n8. See id. at 1112-38. For an excellent media analysis of the legislation, see Legislation Aimed at "Paparazzi" Places All Journalists at Risk: New Laws May Restrict Newsgathering and Influence Publication, Libel Def. Resource Ctr. Bull., Dec. 23, 1998.

n9. See infra notes 52-54 and accompanying text.

n10. See infra notes 57-62 and accompanying text.

n11. See infra notes 60-61 and accompanying text.

n12. See infra notes 49-50, 52, 64-73 and accompanying text.

n13. See infra notes 52, 62-65 and accompanying text. See generally C. Thomas Dienes, L. Levine & R. Lind, Newsgathering and the Law 1-5, at 14-16 (2d ed. 1999).

n14. My concerns are shared by others. See, e.g., John P. Borger, New Whines in Old Bottles: Taking Newsgathering Torts Off the Food Lion Shelf, 34 Tort & Ins. L.J. 61, 65-67 (1998); Carolyn K. Foley & David A. Schulz, Damage Considerations When the Press Is Sued for Gathering the News, Libel Def. Resource Ctr. Bull., Apr. 30, 1997, at 1, 1-4.

n15. 887 F. Supp. 811 (M.D.N.C. 1995). In Food Lion, the plaintiff claimed the defendants committed a variety of newsgathering torts after two ABC producers posed as Food Lion employees to gather information for a segment on Prime Time Live. See id. at 812. The producers secretly recorded hours of videotape, some of which aired in the segment on unsanitary and unsafe practices by the grocery chain. See id. at 816.

n16. See id. at 822.

n17. See id. at 822-23.

n18. See, e.g., Dietemann v. Time, Inc., 449 F.2d 245, 249-50 (9th Cir. 1971) (allowing publication-related damages for intrusion); Belluomo v. KAKE TV & Radio, Inc., 596 P.2d 832, 842 (Kan. Ct. App. 1979) (holding that "a party is entitled to recover compensatory damages for injury resulting from publication of information acquired by tortious conduct"); Prahl v. Brosamle, 295 N.W.2d 768, 781-82 (Wis. Ct. App. 1979) (allowing damages for nonphysical harm subsequent to the trespass).

n19. 376 U.S. 254 (1964) (holding that there is no claim for defamation when media report on the official activities of a public official unless the plaintiff can establish actual malice - knowledge of falsity or reckless disregard for truth or falsity - by clear and convincing evidence).

n20. 491 U.S. 524 (1989). In Florida Star, the Court held that the First Amendment prevents use of a rape shield statute to establish negligence per se against a newspaper for publishing the name of a rape victim which it legally obtained from a police report. See id. at 539, 541. The Court adopted the holding of Smith v. Daily Mail, 443 U.S. 97 (1979). See Florida Star, 491 U.S. at 537. The Daily Mail Court held: "If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." Daily Mail, 443 U.S. at 103.

n21. See Deteresa v. ABC, Inc., 121 F.3d 460, 465-66 (9th Cir. 1997); Sanders v. ABC, Inc., 978 P.2d 909, 913-19 (Cal. 1999); Shulman v. Group W Prods., Inc., 955 P.2d 469, 489-97 (Cal. 1998); People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1275-83 (Nev. 1995); infra notes 74-78.

n22. See infra text accompanying notes 72-91.

n23. See Brooke Kroeger, Nellie Bly: Daredevil, Reporter, Feminist 85-99 (1994); David A. Logan, "Stunt Journalism," Professional Norms, and Public Mistrust of the Media, 9 U. Fla. J.L. & Pub. Pol'y 151, 152 (1998).

n24. See Kroeger, supra note 23, at 96-99.

n25. See Logan, supra note 23, at 152-53.

n26. See id. at 153.

n27. See Madelon Golden Schlipp & Sharon M. Murphy, Great Women of the Press 137-38 (1983).

n28. Kroeger, supra note 23, at 509 (quoting Arthur Brisbane, The Death of Nellie Bly, N.Y. Evening J., Jan. 28, 1922, at 1).

