INTRUSION AND THE MEDIA: AN OLD TORT LEARNS NEW TRICKS

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INTRODUCTION

It is 9:30 p.m. on October 20, 1996. As Marietta Marich settles into the couch to watch a movie in her Houston home, the phone rings. The man on the other end of the line insists upon talking to her husband, who is asleep in the next room. Thinking it is a sales call, Marietta starts to hang up. Then the man says, "Are you Michael Marich's mother?" She tells him that she is. "Well, your son is deceased." As the moments pass, the Marichs grapple with grief as the police officer explained that their son's body was found in his Los Angeles apartment, apparently dead of a drug-overdose. Unbeknownst to the Marichs, a camera crew in Michael's apartment was recording every sorrow-stricken sound.[1]

The camera crew accompanied police to Michael Marich's apartment to film a segment for the television series *L.A.P.D.: Life On The Beat*. Four months later, after begging the producers not to air the segment, Michael's mother was working on an assignment for her eighth grade students when she caught site of something familiar on the muted television. It was a curtain, slightly askew, just like the one she continually reminded Michael to fix. There was a man seated on the floor cross-legged. He was shirtless, his limbs were rigid in death, and he was gruesomely bent forward with his head nearly touching the carpet. Next to him was a two-headed dinosaur, a toy Marietta recognized as something a friend had given to Michael.[2]

In 1999, the Marich's won an invasion of privacy suit against the media outlets based on the recorded phone call.[3] The case is among a growing line of cases presenting the difficult question: When does a television network cross the line from reporting the news to invading privacy? With increasingly sophisticated surveillance equipment, undercover investigative tactics have become more commonplace. And in the intensely competitive world of reality-based television and newsmagazine shows, reporters are driven to not only get the story, but to get it in the most dramatic way.

Historically, courts have taken a "hands off" approach with the media, allowing most of its actions to fall under the protective umbrella of the First Amendment.[4] But recent court decisions show a diminishing tolerance for

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1. *See* Howard Rosenberg, *A Family's Pain, for All to See*, L.A. TIMES, Nov. 29, 1998, at F8.

2. *See* Howard Rosenberg, *Pleas For Privacy, Left Unheeded*, L.A. TIMES, Nov. 30, 1998, at F1.

3. *See* Marich v. QRZ Media, Inc., 86 Cal. Rptr. 2d 406 (Cal. Ct. App. 1999), *review denied*, No. S081294, 1999 Cal. LEXIS 7291 (Cal. Oct. 22, 1999) (unpublished opinion).

4. *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); N.Y. Times Co. v. Sullivan,

intrusive newsgathering tactics.[5] These decisions are giving new life to the tort of intrusion by expanding it to encompass invasions of privacy in semi-public places. Although the threat of liability may clean up some of the most offensive behavior by tabloid television programs, it also stands to undercut legitimate investigative journalism by chipping away at the media's First Amendment rights. The traditional interpretation of the tort of intrusion upon seclusion prohibited the media from intruding into private places. Recent cases, however, have effectively removed "upon seclusion" from the title of the tort of intrusion by imposing liability on media outlets covering events occurring in semi-public places. Further expansion of the tort will chill legitimate newsgathering by instilling fear of liability and will cause confusion over what the press may cover in the elusive "semi-public" place.

This Note will analyze the newly invigorated tort of intrusion, its recent applications to the media, and the dangers of further infringement on the First Amendment. Part I of this Note provides historical background for the nearly absolute First Amendment protection courts have given publication of truthful information and discusses the varying approaches courts have taken when applying the First Amendment to newsgathering. Part II discusses two recent U.S. Supreme Court decisions involving media "ride-alongs" with police that show a fading tolerance for intrusive newsgathering activities.[6] Parts III and IV analyze the tort of intrusion as it has been applied to the media before and after the Supreme Court decisions. Finally, Part V of this Note discourages further expansion of the tort and suggests self-regulation.

I. SCOPE OF FIRST AMENDMENT PROTECTION

A. Broad Protection for Publication

Historically, courts have taken a "hands off" approach to media regulation to avoid infringing on First Amendment rights. In a landmark case for the press, *New York Times Co. v. Sullivan*, the U.S. Supreme Court provided nearly absolute First Amendment protection to the publication of truthful speech.[7] By requiring public figures to show falsity and actual malice in a libel suit, *Sullivan* also extended First Amendment privileges to false speech.[8] An "erroneous statement is inevitable in free debate[;] . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[9]

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376 U.S. 254 (1964).

5. *See, e.g.*, Wilson v. Layne, 526 U.S. 603 (1999); Sanders v. Am. Broad. Cos., 978 P.2d 67 (Cal. 1999), *review denied*, No. S059692, 2000 Cal. LEXIS 1892 (Cal. Mar. 15, 2000); *Marich*, 86 Cal. Rptr. 2d at 406.

6. *See Wilson*, 526 U.S. at 603; *see also* Hanlon v. Berger, 526 U.S. 808 (1999).

7. 376 U.S. 254 (1964).

8. *Id*. at 283, 286. The court held that factual error and defamatory content alone are not enough to remove the "constitutional shield from criticism of official conduct." *Id*. at 273.

9. *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

The ruling in *Sullivan* insulated the media from liability for publication unless it published information it knew to be false with malicious intent.[10]

Later Supreme Court decisions enhanced the First Amendment protection announced in *Sullivan*. In *Cox Broadcasting Corp. v. Cohn*, the Court held that the publication of truthful information released to the public in official court records was constitutionally protected.[11] The Court recognized that to rule otherwise "would invite timidity and self-censorship and very likely lead to suppression of many items that would otherwise be published and that should be made available to the public."[12] The Court reiterated its concern for overdeterrence in *Florida Star v. B.J.F.* when it refused to impose liability for publishing truthful information that was lawfully obtained from police records.[13] Gleaning information from government documents is a common reporting technique. To impose liability for disseminating information found in those public records would violate the First Amendment and lead to self-censorship.[14]

From *Sullivan* and its resulting line of cases, it is evident that the media receives broad First Amendment protection for the information it publishes. Yet how much protection does the First Amendment afford the gathering of this information before publication?

B. Unsettled Level of Constitutional Protection for Newsgathering

The Supreme Court has conceded that "news gathering is not without its First Amendment protections" but has offered little guidance as to the scope of such protection.[15] In *Branzburg v. Hayes*, the Court recognized that some protection for newsgathering is an essential precursor to the broad protection given to publication.[16] "[W]ithout some protection for seeking out the news, freedom of

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10. When a public figure plaintiff seeks damages resulting from publication of speech protected by the First Amendment, the plaintiff must also satisfy the actual malice standard from the *Sullivan* case. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988).

11. 420 U.S. 469 (1975).

12. *Id.* at 496.

13. 491 U.S. 524, 541 (1989).

14. *See id.* at 538-39.

15. Branzburg v. Hayes, 408 U.S. 665, 707 (1972).

16. *Id.* at 681; *see also* Houchins v. KQED, Inc., 438 U.S. 1, 32 (1978) (Stevens, J., dissenting).

