

THE PRESS BEHAVING BADLY: FIRST AMENDMENT FREEDOMS FOR NEWS MEDIA  
AND LIMITATIONS ON LAWFUL NEWSGATHERING

By

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A DISSERTATION PRESENTED TO THE GRADUATE SCHOOL  
OF THE UNIVERSITY OF FLORIDA IN PARTIAL FULFILLMENT  
OF THE REQUIREMENTS FOR THE DEGREE OF  
DOCTOR OF PHILOSOPHY

UNIVERSITY OF FLORIDA

2008

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To Ronald & Pamela,

“ . . . parents are the pride of their children.”

*Proverbs 17:6 (NIV)*

## ACKNOWLEDGMENTS

I express my deepest gratitude to Dr. Laurence Alexander, who served as my supervisory committee. I am grateful to him for accepting me as his advisee and for toiling with me to complete this project, and my doctorate. His assistance facilitated my study greatly. In addition to Dr. Alexander, I would like to thank the rest of my committee: Dean Jon Mills, Dr. Cory Armstrong, and Dr. Bill Chamberlin. Their efforts and suggestions were greatly appreciated. I am grateful for the love and support of a host of family, friends, and friends who became family. Their support, generosity, and willingness to listen have been a great help as while I worked to complete this program.

este cuento se acabado. . .

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Abstract of Dissertation Presented to the Graduate School  
of the University of Florida in Partial Fulfillment of the  
Requirements for the Degree of Doctor of Philosophy

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August 2008

Chair: Laurence Alexander  
Major: Mass Communication

The press plays a central role in American society, providing information and acting as a surrogate for the public. At times, however, journalists' newsgathering methods that fall outside of what is permitted by law. As a result, the journalists have faced civil lawsuits from private individuals and prosecution by the government for their newsgathering methods.

The U.S. Supreme Court developed a principle aimed at protecting the First Amendment rights of news outlets that publish lawfully acquired, truthful information. The Court has not answered whether the press could be punished for unlawfully acquiring truthful information and then publishing that information.

This dissertation used legal research methods to examine how the courts have decided cases in which members of the press have been sued for wiretapping, intrusion, trespass and committing fraud to gather information, and have then published that information. This dissertation also analyzes how the courts viewed the news organizations' First Amendment defenses.

## CHAPTER 1 INTRODUCTION

*In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly.*<sup>1</sup>

The American press has a history of engaging in questionable behavior to get a story. From hidden cameras to outright deception, the people who provide the nation with news seemingly know no boundaries with regard to gathering information. One journalist had herself committed to an insane asylum to document the care given to poor, mentally ill immigrants.<sup>2</sup> Another went undercover in a Chicago meat-packing plant, later writing a novel that exposed the horrendous and unsanitary meat handling practices in the industry.<sup>3</sup> Such stories shed light on issues of public interest and in some cases brought about sweeping change. For instance, Upton Sinclair's novel, *The Jungle*, based on his experience in a Chicago slaughterhouse, is credited with sparking the passage of both the Meat Inspection Act and Pure Food and Drugs Act of 1906.<sup>4</sup> These changes in the law may not have occurred, however, without the public outcry that resulted from these stories obtained through intrepid reporting.

Feigning madness and working as a meat-packer may be considered extreme lengths to go to for a story. On the other hand, many journalists view such undercover reporting as necessary to expose abuses in the public and private sector. That does not mean that this kind of journalism does not have its detractors. Some journalism practitioners call these newsgathering

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<sup>1</sup> *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

<sup>2</sup> See Jean Marie Lutes, *Into the Madhouse with Nellie Bly: Girl Stunt Reporting in Late Nineteenth-Century America*, 54 AM. Q. 217 (2002).

<sup>3</sup> Upton Sinclair, a journalist, wrote his famous novel, *The Jungle*, after working undercover in a Chicago Slaughterhouse. See Susan Paterno, *The Lying Game*, 19 AM. J. REV. 40, 42 (1997); Mark Feldstein, *A Muckraking Model: Investigative Reporting Cycles in American History*, 11 HARV. J. PRESS/POL. 105, 109 (2006).

<sup>4</sup> See Arlene Finger Kantor, *Upton Sinclair and the Pure Food and Drugs Act of 1906*, 66 AM. J. PUB. HEALTH 1202 (1976); see also Justin Ewers, *Don't Read This Over Dinner*, US NEWS and WORLD REPORT, Aug. 15, 2005, at 45.

methods “shoddy journalism unworthy of the best tradition of investigative reporting.”<sup>5</sup> Further, this kind of reporting is seen as nothing more than sensationalism bordering on excessive.<sup>6</sup>

But journalists have gone, and continue to go to extremes to get the scoop; advances in technology only further their efforts to overcome physical barriers to gain access to information considered newsworthy. The invention of the photocopy machine, for example, allowed a government source to make a copy of a classified government study and pass it on to the *New York Times* and *The Washington Post*.<sup>7</sup> Even before this, advances in photography allowed a *New York Daily News* reporter in 1928 to snap a picture of an execution from a camera hidden in his shoe.<sup>8</sup> Hidden cameras continue to be a favorite tool of broadcast journalists, allowing them to record images for stories on slacking policemen, shiesty attorneys and patient abuse at health care facilities.<sup>9</sup>

These newsgathering methods, while examining issues of public concern, have exposed the journalists involved to multimillion-dollar lawsuits and criminal convictions. A Southern grocery chain sued the American Broadcasting Company (ABC) after reporters from the broadcaster’s *PrimeTime Live* news program secured employment at the stores and secretly recorded unsanitary food preparation and meat packaging practices.<sup>10</sup> In a separate case, a freelance journalist was tried and convicted in federal court of receiving child pornography while supposedly researching an article on government sting operations designed to catch child

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<sup>5</sup> Paul Starobin, *Why Those Hidden Cameras Hurt Journalism*, N.Y. TIMES, Jan. 28, 1997, at A21.

<sup>6</sup> *Id.* See also Lewis Lord, *Perils of ‘gotcha’ journalism*, U.S. NEWS & WORLD REPORT, Feb. 3, 1997, at 11.

<sup>7</sup> See Melville Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974).

<sup>8</sup> Robert Lissit, *Gotcha!*, 17 AM. J. REV. 16, 18-19 (1995).

<sup>9</sup> See Lissit, *supra* note 8.

<sup>10</sup> See *Food Lion Inc. v. Capital Cities/ABC*, 194 F.3d 505 (4<sup>th</sup> Cir. 1999).

pornographers online.<sup>11</sup> A radio journalist was accused of violating a federal wiretapping statute for airing a copy of an illegally recorded cellular phone call.<sup>12</sup> The main issue in these cases concerned the extra-legal newsgathering methods and the publication of information acquired through the use of these methods. The U.S. Supreme Court already has developed a doctrine allowing the publication of lawfully acquired information. In essence, the doctrine provides that the publication of lawfully acquired, truthful information cannot be punished through civil or criminal penalties.<sup>13</sup> On the other hand, journalists have often been accused of gaining access to news and information by using unlawful means, as demonstrated in the examples above. The courts have not always favored these methods in spite of their perceived effectiveness for news reporting.

The cases above demonstrate that private individuals also have not been particularly receptive of journalists' unlawful newsgathering methods and the publication of the information found. In spite of this, there exists a significant relationship between the public and the press. Professor Denis McQuail used what he called "normative theories of the press," which deal with the manner in which the media should be structured and operate within the context of a given society to describe the relationship between the public and the press.<sup>14</sup> One of the main values espoused by normative theories is that of the public interest, and the idea of the press working in the public interest.<sup>15</sup> A problem arises, however, in determining who gets to decide, and what

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<sup>11</sup> See *United States v. Matthews*, 11 F. Supp.2d 656 (D. Md. 1998). See also Amy Triggell, *Newsgathering and Child Pornography Research: The Case of Lawrence Charles Matthews*, 33 COL. J. L & SOC. PROB. 343 (2000).

<sup>12</sup> See *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

<sup>13</sup> See *infra* text accompanying notes 15-100. Lawfully acquired information, in this dissertation, is defined as information obtained using routing reporting practices, without violating some criminal law or causing a civil harm.

<sup>14</sup> DENIS MCQUAIL, *MCQUAIL'S MASS COMMUNICATION THEORY* 8 (2000).

<sup>15</sup> *Id.* at 142.

constitutes the public interest.<sup>16</sup> According to Professor Jay Blumler, three key points must be considered when deciding what is in the public interest in relation to the media.<sup>17</sup> First, the media has to use its power legitimately. Secondly, public interest considerations must look beyond what is beneficial for the current society. Lastly, the idea of the public interest has to work within the context of that current society.<sup>18</sup>

McQuail and Blumler are not alone in asserting what constitutes the public interest with regard to the media. In deciding cases concerning press behavior during newsgathering, judges also make pronouncements concerning what is in the public interest.<sup>19</sup> In these cases, courts may consider whether the journalists' behavior while gathering news was in the public interest. Further, the court may decide whether the information the journalists acquired had some kind of value to the public. In so doing, the courts have, at times, used "public interest," "public concern," and "newsworthy" without noting a difference between the terms. This dissertation examines the value that the courts have placed on the information journalists collect while using unlawful methods to gather news.

This dissertation also examines court decisions and related principles on "unlawfully" acquired information and the publication of this information. Examining how the courts have decided these newsgathering cases will shed light on how the courts view the issue of First Amendment protection for newsgathering. In so doing it may establish a de facto theory of freedom of the press with regard to the collection of information viewed as in the public interest.

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<sup>16</sup> *Id.*

<sup>17</sup> Jay G. Blumler, *Wrestling with the public interest in organized communications*, THE MEDIA IN QUESTION 51, 54-55 (K. Brants, et al, eds., 1998).

<sup>18</sup> *Id.*

<sup>19</sup> VIRGINIA HELD, THE PUBLIC INTEREST AND INDIVIDUAL INTERESTS 183 (1970).

## Background

The Missouri Group, a team of journalism educators from the School of Journalism at the University of Missouri, writes in its well-known textbook that investigative reporting begins with the journalist attempting to answer two questions: “(1) ‘Is there a story here?’ and (2) ‘Am I going to be able to get it?’”<sup>20</sup> A negative answer to either of these questions renders further investigation pointless. Of most concern to this dissertation is what happens when reporters find the answer to the second question to be “no” by any legal means, and continue with the investigation anyway.

The issue that this dissertation examines is decades old, famously appearing in *New York Times v. United States*,<sup>21</sup> otherwise known as the *Pentagon Papers* case. This case involved the acquisition and publication of information from copies of a confidential report on the United States’ involvement in Vietnam.<sup>22</sup> The U.S. Supreme Court did not mention the unlawful acquisition in its per curiam opinion on this case; instead it focused on whether the government had the ability to restrain the publication of the information. The Court held that the government had not met its burden of demonstrating that an injunction against publishing the material from the report was justified.<sup>23</sup>

None of the five concurring opinions mention that the report was stolen from the government. Instead, the opinions focused on whether it was within the power of the Executive and Judicial branches to enjoin publication. Both Justices Black and Douglas asserted an

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<sup>20</sup> THE MISSOURI GROUP, NEWS REPORTING AND WRITING 493 (6<sup>th</sup> ed. 1999).

<sup>21</sup> 403 U.S. 713 (1971).

<sup>22</sup> *Id.* at 714. The report, “History of U.S. Decision-Making Process on Viet Nam Policy” was copied and given to both the *New York Times* and the *Washington Post*. See Melville Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974).

<sup>23</sup> 403 U.S. at 714.

absolutist interpretation of the First Amendment stating, “It should be noted at the outset that the First Amendment provides that ‘Congress shall make no law...abridging the freedom of speech, or of the press.’ That leaves, in my view, no room for governmental restraint on the press.”<sup>24</sup> The Framers of the Constitution created this protection for the press, according to Justice Black, in order for the press to be able to fulfill its role in the newly formed democracy.<sup>25</sup>

Three other concurring opinions discussed the inability of the Executive branch to bar the publication of the information from the report without a grant of such power by Congress. Justice White stated that the government erroneously chose to seek an injunction against the press when Congress had provided for criminal sanctions for the disclosure of information like that in the report.<sup>26</sup> Criminal sanctions would not require heavy justifications like those necessary for prior restraints to be found constitutional.<sup>27</sup> The criminal statute available to the government punished the “communication” of unlawfully acquired information.<sup>28</sup>

The actual question concerning the publication of unlawfully acquired information evolved from cases that involved lawfully obtained information. One of the first Supreme Court decisions in this line of cases was *Cox Broadcasting Corp. v. Cohn*.<sup>29</sup> In *Cox*, the father of a

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<sup>24</sup> *Id.* at 720 (Douglas, J. concurring).

<sup>25</sup> *Id.* at 717. (Black, J. concurring) “The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.” *Id.*

<sup>26</sup> *Id.* at 734-738 (White, J. concurring). “That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.” *Id.* at 733. Further, Justice Marshall noted that Congress specifically declined to grant the Executive branch the power to censor the press. *Id.* at 745 (Marshall, J. concurring).

<sup>27</sup> *Id.* at 733 (White, J. concurring). “Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication.” *Id.*

<sup>28</sup> Justice White stated that the government could have prosecuted the newspapers under the Espionage Act which punishes the “willfull[ly] communicat[ion]” of information related to national security by one who had “unauthorized possession of the information.” *Id.* at 737 (White, J. concurring). *See also* 18 U.S.C. § 793 (e).

<sup>29</sup> 420 U.S. 469 (1975).

teenage rape and murder victim sued Cox Broadcasting, the owner of a news station, after a reporter broadcast the name of the victim.<sup>30</sup> A Georgia statute made it illegal to publish the name of a rape victim; the father of the victim claimed that Cox had invaded his privacy under the Georgia statute by broadcasting his daughter's name during a news segment.<sup>31</sup>

The U.S. Supreme Court ruled that the Georgia statute directly conflicted with the First Amendment.<sup>32</sup> The Court focused on the narrow issue of whether the state can punish the publication of the name of a rape victim if the name is obtained from public records;<sup>33</sup> the Court decided that a state could not punish the publication.<sup>34</sup> According to the Court, the press had the responsibility to report on the actions of the government. In this case, the news station was reporting on a judicial proceeding.<sup>35</sup> Under the common law, there could be no invasion of privacy action when the information in question was a part of the public record.<sup>36</sup> Also, the Georgia statute sanctioned pure expression and not a combination of speech and action.<sup>37</sup> In

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<sup>30</sup> *Id.* at 474.

<sup>31</sup> *Id.* The Georgia statute made it “unlawful for any news media or any other person to print and publish, broadcast, televise or disseminate through any other medium of public dissemination or cause to be printed...in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made.” GA. CODE ANN. § 26-9901 (1972).

<sup>32</sup> 420 U.S. at 489.

<sup>33</sup> *Id.* at 491.

<sup>34</sup> *Id.* at 496.

<sup>35</sup> *Id.* at 492. “Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.” *Id.*

<sup>36</sup> *Id.* at 494-495. “Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media.” *Id.* at 495

<sup>37</sup> *Id.* at 495.

focusing on the specifics of the *Cox* case, the Court declined to decide the larger question of whether the publication of truthful information can ever be punished.<sup>38</sup>

The Court's decision in *Oklahoma Publishing Co. v. District Court for Oklahoma County*<sup>39</sup> picked up the path toward the ultimate question. In *Oklahoma Publishing*, reporters attended a detention hearing and learned the name of a boy accused of fatally shooting a railroad switchman. One reporter took a picture of the boy as he was taken from the courthouse.<sup>40</sup> Later, at a closed arraignment the judge entered a pretrial order enjoining the publication of the boy's name and picture.<sup>41</sup> The journalists' motion to quash the order was denied.<sup>42</sup>

The U.S. Supreme Court reversed this decision and based its rulings on *Cox* and also *Nebraska Press Association v. Stuart*,<sup>43</sup> which, according to the Court, reaffirmed the *Cox* ruling that "the press may not be prohibited from 'truthfully publishing information released to the public in official court records.'"<sup>44</sup> The Court cited the fact that the juvenile hearings, whether actually closed by the judge or not, were actually attended by the journalists with judge's knowledge.<sup>45</sup> There was, therefore, no evidence that the reporters acquired the information unlawfully or without approval.<sup>46</sup>

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<sup>38</sup> *Id.* at 491.

<sup>39</sup> 430 U.S. 308 (1977).

<sup>40</sup> *Id.* at 309.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 427 U.S. 539 (1976) (holding that a court order prohibiting the publication, by the press, of certain trial information unconstitutional).

<sup>44</sup> *Oklahoma Publ'g*, 430 U.S. at 310 (quoting *Cox*, 420 U.S. at 496).

<sup>45</sup> 430 U.S. at 311.

<sup>46</sup> *Id.*

The issue of acquiring and publishing information from closed hearings resurfaced a year later in *Landmark Communications, Inc. v. Virginia*.<sup>47</sup> The Commonwealth of Virginia had a law making the proceedings and documents of its Judicial Inquiry and Review Commission confidential.<sup>48</sup> Any disclosure of the information from the proceedings was considered a misdemeanor.<sup>49</sup>

In 1975 the *Virginia Pilot*, a newspaper published by Landmark Communications, published an article identifying a judge involved in a then pending Commission investigation.<sup>50</sup> The newspaper was indicted and found guilty of violating the Virginia statute, incurring a fine of \$500 plus costs.<sup>51</sup> The U.S. Supreme Court reversed the conviction, finding the statute unconstitutional as applied to Landmark and the press.<sup>52</sup> As it had ruled in *Cox*, the Court found that court proceedings and the conduct of judges were matters of public concern.<sup>53</sup> Further, the Court questioned the relevance of the “clear and present danger” test and how the Virginia Supreme Court applied the test.<sup>54</sup> According to the Court, a proper application of the test requires that a court evaluate the magnitude of the danger said to arise from the speech.<sup>55</sup> The Court found that because the “clear and present danger” test was not satisfied in its previous

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<sup>47</sup> 435 U.S. 829 (1978).

<sup>48</sup> VA. CONST. ART. 6 § 10; *see also* VA. CODE § 2.1-37.13 (1973).

<sup>49</sup> *Id.* “Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor.” *Id.*

<sup>50</sup> *Landmark*, 435 U.S. at 831.

<sup>51</sup> *Landmark Comm. Inc. v. Virginia*, 233 S.E.2d 120, 122 (Va. 1977).

<sup>52</sup> *Landmark*, 435 U.S. at 838.

<sup>53</sup> *Id.* at 839.

<sup>54</sup> *Id.* at 842-843.

<sup>55</sup> *Id.* at 843.

cases concerning the power of the court to punish out-of-court comments on pending cases. Likewise, the test could not be satisfied under the facts of the *Landmark* case.<sup>56</sup>

In *Landmark* the Court again expressly declined to answer the question of whether the truthful publication of information could ever be punished.<sup>57</sup> Instead, the Court decided to answer the narrow question of whether a third party could be punished for publishing confidential information concerning proceedings of the Judicial Commission.<sup>58</sup> Further the Court stated that it was not concerned, in this instance, with the individual who “secures the information by illegal means and thereafter divulges it.”<sup>59</sup> The Court concluded that the speech that the statute sought to suppress was at the very center of First Amendment protection.<sup>60</sup>

*Smith v. Daily Mail Publishing Co.*,<sup>61</sup> decided a year after *Landmark*, synthesized *Cox*, *Oklahoma Publishing*, and *Landmark* and ruled that the cases “all suggest strongly that 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.”<sup>62</sup> *Daily Mail* involved facts similar to both *Landmark* and *Oklahoma Publishing*. West Virginia had a statute criminalizing the publication of the name of a juvenile in connection with judicial proceedings, without a written order from the court.<sup>63</sup>

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<sup>56</sup> *Id.* at 844-845.

<sup>57</sup> *Id.* at 840.

<sup>58</sup> *Id.* at 837.

<sup>59</sup> *Id.* The Court stated that there was not constitutional challenge to Virginia’s power to keep Commission proceedings confidential or to punish Commission participants for breaching that confidentiality. *Id.*

<sup>60</sup> *Id.* at 838.

<sup>61</sup> 443 U.S. 97 (1979).

<sup>62</sup> *Id.* at 103.

<sup>63</sup> W.VA. CODE § 49-7-3 (1976).

Reporters for *The Daily Mail* newspaper printed the name of a juvenile murder suspect.<sup>64</sup> *The Daily Mail* obtained the juvenile's name by interviewing witnesses to a junior high school shooting, which the reporters learned of while listening to a police scanner.<sup>65</sup>

A grand jury indicted *The Daily Mail* for knowingly violating the state statute.<sup>66</sup> In affirming the decision of the West Virginia Supreme Court, the U.S. Supreme Court held that the indictment was an unconstitutional prior restraint.<sup>67</sup> The Court emphasized that its holding was narrow.<sup>68</sup> It defined the issue as whether a state had the power to punish the "truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper."<sup>69</sup> In doing so, the Court again avoided the question of whether the truthful publication of information could ever be punished.<sup>70</sup> The Court, however, did indicate that when the press uses "routine reporting techniques" it is considered to have lawfully obtained the information.<sup>71</sup> Further, the Court found that the press should not have to rely upon the whim of government to obtain information.<sup>72</sup> In so doing, the Court can be seen as endorsing enterprising reporting, which some may take to mean acquiring information in any way possible.

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<sup>64</sup> *Daily Mail*, 443 U.S. at 99-100. The newspaper printed the name a day after another newspaper and three radio stations published the juvenile's name

<sup>65</sup> *Id.* at 99.

<sup>66</sup> *Daily Mail Publ'g Co.v. Smith*, 248 S.E.2d 269, 270 (W.Va. 1978). The newspaper filed for and received a writ of prohibition from the West Virginia Supreme Court.

<sup>67</sup> *Daily Mail*, 443 U.S. at 106.

<sup>68</sup> *Id.* at 105.

<sup>69</sup> *Id.* at 105-106.

<sup>70</sup> *Id.* at 105. "There is no issue before us of unlawful press access to confidential judicial proceedings." *Id.*

<sup>71</sup> *Id.* at 103.

<sup>72</sup> *Id.* at 104.

In *Florida Star v. B.J.F.*<sup>73</sup> the Court began calling the ruling in *Daily Mail* the “*Daily Mail* principle.”<sup>74</sup> Whenever the issue of lawful acquisition by a journalist arises and punishment hangs in the balance, the *Florida Star* Court said there must be an inquiry into the method of how the information was acquired and the effect of any penalties on the media. Specifically, a court deciding a case concerning prohibitions on the publication of certain information should look at whether the information at issue was lawfully obtained, whether the information was already publicly available, and the likelihood of a chilling effect on the media.<sup>75</sup> *Florida Star*, like *Cox*, involved a statutory prohibition on the printing of the name of a sexual assault victim.<sup>76</sup> *The Florida Star* newspaper printed a police brief describing a reported sexual assault and using the assault victim’s name.<sup>77</sup> A reporter-trainee obtained the information for the brief by copying a police report made available in the police department’s pressroom.<sup>78</sup>

In reversing B.J.F.’s jury award, the U.S. Supreme Court applied the *Daily Mail* principle to the facts of the case. The Court found that the name of the rape victim was lawfully obtained and that information was publicly available.<sup>79</sup> The newspaper had relied on a news release created by the government; according to the Court, the reliance on a news release was a “routine newspaper reporting techniqu[e].”<sup>80</sup> Under the facts, enforcement of the Florida statute would

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<sup>73</sup> 491 U.S. 524 (1989).

<sup>74</sup> *Id.* at 534.

<sup>75</sup> *Id.* at 534-539.

<sup>76</sup> *Id.* at 526. The Florida statute made it unlawful to “print, publish, or broadcast in any instrument of mass communication...the name...of the victim of any sexual offense. FLA. STAT. § 794.03 (1987).

<sup>77</sup> *Florida Star*, 491 U.S. at 527.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 536-539.

<sup>80</sup> *Id.* at 539 (quoting *Daily Mail*, 443 U.S. at 103).

not “further a state interest of the highest order.”<sup>81</sup> The Court found, however, that the *Daily Mail* principle did not answer the question of whether the government could punish the press for unlawfully acquiring information and the publication of that information, and declined to address that question.<sup>82</sup>

The Court noted that one of the important reservations that it had with allowing the enforcement of the Florida statute was that the statute was “facial[ly] underinclusive[.]”<sup>83</sup> Instead of prohibiting the disclosure by anyone of the name of a victim of sexual assault, the statute limited this prohibition to “instrument[s] of mass communication.”<sup>84</sup> As such, an individual disclosing the name of a rape victim would not be punished. The Court concluded that, “When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant.”<sup>85</sup>

The applicability of laws to the media and the public would arise again two years later in *Cohen v. Cowles Media*.<sup>86</sup> *Cohen* arose after two newspapers published the name of a political operative, Dan Cohen, in connection with information that he provided to the newspapers, concerning a gubernatorial candidate, in exchange for the newspapers promising not to reveal his identity.<sup>87</sup> A jury awarded damages to Cohen. The damage award was reversed by the Minnesota Supreme Court, which found that in balancing “the constitutional rights of a free

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<sup>81</sup> 491 U.S. at 537.

<sup>82</sup> *Id.* at 535 n.8.

<sup>83</sup> *Id.* at 540.

<sup>84</sup> *Id.* The statute did not define “instrument of mass communication.” *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> 501 U.S. 663 (1991).

<sup>87</sup> *Id.* at 665.

press against the common law interest in protecting a promise of anonymity,” the enforcement of the promise of confidentiality under a theory of promissory estoppel would violate the newspapers’ rights.<sup>88</sup>

The U.S. Supreme Court reversed this decision and held that the First Amendment did not prohibit Cohen from recovering damages under promissory estoppel.<sup>89</sup> In doing so, the Court expressly declined to follow the *Daily Mail*. The Court distinguished *Landmark, Daily Mail* and *Florida Star*, noting that an important criterion in that principle required that the information to be published must be lawfully obtained.<sup>90</sup> In this case the majority expressed uncertainty as to whether the newspapers lawfully obtained Cohen’s name.<sup>91</sup>

Instead, the Court found that precedent established that laws of general applicability did not violate the First Amendment if the laws’ effect on the freedom of the press was only incidental to the laws’ enforcement controlled the case.<sup>92</sup> As such, the Court ruled that these laws were not subject to strict scrutiny, meaning that the laws did not have to serve a compelling state interest in order to be found constitutional.<sup>93</sup> The Court concluded that the Minnesota law of promissory estoppel was a law of general applicability.<sup>94</sup> Any effect on newsgathering as a result of the enforcement of the law would be incidental and “constitutionally insignificant.”<sup>95</sup>

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<sup>88</sup> *Id.* at 667 (quoting *Cohen v. Cowles Media*, 457 N.W.2d 199, 205 (1990))

<sup>89</sup> 501 U.S. at 665.

<sup>90</sup> *Id.* at 669.

<sup>91</sup> *Id.* at 671.

<sup>92</sup> *Id.* at 669.

<sup>93</sup> *Id.* at 670.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 672 (Blackmun, J. dissenting).

Almost ten years after its *Cohen* decision, the U.S. Supreme Court again had the opportunity to decide whether the government could punish the press for unlawfully acquiring information and publishing that information, in *Bartnicki v. Vopper*.<sup>96</sup> Federal and Pennsylvania state statutes prohibited the knowing and intentional disclosure of illegally intercepted communications.<sup>97</sup> A cellular phone conversation between the local teacher's union president and the union's chief negotiator was intercepted and recorded.<sup>98</sup> The recording was then delivered to the head of the local taxpayer's organization; and later passed to a radio journalist who played the conversation on his show.<sup>99</sup>

Bartnicki, the union's chief negotiator, sued for damages under both the federal and state wiretap statutes.<sup>100</sup> The Supreme Court used the *Daily Mail/Florida Star* line of reasoning in invalidating sections of federal and state wiretap statutes. In ruling in favor of the media defendant, the majority based its decision on the media's lack of direct involvement in the illegal activity.<sup>101</sup> The court ruled that the content of the recording was a matter of public concern; therefore, the publication of the recording could not be prohibited.<sup>102</sup>

According to the dissenting opinion by Chief Justice William Rehnquist, the problem with this ruling is its reliance on the *Daily Mail/Florida Star* cases.<sup>103</sup> The dissent states that the *Daily Mail/Florida Star* cases were decided based on three factors: 1) the information was

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<sup>96</sup> 532 U.S. 514 (2001).

<sup>97</sup> See 18 U.S.C. § 2511(1)(a).

<sup>98</sup> 532 U.S. at 518. The teacher's union was in negotiations with the school board. *Id.*

<sup>99</sup> *Id.* at 519.

<sup>100</sup> *Id.* at 520.

<sup>101</sup> *Id.* at 525.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 545 (Rehnquist, C.J., *dissenting*).

lawfully obtained from the government, 2) the information was already “publicly available,” 3) the cases concerned the possible chilling effect that the punishment for publication of the information may have. These factors, however, did not answer the question of whether, “in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.”<sup>104</sup>

These cases, along with the Rehnquist dissent in *Bartnicki*, provide the foundation for the question this dissertation analyzed. While the Court has had the opportunity to preemptively decide whether the government could punish the unlawful acquisition of information, it has chosen not to. Instead the Court’s decisions have “swept[t] no more broadly than the appropriate context of the instant case[s].”<sup>105</sup> Further, the Court has not yet defined what constitutes “lawful” and “unlawful” acquisition, although hinting that the First Amendment may protect the activities of “routine” newsgathering.<sup>106</sup> Through a review of constitutional and common law precedents, this dissertation extracts those cases that shed light on the protection for information considered unlawfully acquired by the press.

### **Literature Review**

A search for literature concerning the questions to be answered in this dissertation found a paucity of articles directly relating to the media’s use of unlawfully acquired information in newsgathering. This topic involves, however, more than just unlawfully acquired information; it also involves First Amendment protection for newsgathering, and the application of laws of general applicability to acts committed while gathering information for a news story. Secondary

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<sup>104</sup> *Id.* at 547 (Rehnquist, C.J. dissenting) (quoting *Florida Star*, 491 U.S. at 535, n. 8).

<sup>105</sup> *Florida Star*, 491 U.S. at 533.

<sup>106</sup> *See supra* note 65 and accompanying text.

sources were sought in the law review and journal section of the legal databases Westlaw and LEXIS NEXIS. The results from these searches were then examined for important cases identified in each article.

### **Newsgathering and the First Amendment**

Some authors contend that when journalists engage in unlawful activity while newsgathering, they automatically lose their First Amendment protection.<sup>107</sup> Other commentators argue for greater First Amendment protection for the press engaged in newsgathering activities.<sup>108</sup> Still others offer a balancing test for the award of damages against media organizations that are taken to court for their newsgathering methods.<sup>109</sup> This section provides an overview of the literature concerning First Amendment protection for newsgathering activities.

In their 1996 article on liability for illegal newsgathering methods, John Walsh, Steven Selby and Jodie Schaffer argued that the First Amendment should not be a shield from damages

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<sup>107</sup> See John J. Walsh et al, *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111 (1996); Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895 (1998); .

<sup>108</sup> See Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143 (2000); Stephen M. Stern, *Witch Hunt or Protected Speech: Striking a First Amendment Balance Between Newsgathering and General Laws*, 37 WASHBURN L.J. 115 (1997); Merrit Jones, *First Amendment Protection for Newsgathering: Applying the Actual Malice Standard to Recovery of Damages for Intrusion*, 27 HASTING CONST. L.Q. 539 (2000); Amy Tridgell, *Newsgathering and Child Pornography Research: The Case of Lawrence Charles Matthews*, 33 COLUM. J. L. & SOC. PROBS. 343 (2000); Roy S. Gutterman, *Chilled Bananas: Why Newsgathering Demands More First Amendment Protection*, 50 SYRACUSE L. REV. 197 (2000); Brandy M. Burnette, *Investigatory Newsgathering: Promoting the Public Interest or Invading Privacy Rights?*, 31 CUMB. L. REV. 769 (2000-2001); James A. Albert, *The Liability of the Press for Trespass and Invasion of Privacy in Gathering the News—A Call for the Recognition of a Newsgathering Tort Privilege*, 45 N.Y.L. SCH. L. REV. 331 (2002).

<sup>109</sup> Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U. L. REV. 507 (1998); Charles C. Scheim, *Trash Tort or Trash TV?: Food Lion, Inc. v. ABC, Inc., and Tort Liability of the Media for Newsgathering*, 72 ST. JOHN'S L. REV. 185 (1998); Dynn Nick, *Food (Lion) for Thought: Does the Media Deserve Special Protection Against Punitive Damage Awards when it Commits Newsgathering Torts?*, 45 WAYNE L. REV. 203 (1999); Jacqueline A. Egr, *Closing the Back Door on Damages: Extending the Actual Malice Standard to Publication-Related Damages Resulting from Newsgathering Torts*, 49 U. KAN. L. REV. 693 (2001).

for newsgatherers who engage in illegal or tortious methods to obtain information.<sup>110</sup> The authors asserted that the First Amendment is not applicable to newsgathering activities occurring before publication.<sup>111</sup> As a basis for their argument, the authors analogized holding the media accountable for illegal behavior to Fourth Amendment jurisprudence, and stated that the “justification for excluding illegally obtained evidence from the state’s case is similar to the reasoning behind refusing to free the media from the damaging consequences of illegal newsgathering activity.”<sup>112</sup> If the government seized evidence based on an illegal search, the court will exclude that evidence if the state attempts to use it against the defendant. This rule was established to deter unlawful activity by the government by prohibiting the government to profit from its illegal activity.<sup>113</sup> Likewise, the media would not be allowed to profit, by being granted a newsgathering privilege, for its illegal activity.<sup>114</sup>

The authors further asserted that the media should be liable for all damages caused by their illegal behavior during newsgathering.<sup>115</sup> This included instances when the plaintiff’s injury resulted not so much from the tortious act but from the publication of the information gained from that act.<sup>116</sup> The media could be held to have reasonably foreseen the possible injuries to the plaintiff flowing from both the newsgathering tort and the later publication.<sup>117</sup>

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<sup>110</sup> Walsh et al, *supra* note 107 at 1112-1113.

<sup>111</sup> *Id.* at 1115.

<sup>112</sup> *Id.* at 1116. The authors do not, however, address the exceptions to this principle.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1132.

<sup>116</sup> *Id.* at 1132-1143.

<sup>117</sup> *Id.* at 1136.

This reasonable foreseeability satisfied the proximate cause prong necessary for the recovery of damages.<sup>118</sup>

Walsh, Selby and Schaffer further argued that there should be no consideration for the “newsworthiness” of the information.<sup>119</sup> Newsworthiness analysis ignores the principle that the media are responsible for committing illegal acts while newsgathering.<sup>120</sup> Newsworthiness analysis would mean that a journalist may be excused from his illegal actions.<sup>121</sup> According to the authors, this would encourage more illegal conduct.<sup>122</sup> The authors asserted that the newsworthiness inquiry would mean that the media’s liability for damages would depend on whether or not the information acquired was of a public concern.<sup>123</sup> This would “encourage fishing expeditions into zones of privacy with hopes of hooking a ‘newsworthy’ story.”<sup>124</sup>

Professor Randall Bezanson echoed Walsh’s sentiment that the press should be held liable for the consequences of laws of general applicability.<sup>125</sup> Bezanson based his argument, however, on a goal of the First Amendment: the independence of the press.<sup>126</sup> According to Bezanson, press freedom meant independence; “Freedom of the press rests, at its core, on

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<sup>118</sup> *Id.* at 1135.

<sup>119</sup> *Id.* at 1137-1140. “Whether a published story is within the “public interest” should not be the determinative factor in permitting or precluding compensatory damages arising from publication of wrongfully obtained material.” *Id.* at 1138.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1139.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Bezanson, *supra* note 107.

<sup>126</sup> *Id.* at 901.

editorial judgment.”<sup>127</sup> Bezanson asserted that this editorial freedom depended on the press being independent from the government.<sup>128</sup> By obtaining immunity from prosecution for crimes or torts committed during newsgathering, the press achieved preferred position, different from the regular citizen.<sup>129</sup> The press then must continually prove itself to be deserving of immunity from prosecution. The press, therefore, becomes beholden to the government, the creator of this immunity.<sup>130</sup>

Advocates for greater protection of newsgathering methods assert that commentators such as Bezanson and Walsh take too narrow a view of the scope of First Amendment protection for the press.<sup>131</sup> Professor Erwin Chemerinsky argued that newsgathering is protected under the First Amendment, creating a presumption against media liability.<sup>132</sup> Because news is gathered for publication, those who publish the news serve the core purpose of the First Amendment.<sup>133</sup> The information obtained in newsgathering serves both political and social functions.<sup>134</sup> It also fulfills the interest in allowing people to receive important information needed for decision-making.<sup>135</sup>

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<sup>127</sup> *Id.* at 904.

<sup>128</sup> *Id.* at 912.

<sup>129</sup> *Id.* at 917.

<sup>130</sup> *Id.*

<sup>131</sup> *See* Chemerinsky, *supra* note 108 at 1158.

<sup>132</sup> *Id.* “I disagree with Professor Bezanson’s premise and his conclusion. Unlike Professor Bezanson, I believe that the First Amendment’s protection for freedom of the press safeguards more than just the ability to print what the press chooses.” *Id.*

<sup>133</sup> *Id.* at 1159. *See also* Gutterman, *supra* note 108.

<sup>134</sup> *Id.* “Speech can benefit people with information relevant to all aspects of life.” *Id.*

<sup>135</sup> *Id.* at 1160.

But Chemerinsky did not go so far as to grant the press a license to engage in any kind of newsgathering behavior.<sup>136</sup> Instead he offered a solution of using intermediate scrutiny when deciding media liability cases.<sup>137</sup> In this way, the media could only be found liable if the plaintiff is able to prove that the liability “is necessary to achieve an important government purpose.”<sup>138</sup> According to Chemerinsky, Supreme Court precedent would allow the use of intermediate scrutiny to analyze content-neutral laws.<sup>139</sup>

Other advocates for heightened protection for newsgathering have made various proposals for how courts can protect the media in liability cases. Ideas such as requiring the plaintiff to prove actual malice in intrusion cases,<sup>140</sup> and allowing a “necessity defense” for criminal conduct have been asserted.<sup>141</sup> Some, however, have called for a privilege that protects all newsgathering activities.<sup>142</sup>

Professor James Albert argued that a privilege for newsgathering should be considered with respect to the traditional privileges allowed in tort law.<sup>143</sup> In tort, certain actions are privileged if they are done in the public interest.<sup>144</sup> This privilege is only “bounded by current

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<sup>136</sup> *Id.* at 1160-1161.

<sup>137</sup> *Id.* at 1161.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1161-1162 (basing his theory on *Turner Broadcasting System v. Federal Communications Commission*, 512 U.S. 622 (1994)). “Imposing tort liability on the media for its newsgathering activities is applying a content-neutral law in a manner that burdens First Amendment conduct. Intermediate scrutiny is thus appropriate.” Chemerinsky, *supra* note 108 at 1162.

<sup>140</sup> *See* Jones, *supra* note 108; *see also* Egr *supra* note 109.

<sup>141</sup> *See* Note, *And Forgive Them Their Trespasses: Applying the Defense of Necessity to the Criminal Conduct of the Newsgatherer*, 103 HARV. L. REV. 890 (1990).

<sup>142</sup> *See* Albert, *supra* note 108, Sims, *supra* note 109, Nick, *supra* note 109.

<sup>143</sup> Albert, *supra* note 108 at 354-356.

<sup>144</sup> *Id.* at 356.

ideas on what will most effectively promote the general welfare.”<sup>145</sup> The interests served by newsgathering advance the public interest and therefore should be protected by a privilege.<sup>146</sup> Dynn Nick repeated this argument in his law review note and contended that publications concerning the public interest are constitutionally protected.<sup>147</sup>

Professor Andrew Sims asserted an argument similar to Albert’s proposed privilege for newsgathering in the public interest. Sims proposed a limitation on the award of damages for newsgathering torts based on principals from the law of libel and the Court’s ruling in *Florida Star*.<sup>148</sup> In the libel case *Gertz v. Robert Welch, Inc.*, the U.S. Supreme Court held that a private plaintiff in a libel action must prove actual malice, or that the information was published with knowledge of falsity or reckless disregard for the truth, if the libel related to a “matter of public concern.”<sup>149</sup> Sims asserted that the Court in *Florida Star* similarly protected the press in ruling that the name of the rape victim was of a public concern and therefore the press could not be punished for publishing that information.<sup>150</sup> His concern was that the *Florida Star* opinion too broadly defined “of public concern;” the *Gertz* opinion too narrowly defined “of public concern.”<sup>151</sup> Sims advocated a midpoint between the definitions, although more closely aligned with the *Gertz* conception of public concern, “requiring that the matter reported be not merely ‘of public concern,’ but ‘of significant public concern.’”<sup>152</sup> According to Sims, “A broad definition

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<sup>145</sup> *Id.* (quoting W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 16, at 109 (5<sup>th</sup> ed. 1984)).

<sup>146</sup> Albert, *supra* note 108 at 356.

<sup>147</sup> See Nick, *supra* note 109 at 206.

<sup>148</sup> See Sims, *supra* note 109 at 560.

<sup>149</sup> 418 U.S. 323, 348-349 (1974).

<sup>150</sup> See Sims, *supra* note 103 at 560.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 561.

of this requirement would encompass all politically relevant information but exclude the merely morbid, prying, and sensational.”<sup>153</sup> If the media invaded a zone of privacy by intrusion or other tort, the relevant standard would be “of the most serious public concern,” which would include serious criminal acts, political corruption and dangers to public safety.<sup>154</sup> Media defendants that failed to meet the public concern standards would not be given immunity from large damage awards.<sup>155</sup>

### **Unlawfully Acquired Information**

The earliest literature found discussing the use of unlawfully acquired information was published in the 1969 *Harvard Law Review* as part of the “Recent Cases” section.<sup>156</sup> The article, which amounted to a case comment, discussed a federal appellate court decision concerned with stolen information.<sup>157</sup> In *Dodd v. Pearson*,<sup>158</sup> a Senator sued two journalists who received copies of files stolen from his office by his former employees.<sup>159</sup> The journalists later wrote a column using the stolen information.<sup>160</sup> The Senator sued under a theory of invasion of privacy. The court found the journalists liable for damages to the Senator under the theory of conversion but rejected the Senator’s invasion of privacy claim.<sup>161</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 562.

<sup>156</sup> RECENT CASES—*Constitutional Law—Freedom of the Press—Judgment for Conversion Against Journalists Who Acquire and Publish Information with Knowledge that it was Stolen from U.S. Senator’s Files does not Violate Freedom of the Press—Dodd v. Pearson*, 279 F.Supp. 101 (D.D.C. 1968), 82 HARV. L. REV. 921, 926 (1969).

<sup>157</sup> RECENT CASES, *supra* note 156.

<sup>158</sup> 279 F.Supp. 101 (D.D.C. 1968).

<sup>159</sup> 279 F.Supp. 101, 102, *rev’d* in part by *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969).

<sup>160</sup> *Dodd v. Pearson*, 279 F.Supp. at 102.

<sup>161</sup> *Id.* at 104-105.

The *Harvard Law Review* article asserted that the court had taken a broad view of the crime of conversion since the traditional doctrine of conversion requires that a person received and used the actual property of another with knowledge that it was obtained illegally; in this case, the journalist only received copies of the files.<sup>162</sup> In doing so, the court made the information included in the files the subject of conversion, instead of the files themselves.<sup>163</sup> According to the author, this was done in spite of a lack of precedent for placing value on intangibles.<sup>164</sup>

The author further asserted that the *Dodd* court might have rejected the invasion of privacy claim based on the newsworthiness privilege.<sup>165</sup> The article stated that the decision may actually hurt the newsworthiness privilege. Instead of basing the measure of damages on the value of the converted property, the damages in *Dodd* were based on injury to the intangibles normally recoverable under invasion of privacy.<sup>166</sup> By not explicitly removing damages based on injury to the owner's feelings, the court may have left the journalists, and future media defendants, open to liability for large damage awards. Such damages would have a chilling effect on the dissemination of information in the public interest, thereby negating any benefit from the newsworthiness privilege.<sup>167</sup>

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<sup>162</sup> RECENT CASES, *supra* note 156 at 926-927.

<sup>163</sup> *Id.* at 927.

<sup>164</sup> *Id.* "Classically courts have been reluctant to recognize such intangibles as the requisite property necessary for the maintenance of an action for conversion." *Id.*

<sup>165</sup> *Id.* at 928.

<sup>166</sup> *Id.* According to the author the damages claim in *Dodd* rested on "injury to his reputation, his personal embarrassment, and his mental anguish." *Id.*

<sup>167</sup> *Id.*

The author argued that the court was incorrect in not holding the journalists liable for invasion of privacy.<sup>168</sup> According to the author, under the common law, the tort of intrusion, which is a major category of the invasion of privacy tort, does not provide for a public interest privilege.<sup>169</sup> Because the journalists received and then published the information with knowledge that it was stolen, they would be held liable for intrusion in the same way that the original intruder would.<sup>170</sup>

The author contended that such liability may be precluded by the First Amendment's guarantee of freedom of the press. The broad interpretation of the U.S. Supreme Court's rulings in *New York Times v. Sullivan*<sup>171</sup> and *Time, Inc. v. Hill*,<sup>172</sup> may support a freedom of the press claim in cases where there is a conflict between public and private interests.<sup>173</sup> The author noted that the *Dodd* case was distinguishable from *Hill* in that *Hill* was based on inaccuracies in the publication, while *Dodd* was based on the journalists' conduct.<sup>174</sup> The author did, however, admit that allowing recovery against the journalists would conflict with the public's right to be informed. On the other hand, the author stated, allowing no liability for the journalists may encourage more individuals to steal government files.<sup>175</sup>

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 929.

<sup>170</sup> *Id.*

<sup>171</sup> 376 U.S. 254 (1964)(finding instances in which the private interests give way to the public interest).

<sup>172</sup> 385 U.S. 374 (1967)(establishing a public interest privilege in privacy cases).

<sup>173</sup> RECENT CASES, *supra* note 156 at 929.

<sup>174</sup> *Id.* at 929-930.

<sup>175</sup> *Id.* at 930. "Such a result would undermine the public interest in freeing officials from the fear that their personal papers will be subjected to public scrutiny." *Id.*

In the 1970s, more individuals unlawfully obtained government information. One notable U.S. Supreme Court case that arose during this decade is *New York Times Co. v. United States*,<sup>176</sup> also known as the *Pentagon Papers* case. In the *Pentagon Papers* case, two newspapers received unlawfully obtained copies of a classified government study and proceeded to publish articles based on the information contained within; the government sued for an injunction to stop the publication of the articles.<sup>177</sup> The Court found in favor of the newspapers and ruled that a prior restraint on publication of information was unconstitutional.<sup>178</sup>

The literature surrounding this case, and focusing on the unlawfully obtained information, is limited. One relevant article was published in December of 1971, the same year in which the Court decided the *Pentagon Papers*. In his commentary, Professor Louis Henkin argued that the main question in the *Pentagon Papers* case was not whether the government could withhold information or punish the publication, but whether publication by the press deserved a different standard.<sup>179</sup>

According to Henkin, the Supreme Court decided in the *Pentagon Papers* case that the press was different.<sup>180</sup> The case did not, however, explain how or why the press was different. Henkin asserted that the Court ruled that “when congress has not spoken, Press publication even of government documents cannot be enjoined unless the courts ‘balance’ in favor of the

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<sup>176</sup> 403 U.S. 713 (1971).

<sup>177</sup> *Id.* at 714.

<sup>178</sup> *Id.*

<sup>179</sup> Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 276 (1971). For a perspective of how the Nixon administration handled this case, and cases dealing with reporters at the same time see Mark Feldstein, *The Jailing of a Journalist: Prosecuting the Press for Receiving Stolen Documents*, 10 COMM. L. & POL’Y 137 (2005).

<sup>180</sup> Henkin, *supra* note 179 at 277.

government, and the balances are weighted heavily on the side of freedom.”<sup>181</sup> The opinion only stood for the premise that when deciding cases concerning the press’ publication of government documents using a balancing test, the government cannot win unless the court finds more weight on the government side; the problem was that the press’ side was already weighted heavily.<sup>182</sup>

In his 1980 law review note, Bruce E. Methven suggested a test by which the press’ interest in publication of the confidential government information could be examined.<sup>183</sup> Instead of the *Pentagon Papers*, Methven’s article focused on the Supreme Court’s decision in *Landmark*.<sup>184</sup> In *Landmark*, the Court ruled that in order for the government to punish publishers of confidential government information, “the substantive evil must be extremely serious and the degree of imminence extremely high.”<sup>185</sup> According to Methven, the problem with this test was that the Court might lower the standard at times where there is great danger but not extreme imminence.<sup>186</sup>

To protect the public’s First Amendment interest, Methven argued that statutes that punish the publication of confidential government information should be reviewed under a less stringent standard than that of imminent danger.<sup>187</sup> He suggested that the Court consider a test requiring that if “a reasonable person would consider the particular information clearly relevant in formulating political opinions, the publication would be constitutionally protected unless it

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> See Bruce E. Methven, *First Amendment Standards for Subsequent Punishment of Dissemination of Confidential Government Information*, 68 CAL. L. REV. 83 (1980).

<sup>184</sup> For more information on *Landmark* see *supra* text accompanying notes 47-60.

<sup>185</sup> *Id.* at 845.

<sup>186</sup> Methven, *supra* note 183 at 98.

<sup>187</sup> *Id.* at 99-100.

created an extreme imminence of extremely serious danger.”<sup>188</sup> In this way, the publication of confidential government information relevant to the public interest would rarely be punishable. The test would not encourage Congress to classify more information as confidential solely to prevent publication.<sup>189</sup>

In the 1990s the theme of the articles related to the use of unlawfully acquired information changed from that of government information, to the conduct of the media in acquiring information on private businesses.<sup>190</sup> Giles Cohen discussed why courts may have the power to prevent media nonparties, who have acquired confidential discovery materials, from publishing the information.<sup>191</sup> He noted that courts have already barred media publications of information protected by copyright and trade secret.<sup>192</sup> According to Cohen, one can analogize the confidential information protected by a court order to property, and thereby formulate a basis for enforcement of protective orders against media-nonlitigants.<sup>193</sup>

In order to enforce a protective order against the media nonparty, however, a court would have to analyze whether “an injunction will ‘reach’ the nonlitigant, and (2) whether there are competing interests which would advise against the injunction.”<sup>194</sup> According to Cohen, the court’s power to issue an injunction against the media in this situation would depend on whether

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<sup>188</sup> *Id.* at 102.

<sup>189</sup> *Id.* at 103.

<sup>190</sup> See Giles T. Cohen, *Protective Orders, Property Interests and Prior Restraints: Can the Courts Prevent Media Nonparties from Publishing Court-Protected Discovery Materials?*, 144 U. PA. L. REV. 2463 (1996); William E. Lee, *The Unusual Suspects: Journalists as Thieves*, 8 WM. & MARY BILL RTS. J. 53 (1999).

<sup>191</sup> See Cohen, *supra* note 184.

<sup>192</sup> *Id.* at 2482-2488.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 2503.

the media knew about the injunction and how the media obtained the confidential information.<sup>195</sup> In this way the court has to make a determination as to whether the media actively procured the information under the protective order.<sup>196</sup> If the court determines that the media actively procured the information, it links the media nonparty to a party to the order, thereby establishing the power of the court to issue an injunction against the media.<sup>197</sup>

Professor William Lee examined the link between the method of information acquisition and the level of First Amendment protection the publisher of that information is afforded.<sup>198</sup> Lee first explored how the courts have analyzed the method in which the media obtained confidential information.<sup>199</sup> Lee provided four reasons why the U.S. Supreme Court has not treated the method of newsgathering as relevant to whether it issues an injunction.<sup>200</sup> First, the method of newsgathering does not automatically disclose the consequences of publication.<sup>201</sup> Second, the court must spend time inquiring into the method of newsgathering, adversely affecting the public interest in timely information.<sup>202</sup> Third, evidentiary issues may arise as the Court may find it necessary to delve into the identity of journalists' sources.<sup>203</sup> Finally, Congress is better able than the courts to make distinctions between methods of newsgathering.<sup>204</sup>

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 2504.

<sup>197</sup> *Id.*

<sup>198</sup> *See Lee, supra* note 190.

<sup>199</sup> *Id.* at 60-89.

<sup>200</sup> *Id.* at 70-74.

<sup>201</sup> *Id.* at 71.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 72-73.

<sup>204</sup> *Id.* at 73.

In discussing post-publication punishment for the media, Lee evoked the Court's ruling *Daily Mail*, which, he asserted, may leave the press open to punishment for unlawfully acquiring information and publishing it.<sup>205</sup> In *Daily Mail*, the Court ruled that "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."<sup>206</sup> However, the Court did not define "lawful acquisition," as such, what constitutes "unlawful acquisition" is questionable.<sup>207</sup>

Lee noted that journalists have faced criminal prosecution and tort lawsuits for receiving confidential information.<sup>208</sup> He argued that case law supports the idea that even when a journalist knew that a source was required to keep certain information confidential, asking for that information was not illegal.<sup>209</sup> Lee concluded that the method used in newsgathering should not lessen the First Amendment protection for publication of the information found.<sup>210</sup>

Lee's article noted lower court cases that come close to answering whether the First Amendment would protect the publication of truthful information that was unlawfully obtained. In his 2002 *Oklahoma Law Review*, article Matthew Coleman analyzed the *Bartnicki* decision, which he called the U.S. Supreme Court's "boldest steps to date in this area."<sup>211</sup> The *Bartnicki* Court ruled, under the specific facts of that case, that a publisher who legally obtains information

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<sup>205</sup> Lee, *supra* note 190 at 89.

<sup>206</sup> *Daily Mail*, 435 U.S. at 103.

<sup>207</sup> Lee, *supra* note 190 at 89. See also Peter Karnajia, *Boehner v. McDermott: Trafficking in Illegally Intercepted Information*, 22 COMM. LAW. 10, 12-13 (2005).

<sup>208</sup> Lee, *supra* note 190 at 90-95.

<sup>209</sup> *Id.* at 96.

<sup>210</sup> *Id.* at 132.

<sup>211</sup> Matthew J. Coleman, *The "Ultimate Question": A Limited Argument for Trafficking in Stolen Speech*, 55 OKLA. L. REV. 559, 559 (2002).

from an individual who otherwise illegally obtained the information has First Amendment protection.<sup>212</sup> Coleman did not think, however, that this protection went far enough. Coleman argued that the Court should extend the privilege to truthful information even if the publisher obtained it illegally.<sup>213</sup> But instead of arguing for a broad rule, Coleman asserted that the Court should be guided by recognizing two things:

(1) ... there are competing rights on both sides of the equation—the privacy and speech rights of those whose conversations are misappropriated, on the one hand, and the First Amendment rights of the publisher and its audience, on the other hand—and (2) “[our] profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>214</sup>

Coleman asserted the need for the courts to use a harm/benefit paradigm in deciding these cases. This kind of balancing approach would take into account the competing interest of the speaker and the privacy of the individual. It would also allow for a more “nuanced” result in comparison with an approach that only examined whether the information was lawfully acquired.<sup>215</sup> Coleman went further to propose a methodology for how the courts could weigh the potential harm to the speaker against the rights of the public and the press.

In his methodology, Coleman proposed that in assessing the harm to an individual speaker, the court must look at the nature of the speaker, whether he was a public or private figure, and the nature of the speech, whether public or private.<sup>216</sup> These factors have an inverse relationship with the harm to the speaker.<sup>217</sup> The two factors would also be used in evaluating

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<sup>212</sup> *Bartnicki*, 532 U.S. at 528.

<sup>213</sup> Coleman, *supra* note 211 at 560.

<sup>214</sup> *Id.* at 561 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

<sup>215</sup> Coleman, *supra* note 211 at 583.

<sup>216</sup> *Id.* at 601-602.

<sup>217</sup> *Id.* at 602-603. “As with the public/private nature of the speaker, there is an inverse correlation between the public nature of the speech at issue and the harm to the speaker, i.e., as a general matter, as the public nature of the

the benefit to the public of publication of the information. As the public nature of the individual and the speech increased, the benefit to the public increased.<sup>218</sup> By considering both the rights of the speaker and the rights of the press, the harm/benefit analysis encouraged debate on issues of public importance, yet avoids the First Amendment implications of chilling private speech.<sup>219</sup>

### **Judicial Analysis and the Freedom of the Press**

To the extent that commentators argue both for and against special newsgathering consideration for the press, it is necessary to define how the courts have traditionally analyzed cases involving the freedom of the press. Several commentators have noted the judicial tests used in evaluating cases involving the First Amendment.<sup>220</sup> These methods of analysis include absolutism, bad tendency and clear and present danger, and balancing.

#### **Absolutism**

Theorists who say that the First Amendment means what it says are called literalists because they take the literal text of the Constitution to mean exactly what it says.<sup>221</sup> Literalists who treat the First Amendment literally by proclaiming that “no law means no law” are considered absolutists.<sup>222</sup> For absolutists, every law that inhibited the freedom of expression was unconstitutional.<sup>223</sup> This “test” has rarely, if ever, found the support of the majority of the Court,

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intercepted speech increases, the harm to the speaker of having otherwise private communications published likely decreases.” *Id.*

<sup>218</sup> *Id.* at 606-607.

<sup>219</sup> *Id.* at 610.

<sup>220</sup> See LARISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 18-21 (2004); MARC A. FRANKLIN, ET AL, MASS MEDIA LAW 57-81 (2000); JOSEPH J. HEMMER, Jr., THE SUPREME COURT AND THE FIRST AMENDMENT 2-9 (1986).

<sup>221</sup> Hemmer, *supra* note 220 at 8.

<sup>222</sup> *Id.*

<sup>223</sup> Lidsky, *supra* note 220 at 18

but its most known advocate was Justice Hugo Black.<sup>224</sup> Justice Black asserted the absolutist viewpoint with respect to the freedom of the press in the *Pentagon Papers* case.<sup>225</sup> In his concurring opinion in that case, he agreed with the majority that the government did not meet its burden of proof in order to restrain the publication of classified documents. In contrast with the majority's view, he offered historical reasoning as to why the injunction issued in the case was unconstitutional.<sup>226</sup> According to Justice Black, “[b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions or prior restraints.”<sup>227</sup>

Further, the Justice noted that the press served an essential role in the American system of democracy.<sup>228</sup> He stressed that the press served the citizens of the democracy and not the government. As such, the power of the government to censor the press was removed.<sup>229</sup> “The press was protected so that it could bare the secrets of government and inform the people.”<sup>230</sup> Justice Douglas' concurring opinion echoed Justice Black in his absolutist assertions.<sup>231</sup> Justice Douglas said that the First Amendment left “no room for governmental restraint on the press.”<sup>232</sup> He also noted that the case was really about the ability to have informed debate on issues of

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<sup>224</sup> *Id.* Justice Douglas has also supported this test at times. Hemmer, *supra* note 220 at 8.

<sup>225</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Black, J. concurring).

<sup>226</sup> *Id.* at 716-717 (Black J., concurring).

<sup>227</sup> *Id.* at 717 (Black, J., concurring). “Madison and the other Framers of the First Amendment, able men that they were, wrote in language they earnestly believed could never be misunderstood: ‘Congress shall make no law. . .abridging the freedom. . .of the press. . .’”*Id.* at 716-717 (Black, J., concurring).

<sup>228</sup> *Id.* at 717 (Black, J., concurring).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 720 (Douglas, J., concurring).

<sup>232</sup> *Id.*

public importance.<sup>233</sup> Said Justice Douglas, “Open debate and discussion of public issues are vital to our national health. On public questions there should be ‘uninhibited, robust, and wide-open’ debate.”<sup>234</sup>

According to Professor Joseph Hemmer, the absolutist position was designed to “enlarge the scope of expression protected by the Constitution.”<sup>235</sup> Other tests used to analyze regulations on freedom of expression were thought to provide only conditional protection for expression under the First Amendment.<sup>236</sup> But that did not mean that absolutist construed the First Amendment as protecting everything. Justice Black was careful to delineate between expression and conduct:

I think I have made clear my belief that the Constitution guarantees absolute freedom of speech, and I have not flinched in applying the First Amendment to protect ideas I abhor. I have also continuously voted within the court to strike down all obscenity and libel laws as unconstitutional. In giving absolute protection to speech, however, I have always been careful to draw a line between speech and conduct.<sup>237</sup>

### **Bad tendency and “clear and present danger”**

The bad tendency test was most famously used in *Gitlow v. New York*,<sup>238</sup> in which the U.S. Supreme Court ruled that the government could restrain expression that was “inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace.”<sup>239</sup> The danger in this test is that it would allow the punishment of a wide variety of speech even

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<sup>233</sup> *Id.* at 724 (Douglas, J., concurring).

<sup>234</sup> *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270).

<sup>235</sup> 403 U.S. at 724. Hemmer, *supra* note 220 at 8.

<sup>236</sup> *Id.*

<sup>237</sup> HUGO BLACK, A CONSTITUTIONAL FAITH 53 (1968).

<sup>238</sup> 268 U.S. 652 (1925).

<sup>239</sup> *Id.* at 667. In *Gitlow* a man was arrested for distributing socialist pamphlets under a New York law that prohibited advocating the overthrow of the government. *Id.* at 656-659.

when there was no harm intended. Emerson noted that in using this test to analyze First Amendment cases the Court made a strong presumption in favor of government regulation of speech.<sup>240</sup> The Court later rejected the bad tendency test in favor of the “clear and present danger” test.<sup>241</sup>

The clear and present danger test was first enunciated in *Schenck v. United States*.<sup>242</sup> In *Schenck* a man was convicted under the Espionage Act for distributing flyers to draftees urging them to resist the draft.<sup>243</sup> In affirming the conviction, the court ruled that the First Amendment was not an absolute bar to prosecution for speech.<sup>244</sup> The Court ruled that the “question in every case is whether the words used are in such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent.”<sup>245</sup> The test was later further delineated clear and present danger in *Bridges v. California*,<sup>246</sup> in which the Court noted the main factors for the using the test: “a substantial evil,” “extreme serious[ness],” and an extremely high “degree of imminence.”<sup>247</sup>

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<sup>240</sup> THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 104 (1970).

<sup>241</sup> See *Herndon v. Lowry*, 301 U.S. 242 (1937) and *Bridges v. California*, 413 U.S. 252 (1941).

<sup>242</sup> 249 U.S. 47 (1919).

<sup>243</sup> *Id.* at 48-49.

<sup>244</sup> *Id.* at 52.

<sup>245</sup> *Id.*

<sup>246</sup> 413 U.S. 252 (1941) (reversing the contempt convictions of a newspaper and a union leader for out of court statements).

<sup>247</sup> *Id.* at 263. Compare *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

## Balancing

Balancing tests require a court to weigh the government's interest against the interest in free expression.<sup>248</sup> Professor Zachariah Chaffee, in his book on freedom of speech, wrote that in deciding cases using balancing:

We must regard the desires and needs of the individual human being who wants to speak and those of the great group of human beings among whom he speaks. That is, in the technical language, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right.<sup>249</sup>

The courts have more than one way to go about balancing. A court may use "ad hoc" balancing, in which the court will weigh the specific interests involved based on the facts of that specific case.<sup>250</sup> Court decisions based on ad hoc balancing provide little assistance in future cases because the opinions are so fact specific.<sup>251</sup>

A court may also use definitional balancing. This kind of analysis requires a court to consider the category of speech or speaker at issue and balance this against the societal or governmental interest in restricting that speech.<sup>252</sup> An example of this is the U.S. Supreme Court's decision in *Chaplinsky v. New Hampshire*,<sup>253</sup> in which the Court ruled that there were "certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."<sup>254</sup> These words were of

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<sup>248</sup> Franklin, *supra* note 220 at 57. Professor Franklin also notes that balancing is the most frequently used method of analysis.

<sup>249</sup> ZACHARIAH CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 31 (1941).

<sup>250</sup> Lidsky, *supra* note 220 at 19; Franklin, *supra* note 220 at 57.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> 315 U.S. 568 (1942).

<sup>254</sup> *Id.* at 571-572.

such insignificant societal value that the government interest in restricting their utterance did not need to rise to the levels of “substantial,” “important,” “compelling,” or “overriding” that are commonly necessary for a government interest in cases involving the First Amendment.<sup>255</sup> The idea of the “preferred position” should also be noted in reference to balancing and the First Amendment. The idea of the preferred position suggests that in cases involving the First Amendment, the expression side is favored.<sup>256</sup>

In sum, the literature on the First Amendment and unlawful newsgathering, and the use of unlawfully acquired information by the media, has focused mostly on cases current at the time of publication. The major themes in the literature on unlawful newsgathering were whether the media should be privileged in newsgathering and whether the media should be immune from damages related to this unlawful newsgathering. Another main theme to the literature was the courts use of balancing tests in order to decide whether or not unlawful newsgathering activity should receive constitutional protection. This research did not locate a comprehensive study of all the cases in which the media was prosecuted for using illegally obtained information, whether the media was party to the illegal activity or not. This dissertation looks to fill in the gaps in the literature.

### **Statement of Purpose and Research Questions**

This dissertation explores how the courts have, or will, decide the question of whether or not the media can be punished for truthful yet, unlawfully acquired information. This research investigates the court cases in which the plaintiff, or prosecution, has claimed that the media committed some unlawful act in order to acquire information for publication. This study also

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<sup>255</sup> *Id.* at 572.

<sup>256</sup> Hemmer, *supra* note 220 at 7.

inquires into the judicial decision making process in cases involving unlawful newsgathering activities. This study is significant because it seeks to provide a better understanding of what freedom of the press means in relation to the ability to gather news. In undertaking this study this researcher will attempt to answer research questions related to this topic. These questions include:

1. Is unlawfulness a bar to First Amendment protection for newsgathering activities?
2. What value have the courts placed on unlawfully acquired information and its use by the press to inform the public?
3. What kind of scrutiny have the courts used to decide cases brought against the media for unlawful newsgathering, and how is the type of scrutiny used determinative of the outcome of these cases

### **Methodology**

The literature on unlawful newsgathering identified the common newsgathering activities for which the media is sued:

(1) [F]raud or misrepresentation, usually centering on the reporter's employment status or affiliation; (2) trespass on the property of the target of the investigation; (3) intrusion into the privacy or seclusion of the target's home, often by means of subterfuge; (4) violation of privacy by hidden camera surveillance; and (5) tortious interference with contract in order to obtain information from third parties.<sup>257</sup>

The literature also identified cases useful for successfully answering the inquiries proposed by this dissertation. These cases were *Food Lion v. ABC*,<sup>258</sup> *Dietemann v. Time, Inc.*,<sup>259</sup> *Desnick v. ABC, Inc.*,<sup>260</sup> *Wilson v. Layne*,<sup>261</sup> and *Berger. v. Hanlon*.<sup>262</sup> Using legal research methods, the

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<sup>257</sup> See Sims, *supra* note 109 at 531-532.

