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Note

Balancing, Press Immunity, and the Compatibility of Tort Law with the First Amendment

Mark Weidemaier*

While the First Amendment¹ imposes limitations on private actions against the press for defamatory publications,² the press is generally liable for the torts it commits while gathering news.³ After all, the exercise of a First Amendment right does not ordinarily create immunity from tort liability, and private property is not dedicated to the exercise of First Amendment rights by the general public.⁴ Why should a "No Trespassing" sign defeat a Jehovah's Witness pursuing a convert but not a reporter pursuing a story?⁵ Yet imposing tort liability on journalists may deter investigative reportage and deprive the public of valuable information. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,⁶ a North Carolina jury awarded \$5.5 million dollars in punitive damages against ABC for an investigation

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1. The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I (emphasis added).

2. See generally ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS 2-37 (1994) (describing incorporation of First Amendment principles into libel and slander law).

3. Cf. *Desnick v. ABC*, 44 F.3d 1345, 1351 (7th Cir. 1995) ("[T]here is no journalists' privilege to trespass.").

4. Compare *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736 (1970) (holding that a person may protect his privacy interest in the home even if that means interfering with "the highly important right to communicate"), with *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (describing streets and parks as traditional public fora on which First Amendment rights may be asserted).

5. Cf. *Martin v. Struthers*, 319 U.S. 141, 148-49 (1943) (voiding ordinance prohibiting distribution of pamphlets as applied to leaflets advertising Jehovah's Witness meeting but suggesting that a city can "punish those who call at a home in defiance of the previously expressed will of the occupant").

6. 984 F. Supp. 923 (M.D.N.C. 1997).

conducted by the news magazine *Prime Time Live*.⁷ *Prime Time Live* investigators had falsified employment applications to obtain jobs at two Food Lion grocery stores.⁸ The reporters recorded activities in work areas of the store with hidden cameras, and *Prime Time Live* ultimately used the footage in an exposé of allegedly unsanitary food practices.⁹

The Seventh Circuit reached a contrary result in *Desnick v. ABC*.¹⁰ In *Desnick*, an ophthalmic clinic and two of its physicians sued *Prime Time Live* for trespass, invasion of privacy, and other claims after *Prime Time Live* reporters had posed as patients and had used hidden cameras to record their conversations with physicians at two clinic offices.¹¹ The footage appeared in a *Prime Time Live* exposé of unnecessary surgery and Medicare fraud.¹² The Seventh Circuit affirmed summary judgment against the clinic and its physicians.¹³

As these two cases indicate, the media have the potential to ferret out and expose fraudulent or illegal activity in all walks of life.¹⁴ However, the contrary results in *Food Lion* and *Desnick* suggest that tort law is so unpredictable when applied to newsgathering conduct that the press will eschew investigative reports that could ultimately benefit the public as a whole. For example, if subterfuge is the best or only way to expose illicit conduct in industry,¹⁵ tort law may lead to substantial underproduction of socially useful information. To counteract this effect and to encourage investigative reportage that might expose illegal or fraudulent conduct, a number of authors have

7. See *id.* at 927. The district judge ultimately found the award constitutionally suspect, and remitted it to \$315,000. See *id.* at 937-40.

8. See *id.* at 927.

9. See *id.*

10. 44 F.3d 1345 (7th Cir. 1995).

11. See *id.* at 1348.

12. See *id.* at 1348-49 (describing the content of the broadcast).

13. See *id.* at 1353, 1355. The Seventh Circuit, however, reversed the district court's grant of summary judgment against the plaintiffs' defamation claim. See *id.* at 1351.

14. Cf. Lyriisa C. Barnett, Note, *Intrusion and the Investigative Reporter*, 71 TEX. L. REV. 433, 433 (1992) ("[U]ndercover newsgathering has proven effective in exposing fraud, corruption, and illegal activity in government and industry." (footnote omitted)).

15. See *id.* at 434, 437 (describing some cases where surreptitious newsgathering produced stories that might otherwise have been unavailable and arguing that reporters should enjoy a qualified privilege to employ subterfuge to monitor people engaged in the "public business").

suggested that reporters enjoy a qualified privilege to commit newsgathering torts.¹⁶

This Note contends that arguments for such a privilege rest on the debatable assumption that tort law is underprotective of the media's right to gather news. The press enjoys substantial newsgathering freedom, and there is currently little evidence that newsgathering tort suits have substantial First Amendment implications. Part I briefly discusses the conflict between private rights and newsgathering interests and describes the arguments for granting the media immunity from minor newsgathering torts. Part II describes current case law, using a framework frequently found in discussions of newsgathering cases: whether the court "balances" First Amendment interests with the private rights at stake. This Part concludes that the "balancing" distinction ultimately has little meaning and suggests that courts frequently engage in a tort analysis flexible enough to accommodate newsgathering interests. Part III argues that a newsgathering "privilege" cannot be grounded in the text or legislative history of the First Amendment and is not supported by the Supreme Court's First Amendment jurisprudence. This Part suggests that a newsgathering privilege assigns too much value to the newsgathering function in relation to the right to protect other private rights. This Part also contends that many of the assumptions that underlie arguments for a newsgathering privilege are unwarranted. Finally, Part IV briefly considers a more productive argument for limiting media liability for tortious newsgathering—that publication damages should be excluded from recovery in tort actions.

I. TORT ACTIONS AGAINST THE MEDIA, AND THE NEED FOR A NEWSGATHERING PRIVILEGE

Plaintiffs whose lawsuits implicate First Amendment rights¹⁷ face substantial barriers. A defamation plaintiff, for

16. See, e.g., Eric B. Easton, *Two Wrongs Mock a Right: Overcoming the Cohen Maledicta That Bar First Amendment Protection for Newsgathering*, 58 OHIO ST. L.J. 1135 (1997); Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection From Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145 (1996); Barnett, *supra* note 14; Stephen M. Stern, Note, *Witch Hunt or Protected Speech: Striking a First Amendment Balance Between Newsgathering and General Laws*, 37 WASHBURN L.J. 115 (1997).

17. Enforcing generally applicable laws in civil suits between private parties does constitute state action under the Fourteenth Amendment, be-

example, must prove not only that the story was false, but that the defendant acted with "actual malice."¹⁸ However, plaintiffs suing in tort for acts associated with newsgathering, as opposed to publication, can avoid this increased First Amendment scrutiny.¹⁹ Newsgathering tort suits thus raise the possibility that corporate plaintiffs will seek to prevent future undercover investigations by attacking the conduct of the press in gathering the news rather than the truth of what is reported.²⁰

A. TORT ACTIONS AGAINST THE MEDIA

While newsgathering in public places is typically not actionable,²¹ the media face a number of challenges while gathering news on private property.²² Of principal interest are the trespass and intrusion upon seclusion torts. Trespass is a particularly formalistic cause of action,²³ which encompasses "any misfeasance, transgression, or offense which damages another person's, health, reputation, or property."²⁴ Trespass is typically a strict liability tort,²⁵ and plaintiffs can recover

cause "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (rejecting the argument that civil suits between private parties could not constitute state action).

18. *See id.* at 279-80 (defining actual malice as knowledge of falsity or reckless disregard of whether report was false or not).

19. *See C. THOMAS DIENES ET AL., NEWSGATHERING AND THE LAW* § 12-1, at 429 (1997) ("Newsgathering in nongovernmental venues, however, has largely given rise to a body of law rich in common law and statutory complexity, but decidedly underdeveloped in constitutional doctrine.").

20. *See, e.g., Stern, supra* note 16, at 148 ("[A] plaintiff who is unable to prove actual malice . . . may instead file a claim for general law violations stemming from newsgathering activities; the objective being to side-step First Amendment protections that require proof of actual malice to obtain actual and punitive damages.").

21. *Cf. infra* notes 95-97 and accompanying text (providing examples of courts rejecting claims arising out of newsgathering in public places).

22. *See DIENES ET AL., supra* note 19, § 12-4.

23. LeBel, *supra* note 16, at 1159 ("Historically, the tort of trespass to land has been one of the most formalistic causes of action.").

24. 7 STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 23:1, at 592 (1990). To prevail on its trespass claim, Food Lion had to prove "(1) [t]hat the plaintiff was . . . in possession of the land at the time the alleged trespass was committed; (2) [t]hat the defendant made an unauthorized . . . entry on the land; and (3) [t]hat the plaintiff suffered damage by [the] invasion of his rights to possession." *Food Lion, Inc. v. Capital Cities/ABC Inc.*, 951 F. Supp. 1217, 1221 (M.D.N.C. 1996) (citation omitted).