n29. Logan, supra note 23, at 153 (quoting Paul Starobin, Food Lion Expose Was Stunt Journalism: ABC Could Have Done a Devastating Story Without the Tricks, Star Trib. (Minneapolis-St. Paul), Jan. 30, 1997, at 21A).

n30. See id.

n31. Upton Sinclair, The Jungle (1906).

n32. See Logan, supra note 23, at 153.

n33. See Borger, supra note 14, at 64 n.19 (describing incidents of investigative journalism).

n34. See id.

n35. See id.

n36. See Gary Paul Gates, Air Time: The Inside Story of CBS News 224 (1978).

n37. See, e.g., Lyrissa C. Barnett, Note, Intrusion and the Investigative Reporter, 71 Tex. L. Rev. 433, 433-34 (1992) (describing articles by the Houston Chronicle and an undercover investigation by 20/20 on nursing home conditions).

n38. See Houchins v. KQED, Inc., 438 U.S. 1, 8 (1978) (plurality opinion) ("Beyond question, the role of the media is important; acting as the 'eyes and ears' of the public, they can be a powerful and constructive force, contributing to the remedial action in the conduct of public business."); Dienes, Levine & Lind, supra note 13, at 13-14; Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. J. 521 passim; Potter Stewart, Or of the Press, 26 Hastings L.J. 631, 634 (1975) ("The primary purpose of the constitutional guarantee of a

free press was... to create a fourth institution outside the Government as an additional check on the three official branches.").

n39. See Blasi, supra note 38, at 562; David A. Logan, Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering, 83 Iowa L. Rev. 161, 170-71 (1997) (explaining that the media has the ability, time, and resources to discover and communicate information more efficiently than a public citizen).

n40. See Borger, supra note 14, at 64 n.19; supra notes 23-33 and accompanying text.

n41. See Logan, supra note 23, at 160-64.

n42. See id. at 162-64.

n43. See id. at 152.

n44. In May 1998, the Cincinnati Enquirer published a special section with twenty-two stories about Chiquita Brands International's business practices, focusing on activities in Latin America. The series alleged, among other things, that Chiquita bribed foreign officials, used dangerous pesticides that were a hazard to both their workers and to local residents, and maintained security measures on its ships that may have been insufficient to prevent their use to transport cocaine. Within two months of the series' publication, the Enquirer had printed a retraction on the front page of a Sunday edition and agreed to run two more front-page retractions and pay a $ 10 million settlement because of the alleged theft of over two thousand voice mail messages by reporter Mike Gallagher. Although the newspaper admitted that some of the information may have been obtained illegally and unethically, most of the information gathered during the year-long investigation was obtained from first-hand interviews, leaked corporate documents, visits to plantations, and land records in Latin America. By focusing on the improper newsgathering techniques, Chiquita was able to obtain a large settlement without being required to prove the falsity of the articles in court. See Alicia C. Shepard, Bitter Fruit: How the Cincinnati Enquirer's Hard-Hitting Investigation of Chiquita Brands International Unraveled, Am. Journalism Rev., Sept. 1998, at 33, 33-37.

n45. Popular columnist Patricia Smith of the Boston Globe resigned in June 1998 for fabricating people and quotes in her columns. See Sinead O'Brien, Secrets and Lies, Am. Journalism Rev., Sept. 1998, at 41, 41-42. Two months later, Globe columnist Mike Barnicle also resigned after "serious doubts were raised about the veracity of a column he had written in 1995." Id. at 43. In early July 1998, CNN retracted a story aired on June 7 in the debut of its newsmagazine NewsStand: CNN & Time. See Susan Paterno, An Ill Tailwind, Am. Journalism Rev., Sept. 1998, at 23, 23-24. The story alleged that the U.S. military had used lethal nerve gas on a mission in Laos during the Vietnam War. After the story aired, many questions were raised about its validity, and CNN hired constitutional lawyer Floyd Abrams to investigate the editorial process. After two weeks, Abrams determined that "CNN's conclusion that United States troops used nerve gas during the Vietnamese conflict on a mission on Laos designed to kill American defectors is unsupportable." Id. at 23.

