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Remedies for Private Intelligence Abuses: Legal and Ideological Barriers

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REMEDIES FOR PRIVATE INTELLIGENCE ABUSES: LEGAL AND IDEOLOGICAL BARRIERS

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> The private constabulary system, by which armed forces are employed during labor troubles has worked untold damage in America. It is a condition akin to the feudal system of warfare, when private interests can employ troops of mercenaries to wage war at their command . . . . In no other country in the world, with the exception of China is it possible for the individual to surround himself with a standing army to do his bidding in defiance of law and order . . . . The conditions I have outlined could never obtain in England. During labor troubles the government looks after the policing and under no circumstances permits the meddling of private detectives.
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> —Thomas Beet, of Scotland Yard (1906)[1]

While, as Beet observed, surveillance and intelligence activities by private companies and individuals are not new to the United States,[2] the nuclear power industry's resort to such activities poses new civil liberties and social problems.[3] The extreme danger embodied in nuclear facilities and materials and the fear of "nuclear terrorism" provide the most plausible justification in our history for the wholesale destruction of civil liberties.

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1. L. WHIPPLE, THE STORY OF CIVIL LIBERTY IN THE UNITED STATES 216 (1927), *quoting* Beet, *Methods of American Private Detective Agencies,* 8 APPLETON'S MAGAZINE 444 (1906).

2. *See* F. DONNER, THE AGE OF SURVEILLANCE 414-45 (1980); R. GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA, FROM 1870 TO PRESENT (1978); J. HOUGAN, SPOOKS, THE HAUNTING OF AMERICA, THE PRIVATE USE OF SECRET AGENTS (1978); Wallace, *School for Spies,* INQUIRY MAG., July 9-23, 1979, at 11.

3. *See* R. JUNGK, THE NEW TYRANNY: HOW NUCLEAR POWER ENSLAVES US (1979); Butz, *Surveillance of the Anti-Nuke Movement,* THE PUBLIC EYE, Apr. 1978, at 40 (published by the Repression Information Project, Washington, D.C.); Comey, *Nuclear Power and Civil Liberties,* CBE ENVIRONMENTAL REVIEW, Oct. 1978 at 6; Marwick, *Nuclear Power Critics and the Intelligence Community,* FIRST PRINCIPLES, Apr. 1979, at 1 (published by the Center for National Security Studies); Pollock, *The Shifty Eye of Reddy Kilowatt,* MOTHER JONES, May 1978, at 13; WARNOCK, NUCLEAR POWER AND CIVIL LIBERTIES, CAN WE HAVE BOTH? (1979) (published by the Citizens' Energy Project, Washington, D.C.). For a comprehensive treatment of this problem, *see* J. PETERZELL, NUCLEAR POWER AND CIVIL LIBERTIES (1981) (published by the Center for National Security Studies, Washington, D.C.).

Ostensibly responding to these dangers, corporate and government agencies have conducted surveillance of and gathered intelligence about opponents of nuclear power.[4] As in the past,[5] the targets of these activities are not terrorists but citizens who nonviolently oppose corporate and government policy: the intent and effect has been not to provide security, but to subvert groups and individuals who seek to change those policies.[6] The emerging question is not merely whether we can tolerate some infringements on civil liberties in the face of a potentially great danger, but whether nuclear power and democracy can coexist.

The nature and scope of the nuclear industry's surveillance and intelligence activities have been set out and documented elsewhere.[7] This paper discusses possible legal remedies available to victims of such activities, and after concluding that existing remedies are inadequate, attempts to place the issue in a broader social context.

I

LEGAL REMEDIES

The following discussion briefly considers possible federal, state and administrative remedies. The variety of surveillance and intelligence activities are considered together (and referred to generally as intelligence activities) except where there is a significant difference in the availability of a remedy.

A. Federal Remedies

The federal Civil Rights Acts[8] for the most part apply only to governmental action,[9] and the Supreme Court has recently ruled that the activity of a privately owned utility is not "state action" even where the utility is regulated and has been granted a monopoly by the state.[10] In *Jackson v.*

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4. Butz, *supra* note 3, at 43-45; Marwick, *supra* note 3, at 5-6; Pollock, *supra* note 3 at 13-14; PETERZELL, *supra* note 3; WARNOCK, *supra* note 3, at 55-104.

5. *See generally,* DONNER, *supra* note 2; SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS, SUPPLEMENTARY DETAILED STAFF REPORT ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, (the Church Committee Report); N. BLACKSTOCK, COINTELPRO, THE FBI'S SECRET WAR ON POLITICAL FREEDOM (1975); Ryter, *Cointelpro: Corrupting American Institutions,* FIRST PRINCIPLES, May 1978, at 1; Donner, *The Terrorist as Scapegoat,* THE NATION, May 20, 1978, at 590.

6. Marwick, *supra* note 3, at 5-6; Pollock, *supra* note 3 at 13-14; Butz, *supra* note 3, at 43-45; PETERZELL, *supra* note 3, at 3-4; WARNOCK, *supra* note 3, at 55-104.

7. See authorities cited *supra* notes 3-4. This paper also does not discuss the civil liberties issues particular to employees in the nuclear industry.