25. *See, e.g., Baugh v. CBS, Inc.*, 828 F. Supp. 745, 756 (N.D. Cal. 1993) (discussing California law).

nominal damages even where no harm occurs, and even where the intrusion is accidental and interferes with few, if any, property rights.²⁶

The intrusion upon seclusion tort is also relevant to the media's ability surreptitiously to monitor its investigative targets. Intrusion upon seclusion imposes liability for "an intentional intrusion upon the solitude or seclusion of another which would be highly offensive to a reasonable person."²⁷ Surreptitious newsgathering may invoke liability for trespass, intrusion upon seclusion, or both. And, if courts treat the subsequent publication of the story as a proximate result of the trespass, the press may be liable for any damages caused by publication.²⁸ These damages are potentially vast, because they might include the investigative target's lost profits and decreases in stock value.²⁹ The prospect of punitive damages may further "chill" the media's willingness to employ subterfuge in gathering the news.³⁰ Without a privilege to commit minor newsgathering torts, many fear that information vital to the public interest will remain hidden.³¹

26. See, e.g., *Dougherty v. Stepp*, 18 N.C. 371, 372 (1835) (holding defendant liable for nominal damages for entering plaintiff's land with surveyor, despite the fact that the defendant did not damage the land in any way).

27. See, e.g., *Hanson v. Hancock County Mem'l Hosp.*, 938 F. Supp. 1419, 1435 (N.D. Iowa 1996).

28. *Compare Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 966 (M.D.N.C. 1996) (disallowing damages associated with publication as unrelated to the underlying tort), with *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971) ("No 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.").

29. Cf. *Food Lion*, 964 F. Supp. at 958 (rejecting Food Lion's claim for damages proximately resulting from publication of ABC's tortiously obtained information and stating that "damages resulting from 'lost profits, lost sales, diminished stock value or anything of that nature' would not be permitted").

30. Cf. Lori Keeton, Note, *What Is Really Rotten in the Food Lion Case: Chilling the Media's Unethical Newsgathering Techniques*, 49 FLA. L. REV. 111, 135 (1997) (citing with approval the fact that "since the \$5.5 million award in *Food Lion*, commentators have not stopped talking about how the verdict will cause journalists to be extremely wary of undercover investigations" (footnote omitted)).

31. See, e.g., Barnett, *supra* note 14, at 433-34.

B. THE NEED FOR A NEWSGATHERING PRIVILEGE

In response to this fear, a number of authors have proposed that courts create a partial newsgathering privilege.³² While these proposals vary in detail, each envisions a "balancing" approach that weighs the media's (and, indirectly, the public's) entitlement to the acquired information against the interest protected by the tort.³³ Where this test weighs in favor of access to the information, the media would have a qualified immunity from tort actions.³⁴ A number of arguments might support such an immunity.

1. The First Amendment Is About Access to Information

While this Note does not argue for a particular interpretation of the First Amendment, any theory about it must place a substantial value on information. Justice Holmes, although by no means the first to do so,³⁵ interpreted the speech and press clauses as promoting the search for truth via the "marketplace of ideas."³⁶ Justice Brandeis read the First Amendment to provide a safety valve for releasing social tension,³⁷ and First Amendment scholar Alexander Meiklejohn understood the

32. See *supra* note 16 and accompanying text; see also David P. Freeman, Note, *Press Passes and Trespasses: Newsgathering on Private Property*, 84 COLUM. L. REV. 1298, 1334-42 (1984) (suggesting that courts adopt a balancing approach when deciding private trespass actions against the media); Note, *And Forgive Them Their Trespasses: Applying the Defense of Necessity to the Criminal Conduct of the Newsgatherer*, 103 HARV. L. REV. 890, 898-905 (1990) (arguing for a balancing approach analogous to the defense of necessity in criminal trespass cases against the media).

33. See, e.g., LeBel, *supra* note 16, at 1154 ("Courts should balance the state interest that is served by the legal rule . . . against the First Amendment interest that is served by the acquisition of the information through that activity.").

34. See *id.* ("The First Amendment [protects] conduct leading to the acquisition of information that it would be in the public interest to publish.").

35. Holmes's views echo John Stuart Mill, for example: "[I]t is only by the collision of adverse opinions that the remainder of the truth has any chance being supplied." JOHN STUART MILL, ON LIBERTY 76 (1859).

36. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

37. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (claiming that the framers knew that "order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination . . . [and] that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies").

Amendment to protect expression of ideas and information crucial to democratic self-governance.³⁸ The First Amendment may also protect the press's ability to disseminate information necessary to counterbalance government abuse.³⁹ Access to information is essential to all of these ends. Where the government monopolizes information in the public interest, and where granting universal access to that information would jeopardize the government's ability to function, a useful compromise might be to allow the media limited access rights.⁴⁰ Allowing such access might even further the constitutional scheme.⁴¹

The media, for example, might be immune from private lawsuits when accompanying public officials onto private property.⁴² In this case, few would deny immunity to the press.⁴³ After all, the media serve a valuable function in informing the public of the manner in which public servants conduct their official duties.⁴⁴ This same rationale suggests that the press

38. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22-27 (1948)

39. For example, the Virginia Resolutions of 1798 condemned the Sedition Act of 1798 as unconstitutional, largely because the Act was "levelled against the right of freely examining public characters and measures, and of free communication among the people thereon." 4 ELIOT'S DEBATES ON THE FEDERAL CONSTITUTION 553-54 (1876), *quoted in* *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964).

40. See, e.g., Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 935-38 (1992) (contending that the media should have a right of access greater than the general public to certain types of government-controlled information).

41. Cf. *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve.").

42. See *Florida Publ'g Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976). In *Florida Publishing*, a reporter accompanied emergency personnel into a burned house and, at the fire department's request, photographed the premises, including the chalk outline of plaintiff's daughter, who had died in the fire. See *id.* at 915-16. The court rejected trespass claims and held that custom and usage created an implied consent for reporters to accompany emergency personnel. See *id.* at 918-19.

43. But see Kent R. Middleton, *Journalists, Trespass, and Officials: Closing the Door on Florida Publishing Co. v. Fletcher*, 16 PEPP. L. REV. 259, 271-85 (1989) (rejecting the argument in *Florida Publishing* that custom and usage create implied consent allowing media to accompany public officials into private residences).

44. Cf. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862 (1974) (Powell, J., dissenting) ("What is at stake here is the societal function of the First

should have increased access rights to private property. Locating media access rights in the public's "right to know" information that will prevent public and private abuses leads naturally to the extension of access rights to private property. While the Supreme Court has refused to extend press access rights beyond those of the general public,⁴⁵ the Court has at times acknowledged that press freedom depends in part on the ability to access information.⁴⁶ The press serves an information gathering function that derives from its right to publish,⁴⁷ and there is no reason why this function is served only when important information is held by public sources.

For example, *Desnick* and *Food Lion* illustrate the media's ability to uncover corruption and spur social reform. Assuming the investigative reports in the *Desnick* and *Food Lion* cases were correct,⁴⁸ the media may have performed a valuable service by exposing these business practices. And there is at least a colorable argument that the information would not have been exposed through ordinary investigative techniques. There may also be other reasons to grant the media a qualified immunity for surreptitious newsgathering on business premises. To the extent that businesses dedicate portions of their property to public use, they already may have demonstrated a willingness to relinquish some private rights.⁴⁹ In addition, many busi-

Amendment in preserving free public discussion of governmental affairs.".)

45. See *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972) (rejecting the argument that the First Amendment prevents members of the press from having to disclose the identities of confidential sources to a grand jury).

46. See *id.* at 681 ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.".)

47. See Tom A. Collins, *The Press Clause Construed in Context: The Journalists' Right of Access to Places*, 52 MO. L. REV. 751, 757 (1987) (describing the information gathering function as essential to fulfilling the media's constitutional function of disseminating information to the public).

48. While the plaintiffs in *Desnick* sued for defamation for certain statements made in the course of the broadcast, they did not contend that many other charges, including the charge of performing unnecessary surgery, were false. See *Desnick v. ABC*, 44 F.3d 1345, 1349 (7th Cir. 1995). *Food Lion* did not sue for libel. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 959 (M.D.N.C. 1996). Of course, the increased hurdles plaintiffs in libel and defamation cases must overcome, see *supra* notes 17-18 and accompanying text, might explain plaintiffs' hesitancy to bring these claims.

49. For example, "closely regulated" businesses have a less legitimate expectation of privacy in the Fourth Amendment search and seizure context. See *New York v. Burger*, 482 U.S. 691, 702 (1987). While that Amendment's prohibition on unreasonable searches and seizures applies to commercial property, "the warrant and probable cause requirements . . . have lessened application." *Id.* However, note that this reduced expectation stems from the

nesses, such as those in the restaurant and banking industries, are already accustomed to being monitored by public and private parties masquerading as patrons.⁵⁰ Finally, at least some businesses are engaged in matters of great public interest, which may argue for subordinating their private rights to the public's right to know.