n46. Personal Privacy Protection Act, S. 2103, 105th Cong. (1998) (introduced by Sen. Feinstein); Personal Privacy Protection Act, H.R. 4425, 105th Cong. (1998) (introduced by Rep. Conyers); Privacy Protection Act of 1998, H.R. 3224, 105th Cong. (1998) (introduced by Rep. Gallegly); Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. (1997) (introduced by Rep. Bono).

n47. Cal. Civ. Code 1708.8 (West Supp. 1999).

n48. See, e.g., Jane E. Kirtley, Freedom of the Press: An Inalienable Right or a Privilege To Be Earned?, 9 U. Fla. J.L. & Pub. Pol'y 209, 209-10 (1998); Note, Privacy, Photography, and the Press, 111 Harv. L. Rev. 1086, 1090-91 (1998); John Hiscock, California Restrains Paparazzi, Chi. Sun-Times, Jan. 5, 1999, at 26.

n49. See Cal. Civ. Code 1708.8(a), (b).

n50. See S. 2103, 3(a); H.R. 4425, 1(a); H.R. 3224, 2; H.R. 2448, 2.

n51. See Cal. Civ. Code 1708.8(c), (g); S. 2103, 3; H.R. 3224, 2.

n52. See Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (upholding a promissory estoppel claim and citing a "well-established line of decisions holding 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"); Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978) (holding that there is no First Amendment restriction on searches of newsrooms but that the courts should apply "warrant requirements with particular exactitude when First Amendment interests would be endangered by the search"); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 380-81, 391 (1973) (holding that the press has no special protection from generally applicable antidiscrimination laws); Branzburg v. Hayes, 408 U.S. 665, 690-91 (1972) (holding that reporters have no First Amendment privilege to refuse to disclose confidential information to grand juries); Associated Press v. United States, 326 U.S. 1, 7 (1945) (holding that the press has no special protection from generally applicable antitrust laws); Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937) (holding that the NLRA applies to the press: "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and nondiscriminatory taxes on his business.").

n53. See Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228-29 (1987) (striking down sales tax of general interest magazines that exempted newspapers and certain content-defined categories of magazines); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585, 591 (1983) (striking down tax on newsprint and ink that had disproportionate impact on newspapers as "not unrelated to suppression of expression, and such a goal is presumptively unconstitutional"); Grosjean v. American Press Co., 297 U.S. 233, 240-41, 250-51 (1936) (striking down license tax on sale of newspaper advertisements that applied only to the largest newspapers in Louisiana because "it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties").

n54. See Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 640 (1994) (quoting Arkansas Writers' Project, 481 U.S. at 228).

n55. See Cal. Civ. Code 1708.8(c); S. 2103, 3, 4; H.R. 4425, 1; H.R. 3224, 2; H.R. 2448, 2.

n56. See The Federal "Anti-Paparazzi" Bills: An Unfocused Shot at the Media, Libel Def. Resource Ctr. Bull., Dec. 23, 1998, 1, 6-9 (discussing the not-yet-published statements made at a May 21, 1998 House Judiciary Committee hearing).

n57. See Smolla, supra note 1, at 1113; Note, supra note 48, at 1092-93 (acknowledging that such regulations are content-neutral).

n58. O'Brien v. United States, 391 U.S. 367, 377 (1968) ("[A] content neutral government regulation is sufficiently justified... if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."). There is no requirement that the government use the least burdensome means; it is sufficient if the means are direct and effective. See Ward v. Rock Against Racism, 491 U.S. 781, 797-802 (1989).

n59. See Note, supra note 48, at 1094-98, which argues for strict scrutiny because "photographs have tremendous expressive, communicative, and informative value, and photography as a medium of expression depends on the ability of photographers to capture images without undue governmental regulation." Id. at 1095.

n60. 478 U.S. 697 (1986).

n61. Id. at 704.