<sup>258</sup> 887 F. Supp. 811 (M.D. N.C. 1995); 951 F. Supp. 1217 (M.D. N.C.1996); 984 F. Supp. 923 (M.D. N.C. 1997) *aff'd* at 194 F.3d 505 (4<sup>th</sup> Cir. 1999).

<sup>259</sup> 449 F.2d 245 (9<sup>th</sup> Cir. 1971).

<sup>260</sup> 44 F.3d 1345 (7<sup>th</sup> Cir. 1994).

<sup>261</sup> 526 U.S. 603 (1999).

<sup>262</sup> 188 F.3d 1155 (9<sup>th</sup> Cir. 1999).

researcher generated a list of cases to analyze from both the major cases identified and the common newsgathering activities for which the media is sued.

To find more cases related to unlawful newsgathering the researcher operated under the truth that the court system in the United States is a common law system. Common law judicial systems adhere to the principle of “stare decisis” meaning, “a court should follow previously decided cases, or precedents, on the same legal topic.”<sup>263</sup> As such, the researcher was able to identify other cases concerning unlawful newsgathering by reading the cases identified and examining the cited cases within those cases as to whether or not the cases concerned unlawful newsgathering.

The researcher also used the citator service on the legal database LEXIS to search for more cases related to unlawful newsgathering. “A citator is a research tool that lists later sources that have cited earlier sources.”<sup>264</sup> The cases were then filtered to identify only those cases involving the media and unlawful newsgathering using the words “media, “ “journalist,” “reporter,” and “newsgathering” or “news gathering.” The researcher also used the term “newsgathering” in the LEXIS topical search under the topic “Constitutional Law,” under the “Bill of Rights” subdivision, the “Freedom of Speech” subsection, and “Freedom of the Press” subtopic. The researcher searched this subtopic under the “Federal & State Cases—Selected Constitutional Law Materials” database. To ensure an exhaustive search for cases, the researcher used the terms “media, “ “journalist,” “reporter,” and “newsgathering” or “news gathering” in combination with the terms “misrepresentation,” “fraud,” “breach,” “trespass,” “intrusion,” “hidden camera,” and “hidden microphone,” to search the LEXIS database entitled “Federal &

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<sup>263</sup> CHRISTINA L. KUNZ, ET AL., THE PROCESS OF LEGAL RESEARCH 119 (2000).

<sup>264</sup> *Id.* at 145.

State Cases, Combined.” Again these cases were refined for only those cases involving the media and the common types of unlawful newsgathering for which the media was sued.

The remaining cases were analyzed for the answers to the three research questions proposed. To analyze the cases for an answer to research question one, the researcher examined the cases found for whether the courts protected the media from liability for unlawful newsgathering under the First Amendment. Specifically, the researcher considered whether, and how, the First Amendment was used as a defense to liability, and whether, and to what extent the courts have accepted this defense. To answer research question two, the researcher examined the cases for how the courts have characterized the information gathered unlawfully. Specifically, the researcher examined what kind of language the courts have used to describe this information, and whether the courts have ruled that the information was of value to the public. Finally, to answer research question three, the researcher examined the cases for the method the courts have used to solve these cases. Specifically the researcher considered whether some kind of test was used to decide the cases and whether a pattern has arisen concerning judicial decision-making in these cases.

### **Chapter Outline**

Chapter Two discusses the theories related to the idea of freedom of the press. Specifically this chapter examines the conceptions of freedom of the press and how the courts have used these conceptions to decide cases against the press.

Chapter Three examines unlawful newsgathering as it relates to the invasion of some zone of privacy. The chapter first explores newsgathering cases dealing with private, or confidential communications. Specifically, this chapter examines cases in which the method of newsgathering was a hidden camera or recording or in general is claimed to have violated state or federal wiretapping and eavesdropping statutes.

Chapter Four examines cases in which the journalist is claimed to have trespassed, invaded an individual's privacy by intrusion upon seclusion or violated an individual's 4<sup>th</sup> Amendment right against unreasonable search.

Chapter Five considers cases in which it is claimed that journalist have committed some sort of breach of trust that violated state law. Specifically this chapter examines cases in which a journalist is claimed to have committed some sort of breach of duty, fraud, or misrepresentation.

Chapter six seeks to answer all of the proposed research questions by analyzing the cases collected in the previous chapters, and concludes this dissertation with an analysis of the role of the different theories of the Press clause in the courts' decisions. This chapter summarizes the research from the previous chapters and provides answers to the proposed research questions

## CHAPTER 2 THEORETICAL PERSPECTIVE

Freedom of expression encompasses the ability to communicate ideas through speech and other expression. It is apparent that the ability to express various ideas requires protection. Allowing individuals the freedom to express themselves is thought to benefit society in a number of ways. Professor Thomas Emerson theorized four consequential benefits of freedom of expression: self-fulfillment, attainment of truth, decision making ability, and societal stability.<sup>1</sup> According to Emerson, the ability to formulate beliefs without the permission to express those beliefs hampered individual fulfillment. Restraint of expression was “an affront to the dignity of man, a negation of man’s essential nature.”<sup>2</sup> Further, “truth” could be found by considering all expression on a given subject.<sup>3</sup> Other scholars also have formulated theories to explain the value of free expression.<sup>4</sup>

A well-known theory of freedom of expression is that of the marketplace of ideas. Marketplace theory is traced to John Milton who in 1644 published the *Areopagetica*, which argued for intellectual freedom.<sup>5</sup> In Marketplace theory, all ideas were to be unrestrained, allowing individuals the opportunity to choose from a variety of ideas to accept. This included ideas that were “true” and “false.” Milton wrote,

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her

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<sup>1</sup> Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 876, 877-878 (1963).

<sup>2</sup> *Id.* at 879.

<sup>3</sup> *Id.* at 881.

<sup>4</sup> *See infra* text accompanying notes 5-20.

<sup>5</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 576 (1978).

and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?<sup>6</sup>

According to Milton, ideas that were “true” would be able to survive attack by those that were “false.” Also, the individual had the ability to discriminate between true and false ideas, but in order to use this ability the individual needed unfettered access to the ideas of others.<sup>7</sup>

John Stuart Mill, writing over two centuries later, was unconvinced that truth would always win, but recognized the value in allowing “false” speech.

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generations; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.<sup>8</sup>

One of the main avenues providing the public with a variety of information from which to cull the truth is the news media. William Marnell theorized that the press existed to serve truth.<sup>9</sup> This meant that journalists had a duty to seek the truth and to provide the truth to the other members of society. The rights of the members of society to access truth provided the “framework” for the function of journalists in society. It also created the limitations on what was considered press freedom.<sup>10</sup>

It is standard rhetoric that the press is obligated to print the truth. According to Dale Jacquette, all other journalistic responsibilities derive from this duty to print the truth.<sup>11</sup>

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<sup>6</sup> John Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing, To the Parliament of England* 62 (1644).

<sup>7</sup> FRED S. SIEBERT, *The Libertarian Theory of the Press*, in *FOUR THEORIES OF THE PRESS* 39, 44 (Fred S. Siebert, Theodore Peterson, & Wilbur Schramm 1956).

<sup>8</sup> JOHN STUART MILL, *ON LIBERTY* 13 (1859).

<sup>9</sup> WILLIAM H. MARNELL, *THE RIGHT TO KNOW* xii (1973).

<sup>10</sup> *Id.*

<sup>11</sup> DALE JACQUETTE, *JOURNALISTIC ETHICS* 3 (2007).

Journalists can only print the truth when they are not hindered in the gathering of this information. “This process, in turn can only succeed when inquiry is open, public, and unconstrained by individuals or institutions that might have a contrary interest in trying to prevent others from learning the truth about newsworthy events.”<sup>12</sup> This goal of truth, according to some scholars, “is so important that it also overcomes any concerns about what some people call deception in the gathering of news.”<sup>13</sup> Such theories would allow protection for deceptive newsgathering practices with the aim of bolstering the marketplace of ideas.

The marketplace of ideas concept was formally recognized in American jurisprudence in the early 20th century in the dissenting opinion of a World War I era case concerning the Espionage Act of 1918. *Abrams v. United States* considered whether the enforcement of the Espionage Act violated the freedom of speech and press rights of a group of activists who distributed leaflets critical of the U.S. government during World War I. Justice Oliver Wendell Holmes, dissenting from the Court that found the law to be constitutional, wrote:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>14</sup>

In so writing, Justice Holmes asserted that there is a substantial interest in protecting speech critical of the government even during wartime. The government had to demonstrate that

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<sup>12</sup> *Id.* at 111.

<sup>13</sup> A. DAVID GORDON & JOHN M. KITROSS, *CONTROVERSIES IN MEDIA ETHICS* 74 (1999).

<sup>14</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

an increased risk of harm would arise from allowing such speech; if the government could not fulfill this burden then the speech had to be protected.<sup>15</sup> As such, Justice Holmes wrote, “[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death...”<sup>16</sup>

The venerable Judge Learned Hand voiced the same sentiment during World War II, albeit not concerning speech critical of the war. In *United States v. Associated Press*,<sup>17</sup> the Associated Press (AP) wire service had to defend itself against antitrust allegations by the federal government. The AP was a cooperative of newspapers that collected and exchanged information in exchange for a membership fee and agreeing to follow membership by-laws.<sup>18</sup> The AP was challenged for having by-laws that enable it to deny its services to newspapers that were in competition with members of the cooperative.<sup>19</sup> In ruling that the AP was acting as a monopoly, Judge Hand asserted that the extent of the AP placed it in possession of information essential to the survival of non-AP members.<sup>20</sup> Further, he noted that this case was different from other antitrust cases because it dealt with the news.

[T]hat industry serves one of the most vital of all general interest: the dissemination of news from as many different sources and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked upon it our all.<sup>21</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 52 F. Supp. 362 (S.D.N.Y. 1943).

<sup>18</sup> *Id.* at 364.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 372.

<sup>21</sup> *Id.*

The Supreme Court demonstrated the significance of Marketplace theory in relation to the press' being able to report the news. According to the *AP* decision, the First Amendment protects the dissemination of information by multiple sources. A diversity of sources allows the individual to arrive at the "right conclusions." This is language reminiscent of Milton's theory that truth would win over falsity in open combat. It seems then, that Marketplace theory advocates for uninhibited expression, no matter what the source. This could mean that the publication of unlawfully obtained information, too, is protected under Marketplace theory. But Milton limited speech allowed into the marketplace according to whether it would cause harm.<sup>22</sup>

Free expression theorists also have identified the consequences of uninhibited expression, like that imagined by marketplace theorists. According to Professor Alexander Meiklejohn, free expression assists with informed governance.<sup>23</sup> Meiklejohn connected the First Amendment right to freedom of expression to political action and theorized that the intent behind the Amendment was to prohibit government interference with the power of the people to elect its government.<sup>24</sup> This power was embodied in the ability to the people to vote, but voting was more than casting a ballot; it was the expression of "intelligence, integrity, sensitivity and a devotion to the general welfare."<sup>25</sup> Meiklejohn did, however, extend First Amendment protection to other forms of expression besides political communication in as much as they

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<sup>22</sup> Milton, *supra* note 6 at 16. ". . .and whether it be more the benefit, or the harm that thence proceeds?" *Id.*

<sup>23</sup> See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

<sup>24</sup> *Id.* at 254.

<sup>25</sup> *Id.* at 255.

related to the acquisition of information necessary to make political decisions.<sup>26</sup> Meiklejohn did, however, not share Milton's view that truth would always defeat falsity.<sup>27</sup>

The problem with these theories of free expression clause is that their focus is on the dissemination of information. The freedom of the press necessitates, however, protection for gathering information as well as protection for dissemination. This chapter discusses the theories of free expression related solely to the freedom of the press and the protection for newsgathering within the context of the First Amendment. First, this chapter considers how theorists have interpreted the press clause of the First Amendment and its relationship to the freedom of speech. Next, this chapter examines the right to access to information. Finally, this chapter discusses the methods of analysis used by the courts in deciding First Amendment cases.

### **Or of the Press**

The widely held theoretical function of the press is that of the Fourth Estate.<sup>28</sup> The term "Fourth Estate" is attributed to Thomas Carlyle who wrote:

Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech, or a witty saying; it is a literal fact, --very momentous to us in these times. Literature is our Parliament too. Printing, which comes necessarily out of Writing, I say often, is equivalent to Democracy: invent Writing, Democracy is inevitable. Writing brings Printing; brings universal everyday extempore Printing, as we see at present. Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority. It matters not what rank he has, what revenues or garnitures. The requisite thing is, that he have a tongue which others will listen to; this and nothing more is requisite.<sup>29</sup>

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<sup>26</sup> *Id.* at 257. Meiklejohn argued that education, philosophy and the creative sciences, as well as literature and the arts were protected under the First Amendment because they enabled citizens to make decisions on governance, and sensitized them to issues of the general welfare. *Id.*

<sup>27</sup> *Id.* *But see* *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964), in which the majority finds that "Erroneous statements are inevitable in free debate." *Id.* at 271.

<sup>28</sup> LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 291 (1985).

<sup>29</sup> Thomas Carlyle, *On heroes and hero-worship, and the heroic in history* 92 (1901).

Like the other three estates of power in the British system—possibly the church, the lords and the commons—the fourth estate held power to influence society.<sup>30</sup> Unlike the other three estates that received power by incidence of birth or appointment, the press got its power in its ability to report to the people the actions of the other estates. In this way, the press could reasonably have been considered as having powerful because it had the ability to report on the activities of the authorities to the general public. As such, the power of the press to report on the activities the authorities was controversial and so they passed laws making it a criminal offense to report the sessions of the legislative bodies in England and America.<sup>31</sup>

During the American Revolution, the freedom of the press was advocated, although not for those suspected of having Loyalist sympathies.<sup>32</sup> After the Revolution, many states provided protection for freedom of the press in state constitutions.<sup>33</sup> A specific guarantee of freedom of the press was not included in the Constitution when it was adopted in 1787. The Bill of Rights, the first ten amendments to the Constitution, which included an amendment protecting the freedom of speech and the press, was ratified a few years later in 1791. The First Amendment expressly mentions the press in delineating the kinds of expression protected.<sup>34</sup> The controversial aspect of the constitutional text as it relates to the exact meaning the Framers gave to the phrase “or of the press.”<sup>35</sup>

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<sup>30</sup> See ALBERT F. POLLARD, *THE EVOLUTION OF PARLIAMENT* 61-80 (1926) (calling the historical idea of three estates in parliament a myth).

<sup>31</sup> Levy, *supra* note 28, at 14. Levy writes that under “parliamentary privilege” each house of the legislature claimed and exercised certain rights. One of these rights was to suppress any unauthorized reporting of the proceedings of that parliamentary session. *Id.*

<sup>32</sup> *Id.* at 173.

<sup>33</sup> *Id.* at 183-186.

<sup>34</sup> U.S. CONST. amend. I.

<sup>35</sup> See *infra* text accompanying notes 36-85.

This debate about the significance of the press clause in the First Amendment has lasted for decades, and focuses on whether the Framers meant to protect the press as an institution, or generally protect publication of diverse opinions. Protection for the press as an institution would offer journalistic organization more protection for newsgathering activities than currently recognized by the courts. Viewing the freedom of the press as generally protecting publication does not offer the same level of First Amendment protection to newsgathering as it does to publication.<sup>36</sup> Under this concept of the press clause, journalists would have to depend on the courts to establish what activities are protected.

This press clause controversy involves competing theories: functionalism and structuralism.<sup>37</sup> Justice Potter Stewart best articulated the structuralist approach in his 1974 address to Yale Law School, which was later published in the *Hastings Law Journal*. Justice Stewart described the press clause as “structural,” meaning it protects an institution, thereby granting the press rights that allow it to act as a surrogate or agent for the public in reporting the news.<sup>38</sup> As such, the press clause is not simply guaranteeing freedom of expression; the press clause created and protected an additional check on the three branches of government.<sup>39</sup> If the

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<sup>36</sup> The First Amendment states in pertinent part, “Congress shall make no law . . . abridging the freedom of speech, or of the press.”

<sup>37</sup> See LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION, 8 (2004). See also C. THOMAS DIENES ET AL, NEWSGATHERING AND THE LAW § 1-4 (1999).

<sup>38</sup> Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975). “The publishing business is, in short, the only organized private business that is given explicit constitutional protection.” *Id.* In this dissertation, the press is defined as the organizations related to mass communication including, newspapers, magazines, radio and television news broadcasters. This definition also includes individuals using the Internet to disseminate news. There is, however, a debate as to who should be considered a member of the press. This is beyond the scope of this study. For further discussion of the changing perspective on who is considered a member of the press with the advent of the Internet see SCOTT GANT, WE’RE ALL JOURNALISTS NOW (2007).

<sup>39</sup> Stewart, *supra* note 38 at 633.

press clause existed only to protect the freedom of speech, it would exist only as a “constitutional redundancy,” protecting the same right as that protected under the speech clause.<sup>40</sup>

Justice Stewart also asserted that although the press is a protected institution, the press has no constitutional right to gather information held by the government.<sup>41</sup> According to Justice Stewart, “[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”<sup>42</sup> In discussing the *Pentagon Papers* case, however, Justice Stewart noted that the Court could also not find a constitutional basis for prohibiting the publication of information gathered through illegal means. He asserted that “so far as the Constitution goes, the autonomous press may publish what it knows, and seek to learn what it can.”<sup>43</sup> Justice Stewart does not make an explicit statement as to what methods journalists can use to acquire information. This dissertation examines what the courts have ruled were acceptable methods of gathering news.

Hence, while there is no right to gather news, according to Justice Stewart, the press should be free to gather news and free to publish its findings. His support for the publication of information obtained through unlawful means is quite extensive, but inconsistent with the views of courts in general. His theory permitting the press to “seek to learn what it can” was echoed by Justice Brennan in the landmark newsgathering access case of *Richmond Newspapers, Inc. v. Virginia*<sup>44</sup> in which the Court held that the First Amendment implicitly guarantees the right of the public to attend criminal trials.<sup>45</sup> Justice Brennan wrote a concurring opinion asserting that

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<sup>40</sup> *Id.* at 634.

<sup>41</sup> *Id.* at 636.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 635-636.

<sup>44</sup> 448 U.S. 555 (1980).

<sup>45</sup> *Id.* at 580.

the First Amendment was about more than just protection for the exchange of ideas; the First Amendment played a structural role “in securing and fostering our republican system of self-government.”<sup>46</sup> The Justice asserted that the structural role of the First Amendment was not only about fostering uninhibited debate, but also it is about informing this debate.<sup>47</sup> According to Justice Brennan, “[t]he structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.”<sup>48</sup> Justice Brennan did, however, caution that First Amendment protection should be “invoked with discrimination and temperance” as there existed “few restrictions on action which could not be clothed in ingenious argument in the garb of increased data flow.”<sup>49</sup> Justice Brennan seemed to be concerned that placing such a high First Amendment protection on newsgathering would allow journalists to engage in any kind of behavior to gather information for the purpose of publishing it.

Similarly, Professor Vincent Blasi insisted that court decisions place a high value on newsgathering and freedom of the press. Blasi named this value the “checking value” in that the press can “check the misuse of official power.”<sup>50</sup> In providing an example, Blasi pointed to the reporting on the Watergate scandal that caused President Richard Nixon to resign.<sup>51</sup> The reporting on Watergate and other similar journalistic efforts required the journalists to investigate

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<sup>46</sup> *Id.* at 587.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 588.

<sup>49</sup> *Id.* (quoting *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)).

<sup>50</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (1977).

<sup>51</sup> *Id.*

those in authority, and then to expose their wrongdoing by publishing their results. The publication of the material informed the public about issues of importance.<sup>52</sup>

In Blasi's article on the checking value, he uses three Supreme Court cases to illustrate how courts have decided newsgathering cases, offering his views on the direction the Court should have taken. First he discusses *Branzburg v. Hayes*,<sup>53</sup> the seminal case in which the U.S. Supreme Court decided that the First Amendment did not shield reporters from having to testify in front of a grand jury about confidential sources.<sup>54</sup> *Branzburg* was the consolidation of three cases in which reporters used confidential sources to report on activity of interest to law enforcement.<sup>55</sup> All of the reporters refused to appear before grand juries when subpoenaed to testify about their sources and what they witnessed while newsgathering, asserting that the First Amendment provided protection for journalists. Although the Court rejected their claim and ruled that the journalists were not shielded from having to testify in front of a grand jury, the Court agreed that there was limited First Amendment protection for newsgathering.<sup>56</sup> But according to Blasi, the Court limited the protection for newsgathering because it rejected the idea that the press functions as a watchdog; instead the majority focused on the criminal activity of the confidential sources.<sup>57</sup> This stemmed from the Court's characterization of the press as a private institution rather than organization aimed at fulfilling the role of the Fourth Estate.

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<sup>52</sup> *Id.*

<sup>53</sup> 408 U.S. 665 (1972).

<sup>54</sup> *Id.* at 667.

<sup>55</sup> The first case involved a reporter for the *Louisville Courier-Journal* who was able to interview and report on two drug dealers. In the second case a reporter investigated drug use in Frankfort, Kentucky, with the help of drug users. The final case involved a reporter who was able to observe a meeting of the Black Panther Party.

<sup>56</sup> *Id.* at 707.

<sup>57</sup> Blasi, *supra* note 50 at 593.

The two other cases Blasi cited involve access to prisoners in state and federal prison facilities. In *Pell v. Proconier*<sup>58</sup> journalists sued California prison officials in response to a regulation prohibiting media interviews with specific prisoners. In *Saxbe v. Washington Post*<sup>59</sup> the newspaper sued federal prison officials in response to a similar regulation. In both cases the news organizations claimed that the prisons' ban on press-prisoner interviews violated their right to freedom of the press under the First Amendment.<sup>60</sup> The Court rejected the press' claim in both cases and ruled the press had no more right to access information than the general public.<sup>61</sup>

Blasi noted that in all three of these cases the dissenting opinions alluded to the checking value in First Amendment protection for newsgathering. Justice Douglas' dissent in *Branzburg* noted the important function of the press in society.<sup>62</sup> The Justice asserted that there is no higher function protected under the Constitution.<sup>63</sup> Blasi stated that Justice Stewart's dissent in *Branzburg* also was important because it stressed the "institutional autonomy" of the press in regard to being questioned about their newsgathering practices.<sup>64</sup> Justice Douglas' dissent in *Pell*<sup>65</sup> and Justice Powell's dissent in *Washington Post*<sup>66</sup> convey similar messages about the function of the press in society.

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<sup>58</sup> 417 U.S. 817 (1974).

<sup>59</sup> 417 U.S. 843 (1974).

<sup>60</sup> 417 U.S. at 819; 417 U.S. at 844-45.

<sup>61</sup> 417 U.S. at 835; 417 U.S. at 850.

<sup>62</sup> Blasi, *supra* note 50 at 595. Justice Douglas wrote: "[E]ffective self government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination [sic]." 408 U.S. at 715.

<sup>63</sup> 408 U.S. at 722. "The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work." *Id.*

<sup>64</sup> Blasi, *supra* note 50 at 596.

<sup>65</sup> See 417 U.S. at 835-842 (Douglas, J. dissenting).

<sup>66</sup> See 417 U.S. at 850-875 (Powell, J. dissenting).

The fact that the press' role as a check on government was relegated to mostly the dissent in these important newsgathering cases concerned Blasi. He called the Court's granting of only limited protection for newsgathering a failure.<sup>67</sup> This failure to grant greater First Amendment protection for newsgathering was attributable to two factors: (1) the Court was unsure about the implications of granting full protection to newsgathering, and (2) the Court recognized newsgathering as different than other protected speech activities.<sup>68</sup> Blasi agreed that newsgathering was different from other speech activities. Because of this, he asserted that the Court should evaluate the interest served by newsgathering in terms of the checking value. Investigative reporting, then, would serve the public interest by providing a check on the workings of government and providing citizens with information about those in power.<sup>69</sup>

Blasi submitted that the key stage in checking on government is in obtaining the information. As such the Court should, while balancing the state's interest and the interests of the journalists, "accord greater weight in First Amendment analysis" of newsgathering claims than that given to the publication of the information given.<sup>70</sup> Methods of newsgathering considered "unethical" might also be evaluated for First Amendment protection. But this does not allow courts to establish a journalistic code of ethics.<sup>71</sup> Journalists should not be exempt, however, from generally applicable laws.<sup>72</sup> This meant that journalists could not break the law that applied to everyone in society just to get a story.

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<sup>67</sup> Blasi, *supra* note 50 at 602.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 603.

<sup>70</sup> *Id.* at 610.

<sup>71</sup> *Id.* at 611.

<sup>72</sup> *Id.*

This dissertation examines whether the courts have provided a de facto exemption for journalists who have violated generally applicable laws to gather information. While noting that investigative reporting served the public interest by providing a check on government, Blasi did not specifically state that unlawfully acquired information did not also serve the public interest. This dissertation examines the value the courts say that unlawfully obtained information serves for the public.

In contrast with the structuralist conception of the First Amendment, functionalism posits that the speech and press clauses both protect expression; “speech” meaning oral expression and “press” meaning written or printed expression.<sup>73</sup> Chief Justice Warren Burger enunciated the functionalist approach to the press clause in *First National Bank of Boston v. Bellotti*.<sup>74</sup> Burger agreed with the majority’s ruling that a Massachusetts statute prohibiting corporate speech on political issues was unconstitutional, but wrote a separate concurring opinion that discussed questions about the freedom of the press that arose from the *Bellotti* ruling.<sup>75</sup> Chief Justice Burger argued that a narrow structuralist reading of the press clause would allow the government to impose restrictions on non-media corporations that would not be allowed on media corporations.<sup>76</sup>

Burger noted two problems with the structuralist theory of the press clause. First, the structuralist approach was not historically sound.<sup>77</sup> The common view of freedom of the press in

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<sup>73</sup> Melville B. Nimmer, *Introduction—Is Freedom of the Press A Redundancy: What Does it Add To Freedom of Speech*, 26 HASTING L.J. 639, 640 (1975).

<sup>74</sup> 435 U.S. 765 (1978) (Burger, C.J. *concurring*), *reh’g denied*, 438 U.S. 907 (1978). In *Belotti*, a group of financial institutions challenged the constitutionality of a state law that prohibited certain business organizations from spending money to influence referenda. 435 U.S. at 767. The Court held the statute unconstitutional. *Id.* at 776.

<sup>75</sup> 435 U.S. at 795-801.

<sup>76</sup> *Id.* at 798.

<sup>77</sup> *Id.*

the 1700s was that of freedom for the publication of ideas, and not just freedom of a certain institution.<sup>78</sup> Also, for the most part, freedom of speech was synonymous with freedom of the press.<sup>79</sup> This is not, however, to say that the Press Clause is redundant.<sup>80</sup> Burger pointed out that the Speech Clause may be viewed as protecting “the liberty to express ideas and beliefs,”<sup>81</sup> whereas the Press Clause may be viewed as “liberty to disseminate expression broadly.”<sup>82</sup>

Burger’s second problem with the structuralist interpretation of the Press Clause is the difficulty in formulating a definition of the press.<sup>83</sup> According to Burger, labeling some entities as the press while excluding others is reminiscent of the licensing scheme that the First Amendment was written to prohibit, allowing the government to use content, ownership, and frequency as determinative factors for what constitutes the press.<sup>84</sup> Burger also asserted that the freedom of the press embraces “every sort of publication which affords a vehicle of information and opinion,” and that has an informative function.<sup>85</sup> Therefore, the Justice saw no special protection for the institutional press.

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<sup>78</sup> *Id.* at 798-799.

<sup>79</sup> *Id.* at 799.

<sup>80</sup> *Id.* Compare with Melville B. Nimmer, *Introduction—Is Freedom of the Press A Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 800.

<sup>83</sup> *Id.* at 801.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 704-705 (1972)). Burger asserts:

The informative function asserted by representative of the organized press...is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatist. Almost any author may quite accurately assert that he is contributing to the flow of information into the public. . . *Id.*

## Access to Information

Theorists also recognized the vitality of obtaining information to the sustainability of a democratic society. James Madison wrote:

A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives.<sup>86</sup>

Madison, like Meiklejohn after him, saw the necessity in having a citizenship enabled to make informed decisions about their governance. The people had a right to govern themselves. It follows logically then, that the people could be viewed as requiring a concurrent right to access information, also called the right to know. According to Professor Laurence Tribe, at times the definition of the right to know “may include an individual’s right to acquire desired information or ideas free of governmental veto, undue hindrance, or unwarranted exposure.”<sup>87</sup> Individuals had the right to obtain information without government restraint. Emerson saw this right to know as fitting with freedom of expression:

Reduced to its simplest terms the concept includes two closely related features: First, the right to read, to listen, to see, and to otherwise receive communications; and second, the right to obtain information as a basis for transmitting ideas or facts to others. Together these constitute the reverse side of the coin from the right to communicate. But the coin is one piece, namely the system of freedom of expression.<sup>88</sup>

According to Emerson, both the right to know and the right to communication played important roles in the search for truth. The U.S. Supreme Court demonstrated the connection between these two rights in recognizing the right to receive information. In *Virginia State Board of*

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<sup>86</sup> Letter from James Madison to W.T. Barry, August 4, 1822, in LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES VOL. 3, 276 (1867).

<sup>87</sup> Tribe, *supra* note 5 at 675-676.

<sup>88</sup> Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L. Q. 2 (1976).

*Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>89</sup> the Court found that consumers had the “right to receive information” in the form of advertised prescription drug prices under the First Amendment.<sup>90</sup> But this right concerned mostly prohibiting government restraints on publication, and had less to do with the ability to gather information.

Journalists, as investigators of the workings of government, required constitutional protection to ensure that it was able to facilitate the public’s right to know. It would appear from Tribe and Emerson’s definitions of the right to know that when journalists engaged in unlawful newsgathering methods, such a right to receive information would be a shield from lawsuits. But the right to know did not include a concurrent right to access any information without regard for its source.<sup>91</sup> The laws protecting private individuals and privately held information did not infringe on the right to know.<sup>92</sup>

And yet, the U.S. Supreme Court has ruled that the public and the press have a right to access certain government information. In *Richmond Newspapers, Inc., v. Virginia*,<sup>93</sup> the Court held that implicit in the First Amendment is the right to attend criminal trials.<sup>94</sup> The case arose

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<sup>89</sup> 425 U.S. 748 (1976).

<sup>90</sup> *Id.* at 763-765. A group of prescription drug consumers argued that a Virginia statute, that prohibited pharmacist from advertising the prices of prescription drugs, was unconstitutional. *Id.* at 749-750.

<sup>91</sup> *Id.* at 676. “[T]he right to know is the first amendment [*sic*] filtered through the prism of Holmes’ marketplace of ideas; such a right carries the implication that government, while it may not close the market, may move to correct its defects and regulate its incidental consequences.” *Id.*

<sup>92</sup> Emerson, *supra* note 88 at 19. “Indeed, a private person is protected against unwilling disclosures by a variety of laws against trespass, theft, fraud, and other crimes and torts.” *Id.*

<sup>93</sup> 448 U.S. 555 (1980).

<sup>94</sup> *Id.* at 580. The Court also ruled that “[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.” *Id.* at 581. The Court based this holding on the freedoms of speech and the press, and also the right to peaceably assemble. *Id.* at 577-578.

after the exclusion of the public from the fourth trial of a man indicted for murder.<sup>95</sup> Two members of the media, along with the public, were expelled from the trial after the defense counsel requested that the courtroom be closed.<sup>96</sup>

Criminal trials historically have carried a presumption of openness. In finding this, the Court recognized the value of allowing public trials. Public trials were therapeutic to the community.<sup>97</sup> “[T]he open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.”<sup>98</sup> Further, open trials satisfy the need to feel that “justice” was done.<sup>99</sup> Open trials also increased citizen respect for law enforcement and the judicial process.<sup>100</sup>

The Court also noted the role of the press access to trials played in the promoting the public’s right to know.<sup>101</sup> A democratic society required that the press inform the public of what goes on during a criminal trial, according to the Court.<sup>102</sup> Although recognizing that the public no longer attended criminal trials in the way it had in the past, the Court found that this did not

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<sup>95</sup> *Id.* at 559. The man, Stevenson, was indicted for the murder of a hotel manager. He was first tried and convicted by the state Circuit Court; the Virginia Supreme Court reversed that conviction on the grounds of improperly submitted evidence. The second and third trials ended in mistrials. *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 570.

<sup>98</sup> *Id.* at 571. “Without an awareness that society’s responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful ‘self-help.’ *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 572. “Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.” *Id.* (quoting J. WIGMORE, EVIDENCE § 1834 at 438).

<sup>101</sup> 448 U.S. at 572-574.

<sup>102</sup> *Id.* at 574 n.9. “One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right.” *Id.* (quoting *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950)).

mitigate the resulting “legal education” the public could receive from attending a trial.<sup>103</sup> The Court also noted the special function that the press played in attending these trials:

Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This “[contributes] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . .”<sup>104</sup>

As such, the government had to supply an “overriding interest” in order to constitutionally close a criminal trial to the public and the press.<sup>105</sup>

Two years later, the Court extended the guarantee of access to criminal trials in ruling that while the interest in protecting minors in sexual assault cases was a compelling interest, that interest did not justify the mandatory closure of all sexual assault cases involving a minor victim.<sup>106</sup> In *Globe Newspapers v. Superior Court*, reporters were excluded from a sexual assault trial under a Massachusetts law that mandated the closure of trials involving minor victims.<sup>107</sup> In ruling that mandatory closure of such trials was unconstitutional, the Court found

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<sup>103</sup> 448 U.S. at 572.

With the press, cinema, and electronic media now supplying the representations or reality of the real life drama once available only in the courtroom, attendance at court is no longer a widespread pastime. Yet “[it] is not unrealistic even in this day to believe that public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice.” *Id.* (quoting *State v. Schmit*, 139 N.W. 2d 800, 807 (1966)).

<sup>104</sup> *Id.* at 572-573 (quoting *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 587 (1976)(Brennan, J., concurring in judgment))

<sup>105</sup> 448 U.S. at 581.

<sup>106</sup> *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 607-608 (1982).

<sup>107</sup> *Id.* at 598-599. Massachusetts Gen. Laws Ann., ch. 278, § 16A (West 1981) stated:

At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case. MASS. GEN. L. ANN. ch. 278, § 16A (West 1981).

that the statute mandating closure was not narrowly tailored to meet the state’s compelling interest in protecting minor victims of sexual assault.<sup>108</sup> The Court found that instead of ordering closure, the statute could have required a trial court to make case-by-case determinations of whether closure was necessary.<sup>109</sup>

Recalling the historical reasons behind allowing open criminal trials under the First Amendment, the Court noted that “the First Amendment serve[d] to ensure that the individual citizen [could] effectively participate in and contribute to our republic system of self-government.”<sup>110</sup> The right of access to trials ensured “informed” discussion about the workings of government.<sup>111</sup> Further, the ability of the public to attend trials allowed a “check” on the administration of justice, which was essential to self-government.<sup>112</sup> The Court has also ruled that the same openness requirements applied to jury selection<sup>113</sup> and preliminary hearings.<sup>114</sup>

In all of these “access” cases the Supreme Court did not differentiate the press from the public in ruling on the press’ ability to attend and cover trials. Some commentators believe the press should enjoy a right of access greater than that of the general public in certain situations.<sup>115</sup> Professor Timothy Dyk suggested that the press would deserve greater access to government

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<sup>108</sup> 457 U.S. at 609.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 604.

<sup>111</sup> *Id.* at 605.

<sup>112</sup> *Id.* at 606.

<sup>113</sup> *See* *Press Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984).

<sup>114</sup> *See* *Press Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986).

<sup>115</sup> *See, e.g.*, Timothy Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 (1992).

information in three instances: inequitable granting of press access, denial of press access, and selective press access.<sup>116</sup>

Dyk arrived at his conclusions by differentiating the press from the public. He identified three distinguishing factors. First, the press served interests that the public could only remotely serve by having access to restricted areas.<sup>117</sup> For instance, the press' presence at the scene of a natural disaster is in the role of a surrogate for the general public.<sup>118</sup> Secondly, the presence of the public may be more disruptive in certain situations than the presence of the press.<sup>119</sup> At the scene of a car accident, for example, the members of the public might slow down to gawk at the wreckage, thereby creating a traffic jam, whereas the journalists at the accident scene would know how to investigate without obstructing those in charge. Lastly, the press has the resources, time and personnel to "sift" through information that the public cannot; it is because of this that the press is sometimes allowed access to restricted areas and to sensitive trials.<sup>120</sup> But Dyk asserted that newsgathering should not be mischaracterized as expressive activity that "allows press access only when the public has a right of access for expressive activity at the particular location and ignores the critical issue of whether special access for newsgathering should be permitted."<sup>121</sup> Instead, Dyk argued that the presumption of press access existed if the government had allowed press access in the past. Therefore, the government had the burden of

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<sup>116</sup> *Id.* at 930.

<sup>117</sup> *Id.* at 935.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 936. It should be noted, however, that other theorists are against special access for the press. *See e.g.* Anthony Lewis, *A Preferred Position For Journalism?*, 7 HOFSTRA L. REV. 595 (1979).

proving that denying press access served a legitimate public interest.<sup>122</sup> Courts deciding these cases would use the same balancing test that has been used when the press seeks used when the seeks access to places or information, which inquires whether “the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”<sup>123</sup>

For the most part, those theories concerning access to information and places consider only the information and places controlled by the government. These theories, in general, do not provide journalists with protection for accessing information or places controlled by private persons or organizations. This dissertation will examine how the courts have ruled concerning journalist’s right to access privately held information.

### **Newsgathering and the Law**

Free speech and free press theories have provided the press with some protection for gathering truthful information in an unlawful manner. On the other hand, such newsgathering practices have caused journalists to be accused of violating various tort and statutory laws including, trespass, intrusion, wiretapping, and misrepresentation. In most of these cases, the journalists were not seeking access to government held information, or a governmental proceeding, but access to private individuals and privately held information. Amid these allegations of civil wrongs, the courts have considered the limits of First Amendment protection for newsgathering activities. According to Jane Kirtley, “it is appropriate and necessary for courts to recognize that the First Amendment does encompass news gathering and therefore requires application of [a] stringent constitutional standard.”<sup>124</sup> In a 1999 article, *Triggering the*

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<sup>122</sup> Dyk, *supra* note 115 at 953-954.

<sup>123</sup> *Id.* at 954 (quoting *Globe Newspaper Co.*, 457 U.S. at 607).

<sup>124</sup> Jane Kirtley, *Is it a Crime?: An Overview of Recent Legal Actions Stemming from Investigative Reports*, in *THE BIG CHILL: INVESTIGATIVE REPORTING IN THE CURRENT MEDIA ENVIRONMENT* 137, 153 (2000). Kirtley would have the courts use the same constitutional standard as used in defamation cases. *Id.*

*First Amendment: Newsgathering Torts and Press Freedom*, Matthew Bunker, Sigman Splichal, and Sheree Martin (Bunker, et al) suggest a new framework for how the courts should scrutinize newsgathering cases.<sup>125</sup>

Bunker, et al asserted that when journalists are sued for violating laws of general applicability while gathering news, some form of First Amendment scrutiny should be applied to the plaintiff's claim.<sup>126</sup> This method of analysis would be consistent with both *New York Times Co., v. Sullivan*,<sup>127</sup> in which the Supreme Court fashioned the constitutional standard of proof "actual malice" for public officials in libel cases, *Hustler Magazine, Inc. v. Falwell*,<sup>128</sup> in which the Court ruled that plaintiffs could not circumvent the *Sullivan* standard by claiming a different cause of action. According to Bunker, et al, the proposed approach would be the extension of the *Sullivan* and *Falwell* analyses to newsgathering.<sup>129</sup> The key to this approach was that the courts would examine the plaintiff's motive for using a tort claim against the press in a newsgathering case, "If the use seems primarily intended to inhibit or punish protected speech rather than simply to vindicate the interest associated with the tort, a First Amendment analysis is appropriate."<sup>130</sup> Such a test would filter out cases that do not require First Amendment scrutiny, while at the same time ensuring that the plaintiff was not attempting to punish journalists for speech that occurred as a result of their newsgathering.

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<sup>125</sup> Mathew Bunker, et al, *Triggering the First Amendment: Newsgathering Torts and Press Freedom*, 4 COMM. L. & POL'Y 273 (1999).

<sup>126</sup> *Id.* at 293.

<sup>127</sup> 376 U.S. 254 (1964).

<sup>128</sup> 485 U.S. 46 (1988).

<sup>129</sup> Bunker *supra* note 125 at 293.

<sup>130</sup> *Id.*

If the court identifies the punishment of speech as the plaintiff's motive, then the authors suggested that the court use a test, like strict scrutiny, that says "the plaintiff must establish a compelling interest in vindicating the common-law newsgathering claim alleged, be it trespass, fraud, interference with contract or some other tort."<sup>131</sup> This would place a burden on the plaintiff to demonstrate that the press committed "a serious, if not egregious, invasion of some protected right that genuinely deserves protection even absent any subsequent publication."<sup>132</sup>

The second part of the test would consider the importance of the information sought while newsgathering.

The second step suggest here would adjust for these concerns by requiring a court to inquire into the value of the information sought from the newsgathering conduct. It would clearly not be fair to journalists to require that the information they actually produce be of great importance; after all, some stories, no matter how promising, do not pan out. A purely "consequentialist" analysis would thus inhibit newsgathering to the extent journalists neglected important potential stories that might not materialize. Instead, the approach here would be to look at the potential value of the information as a "reasonable journalist" would have envisioned it at the beginning of the investigation.<sup>133</sup>

The main question would be whether the information sought would have been of great public interest. Therefore, information about food and business practices, consumer safety, and public health would score highly on this second part of the test.<sup>134</sup> "A 'high' score on this part of the balance would make it even more difficult for the plaintiff, while matters of lesser public concern might make recovery somewhat easier, depending also, of course on the severity of the tortious conduct."<sup>135</sup> If accepted, the analysis suggested by Bunker, et al would raise the level of scrutiny used by courts in newsgathering cases by requiring a balancing of the plaintiff's interest

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<sup>131</sup> *Id.* at 294.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 295-296.

<sup>134</sup> *Id.* at 296.

<sup>135</sup> *Id.*

against those of the public. This dissertation examines whether the courts have implemented an analysis similar to that proposed by the authors' in cases concerning unlawful newsgathering techniques.

### **Conclusion**

The freedom of expression, though including freedom of the press, has most often been interpreted as the freedom to publish information with less protection for the ability to gather that information. Advocates for an interpretation of the press clause as protecting the actual newsgathering activities of the press assert that the institutional press plays an essential role in American society in gathering and publishing news. The U.S. Supreme Court has acknowledged the role of the press in newsgathering cases concerning access to criminal trials. The Court, however, has considered about the role of the press in relation to information about the government. This dissertation will examine how the courts have decided newsgathering cases where the press has disregarded general applicable laws when reporting on both public and private institutions. This dissertation will also establish what value, if any, the courts apply to unlawful press behavior and the information gathered from this behavior. This dissertation will also explore the method of analysis the courts have used to decide cases involving unlawful acquisition.

### CHAPTER 3 WIRETAPPING AND EAVESDROPPING

On June 10, 1993, ABC's news program *PrimeTime Live* broadcast an investigative segment that began with reporter Sam Donaldson saying, "We begin tonight with the story of a so-called 'big cutter,' Dr. James Desnick... In our undercover investigation of the big cutter you'll meet tonight, we turned up evidence that he may also be a big charger, doing unnecessary cataract surgery for the money."<sup>1</sup> The broadcast was the culmination of three months of investigation of the Desnick Eye Centers in Illinois and Wisconsin. To create the story, *PrimeTime Live*'s investigative team had contacted Dr. James H. Desnick, who let a film crew videotape the main eye clinic in Chicago, allowed access to a cataract removal operation and permitted interviews with various doctors, eye clinic staff and patients.<sup>2</sup>

Dr. Desnick did not know, however, that ABC had also sent fake patients to the eye clinics armed with hidden cameras, which were able to record the eye examinations they received.<sup>3</sup> *PrimeTime Live* broadcast the hidden camera segments juxtaposed with interviews with former eye clinic patients, staff, and experts on ophthalmology. After the segment aired, Dr. Desnick sued ABC, claiming that ABC's use of hidden cameras constituted violations of federal electronic surveillance laws, also called wiretapping or eavesdropping laws.<sup>4</sup>

This chapter examines how the courts have analyzed the press' behavior in newsgathering with respect to these wiretapping and eavesdropping related newsgathering claims. Specifically, this chapter considers cases in which the press uses the First Amendment as

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<sup>1</sup> *Desnick v. Am. Broad. Co., Inc.*, 44 F.3d 1345, 1348 (7<sup>th</sup> Cir. 1995).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 1351. He also sued ABC under the Illinois state wiretap law.

a defense when accused of recording or disclosing a conversation or communication without consent. The first section explores how the courts have decided wiretap cases brought under the federal wiretap statute, first in cases in which the press is a third-party recipient of intercepted communications and later in cases where it is claimed that the press participated in the wiretapping. Next, this chapter examines state wiretap and eavesdropping cases against the press. This chapter concludes with a summary of the main themes of these cases against the press.

### **Wiretap at the Federal Level**

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2520 (Title III) prohibits the intentional interception and or disclosure of any “wire, oral or electronic communication.”<sup>5</sup> Parties whose conversations or communications were intercepted or disclosed can seek actual or statutory damages of the greater of “\$100 a day for each day of the violation or \$10,000.”<sup>6</sup> In order to recover damages, in a case where the violator is a party to the communication, the federal wiretapping law requires that the plaintiff prove that the interception or disclosure was made for the purpose of committing a crime or tort.<sup>7</sup> Many states have similar laws prohibiting the interception and disclosure of private communications.

Press organizations have been accused of violating these laws most often in situations involving hidden cameras or microphones. In these investigations the news media have, at times, turned up truthful information regarding illegal or unethical activities that the press finds

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<sup>5</sup> See 18 U.S.C.S. §§ 2510-2520 (2007).

<sup>6</sup> 18 U.S.C.S. § 2520(c)(2). The statute computes actual damages as “the sum of actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation.” *Id.* at § 2520(c)(2)(A).

<sup>7</sup> 18 U.S.C.S. § 2511(2)(d) (2007).

newsworthy and the public finds interesting. These cases include situations in which the press was involved in the interception of the communication, and also when the press only received the product of an interception, whether a recording or a transcript. Whether the press was involved in the recording seems to be a factor in whether or not the courts have ruled in the press' favor in these cases. This section explores how the courts have ruled in cases where the press was and was not a party to the interception of a communication.

### **The Press as Third Party Recipient of Intercepted Communications**

One of the earliest cases involving the press and Title III was the 1973 case of *Smith v. The Cincinnati Post & Times-Star*,<sup>8</sup> which arose from a telephone conversation that the plaintiff, Rufus Lee Smith, had with Howard Wunker. During this conversation Smith indicated to Wunker that he could “fix” a divorce case that was pending in a county family court. Unbeknownst to Smith, Wunker recorded the conversation, and then gave the recording to the *Cincinnati Post* newspaper, which published the contents to the recorded conversation.<sup>9</sup>

Smith sued both Wunker and the newspaper for damages arising from recording and disclosing the telephone conversation. The trial court dismissed Smith's suit against Wunker for failure to state a claim upon which relief could be granted.<sup>10</sup> The district court ruled that it was not illegal under the federal wiretap laws for a party to record a conversation to which he or she were a party.<sup>11</sup> The district court also ruled that the disclosure by the newspaper was lawful.<sup>12</sup>

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<sup>8</sup> 475 F.2d 740 (6<sup>th</sup> Cir. 1973)

<sup>9</sup> *Id.* at 740.

<sup>10</sup> See FED. R. CIV. PRO. 12(b)(6), which allows a defendant to a case to file a motion to dismiss in cases in which the other party has not made a valid claim based on the applicable law. See also *Jones v. Capital Cities/ABC Inc.*, 874 F. Supp. 626 (S.D.N.Y. 1995) and *Knautz v. Wilson*, 28 Media L. Rep. 2588 (M.D. Fla. 2000) for discussion of reasons to grant a media defendant's motion to dismiss in a Title III action.

<sup>11</sup> 475 F.2d at 740 (citing *Smith v. Wunker*, 356 F.Supp. 44 (S.D. Ohio 1972)).

<sup>12</sup> *Smith v. Cincinnati Post*, 475 F.2d at 740.

On appeal, Smith argued that although the conversation had legally been recorded, the disclosure of that conversation to the newspaper and the publication of that information was unlawful. The Sixth Circuit disagreed.<sup>13</sup>

The appellate court ruled that Smith could not get damages from the newspaper because the recording of the conversation did not violate the federal law. Further, because it was lawful for a party to a conversation to record the conversation, it was also lawful for that party to later disclose the contents of that conversation.<sup>14</sup> If a party to the conversation, like Wunker, discloses what was said during the conversation, the court concluded, there is no violation of the right of privacy. Wunker did not violate Title III by disclosing what was said in the conversation to the newspaper; hence, the newspaper did not violate the federal wiretap statute.<sup>15</sup>

The U.S. Court of the Appeals for the District of Columbia similarly found no violation of Title III when *The Detroit News* newspaper obtained information from Department of Justice (DOJ).<sup>16</sup> In *Zerilli v. The Evening News Association*, Anthony Zerilli and Michael Polizzi filed suit against the U.S. Attorney General, unknown agents of the DOJ and the publishers of *The Detroit News*, claiming that during the 1960s the DOJ had intercepted private communications, between the plaintiffs and others, by illegally “bugging” the office of the Home Juice Company in Detroit, Michigan.<sup>17</sup> Zerilli and Polizzi also claimed that in 1976, the agents of the DOJ disclosed the contents of the intercepted communications to the newspaper, which used the information to publish a series of articles on organized crime in Detroit. Zerilli and Polizzi

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* See also *Knautz v. Wilson*, 28 Media L. Rep. 2588, 2592 (M.D. Fla. 2000) (ruling that because a wiretap was consensual there was not violation of Title III).

<sup>16</sup> See *Zerilli v. Evening News Ass’n*, 628 F.2d 217 (D.C. Cir. 1980).

<sup>17</sup> 628 F.2d at 218.

argued that they were entitled to damages under the federal wiretap statute for the disclosure of the intercepted communications.<sup>18</sup>

The D.C. Circuit disagreed, finding that the interceptions at issue occurred before the federal law went into effect in 1968. As such, the court noted that the issue was whether 18 U.S.C. § 2520 “provides a remedy for the post-enactment disclosure of information that was unlawfully obtained through a pre-enactment interception.”<sup>19</sup> The court concluded it did not.<sup>20</sup> Because the interceptions were made before the enactment of the statute, the interceptions could not violate the statute. Further, the disclosures of those interceptions could not violate the statute because the interceptions did not violate the federal statute. Therefore, the court decided that the plaintiffs failed to state a claim upon which relief could be granted.<sup>21</sup>

The federal government’s disclosure of intercepted communications to the media, and the disclosure of that information, was also at issue in *In re The Providence Journal Company*.<sup>22</sup> This case arose when Raymond J. Patriarca filed a motion for a temporary injunction against *The Providence Journal* to prevent the newspaper from publishing any information from logs and memoranda the newspaper received from a Freedom of Information Act (FOIA) request to the FBI.<sup>23</sup> The logs and memoranda were compiled by the FBI from the FBI’s electronic

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<sup>18</sup> *Id.* at 219. The plaintiffs also claimed asserted 4<sup>th</sup> Amendment claims against both the government and the newspaper. *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 220-222. The court did note, however, that the plaintiff may have a case for common-law invasion of privacy if all of the elements could be shown. *Id.* at 221.

<sup>22</sup> 820 F. 2d 1342 (1<sup>st</sup> Cir. 1986). *But See In re The Providence Journal Co.*, 820 F.2d 1354 (1<sup>st</sup> Cir. 1987), *cert. denied*, 444 U.S. 1071 (1980).

<sup>23</sup> *Id.* at 1344.

surveillance, in violation of the 4<sup>th</sup> Amendment,<sup>24</sup> of Patriarca's father. The FBI later destroyed the tapes related to the surveillance, but kept the logs and memoranda, releasing the surveillance materials to the *Journal* and other media outlets only after Patriarca's father's death in 1985.<sup>25</sup>

The court granted Patriarca's motion for an injunction against the newspaper. One day later, the newspaper published an article using the information from the logs and memoranda. Patriarca then filed a motion for criminal contempt against the *Journal*.<sup>26</sup> The district court found the newspaper in contempt and fined it \$100,000 and gave its executive director an 18-month suspended jail sentence. The newspaper appealed arguing that the injunction was a prior restraint on its First Amendment rights.<sup>27</sup>

In analyzing the newspaper's appeal, the First Circuit would seemingly have to decide which principle took precedence: the First Amendment presumption against prior restraints,<sup>28</sup> or the collateral bar rule, which states that parties must comply with a court order even if that order is later ruled unconstitutional.<sup>29</sup> Instead of deciding between these two options, the court chose

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<sup>24</sup> "The FBI conducted this surveillance without a warrant in violation of his [Patriarca's] Fourth Amendment rights." *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1345.

<sup>27</sup> *Id.*

<sup>28</sup> The U.S. Supreme Court has ruled unequivocally that prior restraints on the press carry a presumption of unconstitutionality. See *Near v. Minnesota*, 283 U.S. 267 (1931); *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

Prohibiting the publication of a news story or an editorial is the essence of censorship. The power to censor is the power to regulate the marketplace of ideas, to impoverish both the quantity and quality of debate, and to restrict the free flow of criticism against the government at all levels. It is plain now as it was to the framers of the Constitution and Bill of Rights that the power of censorship is, in the absence of the strictest constraints, too great to be wielded by any individual or group of individuals. *In re The Providence Journal Co.*, 820 F.2d at 1345.

<sup>29</sup> The collateral bar rule "holds that one charged with contempt for disobeying an injunction cannot defend on the ground that the injunction was unconstitutional. The theory is that orderly judicial process requires that injunctions be obeyed until found to be invalid." MARC A. FRANKLIN, ET AL, *MASS MEDIA LAW: CASES AND MATERIALS* 47 (2000).

to focus on the narrower issue of whether the order in question was invalid.<sup>30</sup> The newspaper would have an exception to the collateral bar rule if the court ruled that the injunction was invalid. The *Journal* would then be able to assert that it should not be cited for contempt because the injunction was unconstitutional. Although court orders are presumed valid, the court noted that there were situations in which an order would be excepted from the collateral bar rule.<sup>31</sup> The court found that this was such a situation.<sup>32</sup>

In reviewing U.S. Supreme Court precedents concerning the use of prior restraints, the court found that the order had not met the burden required for allowing prior restraints on the press. The court relied on the Supreme Court's three-part test from *Nebraska Press Association v. Stuart*<sup>33</sup> in which the Supreme Court held that a gag order against the press during a criminal trial was unconstitutional using three factors to examine whether the "gravity of the evil" promoted by pretrial publicity deserved a prior restraint. The court examined "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."<sup>34</sup>

The *Providence Journal* court used the *Nebraska Press Association* test to find the injunction against the newspaper to be invalid. First, Patriarca's motion for an injunction was

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<sup>30</sup> 820 F.2d at 1347.

<sup>31</sup> The court noted that two such exceptions to the collateral bar rule: when a court order issued by a court without the proper jurisdiction to make the order, and when the court order is "transparently invalid." *Id.*

<sup>32</sup> *Id.* at 1352.

<sup>33</sup> 427 U.S. 539 (1976). The court also examined the Supreme Court's decision in *New York Times Co. v. United States*, 403 U.S. 713 (1971), in which Justice Stewart, in his concurring opinion, wrote that a prior restraint on the press was inappropriate absent proof that it "will surely result in direct, immediate, and irreparable damage to our Nation or its people." 403 U.S. at 730 (Stewart, J., concurring).

<sup>34</sup> 427 U.S. at 562.

based on Title III, among other things.<sup>35</sup> The court found that Title III provided no basis for a prior restraint because the law did not provide for injunctive relief within its text. Also, the actual electronic surveillance by the FBI took place before the enactment of the statute, and the statute did not apply retroactively.<sup>36</sup> Further, the court noted that in order for a court to provide a injunction against the press, the party seeking the injunction must demonstrate “not only that [the] publication will result in damage to a near sacred right, but also that the prior restraint will be effective and that no less extreme measures are available.”<sup>37</sup> Patriarca’s only interest implicated by the *Journal*’s publication was his right to privacy, which the court ruled was an insufficient interest for issuing a prior restraint.<sup>38</sup>

The court’s discussion of the value of news is of particular interest to newsgathering and publication. The court found that temporary restraining orders interrupt the mode of operation for daily newspapers. Because news was ever changing, even a small delay in publication can hurt a newspaper’s ability to publish a story and to have any impact on events.<sup>39</sup> Similarly, other media outlets could have obtained the logs and memoranda and published the information because they were not subject to an injunction. Therefore, the *Journal*’s inability to publish, as a result of the injunction, may make some readers lose confidence in the newspaper’s competence.<sup>40</sup> The injunction may have also infringed on the newspaper’s editorial discretion.

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<sup>35</sup> *In re The Providence Journal*, 820 F.2d at 1349. Patriarca also based his motion on the FOIA and the 4<sup>th</sup> Amendment. These were found to not support the prior restraint. *Id.*

<sup>36</sup> *Id.* at 1350.

<sup>37</sup> *Id.* at 1351.

<sup>38</sup> *Id.* at 1350. The court noted that the U.S. Supreme Court has implied that there are a narrow range of cases in which prior restraint might be appropriate such as “when either national security or an individual’s right to a fair trial is at stake. An individual’s right to protect his privacy from damage by private parties, although meriting great protection, is simply not of the same magnitude.” *Id.*

<sup>39</sup> *Id.* at 1351.

<sup>40</sup> *Id.* at 1352.

The court also noted that even if the paper had decided to appeal the court order, the delay in getting an appeal could cause the information to lose its news value.<sup>41</sup>

Wiretap information available in public records was also at issue, at least in part, in a group of cases involving Carver Peavy, who at one time was a trustee of the Dallas Independent School District (DISD). Peavy filed at least two lawsuits against news organizations based on the organizations' reporting of conversations intercepted in violation of the federal wiretap law. In *Peavy v. New Times, Inc.*<sup>42</sup> Peavy sued the publishers of the *Dallas Observer*, which published an article containing the transcripts of a DISD meeting at which two DISD trustees read transcripts of recordings that were anonymously mailed to their offices. The recordings were of conversations that Peavy had with various persons in which he used racial, gender and sexual orientation epithets and profanity to describe other DISD trustees and Dallas school community members.<sup>43</sup> The newspaper obtained the transcripts of the meeting by making a state open records act request, but never obtained a copy of the recordings, and printed the transcript of the recordings in its entirety along with an editor's note.<sup>44</sup>

Peavy sued the paper under section 2510 of the federal wiretap act arguing that the newspaper violated the act by publishing the transcript with knowledge that the information contained had been illegally intercepted.<sup>45</sup> In the newspaper's response it challenged the constitutionality of the statute as applied to it under the facts, claiming if it were found liable under the wiretap statute, the newspaper would be punished for publishing truthful information.

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<sup>41</sup> *Id.* 1352-1352.

<sup>42</sup> 976 F. Supp. 532 (N.D. Tex. 1997).

<sup>43</sup> *Id.* at 534.

<sup>44</sup> *Id.* at 535.

<sup>45</sup> *Id.* at 537.

The district court chose to answer the narrow question of “whether Congress may impose sanctions on the accurate publication of transcripts of a telephone conversation obtained from public records—more specifically, from school board minutes open to public inspection.”<sup>46</sup> In holding that Congress could not punish the publication of public information, the court relied on the three-part *Daily Mail* principle, which, according to the Supreme Court in *Florida Star v. BJJF*,<sup>47</sup> inquires into (1) whether the information at issue was lawfully acquired, truthful and about a matter of public concern; (2) whether the proposed punishment served a state interest “of the highest order;” and (3) whether the punishment would have a chilling effect on the press.<sup>48</sup>

The court found that the under the *Daily Mail* principle it would be unconstitutional to sanction the press under the wiretap statute in this case.<sup>49</sup> First, the newspaper lawfully obtained the information from the public record even though the original recording may have been illegally intercepted.<sup>50</sup> Further, the information contained in the transcript was of particular concern to DISD constituents and the Dallas community at large.<sup>51</sup> Second, the interest that the

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<sup>46</sup> *Id.* at 537-538.

<sup>47</sup> 491 U.S. 524 (1989) (holding that a newspaper could not be punished for publishing information contained in a police report that was available to the public).

<sup>48</sup> 976 F. Supp. at 538. (quoting *Florida Star*, 491 U.S. at 536)

<sup>49</sup> 976 F. Supp. at 540.

<sup>50</sup> The next year the District Court for the Northern District of Texas granted summary judgment to a television station who received and broadcast excerpts from an illegally intercepted telephone conversation between member of the Dallas City Council and her brother in which the councilwoman used profanity and derogatory names for minorities. *See Mayes v. LIN T.V. of Tex., Inc.*, 1998 U.S. Dist. LEXIS 15088 (N.D. Tex. 1998). In *Mayes*, the court ruled that the councilwoman’s Title III claim against the television station failed because she had provided no evidence that the station knew of the illegality of the recording. *Id.* at \*21. The court ruled:

To establish liability for use or disclosure, a plaintiff must demonstrate that the defendant knew: 1) the information used or disclosed came from an intercepted communication, and 2) sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of the statute. *Id.* (quoting *Forsyth v. Barr*, 19 F.3d 1527, 1538 (5<sup>th</sup> Cir. 1994).

<sup>51</sup> 976 F.Supp. at 538.

enforcement of the statute would protect in this case was the privacy of Peavy. The court concluded, however, that in light of Supreme Court precedent, Peavy's privacy rights were not compelling enough to infringe on the press' First Amendment rights.<sup>52</sup>

Finally, the court noted that there indeed would be a high probability of self-censorship if the press were punished when for publishing lawfully obtained truthful information. Such a ruling would also create a burden on the media that would require them not to rely solely on government held public information.<sup>53</sup>

Unlike the *New Times* court, the U.S. Fifth Circuit Court of Appeals rejected the use of the *Daily Mail* principle when deciding another Peavy wiretap case that arose under different facts. In *Peavy v. WFAA-TV, Inc.*,<sup>54</sup> Peavy sued a television station under Title III claiming the station violated the statute when it broadcast information obtained from illegally intercepted telephone conversations. The station broadcast information learned from the recordings during three news reports on Peavy's alleged misconduct concerning DISD insurance.<sup>55</sup> Peavy's neighbor Charles Harmon, with whom Peavy had ongoing conflicts, originally intercepted the conversations. Harman used a police scanner to intercept and record Peavy's telephone conversations.<sup>56</sup>

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<sup>52</sup> *Id.* at 539. The court compared Peavy's privacy rights to those rights asserted in *Smith v. Daily Mail*, 443 U.S. 97 (1979) (holding that a state's interest in protecting the anonymity of a juvenile criminal defendant was not substantial enough to infringe on the freedom of the press), *Florida Star* (holding that a statute that allowed the punishment of the media for identifying a rape victim did not serve a substantial state's interest), and *Landmark Communications Inc. v. Virginia*, 435 U.S. 829 (1978) (holding that the state's interest in prohibiting the publication of judicial conduct review committee proceedings was not substantial).

<sup>53</sup> 976 F. Supp. at 540.

<sup>54</sup> 221 F. 3d 158 (5<sup>th</sup> Cir. 2000).

<sup>55</sup> *Id.* at 166. Peavy also sued under state law claiming a violation of the Texas wiretap act, TEX. CIV. PRAC. & REM. CODE § 123.001 (1996), and civil conspiracy. *Id.* at 166.

<sup>56</sup> *Id.* at 164.

Harman later contacted WFAA and spoke with a producer and later an investigative reporter about the recorded conversations. Harman disclosed how he had recorded the conversations, and he gave copies of some of the recordings to a reporter.<sup>57</sup> The reporter also instructed Harman not to turn off the recorder while intercepting the conversations. The reporter later met with the producers who agreed the content of the recordings was worth investigating.<sup>58</sup> The news station also consulted an attorney who stated that it was lawful for the journalist to acquire the tapes of the telephone conversations.<sup>59</sup> The attorney later informed the reporter that this activity was illegal and that he should not accept any more tapes from Harman.<sup>60</sup> By this time the station had received 18 tapes containing 188 telephone conversations between Peavy and others.<sup>61</sup> The content of the conversations were used as part of the research and background to three broadcasts by the news station concerning DISD insurance. The station did not use any of the actual conversations during the broadcasts.<sup>62</sup>

The federal district court held that even though WFAA had violated Title III by disclosing and using the information from the intercepted conversations, Title III was unconstitutional as applied to the television station.<sup>63</sup> “[R]ely[ing] on limited principles that

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Title III originally only prohibited the interception and disclosure of wire and oral communications. “The radio portion of a cordless telephone communication transmitted between the cordless handset and the base unit” was not covered under the law until Title III was amended in 1994. *See* H.Rep. No. 827, 103d Cong., 2d Sess., *reprinted in* 1994 U.S.C.C.A.N. 3489, 3497. “This amendment became effective on October 25, 1994, just five weeks before Harman purchased his police scanner and began to record Peavy’s telephone calls.” *Peavy v. WFAA-TV, Inc.*, 37 F. Supp. 495, 506 (N.D. Tex. 1998).

<sup>60</sup> *Id.* at 165.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 166.

<sup>63</sup> *Peavy v. WFAA-TV, Inc.*, 37 F. Supp. 2d 495, 513-515 (N.D. Tex. 1998). The district court also granted the station’s motion for summary judgment on the Texas wiretap claims for the same reason. *Id.* at 516.

sweep no more broadly than the appropriate context of the instant case”<sup>64</sup> to analyze whether the application of Title III would violate the First Amendment the court ruled:

[t]his fact-intensive analysis is guided by three considerations: (1) whether the media lawfully obtained truthful information about a matter of public significance; (2) whether imposition of liability is necessary to further a state interest of the highest order; and (3) whether punishing the media for publishing truthful information would result in “timidity and self-censorship.”<sup>65</sup>

Peavy conceded that the intercepted information was truthful. The court then had to decide whether the television station had lawfully obtained the information and whether the information concerned a matter of public significance.<sup>66</sup> The court found that the station did not seek out Harman to intercept and record Peavy’s conversations. Instead, Harman contacted the station with his information; “receiving, investigating, and reporting on tips from such sources is a routine news gathering technique.”<sup>67</sup> The court went on to rule that it was not the duty of the media to determine whether or not information provided by a private source was unlawfully acquired. Such a requirement would place a heavy burden on the media and impede its interest in timely dissemination of the news.<sup>68</sup> The court ruled that “any information acquired through legitimate newsgathering techniques is lawfully obtained.”<sup>69</sup>

The court also found the information contained in the recorded interceptions involved a matter of public significance.<sup>70</sup> The contents of the recordings concerned an insurance scheme that would enrich Peavy; because Peavy was using his elected position to implement this scheme

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (citing *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)).

<sup>66</sup> 37 F. Supp. 2d at 516.

