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SYMPOSIUM: PRIVACY AND THE LAW: PANEL I THE MEDIA'S INTRUSION ON PRIVACY: Privacy and the First Amendment Right to Gather News

NAME: **Rodney A. Smolla** *

BIO: * George Allen Professor of Law, University of Richmond, T.C. Williams School of Law.

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Introduction

This Article examines privacy and its relationship to newsgathering, against the backdrop of larger currents in contemporary debates about privacy. We live in interesting times, in which privacy appears to be disintegrating all around us. This Article concentrates on only one relatively narrow band of current public discourse concerning privacy - the band that encompasses media issues such as whether laws should be passed to curb the practices of paparazzi, and whether the media should be liable for engaging in aggressive newsgathering techniques or for publishing private facts. A principal hypothesis of this piece is that our future laws and public policies on these issues inevitably will be influenced by broader cultural movements regarding privacy. This Article attempts to place information-gathering issues in the context of these larger privacy debates.

Although the phrase "the right to gather news" appears in the title of this piece, many of the issues discussed here go beyond what we might conventionally call "newsgathering," at least to the extent that the term conjures images of the mainstream institutional press. The array of individuals and entities that engage in aggressive or surreptitious tactics to gather and disseminate ostensibly private information about other individuals and entities is as multifarious as modern life, and it seems that whether or not we would all do the things that some people do to get this stuff, we all end up trafficking it. At times it seems as if everybody is invading everybody's privacy every day: activists and interest groups, labor unions and corporate competitors, prosecutors and persecutors, presidential aides and congressional committees, journalists and jilted lovers, alienated executives and estranged spouses, whistle-blowers and flame-throwers, fame-seekers and window peekers, Linda Tripps and Larry Flynts - the carnival carousel goes round and round - Letterman to Leno, Jerry Springer to Larry King; everything is hanging out; nothing is sacred; we have all gone nuts.

This Article begins by canvassing the cultural mood with broad brush-sweeps, in which alleged invasions of privacy by the press and other information-gatherers are located against the backdrop broader privacy debates. After briefly cataloguing what some of the ingredients of a privacy-restorative agenda might be, the Article focuses more narrowly on the legal and policy issues governing proposals to restrain the conduct of paparazzi, to enhance legal protection against intrusion in the course of information-gathering, and to rejuvenate the tort of publication of private facts.

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I. The Mood of the Culture

The cultural mood is to retrench privacy and restrain the press. This means that for privacy advocates, these are at once the worst of times and the best of times.

These are the worst of times for privacy, because we seem to have so little of it. A report on the state of privacy in modern times would note the following disquieting trends:

We Live in a Paparazzi and Tabloid Culture. Modern mass culture often appears to be careening out of control, as if we were all characters in a massive Tom Wolfe novel run amuck, our lives turned inside-out, made into veritable amusement parks for the decadent entertainment of the world's prurient voyeurs. [n1]

The Dividing Line Between Public and Private Life Has Evaporated. If there was once a cultural understanding that life contained public and private spheres and that even celebrities and powerful public officials deserved some semblance of private lives, that understanding passed with the wind. Sex, infidelity, and lies about both are not just sinful anymore, they are newsworthy.

The Lives of Ordinary People Are Often the Focus of Entertainment and News in Mass Culture. In both mass culture and elite culture, portrayals of the common person have always been important. Stories about the tragedies or triumphs of what the law would normally call "private figures" are not new. The grief of a family devastated by a fire or the giddy highs of a family that has just won the lottery jackpot have always been deemed newsworthy. Stories about ordinary people, however, appear to be increasing in quantity, in intensity, and in their degree of penetration into private lives. "Reality television" programs, talk shows such as Jerry Springer, and a greater emphasis on "human interest" stories even in mainstream news reporting have all contributed to a dissolving of the line between public and private figures.

New Technologies Allow our Privacy to Be Penetrated in Ways Never Before Possible. There is a widespread sense that the sheer power of modern technologies to penetrate what were once private spaces have dramatically degraded privacy. What was once the high-tech exotica of spy movies is now readily available to the upscale mail-order customer: cameras that can fit within a pair of eyeglasses, microphones that hear through walls from afar to pick up the sighs and whispers of the bedroom, and telephone taps that can make anyone a fully-equipped Linda Tripp. Celebrities appear before Congress to complain that it is just not fun anymore dealing with all the feeding frenzies, the paparazzi, and the tabloids, largely because the privacy-invaders have become so good at what they do. [n2]

[*1099] We Are Awash in Surveillance. If new technologies have increased the degree of penetration into privacy, they have also, in a somewhat different way, increased the scope of surveillance. We are increasingly "watched" in the mundane actions of daily life, as cameras record our movements on streets and sidewalks, at the automated teller machine, inside stores, restaurants, lobbies of public buildings, and in our work spaces. Our daily transactions are recorded and stored in data banks - our use of credit or debit cards, our entry and exit from buildings, our telephone calls, and our e-mail messages. [n3]

There Is a Growing Threat to Privacy On-Line. As the Internet has become a tool used by many Americans as part of their daily social and business lives, concerns over privacy on the Internet have expanded. There is an ongoing struggle among Internet providers, software manufacturers, on-line privacy advocates, and consumers over on-line privacy issues. [n4]

The Partnership of the Press and Law Enforcement. Whether the partnership is real or merely imagined, there is a growing sense that the media and the law enforcement are often in cahoots. With increasing frequency, cops and journalists seem to pursue the same stories, to trade information with one another, and even to collaborate in the processes of search, seizure, and arrest. [n5] Television programs show real police officers in real police cars arriving at the homes of real people to serve real warrants with real reporters filming right along side. In the midst of all this reality there is a confusion of roles. Being searched, seized, and arrested was once largely a private thing. In modern times, however, these events happen on television. [n6]

There Is an Increased Use of Shaming as a Form of Social Control and Criminal Punishment. Aside from the increasing appearance of collaboration between the press and law enforcement, there is a growing use of "shaming" as a formal method of criminal punishment, or a less formal method of social **[*1100]** control. Shaming, the use of public ridicule or embarrassment to punish wrongdoing, is frequently privacy-invading. Some states, for example, have recently begun to place the criminal records of sexual offenders on Internet web sites. [n7]

This Is a Time of Ambivalent Legal Protection for Private Autonomy on Matters such as Reproduction, Sexual Conduct, or Assisted Suicide. The legal protection that society provides for private autonomy on matters such as reproduction, sexual conduct, or assisted suicide is currently in a state of ambivalence. Constitutional law appears somewhat "stalled" on these issues at present. [n8] This irresolute commitment to the "substantive" protection of these type of autonomy-grounded privacy choices may seem unrelated, or only distantly related, to the debate over the tensions between privacy and the news media, which this Article principally focuses on, but I believe that linkages do exist. Many of the same cultural forces that have tended to diminish "informational privacy" have also worked against any robust protection of "substantive" privacy.

II. A Corrective Agenda

These may be the worst of times for privacy, in that there appears to be so little of it. Yet these may also be the best of times, because the collective sense that privacy is being lost appears to be generating a cultural backlash. There is a yearning for correctives. Our public discourse today includes many proposals for retrenching privacy, and reigning in the press and other privacy-invaders, through the development of new privacy-protecting laws. Some of the possibilities include:

(1) Restrictions on the Practices of Paparazzi. Legislation has been enacted in California [n9] and proposed at the federal level [n10] to restrict the perceived **[*1101]** abuses of the paparazzi. While some of these proposals are relatively modest, targeting only the most extreme forms of dangerous "paparazzitic" behavior, [n11] other proposals would substantially augment existing criminal and tort protection of privacy. [n12]

(2) Invigorating the Tort of Publication of Private Facts. One of the quintessential privacy torts is the publication of private facts. [n13] This tort, however, often seems to exist more "in the books" than in practice. Suits by plaintiffs often fail, commonly because the fact that is revealed, even if admittedly "private," is nonetheless deemed newsworthy and its revelation protected by the First Amendment. [n14] Thus an obvious strategy for increasing legal protection of privacy would be to modify First Amendment and tort doctrines so as to make this a more viable tort. [n15] Closely related to this strategy would be to make it illegal to traffic in privacy contraband, a restriction discussed below in connection with possible new limitations on newsgathering. [n16]

(3) Creating Legally Enforceable Limits on Newsgathering Methods. One way to counter invasions of privacy by the media is to create new legal limitations on newsgathering techniques, or to reinvigorate old ones. This is **[*1102]** a broad strategy that may be subdivided into a number of constituent parts, such as:

(A) Elimination or Restriction of the Reporter's Privilege. Journalists today make heavy use of confidential sources to obtain stories. [n17] The promises of confidentiality they make are protected, to varying degrees depending on the jurisdiction and the circumstances, under the "reporter's privilege," which courts widely recognize under the First Amendment, state shield legislation, or state common law. [n18] One tactic for reducing invasions of privacy is **[*1103]** to eliminate or severely restrict this privilege, on the theory that many of the sources used by reporters to obtain private information would dry up if promises of confidentiality no longer received legal protection. [n19]

(B) Expansion of Liability for Intrusion. A variety of standard torts, such as intrusion, trespass, assault, battery, fraud, or inducement of breach of contract may be used to attack aggressive newsgathering methods. Recently, media targets have brought an increasing number of highly visible cases grounded in these causes of action. [n20] As these torts become viable methods of attacking aggressive newsgathering techniques, the use of those techniques may be deterred, thereby increasing protection of privacy. The tort of intrusion, either as a common-law or statutory cause of action, is of particular importance in this area of pro-privacy reform. [n21]

(C) Making It Illegal to Traffic in Privacy Contraband. One of the existing dogmas of First Amendment law is that the press has a presumptive right to publish truthful information that is lawfully obtained. [n22] The dissemination of a fact that might otherwise be deemed private (and thus protected, for example, under a newly-invigorated version of the tort of publication of private facts), will normally be deemed protected under today's First Amendment standards if the fact was "lawfully obtained" by the person seeking to **[*1104]** disseminate it. [n23] Thus, the press may publish private material leaked to it intentionally or through inadvertence, even though the person who leaked the material may have violated some legal duty. [n24] But if such information were deemed "privacy contraband," the law might be able to proscribe its "downstream" dissemination, in much the same way that it is illegal to traffic in or possess illegal drugs or to receive stolen goods. [n25]

(4) Breaking the Partnership Between the Media and Law Enforcement. If one of the threats to privacy today is the growing appearance of partnership between the press and law enforcement, breaking up that joint venture is a natural avenue for pro-privacy reform. Police, for example, might be forbidden from bringing journalists along when they execute search or arrest warrants. The Supreme Court recently held that such media "ride-alongs" violate the Fourth Amendment, [n26] which will presumably put an effective end to this practice. [n27]

[*1105] (5) Reducing the Availability of Privacy-Invading Material in On-Line Databases. This is not a proposal that necessarily targets the media, but rather one that may affect governmental agencies and various private commercial database services. [n28] If the accumulation and accessibility of private information on-line is curtailed, privacy will be enhanced. [n29]

(6) Turning Off Surveillance Cameras. The most direct and obvious way to counter the increasingly pervasive surveillance in society is to require that some of the cameras be turned off. [n30] In most cases a surveillance camera was put

in place by some private business or public authority with the legal right to put the camera where it is - on the property of the business itself, in some public building, or in some public place. [n31] To disable the private retail business from taking video images of its own premises, or the private employer **[*1106]** from videotaping its own employees, would require legislation diminishing the normal prerogatives of ownership in the service of privacy. To effect similar changes against public entities would require similar legislative or administrative enactments or an interpretation of constitutional law that treats such videotaping as a violation of a constitutional right. [n32]

III. A Critique of Privacy-EnhancingProposals

The various proposals listed above (and many other creative proposals not listed) implicate a wide range of policy and legal issues, many of which the articles presented as a part of this symposium discuss in detail. Having attempted to set the debate over information-gathering against the backdrop of these larger debates, the focus here is now narrowed to several of the proposals that deal with information-gathering: curbing the paparazzi, expanding liability for aggressive newsgathering through the enhancement of liability modeled after the tort of intrusion, and rejuvenating the tort of publication of private facts. [n33]

A. Curbing the Paparazzi

The paparazzi do not have many friends in high places. Whatever the actual forensic truth, cultural mythology will always hold the paparazzi partly responsible for the death of Princess Diana. Alcohol, reckless driving, or unbuckled seatbelts in some combination may have been the proximate cause, but the paparazzi were on the scene before, during, and after the accident, and the people will never forgive them for it. Diana was at once the princess and the martyr of celebrity. What the paparazzi made, the paparazzi took away. And for some, having destroyed the princess, the paparazzi ought now be destroyed. [n34]

The political impulse to "do something" about the paparazzi is strong, and were it not for the First Amendment, there would be little meaningful opposition. When Congress conducted hearings on possible federal anti-paparazzi legislation, an impressive panel of beleaguered celebrities, including actors Michael J. Fox and Paul Reiser, told their woeful and compelling tales to a sympathetic audience. [n35] The paparazzi, it turns out, are not particularly nice people.

Even so, the paparazzi's actions in gathering photographic images of the infamous and celebrated have been understood, up to now, as protected under the First Amendment, at least when they took photographs in public **[*1107]** places and did not engage in any independently criminal or tortious activity. A crime or a tort does not occur when merely photographing a public person in a public place. [n36]

The most far-reaching anti-paparazzi legislation is California's new law, [n37] a product in part of the influence that the Screen Actors Guild has in the California legislature. [n38] The law prohibits physical invasions of privacy for the purpose of capturing images about a person engaging in "personal or familial activity" when that "invasion occurs in a manner that is offensive to a reasonable person" and is done for a commercial purpose. [n39] Far more significantly, however, the new California law imposes liability under a theory of "constructive invasion of privacy," prohibiting intrusions through the use of technical means that facilitate privacy invasions that otherwise could not have been obtained without a trespass. [n40] The law defines "personal and familial" **[*1108]** activity to include intimate personal matters, close relationships, and other private affairs, but specifically excludes actions that are illegal. [n41] The law defines "for a commercial purpose" as any act done with the "expectation of a sale, financial gain, or other consideration." [n42]

The California law authorizes compensatory damages, treble damages, punitive damages, the disgorgement of profits obtained from the sale of the information obtained, [n43] as well as equitable relief against future violations. [n44] Going after the tabloids that create the markets for the paparazzi, the law also holds liable any person who directs, induces, or solicits the invasion of privacy, whether or not there is an employer-employee relationship, and further subjects this person to punitive damages. [n45] In its only apparent show of restraint, the California law falls short of making the photographs of paparazzi "privacy contraband," by including the caveat that mere publication of material obtained in violation of the law does not itself qualify as a violation, although such a publication might be independently tortious as the publication of private facts. [n46]

[*1109] The legislative initiatives proposed at the federal level vary somewhat in their details, but essentially they would make it a crime to photograph any person for the purpose of selling that photograph for commercial gain if, in the process, the photographer places the person being photographed in danger of serious physical injury or death. [n47]

[*1110] California Senator Dianne Feinstein and Senate Judiciary Committee Chairman Orrin Hatch introduced a bill in 1998, again with the enthusiastic support of the Screen Actors Guild, that would make it a federal crime to persistently follow or chase "a person in a manner that causes the person to have a reasonable fear of bodily injury" in order to film or record them for commercial purposes. [n48] The bill established a penalty of up to one year in prison for engaging in such action, enhanced to at least five years if the actions caused serious bodily injury, and at least twenty if the actions caused death. [n49] Following the California model, the Feinstein bill also banned paparazzi tactics that included either physical trespass or constructive trespass. [n50]

The anti-paparazzi proposals have three principal characteristics. First, they single out one class of persons for coverage, a class apparently intended to cover only the classic "paparazzi," but that might well encompass certain "mainstream" journalistic efforts. Second, they seek to provide protection against physical injury or fear of injury. And third, they attempt to curb certain high-tech methods of photography and recording through the concept of constructive trespass.