8. 42 U.S.C. §§ 1981-95, 2000(a)-(h) (1976).

9. This statement pertains specifically to section 1983, which provides for a civil action for deprivation of civil rights under color of law. Section 1985 probably does not require state action, *see* Griffin v. Breckenridge, 403 U.S. 88 (1971), but the plaintiff must prove the existence of a conspiracy in order to prevail. *See* 42 U.S.C. § 1985 (1976). *See infra* text accompanying notes 27-32.

10. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

Metropolitan Edison Co.,[11] involving the operator of Three Mile Island, the Court affirmed the dismissal of a complaint alleging that the utility had terminated electric service to a home without notice, a hearing, or an opportunity for the resident to pay overdue bills.[12] The customer argued that this act constituted state action, giving several reasons: the state had conferred monopoly status on Metropolitan, Metropolitan provided "an essential public service required to be supplied on a reasonably continuous basis . . . and hence performed a 'public function,' "[13] the state had authorized and approved the termination practice, and the state taxed and regulated Metropolitan and thus had a "close symbiotic relationship" with the utility.[14] The Court found these contentions, considered both individually and together, unpersuasive.[15] It reasoned that, at most, "Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly . . . and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law."[16] This connection, it concluded, was insufficient to attribute Metropolitan's conduct to the state for purposes of the Fourteenth Amendment.[17]

Although the Court's standards for determining state action—a "sufficiently close nexus" and a "symbiotic relationship"[18]—are so vague, tautological and devoid of content as to defy reasoned application, there are two major arguments available for distinguishing *Metropolitan Edison* in the nuclear surveillance context. First, one could argue that different constitutional rights or different public functions carried out by private entities call for differing standards for finding state action. Specifically, utilities could be held to exercise state power when they act contrary to principles of free speech or equality (as opposed to due process rights) or when the function challenged closely parallels the state's police function (as opposed to some other state function). However, as Justice Marshall pointed out in his dissent,[19] the Court has thus far rejected the notion of differing state action standards.[20]

Second, one could argue that where the utility action concerns nuclear power, it may amount to federal action.[21] This argument would stress that

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11. *Id.*
12. *Id.*
13. *Id.* at 352.
14. *Id.* at 351-58.
15. *Id.* at 351.
16. *Id.* at 358.
17. *Id.* at 358-59.
18. *Id.* at 351, 357.
19. *Id.* at 365. Justices Douglas and Brennan also dissented in separate opinions. *Id.* at 359, 364.
20. *Id.* at 373-74.
21. This argument has been raised and briefed by an anti-nuclear group in Long Island Lighting Co. v. SHAD, No. 80-17790 (N.Y. Sup. Ct., motion for dismissal for counterclaims granted Sept. 10, 1981) (discussed *infra* at notes 79-84 and accompanying text.)

nuclear power is subject to government control far beyond that exercised over utilities generally,[22] although it does not appear that the government has specifically required or suggested that the utilities engage in intelligence activities against opponents of nuclear power.

These and other arguments should be pressed, but the substance and tone of the *Metropolitan Edison* decision are quite clear, and the case should be seen not as an aberration but as part of the Court's recent trend toward restricting federal court jurisdiction to remedy constitutional violations.[23] It is unlikely that any court will find that a private utility's activities constitute state action.

There are two alternative approaches pursuant to the Civil Rights Acts that do not depend on a finding of state action, but they are of limited utility. The first approach makes use of the fact that private activity in conjunction or conspiracy with official government activity gives rise to a cause of action.[24] The nuclear industry often undertakes its intelligence activities with at least the cooperation of government officials.[25] However, a finding of conspiracy with government officials requires substantially more government participation than this.[26]

Second, the conspiracy provisions of the Civil Rights Acts[27] reach some exclusively private activities.[28] However, the likelihood of making private conspiracies actionable has been diminished by a requirement of "class based animus," which has been interpreted by some courts to include only a racial motivation,[29] and by a requirement of a constitutional violation, which covers only a very limited range of intelligence activities.[30] The

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22. *See* Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended in scattered sections of 42 U.S.C.); S. Rep. No. 1325, 88th Cong., 2d Sess. (1964), *cf,* Public Utilities Commission v. Pollak, 343 U.S. 451 (1952).

23. *See, e.g.,* United States Parole Comm'n. v. Veraghty, 445 U.S. 388 (1980); Worth v. Seldin, 422 U.S. 490 (1975); Hall v. Beals, 346 U.S. 45 (1969).

24. *See, e.g.,* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970).

25. *See, e.g.,* Butz, *supra* note 3, at 44-45; Marwick, *supra* note 3, at 6; PETERZELL, *supra* note 3, at 25-65, WARNOCK, *supra* note 3, at 78-107.

26. In *Adickes v. S.H. Kress & Co.,* 348 U.S. 144, 170 (1970) the Court stated that the petitioner would show an abridgement of her fourteenth amendment right if she demonstrated that the state had *compelled* the allegedly unconstitutional act. *See also* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 460-64 (1978).

27. 42 U.S.C. § 1985.

28. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971); Westberry v. Gilman Paper Co., 507 F.2d 206 (5th Cir. 1975); Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (en banc); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971); Puentes v. Sullivan, 425 F. Supp. 249 (W.D. Tex. 1977). *See generally* M. AVERY & D. RUDOVSKY, POLICE MISCONDUCT LAW AND LITIGATION § 2.3(1)(2) (1980); Note, *The Scope of Section 1985(3) Since* Griffin v. Breckenridge, 45 GEO. WASH. L. REV. 239 (1977); Note, *Private Conspiracies to Violate Civil Rights,* 90 HARV. L. REV. 1721 (1977).

29. *See* Murphy v. Mt. Carmel High School, 543 F.2d 1189 (7th Cir. 1976); Bellamy v. Mason's Stores, Inc., 508 F.2d 504 (4th Cir. 1974).

30. Some courts have suggested that violations of federal statutory rights may also be included. *See* M. AVERY & D. RUDOVSKY, *supra* note 28, § 2.3(1)(2).

constitutional limits on intelligence activities have been summarized as follows:

> [S]urveillance of public political activity by non-intrusive means and the cataloguing of the information obtained may not state a cause of action . . . [except] where the police use illegal surveillance or disruption techniques, e.g., wiretapping without court order, theft of documents, acts of provocation by agents . . . . [Also,] the police cannot disseminate the information obtained by surveillance beyond other government officials with a need to know, particularly where such dissemination is for the purpose of deterring or preventing one's exercise of constitutional rights.[31]

There are no constitutional limits, for example, on the infiltration of groups, which has been the source of many of the most serious intelligence abuses.[32]

B. State Remedies

There exist tort and criminal remedies for some forms of surveillance and harassment, including those generally perceived as the most offensive: physical attacks,[33] wiretapping[34] and "character assassination."[35] In addition, the more generalized tort of intentional infliction of emotional distress[36] offers a possible avenue of relief in some instances. Generally, the defenses available in tort actions based on these theories are limited to a narrow conception of defense of oneself or others.[37] Unless the danger embodied in nuclear power leads courts and juries to expand the scope of

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31. *Id.* § 2.3(f) (citations omitted). *See also* Socialist Workers Party v. Attorney Gen., 419 U.S. 1314 (1974); Laird v. Tatum, 408 U.S. 1 (1972); Philadelphia Yearly Meeting v. Tate, 519 F.2d 1335 (3d Cir. 1975); Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975); Fifth Avenue Peace Parade Comm. v. Gray, 480 F.2d 326 (2d Cir. 1973); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976); Alliance to End Repression v. Rochford, 407 F. Supp. 115 (N.D. Ill. 1975); Handschu v. Special Serv. Div., 349 F. Supp. 766 (S.D.N.Y. 1972).

32. *See, e.g.*, DONNER, *supra* note 2; Marwick, *supra* note 3, at 6. *See also* PETERZELL, *supra* note 3 at 25-89; WARNOCK, *supra* note 3, at 55-107.

33. All jurisdictions permit common-law or statutory claims for assault and/or battery. *See* RESTATEMENT (SECOND) OF TORTS §§ 13, 21 (1965) [hereinafter cited as RESTATEMENT].

34. Most states have adopted statutes rendering private-party wiretapping criminal, *e.g.*, CAL. PENAL CODE § 631 (West Supp. 1981); many have incorporated wiretapping into the common-law tort of invasion of privacy. *See infra* note 55 and accompanying text. Pennsylvania's statute makes it a felony to "willfully intercept . . . . any wire or oral message." 18 PA. CONS. STAT. ANN. § 5703(1). *See also* Hamberger v. Eastment, 106 N.H. 107, 206 A.2d 239 (1964); LaCrone v. Ohio Bell Tel. Co., 114 Ohio App. 2d 299, 182 N.E. 2d 15 (Ct. App. 1961).

35. "One who gives publicity to a matter concerning the private life of another is subject to liability . . . if the matter publicized . . . (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." RESTATEMENT, *supra* note 33, § 652D.

36. *See id.* § 46.

37. *Id.* §§ 63-76.

these defenses,[38] these remedies appear adequate for the activities they cover.

For a broad range of other intelligence activities, however, there are no remedies. Among the practices deemed acceptable are systematic interviews of friends, relations and acquaintances;[39] development of extensive files on individuals, which include information on membership in organizations; attendance at meetings and contacts with other individuals;[40] following and photographing individuals, as long as they are in a public place;[41] and some forms of surveillance of subjects around their homes.[42] There are no limits on the infiltration of groups.

Along with the absence of remedies for such intelligence and surveillance activities there may exist another problem—a tendency for judges to focus on isolated incidents rather than courses of conduct. At least one court, when faced with a pattern of surveillance activities involving a range of practices over a period of time, chose to dissect the overall pattern of behavior and examine each activity separately and in isolation.[43] Such an attitude, in combination with the problem of inadequate remedies, creates a dangerous blind spot, an area in which private surveillance seems to operate unchecked, allowing wrongs to go unredressed.

There are several common-law torts which in the future may apply to these activities to provide control and recovery. This section will examine the problems, limitations and potential use of the following torts: conversion, trespass to personal property or chattels, tresspass to property, invasion of privacy and intentional infliction of emotional distress.