2. The Cost to Private Rights Can Be Minimized

Obviously, any newsgathering privilege comes at the expense of the ability to enforce certain private rights. This Note deals particularly with undercover investigations of businesses, in which context trespass is particularly important.⁵¹ In an effort to minimize the sacrifice of private rights, some have suggested that the newsgathering privilege arise only where the media investigates the "work-related" activities of those "engaged in public business," and even then only where the media has "probable cause" to believe that the plaintiff was engaged in "illegal, fraudulent, or potentially harmful activities."⁵² These limits recognize the possibility for abuse of the newsgathering privilege and attempt to channel media behavior into production of socially "useful" information.

3. Information Tends To Be Underproduced

Arguments for a newsgathering privilege may be supported by recognizing that media products have many characteristics of public goods.⁵³ Because it is desirable to uncover

comprehensiveness of government regulation, *see id.*, which cannot form the basis for a *media* privilege to invade the property and also fails to distinguish commercial from other private property; *cf.* *South Dakota v. Opperman*, 428 U.S. 364, 367-68 (1976) (justifying the "automobile exception" to the Fourth Amendment warrant requirement, in part, on the fact that comprehensive government regulation reduces the expectation of privacy private citizens have in their automobiles).

50. *See* Barnett, *supra* note 14, at 453.

51. Corporations cannot sue for invasion of privacy, *see* SACK & BARON, *supra* note 2, at 574, but can sue for trespass. Individuals working at a business, however, can certainly sue for invasion of privacy. *Cf.* *Desnick v. ABC*, 44 F.3d 1345 (7th Cir. 1995) (ophthalmic clinic and two surgeons sue for trespass and invasion of privacy).

52. *See* Barnett, *supra* note 14, at 449-52.

53. Public goods have two essential characteristics: nonexclusivity, which occurs when providers cannot prevent nonpurchasers from using the good, and nonrivalry, which occurs when use of the good by one person does not affect any other person's ability to make similar use of the good. *Cf.* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 558-59 (1991) ("[T]he benefits of information

fraud, corruption, and unsafe business practices, courts should be skeptical of newsgathering tort actions; after all, these suits aim to suppress the production of information that is likely to be underproduced in the first place.⁵⁴ In fact, if behavior with First Amendment implications is produced at less than optimal levels, perhaps that behavior should be subsidized.⁵⁵

The argument for a qualified press immunity thus relies on a number of assumptions: that the press serves a special role as gatherer and disseminator of information,⁵⁶ which is at the heart of the First Amendment; that businesses have a less legitimate claim to the full exercise of property rights than private individuals and are engaged in activities about which the public has a legitimate right to know;⁵⁷ that any privilege can be successfully limited;⁵⁸ that the current state of affairs is so uncertain that reporters and editors, fearful of massive tort liability, will engage in "rational self-censorship" and forgo surreptitious newsgathering efforts;⁵⁹ and, finally, that this additional "chilling" of investigative activity must be evaluated with the knowledge that information is already underproduced.⁶⁰ To begin to evaluate these assumptions, it is important to understand how courts approach newsgathering tort cases. The remainder of this Note, therefore, describes the current case law

cannot be restricted to direct purchasers, but inevitably spread to larger groups. . . . Because the producer does not consider these benefits in his production decision, less information is produced than is socially optimal."). Professor Farber does not argue for a newsgathering privilege but suggests that the constitutional protections for speech reflect an awareness that information is a public good. See *id.* at 555-57.

54. Cf. C. Edwin Baker, *Giving the Audience What it Wants*, 58 OHIO ST. L.J. 311, 316-19 (1997) (discussing the public good aspects of media products); see also Farber, *supra* note 53. Neither of these authors is discussing a newsgathering privilege.

55. Cf. Farber, *supra* note 53, at 571 (likening some First Amendment jurisprudence to speech subsidies). Professor Farber likens the invalidation of content-neutral rules to a speech subsidy:

Decisions that invalidate content-neutral rules can also be viewed as forced subsidies of speech by onlookers, who must contend with increased traffic, littering, noise, or other costs. Because information is underproduced, a subsidy of this type is desirable. As long as limiting content-neutral restrictions on speech spreads costs widely and thinly, it remains a reasonably equitable way of providing a subsidy.

Id.

56. See Barnett, *supra* note 14, at 443.

57. See *supra* notes 49-50 and accompanying text.

58. See *supra* Part I.B.2.

59. See Barnett, *supra* note 15, at 443.

60. See *supra* Part I.B.3.

in this area and questions the validity of the assumptions underlying the newsgathering privilege.

II. CASE LAW AND THE USE(LESSNESS) OF THE "BALANCING" DISTINCTION

A. THE SUPREME COURT: COLLAPSING SPEECH AND PRESS

While the Supreme Court has never interpreted the Press Clause as granting rights in excess of individual speech rights,⁶¹ the Court has not explicitly ruled out such a treatment.⁶² Nevertheless, it appears unlikely that the Court would grant privileged status to the press absent extremely unusual circumstances. The Court has repeatedly held that the media are not immune from laws of general applicability.⁶³ The media, for example, may be sued for breach of contract for breaking a promise not to reveal a source's identity.⁶⁴ The press has no greater access rights to jails and prisons than the general public.⁶⁵ Nor does the press have greater access to pretrial proceedings.⁶⁶ And, while the Supreme Court has held that criminal

61. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 16.19 (5th ed. 1995) (discussing the Court's jurisprudence in this area and noting that, as of yet, the Court has not granted to the press access rights in excess of those enjoyed by the general public). Occasionally, individual justices have intimated that the press may sometimes have rights greater than individual speech rights. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting) ("The press has a preferred position in our constitutional scheme . . . to bring fulfillment to the public's right to know."); Potter Stewart, *Or of the Press*, 26 *HASTINGS L.J.* 631 (1975) (arguing that the press serves a separate, structural role as a counterweight to government power).

62. See David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455, 459 (1983)

63. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (holding that the First Amendment does not immunize a journalist who breaches a promise of confidentiality to a source); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding that First Amendment does not prevent state from requiring journalist to testify before grand jury about information gathered from confidential sources).

64. See *Cohen*, 501 U.S. at 665.

65. See *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (holding that the Constitution does not require the state "to make available to journalists sources of information not available to members of the public generally"); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (upholding regulations prohibiting media interviews of specific individual inmates).

66. See *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (upholding trial judge's order closing, at defendants' request, pretrial proceedings to the public

trials must, absent an overriding interest, be open to the public, it has refused to grant preferential access rights to the media.⁶⁷ These decisions reflect the Court's tendency to treat uniformly the First Amendment's separate references to speech and press. To date, where the Court has granted access rights to information within the government's control, it has not limited those rights to the press.⁶⁸

B. THE "HOSTILITY" OF TORT LAW TO NEWSGATHERING

1. To Balance or Not To Balance—A Distinction Without a Difference

Commentators reviewing lower court treatment of news-gathering tort cases frequently distinguish between courts that adopt a "balancing" approach, in which First Amendment press freedoms are weighed against privacy interests, and courts that eschew such an approach.⁶⁹ On the surface, this distinction appears meaningful. Courts that are willing explicitly to weigh competing privacy and press freedoms ought to tolerate a wider variety of press newsgathering misconduct than those that engage in a standard tort analysis. But the distinction is far more superficial than it seems.

Some courts state outright whether a balancing analysis is appropriate.⁷⁰ Depending on one's perspective, these courts are

and press).

67. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (holding, in six separate opinions, that the First Amendment requires that criminal trials be open to the public absent an overriding interest). In *Richmond Newspapers*, Justice Stevens suggested that the holding might possibly extend beyond the criminal or civil trial context, to situations in which the government has arbitrarily interfered with "access to important information." *Id.* at 583 (Stevens, J., concurring). And Justice Brennan might have accepted superior media access privileges in certain circumstances: "Since the media's right of access is at least that of the general public . . . [the] state statute unconstitutionally restricts public access to trials." *Id.* at 582 n.2 (Brennan, J., concurring) (emphasis added).

68. Cf. Anderson, *supra* note 62, at 456-59 (describing the Supreme Court's refusal to give the press more protection under the Press Clause than individuals enjoy under the Speech Clause).

69. 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, 1124-27 (1996) (comparing "balancing" cases unfavorably to cases that refuse to consider arguments that the First Amendment immunizes some media misconduct); Barnett, *supra* note 14, at 439-42 (discussing the difference between courts that balance First Amendment interests and those that do not).