I will deal first with the constitutional and policy issues implicated by the attempt to single out one class of persons for coverage. The proposals attempt to confine their coverage in two ways - one dealing with motive and the other with method. The California law and the various federal proposals only proscribe attempts to obtain photographs or recordings for "commercial purposes." In turn these attempts are made illegal only through such actions as persistently following or chasing the individual or by engaging in trespass or constructive trespass.

To the extent that the intent and operation of these laws focus on the traditional paparazzi, they violate current First Amendment principles that prohibit singling out a certain class of speakers or a certain form of media for specially disfavorable treatment. [n51] The bill proposed in the House of Representatives limited liability to persons actually doing the photographing or recording [n52] and subsequently engaged in a "sale or transfer" of the materials for financial consideration. [n53] Only the photographer is on the hook - the bill **[*1111]** explicitly excludes from coverage the photographer's employer, or if the photographer is an independent contractor, the entity that purchases the material, such as a tabloid. [n54]

Imagine seven different photographers who take photographs or video recordings of a celebrity, each of whom engages in behavior that otherwise would be proscribed by the law, such as by persistent following and chasing, or the use of equipment that permits taking the photographs or recordings through methods that would constitute trespass or constructive trespass:

(1) The first photographer is an obsessive fan of the celebrity, who wishes to obtain the photographs and video recordings for his or her own private collection of memorabilia. No sale or dissemination of the photographs or recordings is intended.

(2) The second photographer is a member of an animal rights group who believes that the celebrity consistently engages in behavior constituting cruelty to animals. The photographer wishes to obtain photographs or video recordings documenting such abuse. The photographs will not be sold, but will be donated to the animal rights group, for public dissemination in the group's various publications, for the purpose of raising public consciousness about mistreatment of animals.

(3) The third photographer is a private investigator hired by the celebrity's spouse to attempt to document suspected adulterous behavior. The investigator is being paid for her services, but there is no separate charge for the photographs or video recordings as such, and thus no apparent sale or transfer of the images for financial consideration. The photographs will be given by the investigator to her client, who may use them to confront the errant spouse, or as evidence in divorce proceedings.

(4) The fourth photographer is a journalist working for a mainstream television news program. The photo-journalist is a paid employee of the network. The photographs or video recordings obtained will be used by the network for commercial news programming as part of a program on animal abuse.

(5) The fifth photographer is a salaried paparazzo, working for a print or broadcast tabloid that will use the photographs or video recordings obtained for dissemination in a print tabloid such as The National Enquirer or a broadcast tabloid such as Inside Edition. These tabloids are commercial enterprises that publish or broadcast their material for profit. But because the photographer is a paid employee of the tabloid, the photographer will not engage in any sale or transfer of the material for financial consideration.

[*1112] (6) The sixth photographer is a free-lance journalist doing a story on animal abuse. The journalist intends to sell the photographs or video recordings for commercial gain to a serious, mainstream, non-tabloid newspaper, magazine, or television news program.

(7) The seventh photographer is a traditional paparazzo, who is attempting to obtain photographs or video recordings of the celebrity that can be sold to print or broadcast tabloid outlets for commercial profit.

Under the California law, only the first two photographers, the obsessive fan and the animal rights activist, would appear to be off the hook. Every other photographer would have engaged in his or her actions for financial gain. At least as currently drafted, it appears that under the federal proposals, however, only the last of these photographers would be subject to the anti-paparazzi legislation. The first photographer (the obsessive fan) and the second photographer (the animal rights activist) do not appear to have any "commercial purpose," and thus appear cleanly out of the law's coverage. The third photographer (the private detective) is operating for commercial gain, in the sense that she is being paid for her services, and as part of that service she will indeed transfer the photographs to her client. She is an independent contractor. The question would be whether the transfer of the material as part of the overall service of investigating would trigger the coverage of the act. The fourth and fifth photographers are in identical "transactional" positions, both are salaried employees of entities that intend to use the material for publication or television programming for profit. The bill as drafted clearly exempts from liability the tabloids that employ these photographers. Because there is no literal "sale or transfer" of the material, the photographers themselves appear to be outside the bill's coverage.

So we are down to the sixth and seventh photographers, the serious free-lance photojournalist and the traditional paparazzo, both of whom operate as independent contractors. If these are the correct constructions of the California law and of the proposed federal laws, they are constitutionally vulnerable for multiple reasons.

At the broadest level, the coverage of these laws is triggered only by acts of communication and expression, and on that basis alone they constitute content-based regulation of speech [n55] of the sort presumptively violative of the First Amendment. [n56] Although one of the federal bills recites that it is not **[*1113]** a defense that an image is not actually captured or actually sold, [n57] a provision clearly intended to bring within the act's prohibitions the hapless photographer whose camera fails to operate or is unable later to effectuate a sale. The bill does only cover persons who engage in behavior for the purpose of capturing such images and making such sales. These proposals thus do not proscribe physical conduct alone. It is not the mere "chasing or following" or "trespass" or "constructive trespass" that is made illegal. The chasing or following must be for the purpose of obtaining the image or recording, with the intent to sell, transfer, or obtain financial gain from that image or recording. The transfer of an image or recording is an act of communication. As such, only conduct that is engaged in for the purpose of communication is proscribed. Thus, the legislation is not content-neutral; it does not target "conduct" that merely impacts speech in an "incidental" manner. [n58]

The anti-paparazzi laws are manifestly content-based laws, because they contain as a predicate element the perpetrator's intent to sell or transfer communicative material. [n59] As content-based laws, they are presumptively unconstitutional. [n60] Most pointedly, they run afoul of the principles established in the so-called "Son of Sam" case, Simon & Schuster, Inc. v. New York State Crime Victims Board, [n61] which struck down the New York law that targeted the royalties earned by criminals who sold the stories of their criminal activities for profit through media such as books or movies. [n62] Although a general law confiscating the proceeds of criminal activity is not unconstitutional, **[*1114]** a law that singles out for confiscation only those proceeds derived from communicative activity is not. [n63]

Indeed, the proponents of the anti-paparazzi legislation may have actually shot themselves in the foot by attempting to narrow their target to paparazzi. There are actually two shots, hitting both feet, and leaving the proposals without a leg to stand on. As already explained, the proposals trigger the First Amendment's rigorous proscriptions against content-based discrimination. That is the first shot. But the legislation also targets one narrow class of photographers. [n64] That is the second shot. Both shots cause the proponents of these reforms to forfeit one of the most formidable current doctrines available to them, the principle that members of the media normally enjoy no First Amendment exemption from laws of "general applicability." In Cohen v. Cowles Media Co., [n65] for example, the Supreme Court refused to allow a First Amendment defense to a promissory estoppel claim brought against a newspaper that violated a promise of confidentiality it had granted to a source. [n66] The Court said 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." [n67] Similarly, cases involving taxes on the press generally appear to track Equal Protection Clause analysis - sustaining taxes that are generally applicable but striking down taxes that single out the press, or any subset of it, for disadvantageous tax treatment. [n68] This doctrine is one of the most powerful weapons privacy advocates have in their

arsenal; yet, it is not available to defend anti-paparazzi legislation, because such legislation is manifestly not of general applicability.

Another free-standing infirmity in the anti-paparazzi proposals is that they discriminate among speakers, differentially penalizing information-gathering efforts and chilling free expression in a manner that offends the equality principles embedded in the First Amendment. [n69] In the example given **[*1115]** above, all five of the photographers - the animal rights activist, the salaried "mainstream" journalist, the salaried "tabloid" journalist, and the two free-lance photographers - engaged in identical physical behavior, and all did so with the intent of obtaining images and disseminating those images to others for the purpose of communication. Only the altruistic non-profit motivation of the animal rights activist exempted the activist from the anti-paparazzi laws' coverage. Further, in the federal proposals, only the nature of the employer-employee relationship put the salaried photographer outside the act's coverage and the free-lancer within it. Orthodox First Amendment doctrine simply will not countenance such forms of speaker-based discrimination.

The First Amendment does not, for example, generally tolerate discrimination against a particular medium of expression or a particular form or genre of expression. [n70] More profoundly, just because a speaker engages in communicative activity for profit does not diminish the constitutional protection that the speaker would otherwise enjoy. The commercial motivation of the speaker simply does not disqualify otherwise protected speech, or otherwise protected forms of information-gathering, from the shelters of the First Amendment.

Photographs and visual recordings obtained by the freelance journalist and freelance paparazzo are not in any sense "commercial speech," which sometimes receives less First Amendment protection than other types of speech. [n71] "Commercial speech" is not simply speech engaged in for profit. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., [n72] the Supreme Court declared that "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." [n73] Elaborating, the Court declared that "speech likewise is protected even though it is carried in a form that is 'sold' for profit." [n74] If this were not the rule, the entire content of any book, **[*1116]** newspaper, or television program sold or supported by advertising would constitute commercial speech. Commercial speech is thus speech that proposes commercial transactions - advertising, essentially - and even advertising enjoys expansive constitutional shelter. [n75]

B. Expanding Liability for Aggressive Information-Gathering

If the laws that target the paparazzi are unconstitutional largely because they target paparazzi, the question remains whether genuinely general laws, at least laws that do not single out any subset of speakers or particular genre of expression for particularly disfavorable treatment, would be constitutional. Imagine, for example, a law that would make the information-gathering efforts of all seven of the photographers in the example above illegal. Such a law would actually enhance privacy more than the narrow anti-paparazzi legislation and would simultaneously chill a far broader range of information-gathering and expression.

Such an expansion could be effected through anti-paparazzi legislation that simply left out the anti-paparazzi part. Or it could be effected through expansion of the common law tort of intrusion. Because legislative and common law expansion of the notion of "intrusion" implicate similar policy concerns and constitutional problems, they are discussed here in one basket. [n76] The mosaic of policy and legal questions posed by the application of the tort of intrusion to information-gathering efforts by the mainstream media, public interest, or paparazzi is arresting in its texture, color, and complexity. The intrusion tort in its classic formulation contains three elements. A plaintiff **[*1117]** must prove: (1) an intentional intrusion; (2) on the "solitude or seclusion of another"; (3) that would be "highly offensive to a reasonable person." [n77] Before the First Amendment is even implicated, the perplexity of these three tort concepts itself provides a magnificent display. The three elements have differing points of focus. The concept of "seclusion" appears to focus on the plaintiff. In contrast, the element of "intrusion" appears to concern itself more with the conduct of the defendant, or at least on the interaction between the defendant's conduct and the "seclusion" of the plaintiff. And the third requirement, "offensiveness," seems also to be an admixture, inviting an assessment of the repugnance of the defendant's actions in relation to perceived intensity of the plaintiff's asserted claim for solitude.

Brooding over, under, and through these tort issues is the First Amendment. Because the tort of intrusion ostensibly redresses actions by the defendant that precede any act of communication, some argue that constitutional freedoms of speech and press simply play no role whatsoever in intrusion cases, permitting jurisdictions to develop the law of intrusion unfettered by First Amendment restraints. Yet intrusions are often committed by the media in the context of news-gathering, or by public interest groups intent on exposing perceived abuses of power, or by private individuals engaged in acts of dissent or "whistleblowing." If the First Amendment provided at least some measure of protection for infor-

mation-gathering activity, the tort doctrine would be limited by constitutional standards, in much the same way that the First Amendment already constrains tort doctrine in defamation and in other branches of privacy law.

If the tort of intrusion was constructed merely to safeguard physical interests, there would be no obvious reason for its existence. [n78] Interests in bodily integrity are adequately protected by the crime and the tort of battery. [n79] To the extent that some additional buffer zone of physical protection is required, the tort of assault provides it, extending protection to the wider zone of physical fear. Similarly, interests in the integrity of physical spaces and things that one owns are sufficiently protected by torts such as trespass, conversion, or trespass to chattels.

From the opposite extreme, if the tort of intrusion is solely designed to protect psychological interests, it would also appear to be expendable. If intrusion is simply the "peace tort," created to vindicate interests in equanimity **[*1118]** and mental well-being, the tort of intentional infliction of emotional distress would seem to adequately cover the field.

In terms of the architecture of tort doctrine, therefore, the question is what load should the tort of intrusion - either in its common law form or as part of some new legislative privacy package - be engineered to carry? What value does society gain from the tort's existence?

The starting point in attempting to make a case for intrusion is "seclusion." Borrowing from Fourth Amendment search and seizure concepts, at the threshold of an intrusion case, courts frequently ask whether the plaintiff had a "reasonable expectation of privacy" in the seclusion that has allegedly been invaded. But what makes an expectation "reasonable" is itself a social construct, and the conclusion that a plaintiff's expectation was or was not reasonable inevitably turns on more detailed and subtle evaluations. [n80] "Seclusion" in privacy law thus appears to be an amalgam of factors relating to physical space, personal and professional relationships, human intimacy, psychological peace, and personal culpability.