n62. Courts have applied strict scrutiny in a number of cases in which restraints on newsgathering significantly burdened publication rights. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 13-14 (1986) (Press-Enterprise II) (holding that there is a qualified right to attend preliminary hearings because such proceedings have "historically been open to the press and general public" and "access plays a significant positive role in the functioning" of the proceeding; the right to attend cannot be overcome "unless specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." (internal quotes omitted)); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) (Press-Enterprise I) (holding that the presumption of access to voir dire in criminal cases "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest" and that "the interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered"); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982) (recognizing presumptive right of access to criminal trials and applying strict scrutiny to their closure: "Where... the State attempts to deny the right of access [to criminal trials] in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."); Washington Post Co. v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991) (recognizing a First Amendment-based right of access to a sealed plea agreement and related documents and requiring that Press-Enterprise I standards be met to overcome presumption of access); Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 505, 509 (1st Cir. 1989) (applying strict scrutiny and holding that a statute prohibiting access to court records in criminal cases that had not resulted in a conviction violated the First Amendment); In re NBC, 828 F.2d 340, 344-46 (6th Cir. 1987) (applying Press-Enterprise II standards in recognizing a First Amendment-based right of access to documents and proceedings related to motions to disqualify a judge and to proceedings regarding alleged attorney conflicts of interest); Associated Press v. United States Dist. Court, 705 F.2d 1143, 1145-46 (9th Cir. 1983) (holding that there is a First Amendment-based right of access to pretrial documents which may only be overcome if the trial court makes specific findings that there is a substantial probability that: (1) "irreparable damage to [a defendant's] fair-trial will result," (2) " alternatives to closure will not adequately protect [his] right to a fair trial," and (3) "closure will be effective in protecting against the perceived harm"); see also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576-77 (1980) (plurality opinion) (guaranteeing public and press's right of access to criminal trials: "The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.").

n63. See Smolla, supra note 1, at 1110, 1112-38; see also Note, supra note 48, at 1103 ("It would be unfortunate for the United States, with its historical commitment to a strong, assertive press, to respond to recent events with such misguided, unnecessary, and constitutionally suspect legislation.").

n64. See Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."); see also Richmond Newspapers, 448 U.S. at 576 (guaranteeing public and press's right of access to criminal trials: "The First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors....").

n65. See, e.g., CBS Inc. v. Davis, 510 U.S. 1315, 1315-16, 1318 (1994) (Blackmun, Circuit Justice) (staying preliminary injunction prohibiting CBS from airing videotape footage taken at a meat packing factory by a factory employee wearing undercover camera equipment); Florida Star v. B.J.F., 491 U.S. 524, 539, 541 (1989) (holding that the First Amendment prevents using rape shield statute to establish negligence per se against newspaper for publishing name of rape victim after it obtained the information from a publicly released police report); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103-04 (1979) (striking down statute allowing prosecution of newspapers for publishing name of juvenile homicide suspect because the newspaper had published "lawfully obtained truthful information about a matter of public significance" and prosecution was not needed to "further a state interest of the highest order"); Landmark Comm., Inc. v. Virginia, 435 U.S. 829, 837-38 (1978) (holding that newspaper may not be prosecuted for publishing truthful information about the proceedings of a confidential judicial review commission); Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 562 (1976) (stating that prior restraints are a "most extraordinary remedy" and should be imposed "only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures"); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (holding that the Government failed to meet its '"heavy burden of showing justification for the imposition of such a [prior] restraint'" of the publication of classified documents (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971))); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding that there is no claim for defamation when media report on the official activities of a public official unless plaintiff can establish actual malice - knowledge of falsity or reckless disregard for truth or falsity - by clear and convincing evidence); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 709-10, 716, 722-23 (1931) (recognizing that prior restraints may only be used in exceptional circumstances and striking down as a prior restraint a statute that suppresses as a public nuisance any newspaper or periodical that publishes scandalous and defamatory matter).

n66. See Richmond Newspapers, 448 U.S. at 587 (Brennan, J., concurring) (finding the First Amendment guarantees the public's and the press's right of access to criminal trials to foster informed debate in public issues: "The First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of

self-government."); Globe Newspaper Co., 457 U.S. at 604 (Brennan, J.) (recognizing presumptive right of access to criminal trials and applying strict scrutiny to their closure: "The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."); William J. Brennan, Jr., Address at the Dedication of the S.I. Newhouse Center for Law and Justice (Oct. 17, 1979), in 32 Rutgers L. Rev. 173, 175-81 (1979). See generally Dienes, Levine & Lind, supra note 13, at 14-16, 47-50 (discussing Justice Brennan's structuralist approach).