> Without some protection for the acquisition of information about operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.
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> . . . [I]nformation gathering is entitled to some measure of constitutional protection. . . . [T]his protection is not for the private benefit of those who might qualify as representatives of the "press" but to insure that the citizens are fully informed regarding matters of public interest and importance.

Id. at 32.

the press could be eviscerated."[17] However, the Court immediately limited the newsgathering protection by stating that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[18] Publishers do not have "special immunity from the application of general laws" or "special privilege to invade the rights and liberties of others."[19]

Branzburg thus set forth an internal contradiction: newsgathering merits some constitutional protection, but the press is subject to the same laws that apply to all citizens, regardless of how such laws may burden the newsgathering process.[20] The media receives some immunity when publishing the news because the publication is constitutionally protected.[21] If there is a constitutional protection for gathering the news, does it not follow that the media should also receive some immunity while newsgathering? The lower courts have struggled to interpret the conflicting principles of *Branzburg*, and the level of constitutional protection extended to newsgathering remains unsettled. Two approaches to the problem have emerged.

1. First Approach: Remove First Amendment From Analysis.—When determining whether media outlets are liable for torts as a result of newsgathering activities, some courts refuse to weigh any First Amendment interests. *Dietemann v. Time, Inc*.,[22] handed down shortly before *Branzburg*, is a classic example of this approach.[23] In *Dietemann*, two reporters from Life Magazine used false identities to gain access to the office portion of the home of a man practicing herbal medicine.[24] The "quack" doctor was a disabled veteran with little education who engaged in the practice of healing with clay, minerals, and herbs.[25] While one of the reporters posed as a patient, the other reporter used a hidden camera to photograph the man attempting to heal with some gadgets and a wand.[26] The Ninth Circuit did not allow the First Amendment to shield the reporters from an invasion of privacy claim.[27] In a widely cited passage, the court found that the man could reasonably expect to be free of eavesdropping newsmen in the den of his home.[28] "The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass,

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17. *Branzburg*, 408 U.S. at 681.

18. *Id*. at 682.

19. *Id*. at 683 (quoting Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937)).

20. *See* Lyrissa Barnett Lidsky, *Prying, Spying and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 186-87 (1998).

21. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

22. 449 F.2d 245 (9th Cir. 1971).

23. *See* Lidsky, *supra* note 20, at 190.

24. *See Dietemann*, 449 F.2d at 246.

25. *See id.* at 245.

26. *See id.* at 246.

27. *See id*. at 249.

28. *See id*.

to steal, or to intrude by electronic means into the precincts of another's home or office."[29]

Dietemann dulled the media's First Amendment sword by proclaiming that reporters should be subject to tort law to the same extent as other citizens, regardless of its affect on newsgathering.[30] In the process, the court laid the foundation for the invasion of privacy cases against the media which followed. Nevertheless, some courts followed a different approach to determine the constitutional protection afforded to newsgathering.

2. Second Approach: First Amendment Limits Reach of State Tort Law.— Some courts found support in *Branzburg* for the opposite position—that the First Amendment limits states' ability to sanction intrusive newsgathering.[31] Freedom of the press is a "fundamental principle of the American form of government"[32] and with it comes the risk of the press acting outside its boundaries. The risks associated with a free press were recognized as early as the Constitutional debates when James Madison said, "[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press."[33] In the face of invasion of privacy claims, courts have held that the First Amendment protects the broadcast of an incriminating video of a well-known physician even though the video was fraudulently obtained by television reporters;[34] it protects a newspaper that published a photograph of a woman's bare breast obtained from unsealed court records;[35] it even protects the publication of a photograph of a dead woman obtained during a customary media

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29. *Id*. The Second Circuit agreed when it held a free-lance photographer liable for invasion of privacy for unceasingly shadowing Jacqueline Onassis and her children in pursuit of photographs. *See* Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973). The *Galella* court concluded that the First Amendment does not immunize all conduct designed to gather information about a public figure. *See id*. at 995-96.

30. One court has even found a television news crew guilty of criminal charges. *See* State v. Krueger, 975 P.2d 489, 498 (Utah Ct. App. 1999) (finding that by asking minors to chew tobacco on camera to illustrate a story, the news crew "stepped beyond the protections of the First Amendment").

31. *See* Lidsky, *supra* note 20, at 191-92; *see also* Houchins v. KQED, Inc., 438 U.S. 1 (1978). "[T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see." *Id*. at 17.

32. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 275 (1964).

33. *Id.* at 271 (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)).

34. *See In re* King World Prods., Inc., 898 F.2d 56, 59 (6th Cir. 1990) (Physicians secretly videotaped by *Inside Edition* reporters failed to show requisite harm to justify prior restraint of producer's First Amendment freedom to broadcast the video, even if fraudulently obtained. "No matter how inappropriate the acquisition, or its correctness, the right to disseminate that information is what the Constitution intended to protect.").

35. *See* Munoz v. Am. Lawyer Media, 512 S.E.2d 347 (Ga. Ct. App. 1999), *cert. denied*., No. S99C0794, 1999 Ga. LEXIS 546 (Ga. June 3, 1999).

walk-through with fire officials but without the consent of her family.[36] These cases support the notion that the First Amendment shields the press from liability when reporters use routine reporting techniques to obtain truthful information.[37]

The most noted example of this approach is *Desnick v. American Broadcasting Cos*.[38] In an effort to uncover fraudulent practices in an eye clinic, reporters from *PrimeTime Live* equipped "test patients" with hidden cameras.[39] The patients filmed their eye exams and conversations with clinic doctors, which were later aired in a segment about doctors who perform unnecessary cataract surgery for the money.[40] In denying recovery for the clinic's trespass and invasion of privacy claims, the court noted the importance of the First Amendment even when the investigative tactics are "surreptitious, confrontational, unscrupulous, and ungentlemanly."[41]

> Today's "tabloid" style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market constitutes—although it is often shrill, one-sided, and offensive, and sometimes defamatory—an important part of the market. It is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation.[42]

Branzburg and the lower court decisions that followed drew a blurry line in the sand for journalists. Newsgathering is constitutionally protected, but to what extent? The question remains unresolved, but the U.S. Supreme Court sharpened the focus of that line in the summer of 1999.

II. SUPREME COURT'S FADING TOLERANCE OF INTRUSIVE NEWSGATHERING

In the early morning hours of April 16, 1992, officers gathered outside the home of Charles and Geraldine Wilson to prepare to execute an arrest warrant on the Wilson's son, Dominic.[43] A reporter and photographer from the *Washington Post* accompanied the officers as part of the U.S. Marshal's Service ride-along policy. Charles Wilson, still in bed when he heard the officers in his living room, ran into the room in his underwear and demanded to know what was happening. Believing Charles to be Dominic, the officers subdued him by pushing him to the floor as Geraldine entered in her nightgown. The *Post* photographer took

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36. Fla. Publ'g Co. v. Fletcher, 340 So. 2d 914 (Fla. 1977) (ruling that plaintiff could not recover for publication of a photograph of the silhouette of her daughter who died in a fire under theory of trespass because consent was implied by custom authorizing news media to accompany fire officers in the investigation of fires).

37. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)

38. Desnick v. Am. Broad. Cos., 44 F.3d 1345 (7th Cir. 1995).

39. *Id.* at 1348.

40. *See id.*

41. *Id*. at 1355.

42. *Id*. (internal citations omitted).

43. *See* Wilson v. Layne, 526 U.S. 603, 607 (1999).

numerous pictures during the incident, but none were published. The officers and journalists left after realizing Dominic was not inside the house.[44]

The Wilsons sued the officers in their personal capacities claiming the officers, in allowing the reporter and photographer into the Wilson's home without their consent, violated the Wilson's Fourth Amendment rights.[45] The Court found that "although the presence of third parties during the execution of a warrant may in some circumstances be constitutionally permissible . . . the presence of these third parties was not."[46] Although the Court recognized the undeveloped state of the law, it granted the officers qualified immunity because the right to not have the media enter a home with police was not clearly established at the time of the incident.[47] In making this finding, the Court noted that the U.S. Marshal's ride-along policy explicitly allowed media to enter private homes during the execution of warrants[48] and the law among the lower courts was unsettled.[49]

A. Implications of Wilson *for the Media*

Although the police, not the media, were the defendants in *Wilson*, a diminishing tolerance for intrusive newsgathering behavior may be inferred. The Court recognized the importance of an individual's home as his "castle," where he has the highest expectation of a right to privacy.[50] The Fourth Amendment embodies this principle:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[51]

The officers were authorized to enter the Wilsons' home because they had a warrant, but the Court noted that it does not necessarily follow that the officers were entitled to bring journalists along.[52]

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44. *See id*.

45. *See id*. at 608.

46. *Id*. at 613 (internal citation omitted); *see also* Hanlon v. Berger, 526 U.S. 808 (1999) (companion case with similar facts and identical holding).

47. *See Wilson*, 526 U.S. at 608, 617-18.

48. *See id.* at 613.

49. *See* Stack v. Killian, 96 F.3d 159 (6th Cir. 1996); Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996) (both cases holding that officers who allowed media to ride along were entitled to qualified immunity). *But cf.* Barrett v. Outlet Broad., Inc., 22 F. Supp. 2d 726 (S.D. Ohio 1997); Ayeni v. CBS, Inc., 848 F. Supp. 362 (E.D.N.Y. 1994) (both cases holding that officers who allowed media to ride along were not entitled to qualified immunity).

50. *See Wilson*, 526 U.S. at 609-10.

51. U.S. CONST. amend. IV.

52. *See Wilson*, 526 U.S. at 611.

Media ride-along policies allow civilian observers to accompany police officers while the officers perform their duties. Ride-alongs have become a common activity for journalists and are thought to serve important objectives for both the police agency and the media outlet. These objectives include: (1) publicizing the government's efforts to combat crime, (2) facilitating accurate reporting on law enforcement activities, (3) protecting the suspects by minimizing police abuses, and (4) protecting the safety of the officers.[53] But these objectives, though important, do not override the right of residential privacy.[54] "Were such generalized 'law enforcement objectives' themselves sufficient to trump the Fourth Amendment, the protections guaranteed by that Amendment's text would be significantly watered down."[55]

Although the Court recognized the importance of the First Amendment in protecting freedom of the press, it found that the Fourth Amendment's protection of the home as the ultimate zone of privacy outweighed the First Amendment in the narrow sense of police ride-alongs.[56] The core of *Wilson* is the idea that an action by state actors and the media that reaches into one's home is an intrusive offense against that person's privacy. By not allowing journalists to enter a private residence "on the coattails" of a police warrant, the Court reined in a longstanding media practice and revealed some distaste for newsgathering that interferes with the individual's right to privacy.

Wilson marks one of the few times since *Branzburg* that the Supreme Court has spoken about the scope of the constitutional protection for newsgathering. During the scuffle in the Wilson's living room, the *Washington Post* photographer took numerous photographs. But the Court noted that none of the photographs were published.[57] At issue was the *way* the reporter got the photographs, not what was done with them later. Had the pictures been published, the newspaper may have been protected under *Sullivan*.[58] But its newsgathering method—riding along with police—was not protected.[59] The Court seems to be saying that it is growing tired of intrusive newsgathering behavior and will no longer allow the media to hide behind the shield of the First Amendment, at least in these narrow circumstances. But how far can *Wilson* be taken?

Although *Wilson* does not mention the tort of intrusion upon seclusion, increased liability for intrusive newsgathering by the media is a logical outgrowth of the strong right to privacy sentiment underlying the opinion. If police entry with a warrant is an "authorized intrusion"[60] as stated in *Wilson*, it follows that media entry is an unauthorized intrusion. Eliminating ride-alongs during the

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53. *See id.* at 612-13.
54. *See id*. at 613-14.
55. *Id*. at 612.
56. *See id*. at 612-13.
57. *See id*. at 608.
58. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
59. *See Wilson*, 526 U.S. at 611.
60. *Id*.

execution of a warrant is a sign of the Supreme Court's diminishing tolerance for the media's intrusive behavior. Not only will *Wilson* impair popular reality television shows that rely on police ride-alongs,[61] it stands to open the door for new invasion of privacy suits against the media based on the tort of intrusion.

III. INVIGORATING THE TORT OF INTRUSION UPON SECLUSION

The tort of intrusion upon seclusion transcends trespass actions and protects a broad sphere of privacy by filling the gaps left by trespass, nuisance, and intentional infliction of emotional distress.[62] The tort extends beyond the physical intrusion so long as the intruded-upon event is, and is entitled to be, private.[63] Most courts have adopted the Restatement's explanation of the tort of intrusion.[64]

The Restatement (Second) of Torts states that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[65] Comment b further notes that "[t]he invasion may be . . . by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires."[66]

Non-media applications of intrusion have covered a broad range of offensive activities that encroach on a person's privacy. The classic illustration of intrusion arose from a case decided decades before the courts recognized the tort. In *De May v. Roberts*,[67] the court awarded damages against a person who intruded into a place where a woman was giving birth under the guise of being the physician's assistant.[68] Modern cases reflect *De May's* protection of personal privacy, finding liability for harassing phone calls by a creditor to a debtor at

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61. *COPS*, for example, is in its twelfth season and is syndicated to more than ninety percent of the U.S. market. "[T]he series has profiled more than 120 law enforcement agencies in 140 different cities and countries." Ronald B. Kowalczyk, Comment, *Supreme Court Slams the Door on the Press: Media "Ride-Along" Found Unconstitutional in* Wilson v. Layne, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 353, 353 (1999).

62. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 392 (1960).

63. *Id*. at 391.

64. *See generally* Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 678 (Cal. Ct. App. 1986); Benitez v. KFC Nat'l Mgmt. Co., 714 N.E.2d 1002, 1006 (Ill. App. Ct. 1999); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998); Household Credit Servs., Inc. v. Driscol, 989 S.W.2d 72, 84-85 (Tex. App. 1998).