1. Conversion

Theft of documents, photographs, membership lists or other property is actionable as conversion.[44] The remedy, however, is limited to the value

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38. In some areas of tort law, particular instances of otherwise actionable conduct have been excused because of a substantial state interest in the continued performance of the conduct. *See infra* notes 58-64 and accompanying text.

39. *See* Nader v. General Motors Corp., 57 Misc.2d 301, 292 N.Y.S. 2d 514 (Sup. Ct. 1968), *aff'd* 31 A.D.2d 392, 298 N.Y.S.2d 137 (1969), *aff'd* 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

40. The Supreme Court has found that similar conduct by federal agencies creates no injury and therefore does not come within the jurisdiction of the courts. Laird v. Tatum, 408 U.S. 1 (1971).

41. Nader v. General Motors Corp., 57 Misc.2d 301, 292 N.Y.S.2d 514.

42. Some extremely intrusive means of home surveillance would be criminal under Peeping Tom statutes. *See, e.g.,* CAL. PENAL CODE § 647(h) (West Supp. 1981). However, monitoring entry and exit of visitors and observing outdoor activities will generally be approved. Alabama Elec. Coop. Inc. v. Partridge, 284 Ala. 442, 225 So.2d 848 (1969); Souder v. Pendleton Detective Agency, 88 So.2d 716 (La. Ct. App. 1956).

43. Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 265, 307 N.Y.S.2d 647 (1970).

44. "Conversion is an intentional exercise of dominion over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay

of the property converted.[45] Since documents, membership lists and even photographs are of little value except to the original owner, recovery is likely to be trivial.[46] Conversion does not necessitate return of the items, assuming their continued existence, as long as the plaintiff is compensated.[47] Thus, both as a restorative remedy and as a deterrent, the traditional notion of conversion is of limited use. Recognition of the unusual "value" and the potential for abuse embodied in a membership list might, in the future, make this a more effective remedy, but no court to date has taken this step.

2. Trespass to Personal Property or Chattels

Trespass to personal property traditionally is distinguished from conversion in that the former encompasses cases involving less than "serious" dispossession, while the latter is restricted to more extreme cases.[48] Again, the cause of action's critical weakness lies in its remedy, which is formulated by reference to the value of the property.[49] Moreover, the tort of trespass to personal property leaves untouched a significant intelligence activity: the copying of documents, by photocopying or photography, which in effect "steals" the content, yet is neither conversion nor trespass because it results in no "damage" to the document.[50]

3. Trespass

Physical entry onto private property would constitute a trespass and entitle the victim to damages,[51] but the amount of damages is likely to be insignificant. If the trespasser causes no harm, only nominal damages will usually be awarded.[52] If the trespasser causes some harm to land, the damages are limited to: "(a) the difference between the value of the land before the harm and the value after the harm . . . (b) the loss of use of the land, and (c) discomfort and annoyance to him as an occupant."[53] In either case, the damages are unlikely to amount to much.

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the other full value of the chattel." RESTATEMENT, *supra* note 33, § 222A. *See also* Socialist Workers Party v. Attorney Gen., 463 F. Supp. 515 (E.D.N.Y. 1978).

45. RESTATEMENT, *supra* note 33 § 222A, comment c.

46. *See* Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969). The authorities do recognize that certain papers have special value: "If the document is of peculiar historic, literary, or artistic value, such value may be obtained under ordinary rules of the law of damages." RESTATEMENT, *supra* note 33, § 242 comment a. But the cause of action is unlikely to avail someone dispossessed of a business document such as a membership list.

47. RESTATEMENT, *supra* note 33, § 222A, comment c.

48. *Id.*

49. *Id.*

50. RESTATEMENT, *supra* note 33, § 218(b). In order to gain access to documents, the defendant may commit other torts—particularly trespass to land. *See infra* notes 51-52, and accompanying text.

51. RESTATEMENT, *supra* note 33, § 158.

52. RESTATEMENT, *supra* note 33, § 163, comment e. However, punitive damages may be imposed on a trespasser who knows "that his entry is without the consent of the possessor and without any other privilege." *Id.*

53. RESTATEMENT, *supra* note 33, § 162.

4. Invasion of Privacy

In most jurisdictions, invasion of privacy includes four distinct torts.[54] For the purposes of this paper the most relevant is intentional intrusion upon the seclusion, solitude or private affairs and concerns of another. Such an intrusion is generally actionable only if "highly offensive to a reasonable person."[55] This has been held to include wiretapping, mail opening, and the use of parabolic microphones or binoculars to spy on the home.[56]

However, spying on *public* activities through techniques like photographing demonstrators at a public meeting, observing visitors at a subject's home or following individuals on the street is not generally actionable under this tort.[57] The distinction between actionable and nonactionable conduct rests on the notion that participants in public activities have a diminished expectation of privacy concerning those activities.[58] Since a "reasonable" person would not expect such activities to enjoy a cloak of privacy, she would suffer no "highly offensive intrusion" as a result of surveillance. Even in cases where surveillance of public or private activities does cause an offensive intrusion, another obstacle may block a successful invasion of privacy claim: some courts have shown a willingness to allow defendants to avoid liability on the ground that a reasonable purpose or social utility justified their actions.