<sup>67</sup> *Id.* According to the court, “these kind of activities are protected by the First Amendment.” *Id.*

<sup>68</sup> *Id.* at 517.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

it was a matter of public concern.<sup>71</sup> Further, the court found the privacy interest asserted by Peavy was created by the federal wiretap act and was not constitutional privacy. As such, the district court ruled that the privacy interest asserted was not compelling enough to stand against the press' constitutional right to publish.<sup>72</sup> Lastly, the court determined that the station's actions "were consistent with those of responsible journalist—to investigate leads, verify facts, and publish newsworthy information."<sup>73</sup> Any other requirements for the station would "undoubtedly result in 'timidity and self-censorship.'"<sup>74</sup>

On appeal, the Fifth Circuit rejected the use of strict scrutiny and distinguished the *Florida Star/Daily Mail* considerations.<sup>75</sup> The court distinguished *Florida Star* on the basis that *Florida Star* and *Daily Mail* concerned content-based statutes, meaning the statutes prohibited a certain kind of speech, whereas in the *Peavy* case, the statute prohibited publication without regard to the subject matter. According to the court, the wiretap act prohibits use and disclosure of illegally intercepted communications solely based on the manner in which the information is obtained.<sup>76</sup> In contrast to the federal wiretap statute, the statute in *Florida Star* only applied to one segment of the media; Title III applied to all media and the public.<sup>77</sup>

The court also found the three *Florida Star/Daily Mail* considerations protecting truthful information that was lawfully obtained inapplicable. First, the telephone conversations were not a part of the public record, but were illegally intercepted by private individuals, thereby placing

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 517.

<sup>73</sup> *Id.* at 518.

<sup>74</sup> *Id.*

<sup>75</sup> 221 F. 3d at 189-190. *Accord with Natoli v. Sullivan*, 606 N.Y.S.2d 504, 506-510 (N.Y.S. 1993).

<sup>76</sup> 221 F.3d at 189.

<sup>77</sup> *Id.*

the information outside of the *Daily Mail* principle.<sup>78</sup> The lawfulness of the acquisition of the tape was questionable because the station could be seen as having had some participation in the interceptions. The court also found the second *Daily Mail* consideration inapplicable because the telephone conversations were not public at the time WFAA used and disclosed them.<sup>79</sup> Finally, the appeals court found that the Title III did not place such a burden on the press so as to have a chilling effect as the “Act[] do[es] not impose an ‘onerous obligation’ on the media,” but prohibited the use and disclosure of illegal interceptions by everyone.<sup>80</sup> Title III also contained a scienter requirement that makes the prohibition on use and disclosure applicable only if the person “intentionally” uses or discloses the information, or “knows or has reason to know” that the interceptions were illegal.<sup>81</sup> As such, the court concluded that intermediate scrutiny was the appropriate level of scrutiny for the federal wiretap act.<sup>82</sup>

The court used the test for intermediate scrutiny derived from *United States v. O’Brien*,<sup>83</sup> which makes three inquiries: (1) “[whether the law] furthers an important or substantial governmental interest; [(2)] if the governmental interest is unrelated to the suppression of free expression; and [(3)] if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.”<sup>84</sup> The court found that the wiretap act

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<sup>78</sup> *Id.* (quoting *Florida Star*, 491 U.S. at 534).

<sup>79</sup> 221 F.3d at 189.

<sup>80</sup> *Id.* at 190.

<sup>81</sup> *Id.* Black’s Law Dictionary defines “scienter” as, “A degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission.” BLACKS LAW DICTIONARY 624 (2001). According the court, Title III places a requirement on “all citizens” not to use or disclose interceptions “knowing or having reason to know [the interceptions] were in violation of the Wiretap Acts.” *Peavy*, 221 F.3d at 190.

<sup>82</sup> *Id.*

<sup>83</sup> 391 U.S. 367 (1968) (holding that the federal statute criminalizing defacement of draft cards was constitutional)

<sup>84</sup> *Id.* 377.

satisfied intermediate scrutiny. First, the government interest was in protecting privacy, which the court ruled to be sufficient for this level of scrutiny and of a “constitutional dimension.”<sup>85</sup> Secondly, the wiretap statute was directed at how the information was obtained and not at the content of the information, and only applied when the scienter requirement is fulfilled.<sup>86</sup> Finally, the prohibitions did not place a burden on more speech than is necessary to protect the privacy interests.<sup>87</sup> As such, the appellate court reversed the district court’s grant of summary judgment as it applied strict scrutiny. Instead, the Fifth Circuit found Title III constitutional under intermediate scrutiny, and held that the wiretap statute did not violate the First Amendment because, “the United States [. . .] ha[s] a substantial interest in maintaining the confidentiality of private communications; the use and disclosure proscriptions are unrelated to the suppression of speech...; and the incidental burdens on speech are not impermissibly broad...”<sup>88</sup>

Almost one year later, the U.S. Supreme Court seemingly vacated the Fifth Circuit ruling in a case involving the application of Title III to similar facts and circumstances as those in *Peavy*. In *Bartnicki v. Vopper*<sup>89</sup> the Court held that the First Amendment protected the disclosure by a radio journalist of an illegally intercepted cellular telephone conversation.<sup>90</sup> *Bartnicki* arose during a time of conflict between the Pennsylvania State Education Association and the Wyoming Valley School Board.<sup>91</sup> In May 1993, the teachers union negotiator contacted

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<sup>85</sup> 221 F.3d at 192.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* The court also ruled that the statute was not vague or overbroad. *Id.* at 193.

<sup>88</sup> *Id.* at 191.

<sup>89</sup> 535 U.S. 514 (2001).

<sup>90</sup> *Id.* at 518.

<sup>91</sup> The Pennsylvania State Education Association, a union, was involved in “contentious” negotiations with the Wyoming Valley School Board. *Id.*

the president of the union, by cellular telephone, to discuss ongoing negotiations between the board and the union.<sup>92</sup> At one point during the conversation, the union president said, “If they’re not gonna [sic] move for three percent, we’re gonna [sic] have to go to their, their homes...To blow off their front porches, we’ll have to do some work on some of those guys.”<sup>93</sup>

An unknown party intercepted and recorded the conversation. A tape recording of the conversation was anonymously delivered to the head of the local taxpayers’ organization, who then sent the tape to a local radio journalist and other media outlets.<sup>94</sup> Vopper, a radio journalist played the recording of the conversation during his “public affairs talk show.”<sup>95</sup> Both the union president and chief negotiator sued the radio journalist claiming that the publication of the contents of their cellular telephone conversation violated both federal and Pennsylvania state wiretap statutes.<sup>96</sup> The defense argued that it had nothing to do with the interception of the conversation and that the publication of the conversation was protected by the First Amendment because the journalist did not participate in the interception, the journalist lawfully accessed the interception, and the content of the interception was a matter of public concern.<sup>97</sup>

The U.S. Supreme Court recognized the lack of active participation by the press in intercepting and recording the union members’ conversation as one of three factors that distinguishes the case from other cases brought under Title III.<sup>98</sup> The other two factors were that the press lawfully obtained the recording of the conversation and that the subject matter of the

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 518-519.

<sup>94</sup> *Id.* at 519.

<sup>95</sup> *Id.* The tape was aired after the union and the school board had reached an agreement. *Id.*

<sup>96</sup> *Id.* at 520. *See also* 18 PA. CONS. STAT. § 5725(a) (2000).

<sup>97</sup> 535 U.S. at 526.

<sup>98</sup> *Id.* at 525.

conversation was of public importance.<sup>99</sup> In fact, because the press played no part in the actual acquisition of the information, there is no real discussion of First Amendment protection for newsgathering.

The Court did, however, discuss First Amendment protection for the publication of the information, and held that the publication of the union members' conversation was protected under the First Amendment. The Court declined, however, to answer the broad question of "whether the government may ever punish not only the unlawful acquisition, but the ensuing publication as well."<sup>100</sup> Instead, the Court focused on the much narrower question of whether the government can punish the publisher of information if the publisher lawfully obtained the information from a third-party who obtained the information unlawfully.<sup>101</sup> While acknowledging that there may be situations in which the publisher may be punished, the Court reasoned that *Bartnicki* was not such a case.

The Court identified two interests served by the wiretap statute: removing the incentive to intercept private conversations and protecting the privacy of those whose conversations have been intercepted. It reasoned, however, that if the press were to be punished in this case, the governmental interests would not be served:<sup>102</sup>

The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach to a violation of § 2511(1)(a) do not provide sufficient deterrence, perhaps those sanctions should be made more severe. But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party. Although there are some rare occasions in which a law suppressing one party's

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<sup>99</sup> *Id.* These are the *Florida Star/Daily Mail* considerations.

<sup>100</sup> *Id.* at 528. (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 535 n. 8 (1989)).

<sup>101</sup> 535 U.S. at 528.

<sup>102</sup> *Id.* at 529-531.

speech may be justified by an interest in deterring criminal conduct by another, this is not such a case.<sup>103</sup>

In *Bartnicki*, the press did not engage in the interception of the conversation. Therefore, the punishment of the press would not deter third-parties from again intercepting and recording conversations.<sup>104</sup> Further, the Court rejected the idea that the unlawful conduct of a third-party should be grounds to prohibit publication by the press, finding “no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal interceptions.”<sup>105</sup>

The Court further reasoned that although privacy was an important government interest, in this case “privacy concerns give way when balanced against the interest in publishing matters of public importance.”<sup>106</sup> In this case the enforcement of the statute would have punished the publication of truthful information of public concern: information about the negotiations between the school board and the teachers’ union. The Court noted its previous cases in which it ruled that not even defamation or fact errors removed First Amendment protection in some instances, demonstrating the Court’s commitment to protecting open debate.<sup>107</sup>

In his dissenting opinion, Chief Justice Rehnquist rejected the majority’s reasoning for holding that the application of Title III in this case violated the First Amendment. Far from protecting free and open debate, Justice Rehnquist saw the ruling as actually causing self-censorship in private speech:

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<sup>103</sup> *Id.* at 529-530. (citation omitted)

<sup>104</sup> *Id.* at 531. “[T]here is no basis for assuming that imposing sanctions upon respondents will deter the unidentified scanner from continuing to engage in surreptitious interceptions.” *Id.*

<sup>105</sup> *Id.* at 531.

<sup>106</sup> *Id.* at 534.

<sup>107</sup> *Id.* at 534-535. The Court cited *New York Times v. Sullivan*, 376 U.S. 254 (1964), in which it ruled that in order to meet constitutional standards, public officials in libel cases had to prove actual malice to recover damages.

The Court holds that all of these statutes violate the First Amendment insofar as the illegally intercepted conversation touches upon a matter of “public concern” an amorphous concept that the Court does not even attempt to define. But the Court’s decision diminishes, rather than enhances the purposes of the First Amendment: chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day.<sup>108</sup>

The Chief Justice believed the main problem with this ruling was the majority’s reliance on the *Daily Mail/Florida Star* cases.<sup>109</sup> The *Daily Mail/Florida Star* cases were decided based upon three factors: 1) the information was lawfully obtained from the government; 2) the information was already “publicly available;” 3) the cases concerned the possibility of press self-censorship in order to avoid punishment for publishing of the information.<sup>110</sup> The dissent argued that the *Daily Mail* cases did not answer the question of whether, “in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.” Therefore, the Chief Justice held that the *Daily Mail* principle was inapplicable to the *Bartnicki* case.<sup>111</sup>

### **Press Participation In The Interception**

Although the courts have found both for the press when the press has not directly participated in an illegal interception using the *Florida Star/Daily Mail* considerations, these are not the determining factors when the press has directly participated in the unlawful activity. In cases where the media has directly participated in intercepting private communications the courts look to § 2511(2)(d) of Title III, which enumerates exceptions to its prohibitions against interception. Section 2511(2)(d) states:

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<sup>108</sup> *Id.* at 542 (Rehnquist, C.J., dissenting).

<sup>109</sup> *Id.* at 545 (Rehnquist, C.J., dissenting).

<sup>110</sup> *Id.* at 546-547 (Rehnquist, C.J., dissenting).

<sup>111</sup> *Id.* at 547 (Rehnquist, C.J., dissenting) (quoting *Florida Star*, 491 U.S. at 535, n. 8).

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.<sup>112</sup>

This exemption allows a journalist to record a communication without the knowledge or consent of the other party, making hidden camera and microphone recording seemingly excluded from Title III. This exemption to Title III does not apply, however, if the party giving consent to the interception does so in order to commit a crime or other injury to another party. In order to circumvent this exception, plaintiffs in civil actions brought under Title III have asserted (1) that the press was not a party to the recorded communication, and (2) that the press recorded the communication with the intent to commit a crime or tort.

#### **Not a party to the communication**

The District Court for the District of Northern Illinois determined that a recording was not nonconsensual because not everyone agreed to have the conversation recorded.<sup>113</sup> *Russell v. ABC* arose after the ABC network aired a story on sanitation issues in the commercial fish industry. A reporter for *PrimeTime Live* obtained a job at Potash Brothers grocery store in Chicago that sold seafood products. While working there, the reporter wore a hidden camera and microphone, and recorded conversations she had with the store's manager, Marilyn Russell.<sup>114</sup> Portions of the conversations were aired during the *PrimeTime Live* broadcast.

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<sup>112</sup> 18 U.S.C.A. § 2511(2)(d)(2007)

<sup>113</sup> *Russell v. ABC, Inc.*, 1995 U.S. Dist. LEXIS 7428, \*4 (N.D. Ill. 1995)

<sup>114</sup> *Id.* at \*1.

Russell sued ABC claiming that the reporter's secret filming and recording violated the federal wiretap law.<sup>115</sup> She argued that the "party to the communication" exception to Title III, which exempts interceptions made by or with the permission of one of the parties involved in the intercepted communication, should not apply to ABC in this case because the reporter's conduct was criminal and tortious. Russell argued that the federal statute prohibited nonconsensual recording.<sup>116</sup> The district court disagreed, finding that her logic was flawed. The court stated that "it [wa]s circular to suggest that defendants violated the Wiretap Act because defendants violated the Wiretap Act."<sup>117</sup> Additionally, the court found that the language of the statute specifically states that only one of the parties need consent to the recording to make it lawful.<sup>118</sup> As such, the court dismissed Russell's claim under the wiretap act.<sup>119</sup>

Although, as noted by the *Russell* court, Title III specifically states that a party to a conversation may lawfully record that conversation, there is no language in the statute or statutory history defining who is a "party to the communication." At least one federal court decision provided guidance on this issue in another case involving the use of hidden cameras and microphones. In *Pitts Sales, Inc. v. King World Productions*,<sup>120</sup> the owners of a magazine sales company sued King World Productions after a story aired on *Inside Edition* examining the business practices of magazine sales companies. A producer for *Inside Edition* secured a job with Pitts Sales by misrepresenting personal information on the job application, and while

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<sup>115</sup> *Id.* at \*2. She also claimed invasion of privacy by false light and intrusion. *Id.*

<sup>116</sup> *Id.* at \*3.

<sup>117</sup> *Id.* at \*4

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at \*11.

<sup>120</sup> 383 F. Supp. 2d. 1354 (S.D. Fla. 2005).

working for the company he recorded the day-to-day activities of the magazine sales staff with a hidden camera and microphone.<sup>121</sup> Portions of the film footage and recordings were used during a news report focusing on the treatment, abuse, and inadequate supervision given to young sales agents. Pitts Sales sued King World claiming that *Inside Edition* had violated Title III by recording the conversations and meetings the producer had while employed as a magazine sales agent.<sup>122</sup>

In its defense, King World argued that the producer was always a party to the communication because he was always in the room while recording, even though he may not have always participated in the conversations.<sup>123</sup> Pitts Sales argued that in order to be protected as a “party to the communication” the producer had to be a direct participant in the conversations.<sup>124</sup> The court agreed with King World and ruled that a “party to a communication,” under Title III, is any person present when the communication is uttered. That person does not have to be a direct participant in the conversation.<sup>125</sup> The court reasoned that the *Inside Edition* producer was close enough to pick up the conversations on the camera and microphone that he carried. His proximity to the conversations alone made him a party to the communications.<sup>126</sup>

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<sup>121</sup> *Id.* at 1356.

<sup>122</sup> *Id.* at 1357. The company also claimed the producers violated the federal RICO statute, fraud, trespass and tortious interference with contractual relations. *Id.*

<sup>123</sup> *Id.* at 1359.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1361.

<sup>126</sup> *Id.*

The court also cited *Sussman v. ABC*,<sup>127</sup> a case where, as in *Pitts Sales*, reporters secretly recorded conversations in the work place. In that case, a federal appellate court ruled that the reporter was always a party to the communication even though she used multiple surveillance devices to record what was going on around her.<sup>128</sup> Although the *Sussman* court did not specify whether the journalist was always present at the time of the recordings, the *Pitts Sales* court implied that was what the *Sussman* court meant.<sup>129</sup> The *Pitts Sales* court also cited *Brooks v. ABC*,<sup>130</sup> a federal district court case in which the court ruled that even in a situation where the nonconsenting party did not meaningfully participate in the recorded communication, a person could still be considered a party to the communication. The *Brooks* court ruled that a requirement of meaningful participation by the nonconsenting party would be burdensome and unsupported by the statute or statutory history:

[T]he court can find nothing in Title III or its history that requires meaningful participation in the communication by the non-consenting party for the one-party consent exceptions to have effect. Such a requirement would do more harm than good. Courts would be stalled trying to determine how much participation is necessary and there would be serious vagueness problems with such a requirement.<sup>131</sup>

Using the *Brooks* and *Sussman* rulings, the *Pitts Sales* court reasoned that the producer's mere presence was enough to qualify for the exception to the federal law as a party to the communication. If not, then the court would be stalled determining the extent of the producer's participation in any conversations, whether the producer spoke or if the speaker looked at the

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<sup>127</sup> 185 F.3d 1200 (9<sup>th</sup> Cir. 1999).

<sup>128</sup> *Id.* at 1202.

<sup>129</sup> 383 F. Supp. at 1361.

<sup>130</sup> 737 F. Supp. 431 (N.D. Ohio 1990) *aff'd* by 932 F.2d 495 (6<sup>th</sup> Cir. 1991).

<sup>131</sup> 737 F. Supp. at 437.

producer to include him in the conversation.<sup>132</sup> As such, the court found that the communications were lawfully recorded by a party to the communication, and granted summary judgment to King World Productions.<sup>133</sup>

### **Bad purpose**

Even if a court finds that a journalist was a party to a communication, the plaintiff may still assert that the journalist is not exempt from liability under the Title III if the journalist recorded the communication with a criminal or tortious purpose. Prior to the statute's amendment in 1986, plaintiffs could bring suit if they could prove that a recording was made for an "injurious purpose." That language was at issue in *Boddie v. ABC*,<sup>134</sup> a court decision that is noted as the cause of the 1986 amendment to the statute by Congress.<sup>135</sup>

In *Boddie*, a woman sued ABC after the company aired portions of an interview on the program *Injustice for All*.<sup>136</sup> Although the woman agreed to be interviewed for the program, she declined to appear on camera. Therefore, the interviewer secretly recorded the interview. The woman sued ABC, claiming that the company had violated the federal wiretap law.<sup>137</sup> The district court dismissed the wiretap claim.

On appeal, the Sixth Circuit held that the wiretap claim had been improperly dismissed. The court found that whether ABC acted with an injurious purpose was a matter for a jury to

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<sup>132</sup> 383 F. Supp. at 1362.

<sup>133</sup> *Id.*

<sup>134</sup> 881 F.2d 267 (6<sup>th</sup> Cir. 1989).

<sup>135</sup> See S. Rep. No. 541, 99<sup>th</sup> Cong., 2d Sess. 17 (1986), reprinted in 1986 U.S.C.C.A.N. 3555.

<sup>136</sup> 881 F.2d at 268.

<sup>137</sup> *Id.* at 268.

determine. Thus, the court remanded the case to the district court.<sup>138</sup> While on remand, Congress amended section 2511(2)(d) of Title III and removed the “injurious purpose” language.<sup>139</sup> As such, the district court ruled that the 1986 amendment was a clarification of the pre-1986 language of the statute, and that Congress did not mean for the phrase “injurious purpose” to allow “a cause of action for conduct relative to the gathering and disseminating of news which does not rise to the level of a crime or tort...”<sup>140</sup>

The Sixth Circuit affirmed the district court’s judgment, but disagreed with its reasoning. Although agreeing that courts may use subsequent legislation to determine the purpose or intent of a statute, the court ruled that in this instance Congress did not clarify the meaning of the statute. Instead, the legislative history of the amendment made clear that Congress acted to eliminate the ability to bring suit where a journalist commits no tort or crime.<sup>141</sup> The court also ruled that the amendment to the statute could not be applied retroactively.<sup>142</sup>

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<sup>138</sup> *Boddie v. ABC, Inc.*, 731 F.2d 333, 338 (6<sup>th</sup> Cir. 1984). *Accord with* *Brown v. ABC, Inc.*, 704 F.2d 1296 (4<sup>th</sup> Cir. 1983) and *Benford v. ABC, Inc.*, 502 F. Supp. 1159 (D. Md. 1980).

<sup>139</sup> 881 F. 2d at 268.

<sup>140</sup> *Boddie v. ABC, Inc.*, 694 F. Supp. 1304, 1309 (N.D. Ohio 1988).

<sup>141</sup> 881 F.2d at 269. The court found that

[t]he legislative history never explains how the courts ought to have interpreted “the term ‘improper purpose’”; it says only that the term “is overly broad and vague.” Further, any inference that the amendment merely clarified the “injurious purpose” language is negated by the fact that rather than defining or rephrasing the term, the amendment removed it altogether. Finally, Congress’ rationale for removing the phrase also indicates that it wished to eliminate a basis of liability altogether, not to clarify it. *Id.*

(citing a Senate Report that stated, “Many news stories are embarrassing to someone. The present working of section 2511(2)(d) not only provides such a person with a right to bring suit, but it also makes the actions of the journalist a potential criminal offense...” S.Rep. No. 541, 99<sup>th</sup> Cong., 2d Sess. 17, reprinted in 1986 U.S.C.C.A.N. 3555, 3571).

<sup>142</sup> 881 F.2d at 270.

ABC argued in its defense that the “injurious purpose” language of the pre-1986 statute was unconstitutionally vague because it did not define what constituted an injurious purpose.<sup>143</sup> The court agreed and analyzed the “injurious purpose” language using the “void for vagueness” doctrine that inquires into whether a person of ordinary intelligence would understand what actions are prohibited.<sup>144</sup> The court found that there was uncertainty as to the limits of “injurious purpose.”<sup>145</sup> The court noted that a journalist’s reason for recording a conversation was to disseminate the information obtained.<sup>146</sup> It is this dissemination of information gained from recording a conversation that may prove to be “injurious,” but whether the dissemination of information was injurious was a matter for a jury to decide. The court found that if a journalist could not determine before disseminating the information whether a jury may deem the information injurious, this might deter the journalist from publishing, thereby chilling speech.<sup>147</sup> Because the wiretap statute has a ‘potentially inhibiting effect’ on the press’ constitutionally protected reportorial functions, the court concluded that the vagueness test applie[d] ‘with particular force.’<sup>148</sup> Therefore, the pre-1986 language of the federal wiretap statute could not pass the vagueness test because it failed to give adequate notice of its scope, rendering the statute unconstitutional.<sup>149</sup>

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<sup>143</sup> *Id.* at 270.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 271.

<sup>146</sup> *Id.* at 270.

<sup>147</sup> *Id.* at 271.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 272. *See also* Lucas v. Fox News Network, LLC, 2000 U.S. Dist. LEXIS 22834 (N.D. Ga. 2000)(ruling that a plaintiffs claim that the news organization secretly recorded private conversations to cause insult and injury is not valid as Congress deleted the language that would have allowed recovery for this type of injury under that statute).

Although the statutory history of the 1986 amendment to the statute noted Congress' wish to protect journalists from civil liability, courts have noted that the statute does not now provide the media with the privilege to unlawfully wiretap.<sup>150</sup> A plaintiff may recover damages from the journalist if the plaintiff can prove that the journalist acted with criminal or tortious intent for recording a conversation. Evidence of criminal or tortious intent was the crux of several wiretap cases against the press. Because proving that a journalist's purpose is very difficult, many media defendants in wiretap cases make motions for summary judgment claiming that the plaintiff has failed to state a claim upon which relief can be granted.<sup>151</sup>

The federal court of appeals in *Brooks v. ABC*<sup>152</sup> affirmed a district court's grant of a summary judgment to a media defendant sued for a Title III violation. In *Brooks*, William Brooks agreed to meet with a reporter from ABC to discuss allegations that a judge was having sex with women in exchange for favorable court rulings.<sup>153</sup> Once Brooks arrived at the hotel where he was supposed to meet the reporter, the reporter began to rapidly ask him questions concerning his suspected role as an enforcer for the judge. During the questioning, a crew secretly recorded Brooks' answers. Soon after, a camera crew emerged and began to videotape the questioning.<sup>154</sup> Portions of the secret recordings and the film from the camera crew were aired on the ABC program 20/20.

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<sup>150</sup> 881 F.2d at 271.

<sup>151</sup> See, e.g. *Deteresa v. ABC*, 121 F.3d 460 (9<sup>th</sup> Cir. 1997) (finding that summary judgment was appropriate when the plaintiff presented no evidence of a tortious or criminal purpose by the press in recording an interview).

<sup>152</sup> 932 F.2d 495 (6<sup>th</sup> Cir. 1991).

<sup>153</sup> *Id.* at 496.

<sup>154</sup> *Id.*

In 1981, Brooks filed suit against ABC claiming that the broadcast libeled him.<sup>155</sup> He then filed a motion to amend his complaint to include a claim that ABC violated the federal wiretap act.<sup>156</sup> ABC filed a motion for summary judgment. The district court granted the motion for summary judgment to ABC and denied the motion to amend.<sup>157</sup> The federal appellate court affirmed the district court's denial of the motion to amend the claim.<sup>158</sup>

Brooks argued that summary judgment was inappropriate because ABC had acted with the purpose of violating the repealed Ohio wiretap statute that prohibited conduct "not permitted under the laws of the United States."<sup>159</sup> The district court concluded that the law of the United States at issue was section 2511 of the wiretap act. Therefore, ABC had not acted tortiously to trigger § 2511.<sup>160</sup> The Sixth Circuit agreed and found that § 2511 of the federal wiretap act and the Ohio statute prohibited the same conduct.<sup>161</sup> Therefore, there was no substance to the man's federal wiretap claim, making summary judgment appropriate.<sup>162</sup>

In *Desnick*, the Seventh Circuit also found that there was no substance to a doctor's claim that ABC had violated Title III when it sent reporters, with hidden cameras, to his eye clinics posing as patients seeking treatment. On appeal of a grant of dismissal of the Title III claim against ABC for secretly recording at an eye clinic, the federal appellate court found that ABC

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<sup>155</sup> *Id.* at 497.

<sup>156</sup> *Id.* He also claimed that ABC violated the federal civil rights statutes 42 U.S.C. §§ 1981, 1985. *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 499. The court did, however, vacate the summary judgment ruling on the libel claim. *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 499-500.

<sup>161</sup> It was unnecessary for the court to discuss the possibility that Title III preempted the Ohio law because at the time of the appeal, the Ohio statute had been repealed. *Id.* at 499.

<sup>162</sup> *Id.* 500.

did not send reporters to the clinic in order to commit a crime or tort, even though the broadcast may later be proven to be tortious.<sup>163</sup> Further, Dr. James Desnick had not furnished evidence that that was ABC's intent. The court found the journalists' purpose was to see whether or not the clinic would recommend cataract surgery.<sup>164</sup> The court ruled that if no rights were infringed upon in the process of the investigation by the news organization, Dr. Desnick had no possibility for damages even if the newsgathering activities were "surreptitious, confrontational, unscrupulous, [or] ungentlemanly."<sup>165</sup>

In *Russell v. ABC*,<sup>166</sup> the Northern District of Illinois, following the Seventh Circuit's in *Desnick*, found that the critical inquiry for a court to make in a wiretap case was, "why the communication was intercepted, not how the recording was ultimately used."<sup>167</sup> In *Russell*, a reporter from ABC obtained a job at a Chicago grocery store and secretly recorded conversations she had with the store manager concerning how to sell the store's seafood. Portions of the conversations were later broadcast on *PrimeTime Live*.<sup>168</sup> The court found that the purpose of the recordings in *Russell* was to obtain information about sanitation practices in the commercial fish industry, not to commit a crime or a tort.<sup>169</sup>

The Federal District Court of Arizona used this same kind of critical question analysis to grant summary judgment to ABC in *Medical Laboratory Management Consultants v. ABC*.<sup>170</sup>

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<sup>163</sup> 44 F.3d 1345, 1353. For facts of case *see supra* text accompanying notes 1-4.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1355.

<sup>166</sup> 1995 U.S. Dist. LEXIS 7528 (N.D. Ill. 1995).

<sup>167</sup> *Id.* at \*10.

<sup>168</sup> *Id.* at \*1.

<sup>169</sup> *Id.* at \*10.

<sup>170</sup> 30 F. Supp. 2d 1182 (Dist. Ariz. 1998).

In this case, the owners of a medical laboratory, the Devarajs, sued ABC, claiming the company had violated the federal wiretap statute.<sup>171</sup> A reporter from ABC was able to tour the Devarajs' laboratory after the reporter called them and told them that she was a cytotechnologist interested in starting her own laboratory.<sup>172</sup> During the tour, a hidden camera specialist posing as a computer expert recorded footage of the active lab with a hidden camera, while accompanying the reporter. The footage was later broadcast in a report about inaccurate results in pap smear tests.<sup>173</sup>

The Devarajs argued that ABC recorded the tour for purpose of committing intrusion, fraud, trespass and tortious interference with contractual relations. When ABC moved for summary judgment,<sup>174</sup> the court found that the Devarajs provided no evidence of ABC's purpose.

As in *Russell and Desnick*, the *Med. Lab.* court ruled that the critical question was “not whether they are ultimately liable for conduct found to be tortious, but whether, at the time the recording took place, they recorded the conversation with the express intent of committing a tort.”<sup>175</sup> The court found that the distinction in this inquiry was significant because the media could be held liable for any surreptitious recording even when the purpose was newsgathering.<sup>176</sup>

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<sup>171</sup> *Id.* at 1204. The Devarajs also claimed public disclosure of private facts, intentional infliction of emotional distress, unfair practices, trade libel, negligent infliction of emotional distress, conspiracy, intrusion, fraud, interference with contractual relations, trespass and punitive damages. *Id.* at 1186.

<sup>172</sup> *Id.* at 1185.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 1204-1205.

<sup>175</sup> *Id.* at 1205.

<sup>176</sup> *Id.* See also *Vazquez-Santos v. El Mundo Broad. Corp.*, 283 F. Supp. 2d 561 (Dist. P.R. 2003).

Because the Devarajs had presented no evidence that ABC had any other purpose besides gaining information for its broadcast, the court ruled summary judgment was appropriate.<sup>177</sup>

Protecting newsgathering from an overly burdensome interpretation of Title III was also at issue for the Ninth Circuit in *Sussman v. ABC*.<sup>178</sup> In *Sussman*, a reporter for ABC posed as a telephone psychic to gain employment at Psychic Marketing Group. Once employed, the reporter secretly recorded the activities around her; the footage of these recordings later aired on *PrimeTime Live*.<sup>179</sup> Other employees of the marketing group sued ABC claiming that the reporter violated the federal wiretap act.<sup>180</sup>

The federal district court ruled that ABC's conduct was not criminal or tortious because the surreptitious recording was done to gather news.<sup>181</sup> On appeal, the Ninth Circuit clarified the district court's ruling. According to the federal appellate court, Congress did not mean to exempt all journalists from liability under the statute.<sup>182</sup> The Ninth Circuit found that the district court must have meant that there was a lawful purpose for the journalist's taping: newsgathering. But the existence of a lawful purpose for the recording did not preclude a journalist from having an unlawful purpose; nor did the lawful purpose of a taping delete any unlawful purpose for the intended use of the taping.<sup>183</sup>

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<sup>177</sup> 30 F. Supp. 2d at 1206.

<sup>178</sup> 186 F.3d 1200 (9<sup>th</sup> Cir. 1999).

<sup>179</sup> *Id.* at 1201.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 1202. The district court stated "Where a journalist is a party to a conversation, the recording of such a conversation for newsgathering purposes is not criminal or tortious conduct withing the meaning of the statute." *Id.*

<sup>182</sup> *Id.* The court gives the example of "a news gathering organization secretly videotap[ing] bedroom activities. Even though there may be some legitimate news gathering purpose (e.g., listening for "pillow talk" about some newsworthy event), public airing of such a tape may be illegal or tortious under state law." *Id.*

<sup>183</sup> *Id.*

The court found that there was no California state law that made it illegal to air the tapes made by the reporter while employed at the marketing group. In fact, a recent California state court ruling made newsworthiness a complete bar to claims brought for invasion of privacy by publication of private facts.<sup>184</sup> The court noted that in the present case the plaintiffs had not claimed that the story was not newsworthy.<sup>185</sup> Further, the focus of the court’s inquiry was “not upon whether the interception itself violated another law; it [wa]s upon whether the purpose for the interception—its intended use—was criminal or tortious.”<sup>186</sup> Although ABC’s taping may have violated state invasion of privacy laws, the court found there was no evidence that ABC had an illegal or tortious purpose for its taping.<sup>187</sup>

Although most courts agree that the critical question in wiretap cases is not whether the recording itself violated the law, at least one court has ruled that if the interception itself is not unlawful, then the use or the disclosure cannot be unlawful.<sup>188</sup> In *Vazquez-Santos v. El Mundo Broadcasting*, a radio reporter received notice that Bernardo Vazquez-Santos, the legal counsel to the Governor of Puerto Rico, was using his secretaries to send out invitations to a political party fundraiser.<sup>189</sup> The reporter called Vazquez-Santos at his office and questioned him about

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<sup>184</sup> *Id.* (noting the California Court of Appeal’s ruling in *Marich v. QZR Media, Inc.*, 73 Cal. App. 4<sup>th</sup> 299 (Cal. Ct. App. 1999).

<sup>185</sup> 186 F.3d at 1202.

<sup>186</sup> *Id.* (quoting *Payne v. Norwest Corp.*, 911 F. Supp. 1299, 1304 (D. Mont. 1995), *aff’d* in part and *rev’d* in part, 113 F.3d 1079 (9<sup>th</sup> Cir. 1997).

<sup>187</sup> 186 F.3d at 1203. “Where the purpose is not illegal or tortious, but the means are, the victims must *Seek* redress elsewhere.” *Id.* at 1202-1203. *But cf.* *W.C.H. of Waverly, Mo., Inc. v. Meredith Corp.*, 1986 U.S. Dist. LEXIS 18125 (W.D. Mo. 1986)(holding that summary judgment was inappropriate for a media defendant on a Title III claim because the plaintiff had “alleged facts and tort claims in its amended complaint that, if proved, may also establish a tortious or injurious purpose.” *Id.* at \*8).

<sup>188</sup> *See Vazquez-Santos*, 283 F. Supp. 2d at 566 (citing *Betancourt v. Nyppy, Inc.*, 137 F. Supp. 2d 27, 31-32 (D.P.R. 2003).

<sup>189</sup> 283 F. Supp. 2d at 562-563.

the use of taxpayer money for political advertising, recorded their conversation, and later played the recording on his radio show.<sup>190</sup> Vazquez-Santos sued, claiming the reporter had violated the federal wiretap statute. El Mundo moved for summary judgment.<sup>191</sup>

The court ruled that in order to prevail on his federal wiretap claim, Vazquez-Santos had to establish a criminal or tortious purpose for the recording.<sup>192</sup> The court found that even if El Mundo was found liable for violations of the laws of Puerto Rico, the question was whether at the time of the recording, the reporter made the recording with tortious intent.<sup>193</sup> Because Vazquez-Santos could not prove that the recording was made with a tortious or criminal intent, the district court granted summary judgment to El Mundo.

One federal court has ruled that although Title III prohibits certain conduct, it does not allow “a prior restraint of the press in their exercise of first amendment [sic] rights even if the press’s conduct clearly violates” Title III.<sup>194</sup> *In re King Word Productions, Inc.* arose after Dr. Stuart Berger petitioned for, and was granted, an injunction prohibiting *Inside Edition* from broadcasting footage that its producer had filmed surreptitiously while in Berger’s office claiming to be a patient. The producer was actually investigating Berger for malpractice and unethical behavior.<sup>195</sup> Berger filed for the injunction in a federal district court, alleging that *Inside Edition* had violated Title III, and that he would be “irreparably harmed” if the footage

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<sup>190</sup> *Id.* at 563.

<sup>191</sup> *Id.* at 562.

<sup>192</sup> *Id.* at 567.

<sup>193</sup> *Id.* at 568. (citing *Desnick*, 44 F.3d at 1353).

<sup>194</sup> *In re King World Prod.*, 898 F.2d 56, 59 (6<sup>th</sup> Cir. 1990).

<sup>195</sup> *Id.* at 57-58.

were broadcast.<sup>196</sup> The district court granted a temporary restraining order against broadcasting the footage, and rejected *Inside Edition*'s First Amendment arguments. *Inside Edition* sought a writ of mandamus, an order commanding the district court to perform its duties correctly, from a federal appellate court, arguing that the restraining order was a prior restraint on their First Amendment rights.<sup>197</sup>

According to the Sixth Circuit, the party seeking a writ of mandamus must demonstrate a "clear abuse of discretion or conduct" by the district court, and "a lack of adequate alternative means to obtain the relief they seek."<sup>198</sup> The court also enumerated five criteria, which formulated the standard for a mandamus petition:

- 1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired.
- 2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first).
- 3) The district court's order is clearly erroneous as a matter of law.
- 4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
- 5) The district court's order raises new and important problems, or issues of law of the first impression.<sup>199</sup>

The Sixth Circuit ruled that *Inside Edition* could not challenge the restraining order on direct appeal because a temporary restraining order could not be appealed.<sup>200</sup> Further, the court ruled "[a]s to the second factor, because the purpose of the first amendment [sic] press freedom

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<sup>196</sup> *Id.* at 58.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 58-59.

<sup>200</sup> *Id.* at 59.

clause is to allow the dissemination of information, good or bad, right or wrong, even minimal interference with the first amendment freedoms causes an irreparable injury.”<sup>201</sup>

In granting Berger’s petition for an injunction the district court relied on *Stockler v. Garratt*,<sup>202</sup> in which the Sixth Circuit ruled that liability under Title III applied even if the information gathered by wiretap was never used for a criminal or tortious purpose. According to the Sixth Circuit, the district court used *Stockler* to conclude that violation of Title III trumped the First Amendment right to air the footage. The court stated, “The First Amendment is just not interested in protecting the news media from calculated misdeeds.”<sup>203</sup> There was, however, nothing in the *Stockler* decision or Title III that allowed an abridgment of the rights of the First Amendment.

The court found that the restraining order was an impermissible prior restraint on *Inside Edition*’s First Amendment rights.<sup>204</sup> To be granted such an order, Berger had to demonstrate that the harm he would suffer would be “great enough to justify a prior restraint.”<sup>205</sup> The standard for a prior restraint was, however, especially high:

Protection of the right to information that appeals to the public at large and which is disseminated by the media is the cornerstone of the free press clause of the first amendment [sic]. No matter how inappropriate the acquisition, or its correctness, the right to disseminate that information is what the Constitution intended to protect. Consequently, even prior restraint of the dissemination of national security information has been denied.<sup>206</sup>

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<sup>201</sup> *Id.*

<sup>202</sup> 893 F.2d 856 (6<sup>th</sup> Cir. 1990).

<sup>203</sup> 898 F.2d at 59.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 60

<sup>206</sup> *Id.*

The Sixth Circuit ruled, therefore, that *Inside Edition* had demonstrated that it had a right to the writ of mandamus, and the court instructed the district court to vacate the restraining order. The court did, however, note that its issuance of the writ did not “constitute an approval of the surreptitious means used to gather this information.”<sup>207</sup>

### **Wiretap at the State Level**

In his dissent in *Bartnicki*, Chief Justice Rehnquist noted that, “the District of Columbia, and 40 states, have enacted laws prohibiting the intentional interception and knowing disclosure of electronic communications.”<sup>208</sup> Like Title III, the federal wiretap law,<sup>209</sup> most state wiretap laws only require the consent of one of the parties to the communication.<sup>210</sup> Other state wiretap laws, however, require the consent of all parties. This section examines wiretap claims against the press based on state law.

#### **California**

California Penal Code section 632(a) provides:

Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punished...<sup>211</sup>

Section 637.2(a) allows the parties to a conversation to sue the person who violated § 632(a) for damages.<sup>212</sup> Such a suit can only be won if the plaintiff can prove that the communication was

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<sup>207</sup> *Id.*

<sup>208</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 542 (Rehnquist, C.J., dissenting). *See also Id.* at fn.1 (listing state statutes).

<sup>209</sup> 18 U.S.C. §§ 2510-2520.

<sup>210</sup> *See Franklin*, *supra* note 29 at 591.

<sup>211</sup> CAL. PENAL CODE § 632(a) (2004).

<sup>212</sup> This section of the statute allows damages in the amounts of, “Five Thousand dollars (\$5,000) [or] [t]hree times the amount of actual damages, if any, sustained by the plaintiff.” It also allows the plaintiff to bring an action for an injunction. CAL. PENAL CODE § 637.2 (2004).

“confidential” under the meaning of the statute. The statute defines a “confidential communication” as:

[I]nclud[ing] any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.<sup>213</sup>

In deciding cases based on § 632, the courts must determine whether the plaintiff had a reasonable expectation of confidentiality for the communication.

The Ninth Circuit ruled, in *Deteresa v. ABC*,<sup>214</sup> that a reasonable jury could not find that a woman, who refused to be interviewed by an ABC reporter but continued to have a casual conversation with him, had a reasonable expectation that the reporter would not publish the information from the conversation.<sup>215</sup> In *Deteresa*, a producer from ABC visited the home of Beverly Deteresa who had been a flight attendant on the flight that O.J. Simpson had taken after the murder of his ex-wife.<sup>216</sup> Deteresa never allowed the producer into her home, and expressed that she did not want to be interviewed for the news program. She did, however, continue to talk to the producer outside of her home and explained that she was “frustrated” with hearing some of the false news reports being published about what occurred on the flight with O.J. Simpson and explained to the producer some of the details of what really occurred.<sup>217</sup> The next day the producer called Deteresa to ask her if she would appear on camera; she declined. The producer then informed her that he had recorded their conversation from the previous day, and also had a

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<sup>213</sup> CAL. PENAL CODE § 632(c).

<sup>214</sup> 121 F.3d 460 (9<sup>th</sup> Cir. 1997).

<sup>215</sup> *Id.* at 465.

<sup>216</sup> *Id.* at 462.

<sup>217</sup> *Id.* 462-463.

cameraperson videotape the conversation from a public street.<sup>218</sup> That night, ABC broadcast a clip of the news program *Day One* in which the announcer stated that “the flight attendant who served Simpson in the first class section told ‘Day One’ that she did not, as widely reported, see him wrap his hand in a bag of ice.”<sup>219</sup> ABC did not, however, broadcast the audiotape.<sup>220</sup>

The court noted that the main issue of dispute between the parties on the § 632 claim was whether the conversation between Deteresa and the producer constituted a “confidential communication” under the statute.<sup>221</sup> According to the court, “Application of the statutory definition of ‘confidential communication’ turns on the reasonable expectations of the parties judged by an objective standard and not by the subjective assumptions of the parties.”<sup>222</sup> But to determine whether Deteresa had a reasonable expectation of privacy, the court had to choose between two tests from the California state courts of appeal.<sup>223</sup> The first test, from *Frio v. Superior Court*,<sup>224</sup> stated that, “under section 632 ‘confidentiality’ appears to require nothing more than the existence of a reasonable expectation by one of the parties that no one is ‘listening in’ or overhearing the conversation,” but confidentiality could be defined “more narrowly by defining it as a reasonable expectation that the content of the communication has been entrusted privately to the listener.”<sup>225</sup> The opposing test, from *O’Laskey v. Sortino*, takes a narrower

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<sup>218</sup> *Id.* at 463.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* See also *Sanders v. ABC, Inc.*, 978 P.2d 67 (Cal. 1999) (discussing the expectation of privacy with respect to conversations).

<sup>222</sup> 121 F.3d at 463 (quoting *O’Laskey v. Sortino*, 273 Cal. Rptr. 674, 677 (Cal. Ct. App. 1990)).

<sup>223</sup> *Id.* 463-464.

<sup>224</sup> 250 Cal. Rptr. 819 (Cal. Ct. App. 1988).

<sup>225</sup> *Id.* at 824.

construction of “confidential” and required that in making the determination of reasonableness with respect to confidentiality “courts must examine whether either party ‘reasonably expected, under the circumstances...., that the conversation would not be divulged to anyone else.’”<sup>226</sup>

Without guidance from the California Supreme Court, the federal appellate court chose to adopt the *O’Laskey* standard.<sup>227</sup>

Using this standard the court had to “ask whether Deteresa had an objectively reasonable expectation that the conversation would not be divulged to anyone else.”<sup>228</sup> The court found that she did not. The producer, when first approaching Deteresa, immediately revealed who he was and for whom he worked.<sup>229</sup> Further, Deteresa did not tell the producer that she wanted her statements to remain in confidence. Neither did the producer promise not to reveal the information Deteresa told him.<sup>230</sup> The court found that “no one in Deteresa’s shoes could reasonably expect that a reporter would not divulge her account of where Simpson had sat on the flight and where he had or had not kept his hand.”<sup>231</sup>

The *Deteresa* court did not discuss the fact that the producer never entered Deteresa’s home in order to record their conversation. But the location in which a conversation occurred affects whether or not a court will find that a party to the conversation had a reasonable

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<sup>226</sup> *Deteresa*, 121 F.3d at 464 (quoting *O’Laskey*, 272 Cal. Rptr. at 677).

<sup>227</sup> 121 F.3d at 464 “The California Supreme Court had not visited these conflicting lines of cases. ‘When a decision turns upon applicable state law, and the highest state court has not adjudicated the issue, this Court must determine what decision the highest court would reach if faced with the issue.’” *Id.* (quoting *Capital Dev. Co. v. Port of Astoria*, 109 F.3d 516, 519 (9<sup>th</sup> Cir. 1997)).

<sup>228</sup> 121 F.3d at 465.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

expectation that the conversation would be confidential.<sup>232</sup> For example, in *Wilkins v NBC, Inc.*, a California appellate court ruled that a conversation that took place during a lunch meeting held on the outdoor patio of a restaurant was not confidential under the meaning of § 632.<sup>233</sup> *Wilkins* arose from a *Dateline* NBC investigation of the “pay-per-call” industry.<sup>234</sup> Two producers for NBC contacted SimTel, a pay-per-call company, in response to a national advertisement and arranged a lunch meeting with company representatives.<sup>235</sup> The producers brought two additional people to the meeting that took place on the patio of a restaurant; the company representatives did not inquire into the identities of two additional people.<sup>236</sup> During the meeting the SimTel representatives explained how their pay-per-call system worked; the producers recorded the meeting using hidden cameras and later broadcast excerpts from the recording.<sup>237</sup>

The SimTel representatives argued that the producers violated § 632 by recording the lunch meeting because the meeting contained confidential communications. The court disagreed.<sup>238</sup> The court found that the statute excludes “communication made in a public gathering...or any other circumstances in which the parties to the communication may reasonably expect that the communication may be overheard.”<sup>239</sup> Using the *O’Lasky* test for a reasonable expectation of confidentiality, the court found that the SimTel representatives did not

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<sup>232</sup> See *Wilkins v. NBC, Inc.*, 84 Cal. Rptr. 2d 329 (Cal. Ct. App. 1999).

<sup>233</sup> *Id.* at 337.

<sup>234</sup> *Id.* at 332. Pay-per-call is the “practice of charging for services on so-called ‘toll-free’ 800 lines, often without the knowledge of the persona billed for the services.” *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 337.

<sup>239</sup> *Id.* (quoting CAL. PENAL CODE § 632(c)).

have a reasonable expectation of confidentiality because the representatives did not tell anyone that the information discussed was private.<sup>240</sup> Also, the representatives did not inquire into the identities of the two additional people that accompanied the producers to the meeting, and acknowledged that the producers could have brought as many people as they wished to the meeting.<sup>241</sup> Further, the representatives did not attempt to pause in the conversation or lower their voices when waiters came to the table. Therefore, the court ruled that the conversation was not confidential under the California statute.<sup>242</sup>

At least one California appellate court has ruled, however, that the ability of another person to hear a conversation between two other parties is not synonymous with the ability to overhear, which would cause a conversation to be excluded from protection as confidential under § 632.<sup>243</sup> In *Lieberman v. KCOP Television*, decided after *Wilkins*, a doctor sued a television station claiming the company violated § 632 when it twice sent reporters, with hidden cameras, to his clinic seeking medical attention.<sup>244</sup> An unidentified companion accompanied the reporters during both visits.<sup>245</sup> The reporters used the hidden camera footage to do a story about allegations that the doctor prescribed prescription drugs without the proper medical examinations.<sup>246</sup> In response to the doctor's lawsuit, the station filed a special motion to strike the complaint under the California Code of Civil Procedure § 425.16, also called a strategic

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<sup>240</sup> 84 Cal. Rptr. 2d at 337.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* *But see* *Sanders v. ABC, Inc.*, 85 Ca. Rptr. 2d 909 (Cal. 1999) (finding that the mere fact that a conversation could possibly be overheard did not automatically negate the speakers expectation of privacy).

<sup>243</sup> *See Lieberman v. KCOP T.V., Inc.*, 1 Cal. Rptr. 3d 536, 544 (Cal. Ct. App. 2003).

<sup>244</sup> *Id.* at 539.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* The television station used the excerpts for a news segment entitled, "Caught in the Act." *Id.*

lawsuit against public participation (SLAPP).<sup>247</sup> The station claimed that § 632 was not applicable because the doctor had “no expectation of privacy with the extra person involved,” and that “§ 632 should not apply to its newsgathering activities.”<sup>248</sup> The trial court denied the station’s motion to strike and found that the recorded conversations were confidential communications despite the third-party presence.<sup>249</sup>

On appeal, the station argued that the doctor could not have had a reasonable expectation of privacy because of the presence of the third person, who was not a participant in the conversations, during the medical consultations.<sup>250</sup> The court found, however, that the definition of “party” includes not only a participant, but also “a person who is simply concerned.”<sup>251</sup> Further, the court found that the “presence of others does not necessarily make an expectation of privacy objectively unreasonable, but presents a question of fact for the jury to resolve.”<sup>252</sup>

With respect to the station’s argument under its SLAPP motion, the court found that the California Code of Civil Procedure § 425.16 provided protection for four categories of statements,

The first two categories pertain to statements made in connection with proceedings “before” or “in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.” The third category identifies matters of “public interest” addressed in circumstances traditionally protected by the right to freedom of speech...Category four provides a catch-all for “any other conduct in furtherance of the exercise of the constitutional right of petition or the

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<sup>247</sup> *Id.* at 539-540.

<sup>248</sup> *Id.* The court seems to use “privacy” and “confidential” interchangeably.

<sup>249</sup> *Id.* at 540.

<sup>250</sup> *Id.* at 543-544.

<sup>251</sup> *Id.* at 544.

<sup>252</sup> *Id.*

constitutional right of free speech in connection with a public issue or in an issue of public interest.”<sup>253</sup>

The court noted that the last two categories of statements applied to the facts in *Lieberman*.<sup>254</sup>

The court characterized the hidden recordings as not being “pure” § 632 violations because the recordings “were used in connection with an investigative report by the media.”<sup>255</sup> The court found that “reporting the news is speech subject to the protections of the First Amendment and subject to a motion brought under section 425.16, if the report concerns a public issue or an issue of public interest.”<sup>256</sup> The court determined that the improper prescribing of drugs is a crime and is of great public interest.<sup>257</sup> Therefore, the court concluded that the broadcast was “in furtherance” of the stations exercise of free speech in connection with an issue of public interest.<sup>258</sup>

But this conclusion did not lead the court to create an affirmative defense for § 632 “allowing secret recording if ‘justified by the legitimate motive of gathering news.’”<sup>259</sup> The court noted that the California Supreme Court recognized that

[T]he common law intrusion tort and section 632 “might, under some circumstances, impose an ‘impermissible burden’ on newsgathering; and that such a burden might be found in a law that, as applied to the press, would result in a ‘significant constriction of the flow of news to the public’ and thus ‘eviscerate’ the freedom of the press”<sup>260</sup>

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<sup>253</sup> *Id.* at 540-541.

<sup>254</sup> *Id.* at 541.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 545.

<sup>260</sup> *Id.* (quoting *Shulman v. Group W Prod. Inc.*, 955 P.2d 469, 495 (Cal. 1998)).

The court noted, however, that the California Supreme Court did not create a bright-line rule that § 632, or intrusion, placed an impermissible burden on the press. Further the court found that “the conduct of journalism does not depend, as a general matter, on the use of secret devices to record private conversations.”<sup>261</sup> Therefore, the court ruled that there was no need to create a affirmative defense to § 632 based on newsgathering.<sup>262</sup>

The federal District Court for the Central District of California found, however, that the California courts did recognize a distinction between an individual discussing a conversation to another party and the “covert recording” of the conversation.<sup>263</sup> In *Turnbull v. ABC*, a group of actors sued ABC after a producer for the company attended and secretly recorded acting workshops in which the actors participated.<sup>264</sup> In order to gain entry to the workshops, the producer had to pay a fee,<sup>265</sup> and at one workshop she was required to sign a sign-in sheet that stated, “I am here to practice my acting in a professional atmosphere and sharpen my craft, I am here to hone my audition techniques.”<sup>266</sup> While at the workshops, the producer recorded a variety of conversations, most of which the producer was not a part.<sup>267</sup>

The district court found that a triable issue of fact existed as to whether the actors attending the workshop had a reasonable expectation of privacy in their conversations, and therefore, summary judgment for ABC was inappropriate.<sup>268</sup> The court rejected ABC’s

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<sup>261</sup> 1 Cal. Rptr. at 545.

<sup>262</sup> *Id.*

<sup>263</sup> *See* *Turnbull v. ABC*, 2004 U.S. Dist. LEXIS 24351 (C.D. Cal. 2004).

<sup>264</sup> *Id.* at \*10-11.

<sup>265</sup> *Id.* at \*12.

<sup>266</sup> *Id.* at \*15.

<sup>267</sup> *Id.* at \*14.

<sup>268</sup> *Id.* at \*33-34.

argument that the conversations were not confidential because others could overhear the conversations in the room.<sup>269</sup> The court found that “if the court were to accept Defendants’ argument, it would vitiate the statute. Defendants are arguing, in effect, that anything that can be overheard is not confidential. However, in order for a conversation to be recorded, it must be overheard—in this case by a sensitive recording device.”<sup>270</sup> Further, the court noted that the producer recorded conversations that occurred when the participants were across the room from or had their backs to the producer.<sup>271</sup> Also, the workshops were small, and at least one recorded participant stated “they don’t have to know that,” which the court determined was an indication that the participant had a reasonable expectation of privacy.<sup>272</sup>

## **Florida**

The 1974 amendment to the Florida wiretap statute<sup>273</sup> requiring consent from all parties to record a communication resulted in a lawsuit filed by Sunbeam Television Corporation, and the *Miami Herald*, against the State of Florida.<sup>274</sup> The station claimed that the amendment constituted a prior restraint on the press because it impaired its ability to gather news.<sup>275</sup> The television station asserted “that secret recordings during investigative reporting activities were necessary to insure the accuracy of the information gathered and to preserve the conversation. [Also] the interests protected by the statute were interests in privacy, which are subordinate to

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<sup>269</sup> *Id.* at \*26.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at \*31-33.

<sup>272</sup> *Id.* at \*32.

<sup>273</sup> FLA. STAT. § 934.03(2)(d).

<sup>274</sup> *See Shevin v. Sunbeam T.V. Corp.*, 351 So. 2d 723 (Fla. 1977).

<sup>275</sup> *Id.* at 725.

their alleged First Amendment rights.”<sup>276</sup> In defense of its claim that recording was a necessity, the station further argued that

There are three basic elements which necessitate the use of concealed recording equipment in investigative reporting: accuracy; candidness of person interviewed; and corroboration. The element of accuracy, they say, is in the interest of the individual as well as the public generally, in that no one will be harmed by an untruth. Further, it is in the interest of the broadcaster or publisher that it be able to establish the truth with precision.<sup>277</sup>

The station also noted that individuals engaged in criminal or “undesirable” behavior would not speak freely to the press if they knew that they were being recorded.<sup>278</sup>

The Florida Supreme Court noted, however, that the media plaintiffs did not claim that the amendment to the statute in any way restrained their ability to publish the news.<sup>279</sup> Applying this fact, the court cited the U.S. Supreme Court’s decisions in *Pell v. Procunier*,<sup>280</sup> *Saxbe v. Washington Post*,<sup>281</sup> and *Branzburg v. Hayes*<sup>282</sup> to conclude that the amendment to the wiretap law was not a restraint on the press. The court noted that the amendment did not restrict what the press could publish, nor did it “exclude any source from the press, intrude upon the activities of the news media in contacting sources, prevent the parties to the communication from consenting to the recording, or restrict the publication of any information gained from the communication.”<sup>283</sup> The court found that in passing the law, the Florida legislature was allowing

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<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* The station also claimed that “if no corroboration of the information gathered was available other than the notes or memory of the reporter, the news resulting from the investigation could not be broadcast.” *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> 417 U.S. 817 (1974)(holding that the press did not have a right of access to a prison under the First Amendment).

<sup>281</sup> 417 U.S. 843(1974)

<sup>282</sup> 408 U.S. 665 (1972)(holding that the First Amendment did not invalidate the requirement that reporters appear and testify before a grand jury).

<sup>283</sup> 351 So. 2d at 727.

all parties to a conversation to have an expectation of privacy.<sup>284</sup> In holding that the amendment to the Florida wiretap statute did not violate the First Amendment, the court found:

News gathering [sic] is an integral part of news dissemination, but hidden mechanical contrivances are not indispensable tools of news gathering. The ancient art of investigative reporting was successfully practiced long before the invention of electronic devices, so they cannot be said to be “indispensable tools of investigative reporting.” The First Amendment is not a license to trespass or to intrude by electronic means into the sanctity of another’s home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.<sup>285</sup>

## Illinois

The Illinois eavesdropping statute prohibits the use of an “eavesdropping device” to hear or record a communication without the consent of all parties to the communication.<sup>286</sup> The statute defines an eavesdropping device as “any device capable of being used to hear or record oral conversation or intercept, retain, or transcribe electronic communications whether such conversation or electronic communication is conducted in person, by telephone, or by any other means.”<sup>287</sup> The statute also prohibits the use or disclosure of any information that an individual knows or should know was obtained by use of an eavesdropping device.<sup>288</sup>

What exactly constituted an eavesdropping device was at issue in *Cassidy v. ABC*.<sup>289</sup> Arlyn Cassidy, then a Chicago police officer, filed for an injunction against ABC after a camera crew secretly recorded him during a police undercover investigation.<sup>290</sup> The manager of a

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<sup>284</sup> *Id.* at 726-727.

<sup>285</sup> *Id.* at 727.

<sup>286</sup> 720 ILL. COMP. STAT. ANN. 5/14-2 (LexisNexis 2008). The statute was previously ILL. REV. STAT. Ch. 38, par. 14-2, which only required the consent of one of the parties to a conversation. *See Cassidy v. ABC, Inc.*, 377 N.E.2d 126, 129 (Ill. App. Ct. 1978).

<sup>287</sup> 720 ILL. COMP. STAT. ANN. 5/14-1 (LexisNexis 2008).

<sup>288</sup> 720 ILL. COMP. STAT. ANN. 5/14-2 (LexisNexis 2008).

<sup>289</sup> 377 N.E.2d 126 (Ill. App. Ct. 1978).

<sup>290</sup> *Id.* at 127-128.

massage parlor contacted ABC to complain about police harassment of his business.<sup>291</sup> A film crew then set up a camera in a two-way mirror, which gave them access to a neighboring room, but did not install a microphone in the room.<sup>292</sup> The police officer entered the room accompanied by one of the “lingerie models” who worked at the massage parlor. Upon entering the room and noticing what looked like camera lights, the officer asked the model if someone were filming, to which the model responded in the affirmative without revealing that a news crew was recording. After some interaction with the model the officer arrested her for solicitation.<sup>293</sup> He was joined in the room by three other undercover officers and asked the model if anyone was in the neighboring room. At that time, the camera crew opened the door and yelled out “Channel 7 News” while continuing to film the scene in the room.<sup>294</sup>

In ruling that summary judgment for ABC was appropriate, the Illinois appellate court ruled that the camera crew did not violate the statute because a camera was not an eavesdropping device as the camera could not have been used to hear or record a conversation.<sup>295</sup> The court found that the only eavesdropping device was the microphone that was located in the other room, which did not record the interaction between the officer and the model.<sup>296</sup> Further, the court noted that although it was logical that the officer would have expected his interaction with the model to be private, “his conduct was performed in the line of his duty as an officer.”<sup>297</sup> The court also found that because the officer continued into the room with the model even after the

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<sup>291</sup> *Id.* at 128.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 129.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 130.

model informed him that someone was recording in the room, the officer had no expectation of privacy.<sup>298</sup>

The federal District Court for the Northern District of Illinois, in interpreting the Illinois law, has found that “there is no expectation of privacy... where the individual recording the conversation is a party to the conversation.”<sup>299</sup> In *Russell v. ABC, Inc.*, a reporter obtained a job at a grocery store to do an investigation of seafood handling methods; while working at the store, the reporter wore a hidden camera.<sup>300</sup> Excerpts from the hidden camera footage were then broadcast on ABC’s *PrimeTime Live* news program.<sup>301</sup> The manager of the store claimed that the reporter violated the Illinois eavesdropping statute because it was a crime in the state to record a conversation without the consent of all parties.<sup>302</sup>

The court rejected the manager’s claim and found that the Illinois courts have held that “no eavesdropping occurs where an individual to whom statements are made or directed records them, even without the knowledge or consent of the person making the statements private vis-à-vis that individual.”<sup>303</sup> The court determined that the critical factor in the determination of whether there was a violation of the statute was “whether [the parties] justifiably expected their conversation to be private.”<sup>304</sup> Although the store manager claimed that she intended her

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<sup>298</sup> *Id.*

<sup>299</sup> *Russell v. ABC, Inc.*, 1995 U.S. Dist. LEXIS 7528, \*7 (N.D. Ill. 1995) (quoting *People v. Herrington*, 645 N.E.2d 957, 958 (Ill. 1994)).

<sup>300</sup> 1995 U.S. Dist. LEXIS at \*1.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at \*4.

<sup>303</sup> *Id.* at \*5 (quoting *Herrington*, 645 N.E.2d at 958-959).

<sup>304</sup> *Id.* at \*6. The court established this rule from *People v. Beardsley*, 503 N.E.2d 346 (1986) in which a defendant secretly recorded the conversation of two police officers sitting in the front of a squad car while he was under arrest. In that case the Illinois Supreme Court did not find that this conduct violated the eavesdropping statute. 503 N.E.2d at 350.

conversations with the reporter to be private, the court found that the reporter did not illegally eavesdrop on the manager.<sup>305</sup> The court ruled that “when a party to a conversation records it, all he is doing is making a more accurate record of something that he has already heard. This does not violate the [manager’s] right to privacy.”<sup>306</sup> In this case the reporter had only made a recording of what she heard; she therefore did not infringe on the manager’s privacy, or impermissibly eavesdrop.

## **Louisiana**

The Louisiana wiretap statute was fashioned after the federal wiretap statute Title III.<sup>307</sup> The statute prohibits the “willful” interception of any “wire or oral communication;” it also outlaws the use and disclosure of any of the contents of an interception.<sup>308</sup> The Louisiana law further prohibits the publication or broadcast of the contents of an interception.<sup>309</sup> A violation of the law can result in criminal and civil penalties.<sup>310</sup> In spite of the prohibition on publication and broadcast, at least one Louisiana state court has ruled that the statute did not violate the First Amendment or the Louisiana constitutional right to freedom of the press.<sup>311</sup>

In *Keller v. Aymond*, a publisher intercepted and recorded the conversations of two men. The publisher then called a press conference at which he played the recordings and gave copies

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<sup>305</sup> 1995 U.S. Dist. LEXIS at \* 6-7. The court analogized this case with another Illinois eavesdropping statute case, *Thomas v. Pearl*, 998 F.2d 447 (7<sup>th</sup> Cir. 1993), in which a basketball coach secretly recorded telephone conversation he had with a recruit. That court in that case ruled that the coach did not eavesdrop on the recruit because the recruit agreed to speak with him. *Id.* at 453.

<sup>306</sup> 1995 U.S. Dist. LEXIS at \*7.

<sup>307</sup> See LA. REV. STAT. ANN. §§ 15:1301-1307. See also *Keller v. Aymond*, 722 So. 2d 1224, 1230-1232 (La. Ct. App. 1998) (discussing the differences in language between the Louisiana statute and Title III).

<sup>308</sup> LA. REV. STAT. ANN. § 15:1303.

<sup>309</sup> LA. REV. STAT. ANN. § 15:1307.

<sup>310</sup> LA. REV. STAT. ANN. § 15:1303 and § 15:1312.

<sup>311</sup> See *Keller*, 722 So. 2d at 1230.

of transcripts of the conversations to those in attendance, including reporters.<sup>312</sup> The newspapers printed excerpts from the transcripts of the conversations.<sup>313</sup> The two men filed suit against both the publisher and the newspapers claiming that they had violated the Louisiana wiretap law.<sup>314</sup> The newspapers filed a motion for, and were granted, summary judgment by the trial court. The Louisiana appellate court reversed.<sup>315</sup>

The appellate court found that in this case the constitutional rights of access to information and the freedom of the press were in conflict with the right to privacy. But because there were no Louisiana rulings on the issue, in considering the constitutionality of the state wiretap statute the court found it instructive to examine Title III cases in order to accurately balance the two competing rights.<sup>316</sup> The court first considered the U.S. Court of Appeals for the Eighth Circuit's decision in *Certain Interested Individuals, John Does I-V, Who Are Employees of McDonnell Douglas Corporation v. The Pulitzer Publishing Company*,<sup>317</sup> in which that court ruled that an individual's right to privacy "outweighed the public's interest in access to the information [contained in FBI affidavits attached to federal search warrants] and that Title III, 18 U.S. 2510 et seq, protected the materials from disclosure because the materials contained intercepted communications."<sup>318</sup> The *Pulitzer* court found:

[D]isclosure to a limited audience of "professionally interested strangers" in the context of their official duties is not the equivalent to disclosure to the public. Title III does not allow

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<sup>312</sup> *Id.* at 1226.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* The two men claimed that the newspapers had published, disclosed and used the contents of the illegal interception. *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 1227-1228.

<sup>317</sup> 895 F.2d 460 (8<sup>th</sup> Cir. 1990).