65. RESTATEMENT (SECOND) OF TORTS § 652B (1965).

66. *Id*. cmt. b.

67. 9 N.W. 146 (Mich. 1881).

68. *See id.* at 149.

home and work,[69] spying on women in the bathroom of a fast-food restaurant,[70] circulating nude photographs after film was dropped off for developing,[71] and performing an HIV blood test without permission.[72]

Today, nearly every state recognizes the tort of intrusion,[73] but it has been a "toothless" tort against media defendants with few cases making it past the hurdle of summary judgment. In fact, between 1986 and 1996 defendants prevailed on summary judgment motions in intrusion cases nearly ninety percent of the time.[74] One possible explanation for the dismal success rate of media intrusion suits is "kitchen sink" pleading.[75] Because intrusion is so broad, plaintiffs tend to plead it along with a host of other tort theories in hopes that one will succeed.[76] But unlike other privacy torts, the tort of intrusion is ideally suited to address intrusive newsgathering because it targets offensive behavior without raising First Amendment difficulties.[77] Intrusion focuses on the methods used to gather information rather than on the publication of it.[78] Thus, the plaintiff is relieved of the task of proving the tort withstands the constitutional scrutiny applied to publication-based torts.[79] The tort of intrusion can be successfully applied to the media, as shown in some jurisdictions that are redesigning the tort to address egregious media wrongs.[80]

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69. *See* Household Credit Servs. v. Driscol, 989 S.W.2d 72 (Tex. App. 1998).

70. *See* Benitez v. KFC Nat'l Mgmt. Co., 714 N.E.2d 1002 (Ill. App. Ct. 1999).

71. *See* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998).

72. *See* Doe v. High-Tech Inst., Inc., 972 P.2d 1060 (Colo. Ct. App. 1998).

73. As of 1996, one author found that six states did not recognized the tort of intrusion. *See* Dennis F. Hernandez, *Litigating the Right to Privacy: A Survey of Current Issues*, 446 PRAC. LAW INST. 425, 437 (1996). Illinois and Minnesota expressly recognized the tort in the past year. *See Benitez*, 714 N.E.2d at 1007; *Lake*, 582 N.W.2d at 235.

74. *See* Lidsky, *supra* note 20, at 207.

75. *Id.* at 208.

76. *See id*.

77. *See* Melville B. Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 957 (1968). The privacy tort of public disclosure of private facts has a difficult First Amendment standard to meet. If the information is truthful, lawfully obtained, and deemed "newsworthy," no liability may be imposed for publishing or broadcasting the information. *See* Florida Star v. B.J.F., 491 U.S. 524 (1989).

78. *See* RESTATEMENT (SECOND) OF TORTS § 652B, cmt. b (1965).

79. *See generally* Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

80. *See generally* Sanders v. Am. Broad. Cos., 978 P.2d 67 (Cal. 1999), *review denied*, No. S059692, 2000 Cal. LEXIS 1892 (Cal. Mar. 15, 2000); Shulman v. Group W Prods., Inc., 955 P.2d 469 (Cal. 1998); Marich v. QRZ Media, Inc., 86 Cal. Rptr. 2d 406 (Cal. Ct. App. 1999), *review denied*, No. S081294, 1999 Cal. LEXIS 7291 (Cal. Oct. 22, 1999) (unpublished opinion); Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668 (Cal. Ct. App. 1986).

A. Tweaking the Tort of Intrusion to Fit Media Applications

Shortly before *Wilson*, California courts began to recognize intrusion as a valuable tool to sanction the media for offensive newsgathering tactics, a significant step for the capital of the entertainment industry.[81] Two post-*Wilson* decisions from California strengthened the framework of the tort's application to the media.[82] In building this framework, California state courts have found intrusion when a reality TV show equipped a nurse in a rescue helicopter with a microphone to record her conversation with a car accident victim,[83] when a television news crew filmed paramedics administering life-saving techniques to a dying man in his bedroom,[84] and when a television news magazine reporter posed as an employee of a psychic telephone network and used a hidden camera to uncover fraudulent practices.[85]

The Restatement offers a two-prong test for intrusion: (1) intrusion into a private place, conversation or matter that (2) is highly offensive to a reasonable person.[86] Starting with this test, courts have retrofit the tort to reflect the intricacies of today's world of high-tech media. In the first prong of the test, courts have expanded the meaning of the word "private" and created an exception for intrusions with consent to better address the use of surreptitious surveillance for investigative reporting. An intrusion need not be a physical invasion; it includes the use of electronic means to oversee or overhear that which is meant to be private.[87] So it appears that the difference between whether a media tactic will be deemed intrusive or not is often the degree of privacy the individual could have reasonably expected during the activity.

Typically intrusion cases would fail where the intruded-upon event took place in public.[88] "On the public street, or in any other public place, the plaintiff has no right to be alone . . . ."[89] This traditional interpretation of the tort limited its application to intrusions into strictly private areas. A person visible to the public eye was not "secluded" and therefore could not claim "intrusion upon seclusion." But with the advent of miniature cameras and microphones that can record conversations up to sixty yards away, under the traditional interpretation an individual's right to privacy would be shattered upon leaving his home.

To protect individuals from intrusive media behavior in semi-public places,

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81. *See Shulman*, 955 P.2d at 469; *Miller*, 232 Cal. Rptr. at 668.

82. *See Sanders*, 978 P.2d at 67; *Marich*, 86 Cal. Rptr. 2d at 406; *see also infra* Part IV.

83. *See Shulman*, 955 P.2d at 469.

84. *See Miller*, 232 Cal. Rptr. at 689.

85. *See Sanders*, 978 P.2d at 67.

86. RESTATEMENT (SECOND) OF TORTS § 652B (1965).

87. *See id*. at cmt. b.

88. *See id.* at cmt. c; *see also* Wehling v. Columbia Broad. Sys., 721 F.2d 506, 509 (5th Cir. 1983); Frazier v. S.E. Pa. Transp. Auth., 907 F. Supp. 116, 122 (E.D. Pa. 1995); Machleder v. Diaz, 538 F. Supp. 1364, 1374 (S.D.N.Y. 1982); Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1087 (E.D. Pa. 1980); Aisenson v. Am. Broad. Co., 269 Cal. Rptr. 379, 388 (Cal. Ct. App. 1990).

89. Prosser, *supra* note 62, at 391.

a flexible interpretation of the word "privacy" became necessary. Courts recognized this necessity in modern media intrusion cases and have held that an expectation of *complete* privacy is not necessary to sustain an action for intrusion.[90] "[P]rivacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances . . . of privacy: 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."[91]

By expanding the tort to cover intrusions into areas with lesser expectations of privacy, courts are better equipped to sanction the media for high-tech newsgathering practices that previously were not considered intrusive. While this expansion will be helpful to target egregious media tactics, the same case law will be available to attack legitimate newsgathering driven by a great public interest. Once again courts will be asked to strike a balance between individuals' right to privacy and the rights of the press.