For example, in *Forster v. Manchester,*[59] the plaintiff sued for injunctive and monetary relief on theories of invasion of privacy and intentional infliction of emotional distress. It was conceded that the defendant, a licensed private investigator, had assigned two men equipped with movie cameras to report on the plaintiff's activities. The surveillance teams followed the plaintiff's car, keeping a log of all stops and filming her activities.[60]

The Pennsylvania Supreme Court rejected the plaintiff's claim, noting two factors. First, because all the surveillance occurred in public places, where the plaintiff could be observed by passersby, she was entitled to only

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54. They are (1) unreasonable intrusion upon the seclusion of another, (2) appropriation of another's name or likeness, (3) unreasonable publicity given to another's private life, and (4) publicity that unreasonably places another in a false light. RESTATEMENT, *supra* note 32, § 652A; *see also* N.Y. Civ. Rights Law §§ 50-51 (McKinney 1981).

55. *Id.*, § 652B.

56. *See* Fowler v. Southern Bell Tel. & Tel., 343 F.2d 150 (5th Cir. 1965) (wiretapping); Spock v. United States, 464 F. Supp. 510 (S.D.N.Y. 1978) (wiretapping); Birnbaum v. United States, 436 F. Supp. 967 (E.D.N.Y. 1977), *aff'd* 588 F.2d (2d Cir. 1978) (mail opening); Souder v. Pendelton Detective Agency, 88 So.2d 716 (La. Ct. App. 1956) (general surveillance using binoculars).

57. *See supra* notes 38-41 and accompanying text.

58. *See* Forster v. Manchester, 410 Pa. 192, 189 A.2d 147 (1963). This notion also pervades fourth amendment jurisprudence. *See, e.g.,* Katz v. United States, 389 U.S. 347, 351-52 (1967).

59. 410 Pa. 192, 189 A.2d 147 (1963).

60. *Id.* at 193-94, 189 A.2d at 148.

a limited expectation of privacy.[61] Second, the surveillance of the plaintiff was arranged by the defendant in connection with a separate lawsuit brought by the plaintiff. The defendant hoped to use the surveillance to determine the merits of the plaintiff's injury claims. The court, noting the circumstances that led to the surveillance, stated: "[W]e feel that there is much social utility to be gained from these investigations. It is in the best interests of society that valid claims be ascertained and fabricated claims be exposed."[62] The court concluded that the defendant could, in this instance, successfully invoke "the defense of social utility."[63]

This defense of social utility could present a major stumbling block to successful claims of invasion of privacy in the context of nuclear industry surveillance. However, cases of the *Forster v. Manchester* type may represent a narrow and exceptional use of the defense of social utility. In such cases, the defense is available only because the plaintiff has placed his own activities or physical condition directly at issue by bringing suit. A similar rationale is reflected in the Federal Rules of Civil Procedure which provide that a party may be required to submit to a medical examination when his or her mental or physical condition is at issue.[64] The penalty for not submitting to this invasion of privacy is forfeiture of the claim.[65] Under this rationale the social utility defense would be allowed only when the defendant undertakes the surveillance to collect evidence pertinent to an issue created by the plaintiff's suit. Thus the social utility defense would not be applicable to nuclear industry surveillance of anti-nuclear activists whose only litigation arises from the privacy claim.

Two arguments, however, may be advanced against this proposition. First, by publicly opposing nuclear power, an individual arguably places herself in the public eye in a manner analogous to the plaintiff in a civil suit. This limited public figure status may justify diminution of the individual's right to privacy, especially regarding the individual's motivation for the public anti-nuclear stand or acts.

Second, it could be argued that the limits of the rationale should be ignored because the danger allegedly posed by nuclear terrorism or sabotage is so grave. The defense of social utility could be expanded, in other words, because of security—perhaps even national security—concerns. Indeed, the danger posed by a handful of fraudulent claims may be said to pale beside that of unauthorized individuals gaining control of large amounts of fissionable materials. Extension of the "social utility" defense along these lines could eliminate invasion of privacy suits as an effective response to nuclear industry surveillance.

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61. *Id.* at 197, 189 A.2d at 150.
62. *Id.*
63. *Id.* at 198, 189 A.2d at 151.
64. Fed. R. Civ. P. 35.
65. *Id.*

5. Intentional Infliction of Emotional Distress

This tort could reach a wide range of surveillance activities, including all of those discussed above.[66] However, one element of the tort is intent to cause emotional distress.[67] Ironically, a stated purpose to obtain information could preclude the required showing of intent.[68] In addition, the surreptitious nature of most surveillance activities would circumstantially rebut an allegation of intent to harass.