70. Compare *Galella v. Onassis*, 487 F.2d 986, 995 (2d Cir. 1973) ("Of

either behaving “generously”⁷¹ or are “creating dangerously subjective and ad hoc exceptions” to the “general rules of liability and damages.”⁷² However, despite the broad language favoring or rejecting a balancing approach in these cases, it is unclear whether the approach taken has any predictive power. In fact, were the opinions edited to remove the few statements that explicitly deal with balancing First Amendment and privacy interests, the analyses would appear almost identical.

In *Dietemann v. Time, Inc.*,⁷³ the Ninth Circuit refused to balance First Amendment and private rights and upheld an invasion of privacy claim against reporters who used hidden cameras and microphones to record an encounter with a disabled veteran who purported to heal using clay, minerals, herbs, and various “gadgets.” The veteran practiced out of his home, did not advertise or charge for his services, and did not hold his home open to the public.⁷⁴ The reporters used a ruse to gain entrance to the home and had even agreed with the police to obtain pictures to use as evidence against the veteran, in addition to photos for publication.⁷⁵ While the court explicitly rejected the argument that the First Amendment in any way insulated the media’s conduct,⁷⁶ few of the concerns implicating the First Amendment were present. Since the veteran did not serve the general public and did not charge for the services he provided, the reporters could hardly claim to be protecting the

course legitimate countervailing social needs may warrant some intrusion despite an individual’s reasonable expectation of privacy.”), *Scheetz v. The Morning Call, Inc.*, 747 F. Supp. 1515, 1527 (E.D. Pa. 1990) (dismissing invasion of privacy claims and stating that “[b]efore this court can balance these [First Amendment and privacy] rights, it notes that balancing is legitimate”), *aff’d*, 986 F.2d 202 (3rd Cir. 1991) (holding that plaintiffs did not have a constitutional privacy interest sufficient to maintain a § 1983 action) and *Schulman v. Group W Prod’s., Inc.*, 51 Cal. App. 4th 850, 875 (1996) (“[A]n individual’s right to privacy must be weighed and balanced against the public’s right to news and information.”), *with Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (“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.”) and *Le Mistral, Inc. v. CBS*, 3 Media L. Rep. (BNA) 1913, 1913 (N.Y. 1978) (stating that the “First Amendment is not a shibboleth before which all other rights must succumb”).

71. Barnett, *supra* note 14, at 440.

72. Walsh et al., *supra* note 69, at 1126.

73. 449 F.2d 245 (9th Cir. 1971).

74. *See id.* at 245-46.

75. *See id.*

76. *See supra* note 70.

public from fraud. Had the court applied a balancing analysis, it would likely have arrived at the same result.

This pattern continues in cases that purport to weigh the First Amendment interests against the private interests protected by the tort. In *Galella v. Onassis*,⁷⁷ the Second Circuit upheld an injunction against a photographer who had doggedly followed and photographed Jaqueline Onassis.⁷⁸ Although Galella's photography occurred mostly in public places, Galella intrusively photographed Mrs. Onassis engaged in personal activities that were of little public import and in situations in which she had a reasonable expectation of privacy.⁷⁹ While at times the court acknowledged that it had to weigh the value of the First Amendment interests claimed by Galella,⁸⁰ its analysis appears to be totally unaffected.⁸¹ Except for a brief mention of the importance of First Amendment interests, the case is analytically indistinguishable from a "non-balancing" case.

*Schulman v. Group W Products, Inc.*⁸² provides a more complex example. The plaintiff in that case suffered an accident in which her car overturned on an expressway.⁸³ Firefighters, police, and other rescue personnel came to the scene, and the media's presence could be justified as serving the important public interest in monitoring public officials in the performance of their duties.⁸⁴ While the court acknowledged a First Amendment interest in press coverage of accidents and catastrophes,⁸⁵ its decision is easily accommodated by a stan-

77. 487 F.2d 986 (2d Cir. 1973).

78. See *id.* at 992.

79. Galella was ultimately held to have violated an injunction requiring him to maintain a certain distance from Mrs. Onassis by, among other things, renting a fishing boat to take photographs of Onassis vacationing at Martha's Vineyard. See *Galella v. Onassis*, 533 F. Supp. 1076, 1089-93 (S.D.N.Y. 1982).

80. See *supra* note 70.

81. See *Galella*, 487 F.2d at 995-96. The court did agree that the defendant's First Amendment interest was of some merit, but concluded:

When weighed against the *de minimus* public importance of . . . [Mrs. Onassis], Galella's constant surveillance . . . was unwarranted and unreasonable. . . . Galella does not seriously dispute the court's finding of tortious conduct. Rather, he sets 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.

Id. at 995.

82. 51 Cal. App. 4th 850 (1996).

83. See *id.* at 862.

84. See *id.* at 866.

85. See *id.* at 875; see also *supra* note 70 (citing the court's explicit adop-

dard tort analysis. The court upheld summary judgment against Ms. Schulman's invasion of privacy claim while she was at the accident scene itself and was audible to and in full view of a large crowd of spectators.⁸⁶ No reference to the First Amendment is needed to reach this conclusion. To prevail on an invasion of privacy claim, a plaintiff must have a reasonable expectation of privacy.⁸⁷ Ms. Schulman had no such expectation.⁸⁸

However, the court determined that Ms. Schulman had a legitimate expectation of privacy in the helicopter on the way to the hospital, and thus reversed summary judgment for her claims arising during the flight.⁸⁹ Her expectation was legitimate even though the public had a valid interest in monitoring the work of "air rescue paramedics licensed by the county."⁹⁰ Superficially, this decision reflects a "balancing" approach. While Ms. Schulman was lying on the street, the public's right to know outweighed her privacy interest, which was weakened by her exposure to the public. In the helicopter, her reduced exposure to the public led the court to conclude that Ms. Schulman's privacy interest outweighed the public's legitimate interest in the provision of public services. But this result is no different from that reached by a tort analysis that is even remotely sensitive to whether the rights underlying the tort were infringed.⁹¹ On the street, plaintiff had no reasonable expectation of privacy. In the helicopter, she did.⁹²

tion of a "balancing" approach).

86. See *Schulman*, 51 Cal. App. 4th at 875-76.

87. See *id.* at 873.

88. See *id.* at 875-76.

89. See *id.* at 878-82.

90. *Id.* at 889 (also reversing summary judgment against plaintiff's claim for publication of private facts).

91. Without a reasonable expectation of privacy, a plaintiff has no claim for invasion of privacy. See *supra* text accompanying note 87. While trespass actions are typically more formalistic, see *supra* notes 23-26 and accompanying text (describing trespass analysis as formalistic; for example, nominal damages are appropriate even where no damage results from the trespass), a slightly more functional trespass analysis will allow the media to escape liability where no established rights are infringed. For an example of this more functional tort analysis, see *Desnick v. ABC*, 44 F.3d 1345, 1352 (7th Cir. 1995), which rejected trespass and invasion of privacy claims because none of the interests protected by the tort, including protection from invasion of private space, maintenance of order on the premises, and protection from revelation of intimate details, were infringed by defendants' surreptitious recording.

92. The court even acknowledged that introducing First Amendment concerns did not necessarily change the result: "Thus, in regard to the issues

The cases demonstrate not that the adoption of a balancing approach is totally irrelevant, but that whether a court "balances" or not often has little impact on the analysis. Courts tend to explicitly reject the media's First Amendment arguments in those cases where the First Amendment interests are least at stake. The "balancing/non-balancing" distinction is thus driven more by the content of the lawsuit than by the court's analytical bent.⁹³

2. Is Tort Law Unduly Hostile to Newsgathering Interests?

Whether a court "balances" First Amendment and privacy interests is not really the question. Tort law also "balances" in that it represents a series of loose empirical judgments about the manner in which legal rules affect socially desirable behavior.⁹⁴ Furthermore, the notion that tort law is insensitive to the First Amendment is not necessarily true. Newsgathering tort cases allow the media substantial flexibility in deciding how to investi-

which we find determinative here—whether appellants had a reasonable expectation of privacy and whether their claims are outweighed by a competing First Amendment interest—the two causes of action are identical." *Id.* at 875.

For another example of the similarity between "balancing" and "non-balancing" analyses, see *Scheetz v. The Morning Call, Inc.*, 747 F. Supp. 1515, 1527 (E.D. Pa. 1990), where the court dismissed an invasion of privacy claim brought by a policeman and his wife against a newspaper that had obtained a confidential police report detailing a complaint for domestic assault filed by the officer's wife. The newspaper ran two stories that divulged the complaint against the policeman, who had been named "Officer of the Year." *See id.* at 1517. The Court determined that plaintiffs' privacy interests were outweighed by the First Amendment interests, because a significant number of people already knew of the alleged incident and because the articles focused primarily on the police department's actions. *See id.* at 1528. While the court engaged explicitly in balancing First Amendment and privacy interests, its decision rested in large part on the fact that, because the incident was widely known within the police department and, to a more limited extent, in the surrounding community, the plaintiffs' expectation of privacy was largely attenuated. *See id.* at 1530-32.