That balance seems to be shifting in favor of individuals' right to privacy as courts continue to expand the reach of intrusion. For example, courts have found that individuals possess a limited right to privacy in public places, such as a restaurant[92] or the workplace[93] where, although open to the public, the atmosphere is private.

> In an office or other workplace to which the general public does not have unfettered access, employees may enjoy a limited, but legitimate, expectation that their conversations and other interactions will not be secretly videotaped by undercover television reporters, even though those conversations may not have been completely private from the participants' coworkers.[94]

Moreover, "[c]onduct that amounts to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi-public place, may nevertheless rise to the level of" intrusion.[95] One court even

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90. *See* Sanders v. Am. Broad. Cos., 978 P.2d 67, 69 (Cal. 1999), *review denied*, No. S059692, 2000 Cal. LEXIS 1892 (Mar. 15, 2000).

91. *Id.* at 72.

92. *See* Stessman v. Am. Black Hawk Broad. Co., 416 N.W.2d 685, 687-88 (Iowa 1987) (videotaping of a woman eating in a private dining room of a restaurant after she repeatedly asked them to stop states a claim for intrusion); *cf.* Simtel Comm. v. Nat'l Broad. Co., 84 Cal. Rptr. 2d 329, 336 (Cal. Ct. App. 1999) (videotaping of business meeting by *Dateline NBC* reporters on the patio of a crowded restaurant was not an intrusion into a private place, conversation or matter), *review denied sub nom.* Wilkens v. Nat'l Broad. Co., No. S079583, 1999 Cal. LEXIS 4884 (Cal. July 21, 1999).

93. *See Sanders*, 978 P.2d at 69.

94. *Id.*

95. Wolfson v. Lewis, 924 F. Supp. 1413, 1420 (E.D. Pa. 1996). The Restatement recognizes that repeated conduct that "amount[s] to a 'course of hounding the plaintiff, [and] becomes a substantial burden to his existence' may constitute an invasion of privacy." *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652B, cmt. b (1977)).

left open the possibility of "photographic intrusions" by way of recording private moments and broadcasting them into a family member's home—the transmission itself being the intrusive act.[96]

Although courts tightened the reins over the media by recognizing limited privacy rights, the court also loosened the reins by proclaiming that consent bars an intrusion claim, even if fraudulently induced.[97] In *Baugh v. CBS, Inc*., reporters from the television program *Street Stories* accompanied police officers on a domestic dispute call.[98] The officers told the homeowners that the reporters were from the D.A.'s office and were there to help them.[99] The homeowners then allowed the reporters to enter the home and begin filming.[100] The court dismissed the homeowners' intrusion claim because homeowner consent, although fraudulently induced, precludes recovery under intrusion.[101] "No California cases indicate that the consent must be knowing or meaningful and the Court does not find any reason to add that requirement to the tort. . . . [C]onsent is an absolute defense, even if improperly induced."[102] If consent is given to the media in any form or for any reason, the individual will not have a claim for intrusion.[103]

The second prong of the intrusion test requires that the "intrusion be highly offensive to a reasonable person."[104] Noting a lack of case law to assist courts in determining the "offensiveness" of an intrusion by the media, the court in *Miller v. National Broadcasting Co.* delineated five factors to be considered: (1) degree of intrusion; (2) context, conduct and circumstances surrounding the intrusion; (3) intruder's motives and objectives; (4) setting into which he intrudes; and (5) expectations of those whose privacy is invaded.[105] Taking these

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96. Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 682 (Cal. Ct. App. 1986).

97. *See* Baugh v. CBS, Inc., 828 F. Supp. 745, 757 (N.D. Cal. 1993).

98. *Id.* at 750.

99. *See id*. at 751.

100. *See id*.

101. *See id.* at 757.

102. *Id.*

103. *See id.*; *see also* Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., 30 F. Supp. 2d 1182, 1189-91 (D. Ariz. 1998) (holding that *PrimeTime Live* reporter's use of false pretenses to enter medical clinic and secretly videotape a conversation does not give rise to intrusion claim); Reeves v. Fox Television Network, 983 F. Supp. 703, 713 (N.D. Ohio 1997) (holding that a homeowner who willingly allowed police officers and a camera crew inside his home is barred from later claiming intrusion after learning the crew was from the television program *COPS*); *cf.* Copeland v. Hubbard Broad. Inc., 526 N.W.2d 402, 405 (Minn. Ct. App. 1995) (holding homeowners' consent to allow veterinary student to accompany a veterinarian into a home to treat an animal did not amount to consent for the student to secretly videotape the visit).

104. RESTATEMENT (SECOND) OF TORTS § 652B (1965).

105. Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 679 (Cal. Ct. App. 1986). The court points out that the lack of "offensiveness" case law is attributable to the fact that "most individuals not acting in some clearly identified official capacity do not go into private homes without the consent of those living there; not only do widely held notions of decency preclude it, but most individuals understand that to do so is either a tort, a crime, or both." *Id*. at 678-79 (footnote

factors into consideration, the *Miller* court concluded that the test is whether a reasonable person could regard the media's conduct as highly offensive.[106] In *Miller*, an NBC camera crew entered the bedroom of a man having a heart attack to film the paramedics' attempt to save him.[107] The camera crew had neither the consent of the man nor his wife.[108] The court found this intrusion highly offensive.[109] The court noted that at a time of confusion and vulnerability, NBC showed a lack of restraint and sensitivity by disregarding the Millers' right of privacy.[110]

The *Miller* factors for offensiveness were applied in a similar California media intrusion case a few years later. In *Shulman v. Group W Productions, Inc*., an accident victim successfully brought a claim for intrusion against a reality television program that filmed her rescue.[111] Before seeing the segment of *On Scene: Emergency Response*, the only memory Ruth Shulman had of the accident that left her a paraplegic was waking up in intensive care.[112] The program showed Shulman pinned inside her family's overturned car, moaning in pain and begging to know if her children were alive.[113] At one point she even urged the paramedic to let her die.[114] The paramedic wore a mini-microphone, and cameramen recorded the accident scene on the ground and inside the rescue helicopter.[115] Although the court recognized that the camera crew's mere presence at the scene and filming of the events occurring on the ground were not an intrusion upon Shulman's seclusion, it found the crew went too far by equipping the paramedic with a microphone and riding in the helicopter.[116]

> [W]e are aware of no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient's consent.
>
> . . . .
>
> . . . Ruth was entitled to a degree of privacy in her conversations with [the paramedic].
>
> . . . .

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omitted).

106. *See id.* at 679.

107. *See id.* at 673.

108. *See id.*

109. *See id*. at 679; *cf.* Deteresa v. Am. Broad. Cos., 121 F.3d 460, 466 (9th Cir. 1997) (surreptitious taping of woman standing on her front porch while she was refusing to do an on-camera interview was not sufficiently offensive to support an intrusion claim).

110. *See Miller*, 232 Cal. Rptr. at 679.