Seclusion is, to some degree, a "spacial" concept, in which a principal focus is on the nature of the physical space the plaintiff is occupying at the moment of the purported intrusion. [n81] Courts generally hold, for example, that it does not constitute intrusion to photograph a person in a public place. [n82]

At the opposite end of the spectrum are places, such as the home, that our legal tradition has tended to treat as "private." The sacredness of the home as a "castle," a fortress of privacy surrounded with moats of constitutional and common-law protection, is legendary and centuries old. [n83] William Pitt, in a speech before Parliament, declared the home a sanctuary against the force of government, demarking the line at which the brute power of the state must yield to the principle of privacy:

"The poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his force dares not cross the threshold of the ruined tenement." [n84]

[*1119]

This tradition was the backdrop of the Fourth Amendment, and its guarantee of the right of the people to be secure in their "persons, houses, papers, and effects" against unreasonable searches and seizures. [n85]

This solicitude for the home, originally conceptualized as a bulwark against the force of the state, has evolved into a broader concept, in which the home is seen as an essential to one's autonomy and privacy, a place of respite from the cruel world. In the words of Judge Jerome Frank:

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty - worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle. [n86]

The integrity of the home as a castle has been tested by the so-called "ride-along" cases, in which plaintiffs complain that their civil rights are violated when the press accompany police executing search or arrest warrants in the home. Lower courts had split in these cases, and the Supreme Court granted review. [n87] In holding that such media "ride-alongs" violate the Fourth Amendment, [n88] the Supreme Court recited the famous maxim that the house is one's castle - "the Fourth Amendment embodies the centuries-old principal of respect for the privacy of the home." [n89]

There are other physical spaces that are also considered quintessentially private. These spaces often take on their private character both because of the attributes of the space itself and the nature of the activity that usually occurs there. Hospital rooms, for example, are places we would normally regard as private. [n90] A patient in a hospital room is in some sense a temporary resident there. But more important is the quality of personal intimacy we tend to attach to the medical care that takes place in hospital rooms. [n91]

[*1120] If claims for intrusion are presumptively weakest in public spaces and strongest in private spaces, there will also naturally be many spaces that elude easy classification. A hospital room may be presumptively private, but what about an ambulance or a rescue helicopter? Does it matter whether the door to the ambulance or helicopter is open or shut? Our social intuitions regarding the ambulance or helicopter will more likely be informed not by the nature of the physical space or the vehicle, but by what is happening to the person at the time. A recent California case, wrestling with these concerns, held that a viable intrusion claim did exist in a case in which a news cameraman filmed an accident victim's conversations with medical rescue workers that occurred inside a rescue helicopter. [n92]

Though it may seem counter-intuitive, seclusion is also a relational concept. Defamation is a classic example of a "relational" tort, a tort that is designed to vindicate damage to "reputation," which is an injury to one's personal, social, familial, or business relationships. [n93] Privacy torts are traditionally not conceptualized as "relational." The difference between defamation and privacy, supposedly, is that defamation looks to the "external" damage done by the defendant to the "personal asset" known as reputation, whereas privacy looks inward, at the damage done to the individual's own psychic peace and tranquility. [n94]

This division, however, has always been more the stuff of paper than reality, and even the paper is porous. After a relatively nominal showing of injury to reputation, for example, plaintiffs in defamation cases can usually recover for their personal anguish and distress. [n95] In some jurisdictions the charade is abandoned altogether, and the plaintiff in a defamation action may recover for personal distress alone, without the necessity of showing any reputational injury at all. [n96]

Conversely, the tort of intrusion is a tort that, in at least some circumstances, seems aimed at protecting not merely internal peace of mind, but the inviolability of certain personal and professional relationships. Intrusion is thus in some of its applications a "relational" tort - one that focuses on whether the defendant has in some way invaded a confidential or intimate relationship the plaintiff has with someone else. [n97] Eavesdropping on the conversation of an attorney with her client, or a priest and his penitent, may well **[*1121]** be deemed more an invasion than eavesdropping on the conversation of an animal trainer with his monkeys. [n98]

One of the ongoing battlegrounds for intrusion is whether entry into a place of business or commerce constitutes an entry into a space sufficiently imbued with privacy interests to merit protection under the intrusion tort. [n99] **[*1122]** One of the most watched intrusion-style cases of current times involves such a commercial context. In Food Lion, Inc. v. Capital Cities/ABC, Inc., [n100] the grocery store chain, Food Lion, sued ABC on various state tort theories such as fraud, trespass, and breach of fiduciary duty for actions by undercover ABC reporters and agents who infiltrated Food Lion operations and used hidden cameras to document alleged safety and sanitary violations by the store. On December 20, 1996, a Greensboro, North Carolina jury found ABC liable for fraud, trespass, and breach of loyalty and awarded Food Lion $ 1,402 in compensatory damages, which was the approximate cost of hiring and paying the two reporters who obtained jobs in Food Lion stores for the sole purpose of spying on their meat departments. [n101] One month later, the jury awarded punitive damages of $ 5.5 million, later reduced by the trial judge. [n102] The question of the truth or falsity of the 1992 ABC broadcast was not at issue in the case. Rather, Food Lion attacked only ABC's newsgathering techniques, particularly the fraud and deception. [n103] The United States court of appeals for the Fourth Circuit reversed in part and affirmed in part, holding that the defendants could not be found liable for fraud, but could be held responsible for tortious breach of loyalty and for trespass. [n104] The court of appeals also held that there was no First Amendment privilege sheltering the defendants from these "run-of-the-mill" torts, laws of "general applicability." Because the award of damages against the defendants on those counts was only an award of $ 2 in nominal damages, however, the net financial effect of the Court of Appeals ruling was a victory for ABC.

Seclusion may also be at least partially an "intimacy" concept, in which the emphasis is on the activity in which the plaintiff is engaged at the time of the intrusion. Courts attempt to gage how "personal" or "intimate" or "private" the activity is. We are socially habituated to treat matters as sexuality, love, physical health, or medical procedures as highly private. Accordingly, tort law is more likely to treat such activities as within the ambit of personal seclusion. The constitutional law protections for privacy, such as they are, tend to involve matters of intimacy. [n105]

[*1123] Similarly, seclusion may in part be a psychological concept, the metes and bounds of which do not demarcate physical space, personal relations, or intimacy, so much as psychological peace. [n106] The right to be left alone may to some degree protect the option to simply be alone. Alone for contemplation, meditation, or prayer. Alone for rejuvenation, respite, or rehabilitation. Alone for silence.

Solicitude for this simple right to be left alone seemed to be a driving concern in what still remains one of the most famous intrusion cases, Galella v. Onassis, [n107] involving the paparazzo Donald Galella, who had persistently and aggressively pursued photographs of Jacqueline Kennedy Onassis and her children, John and Caroline. [n108] The trial in that case exposed a textbook of paparazzi practices. There was evidence that Galella had jumped into the path of John Kennedy, Jr. while riding his bicycle in Central Park, causing Secret Service agents concern for the boy's safety; that he had interrupted Caroline Kennedy while playing tennis; that he had entered the children's private schools; and that he had come uncomfortably close in a power boat to Jacqueline Onassis while she was swimming. [n109] He would often jump and posture while taking pictures of Onassis at public events, such as theater openings. [n110] He engaged in the practice of "bribing apartment house, restaurant and nightclub doormen" to be kept apprised of family movements. [n111] He even went so far as to romance a family servant. [n112]

The trial court found this conduct tortious and granted injunctive relief, which was sustained, in a somewhat modified form, on appeal. [n113] Galella was ordered to stay twenty-five feet away from Jacqueline Onassis and thirty feet from the children, to avoid any touching of them, to avoid any blocking of their "movement in public places and thoroughfares," to avoid "any act foreseeably or reasonably calculated to place" their lives and safety in jeopardy, and to avoid "any conduct which would reasonably be foreseen to harass, alarm, or frighten" them. [n114] Outside of those restrictions, however, Galella remained free to follow and photograph Onassis and her children, and to sell and publish his photos. [n115]

Finally, the plaintiff's own conduct may bear on the claim of intrusion. The policies that traditionally inform such stalwart tort concepts as contributory negligence or assumption of risk, or even such equitable principles like **[*1124]** "unclean hands," may have an appropriate place in judging whether a viable intrusion claim exists. The plaintiff's conduct may enter the equation in a number of different ways. At the outset it may be a factor in judging whether there is an actionable intrusion into seclusion at all. Down the line it may come into play in assessing whether intrusion, under the circumstances, should be deemed justified.

The simplest way in which the plaintiff's conduct may be relevant involves the plaintiff's own precautionary efforts to protect his or her own seclusion. The plaintiff's conduct thus works as a sort of conceptual umbrella that extends over all the factors we would otherwise weigh in deciding whether the plaintiff is entitled to some measure of legal protection of his or her privacy. To what extent is the privacy you take equal to the privacy you make? A person so imprudent as to not draw the shade may have a less persuasive claim against a stranger's prurient eyes than one who keeps the shades drawn. [n116] The impropriety of the plaintiff's behavior may also bear on the viability of the plaintiff's intrusion claim. A plaintiff who is intruded upon while engaging in an illegal activity may be disqualified from asserting an intrusion claim.

Furthermore, what does it mean to "intrude?" Something more than "two's company and the press is a crowd." The law of torts already has a battery of devices that protect an individual's privacy and physical integrity. Battery is in the battery, along with assault and trespass. Are there "intrusions" into "seclusion" such that it makes sense for tort law to redress that which is not already a battery, assault, or trespass? If our intuitive answer to this question is "yes," then we must unpack the nature of "intrusion" with greater care. Again, the analysis fruitfully begins with the physical positioning. To what extent does the judgment of whether an "intrusion" occurred turn on where the alleged intruder is standing at the moment of the purported intrusion? Does it matter, for example, whether the defendant is in a public or private space at the time?

Whether the penetration of the plaintiff's integument is or is not "intrusion" will also be informed by social perceptions regarding the "offensiveness" of the defendant's actions. "Offensiveness" is a ubiquitous concept in tort law. That it may be a common term, however, does not make it a clear one. The law of torts has always struggled for some way to define "offensive" conduct. Because what qualifies as offensive is, quintessentially, a social construct, a distilled deposit

of cultural mores, manners, and morals. Courts and commentators inevitably lapse into platitude, euphemism, and subjectivity in attempting to define it. In the context of newsgathering, we might attempt to break the concept down, like a photographer breaks down her camera, into its component parts.

It is first worth observing that our sense of the offensiveness of any particular intrusion is likely to be affected both by the conduct of the defendant and the intensity of our judgment that the plaintiff has had his or her seclusion invaded. Offensiveness is thus a hybrid construct that bridges the actions **[*1125]** of the plaintiff and the defendant. The stronger our feelings in a particular case for the plaintiff's seclusion, the more willing we are to label the defendant's conduct that interferes with seclusion as offensive. But for the sake of analysis, if we hold the plaintiff's position constant for the moment and make the only variable in the experiment the actions of the defendant, what kinds of factors should influence the offensiveness judgment?

One obvious factor that may deserve consideration is "manner." How has the defendant entered the plaintiff's seclusion? Was the entry open or surreptitious? Was the motive of the entrant revealed or concealed? Interestingly, judicial decisions cut both way on this issue. Some decisions seem to treat the hidden nature of the camera as something that adds to the offensive character of the defendant's action, presumably because of the increased deception involved. [n117] Other courts, however, have noted that a hidden camera may at times be less intrusive, because it does not in any way interfere with the plaintiff's activity or distract the plaintiff from that activity. [n118]

A second possible factor is "method." Did the purported intruder merely observe with his or her own eyes and ears? Or was technical assistance required, like a high-powered telephoto lens, night-vision binoculars, or sensitive long-range microphones? To what degree is the calculation of "offensiveness" thus influenced by the technical ingenuity with which the invasion was achieved? [n119]

A third potential factor is motive. [n120] To what extent should the law of torts be concerned with why the defendant intruded? Are altruistic intrusions more protected than selfish ones? How should we assess the motive of the animal rights activist who secretly tape-records episodes of alleged animal abuse behind the scenes of a movie set to expose the alleged abuse to public scrutiny, or instigate possible criminal prosecution? [n121] How should that motive be compared to the motive of a journalist who engages in the same act of secret recording in order to display the alleged abuse on a television news program? [n122] If the intruder is motivated by personal animus or **[*1126]** private vengeance, should that matter? Should it matter whether commercial profit plays a role in the intruder's calculus of motivation? Is an intrusion solely for commercial advantage, such as a banal exercise in industrial espionage, more offensive than intrusions motivated by a desire to reform? To inform? Should we care what the nature of the information is? Is the uncovering of the salacious and sinful as important as the ferreting out of crime or abuse of power? And what are we to make of the mixed-motive case, as most human behavior is mixed in its motive? Is the paparazzo who intrudes for the sake of a shocking photograph revealing the President in the midst of a high crime and misdemeanor to be less protected for the high fee he receives when the photograph is sold to the highest bidder?

A fourth nominee is "fixation." Did the purported intruder merely intrude, or was there some element of recording involved, some fixation of the plaintiff's conduct in a photo or film or audio recording? Once again, the tort of intrusion here bumps into its doctrinal cousins, those other causes of action that contain some element of copying or publication or appropriation among their formal elements. These torts are myriad and multifarious: libel, slander, false light invasion of privacy, publication of private facts, appropriation of name or likeness, invasion of the right of publicity, copyright, trademark, and trade secret laws - common law and statutory claims requiring that something be "published" or "appropriated" or "copied." Should the tort of intrusion wall itself off from these concerns? Or does fixation play a role? If it does play a role, does it matter whether the images "fixed" are ultimately distributed or published? Does it matter whether the fixation independently violates some other civil or criminal law?

And then, of course, there comes the Constitution. At the threshold is the issue of what kind of issue this is and whether it is in this context, "a constitution we are expounding." [n123] Are we dealing here entirely with tort law or is the First Amendment part of the conversation? If the First Amendment is to play a role, is it direct? Does the Constitution impose firm doctrinal limits on the power of states to make available to plaintiffs the tort of intrusion in situations involving newsgathering? Or is the role of the First Amendment more indirect and rhetorical, in the nature of a "value" to be weighed in the mix of factors that comprise the tort analysis?

If the First Amendment is treated as an authentic "player" in the policy and legal discussion, what vision of the First Amendment should inform its play? Is this the "Press Clause" First Amendment, a unique protection for the process of newsgathering, a largely "structural" notion designed to provide special protection for the functional and institutional role of the media in society? [n124] If this is the driving First Amendment engine, will some definition **[*1127]** of "me-

dia" or of who does and does not qualify as a "journalist" be required? Will all "media" be treated equal? Or will distinctions be drawn between the high-brow and the tabloid? If a First Amendment newsgathering privilege of some sort is engrafted on the tort of intrusion, will this be another privilege bearing the moniker of The New York Times? [n125] And how will public interest groups fare, groups that we normally would not think of as part of the "press," such as People for the Ethical Treatment of Animals or Greenpeace, groups that engage in information-gathering out of ideological or religious conviction, but not for the purposes of "disseminating news" in the more conventional sense? [n126]

If the First Amendment is to play a direct, substantive, doctrinal role, should that role include the very shaping of the substantive cause of action of intrusion itself? Or should the First Amendment's position in the analysis be more moderate, kicking in only at the back end of the litigation, placing limits on the remedies the plaintiff may invoke?