In *Nader v. General Motors Corp.*,[69] a majority of the New York Court of Appeals suggested that infliction of emotional distress was the proper cause of action for Mr. Nader's surveillance claim.[70] The concurring opinion, noting the particular proof requirements for that tort and the potential for the defense of alternative purposes, disagreed. Three judges concluded that it would prove nearly impossible for Nader to prevail on that theory.[71]

6. The Difficulties of State Tort Law Remedies: Two Examples

Ralph Nader's suit against General Motors[72] (GM) exemplifies the difficulties of the various state tort law remedies. Nader alleged that GM had tapped his phone, shadowed him, made harassing phone calls, interviewed friends to obtain personal information, and attempted to sexually entice and compromise him through several young women.[73] The New York Court of Appeals, ruling on defendant's motion to dismiss, held that gathering information does not constitute invasion of privacy under the law of the District of Columbia[74] unless the information is completely confidential (not including anything known to others) and the defendant is unreasonably intrusive.[75] The interviews of friends, harassing phone calls and attempts at sexual enticement were seen as aimed at gathering nonconfidential information.[76] The shadowing was allowable if the information would be available to a casual observer.[77] Only the wiretapping was clearly actionable.[78] In a concurring opinion, Justice Breitel, joined by two other jus-

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66. RESTATEMENT, *supra* note 33, at § 46.

67. *Id.*

68. *See, e.g.*, Nader v. General Motors Corp., 25 N.Y.2d 560, 572, 255 N.E.2d 765, 772, 307 N.Y.S.2d 647, 656 (1970) (Breitel, J., concurring in result).

69. 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

70. *Id.* at 569-70, 255 N.E.2d at 770, 307 N.Y.S.2d at 654-55.

71. *Id.* at 572, 255 N.E.2d at 772, 307 N.Y.S.2d at 656.

72. Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

73. *Id.* at 564, 255 N.E.2d at 767, 307 N.Y.S.2d at 650.

74. The parties stipulated to application of the substantive law of the District of Columbia, the place where most of the acts allegedly occured, and where plaintiff lived and suffered the effects of the acts. *Id.* at 565, 255 N.E.2d at 767-68, 307 N.Y.S.2d at 651.

75. *Id.* at 567, 255 N.E.2d at 769, 307 N.Y.S.2d at 653.

76. *Id.* at 568-9, 255 N.E.2d at 770, 307 N.Y.S.2d at 654.

77. *Id.* at 570, 255 N.E.2d at 771, 307 N.Y.S.2d at 655.

78. *Id.*

tices, took a somewhat broader view of actionable conduct and suggested that the activities be viewed together rather than separately.[79] But the majority decision rendered the state tort route essentially meaningless.

Another recent case, *Long Island Lighting Co. v. SHAD,*[80] also highlights the problems of applying state tort law remedies to nuclear industry surveillance. Here, an antinuclear group raised several state and federal law claims in a counterclaim challenging a nuclear utility's intelligence activities. The Long Island Lighting Company (LILCO) and several unions involved in the construction of its Shoreham Nuclear Generating Station had brought an action in the New York Supreme Court asking for over $2 million in damages and an injunction against attempts by the SHAD Alliance and other antinuclear groups to stop construction of the plant. The defendants raised first amendment, necessity, and other defenses and filed a counterclaim alleging that LILCO had infiltrated the SHAD Alliance, stolen some of its documents and engaged in a course of intelligence and other activities intended to create fear among persons opposed to nuclear power and to undermine support for the SHAD Alliance. The counterclaim was based on the federal Civil Rights Acts and several state torts, including invasion of privacy, harassment and intentional infliction of emotional distress.

After a brief removal to federal court, where a motion to dismiss the counterclaim was largely denied,[81] the state court dismissed it entirely and denied leave to replead.[82] While the dismissal was based in part on the inadequacy of the pleadings, the court substantively rejected the federal claims for lack of state action, without even discussing the private conspiracy claim.[83] The state tort claims were dismissed largely without explanation.[84] An additional claim that LILCO had interfered with SHAD's "economic relationships" with third parties was also rejected, because SHAD is not "a profit-making organization" and is "nothing more than a group of people who are opposing nuclear power."[85]

C. *Administrative Remedies*

Since most nuclear power utilities are state regulated, it is possible to obtain limited relief against them in administrative proceedings. Most utility

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79. *Id.* at 571-3, 255 N.E.2d at 772, 307 N.Y.S.2d at 656-57.

80. No. 80-17790 (N.Y. Sup. Ct. Sept. 10, 1981) (granting motion for dismissal of counterclaims).

81. Long Island Lighting Co. v. SHAD, No. 80-2647 (E.D.N.Y. Mar. 13, 1981). Plaintiff's initial motion to remand to the state court, pursuant to 28 U.S.C. § 1447(c), was denied, but the court granted a later remand motion on March 13, 1981. *Id.*

82. Long Island Lighting Co. v. SHAD No. 80-17790 (N.Y. Sup. Ct. Sept. 10, 1981) (granting motion for dismissal of counterclaims).

83. *Id.*

84. On the invasion of privacy issue, the court said, "defendants failed to show any right as to their privacy which has been violated." *Id.* On the infliction of emotional distress issue, the court dismissed the counterclaim without further explanation, "on the authority of *Fischer v. Maloney.*"

85. *Id.*

regulatory agencies are authorized to exclude from customer rates expenditures that are inconsistent with the customers' or the public's interest.[86] This possibility is being pursued in a case now pending before the Pennsylvania Public Utilities Commission, where the Keystone Alliance, the American Friends Service Committee, the Consumer Education and Protective Association, and a variety of anti-nuclear groups and individuals are challenging intelligence activities of the Philadelphia Electric Company (PE).[87] These groups filed their complaint following PE's release of photographs of anti-nuclear demonstrators to the local news media in an attempt to undercut the activists' effectiveness.[88] While a successful result in this case would financially limit the utility, save the customers' money and bring the surveillance issue to the public's attention, no injunctive or monetary relief for the victims is likely to be available.[89]

The law simply has not come to grips with private intelligence activities that are already widespread throughout our society. Existing remedies do not discourage abusive conduct, and no new remedies appear on the horizon. No standards or concern for specifically political private surveillance have been incorporated into the law or even seriously discussed. Some observers might blame this vacuum on the law's tardiness in responding to social developments, pointing out that the remedies currently available developed in response to other transgressions in other times and, sometimes, other places. However, the lack of adequate legal remedies for private intelligence activities arises from far deeper social and legal problems.