111. 955 P.2d 469 (Cal. 1998).

112. *See* Maura Dolan, *The Right to Know vs. the Right to Privacy*, L.A. TIMES, Aug. 1, 1997, at A1.

113. *See id.*

114. *See id.*

115. *See id*.

116. *See Shulman*, 955 P.2d at 490-91.

> . . . [T]he last thing an injured accident victim should have to worry about while being pried from her wrecked car is that a television producer may be recording everything she says to medical personnel for the possible edification and entertainment of casual television viewers.[117]

The court concluded the camera crew acted with "highly offensive disrespect" for Shulman.[118] Furthermore, their motive to gather newsworthy information did not justify placing a microphone on the paramedic or filming inside the helicopter.[119]

But *Shulman* also carved out an exception for the offensiveness prong of the intrusion test: the level of offensiveness may be mitigated by the social utility of the intruders' objections.[120] The court recognized that the constitutional protection of the press reflects the "strong societal interest in effective and complete reporting of events," and therefore, actions that normally would qualify as an intrusion as a matter of tort law may be justified for journalists.[121] "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."[122]

One may imagine a scenario, such as a routine interview, that is clearly not an intrusion and a scenario involving wire-tapping a personal telephone line, that probably is an intrusion. However, a problem lies in the area between these extremes. Miniature cameras and high-power microphones are powerful investigative tools for reporters, but they also have the potential to severely threaten privacy.[123] The redesigned tort of intrusion may be successful against egregious uses of this technology but will also expose legitimate media investigations to liability.

The application of intrusion tort law to the media is still evolving and courts generally examine the facts on a case-by-case basis. However, a framework is taking shape. The intrusion no longer needs to be into a strictly private place, it may be in a semi-public place such as a restaurant or office. The intrusion may be through high-powered microphones and miniature cameras, rather than the physical presence of an individual. Now, together with support inferred from the

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117. *Id*. at 490-91, 494 (citations omitted).

118. *Id.* at 494-95.

119. *See id*.

120. *See id*. at 493; *see, e.g.*, Wilcher v. City of Wilmington, 60 F. Supp. 2d 298, 304-05 (D. Del. 1999) (requiring that a firefighter urinate while under observation to avoid cheating on a drug test was not sufficiently offensive to constitute an invasion of privacy). "A reasonable person would recognize the importance of drug testing, particularly among firefighters who confront dangerous circumstances to save the lives and property of others." *Id*. at 304.

121. *Shulman*, 955 P.2d at 493.

122. *Id*.

123. *See id*.

U.S. Supreme Court in *Wilson*,[124] the newly invigorated tort of intrusion is prepared to sustain claims against the modern media.

IV. POST-WILSON: A NEW ERA FOR INTRUSION?

Since *Wilson*, two California courts have handed down decisions finding media outlets liable for intrusion, thereby strengthening the tort's framework.[125] In *Sanders v. American Broadcasting Cos.*, a *PrimeTime Live* reporter obtained employment in the Los Angeles office of the Psychic Marketing Group as part of an investigation of psychic phone lines.[126] When she was not giving psychic phone readings, the reporter secretly recorded conversations with co-workers with a small camera hidden in her hat and a microphone attached to her brassiere.[127] Each conversation took place in office cubicles that were enclosed on three sides and separated by partitions.

Sanders raised the issue of whether a person who lacks a reasonable expectation of privacy in a conversation because it could be seen and overheard by co-workers can state a claim for invasion of privacy when that conversation is secretly recorded.[128] In reversing the California Court of Appeals, the California Supreme Court recognized this expectation of limited privacy as reasonable.[129] "[T]he cause of action is not defeated as a matter of law simply because the events or conversations upon which the defendant allegedly intruded were not completely private from all other eyes and ears."[130] The decision in *Sanders* explicitly recognized an expectation of limited privacy in a semi-public place for the purposes of privacy torts, thus changing the face of intrusion.[131] By not requiring the intrusion to disturb a strictly private place, *Sanders* effectively removed the "seclusion" from intrusion upon seclusion, expanding the tort for application to semi-public places where "the general public does not have

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124. Wilson v. Layne, 526 U.S. 603 (1999).

125. *See* Sanders v. Am. Broad. Cos., 978 P.2d 67 (Cal. 1999), *review denied*, No. S059622, 2000 Cal. LEXIS 1892 (Cal. Mar. 15, 2000); Marich v. QRZ Media, 86 Cal. Rptr. 2d 406 (Cal. Ct. App. 1999), *review denied*, No. S081294, 1999 Cal. LEXIS 7291 (Cal. Oct. 22, 1999) (unpublished opinion).

126. *See Sanders*, 978 P.2d at 69-70.

127. *See id*. at 70.

128. *See id*. at 71.

129. *See id*. at 77.

130. *Id*. at 69. The television network, however, was exempted from liability in the federal wiretapping suit based on the same facts. *See* Sussman v. Am. Broad. Cos., 186 F.3d 1200 (9th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000). "Although ABC's taping may well have been a tortious invasion of privacy under state law, plaintiffs have produced no probative evidence that ABC had an illegal or tortious purpose when it made the tape." *Id*. at 1203.

131. *See, e.g.*, Machleder v. Diaz, 538 F. Supp. 1364, 1374 (S.D.N.Y. 1982) (holding a television reporter not liable for intrusion for an interview conducted outside company's headquarters because it was filmed in a semi-public area where the parties to the interview were visible to the public eye).

unfettered access."[132]

Sanders came three years after *Russell v. American Broadcasting Co.*, a similar case also involving a *Prime Time Live* investigation with the opposite courtroom result.[133] In that case, the reporter secured a job at Potash Brothers, a retail grocery store in Chicago, to uncover sanitation problems in the commercial fish industry.[134] The reporter wore a hidden camera and microphone to record conversations with co-workers that revealed questionable handling of fish sold at Potash.[135] Though at the time Illinois did not recognize the tort of intrusion, the court stated that even if such an action was available, Potash would not recover.[136] "[T]he core of this tort is the offensive prying into the private domain of another. . . . [P]laintiff alleges that defendants secretly recorded a conversation she willingly had with a co-worker at her place of business. This is hardly 'offensive prying into the private domain of another.'"[137] The fact pattern is nearly identical to *Sanders*; however, this covert workplace recording three years earlier was held not to be an offensive intrusion.[138] The opposing results indicate courts are becoming less tolerant of intrusive newsgathering techniques and are molding the tort of intrusion into a viable claim against intrusive media. With its connection to the entertainment industry, it is particularly significant that the courts of California are leading the way.

Less than two weeks after the California Supreme Court decided *Sanders*, the California Court of Appeals followed its lead in *Marich v. QRZ Media, Inc*.[139] In *Marich*, reporters from *LAPD: Life On The Beat* accompanied police officers on a call by an apartment manager who found the body of a tenant.[140] The camera crew filmed the inside of the apartment showing Michael Marich hunched over on the floor, dead of an apparent drug overdose. Based upon a job application found in the apartment, police determined Marich was an actor and speculated that he accidentally killed himself while celebrating a success. The police called his parents from the apartment while the camera crew was still taping.[141] Although the Marichs' responses were unintelligible, they clearly projected shock and anguish. The entire incident was taped and later shown as a four-minute segment on the television program.[142]

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132. *Sanders*, 978 P.2d at 69.