The list of questions posed above largely form the current policy and legal battleground. Without presuming to have answers to every question or insights into every subtlety and nuance, I would suggest a number of broad working propositions as guides to the future evolution of the law in this area.

The First Amendment should be understood to forbid liability for obtaining information when the plaintiff is located in a public place, in the absence physical harm, or a true threat of physical harm. There really is no debate over activity that either causes physical harm or truly threatens physical harm. No serious First Amendment argument can be made to immunize such conduct.

Short of threats of physical harm, however, the application of intrusion torts to information-gathering activity should be governed by a bright-line rule that prevents liability when the plaintiff is in a public place. Thus, no matter how irritating it may be for a person to be "chased" or "followed" through public places, the mere chasing and following alone, unaccompanied by any physical harm or threat, may not be made the subject of liability when the chasing or following is for the purpose of information-gathering. This **[*1128]** should be the rule even though intrusion may be characterized as a "law of general applicability."

The catch-phrase "law of general applicability" cannot simply be recited like a voodoo talisman to ward off noisome First Amendment spirits. At the threshold, the First Amendment must provide some general protection for information-gathering activity, hale enough to withstand even laws of general applicability. If the person about whom information is gathered is in a public place, the First Amendment should bar the tort of intrusion, absent physical harm or threats of such harm.

If some state legislature were to become suddenly galvanized into a mood of zealous pro-privacy protection, and in that mood were to enact a privacy "super-tort" that made it illegal to take anyone's photograph in any public or private place without that person's consent, surely the First Amendment would require striking the law down. Such a super-tort, a cross between intrusion and appropriation, would effectively take what had traditionally been conceptualized as part of the public domain and turn it into private intellectual property. One's physical presence in a public space, and concomitant image in the eyes or camera lens of others, had not been traditionally thought of as something that one owns. A law that purported to make it so would be, in a sense, a law of general applicability. But it would also be a law that would cripple communication and expression, a law that would effectively give to the actors in human events a quality of ownership over news and history itself.

If it seems awkward identifying the precise locus of unconstitutionality for such a provision, that is only because no attempt at such a super-tort has been made. Strong First Amendment advocates would begin with the well-established proposition that there is a right to disseminate information lawfully obtained. The defenders of the super-tort would rejoin that whatever protection this principle might previously have given photographers has now been lost, for now the obtaining of the information has been rendered unlawful, through passage of this new law of general applicability. But certainly this argument is not convincing. If it were, an open society could, through simple fiat, be suddenly rendered a closed one. The massive chill on the dissemination of information brought on by such a super-tort would surely violate the First Amendment, whether or not the law could be ingeniously characterized as one of "general applicability" or "content-neutrality." It would just be "too much." [n127]

[*1129] It is one thing to debate whether the famous Abraham Zapruder, who caught on a home camera the images of the assassination of President John Kennedy, has a legally enforceable copyright in his film, or whether others may copy the images he captured under the "fair use" exception to copyright law, or under some First Amendment right to discuss newsworthy events. But imagine that those whose images were caught on the film - Jacqueline Kennedy or Texas Governor John Connolly or any of Secret Service agents, police officers, or faces in the crowd - were understood

as having a property interest in their own physical images. Not only would such a law be silly as public policy, it would be unconstitutional.

These results should not change when, in the course of some accident or disaster, public or private individuals suffer serious harm in some public place, and journalists, filming or photographing or taking notes from some vantage point within the public space at which they have a right to be, capture images or information that appears to invade a plaintiff's privacy interests. It may offend good taste or even elemental norms of human sensitivity and decency to film a person dying on the street after a shooting or fire, but the images are certainly newsworthy, and the decision to disseminate them should be left to the ethnical judgment of journalists.

The balance of First Amendment interests do not change merely because the victim is loaded to a stretcher or placed inside an ambulance or rescue helicopter. As long as the journalist does not engage in physical trespass to see inside the open doors or transparent windows of the vehicle, the right to gather news in public places should trump whatever privacy interests of the plaintiff may be implicated.

When the plaintiff is not in a public place, the analysis becomes more difficult. When it is an employee or agent of the plaintiff that obtains the photographic images or recordings, as part of an act of whistleblowing, the First Amendment should preclude liability against employee or agent, and certainly against any news organization or other group that receives the fruits of the employee's or agent's betrayal for dissemination to the public. Thus, if in the Food Lion case ABC had not used its own agents or employees as confederates to infiltrate Food Lion, but had instead convinced Food Lion employees to wear hidden cameras, neither ABC nor the Food Lion employees should be subject to liability. If this was a governmental agency, the employee's decision to speak out and blow the whistle on wrongdoing within the agency would receive at least qualified First Amendment protection, under the matrix of rules that protect government employees when they speak out on issues of public concern. [n128] The employee of a private company in similar circumstances should be allowed to have at least some parallel First Amendment rights. If the employer sues the employee for intrusion or fraud or breach of some duty of loyalty, or for breach of contract for violating some **[*1130]** rule of confidentiality or loyalty, state action doctrine should be sufficiently flexible to require that those rules of tort or contract be subject to First Amendment constraints. In much the same way that ordinary rules of tort law governing libel and invasion of privacy were constitutionalized in New York Times Co. v. Sullivan [n129] and its progeny, and ordinary rules of contract and property law were brought within constitutional restraints in the racially restrictive covenant cases, Shelley v. Kramer [n130] and Barrows v. Jackson, [n131] First Amendment doctrines should constrain the power of state courts to afford remedies to private employers who attempt to penalize employees for engaging in communicative actions intended to expose wrongdoing implicating matters of public concern. The First Amendment, so construed, would be a font of whistleblower law.

In the actual Food Lion case, of course, ABC used its own employees. [n132] In situations such as this, in which the plaintiff is in a private place, and the defendant or the defendant's agents have open access to that place, a qualified First Amendment privilege should protect the recording or photographing of what takes place in the setting, even if that recording or photographing is surreptitious. The qualified privilege should weigh the strength of the plaintiff's interests against the defendant's interest in gathering information on matters of public concern for public dissemination. This means that imposing liability against investigative reporters for the type of surreptitious recording that took place in the Food Lion case should not be permitted. In Food Lion, ABC's operatives had been invited into the Food Lion stores and had merely recorded activity that they were able to observe with their naked eyes. [n133] It is true that Food Lion was deceived and that Food Lion would not have invited the ABC employees in if Food Lion had known their identity, or if Food Lion had known that the activity was being recorded. But Food Lion's interests are not worthy of great respect. ABC's people were inside the food-preparation area. This was not an intrusion into confidential relationships. It was not an intrusion into a place of contemplation or peace. It was not an intrusion into actions involving intimacy. If there was trespass or fraud, it was technical. No palpable damage flowed directly from either. ABC's motivation, on the contrary, was laudable. ABC acted with "journalistic probable cause," relying on information furnished by numerous "whistleblowers" inside Food Lion that were complaining of the food preparation practices of the company. [n134] The story involved matters of the highest public concern. The only way to document the practices was through the use of hidden cameras. In this setting, the First Amendment should either be understood to preclude liability altogether, or to limit damages to those actual physical or financial harms that flowed directly and immediately from the technical trespass or fraud. Any punitive damages, or damages flowing from the broadcast aired by ABC, should not have been permitted.

[*1131] An even harder group of questions is posed when intrusions are accomplished through "constructive trespass," in which the defendant is in a public place, the plaintiff is in a "private place" in a setting in which there is a reasonable expectation of privacy, and the defendant uses technological equipment that enables the defendant to obtain

images or recordings that would not have otherwise been obtainable without trespassing. Even in this situation, some measure of First Amendment protection should exist, through a requirement that the plaintiff engage in reasonable behavior to protect his or her privacy before any liability can be imposed. Thus, a plaintiff engaged in intimate activity inside his or her bedroom, who has not drawn the shades, ought not be permitted to obtain relief even if the visual images obtained involve high-powered telescopic lenses.

The laws of physics will usually provide sufficient protection for plaintiffs who draw their shades. At least at present, technology does not exist that will see through walls and curtains. Technology that may hear through walls and shaded windows does exist, however, and there may come a time when technologies that somehow visually penetrate solid structures will exist. Imagine that the plaintiff is in a setting of true seclusion, engaged in activity in which the various factors that would normally weigh heavily in favor of protecting privacy exist in abundance. Take, for the sake of argument, a defense attorney's worst nightmare: imagine that the plaintiff is inside her own home, in bed with her spouse, who also happens to be her physician, and after engaging in sexual activity, engages in an intimate discussion regarding reproductive choices. If journalists were to use sophisticated technology to somehow penetrate the walls of the building and obtain audio recordings of everything that was done and said, this should clearly be deemed intrusion.

Turning to the ride-along cases, the Supreme Court's holding that such "ride-alongs" violate the Fourth Amendment did not address any First Amendment issues or the possible liability of the media itself for participating in such ride-alongs. [n135] Given the Court's ruling that the practice violates the Fourth Amendment, these ride-alongs will, presumably, now be at an end, at least when they involve the execution of warrants. Wholly aside from the Fourth Amendment doctrine, however, this is an area where the media has long-term interests to cease and desist. I fear that if the press gets too close to the police, bad things will happen to the First Amendment. From the media's perspective, breaking the incipient partnership with law enforcement is important for reasons that transcend the significance of any one story. Strong advocates of reporter's privilege have long argued that the Constitution should not permit law enforcement officials to "annex the media" as a means of law enforcement. [n136] Journalists also have argued, with mixed success, against searches of newsrooms and the issuance of subpoenas directed to materials journalists gathered for news reports. [n137] Finally, journalists have insisted on the right to publish and broadcast information that comes from the police, judicial records, and judicial officers, even though they may be **[*1132]** aware that the information was actually not intended for their consumption. [n138] Journalists are not officers of the court; they are not officers at all.

Yet the more journalists behave as if they are integral actors in the process of law enforcement, the more the force of their claims will be diminished. The press itself should, thus, be circumspect about ride-alongs. The problem with a ride-alongs is that they place the media dangerously close to being in a position of joint venture with the government. When a news organization and a law enforcement agency actually enter into a contract governing their relationship in a ride-along, the reciprocity is made formal. From a policy and constitutional perspective, this is a hazardous practice for the press, undercutting years of hard-fought arms-length autonomy from government.

The advantage of the ride-along, of course, is that it allows the journalist to witness, live and first-hand, the gritty realities of law enforcement. There may well be material gathered in a ride-along that is compelling and newsworthy.

If I were advising the media, however, I would at the very least urge a distinction between ride-alongs in public spaces, such as police cars cruising neighborhoods, and ride-alongs involving the actual execution of warrants, particularly at residences. In the public space ride-along, the police have simply been willing to share with journalists access to their own internal spaces and processes (the squad cars, the banter between the cops, and the exchanges over the radio) and access to the streets and sidewalks, which are themselves public spaces. As long as there is no explicit or implicit compromise with the journalist's independence, so that the journalist remains free to criticize and report negative material about the cops as well as the robbers, journalists might well find that the newsgathering advantages of such ride-alongs outweigh the ethical costs attendant to the appearance of partnership that the ride-alongs might create.

From an ethical perspective, however, the press should stop riding along with law enforcement officers to execute warrants. Now the press is no longer simply gaining a particularly valuable form of access to what is already a public setting. Now the press is no longer simply gaining the ability to report on news in the public arena from the point of view (physically, and perhaps psychologically) of the law enforcement official. In the warrant situation, when the warrant is being executed at a private residence, the press is at a location that it could not have gained access to at all without the assistance of the police. This pushes collaboration too far. Indeed, in defending itself against civil rights suits challenging ride-alongs, the government officials who have been sued have been forced to make the press's valuable assistance an element of the officials' defense. [n139] Only if the media somehow can be understood to be aiding law en-

forcement officials can the police argue that the media's presence is consistent with the terms and function of the warrant. This is an embarrassment to the press and a threat to its independence.

[*1133] Having stated all this, however, I do not believe that the press should be legally answerable for its participation in such ride-alongs. The journalist who goes with the police inside a residence to witness or record an arrest is there at the invitation of the police. That should be enough to transform the private residence into a liability-free zone so far as the journalist is concerned. I do not believe the police should give journalists this permission to enter, or indeed, that the police have the constitutional right to give this authority, but if they do, it is the cops' problem, not the journalist's. Police should bear sole responsibility for the constitutional violation. A journalist who accompanies the cops has not been transformed into a state actor. In fact, it offends the notion of an independent press embedded in our First Amendment tradition, as well as norms of journalistic ethics, to treat the press as a governmental agent.

That the press may have a right to legal immunity for its presence, however, does not mean that it should be present. For the reasons argued above, the press here has been its own worst enemy. For ethical and philosophical reasons, and for the long-term health of the First Amendment, this collaboration should end.

C. Rejuvenating the Tort of Publication of PrivateFacts

Connected to the possibility of creating new "super-torts" aimed at restricting various forms of information-gathering is the possibility of breathing new life into the tort of publication of private facts.

The law of defamation, and its privacy cousin, false-light invasion of privacy, are the normal vehicles for redress when false information is published that causes a plaintiff damage. Defamation claims are not attractive to plaintiffs who find their "behind-the-scenes" actions captured from hidden cameras, however, because it is difficult to argue that the material presented is "false," when it is right there on the screen for everyone to see. The visual images are usually "true," at least in a literal sense. The only viable claim a plaintiff may have in such circumstances is the claim that the images have been edited, altered, selectively presented, or elaborated upon in such a way as to make them misleading or false. In the absence of a plausible claim that the images have been distorted so as not to present a true picture, a defamation claim will fail. [n140]

The plaintiff may also attempt to invoke the tort of publication of private facts. Even if the information is true, it may be tortious to publish it when it is nobody else's business. As the law now stands, however, this is not an inviting tort from the plaintiff's perspective, because both the common law and the First Amendment protect the dissemination of facts that are deemed newsworthy. [n141]

[*1134] Plaintiffs may argue, of course, that since the tort, by definition, only applies to "private" facts, any "private" fact will by hypothesis not be newsworthy. This, however, has not been a particularly successful argument to date, for courts have recognized, properly, that a "fact" may be at once "private" and "newsworthy," and thus protected by the First Amendment even when its revelation offends mainstream sensibilities. [n142] A sexual affair is normally private. If it comes about because of sexual harassment, however, in which a public official has taken advantage of his or her power in office to force a subordinate to acquiesce to sexual advances in order to obtain advantages in the workplace, it becomes simultaneously newsworthy.