<sup>318</sup> 722 So. 2d at 1228.

public disclosure of all lawfully obtained wiretap evidence just because a few officers are privy to its contents; if this were construed to do so, much of the statute would be superfluous...<sup>319</sup>

Analogizing the ruling in *Pulitzer* to its case, the Louisiana appellate court found that once the two men's conversations were intercepted by the publisher and then used in the press conference, this did not "transform the intercepted communications into non-intercepted communications unprotected" by the Louisiana statute.<sup>320</sup> The court also noted that the two men might be entitled to more protection because of the nature of their conversations.<sup>321</sup>

The *Keller* court distinguished *Pulitzer*, finding that the case at bar involved no government or law enforcement interception of the conversations, only private citizen's illegally recording the conversations.<sup>322</sup> Because of this, the court found that "there [was] no legitimate public interest to be served by the newspaper's disclosure of the private conversations of the plaintiffs in this case. The plaintiffs had an expectation of privacy in their personal conversations that is clearly protected by the Fourth Amendment to the United States Constitution and [the Louisiana state] constitution."<sup>323</sup>

The court also repeated the rule that the press had no more right to access information than the public did,<sup>324</sup> following the Ninth Circuit's ruling in *California First Amendment Coalition v. Calderon*.<sup>325</sup> In that case, court ruled that the freedom of the press, "although

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<sup>319</sup> 895 F.2d at 465.

<sup>320</sup> 722 So. 2d at 1228.

<sup>321</sup> *Id.* at 1229.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* The court found that "neither the public nor the press has a right of access to private conversations between private individuals initiated in the privacy of their respective homes." *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> 150 F.3d 976 (9<sup>th</sup> Cir. 1998) (holding that a rule prohibiting the press from witnessing certain procedures with respect to a prisoner's execution did not violate the First Amendment).

substantial, [is] not without limits.”<sup>326</sup> The *Calderon* court, while recognizing the role the media played in informing the public, stated that the First Amendment did not offer the press the right to gather news not available to the public, nor did the importance of interest in the subject matter factor into the ruling.<sup>327</sup> The Louisiana appellate court found that the public did not have a right to access private telephone conversations and that conduct was prohibited under the state wiretap statute.<sup>328</sup> As such the court ruled

[The] prohibitions are constitutional and are extended to the press. The press cannot escape the prohibitions of the Louisiana Electronic Surveillance Act under the guise of constitutional protection. We find that La.R.S. 15:1301 et seq should be stringently enforced and construed against the violator of any of its sections pursuant to a literal interpretation of the statute.<sup>329</sup>

## **Maryland**

Like the Louisiana statute, the Maryland Wiretapping and Electronic Surveillance Statute was patterned after Title III.<sup>330</sup> Like Title III, the Maryland wiretap law prohibits the interception, use or disclosure of an oral or wire communication.<sup>331</sup> The Maryland statute also has a scienter requirement in that interceptions, use and disclosure of an oral or wire communication is unlawful only if done willfully and “knowing or having reason to know that the information was obtained through the interception of a wire or oral communication.”<sup>332</sup> The federal District Court for the District of Maryland analyzed the statute’s willfulness requirement

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<sup>326</sup> *Id.* at 981 (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

<sup>327</sup> *Id.* at 982.

<sup>328</sup> 722 So.2d at 1229.

<sup>329</sup> *Id.*

<sup>330</sup> See MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401-414 (2008).

<sup>331</sup> MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (2008).

<sup>332</sup> *Id.*

in *Benford v. ABC, Inc.*<sup>333</sup> In *Benford*, an insurance salesman was recorded on a hidden camera while giving a sales speech to members of Congress who were posing as prospective insurance purchasers.<sup>334</sup> Portions of the recording were broadcast on ABC.<sup>335</sup> The salesman sued claiming that ABC violated the Maryland wiretap law.<sup>336</sup>

In denying the salesman's motion for summary judgment on his claim that ABC violated the Maryland wiretap law, the court found that there were issues concerning ABC's conduct in relation to the law that needed to be considered by a jury.<sup>337</sup> First, the court ruled that in order to prove that ABC was liable under the state law, the salesman had to prove that ABC acted "willfully" in recording his communication.<sup>338</sup> The Maryland statute did not, however, define "willfully," nor did the legislative history, or any prior Maryland state court decision.<sup>339</sup> The federal court found that it was appropriate to look to the meaning of willful as established in Title III.<sup>340</sup> The court noted that under Title III, willful denotes "either an intentional violation or a reckless disregard of known legal duty."<sup>341</sup> The court found then that there were issues of material fact as to whether ABC acted willfully to violate the Maryland law.

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<sup>333</sup> 649 F. Supp. 9 (D. Md. 1986)

<sup>334</sup> See *Benford v. ABC, Inc.*, 554 F. Supp. 145, 147 (D. Md. 1982).

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* The salesman also claimed that the defendants violated his 4<sup>th</sup> Amendment rights, invaded his privacy, and violated Title III, among other things.

<sup>337</sup> *Benford*, 649 F. Supp. at 10.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* The court also noted that the willfulness standard was the same in both the criminal and civil context of the statute. *Id.*

The court also found that the salesman had failed to prove that ABC's recording of the salesman's sales pitch was "an oral communication within the meaning of the Maryland statute."<sup>342</sup> The Maryland statute defined oral communication as "any conversation or words spoken to or by any person in private conversation," but the statute failed to define "private conversation."<sup>343</sup> The court found that the sales presentation took place in a private home, and that there was not an indication as to whether the salesman wanted "his listeners to pass the message or to others."<sup>344</sup> The court further found that there was no evidence as to the reasonableness of the salesman's intentions. Therefore, the court found that summary judgment was in appropriate for the salesman.<sup>345</sup>

## **Massachusetts**

A 2007 Massachusetts case involving the publication of unlawfully intercepted recordings followed the U.S. Supreme Court's ruling in *Bartnicki*.<sup>346</sup> In *Jean v. Massachusetts State Police*, Mary Jean, a local political activist who maintained a website complete with articles and critiques of local politicians, was contacted by Paul Pechonis. Pechonis explained that a few days prior, armed State Police had arrested him at his home for a misdemeanor.<sup>347</sup> While at his home, the officers conducted a warrantless search that was audio and videotaped by a "nanny-cam."<sup>348</sup> Pechonis gave Jean a copy of the tape, which Jean posted on her Web site

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<sup>342</sup> *Id.* at 11.

<sup>343</sup> *Id.* (quoting MD. CODE ANN. § 10-401).

<sup>344</sup> 649 F. Supp. at 11.

<sup>345</sup> *Id.*

<sup>346</sup> *See Jean v. Massachusetts State Police*, 492 F.3d 24 (2007).

<sup>347</sup> *Id.* at 25.

<sup>348</sup> *Id.*

accompanied by “editorial comment.”<sup>349</sup> A few months later the State Police informed Jean that she was in violation of Massachusetts General Law ch. 272, § 99, which prohibited the willful interception and/or disclosure of a wire or oral communication.<sup>350</sup> The letter required that Jean remove the video within 48 hours or the police would contact the District Attorney.<sup>351</sup>

Jean filed a motion for a temporary restraining order and an injunction against the State Police and the Massachusetts Attorney General, claiming that the threatened enforcement of § 99 would infringe on her right to free speech.<sup>352</sup> The federal district court granted the injunction, ruling that *Bartnicki* was the controlling law for the decision. The court also found that Jean had lawfully obtained the videotape that related to a “matter of public concern.”<sup>353</sup> The district court concluded that a balancing of the State and the public interest weighed in favor of granting the injunction; the State Police appealed.<sup>354</sup>

In examining the U.S. Supreme Court’s decision in *Bartnicki*, the U.S. Court of Appeals for the First Circuit found that the Supreme Court based its ruling on three factors.<sup>355</sup> First, the Court found that the federal wiretap statute Title III was content-neutral, and the law was a “regulation of pure speech.”<sup>356</sup> Second, the Court identified two state interests: removing the

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<sup>349</sup> *Id.*

<sup>350</sup> *Id.* at 25-26. MASS. GEN. LAWS ch. 272 § 99 defines interception as “to secretly hear, secretly record, or aid another to secretly hear or secretly record through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication.” MASS. GEN. LAWS ch. 272 § 99 (B)(4)(2007).

<sup>351</sup> 492 F.3d at 26. The police again contacted Jean to clarify the meaning of the statute, and stated that because the statute was limited to oral and wire communications if Jean were to remove the audio portion of the recording, she would not be in violation of the statute. *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* at 28.

<sup>356</sup> *Bartnicki*, 532 U.S. at 526.

incentives for intercepting private communications, and “minimizing the harm to persons whose conversations have been illegally intercepted.”<sup>357</sup> The Court found that the first interest carried little weight as there was no evidence that punishing someone who lawfully obtained information from a third-party who unlawfully obtained the information would reduce the amount of illegal interceptions.<sup>358</sup> The Court found that the second interest carried more weight because it dealt with the state interest in protecting privacy.<sup>359</sup> The Court emphasized that the rule with respect to public disclosure of private information that was obtained was the *Daily Mail* principle that states that, “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...of the highest order.”<sup>360</sup> Using this balancing principle, the Court considered the question of whether the government could punish the publisher of information lawfully obtained from a source that unlawfully obtained it. The U.S. Supreme Court decided that the state’s “privacy concerns give way when balanced against the interest in publishing matters of public importance.”<sup>361</sup>

Applying the *Bartnicki* decision to the *Jean* case, the First Circuit concluded that “Jean’s circumstances [were] otherwise materially indistinguishable from those of the defendants in *Bartnicki*.”<sup>362</sup> In so ruling, the court first noted that § 99 was a content-neutral law of general

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<sup>357</sup> *Id.* at 527.

<sup>358</sup> *Id.* at 530-531.

<sup>359</sup> *Id.* at 533. The court found that “disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself.” *Id.*

<sup>360</sup> *Id.* at 528. (quoting *Smith v. Daily Mail*, 443 U.S. 97).

<sup>361</sup> 532 U.S. at 534. The Court noted that, “one of the costs associated with participation in public affairs is an attendant loss of privacy.” *Id.*

<sup>362</sup> 492 F.3d at 33.

applicability.<sup>363</sup> The court then considered the competing interests involved with respect to § 99 as applied to the circumstances in *Jean*. The court found that the state interest in protecting privacy was less compelling in *Jean* than in *Bartnicki*.<sup>364</sup> In *Bartnicki* the main concern was “encouraging the uninhibited exchange of ideas and information among private parties,”<sup>365</sup> the First Circuit found, “[h]owever, this interest is virtually irrelevant here, where the intercepted communications involve a search by police officers of a private citizen’s home in front of that individual, his wife, other members of the family, and at least eight law enforcement officers.”<sup>366</sup> Further, the court found that the state interest in deterring illegal interception was not compelling, even though the identity of the interceptor was known, there was no justification for punishing the subsequent publisher of the illegally intercepted information.<sup>367</sup>

In considering the public interest in the publication of the intercepted information, the First Circuit noted that the interest in permitting the publication of truthful information of public concern applied.<sup>368</sup> Therefore, the only possible argument that the State Police could have was that Jean did not obtain the information lawfully.<sup>369</sup> The court found, however, that Jean’s conduct was not determinative of whether she acted unlawfully. Instead the court ruled that the “determinative question [was] whether the First Amendment, . . . permits Massachusetts to criminalize Jean’s conduct.”<sup>370</sup> The court found that it did not, and that neither Jean’s

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<sup>363</sup> *Id.* at 29.

<sup>364</sup> *Id.*

<sup>365</sup> *Bartnicki* 532 U.S. at 532.

<sup>366</sup> 492 F.3d at 30.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 31.

knowledge of the illegality of the interception, nor her ability to prevent further dissemination of the interception, was persuasive.<sup>371</sup> Consequently, the court ruled that the First Amendment protected Jean's publication of the video on her Web site.<sup>372</sup>

## Michigan

A Michigan appellate court immediately dismissed a media defendant's assertion that a claim against the media for a violation of the Michigan eavesdropping statutes involved the First Amendment.<sup>373</sup> *Dickerson v. Raphael* arose after a daughter secretly taped a conversation she had with her mother, in the presence of other relatives, concerning her mother's participation in the Church of Scientology.<sup>374</sup> The daughter received help in intercepting the conversation from producers for the Sally Jesse Raphael talk show.<sup>375</sup> The daughter wore a microphone that transmitted the conversation to the producers, who later used excerpts of the conversation on the talk show.<sup>376</sup> The mother, who declined to appear on the show, sued Sally Jesse Raphael claiming that the producers had violated Michigan Compiled Laws § 750.539 and § 28.807, both of which prohibit eavesdropping, and the use or divulgence of any information obtained from eavesdropping.<sup>377</sup> A jury decided the case in favor of Raphael.<sup>378</sup>

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<sup>371</sup> *Id.* at 31-32.

<sup>372</sup> *Id.* at 33. The court also supported its opinion with *Boehner v. McDermott*, 484 F.3d 573(D.C. Cir. 2007)(indicating that if a Congressman had been a private citizen the court would have granted First Amendment protection to his disclosure of an illegal interception of the conversation of another Congressman).

<sup>373</sup> *See Dickerson v. Raphael*, 564 N.W.2d 85, 88 (Mich. Ct. App. 1997).

<sup>374</sup> *Id.* at 87.

<sup>375</sup> *Id.*

<sup>376</sup> *Id.* at 88.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

The Michigan appellate court rejected Raphael's argument that the producers did not violate the Michigan statutes because the conversation was not "private." Because neither statute contained a definition of private, the court resorted to a dictionary definition that defined private as "intended for or restricted to the use of a particular person or group or class of persons."<sup>379</sup> The court ruled that the trial court erred in interpreting the statute as allowing a participant in a conversation to "broadcast [the conversation] simultaneously to other nonparticipants."<sup>380</sup> The trial court had based this ruling on a case in which a court had allowed the police to monitor informants with eavesdropping devices.<sup>381</sup> The court of appeal found this case inapplicable because the statutes contain exceptions for law enforcement; the present case did not involve the police, only private persons.<sup>382</sup> Further, the court found that the trial court erred in reasoning that if one participant broadcasts a conversation, that conversation would no longer be private.<sup>383</sup> The trial court had based its reasoning on cases in which courts had found that users of cordless telephones knew that the telephones could possibly transmit their conversations to others beyond those intended, and therefore defendants who overheard these conversations were not liable under Title III.<sup>384</sup> The appellate court found that unlike the plaintiffs in the cases involving cordless phones, the mother in this case did not know about or consent to the interception of her conversation.<sup>385</sup>

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<sup>379</sup> *Id.* at 89 (quoting *Webster's Third New International Dictionary, Unabridged Edition* (1966)).

<sup>380</sup> 564 N.W.2d at 89.

<sup>381</sup> *Id.* (citing *People v. Collins*, 475 N.W.2d 684 (Mich. 1991)).

<sup>382</sup> 564 N.W.2d at 89.

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* (citing *Tyler v. Berodt*, 877 F.2d 705 (8<sup>th</sup> Cir. 1989) and *Edwards v. Bardwell*, 632 F. Supp. 584 (M.D. La. 1986)).

<sup>385</sup> 564 N.W.2d at 89.

The court decided that as a matter of law, the producers conduct violated the Michigan eavesdropping statutes, and therefore, the case warranted a directed verdict in favor of the mother.<sup>386</sup> The court ruled that the conversation between the mother and daughter was private, as the mother testified that she expected the conversation to be private, and both the daughter and the producers knew that the mother would not have consented to have the conversation recorded.<sup>387</sup> The court also found that

While the First Amendment protect[ed] the publication of truthful information of legitimate public concern, the information may not be obtained unlawfully: “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.”<sup>388</sup>

The court found that the Michigan eavesdropping statutes were generally applicable laws “that only have an incidental effect on defendants’ newsgathering and reporting.”<sup>389</sup> The Supreme Court of Michigan later reversed, in part, the judgment of the appellate court and remanded the case for consideration of the issue of whether the conversation was private.<sup>390</sup>

## **Minnesota**

Like many other states, the Minnesota wiretapping statute was modeled after Title III.<sup>391</sup> Like Title III, the Minnesota statute attaches liability to anyone who intentionally intercepts an oral communication.<sup>392</sup> The statute also provides an exemption for a party to the conversation so

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<sup>386</sup> *Id.* at 90. Black’s Law Dictionary defines “directed verdict” as, “A ruling by a trial judge taking a case from the jury because the evidence will permit only one reasonable verdict.” BLACKS LAW DICTIONARY 746 (2d ed. 2001).

<sup>387</sup> 564 N.W.2d at 90.

<sup>388</sup> 564 N.W.2d at 92 (citing *Cohen v. Cowles Media Co.*, 501 U.S. 661, 669(1991)).

<sup>389</sup> 564 N.W.2d at 92.

<sup>390</sup> *See Dickerson v. Raphael*, 601 N.W.2d 108 (Mich. 1999).

<sup>391</sup> *See Copeland v. Hubbard Broad., Inc.*, 526 N.W.2d 402 (Minn. Ct. App. 1995).

<sup>392</sup> MINN. STAT. § 626A.02(1)(a)(1992).

long as the interception was in furtherance of a crime or tort.<sup>393</sup> A Minnesota appellate court has found that the burden of proving that an interception was in furtherance of a crime or tort lay with the plaintiff.<sup>394</sup>

In *Copeland v. Hubbard Broadcasting*, a couple allowed an intern to accompany a veterinarian into their home to treat their cat.<sup>395</sup> Neither the couple nor the doctor knew that the student was also an employee of a local television station, who at the time of the visit wore a hidden camera to videotape the doctor's methods.<sup>396</sup> The station later broadcast excerpts from the recordings. The couple sued the station for trespass and later moved to amend their complaint to include a claim for a violation of both Title III and the Minnesota wiretap statute.<sup>397</sup> The trial court denied their motion.

The appellate court affirmed the trial court's ruling and found that the couple had not presented evidence that would create a "triable issue."<sup>398</sup> The court also rejected the couple's claim that the station was not exempted from the Minnesota statute because the station had committed trespass. The court ruled that the couple's allegation of trespass was "insufficient because the statute requires that the communication be intercepted for the purpose of committing a tortious act. The evidence is undisputed that [the station] intercepted the communication for

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<sup>393</sup> MINN. STAT. § 626A.02(2)(d)(1992).

<sup>394</sup> *Copeland*, 526 N.W.2d at 406 (citing *Thomas v. Pearl*, 998 F.2d 447, 451 (7<sup>th</sup> Cir. 1993)).

<sup>395</sup> 526 N.W.2d at 404.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* at 406.

commercial purposes and not for the purpose of committing trespass.”<sup>399</sup> Therefore, the court affirmed the trial court’s denial of the couple’s motion to amend their complaint.<sup>400</sup>

## **New Jersey**

The New Jersey Wiretapping and Electronic Surveillance Control Act, modeled after Title III, allows anyone whose conversation has been intercepted or disclosed to file a civil suit against the individual who intercepted or disclosed their conversation.<sup>401</sup> In *Hornberger v. ABC, Inc.*,<sup>402</sup> two policemen sued ABC after hidden cameras recorded the officers stopping, frisking, and searching the car occupied by three young black men. Producers from ABC arranged for the three men to drive one of their mother’s Mercedes on the New Jersey highway to “test” complaints of law enforcement targeting blacks.<sup>403</sup> ABC broadcast clips from the footage taken by hidden cameras on its *PrimeTime Live* television program; the officers sued under the New Jersey wiretap statute. Ruling that the officers had no expectation of privacy in their conversation while searching the car, the trial court granted ABC summary judgment.<sup>404</sup>

The New Jersey appellate court affirmed the grant of summary judgment on appeal. Although the officers did not consent to have their conversation recorded, the court found that they did not have a reasonable expectation of privacy while searching the car.<sup>405</sup> This was because the car was considered open and publicly accessible:

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<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> N.J. STAT. ANN. §§ 2A:156A-1 to -34.

<sup>402</sup> 799 A.2d 566 (N.J. Super. Ct. App. Div. 2002).

<sup>403</sup> *Id.* at 586.

<sup>404</sup> *Id.*

<sup>405</sup> *Id.* at 627.

Here, the location of the conversation [the officers] was more akin to an open, accessible place than an enclosed, indoor room. The search of the car occurred on the shoulder of a busy public highway. Automobiles and other means of transportation are afforded a lower expectation of privacy than homes, offices and other structures. The four doors of the Mercedes were wide open while [the officers] were conducting their search, rendering the vehicle even more exposed. These officers were public servants performing their police function in public view.<sup>406</sup>

Because the officers were performing the search in public, and because they were on duty, the officers' "expectation of privacy [was] restricted."<sup>407</sup> The court ruled, therefore, that summary judgment for ABC was appropriate.

## **Oregon**

A media defendant challenged the constitutionality of the Oregon wiretap statute in *Oregon v. Knobel*.<sup>408</sup> While being interviewed by a reporter for a local newspaper, a deputy noticed that the reporter had a tape recorder in his shirt pocket.<sup>409</sup> The officer asked the reporter if he knew that it was illegal to record a conversation without permission, to which the reporter replied in the affirmative.<sup>410</sup> The conversation continued for another 10-15 minutes.<sup>411</sup> The reporter was charged with violating Oregon Revised Statutes § 165.540(1)(c), which provides that "no person shall...obtain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if all participants in the conversation are not specifically informed that their conversation is being obtained."<sup>412</sup> The reporter was convicted of the statutory violation.

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<sup>406</sup> *Id.* at 623 (citations omitted).

<sup>407</sup> *Id.* at 625.

<sup>408</sup> 777 P.2d 985 (Or. Ct. App. 1989).

<sup>409</sup> *Id.* at 987.

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> *Id.* (quoting OR. REV. STAT. § 165.540(1)(c)).

On appeal the reporter argued that the statute violated his freedom of press under both Oregon and U.S. Constitutions, because it prevented him from transcribing notes from a conversation and it interfered with his ability to gather news.<sup>413</sup> The court rejected his claims, and found that the statute did not prevent him from taking notes because the statute was aimed at prohibiting electronic surveillance.<sup>414</sup> By transcribing a recording, a person was not making an interception, therefore, there was no violation of the law. Further, the court ruled, “prohibiting surreptitious tape recording of a conversation does not restrict [the reporter’s] right to communication with individuals or to gather news.”<sup>415</sup> The court found that the First Amendment did not “invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.”<sup>416</sup> The court held that the Oregon statute did not impermissibly burden the press and was, therefore, constitutional.<sup>417</sup>

## **Pennsylvania**

The constitutionality of the application of Pennsylvania’s wiretap statute with regard to the press was challenged in the 1991 case of *Boettger v. Loverrro*.<sup>418</sup> In *Boettger*, the Pennsylvania State Police intercepted Boettger’s telephone conversation pursuant to a warrant obtained under the Pennsylvania wiretap statute.<sup>419</sup> The conversation revealed Boettger’s involvement with illegal gambling. Boettger was later charged with bookmaking and

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<sup>413</sup> 777 P.2d at 987-989.

<sup>414</sup> *Id.* at 988.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* at 989.

<sup>417</sup> *Id.* The court did, however, remand the case for a new trial as to whether or not the tape recorder was hidden and to for the trial courts err in not excluding evidence of bias. *Id.* at 989-990.

<sup>418</sup> 587 A.2d 712 (Pa. 1991).

<sup>419</sup> *Id.* at 713.

conspiracy.<sup>420</sup> While awaiting trial Boettger filed a motion to compel the District Attorney to produce a transcript of the intercepted call. The District Attorney complied and attached a copy of the transcript to a response, and filed it with the Clerk of Court.<sup>421</sup> Boettger also filed a motion to suppress the intercepted call.<sup>422</sup> Loverro, a reporter who attended the hearing for the suppression motion went to the Clerk of Court's office to see the court file for the case.<sup>423</sup> The reporter was allowed to inspect the file including the transcript of the interception, from which the reporter made notes for publication.<sup>424</sup> Publication of the story was withheld, however, until the court issued an order denying Boettger's motion to suppress.<sup>425</sup> Boettger sued the reporter claiming a violation of the Pennsylvania wiretap statute.<sup>426</sup>

The trial court granted Boettger a directed verdict as to the newspaper's liability for violating the wiretap statute from the reporter's disclosure of the transcript information.<sup>427</sup> The trial court also denied the newspaper's motions for a judgment notwithstanding the verdict and a new trial.<sup>428</sup> The Pennsylvania intermediate appellate court reversed the trial court's ruling, and entered a ruling for the newspaper. The Pennsylvania Supreme Court reversed the intermediate

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<sup>420</sup> *Id.* at 714.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.* This motion was filed pursuant to 18 Pennsylvania Constitutional Statutes § 5721, which allows "any aggrieved person in any trial...to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom." 18 PA. CONS. STAT. § 5721.

<sup>423</sup> 587 A.2d at 714.

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

<sup>426</sup> *Id.* 18 Pennsylvania Constitutional Statutes § 5725 creates a civil cause of action for "any person whose wire or oral communication is intercepted, disclose or used." 18 PA. CONS. STAT. § 5725.

<sup>427</sup> 587 A.2d at 715.

<sup>428</sup> *Id.* A judgment notwithstanding the verdict, or non obstante veredicto, is "a judgment entered for one party even though a jury verdict has been rendered for the opposing party." BLACK'S LAW DICTIONARY 378 (2d ed. 2001).

appellate court.<sup>429</sup> The newspaper then filed a petition for certiorari to the U.S. Supreme Court, which vacated and remanded the case to the Pennsylvania Supreme Court in light of the *Florida Star v. B.J.F.*<sup>430</sup> decision.<sup>431</sup> On remand, the Pennsylvania Supreme Court found the three *Smith v. Daily Mail*<sup>432</sup> considerations, as stated in *Florida Star*, to be applicable to the *Boettger* case.<sup>433</sup>

The *Boettger* court identified those considerations as:

[F]irst the government has “ample means of safeguarding significant interests upon which publication may impinge” since the publication of only lawfully obtained information is protected; second, punishing the press for publication of information already publicly available is relatively unlikely to further the interest for which the state seeks to act; and third, “timidity and self-censorship” may result from permitting punishment of the media for publishing truthful information.<sup>434</sup>

First the *Boettger* court found that “the transcripts in this case [did] not fall within the category of recordation or transcription of interceptions intended to be protected by the Act.”<sup>435</sup>

The transcripts were submitted by the District Attorney to the Clerk of Court, thereby making the transcript a public record without any restrictions on access or disclosure.<sup>436</sup> Also, the information from the transcript was not of the categories of information the statute was designed to protect.<sup>437</sup> The excerpts of the transcripts used in the news story detailed Boettger’s dealing with illegal gambling. According to the court, “This is precisely the type of conversation sought to be uncovered by the authorized interceptions of the Act. The state’s interest in protecting our

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<sup>429</sup> 587 A.2d at 715.

<sup>430</sup> 491 U.S. 524 (1989).

<sup>431</sup> 587 A.2d at 715.

<sup>432</sup> 443 U.S. 97 (1979).

<sup>433</sup> 587 A.2d at 716.

<sup>434</sup> *Id.* (quoting *Florida Star*, 491 U.S. at 533-535).

<sup>435</sup> 587 A.2d at 717.

<sup>436</sup> *Id.* at 718.

<sup>437</sup> *Id.*

citizens' right to privacy does not extend to protecting a 'right to privacy' in illegal endeavors."<sup>438</sup> The court also found that the denial of the motion to suppress the interception removed any protection for the transcript under the statute.<sup>439</sup>

Finally, the court found that the newspaper had made a good faith reliance on the denial of the motion to suppress, as illustrated by the newspaper's waiting for the court order denying the motion to publish the story.<sup>440</sup> The court noted "the teachings of *Florida Star* tell us that to disallow the reliance of Easton upon the court order as a defense to the civil suit is to run afoul of the constitutional infirmity of 'timidity and self-censorship.'"<sup>441</sup> The court found that the press served a purpose by disseminating information, which is protected by the First Amendment's press clause.<sup>442</sup>

It is the freedom of dissemination of information and ideas of public importance that is the bonding agent in a democracy. Without dispute, it is in the public interest to have a free press. Thus the legislature intended for the public interest in a free press to supercede the interest of an individual whose private conversation regarding his illegal activities had been lawfully intercepted and lawfully obtained by a newspaper.<sup>443</sup>

Therefore, the court affirmed the judgment of the intermediate appellate court, and ruled in favor of the newspaper.<sup>444</sup>

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<sup>438</sup> *Id.* The court examined the statute's legislative history to find that illegal activity such as blackmail, kidnapping, and gambling were the kind of activities that the legislature was concerned with in authorizing law enforcement power to intercept telephone conversations. *Id.*

<sup>439</sup> *Id.* at 719. The court found that "the court order denying the motion to suppress placed the contents of the wiretapped conversation squarely into the category of evidence which is neither privileged nor protected." *Id.*

<sup>440</sup> *Id.* 719-720.

<sup>441</sup> *Id.* at 720 (quoting *Florida Star*, 491 U.S. at 535-536).

<sup>442</sup> 587 A.2d at 720.

<sup>443</sup> *Id.* at 720-721.

<sup>444</sup> *Id.* at 721.

## Texas

The press has also challenged the constitutionality of the Texas wiretap statute.<sup>445</sup> *Stephens v. Dolcefino* involved a television station's hidden camera investigation of a city politician. A reporter for KTRK Television began an investigation of the City of Houston Controller.<sup>446</sup> To do so, the reporter sent a researcher from the television station to a legal education conference, at which the Controller was in attendance, equipped with a hidden camera.<sup>447</sup> At the conference, the researcher filmed the Controller, along with other public officials, and recorded their conversations using the hidden camera.<sup>448</sup> The next month, the television station broadcast footage recorded on the researcher's camera.<sup>449</sup> William Stephens, then Deputy Controller of the City of Houston, sued the station claiming the station had violated the Texas wiretap statute.<sup>450</sup> The trial court granted the television stations motion for summary judgment partially on the ground that the application of the statute violated the First Amendment.<sup>451</sup>

On appeal, Stephens argued that the trial court erred in granting summary judgment to the television station.<sup>452</sup> The Texas appellate court agreed. According to the appellate court, the television station relied on cases where the media defendant lawfully obtained truthful

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<sup>445</sup> See *Stephens v. Dolcefino*, 126 S.W.3d 120 (Tex. Ct. App. 2003). See also *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5<sup>th</sup> Cir. 2000)(holding that neither Title III nor the Texas wiretap act infringed upon the First Amendment).

<sup>446</sup> 126 S.W.3d at 124.

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

<sup>450</sup> *Id.* at 125.

<sup>451</sup> *Id.* at 137.

<sup>452</sup> *Id.*

information.<sup>453</sup> But the court found that “the media ‘has no special immunity from the application of general laws. [It] has no special privilege to invade the rights and liberties of others.’”<sup>454</sup> Further the court found that it was for a jury to decide whether the television station’s use of the hidden camera to record the conversations was lawful.<sup>455</sup> The court found that until that issue of lawfulness was resolved, the court could not determine whether the television station could use the First Amendment as a defense to the wiretapping charge.<sup>456</sup>

## Washington

The Washington privacy statute,<sup>457</sup> like wiretap statutes, prohibits the recording of private conversations without consent, has also been challenged for constitutionality under the First Amendment with respect to journalists. But, the court in that case did not definitively decide on the statute’s constitutionality.<sup>458</sup> *Fordyce v. City of Seattle* arose from the arrest of a journalist, Jerry Fordyce, who was filming a public demonstration. Police arrested Fordyce for violating the Washington privacy statute.<sup>459</sup> Although the charges were later dropped, Fordyce filed suit against the city claiming the police had violated his civil rights by interfering with his First Amendment right to gather news.<sup>460</sup> He also petitioned the court for a permanent injunction against the enforcement of the Washington statute.<sup>461</sup> The federal district court

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<sup>453</sup> *Id.*

<sup>454</sup> *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972)).

<sup>455</sup> 126 S.W.3d at 137.

<sup>456</sup> *Id.*

<sup>457</sup> WASH. REV. CODE § 9.73.030.

<sup>458</sup> *See Fordyce v. City of Seattle*, 55 F.3d 436 (9<sup>th</sup> Cir. 1995).

<sup>459</sup> *Id.* at 438.

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

granted the city’s motion for summary judgment on the civil rights claims and declined to grant Fordyce injunctive relief.<sup>462</sup> Instead, the court granted Fordyce declaratory relief, stating that the Washington statute “does not prohibit the videotaping or sound-recording of conversations held in a public street, within the hearing of persons not participating in the conversation, by means of a readily apparent recording device.”<sup>463</sup>

On appeal, the Ninth Circuit found that there were issues of material fact as to whether the police attempted to prevent Fordyce from exercising his First Amendment rights by arresting him under the statute.<sup>464</sup> Further the Ninth Circuit vacated the trial court’s grant of a declaratory judgment, finding that the federal district court never informed the State of Washington that it planned to render a declaratory judgment as to the constitutionality of the state statute.<sup>465</sup> Therefore, the State of Washington did not have an adequate opportunity to defend the statute.<sup>466</sup>

### **Conclusion**

As evidenced by the cases documented above, the courts may carve out First Amendment protections for the press in cases brought under the federal wiretap statute. When the press has not directly participated in the recording of a communication, but has still acquired the information from that recording, the majority of the courts have relied on the *Florida Star/Daily Mail* considerations in order to determine whether or not the First Amendment protected the press. In *Bartnicki*, the controlling Supreme Court case on this issue, the Court used the *Florida*

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<sup>462</sup> *Id.* at 439.

<sup>463</sup> *Id.* (quoting *Fordyce v. City of Seattle*, 840 F. Supp. 784, 794 (W.D. Wash. 1993).

<sup>464</sup> 55 F.3d at 439.

<sup>465</sup> *Id.* at 440.

<sup>466</sup> *Id.* The court concluded that the district court had failed to comply with 28 U.S.C. § 2403(b), which requires that when a state or state agency is not a party to an action where the constitutionality of a statute is in question, the court must notify the state to allow it to intervene in the action. 28 U.S.C. § 2403(b).

*Star/Daily Mail* precedent in ruling that the publication of wiretap information by the press was constitutionally protected.

The courts placed a great emphasis on the method of newsgathering. How the journalists obtained the information was noted in all of the cases in which the press was not a party to the underlying recording. The press obtained information from the government and from private individuals. In cases where the press obtained information from the government, the courts found that the press' publication was not a violation of Title III. In the cases where the press obtained information from private individuals, the courts were mixed in judgment, sometimes finding that the press was protected by the First Amendment, other times not. In spite of the mixed results in these opinions, the courts have found that the purpose of the use of hidden cameras and microphones, newsgathering, played an integral part in whether the disclosure of the information will be considered lawful.

As in the cases brought against the press under Title III, the press has asserted First Amendment protection for newsgathering activities when prosecuted under state wiretap statutes. In deciding these cases the courts, the federal and state courts have balanced competing interests. One of the main interests competing with the journalists' right of freedom of the press was the right to privacy. Courts have had to determine whether the journalists right to gather news outweighed an individual's right to privacy in their conversation. Preliminarily, however, the courts had to decide whether the expectation of privacy in that conversation was reasonable. Also, the courts had to balance the public interest in receiving the information gathered against that individual's right to privacy. In addition, some courts made assertions concerning the techniques that newsgathering necessitated, and found that the press had no privilege to disobey laws of general applicability. Therefore, when a journalist disobeyed one of these laws, the First

Amendment provided no shield from liability for the unlawful acquisition of truthful information.

## CHAPTER 4 INTRUSION AND TRESPASS

The November 1, 1963 edition of *Life Magazine* carried an article entitled “Crackdown on Quackery,” and featured photographs of A.A. Dietemann, a plumber practicing healing with minerals, herbs, and clay.<sup>1</sup> A few weeks earlier, officers arrested Dietemann for practicing medicine without a license. *Life Magazine* photographers took pictures of Dietemann as officers arrested him at his home in California.<sup>2</sup>

The magazine also used pictures that were taken, without Dietemann’s knowledge or permission, inside of his home. Before Dietemann’s arrest, two *Life Magazine* employees, working in conjunction with the District Attorney’s Office of Los Angeles County, gained entry to Dietemann’s home by posing as patients seeking his medical help.<sup>3</sup> While inside Dietemann’s house, the magazine employees took pictures using a hidden camera. The magazine workers’ conversation with Dietemann was also transmitted by a hidden radio transmitter and recorded.<sup>4</sup> Dietemann sued the magazine publisher for invasion of privacy.

Invasion of privacy by intrusion upon seclusion is a commonly alleged newsgathering tort. In intrusion cases, plaintiffs claim that the press intruded, “whether by physical trespass or not, into spheres from which an ordinary man in plaintiff’s position could reasonably expect that the particular defendant should be excluded.”<sup>5</sup> Plaintiffs have claimed various “spheres” of privacy including, their homes,<sup>6</sup> a public restaurant,<sup>7</sup> and their place of businesses.<sup>8</sup> Related to,

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<sup>1</sup> Dietemann v. Time, 449 F.2d 245, 245 (1971).

<sup>2</sup> *Id.* at 246.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See Pearson v. Dodd, 410 F.2d 701, 704 (1969).

<sup>6</sup> Dietemann v. Time, 449 F.2d 245 (1971).

and often claimed with, intrusion is trespass. Trespass is entry upon the property of another without permission.<sup>9</sup> Journalists were claimed to have trespassed while covering protests,<sup>10</sup> entering a crime scene<sup>11</sup> and, investigating auto repair shops.<sup>12</sup>

This chapter examines cases in which the press is alleged to have intruded upon someone's privacy or trespassed. Specifically this chapter discusses those cases in which the courts have analyzed journalists' assertions of First Amendment protection for their newsgathering activities in light of the claims of trespass and intrusion. First, this chapter explores cases involving intrusion in light of the different claimed spheres of privacy. Then this chapter considers cases in which the press is alleged to have trespassed. This chapter also explores cases based on media "ride-alongs," or when the media acts in conjunction with law enforcement, paramedics, or other first responders and public officials. This chapter ends with a summary of the main themes found in the intrusion and trespass cases.

### **Intrusion**

The Restatement of Torts defines an intruder as, "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns [ . That person] is subject to liability to the other for invasion of his privacy, if the

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<sup>7</sup> *Stressman v. Am. Black Hawk Broad. Co.*, 416 N.W.2d 685 (Iowa 1987).

<sup>8</sup> *Desnick v. ABC, Inc.*, 44 F.3d 1345, 1348 (7<sup>th</sup> Cir. 1995).

<sup>9</sup> BLACK'S LAW DICTIONARY 720 (2d Ed. 2001).

<sup>10</sup> *Stahl v. Oklahoma*, 665 P.2d 839 (Okla. 1983).

<sup>11</sup> *People v. Berliner*, 3 Media L. Rep. (BNA) 1942 (Yonkers (N.Y.) City Ct. 1978).

<sup>12</sup> *Am. Transmission, Inc. v. Channel 7 of Detroit, Inc.*, 609 N.W.2d 607 (Mich. Ct. App. 2000).

intrusion would be highly offensive to a reasonable person.”<sup>13</sup> Broken into its essential elements, intrusion requires proof that:

“the defendant committed an unauthorized intrusion or prying into the plaintiff’s seclusion; the intrusion would be highly offensive or objectionable to a reasonable person; the matter intruded on was private; and the intrusion caused the plaintiff anguish and suffering.”<sup>14</sup>

Publication of information is not an essential element of intrusion.<sup>15</sup> Intrusion rests solely on the nonconsensual prying or invasion into the spheres of privacy of another person through physical or other means.

## **Home**

The home is considered a major sphere of individual privacy. In *Dietemann*, the Ninth Circuit ruled that Dietemann had an expectation of privacy in his home.<sup>16</sup> When Dietemann invited the reporters into his private home, he did not assume the risk that his actions or conversation would be photographed or recorded.<sup>17</sup> The court also ruled that the First Amendment did not immunize the magazine from liability for the reporters’ invasion of Dietemann’s privacy.<sup>18</sup> The Ninth Circuit declined to recognize the hidden camera and recording device as “indispensable tools of investigative reporting.”<sup>19</sup> Although agreeing with the magazine’s claim that newsgathering was an important part of publication, the court rejected the magazine’s claim that the use of electronic devices was protected. The court explained:

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<sup>13</sup> RESTATEMENT (SECOND) OF TORTS § 652B (1977).

<sup>14</sup> 62A AM. JUR. 2d *Privacy* § 37 (2007).

<sup>15</sup> *Id.* at comment a.

<sup>16</sup> *Dietemann*, 449 F.2d at 249. For facts of the case *see supra* text accompanying notes 1-4.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

Investigative reporting is an ancient art; its successful practice long antedates the invention of miniature cameras and electronic devices. 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, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.<sup>20</sup>

The Ninth Circuit also observed that publication was not an essential element of intrusion, therefore, the magazine's reliance on defamation cases in its defense, in which the U.S. Supreme Court recognized protection for the publication of tortious information, were not persuasive against Dietemann's intrusion claim.<sup>21</sup> The court maintained that there was "no First Amendment interest in protecting news media from calculated misdeeds."<sup>22</sup> The court concluded that "[n]o interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired."<sup>23</sup>

Unlike the *Dietemann* Court, which ruled that a plaintiff had an expectation of privacy in his own home, a federal district court in Georgia ruled that a woman had no expectation of privacy in her private bedroom because she was engaged in "public" activity.<sup>24</sup> In *Lucas v. Fox News* a reporter went undercover as a college student to research a story on campus cult

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* Time, Inc. relied on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)(holding that public officials had to prove actual malice in libel cases) and *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971)(ruling that private plaintiffs had to prove more than the existence of libel in order to win a libel case). See also *Mayes v. LIN TV of Texas, Inc.*, 1998 U.S. Dist. LEXIS 15088. In *Mayes*, a case in which a public official sued a newspaper for reporting information received from a transcript and a copy of a secretly recorded telephone conversation, the federal district court addressed the elements of intrusion. The court found that intrusion was usually associated with "either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying." *Id.* at \*11.

<sup>22</sup> *Id.* at 250. Accord with *Mitchell v. Baltimore Sun Co.*, 883 A.2d 1008 (Md. Ct. Spec. App. 2004).

<sup>23</sup> *Id.*

<sup>24</sup> *Lucas v. Fox News Network, LLC*, 2000 U.S. Dist. LEXIS 22834, \*18 (N.D. Ga. 2000).

activity.<sup>25</sup> While investigating, the reporter met and became involved in Bible studies conducted by Esmeralda Lucas, who was a campus ministry leader for the local branch of an international church.<sup>26</sup> As part of her investigation, the reporter expressed to Lucas the desire to join the church. Lucas then invited the reporter to her home for a private Bible study.<sup>27</sup> While at Lucas' home, the reporter secretly recorded the study session; excerpts of the video footage were later used in a Fox News broadcast.<sup>28</sup> Lucas sued for invasion of privacy by intrusion upon seclusion.

The court determined that Lucas failed to establish all of the elements of an intrusion claim.<sup>29</sup> In Georgia, physical intrusion was required to prove intrusion; in this case Lucas consented to the reporter's presence in her home.<sup>30</sup> The court declined to rule that the reporter's misrepresentation of being a college student did not vitiate consent for the purposes of intrusion.<sup>31</sup> The court found that the reporter entered premises that were essentially opened to anyone who expressed an interest in membership in the church.<sup>32</sup> The court explained that the focus of the reporter's investigation was on the church's activities in the community. During the course of the investigation "facts about Lucas that the [] report may have revealed—that she [wa]s a member of the Church and that her role [wa]s a Church member ... are most certainly

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<sup>25</sup> *Id.* at \*1-2.

<sup>26</sup> *Id.* at \*2.

<sup>27</sup> *Id.* at \*3.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at \*13.

<sup>30</sup> *Id.* *Accord with* Pierson v. News Group. Publ'ns, Inc., 549 F. Supp. 635 (S.D. Ga. 1982), in which a federal district court ruled that because the commanding officers of a military base had consented to the media's entry for newsgathering purposes, a soldier had no claim for intrusion. *Id.* at 640.

<sup>31</sup> 2000 U.S. Dist. LEXIS 22834 at \*17.

<sup>32</sup> *Id.*

public or community activities, not private affairs.”<sup>33</sup> Lucas, then, had no expectation of privacy when she invited the reporter into her home, therefore, she had no claim for intrusion.<sup>34</sup>

The Ninth Circuit also found that a plaintiff had no expectation of privacy at her home with respect to public activities. In *Deteresa v. ABC, Inc.*,<sup>35</sup> a producer from ABC visited the home of Beverly Deteresa who had been a flight attendant on the flight that O.J. Simpson had taken after the murder of his ex-wife.<sup>36</sup> Deteresa never allowed the producer into her home but did express that she did not want to be interviewed for the news program. She did, however, continue to talk to the producer at her door and explained that she was “frustrated” with hearing some of the false news reports being published about what occurred on the flight with O.J. and explained to the producers some of the details of what really occurred.<sup>37</sup> The next day the producer called Deteresa to ask her if she would appear on camera; she declined. While the producer spoke with Deteresa, a camera crew filmed her from a public street; the producer also surreptitiously recorded their conversation. That night, ABC broadcast a clip of the news program “Day One” in which the announcer stated that “the flight attendant who served Simpson

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<sup>33</sup> *Id.* at \*18.

<sup>34</sup> See also *Ouderkirk v. People for the Ethical Treatment of Animals*, 2007 U.S. Dist. LEXIS 29451 (E.D. Mich. 2007). In *Ouderkirk* the court ruled that a chinchilla rancher did not have a cause of action for intrusion against a member of PETA, even though the PETA member lied to gain access to the man’s ranch and to videotape the man’s seminars of chinchilla ranching, later publishing excerpts from the videotape on a Web site, and in a newsletter. The court ruled that the rancher waived his expectation of privacy when he twice invited the PETA member to his ranch. *Id.* at \*42. The court also found that the PETA member’s deception did not void the rancher’s consent “when the activity exposed involves a commercial endeavor where no embarrassingly intimate details of anybody’s life were publicized.” *Id.*

<sup>35</sup> 121 F.3d 460 (9<sup>th</sup> Cir. 1997).

<sup>36</sup> *Id.* at 462.

<sup>37</sup> *Id.* 462-463.

in the first class section told ‘Day One’ that she did not, as widely reported, see him wrap his hand in a bag of ice.”<sup>38</sup> Deteresa sued for intrusion.

The Ninth Circuit articulated the Restatement of Torts definition of intrusion, adopted by California, which delineates the elements of intrusion as, “One who intentionally intrudes, physically or otherwise, upon 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.”<sup>39</sup> The court noted that as a matter of law it was required to make a preliminary determination of “offensiveness,” which required that it consider “the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder’s motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded.”<sup>40</sup>

The court determined that the filming of Deteresa, who was in public view, from a public place did not intrude upon Deteresa’s seclusion.<sup>41</sup> The court found that the filming had an “insubstantial impact on [Deteresa’s] privacy interests.”<sup>42</sup> The court ruled that the surreptitious recording also was insufficiently offensive for an intrusion claim.<sup>43</sup> The court reasoned that Deteresa spoke openly with the producer, and the producer never entered her home. The Ninth

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 465. (quoting Restatement (2d) Torts § 652B).

<sup>40</sup> 121 F.3d at 465 (quoting *Miller v. NBC*, 232 Cal. Rptr. 668, 678 (Cal. Ct. App. 1986)).

<sup>41</sup> *Id.* at 466.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Circuit also did not find evidence that “any intimate details of anyone’s life were recorded.”<sup>44</sup> Consequently, Deteresa’ intrusion claim failed.

An Alabama circuit court also ruled that a man did not have a cause of action for intrusion when journalists photographed him outside of his home after a crime. In *White v. Anniston Star*, journalists from a local newspaper photographed Marvin White and his daughter, who stood in White’s front yard, after a fatal shooting at White’s house.<sup>45</sup> The police had roped off White’s yard with crime scene tape, and both journalists and other onlookers stood on the dirt road leading to the house.<sup>46</sup> White claimed to have an easement for use of the dirt road.<sup>47</sup> When White’s daughter noticed the photographer taking pictures, she ordered the photographer to leave the scene; the journalist left after the confrontation.<sup>48</sup> The next day, the newspaper published one of the photographs of White and his daughter in conjunction with a story on the shooting.<sup>49</sup> White sued for intrusion.

The court found that although White had an easement to use the dirt road, he did not have the right to prevent others from using it; White did not own the dirt road.<sup>50</sup> Also, the journalists were among several members of the public and law enforcement observing the crime scene.<sup>51</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> 28 Media. L. Rep. 2302, 2303 (Ala. Cir. Ct. 2000). White’s son shot and killed his former girlfriend, then drove to a national forest and committed suicide. *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* Black’s Law Dictionary defines an easement as “an interest in land owned by another person, consisting in the right to use or control the land...for a specific limited purpose.” BLACK’S LAW DICTIONARY 226 (2d. Pocket Ed. 2001).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 2304.

<sup>51</sup> *Id.*

The court also noted that White knew that the journalist was taking pictures, but did not request that the journalist stop.<sup>52</sup> The court, therefore, concluded that White “had no reasonable expectation of privacy or seclusion when he came into the yard in full view of a crowd of law enforcement officials and onlookers.”<sup>53</sup>

### **Private Gatherings**

Some courts have found no First Amendment protection for journalists that intrude into private gatherings. In *Rafferty v. Hartford Courant Co.*, for example, a Connecticut superior court ruled that the press had no privilege to intrude upon an “unwedding” party.<sup>54</sup> Kathleen Rafferty and a male friend held the party in celebration of their recent divorces.<sup>55</sup> Although she held the party on a hill visible to the public at a distance, the party was only open to invited guests.<sup>56</sup> A photographer and a reporter for the *Hartford Courant* infiltrated the party, however, and took pictures and made notes about the event; at no time were the reporters given permission to attend or to report on the party.<sup>57</sup> The newspaper published an article on the unwedding accompanied by a picture taken at the ceremony.<sup>58</sup> Rafferty sued for intrusion.<sup>59</sup>

The court ruled that summary judgment for the newspaper was inappropriate because the newspaper was not working in the public interest when it intruded into the party.<sup>60</sup> Although not

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<sup>52</sup> *Id.* The court makes no mention of the daughter’s confrontation with the journalists.

<sup>53</sup> *Id.*

<sup>54</sup> 416 A.2d 1215, 1216 (Conn. Super. Ct. 1980).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* Rafferty also sued for invasion of privacy by publication of private facts and false light. *Id.*

<sup>60</sup> *Id.* at 1221.

analyzing the newspaper's motion for summary judgment on the intrusion claim substantively, the court did provide a significant analysis of the freedom of the press. The court noted that if the information about the party was "obtained fairly and legitimately it might be considered to be of some minor concern to some minor part of the public."<sup>61</sup> Determining that there was no public interest in the story on Rafferty's unwedding, the court rejected the idea that the public had a right to know about everything:

That concept implies the infusion of knowledge into the public mind. In fact, what the public has is a "right to find out." That right is not absolute. The public has no right, for example, to break into a private home to see what pictures are on the wall, or to peek into a voting booth to see how someone votes. A newspaper can at best, claim only to be one of the public. It has the same "right to find out" as the rest of the public.<sup>62</sup>

Viewing that the press as only a member of the public, the court found that the press had "no greater right to intrude to obtain information than each citizen has because each citizen has the same right to publish."<sup>63</sup>

The court expressly rejected Justice Brennan's suggestion in *Time, Inc. v. Hill*<sup>64</sup> that the press was different than the public.<sup>65</sup> In *Time, Inc. v. Hill*, a case in which a family sued a magazine for placing it in a false light, Justice Brennan, writing for the majority, stated that, "We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts..."<sup>66</sup> Justice Brennan in this statement, and the rest of the *Time, Inc.* opinion, seemed to

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1216-1217.

<sup>63</sup> *Id.* at 1217.

<sup>64</sup> 385 U.S. 374 (1967) (ruling that public figures in false light invasion of privacy actions had to prove actual malice).

<sup>65</sup> 416 A.2d at 1217.

<sup>66</sup> 385 U.S. at 389.

separate the press from the rest of the public. According to the *Rafferty* court, there was no historical justification for recognizing any difference between the public and the press.<sup>67</sup> The court explained that, “such a posture would seriously threaten the freedom of the press.”<sup>68</sup> “If ‘the press’ is a separate entity, then it must be identified. In the identification alone certain restrictions will necessarily creep in by way of the definition.”<sup>69</sup>

The court maintained that if the press was defined to exclude the rest of the public, it would possibly be licensed, and the rest of the public could be restrained from freely publishing.<sup>70</sup> The court articulated that, “There is no entity that is ‘the press’—there is only ‘all of us.’ Freedom of the press is the freedom of each person individually, collectively, jointly, severally, in partnership or corporation, by pen, Photostat or computer to publish what will be subject only to law.”<sup>71</sup>

A federal district court in California, like the *Rafferty* court, denied the press’ motion for summary judgment on a claim that a reporter intruded into private acting workshops.<sup>72</sup> In *Turnbull v. ABC* a group of actors sued ABC after a producer for the company attended and secretly recorded acting workshops in which the actors participated.<sup>73</sup> ABC decided that the workshops were public because the workshops were advertised in newspapers and trade publications.<sup>74</sup> In order to gain entry to the workshops, the producer had to pay a fee<sup>75</sup> and at

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<sup>67</sup> 416 A.2d at 1217. It is very rare for a lower court to reject the reasoning of the majority U.S. Supreme Court.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Turnbull v. ABC*, 2004 U.S. Dist. LEXIS 24351, \*50 (C.D. Cal. 2004).

<sup>73</sup> *Id.* at \*10-11.

<sup>74</sup> *Id.* at \*20.

one workshop she was required to sign a sign-in sheet that stated, “I am here to practice my acting in a professional atmosphere and sharpen my craft, I am here to hone my audition techniques.”<sup>76</sup> While at the workshops, the producer recorded a variety of conversations, most of which the producer was not a part.<sup>77</sup> The actors sued for intrusion.<sup>78</sup>

The court found that “clandestine recording of a private conversation without the authorization of the parties to the conversation, is often per se invasion of privacy, regardless of whether the conversation could have been overheard by a third party.”<sup>79</sup> Therefore, the court declined to agree with ABC’s argument that the actors did not have an expectation of privacy in their conversations because the conversations could be overheard.<sup>80</sup> Instead, the court ruled that the actors had a reasonable expectation that their conversations were private and not being recorded on a hidden camera, even though some other their conversations could be overheard.<sup>81</sup> The court found that the workshops took place in a private room of a private building, and that the actors “could not have expected, as they talked amongst themselves in the corners or against the wall of the classroom, in their chairs awaiting class to begin, much less the ladies room, that a reporter was covertly recording their conversations.”<sup>82</sup>

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<sup>75</sup> *Id.* at \*12.

<sup>76</sup> *Id.* at \*15.

<sup>77</sup> *Id.* at \*14.

<sup>78</sup> The actors also claimed trespass, emotional distress and a violation of Cal. Penal Code § 632, among other things. *Id.* at \*5.

<sup>79</sup> *Id.* at \*41. (citing *Sanders v. ABC, Inc.*, 85 Cal. Rptr.2d 909).

<sup>80</sup> *Id.* at \*45.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at \*46.

The court also held that “the mere fact that an intruder is in pursuit of a ‘story’ does not generally justify an otherwise invasive intrusion.”<sup>83</sup> Although a court’s determination that the press’ intrusion was offensive required consideration of the press’ motives, the court found that there were some “violation[s] of well-established legal areas of physical or sensory privacy [that could] rarely, if ever, be justified by a reporter’s need to get the story.”<sup>84</sup> The court reasoned that ABC’s surreptitious taping of the acting workshops was one such violation, finding there was no evidence that there was any public interest in the story.<sup>85</sup> The court further determined that ABC’s use of hidden cameras in reporting was gratuitous and only for aesthetic purposes, adding nothing to the actual investigation.<sup>86</sup> The court decided that “ABC had little justification in using hidden camera footage,” and denied ABC’s motion for summary judgment.<sup>87</sup>

In contrast to the rulings in *Rafferty* and *Turnbull*, the Tenth Circuit ruled that a photographer’s photographing of body of a soldier killed in combat was not intrusion because the funeral was open to the public.<sup>88</sup> In *Showler v. Harper’s Magazine Foundation*, the family of a member of the Oklahoma National Guard killed in Iraq sued *Harper’s Magazine* after a photographer for the magazine took pictures of the guardsman’s body at the guardsman’s funeral.<sup>89</sup> The guardsman’s death earned a lot of media attention because he was the first

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<sup>83</sup> *Id.* at \*47.

<sup>84</sup> *Id.* at \*47-48.

<sup>85</sup> *Id.* at \*48. The court found that ABC reported on the story weeks after the story first broke and several months after the investigation was complete. *Id.*

<sup>86</sup> *Id.* at \*48-48.

<sup>87</sup> *Id.* at \*50.

<sup>88</sup> *Showler v. Harper’s Mag. Foud.*, 222. Fed. App’x 755, 765 (10<sup>th</sup> Cir. 2007).

<sup>89</sup> *Id.* at 758-759.

member of the Oklahoma National Guard to be killed in combat since the Korean war.<sup>90</sup> The family expressed to the funeral home its wish to have an open casket funeral ceremony, but also that the press not be allowed to photograph the soldier's body.<sup>91</sup> The reporter from *Harper's* obtained permission to attend the funeral, but was informed that there would be a section at the back of the auditorium reserved for the press, and that he could not interview the guardsman's family.<sup>92</sup> The photographer took pictures of the funeral, which 1200 people attended. At the end of the ceremony, the guardsman's casket was moved to the back of the auditorium so that those in attendance wishing to view the body could do so as they filed out of the room.<sup>93</sup> The reporter for *Harper's* then took pictures of the guardsman's body.<sup>94</sup> The family did not learn of the pictures until the photographer sent the guardsman's father copies of the photos the reporter had taken during the funeral.<sup>95</sup> *Harper's Magazine* also published the photos and entered them into various competitions.<sup>96</sup>

The Tenth Circuit affirmed a district court's grant of summary judgment to the magazine stating that there was "no evidence that a reasonable jury could conclude that the intrusion was highly offensive to a reasonable person."<sup>97</sup> The court reasoned that the photographs were taken at a funeral that was open to the public, and held in an auditorium in order to accommodate the

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<sup>90</sup> *Id.* at 758.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 758-759.

<sup>94</sup> *Id.* at 759.

<sup>95</sup> *Id.* After the funeral, the reporter approached the guardsman's father and offered to send him copies of the photographs that he had taken. *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 764.

members of the public that wished to attend.<sup>98</sup> Further, the court found that the reporter took the pictures while in the area reserved for the press, and that other photographers were present.<sup>99</sup>

A Kentucky circuit court, similarly, found that a television station did not intrude on the privacy of a horse trainer when a television crew filmed the him on the grounds of a horse riding competition.<sup>100</sup> In *Stith v. Cosmos Broadcasting*, the television show *Inside Edition* filmed Kevin Stith, a horse trainer, as he explained the use of chains in horse training.<sup>101</sup> The filming took place at The Celebration, where horse shows were held.<sup>102</sup> *Inside Edition* then used the footage in a show about horse abuse.<sup>103</sup> Stith sued the tabloid program for intrusion.<sup>104</sup>

The court held, however, that Stith had no reasonable expectation of privacy at The Celebration.<sup>105</sup> The Celebration was a venue open to the public, therefore, *Inside Edition* did not intrude on Stith's privacy.<sup>106</sup> Further, Stith did not indicate that he did not want the public to hear his comments about horse training using chains.<sup>107</sup> The Court also found that Stith was well known in the horse training industry, and he made no indication that he wanted to keep his status in that industry private.<sup>108</sup> Consequently, the court ruled for the television program.

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<sup>98</sup> *Id.* at 765.

<sup>99</sup> *Id.*

<sup>100</sup> *Stith v. Cosmos Broad. Inc.*, 25 Media L. Rep. (BNA) 1151, 1155 (Ky. Cir. Ct. 1996).

<sup>101</sup> *Id.* at 1152.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* Stith also sued for defamation. *Id.*

<sup>105</sup> *Id.* at 1155.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

## Work

Considering the rulings of both federal and state courts in intrusion cases, it is unclear whether a person's place of business is considered a sphere of privacy. For example in *Mark v. King Broadcasting*,<sup>109</sup> a pharmacist, under investigation for Medicaid fraud, sued a television channel for intrusion after the station filmed him while he was inside of his pharmacy.<sup>110</sup> The cameraman shot the footage of the pharmacist completely from the exterior of the pharmacy, through the pharmacy's window.<sup>111</sup> The channel aired a clip of the footage during a report on the investigation of the pharmacist.<sup>112</sup>

The Washington state court of appeal ruled that there was no intrusion because the film was shot from the exterior of the pharmacy in a "place that was open to the public."<sup>113</sup> According to the court "intrusion must be of something which the general public would not be free to view."<sup>114</sup> In this case, the court found that the cameraman filmed nothing that a passerby could not see while walking past the pharmacy; therefore, a reasonable person would not have been offended by the filming.<sup>115</sup> Further, the film did not depict the pharmacist in any embarrassing situation. The court concluded "the filming of the interior of Mark's pharmacy from outside the building, in conjunction with a legitimate news story, was neither an unreasonable nor an unwarranted intrusion upon Mark's seclusion."<sup>116</sup>

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<sup>109</sup> 618 P.2d 512 (Wash. Ct. App. 1980).

<sup>110</sup> *Id.* at 514.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* The pharmacist also sued for defamation as a result of publication of the footage. *Id.*

<sup>113</sup> *Id.* at 519.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 520.

On appeal, the Washington Supreme Court affirmed the appellate court's ruling.<sup>117</sup> The state supreme court explained that intrusion upon a plaintiff's seclusion had to be substantial in order to be actionable.<sup>118</sup> The court stated:

On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see.<sup>119</sup>

The court held that there was no intrusion because the film footage was shot from a place open to the public.<sup>120</sup> The court also ruled "a person accused of a crime loses some of his or her claims to privacy."<sup>121</sup>

A federal district court made a similar ruling in a case where the president of a company sued a broadcast station for intrusion. In *Machleder v. Diaz*,<sup>122</sup> Arnold Diaz, a reporter for WCBS-TV in Newark, acting on a tip, went to a lot adjacent to the Flexcraft Corporation, an adhesives and other chemical products manufacturer.<sup>123</sup> The tip reported that someone was illegally dumping chemical waste at the lot.<sup>124</sup> At that location, Diaz observed many large drums marked with the words "flammable" and "hazardous."<sup>125</sup> Diaz and his camera crew then proceeded next door to the Flexcraft building, where they filmed an area inside of the building,

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<sup>117</sup> *Mark v. The Seattle Times*, 635 P.2d 1081, 1095 (Wash. 1981). The court consolidated five cases in which the pharmacist sued various media outlets for defamation. *Id.*

<sup>118</sup> *Id.* at 1094.

<sup>119</sup> *Id.* (quoting W. Prosser, TORTS 808-809 (4<sup>th</sup> Ed. 1971)).

<sup>120</sup> 635 P.2d at 1095.

<sup>121</sup> *Id.*

<sup>122</sup> 538 F. Supp. 1364 (S.D.N.Y. 1982), *aff'd in part, rev'd in part* at 801 F.2d 46 (2d Cir. 1986).

<sup>123</sup> 538 F. Supp. at 1367.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

lighted by the camera lights, from the outside.<sup>126</sup> Bruce Machleder, the son of the company's president asked Diaz to stop filming and to leave because trade secrets were visible.<sup>127</sup> When Diaz attempted to ask the younger Machleder about the drums in the lot, he was directed to the building's office.<sup>128</sup> At this time Irving Machleder arrived in the Flexcraft parking lot; Diaz immediately began filming and asking Machleder questions about the drums.<sup>129</sup> Machleder informed Diaz that he did not want to be filmed and told him to call a city government department in response to the questions about the drums.<sup>130</sup> Diaz continued to ask questions, and followed Machleder as he attempted to walk to his office.<sup>131</sup>

The federal court found that there was no intrusion because Diaz filmed Machleder in the parking lot, a "semi-public area, and he was visible to the public eye."<sup>132</sup> Further, the court found that even though Diaz's questioning of Machleder was aggressive, the questioning "occurred in one encounter with plaintiff and does not constitute unabated hounding of the plaintiff."<sup>133</sup> The court, therefore, concluded that there was no intrusion.<sup>134</sup>

In both *Mark* and *Machleder*, the courts decided that there was no intrusion, for the most part, because the media filmed plaintiffs from public vantage points. Courts have also ruled in favor of media defendants when journalists have entered a plaintiff's place of business. An

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1374.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

example of this was *Desnick v. ABC, Inc.*,<sup>135</sup> in which ABC broadcast a story that was the culmination of three months of investigation of the Desnick Eye Centers in Illinois and Wisconsin. To create the story, *PrimeTime Live*'s investigative team contacted Dr. James H. Desnick, who allowed a film crew to videotape inside the main eye clinic in Chicago, permitted access to a cataract removal operation and granted interviews with various doctors, eye clinic staff and patients.<sup>136</sup>

Dr. Desnick did not know, however, that ABC had also sent fake patients to the eye clinics armed with hidden cameras, which were able to record the eye examinations they received.<sup>137</sup> *PrimeTime Live* broadcast the hidden camera segments juxtaposed with interviews with former eye clinic patients, staff, and experts on ophthalmology. After the segment aired, Dr. Desnick sued ABC for intrusion.<sup>138</sup>

The Seventh Circuit found that ABC's "test patients" had not invaded the doctors' privacy by entering the clinics and surreptitiously taping their interactions.<sup>139</sup> According to the court, ABC had not infringed upon the privacy interests in "concealing intimate personal facts and in preventing intrusion into legitimately private activities."<sup>140</sup> The court reasoned that none of the doctors' private information was revealed during the investigation. Further, the test patients only recorded conversations between the doctors and themselves.<sup>141</sup>

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<sup>135</sup> 44 F.3d 1345 (7<sup>th</sup> Cir. 1995).

<sup>136</sup> *Id.* at 1348.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1347.

<sup>139</sup> *Id.* at 1353.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

A federal district court in Arizona also found that there was no intrusion when ABC, under false pretenses, entered and filmed a laboratory with hidden cameras.<sup>142</sup> In *Medical Laboratory Management Consultants v. ABC, Inc.*, the owners of a medical laboratory, the Devarajs, sued ABC claiming the company had intruded upon their privacy.<sup>143</sup> A reporter from ABC was able to tour the Devarajs' laboratory after she called them and told them that she was a cytotechnologist interested in starting her own laboratory.<sup>144</sup> During the tour, a hidden camera specialist posing as a computer expert recorded footage of the active lab with a hidden camera, while accompanying the reporter. The footage was later broadcast in a report about inaccurate results in pap smear tests.<sup>145</sup> The Devarajs sued ABC for intrusion.