II.

THE LEGAL AND SOCIAL PROBLEM

The Nuclear Regulatory Commission and its predecessor, the Atomic Energy Commission, have sponsored three studies that seriously discuss detention of dissidents without charges or probable cause, indiscriminate general searches, widespread wiretapping, infiltration of groups and even torture. The Barton Report,[90] which evidences considerable sensitivity to the civil liberties issues, envisioned the following scenarios:

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86. *See, e.g.*, N.Y. PUB. SERV. LAW § 113 (Consol. Supp. 1982).

87. Keystone Alliance, et al. v. Philadelphia Elec. Co., No. C-78080459 (Pa. P.U.C. Aug. 3, 1979) (denying motion to dismiss). The complainants also seek exclusion of any activity that promotes nuclear power. David Kairys serves as counsel for complainants in this case.

88. The same activitiy undertaken by the local police or by an institution or agency considered an arm of the state could be unconstitutional. *See* Philadelphia Yearly Meeting v. Tate, 519 F.2d 1335 (3d Cir. 1975).

89. In *Keystone Alliance,* complainants' request that the utility be ordered to cease its intelligence activities was dismissed as falling outside the jurisdiction of the Commission.

90. J. BARTON, INTENSIFIED NUCLEAR SAFEGUARDS AND CIVIL LIBERTIES (1975).

> [D]issidents might be seized and detained after a plutonium theft. Detention might be justified as a way to isolate and immobilize persons capable of fashioning the material into an explosive device . . . . [D]etention could also be used as a step in a very troubling interrogation scheme—perhaps employing lie detectors or even torture.[91]

The Mitre Report[92]—which utilized consultants like William Sullivan and Charles Brennan, who ran the FBI's COINTELPRO spying and disruption program—and the Rosenbaum Report[93] foresaw widespread surveillance and intelligence activities by nuclear corporations and the government, including infiltration of groups and exchanges of intelligence information with the Nuclear Regulatory Commission acting as a clearinghouse.[94] These forecasts should be understood in the context of the proliferation of private intelligence agencies and activities that accompanied the relative decline, under considerable public pressure, of governmental intelligence activities beginning in the mid-1970's.[95]

Provision of effective legal remedies for such activities raises two basic problems of the law and of society generally. First, traditional standards for analyzing speech and associational issues, even if an appropriate vehicle can be found for their application, will likely prove inadequate to the task with regard to both private and governmental intelligence activities. Second, traditional thinking about the distinction between public and private activity prevents the development of legal remedies for private, and particularly corporate, abuse of individual liberties.

Using the traditional approach, courts consider the possible infringements on civil liberties and balance them against a variety of other factors to determine whether the infringements are legally permissible.[96] Surveillance and infiltration can be shown to involve considerable infringements of civil liberties, and substantial arguments against allowing such infringements may be marshalled. For example, courts could be urged to insist that utilities protect nuclear security by insuring the physical security of nuclear facilities and materials rather than surveilling nuclear opponents and the public. Courts could also be encouraged to question the tendency to view opponents of nuclear power as dangerous. People oppose nuclear power mainly be-

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91. *Id.* at 27.

92. MITRE CORP., THE THREAT TO LICENSED NUCLEAR FACILITIES (1975).

93. D. ROSENBAUM, A SPECIAL SAFEGUARDS STUDY: REPORT TO THE ATOMIC ENERGY COMMISSION (1974).

94. These reports, particularly the Barton report, also discuss civil liberties issues concerning employees in the nuclear industry.

95. *See* DONNER, *supra* note 2, at 414.

96. *See generally,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 581-84, 674, 682-88, 722-24, 748, 847-48 (1978).

cause they are concerned about inadequate safety precautions, the danger of nuclear catastrophe and the effects on the environment and the economy. This hardly seems like an appropriate segment of the population to target for investigation if one is looking for terrorists or thieves.[97]

Despite these arguments against infringement of civil liberties, the traditional balancing approach involves the possibility that each infringement, viewed in isolation, will seem minimal compared to the danger of nuclear theft or terrorism. The balancing test is quite vague and open to subjective considerations; it provides only "various considerations [that can] be enumerated but not weighed. There [is] no standard of reference upon which to base a reasoned, functional determination. Ultimately, the decision rest[s] upon vague judgments, most of them unexpressed."[98] Even without the nuclear power factor or the problems of trying to reach private activities, the balancing test as applied to the government has failed to yield, for example, any limits on the infiltration of groups.[99] In the nuclear context, the specter of the overwhelming consequences of a nuclear incident could convince even the most libertarian judge or legislator of the appropriateness of a particular restraint on civil liberties.