93. While *Dietemann* is typical of "nonbalancing" cases, courts occasionally refuse to "balance" in cases where the decision could conceivably have made a difference. For example, an Oklahoma court upheld a criminal trespass conviction against reporters who accompanied protesters onto the site of a proposed nuclear facility. *See Stahl v. Oklahoma*, 665 P.2d 839 (Okla. Crim. App. 1983). Presumably, this court would also have upheld a civil trespass claim, although the media could claim to be following an act of civil disobedience, surely a matter of significant public import. Of course, the protest could also have been monitored, though less effectively, from outside the premises, but the court gives no indication that the presence of less intrusive newsgathering alternatives is a prerequisite to a finding of media liability.

94. *See infra* notes 154, 160 and accompanying text (describing the use of proximate cause to optimally deter accidents).

gate. For example, newsgathering on public streets is typically protected, so long as performed with reasonable discretion, even when observing activity on private property.⁹⁵ Even newsgathering in semi-public places is protected, again so long as performed with reasonable discretion.⁹⁶ And journalists typically do not become liable for newsgathering on public portions of private businesses, at least where the newsgathering conduct does not disrupt the business's operation.⁹⁷

Newsgathering tort cases also use the notion of consent to favor newsgatherers. Consent is a defense to trespass and intrusion and can be either express or implied.⁹⁸ Consent may be implied if local "custom and practice" is to allow certain types of media access to private property.⁹⁹ In most contexts, the notion of implied consent raises few eyebrows. In some cases, however, courts strain to expand the doctrine of implied consent to accommodate media newsgathering interests.¹⁰⁰

For example, even fraudulently induced consent may be sufficient to defeat a trespass claim.¹⁰¹ Courts are also likely to

95. See, e.g., *Mark v. King Broadcasting Co.*, 618 P.2d 512 (Wash. App. 1980), *aff'd*, 635 P.2d 1081 (Wash. 1981), *cert. denied*, 457 U.S. 1124 (1982) (finding no claim for invasion of privacy where plaintiff was photographed inside his pharmacy from outside the front window).

96. See, e.g., *Machleder v. Diaz*, 538 F. Supp. 1364 (S.D.N.Y. 1982) (dismissing intrusion upon seclusion claim because plaintiff was interviewed in semi-public area and because the interview, while aggressive, was confined to one incident; also dismissing trespass claim on notion of implied consent to the reporter's presence).

97. Compare the *Desnick* facts, *supra* note 10-13 and accompanying text, with those in *Le Mistral, Inc. v. CBS*, 3 Media L. Rep. (BNA) 1913 (N.Y. 1978). In *Le Mistral*, a New York court upheld a trespass verdict against a media defendant whose camera crew entered a restaurant during business hours, greatly disrupting the operation of the business. See *id.* at 1913 & n.1. The *Prime Time Live* reporters in *Desnick* merely posed as patients and did not disrupt the clinic's business in any way. See *Desnick v. ABC*, 44 F.3d 1345, 1352 (7th Cir. 1995).

98. See 75 AM. JUR. 2D Trespass § 87 (1964).

99. See, e.g., *Florida Pub'g Co. v. Fletcher*, 340 So. 2d 914, 918-19 (Fla. 1976) (custom and usage creates implied consent for reporters to accompany emergency personnel).

100. For example, a California court dismissed a trespass claim after plaintiff "consented" to the presence of a film crew at her home after she called the police to report a domestic assault. See *Baugh v. CBS, Inc.*, 828 F. Supp. 745 (N.D. Cal. 1993).

101. See *id.* at 756-57. The court also held that the camera crew did not exceed the scope of the plaintiff's consent: "If they exceeded the scope of [her] consent, they did so by broadcasting the videotape, an act which occurred after they left [her] property and which cannot support a trespass claim." *Id.* at 756-57. The court was obviously sensitive to newsgathering interests.

imply consent where camera crews accompany emergency officials¹⁰² or police officers on searches or emergency calls.¹⁰³ Of course, none of these plaintiffs actually consented to the media's presence, and there is no reason to suppose they would have done so had they been given the chance. In the context involved here, where a reporter poses as a customer or an employee to gain access to places or information from which he would otherwise be excluded, the concept of implied consent is misleading.¹⁰⁴ Consent by implication arises, in almost any context, where a party has not expressly consented and would almost certainly refuse to do so if asked.¹⁰⁵ Nevertheless,

While the court might have been correct that broadcasting is an act separate from the trespass, it does not follow that publication of material in express defiance of a condition upon which consent was granted does not create liability. At the very least, this behavior should support liability in contract. The media can be explicitly denied consent by a homeowner, despite custom and usage permitting media entry. See *Florida Publ'g*, 340 So. 2d. at 918. If property owners may deny consent to the media, owners can logically condition their consent upon the reporter's promise not to publish. Consent to enter is presumably of value to the would-be trespasser, who surrenders the privilege to publish as consideration for the right to enter the premises. No breach of contract claim was made, however, in *Baugh*.

102. The principal case in this area is *Florida Publishing Co. v. Fletcher*, 340 So. 2d. 914 (Fla. Sup. Ct. 1976), cert. denied, 431 U.S. 930 (1977), which rejected an intrusion claim where a photographer accompanied a fire Marshall into a home destroyed by fire and, at the Marshall's request, photographed a chalk outline where plaintiff's daughter, who was killed in the fire, had lain. The plaintiff was away, and learned of her daughter's death when the photographs were published in defendant's newspaper.

103. See *Berger v. Hamilton*, 24 Media L. Rep. (BNA) 1757 (D. Mont. 1996) (dismissing trespass claim against camera crew that accompanied federal agents on search of plaintiff's land, because government was in temporary control of land during search and had granted the crew permission to be there).

104. In *Desnick*, Judge Posner described the use of implied consent as a tool for balancing competing interests, see *Desnick v. ABC*, 44 F.3d 1345, 1351-52 (7th Cir. 1995), and stated, "there can be no implied consent in any nonfictitious sense of the term when express consent is procured by a misrepresentation or misleading omission," *id.* at 1351.

105. Justice Holmes provides a useful and analogous discussion of constructive presence in conspiracy cases:

To speak of constructive presence is to use the language of fiction, and so to hinder precise analysis. When a man is said to be constructively present where the consequences of an act done elsewhere are felt, it is meant that for some special purpose he will be treated as he would have been treated if he had been present, although he was not. For instance, if a man, acting in one state, sets forces in motion that kill a man in another . . . the latter state is very likely to say that, if it can catch him, it will punish him, although he was not subject to its laws when he did the act. . . . He was not present in fact, and in theory of law he was present only so far as to be charged

courts often use consent to relieve the media of liability for otherwise tortious newsgathering conduct.

Yet another option exists for courts that seek to accommodate reasonable newsgathering behavior without relieving the media of tort liability. Courts can engage in a more functional tort analysis, one that is sensitive to whether the media's behavior actually infringed any rights protected by the tort. The Seventh Circuit's decision in *Desnick*, for example, was based not on First Amendment grounds but on functional tort considerations. Simply put, there was no invasion of any of the "specific interests that the tort of trespass seeks to protect."¹⁰⁶ The same was true of the interests protected by the privacy tort.¹⁰⁷

In this respect, the *Food Lion* decision is distinguishable, and rightly decided.¹⁰⁸ Food Lion's property interests were undoubtedly infringed by having people hostile to the company's interests invade the private areas of the store. The plaintiffs in *Desnick*, on the other hand, were recorded by people posing as customers during normal business hours.¹⁰⁹ No information was recorded that could not have been recorded by any patient, and it cannot be said that recording the information accurately with a camera infringes property or privacy rights that are otherwise intact.¹¹⁰

with the act.

Hyde v. United States, 225 U.S. 347, 386 (1909).

106. *Desnick*, 44 F.3d at 1352. The *Desnick* court noted that the offices were open to the general public, the videotaped encounters were completely professional and no personal information was revealed, the offices were not disrupted in any way, no intimate details of the plaintiffs' private lives were exposed, and no trade secrets were stolen. See *id.* at 1352-53.