The difficulty with the private facts tort is the seeming impossibility of applying any objective standard of newsworthiness. [n143] The very enterprise itself seems to offend the First Amendment. The Bill Clinton-Monica Lewinsky scandal provides a telling illustration. On the one hand, the scandal seems to underscore a consensus that private consensual conduct is not newsworthy. The remarkable results of public opinion polls, stubbornly supporting the President no matter how bad things got, seemed to send the message that for most Americans, the President's infidelities did not bear any nexus to his fitness for or performance in office. Even the President's prosecutors were repeatedly at pains to emphasize that they were not pursuing the President because of his sexual activity, but because of his alleged perjury and obstruction of justice in attempting to cover it up. Thus, both sides appear to have agreed that the sexual behavior, standing alone, was not public business.

But surely it does not follow, from this exercise in pop political science, that Clinton, or more plausibly, Monica Lewinsky, might have been able to sue the news organizations that reported on the affair, for publication of private facts. For although the polls were one-sided, they were not absolute. Some Americans did think Clinton's sexual behavior, standing alone, was probative of both his public and private character. Once this true fact falls into the lap of a news organization, the First Amendment contemplates that the ethical and news instincts of journalists, not the post-mortems of juries and judges, should dictate what is or is not published. [n144]

When the plaintiff is a private figure, the analysis is more problematic. It is perhaps useful, here, to draw some comparisons to the defamation doctrine. **[*1135]** At the outset it is worth observing that at least in theory, the defamation doctrine would seem to support the viability of the private facts tort, even as applied to public officials and public figures. In defamation law there is a formal doctrinal requirement that the defamatory speech at issue be germane to a public official's fitness for or performance in office. [n145] And, at least for limited-purpose public figures, the law requires that the defamatory speech bear a nexus to whatever sphere of activity it was that made the plaintiff a public figure. [n146] Thus, when a court holds a putative limited-purpose public figure not to be a public figure for the purposes of the defamatory speech at issue, this might be seen as an adjudication on relevance. The court's determination that the speech does not connect to any public controversy that the plaintiff has entered can be seen as a declaration that the defamatory speech is not on a topic deserving heightened First Amendment protection, at least as applied to this plaintiff. Maybe this same sort of "nexus" requirement we routinely apply in defamation cases could be used in the private facts context.

This picture, however, is deceptively neat. There is first that conceptually puzzling category, the "all-purpose" public figure. This person, whom we usually think of as the mega-celebrity, a Michael Jordan or a Madonna, is deemed a public person for all aspects of life. This seems to contradict the notion of a nexus, and seems to be a concession in defamation doctrine that for this type of celebrity plaintiff, there are no spheres of private life at all.

In defamation cases, moreover, the lawsuit is, by hypothesis, predicated on a false and defamatory statement of fact. We thus are not dealing with dissemination of truth at all, but a dissemination of falsehood. There is some policy sense to the argument that such falsehood deserves no heightened constitutional protection unless it is connected in some way to public discourse. The entire rationale for New York Times Co. v. Sullivan [n147] and its progeny was to provide breathing space for robust debate on issues of public concern. When the false speech at issue cannot plausibly be connected to such matters, the argument for stripping the speech of heightened protection is at least theoretically coherent.

Yet in practice, very few cases, if any, involving public officials have ever held that the defamatory statements at issue are too far outside the ambit of the official's duties to merit the protection of the New York Times standard. There are a fair number of cases involving governmental employees deemed too low in the hierarchy of government to trigger the New York Times standard. In some of those cases, it is possible that the decision to not treat the governmental employee as a public official was influenced by the apparent lack of connection between the employee's official duties and the defamatory statements. Yet these cases are rare, and by no means is the "relevance to office" a well-grooved and sharply defined component of modern defamation practice.

[*1136] Yet the defamation cases do seem to invite a doctrinal division between public and private figures. Even so, it is difficult to see how the fault standards that mark that division in defamation cases would be translated to the private facts tort, in which falsity is not an element, and thus to speak of knowing or reckless falsity, or negligence with regard to falsity, is nonsensical. We might calibrate fault more in terms of "good faith" in privacy cases, asking in public plaintiff cases whether the defendant subjectively believed in the newsworthiness of the material being presented, and in private plaintiff cases whether objectively, the presentation of the material was newsworthy.

Thus, in public figure and public official cases, we would examine the subjective state of mind of the defendant, asking whether the defendant subjectively believed that the material being presented was newsworthy. Unless we had evidence that the defendant did not subjectively believe in the newsworthiness of the material, but rather published the material gratuitously, to embarrass or humiliate the plaintiff, no cause of action could exist. This doctrine would resemble the concept in defamation law of the "dishonestly maintained opinion." [n148] Even though statements of opinion are generally not actionable, when the opinion being presented is not in fact sincerely held, there is a question as to whether the normal immunity for expression of opinion should exist. Imagine, for example, a malicious New York Times drama critic on a private vendetta against a Broadway producer, who pans the producer's new play on Broadway, causing the play to fold, when in fact the critic thought the play was excellent. [n149] There is authority for the proposition that in these circumstances, the normal immunity for expression of opinion should be forfeited. [n150]

To continue the comparison to defamation law, in private figure cases the defendant could be held liable for the publication of private facts if the ordinary reasonable person would find the material at issue not newsworthy.

For a number of reasons, I do not believe that the matrix of fault suggested above, which would attempt to mimic the rules that currently exist for defamation, are appropriate in privacy cases. The standards may seem reasonably balanced in theory, but in practice I believe they would fail to adequately protect First Amendment values. Privacy advocates, in my view, should be pleased if future First Amendment doctrine were actually to evolve along these lines. Such an evolution would go a long distance toward revitalizing the tort of publication of private facts as applied to private

figures. Private figures, particularly those swept up into media coverage through no voluntary action of their own, present highly sympathetic stories, and one would predict that juries would be very inclined to treat the presentation of ostensibly private material about such figures as unreasonable and therefore actionable.

[*1137] Privacy advocates might argue, of course, that at least as to public figures, such a regime would effectively render the private facts tort dead, because defendants will always claim that they subjectively believed that the facts at issue were newsworthy, and this self-serving testimony will effectively immunize them from liability. It is not at all clear, however, that the picture would really be so bleak. By giving some doctrinal form to what has been, up to now, a the relatively unbounded "newsworthiness" defense, plaintiffs would have a foot in the door. Once the question of proof of state of mind becomes an element in litigation, plaintiffs will be permitted to demand the opportunity to meet their evidentiary burden through circumstantial evidence. This has been, for example, the doctrine that has evolved in defamation law, in which the actual malice standard is almost always established by circumstantial proof, proof that goes against a defendant's self-serving protestations of innocence.

In Eastwood v. National Enquirer, Inc, [n151] for example, the court held that Clint Eastwood had satisfied the actual malice standard in a suit against the National Enquirer arising from an "exclusive interview" published by the Enquirer that Eastwood claimed never took place. [n152] The Enquirer actually lifted the interview from a London tabloid, presenting it as its own. [n153] Eastwood denied ever giving an interview to either publication. [n154] "As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence," the court wrote. [n155] "By examining the editors' actions we try to understand their motives." [n156] While there is no actual malice where journalists unknowingly mislead the public, [n157] the court reasoned, a jury could conclude that the Enquirer's editors knew or should have known that their statements would be misleading. [n158]

This analysis is appropriate for defamation law, where we are dealing with falsity. But it breaks down in privacy cases, in which by definition the facts revealed are true. The subjective judgment of what is or is not newsworthy is different in kind from the subjective inquiry into whether a defendant doubted the truth or falsity of a story. The temptation to hold defendants liable on the theory that they must have believed their story was not genuinely newsworthy would simply be too great, leaving too little of the breathing space required to protect the independence of editorial judgment. **[*1138]** Admittedly, the balance of interests is much closer in private figure cases. If the reported decisions were awash in examples of the press gratuitously descending on private figures to reveal private facts about their lives when there is no apparent connection to any independently newsworthy, a case for crafting some new doctrinal protection for private figures might be more persuasive. But no such tide of media abuse is discernable. Rather, privacy cases brought by private figures seem to arise in contexts in which the general news value of the story is apparent. The harm is usually in the inclusion of some intimate detail or some particularly anguishing or poignantly tragic visual image. Once again, there is simply too much danger that application of a negligence standard to these types of cases could cripple the ability of the press to present stories involving "ordinary people" on matters of public interest. If the tort is to exist at all as applied to private figures, there ought to be at least a requirement of proof that the defendant acted with no subjective belief that the material was newsworthy. The net effect would be to rachet upward the standards for defamation one level when those standards are applied to privacy torts, permitting a cause of action to exist in private figure cases upon a showing of subjective fault, and entirely forbidding the cause of action as applied to public plaintiffs.

Conclusion

With cheeky tongue in cheek I have suggested that to some degree, the privacy plaintiff's take is the product of the privacy plaintiff's make. On a less impish concluding note, it might be worth turning this equation around. The freedom of speech and press that information-gatherers enjoy will inevitably, over the long run, be influenced by the degree of restraint and responsibility with which that freedom is exercised. If this is the stuff of grand cliche - that with freedom comes responsibility - it is also the stuff of true cliche, the stuff of legal realism.

For the widespread sense of public disquiet that privacy is an endangered species, perhaps on the edge extinction, will inevitably engender calls for legal reforms designed to retrench the right to be let alone, restoring some sense of equilibrium to modern life. The public's concerns about privacy in relation to information-gathering feed from much the same well of concerns about broader privacy invasions. Information gatherers, particularly the mainstream press, must be sensitive to this growing concern. As matters stand today, strong First Amendment doctrines stand in the way of many of the most meaningful privacy reforms. But the First Amendment tradition is always evolving; like all law, it is malleable and elastic, constantly being shaped by evolving social movements and cultural sensibilities. A press with no respect for society's interests in privacy may someday find itself in a society with no respect for the press.

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawCivil ActionsPublic Disclosure of Private FactsComputer & Internet LawCriminal OffensesSearch & SeizureComputer & Internet LawPrivacy & SecurityGeneral Overview

FOOTNOTES:

n1. See Tom Wolfe, The Bonfire of the Vanities (1987).

n2. See Protection from Personal Intrusion Act and Privacy Protection Act of 1998: Hearings on H.R. 2448 and H.R. 3224 Before the Comm. on the Judiciary, 105th Cong. (1998) (testimony of Michael J. Fox) ("Personally, I work very hard to entertain an audience, and when they enjoy my work, I am deeply gratified. I am polite to those who are polite with me, and I try to deflect some of the attention that comes with my celebrity toward worthwhile causes... I also maintain a positive and cooperative relationship with the legitimate press. Beyond that, I'd like to think of my life as my own. I strongly disagree with those who would argue that some sort of Faustian bargain has been struck whereby 'public' figures are fair game, any time, any place, including within the confines of their own homes."); id. (testimony of Paul Reiser) ("I'm sure there are many in the American public, and perhaps even those among you here in this room who feel that the last thing this Congress needs to do is enact a law to help fancy celebrities enjoy their fancy lives in their big fancy homes. And while I can understand that sentiment, I have traveled here today to tell you in all sincerity that that is not our intention. Rather, we need to protect all civilians- famous and not famous, from the invasive and very often dangerous tactics of some - not all, but some - photographers and news gatherers.").

n3. See Vega-Rodriguez v. Puerto Rico Tel. Co., 110 F.3d 174, 184 (1st Cir. 1997) (dismissing invasion of privacy claim arising from employers surveillance of employees in work areas).

n4. See, e.g., Robert O'Harrow Jr. and Elizabeth Corcoran, Intel Drops Plans to Activate Chip IDs, Wash. Post, Jan. 26, 1999, at E1 ("Intel Corp. yesterday abruptly backed away from plans for its new silicon chips to automatically issue a unique identification number on the Internet, after critics complained that the technology could expose computer users to privacy intrusions. The turnabout by the giant computer chip maker followed an announcement by privacy advocates earlier in the day that they would urge consumers to boycott Intel products in protest of the chip's ID component.").

n5. See David G. Savage, Reach for the Sky... and Smile, A.B.A. J., Feb. 1999, at 30.

n6. These times may have come to an end. The Supreme Court recently held that such media "ride-alongs" violate the Fourth Amendment. See Wilson v. Layne, 119 S.Ct. 1692, 1695 (1999); Hanlon v. Berger, 119 S.Ct. 1706, 1706 (1999).

n7. See Metro in Brief, Wash. Post, Jan. 6, 1999, at B3 ("A new Web site listing violent sex offenders attracted 280,000 visits... forcing Virginia State Police to increase the site's capacity. Heavy traffic at the site (www.vsp.state.va.us) prevented hundreds of people from visiting over the New Year's weekend. The equipment on the site was designed to handle six new visits a second, and that capacity will be doubled with the new equipment, officials said.")

n8. Reproductive freedom enjoys modest constitutional protection. See Planned Parenthood v. Casey, 505 U.S. 833, 834, 874 (1992) (affirming core of abortion right recognized in Roe v. Wade, 410 U.S. 113 (1973), but modifying that right through imposition of "undue burden" standard). Gay and lesbian rights are advancing on some fronts, see Romer v. Evans, 517 U.S. 620, 624, 635 (1996) (striking down Colorado constitutional amendment that prohibited all legislative, executive, or juridical action designed to protect gays and lesbians). But the rights of gays and lesbians are merely holding even or actually declining on other fronts. See Able v. United States, 155 F.3d 628, 630, 636 (2d Cir. 1998) (sustaining military's "don't ask, don't tell" policy). The notion of any expansive "right to die" or right to physician-assisted suicide has yet to materialize. See Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (refusing to recognize physician-assisted suicide as a substantive due process right); Vacco v. Quill, 521 U.S. 793, 795 (1997) (refusing to strike down prohibition on physician-assisted suicide as violation of equal protection).

n9. See Cal. Civ. Code 1708.8 (West 1998). California's new anti-paparazzi law is discussed in greater detail infra text accompanying notes 37-46.

n10. Prior to his untimely death Representative Sonny Bono introduced a criminal harassment bill, the Protection from Personal Intrusion Act, that would have made it a federal crime to persistently follow or chase someone to obtain an image. See H.R. 2448, 105th Cong. (1997). A similar proposal entitled the Privacy Protection Act of 1998 was introduced by Congressman Elton Gallegly. See H.R. 3224, 105th Cong. (1998). Another privacy bill along the same lines was introduced by Representative John Conyers, Jr. See H.R. 4425, 105th Cong. (1998). Senator Dianne Feinstein introduced legislation similar to the recently-enacted California statute, Cal. Civ. Code 1708.8 (West 1998). See S. 2103, 105th Cong. (1998). None of the federal bills were enacted. These proposals are discussed in greater detail infra text accompanying notes - .