In reviewing the Devarajs' intrusion claim, the court noted that the expectation of privacy is diminished in the workplace.<sup>146</sup> According to the court "when courts have considered claims in the workplace, they have generally found for the plaintiffs only if the challenged intrusions involved information or activities of a highly intimate nature."<sup>147</sup> In this case, the Devarajs had invited the reporters into their laboratory without requesting that what was discussed not be disclosed to others.<sup>148</sup> Devaraj also did not take any precautions to ensure the confidentiality of his discussion with the reporters.<sup>149</sup> The court also found that the topics of conversation centered

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<sup>142</sup> *Med. Lab. Mgmt. Consul. v. ABC, Inc.*, 30 F. Supp. 2d 1182, 1191 (D. Ariz. 1998).

<sup>143</sup> *Id.* at 1204. The Devarajs also claimed public disclosure of private facts, intentional infliction of emotional distress, unfair practices, trade libel, negligent infliction of emotional distress, conspiracy, wiretapping, fraud, interference with contractual relations, trespass and punitive damages. *Id.* at 1186.

<sup>144</sup> *Id.* at 1185.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1188.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

on the entire laboratory business and general business practices, all of which Devaraj freely shared, without disclosing any “intimate personal facts.”<sup>150</sup> The court concluded that Devaraj had no reasonable expectation of privacy during the tour of the lab or the conversation with the reporters.<sup>151</sup>

The court also stated that the offensiveness of an intrusion was determined by considering “the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder’s motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded.”<sup>152</sup> The intruder’s motive was particularly important in cases involving newsgathering journalists.<sup>153</sup> The court found that “the public’s interest in the news and the absence of less invasive methods of reporting the story may mitigate the offensiveness of the intrusion.”<sup>154</sup> The court determined that the journalists in this case were collecting information on a story of public interest: the potential for laboratory errors in pap smear testing.<sup>155</sup> Further, the journalists did not pry into the Devarajs’ private affairs or endanger their safety.<sup>156</sup> The court concluded that because the journalists had not intruded on

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<sup>150</sup> *Id.* at 1189 (quoting *Desnick*, 44 F.3d at 1353). The court noted that one of the topics of conversation was about how much Mr. Devaraj paid his technologist in comparison to other labs. 30 F. Supp. 2d 1189.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* (quoting *Deteresa v. Am. Broad. Co., Inc.*, 121 F.3d 460, 465 (9<sup>th</sup> Cir. 1997)).

<sup>153</sup> *Id.* at 1190.

<sup>154</sup> *Id.* The court cites *Shulman v. Group W Prod., Inc.*, 74 Cal. Rptr.2d 843 (Cal. 1998), in which the California Supreme Court ruled that “[I]nformation 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.” *Id.* at 867.

<sup>155</sup> 30 F. Supp. 2d at 1190.

<sup>156</sup> *Id.*

the Devarajs private affairs, and the intrusion was not highly offensive to a reasonable person, ABC was entitled to summary judgment.<sup>157</sup>

A federal district court in Illinois found that because a woman did not prove that a journalist's secret recording of their conversation harmed her, she did not have a claim for intrusion.<sup>158</sup> In *Russell v. ABC, Inc.*, a reporter for *PrimeTime Live* obtained a job at Potash Brothers, a grocery store in Chicago that sold seafood products. While working there, the reporter wore a hidden camera and microphone, which recorded conversations she had with the store's manager, Marilyn Russell.<sup>159</sup> Portions of the conversations were aired during the *PrimeTime Live* broadcast.

The court ruled that the secret recording of conversations that Russell willingly had with the journalist did not amount to prying into Russell's private life.<sup>160</sup> The court reasoned that Russell could only have possibly been harmed by the broadcasts of excerpts from the conversations, and not from the actual taping.<sup>161</sup> The court ruled, therefore, that Russell did not have a claim for intrusion.<sup>162</sup>

Not all courts have followed the Russell ruling. In 1999, four years after the *Russell* court denied a plaintiff's claim for intrusion after her conversations at work were secretly recorded, the California Supreme Court, although acknowledging that a worker had only a limited expectation of privacy at her workplace, ruled that he could still maintain an intrusion

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<sup>157</sup> *Id.* at 1191.

<sup>158</sup> *Russell v. ABC, Inc.*, 1995 U.S. Dist. LEXIS 7528, \*22 (N.D. Ill. 1995).

<sup>159</sup> *Id.* at \*1.

<sup>160</sup> *Id.* at \*21-22.

<sup>161</sup> *Id.* at \*22.

<sup>162</sup> *Id.* The Med. Lab court noted this ruling in its alternative reasoning as to why the Devarajs did not have a claim for intrusion. 30 F. Supp. 2d at 1191.

claim against a reporter who secretly recorded his conversation.<sup>163</sup> *Sanders v. ABC, Inc.* arose after a reporter for ABC obtained employment as a telephone psychic at Psychic Marketing Group, where Mark Sanders also worked as a psychic.<sup>164</sup> Once hired by the company, the reporter was given a cubicle, where she conducted psychic readings for call-in customers. The reporter could hear readings and conversations from other cubicles and the aisles.<sup>165</sup> While at work, the reporter wore a hidden camera in her hat, and a microphone to record her daily interactions.<sup>166</sup> The reporter recorded Sanders' conversations, once when he was in the aisle speaking with another coworker and a second time when he spoke directly to the reporter.<sup>167</sup> A *PrimeTime Live* broadcast contained excerpts from the second conversation.<sup>168</sup>

The court noted that although in California there was no intrusion unless the plaintiff proved that they had a reasonable expectation of privacy, this did not mean that the privacy had to be "absolute or complete."<sup>169</sup> According to the court, "mass media videotaping may constitute an intrusion even when the events and communications recorded were visible and audible to some limited set of observers at the time they occurred."<sup>170</sup> The court found that the idea of seclusion was relative; so even though an individual did not have an expectation of confidentiality in a conversation, the individual might have a reasonable expectation of privacy

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<sup>163</sup> *Sanders v. ABC, Inc.*, 978 P.2d 67 (Cal. 1999).

<sup>164</sup> *Id.* at 69.

<sup>165</sup> *Id.* at 70.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at fn.1.

<sup>169</sup> *Id.* at 71.

<sup>170</sup> *Id.* at 72. The court based this finding on its decision in *Shulman v. Group W. Prod.*, 74 Cal. Rptr.2d 843 (Cal. 1998). See *infra* text accompanying notes 740-757.

with regard to that conversation not being recorded.<sup>171</sup> The court found, “There are degrees and nuances to societal recognition of our expectations of privacy; the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law.”<sup>172</sup>

The court also found that privacy, with respect to intrusion, required an evaluation into the identity of the intruder.<sup>173</sup> This was so, because employees might still have an expectation of privacy with respect to a “stranger” entering their workplace, “despite the fact that the conversations and interactions at issue could be witnessed by coworkers.”<sup>174</sup> The court stated that the ABC reporter was not an employee of the psychic company when she recorded the conversations of her coworkers; at that time “she acted solely as an agent of ABC.”<sup>175</sup> Further, the court distinguished *Desnick*, ruling, “We are concerned here with interactions between coworkers rather than between a proprietor and customer.”<sup>176</sup> Further the court found that as opposed to the Desnick clinic, which was open to the public, the area in which the reporter recorded the conversations was not public.<sup>177</sup>

The court also rejected ABC’s claim that allowing a workplace privacy doctrine “would place a dangerous chill on the press’ investigation of abusive activities in open work areas,

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<sup>171</sup> *Id.* at 72.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 73.

<sup>174</sup> *Id.* at 73-74.

<sup>175</sup> *Id.* at 76. When she answered the phones and gave readings, she was functioning as an employee of the telepsychic company.

<sup>176</sup> *Id.* at 77.

<sup>177</sup> *Id.*

implicating substantial First Amendment concerns.”<sup>178</sup> The court maintained that it had not adopted a workplace privacy doctrine, and held that “the possibility of being overheard by coworkers does not, as a matter of law, render unreasonable an employee’s expectation that his or her interaction within a nonpublic workplace will not be videotaped in secret by a journalist.”

The court ruled

Nothing we say here prevents a media defendant from attempting to show, in order to negate the offensiveness element of the intrusion tort, that the claimed intrusion, even if it infringed on a reasonable expectation of privacy, was ‘justified by the legitimate motive of gathering the news.’ As for possible First Amendment defenses, any discussion must await a later case.<sup>179</sup>

### **Public Persons**

The “publicness” of a plaintiff also bears on whether a court will rule in favor of a news organization accused of intrusion. In *Cassidy v. ABC, Inc.*,<sup>180</sup> an Illinois appellate court ruled that the press did not intrude upon the seclusion of a police officer filmed during an official investigation. Arlyn Cassidy, then a Chicago police officer, filed for an injunction against ABC after a camera crew secretly recorded him during a police undercover investigation.<sup>181</sup> The manager of a massage parlor contacted ABC to complain about police harassment of his business.<sup>182</sup> A film crew then set up a camera in a two-way mirror, which gave them access to a neighboring room, but did not install a microphone in the room.<sup>183</sup> The police officer entered the room accompanied by one of the “lingerie models” working at the massage parlor. Upon

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> 377 N.E.2d 126 (Ill. Ct. App. 1978).

<sup>181</sup> *Id.* at 127-128.

<sup>182</sup> *Id.* at 128.

<sup>183</sup> *Id.*

entering the room and noticing what looked like camera lights, the officer asked the model if someone were filming, to which the model responded in the affirmative without revealing that a news crew was recording. After some interaction with the model, the officer arrested her for solicitation.<sup>184</sup> He was joined in the room by three other undercover officers and asked the model if anyone was in the neighboring room. At that time, the camera crew opened the door and yelled out “Channel 7 News” while continuing to film.<sup>185</sup>

The court found that the news station’s filming of the officer during his investigation did not amount to intrusion because as a police officer, Cassidy was considered a “public official.”<sup>186</sup> The court noted that the Illinois Supreme Court had recently ruled that police officers were public officials and “held that an officer had no cause of action against a newspaper for libel unless he bore the burden of showing that the publication was motivated by actual malice.”<sup>187</sup> The Cassidy court found that public officials’ connection with the government made their actions a source of public interest.<sup>188</sup> Applying this reasoning to the police officers claim, the court found

[I]t appears at once that plaintiff was not a private citizen engaged in conduct which pertained only to himself. He was a public official performing a laudable public service and discharging a public duty. In our opinion, under these circumstances no right of privacy against intrusion can be said to exist with reference to the gathering and dissemination of news concerning discharge of public duties.<sup>189</sup>

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 131-132.

<sup>187</sup> *Id.* at 131.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 131-132.

The court distinguished *Dietemann*, saying that *Dietemann* involved a private individual while this case involved a public official.<sup>190</sup> The court also noted *Eick v. Perk Dog Food Co.*,<sup>191</sup> an appropriation case in which the Illinois Supreme Court ruled, “The right of privacy is, of course, limited in cases of express or implied consent and in areas of legitimate public interest.”<sup>192</sup> The *Cassidy* court agreed with the news station’s argument that the police activities were areas of public interest. Further, the court found

[T]he very status of the policeman as a public official, as above pointed out, is tantamount to an implied consent to informing the general public by all legitimate means regarding his activities in the discharge of his public duties. There is no allegation in any of the pleadings charging defendants or any of them with actual malice or with any willful attempt to impede police work.<sup>193</sup>

The court concluded that there was no intrusion by the press.<sup>194</sup>

The Tenth Circuit similarly found that the press had not intruded upon the seclusion of two officers accused of rape.<sup>195</sup> *Alvarado v. KOB-TV* arose after a news station obtained information from a sealed search warrant related to a rape investigation involving two New Mexico police officers.<sup>196</sup> KOB-TV ran a news story detailing the investigation and also naming the two officers and showing footage of them as the officers answered their front doors.<sup>197</sup> At some point between the first and second broadcast of the story, the station learned that the two officers were undercover narcotics detectives, therefore the station blurred officers’ faces in the

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<sup>190</sup> *Id.* at 132.

<sup>191</sup> 347 Ill. App. 293 (Ill. 1952).

<sup>192</sup> *Id.* at 299.

<sup>193</sup> 377 N.E.2d at 132.

<sup>194</sup> *Id.*

<sup>195</sup> *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1218 (10<sup>th</sup> Cir. 2007).

<sup>196</sup> *Id.* at 1213.

<sup>197</sup> *Id.* at 1214.

second broadcast.<sup>198</sup> A later story reported that the officers had been cleared of the rape charges.<sup>199</sup>

The trial court dismissed the officers' claims for invasion of privacy.<sup>200</sup> The Tenth Circuit affirmed, and ruled that intrusion was based on how the station obtained the information and not on what the station did with the information.<sup>201</sup> Additionally, the court ruled that the station had not acted in a manner highly offensive to a reasonable person by simply knocking on the officers' front doors.<sup>202</sup> The officers would have had to prove that KOB-TV had "tried to badger their way into the officers' home, or they repeatedly approached [the officers],...or obtained footage through their windows or other intrusive means."<sup>203</sup>

A California appellate court also found no intrusive means when a reporters filmed that a judge, considered a public official, outside of his home, and ruled that there were no grounds for an intrusion claim.<sup>204</sup> In *Aisenson v. ABC*, a judge sued the broadcasting company after the broadcasters aired a series of news reports on a recent opinion poll.<sup>205</sup> The opinion poll results showed that David Aisenson, the plaintiff judge, received the lowest ratings of the judges on the

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 1217.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 1218. The court based this reasoning on the Restatement of Torts § 652B cmt. d, which states:

[T]here is no liability for knocking at the plaintiff's door, or calling him to the telephone on one occasion or even two or three, to demand payment of a debt. It is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that it becomes a substantial burden to his existence, that his privacy is invaded.

RESTATEMENT (SECOND) TORTS § 652B cmt. d. (2007).

<sup>204</sup> *Aisenson v. ABC, Inc.*, 269 Cal. Rptr. 379, 388 (Cal. Ct. App. 1990).

<sup>205</sup> *Id.* at 281.

Los Angeles Superior Court.<sup>206</sup> One of the reports used footage of Aisenson as he walked from his house to his car, in a manner that Aisenson claimed “made it appear as if he were a criminal or the subject of some ongoing criminal investigation.”<sup>207</sup> Aisenson claimed that the filming of him walking to his car was unconsented, and therefore, an intrusion.<sup>208</sup>

In deciding this case, the court reiterated the rule that in order for a defendant to be liable for intrusion, the intrusion had to be highly offensive to a reasonable person.<sup>209</sup> According to the court, a “factor relevant to whether an intrusion is ‘highly offensive to a reasonable person’ is the extent to which the person whose privacy is at issue voluntarily entered the public sphere.”<sup>210</sup> The court ruled that as long as news coverage did not extend beyond that necessary to protect the public interest, public officials and public figures were subject to news coverage.<sup>211</sup>

When the legitimate public interest in the published information is substantial, a much greater intrusion into an individual’s private life will be sanctioned, especially if the individual willingly entered into the public sphere. Because of their public responsibilities, government officials and candidates for such office have almost always been considered the paradigm case of ‘public figures’ who should be subject to the most thorough scrutiny.<sup>212</sup>

The court found no invasion of privacy in ABC’s filming of the judge while he was walking to his car. The court reasoned that there was no “evidence to support a finding that ABC’s method of newsgathering exceeded the public’s interest in seeing a current videotape

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 382. This clip was used as evidence for part of Aisenson’s other claims for defamation and false light.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 387.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 388.

<sup>212</sup> *Id.* at 387-388. (Quoting *Kapellas v. Kofman*, 459 P.2d 912, 922-923 (Cal. 1969) (ruling that a newspapers articles on the children of a public official did not violate the children’s privacy).

picture of an elected official.”<sup>213</sup> ABC did not enter the judge’s home or come into physical contact with him or his family. The court found that Aisenson was in public view when he was filmed, therefore, there was no invasion of privacy.<sup>214</sup>

## **Harassment**

Courts have found, however, intrusion by harassment, when the press has photographed public figures in public, famously in *Galella v. Onassis*.<sup>215</sup> Donald Galella was a free-lance photographer who made a living selling photographs he took of famous people.<sup>216</sup> Some of his most favorite subjects were Jacqueline Onassis, the widow of President John F. Kennedy, and her two children, John and Caroline Kennedy.<sup>217</sup> Galella constantly followed the family for pictures, engaging in behaviors such as entering the children’s private schools and, using a powerboat to get pictures of the family while they were swimming.<sup>218</sup> In one instance, Galella jumped out in front of John, who was riding his bike in a park, causing secret service agents to accost and question him.<sup>219</sup> The police arrested Galella; he was acquitted of the charges.<sup>220</sup> After his acquittal, Galella filed suit against the secret service agent and Mrs. Onassis, for false arrest, malicious prosecution and interference with his business.<sup>221</sup> Onassis counterclaimed for damages related to Galella’s invasion of her and her children’s privacy, and for an injunction

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<sup>213</sup> *Id.* at 388.

<sup>214</sup> *Id.*

<sup>215</sup> 487 F.2d 986 (2d Cir. 1973).

<sup>216</sup> *Id.* at 991.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 992.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

against any further harassment.<sup>222</sup> A court granted Onassis a temporary restraining order against Galella, however, two months later, police charged Galella with violating the restraining order.<sup>223</sup> The court, therefore, issued a new restraining order requiring that Galella remain 100 yards away from Onassis' home and 50 yards away from Onassis and her children.<sup>224</sup> At trial, the court dismissed Galella's claims, and entered an injunction requiring that Galella discontinue any surveillance of Onassis and her children, prohibiting Galella from using Onassis and her children's names or pictures, and prohibiting Galella from contacting Onassis.<sup>225</sup>

On appeal the Second Circuit affirmed the trial court's dismissal of Galella's claims against the secret service agents.<sup>226</sup> The court also found that Galella had intentionally harassed Onassis and her children and "caused fear of physical contact in his frenzied attempts to get their pictures."<sup>227</sup> The court ruled, therefore, that Galella had not successfully challenged the trial court's finding that he had acted tortiously.<sup>228</sup> The court noted that Onassis was a public figure, and consequently subject to news coverage.<sup>229</sup> According to the Second Circuit, "legitimate countervailing social needs may warrant some intrusion despite an individual's reasonable expectation of privacy and freedom from harassment."<sup>230</sup> The court limited this exception,

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<sup>222</sup> *Id.* Onassis also pleaded for damages for assault and battery, intentional infliction of emotional distress, and harassment. *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 993. The limitations on how close Galella could come to Onassis and her children were relatively the same. Galella was not allowed within 100 yards of the Onassis' home or school, with 75 yards of the children, or 50 yards of Onassis. *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 994.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 995.

<sup>230</sup> *Id.*

however, to intrusions that were “no greater than [] necessary to protect the overriding public interest.”<sup>231</sup> The court ruled that Galellas’ conduct went beyond newsgathering in the public interest, and rejected Galellas’ argument for protection under the First Amendment.<sup>232</sup> The court stated that Galella:

[S]ets up the First Amendment as a wall of immunity protecting newsmen from any liability for their conduct while gathering news. There is no such scope to the First Amendment right. Crimes and torts committed in news gathering [sic] are not protected. There is no threat to a free press in requiring its agents to act within the law.<sup>233</sup>

Galella did not, however, follow the rules of the restraining order, and Onassis filed an action in court to find Galella in contempt.<sup>234</sup> The federal district court found Galella in contempt, and citing the Second Circuit’s previous ruling, ruled that Onassis had the right to be left alone.<sup>235</sup>

A federal district court in California, however, found no intrusion where a reporter contacted a prisoner’s relatives and friends while seeking information for a story.<sup>236</sup> In a widely publicized trial, Stan Rifkin was convicted of wire fraud and sentenced to federal prison for eight years.<sup>237</sup> A reporter contacted Rifkin’s friends, ex-wife and prison officials to gather information about Rifkin and his crime.<sup>238</sup> The reporter, falsely, told both Rifkin’s friends and ex-wife that Rifkin had given him permission to speak with them.<sup>239</sup> Rifkin claimed that by doing this, the

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 995-996 (citations omitted). The court, though upholding injunctive relief against Galella, did find the language of the restraining order overbroad, and modified it to ensure its narrow tailoring to meet Onassis and her children’s privacy interest. See *Id.* at 998.

<sup>234</sup> *Galella v. Onassis*, 533 F. Supp. 1076 (S.D.N.Y. 1982).

<sup>235</sup> *Id.* at 1106.

<sup>236</sup> *Rifkin v. Esquire Publ’g Inc.*, 1982 U.S. Dist. LEXIS 18405, \*9 (C.D. Cal. 1982).

<sup>237</sup> *Id.* at \*1.

<sup>238</sup> *Id.* at \*5-6.

<sup>239</sup> *Id.* at \*5.

reporter invaded his privacy and therefore sought damages for the invasion, and an injunction on the publication of the article based on this information the reporter gathered.<sup>240</sup>

The court ruled that the reporter's contacting third parties "in no way (physically or otherwise) intruded upon plaintiff's solitude or seclusion."<sup>241</sup> Liability for intrusion would only have existed if the reporter had gone "beyond the limits of decency."<sup>242</sup> The court ruled that the reporter's attempts to gather information from third parties or to elicit the assistance of third parties in contacting plaintiff, even if pursued using subterfuge and fraud, cannot constitute an intrusion upon plaintiff's solitude or seclusion."<sup>243</sup> The court noted, however, that "an unreasonably intrusive investigation [might] constitute a violation of a person's right to privacy;" in this case the court found no intrusive investigation.<sup>244</sup>

The federal district court in Maine also found no intrusive investigation and dismissed Henry Dempsey's motion to amend a complaint against a reporter for *The National Enquirer*.<sup>245</sup> At issue was a *National Enquirer* article that detailed Dempsey's nearly falling out of an airplane, surviving death by holding on to the plane's boarding ladder.<sup>246</sup> Dempsey based his intrusion claim on the reporter's repeated attempts to interview and photograph him. The

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<sup>240</sup> *Id.* at \*1.

<sup>241</sup> *Id.* at \*8.

<sup>242</sup> *Id.* at \*8-9. (citing *Gill v. Hearst Publishing Co.*, 253 P.2d 441 (Cal. 1953).

<sup>243</sup> *Id.* at \*9.

<sup>244</sup> *Id.* at \*9. The court cites *Noble v. Sears Roebuck and Co.*, 109 Cal. Rptr. 269 (Cal. Ct. App. 1973), in support of this ruling. In *Noble*, a department store hired private detectives to investigate a woman's personal injury claim against it. One detective entered the woman's hospital room and by deception, gained the address of a man who had accompanied the woman to the department store. *Id.* at 270-271. In addition to holding the department store could be liable for intrusion by the detective, the California appellate court agreed with the plaintiff that damages for an "unreasonably intrusive" investigation were recoverable. *Id.* at 272.

<sup>245</sup> *Dempsey v. The Nat'l Enquirer*, 702 F. Supp. 927, 931 (D. Me. 1988). Dempsey's other claims included appropriation, false light, and intentional infliction of emotional distress. *Id.* at 929.

<sup>246</sup> *Id.* at 928 fn.1.

reporter went to Dempsey's house and asked for an interview; she drove by his house for almost an hour when he refused, and returned to Dempsey's house two days later, where she was again refused.<sup>247</sup> The reporter also followed Dempsey to a restaurant attempting to get an interview and a photograph, and only left the restaurant when Dempsey threatened to call the manager.<sup>248</sup>

The court found, however, that none of the reporter's conduct rose to the level of intrusion upon seclusion.<sup>249</sup> The court reasoned that the reporter never entered Dempsey's house.<sup>250</sup> Further, the reporter's presence in the restaurant was not intrusive because the restaurant was open to the public.<sup>251</sup> The court also found that the reporter's attempts to take Dempsey's picture was not actionable, because Dempsey was in a public place.<sup>252</sup> The court ruled that although the reporter's actions were annoying, "they [could not] reasonably be seen as highly offensive."<sup>253</sup> Dempsey's claim against the magazine for intrusion based on a reporters repeated attempts to photograph him and obtain an interview, therefore, failed.

In contrast to the *Dempsey* ruling, a federal court in Pennsylvania ruled that a camera crew's repeated attempts to interview and film a family might sustain a claim for invasion of privacy by intrusion. In *Wolfson v. Lewis*,<sup>254</sup> journalists from *Inside Edition*, while attempting to investigate a story on the salaries paid to U.S. Healthcare executives, among other things,

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<sup>247</sup> *Id.* at 931.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* The court based this on the Restatement conception of intrusion and a Maine state case *Nelson v. Maine Times*, 373 A.2d 121 (Me. 1977) in which the Maine Supreme Court expressly adopted the Restatement approach to intrusion. *Id.* at 930.

<sup>250</sup> *Id.* at 931.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> 924 F. Supp. 1413 (E.D. Pa. 1996).

repeatedly requested interviews with an executive, stationed a news van for surveillance of the executive and his wife as they left on an airplane, conducted surveillance and followed the daughter and son-in-law of the executive, the Wolfsons, and “ambushed” the executive’s son-in-law in attempt to get an interview.<sup>255</sup> The court found that the executive’s son-in-law had sufficient evidence to prove that the journalists intruded upon his family’s seclusion.<sup>256</sup> The court determined that the journalists had “engag[ed] in a course of conduct apparently designed to hound, harass, intimidate and frighten,” the family.<sup>257</sup> The court also determined that the journalists did not have “legitimate purpose” for harassing the family, but were only attempting to entertain for their television program.<sup>258</sup> Further, the court decided that the First Amendment did not protect the journalists’ activities, and those activities were not routine newsgathering.

The First Amendment protects routine, lawful newsgathering. A reasonable jury would likely conclude that it is difficult to understand how hounding, harassing, and ambushing the Wolfsons would advance the newsworthy goal of exposing the high salaries paid to U.S. Healthcare executives or how such conduct would advance the fundamental policies underlying the First Amendment which include providing information to ‘enable members of society to cope with the exigencies of their period.’<sup>259</sup>

The court ruled that a “course of repeated harassment that amounts to hounding and becomes a substantial burden to a person may constitute an invasion.”<sup>260</sup> The court did, however, establish that a story on the healthcare executive’s salaries might serve the values that

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<sup>255</sup> *Id.* at 1423-1432.

<sup>256</sup> *Id.* at 1432.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 1433. (quoting *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967)).

<sup>260</sup> *Id.*

underlie the First Amendment, because the press had the right “to inform the public about the organizations that provide health insurance to millions of Americans.”<sup>261</sup>

### **In Public**

Generally, courts have not found intrusion where journalists have gathered news in a public setting. For example, in *Wilkins v NBC, Inc.*, a California appellate court ruled that two businessmen had no expectation of privacy in a conversation that took place during a lunch meeting held on the outdoor patio of a restaurant.<sup>262</sup> *Wilkins* arose from a Dateline NBC investigation of the “pay-per-call” industry.<sup>263</sup> Two producers for NBC contacted SimTel, a pay-per-call company, in response to a national advertisement, and arranged a lunch meeting with company representatives.<sup>264</sup> The producers brought two additional people to the meeting that took place on the patio of a restaurant; the company representatives did not inquire into the identities of two additional people.<sup>265</sup> During the meeting the SimTel representatives explained how their pay-per-call system worked; the producers recorded the meeting using hidden cameras and later broadcast excerpts from the recording.<sup>266</sup>

The California appellate court found that the journalists had not intruded on the businessmen’s seclusion because the men freely spoke about their business in a public place.<sup>267</sup> The men had the meeting on the patio of a public restaurant. They also spoke about their

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<sup>261</sup> *Id.* at 1416.

<sup>262</sup> *Id.* at 336.

<sup>263</sup> *Id.* at 332. Pay-per-call is the “practice of charging for services on so-called ‘toll-free’ 800 lines, often without the knowledge of the persona billed for the services.” *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 336.

telephone business even though two unknown people attended the meeting.<sup>268</sup> The court noted that the NBC journalists did not intrude into the men's private lives or homes; "NBC photographed the two men in a public place and taped their conversations which were about business not personal matters. There was no intrusion into a private place, conversation or matter."<sup>269</sup>

An individual's presence at a restaurant does not, however, automatically prohibit a finding of intrusion. In *Stressman v. American Black Hawk Broadcasting Co.*,<sup>270</sup> the Iowa Supreme Court ruled that "film[ing] a person in a private dining room might conceivably be a highly offensive intrusion upon that person's seclusion."<sup>271</sup> Theresa Stressman sued American Black Hawk Broadcasting after she asked a reporter not to record her as she was dining at a restaurant. The reporter filmed her, and the film was used in a later broadcast.<sup>272</sup>

Stressman argued that the filming was "an unreasonable interference with her right in not having her affairs known to others or her picture shown on television."<sup>273</sup> Black Hawk countered that Stressman had no grounds for intrusion because she was eating in a restaurant open to the public.<sup>274</sup> The court determined that although it did not have all the facts, Stressman

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.* (citing *Shulman*, 18 Ca. 4<sup>th</sup> at 231).

<sup>270</sup> 416 N.W.2d 685 (Iowa 1987).

<sup>271</sup> *Id.* at 687.

<sup>272</sup> *Id.* at 685.

<sup>273</sup> *Id.* at 687.

<sup>274</sup> *Id.*

could possibly have been secluded in the restaurant.<sup>275</sup> The court found that if Stressman were in a private dining room she could possibly have the grounds for intrusion against the station.<sup>276</sup>

Similarly, a court in Massachusetts ruled that a man might have an intrusion claim even though a news station filmed him while in he was in public.<sup>277</sup> In *Cook v. WHDH-TV*, Albert Cook, a Massachusetts business owner, sued a broadcast station after a reporter filmed him while he was in a Burger King drive-thru.<sup>278</sup> The journalist, conducting an investigation of Cook's business dealings, confronted Cook on camera.<sup>279</sup> Although Cook twice pushed the camera away, and refused to answer any of the reporter's questions, the reporter continued filming.<sup>280</sup> The reporter also leaned into Cook's car window and pressed a microphone close to Cook's face.<sup>281</sup> Cook sued for invasion of privacy based on Massachusetts General Laws chap. 214 § 1B, which provides that a "person shall have a right against unreasonable, substantial or serious interference with his privacy."<sup>282</sup>

The court determined that in order to prove an invasion of privacy under the Massachusetts statute, Cook would have to demonstrate that "the defendant's conduct was unreasonable or unjustified and that the conduct amounted to a serious or substantial interference

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<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Cook v. WHDH-TV, Inc.*, 1998 Mass. Super. LEXIS 739, \*17 (Mass. Super. Ct. 1998).

<sup>278</sup> *Id.* at \*6.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> MASS. GEN. LAWS ch. 214 § 1B (1998). Cook also sued for defamation, assault, and unfair and deceptive trade practices. 1998 Mass. Super. LEXIS 739 \*1.

with his privacy.”<sup>283</sup> The court further noted that in order to determine whether the reporter violated the statute, the court had to “balance privacy interest with the interest served by the disclosure.”<sup>284</sup> Although recognizing that usually a plaintiff claiming to have had their seclusion intruded upon while in public was said to have “assumed the risk of being observed,” the court ruled that Cook’s claim for intrusion should be allowed.<sup>285</sup> Using the balancing test, the court found that there was “a disputed issue of fact as to whether the interest served by the intrusion of the defendants is outweighed by his interest in his privacy.”<sup>286</sup> According to the court, at trial the jury should consider the reporter’s motive, whether Cook had a reasonable expectation of privacy while in the drive-thru, and whether Cook consented to the intrusion. Additionally the court stated that the jury might want to consider “the importance to the public of the information gained by the intrusion.”<sup>287</sup>

[W]hile the information disclosed by the television news story may have been of some importance to the public, the confrontation of the plaintiff at Burger King and the information gained therein was of negligible value to the story. A jury could well conclude that the design of the defendants was to make Mr. Cook look guilty and add to the sensationalism of the story.<sup>288</sup>

The court concluded, therefore, that Cook’s intrusion claim should go to trial.<sup>289</sup>

A District of Columbia Superior Court ruled, however, that the administrator and staff of a public school could not possibly establish an intrusion claim against a reporter who entered the

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<sup>283</sup> *Id.* at \*14.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at \*16-17.

<sup>286</sup> *Id.* \*17.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at \*17-18.

<sup>289</sup> *Id.* at \*18. *Accord with* Larsen v. Philadelphia Newspapers, Inc., 543 A.2d 1181 (Pa. Super. Ct. 1988).

school because the reporter entered public property.<sup>290</sup> In *The Marcus Garvey Charter School v. The Washington Times Corporation*, Susan Ferrechio, a reporter for *The Washington Times*, went to the Marcus Garvey Charter School's office attempting to interview the school's principal. When the principal arrived she angrily declined to be interviewed and grabbed Ferrechio's notebook; other school staff and students then physically assaulted Ferrechio and removed her from the school.<sup>291</sup> Ferrechio called her editor, who then called the police; the editor also sent another reporter and a photographer to the school to meet Ferrechio.<sup>292</sup> When the police arrived, the officers, along with Ferrechio and the two other *Washington Times* reporters, entered the school. The principal refused to return the notebook, then the principal and a staff member assaulted police.<sup>293</sup> The principal and several members of the school staff were charged with assault and taking property.<sup>294</sup>

The principal and staff members claimed that Ferrechio, and the other reporters, intruded upon their seclusion by entering the school without permission.<sup>295</sup> A judge at a pretrial hearing ruled, however, that the school's office was a public area.<sup>296</sup> The Superior Court found that Ferrechio and the other reporters only entered into the public areas of the school, places "where...members of the public with a legitimate basis for visiting are normally permitted to

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<sup>290</sup> *The Marcus Garvey Chart. Sch. v. The Wash. Times Corp.*, 27 Media L. Rep. (BNA) 1225, 1229-1230 (D.C. Super. Ct. 1998).

<sup>291</sup> *Id.* at 1227.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 1228.

<sup>296</sup> *Id.* at 1229. "Plaintiffs are estopped from arguing the issue of the public nature of the school's front hallway for main office because that issue was actually litigated in the pretrial hearing and Judge Morrison's determination was essential to the judgment that plaintiffs were criminally liable for their assault on the police officers." *Id.*

enter.”<sup>297</sup> The court rejected the principal’s argument that the policy of the school district excluded the press from the school, and that she and the staff, therefore had an expectation of privacy.<sup>298</sup> The court found that the school district policy only prohibited school employees from giving interviews without permission, and did not exclude the media from the schools.<sup>299</sup> The court ruled that the principal and the school staff had no expectation of privacy.<sup>300</sup> The court also found that the Ferrechio’s entrance into the school was not highly offensive to a reasonable person.<sup>301</sup> Because the principal could not prove her intrusion claim, the court granted summary judgment in favor of *The Washington Times*.<sup>302</sup>

### Trespass

Trespass is the non-consensual entry upon the property of another.<sup>303</sup> A trespass plaintiff must prove ownership of the property. In *Stith v. Cosmos Broadcasting, Inc.*,<sup>304</sup> for example, a Kentucky trial court ruled that a horse trainer had no claim against *Inside Edition* because he did not own the property on which the media entered.<sup>305</sup> *Inside Edition* filmed Kevin Stith, a horse trainer, as he explained the use of chains in horse training.<sup>306</sup> The filming took place at The

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<sup>297</sup> *Id.*

<sup>298</sup> *Id.* The principal based this argument on *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969), in which the federal court of appeals ruled that intrusion might extend into “spheres from which an ordinary man in a plaintiff’s position could reasonably expect that the particular defendant should be excluded.” *Id.* at 705.

<sup>299</sup> 27 Media L. Rep. (BNA) at 1229.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 1230.

<sup>302</sup> *Id.*

<sup>303</sup> RESTATEMENT (SECOND) OF TORTS § 158 (1965).

<sup>304</sup> 25 Media L. Rep. (BNA) 1151 (Ky. Cir. Ct. 1996).

<sup>305</sup> *Id.* at 1156.

<sup>306</sup> *Id.* at 1152.

Celebration, a place where horse shows were held.<sup>307</sup> *Inside Edition* then used the footage in a show about horse abuse.<sup>308</sup> The court ruled that Stith was an invitee of The Celebration and not the owner, or constructive owner, of the property. He therefore had no standing to claim trespass.<sup>309</sup>

A trespass plaintiff need not prove that the defendant committed some harm during the trespass. In *La Luna Enterprises, Inc. v. CBS Corp.*,<sup>310</sup> a federal district court ruled that club could receive nominal damages where there was no actual damage from CBS's trespass.<sup>311</sup> CBS obtained the club's permission to film its cabaret show to use in a broadcast on tourism. Instead the station used the film footage as background for a show on the Russian Mafia.<sup>312</sup> La Luna claimed CBS trespassed by fraudulently obtaining permission to film at the club.<sup>313</sup> Denying CBS's motion to dismiss La Luna's trespass claim, the court ruled that under the law, the club could sue for nominal damages.<sup>314</sup>

A defense to a trespass claim is consent to entry onto the property. Consent is not, however, an absolute defense to trespass. The next section details the press' use of consent as a defense and what vitiates consent as a defense.

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<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 1156.

<sup>310</sup> 74 F. Supp. 2d 384 (S.D.N.Y. 1999).

<sup>311</sup> *Id.* at 393.

<sup>312</sup> *Id.* at 387.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 393.

## Consent

*Lal v. CBS, Inc.*<sup>315</sup> arose after Amrit Lal, a college professor, sued a college newspaper for libel after it published a story concerning the substandard conditions in which he kept his rental properties.<sup>316</sup> A reporter for a local broadcast station assigned to cover the lawsuit interviewed Lal and the newspaper staff. The reporter also went to one of Lal's properties to interview the tenants.<sup>317</sup> The tenants allowed the reporter into the house where she filmed the rental conditions. The film footage was used as part of a report aired on the station later that evening.<sup>318</sup> After the broadcast, Lal sued the station for trespass and defamation.<sup>319</sup>

The court granted CBS summary judgment on the trespass claim, finding that the tenants had consented to the reporter's entry onto the property. "It is elementary that an owner who is not in possession cannot maintain an action for trespass absent an injury to his reversion."<sup>320</sup> The federal appellate court affirmed this ruling, finding that the tenant had granted the reporter permission to enter the house and that "there was no damage to the property as a result of the entry."<sup>321</sup>

In *Machleder v. Diaz*, the federal court ruled that the business owner implied consent to a camera crew entering the business office.<sup>322</sup> The court found that the reporter had not forced his

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<sup>315</sup> 551 F. Supp. 356 (E.D. Pa. 1982).

<sup>316</sup> *Id.* at 358-359.

<sup>317</sup> *Id.* at 359.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 360.

<sup>320</sup> *Id.* at 364.

<sup>321</sup> *Lal v. CBS, Inc.*, 726 F.2d 99, 100 (3d. Cir. 1984). The appellate court also ruled that even in the event that the tenants signed a lease prohibiting the admission of the media onto the property, Lal would not have had a basis for trespass. *Id.*

<sup>322</sup> 538 F. Supp. 1364, 1375. For the facts of *Machleder* see *supra* texts accompanying notes \_\_\_\_.

way into the building; nor were there signs warning the reporter to keep off of the property.<sup>323</sup>

The court also found that Bruce Machleder, the son of the company president, told the reporter to go to the business office. According to the court, by neglecting to tell the reporter to leave the property and by directing the reporter to the office, the younger Machleder implied consent to the media remaining at the building.<sup>324</sup> Further, although Irving Machleder did not want to be filmed, he did not tell the reporter to leave the property; he still answered the reporter's questions.<sup>325</sup> The court ruled that this also implied consent for the reporter to remain at the building and therefore vitiated Machleder's trespass claim.<sup>326</sup>

A Minnesota appellate court ruled, however, that consent to enter a person's property for one purpose did not extend consent to enter for another purpose.<sup>327</sup> In *Copeland v. Hubbard Broadcasting*, a couple sued a news station after one of the station's reporters posed as a veterinary student.<sup>328</sup> The reporter was conducting a hidden camera investigation of a veterinarian, with whom she had gotten an internship. The veterinarian had an appointment to examine the Copelands' cat, and received permission to bring the vet student along to shadow him.<sup>329</sup> The station broadcast the footage taken inside of the Copeland home.<sup>330</sup>

The court determined that under Minnesota law a person who has permission to enter property can become a trespasser by "moving beyond the possessor's invitation or

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<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Copeland v. Hubbard Broad., Inc*, 526 N.W.2d 402 (Minn. App. Ct. 1995).

<sup>328</sup> *Id.* at 404.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

permission.”<sup>331</sup> An individual could exceed permission by doing more than going beyond geographic bounds.<sup>332</sup> The court noted *Baugh v. CBS*,<sup>333</sup> a case in which a woman sued a broadcaster for trespass after she granted permission to film in her house, so long as she was not filmed.<sup>334</sup> In that case, the court ruled that the woman’s consent was not exceeded because the woman had agreed to the videotaping.<sup>335</sup> Distinguishing *Baugh*, the *Copeland* court found that the *Copeland*’s had not given the reporter the permission to videotape while in their home; “the record [] indicates that consent was given only to allow a veterinary student to accompany” the veterinarian.<sup>336</sup> The court, therefore, denied the station’s motion for summary judgment.

A mere fourteen days before the Minnesota appellate court decided *Copeland*, the Seventh Circuit Court of Appeal decided *Desnick v. ABC*, holding that there was no trespass when reporters, posing as eye clinic patients, secretly recorded their interactions with doctors inside an eye clinic.<sup>337</sup> Although acknowledging that there was no journalist’s privilege to trespass, and that there was no implied consent when express consent was granted through misrepresentation, the court found that in some circumstances consent is considered valid even when procured by fraud.

There must be something to this surprising result. Without it a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who in an effort to bargain down an automobile dealer falsely

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<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 405.

<sup>333</sup> 828 F. supp. 745 (N.D. Cal. 1993).

<sup>334</sup> *Id.* at 752.

<sup>335</sup> *Id.* at 756.

<sup>336</sup> 526 N.W.2d at 405.

<sup>337</sup> 44 F.3d 1345, 1352-1353. For the facts of *Desnick* see *supra* text accompanying notes \_\_\_\_.

claimed to be able to buy the same car elsewhere at a lower price would be a trespasser in the dealer's showroom. Some of these might be classified as privileged trespasses, designed to promote competition. Others might be thought justified by some kind of implied consent—the restaurant critic for example might point by way of analogy to the use of the “fair use” defense by book reviewers charged with copyright infringement and argue that the restaurant industry as a whole would be injured if restaurants could exclude critics. But most such efforts at rationalization would be little better than evasions. The fact is the consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent.<sup>338</sup>

The court also noted the law's “willingness to give effect to consent procured by fraud” in areas other than trespass such as battery.<sup>339</sup> To distinguish between cases of valid consent and invalid consent, the court had to examine the interests trespass supposedly protected: “the inviolability of the person's property.”<sup>340</sup> Using this conception of the interests trespass protected, the court reasoned that ABC's “test patients” did not trespass because they did not infringe on any of the interests protected by trespass.<sup>341</sup> The clinics were open to the public, and “videotaped physicians engaged in professional, not personal, communications.”<sup>342</sup> Further, the patients did not disrupt the clinics.<sup>343</sup>

The court found that in the instant case, unlike in *Dietemann*, involved a business.<sup>344</sup> Further, the court conceptualized the test patients as analogous to other “testers” who perform a public service.<sup>345</sup>

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<sup>338</sup> *Id.* at 1351.

<sup>339</sup> *Id.* at 1352. The court gave the Restatement example of a man who promised a woman \$100 to have sex with him. Upon completion of the act, the man gave the woman a counterfeit \$100 bill. That man was not guilty of battery. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 892B, illustration 9 (1979)).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 1353.

“Testers” who pose as prospective home buyers in order to gather evidence of housing discrimination are not trespassers even if they are private persons not acting under color of law. The situation of [ABC’s] “testers” is analogous. Like testers seeking evidence of violation of antidiscrimination laws, the defendants’ test patients gained entry into the plaintiffs premises by misrepresenting their purposes (more precisely by a misleading omission to disclose those purposes). But the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land.<sup>346</sup>

The court ruled, therefore, in favor of ABC.

A federal district court in North Carolina declined, however, to apply the Seventh Circuit’s ruling in *Desnick* to a case involving reporters conducting a hidden camera investigation while acting as employee’s of a major supermarket.<sup>347</sup> *Food Lion v. ABC* arose after two reporters for ABC’s *PrimeTime Live* gained employment, by falsifying parts of their employment applications, in the deli section of two different Food Lion grocery stores.<sup>348</sup> While working the stores, both reporters secretly recorded hidden camera footage of meat handling practices. Food Lion sued ABC for trespass and fraud, among other things.<sup>349</sup> ABC moved for summary judgment on these claims.

The district court examined North and South Carolina’s approach to allowing misrepresentation to vitiate consent and found that those states followed § 892B of the Restatement (Second) of Torts:

[I]f the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interest or the extent of the harm to be

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<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Food Lion, Inc., v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217 (M.D.N.C 1996).

<sup>348</sup> *Id.* at 1218.

<sup>349</sup> *Id.* Food Lion also pleaded claims for civil conspiracy and negligent supervision. *Id.*

expected from it and the mistake is known to the other or is induced by the other's misrepresentations, the consent is not effective for the unexpected invasion or harm.<sup>350</sup>

The court reasoned, therefore, that a reasonable jury could find that the misrepresentations by ABC reporters could have caused Food Lion to give consent.<sup>351</sup> Expressly declining to rely on *Desnick*, the court reasoned that the *Desnick* court did not rule that fraud could never negate consent.<sup>352</sup> The court found that the *Desnick* court also based its ruling on § 892B of the Restatement, “the same section set out above for the proposition that fraud can negate consent.”<sup>353</sup> Further, the court ruled that unlike the test patients in *Desnick* who entered a clinic opened to anyone, the reporters in *Food Lion* used fraud to enter portions of the store that were not open to the general public.<sup>354</sup> Additionally, in *Desnick* there was no type of theft, whereas here the *Food Lion* court found that “Defendants did gain from the entry of [the reporters] what they otherwise would not have had, a story.”<sup>355</sup>

In ruling that consent could be negated by exceeding the scope of the consent, the court relied on *Copeland*, and found that ABC could not be granted summary judgment.<sup>356</sup> Using the *Copeland* decision, the court found that “whether a possessor of land has given consent for entry

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<sup>350</sup> RESTATEMENT (SECOND) OF TORTS § 892B(2) (1979).

<sup>351</sup> 951 F. Supp. at 1222.

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* at 1223.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

is, when disputed, a factual issue.”<sup>357</sup> The court also found that it was a factual issue whether the reporters should be considered Food Lion employees while they were filming inside the store.<sup>358</sup>

A jury found ABC liable for trespass and awarded Food Lion significant damages.<sup>359</sup> The district denied ABC’s motion for a judgment as a matter of law on Food Lion’s trespass claim.<sup>360</sup> Further, the court ruled that “the press is not free to violate laws of general applicability in order to reach its ultimate goals.”<sup>361</sup>

Although recognizing consent as a defense to trespass, the Fourth Circuit, on appeal, found that consent to enter property can be “canceled out” by a wrongful act.<sup>362</sup> Using the *Desnick* court’s holding that the test patients who misrepresented their purpose in order to enter places open to the general public did not trespass, the Fourth Circuit found that the ABC reporters could not be held to have trespassed because of misrepresentations on their job applications.<sup>363</sup>

The court noted, however, that the jury “found that the reporters committed trespass by breaching their duty of loyalty to Food Lion,” by conducting the hidden camera investigation.<sup>364</sup> The court affirmed this basis for finding that the reporters had trespassed because “the breach of duty of loyalty—triggered by the filming in non-public areas, which was adverse to Food Lion—

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<sup>357</sup> *Id.* at 1224 (quoting *Copeland*, 526 N.W.2d at 405).

<sup>358</sup> *Id.*

<sup>359</sup> *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 984 F. Supp. 923, 927 (M.D.N.C. 1997). The Jury awarded Food Lion \$5,545,750 in total damages.

<sup>360</sup> *Id.* at 929.

<sup>361</sup> *Id. Accord with Shiffman v. Empire Blue Cross & Blue Shield*, 681 N.Y.S.2d 511 (N.Y. App. Div. 1998).

<sup>362</sup> *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 517 (4<sup>th</sup> Cir. 1999).

<sup>363</sup> *Id.* at 518.

<sup>364</sup> *Id.*

was a wrongful act in excess of [the reporter’s] authority to enter Food Lion’s premises as employees.”<sup>365</sup> The court, therefore, sustained the jury’s verdict.<sup>366</sup>

Like the district court in *Food Lion*, a federal district court in Arizona expressly rejected *Desnick* in deciding that ABC reporters had trespassed when they misrepresented their identities in order to get a tour of, and secretly record, a laboratory.<sup>367</sup> The court declined to accept the *Desnick* “formula for determining whether a plaintiff’s interest in ownership or possession of land has been harmed” for four reasons. First, “the [*Desnick*] court attempt[ed] to distinguish cases reaching different results with factual distinctions.”<sup>368</sup> According to the *Med Lab* court, the *Desnick* court allowed intrusion analysis to affect its trespass analysis.<sup>369</sup> Secondly, and similar to the first reason, “the cases upon which the Seventh Circuit relies...do not all involve trespass claims.”<sup>370</sup> According to the *Med Lab* court, this indicates that the Seventh Circuit’s decision was based more on theory than settled law.<sup>371</sup> The court also noted that the *Desnick* court did not explain “how the cited examples in which fraudulently induced consent is deemed ineffectual differ from those in which consent is found to be valid.”<sup>372</sup> Finally, the court ruled that “the conclusions reached in *Desnick* [were] not supported by the law in Arizona or the Ninth Circuit.”<sup>373</sup>

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<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 519.

<sup>367</sup> *Med. Lab.*, 30 F. Supp. 2d 1182, 1204. For facts of *Med Lab* see *supra* text accompanying notes 143-157.

<sup>368</sup> *Id.* at 1202.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 1203.

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

The court determined that § 892B of the Restatement was the applicable law.<sup>374</sup> Reasoning that Devaraj's consent to give the reporters a tour of the lab was based on the reporters' misrepresentations, the court found that "Mr. Devaraj may have consented to the presence of [the reporters], but he did not consent to the use of the cameras."<sup>375</sup> The court granted ABC's motion for summary judgment on the trespass claim, however, finding that "any damages caused by the publication of the videotaped meeting were not proximately caused by the trespass and Plaintiffs do not claim to have incurred any other damages as a result of the trespass."<sup>376</sup>

Unlike the *Med Lab* court, a Michigan appellate court followed the *Desnick* opinion in deciding that a broadcast station had not trespassed while conducting a hidden camera investigation of an autoshop.<sup>377</sup> In *American Transmission v. Channel 7 of Detroit*, a news station conducted a hidden camera investigation of various transmission repair shops.<sup>378</sup> A reporter for the station drove to the various shops and complained that her car was making loud noises. The reporter would film the inspection of the car with a hidden camera.<sup>379</sup> Footage filmed at American Transmission was used as part of a consumer advocacy section of a news broadcast. American Transmission sued claiming that the reporter trespassed by concealing her identity to gain entry into the shop.<sup>380</sup>

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<sup>374</sup> *Id.*

<sup>375</sup> *Id.* at 1204.

<sup>376</sup> *Id.*

<sup>377</sup> *Am. Trans., Inc. v. Channel 7 of Detroit, Inc.*, 609 N.W.2d 607 (Mich. App. Ct. 2000).

<sup>378</sup> *Id.* at 609.

<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 610.

Following *Desnick*, the Michigan appellate court held that even though the reporter misrepresented her identity, the transmission shop's consent was "still valid because she did not invade any of the specific interests relating to the peaceable possession of land that the tort of trespass seeks to protect."<sup>381</sup> The reporter entered an auto repair shop "open to anyone" and only recorded the shop employees "engaging in a professional discussion with her."<sup>382</sup> Further, the reporter did not disrupt the operation of the transmission shop. The court, therefore, affirmed the trial court's grant of summary judgment to the station.<sup>383</sup>

In contrast, a federal district court in Florida distinguished *Desnick*, finding that a reporter, who obtained employment with a magazine sales company, and who was able to access areas of the company not open to the public, may have trespassed.<sup>384</sup> In *Pitts Sales, Inc. v. King World Productions* the owners of a magazine sales company sued King World Productions after a story aired on *Inside Edition* examining the business practices of traveling magazine sales companies. A producer for *Inside Edition* secured a job with Pitts Sales by misrepresenting personal information on the job application, and while working for the company, he recorded the day-to-day activities of the magazine sales staff he observed with a hidden camera and microphone.<sup>385</sup> Portions of the film footage and recordings that the producer acquired while working for the magazine sales company were used during a news report that showed the treatment, abuse, and inadequate supervision given to young sales agents.

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<sup>381</sup> *Id.* at 614.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Pitts Sales, Inc v. King World Prod., Inc.*, 383 F. Supp. 2d 1354 (S.D. Fla. 2005).

<sup>385</sup> *Id.* at 1356.

Pitts Sales argued that the producer trespassed when he entered hotels, conference rooms and company vehicles while filming with a hidden camera.<sup>386</sup> In deciding this case, the court examined *Desnick*, *Food Lion* and *Med Lab*. The court distinguished the *Med Lab* grant of summary judgment to the press on the issue of damages because in this case Pitts Sales sought nominal damages.<sup>387</sup> The court further distinguished *Desnick* because the *Inside Edition* producer was able to access non-public areas.<sup>388</sup> The court accepted the *Food Lion* court sending the trespass claim to a jury, and concluded, “a trier of fact must determine whether the acts of [the producer] exceed[ed], or are in conflict with, the purposes for which such consent was given.”<sup>389</sup>

### **Trespass and the First Amendment**

For the most part, trespass is a strict liability tort, meaning courts only consider whether the individual entered the property of another without permission, without exploring the trespasser’s intent. Some courts have, however, examined intent when the press has been accused of trespass. In *Costlow v. Cusimano*,<sup>390</sup> for example, a New York appellate court ruled that a family had no cause of action for trespass against a reporter because “(1) the sole motivation for the damaging acts was not malicious intent to injure the plaintiffs; and (2) the constitutionally protected right to publish articles on subjects within the area of public concern affords a clear legal justification for [the journalist’s] acts.”<sup>391</sup> Frederick Cusimano, a journalist,

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<sup>386</sup> *Id.* at 1365.

<sup>387</sup> *Id.* at 1366.

<sup>388</sup> *Id.* at 1367.

<sup>389</sup> *Id.*

<sup>390</sup> 311 N.Y.S.2d 92 (N.Y. App. Div. 1970).

<sup>391</sup> *Id.* at 95-96.

entered the Costlow's residence, after the Costlows' young children suffocated while playing in a refrigerator.<sup>392</sup> Cusimano took pictures of both the Costlow house and the dead children and later published these photographs.<sup>393</sup> The Costlows claimed that Cusimano trespassed by entering their premises to take photographs; they also claimed invasion of privacy, intentional infliction of emotional distress and, the prima facie tort.<sup>394</sup>

The court ruled that the Costlows' trespass claim and their intentional infliction of emotional distress claim were insufficient for the same reason.<sup>395</sup> They were insufficient because the evidence did not show that Cusimano acted maliciously and with the single-minded purpose to shame or intentionally harm the Costlows.<sup>396</sup> Cusimano was "acting under the protection of the constitutional guarantee of freedom of speech and press," and the court found no precedent in which intentional infliction of emotional distress was allowed against someone exercising their constitutional rights.<sup>397</sup>

The court also found that the Costlows were suing for damages that were not recoverable under a theory of trespass. "Although a cause of action for trespass could be established upon the fact of Cusimano's entering upon plaintiffs' property, unless that entry was justified by his status as a radio station employee investigating the death of two children, that cause of action has

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<sup>392</sup> *Id.* at 93.

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 94. Prima facie tort is defined as, "An unjustified, intentional infliction of harm on another person, resulting in damages, by one or more acts that would otherwise be lawful." BLACK'S LAW DICTIONARY 713 (2d ed. 2001).

<sup>395</sup> *Id.* at 95.

<sup>396</sup> *Id.* at 96. The court found that the Costlows' pleaded that "Cusimano acted maliciously and intentionally to hold the plaintiffs up to public shame and to cause anguish and shock; however, [the Costlows] also allege[d] that Cusimano published and exhibited his article both for financial profit and to enhance his professional reputation." *Id.*

<sup>397</sup> *Id.*

not been well pleaded.”<sup>398</sup> The court ruled that trespass damages were limited to “consequences flowing from the interference with possession,” and not for consequences only indirectly related to the trespass.<sup>399</sup> The reporter could have been liable for any physical harm to the plaintiff under a theory of trespass, but not for the psychic harm of emotional distress.

Another New York appellate court has held, however, that a news network’s intent to exercise its First Amendment rights did not prohibit liability for trespass.<sup>400</sup> In *Le Mistral v. CBS*, a news crew entered and filmed in a restaurant that had been cited for health code violations.<sup>401</sup> The manager of the restaurant asked the crew to leave, but the crew was able to film at the restaurant for a significant amount of time.<sup>402</sup> The restaurant sued for trespass, and a jury awarded the restaurant both compensatory and punitive damages.<sup>403</sup> The trial court affirmed the jury’s trespass verdict, but set aside the damage award.

The appellate court found that the trial court set aside the damage award because evidence as to CBS’s motives for filming in the restaurant was excluded from testimony.<sup>404</sup> The award of punitive damages depended on a finding that CBS acted with “evil or wrongful motive,” therefore CBS had a right to explain its motive at retrial.<sup>405</sup> CBS’s motive for entering the restaurant did not, however, figure into whether the journalists were found to have

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<sup>398</sup> *Id.* at 97.

<sup>399</sup> *Id.* “[D]amages for trespass are limited to consequences flowing from the interference with possession and not for separable acts more properly allocated under other categories of liability.” *Id.*

<sup>400</sup> *Le Mistral, Inc. v. CBS*, 402 N.Y.S.2d 815 (N.Y. App. Div. 1978).

<sup>401</sup> *Id.* at 816.

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> *Id.* at 817.

<sup>405</sup> *Id.* at 817-818.

trespassed, nor did CBS’s argument that its journalists were exercising their First Amendment rights. The court found that the First Amendment did not outweigh other personal rights.<sup>406</sup>

This court ‘recognizes that the exercise of the right of free speech and free press demands and even mandates the observance of the coequal duty not to abuse such right, but to utilize it with right reason and dignity. Vain lip service to ‘duties’ in a vacuous reality wherein ‘rights’ exist, sovereign and independent of any balancing moral or social factor, creates a semantical mockery of the very foundation of our laws and legal system.’<sup>407</sup>

The U.S. Supreme Court has held, however, that the First Amendment demanded that a broadcaster be allowed to publish information obtained by trespass.<sup>408</sup> In *CBS v. Davis*, a South Dakota trial court placed an injunction on CBS, prohibiting it from airing footage it obtained by outfitting a meat-packing plant employee with a hidden camera.<sup>409</sup> The meat-packing plant sued to prevent CBS from using the footage, claiming trespass, breach of loyalty and trade secret violations.<sup>410</sup> Finding that CBS’s publication of the footage “could result in a significant portion of the national chains refusing to purchase beef” from the plant, the trial court entered a preliminary injunction.<sup>411</sup> The trial court also ruled that CBS obtained the footage “through calculated misdeeds,” and that the First Amendment’s protection against prior restraints was improper.<sup>412</sup> The South Dakota Supreme Court declined to give CBS a stay of the injunction.<sup>413</sup>

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<sup>406</sup> *Id.* at 817.

<sup>407</sup> *Id.* (quoting *Bavarian Motor Works v. Manchester*, 61 Misc.2d 309, 311 (N.Y. Sup. Ct. 1969) (holding that a corporation suing for libel did not have to plead facts upon which its claim for actual malice was based)).

<sup>408</sup> *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994).

<sup>409</sup> *Id.* at 1315-1316.

<sup>410</sup> *Id.* at 1316.

<sup>411</sup> *Id.* at 1316.

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

Recognizing the heavy presumption against prior restraints, the U.S. Supreme Court ruled that the plant had not met its burden of proving that prior restraint was necessary.<sup>414</sup> The Court found that even in cases involving national security and competing constitutional rights, prior restraints have been found unconstitutional.<sup>415</sup> Further, the Court ruled that CBS's behavior in obtaining the footage did not factor into whether the prior restraint was applicable:

Nor is the prior restraint doctrine inapplicable because the videotape was obtained through the "calculated misdeeds" of CBS. In *New York Times, Co.*, the Court refused to suppress publication of papers stolen from the Pentagon by a third party. Subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context. Even if criminal activity by the broadcaster could justify an exception to the prior restraint doctrine under some circumstances, the record as developed thus far contains no clear evidence of criminal activity on the party of CBS...<sup>416</sup>

Concluding that allowing a restraint on CBS would "cause irreparable harm to the news media that is intolerable under the First Amendment," the Court granted CBS a stay of injunction.<sup>417</sup>

The Court did, however, note, "If CBS has breached its state law obligations, the First Amendment requires, that [the plant] remedy it harms through a damages proceeding rather than through suppression of protected speech."<sup>418</sup>

The Supreme Court's ruling in this case did not, however, consider the company's trespass claim. The *Davis* case then, could be considered an anomaly when viewed alongside other trespass cases involving the press. *Davis* should not be construed as holding that the First Amendment protected the press from liability for trespass.

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<sup>414</sup> *Id.* at 1317.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* at 1318.

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

For example, a Minnesota appellate court ruled that the First Amendment did not “insulate a person from liability for unlawful trespass.”<sup>419</sup> In *Special Force Ministries v. WCCO Television*, a care facility for handicapped persons sued a television station for trespass and fraud after a journalist for the station obtained a volunteer job at the facility and secretly recorded footage while she worked.<sup>420</sup> The station used journalist’s footage in a report on patient care at the facility.<sup>421</sup> The station argued that the court should limit the decision in *Copeland* in which a Minnesota appellate court reversed a grant of summary judgment to a television station whose journalist had used a hidden camera. In the *Copeland* case, the homeowner, who was not the subject of the news story, sued for trespass.<sup>422</sup> The court declined, however, to distinguish *Copeland*, and found the distinction between the cases insignificant.<sup>423</sup> As a result, the court found the trespass claim viable.

The court also ruled that the First Amendment would not shield the station from a trespass claim. Distinguishing trespass from false light invasion of privacy, which the Minnesota Supreme Court had recently declined to recognize, the *Special Force* court ruled:

There is no inherent conflict or tension with the First Amendment in holding media representatives liable for the tort of fraud or trespass; neither the courts nor the legislature has given such representatives carte blanche to commit such torts in their pursuit of videotape. We therefore see not need to overrule *Copeland*.<sup>424</sup>

The court, therefore, declined the station’s motion for summary judgment.<sup>425</sup>

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<sup>419</sup> *Special Force Ministries v. WCCO TV*, 584 N.W.2d 789,793 (Minn. Ct. App. 1998).

<sup>420</sup> *Id.* at 791.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.* at 792.

<sup>423</sup> *Id.*

<sup>424</sup> *Id.* at 793

<sup>425</sup> *Id.* at 795.

In these trespass cases in which a private individuals have sued the press for entering their property, the courts have, for the most part, have considered whether the plaintiff actually consented to the press' presence. In these civil cases some courts also have examined whether the First Amendment shielded the press from liability for trespass, an otherwise strict liability tort. These same issues arise when states have prosecuted members of the press for trespass under criminal statutes.

### **Criminal Trespass**

In addition to civil trespass, criminal remedies are available for use against trespassers. In *People v. Berliner*,<sup>426</sup> for example, the State of New York charged four journalists with criminal trespass after the journalist entered a crime scene to gather news.<sup>427</sup> The journalists were assigned to cover the arrest of David Berkowitz, the “Son of Sam” killer, and went to Berkowitz’s apartment on the day after his arrest to get information.<sup>428</sup> The journalists entered the apartment door on which the police had posted a sign stating, “Do Not Enter, Crime Scene.”<sup>429</sup> Police arrested the journalists upon entry – after the journalists were able to take pictures.<sup>430</sup>

Arguing that the elements of the crimes with which they were charged were not met, the journalists urged the court to dismiss the case.<sup>431</sup> The information under which the journalists were charged stated:

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<sup>426</sup> 3 Media L. Rep. (BNA) 1942 (Yonkers (N.Y.) City Ct. 1978).

<sup>427</sup> *Id.* at 1942-1943.

<sup>428</sup> *Id.*

<sup>429</sup> *Id.* at 1943.

<sup>430</sup> *Id.*

<sup>431</sup> *Id.* The state charged the journalists with Second Degree Criminal Trespass and Obstruction of Governmental Administration. *Id.* at 1942.

At above time and place defendants acting in concert, each aiding and abetting the other did knowingly and unlawfully enter the apartment of one, David Berkowitz said apartment being at the time in the control and custody of the Yonkers Police Department. Defendants did enter same without the permission of the Yonkers Police Department and did there take photographs evidence contained therein. Said premises were at the time posted “Crime Scene, Do Not Enter.”<sup>432</sup>

Under New York law, criminal trespass occurred when someone “knowingly” entered or remained “unlawfully” in a private residence.<sup>433</sup> The statutory definition of “unlawfully” referred to a person remaining or entering a private residence while “not licensed or privileged to do so.”<sup>434</sup> In reviewing the journalists request, the court framed the main issue in the case as whether the police “had sufficient possessory interest in the premises necessary to support a charge of trespass.”<sup>435</sup>

Although acknowledging that the police have the authority to exclude people from residences in which they are conducting a lawful search, the court ruled that the journalists did not commit criminal trespass.<sup>436</sup> The court found that even though the police had custody of the apartment, they were not in actual possession of the apartment.<sup>437</sup> The officers’ authority stemmed from, and was limited by, the Constitution in the form of a search warrant. Therefore, a person who did not follow the officers’ directions during a search could be criminally charged, but not with trespass.<sup>438</sup> After the time specified on the warrant, the police authority was limited

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<sup>432</sup> *Id.* at 1943.

<sup>433</sup> N.Y. PENAL LAW § 140.15 (defining criminal trespass in the second degree).

<sup>434</sup> N.Y. PENAL LAW § 140.00(5).

<sup>435</sup> 3 Media L. Rep. (BNA) at 1943.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* at 1944.

<sup>438</sup> *Id.*

with respect to control of the residence; “[t]he police then have only a bare temporary license to search and do not acquire any further legal interest to sustain a trespass action.”<sup>439</sup>

The court ruled that had the information alleged that the journalists entered the apartment without the consent of Berkowitz, the apartment owner, it might have sustained the criminal trespass charge. The court dismissed the charge, noting:

While the Court is not passing upon the actions of reporters relative to freedom of the press, nevertheless the Court feels constrained to state that the actions alleged to have been committed and those they concede took place, can best be described as reprehensible and cannot be justified as legitimate in the pursuit of a news story.<sup>440</sup>

The court, therefore, discharged the journalists.