107. See *id.* at 1353.

108. The defendants in *Food Lion*, unlike those in *Desnick*, gave false information to obtain jobs at the store and entered areas that were closed to the general public. See 951 F. Supp. 1217, 1222-23 (M.D.N.C. 1996). The *Desnick* court upheld summary judgment on the fraud complaint, because the defendants' promises (not to engage in undercover surveillance, among others) were ultimately harmless and failed to constitute a "scheme" to defraud as required by Illinois law. See *Desnick*, 44 F.3d at 1354-55.

109. See *id.* at 1352.

110. See *id.* Admittedly, the *Desnick* decision could easily have turned out differently if a few facts were changed. If, for example, the reporters had disrupted the office's activities or had recorded and published intimate details of the plaintiff's lives, even the *Desnick* court would have ruled differently. However, this is exactly the point. Had either happened, interests protected by the trespass and invasion of privacy torts would clearly have been implicated. Were that the case, there would obviously have been a way for the media to conduct its business in a less intrusive manner. The standard tort

Clearly, many courts apply tort law quite flexibly to accommodate reasonable newsgathering behavior. However, the cases are not uniform, and media advocates fear that the lack of uniformity will "chill" important investigative activity.¹¹¹ To counteract this chilling effect, these advocates suggest that courts grant the media a qualified privilege to commit torts while gathering news.¹¹² The remainder of this Note will evaluate the arguments that might support such a privilege.¹¹³

III. THE (UNTESTED) ASSUMPTIONS UNDERLYING THE NEWSGATHERING PRIVILEGE

A. The Ambiguous Text and History of the First Amendment

Any attempt to create a newsgathering privilege must be grounded in policy rather than Supreme Court precedent or the text and legislative history of the First Amendment. It is tempting to cite the Amendment's separate references to speech and press¹¹⁴ as evidence that the Framers intended the press to occupy a unique position. Although treating the Speech and Press Clauses identically might render the explicit reference to the press meaningless,¹¹⁵ the Amendment's text does not yield so unambiguous a meaning. Redundancy is hardly unheard of in constitutional interpretation,¹¹⁶ and the Press Clause may merely emphasize free speech principles in the press context without granting any special privileges to the organized media. Likewise, there is no reason to presume that any constitutional distinction between speech and press, as-

analysis, in this case, reaches the right balance. However, granting to the media a privilege to trespass would have removed the incentive to conduct an investigation in the least intrusive manner possible.

111. *Cf. supra* note 30 and accompanying text (examining the effect of large punitive damage awards on the newsgathering and reporting process).

112. *See supra* notes 16, 32-34 and accompanying text (discussing the proposal to offer a limited privilege to media).

113. *See supra* Part I.B (describing arguments for a newsgathering privilege).

114. *See supra* note 1.

115. *Cf. Stewart, supra* note 61, at 633 ("If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.").

116. *Cf. Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws*, 104 *YALE L.J.* 541, 585 (1994) (describing the Constitution as "full of redundancies" and citing as potential examples the Necessary and Proper Clause, the Tenth Amendment, and incorporation of the Bill of Rights into the Fourteenth Amendment Due Process Clause).

suming there to be one, assigns more substantial First Amendment rights to the press. The text of the Amendment may support an analytical distinction between speech and press; it does not supply the content of that distinction.¹¹⁷

The Supreme Court's interpretation of the First Amendment likewise provides soil too infertile to support a newsgathering privilege.¹¹⁸ While the Amendment sweepingly prohibits regulation of speech and press activity, the Supreme Court did not apply First Amendment principles to the torts of libel and slander until its 1964 decision in *New York Times Co. v. Sullivan*.¹¹⁹ Since that time, while the Court has provided an increasing amount of protection for speech that would formerly have been tortious,¹²⁰ it has never granted to the press rights in excess of those enjoyed by the general public.¹²¹

Nor can a newsgathering privilege be grounded in a coherent theory of the Framers' intent in crafting the First Amendment. Historians have debated the extent to which the Framers intended to protect the press from government intervention—whether they merely intended to prohibit prior restraints while leaving the law of seditious libel intact¹²² or whether they believed that press freedom was essential to representative self-government.¹²³ This line of inquiry is likely to

117. Cf. Collins, *supra* note 47, at 758 (“[E]ither the press clause is an emphasis (perhaps redundant) of the first amendment or the press clause states a separate right . . .”).

118. See *supra* Part III.A.

119. 376 U.S. 254, 283 (1964) (requiring public officials to prove “actual malice” to recover damages for defamatory falsehoods relating to their official conduct).

120. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (requiring showing of “actual malice” for even private plaintiffs to recover for false light invasion of privacy where discussion of public matters was concerned); see also SACK & BARON, *supra* note 2, at 1-37 (describing evolution of “actual malice” doctrine from 1964 to 1991).

121. See Anderson, *supra* note 62, at 456 (1983) (describing cases in which the Supreme Court has denied to the press special rights not available under the speech clause).

122. See LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960).

123. See Anderson, *supra* note 62, at 533 (arguing against Levy's interpretation and concluding that the Framers possessed, to varying degrees, the notion that press freedom was essential to representative self-government). The proper interpretation of the press clause is beyond the scope, and competence, of this Note. For criticism of Professor Levy's influential thesis, see Merrill Jensen, Book Review, 75 HARV. L. REV. 456, 457 (1961) (claiming that “[d]espite the law, there was freedom of expression in fact”). Professor Levy later revised his conception of the First Amendment to conclude that, while

yield few answers. Ascribing a single intent to a legislative body is an impossibly complicated task,¹²⁴ especially when applied to the drafters of the First Amendment,¹²⁵ whose work still had to be ratified by the states. Perhaps the most that can be safely ascribed to the Framers is a belief that regulation of the press was best left to post-publication lawsuits. If so, this belief cannot form the basis of a journalist's privilege to commit torts while gathering the news.

Of course, even if all agreed about what the drafters meant by "freedom of the press," there is no inherent reason why their intentions should control modern interpretation. Times and technology have changed, and the First Amendment must be "restated and reiterated not only for each generation, but for each new situation."¹²⁶ Whether, and in what circumstances, the First Amendment can trump other private rights should be resolved by balancing the functional concerns underlying the rights at stake. To that end, a thorough evaluation of the assumptions underlying a newsgathering privilege is required.

B. UNANSWERED QUESTIONS UNDERLYING THE NEWSGATHERING IMMUNITY

1. The Extent of the *Public's* Right to Know

Arguments for a newsgathering privilege must weigh access to information heavily in a First Amendment calculus.¹²⁷ However, these arguments are weakened to the extent the First Amendment protects the right to *contribute to*, rather than *receive from*, the available pool of information. If the First Amendment merely protects the ability to contribute to the pool of information or speech, then information gathering is no more indispensable for the reporter than for any other per-

the doctrine of seditious libel remained intact, the American press had become so bold, and the scope of political discourse had become so broad, that the press was practically beyond the doctrine's reach. See LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985); see also Leonard W. Levy, *The Legacy Reexamined*, 37 STAN. L. REV. 767, 768 (1985).

124. See generally RONALD DWORKIN, *LAW'S EMPIRE* 317-27 (describing difficulties in identifying legislative intent).

125. Cf. *id.* at 359-63 (describing similar difficulties in determining the framers' intent in constitutional interpretation).

126. Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 894 (1963).

127. See *supra* notes 35-41 and accompanying text (describing the role information plays in theories of the First Amendment).

son exercising First Amendment rights. The media's ability to publish is no more dependent on access to information than the ordinary person's right to speak. Instead, arguments for special First Amendment status for the media must focus on the increased benefit the public derives from the media's superior ability to investigate and disseminate.¹²⁸ This benefit comes in the form of increased access to information and is properly located in the general public instead of in the media that fulfill the demand for information.

So located, the access right loses some of its First Amendment luster. Granting the press minor tort immunity has doctrinal implications deserving of far more attention than they have received. Even the "balancing" cases described above rarely explain precisely how they are balancing private and press interests.¹²⁹ In effect, allowing the media to engage in tortious behavior imposes costs upon the public whose interests the media is claimed to serve. Forcing the public, ostensibly in its own interest, to subsidize newsgathering behavior is not a decision to be undertaken lightly.

Even the "easy" cases for press newsgathering immunity are more complicated than they appear. Take, for example, a situation where reporters accompany police or emergency rescue personnel onto private property.¹³⁰ Here, the press disseminates to the public information about the manner in which public servants perform their duties. However, it is somewhat odd to justify intrusions onto private property by reference to the press's value in monitoring the public officials who have *invited*

128. One such benefit is the increased scrutiny faced by public officials whose activities are exposed to the public eye. See *supra* text accompanying notes 39-41.