n11. Author's Note: to the best of my knowledge, "paparazzitic" is not a word.

n12. Conventional criminal and tort doctrines do provide some protection against the paparazzi and the tabloids that form the market for their wares. For example, Eric Ford, a paparazzo who covers the Hollywood celebrity scene, was arrested in December 1998 by the FBI "on charges of illegally intercepting a cellular phone conversation between actor Tom Cruise and his wife, Nicole Kidman, and then peddling the

information to two tabloids." David Rosenzweig, Paparazzo Indicted in Interception of Cruise-Kidman Telephone Call, L.A. Times, Dec. 11, 1998, at B1. Additionally, Cruise and Kidman won a suit against a British tabloid that reported that Cruise and Kidman's marriage was a sham to hide the fact that Cruise was gay. The couple obtained a settlement of $ 167,000 in damages, recovered legal fees totaling about $ 250,000, and received a public apology from the tabloid, which admitted that the story was "entirely false." Id.

n13. See Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 765, 775 (1983) (agreeing a compensatory damage award of $ 250,000 was not excessive for newspaper story revealing that plaintiff, a female college student body president, was a transsexual although the appellate court reversed the judgment on other grounds).

n14. See Florida Star v. B.J.F., 491 U.S. 524, 527, 529 (1989) (holding unconstitutional an attempt to hold a newspaper liable for identifying name of rape victim inadvertently released in a police document). See generally Geoff Dendy, The Newsworthiness Defense to the Public Disclosure Tort, 85 Ky. L.J. 147, 148 (1997) ("But the general case is that many courts provide media with the extraordinarily broad newsworthiness defense, leaving the public disclosure tort effectively impotent."); Diane L. Zimmerman, Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort, 68 Cornell L. Rev. 291, 351 (1983).

n15. See Linda N. Woito & Patrick McNulty, The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?, 64 Iowa L. Rev. 185, 232 (1979) (proposing that community standards of decency replace the newsworthiness concept as the touchstone for the disclosure of private facts tort).

n16. See infra text accompanying notes 22-25.

n17. Journalists for news organizations large and small, reporting on events both national and local, regularly rely on confidential sources as a staple in the newsgathering process. See, e.g., Robert G. Kaiser, More About Our Sources and Methods, Wash. Post, Mar. 15, 1998, at C1 ("We expend much of our energy on finding information of public interest that others don't want published in a newspaper ...."); Rich Martin, Taking Stand to Stay Off Witness Stand, Roanoke Times & World News, May 10, 1998, at B1 ("The Roanoke Times resists subpoenas because they threaten to turn reporters into investigative arms of the prosecution or defense. We believe that forcing journalists to testify about what they learn in the course of reporting almost always hampers the news-gathering function of a free press."). So that the public may be presented with more than the pallid and sanitized spoon-feeds of governmental and corporate press releases as the news of the day, journalists must rely on confidential sources. See, e.g., Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir. 1979) ("The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis."); Baker v. F & F Inv., 470 F.2d 778, 782 (2d Cir. 1972) ("Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis... The deterrent effect such disclosure is likely to have upon future 'undercover' investigative reporting, the dividends of which are revealed in articles such as Balk's, threatens freedom of the press and the public's need to be informed. It thereby undermines values which traditionally have been protected by federal courts ...."); Miller v. Mecklenburg County, 606 F. Supp. 488, 490 (W.D.N.C. 1985) ("Compelling revelation of the name may cause future sources not to bring potentially important matters to the press's and public's attention out of fear of losing confidentiality."), aff'd, 813 F.2d 402 (4th Cir. 1986); see also David Broder, Behind the Front Page 317-22 (1987) (observing that accomplished political reporters regularly consult confidential sources in order to ascertain "what is going on"); Monica Langley & Lee Levine, Branzburg Revisited: Confidential Sources and First Amendment Values, 57 Geo. Wash. L. Rev. 13, 25-26 (1988) (explaining that in recent decades, the nature of journalism has evolved from what was once an excessive reliance on the handout of press releases to a more complex interaction between reporters and sources, and that contemporary reporters must often extend a promise of confidentiality in order to have any meaningful channel to the truth); John E. Osborn, The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas, 17 Colum. Hum. Rts. L. Rev. 57, 64-67 (1985) (documenting the substantial use of confidential sources by successful reporters, demonstrating that without confidentiality many sources are unwilling to provide verification).

n18. The Supreme Court in Branzburg v. Hayes, 408 U.S. 665 (1972), was divided, by a 4-1-4 vote, over whether the First Amendment created a reporter's privilege. Justice Lewis Powell, in his pivotal concurring opinion, articulated the need for legal protection of confidential sources in terms that would balance the competing social interests at stake. See id. at 710 (Powell, J., concurring). Justice Powell mediated between two wings of the Court, as he so often did in his distinguished career, crafting a compromise position that lower courts throughout the country would come to apply through the adoption of a qualified constitutional privilege. See id. at 709-10 (Powell, J., concurring). Preserving the arms-length independence of the press was central to Justice Powell's concerns, as he admonished that state and federal authorities are not "free to 'annex' the news media as 'an investigative arm of government.'" Id. at 709 (Powell, J., concurring). Justice Powell instructed that: the 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. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. Id. at 710 (Powell, J., concurring). Following Justice Powell's lead, courts throughout the country recognized a qualified First Amendment reporter's privilege, usually employing a multi-part balancing test, which focused on "(1) whether the information is relevant" (often requiring that the material be "critical" or go to the "heart of the matter" being litigated), "(2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information." LaRouche v. NBC, 780 F.2d 1134, 1139 (4th Cir. 1986); see also United States v. Lloyd, 71 F.3d 1256, 1261, 1268-69 (7th Cir. 1995); United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 593-99 (1st Cir. 1980); Miller v. Transamerican Press, Inc., 621 F.2d 721, 726 (5th Cir. 1980); United States v. Cuthberston, 630 F.2d 139, 146-48 (3d Cir. 1980).

n19. See Gonzalez v. NBC, 155 F.3d 618, 623-27 (2d Cir. 1998) (refusing to extend the privilege to non-confidential information).

n20. See, e.g., Desnick v. ABC, 44 F.3d 1345, 1347 (7th Cir. 1995); United States v. Mullins, 992 F.2d. 1472 (9th Cir. 1993); Wolfson v. Lewis, 924 F. Supp. 1413, 1415-16 (E.D. Pa. 1996); Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811 (M.D.N.C. 1995); discussion infra text accompanying notes 100-104.

n21. See infra text accompanying notes 75-82.

n22. One of the core principles of modern First Amendment jurisprudence is that absent the need to vindicate a governmental interest of the highest order, the press is entitled to examine and publish truthful material that falls into its hands, even though that material may be legally classified, confidential, or under judicial seal. This principle has been consistently applied by the Supreme Court. For example, the Court has refused to permit civil liability against the media for the accurate revelation of the identity of rape victims lawfully obtained through public records, even if the records were released by mistake. See Florida Star v. B.J.F., 491 U.S. 524, 526-29 (1989) (holding unconstitutional the imposition of liability against a newspaper for publishing the name of a rape victim in contravention of a Florida statute prohibiting such publication in circumstances in which a police department inadvertently released the victim's name); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 471, 496-97 (1975) (holding unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape-murder victim obtained from courthouse records).

n23. The Court has declared unconstitutional orders attempting to shield from public disclosure the identity of juveniles in court proceedings. See Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104 (1979) (finding unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender, where the newspapers obtained the name of the alleged juvenile assailant from witnesses, the police, and a local prosecutor, stating that the "magnitude of the State's interest in this statute is not sufficient to justify application of a criminal penalty"); Oklahoma Publ'g Co. v. Oklahoma County Dist. Court, 430 U.S. 308, 308-09 (1977) (declaring unconstitutional a state court's pretrial order enjoining the media from publishing the name or photograph of an eleven-year-old boy in connection with a juvenile proceeding reporters had attended). The Court has refused to permit penalties against a newspaper for publishing confidential information in the secret proceedings of a Judicial Inquiry and Review Commission. See Landmark Comm., Inc. v. Virginia, 435 U.S. 829, 830-34 (1978) (overturning criminal sanctions against newspaper for publishing information from confidential judicial disciplinary proceedings leaked to the paper). The Court has even extended the principle to the revelation of material from grand jury proceedings. See Butterworth v. Smith, 494 U.S. 624, 626 (1990) (refusing to enforce the traditional veil of secrecy surrounding grand jury proceedings against a reporter who wished to disclose the substance of his own testimony after the grand jury had terminated, holding the restriction inconsistent with the First Amendment principle protecting disclosure of truthful information).

n24. The Florida Star Court summarized this now well-entrenched line of precedent with this statement: "'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.'" Florida Star, 491 U.S. at 533 (quoting Daily Mail, 443 U.S. at 103); see also Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225 (6th Cir. 1996) (striking down as an unconstitutional prior restraint an order preventing Business Week magazine from publishing materials sealed pursuant to a protective order obtained by the magazine through the disclosure by a member of a law firm representing one of the parties who did not realize the materials were sealed).

n25. In the Pentagon Papers case, New York Times Co. v. United States, 403 U.S. 713 (1971), Justice White, in a concurring opinion, seemed to support the proposition that the New York Times and Washington Post could be held criminally responsible for having published the Pentagon Papers, which were classified when the newspapers published them. See id. at 737 (White, J., concurring) ("I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.").

n26. See Wilson v. Layne, 119 S. Ct. 1692, 1695 (1999); Hanlon v. Berger, 119 S.Ct. 1706, 1706 (1999).

n27. See infra notes 135-139 and accompanying text.

n28. See Whalen v. Roe, 429 U.S. 589 (1977). The Court in Whalen rejected a challenge to New York's maintenance of a centralized computer file, which contained "the names and addresses of all persons who had obtained, pursuant to a doctor's prescription, certain drugs for which there [was] both a lawful and an unlawful market." Id. at 591. The Court, however, noted: We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. Id. at 605.

n29. See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762-66 (1989). This Freedom of Information Act decision held that personal rap sheets were subject to privacy exemption and noted that the accumulation and organization of data may create an invasion of privacy even though the data, in its component parts, is available from scattered public courthouse records. See id. Recognition of this attribute of a privacy interest supports the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole. The very fact that federal funds have been spent to prepare, index, and maintain these criminal-history files demonstrates that the individual items of information in the summaries would not otherwise be "freely available" either to the officials who have access to the underlying files or to the general public. Id. at 764; see also Restatement (Second) of Torts 652D (1977) ("There is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the date of his birth... On the other hand, if the record is one not open to public inspection, as in the case of income tax returns, it is not public, and there is an invasion of privacy when it is made so"); W. Page Keeton et al., Prosser & Keeton on the Law of Torts 117, at 859 (5th ed. 1984) (arguing that merely because a fact can be found in a public record "does not mean that it should receive widespread publicity if it does not involve a matter of public concern").

n30. See People v. Dezek, 308 N.W.2d 652, 654-55 (Mich. Ct. App. 1981) (upholding a reasonable expectation of privacy against video surveillance in restroom stalls).

n31. See Vega-Rodriguez v. Puerto Rico Tel. Co., 110 F.3d 174, 184 (1st Cir. 1997) (dismissing invasion of privacy claim arising from employers surveillance of employees in work areas).

n32. See Quentin Burrows, Scowl Because You're on Candid Camera: Privacy and Video Surveillance, 31 Val. U. L. Rev. 1079, 1096-98, 1131-38 (1997).

n33. The first two of these proposals, dealing with the paparazzi and intrusion, are aimed in a relatively pure sense at information-gathering. The third, dealing with expanding the tort of publication of private facts, actually deals with publication, not the information-gathering process as such; but the policy issues presented by this tort are so closely related to those that affect curbs on paparazzi and intrusion that it makes sense to include them in this discussion.

n34. See Rodney Smolla, From Paparazzi to Hidden Cameras: The Aggressive Side of a Free and Responsible Press, 3 Comm. L. & Pol'y 315, 315-16 (1998).

n35. See Privacy Protection Act of 1998, H.R. 3224, 105th Cong. (1998); Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. (1997).

n36. See, e.g., Oklahoma Publ'g Co. v. Oklahoma County Dist. Court, 430 U.S. 308, 308-09 (1977) (photograph of eleven-year-old boy taken in connection with a juvenile proceeding involving that child and attended by reporters was not private); Ault v. Hustler Mag., 860 F.2d 877, 883 (9th Cir. 1988) (stating that a photograph is not a private concern when the person photographed consents to having pictures taken for a newspaper); Heath v. Playboy Enter., Inc., 732 F. Supp. 1145, 1148 (S.D. Fla. 1990) ("A photograph taken in a public place is not private."); Jackson v. Playboy Enter., Inc., 574 F. Supp. 10, 11, 13-14 (S.D. Ohio 1983) (finding that photographs of three minor boys and policewoman on city sidewalk in plain view of the public did not constitute "purely private activity"); Cape Publications, Inc. v. Bridges, 423 So.2d 426, 427-28 (Fla. Dist. Ct. App. 1982) (holding the press could print a photograph of woman clutching a dish towel to her body in order to conceal her nudity as she was escorted to a police car "in full public view" after escaping a kidnapping).

n37. Cal. Civ. Code 1708.8 (West 1998).

n38. Author's Note: My friend Professor Erwin Chemerinsky wrote his reply to my article based on a preliminary draft that I had circulated in advance of the Law Review's symposium. In listening to Professor Chemerinsky's oral presentation at that symposium, and in reading the first draft of his reply, I became convinced that he was probably right, and I was probably wrong on one point. Whereas the various federal proposals discussed in my article do appear to be clearly targeted at the paparazzi, the California proposal is more carefully worded, and arguably is not. (No doubt this is in part attributable to the fine counsel its sponsors received from Professor Chemerinsky.) Since Professor Chemerinsky had already put considerable effort into his reply in reliance on my strongly-worded critique of the California law, it seemed unfair for me to simply delete those passages, thereby requiring Professor Chemerinsky to re-write his response. So instead I offer this footnote of modest retreat. The California statute strikes me now as on the cusp between a content-based and content-neutral law, posing the kind of difficult problem of characterization that faced the Supreme Court in Ladue v. City of Gilleo, 512 U.S. 43 (1994). In Ladue, the Court in effect finally said that it did not really matter, because whether the law was content-based or content-neutral, the impact on expressive interests was too severe to be sustained. For the reasons that are elaborated at length in the text, that is my view of the California law, even if Chemerinsky is correct that it is content-neutral. Whatever the best view of this debate may be, however, I suppose it is worth noting that this exchange may itself be a visible vindication of the occasional validity of the marketplace of ideas metaphor. Here we actually have a case of a person going to an academic conference, listening to a critic, and admitting that on at least one significant point, the critic may have the better of the argument.