Although the journalists in *Berliner* did not claim that the criminal trespass charge infringed on their constitutional right to gather news, other members of the press have asserted the First Amendment as a defense in criminal trespass cases. In *People v. Rewald*,<sup>441</sup> police arrested a reporter for trespass after the reporter was asked, and refused to leave a migrant camp.<sup>442</sup> The owners of the camp, a local produce cooperative, ran the property like a “company town;” workers had housing, a hospital, a church, and other amenities regularly found in actual cities.<sup>443</sup> Workers could leave and return at their pleasure. However, a sign to the entrance of the camp said, “LABOR CAMP—PRIVATE PROPERTY—Open to Residents—Non-residents Must Register at Office—Violators Will be Prosecuted.”<sup>444</sup> The camp manager had, however,

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<sup>439</sup> *Id.*

<sup>440</sup> *Id.* The court also dismissed the Obstructing Governmental Administration charge. *Id.*

<sup>441</sup> 318 N.Y.S.2d 40 (N.Y. Cty. Ct. 1971).

<sup>442</sup> *Id.* at 42.

<sup>443</sup> *Id.* at 42-43.

<sup>444</sup> *Id.* at 43.

allowed the reporter entrance to the camp without registering for several years.<sup>445</sup> Over the duration of a year, however, the relationship between the camp management and the reporter had soured. On the day of the journalist's arrest, he had called the camp manager and informed him of his intention to visit the camp.<sup>446</sup> Once there, the camp manager ordered the reporter to leave; when he refused he was arrested for trespassing.<sup>447</sup>

In analyzing the reporter's appeal of his conviction for trespass, the court framed the main issue as whether the reporter had entered or remained at the camp unlawfully, as defined by state statute.<sup>448</sup> The New York criminal trespass statute stated in pertinent part, "A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises. . . ."<sup>449</sup>

A person "enters or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person.<sup>450</sup>

After finding that the camp was open to the public because its residents were free to come and go as they pleased, the court ruled that even though the produce cooperative owned the property, it could not arbitrarily exclude people.<sup>451</sup> According to the court, a public or quasi-public use of property required a "determination of the right to impose the penal sanction against trespass."<sup>452</sup>

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<sup>445</sup> *Id.*

<sup>446</sup> *Id.* at 42.

<sup>447</sup> *Id.*

<sup>448</sup> *Id.* at 44.

<sup>449</sup> N.Y. PENAL LAW § 140.05 (defining criminal trespass in the third degree).

<sup>450</sup> N.Y. PENAL LAW § 140.00(5).

<sup>451</sup> 318 N.Y.S.2d at 44-45.

<sup>452</sup> *Id.* at 44.

This determination depended upon “the degree of the public use which the owner permits or invites upon his premises.”<sup>453</sup>

Public or partial public use of premises, whether under express or implied invitation or permission, carries with it the license to enter and, absent abuse of such privilege, carries with it the correlative license to lawfully remain...[I]n no event...should revocation of the right to remain be predicated upon mere whim, caprice, or arbitrary choice. To permit arbitrary and capricious ejection from publicly used premises would violate not only the fair intendment of the statutory privilege, but would clearly raise serious questions of fundamental constitutional rights.<sup>454</sup>

The journalist also argued that his conviction for trespass violated his right to freedom of the press as well as other constitutional rights.<sup>455</sup> Focusing on the residents of the camp instead of the journalist, the court ruled:

[The residents] have under our Constitution a right to free access to information and, most certainly, visitors such as news reporters, may not be denied without good cause shown the right of reasonable visitation for purposes of gathering and disseminating news. Thus, camp residents and public alike may be fully informed, may openly communicate their ideas, may intelligently exercise their franchise to vote and, when and if necessary, petition their government for redress of grievances.<sup>456</sup>

The court recognized that a property owner’s right to control property used only for private purposes differed from those when a property owner’s land was open to the public. When property was open to the public, the public’s constitutional rights circumscribe the property owner’s right to control the property.<sup>457</sup> The court found that the right against trespass could not be used on property open to the public. Nor could that right be used in such a manner that would

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<sup>453</sup> *Id.*

<sup>454</sup> *Id.* at 44-45.

<sup>455</sup> *Id.* at 45. The journalist asserted that the conviction also violated his 14<sup>th</sup> Amendment rights. *Id.*

<sup>456</sup> *Id.*

<sup>457</sup> *Id.* The court cited *Marsh v. Alabama*, 326 U.S. 501 (1946), in which the U.S. Supreme Court held, “Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.” 326 U.S. at 506.

inhibit the people's right to receive information. It concluded that the reporter had not trespassed.<sup>458</sup>

But the public or quasi-public status of property is not always determinative of whether a journalist will be convicted of criminal trespass. Sometimes the decision may rest on, simply, whether the journalists violated the law. In *Stahl v. Oklahoma*,<sup>459</sup> the Oklahoma Court of Criminal Appeals affirmed the convictions of nine journalists for criminal trespass, after the journalists followed protesters onto the land of a nuclear power facility.<sup>460</sup> The Public Service Company of Oklahoma (PSO), in conjunction with two rural electric companies, began developing a nuclear power facility at Black Fox Station, a 2206 acre tract of land in Oklahoma.<sup>461</sup> Members of an organization opposed to the nuclear plant began protesting at Black Fox Station, where the PSO had erected a fence to exclude protesters.<sup>462</sup> The PSO had warned protesters that it would have anyone who crossed the fence arrested. In spite of this, protesters crossed the fence, followed by the journalists.<sup>463</sup> Both protesters and journalists were arrested.

The journalists were convicted of criminal trespass under title 21 Oklahoma Statute § 1835, which states:

Whoever shall willfully or maliciously enter the garden, yard, or enclosed field of another after being expressly forbidden to do so by the owner or occupant thereof shall be deemed

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<sup>458</sup> 318 N.Y.S.2d at 46.

<sup>459</sup> 665 P.2d 839 (Okla. Crim. App. 1983).

<sup>460</sup> *Id.* at 840.

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

guilty of trespass and upon conviction thereof shall be fined in any sum not to exceed Twenty-five Dollars (25.00).<sup>464</sup>

The journalists argued that the convictions should be overturned because they lacked the intent necessary for criminal trespass under the Oklahoma Statute, and that they were privileged by the First Amendment to accompany the protesters onto the closed property.<sup>465</sup> The court found, however, that Title 21 Oklahoma Statute § 92 established that “willfully,” the requisite intent for criminal trespass, “when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.”<sup>466</sup> Therefore, it did not matter that the journalists did not intend to break the law or to injure the property rights of the PSO; it is sufficient that they trespassed on the property.<sup>467</sup>

Further, the court ruled that the First Amendment did not shield the journalists from criminal trespass convictions.<sup>468</sup> Although recognizing the PSO’s actions in having the journalists arrested constituted state action,<sup>469</sup> the court found the Black Fox grounds were closed to both the public and the press. The PSO had, however, established a viewing area near the facility, and visitors could have requested permission to visit the site.<sup>470</sup> Finding this policy

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<sup>464</sup> OKLA. STAT. tit. 21, § 1835(a) (1981).

<sup>465</sup> 665 P.2d at 840-841.

<sup>466</sup> OKLA. STAT. tit. 21, § 92 (1981).

<sup>467</sup> 665 P.2d at 840. The court noted that actual damage to the landowner was not an element of criminal trespass in the first part of the statute under which the journalists were convicted. *Id.*

<sup>468</sup> *Id.* at 841. “The First Amendment does not shield newsperson from liability for torts and crimes committed in the course of news-gathering.” *Id.* (citing *Galella* and *Dietemann*).

<sup>469</sup> 665 P.2d at 841. The court notes that the trial court found “a sufficiently close nexus existed between the actions of PSO and the state and federal governments to fairly treat the actions of PSO as the actions of government itself.” *Id.*

<sup>470</sup> *Id.*

to be “based on the need to avoid harm to visitors due to ditches and holes on the property and the roads,” as well as to avoid vandalism, the court ruled that the PSO had acted within its power to have the journalists arrested.<sup>471</sup> Additionally, the court stated that the First Amendment did not establish a right of special access for the press not available to the public.<sup>472</sup> Also, the court ruled “this property is not a traditional public forum such as public streets, sidewalks, and parks, and there is no constitutional guarantee of access.”<sup>473</sup>

The lone dissenter, Judge Brett, argued, however, that the application of the Oklahoma criminal trespass statute to the journalists in this case was unconstitutional for three reasons. To make these conclusions, Judge Brett examined precedent from both state and federal law. The Oklahoma constitution provides, “No law shall be passed to restrain or abridge the liberty of speech or of the press.”<sup>474</sup> The Oklahoma courts had interpreted this provision of the state constitution as meaning:

No one can deny the long established right of the press in the United States to gather and disseminate news and information concerning every phase of human activity, together with the incidents pertaining thereto. This [right] makes the press the most potent servant of the people in protecting all rights against acts of tyranny, fraud, and corruption, as well as a most prolific medium of information and education. We are of the opinion that freedom of speech and press is not a discriminate right but the equal right of newsgathering and

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<sup>471</sup> *Id.* “Governmental entities are empowered to regulate property under their control in order to preserve the property under their control in order to preserve the property for the use to which it is lawfully dedicated.” *Id.*

<sup>472</sup> *Id.* at 842. (citing *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972)).

<sup>473</sup> *Id.* The court cited *U.S. Postal Service v. Council of Greenburgh Civic Assoc.*, 453 U.S. 114 (1981), in which the U.S. Supreme Court ruled:

The First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In *Greer v. Spock*, 424 U.S. 828, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976), the Court cited approvingly from its earlier opinion in *Adderley v. Florida*, 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966) wherein it explained that ‘The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.’ 424 U.S. 828, 836, 96 S. Ct. 1211, 1216, 47 L. Ed. 2d 505.

*U.S. Post. Serv. v. Coun. of Greenburgh Civ. Assoc.*, 453 U.S. 114, 129-130.

<sup>474</sup> OKLA. CONST. ART. II, § 22.

disseminating agencies, subject to the restrictions against abuse, and injurious use to individuals or public rights and welfare.<sup>475</sup>

Judge Brett also noted that federal court cases, although not factually analogous to the *Stahl* case, were instructive because the federal cases provided a method of analyzing challenges to First Amendment rights.<sup>476</sup> In these cases, the U.S. Supreme Court balanced First Amendment rights with the state's actions. Judge Brett interpreted these cases as "hold[ing] that any press access claim to government information is subject to a degree of restraint dictated by the kind of forum, the nature of the information sought and the countervailing governmental interests. These claims are analyzed by balancing these three factors."<sup>477</sup> Using these three factors, Judge Brett held:

[O]ur State Constitution gives protection for the rights of the press to reasonable access to gather news and any restraint on this right, including but not limited to enforcement of a criminal trespass statute, requires that the State show a relatively greater consideration that must be exercised in the public interest. A balancing of these opposing interests is thus mandated.<sup>478</sup>

First, Judge Brett argued that the journalists' right of reasonable access to newsworthy events outweighed the State's reasons for prohibiting the journalists from newsgathering at Black Fox Station.<sup>479</sup> Although acknowledging that Black Fox Station was not a traditional public forum, and that the PSO's actions did not, therefore, require "the stringent weighing standards of time, place, and manner regulations," Judge Brett did conclude that the property was quasi-

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<sup>475</sup> 665 P.2d at 845 (Brett, J. dissenting). (quoting *Lyles v. State*, 330 P.2d 734, 739 (Okla. Crim. App. 1958) (upholding a courts decision to permit television cameras in its courtroom)).

<sup>476</sup> 665 P.2d at 845 (Brett, J. dissenting).

<sup>477</sup> *Id.* at 846.

<sup>478</sup> *Id.*

<sup>479</sup> *Id.* at 849.

public and the PSO's actions constituted state action.<sup>480</sup> Further, he argued that the press' right to gather news and to have reasonable access to newsworthy events was constitutionally protected:

It is an uncontroverted fact that the news media is an integral part of our national communication system by which the public obtains information to form their judgments about national politics. The press has a constitutionally recognized role to inform and educate, offer criticism and provide a forum for public discussion and debate.<sup>481</sup>

Judge Brett reasoned that the Black Fox protest was newsworthy and the First Amendment protected the press' coverage of the event.<sup>482</sup> Also, the PSO's designated area for the press was not reasonable access because it did not allow the press the ability to observe the protest.

Further, the journalists were gathering news about the government, "and this [is the] type of information the public had a deserved right to know."<sup>483</sup> On the other hand, Judge Brett argued that the state justified the prosecution of the journalists for criminal trespass "to maintain order and to protect property interests."<sup>484</sup> In order to determine whether a state had acted within its police powers, the court had to evaluate whether "the State's police powers extend so far as to restrict or totally subvert press access to a newsworthy event?"<sup>485</sup>

The determination of that question begins with the observation that the usual presumption favoring statutory validity is not operative against restrictions of pre-eminent freedoms secured by our State Constitution and the First Amendment of the U.S. Constitution. These liberties are given a priority that does not permit dubious intrusion. Accordingly, any attempt to restrict them must be justified by a clear public interest that is presently threatened by the activity sought to be regulated.<sup>486</sup>

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<sup>480</sup> *Id.* at 846.

<sup>481</sup> *Id.* at 847.

<sup>482</sup> *Id.*

<sup>483</sup> *Id.* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

<sup>484</sup> 665 P.2d at 847.

<sup>485</sup> *Id.*

<sup>486</sup> *Id.*

The dissent found the state’s interest in protecting public safety inapplicable to the prosecution of the journalists for criminal trespass.<sup>487</sup> The journalists were only interested in gathering news. Further, Black Fox Station was not a crime or disaster scene at which the exclusion of the press would have been warranted.<sup>488</sup>

The dissent also argued that the state’s argument that the protest was not newsworthy was “constitutionally impermissible.”<sup>489</sup> The government was not allowed to decide what was newsworthy, according to the dissent. On the contrary, the public decided newsworthiness.<sup>490</sup> Also, although finding the state’s interest in protecting the PSO’s property rights was of the “highest importance,” in this case property rights were not implicated because the journalists had not endangered the PSO’s property rights.<sup>491</sup>

Finally, the dissent noted that the trial court found that the reason behind the PSO’s restriction on press access was for the “illegitimate purpose of controlling the kind of news story the press would later distribute to the public.”<sup>492</sup> The trial court, however, did not properly weight the state’s illegitimate purpose. Judge Brett noted that the U.S. Supreme Court held content-based regulations unconstitutional.<sup>493</sup> The dissent reasoned that the trial court did not

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<sup>487</sup> *Id.*

<sup>488</sup> *Id.*

<sup>489</sup> *Id.* at 848.

<sup>490</sup> *Id.* (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding a Florida right of reply statute unconstitutional).

<sup>491</sup> 665 P.2d at 848.

<sup>492</sup> *Id.*

<sup>493</sup> *Id.*

properly scrutinize the PSO's motives for restricting the press, and held, therefore, that the PSO had no legitimate reason to have the journalists prosecuted for criminal trespass.<sup>494</sup>

The dissent did, however, limit its holding, stating that the press did not have an absolute right to gather news on public property, but that criminal trespass could not be used to “exclude the press from their constitutionally protected news gathering role on public property when the State does not present a legitimate or important countervailing interest.”<sup>495</sup>

The press remains subject to reasonable time, place and manner restriction when exercising its news gathering role in traditional First Amendment forums and subject to the weighing tests discussed herein when making a press access claim to non-traditional public forums. I would reaffirm the holding in *Central Liquor Co. v. Oklahoma Alcoholic Beverage and Control Board*, 640 P.2d 1351 (Okla. 1980), where the State Supreme Court stated: “Police power must be exercised in the public interest with scrupulous concern for private rights guaranteed by the Constitution. It may not be utilized for the benefit of a private company. I agree that the power of the State must be protected but it must not be abused.”<sup>496</sup>

*New Mexico v. McCormack*<sup>497</sup> also involved the arrest of a journalist, Kenneth McCormack, for criminal trespass. Protesters gathered at a federal nuclear waste site that the Department of Energy (DOE) had closed to the public.<sup>498</sup> The DOE had created a buffer zone some 800 feet away from the site's construction zone, and posted “No Trespassing” signs.<sup>499</sup> The day before the protest, the DOE held a conference for the media at which journalists were warned that there were no exceptions to the “no trespassing” mandate; McCormack was not, however, at the meeting.<sup>500</sup> On the day of the protest, McCormack followed, taking pictures, as

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<sup>494</sup> *Id.* at 849.

<sup>495</sup> *Id.*

<sup>496</sup> *Id.*

<sup>497</sup> 682 P.2d 742 (N.M. Ct. App. 1984).

<sup>498</sup> *Id.* at 744.

<sup>499</sup> *Id.*

<sup>500</sup> *Id.*

twenty-nine protesters crossed a police barricade into the restricted area at the site.<sup>501</sup> Police arrested the protesters and McCormack for criminal trespass. A court found him guilty and fined him \$500 and gave him a suspended jail sentence of 30 days.<sup>502</sup>

On appeal, McCormack argued that he did not criminally trespass because he did not have the requisite intent to violate the statute because he did not believe that the DOE's restrictions applied to the media.<sup>503</sup> The court disagreed, and ruled that ignorance of the law is no defense to a crime of general intent.<sup>504</sup> The state was only required to demonstrate that McCormack entered the land without authorization; in this case, McCormack entered the restricted property in spite of the warnings.<sup>505</sup>

McCormack also argued that the criminal trespass statute, as applied in this case, infringed upon his First Amendment rights.<sup>506</sup> According to the journalist, the criminal trespass statute infringed upon his right to peaceably assemble.<sup>507</sup> The court rejected this argument, asserting that U.S. Supreme Court has held that “the government may exclude peaceful assembly or access which interferes with the function of the institution.”<sup>508</sup> The court ruled that it needed only to inquire into whether the restriction was “reasonable and content-neutral.”<sup>509</sup> The court

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<sup>501</sup> *Id.*

<sup>502</sup> *Id.* at 743.

<sup>503</sup> *Id.* at 744.

<sup>504</sup> *Id.* at 745. General intent means, “The state of mind required for the commission of certain common-law crimes not requiring a specific intent or not imposing strict liability.” BLACK’S LAW DICTIONARY 360 (2d ed. 2001). This means that it is unnecessary to intend to commit a crime in order to be found guilty of that crime.

<sup>505</sup> *Id.*

<sup>506</sup> *Id.*

<sup>507</sup> *Id.*

<sup>508</sup> *Id.* at 746.

<sup>509</sup> *Id.* The court based this ruling on *Adderley v. Florida*, 385 U.S. 39 (1966)(upholding the convictions of students who protested outside of a jail).

reasoned that the DOE’s restriction on entry into the site was reasonable because it was intended to “protect the people working in the construction, the property and equipment located there, and to avoid a shutdown of the costly project.”<sup>510</sup> The court ruled that the DOE’s restrictions did not violate McCormack’s First Amendment right to assemble.<sup>511</sup>

McCormack also argued that his conviction for criminal trespass infringed on his right to freedom of the press because it restricted his ability to gather news.<sup>512</sup> Although acknowledging that the freedom of the press involved both “acquisition of information and dissemination of information,” the court rejected McCormack’s argument that the press has special access to areas.<sup>513</sup> The court chose instead to follow the U.S. Supreme Court’s decision in *Pell v. Procunier*,<sup>514</sup> which the McCormack court interpreted as “holding that the First Amendment does not require that members of the press have a special right of access to gather information, above and beyond that of the public generally.”<sup>515</sup>

Further, the court rejected McCormack’s argument that *Richmond Newspapers, Inc. v. Virginia*<sup>516</sup> controlled whether or not the press should have been granted access to the property.<sup>517</sup> Distinguishing *Richmond Newspapers*, the court found that the government construction site at issue in the instant case was different from the criminal trial at issue in

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<sup>510</sup> 682 P.2d at 746.

<sup>511</sup> *Id.*

<sup>512</sup> *Id.*

<sup>513</sup> *Id.*

<sup>514</sup> 417 U.S. 817 (1974).

<sup>515</sup> 682 P.2d at 746.

<sup>516</sup> 448 U.S. 555 (1980).

<sup>517</sup> 682 P.2d at 747. The U.S. Supreme Court ruled in *Richmond Newspapers*, “[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” 448 U.S. at 575.

*Richmond Newspapers*.<sup>518</sup> The court also noted *Zemel v. Rusk*<sup>519</sup> which it interpreted as holding that “many actions may decrease data flow to the public, but that does not mean that they violate the First Amendment.”<sup>520</sup> The court held that McCormack had no greater right to enter the federal land than a member of the public. The court, therefore, affirmed McCormack’s conviction for criminal trespass.<sup>521</sup>

A federal court also used *Pell* to deny the appeal of journalists convicted of criminal trespass under a federal statute.<sup>522</sup> In *United States v. Maldonado-Norat*, the federal district court in Puerto Rico rejected the First Amendment arguments of a group of journalists who trespass onto a naval base.<sup>523</sup> While expressing its sympathy for the journalists’ “unassailable premise that ‘a truly free press’ is essential to the preservation of a just and free society,” the court found that Supreme Court precedent rejected that idea that the freedom of the press allowed journalists to break the law.<sup>524</sup>

The court examined *Branzburg v. Hayes*<sup>525</sup> in which the Supreme Court held that the First Amendment did not absolve journalists from their civic duty to testify in front of a grand jury, and found that “the Supreme Court declared that ‘it is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of

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<sup>518</sup> 682 P.2d at 747.

<sup>519</sup> 381 U.S. 1 (1965) (holding that the press did not have an unrestrained right to gather news).

<sup>520</sup> 682 P.2d at 747.

<sup>521</sup> *Id.*

<sup>522</sup> *U.S. v. Maldonado-Norat*, 122 F. Supp. 2d 264 (Dist. P.R. 2000).

<sup>523</sup> *Id.* at 264.

<sup>524</sup> *Id.* at 265.

<sup>525</sup> 408 U.S. 665 (1972).

civil or criminal statutes of general applicability.”<sup>526</sup> The court found that the Supreme Court held that the press had no constitutional right to special access to information.<sup>527</sup> The *Maldonado-Norat* court, therefore, ruled that the journalists had no special right of access to the naval base, and that there was no “special circumstances” that would require such access.<sup>528</sup> The court supported its ruling against special access for the press with *Pell*, in which the Supreme Court ruled that “The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.”<sup>529</sup> In *Pell*, the Court also noted, “there are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.”<sup>530</sup> The *Maldonado-Norat* court found that the federal trespass statute was subject to an “ingenious argument,” but that it did not violate the journalists’ First Amendment rights.<sup>531</sup> As such, the court denied the journalists’ motion to dismiss based on the First Amendment.

### **Joint Activities With Government Officials**

Members of the press do not always purposely intrude or trespass on private property. Sometimes public officials such as police officers, paramedics and health inspectors, allow journalists to accompany them as they go about their official duties. These instances are sometimes called “ride-alongs.” But receiving permission to accompany government employees does not always absolve the press from suits for intrusion or trespass. This section examines

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<sup>526</sup> 122 F. Supp. 2d at 265 (quoting *Branzburg*, 408 U.S. at 682).

<sup>527</sup> 122 F. Supp. 2d at 265 (citing *Branzburg*, 408 U.S. at 684).

<sup>528</sup> 122 F. Supp. 2d at 265.

<sup>529</sup> *Pell*, 417 U.S. at 819.

<sup>530</sup> *Id.* at 834 n. 9 (quoting *Zemel*).

<sup>531</sup> 122 F. Supp. 2d at 265.

cases in which journalists have been sued for acting jointly, or claiming to act jointly, with law enforcement or other government response units.

For example, on the afternoon of September 15, 1972 a fire broke out at the Fletcher family home, killing the oldest child, Cindy.<sup>532</sup> After the fire department doused the fire and removed the body of the victim, the Fire Marshal and a police sergeant began their investigation; they invited members of the media to join them, “as they deposed was their standard practice.”<sup>533</sup> The reporters entered the house after the marshal, without causing any further damage to the property.<sup>534</sup> During his investigation, the Fire Marshal attempted to take pictures of the silhouette that the child’s body had made on the floor. To do this, he used a Polaroid camera, but found that the photo inadequate.<sup>535</sup> He, therefore, asked one of the accompanying photographers to photograph the silhouette; this picture later became a part of the official investigation file.<sup>536</sup> The photographer also gave the pictures to the newspaper, which then published the photos.<sup>537</sup>

Cindy’s mother sued the newspaper publisher for damages claiming trespass, invasion of privacy and intentional infliction of emotional distress.<sup>538</sup> The trial court dismissed the invasion of privacy claim and granted summary judgment to the publisher on the trespass claim.<sup>539</sup> The court conceptualized the main issue on Fletcher’s trespass claim as whether the journalists’ entry and photographing of the house was “consented to by the doctrine of common custom and

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<sup>532</sup> Florida Publ’g Co. v. Fletcher, 340 So. 2d 914, 915 (Fla. 1976).

<sup>533</sup> *Id.*

<sup>534</sup> *Id.*

<sup>535</sup> *Id.* at 915-916.

<sup>536</sup> *Id.* at 916.

<sup>537</sup> *Id.*

<sup>538</sup> *Id.*

<sup>539</sup> *Id.* The court also granted the publisher summary judgment on the emotional distress claim. *Id.*

usage.”<sup>540</sup> In noting that the settled law in Florida recognized no trespass when entry onto property was made under custom or usage, the court acknowledged *Martin v. Struthers*,<sup>541</sup> in which the U.S. Supreme Court struck a city ordinance that made it a trespass to knock on doors while pamphleting.<sup>542</sup> Ruling the ordinance an unconstitutional infringement on speech, the Court held:

Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off... We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away.<sup>543</sup>

In addition, the Fire Marshal testified and several media outlets submitted affidavits validating the custom of allowing the media to enter private property after fires.<sup>544</sup> In light of this evidence, and Fletcher’s concession that the fire and police departments were privileged to enter her property without permission, that the silhouette photograph was used as part of the official investigation, and that the photographer was not restricted from publishing the picture, the court moved in favor of the newspaper.<sup>545</sup> The trial court found no issue of material fact, “and as a matter of law an entry, that may otherwise be an actionable trespass, becomes lawful and non-actionable when it is done under common usage, custom and practice.”<sup>546</sup>

On appeal, the Florida District Court found the evidence of the custom of allowing the media, under certain circumstances, to enter private property, insufficient and reversed the trial

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<sup>540</sup> *Id.*

<sup>541</sup> 319 U.S. 141 (1943).

<sup>542</sup> *Id.* at 147-149.

<sup>543</sup> *Id.* at 147-148.

<sup>544</sup> 340 So. 2d at 916.

<sup>545</sup> *Id.* at 917.

<sup>546</sup> *Id.*

court's grant of summary judgment.<sup>547</sup> The Florida Supreme Court reversed the District Court, however, and ruled the trial court's grant of summary judgment was proper.<sup>548</sup> Using Judge McCord's lone dissent from the District Court, the state supreme court found "it had been shown that it was common usage, custom and practice for news media to enter private premises and homes *under the circumstances present here.*"<sup>549</sup>

Judge McCord determined that there was implied consent for the media to enter the private property.<sup>550</sup> The fire was of public interest, and the journalists entered the house upon invitation by the Fire Marshal and police sergeant.<sup>551</sup> Further, the affidavits from other media outlets demonstrated

[I]t has been a longstanding custom and practice throughout the country for representatives of the news media to enter upon private property where disaster of great public interest has occurred – entering in a peaceful manner, without causing any physical damage, and at the invitation of the officers who are investigating the calamity. The affidavits of law enforcement officers indicate that the presence of the news media at such investigations is often helpful to the investigation in developing leads, etc.<sup>552</sup>

According to Judge McCord, implied consent by custom and usage did not rest upon whether the property owner had previously given the media permission to enter the property, but on custom and usage.<sup>553</sup> Also, the judge noted that the issue of custom and usage for media to enter private

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<sup>547</sup> *Id.* The intermediate appellate court determined that although custom and usage were implied consent, Fletcher had not impliedly consented to the media entering her house. Further, the court concluded the testimonial and affidavit evidence presented at trial did not demonstrate that there was "no genuine issue of material fact as to whether implied consent by custom an usage authorized entry into the premises without invitation by appellant." *Id.*

<sup>548</sup> *Id.* at 918.

<sup>549</sup> *Id.* (emphasis original).

<sup>550</sup> *Id.*

<sup>551</sup> *Id.*

<sup>552</sup> *Id.*

<sup>553</sup> *Id.* The judge did, however, recognize that implied consent would not exist if the property owner had previously informed the media not to enter. *Id.*

property at the invitation of officers was a matter of first impression, indicating that this was common newsgathering practice.<sup>554</sup> Because of this, Judge McCord affirmed the trial court's grant of summary judgment for the newspaper. The Florida Supreme Court approved this conclusion.<sup>555</sup>

Although the *Fletcher* case was the first case dealing with the custom and usage of media entering private property during an event of public interest, this does not mean that all courts have followed its ruling. In *Prahl v. Brosamle*,<sup>556</sup> a Wisconsin appellate court ruled that a research scientist had not expressly or impliedly consented to a reporter's entry onto his property to cover a story.<sup>557</sup> In *Prahl*, police were called to the residence of Helmut Prahl after four boys accused him of shooting at them as they rode past his house on their bicycles.<sup>558</sup> Brosamle, a reporter for a local television station, heard about the incident while listening to a police scanner, and went to Prahl's property. At the property, Brosamle introduced himself to officers, and asked one officer for a ride to Prahl's residence, to which the officer obliged.<sup>559</sup> The reporter entered the building and filmed officers as they searched and confiscated materials. Prahl noticed Brosamle, but did not request that the reporter leave because he "thought that he was an

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<sup>554</sup> *Id. Cf. Green Valley Sch., Inc. v. Cowles Florida Broad.*, 327 So. 2d 810, 819 (Fla. Ct. App. 1976) "In this jurisdiction, a law enforcement officer is not as a matter of law endowed with the right or authority to invite people of his choosing to invade private property and participate in a midnight raid of the premises." *Id.*

<sup>555</sup> 340 So. 2d at 919.

<sup>556</sup> 295 N.W.2d 768 (Wis. App. Ct. 1980).

<sup>557</sup> *Id.* at 780.

<sup>558</sup> *Id.* at 772.

<sup>559</sup> *Id.* at 773.

officer or a deputy.”<sup>560</sup> Brosamle used the footage he shot at the scene for an evening news report.<sup>561</sup>

Prahl sued both law enforcement and the television station for which Brosamle worked for damages related the reporter’s newsgathering.<sup>562</sup> The doctor claimed that Brosamle, acting in conjunction with police, violated his civil rights, under 42 U.S.C. § 1983, which provides a cause of action against any person, acting under color of state law, who deprives another of any constitutional or federal right.<sup>563</sup> In order to recover under § 1983, Prahl had to prove that Brosamle deprived him of his constitutional or federal rights and that the reporter acted under color of state law. Although conceding that the police had probable cause to search his house, Prahl argued that the search became unreasonable when Brosamle filmed and later broadcast the footage of the search.<sup>564</sup> The court disagreed, and declined to rule “that the filming and television broadcast of a reasonable search and seizure, without more, result in unreasonableness.”<sup>565</sup> The court found that the lack of intimate or offensive content of the search, filming and broadcast made those activities reasonable.<sup>566</sup>

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<sup>560</sup> *Id.*

<sup>561</sup> *Id.*

<sup>562</sup> *Id.* at 772. Prahl also sued for defamation, which is beyond the scope of this dissertation.

<sup>563</sup> Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured. . .

42 U.S.C. § 1983.

<sup>564</sup> 295 N.W.2d at 774.

<sup>565</sup> *Id.*

<sup>566</sup> *Id.*

The court also ruled that there was no evidence that Brosamle acted under state law. The court found that a person acts under color of law when that person was “a willful participant in joint activity with the State or its agents.”<sup>567</sup> Using this rule, the court found that Brosamle “acted exclusively for his private employer.”<sup>568</sup>

The Wisconsin court also ruled Brosamle trespassed when he entered Prahls home without express or implied permission.<sup>569</sup> Rejecting the journalist’s assertion that Prahls impliedly consented, by custom and usage, to Brosamle’s entering his home, the court distinguished *Fletcher*.<sup>570</sup> The court found that unlike *Fletcher*, where the Fire Marshal requested the photographer’s assistance, the police at the Prahls residence did not request the Brosamle’s presence or assistance.<sup>571</sup> Brosamle, also, did not present evidence of custom and usage like journalists had in *Fletcher*.<sup>572</sup> The court ruled:

We will not imply a consent as a matter of law. It is of course well known that news representatives want to enter a private building after or even during a newsworthy event within the building. That knowledge is no basis for an implied consent by the possessor of the building to entry. . . Few private persons anticipate [ . . . ] that an unplanned newsworthy event will occur on their property. An advance objection to entry under remotely possible circumstances need not be made, and it is unreasonable to require an objection after entry under distracting circumstances, especially when the identity of the intruder is unknown.

We conclude that custom and usage have not been shown in fact or law to confer an implied consent upon news representatives to enter a building under the circumstances presented by this case.<sup>573</sup>

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<sup>567</sup> *Id.* (quoting *Adickes v. Kress & Co.*, 398 U.S. 144, 152 (1970)).

<sup>568</sup> 295 N.W.2d at 774.

<sup>569</sup> *Id.* at 779.

<sup>570</sup> *Id.* at 779.

<sup>571</sup> *Id.* at 780.

<sup>572</sup> *Id.*

<sup>573</sup> *Id.*

Further, the court rejected Brosamle’s argument that his trespass was privileged by the First Amendment, concluding that “the claimed constitutional privilege did not exist.”<sup>574</sup>

Whether a constitutional privilege exists is a major issue in these cases involving joint activities with government officials. The first part of this section considers joint activities with law enforcement. Following this, joint activities with other first responders are examined. This section ends by considering other joint activities conducted to gather news.

## **Law Enforcement**

Joint activity with law enforcement may be the most common type of joint activity between the press and government officials. Members of law enforcement are commonly called to the scene of crimes, accidents, and other major events. In order to cover these events effectively, and to report on the behavior of law enforcement, journalists often develop relationships with police departments, which allow them to ride along with officers. These law enforcement ride-alongs can be divided into two categories: warrant searches and investigations.

### **Warrant searches**

The Fourth Amendment of the Constitution annunciates “the right of the people to be secure...against unreasonable searches and seizures.”<sup>575</sup> This amendment protects some aspects of an individual’s right to privacy. One way in which the Fourth Amendment does this is by requiring a warrant for certain searches.<sup>576</sup> A warrant is “[a] writ directing or authorizing someone to do an act.”<sup>577</sup> For law enforcement such a writ would authorize members of law enforcement to enter an individual’s home to search for and seize items or persons under

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<sup>574</sup> *Id.* at 781.

<sup>575</sup> U.S. CONST. amend IV.

<sup>576</sup> “[N]o 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.” U.S. CONST. amend IV.

<sup>577</sup> BLACK’S LAW DICTIONARY 758 (2d ed. 2001).

investigation. To obtain a warrant, the investigator makes a sworn application stating the specific place, items or persons for which to be searched.<sup>578</sup> The officer must then have the application approved by a judge, who examines the document for the required level of specificity and to ensure that the officer has the requisite probable cause for such a warrant.<sup>579</sup> Once a warrant is approved, the officer is bound to the scope of the warrant. Meaning, that the officer may not search or seize, except in certain circumstances, items or places not described in the warrant.<sup>580</sup> When officers allow members of the press to accompany them during the execution of a search warrant, the officer may be accused of going beyond the scope of the warrant; the journalist may be accused of trespass or intrusion

In *Anderson v. WROC-TV*,<sup>581</sup> for example, a homeowner sued a broadcast station, after journalists accompanied a Humane Society investigator on warrant search of her property.<sup>582</sup> Ronald Storm, an investigator for the Humane Society, obtained a warrant to search a house after receiving complaints that animals at the residence were not being properly maintained.<sup>583</sup> Storm contacted three television stations and invited journalists to accompany him inside the home. While at the residence, the reporters filmed the interior of the home, and later used the footage on an evening news broadcast.<sup>584</sup>

The basis of the homeowner's complaint was the allegation that she asked the reporters not to enter her home. The journalists, however, ignored her requests and entered her residence

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<sup>578</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 11.02 (2002).

<sup>579</sup> *Id.*

<sup>580</sup> *Id.* at § 11.06 [F].

<sup>581</sup> 441 N.Y.S.2d 220 (N.Y. Sup. Ct. 1981).

<sup>582</sup> *Id.* at 222.

<sup>583</sup> *Id.*

<sup>584</sup> *Id.*

with the officers.<sup>585</sup> Relying on *Fletcher*, the television station argued three defenses: (1) the reporters had an absolute privilege; (2) entry was protected based the public's right to access information; (3) the property was open to the public based on custom and usage.<sup>586</sup> Although agreeing with the laws stated by the *Fletcher* court, the *Anderson* court did not accept the *Fletcher* conclusions.<sup>587</sup> According to the *Anderson* court, the Florida Supreme Court ruling in *Fletcher* that news media entry onto property with the consent of law enforcement was customary in Florida was based on affidavits from state and national news editors and state law enforcement officials.<sup>588</sup> The *Anderson* court disagreed with this conclusion:

The gathering of news and the means by which it is obtained does not authorize, whether under the First Amendment or otherwise, the right to enter into a private home by an implied invitation arising out of a self-created custom and practice. This is a bootstrap argument which does not eliminate the trespassory conduct of the defendants in this case.<sup>589</sup>

Recognizing that trespass by law enforcement can be justified when an officer acts in the performance of his duty, the court ruled “such authority does not extend by invitation, absent an emergency, to every and any other member of the public, including members of the news media.”<sup>590</sup>

What must be remembered is that news people do not stand in any favored position with respect to newsgathering activity. The United States Supreme Court has repeatedly held that the First Amendment right to speak and publish does not carry with it the unrestrained

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<sup>585</sup> *Id.*

<sup>586</sup> *Id.* at 222-223.

<sup>587</sup> *Id.* at 223.

<sup>588</sup> *Id.*

<sup>589</sup> *Id.*

<sup>590</sup> *Id.*

right to gather information. News people have no special First Amendment immunity or special privilege to invade the rights and liberties of others.<sup>591</sup>

The court found that restrictions may be imposed on the press that restrict its free exercise of its First Amendment rights when those rights involve unlawful entry onto private property.<sup>592</sup>

The court also rejected the television station's argument that it should be allowed a qualified privilege "which would excuse only a certain degree of intrusion, the scope of the invasion being balanced against the public interest served."<sup>593</sup> Under the balancing test proposed by the television station, the alleged intrusion would be balanced against the newsworthiness of the story. A jury, then, would determine whether the public interest granted the reporters permission to enter the property to cover the story. To allow any other test, according to the television station, would be akin to prior restraint.<sup>594</sup> Finding this argument unpersuasive, the court ruled that, "[a]ssessing the degree of the intrusion against the newsworthiness of the story is a test that is too vague and subjective to counterbalance the predominant interest served in protecting the rights of individuals in a free society against invasion of their privacy or their home."<sup>595</sup> Additionally, the court noted that the homeowner's cause of action focused on how

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<sup>591</sup> *Id.* at 224 (citing *Branzburg; Pell v. Procunier*, 417 U.S. 817 (1974); and *Houchins v. KQED*, 438 U.S. 1 (1978)).

<sup>592</sup> 441 N.Y.S.2d at 224. The court notes the U.S. Supreme Court opinion stating "[Where] property is not ordinarily open to the public, this Court has held that access to it for the purpose of exercising First Amendment rights may be denied altogether." *Food Employees v. Logan Plaza*, 391 U.S. 308, 320 (1968).

<sup>593</sup> 441 N.Y.S.2d at 224.

<sup>594</sup> *Id.* The television station analogized its balancing test to the law of defamation "which, while it does not permit prior censoring of a story, allows the damages if a jury finds the existence of malice and the absence of good faith and fair comment." *Id.*

<sup>595</sup> *Id.* Noting one commentator:

Even if the information sought were considered especially important, an ad hoc balancing test would seem improper since it would determine the lawfulness of the means of gathering according to the end value of the information gained in each case. Moreover, it would often be difficult to determine if the activity at issue was pursued with the ultimate objective of obtaining information, and any measurement of the value of the information obtained would be vague, subjective criteria.

the television station obtained the information, and not the publication of that information.<sup>596</sup>

The mere fact that the homeowner was under suspicion of a crime also did not excuse the television station's trespass.<sup>597</sup>

According to the *Anderson* court, the Florida Supreme Court in *Fletcher* relied on cases that were not applicable to that case.<sup>598</sup> The court relied upon cases that concluded that custom and usage implied permission to enter private property.<sup>599</sup> According to the *Anderson* court, the same principle applies to anyone, but does not allow entry into a private home.<sup>600</sup> In addition, the court found that such a right to enter would only apply to certain property, and was not left to the discretion of the news media organization to determine when "there is an event occurring which they alone deem newsworthy."<sup>601</sup> Allowing such entry would grant the press more authority to enter private property than the Constitution permits the government and would amount to "a general warrant, equivalent to the writs of assistance which were so odious to the American colonists."<sup>602</sup>

The court also used the court opinions *Prahl* case and *Costlow v. Cusimano* to make its ruling. The court found the television station's reliance on *Costlow* to be "misplaced." The

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Id. at 224-225 (quoting Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1515 (1974)).

<sup>596</sup> 441 N.Y.S.2d at 225.

<sup>597</sup> *Id.*

<sup>598</sup> *Id.*

<sup>599</sup> *Id.* (citing *Prior v. White*, 180 So. 347 (Fla. 1938); *Martin v. Struthers*, 319 U.S. 141 (1943); *Boston Mfrs. Mut. Ins. Co. v. Fornalski* (234 So.2d 386 (Fla. 1970); *McKee v. Gratz*, 260 U.S. 127 (1922)).

<sup>600</sup> 441 N.Y.S.2d at 226.

<sup>601</sup> *Id.*

<sup>602</sup> *Id.* The court stated, "There is no consent that I am aware of, whether created by law or by custom, which permits television cameras to enter where the sovereign may not." *Id.*

*Costlow* court's statement that the journalist's entry onto private property possibly justified, according to the *Anderson* court, was dictum.<sup>603</sup> The court found other significant differences between the investigation of a fire in *Fletcher* and the investigation by the Humane Society in *Anderson*.<sup>604</sup> While journalists in *Fletcher* were also asked to photograph the silhouette as part of an investigation file, the reporters in the *Anderson* case took no part in the investigation.<sup>605</sup> The television station also lacked the evidentiary support of the affidavits of custom and usage that the journalists in *Fletcher* provided. The evidence the television station provided was insufficient to support the journalist's argument of custom and usage. The court, therefore, ruled in favor of the homeowner and dismissed the station's motion for summary judgment.<sup>606</sup>

A federal court also has denied a media outlet's motion to dismiss a claim against it for violation of a mother and son's constitutional rights during a ride-along with federal agents.<sup>607</sup> Agents of the United States Treasury executed a search warrant on the home of Babatunde Ayeni, who was under investigation for running a credit card fraud operation.<sup>608</sup> At the time of the search, Ayeni was not at home. His wife and four-year-old son, however, were present.<sup>609</sup> The head agent, Agent Mottola, had arranged for a CBS's *Street Stories* camera crew to be present during the search. Arriving two hours after the search began, Mottola and the CBS crew entered the apartment and began filming as other agents searched.<sup>610</sup> Ayeni objected to the

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<sup>603</sup> *Id.* at 226-227.

<sup>604</sup> *Id.* at 227.

<sup>605</sup> *Id.*

<sup>606</sup> *Id.*

<sup>607</sup> *Ayeni v. CBS, Inc.*, 848 F. Supp. 362, 368 (E.D.N.Y. 1994).

<sup>608</sup> *Id.* at 364.

<sup>609</sup> *Id.*

<sup>610</sup> *Id.*

presence of the camera and the filming of herself and her son.<sup>611</sup> The camera crew continued to film the search, however, and take pictures of the insides of closets, letters, family pictures and wall hangings.<sup>612</sup> The camera crew also filmed while the agents questioned Ayeni about her husband's whereabouts and items in the apartment.<sup>613</sup> Ayeni filed suit against the agents and CBS, claiming the parties had violated her and her son's constitutional right to privacy.<sup>614</sup>

CBS argued that it was immune from suit because its journalists accompanied federal agents in the execution of a search warrant.<sup>615</sup> Government agents are immune from civil suits "unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person should have known.'"<sup>616</sup> In order for the court to determine whether Mottola was immune from suit, the court had to determine "whether, at the time of the search, it was clearly established that his actions constituted an unreasonable search and seizure under the Fourth Amendment."<sup>617</sup> According to the court, a person's home is the clearest example of a place where the individual has a reasonable expectation of privacy; if the government wants to enter and search, it must have a search warrant.<sup>618</sup> The government's search must stay within scope of the warrant, and "[i]t is well established by statute that a person not specifically

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<sup>611</sup> *Id.* at 365.

<sup>612</sup> *Id.*

<sup>613</sup> *Id.*

<sup>614</sup> *Id.* at 364.

<sup>615</sup> *Id.*

<sup>616</sup> *Id.* at 365 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

<sup>617</sup> *Id.* at 366. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . ." U.S. Const. amend IV.

<sup>618</sup> *Id.*

authorized by a search warrant may not participate in a search unless he is aiding the officer authorized by the warrant.”<sup>619</sup>

In applying this law, the court found that Mottola’s allowing CBS to enter and film the Ayeni home during the search exceeded the scope of the search warrant.<sup>620</sup> The court ruled, “It was a clear violation of then well established Fourth Amendment principles. For this purpose, it is the equivalent of a rogue policeman using his official position to break into a home in order to steal objects for his own profit or that of another.”<sup>621</sup> The court found the agent’s behavior constitutionally unacceptable, as he executed the search warrant for the benefit of a private entity.<sup>622</sup> The court ruled, “It would be grossly unreasonable for a government agent not to have known that the presence of private persons he invited in, so that they could titillate and entertain others was beyond the scope of what was lawfully authorized by the warrant.”<sup>623</sup>

Further, the court ruled that the pictures CBS took during the search constituted a seizure under the Fourth Amendment.<sup>624</sup> Ayeni’s complaint alleged that the camera crew was not aiding the investigation, but “was filming for their own newsgathering purposes.”<sup>625</sup> The court ruled that if this was true, the filming violated the Constitution and federal law, and was therefore, “a seizure beyond the scope of the warrant.”<sup>626</sup> The court ruled that CBS, as a private entity, was not entitled to qualified immunity, “CBS had no greater right than that of a thief to be in the

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<sup>619</sup> *Id.* (citing 18 U.S.C. § 3105).

<sup>620</sup> 848 F. Supp. at 368.

<sup>621</sup> *Id.*

<sup>622</sup> *Id.*

<sup>623</sup> *Id.*

<sup>624</sup> *Id.*

<sup>625</sup> 848 F. Supp. at 368.

<sup>626</sup> *Id.*

home, to take pictures and to remove the photographic record.”<sup>627</sup> The Second Circuit U.S. Court of Appeals affirmed the courts ruling on appeal.<sup>628</sup>

Ayeni’s claim against the agent for violating her constitutional rights was what’s called a *Bivens* action. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>629</sup> the U.S. Supreme Court ruled that the Fourth Amendment demands that officers executing a search warrant stay within the express parameters of that warrant.<sup>630</sup> Other federal courts continue to follow this ruling, and have rejected immunity for officers when they have exceeded the scope of search warrants. In ride-along cases, like the one involved in *Ayeni*, this may mean that the court will reject the media outlet’s claim of qualified immunity. Plaintiffs in these cases usually file suit under 42 U.S.C. § 1983, the federal civil rights statute.

In *Parker v. Clarke*,<sup>631</sup> for example, Sandra Parker and her daughter sued members of the Board of Police Commissioner of the City of St. Louis, police officers, and Multi-Media KSDK, Inc. pursuant to 42 U.S.C. § 1983 and Missouri tort law, for violating their civil rights and for invasion of privacy.<sup>632</sup> The suit arose after police executed a search warrant for drugs, money and drug transaction records at the Parker residence. A KSDK reporter accompanied officers on the raid and filmed during the search.<sup>633</sup> The reporter was not, however, aware beforehand that the warrant would be executed.<sup>634</sup> The target of the search warrant, a relative of the Parkers, was

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<sup>627</sup> *Id.*

<sup>628</sup> *Ayeni v. Mottola*, 35 F.3d 680, 691 (2d Cir. 1994).

<sup>629</sup> 403 U.S. 388 (1971).

<sup>630</sup> *Id.* at 394 n.7.

<sup>631</sup> 905 F. Supp. 638 (E.D. Mo. 1995).

<sup>632</sup> *Id.* at 640.

<sup>633</sup> *Id.* at 640-641.

<sup>634</sup> *Id.* at 641.

detained outside of the home before officers entered. Police seized drugs and firearms, but the relative was ultimately not charged.<sup>635</sup> The police did not limit where the reporters could film, neither did the Parkers request that the reporters not enter their home.<sup>636</sup>

In order for the Parkers to recover against KSDK under the federal statute, they had to “demonstrate that KSDK violated plaintiffs’ constitutional rights under color of state law.”<sup>637</sup> Applying the Eighth Circuit U.S. Court of Appeals’ requirement of “a mutual understanding, or meeting of the minds, between the private party and the state actor,”<sup>638</sup> the court ruled that the journalists were not state actors for the purposes of 42 U.S.C. § 1983. The court wrote:

The record in this case yields no evidence to support such a mutual understanding or purpose on the part of the KSDK personnel and the police officers who conducted the search. The undisputed evidence indicates that the KSDK personnel had been allowed to “ride along” with Mobile Reserve Unit officers during their shift, and that when, in the course of that shift, a determination was made to execute this particular search warrant, the KSDK personnel came along. The passivity of this circumstance demonstrates the absence of any affirmative agreement between KSDK and the police concerning the particular conduct of KSDK which plaintiffs now challenge.<sup>639</sup>

The court, therefore, granted KSDK summary judgment on the § 1983 claims.<sup>640</sup> The court declined, however, to grant summary judgment on the state tort claims, holding that these claims should be adjudicated in state court.<sup>641</sup> On appeal, the Eighth Circuit affirmed the district court’s grant of summary judgment to KSDK.<sup>642</sup>

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<sup>635</sup> *Id.*

<sup>636</sup> *Id.*

<sup>637</sup> *Id.* at 642 (citing *Adickes*, 398 U.S. at 150).

<sup>638</sup> *Id.* (quoting *Mershon v. Beasley*, 994 F.2d 449, 451 (8<sup>th</sup> Cir. 1993)).

<sup>639</sup> 905 F. Supp. at 642.

<sup>640</sup> *Id.* at 643.

<sup>641</sup> *Id.* at 646.

<sup>642</sup> *Parker v. Boyer*, 93 F.3d 445, 448 (8<sup>th</sup> Cir. 1996). The appellate court did, however, reverse the district courts grant of summary judgment to the police officers. *Id.*

In one of the best known federal ride along cases, *Berger v. Cable News Network, Inc.*,<sup>643</sup> officers of the U.S. Fish and Wildlife Service allowed reporters from CNN to accompany them on the execution of a search warrant at the Berger's Montana ranch.<sup>644</sup> CNN later broadcast the arrest of the Bergers on its nightly news program.<sup>645</sup> In filing the suit, the Bergers alleged that CNN violated their constitutional right against unreasonable searches and seizures. They also claimed that the station violated the federal wiretap statute, as well as claiming trespass and conversion.<sup>646</sup>

The court found that the Berger's constitutional claims were barred by collateral estoppel.<sup>647</sup> Collateral estoppel bars "a party from relitigating an issue determined against that party in an earlier action."<sup>648</sup> The court in the *Berger* criminal case ruled that the search did not violate the Fourth Amendment; the civil court ruled that this decision barred Berger from again arguing that their Fourth Amendment rights were violated in the search.<sup>649</sup> The court ruled that CNN was not acting under color of law when it filmed the raid on the Berger ranch, "When a private party, such as CNN, is present during a search as a means of furthering its own interests, it is not acting under color of federal law and is not liable under *Bivens*."<sup>650</sup>

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<sup>643</sup> 1996 U.S. Dist. LEXIS 22524 (D. Mont. 1996).

<sup>644</sup> *Id.* at \*3.

<sup>645</sup> *Id.*

<sup>646</sup> *Id.* The Bergers also claimed intentional infliction of emotional distress, which is beyond the scope of this research.

<sup>647</sup> *Id.* at \*7.

<sup>648</sup> Black's Law Dictionary 108 (2d ed. 2001).

<sup>649</sup> 1996 U.S. Dist. LEXIS 22524 at \*8. "Because the constitutionality of the search has already been litigated, the causes of action based on the constitutionality of the search are barred by collateral estoppel." *Id.*

<sup>650</sup> *Id.* at \*9. See also, *Nichols v. Hendrix*, 19999 U.S. Dist. LEXIS 23347, \*8 (N.D. Ga. 1999) (finding "plaintiffs agree that the media defendants were there solely for their own purposes. The fact that the media defendants were invited to accompany the officers and to film the raid is not enough to turn the defendants into state actors").

Quickly disposing of the wiretap claim, the court found that because the federal agents had consented to CNN's recordings of their conversations, the station had not violated 18 U.S.C § 2511.<sup>651</sup> The court further rejected the Bergers' request for an injunction against CNN broadcasting or selling any more of the footage from the search.<sup>652</sup> Additionally, the court ruled that the photographs, taken by CNN, of the Bergers could not be the subjects of a conversion.<sup>653</sup> In addition, the court dismissed the Bergers' trespass claim on the grounds that CNN had permission to enter the property from the government, which was in control and possession of the property during the execution of the search warrant.<sup>654</sup> The court granted CNN summary judgment.<sup>655</sup> On appeal, the Ninth Circuit ruled that the media was only entitled to summary judgment on the wiretapping claims, but not for the Fourth Amendment, trespass or conversion claims, finding that CNN and the federal agents had acted jointly to enter the Berger property.<sup>656</sup>

Although the U.S. Supreme Court has not directly ruled on a case against the news media for ride-along activities, the Court has mentioned that ride-alongs violated the Fourth Amendment. In *Wilson v. Layne*,<sup>657</sup> the Court held that a newspaper reporter and photographer's ride-along with federal marshals, during the execution of a search warrant, did violate the Fourth

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<sup>651</sup> 1996 U.S. Dist. LEXIS 22524 at \*10. For a full discussion of the federal wiretap statute, see Chapter 3.

<sup>652</sup> *Id.* at \*12. The court ruled that this injunction carried a "heavy presumption against its constitutional validity. *Id.* (quoting *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994)).

<sup>653</sup> *Id.* at \*14. A conversion is the "wrongful possession or disposition of another's property." BLACK'S LAW DICTIONARY 144 (2d. ed. 2001).

<sup>654</sup> *Id.* at \*15. The court also noted, citing *Desnick*, that CNN did not invade any property interests. *Id.* at \*16.

<sup>655</sup> *Id.* at \*19.

<sup>656</sup> *Berger v. Hanlon*, 188 F.3d 1155, 1157 (9<sup>th</sup> Cir. 1999). It should be noted that the Berger's cases against the federal agents went to the U.S. Supreme Court, in *Berger v. Hanlon*, 526 U.S. 808 (1999), which reversed the judgment of the Ninth Circuit in *Berger v. Hanlon*, 129 F.3d 505 (9<sup>th</sup> Cir. 1997), affirming the district court. On remand the Ninth circuit gave the opinion reported here.

<sup>657</sup> 526 U.S. 603 (1999). This opinion was given on the same day as the *Berger* opinion.

Amendment. Because the law on ride-alongs was not “clearly established,” however, the officers were entitled to qualified immunity.<sup>658</sup> Charles and Geraldine Wilson sued federal marshals, who raided their home while executing a warrant for their son, contending that the officers violated the Wilsons’ Fourth Amendment rights by “bringing members of the media to observe and record the attempted execution of the arrest warrant.”<sup>659</sup> The trial court denied the officers claim of qualified immunity. The federal appellate court reversed, but did not decide whether the officers’ actions violated the Fourth Amendment.<sup>660</sup>

The U.S. Supreme Court affirmed the Ninth Circuit, holding that “it was not unreasonable for a police officer in April 1992 to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was lawful.”<sup>661</sup> The Court reasoned that “[a]ccurate media coverage of police activities serves an important public purpose.”<sup>662</sup> Because of this, it may not have been obvious that allowing the media to film a raid violated constitutional principles. Also, the Court found no opinions holding ride alongs to be unlawful.<sup>663</sup> Finally, the policy of the U.S. marshals and state law enforcement allowed media to

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<sup>658</sup> *Id.* at 605.

<sup>659</sup> *Id.* at 608. The media never published the pictures they took during the raid, and the Wilsons did not bring suit against the reporters.

<sup>660</sup> *Id.* “It concluded instead that because no court had held (at the time of the search) that media presence during a police entry into a residence violated the Fourth Amendment, the right allegedly violated by petitioners was not ‘clearly established’ and thus qualified immunity was proper.” *Id.* (citing *Wilson v. Layne*, 141 F.3d 111 (4<sup>th</sup> Cir. 1998)).

<sup>661</sup> 526 U.S. at 615.

<sup>662</sup> *Id.*

<sup>663</sup> *Id.* at 616. “The only published decision directly on point was state intermediate court decision which, though it did not engage in an extensive Fourth Amendment analysis, nonetheless held that such conduct was not unreasonable.” *Id.* (citing *Prahl*, 295 N.W.2d at 782). The Court meant that no cases at the time of the raid in 1992 had found allowing media on the execution of a search warrant to be unconstitutional. In 1998, the Southern District of Texas held that a Drug Enforcement Administration officer, who allowed a camera crew to accompany her as she executed a search warrant to seize records at two drug clinics, violated the clinic owner’s constitutional rights. *Swate v. Taylor*, 12 F. Supp. 2d 591, 593 (S.D. Tex. 1998). *C.f. Stack v. Killian*, 96 F.3d 159 (6<sup>th</sup> Cir. 1996)(finding no violation of constitutional rights because the search warrant authorized videotaping and photographing).

accompany officers on home entries. According to the Court, this demonstrated that the law on ride-alongs was not developed.<sup>664</sup> The Court, therefore, ruled that the officers had qualified immunity.

In spite of this ruling, the Court held that ride-alongs violated the Fourth Amendment. The court reasoned that although the arrest warrant allowed officers to enter the Wilson home, this access did not extend to journalists.<sup>665</sup> Recognizing that every action that officers take while searching a home did not have to be authorized by a search warrant, the Court found that the Fourth Amendment required their actions to “be related to the objectives of the authorized intrusion.”<sup>666</sup>

Certainly the presence of reporters inside the home was not related to the objectives of the authorized intrusion. Respondents concede that the reporters did not engage in the execution of the warrant, and did not assist the police in their task. The reporters therefore were not present for any reason related to the justification for police entry into the home—the apprehension of Dominic Wilson.<sup>667</sup>

The Court rejected the officers’ three arguments of legitimate purposes for allowing the media to accompany law enforcement. Ruling that although allowing journalists on ride-alongs may further the objectives of law enforcement, this was not the same thing “as furthering the purposes of the search. 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.”<sup>668</sup> Similarly, the Court found that although the media could possibly serve a quality control purpose while participating in a ride along by collecting

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<sup>664</sup> *Id.* at 617.

<sup>665</sup> *Id.* at 611.

<sup>666</sup> *Id.*

<sup>667</sup> *Id.* “This is not a case in which the presence of the third parties directly aided in the execution of the warrant.” *Id.*

<sup>668</sup> *Id.* at 612.

evidence that officers acted legally, the reporters in this case were not interested in protecting officers.<sup>669</sup>

Even the officers' First Amendment related argument, that "the presence of third parties could serve the law enforcement purpose of publicizing the government's efforts to combat crime, and facilitate accurate reporting on law enforcement activities," was not persuasive.<sup>670</sup> While recognizing that its previous opinions noted the press' role in informing the public "about the administration of criminal justice," the Court ruled that the First Amendment did not outweigh the rights protected by the Fourth Amendment.<sup>671</sup>

No one could gainsay the truth of these observations, or the importance of the First Amendment in protecting press freedom from abridgement by the government. But the Fourth Amendment also protects a very important right, and in the present case it is in terms of that right that the media ride-alongs must be judged.

Surely the possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home. And even the need for accurate reporting on police issues in general bears no direct relation to the constitutional justification for the police intrusion into a home in order to execute a felony arrest warrant.<sup>672</sup>

In spite of the U.S. Supreme Court's ruling that ride-alongs violated the Fourth Amendment, media liability in ride along cases still depends upon a finding that the reporters were acting under color of state law. Private individuals will be deemed as acting under color of state law if they willfully participate in joint action with government agents.<sup>673</sup> In *Brunette v. Humane Society of Ventura County*,<sup>674</sup> the Ninth Circuit discussed three possible tests for finding

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<sup>669</sup> *Id.* at 613.

<sup>670</sup> *Id.* at 612.

<sup>671</sup> *Id.* at 613.

<sup>672</sup> *Id.*

<sup>673</sup> ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.3 (2003) (citing *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)).

<sup>674</sup> 294 F.3d 1205 (9<sup>th</sup> Cir. 2002).

if newspaper reporters engaged in state action. Glenda Brunette sued the Humane Society and the Ojai Publishing Company, alleging violations of her constitutional rights as well as trespass and invasion of privacy, after the Humane Society invited reporters to accompany it during the execution of a search warrant on Brunette's ranch.<sup>675</sup> Brunette settled her suit against the Humane Society, but the reporters file a motion to dismiss for failure to state a claim.<sup>676</sup> The trial court granted the newspaper's motion.<sup>677</sup>

On appeal, the Ninth Circuit ruled that in order for Brunette to prevail on her claims, she had to demonstrate a significant relationship between the Humane Society and the reporters.<sup>678</sup> The court dismissed Brunette's argument that *Wilson* provides for a § 1983 liability against the media for participating in a search of her ranch. Distinguishing *Wilson*, the court found that case to speak only on the liability of officers and not the reporters.<sup>679</sup> To find the journalists liable, Brunette had to demonstrate that the reporters were "willful participant[s]" with the state.<sup>680</sup> Under the joint action test, Brunette had to prove that the journalists' actions were "inextricably intertwined" with those of the government.<sup>681</sup> Brunette argued that her case was like *Berger*, but the court rejected this contention. The reporters did not contract with the Humane Society to accompany it on the raid. Further, the reporters did not plan the raid.<sup>682</sup> In addition, the court

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<sup>675</sup> *Id.* at 1208.

<sup>676</sup> *Id.* at 1209.

<sup>677</sup> *Id.*

<sup>678</sup> *Id.*

<sup>679</sup> *Id.* at 1211. "[Wilson] provides no assistance in deciding whether the Media engaged in joint action sufficient to convert it into a state actor." *Id.*

<sup>680</sup> *Id.*

<sup>681</sup> *Id.*

<sup>682</sup> *Id.* at 1212.

found that the Humane Society “did nothing to facilitate the Media’s news gathering mission.”<sup>683</sup> Brunette could not, therefore, prove state action under the joint action test.

The Ninth Circuit also dismissed Brunette’s argument under the symbiotic relationship test, which requires the plaintiff to prove that “the government has ‘so far insinuated itself into a position of interdependence (with a private entity) that it must be recognized as a joint participant in the challenged activity.’”<sup>684</sup> The court ruled that Brunette did not establish a symbiotic relationship between the Humane Society and the media. She did not prove that the groups were financially interdependent, nor that the “Media rendered any service indispensable to the Humane Society’s continued financial viability.”<sup>685</sup> The court did acknowledge that a custom and usage allowance existed between the Humane Society and the press:

What Brunette did allege was a long-standing custom by the Humane Society to allow the Media to observe and photograph the execution of search warrants. This custom, Brunette asserted, ensured that the Humane Society received free publicity and the Media received “a steady source of sensational stories.” These allegations, even if true, do not demonstrate that the Humane Society or the Media is indispensable, in any way, to the other’s continued business operation or financial success.<sup>686</sup>

Finally, the court rejected Brunette’s argument of state action by the media under the public function test, which transforms private activity into state action if “that action has been ‘traditionally the exclusive prerogative of the State.’”<sup>687</sup> The Ninth Circuit ruled, “News

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<sup>683</sup> *Id.* “Although simultaneously present at Brunette’s ranch, the Humane Society and the Media acted independently.” *Id.*

<sup>684</sup> *Id.* at 1213 (quoting *Burton v. Wilmington Park’s Auth.*, 365 U.S. 715, 725 (1961)).

<sup>685</sup> *Id.* 1214.

<sup>686</sup> *Id.*

<sup>687</sup> *Id.* (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)).

gathering is the quintessential private activity, jealously guarded from impermissible government influence.”<sup>688</sup> Therefore, the court affirmed the dismissal of Brunette’s claims.<sup>689</sup>

In cases where journalists have been sued for accompanying law enforcement officers while executing warrants, the courts have focused on balancing the individual’s right of privacy and the journalists’ right to gather news. For the most part, the courts have ruled that when officers and journalists were acting jointly the journalists could be held liable for violating a plaintiff’s rights by intrusion or trespass. This was because officers are bound by the scope of the warrant, which did not allow private third parties to enter the property of the individual being investigated.

### **Warrantless investigations**

The media have also been sued for accompanying law enforcement on warrantless investigations and arrests. Warrantless investigations are those in which officers are called to the scene of a crime to make an arrest or to investigate the circumstances of an event. In *Reeves v. Fox Television Network*,<sup>690</sup> for instance, Willie Reeves filed a 42 U.S.C. § 1983 suit against the television network and the producers of the show *COPS*, claiming invasion of privacy and trespass, among other violations.<sup>691</sup> Reeves’ claim stemmed from the filming of his arrest inside of his home when a camera crew followed police inside.<sup>692</sup> The network defendants argued that

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<sup>688</sup> *Id.*

<sup>689</sup> *Id.* at 1214. *C.f. Carr v. Mobile Video Tapes, Inc.*, 893 S.W.2d 613 (Tex. Ct. App. 1994) (denying summary judgment to media defendants for trespass and intrusion stemming from a ride along with a Humane Society investigator).

<sup>690</sup> 983 F. Supp. 703 (N.D. Ohio 1997).

<sup>691</sup> *Id.* at 707. Reeves also claimed appropriation, private facts, false light, intentional and negligent infliction of emotional distress. *Id.*

<sup>692</sup> *Id.*

Reeves could not claim trespass and intrusion because he allowed the camera crew into his home.<sup>693</sup>

The court found that the videotape of the arrest and Reeves deposition demonstrated that Reeves consented to the camera crew entering his home and filming.<sup>694</sup> Reeves argued, however, that *Prahl* supported the contention that “unless a homeowner gives specific oral consent to each person in a group of people that enter his home after the homeowner opens his door to let them in, every person after the first person to enter the home is a trespasser.”<sup>695</sup> The court found this argument unpersuasive, instead finding the videotapes showed that Reeves consented to the camera crew’s presence, and therefore, there was no intrusion or trespass.<sup>696</sup>

Unlike the Reeves court, which declined to find that a television crew violated a man’s civil rights when it entered his house with police officers, the federal district court for the Southern District of Ohio ruled that § 1983 was applicable to a television station.<sup>697</sup> In *Barrett v. Outlet Broadcasting, Inc.*, the children of a suicide victim sued police and a television station after reporters entered their mother’s home and took pictures of her dead body. The reporters, on a ride-along with the homicide squad, accompanied officers into the woman’s home after officers asked permission from someone living inside in the house.<sup>698</sup> Assisted by police, the reporters were able to enter the victim’s private bedroom and take pictures of the victim’s naked torso.<sup>699</sup>

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<sup>693</sup> *Id.* at 712.