129. But see *Scheetz v. The Morning Call, Inc.*, 747 F. Supp. 1515, 1527-34 (E.D. Pa. 1990), for a rare exception. The *Scheetz* plaintiffs sued based on a publication revealing the identities of the police "Officer of the Year" and his wife, and criticizing the police investigation of the wife's spousal abuse complaint. See *id.* at 1517. The *Scheetz* court identified two public values served by the press's disclosure of the confidential police report—questioning the wisdom of the police department's choice of Officer of the Year and the adequacy of their investigation of one of their own officers—and compared these interests to the plaintiffs' interests in confidentiality and autonomy. See *id.* at 1528-32. Of course, the privacy interests were greatly reduced by the fact that the incident was widely-known among the police officers, and may have been witnessed by a number of others. See *id.* at 1530-32. The court acknowledged that the plaintiffs lacked a reasonable expectation of privacy, so it is hard to see how their privacy rights were infringed, regardless of the defendant's First Amendment status. See *id.* at 1532

130. See *supra* notes 42-44 and accompanying text.

them there.¹³¹ The typical view of the press is as a counterweight to abuse of official power, but few of the cases actually present this picture. Instead, the cases present a picture of media and government working hand in hand.¹³² The press's ability to check official abuse and disseminate information about the delivery of public services is almost nonexistent here. The police are hardly likely to invite the press to attend a beating or warrantless search, and public officials will have incentives to monitor their behavior carefully when the press accompanies them.

Given these incentives, the "informed public" justification would seem to *require* public officials to allow the media to accompany them on official business, at least where the media's presence would not disrupt the provision of public services. No one, however, advances this argument. There are clearly costs associated with allowing the press to accompany emergency officials onto private property.¹³³ The benefits of monitoring the government may be less substantial than they initially would appear, especially if the media can be excluded without a showing that its presence would be disruptive.¹³⁴ If so, the net result of a balancing of First Amendment and private rights may weigh against press immunity even in those cases where such immunity seems most appropriate. It is even less likely that the media merit immunity for tortious conduct on private property that occurs without consent from public officials. Any interpretation of the press clause would surely assign more constitutional significance to the monitoring of public, as opposed to private, activity and persons.¹³⁵

131. In *Florida Publishing*, facts *supra* note 42, the camera crew was not only invited to accompany the police, but was also asked to take photographs of the chalk-outlined body. See *Florida Publ'g Co. v. Fletcher*, 340 So. 2d 914, 918 (Fla. 1976).

132. See *id.*; see also *Dietemann v. Time, Inc.*, 449 F.2d 245, 246 (9th Cir. 1971) (noting a situation where the press actually conspired with the police to record plaintiff's quackery for use as evidence).

133. At the least, these costs include a reduced ability to exercise private rights through trespass and intrusion actions. For a somewhat different example of the costs of media access, see *Florida Publishing*, 340 So. 2d at 916, where the plaintiff learned of her daughter's death when photographs of the chalk outline of the daughter's body were published in defendant's newspaper.

134. See *supra* text accompanying notes 130-132.

135. The Supreme Court's First Amendment jurisprudence certainly reflects this fact in other ways. Public officials, public figures, and people who temporarily lose their private status by experiencing general fame and notoriety must prove "actual malice" to prevail in a defamation action. Compare

2. Is Tortious Newsgathering Already Overproduced?

Undoubtedly, the *Food Lion* investigation uncovered socially valuable information. Assuming information about sanitation practices is not available through some other investigative technique, allowing tort suits in similar circumstances may "chill" media investigation. But such "chilling" will not necessarily reduce newsgathering to a less-than-optimal level. While many types of information may be underproduced,¹³⁶ there is actually little reason to suppose that tortiously produced information is one of them. All information is costly to generate, but information derived from tortious behavior imposes substantial costs on third parties—costs which producers will not take into account when making production decisions.¹³⁷ In fact, because much of the cost of tortious newsgathering is externalized, such behavior is likely to be overproduced, because the media need not consider these costs when deciding to investigate. And, unlike most other cost-externalizing forms of First Amendment expression, the costs of tortious newsgathering are potentially substantial and narrowly distributed.¹³⁸

This is not to say that the press is completely inattentive to the costs its investigations may impose on third parties. Many media organizations operate under self-imposed ethical standards that serve to reduce these costs.¹³⁹ However, it is

New York Times v. Sullivan, 376 U.S. 254 (1964) (requiring public officials to prove that defendant made a defamatory statement with malice) and Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (requiring public figures to demonstrate actual malice to prevail in an action for intentional infliction of emotional distress), with Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (holding that those who "thrust themselves to the forefront of particular public controversies" would have to prove actual malice, but states were free to apply any standard except strict liability to defamation of private parties). However, private citizens do not become "public figures" merely by becoming peripherally involved in a matter of public interest. See Gertz, 418 U.S. at 351-52.

136. See *supra* notes 53-55 and accompanying text.

137. Cf. Farber, *supra* note 53, at 562 ("Like any other activity, speech may impose costs on third parties, and when these externalities exceed the total social value of the speech, regulation may be in order.")

138. See, e.g., Farber, *supra* note 53, at 571 (describing how exercise of First Amendment rights externalizes costs in the form of "increased traffic, littering, noise, [and] other costs"). Professor Farber describes the invalidation of content-neutral rules as forcing third parties to subsidize this cost-externalizing speech. See *id.* This subsidy "remains . . . reasonably equitable" so long as it "spreads costs widely and thinly." *Id.*

139. See Lynn Wickham Hartmann, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637 (1987) (describing the history and then current use of written journalistic

questionable whether ethical obligations are powerful enough to override the desire to enter the profitable world of investigative journalism.¹⁴⁰ In the increasingly competitive news world, investigative news magazines are proliferating rapidly.¹⁴¹

More importantly, it is not necessarily true that tort suits against the media "chill" the overall level of investigative activity. Media enterprises have many ways to gather information, and resources not devoted to certain types of undercover exposés may be spent on other information-gathering techniques. It is even possible that those techniques produce information of more First Amendment value. "Chilling," therefore, might more aptly be called "redirecting," and a determination of whether any (hypothesized) redirection of media resources has a result contrary to the First Amendment is a necessary precursor to granting a newsgathering privilege.

3. How Well Suited Is the Media To Perform It's First Amendment Function?

Granting to the media a newsgathering privilege from tort suits presumably reflects the media's superior ability to fulfill its First Amendment function of gathering and disseminating information.¹⁴² But should this superior ability justify the media in gathering any information it chooses? If not, we might tie a newsgathering privilege to the gathering of information of First Amendment significance. A starting point is to note how difficult it is to agree on what types of information are central to the First Amendment.¹⁴³ However one defines information

standards and determining that newspapers use written standards despite the chance that those standards will be used against the paper in litigation).

140. In fact, when ABC commenced its *Food Lion* investigation, the ABC News Policy Manual provided that "news gathering of whatever sort does not include any license to violate the law." *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 814 (M.D.N.C. 1995).

141. See Thomas D. Yannucci, *Debunking the "Big Chill" Why Defamation Suits by Corporations Are Consistent with the First Amendment*, 39 ST. LOUIS U. L.J. 1187, 1189 (1995).

142. See *supra* text accompanying notes 47-48 (discussing the media's information-gathering function and ability to root out corruption).

143. The "marketplace" model advocated by Justice Holmes would appear to place few restrictions on the type of information favored by the First Amendment, because the "best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Alexander Meiklejohn's "self-governance" model, however, would assign more First Amendment value to speech related to participation in democratic government. See MEIK.

with First Amendment value, the media will determine what types of activity merit investigation largely based on what sells—an economic ground substantially unrelated to the purposes of the First Amendment.¹⁴⁴ In addition, if the media, driven by competitive pressure, see exposé reporting as a way to increase profits, there is already substantial incentive to engage in such activity.¹⁴⁵ Providing an additional incentive in the form of a newsgathering “privilege” may encourage excessive use of investigative reporting at the expense of reporting information of more First Amendment value.

Advocates of a newsgathering privilege might see the media as watchdogs whose interests are adverse to those of their investigative targets. Ideally, the media would select matters of substantial public interest to investigate. But it is not necessarily the case that the media will select for investigation those targets whose behavior is most contrary to the public interest. Investigative targets could instead be selected for their neutrality and lack of affiliation with the media enterprise. For example, businesses that provide substantial advertising revenue to media sources have long been treated with kid gloves.¹⁴⁶ Occasionally, competing interests may even use the media against each other. The *Food Lion* complaint alleged that a disgruntled union suggested to ABC that Food Lion would make a good investigative target, perhaps in retaliation for Food Lion’s successful resistance of unionization.¹⁴⁷ These

LEJOHN, *supra* note 38.