133. Russell v. Am. Broad. Co., No. 99-C-5768, 1995 WL 330920, at *1 (N.D. Ill., May 30, 1995).

134. *See id*.

135. *See id*.

136. *See id*. at *7-8.

137. *Id*. at *8 (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1977) (internal citation omitted)).

138. *See id.*

139. Marich v. QRZ Media, Inc., 86 Cal. Rptr. 2d 406 (Cal. Ct. App. 1999), *review denied*, No. S081294, 1999 Cal. LEXIS 7291 (Cal. Oct. 22, 1999) (unpublished decision).

140. *See id*. at 412.

141. *See id*. at 413.

142. *See id*. at 412-13.

The Marichs sued for invasion of privacy by intrusion. After citing *Wilson* and *Sanders* as confirming "the right of privacy from inappropriate media intrusion," the court held QRZ Media liable for intrusion.[143] The phone call made to the parents and recorded without their consent triggered the claim.[144] Though the conversation was not completely private, the Marichs could have reasonably expected a third party would not record the call for broadcast on a nationally syndicated television program; therefore, their privacy was invaded.[145] The call was deemed "highly offensive" even though the actual words spoken by the Marichs could not be discerned.[146] The court found that the fact their words were not understood did not detract from the highly personal and agonizing circumstances of the call.[147]

Sanders and *Marich* turned on the concept of the right to limited privacy in a semi-public situation. By finding an actionable intrusion without seclusion, these two courts expanded the tort in a way that could prove fatal to media defendants in the future. Of course, there is a line to be drawn—the media should not be permitted to commit crimes such as breaking and entering in the process of getting a story.[148] By expanding the tort of intrusion, courts will chill investigative reporting into areas like the workplace in *Sanders*.

Though seldom successful in the past, intrusion claims against the media are gaining favor in American courtrooms. California courts took the lead in *Miller* and continue to pave the way for media liability with decisions like *Sanders* and *Marich*.[149] Now, the state is finding support from the U.S. Supreme Court in *Wilson* and *Hanlon*. With a framework of solid precedent in place, other states will likely follow. But too much judicial control over the media could have far-reaching and unintended consequences.

V. THE SLIPPERY SLOPE OF CONTROLLING THE PRESS

In 1991, *20/20* reporters went undercover to expose abuses in Texas nursing homes.[150] Graphic footage of residents tied to their beds, starving and lying in filth, spurred public outrage and prompted reform in the Texas legislature.[151] *PrimeTime Live* reporters uncovered patient abuse at a VA hospital, which led to reform.[152] Reporters from the *Chicago Sun-Times* used undercover techniques

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143. *Id*. at 409.

144. *See id*. at 419.

145. *See id.*

146. *See id.*

147. *See id.*

148. *See* Branzburg v. Hayes, 408 U.S. 665 (1972).

149. *See also* Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991) (finding newspaper liable for revealing the identity of a confidential source in its article).

150. *See* Lidsky, *supra* note 20, at 218.

151. *See id.*

152. *See* Ginia Bellafante, *Hide and Go Sue: Will Food Lion's Lawsuit Against* PrimeTime Live *Squelch TV's Aggressive Undercover Reporters?*, TIME, Jan. 13, 1997, at 81.

to expose clinics that performed costly abortions on women who were not pregnant.[153] These were investigative projects of great public concern where it seemed unlikely any plaintiff would bring suit; or if one did sue, that any court would find the news organization liable for its newsgathering technique because of the investigation's social utility.[154] But what about this scenario: A television news reporter goes undercover in a supermarket, revealing unsanitary food handling practices such as grinding expired beef with fresh beef and applying barbecue sauce to expired chicken to mask the smell, then selling it as "gourmet" food.[155] Is this public service or questionable newsgathering?

That was the scenario in *Food Lion Inc. v. Capital Cities/ABC, Inc*.[156] Two *PrimeTime Live* reporters used false resumes to obtain jobs at Food Lion grocery stores then secretly videotaped unwholesome food practices.[157] In a subsequent *PrimeTime Live* broadcast, allegations were made that Food Lion employees were bleaching rank meat to remove its odor and re-dating and offering for sale products not sold before the expiration date.[158] The truth of the mishandling of meat in the broadcast was not at issue in the litigation.[159] The *Food Lion* jury, finding the news crew liable for fraud and trespass, leveled more than $5 million in punitive damages against the network in that case.[160] The trial judge reduced the damages to $315,000, which was recently overturned on appeal by the Fourth Circuit.[161]

Despite its reversal, *Food Lion* looms over journalists as a warning that even when significant wrongs are uncovered, an elaborate scheme of deception to obtain a story can lead to costly legal battles. Although the court resolved the case under the theories of trespass and fraud, not intrusion, it shows a growing mistrust of the media among judges and jurors. Perhaps under *Sanders*, an intrusion claim by an employee in *Food Lion* ultimately would have been more successful. Both cases involved the invasion of workplace privacy by reporters posing as employees to uncover wrongdoing. The public mistrust of the media is forming a body of case law that protects individuals from unknowingly becoming a tragic segment in reality TV programs. However, the case law may also be used to stifle legitimate journalistic investigative matters vital to the public interest.

Judicial restraint on undercover practices through the expansion of the tort of intrusion will produce a "chilling effect" on these investigations. The

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153. *See* Eleanor Randolph, *"Lipstick Camera" Reshapes TV Investigative Journalism Media*, L.A. TIMES, Jan. 14, 1997, at A11.

154. *See* Lidsky, *supra* note 20, at 218; *see also* Shulman v. Group W Prods., Inc., 955 P.2d 469, 493-94 (Cal. 1998).

155. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 511 (4th Cir. 1999).

156. *Id.* at 510.

157. *See id*.

158. *See id.*

159. *See id*. at 511.

160. *See id.*

161. *See id.* at 511, 524.

"chilling" effect was contemplated by the U.S. Supreme Court in *Cox Broadcasting Corp. v. Cohn*, which found that to "make public records generally available to the media but forbid their publication if offensive" would "invite timidity and self-censorship."[162] Huge jury verdicts, such as the one in *Food Lion*, can be a setback for the major networks and could destroy a local station. Even a slight threat of liability may be enough to deter local stations from going undercover.[163] One of the goals of the press is to be a "watchdog" for the public—scoping out wrongdoing that ordinary citizens busy with their own lives could not detect. News organizations' ability to perform this duty will be greatly diminished if undercover investigations are avoided for fear of costly liability.