<sup>694</sup> *Id.*

<sup>695</sup> *Id.* at 713.

<sup>696</sup> *Id.* The court also dismissed Reeves’ claim that he consented under duress. *Id.*

<sup>697</sup> *Barrett v. Outlet Broad., Inc.*, 22 F. Supp. 2d 726, 739 (S.D. Ohio 1997).

<sup>698</sup> *Id.* at 731-732.

<sup>699</sup> *Id.* at 733.

The victim's children sued under 42 U.S.C. § 1983, claiming the reporters had violated their Fourth and Fourteenth Amendment rights, as well as trespass.

The court denied the station's motion for summary judgment on the § 1983 claim. According to the court, if a party is "jointly engaged with state officials in a prohibited action," they are considered to be acting under color of state law.<sup>700</sup> Here the court found that the reporters had entered into an agreement with police that allowed them access to the crime, which they otherwise would not have been able to view.<sup>701</sup> The police could be viewed as having assisted the media in newsgathering, according to the court.<sup>702</sup> Additionally, the suicide victim's children had a right to privacy under the Fourth Amendment because the children had a legitimate expectation of privacy in their mother's house.<sup>703</sup> The children kept clothing at the house, visited frequently and had keys.

The court also found that law enforcement officers may exceed their authority to control a crime scene when they allow the reporters, who are not present for any law enforcement purpose, to enter the premises.<sup>704</sup> In this case, the court concluded the reporters did not enter the home for any law enforcement purpose.<sup>705</sup> Further, police actually helped to stage some of the scenes photographed by reenacting the search for the woman's identity and uncovering her body.<sup>706</sup>

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<sup>700</sup> *Id.* at 735.

<sup>701</sup> *Id.*

<sup>702</sup> *Id.* 736.

<sup>703</sup> *Id.* at 736-737.

<sup>704</sup> *Id.* at 737.

<sup>705</sup> *Id.*

<sup>706</sup> *Id.* at 738.

On the issue of consent vitiating the plaintiffs' claims, the court found that even if the man residing at the house, a son of the victim, gave consent for the reporters to enter the house, there was no evidence that the police informed him that the reporters were there to film the body.<sup>707</sup> It was unreasonable for the reporters and police to think that he gave permission for them to go into the woman's bedroom and film her body.<sup>708</sup> As such, the court ruled that the reporters were not entitled to summary judgment for trespass because they entered at the invitation of police who had only a limited invitation resulting from a call to 9-1-1.<sup>709</sup> The police did not show that their limited invitation included permission to bring reporters.<sup>710</sup>

Similar issues involving the presence of the electronic media when police parade criminal suspects in front of cameras for publicity purposes. Plaintiffs have sued the media in these situations also. In *Jones v. Taibbi*,<sup>711</sup> for instance, a reporter made a deal with police allowing him to film the arrest of an alleged murderer. When police arrested the man and searched his home and car, they allowed the reporter to film.<sup>712</sup> The plaintiff, Peter Jones, sued the reporter's broadcast station claiming invasion of privacy, defamation and a violation of his civil rights under the federal civil rights statute.<sup>713</sup>

Although remanding the state tort claims, defamation and invasion of privacy, the court granted summary judgment to the reporter on Jones' federal civil rights claim.<sup>714</sup> According to

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<sup>707</sup> *Id.* at 739.

<sup>708</sup> *Id.*

<sup>709</sup> *Id.* at 746.

<sup>710</sup> *Id.*

<sup>711</sup> 508 F. Supp. 1069 (D. Mass. 1981).

<sup>712</sup> *Id.* at 1071.

<sup>713</sup> *Id.* at 1070.

<sup>714</sup> *Id.* at 1074-1075.

the court, the reporter's agreement not to reveal what he knew in exchange for permission to film Jones' arrest was not state action. There was no symbiotic relationship between officers and the reporter.<sup>715</sup> The court found that the police played no role in what the reporter would publish, and the reporter was not involved in planning Jones' arrest.<sup>716</sup> The court ruled that the journalist acted as the "typical at large reporter," who "routinely learns details pertaining to ongoing police investigations."<sup>717</sup> In this case, the court found that the reporter "balanced his First Amendment responsibilities as a reporter with his least equally compelling responsibilities as a citizen."<sup>718</sup> To rule the reporter liable under the civil rights statute "would establish a precedent inconsistent with the public interest, which includes both a right to know, and a right to effective law enforcement."<sup>719</sup>

### **Other First Responders**

News media outlets also face liability for ride-alongs with other first responders such as paramedics or crisis intervention teams. These joint activities allow journalists to examine the duties of non-law enforcement responders, and allow reporters access to public events such as accidents and health crisis. This access by reporters has, however, implications for the privacy of those involved. In *Miller v. NBC*,<sup>720</sup> for example, a camera crew followed paramedics into the home of a heart attack victim. The camera crew was filming the paramedics as part of a documentary series, and entered the home without the consent the victim's wife, who was home

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<sup>715</sup> *Id.* at 1073.

<sup>716</sup> *Id.*

<sup>717</sup> *Id.* at 1074.

<sup>718</sup> *Id.*

<sup>719</sup> *Id.*

<sup>720</sup> 232 Cal. Rptr. 668 (Cal. Ct. App. 1986).

at the time.<sup>721</sup> The man's wife sued for trespass and intrusion, as well as intentional infliction of emotional distress.<sup>722</sup> At trial, the court granted summary judgment to the media on all claims.<sup>723</sup>

On appeal, the court used traditional intrusion and trespass analysis to hold that summary judgment for NBC was inappropriate because a reasonable jury could view the camera crew's entry into the home, under the circumstances, as highly offensive.<sup>724</sup> Like other court decisions involving intrusion, the *Miller* court noted it was up to a jury to determine if an intrusion was "highly offensive to a reasonable person."<sup>725</sup> The court, however, made a preliminary determination of offensiveness based on factors like "the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded."<sup>726</sup> The court found, "Here reasonable people could construe the lack of restraint and sensitivity [the NBC crew] displayed as a cavalier disregard for ordinary citizens' rights of privacy, or, as an indication that they considered such rights of no particular importance."<sup>727</sup> The camera crew not only entered the plaintiff's home, but intruded into her bedroom in order to film the paramedics as they attempted to save her husband. The court ruled, therefore, that the plaintiff was entitled to a jury verdict on her intrusion claim.<sup>728</sup>

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<sup>721</sup> *Id.* at 670.

<sup>722</sup> *Id.* The man's daughter filed similar claims; the court found that the daughter had no claims. *Id.* at 682.

<sup>723</sup> *Id.* at 672.

<sup>724</sup> *Id.* at 679.

<sup>725</sup> *Id.* at 678.

<sup>726</sup> *Id.* at 679.

<sup>727</sup> *Id.*

<sup>728</sup> *Id.*

Further, the court held that NBC's obligation not to enter private property without permission did not place a burden on the press, nor did it have a chilling effect on the press' exercise of the First Amendment.<sup>729</sup>

We conclude, in the case before us, that the obligation not to make unauthorized entry into the private premises of individuals like the Millers does not place an impermissible burden on newsgatherers, nor is it likely to have a chilling effect on the exercise of First Amendment rights. To hold otherwise might have extraordinarily chilling implications for all of us; instead of a zone of privacy protecting our secluded moments, a climate of fear might surround us instead. Others besides the media have rights, and those rights prevail when they are considered in the context of the events at the Miller home.<sup>730</sup>

The court also held that Miller had properly stated a claim for trespass. The court ruled that the station's newsgathering motivations were irrelevant because its trespass was intentional.<sup>731</sup>

In a case similar to *Miller* the federal court for the Northern District of California found that a camera crew had not invaded the privacy of a woman when they entered her home with a crisis intervention team.<sup>732</sup> In *Baugh v. CBS, Inc.*, a camera crew for CBS's *Street Stories* joined a mobile crisis intervention team on a call to the Baugh residence.<sup>733</sup> Yolanda Baugh had called police to report her husband for domestic violence; the crisis team responded with police.<sup>734</sup> When police and the crisis team entered Baugh's home, accompanied by the camera crew, Baugh inquired about the camera crew's identity. Reportedly, an officer informed her that the crew was from the district attorney's office. Relying on this information, Baugh allowed the camera crew to enter.<sup>735</sup> Baugh did, however, tell the cameraman not to film her, and she was assured that he

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<sup>729</sup> *Id.* at 684.

<sup>730</sup> *Id.*

<sup>731</sup> *Id.* at 677.

<sup>732</sup> *Baugh v. CBS, Inc.*, 828 F. Supp. 745 (N.D. Cal. 1993).

<sup>733</sup> *Id.* at 750-752.

<sup>734</sup> *Id.* at 751.

would not.<sup>736</sup> CBS later aired the footage shot in the Baugh home for their news documentary program. Baugh sued CBS for invasion of privacy by intrusion and trespass.<sup>737</sup>

The court dismissed Baugh's claim for intrusion and trespass based on the fact that she consented to CBS entering her home.<sup>738</sup> As in other trespass cases, the court noted that consent was an absolute defense to any intentional tort. Baugh gave consent for the camera crew to enter her home. She, therefore, had no remedy for trespass or intrusion.<sup>739</sup>

Perhaps one of the most best known first responder ride-along cases is *Shulman v. Group W. Productions, Inc.*<sup>740</sup> *Shulman* arose when a documentary film crew rode along with a medical helicopter team to a car accident where two members of the Shulman family were injured. The camera crew filmed both the rescue and the medical care on scene and within the helicopter. In addition, the flight nurse wore a microphone that recorded conversations with Shulman at the scene.<sup>741</sup> The footage and sound were later broadcast as part of a documentary.<sup>742</sup> Shulman sued for intrusion.<sup>743</sup> The trial court granted summary judgment to the camera crew based on the

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<sup>735</sup> *Id.*

<sup>736</sup> *Id.* at 752.

<sup>737</sup> *Id.* at 750. Baugh actually sued for three invasion of privacy torts; the court, however, dismissed her claims of appropriation, but granted CBS's motion for summary judgment on the private facts claim. *Id.*

<sup>738</sup> *Id.* at 756-757.

<sup>739</sup> *Id.* at 757.

<sup>740</sup> 955 P.2d 469 (Cal. 1998).

<sup>741</sup> *Id.* at 474-475.

<sup>742</sup> *Id.* at 475.

<sup>743</sup> *Id.* The California Supreme Court affirmed the trial court's grant of summary judgment to the press on Shulman's public disclosure claim.

First Amendment, but the appellate court reversed. The California Supreme Court affirmed the appellate court's ruling on the intrusion claim.<sup>744</sup>

Noting that *Miller* was the leading case on intrusion, the court ruled that Shulman had to prove that the camera crew intruded into a private place and that it was highly offensive to a reasonable person.<sup>745</sup> Although the court concluded that the cameraman's presence at the accident scene was not intrusive, it ruled that there was a triable issue of fact as to whether Shulman had a reasonable expectation of privacy within the helicopter.<sup>746</sup> The court found that Shulman was entitled to privacy in her conversations with the flight nurse at the scene, and in the information being relayed about her.<sup>747</sup>

Agreeing with the *Miller* court, the *Shulman* court considered the circumstances, the degree of intrusion and setting and the intruder's motives to determine offensiveness.<sup>748</sup> The court noted that the intruder's motivation was important especially when the intruder was a member of the press.<sup>749</sup> In deciding whether a reporter's intrusion was offensive,

courts must consider the extent to which the intrusion was, under the circumstances justified by the legitimate motive of gathering the news. 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.<sup>750</sup>

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<sup>744</sup> *Id.*

<sup>745</sup> *Id.* at 489-490.

<sup>746</sup> *Id.* at 490.

<sup>747</sup> *Id.* at 491.

<sup>748</sup> *Id.* at 493.

<sup>749</sup> *Id.*

<sup>750</sup> *Id.*

The court ruled, however, that a reporter's pursuit of a story did not justify an intrusion, but that offensiveness depended on the method of investigation.<sup>751</sup> The court concluded that a reasonable jury could find that the recording of Shulman's conversations with the flight nurse, and the filming of Shulman in the helicopter were offensive.<sup>752</sup>

Further, the court held, "[T]he press in its newsgathering activities enjoys no immunity or exemption from generally applicable laws."<sup>753</sup> The California invasion of privacy law was a law of general applicability, therefore, the cameraman had no constitutional privilege to eavesdrop on Shulman's conversations.<sup>754</sup> According to the court, "the conduct of journalism does not depend on the use of secret devices to record private conversations."<sup>755</sup>

[T]he constitutional protection accorded newsgathering, if any, is far narrower than protection surrounding the publication of truthful material; consequently, the fact that a reporter may be seeking "newsworthy" material does not in itself privilege the investigatory activity. The reason for the difference is simple: The intrusion tort, unlike that for publication of private facts, does not subject the press to liability for the contents of its publications. Newsworthiness, as we stated earlier, is a complete bar to liability for publication. . . . The same deference is not due, however, when the issue is not the media's right to publish or broadcast what they choose, but their right to intrude into secluded areas or conversations in pursuit of publishable material. At most, the Constitution may preclude tort liability that would "place an impermissible burden on newsgatherers" by depriving them of their "indispensable tools."<sup>756</sup>

The court found no constitutional protection for intrusion.<sup>757</sup>

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<sup>751</sup> *Id.* at 494.

<sup>752</sup> *Id.*

<sup>753</sup> *Id.* at 495.

<sup>754</sup> *Id.*

<sup>755</sup> *Id.* (citing *Dietemann*, 449 F.2d at 249).

<sup>756</sup> 955 P.2d at 496. (citations omitted).

<sup>757</sup> *Id.* at 497.

## Other Joint Activities With Government Officials

The press has faced claims for liability based on government officials allowing reporter's entry into other areas in which they are not wanted. In *Holman v. Arkansas*,<sup>758</sup> for example, a man filed a §1983 suit for invasion of privacy and other civil rights violations after police allowed a reporter to record the man's screaming and banging in a jail.<sup>759</sup> Marvin Holman and his wife were arrested for driving while intoxicated and taken to jail. While in the cell, Holman "was hitting and banging his cell door, hollering and cursing."<sup>760</sup> A nearby radio station called the jail to inquire about the noise, and police informed them that it was an intoxicated individual. The radio station sent over a reporter, whom the officers allowed into the cell block to record Holman's behavior.<sup>761</sup>

The court held that there was no invasion of privacy because Holman made his statements loudly and in a manner to attract attention.<sup>762</sup> Holman had no expectation of privacy while banging and shouting. Further, the court ruled that there could be no invasion of privacy when police allowed the publication of an official act, in this case, Holman's arrest and detention.<sup>763</sup> "[The reporter] could not be prevented from reporting the statements he could so easily over hear aurally; use of a device to record them cannot create a claim for invasion of privacy when one would not otherwise exist."<sup>764</sup>

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<sup>758</sup> 610 F.2d 542 (8<sup>th</sup> Cir. 1979).

<sup>759</sup> *Id.* at 543.

<sup>760</sup> *Id.*

<sup>761</sup> *Id.* at 543-544.

<sup>762</sup> *Id.* at 544.

<sup>763</sup> *Id.* See also *Smith v. Fairman*, 98 F.R.D. 445 (C.D. Ill. 1982) (holding that an inmate had a limited expectation or privacy).

<sup>764</sup> *Id.* at 545.

In contrast, in *Huskey v. NBC, Inc.*,<sup>765</sup> a federal district court ruled that prison inmates did have a legitimate expectation of privacy to be free from intrusion.<sup>766</sup> Arnold Huskey, an inmate at the Marion, Illinois United States Penitentiary, sued NBC after a camera crew, authorized to film in the prison by the warden, filmed him while he was alone in the prison's exercise yard.<sup>767</sup> NBC had previously agreed to follow federal regulations prohibiting the photographing of filming of inmates without their consent.<sup>768</sup> While in the exercise yard, Huskey wore only gym shorts, exposing his tattoos. According to the court, "His expectation was that the only ones able to see him would be persons 'to whom he might be exposed as a necessary result of his incarceration.'"<sup>769</sup> Huskey sued NBC for invasion of privacy.

NBC argued that there was no intrusion because Huskey was not secluded.<sup>770</sup> Rejecting this argument, the court found that "the mere fact a person can be seen by others does not mean that person cannot legally be 'secluded.'"<sup>771</sup> The ability of other prisoners and prison officials to see Huskey did not deny him his right to seclusion. According to the court, prisons were "closed systems" where inmates can feel secluded from the outside world, while at the same time visible to those inside.<sup>772</sup> It was for a jury, however, to determine whether the exercise yard was such a place where Huskey could reasonably feel secluded.<sup>773</sup> Further, determining whether a prisoner

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<sup>765</sup> 632 F. Supp. 1282 (N.D. Ill. 1986).

<sup>766</sup> *Id.* at 1292.

<sup>767</sup> *Id.* at 1285.

<sup>768</sup> *Id.*

<sup>769</sup> *Id.*

<sup>770</sup> *Id.* at 1287.

<sup>771</sup> *Id.* at 1287-1288.

<sup>772</sup> *Id.* at 1288.

<sup>773</sup> *Id.*

had a reasonable expectation of privacy required balancing Huskey's expectation of privacy with the prison's security interests, which, according to the court, "NBC is in no position to assert."

<sup>774</sup> Because NBC broke its promise not to film prisoners without their permission, NBC could not argue that it was assisting prison officials by filming.<sup>775</sup> Further, although prisoners "may expect large doses of intrusion from prison officials, [] it does not in the slightest pare down prisoners' right to be free from private intrusions."<sup>776</sup> Therefore, the court ruled that Huskey had a valid claim for intrusion.

In *Holman* the prisoner could claim no reasonable expectation of privacy because he behaved in a manner so as to draw attention. In contrast, the prisoner in *Huskey* could still claim an expectation of privacy because he was not behaving in a manner that drew attention. Further, although the prisoner in *Holman* did not know that a reporter was recording his yelling, he knew that he could be heard. The *Huskey* prisoner had no reason to believe that a non-prison official third party was viewing him. It seems then, in cases involving media access to jails, if an inmate acts in a manner that a court would view as waiving his expectation of privacy, journalists may not be found liable for filming him in the areas of the jail usually considered private.

Plaintiffs have also sued journalists who accompanied health inspectors into the private areas of restaurants. In *Belluomo v. KAKE TV*,<sup>777</sup> restaurant owners sued a television station for trespass after reporters entered, and filmed, in the kitchen of a restaurant.<sup>778</sup> Reporters accompanied a state food inspector as he inspected a steakhouse. Originally, the manger of the

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<sup>774</sup> *Id.* at 1291.

<sup>775</sup> *Id.*

<sup>776</sup> *Id.* at 1291-1292.

<sup>777</sup> 596 P.2d. 832 (Kan. Ct. App. 1979).

<sup>778</sup> *Id.* at 835.

restaurant consented to the reporters accompanying the inspector and filming.<sup>779</sup> The manager later claimed that he was fraudulently induced to consenting, and the restaurant owner sent the station a letter revoking the manager's consent.<sup>780</sup> KAKE-TV used the footage in a report on the inspector's findings about the restaurant.<sup>781</sup> A jury found that KAKE-TV had not trespassed. The Kansas appellate court affirmed.

The appellate court found the issue on appeal was "whether defendant was liable upon proof of damages resulting from tortious conduct, trespass, in its newsgathering."<sup>782</sup> Citing *Fletcher*, the court noted that consent was a complete defense to trespass.<sup>783</sup> The court also cited *Galella*, *Dietemann*, and *Le Mistral* to support the contention that the First Amendment did not protect journalists from liability for torts committed while newsgathering.<sup>784</sup> According to the court, these cases demonstrate that an injured party could recover compensatory damages resulting from the publication of "information acquired by tortious conduct."<sup>785</sup> In spite of this, and because the issue of whether KAKE-TV obtained viable consent was a question for a jury, the court affirmed the jury verdict.<sup>786</sup>

### Conclusion

In general, when the press in search of a story engages in conduct that invades the rights of another, the courts have not always ruled favorably for the press. In intrusion cases, part of

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<sup>779</sup> *Id.* at 836.

<sup>780</sup> *Id.*

<sup>781</sup> *Id.*

<sup>782</sup> *Id.* at 840.

<sup>783</sup> *Id.* (citing *Fletcher*, 319 So.2d at 104).

<sup>784</sup> 596 P.2d at 841-843.

<sup>785</sup> *Id.* at 842.

<sup>786</sup> *Id.* at 845.

the courts' analysis examines whether the individual was actually secluded. Different spheres of privacy have different levels of seclusion attached. A person's home, for instance, is the ultimate sphere of privacy, where the press would almost certainly be found to have intruded. Once the individual steps out of the home, that sphere of privacy evaporates and he cannot claim a reasonable expectation of privacy. Because of this, the courts have repeatedly found that individuals filmed or photographed in most public places cannot claim that the press intruded upon their seclusion.

Many of the trespass cases also dealt with the "publicness" of property upon which the media is alleged to have trespassed. In cases where the courts have found the property open to the public, like the clinics in *Desnick*, the courts have found no trespass. On the other hand, when the property is considered to be exclusively private, the press ends up on the losing end. If journalists can prove that the property owner consented, whether impliedly or expressly, the courts have found no trespass. That is, unless the press has misrepresented itself or committed some breach of loyalty. When journalists have misrepresented themselves in order to gain entry onto private property the consent of the property owner is vitiated, and the courts may find that the reporters trespassed. Further, the First Amendment has not been a shield against trespass actions. In *Le Mistral*, for example, the court found that First Amendment guarantee of a free press came with the responsibility not to infringe on the rights of others. In addition, the courts have found that the First Amendment did not absolve reporters from punishment for violating criminal trespass statutes. Although the property entered might have been considered "public," the government could still set reasonable restrictions and was not required to offer special rights of access to the press that were not given to members of the public. The U.S. Supreme Court has

ruled, however, that even information gathered during a trespass could not be enjoined from publication, except for in extreme circumstances.

The joint activity cases also considered the issue of consent to enter private property. The courts have found that officers who allowed journalists to accompany them during the execution of a warrant have exceeded the scope of the warrant, and therefore violated the property owner's civil rights. Although the U.S. Supreme Court has ruled that allowing journalists to accompany law enforcement officers during the execution of a warrant may violate the Fourth Amendment, these cases usually hinge on whether the media will be viewed as a joint actor with law enforcement. The press may also be liable for injury to an individual's privacy or their interests when accompanying other first responders into homes or into areas where their subjects may have a reasonable expectation of privacy. In these cases, as in *Miller*, the courts may analyze circumstances surrounding the degree, context and motives surrounding the intrusion. In deciding other cases involving joint activities between journalists and government officials, the courts have used traditional intrusion and trespass analysis, considering, as in *Huskey*, whether the plaintiff had a reasonable expectation of privacy, or as in *Belluomo*, whether the property owner had consented to the complained of trespass.

## CHAPTER 5 MISREPRESENTATION AND BREACH OF PROMISE

In September 1983, a municipal court judge found Carla Cantor, a reporter, guilty of impersonating a public official, a violation of New Jersey law.<sup>1</sup> When interviewing the mother of a homicide victim, Cantor, allegedly, identified herself as a county official and then asked intimate questions about the victim.<sup>2</sup> After again being convicted of impersonation during a new trial, Cantor appealed, and argued that the New Jersey statute had to be “interpreted to avoid infringing provisions of the federal and state constitutions which shelter newsgathering activity from governmental intrusion.”<sup>3</sup> The New Jersey Superior Court disagreed.

The New Jersey statute stated that a person falsely impersonates a public official “if he falsely pretends to hold a position in the public service with purpose to induce another to submit to such pretended official authority or otherwise to act in reliance upon that pretense.”<sup>4</sup> According to the court, the statute prohibited exactly the behavior of which Cantor was accused.<sup>5</sup> Further, the court ruled that the First Amendment did not immunize the press from “the application of general laws and [was] no special privilege to invade the rights and liberties of others.”<sup>6</sup> Although acknowledging that the government had to respect the press’ right to

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<sup>1</sup> State v. Cantor, 534 A.2d 83, 84 (N.J. Super. Ct. App. Div. 1987).

<sup>2</sup> *Id.* Cantor denied ever identifying herself as a public official. *Id.*

<sup>3</sup> *Id.* at 85. Cantor also argued that she was denied due process; due process is, however, beyond the scope of this study.

<sup>4</sup> N.J. STAT. ANN. § 2C:28-8 (1987).

<sup>5</sup> 534 A.2d at 85.

<sup>6</sup> *Id.* (citing *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 150 (1967), a defamation case in which the U.S. Supreme Court ruled that a public figure had to prove that defamatory statements made about them were published as a result of irresponsible reporting).

newsgather, the court noted the ruling in *State v. Lashinsky*,<sup>7</sup> in which a reporter was convicted of disorderly conduct for failure to leave the scene of an accident, which states:

In this framework, a balancing of competing values is required in order to assess the reasonableness of a criminal statute or governmental sanction as applied to a member of the press engaged in his profession. The Constitution does not serve to place the media or their representatives above the law. They are subject to the law, as any citizen. The converse proposition would be intolerable. But, the status of an individual as a newsperson seeking news is a weighty factor in the equation for applying the law's strictures.<sup>8</sup>

Applying the New Jersey Supreme Court's reasoning in *Lashinsky*, the *Cantor* court found that Cantor's status as a reporter did not "protect her from the application of the criminal laws forbidding the false impersonation of a public official," especially when she preyed upon someone in a fragile emotional state.<sup>9</sup>

The court found unpersuasive Cantor's argument that the trial judge should have used a heightened standard of review. According to the court, the trial judge used "beyond a reasonable doubt," the standard for criminal cases,<sup>10</sup> and there was no basis for imposing a higher standard.<sup>11</sup> The court also rejected Cantor's assertion that it should inquire into whether a reporter was motivated by actual malice, the constitutional standard applied in libel cases, when the journalist is accused of violating the New Jersey criminal impersonation law.<sup>12</sup> Because

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<sup>7</sup> 404 A.2d 1121 (N.J. 1979).

<sup>8</sup> *Id.* at 1128.

<sup>9</sup> 534 A.2d at 86.

<sup>10</sup> The most common standard of proof for plaintiffs in civil cases is a "preponderance of the evidence," which means that the evidence presented at trial weighs in favor of the plaintiff. In criminal trials, the standard is "beyond a reasonable doubt," which carries a much higher burden for the preponderance standard, and requires that the prosecution prove their case so that no "reasonable man would have [a doubt] after hearing all the evidence in the case and the arguments of counsel, and after applying the law to the case as instructed by the court." HAZEL B. KERPER, INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM 187-188 (1972).

<sup>11</sup> 534 A.2d at 86.

<sup>12</sup> *Id.*

Cantor was on trial for a criminal action and not for civil libel the court found that in requiring proof beyond a reasonable doubt, Cantor was given more protection than a defendant in a libel action.<sup>13</sup> The court, therefore, affirmed Cantor's conviction for impersonating a public official.

Cantor was accused of a misrepresentation that induced the homicide victim's mother to provide sensitive information. The New Jersey state court was unpersuaded by her argument that the First Amendment protected her behavior. Other journalists accused of fraud and or misrepresentation-like offenses have similarly attempted to evoke the First Amendment. This chapter explores these cases and how the courts have analyzed journalists' First Amendment protection for newsgathering arguments. After considering the law on fraud, misrepresentation and similar offenses, this chapter then examines the Supreme Court's *Cohen v. Cowles Media Co.*<sup>14</sup> opinion. The chapter then explores the post-Cohen cases, and then concludes with a summary of the main issues involved in the discussion of journalists and misrepresentation-like offenses.

### **On Fraud and Misrepresentation and Similar Offenses**

Also called deceit or fraud, misrepresentation is, at the most general level, a false statement of fact, opinion, intention or law. Private individuals have sued journalists for misrepresentation when, as in *Cantor*, journalists have made false statements about things such as their identity, or their intentions, in order to gather information. In these cases against journalists, the plaintiff must prove five things in order to recover damages for misrepresentation: the journalist made a false statement, the journalist knew the statement was

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<sup>13</sup> *Id.* According to the court "beyond a reasonable doubt" is one of the three standards of proof allowed under New Jersey law. Other than the standard required in treason cases, or the standard that a defendant was allowed to assert in cases "where constitutional values are implicated," the court found no basis for applying a more stringent standard than reasonable doubt. *Id.*

<sup>14</sup> 501 U.S. 663 (1991).

false, the journalist intended to induce the plaintiff to rely on the false statement, the plaintiff reasonably relied on the false statement, and the plaintiff was damaged as a result of his reliance on the false statement.<sup>15</sup>

If the plaintiff does not prove these elements, he cannot recover damages. In *Ramirez v. Time*,<sup>16</sup> for example, the New York Supreme Court dismissed a misrepresentation cause of action against *Time Magazine* for failure to state a claim after a plaintiff failed to allege that she was actually injured by a reporter's misrepresentation.<sup>17</sup> The case arose after the mysterious disappearance and death of a well known veterinarian. There was wide speculation as to the cause of, and motive for, the veterinarian's death and disappearance in the local media. A reporter for *Time* called the veterinarian and left a message on her answering machine stating that he knew of a witness who had seen the dead veterinarian alive the day after she had disappeared.<sup>18</sup> Upon hearing this message, a representative of the decedent's estate went to the reporter's office hoping to dispel the speculation that the doctor had been killed because of her connections to organized crime.<sup>19</sup> Instead, the reporter admitted that the message he left was false, and then he used the information obtained from the estate representative as part of an article. The representative claimed the article "distorted their information, and, 'in reckless disregard of the truth,' spread a 'false story across the country,' allegedly foreclosing government law

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<sup>15</sup> See W. PAGE KEETON, PROSSER AND KEETON ON TORTS §105 (5<sup>th</sup> ed. 1984).

<sup>16</sup> 12 Media L. Rep. 2230 (N.Y. Sup. Ct. 1986).

<sup>17</sup> *Id.* at 2231.

<sup>18</sup> *Id.* at 2230.

<sup>19</sup> *Id.*

enforcement action on behalf of the” decedent’s family.<sup>20</sup> The estate sued for defamation and fraudulent representation.<sup>21</sup>

The court found that in order to state a cause of action for fraud, the estate had to demonstrate “representation of a material existing fact, falsity, scienter, deception and injury. There must also be detrimental reliance by the party to whom the misrepresentation was made.”<sup>22</sup> Although recognizing that the estate based its fraud claim on the reporter’s false statement that he had a witness that saw the decedent alive, the court ruled that the plaintiff had not alleged any actual injury.<sup>23</sup> The court stated, “Other than meeting with [the reporter], plaintiff fails to allege that she did anything whatsoever in reliance upon his alleged misrepresentation.”<sup>24</sup> Because the estate did not allege any injury derived from its reliance on the reporter’s misrepresentation, the court dismissed the claim.<sup>25</sup>

Misrepresentation does not exist solely in false statements, but runs through many different kinds of torts including the related tort of breach of contract.<sup>26</sup> In contrast to misrepresentations, which are false statements of past or present fact, contracts “are created to enforce promises which are manifestations not only of a present intention to do or not to do something, but also of a commitment to the future.”<sup>27</sup> Therefore, breach of contract signifies the failure of a party to fulfill his promise, and in general, the creation of a misrepresentation.

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<sup>20</sup> *Id.* at 2231. Allegedly, the police ended their search for the veterinarian because of the claims in the article. *Id.*

<sup>21</sup> *Id.* Defamation is, however, beyond the scope of this study.

<sup>22</sup> *Id.* (citations omitted)

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 2232.

<sup>26</sup> Prosser, *supra* note 15 at § 105.

<sup>27</sup> *Id.*

Plaintiffs have also sued journalists for breach of promise, or contract, most of the time in cases in which the journalists have promised to keep the plaintiff's name confidential in exchange for information.

For instance, in *Doe v. ABC, Inc.*,<sup>28</sup> two rape victims and one of their boyfriends sued a broadcast station for breach of contract after the station failed to keep their identities anonymous. The station approached the rape victims for interviews as part of its special report on rape, and gave repeated assurances that during the broadcast neither their faces or voices would be recognizable.<sup>29</sup> During both a commercial for the special report and the special report itself, both the voices and faces of the women were identifiable. After the special report aired, the women received calls from employers and family members.<sup>30</sup> The trial court denied the station's motion for summary judgment; the court of appeals affirmed.

But *Doe* does not demonstrate that news organizations can never escape liability for breaching a promise. In a New York case brought a year later, the state appellate court ruled that in order for a plaintiff to recover against a journalist for breach of confidence, the plaintiff had to demonstrate the reporter violated a constitutional standard of care.<sup>31</sup> In *Virelli v. Goodson-Todman Enterprises*, Louis Virelli sued a newspaper for breach of confidence, or breach of a promise made by a reporter, after the newspaper published an article entitled, "Tormented by a Drug-Crazed Daughter." A reporter had promised Virelli that his family would not be identifiable in her story.<sup>32</sup> Although the reporter used fictitious names, Virelli claimed that his

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<sup>28</sup> 152 A.D.2d 482 (N.Y. Sup. Ct. App. Div. 1989).

<sup>29</sup> *Id.* at 483.

<sup>30</sup> *Id.*

<sup>31</sup> *Virelli v. Goodson-Todman Enter.*, 159 A.D.2d 23, 25 (N.Y. Sup. Ct. App. Div. 1990).

<sup>32</sup> *Id.* at 24.

family was clearly identifiable and that at least 38 people identified the story as being about the Virelli family.<sup>33</sup> The court dismissed this claim, ruling that Virelli had not proved that the newspaper was “grossly irresponsible without due consideration for appropriate news-gathering and reporting standards in allegedly disclosing plaintiffs’ identities in the subject article.”<sup>34</sup> *Virelli* demonstrates that the court may not always rule in favor of plaintiffs in their claims for breach of promise. The *Virelli* decision also demonstrates that courts will not always provide a remedy for breach of promise to a news source who is the victim of a journalist’s broken promise.

Plaintiffs are not limited, however, to solely using breach of contract or breach of promise actions to recover damages from journalists who renege on their promises. Plaintiffs may also assert a claim of promissory estoppel, which makes any promise enforceable if that promise induced the plaintiff to act and the only way to avoid an injustice would be to enforce that promise.<sup>35</sup> In both the *Doe* and *Virelli* cases, the plaintiffs could have claimed promissory estoppel in order to recover damages for the journalists’ broken promises. Like breach of promise, promissory estoppel is very much related to misrepresentation in that both are claims that the defendant was acting in bad faith when he induced the plaintiff to act. All three claims can, and have been alleged against journalists who have made promises or misrepresentations while in pursuit of information. *Virelli* demonstrates that some courts are allowing journalists to escape these claims by implicating constitutional standards. Although not specifically claimed in *Virelli*, a news organization could claim First Amendment protection for breach promises or making misrepresentations while newsgathering. After the 1991 Supreme Court decision in

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See RESTATEMENT (SECOND) CONTRACTS § 90 (1981).

*Cohen v. Cowles Media Co.*, the First Amendment became less of a defense for journalists in breach of contract cases. The next section examines this decision.

### **Cohen v. Cowles Media Co.**

On the eve of the 1982 Minnesota gubernatorial election, Dan Cohen, an associate of the Wheelock Whitney campaign, contacted reporters from the Minneapolis Star Tribune and the St. Paul Pioneer Press with information about Marlene Johnson, the opposition candidate for governor. Cohen offered to provide the information upon the promise that the reporters not disclose his name as the source of the information.<sup>36</sup> Both reporters promised to keep Cohen's identity anonymous without disclosing that their promise of anonymity was subject to approval by their editors.<sup>37</sup> Cohen provided the reporters with copies of public court records concerning Johnson. The first was a 13 year-old case in against Johnson for unlawful assembly for protesting the city's discriminatory construction hiring practices, which was later dismissed; the second was a conviction for petit theft for leaving a store with \$6 worth of sewing materials during a time when Johnson was grieving her father's death. That case, too, was later vacated.<sup>38</sup> After receiving this information, both newspapers interviewed Johnson, and further investigated the court records. Independently, the editors of the newspapers met and decided to publish Cohen's name in conjunction with a story about Johnson's arrests.<sup>39</sup>

The next day, both newspapers published stories about the arrests citing Cohen as the source of the information. The same day, Cohen was fired from his job as a public relations

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<sup>36</sup> *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 200 (Minn. 1990).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 201 fn. 2.

<sup>39</sup> *Id.* at 201. According to the Minnesota Supreme Court, there was a great debate amongst the staffs at the two newspapers as to whether to publish Cohen's name. So reporters contended that the Johnson story, as a whole, was not newsworthy. Others viewed the story about the arrests as newsworthy, and that the story should be published along with Cohen's name. Both original reporters objected to the publishing of Cohen's identity. *Id.*

officer.<sup>40</sup> Cohen sued both newspapers for fraudulent misrepresentation and breach of contract. The trial jury awarded him \$200,000 in compensatory damages and \$500,000 in punitive damages.<sup>41</sup> The Minnesota appellate court, affirmed the trial court's ruling that the First Amendment was not implicated because there was no government action, and that even if the newspapers' First Amendment rights were implicated, compelling state interests outweighed those rights.<sup>42</sup> The appellate court set aside the punitive damage award, ruling that Cohen had not proven misrepresentation.<sup>43</sup> To prove misrepresentation, Cohen had to prove that the reporters misrepresented a past or present fact, and not that they simply failed to keep a future promise.<sup>44</sup> Because he was unable to do this, the appellate court reversed the trial court's ruling.

The Minnesota Supreme Court affirmed the appellate court's ruling to set aside the punitive damage award based on misrepresentation.<sup>45</sup> The court disagreed, however, with the appellate courts grant of damages for breach of contract. Although noting the significant role that anonymous sources play in gathering news and the great importance that journalists place on the protection of these sources, the court found that the protection of anonymous sources was an ethical question and not base in the law. "The question before us, however, is not whether keeping a confidential promise is ethically required but whether it is legally enforceable;

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Cohen v. Cowles Media Co.*, 455 N.W.2d 248, 259.

<sup>44</sup> *Id.*

<sup>45</sup> *Cohen*, 457 N.W.2d at 202.

whether, in other words, the law should superimpose a legal obligation on a moral or ethical obligation. The two obligations are not always coextensive.”<sup>46</sup>

According to the court, “the law [] does not create a contract where the parties intended none.”<sup>47</sup> Nor did the law made every promise legally binding, especially when neither of the parties were thinking in terms of a legal obligation. “We are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract.”<sup>48</sup> The court found that both parties understood the promise not to publish Cohen’s name to be a moral duty and not a legal contract.<sup>49</sup>

What we have here, it seems to us, is an “I’ll-scratch-your-back-if-you’ll-scratch-mine” accommodation. The source, for whatever reasons, wants certain information published. The reporter can only evaluate the information after receiving it, which is after the promise is given; and the editor can only make a reasonable, informed judgment after the information received is put in the larger context of the news. The durability and the duration of the confidence is usually left unsaid, dependent on unfolding developments; none of the parties can safely predict the consequences of publication. Each party, we think, assumes the risks of what might happen, protected only by the good faith of the other party.<sup>50</sup>

The court concluded that a breach of contract action was inappropriate for the newspapers breaking the promise to Cohen that he would remain anonymous.<sup>51</sup>

The court also ruled that a finding in favor of Cohen under a theory of promissory estoppel would violate the newspapers’ First Amendment rights.<sup>52</sup> The newspapers had argued that any state imposed sanction for their printing of Cohen’s name would violate their rights of

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<sup>46</sup> *Id.* at 203.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 205.

freedom of speech and the press. The intermediate court of appeals ruled, using a contract approach that focused on whether there was a binding promise that the newspapers made and breached, found that the application of “neutral principles” of contract law did not invoke the First Amendment.<sup>53</sup> The Minnesota Supreme Court found, however, that promissory estoppel was not neutral toward the First Amendment, but required that the court “weigh the same considerations that are weighed for whether the First Amendment has been violated.”<sup>54</sup> The court had to balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity.<sup>55</sup>

The court was skeptical that an injustice could only be avoided by enforcing the newspapers’ promise to Cohen that induced him to provide the information, although Cohen’s reliance on that promise proved to be to his detriment. According to the court, it was not enough to note that a promise was broken, but that the application of promissory estoppel required an inquiry into why the promise was broken.<sup>56</sup> Such an inquiry might entail “second-guessing the newspaper editors,” but it could not be avoided. The court would have to answer questions that were best left up to the newspapers’ editors:

For example, was Cohen's name "newsworthy"? Was publishing it necessary for a fair and balanced story? Would identifying the source simply as being close to the Whitney campaign have been enough? The witnesses at trial were sharply divided on these questions. Under promissory estoppel, the court cannot avoid answering these questions, even though to do so would mean second-guessing the newspaper editors.<sup>57</sup>

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<sup>53</sup> *Id.* at 204 (citing *Cohen*, 445 N.W.2d at 254-57).

<sup>54</sup> 457 N.W.2d at 205.

<sup>55</sup> *Id.* at 205.

<sup>56</sup> *Id.* at 204.

<sup>57</sup> *Id.*

In deciding that enforcing the promise of anonymity would violate the newspapers' First Amendment rights, the court found of great significance that the promise deal with political speech:

[T]he promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign. The potentiality for civil damages for promises made in this context chills public debate, a debate which Cohen willingly entered albeit hoping to do so on his own terms. In this context, and considering the nature of the political story involved, it seems to us that the law best leaves the parties here to their trust in each other.

On appeal, the U.S. Supreme Court reversed the Minnesota Supreme Court's decision and held that the First Amendment did not prohibit Cohen from recovering damages under promissory estoppel.<sup>58</sup> In doing so, the Court expressly declined to follow the principle asserted in the *Florida Star*, *Daily Mail*, and *Landmark* line of cases that, "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."<sup>59</sup> The Court distinguished those cases from the *Cohen* case, noting that an important criterion in that principle required that the information to be published must be lawfully obtained.<sup>60</sup> In this case the majority expressed uncertainty as to whether the newspapers lawfully obtained Cohen's name.<sup>61</sup>

Instead of applying the *Daily Mail* principle, the Court found that precedent establishing that laws of general applicability did not violate the First Amendment if the law's effect on the

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<sup>58</sup> *Cohen*, 501 U.S. at 665.

<sup>59</sup> *Id.* at 668-669 (quoting *Daily Mail*, 443 U.S. at 103).

<sup>60</sup> 501 U.S. at 669.

<sup>61</sup> *Id.* at 671. The Court stated that unlike the reporter in *Florida Star*, the reporters in this case obtained Cohen's name only by making a promise that they did not fulfill. *Id.* The Court did not note, however, that the reporters' promise was unfulfilled after getting Cohen's name, not in order to obtain the name.

freedom of the press was only incidental to the law's enforcement, controlled the case.<sup>62</sup> As such, the Court noted that these laws were not subject to strict scrutiny, meaning that the laws did not have to serve a compelling state interest in order to be found constitutional.<sup>63</sup> The Court concluded that the Minnesota law of promissory estoppel was a law of general applicability.<sup>64</sup> The law did not target the press and applied to all the citizens of that state. Nor did the First Amendment prohibit the application of promissory estoppel to members of the press.<sup>65</sup> Any effect on newsgathering as a result of the enforcement of the law would be incidental and "constitutionally insignificant."<sup>66</sup> Because general laws did not implicate the Constitution, the Court was not required to apply a greater level of scrutiny.<sup>67</sup>

The dissenting justices took quite the opposite view of the case. Justice Blackmun disagreed with the majority's distinguishing of *Daily Mail*, and characterized the newspapers' naming of Cohen as political speech.<sup>68</sup> He asserted that the majority's reliance on cases

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<sup>62</sup> *Id.* at 669.

<sup>63</sup> *Id.* at 670.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* The court noted cases in which it ruled that the press was not exempt from laws of general applicability:

Similarly, the media must obey the National Labor Relations Act, *Associated Press v. NLRB*, 301 U.S. 103, 81 L. Ed. 953, 57 S. Ct. 650 (1937), and the Fair Labor Standards Act, *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-193, 90 L. Ed. 614, 66 S. Ct. 494 (1946); may not restrain trade in violation of the antitrust laws, *Associated Press v. United States*, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945); *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139, 22 L. Ed. 2d 148, 89 S. Ct. 927 (1969); and must pay non-discriminatory taxes, *Murdock v. Pennsylvania*, 319 U.S. 105, 112, 87 L. Ed. 1292, 63 S. Ct. 870 (1943); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581-583, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983). Cf. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201-202, 107 L. Ed. 2d 571, 110 S. Ct. 577 (1990). It is, therefore, beyond dispute that "the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."

*Id.* (citations omitted).

<sup>66</sup> *Id.* at 672 (Blackmun, J. dissenting).

<sup>67</sup> *Id.* at 670.

<sup>68</sup> *Id.* at 673 (Blackmun, J. dissenting).

concerning the media and generally applicable laws was misplaced.<sup>69</sup> Instead he suggested the Court follow its ruling in *Hustler Magazine v. Falwell*, in which the Court found allowing liability against a magazine for a satirical advertisement under a claim for intentional infliction of emotional distress violated the First Amendment.<sup>70</sup> Justice Blackmun found that like intentional infliction of emotional distress in *Hustler*, promissory estoppel “cannot be said to have a merely “incidental” burden on speech.”<sup>71</sup> The publication of Cohen’s name, which the Justice called political speech, is said to have violated the law.<sup>72</sup> In publishing Cohen’s name, the newspapers published truthful information.<sup>73</sup> The Justice asserted that “[t]o the extent that truthful speech may ever be sanctioned consistent with the First Amendment, it must be in furtherance of a state interest ‘of the highest order.’”<sup>74</sup> As such, the Justice concluded that the application of promissory estoppel to the press in this case was a violation of the First Amendment because the state’s interest in enforcing the law was not compelling.<sup>75</sup>

Justice Souter’s dissent echoed Justice Blackmun’s conclusion that this case did not fall under the authority of cases concerning the media and generally applicable laws.<sup>76</sup> The Justice suggested using a balancing test in order to decide these kinds of cases; “I find it necessary to articulate, measure, and compare the competing interest involved in any given case to determine

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<sup>69</sup> *Id.* at 674 (Blackmun, J. dissenting).

<sup>70</sup> 485 U.S. 46 (1988).

<sup>71</sup> 501 U.S. at 675 (Blackmun, J. dissenting).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 676 (Blackmun, J. dissenting)

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 677 (Souter, J. dissenting).

the legitimacy of burdening constitutional interests.”<sup>77</sup> According to Justice Souter, the majority’s dismissal of balancing conceived First Amendment rights as only those of the speaker without reference to the value of the speech to public discourse.<sup>78</sup> Noted the Justice, “[F]reedom of the press is ultimately founded on the value of enhancing such discourse for the sake of a citizenry better informed and thus more prudently self-governed.”<sup>79</sup> Justice Souter found that the public interest was an integral part of the balancing test in this case as Cohen’s identity “expanded the universe of information relevant to the choice faced by Minnesota voters in that State’s 1982 gubernatorial election, the publication of which was thus of the sort quintessentially subject to strict First Amendment protection.”<sup>80</sup> The Justice did state, however, that how the information was acquired did play a part in the balancing of interests, “although they may go only to what balances against and not to diminish, the First Amendment value of any particular piece of information.”<sup>81</sup>

On remand, the Minnesota Supreme Court affirmed the trial jury’s \$200,000 award to Cohen.<sup>82</sup> In doing so, the court ruled that it would only invalidate promises in certain cases, and declined to address whether “the newsworthiness of Cohen’s identity had achieved a level of such grave importance as to require invalidation of the anonymity promise on the grounds of public policy.”<sup>83</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 677-678 (Souter, J. dissenting).

<sup>79</sup> *Id.* at 678 (Souter, J. dissenting).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 679 (Souter, J. dissenting).

<sup>82</sup> *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 388 (Minn. 1992).

<sup>83</sup> *Id.* at 391.

It appears then, that after the U.S. Supreme Court's opinion, courts will not inquire into the First Amendment implications of speech or newsgathering activities in cases brought under promissory estoppel or misrepresentation. Without consideration for First Amendment rights or the public interest in obtaining certain information, journalists sued for such torts will not have any viable constitutional defenses. The next section considers the cases involving misrepresentation and breach of promise after *Cohen*, and considers how the courts have used the U.S. Supreme Court's opinion in *Cohen* to decide these cases.

### **Misrepresentation and Breach of Promise Post-Cohen**

In suing both the Minneapolis Star Tribune and the St. Paul Pioneer Press, Cohen claimed that the newspapers that published his name had done two things: fraudulently represented to him that he would remain anonymous, and breached the reporters' promises that he would remain anonymous. The Minnesota appellate and Supreme Courts quickly dismissed Cohen's misrepresentation, but the U.S. Supreme Court's decision in *Cohen* is still cited in misrepresentation cases against journalists. *Cohen* is still the major precedent for courts deciding breach of promise cases against journalists also. This section explores how the courts have used *Cohen* in misrepresentation and breach of promise cases because of the impact of such an application on how courts will treat journalists who use information that they have unlawfully acquired.

#### **Breach of Promise**

In 1991, the same year the U.S. Supreme Court announced its opinion in *Cohen*, a New York court used the decision to rule that a news photographer's failure to comply with a promise that an individual in a photo would remain unidentifiable was actionable and not prohibited by

the First Amendment. In *Anderson v. Strong Memorial Hospital*,<sup>84</sup> a doctor and his employing hospital sued Gannett, the owner of the *Democrat & Chronicle* newspaper, for indemnification for breach of contract and causing the breach of the physician-patient privilege. Cornell Anderson, a former patient, sued the hospital and doctor for breach of patient-physician privilege after the doctor allowed a photographer to take a picture of him while he was being treated for HIV.<sup>85</sup> The photographer promised both Anderson and the doctor that Anderson would not be recognizable. When the photograph and accompanying story about the doctor were published, however, members of Anderson's family recognized him, and he was identified as an AIDS patient.<sup>86</sup> The doctor and hospital were ordered to pay Anderson \$35,000 in damages. The hospital filed a third-party lawsuit against Gannett claiming that the photographer's promise that Anderson would not be recognizable created a duty to the hospital, and the breach of that duty in making Anderson recognizable caused the hospital damages.<sup>87</sup>

The court agreed, ruling that under the recently decided *Cohen* opinion, the First Amendment did not prohibit liability by the newspaper company.<sup>88</sup> The court noted, however that the First Amendment was the minimum applicable standard for free speech, and that the New York Constitution was "often broader than the minimum required by the Federal Constitution."<sup>89</sup> There was, however, no public interest in revealing the identity of an HIV-

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<sup>84</sup> 573 N.Y.S.2d 828 (N.Y. Sup. Ct. 1991).

<sup>85</sup> *Id.* at 829.

<sup>86</sup> *Id.* at 830.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 830-831 (citing *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (N.Y. Ct. App. 1991)).

positive person. According to the court, under the circumstances, there was no reason that the State Constitution would offer protection for revealing this information.<sup>90</sup>

The court also distinguished *Virelli* and criticized that court's ruling that the identity of drug users concerned the public interest.<sup>91</sup> There was no evidence that the subject of drug use in the article in that case could not have been fully explored without revealing the family's identity. The *Virelli* court also did not consider the reporter's broken promise not reveal the drug users' identities. Although noting this, the *Anderson* court ruled that *Virelli* was not authoritative because it was in conflict with *Doe v. ABC*, in which a different New York court denied the broadcast company's motion for summary judgment for breach of contract.<sup>92</sup> According to the *Anderson* court, the *Doe v. ABC* ruling that breach of contract was a viable claim was preferable to the *Virelli* ruling.<sup>93</sup> In support of this conclusion, the *Anderson* court cited the Minnesota Supreme Court's first ruling in *Cohen*, in which that court noted that there might be instances when the state interest in providing a remedy for confidential sources under promissory estoppel would outweigh the state interest in protecting First Amendment guarantees. The *Anderson* court concluded that this was one of those instances.<sup>94</sup>

The court also found, using the U.S. Supreme Court's *Cohen* decision, that "an unkept (sic) promise to a news source makes the press' conduct unlawful."<sup>95</sup> Had *Anderson* or the doctor known that the photographer's promise would not have been kept, they would have never

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<sup>90</sup> 573 N.Y.S.2d at 831.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 831-832.

<sup>95</sup> *Id.* at 832.

granted him permission to take the picture. “The absence of permission under such circumstances makes Gannett’s conduct unlawful, in the same way as a TV photographer entering someone’s home without permission. Neither Federal nor State Constitutions condone an unlawful trespass.”<sup>96</sup> According to the court, journalists had no special privilege not to obey the law.

Compelling the press to respect a promise made and relied upon, and to be responsible for that commitment, does no more than compel the press to act as any other responsible citizen with respect to laws of general application.

The Federal and State Constitutions insulate the press from government action or coercion, not from agreements voluntarily entered into. When these agreements have been violated or disregarded, the constitutional protection is no longer a defense.<sup>97</sup>

When journalists violate the agreements that they voluntarily entered into, laws of general applicability are evoked to remedy this breach, even when the agreement concerned the content of the article.<sup>98</sup> Because the photographer in *Anderson* freely agreed to censor himself, there was no danger in there being a chilling effect on speech. Allowing journalists to freely make contracts without ensuring that the journalists fulfilled their promises would be allowing journalists to lie. This would then taint the public perception of journalists, and cause the other members of society to refuse to provide reporters with information, thereby hurting the press in its attempt to fulfill the role of news provider.<sup>99</sup>

The court also ruled that Gannett’s argument that the hospital should have required a “more particular agreement” was invalid. According to the court, the newspapers in *Cohen*

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<sup>96</sup> *Id.* (citations omitted).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 833.

presented the same argument and the U.S. Supreme Court rejected it.<sup>100</sup> Therefore, the court dismissed Gannett's argument that the doctor and the hospital should have required prepublication review of the photograph. The court ruled, "The burden of carrying out its promise of anonymity is that of Gannett and may not be so facilely shifted."<sup>101</sup> The court denied the newspaper company's motion for summary judgment on the breach of contract claims.

Although the U.S. Supreme Court's decision in *Cohen* has been used to assert that the First Amendment did not prohibit a plaintiff from recovering damages from a journalist who breached a contract, *Cohen* has also been used to rule that a plaintiff could not use breach of contract in an attempt to recover damages more closely related to injuries to her state of mind. In *O'Connell v. Housatonic Valley Publishing Co.*,<sup>102</sup> Lorraine O'Connell sued the publisher of *The New Milford Times* after she was identified in a story concerning her neighbor's treatment of a horse. According to O'Connell, she received no assurances from the reporter that her name would not be used in the article, but she believed that her specific request to be anonymous would be honored.<sup>103</sup> The newspaper filed a motion for summary judgment arguing that both the First Amendment and the Connecticut Constitutions protected the printing of O'Connell's name.<sup>104</sup> In addition, O'Connell's statements were contained in an arrest warrant that was part

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 1991 Conn. Super. LEXIS 2749 (Conn. Super. Ct. 1991).

<sup>103</sup> *Id.* at \*1

<sup>104</sup> *Id.*

of the public record.<sup>105</sup> Further, the newspaper asserted that the printing of O’Connell’s name was privileged as a matter of public interest.<sup>106</sup>

The court found that O’Connell’s reliance of *Cohen* in arguing that the First Amendment did not prohibit damages against members of the press for breach of promise of anonymity was misplaced. O’Connell was not seeking damages for breach of contract. Instead, she alleged damages related to “extreme emotional distress as a result of the negligent publication of her name.”<sup>107</sup> According to the court, O’Connell’s alleged injuries appeared more like those stemming from an emotional distress claim. Under *Cohen*, the U.S. Supreme Court ruled that plaintiffs seeking redress of injuries related to emotional distress were required to follow *Hustler Magazine, Inc. v. Falwell*, which mandated the use of constitutional libel standards in emotional distress cases.<sup>108</sup>

The court also restated the U.S. Supreme Court’s prohibition on punishing the press for publishing truthful information already a part of the public record.<sup>109</sup> The court further noted that the Connecticut Constitution, at times, provided greater protection for the press than the federal Constitution, but declined to delve into state constitutional protections because it had already decided that the First Amendment was an appropriate defense for the newspaper company.<sup>110</sup> The court, therefore, granted the newspaper company’s motion for summary judgment.

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<sup>105</sup> *Id.* at \*2.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at \*5-6.

<sup>108</sup> *Id.* at \*7.

<sup>109</sup> *Id.* (citing *Cox Broadcasting v. Cohn*, 420 U.S. 469, 496 (1975), and *Florida Star*, 491 U.S. 524)).

<sup>110</sup> 1991 Conn. Super. LEXIS 2749 at \*8.

Around the same time the *Cohen* case was making its way through the courts, *Ruzicka v. The Conde Nast Publications, Inc.*,<sup>111</sup> another case based on the Minnesota law of promissory estoppel was climbing in the federal courts. After the U.S. Supreme Court ruled in *Cohen* that the First Amendment did not prohibit recovery for promissory estoppel, the Eighth Circuit determined that a jury should decide whether a remedy for promissory estoppel was necessary to prevent injustice.<sup>112</sup> Previously, the court had remanded the case to the district court, which had granted summary judgment to the publishers of *Glamour Magazine*. The district court found that there was no definite promise, and without such a promise the plaintiff was unable to demonstrate that a remedy was necessary to prevent an injustice.<sup>113</sup> *Ruzicka* arose after Claudia Dreifus, a writer for *Glamour*, published identifiable information of a source in an article on therapist-patient sexual abuse.<sup>114</sup> Jill Ruzicka agreed to speak with Dreifus on the condition that she “identified or identifiable” in the article.<sup>115</sup> Although Dreifus used a fictitious name for her source in the article, Ruzicka claimed, however, that the information Dreifus provided about the source clearly identified her.<sup>116</sup>

On appeal, the Eighth Circuit found that Dreifus’ promise not to identify Ruzicka was definite enough to be actionable under promissory estoppel. According to the Eighth Circuit, in determining whether a plaintiff has been identified, “[t]he test is neither the intent of the author

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<sup>111</sup> 999 F.2d 1319 (8<sup>th</sup> Cir. 1993).

<sup>112</sup> *Id.* at 1323.

<sup>113</sup> *Id.* at 1320.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1322. The article identified its source as “Jill Lundquist, a Minneapolis attorney,” but added that the attorney served on a state task force that wrote a law prohibiting therapist-patient sex. Ruzicka was, however, the only female attorney on that task force. *Id.*

nor the apprehension of the plaintiff that the article might disclose the identity of the plaintiff, but rather the reasonable understanding of the recipient of the communication.”<sup>117</sup> The court, therefore, overturned the district court’s grant of summary judgment to the magazine publishers, finding that it was for a jury to decide whether injustice would result in not enforcing the doctrine of promissory estoppel for revealing information that made Ruzicka identifiable.<sup>118</sup>

Moreover, enforcement of the promise would not be unjust to the media defendant. Where the press feels disclosure of identity of a confidential source is valuable to the story and thus disregards its promise, the payment of compensatory damages is, as the United States Supreme Court has stated, simply “a cost of acquiring newsworthy material to be published at a profit. . .”<sup>119</sup>

At least one court has found the press liable for damages in relation to an actual contract signed by a journalist during newsgathering. In *W.D.I.A Corporation v. McGraw-Hill, Inc.*,<sup>120</sup> a federal court found the publisher of *Business Week Magazine* liable for fraud and breach of contract after one of the magazine’s reporters enter into a contract with the company with the purpose of breaking that contract. To test the Fair Credit Reporting Act (FCRA),<sup>121</sup> and to investigate W.D.I.A, a credit reporting service, a reporter for *Business Week* purchased a subscription to the credit reporting service.<sup>122</sup> This subscription would allow the reporter, Jefferey Rothfeder, the ability to access the credit files of third-parties.<sup>123</sup> The FRCA required, however, a permissible purpose for accessing credit information; use of credit reports for other purposes was a criminal offense. Rothfeder and his employer, McGraw-Hill, told W.D.I.A. that

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1323.

<sup>119</sup> *Id.*

<sup>120</sup> 34 F. Supp. 2d 612 (S.D. Ohio 1998).

<sup>121</sup> 15 U.S.C. §§ 1681-1681t.

<sup>122</sup> 34 F. Supp. 2d at 616-617.

<sup>123</sup> *Id.* at 616.

the credit reports would be used for background checks on employees, but this was not the purpose for the use.<sup>124</sup> In fact, Rothfeder intended to use the reports for an investigative article on the credit reporting industry.<sup>125</sup> Rothfeder obtained then Vice-President Dan Quayle's credit report, as well as the credit reports of other public figures with their permission.<sup>126</sup> *Business Week* published an article a few months later on its investigation, without naming W.D.I.A.

W.D.I.A. claimed that McGraw-Hill breached its contract with the credit reporting company by intentionally entering into a contract for the purpose of not keeping its promise to use any information gathered for a permissible purpose.<sup>127</sup> Further, McGraw-Hill did not pay the bill for the services rendered. The court found that W.D.I.A. had a right to insist that McGraw-Hill perform the duties of the contract or be compensated for non-performance of those duties.<sup>128</sup> When Rothfeder signed the contract, he had no intention of using the information W.D.I.A. provided for the permissible purpose as defined under the FCRA.<sup>129</sup> The company "deliberately and wailfully [sic] made misrepresentations on the application and during the application process in order to induce W.D.I.A. to enter into the Subscriber Agreement."<sup>130</sup> Rothfeder's misrepresentations caused W.D.I.A. to violate the FCRA; "but for the misrepresentations, no agreement would have been entered into between the parties."<sup>131</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 617.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 620.

<sup>128</sup> *Id.* at 623.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

The court also found that the First Amendment did not shield McGraw-Hill from liability for breach of contract and fraud. Although noting that the press may publish truthful, lawfully obtained information, the court stated, “there is no absolute immunity against civil or criminal liability when the press obtains information through unlawful means.”<sup>132</sup> The court found that fraud and contract laws were laws of general applicability, therefore, W.D.I.A. could recover damages from McGraw-Hill.<sup>133</sup> Further, the court found that the enforcement of such laws would not require strict scrutiny in order to ensure there would be no chill on expression.<sup>134</sup> The court wrote:

Assessing damages when wrongfully acquired data is purveyed to the multitude chills intrusive acts. It does not chill freedom of expression guaranteed by the First Amendment.

. . .

Under the principles set out by the Sixth Circuit in *Boddie v. American Broadcasting Co., Inc.*, 881 F.2d 267, 271 (6<sup>th</sup> Cir. 1989), defendants are not immunized for their wrongful behavior simply because it was undertaken in the name of news gathering. The defendants intentionally engaged in fraud which induced W.D.I.A. to permit access to credit information.<sup>135</sup>

The court awarded W.D.I.A. \$7,499.95 for compensatory damages related to breach of contract and fraud by McGraw-Hill and Rothfeder. The court would not, however, award punitive damages.<sup>136</sup>

The court also noted the importance of protecting those who test for compliance with the laws. According to the court, “testers” help to determine whether the rights of individuals, as

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<sup>132</sup> *Id.* at 624 (citing *Scheetz v. Morning Call, Inc.*, 747 F. Supp. 1515, 1525 (E.D. Pa. 1990) aff’d, 946 F.2d 202 (3d Cir. 1991))

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991)).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 627. Punitive damages were not recoverable under Ohio law. *Id.*

protected by statute, are being safeguarded.<sup>137</sup> This check on individual rights served the public interest:

Defendants' test of the credit reporting system does not support an award of punitive damages in this case because it served to inform Congress and the general public about a matter of vital public interest and was done in such a way as to protect the identity of W.D.I.A. and the rights of the consumers. Additionally, defendants are committed to an enlightened philosophy that they will never again engage in similar conduct and will always publish the truth. The need to deter future conduct is not present in this case.<sup>138</sup>

The breach of contract and promissory estoppel cases focus on the idea that a reporter creates a duty to perform when making a promise. When journalists have gone undercover as employees, the courts have held the journalists to the duties they agreed to as terms of their employment. One example of this is *Food Lion, Inc. v. Capital Cities/ABC, Inc.*<sup>139</sup> *Food Lion v. ABC* arose after two reporters for ABC's *PrimeTime Live* gained employment in the deli section of two different Food Lion grocery stores, by falsifying parts of their employment applications.<sup>140</sup> While working in the stores, both reporters secretly recorded hidden camera footage of meat handling practices. The footage was then used, along with interviews of ex-Food Lion employees, as part of an investigative report on the Food Lion grocery chain. Food Lion sued ABC for fraud and breach of fiduciary duty, among other things.<sup>141</sup> A jury found ABC liable for trespass and awarded Food Lion nominal damages of \$1.00 for the journalists' breach of loyalty.<sup>142</sup> On appeal, the Fourth Circuit upheld this verdict.<sup>143</sup>

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> 984 F. Supp. 923 (M.D.N.C. 1997).

<sup>140</sup> *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217, 1218 (M.D.N.C. 1996).

<sup>141</sup> *Id.* Food Lion also pleaded claims for civil conspiracy and negligent supervision. *Id.*

<sup>142</sup> *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F. 505, 516 (M.D.N.C. 1998). The Jury awarded Food Lion \$5,545,750 in total damages.

<sup>143</sup> *Id.* at 516.

The federal appellate court reiterated the principle of agency law that states that an employee owes a duty of loyalty to his employer.<sup>144</sup> In North and South Carolina, where the ABC journalists worked for Food Lion stores, employee disloyalty was considered tortious in three contexts: when an employee directly competed with his employer, when “the employee misappropriate[d] her employer’s profits, property or business opportunities,” and “when the employee breaches her employer’s confidences.”<sup>145</sup> The Fourth Circuit found that the journalists’ actions in surreptitiously recording the grocery store’s meat handling practices “verged on the kind of employee activity that has already been determined to be tortious.”<sup>146</sup>

The interests of the employer (ABC) to whom [the journalists] gave complete loyalty were adverse to the interest of Food Lion, the employer to whom they were unfaithful. ABC and Food Lion were not business competitors but they were adverse in a fundamental way. ABC’s interest was to expose Food Lion to the public as a food chain that engaged in unsanitary and deceptive practices. [The journalists] served ABC’s interest, at the expense of Food Lion, by engaging in the taping for ABC while they were on Food Lion’s payroll. In doing this, [the journalists] did not serve Food Lion faithfully, and their interest (which was the same as ABC’s) was diametrically opposed to Food Lion’s.<sup>147</sup>

The Fourth also noted that the ABC journalists had the intent to go against the interests of Food Lion in favor of ABC. Because of this, the court ruled that the district court was correct in not setting aside the jury verdict that the journalists had breached their duty of loyalty.<sup>148</sup>

The court was also not persuaded by ABC’s argument that Food Lion’s tort claims should be subject to heightened First Amendment scrutiny.<sup>149</sup> The Fourth Circuit based its conclusion

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<sup>144</sup> *Id.* at 515.

<sup>145</sup> *Id.* at 515-516.

<sup>146</sup> *Id.* at 516.