n39. Cal. Civ. Code 1708.8(a) ("A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another without permission or otherwise committed a trespass, in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.")

n40. See id. 1708.8(b) ("A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.").

n41. See id. 1708.8(k) ("For the purposes of this section, 'personal and familial activity' includes, but is not limited to, intimate details of the plaintiff's personal life, interactions with the plaintiff's family or significant others, or other aspects of plaintiff's private affairs or concerns. Personal and familial activity does not include illegal or otherwise criminal activity as delineated in subdivision (f). However, 'personal and familial activity' shall include the activities of victims of crime in circumstances where either subdivision (a) or (b), or both, would apply.").

n42. Id. 1708.8(j) ("For the purposes of this section, 'for a commercial purpose' means any act done with the expectation of a sale, financial gain, or other consideration. A visual image, sound recording, or other physical impression shall not be found to have been, or intended to have been captured for a commercial purpose unless it is intended to be, or was in fact, sold, published, or transmitted.").

n43. See id. 1708.8(c) ("A person who commits physical invasion of privacy or constructive invasion of privacy, or both, is liable for up to three times the amount of any general and special damages that are proximately caused by the violation of this section. This person may also be liable for punitive damages, subject to proof according to Section 3294. If the plaintiff proves that the invasion of privacy was committed for a commercial purpose, the defendant shall also be subject to disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the violation of this section.")

n44. See id. 1708.8(g).

n45. See id. 1708.8(d) ("A person who directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate subdivision (a) or (b) or both is liable for any general, special, and consequential damages resulting from each said violation. In addition, the person that directs, solicits, instigates, induces, or otherwise causes another person, regardless of whether there is an employer-employee relationship, to violate this section shall be liable for punitive damages to the extent that an employer would be subject to punitive damages pursuant to subdivision (b) of Section 3294.").

n46. See id. 1708.8(e) ("Sale, transmission, publication, broadcast, or use of any image or recording of the type, or under the circumstances, described in this section shall not itself constitute a violation of this section, nor shall this section be construed to limit all other rights or remedies of plaintiff in law or equity, including, but not limited to, the publication of private facts.").

n47. For example, a bill introduced in the United States House of Representatives, H.R. 3224, 105th Cong. 1822 (1998), read: a)Whoever persistently follows or chases any individual in the United States for the [tn1,2]purpose of obtaining a visual image, sound recording, or other physical impression of that or another individual, shall be punished as provided in subsection (b), if - (1) the image, recording, or impression was intended to be, or was in fact, sold, published, or transmitted in interstate or foreign commerce, or the person attempted to capture such image, recording, or impression moved in interstate of foreign commerce in order to capture such image, recording, or impression. (2) the individual has a reasonable expectation of privacy from such intrusions and has taken reasonable steps to ensure that privacy; (3) the individual has a reasonable fear that death or bodily injury will result from that following or chasing; and (4) the obtaining of the image, recording, or other impression is for commercial purposes. (b)The punishment for an offense under this section is - (1) if death is caused by the offense, the punishment provided under section 1111 or 1112 for a like offense under that section; (2) if serious bodily injury is caused by the offense, the punishment provided in section 113 [sic] for a like offense under that section; and (3) in any other case, a fine under this title or imprisonment for not more than 1 year, or both. (c)(1) A person who is subjected to a violation of subsection (a) may, in a civil action against the person engaging in that violation, obtain any appropriate relief. (2) In any civil action under this section, the court shall allow the prevailing party a reasonable attorney's fee and other reasonable litigation costs as part of the costs. (d)It is not a defense to a prosecution or civil action under this section that - (1) no image or recording was captured; or (2) no image or recording was sold. (e)Nothing in this section may be construed to make the sale, transmission, publica-[tn1,2]tion, broadcast, or use of any visual image, sound recording, or other physical impression in any otherwise lawful manner by any person subject to criminal charge or civil liability. (f)Only a person physically present at the time of, and engaging or assisting another [tn1,2]in engaging in, the following or chasing that constitutes a violation of this section is subject to a Federal criminal charge or civil liability under this section, or section 2, 3, 4, or 371 of this title, based on a violation of this section. A person shall not be subject to such charge or liability by reason of the conduct of an agent, employee, or contractor of that person or because any visual image, sound recording, or other physical impression captured in violation of this section was solicited, bought, used, or sold by that person. (g)The prohibitions of this section do not apply with respect to official law enforce-[tn1,2]ment activities. (h)Nothing in this section shall be taken to preempt any right or remedy otherwise [tn1,2]available under Federal, State, or local law. (i)As used in this section - (1) the term "for commercial purposes" means with the expectation of financial gain or other consideration from the sale or other transfer of the visual image, sound recording, or other physical impression; and (2) the term "State" includes the District of Columbia and each other commonwealth, territory, or possession of the United States. Id.

n48. S. 2103, 105th Cong. (1998).

n49. See id.

n50. See id. Thus, the Feinstein-Hatch proposal also allowed civil actions to be brought against the paparazzi who use high-powered lenses, microphones, or even helicopters to trespass for commercial purposes, employing a notion of "constructive trespass." As in the California law, under this provision, liability exists if the person engaging in the paparazzi tactics trespasses, or if the person commits a constructive trespass, by using visual or auditory enhancement devices to capture recordings that they otherwise could not have captured without trespassing, for commercial purposes. The bill created remedies for the property owner or person photographed for the trespass or constructive trespass. See id.

n51. See Ladeu v. City of Gilleo, 512 U.S. 43, 55 (1994); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Review, 460 U.S. 575, 590 (1993); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

n52. See H.R. 3224, 1822(f) ("Only a person physically present at the time of, and engaging or assisting another in engaging in, the following or chasing that constitutes a violation of this section is subject to a Federal criminal charge or civil liability under this section ....").

n53. See id. 1822(a)(1) ("The image, recording, or impression was intended to be, or was in fact, sold, published, or transmitted in interstate or foreign commerce, or the person attempted to capture such image, recording, or impression moved in interstate of foreign commerce in order to capture such image, recording, or impression."); see also id. 1822(i)(1) ("The term 'for commercial purposes' means with the expectation of financial gain or other consideration from the sale or other transfer of the visual image, sound recording, or other physical impression ....").

n54. See id. 1822(f) ("A person shall not be subject to such charge or liability by reason of the conduct of an agent, employee, or contractor of that person or because any visual image, sound recording, or other physical impression captured in violation of this section was solicited, bought, used, or sold by that person.").

n55. See supra note 38.

n56. See Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."); see also R.A.V. v. City of St. Paul, 505 U.S. 377, 386-87 (1992) (noting that an ordinance that proscribes a subsect of fighting is content-based); United States v. Eichman, 496 U.S. 310, 319 (1990) ("'If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989))); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 56 (1988) (concluding that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publication... without a showing... that the publication contains a false statement of fact which was made with actual malice ...."); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) ("Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose or the forum... or if he is not a member of the class of speakers for whose special benefit the forum was created... the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); Carey v. Brown, 447 U.S. 455, 462-63 (1980).

n57. See H.R. 3224, 1822(a)(1)-(2).

n58. Even if it were, incidental impact on speech would be enough to trigger the First Amendment's intermediate scrutiny standard, under which the law might well be struck down under the principles emanating from United States v. O'Brien, 391 U.S. 367 (1968). In O'Brien, the Court applied an intermediate scrutiny standard to cases where there is an "incidental restriction" on free expression caused by a law "unrelated to the suppression of free expression." Id. at 377. O'Brien is routinely applied by courts to subject content-neutral laws to intermediate scrutiny review. See generally Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech 9-1 to -17 (3d ed. 1996). Under the O'Brien test: a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental 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. O'Brien, 391 U.S. at 377.

n59. See supra note 38.

n60. See Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.")

n61. Id. at 118 (applying strict scrutiny test to strike down New York's "Son of Sam" law because of content-based discrimination).

n62. See id. at 115-16.

n63. See id. at 116 ("The Son of Sam law is such a content-based statute. It singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content.").

n64. See infra notes 69-70 (explaining that equality components of the First Amendment do not allow for speaker-based discrimination).

n65. 501 U.S. 663 (1991).

n66. See id. at 665.

n67. Id. at 669; see also Citizen Publ'g Co. v. United States, 394 U.S. 131, 135 (1969) (sustaining application of antitrust laws to the press); Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 189-92 (1946) (sustaining application of Fair Labor Standards Act to the press); Associated Press v. United States, 326 U.S. 1, 20 (1945) (sustaining application of antitrust laws to the press); Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937) (sustaining application of National Labor Relations Act to the press).

n68. See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 590 (1983); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). The same principle has been applied by the Court in the religion context. See Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 389-91 (1990) (sustaining generally applicable sales tax even as applied to religious books and merchandise). In Leather v. Medlock, 499 U.S. 439 (1991), the Court seemed to compromise these principles, holding that a sales tax was constitutional even though it applied to only certain segments of the media. See id. at 453.

n69. See, e.g., Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 233 (1987) (noting that selective taxation of the press through the narrow targeting of individual members offends the First Amendment).

n70. See Ladue v. Gilleo, 512 U.S. 43, 55 (1994) ("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression.") (citing Frisby v. Schultz, 487 U.S. 474, 486 (1988); Schad v. Mount Ephraim, 452 U.S. 61, 75-76 (1981); Martin v. City of Struthers, 319 U.S. 141, 145-49 (1943) (finding constitutional right to distribute literature door to door); Jamison v. Texas, 318 U.S. 413, 416 (1943) (holding an ordinance prohibiting the distribution of handbills discussing religion unconstitutional); Schneider v. State, 308 U.S. 147, 164-65 (1939); Lovell v. City of Griffin, 303 U.S. 444, 451-52 (1938)).

n71. Once again, it is worth noting that even if such photographs were commercial speech, they would still receive high levels of constitutional protection under the increasingly robust First Amendment standards protecting such speech.

n72. 425 U.S. 748 (1976).

n73. Id. at 761.

n74. Id. (citation omitted); see also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384-85 (1973); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) ("If the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement."); Smith v. California, 361 U.S. 147, 152 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why the operation or profit should have any different effect in the case of motion pictures.").

n75. The Supreme Court set forth the current standard governing regulation of commercial speech in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980) ("At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."). Even commercial speech, however, enjoys increasingly robust protection. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 488, 495 (1966); see also Alex Kozinski & Stuart Banner, Who's Afraid of Commercial Speech?, 76 Va. L. Rev. 627, 652 (1990) (arguing that the ability to exchange commercial information may be more important than political or artistic expression because one's livelihood may depend upon effective commercial speech).

n76. Some might argue, however, that if society is to invigorate legal protection for privacy through notions of intrusion, it would be better if the effort came through common law development, because sweeping legislative interference with First Amendment rights is often more dangerous than the kind of incremental expansions characteristic of tort law. This style of argument, for example, has been used to oppose

statutory efforts to reform the law of libel. See Cynthia Nance, The Uniform Correction or Clarification of Defamation Act: How Not to Reform Arkansas Defamation Law, 51 Ark. L. Rev. 721, 740 n.132 (1998) (quoting Tonda Rush, President and CEO of the National Newspaper Association, as stating, "we wanted the conference to understand that legislation affecting newspapers rarely lends itself to straightforward, objective discussion." (internal quotes omitted)); Rodney A. Smolla & Michael J. Gaertner, The Annenberg Libel Reform Proposal: The Case for Enactment, 31 Wm. & Mary L. Rev. 25, 49 (1989) ("The press fears that the political process of legislative enactment could distort the Annenberg proposal and thus upset the delicate balance... The media also worries that legislators will seek to add intentionally repressive features ....").

n77. Restatement (Second) of Torts 652B (1977).

n78. Nevertheless, interference with physical solitude is often the gravamen of an intrusion claim. See Simons v. Miller, 970 F. Supp. 661, 668 n.2 (S.D. Ind. 1997) (stating that intrusion "typically entails an 'intrusion upon the plaintiff's physical solitude or seclusion ...'" (quoting Cullison v. Medley, 570 N.E.2d 27, 31 (Ind. 1991))).

n79. Any legislative anti-paparazzi proposals that might be limited so as to only target threats to physical safety would be so modest as to accomplish nothing. The policy problem is as glaring as a tabloid headline. We already have plenty of laws against placing people in danger of physical injury or death. Such conduct is already criminal and already tortious. I am opposed to anti-paparazzi legislation, and so I suppose I should be willing to abide such a modest legislative initiative, precisely because it would accomplish nothing. Perhaps I should keep my mouth shut, lest the proponents of the legislation take my impolitic critiques to heart and revise the proposal to make it accomplish more.

n80. See J. Thomas McCarthy, The Rights of Publicity and Privacy 5.10(A)(2) (1993) ("The question of what kinds of conduct will be regarded as a 'highly offensive' intrusion is largely a matter of social conventions and expectations.").

n81. See Frankel v. Warwick Hotel, 881 F. Supp. 183, 188 (E.D. Pa. 1995) (finding that a father's meddling in his son's marriage was not intrusion where there was no "physical or sensory penetration of a person's zone of seclusion"); see also O'Connor v. Ortega, 480 U.S. 709, 715-17 (1987) (stating that a psychiatrist's office was a place at which a psychiatrist had reasonable expectation of privacy).

n82. See Dempsey v. National Enquirer, 702 F. Supp. 927, 931 (D. Me. 1988) (applying Maine law).

n83. See Semayne's Case, 77 Eng. Rep. 194, 195 (K.B. 1604) ("The house of every one is to him as his castle and fortress..."); William Cuddihy & B. Carmon Hardy, A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution, 37 Wm. & Mary Q. 371, 400 (1980) (noting that the belief that "a man's house is his castle" found expression at least as early as the sixteenth century in English jurisprudence).

n84. Cuddihy, supra note 83, at 386 (quoting Thomas M. Cooley, Constitutional Limitations 299 n.3 (1868)); see also 4 William Blackstone, Commentaries 223 (photo. reprint 1967) (1769) ("And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity... For this reason no doors can in general be broken open to execute any civil process; though, in criminal cases, the public safety supersedes the private.").

n85. U.S. Const. amend. IV (emphasis added); see also Silverman v. United States, 365 U.S. 505, 511 (1961) ("The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") (citing Boyd v. United States, 116 U.S. 616, 626-30 (1886); Entick v. Carrington, 19 Howell's State Trials 1029, 1065 (C.P. 1765)).

n86. United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting).

n87. See Wilson v. Layne, 141 F.3d 111 (4th Cir.) (en banc), cert. granted, 119 S. Ct. 443 (1998); Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), cert. granted, 119 S. Ct. 443 (1998).