n67. See supra notes 13, 50.

n68. 487 F.2d 986 (2d Cir. 1973).

n69. See id. at 994-95, 998.

n70. 924 F. Supp. 1413 (E.D. Pa. 1996).

n71. Id. at 1415, 1435.

n72. See id. at 1422-31.

n73. On Food Lion and other newsgathering cases, see generally Symposium, Undercover Newsgathering Techniques: Issues and Concerns, 4 Wm. & Mary Bill Rts. J. 1005 (1996).

n74. 895 P.2d 1269 (Nev. 1995).

n75. See id. at 1282.

n76. Compare Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811 (M.D.N.C. 1995) (finding First Amendment considerations were not overriding), with Desnick v. ABC, 44 F.3d 1345 (7th Cir. 1995) (finding First Amendment considerations substantial). See discussion of Desnick, infra notes 78-89 and accompanying text.

n77. See Smolla, supra note 1, at 1122, 1129-30.

n78. 44 F.3d at 1345.

n79. See id. at 1347.

n80. See id.

n81. See id. at 1348.

n82. See id.

n83. See id.

n84. See id. at 1348-49.

n85. See id. at 1349, 1351.

n86. See id. at 1352-53.

n87. See id.

n88. See id.

n89. Id. at 1355 (citations omitted) (emphasis added).

n90. Cf. Lyrissa B. Lidsky, Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It, 73 Tul. L. Rev. 173, 234-47 (1998) (arguing for the creation of a limited newsgathering privilege while advocating the strengthening the intrusion tort to increase privacy protection).

n91. See supra note 58.

n92. In New York Times Co. v. Sullivan, 376 U.S. 254, 288 (1964), the Court, in determining if the statement was made "of and concerning" the plaintiff, refused to allow impersonal criticism of a governmental body to be turned into a personal criticism because to do so would raise "the possibility that a good-faith critic of government will be penalized for his criticism." Id. at 292. In Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990), the Court refused to establish a First Amendment-based "opinion privilege" defense against defamation actions. The Court did acknowledge, however, that for a statement to have an actionable defamatory meaning, the First Amendment requires that the statement be capable both of being proven false (i.e., verifiable) and of reasonably being interpreted as stating actual facts about a person. See id. at 19-20. In Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 513-14 (1991), the Court acknowledged that any alteration of a quotation results in falsity, but such a rule for proving falsity for actual malice purposes would be too stringent and inconsistent with First Amendment principles. Instead, the Court concluded that "if an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation." Id. at 516. Since such a statement is substantially true, actual malice-knowledge of falsity or reckless disregard of truth or falsity-could not be established. See generally C. Thomas Dienes & Lee Levine, Implied Libel, Defamatory Meaning and State of Mind: The Promise of New York Times v. Sullivan, 78 Iowa L. Rev. 237 (1993) (suggesting the use of defamatory meaning to deal with problems of implied libel).

n93. See Smolla, supra note 1, at 1127-28. For a far more restrictive approach to balancing press and privacy interests, see Randall P. Bezanson, Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press, 47 Emory L.J. 895 (1998). Professor Bezanson states: [I] am suggesting that when the press decides to engage in newsgathering conduct that violates generally applicable law, [it,]... not the party enforcing the law, should bear the burden of proving that the decision to employ illegal means was: (1) a product of protected editorial judgment, not a product of will or whim or avarice, not a decision based only on medium and commerce rather than message

and public need; (2) necessary to serve the public need, not just necessary to achieve the commercial or other interests of the publisher; and (3) justified because the public need is so great that it subordinates public interest in the equal enforcement of law. Id. at 908.

n94. 955 P.2d 469 (Cal. 1998).

n95. See id. at 490-91 (finding that there is a triable issue as to whether accident victims have a reasonable expectation of privacy in a rescue helicopter that served as an ambulance).