Moreover, by instilling fear of liability in the media, courts will inadvertently chip away at journalists' First Amendment rights. Although the broadcast of truthful information would be protected under *Sullivan*, the surreptitious gathering of the same information may lead to intrusion liability. The threat of tort liability will curtail expressions by journalists otherwise protected by the First Amendment. To increase public trust, and perhaps limit judicial interference, journalists should turn their investigative skills toward finding a mode of self-regulation that will sanction gratuitous intrusions yet allow surreptitious newsgathering in matters of great public interest.

A. Options for Self-Regulation

Journalism is not a self-regulated industry.[164] Neither the government nor journalistic professional societies license journalists.[165] There are no formal controls over competence or internal sanctions for wrongdoing. The closest the field comes to self-regulation is a voluntary Code of Ethics promulgated by the Society of Professional Journalists (SPJ).[166] In the early 1990s, SPJ leaders attempted to modify the Code to address the more complex ethical issues facing reporters today.[167] The proposed Code would only endorse deceptive tactics when:

* the information sought is of profound importance. It must be of vital public interest, such as revealing great 'system failure' at the top levels, or it must prevent serious harm to individuals;

* all other methods for obtaining the same information have been exhausted;

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162. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975).

163. *See* Lidsky, *supra* note 20, at 219.

164. *See* David A. Logan, *"Stunt Journalism," Professional Norms, and Public Mistrust of the Media*, 9 U. FLA. J.L. & PUB. POL'Y 151, 158 (1998).

165. *See id.* at 158-59.

166. *See id.* at 159. The SPJ is the largest and most influential organization of journalists. *See id.* Part of its mission is to provide a forum for the discussion of ethical issues. *See id*.

167. *See id*. at 160.

* the individuals involved and their news organization apply excellence, through outstanding craftmanship as well as the commitment of time and funding needed to pursue the story fully;

* the harm prevented by the information revealed through deception outweighs any harm caused by the act of deception; and

* the journalists involved have conducted a meaningful, collaborative, and deliberative decisionmaking process.[168]

The SPJ membership resisted these limits on their conduct and the organization in 1996 adopted a more benign version of the standard for deceptive tactics: "Avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public. Use of such methods should be explained as part of the story."[169] Since the failed reform effort, the negative views of surreptitious newsgathering have remained in the limelight with cases like *Sanders* and *Food Lion*. Strengthening the SPJ Code of Ethics and providing enforcement provisions would be a start toward addressing the potentially intrusive methods of surreptitious newsgathering. However, in light of recent court decisions, such reforms may not be strong enough.

A more stringent option for regulating the media is the implementation of a news council. The short-lived National News Council (NNC), created in response to President Nixon's critique of the media, heard complaints from people in exchange for waiving their right to sue the accused news organization.[170] The NNC consisted of fifteen members drawn from the public and the media.[171] The NNC had no punitive powers. Its authority was rooted in the ability to embarrass news organizations, and thus damage their credibility and reputations.[172] The NNC was disbanded in 1984 because it lacked support from major national newspapers that viewed the Council as a threat to their First Amendment freedoms.[173]

News councils have been implemented at the state level with somewhat more success. The Minnesota News Council, founded in 1971, is the longest running

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168. *Id*.

169. *Id*. at 160-61.

170. *See id.* at 173 n.168.

171. *See* Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 747 (1999).

172. *See* Logan, *supra* note 164, at 173 n.168.

173. *See id*.; *see also* Campbell, *supra* note 171, at 748. While the NNC eventually gained some support from the press, the industry was never willing to provide financial support for the council's operations. *See id*.

and most successful news council in the nation.[174] The process generally used by news councils mimics that of the NNC.[175] First an individual must complain to the news organization's editors.[176] If the differences cannot be resolved, the person may ask the news council to review the written complaint. The complainant must appear in person at a hearing and sign a waiver agreeing to forgo legal or governmental actions against the news organization.[177] The council then asks the news organization to respond. After an initial review, the council decides whether to take testimony at a hearing. Then the council issues a finding.[178] It cannot penalize news organizations or impose sanctions to enforce its findings. The council's impact results from public airing of the dispute, which can be embarrassing to the news organization and damaging to its credibility.[179] The rationale behind this idea is that media will behave more ethically if it fears misdeeds will be exposed to the public.

Although state news councils may increase the accountability of the media and public trust, they also may cause ill effects. Critics argue that news councils infringe on the media's First Amendment rights by forcing the news organization to choose between newsworthy stories and potential public backlash.[180] Opponents also claim the councils could become press-bashing organizations serving no useful purpose.[181]

A hybrid of the SPJ's Code of Ethics and a news council would produce a method of self-regulation that would be more stringent than the Code alone, yet avoid the potential government involvement in a national news council. Using the SPJ's failed reform provisions as a guide, journalists could develop their own national Code of Ethics and adjudication process similar to that used for attorneys in the American Bar Association's Model Rules of Professional Conduct. Even without the authority to impose sanctions, a Code backed up with an adjudication process that publicized its results across the nation could increase the public trust by ensuring that media misdeeds will be addressed. Damaging a media outlet's credibility may be as effective as hitting its pocketbook.

However, it is unlikely in today's litigious society that a news council that requires complainants to waive future legal claims will be successful. This aspect of the news council model needs to be updated. Yet, by using the news council adjudication process as a precursor to litigation, many frivolous suits could be eliminated before media outlets are exposed to the expense of a legal

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174. *See* Tricia Schwennesen, *Journalists Discuss News Monitoring Panel at Eugene, Ore., Forum*, REG. GUARD, July 19, 1999, at B1. The NNC, patterned after Minnesota's group, started hearing cases from Washington and Oregon in 1992. *See* Michael R. Fancher, *Journalists Don't Agree on Need to Have Group Handle Press Complaints*, SEATTLE TIMES, May 25, 1997, at A17.

175. *See* Fancher, *supra* note 174, at A17.

176. *See id.*

177. *See id*.

178. *See id*.

179. *See id*.

180. *See* Schwennesen, *supra* note 174, at B1.

181. *See id.*

battle. If the media acknowledges the eroding public trust and takes affirmative steps to rebuild that trust, courts may be less apt to further modify tort law to rectify media wrongs.

CONCLUSION

Traditionally courts have taken a "hands-off" approach to the media, allowing the First Amendment to shield journalists from liability under a variety of circumstances. However, some courts have molded the tort of intrusion upon seclusion around the complexities of today's technologically advanced media to find liability for intrusive newsgathering. By expanding the tort to cover non-private intrusions, courts are better equipped to sanction media outlets for undercover newsgathering involving surreptitious surveillance. The amount of case law in California is growing and support for media liability may even be inferred from two recent U.S. Supreme Court cases. Now, it is becoming more likely that other states will follow California's lead.

Although the increased success of the tort of intrusion may protect individuals from egregious invasions of privacy by reality television programs, the tort of intrusion may also stifle legitimate investigative reporting and chip away journalists' First Amendment rights. To avoid further redefining of the tort by courts that may make liability even more likely, journalists should implement a method of self-regulation that will monitor newsgathering behavior and may impose internal sanctions. Self-regulation methods could penalize gratuitous intrusions upon individuals' privacy, while allowing intrusive behavior in cases involving great public interest.