n88. See Wilson v. Layne, 119 S. Ct. 1692, 1695 (1999); Hanlon v. Berger, 119 S. Ct. 1706, 1706 (1999).

n89. Wilson, 119 S. Ct. at 1697.

n90. See Noble v. Sears, Roebuck & Co., 109 Cal. Rptr. 269, 272-73 (1973).

n91. See Green v. Chicago Tribune Co., 675 N.E.2d 249, 255-56 (Ill. App. Ct. 1996); Barber v. Time, Inc., 159 S.W.2d 291, 295 (Mo. 1942) ("Certainly if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital... without personal publicity.").

n92. See Shulman v. Group W Prods., Inc., 955 P.2d 469, 474 (Cal. 1998).

n93. See Rodney Smolla, Law of Defamation 1.06[1] (1986 & Supp. 1998)

n94. See id. 10.01.

n95. See, e.g., Little Rock Newspapers v. Dodrill, 660 S.W.2d 936, 935-37 (Ark. 1983); Weller v. ABC, 283 Cal. Rprt. 644, 659 (1991) (sustaining a jury award of $ 500,000 in actual damages for proven injury to reputation, $ 500,000 in presumed damages, and $ 1,000,000 for emotional distress, and holding that "presumed damages for injury to reputation may be awarded" even though jury also found actual damage to reputation, stating: "It does not, however, follow that if a plaintiff offers proof of actual injury to reputation that he has proved or can prove all the likely effects of the damage to his reputation. If we were to accept appellants' contention that presumed damages are available only in lieu of damages for proven injury to reputation, the plaintiff who can prove $ 1 of actual injury would be precluded from further recovery, whereas the plaintiff who cannot marshal any evidence of actual injury would not be so limited.").

n96. See Time Inc. v. Firestone, 424 U.S. 448, 459 (1976).

n97. See David Elder, The Law of Privacy 2.7 (1991).

n98. See People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1280-81 (Nev. 1995) (rejecting an intrusion claim by an animal trainer who allegedly engaged in abuse of monkeys in a backstage preparation area).

n99. In Sanders v. ABC, Inc., 978 P.2d 67 (Cal. 1999), the California Supreme Court dealt with the question of whether a journalist is liable for an intrusion tort because the journalist introduced electronic surveillance inside a business premises. See id. at 69. In 1992, plaintiff Mark Sanders was working as a telepsychic in PMG's [Psychic Marketing Group] giving "readings" to customers who telephoned PMG's 900 number (for which they were charged a per-minute fee). The psychics' work area consisted of a large room with rows of cubicles, about 100 total, in which the psychics took their calls. Each cubicle was enclosed on three sides by five-foot-high partitions. The facility also included a separate lunch room and enclosed offices for managers and supervisors. During the period of the claimed intrusion, the door to the PMG facility was unlocked during business hours, but PMG, by internal policy, prohibited access to the office by nonemployees without specific permission. An employee testified the front door was visible from the administration desk and a supervisor greeted any nonemployees who entered. Id. at 69-70. Stacy Lescht was employed by the ABC television company. See id. at 70. In an investigation of the telepsychic industry, [she] obtained employment as a psychic in PMG's Los Angeles office. When she first entered the PMG office to apply for a position, she was not stopped at the front door or greeted by anyone until she found and approached the administration desk. Once hired, she sat at a cubicle desk, where she gave telephonic readings to customers. Lescht testified that while sitting at her desk she could easily overhear conversations conducted in surrounding cubicles or in the aisles near her cubicle. When not on the phone, she talked with some of the other psychics in the phone room. Lescht secretly videotaped these conversations with a "hat cam," i.e., a small camera hidden in her hat; a microphone attached to her brassiere captured sound as well. Among the conversations Lescht videotaped were two with Sanders, the first at Lescht's cubicle, the second at Sanders's. During the first conversation, Sanders and, after a period, a third employee, were standing in the aisle just outside Lescht's cubicle. They talked in moderate tones of voice, and a fourth employee, passing by, joined in the conversation at one point. Sanders conceded there was a "possibility" the psychic in the next cubicle beyond Lescht could have overheard the first conversation if he tried, although in Sanders's view that was very unlikely because he had no reason to eavesdrop. The second conversation, which took place with both Lescht and Sanders seated in Sanders's cubicle, was conducted in relatively soft voices and was interrupted once by Sanders's receiving a customer call and once by a passing coworker's offer of a snack. During this second, longer conversation, Sanders discussed his personal aspirations and beliefs and gave Lescht a psychic reading. Id. The California Supreme Court held that Sanders might well have had reasonable expectations of privacy violated by ABC's actions. See id. at 76-77. "There are degrees and nuances to societal recognition of our expectations of privacy," the Court stated, and "the fact the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law." Id. at 72. The Court noted that while "the intrusion tort is often defined in terms of 'seclusion,' the seclusion referred to need not be absolute." Id. at 72 (citation ommitted). Quoting scholar J. Thomas McCarthy, the Court observed that "like 'privacy,' the concept of 'seclusion' is relative. The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone." Id. (quoting 1 J. Thomas McCarthy, The Rights of Publicity and Privacy 5.10[A][2] (1998)). The Court in Sanders thus concluded that "in the workplace, as elsewhere, the reasonableness of a person's expectation of visual and aural privacy depends not only on who might have been able to observe the subject interaction, but on the identity of the claimed intruder and the means of intrusion." Id. at 77; see also Sundheim v. Board of County Comm'rs, 904 P.2d 1337, 1351 (Colo. App. 1995), aff'd, 926 P.2d 545 (Colo. 1996) (observing in a non-media case that "business premises are protected from unreasonable searches but they are open to intrusions that would not be permissible in purely private circumstances. A commercial establishment enjoys a diminished expectation of privacy in those areas which are open to the public." (citing G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977))).

n100. 887 F. Supp. 811 (M.D.N.C. 1995).

n101. See Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923, 927 (M.D.N.C. 1997).

n102. The trial judge reduced the award to $ 315,000.00. See 5.5 Million Food Lion Award Slashed, Raleigh News & Observer, Aug. 30, 1997, at 3A.

n103. See James Boylan, Punishing the Press: The Public Passes Some Tough Judgements on Libel, Fairness, and "Fraud," Colum. Journalism Rev., Mar.-Apr. 1997, at 24.

n104. See Food Lion, Inc. v. Capital Cities/ABC, Inc., 1999 WL 957738 (4th Cir. Oct. 20, 1999).

n105. See supra note 8.

n106. Thus there may be a certain residual "halo" of privacy that follows us wherever we go. See State v. Matias, 451 P.2d 257, 259 (Haw. 1969) ("[A] person has a 'halo' of privacy wherever he goes and can invoke a protectable right to privacy wherever he may legitimately be and reasonably expect freedom from governmental intrusion.").

n107. 487 F.2d 986 (2d Cir. 1973).

n108. See id. at 991.

n109. See id. at 992.

n110. See id.

n111. See id.

n112. See id.

n113. See id. at 998.

n114. Id.

n115. In 1982, Galella was convicted of 12 violations of the 25-foot restriction and fined $ 120,000. The fine was suspended when Galella agreed to pay Onassis's $ 10,000 in legal fees and to promise never again to photograph her.

n116. See, e.g., Kemp v. Block, 607 F. Supp. 1262, 1264 (D. Nev. 1985); Mclain v. Boise Cascade Corp., 533 P.2d 343, 346 (Or. 1975).

n117. See, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811 (M.D.N.C. 1995).

n118. See, e.g., People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1280-81 (Nev. 1995).

n119. See Shulman v. Group W Prods., Inc., 955 P.2d 469, 493 (Cal. 1998) ("Equipment such as hidden cameras and miniature cordless and directional microphones are powerful investigative tools for newsgathering, but may also be used in ways that severely threaten personal privacy.").

n120. See Miller v. NBC, 232 Cal. Rptr. 668, 679 (1986) (determining offensiveness requires consideration of all the circumstances of the intrusion, including its degree and setting and the intruder's "motives and objectives").

n121. See People for the Ethical Treatment of Animals, 895 P.2d at 1272.

n122. See Shulman, 955 P.2d at 493 ("Information collecting techniques that may be highly offensive when done for socially unprotected reasons - for purposes of harassment, blackmail or prurient curiosity, for example - may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story."). In Schulman, the Supreme Court of California sustained an invasion of privacy action arising from news coverage of an accident victim's medical treatment by a rescue helicopter squad. See id. at 474-75. The court held that the story of rescue was of legitimate public interest, as was the victim's appearance and words, and that the cameraman's presence and filming of events at the accident scene was not an intrusion on the victim's seclusion. See id. at 487-88. The court also held, however, that victims may have had reasonable expectation of privacy once they were placed in a rescue helicopter, and that they were also entitled to a degree of privacy in conversations with medical rescuers. See id. at 490-92. The recording of communications between the victim and the medical rescuers, as well as the filming of the victim in the helicopter ambulance, may have been highly offensive to reasonable person, the court held, and thus actionable. See id. at 494.

n123. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

n124. See 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, 177 (1979) ("This 'structural' model of the press has several important implications. It significantly extends the umbrella of the press' constitutional protections. The press is not only shielded when it speaks out, but when it performs all the myriad tasks necessary for it to gather and disseminate the news."); Potter Stewart, "Or of the Press," Address at the Yale Law School Sesquicentennial Convocation (Nov. 2, 1974), in 26 Hastings L.J. 631, 633 (1975) ("The Court's approach to all these cases has uniformly reflected its understanding that the Free Press guarantee is, in essence, a structural provision of the Constitution.").

n125. See New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (reinforcing the heavy First Amendment presumption against prior restraints in a case involving publication by The New York Times and The Washington Post of the "Pentagon Papers"); New York Times Co. v. Sullivan, 376 U.S. 254, 284 (1964) (creating First Amendment actual malice privilege in defamation actions brought by public officials); Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113, 120 (2d Cir. 1977) (recognizing a First Amendment-based "neutral reportage" privilege immunizing a publisher from liability for reporting defamatory statements made by a public interest group against scientists in an environmental dispute, in a case arising from coverage of the dispute by The New York Times).

n126. See People for the Ethical Treatment of Animals, 895 P.2d at 1280-81.

n127. See Ladue v. Gilleo, 512 U.S. 43, 53 (1994). In Ladue, the Court struck down an ordinance restricting the size of signs as applied to the placement by Margaret Gilleo of a 24-by 36-inch sign in her front lawn protesting the Persian Gulf War. See id. at 45. The Court repeatedly referred to the ordinance as simply restricting "too much" speech. See id. at 53. "Even if we assume the validity of these arguments, the exemptions in Ladue's ordinance nevertheless shed light on the separate question whether the ordinance prohibits too much speech." Id. at 52. "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent - by eliminating a common means of speaking, such measures can suppress too much speech." Id. at 55; see also Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 57-58 (1987) ("The Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to communicate their views to others.").

n128. See Waters v. Churchill, 511 U.S. 661, 668, 675 (1994); Rankin v. McPherson, 483 U.S. 378, 384 (1987); Connick v. Myers, 461 U.S. 138, 142 (1983); Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

n129. 376 U.S. 254 (1964).

n130. 334 U.S. 1 (1948).

n131. 346 U.S. 249 (1953).

n132. See Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 814 (M.D.N.C. 1995).

n133. See id. at 814-15.

n134. See id. at 813-14.

n135. See Wilson v. Layne, 119 S. Ct. 1692 (1999); Hanlon v. Berger, 119 S. Ct. 1706 (1999).

n136. See supra notes 17-19 and accompanying text.

n137. See supra note 17 and accompanying text.

n138. See supra notes 22-25 and accompanying text.

n139. See Wilson v. Layne, 119 S. Ct. 1692, 1698 (1999), aff'g 141 F.3d 111 (4th Cir. 1997) (en banc).

n140. See People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1280-81 (Nev. 1995).

n141. See, e.g., Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) ("We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully by imposed, if at all, only when narrowly tailored to a state interest of the highest order...."); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993); Ross v. Midwest Communications, Inc., 870 F.2d 271 (5th Cir. 1989) (holding that documentary of a rapist, which included information on rape victims, is newsworthy); Gilbert v. Medical Econ. Co., 665 F.2d 305, 307 (10th Cir. 1981) ("The First Amendment protects the publication of private facts that are 'newsworthy' ...."); Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980); Pasadena Star-News v. Superior Court, 203 Cal. App. 3d 131, 133 (Cal. Ct. App. 1988); Sipple v. Chronicle Publ'g Co., 201 Cal. Rptr. 665, 668 (Cal. Ct. App. 1984); McNutt v. New Mexico State Tribune Co., 538 P.2d 804, 807 (N.M. Ct. App. 1975); Freihoffer v. Hearst Corp., 480 N.E.2d 349, 353-54 (N.Y. 1985); Anderson v. Fisher Broad. Co., Inc., 712 P.2d 803, 808-09 (Or. 1986).

n142. See Neff v. Time, Inc., 406 F. Supp. 858, 861 (W.D. Pa. 1976) (stating that a "factually accurate public disclosure is not tortious when connected with a newsworthy event even though offensive to ordinary sensibilities").

n143. See Rodney Smolla, Free Speech in an Open Society 132-41 (1992).

n144. See generally Robert Post, The Social Foundations of Privacy: Community and Self in the Common Law Tort, 77 Cal. L. Rev. 957, 1007 (1989) (observing that the newsworthiness test "bears an enormous social pressure, and it is not surprising to find that the common law is deeply confused and ambivalent about its application").

n145. See Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

n146. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-46 (1974).

n147. 376 U.S. 254 (1964).

n148. See Smolla, supra note 93, 6.05[3].

n149. See id.

n150. See Fisher v. Washington Post Co., 212 A.2d 335, 337 (D.C. Ct. App. 1965); Keeton et al., supra note 29, 113A ("It can be said that the state of a person's mind is a fact and if a publisher misrepresents his state of mind, he misrepresents a fact even though it is only an opinion.").

n151. 123 F.3d 1249 (9th Cir. 1997).

n152. See id. at 1250, 1256.

n153. See id. at 1253.

n154. See id. at 1254.

n155. Id. at 1253.

n156. Id.

n157. See id.

n158. See id. There was testimony that the Enquirer used a kind of code, applying the label "Enquirer Interview" where an interview is given to the Enquirer directly, and "Exclusive Interview" where it was not. See id. But if this "code" was well-understood among insiders in the tabloid business, the court doubted that it was of much assistance to the average reader or checkout counter browser. See id. The record, the court held, supported the conclusion that the Enquirer set out to create the impression that it had directly interviewed Eastwood, and that was sufficient to support a finding of actual malice. See id.