144. For example, scandal that most people would consider unrelated to the justifications for allowing free speech may have substantial economic value to the press. See LARRY J. SABATO, FEEDING FRENZY: HOW ATTACH JOURNALISM HAS TRANSFORMED AMERICAN POLITICS 56 (1993) (“[E]xecutives are not unaware of the experiences of newspapers such as the *Washington Times*, where screaming front-page headlines about Barney Frank and an unrelated homosexual ‘call boy’ scandal boosted newsstand sales by 25 percent in the summer of 1989.”).

145. The press face substantial competitive pressures, and “exposure” shows of dubious First Amendment value are seen by networks as a means to increase profits. See Yannucci, *supra* note 141, at 1189-92 (1995).

146. See DOUG UNDERWOOD, WHEN MBAS RULE THE NEWSROOM: HOW THE MARKETERS AND MANAGERS ARE RESHAPING TODAY’S MEDIA 133-38 (1993) (describing the tendency for newspapers, at least, to treat as “sacred cows” retail and real estate advertisers and large companies located in the same city as the newspapers).

147. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811 (M.D.N.C. 1995). The complaint alleged that the United Food and Commercial Workers International Union (UFCW) suggested that ABC investigate Food Lion. See *id.* at 814. The UFCW had been trying, without success, to organize Food Lion employees for more than a decade. See *id.* The complaint

examples obviously do not invalidate whatever good comes from a successful investigation, but they do question the press's ability to serve as an effective gatherer and disseminator of information with First Amendment significance.

IV. LIMITATIONS ON DAMAGES—A MORE PRODUCTIVE WAY TO LIMIT MEDIA LIABILITY FOR TORTIOUS NEWSGATHERING

Whether tort suits against the media "chill" the production of socially valuable information in a meaningful way is a matter for debate. This debate requires at least preliminary resolution before the media is granted a partial immunity to commit torts while gathering news. If tort law is not automatically hostile to the First Amendment,¹⁴⁸ and if any reduction in investigative reportage is not necessarily contrary to the First Amendment,¹⁴⁹ the rationale for a newsgathering privilege dissipates. Furthermore, advocates for a media privilege are unlikely to convince the courts to create an explicit immunity for tortious newsgathering.¹⁵⁰ Courts may, however, be willing to exclude publication damages from any recovery for tortious newsgathering.

A. THE PROPER APPROACH TO DAMAGES

While there is little reason to presume a conflict between the trespass and intrusion torts and the First Amendment, a potential conflict does arise if plaintiffs can recover damages resulting from the publication of tortiously acquired information.¹⁵¹ Certainly the prospect of consequential damages may chill media investigation. While the *Food Lion* court prohibited any recovery of publication damages,¹⁵² there is authority

also alleged that ABC received a similar tip from the Government Accountability Project, a group alleged to be closely aligned with the UFCW. See *id.*

148. See *supra* notes 94-110 and accompanying text.

149. See *supra* notes 136-141 and accompanying text (arguing that tortious newsgathering may already occur at excessive levels).

150. See *supra* notes 114-125 and accompanying text (contending that a newsgathering privilege cannot be grounded on the text, legislative history, or Supreme Court interpretation of the First Amendment).

151. See Stern, *supra* note 16, at 148 (suggesting that plaintiffs may focus on the media's newsgathering conduct in an attempt to recover damages for publication without facing the heightened First Amendment protections surrounding publication).

152. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 966 (M.D.N.C. 1996).

to the contrary.¹⁵³ And the typical, formalistic trespass analysis might indeed conclude that publication damages are proximately caused by the trespass. However, proximate cause is itself a functional concern, which exists to further the policies of tort law in general.¹⁵⁴ Tortfeasors are typically liable for the foreseeable consequences of their torts.¹⁵⁵ Presumably, allowing recovery for all foreseeable damages provides the optimal incentive for potential defendants to take precautions. It is impossible to prepare against the unforeseen, so allowing recovery for all foreseeable damages encourages optimal precautions by defendants and prevents excessive and inefficient precautionary measures.

In the First Amendment context, however, there is a substantial reason to exclude recovery of publication damages. The act of publication is of great constitutional import, and publication of truthful information is an activity worthy of substantial First Amendment protection. The *Food Lion* court allowed the plaintiffs to recover punitive damages.¹⁵⁶ While the issue of whether punitive damages are appropriate for torts committed while newsgathering is a difficult one, recent Supreme Court decisions have held that excessive punitive damages can violate due process.¹⁵⁷ One relevant factor in this analysis is the relationship of the punitive damages award to the compensatory damages, so the issue of whether plaintiffs can recover for publication damages becomes crucial.

Despite cases like *Dietemann*, which allow plaintiffs to recover damages resulting from publication of tortiously acquired

153. See, e.g., *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971) ("No 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.").

154. Cf. Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 871 (1996). Judge Calabresi describes allocation of loss, in an "all-or-nothing" tort regime (as opposed to a loss-sharing, comparative negligence regime) as depending on a fluid use of proximate cause. See *id.* Judge Calabresi states, "In effect, we compare fault and non-fault avoidance and find that . . . this conclusion—which we call 'no proximate cause'—determines who is the loss bearer." *Id.*

155. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928) (defining legal wrongs "in terms of the natural or probable, at least when unintentional").

156. The *Food Lion* court allowed punitive damages on the theory that the consciousness of wrongdoing required to commit an intentional tort was the same as the actual malice standard in libel cases. See *Food Lion, Inc. v. Capital Cities/ABC*, 1997 U.S. Dist. LEXIS 13214, at *21-22.

157. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

information,¹⁵⁸ courts may be receptive to arguments that the media should be insulated from publication damages. Proximate cause is likely to be the doctrinal tool for this limitation on damages.¹⁵⁹ Proximate cause is a fluid concept, and the line of causation can be drawn anywhere along the spectrum, depending on the relevant policy goals.¹⁶⁰ In the standard tort context, it is most sensible to draw that line at foreseeability. Publication damages, however, differ from the standard consequential damages authorized in most tort actions. No interests protected by the trespass or invasion of privacy torts are implicated by the publication of most types of truthful information, however obtained.¹⁶¹ Furthermore, when the interests protected by these torts *are* implicated, such as when the information published is needlessly intimate or places the plaintiff in a false light, a plaintiff already has an adequate cause of action in tort.¹⁶² Courts, suspicious that plaintiffs are attempting to recover vast damages for truthful publication without surmounting the First Amendment protections for publication,¹⁶³ may be receptive to these arguments.

158. See *Dietemann*, 449 F.2d at 250.

159. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 962-63 (M.D.N.C. 1996), which held that Food Lion's lost profits and other publication damages stemmed from a loss of consumer confidence caused by the store's allegedly sloppy food handling practices, and not from the broadcast of those practices to the public. The *Food Lion* court also held that, even if ABC could foresee these damages, acts of Food Lion employees severed the causal link between ABC's tortious newsgathering and Food Lion's damages. See *id.* at 963.

160. Cf. *Calabresi*, *supra* note 154, at 871-72 (describing the use of proximate cause to sever an undisputedly "causal" chain at a point that will be most effective in deterring future accidents).

161. The *Desnick* court listed some of the interests protected by the trespass and invasion of privacy torts, which include the right to keep secret "embarrassingly intimate details" and private conversations, the right to protect trade secrets and to maintain a decorous business atmosphere; in short, there was no invasion of a legally protected interest in property or privacy. See *Desnick v. ABC*, 44 F.3d 1345, 1353 (7th Cir. 1995).

162. Plaintiffs may sue for private facts invasion of privacy where a member of the media "gives publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." RESTATEMENT (SECOND) OF TORTS § 652D (1977). In addition, false light invasion of privacy makes tortious the publication of false information that places the plaintiff in a "false light." See *SACK & BARON*, *supra* note 2, at 561. This tort differs from defamation in that it protects injured feelings and not reputation. See *id.* at 562.

163. See *supra* note 20 and accompanying text.

CONCLUSION

Although the suggestion that the media should be privileged to commit minor torts while gathering news may be alluring, such a privilege rests on a shaky foundation at best. Advocates of a newsgathering privilege have offered no evidence that tort doctrine fails adequately to resolve the competing First Amendment and private rights issues. The *Desnick* court's approach, which refused to find a trespass where none of the rights underlying the tort were infringed, illustrates that the tension between the First Amendment and tort law is somewhat overstated. Ultimately, it may be true that Food Lion's practices, assuming they were worthy of exposure, would have remained undetected had ABC not engaged in its investigation. Perhaps. But it may also be true that the costs to private parties who find themselves the subject of media investigations will substantially outweigh the benefits from the rare, and tortious, discovery. In most cases, the same information will be obtainable through less intrusive techniques. The standard tort analysis ensures that those techniques remain the norm.