<sup>147</sup> *Id.* The court was careful, however, to note that its ruling did not apply in all instances where an employee works two jobs. *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 520-521.

on *Cohen* in which the U.S. Supreme Court ruled that the enforcement laws of general applicability against the press did not violate the First Amendment.<sup>150</sup> According to the Fourth Circuit, “the key inquiry in [*Cohen*] was whether the law of promissory estoppel was a generally applicable law.”<sup>151</sup> That court concluded, “The First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law.”<sup>152</sup> The Fourth Circuit found that breach of the duty of loyalty fit into the *Cohen* framework in that it was a law of general applicability and it did not single out the press.<sup>153</sup> The application of these laws only incidentally affected newsgathering. The court found that journalists could do their jobs without committing “run-of-the-mill torts.”<sup>154</sup> Further, the court reconciled the apparent conflict between the ruling in *Cohen* and that in *Barnes v. Glen Theatre, Inc.*<sup>155</sup> in which the U.S. Supreme Court ruled that an ordinance prohibiting public nudity violated the First Amendment, by viewing the tortious conduct in *Cohen* as breach of promise and not speech.<sup>156</sup> Using this conception of those two cases the court ruled, as the U.S. Supreme Court ruled in *Cohen*, that strict scrutiny was inappropriate because the tort law under which ABC was sued was a law of general applicability, that did not single out the press.<sup>157</sup>

The federal district court for the District of Columbia used both the U.S. and Minnesota Supreme Court decisions in *Cohen* to rule against the press for both breach of contract and

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<sup>150</sup> *Id.* at 520.

<sup>151</sup> *Id.* at 521.

<sup>152</sup> *Cohen*, 501 U.S. at 672.

<sup>153</sup> 194 F.3d at 521.

<sup>154</sup> *Id.*

<sup>155</sup> 501 U.S. 560 (1991).

<sup>156</sup> 194 F.3d at 521-522.

<sup>157</sup> *Id.* at 522.

promissory estoppel. In *Steele v. Isikoff*,<sup>158</sup> Julie H. Steele sued Michael Isikoff and *Newsweek Magazine* for breach of contract, fraud, promissory estoppel and breach of fiduciary duty, after the magazine published her name in an article on then-President Bill Clinton's alleged affair with Kathleen Willey.<sup>159</sup> Steele alleged that Isikoff promised that their conversations, about the matter were off the record, but that when pressured by his editors, Isikoff published her name and the information that she provided.<sup>160</sup> Isikoff argued that the First Amendment barred Steele's claims.<sup>161</sup>

The court disagreed with Isikoff's assertion that the First Amendment required dismissal of the suit. Isikoff argued that Steele's claims were based on injury to her reputation, for which she was attempting to collect damages "without meeting the constitutional requirements of a defamation claim."<sup>162</sup> Using *Cohen*, the court found that a complete dismissal of Steele's claims based on First Amendment grounds was inappropriate. According to the court, the Supreme Court's ruling that no First Amendment violation existed was based on that court's finding 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."<sup>163</sup> The *Steele* court found that Steele had based her case on non-reputational claims that were generally

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<sup>158</sup> 130 F. Supp. 2d 23 (D.D.C. 2000).

<sup>159</sup> *Id.* at 26-27.

<sup>160</sup> *Id.* at 27. Steele apparently lied about her knowledge of Willey's relationship with Clinton, at the prompting of Willey.

<sup>161</sup> *Id.* at 28.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 29 (quoting *Cohen*, 501 U.S. at 669).

applicable. Therefore, the court ruled that it was too early to dismiss the claims for fear that reputation damages may be implicated.<sup>164</sup>

The court did, however, dismiss Steele's breach of contract claim. Using the Minnesota Supreme Court's analysis of the breach of contract claim in *Cohen*, the *Steele* court ruled "a reporter-source confidentiality arrangement is more appropriately viewed as a moral commitment."<sup>165</sup> According to the court, the laws of the District of Columbia and Virginia did not elevate moral obligations to contracts: "Accordingly, because a reporter's promise of confidentiality is a moral obligation, not a contractual requirement, and because a moral obligation does not give rise to express or implied contractual duties, there is no contractual relationship between Steele and Isikoff."<sup>166</sup> The court also ruled that if it were to decide that the confidentiality agreement between a reporter and a source was contractual, Steele's claim of a contract would fail because a contract entailed "a covenant of good faith and fair dealing."<sup>167</sup> Because Steele intended to lie to Isikoff about what she knew about the president's relationship, she was acting in bad faith, which would relieve Isikoff of any duty he had under their contract.<sup>168</sup>

Further, the court dismissed her claim for damages under a theory of promissory estoppel because "Virginia law does not recognize the doctrine."<sup>169</sup> The court also dismissed her claim that Isikoff was unjustly enriched by making the promise not to publish her name, which led to

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<sup>164</sup> 130 F. Supp. 2d at 29.

<sup>165</sup> *Id.* at 31.

<sup>166</sup> *Id.* at 31-32.

<sup>167</sup> *Id.* at 32 (quoting *Hais v. Smith*, 547 A.2d 986, 987 (D.C. 1988)).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 33.

her reliance on the promise.<sup>170</sup> Courts in the District of Columbia prohibit claims of unjust enrichment from plaintiffs who acted without good faith:

In an action in equity, ‘he who asks relief must have acted in good faith. The equitable powers of the court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make the court the abetter or iniquity.’ . . . Thus, while ‘equity does not demand that its suitors shall have led blameless lives,. . .it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.’<sup>171</sup>

Because Steele intended to lie to Isikoff, she acted with deceit, barring her from recovery under unjust enrichment.<sup>172</sup>

A federal court in Mississippi also used the breach of contract analysis from *Cohen* to decide a case that was originally based on defamation, invasion of privacy and emotional distress. In *Pierce v. The Clarion Ledger*,<sup>173</sup> Robert Earl Pierce sued the *Clarion Ledger* newspaper after the newspaper published an article about allegations in an internal memo from the Mississippi Bureau of Narcotics (MBN). The memo stated that Pierce, a former MBN official, authorized the inappropriate use of state equipment.<sup>174</sup> The memo intimated that Pierce gave authorization to gain political influence and to obtain a different position, but the memo also stated that Pierce denied the allegations.<sup>175</sup> The source of the memo was later identified, and admitted to giving the memo to a *Clarion* reporter under the agreement that the reporter would not publish the memo until she “checked it out.”<sup>176</sup> Pierce based his breach of contract

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<sup>170</sup> *Id.* at 34.

<sup>171</sup> *Id.* (quoting *Synanon Found., Inc. v. Bernstein*, 503 A.2d 1254, 1264 (D.C. 1986)(citations omitted)).

<sup>172</sup> 130 F. Supp. at 34.

<sup>173</sup> 452 F. Supp. 2d 661 (S.D. Miss. 2006).

<sup>174</sup> *Id.* at 662.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 663

claim on a theory that he was a “third-party beneficiary” of the agreement between the reporter and the source.<sup>177</sup> Because the reporter had published the information from the memo, she had breached her agreement with the confidential source. Pierce claimed that he should he was injured by the reporter’s breach, and therefore deserved to recover damages.

As the breach of contract claim between focusing on a reporter’s promise of confidentiality was a matter of first impression in Mississippi, the court used the Minnesota Supreme Court’s first ruling in *Cohen* to determine that no contract existed.<sup>178</sup> Like the Minnesota Supreme Court, the federal court was not persuaded that reporters and sources usually believe that they are creating a binding contract when the source provides the reporter with information in exchange for anonymity.

The parties understand that the reporter’s promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract. Indeed, a payment of money, which taints the integrity of the newsgathering function, such as money paid a reporter for the publishing of a news story, is forbidden by the ethics of journalism.<sup>179</sup>

The court did, however, note that under the U.S. Supreme Court’s ruling in *Cohen*, the First Amendment did not bar a source from obtaining damages from a reporter, for breach of promise, under a theory of promissory estoppel.<sup>180</sup> Pierce could not, however, recover under promissory estoppel because he was not a party to the promise. “As a third party who was ignorant of the promise, he could not prove that he relied on the alleged promise.”<sup>181</sup>

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 663-664.

<sup>179</sup> *Id.* at 664 (quoting *Cohen*, 457 N.W.2d at 203).

<sup>180</sup> 452 F. Supp. at 665.

<sup>181</sup> *Id.* *But see* *Huskey v. NBC, Inc.*, 632 F. Supp. 1282 (N.D. Ill. 1986) in which the court ruled that a prisoner, filmed without permission, could go forth with a breach of contract claim based on NBC’s agreement with prison officials to abide by a federal statute that prohibited the unauthorized photographing of inmates.

The cases mentioned above used both the state and federal opinions in *Cohen*. This is not to say that all breach of promise cases against members of the press after 1991 cite *Cohen*. In *Showler v. Harper's Magazine Foundation*, the family of a member of the Oklahoma National Guard killed in Iraq sued *Harper's Magazine* after a photographer for the magazine took pictures of the guardsman's body at the funeral.<sup>182</sup> The guardsman's death earned significant media attention because he was the first member of the Oklahoma National Guard to be killed in combat since the Korean war.<sup>183</sup> The family expressed to the funeral home its wish to have an open-casket funeral ceremony, but it also asked that the press not be allowed to photograph the soldier's body.<sup>184</sup> The reporter from *Harper's* obtained permission to attend the funeral, but was informed that there would be a section at the back of the auditorium reserved for the press, and that he could not interview the guardsman's family.<sup>185</sup> The photographer took pictures of the funeral, which 1200 people attended. At the end of the ceremony, the guardsman's casket was moved to the back of the auditorium so that those in attendance wishing to view the body could do so as they filed out of the room.<sup>186</sup> The reporter for *Harper's* then took pictures of the guardsman's body.<sup>187</sup> The family did not learn of the pictures until the photographer sent the

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<sup>182</sup> 222 Fed. App'x 755, 758-759 (10<sup>th</sup> Cir. 2007).

<sup>183</sup> *Id.* at 758.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 758-759.

<sup>187</sup> *Id.* at 759.

guardsman's father copies of the photos the reporter had taken during the funeral.<sup>188</sup> *Harper's Magazine* also published the photos and entered them into various competitions.<sup>189</sup>

The family sued *Harper's Magazine* claiming the photographer committed fraud by promising the funeral home director that he would not take pictures of the open casket.<sup>190</sup> The trial court granted the magazine summary judgment on this claim, ruling that if there was fraud or misrepresentation, it was made toward the funeral director and not the family.<sup>191</sup> On appeal the Tenth Circuit affirmed and ruled that the family did not have evidence that the photographer promised the funeral director not to photograph the open casket, and that he intended not to keep that promise.<sup>192</sup> According to the court, under Oklahoma law, "the general rule is that when a false representation is the basis of fraud, the representation must relate to existing facts or previously existing facts and not to promises of some future act."<sup>193</sup> Although noting that an exception to this rule arises when the promise is made with the intention not to keep the promise and to deceive the promisee, the court found that the family had no evidence of the photographer's lack of intent to photograph the open casket.<sup>194</sup> The court also found that the family's fraud claimed failed because it could not prove that it relied upon any statements made by the photographer.<sup>195</sup>

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<sup>188</sup> *Id.* After the funeral, the reporter approached the guardsman's father and offered to send him copies of the photographs that he had taken. *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 765.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* (citing *Roberts v. Wells Fargo AG Credit Corp.*, 990 F.2d 1169, 1172 (10<sup>th</sup> Cir. 1993)).

<sup>194</sup> 22 Fed. Appx. at 765.

<sup>195</sup> *Id.*

## Misrepresentation

*Showler* demonstrates a connection between misrepresentation claims and claims for breach of promise. In *Cohen*, the Minnesota Supreme Court approved of the appellate courts dismissal of Cohen's misrepresentation claim because he had not proven that the reporters had misrepresented a past or present fact with respect to their promise not to identify him. The U.S. Supreme Court did not focus on fraud or misrepresentation, but courts deciding misrepresentation claims have cited its decision in *Cohen* nevertheless.

This does not mean, however, that the courts have ruled against journalists who have misrepresented themselves in order to gather information. In *Desnick v. ABC, Inc.*,<sup>196</sup> for instance ABC broadcast a story that was the culmination of three months of investigation of the Desnick Eye Centers in Illinois and Wisconsin. To create the story, *PrimeTime Live's* investigative team had contacted Dr. James H. Desnick, who let a film crew videotape the main eye clinic in Chicago, allowed access to a cataract removal operation and permitted interviews of various doctors, eye clinic staff and patients, on the promise that ABC would not conduct ambush interviews or undercover surveillance.<sup>197</sup>

Dr. Desnick did not know, however, that ABC had also sent fake patients to the eye clinics armed with hidden cameras, which were able to record the eye examinations they received.<sup>198</sup> *PrimeTime Live* broadcast the hidden camera segments juxtaposed with interviews with former eye clinic patients, staff, and experts on ophthalmology. After the segment aired, Dr. Desnick sued ABC for fraud, among other things.

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<sup>196</sup> 44 F.3d 1345 (7<sup>th</sup> Cir. 1995).

<sup>197</sup> *Id.* at 1348.

<sup>198</sup> *Id.*

The Seventh Circuit found, however, that Illinois did not offer a remedy for fraudulent promises unless there was a scheme to defraud in ABC's hidden camera investigation.<sup>199</sup> The court said there was no scheme to defraud. Further, the court viewed the "fraud" by ABC to not be of the kind for which the law provides a remedy.

Investigative journalists well known for ruthlessness promise to wear kid gloves. They break their promise, as any person of normal sophistication would expect. If that is "fraud," it is the kind against potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods.<sup>200</sup>

The court also failed to find how Desnick was harmed by ABC's false promises. The court acknowledged that if ABC had informed the doctor that it would be sending undercover investigators and conducting ambush interviews Desnick may not have spoken with ABC. Therefore, the court ruled the "so-called [sic] fraud was harmless."<sup>201</sup>

Like the Seventh Circuit in *Desnick*, in *Deteresa v. ABC, Inc.*,<sup>202</sup> the Ninth Circuit ruled that because a plaintiff and a member of the press did not have a relationship that created a duty of disclosure, there was no fraud when a producer failed to inform the woman that she was being recorded on audio and videotape.<sup>203</sup> *Deteresa* arose after a producer from ABC visited the home of Beverly Deteresa, an attendant on the flight that O.J. Simpson had taken after the murder of his ex-wife.<sup>204</sup> Deteresa never allowed the producer into her home but did express that she did not want to be interviewed for the news program. She did, however, continue to talk to the producer at her door and explained that she was "frustrated" with hearing some of the false news

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<sup>199</sup> *Id.* at 1354.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 1355.

<sup>202</sup> 121 F.3d 460 (9<sup>th</sup> Cir. 1997).

<sup>203</sup> *Id.* at 467.

<sup>204</sup> *Id.* at 462.

reports being published about what occurred on the flight with O.J. and explained to the producers some of the details of what really occurred.<sup>205</sup> The next day the producer called Deteresa to ask her if she would appear on camera; she declined. While the producer spoke with Deteresa, a camera crew filmed her from a public street. The producer also surreptitiously recorded their conversation. That night, ABC broadcast a clip of the conversation on the news program *Day One*.

The court found that under California law, there were four circumstances in which nondisclosure or concealment would constitute fraud:

(1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts.<sup>206</sup>

According to the court, these situations “presuppose[] the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise.”<sup>207</sup> The Ninth Circuit agreed with the district court, which found that there was no evidence that Deteresa and the producer had a relationship that required the producer to disclose that he was taping her.<sup>208</sup>

Further, the court found that even though the federal and state law prohibited unauthorized taping of private communications, California courts have rejected this as a basis for fraud.<sup>209</sup>

Although inferentially, everyone has a duty to refrain from committing intentionally tortious conduct against another, it does not follow that one who intends to commit a tort owes a duty to disclose that intention to his or her intended victim. The general duty is not

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<sup>205</sup> *Id.* 462-463.

<sup>206</sup> *Id.* at 467 (quoting *LiMandri v. Judkins*, 60 Cal. Rptr. 2d 539, 543 (Cal. Ct. App. 1997)).

<sup>207</sup> 121 F.3d at 467 (quoting *LiMandri*, 60 Cal. Rptr. 2d at 543).

<sup>208</sup> 121 F.3d at 467.

<sup>209</sup> *Id.*

to warn of the intent to commit wrongful acts, but to refrain from committing them. We are aware of no authority supporting the imposition of additional liability on an intentional tortfeasor for failing to disclose his or her tortious intent before committing a tort.<sup>210</sup>

The court ruled that ABC had not committed fraud for failing to inform Deteresa of its intent to record her. The court, therefore, affirmed the district court's grant of summary judgment.<sup>211</sup>

In contrast to the Ninth Circuit's ruling in *Deteresa*, a Minnesota appellate court in *Special Force Ministries v. WCCO TV*,<sup>212</sup> ruled that a reporter may have committed fraud by failing to disclose that she worked for a television station when she applied to be a volunteer at a care facility.<sup>213</sup> *Special Force Ministries*, a care facility for handicapped persons, sued the television station, for trespass and fraud, after a journalist for the station obtained a volunteer job at the facility and secretly recorded footage while she worked.<sup>214</sup> The station used the journalist's footage in a report on patient care at the facility.<sup>215</sup> The station argued that *Special Force* could not prove fraud because the reporter had no duty to disclose that she worked for the station.<sup>216</sup> The court found, however, that "a duty is imposed when disclosure is 'necessary to clarify information already disclosed, which would otherwise be misleading.'"<sup>217</sup> The court found that the reporter not only failed to disclose that she was employed by the station, but that she also indicated that she was unemployed. Her references also failed to disclose that she

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<sup>210</sup> *Id.* (quoting *LiMandri*, 60 Cal. Rptr. 2d at 544).

<sup>211</sup> 121 F.3d at 468.

<sup>212</sup> 584 N.W.2d 789 (Minn. Ct. App. 1998).

<sup>213</sup> *Id.* at 793-794.

<sup>214</sup> *Id.* at 791.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 793.

<sup>217</sup> *Id.* (quoting *L&H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989)).

worked for the station.<sup>218</sup> Further, the court rejected the claim that Special Force could not show damages because, “Had Special Force known Johnson worked for WCCO, it would not have given Johnson the volunteer position and placed her in a position of trust working with its vulnerable residents.”<sup>219</sup> The court denied the station’s motion for summary judgment.<sup>220</sup>

A California appellate court, in comparison, found that reporters had no duty to disclose that they were recording two men with whom they were having a business meeting.<sup>221</sup> *Wilkins v NBC, Inc.* arose from a *Dateline* NBC investigation of the “pay-per-call” industry.<sup>222</sup> Two producers for NBC contacted SimTel, a pay-per-call company, in response to a national advertisement and arranged a lunch meeting with company representatives.<sup>223</sup> The producers brought two additional people to the meeting, which took place on the patio of a restaurant. The company representatives did not inquire into the identities of the two additional people.<sup>224</sup> During the meeting the SimTel representatives explained how their pay-per-call system worked. The producers recorded the meeting using hidden cameras and later broadcast excerpts from the recording.<sup>225</sup>

The SimTel representatives pleaded three theories of fraud: that the reporters made “affirmative misrepresentations to them on which they relied;” the reporters failed to disclose

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<sup>218</sup> 584 N.W.2d at 793.

<sup>219</sup> *Id.* at 794.

<sup>220</sup> *Id.*

<sup>221</sup> *Wilkins v. NBC, Inc.*, 84 Cal. Rptr. 2d 329, 339 (Cal. Ct. App. 1999).

<sup>222</sup> *Id.* at 332. Pay-per-call is the “practice of charging for services on so-called ‘toll-free’ 800 lines, often without the knowledge of the persona billed for the services.” *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

that they were journalists, and they were legally obligated to do so; NBC committed “deceptive acts in connection with a contract” and is therefore liable to the SimTel representatives under the California fraud statute. The court found, however, that no fraud could be proved under the theory of misrepresentation because the representatives could not prove that they relied on the reporters’ statements to their detriment.<sup>226</sup> The representatives admitted that they would have answered any questions about the telephone scheme if they had known they were speaking with reporters, and “that ‘the gist of what [he] was saying would have been exactly the same,’ but that he ‘might have worded’ some of his remarks a little differently.”<sup>227</sup> The representatives also admitted that their jobs required them to distribute information about the company and that 97 percent of the people who inquire about SimTel never enter into a business relationship with the company.<sup>228</sup>

The court also disagreed with the representatives’ assertion that the journalist had committed fraud by not disclosing their identities and that they were investigating the company using hidden cameras.<sup>229</sup> Using the Ninth Circuit’s ruling in *Deteresa*, the court ruled that the representatives had to demonstrate that they were in some kind of relationship with the journalists that required disclosure.<sup>230</sup> The representatives failed to do so, and because of this, the court ruled that the journalists’ nondisclosure did not constitute fraud.<sup>231</sup> The court also ruled that because there was no contract between the representatives and the journalists, the

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<sup>226</sup> *Id.* at 338.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 339.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

representatives could not recover damages for fraud under state law, which applies to “fraud ‘committed by a party to the contract...with intent to deceive another party thereto, or to induce him to enter into the contract.’”<sup>232</sup>

Whether the plaintiff reasonably relied on statements made by a journalist was also the crux of a First Circuit case. In *Veilleux v. NBC*,<sup>233</sup> the owners of a trucking company sued NBC for misrepresentation, among other things, alleging that the broadcast company made false promises that it would not include a group critical of the trucking industry, and that NBC would positively portray trucking in a investigative report in which the trucking company agreed to participate.<sup>234</sup> A producer for NBC contacted the trucking company stating that he wanted to do a trip with a long-distance trucker to gather information on trucker experiences and in order to provide a counter viewpoint to the publicity that Parents Against Tired Truckers (PATT) was getting.<sup>235</sup> The owners of the trucking company agreed to allow the producer to ride along with a trucker provided that PATT would not be included in the broadcast. The producer did not disclose to the owners, however, that he had already interviewed members of PATT.<sup>236</sup> NBC later broadcast a story including the interviews with PATT, footage taken on the trip with the trucker, and statements made by the trucker that he violated federal trucking regulations.<sup>237</sup> The

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<sup>232</sup> *Id.*

<sup>233</sup> 206 F.3d 92 (1<sup>st</sup> Cir. 2000).

<sup>234</sup> *Id.* at 102.

<sup>235</sup> *Id.* at 103.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 104.

trial court awarded the trucking company owners damages for negligent and fraudulent misrepresentation under Maine law.<sup>238</sup>

The First Circuit reversed this judgment on appeal as a result of NBC's promise to portray trucking in a positive light. According to the federal Court of Appeals, the company owners' misrepresentation claims could not stand because the promise of favorable portrayal was "too vague to be actionable."<sup>239</sup> The claim of misrepresentation for the promise not to include PATT in the news story was, however, actionable and did not violate the First Amendment.<sup>240</sup> The court determined that a reasonable jury could find that NBC concealed their intention to include PATT in the broadcast, and that the owners reliance on this promise was reasonable.<sup>241</sup>

With regard to the promise to portray the trucking industry positively, the court found that these statements should be viewed as "puffing," which is not recoverable under a theory of fraud.<sup>242</sup> Quoting the court in *Desnick*, the court found that such puffery was common in investigative reporting:

Investigative journalists well known for ruthlessness promise to wear kid gloves. They break their promise, as any person of normal sophistication would expect. If that is 'fraud,' it is the kind against which potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods.<sup>243</sup>

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<sup>238</sup> *Id.* at 119.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 120.

<sup>242</sup> *Id.* at 122.

<sup>243</sup> *Id.* (quoting *Desnick*, 44 F.3d at 1354).

According to the First Circuit, the Maine courts would “think that defendants’ ‘positive’ assurances were simply too vague and laconic to inspire, on the part of a reasonable person, the reliance necessary for a misrepresentation claim.”<sup>244</sup>

Further, the court found that if Maine courts were to rule that NBC’s promise of a positive portrayal was factual, “it would then have to face the difficult issue of whether it would be constitutional to use so vague a yardstick in a misrepresentation action founded on speech relating to matters of public concern.”<sup>245</sup> Whether the portrayal of the truckers was positive enough could not be proven “sufficient[ly] for First Amendment purposes.”<sup>246</sup> The “actual or potential problems suggest that the promise to provide positive coverage could be too contingent to satisfy constitutional norms.”<sup>247</sup>

The court found, however, that allowing the misrepresentation claim based on the promise not to include PATT did not cause the claim to suffer from constitutional deficiency. In doing so, the First Circuit noted the U.S. Supreme Court’s rulings in *Hustler Magazine v. Falwell*<sup>248</sup> and *Cohen*. In *Hustler* the Court ruled that public figures needed to meet a stringent burden of proof for defamation in order to prevail on an emotional distress claim.<sup>249</sup> In *Cohen*, the Court, in a promissory estoppel action, distinguished the *Hustler* case by finding that unlike emotional distress, promissory estoppel was not an attempt to circumvent the First Amendment

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<sup>244</sup> 206 F.3d at 122.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 123.

<sup>247</sup> *Id.*

<sup>248</sup> 485 U.S. 46 (1988).

<sup>249</sup> 485 U.S. at 56.

standard of proof required for a defamation action, in order to recover damages.<sup>250</sup> From these cases, and other major precedents like *Desnick*, the *Veilleux* court extracted five principles:

First, the First Amendment is concerned with speech itself, not the tone or tastefulness of the journalism that disseminates it.

...

Second, the Supreme Court “has long recognized that not all speech is of equal First Amendment importance.

...

Third, even when the information being disseminated is truthful, the press does not enjoy general immunity from tort liability.

...

Fourth, the status of the plaintiff is of constitutional significance.

...

Fifth, the type of damages sought bears on the necessity of constitutional safeguards.<sup>251</sup>

According to the First Circuit, these factors support a finding that the owners’ claim of misrepresentation based on the use of PATT in the broadcast did not violate the First Amendment.<sup>252</sup> Under Maine law, misrepresentation was a law of general applicability; the misrepresentations made were “highly material,” and the owners were not public figures or officials.<sup>253</sup>

The First Circuit also declined to adopt a rule requiring “independent evidence” in cases in which a news source claims a journalist breached a promise.<sup>254</sup> Although recognizing the

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<sup>250</sup> 501 U.S. at 671.

<sup>251</sup> 206 F.3d at 127.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 128.

<sup>254</sup> *Id.* at 129.

possible effects on newsgathering that misrepresentation claims against the press may have, the court found NBC's argument for such a rule unpersuasive:

We recognize the danger that newsgathering might be inhibited by forcing journalists to frequently litigate disputes concerning their purported representations to sources. An independent evidence rule would, however, grant journalists a greater license to lie than is enjoyed by other citizens. Defendants' proposed rule would exceed any protection of newsgathering that the Supreme Court has yet fashioned, and would be more appropriately developed at that level, if at all.<sup>255</sup>

The First Circuit, therefore, remanded the misrepresentation claim for further proceedings.

Like the *Wilkins* and *Vielleux* courts, a federal court in Florida ruled that in order to recover for fraud, a plaintiff had to demonstrate that his reliance was reasonable.<sup>256</sup> In *Pitts Sales, Inc. v. King World Productions* the owners of a magazine sales company sued King World Productions after a story aired on *Inside Edition* examining the business practices of traveling magazine sales companies. A producer for *Inside Edition* secured a job with Pitts Sales by misrepresenting personal information on the job application. While working for the company, he recorded the day-to-day activities of the magazine sales staff with a hidden camera and microphone.<sup>257</sup> Portions of the film footage and recordings the producer acquired while working for the magazine sales company were used during a news report that showed the treatment, abuse, and inadequate supervision given to young sales agents.

Pitts Sales claimed that the journalists committed fraud by making misrepresentations and omissions, upon which the company relied, in order to gain employment with the company.<sup>258</sup> The court that Florida law allowed fraud claims against those who omit

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<sup>255</sup> *Id.*

<sup>256</sup> *Pitts Sales, Inc. v. King World Prod.*, 383 F. Supp. 2d 1354, 1363-1364 (S.D. Fla. 2005).

<sup>257</sup> *Id.* at 1356.

<sup>258</sup> *Id.* at 1362.

information and “places on one who undertakes to disclose material information a duty to disclose that information fully.”<sup>259</sup> Although Pitts Sales argued that the producer made misrepresentations or omissions, with knowledge of falsity, that injured the company, the court ruled that in order to recover damages for injury, Pitts Sales’ reliance on the misrepresentations had to be reasonable.<sup>260</sup>

The court found, however, that Pitts Sales’ reliance on the producer’s misrepresentations was not reasonable.<sup>261</sup> The court applied *Food Lion*, in which the grocery store claimed that it incurred damages relating to the administrative costs of hiring reporters who were working undercover. In that case the Fourth Circuit determined that in order for the grocery store to recover damages related to the hiring of the reporters, the store had to prove that it reasonably relied on the misrepresentations the journalists made on their employment applications and because of this it had incurred administrative costs related to hiring the reporters.<sup>262</sup> That court found that the reporters had not made representations that they would be working for longer than one or two weeks, and Food Lion had not asked for this information.<sup>263</sup> Further, North Carolina and South Carolina, the states in which the investigations occurred, were at-will employment states, meaning either the employer or the employee can terminate employment at any time. The court concluded it was, therefore, unreasonable for Food Lion to believe that the reporters would work for a long period of time.<sup>264</sup> The court also found that Food Lion could not recover wages

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<sup>259</sup> *Id.* (citing *Gutter v. Wunker*, 631 So.2d 1117, 1118-19 (Fla. 4<sup>th</sup> DCA 1994)).

<sup>260</sup> 388 F. Supp. 2d at 1362-1363.

<sup>261</sup> *Id.* at 1363.

<sup>262</sup> *Food Lion*, 194 F.3d 505, 513 (4<sup>th</sup> Cir. 1999).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

to the reporters because it had paid them for the work they actually completed, and not based on the misrepresentations the reporters made during the hiring process.<sup>265</sup>

Using the Fourth Circuit’s reasoning in *Food Lion*, the *Pitts Sales* court ruled that the magazine company could not prove that the producer’s misrepresentations, made to get hired, proximately caused Pitts Sales administrative costs.<sup>266</sup> The producer did not state that he planned on staying with the company for an extended period. Further, under Florida law, “employment contracts without a definite term are generally terminable at will by either party.”<sup>267</sup> The court also found that Pitts Sales regularly experienced a high employment turnover, and that the company did not assume how long a sales agent would work.<sup>268</sup> The court ruled, therefore, that Pitts Sales could not prove it was damaged by the producer’s misrepresentations, nor could it recover the commissions it paid to the producer because the commissions were not based on the misrepresentations that the producer made to get hired.<sup>269</sup>

### **Conclusion**

The statements journalists make to sources in order to gather information can result in liability for misrepresentation or breach of promise. The leading case for breach of promise is *Cohen v. Cowles Media* in which the U.S. Supreme Court ruled that journalists could be liable for breaching a promise and that the First Amendment provided no shield from liability. Post-

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<sup>265</sup> *Id.*

<sup>266</sup> 383 F. Supp. 2d at 1364.

<sup>267</sup> *Id.* (quoting *Iniguez v. American Hotel Register Co.*, 820 So.2d 953, 955 (Fla. 3d DCA 2002)).

<sup>268</sup> 383 F. Supp. 2d at 1364.

<sup>269</sup> *Id.*

*Cohen*, the courts have used the Supreme Court's decision to rule that the First Amendment did not insulate journalists from liability.

In both breach of promise and misrepresentation cases, the courts examined the reasonableness of the plaintiff's reliance upon the journalist's statements. In *Food Lion*, for example, the federal appellate court ruled that the grocery store could not have reasonably believed that the journalists were going to work for more than one or two weeks because the employment law in that state allowed employees to quit at any time. That court did not allow the grocery store to recover damages. Plaintiffs may not recover damages for misrepresentation, according to the *Desnick* decision, when there is no actual damage from the false statements. So when journalists pretended to be patients to gather news at a medical clinic, there was not damage to the clinic owner.

It appears then, that journalists may be vulnerable to breach of promise suits after *Cohen*. In *Cohen*, the Supreme Court viewed the two newspapers as having acted unlawfully to obtain the plaintiff's name even though the actual unlawful act came after his name was obtained. Because the newspapers' methods were viewed as unlawful, the *Daily Mail* principle, which offers a very high level of protection for publishing truthful information, was not used. In cases in which this ruling was followed, the journalists have been found liable for damages.

## CHAPTER 6 ANALYSIS AND CONCLUSION

The institutional press plays a central role in American society. By providing information and acting as a surrogate for the public, established news organizations are able to facilitate one of the fundamental purposes of the First Amendment: free and open debate leading to a politically informed people. Historically, journalists have been at the forefront of reporting on major scandals including those involving sanitation, health care for the mentally ill, and the presidency. Such newsgathering by reporters has prompted changes in law and society at large. To gather and disseminate this information, however, the press has at times used methods that fall outside of what is permitted by law. As a result, the journalists have faced civil action by private individuals and criminal prosecution by the government for their newsgathering methods. For the most part, these cases have been initiated after the unlawfully gathered information has been published.

The U.S. Supreme Court has developed a principle aimed at protecting the First Amendment rights of news outlets that publish lawfully acquired, truthful information. That principle, which was created in *Smith v. Daily Mail Publishing Co.*, and later enunciated in *Florida Star v. BJJF*, require that a court deciding the constitutionality of punishing the publication of truthful information make certain findings with respect to the newsgathering methods and the potential effects of publication on the press. Specifically, the courts should consider whether the information was lawfully obtained, whether the information was already publicly available, and the likelihood that punishing publication would have a censorial effect on the news media. The Court, however, declined to answer in *Daily Mail* and *Florida Star* whether the press could be punished for unlawfully acquiring truthful information and then publishing that information.

Two later U.S. Supreme Court cases also failed to provide a definitive answer to the question of the press' liability for the unlawful acquisition of truthful information. In *Cohen v. Cowles Media Co.*, which involved two newspapers that published the name of an information source in violation of a verbal agreement, the Court declined to follow the *Daily Mail* principle. In *Cohen*, the Court expressed uncertainty concerning the lawfulness of the information acquisition and asserted that the law contested by the newspapers was considered to be generally applicable; as such, any incidental effects on the freedom of the press were not thought to be constitutionally significant. Ten years later, in *Bartnicki v. Vopper*, while acknowledging that a telephone conversation was unlawfully recorded by a third-party in contravention of the generally applicable federal wiretap law, the Court applied the *Daily Mail* principle in prohibiting the punishing of the publication of information of a public concern. Both of these court opinions were very fact specific and cannot be generalized to provide a bright-line rule as to how the courts would decide cases involving the unlawful acquisition of truthful information and the publication of the information.

This dissertation used legal research methods to examine how the courts have decided cases in which members of the press have been sued for using unlawful methods to gather information, and have then published that information. This research examined cases brought against members of the press under common claims of wiretapping, intrusion, trespass and fraud. To accomplish this project, legal databases were used to search for the major state and federal cases involving the news media and the common tort liabilities. The legal literature was reviewed to identify the major issues and theories involved in these gathering cases. The literature was also used to provide background for the questions to be answered in this study.

All cases were analyzed for the court's treatment of the members of the press and the court's analysis of any First Amendment defenses. Cases were first categorized by claim. The cases under each claim were examined for the main issues concerning newsgathering. The author explored whether the courts allowed First Amendment protection for the journalists' newsgathering methods, the value placed by the courts on the information gathered, and the method of analysis the court used to decide the case.

Chapter Three of this dissertation examined cases in which journalists were accused of violating federal or state wiretapping laws. These laws prohibit the surreptitious recording of private conversations, and the disclosure of those conversations. When journalists have not been active participants in intercepting these conversations, or when the interceptions were not found to be unlawful, the courts have ruled that publication of the conversations were not unlawful. Journalists actively participating in the procurement of the secret recordings have also found protection for the publication of the interceptions under the statutory exemptions for recordings made by participants in a conversation and the requirement that a plaintiff demonstrate that the interceptor had a criminal or tortious purpose for making the recording. The courts have almost overwhelmingly found that the gathering of information for publication was not a criminal or tortious purpose.

Chapter Four explored cases in which the media committed some kind of invasion, whether into privacy or onto private property, while newsgathering. For the most part, the courts have ruled that the journalists have no privilege to invade privacy or to trespass while seeking information. Some courts have, however, created novel reasons for excusing journalists from liability for their tortious acts. If a journalist did not act jointly with government officials, then they may not be liable for an intrusion while accompanying law enforcement onto private

property. If journalists were acting in the public interest as testers, then they could not have trespassed. Yet, the public interest is not a great shield against liability. The courts have ruled that the public interest in the information gathered had to be balanced against the plaintiff's expectation of privacy. Privacy, whether under tort law or the Constitution, was a significant right in conflict with the journalists' First Amendment rights.

Chapter Five examined cases against members of the press for fraud or misrepresentation, breaking promises, renegeing on contracts, or outright lying. *Cohen* is the controlling opinion, and says that journalists may not violate laws of general applicability in order to gather news. Of great concern in cases involving journalists committing fraud or misrepresentation is detrimental reliance. The courts will not tolerate actions by journalists that induce a plaintiff to rely on a journalist's promise to the degree that it injures that person. The plaintiff must prove, however, that he had a reasonable reliance on a journalist's promise to his detriment. If a plaintiff cannot demonstrate this, a court will not find the journalist liable for fraud or misrepresentation.

### **Analysis**

The author explored three research questions:

#### **Research Question 1: Is Unlawfulness a Bar to First Amendment Protection for Newsgathering Activities?**

The unlawfulness of the method used to acquire information is not always a bar to First Amendment protection. In cases where a third party unlawfully acquired information and then passed that information on to a journalist, the courts have not barred First Amendment protection. In *Bartnicki*, for example, the U.S. Supreme Court acknowledged that the cellular phone conversation was unlawfully acquired, but because the journalist that disclosed the conversation was not involved in its acquisition, the Court ruled that the journalist could not be

punished for that publication. The Court based this ruling on two factors: that the punishment of third parties not involved in the interception would not deter further interceptions, and that privacy was not an important enough interest to override First Amendment protection for publishing matters of public significance.

*Bartnicki* appears to be the current standard for courts deciding cases in which journalists have not been direct participants in the unlawful interception. The court in *Jean v. Massachusetts State Police*, for instance, followed the *Bartnicki* decision in extending First Amendment protection to a woman who published footage of a police search on her political Web site. In that case, as in *Bartnicki*, the publisher of the unlawfully acquired information received the footage from another source. The *Jean* court ruled that there was no compelling state interest in punishing the subsequent publisher of the intercepted material, even though the identity of the interceptor was known. The publisher's knowledge that the material was obtained illegally did not lessen her First Amendment right to publish it, and it prohibited the State from criminalizing the publication of the footage.

*Bartnicki*, and the cases that follow that opinion, seem to contradict the assertions made by the author of the 1969 Harvard Law Review RECENT CASES article.<sup>1</sup> That article focused on a case in which journalists were sued for invasion of privacy for receiving stolen documents and using the information from the documents to write a column. The author of the RECENT CASES article argued that the court erred in not holding the journalists liable for invasion of privacy in the same way that the original intruder would have been held liable. The author did recognize that the First Amendment protection for freedom of the press might preclude liability,

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<sup>1</sup> RECENT CASES—*Constitutional Law—Freedom of the Press—Judgment for Conversion Against Journalist Who Acquire and Publish Information with Knowledge that it was Stolen from U.S. Senator's Files does not Violate Freedom of the Press—Dodd v. Pearson*, 279 F. Supp. 101 (D.D.C. 1968), 82 HARV. L. REV. 921 (1969).

as it would conflict with the public's right to be informed. At the same time, not holding the journalists liable might encourage more theft. The *Bartnicki* Court ruled, however, that punishing third parties did not deter further unlawful activity. The article's assertion that the freedom of the press might preclude liability proved correct as the *Bartnicki* Court found that the interest in privacy did not outweigh the First Amendment protection for publishing information important to the public.

The courts have not extended First Amendment protection to members of the press when there is a question about whether a journalist lawfully obtained the information published. In *Peavy v. WFAA-TV, Inc.*, the Fifth Circuit found no First Amendment protection for a television station because the court questioned whether the station had actively procured the recorded conversations of a member of the school board through another source. The court noted that the conversations were illegally recorded, although not by the television station. The *WFAA-TV* decision, unlike *Bartnicki* and the *Bartnicki* line of cases, appears to follow the RECENT CASES logic that would hold journalists liable for unlawful acts by third parties. Like the journalists in the case the RECENT CASES article examined, the journalists in *WFAA-TV* knew the recordings were not obtained with permission.

In a law review article examining the link between the method of information acquisition and the level of First Amendment protection afforded the publisher of information, Professor William Lee argued that case law supported that even when journalists knew that information was supposed to be confidential, asking for that information was not illegal.<sup>2</sup> In *WFAA-TV*, the television station knew that the recordings were of private, arguably confidential conversations. The television station did not ask for the recordings initially, but the third party recorder offered

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<sup>2</sup> William E. Lee, *The Unusual Suspects: Journalists as Thieves*, 8 WM. & MARY BILL RTS. J. 53 (1999).

to provide copies. Because television station gave the third party instructions on how to record the conversations, such inaction could be considered going beyond simply asking for confidential information.

It should be noted, however, that the Fifth Circuit decided *WFAA-TV* before the U.S. Supreme Court decided *Bartnicki*. With guidance from the *Bartnicki* decision, the *WFAA-TV* court may have ruled differently, because except for the journalists in *WFAA-TV* knowing the identity of the interceptor, the cases present similar facts. As in *Bartnicki*, in *WFAA-TV*, a third party recorded a conversation of public interest. The recorded conversation in *Bartnicki* involved a teacher's union negotiator and the union president discussing negotiations with the school board. In *WFAA-TV* the recorded conversation involved a member of the school board talking about an insurance scheme concerning the school district. The *Bartnicki* Court ruled that the telephone conversation was a matter of public interest. If the *WFAA-TV* court would have had guidance from *Bartnicki*, it may have found that the school board member's conversation was a matter of public concern. The *WFAA-TV* court may have found, then, that the publication of matters of public concern outweighed the individual's interest in privacy.

The case of *Cook v. WHDH-TV* also demonstrates that the courts will not grant First Amendment protection when it questions the lawfulness of a journalist's newsgathering methods. In *Cook*, a Massachusetts trial court ruled that a television station could be held liable for intrusion after a reporter leaned into a man's car window and held a microphone close to his face in an attempt to get an interview. The court ruled that even though people usually assume the risk of being observed when while in public, the intrusion claim should be allowed because the man could have had an expectation of privacy while in his car. His decision to remain in his car could be seen as an indication that he had created a limited sphere of privacy between himself

and the rest of the public. The reporter's leaning into the car window after the man refused to comment could be construed as an intrusion into that man's limited sphere of privacy.

Therefore, the First Amendment would not prevent the journalist from being held liable.

The courts have repeatedly asserted that members of the press have no privilege to disobey the laws applying to all members of society. Perhaps the most cited declaration of this comes from *Dietemann v. Time, Inc.*, a case in which the Ninth Circuit ruled that there was "no First Amendment interest in protecting the news media from calculated misdeeds."<sup>3</sup> In *Dietemann*, reporters entered the home of an alternative medicine practitioner and photographed him with hidden cameras and secretly recorded his conversations with them. The federal appellate court found not First Amendment protection for the journalists' method of newsgathering.

The *Dietemann* decision and similar rulings that find journalists liable for unlawful newsgathering correspond to an assertion by commentators that the First Amendment does not shield journalists from liability for unlawful acts. In their 1996 law review article, Walsh, Selby, and Schaffer argued that the First Amendment was not applicable to newsgathering activities.<sup>4</sup> For the most part, the courts have made rulings in agreement with this argument. This is particularly so in the cases in which journalists were prosecuted under criminal statutes. In the *State v. Cantor*, the court ruled that the state statute prohibiting the impersonation of a public official did not infringe on the journalist's right to gather news. That law was considered applicable to the general public and not just members of the press. According to Professor Vincent Blasi, even when investigating the government, journalists were not exempt from laws

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<sup>3</sup> 449 F.2d 245, 250 (9<sup>th</sup> Cir. 1971).

<sup>4</sup> John J. Walsh et al, *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS J. 1111 (1996).

of general applicability.<sup>5</sup> The criminal trespass cases demonstrate Blasi's assertion. In *United States v. Maldonado-Norat*, a case in which journalists were convicted of criminally trespassing on a naval base, the court held that they had no special right of access under the First Amendment. That court reminded the journalists that the U.S. Supreme Court ruled in *Branzburg v. Hayes* that the First Amendment did not prohibit incidental burdens on the press stemming from generally applicable civil or criminal statutes.

In sum, when journalists were not involved in unlawful activities to gather news, the courts have found that the First Amendment offers complete protection. This includes situations in which the journalists received information that was unlawfully acquired by a third-party. When there is a question as to the journalist's involvement with unlawful activities or the court finds that the journalist used unlawful methods to gather information, the First Amendment is not a shield from liability for tortious or criminal behavior. These findings demonstrate that the courts have not established a First Amendment privilege for journalists to behave unlawfully while gathering news.

### **Research Question 2: What Value Have the Courts Placed on Unlawfully Acquired Information and its Use by the Press to Inform the Public?**

The value that the courts have placed on unlawfully acquired information and its use by the press to inform the public varies. Courts will explain the value placed on this information in terms of the public interest or public concern. Meiklejohn's idea of what constituted information within the public interest was expression that allowed the individuals in society to make informed political decisions. But political decisions extended farther than the ballot. The courts seem to echo Meiklejohn's conception of the public interest in finding that information about

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<sup>5</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

health, safety and large corporations to be in the public interest. But value of the information in the public interest is circumscribed by the method the journalist used to gather the information.

Courts are less likely to find a public interest in information that has been unlawfully acquired as it implicates the privacy interest of private persons. This appears to be in agreement with Walsh, Selby, and Schaffer, who asserted that “newsworthiness” should not be considered in deciding whether a journalist should be held liable for unlawful newsgathering. According to the authors, inquiring into newsworthiness—whether the information was of a public interest—failed to keep members of the media accountable for illegal actions, and would encourage more illegal conduct. In *Rafferty v. Hartford Courant Co.*, for instance, the court ruled that two journalists were not working in the public interest when they invaded a private party and published an article about it. The court found that if the reporters had gathered information about the party without committing intrusion it might have held some value to the public. But the court ruled that the public did not have a right to know about everything. Because journalists were considered only members of the public, it meant that the press did not have a privilege to know everything either.

Likewise, in cases in which journalists have been accused of harassment while newsgathering, the fact that the information that the journalists sought might have been of interest to the public did not remove the journalists’ liability for unlawful newsgathering. In *Galella v. Onassis*, for example, the court found that although Jacqueline Kennedy Onassis was a public figure and therefore subject to news coverage, the journalist’s ability to gather information was limited. The journalist could only intrude if that intrusion was no greater than what was necessary to serve the public interest. This did not include harassing Onassis and her children. Similarly in *Wolfson v. Lewis*, the court ruled that when journalists engaged harassing activities

in order to gather information about the family of a health care executive, the journalists behaved unlawfully. Although acknowledging that the journalists were researching a topic important to the public—the high salaries for health care executives—the journalists’ conduct did not advance the goal of the public interest.

It seems then, when journalists’ behavior does not comport with the law, the courts believe that the journalists have exceeded the bounds of simply investigating their original subject, which might have held value for the public. In advocating for a privilege limiting liability for newsgathering, Professor Andrew Sims sought to base it on principles from the law of libel that offered protection for matters of a significant public concern.<sup>6</sup> Excluded from Sim’s proposed scheme for protection were things considered prying, morbid and sensational. *Wolfson* and *Galella* demonstrate that the courts already exclude prying newsgathering from First Amendment protection, even if there is a limited public interest in the information collected. Sims also claimed that when journalists intruded to get a story, the journalist would have to prove that the information sought was of even more value than other information. In these cases, the journalist would have to prove that the information was of the more serious public concern. This category of information included serious criminal violations, political corruption and threats to public safety. Much of the information sought in the intrusion cases did not rise to the level of a serious public concern. Therefore, activities like those in *Rafferty*, *Onassis*, and *Wolfson* were not of serious public concern.

In deciding whether the information journalists gathered was in the public interest, the courts will usually balance the privacy interest of the private individuals with the right of the public to know about the information gathered. This means that if the court finds that the

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<sup>6</sup> Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U.L. REV. 507 (1998).

information's value to the public is high, then the courts will find that the public's right to know outweighs the private individual's right to be left alone. Professor William Marnell wrote that society's search for truth limited the freedom of the press.<sup>7</sup> In most of these newsgathering cases, the courts acknowledged a limitation on the freedom of the press with respect to individual privacy. An individual's expectation of privacy depended upon location and the extent to which that individual was exposed to public observation. In *Aisenon v. ABC* then, the court ruled that a judge had no case for intrusion when he was filmed walking to his car in public. The fact that the judge was a public official also weighed against his claim of intrusion. The court found that when an individual serves a public function, a greater intrusion into the individual's activities is sanctioned.

Even when the people the journalists are investigating are not public officials, the "publicness" of their activities may weigh against their claim for intrusion. *Wilkins v. NBC* demonstrates this. The *Wilkins* court ruled that two business representatives had no expectation of privacy against being filmed when they sat on a restaurant's outdoor patio. The men met with the undercover journalists to discuss a pay-per-call scheme, and neither lowered their voices nor canceled the meeting when two additional people attended. This demonstrated that the representatives had no real expectation of privacy. Under Marnell's conception of the bounds on the freedom of the press, the journalists in *Wilkins* would not be limited in their search for the truth.

But just because others could overhear a conversation, the individuals speaking did not automatically lose their expectation of privacy. In *Sanders v. ABC*, a case in which a reporter went undercover at a telephone psychic company and secretly filmed her coworkers, the court

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<sup>7</sup> WILLIAM H. MARNELL, *THE RIGHT TO KNOW* (1973).

ruled that the ability to overhear the conversations did not lessen the coworkers' expectations that those conversations were private. The Sanders case seems to extend more privacy to those in the workplace in comparison to *Medical Laboratory Management Consultants v. ABC*. In *Med Lab* the federal court found that when undercover journalists entered into a private business and secretly recorded, they did not infringe upon any privacy interest by surreptitiously recording. These cases can be reconciled in that *Med Lab* involved interaction between private individuals and the public. *Sanders*, on the other hand, dealt with the interaction between coworkers. Where in *Med Lab*, journalists pretending to be members of the public were invited into businesses, the journalist in *Sanders* pretended to be a coworker in order to record the private conversations. A coworker would have an expectation that his conversation would not be shared with the general public. A business owner who invites the public into his business would not have a reasonable expectation of privacy in what happens within view of the public.

Professor James Albert argued that there should be a privilege for newsgathering in the public interest because this kind of activity promotes the general welfare.<sup>8</sup> Perhaps the most pronounced demonstration of a court invoking this principle was in *Desnick v. ABC*, a case in which the Seventh Circuit ruled that journalists that secretly recorded their interactions with the doctors in an eye clinic were not liable for torts claimed against them. The court analogized the journalists to "testers" who investigate the adherence to federal laws protecting civil rights. In this case, the journalists were investigating whether the doctor was recommending unnecessary eye surgery to clinic patients. Further, the individuals who test compliance with federal laws do not infringe upon the rights of others. Likewise, the reporters that entered the eye clinic did not

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<sup>8</sup> James A. Albert, *The Liability of the Press for Trespass and Invasion of Privacy in Gathering the News--A Call for the Recognition of a Newsgathering Tort Privilege*, 45 N.Y.L. SCH. L. REV. 331 (2002).

infringe upon the rights of the clinic owner because they only filmed in public areas and their private interactions with the doctors.

But *Desnick* appears to be an exception. The Fourth Circuit expressly distinguished the *Desnick* opinion when deciding *Food Lion v. ABC*, a case in which two reporters obtained employment in the deli section of a well-known grocery store by falsifying their job applications. The court did not view the reporters in *Food Lion* as testers because the reporters did not gain entry into areas that the general public was allowed to access. In *Desnick*, the eye clinics were open to the general public. In contrast, the deli sections of the supermarket in *Food Lion* were only accessible by supermarket employees. While the eye clinic, in a way, consented to having anyone enter and view the property, the grocery store only consented to allow its legitimate employees in the areas that the journalists secretly filmed. Although the subject of the story in *Food Lion*, the sanitary conditions of the grocery store's deli section, was of interest to the public, the court established that the journalists' methods for investigating the story went beyond what is permitted by the public interest.

Nevertheless, the information gathered through unlawful methods does not lose its public interest value, and is therefore protected from prior restraint. According to Lee, there were four reasons why the U. S. Supreme Court has not treated the method of newsgathering as relevant as to whether to issue an injunction. Both *In re King World Productions* and *CBS v. Davis* demonstrate Lee's first reason: that newsgathering does not automatically disclose the consequences of publication. In *In re King World*, a case in which a doctor requested an injunction precluding a news show from airing footage shot in his clinic with hidden cameras, the Sixth Circuit ruled that the plaintiff would have to demonstrate that he would suffer a harm great enough to justify a prior restraint on the publication of the hidden camera footage. The

doctor could not justify the prior restraint on these grounds and so the court declined to issue the injunction. Likewise, in *CBS v. Davis*, a case in which a television station obtained footage inside of a meatpacking plant through trespass, the U.S. Supreme Court ruled that the plaintiff had a heavy burden to prove that an injunction was constitutional. The Court noted that if issues of national security could not fulfill this burden, then the possible criminal activity of the station would not either. This did not bar the broadcaster from being susceptible to damages for any tortious harms it committed.

Lee's second reason for why the U.S. Supreme Court does not inquire into the method of newsgathering when deciding whether to issue a prior restraint was that courts have to spend time evaluating the newsgathering method, which would affect the public interest in timely information. The First Circuit noted the public interest in obtaining timely information in *In re The Providence Journal*, a case in which the federal appellate court examined an injunction issued against the publication of information obtained from a government wiretap. The court used a test from *Nebraska Press Association v. Stewart*, which examined whether the gravity of the evil promoted by publishing information required a prior restraint. The court found that injunctions interrupt the mode of operation for daily newspapers that build reputations on being able to distribute current news to the public. Even small delays in publication could impede a newspaper's ability to publish and cause some members of the public to lose confidence in the newspaper's competence.

In sum, the courts place a public interest value on some information that is unlawfully obtained. Whether the courts apply such a label to unlawfully acquired information appears to depend on whether the plaintiff requests an injunction against the publication of the information. In these cases, the courts will decline to issue an injunction on constitutional grounds. But this

does not mean that the journalists are absolved from liability for any tortious or criminal actions they have committed. If a court does not find any public interest value in the information unlawfully gathered, it is because the court found that the journalist has gone beyond the boundaries of the public interest in obtaining the information. Therefore, journalists should ensure that their activities fall in line with what is deemed the public interest.

**Research Question 3: What Kind of Scrutiny Have the Courts Used to Decide Cases Brought Against the Media for Unlawful Newsgathering, and How Is the Type of Scrutiny Used Determinative of the Outcome of These Cases?**

The kind of scrutiny the courts have used to decide cases against the media for unlawful newsgathering varies. With the exception of cases implicating criminal law, courts have used a balancing test to decide whether the journalists' actions were unlawful. In *Miller v. NBC*, for instance, when a news crew invaded the home of a heart attack victim, the court considered the totality of the circumstances surrounding the intrusion into the man's home. Whether the television station would be protected by the First Amendment depended on the intrusion's degree of offensiveness. The more highly offensive the intrusion, the less likely the station would be protected under the First Amendment. Likewise, in *Wilson v. Layne*, a case in which police allowed journalists to accompany them during the execution of a warrant, the U.S. Supreme Court had to balance the homeowner's Fourth Amendment right to privacy against the First Amendment right to freedom of the press. The *Wilson* Court decided that the First Amendment did not trump the Fourth Amendment.

In both these cases and in other instances in which the court used balancing to decide whether journalists were liable for tortious violations, privacy rights set the boundaries of the extent to which the press can intrude into the private lives of individuals. In *Miller*, the California court considered how offensive the intrusion was to a reasonable person. In *Wilson*, the consideration was the extent to which the intrusion violated the homeowner's Fourth

Amendment rights. The courts' methods of analysis appear to be similar to that proposed by Attorney Matthew Coleman, who argued that courts should use a harm/benefit paradigm in deciding cases in which the press publishes unlawfully obtained information.<sup>9</sup> Coleman's proposed paradigm would balance the privacy interest of the private individual with the harm to the private individual. If the individual was a public figure or involved in a matter of public concern, there would be less harm to the individual in intrusion. *Miller* and *Wilson* involved private persons not involved in matters of public concern, therefore, the harm committed when members of the press invaded their homes was considered great, and the journalists were liable for intrusion.

In the balancing tests used by courts to decide whether the First Amendment outweighed the private person's privacy rights, the plaintiff's burden varies depending on whether the journalist was involved with the unlawful acquisition. It is, however, difficult to know exactly what level of scrutiny the court is using when deciding these cases. Some courts have specifically stated the level of scrutiny applicable to the claims against the journalist. In *Bartnicki*, where the journalist was not involved in unlawfully acquiring the conversation, the Court used strict scrutiny. Strict scrutiny places the heaviest burden on the plaintiff to prove that enforcing the law against the journalists was constitutional and requires the plaintiff to demonstrate a compelling government interest in enforcing the law. In *Bartnicki*, the plaintiff could not meet this burden. Therefore, the journalist was not held liable for violating the wiretap statute. The *Bartnicki* decision was very fact specific, which denotes ad hoc balancing. It should be noted, however, that *Bartnicki* is not the usual ad hoc balancing case. Unlike other cases in

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<sup>9</sup> Matthew J. Coleman, *The "Ultimate Question" : A Limited Argument for Trafficking in Stolen Speech*, 55 OKLA. L. REV. 559 (2002).

which the courts have employed ad hoc balancing, *Bartnicki* has proven very useful in deciding similar cases.

In *WFAA-TV*, a case in which there was a question as to whether the journalist participated in unlawful newsgathering, the Fifth Circuit used intermediate scrutiny. This meant that the plaintiff only had to demonstrate that there was an important government interest in holding the journalists liable for violating the wiretap statute. Unlike the *Bartnicki* Court, the *WFAA-TV* court appeared to use definitional balancing to decide the case by first defining the whether the station's activities were lawful, and then deciding the applicable level of scrutiny for the station's First Amendment claim. Once the Fifth Circuit decided that the station's newsgathering methods were not totally lawful, the court decided that the type of government interest needed to only be important, and not compelling for the plaintiff to recover damages.

Professor Erwin Chemerinsky argued that intermediate scrutiny was the appropriate level of scrutiny to use to adequately examine newsgathering cases involving content neutral laws of general applicability.<sup>10</sup> The *WFAA-TV* decision appears to demonstrate some agreement with Chemerinsky's argument. Those cases involving fraud and misrepresentation, however, although clearly not using strict scrutiny, do not appear to follow intermediate scrutiny. Cases like *Cohen* seem to apply a sort of strict liability determination, like that used in cases involving criminal statutes. Therefore, if the plaintiff offers enough proof that the journalist broke a promise upon which the plaintiff reasonably relied, then the journalist will most likely be held liable for promissory estoppel. The courts, for the most part, do not consider of the journalist's constitutional rights.

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<sup>10</sup> Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143 (2000).

In sum, the courts have not, as Professors Bunker, Splichal, and Martin proposed, extended defamation case analyses to newsgathering cases.<sup>11</sup> The Court in *Cohen* expressly declined to do so. But, the courts seem to have already implemented Bunker's suggestion that there first be an inquiring into the plaintiff's motive for filing suit, except for the majority of the cases brought under promissory estoppel. The second part of Bunker's test, an inquiry into whether the information sought would have been of great public interest is also already implemented to a certain extent, as demonstrated in Research Question 2.

These findings, perhaps, demonstrate Justice Black's noted dichotomy in the protection for speech versus the protection for conduct. Although none of the cases found demonstrated an absolutist theory of freedom of speech, the protection for publishing speech was very high, as demonstrated by the use of strict scrutiny in *Bartnicki*. In that case, the journalist was not involved in any conduct. When conduct was at issue, as in *WFAA-TV*, the level of First Amendment protection decreased. Therefore, it should not come as a surprise that publication and newsgathering, while both protected by the First Amendment, do not receive the same level of First Amendment protection.

### **Conclusion**

The courts have not created a First Amendment privilege that protects journalists from liability for crimes or torts committed while newsgathering. Instead, while recognizing a limited constitutional protection for the freedom of the press, the courts have ruled that press freedom does not outweigh the rights of private individuals. Unless there is some exemption for the behavior of the journalist written into the law, a journalist cannot claim that laws of general applicability do not apply to journalists. Perhaps then, this is the fulfillment of Justice Stewart's

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<sup>11</sup> Matthew Bunker, et al, *Triggering the First Amendment: Newsgathering Torts and Press Freedom*, 4 COMM. L. & POL'Y 272 (1999).

structural theory of the press. While the institutional press is recognized for its role in society, it has no special privilege other than the ability to seek information, and publish that information. The First Amendment has created no right to information held by either the government or private individuals. But, the press has the right to seek what information it can find.

The author found four key conclusions:

### **Key Conclusion One**

The courts repeatedly granted First Amendment protection for newsgathering when members of the press were said to have used routine newsgathering methods. The courts have not, however, provided a definition of what constitutes “routine” newsgathering techniques, although providing some guidance as to what activities are unacceptable. According to the Ninth Circuit, trespass, theft and intrusion all fall outside of the bounds of First Amendment protection for newsgathering. The Florida Supreme Court ruled that surreptitious recording was not a necessary part of journalistic practice. Likewise, a California appellate court ruled that journalism did not depend on the use of secret devices. Further, the courts have ruled that journalists may not harass or unreasonably hound a private individual in order to gather news. Also, journalists may not induce detrimental reliance on promises that the journalists do not intend to keep or facts that are untrue.

Although the courts have indicated that activities like inducing a detrimental reliance, theft, intrusion, trespass, and surreptitious recording may be unlawful, journalist and news organizations are left to figure out which newsgathering activities are protected under the First Amendment. Perhaps this is beneficial. Blasi, although asserting that journalists should not be exempt from laws of general applicability, was concerned that the courts not create a code of journalistic ethics. In doing so, the courts would be usurping the press freedom the courts are supposed to uphold, as journalist may “censor” creative newsgathering techniques. This could,

perhaps, have the “chilling effect” on speech that the third prong of the *Daily Mail* principle warns against. Courts then should be careful, when deciding these newsgathering cases, not to create rulings that would appear to dictate the activities that news organizations can engage in when investigating a story.

### **Key Conclusion Two**

The freedom of the press is concomitant with the duty of the press. Well-known is the duty of the press to serve the public by providing news so that, as Micklejohn asserted, the public could make informed political decisions. But the press also has the duty not to infringe upon the rights of others while providing this service to the public. In *Le Mistral v. CBS* the court specifically noted that the rights of freedom of speech and the press did not outweigh personal rights of others. In exercising these freedoms, journalists were required to use dignity and reason to balance the moral and social implications of both their newsgathering methods, and the publication of what they found while newsgathering. Not to do so would be an abuse of these rights. In *Wilson*, also, the U.S. Supreme Court stated that the First Amendment did not outweigh other personal rights.

But it is not just the protection of rights that journalist must be conscious of, but they must also be circumspect in adhering to the law. As demonstrated in the criminal trespass cases, the courts will not grant journalists a special right of entry into government-regulated property. Like other members of the public, journalists are required to abide by the laws implemented to protect health and safety. These laws were also meant to protect the rights of members of society. In this way, Marnell’s assertion that the rights of the members of society provided the limitations on what was considered press freedom is correct. When society establishes laws protecting individual rights, the members of the press may not violate these laws without the expectation of liability.

Journalists should then, inform themselves about the laws related to newsgathering methods. For example, they intend on using a hidden camera or secretly recording a conversation, the journalists should ensure that they are in compliance with state and federal law. Likewise, news organizations may want to continue consulting with attorneys to ensure that their knowledge of the law as it relates to newsgathering is updated.

### **Key Conclusion Three**

It is well settled publication receives the highest level of First Amendment protection. Newsgathering conduct, however, does not receive the same level of protection. In *CBS v. Davis*, while the U.S. Supreme Court refused to grant an injunction against the news station that would prevent them from airing the hidden camera footage, the Court did acknowledge that the plaintiffs could seek relief for damages from newsgathering. Perhaps then, this is a demonstration of marketplace theory. The First Amendment protects the publication of all kinds of information, no matter how gathered. The same cannot be said for the gathering of that speech. In fact, neither Milton, nor Justice Holmes in *Abrams v. United States*, mention conduct in gathering the information. It is understandable then, why newsgathering conduct receives significantly less protection than speech under the First Amendment. Journalists should not then engage in self-censorship with regard to publishing any of the information they obtain while gathering news. They should, however, recognize that the First Amendment not always absolve them from liability for any torts or criminal activities committed while newsgathering.

### **Key Conclusion Four**

In cases involving promissory estoppel, the courts are not considering speech, although a consideration of speech may provide important First Amendment protection for journalists. Instead the courts focus on a promise not to identify the source of information that the journalist made while gathering news. The problem with this kind of analysis is that it seems to ignore the

fat that both promissory estoppel and misrepresentation have scienter requirements that say that the plaintiff must prove that the journalist knew at the time of the promise that he was not going to fulfill the promise. The cases found demonstrate that there was no way that a plaintiff could prove this. In *Cohen*, by far the most important promissory estoppel cases, the journalists did not decide until after the promise that they were going to print the plaintiff's name.

Further, the printing of the man's name, and the printing of the names of sources of information in *Steele v. Isikoff* and other similar cases, could be viewed as political speech. *Cohen* involved a story about a political candidate. Likewise, *Steele* involved a story about the then president. According the dissent in *Cohen*, such information is political speech deserving of the highest level of First Amendment protection. Under Meiklejohnian theory such speech would be protected because it would provide the public with information that would allow the making of informed political decisions.

Another significant issue in the promissory estoppel line of cases is damages. For the most part, the damages claimed in these cases appear to be reputational or emotional, and therefore require constitutional defamation analysis. By failing to do this, the courts are allowing plaintiffs to circumvent the constitutional safeguards that the law of defamation provides. This may have a chilling effect on speech. The courts should revisit the issue of promissory estoppel and misrepresentation in newsgathering cases in order to provide news organizations with the proper level of protection afforded for publication of information. Failure to do so is antithetical to the tradition of protecting publication demonstrated in previous cases.

### **Future Research**

Future research on newsgathering and the First Amendment should focus on the areas of damages and new technology. One issue with respect to damages that needs further exploration is that of reputational or emotional damages caused during newsgathering. Although for the

most part, the courts have not allowed reputational or emotional damages in traditional newsgathering cases, when promissory estoppel is considered as a part of newsgathering, such damages arise. Another issue for exploration would be the application to the freedom of the press and theories about newsgathering to the Internet and bloggers. Although this dissertation noted some Internet related cases, for the most part this study focused on the traditional print and broadcast news. The prominence of the Internet and blogging as avenues for the public to receive their news make freedom of the press with regard to bloggers an issue ripe for study.

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