This may well occur despite the low probability that theft or terrorism would result in a nuclear explosion or a release of radiation, and the even lower probability that surveillance of nuclear power opponents would provide any real protection. In our history, intelligence activities have been used to support established policies and to suppress opponents, not to protect us from danger. Many past intelligence abuses have been planned and malicious, while other seem to result from an apparently inevitable intelligence mentality. But all intelligence activities related to public issues have consistently resulted in abuses and served a primarily or solely political—as opposed to law enforcement or security—function.[100] It would be naive and dangerous to ignore this lesson or to take security and law enforcement claims at face value, particularly when dealing with an industry and government that failed to evacuate people around Three Mile Island[101] and consistently withheld vital information during that crisis because of the possible impact on public opinion.[102]

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97. There is an unsettling irony to the logic of intelligence: opponents of nuclear power are moved to speak out in large part because of the danger of nuclear power, yet they are closely watched, their rights are infringed and public debate is stifled, supposedly because of that same danger.

98. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 117 (1970). *See generally* Kairys, *Freedom of Speech,* in THE POLITICS OF LAW (D. Kairys ed., forthcoming).

99. *See supra* text accompanying note 31.

100. *See generally,* DONNER, *supra* note 2; BLACKSTOCK, *supra* note 5.

101. PRESIDENT'S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND, THE NEED FOR CHANGE: THE LEGACY OF THREE MILE ISLAND 38-41 (1979).

102. *Id.* at 18, 57-58.

Nevertheless, the validity of such claims may well be accepted. Thus, application of the traditional balancing approach could result in a piece-by-piece erosion of fundamental rights, and perhaps a change of attitude about basic civil liberties and democratic processes that could extend beyond nuclear issues. The revision of legal principles which would accompany such a change could include revival of the "bad tendency" and "constructive intent" doctrines, which formed a major component of speech law before the 1930's.[103]

Just as the traditional balancing approach will not avail the victims of government and private surveillance, traditional thinking about the distinction between public and private activity prevents provision of adequate legal remedies to victims of private intelligence activities. While there has been a revolution in the sophistication and availability of private intelligence services,[104] the legal system and society itself have yet to recognize any significant limits on private activities that subvert civil liberties. This vacuum is based on the ideological separation of our lives into public and private spheres, which is quite evident in *Metropolitan Edison.*[105] In the public sphere, which includes activities like expression of political beliefs and selection of government officials, basic concepts of freedom, democracy and equality apply. However, in the private sphere, which includes almost all economic activity and other major decisions that shape our society and affect our lives, we insure no democracy or equality, only the freedom to buy and sell. Fundamental social issues, such as the use of resources, investment, the energy problem and the distribution of goods and services, are all left to private—mainly corporate—decision makers.

Maintenance of this separation in contemporary society may well render the notion of civil liberties meaningless; and in this sense, intelligence activities of the nuclear industry constitute just one aspect of the broader problem of establishing limits on corporate activities, akin to more familiar issues like toxic wastes, workplace safety and runaway shops. While the present administration and political mood tend to identify unrestricted corporate power with the public interest and basic democratic principles, their fundamental incompatability will emerge with painful clarity as the "unleashing" of the corporation proves economically, environmentally, and socially disastrous. What will be needed, if the law is to play a progressive role, is a leap similar to the recognition many decades ago that the concept

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103. The "bad tendency" doctrine regarded as constitutionally unprotected any expression of words that might, in however remote or indirect a fashion, contribute to some future harm. The "constructive intent" doctrine ascribed to the spearker or writer the intent to cause such remote consequences. *See* Z. CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1941); L. WHIPPLE, THE STORY OF CIVIL LIBERTY IN THE UNITED STATES (1927); Rabban, *The First Amendment in its Forgotten Years,* 90 YALE L.J. 514 (1981); Kairys, *supra* note 98.

104. *See supra* note 2.

105. 419 U.S. 345 (1974). *See supra* text accompanying notes 8-15.

of civil liberty is meaningless unless it restricts the states as well as the federal government.[106]

III

CONCLUSION

Corporate and government agencies have engaged in a wide variety of intelligence activities aimed at opponents of nuclear power. Because traditional legal thinking distinguishes between the public sphere, in which constitutional limitations apply, and the private sphere, in which no significant constitutional or other limitations apply, intelligence activities carried out by private individuals or organizations remain largely unchecked by the law. Governmental intelligence activities in theory are subject to constitutional limitations; in practice, victims of such activities have no adequate legal remedy. Application of the traditional balancing approach used to assess the legality of conduct infringing civil liberties may very well result in a finding that the overwhelming need for nuclear security outweighs and justifies the infringement. If this justification gains judicial or societal acceptance, because of real, imagined or manipulated perceptions, we may face a fundamental choice between nuclear power and civil liberties. Instead of accepting nuclear power as a given, and attempting, perhaps vainly, to minimize its effect on civil liberties, we should recognize that it is nuclear power, not liberty, that poses the danger, and we should decide as a society which is more important.

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106. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 567-69 (1978).