

# *Nova Law Review*

---

*Volume 27, Issue 2*

2002

*Article 6*

---

## Accounting for the Slow Growth of American Privacy Law

Rodney A. Smolla\*

\*

Copyright ©2002 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <http://nsuworks.nova.edu/nlr>

# Accounting for the Slow Growth of American Privacy Law

Rodney A. Smolla \*

---

## TABLE OF CONTENTS

I.	INTRODUCTION .....	289
II.	ACCOUNTING FOR THE WEAKNESS OF THE FIRST THREE PRIVACY TORTS .....	290
	A. <i>False Light</i> .....	291
	B. <i>Publication of Private Facts</i> .....	296
	C. <i>Intrusion</i> .....	312
III.	WHEN PRIVACY AND PROPERTY CONVERGE .....	316
IV.	CONCLUSION: SOME RESTORATIVE SUGGESTIONS .....	321

## I. INTRODUCTION

American privacy law is surprisingly weak.<sup>1</sup> If privacy law were a stock, its performance over the last century would not be deemed impressive.

---

\* Rod Smolla joined the law faculty at the University of Richmond, T.C. Williams School of Law, in 1998 as the new George E. Allen Professor of Law. He formerly taught at as the Arthur B. Hanson Professor of Law at the College of William and Mary, Marshall-Wythe School of Law. He graduated from Yale in 1975 and Duke Law School in 1978, where he was first in his class. He then served as law clerk to Judge Charles Clark on the United States Court of Appeals for the Fifth Circuit. After practicing law in Chicago, he entered academic life, and taught at DePaul University, University of Illinois, and University of Arkansas law schools before beginning at William and Mary. He is the author of several books, including *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* (St. Martin's Press 1988); three treatises: *Smolla and Nimmer on Freedom of Speech* (West Group, 2 volumes 1996); *Federal Civil Rights Acts* (West Group, 2 volumes 1994); and *Law of Defamation* (West Group 1986 & 2d edition 1999); and co-author of a casebook on constitutional law: *CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM* (with Banks and Braveman, Lexis/Matthew Bender, 4th Edition 2000). His book, *DELIBERATE INTENT: A LAWYER TELLS THE TRUE STORY OF MURDER BY THE BOOK* was published by Crown Publishers in July 1999. His new law school textbook, *THE FIRST AMENDMENT: FREEDOM OF EXPRESSION, REGULATION OF MASS MEDIA, FREEDOM OF RELIGION*, is published by Carolina Academic Press.

1. The phrase "privacy law" is admittedly amorphous, and might be understood to refer to any number of discrete bodies of American law, including the constitutional "right to privacy" reflected in such substantive due process decisions as those protecting personal decisions of issues relating to reproduction and procreation. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing privacy right relating to procreation and use of

It has been a consistently poor achiever, barely keeping up with inflation. I speak here of privacy law in the tort sense, and the four torts that are classically understood to comprise invasion of privacy: 1) false light; 2) publication of private facts; 3) intrusion; and 4) appropriation.<sup>2</sup> Of these four torts, only appropriation (or “the right of publicity”) has been a ripping success for plaintiffs, a genuine high-return stock, and a species of intellectual property, even though appropriation is arguably not a true form of invasion of privacy at all.<sup>3</sup>

Samuel Warren and Louis Brandeis are frequently credited for having launched modern privacy law in their article *The Right to Privacy*.<sup>4</sup> Warren and Brandeis have been critiqued by such estimable scholars as Diane Zimmerman and Harry Kalven, Jr., who have played the requiem for the tort, asking if Warren and Brandeis were wrong.<sup>5</sup> I come not to bury privacy, however, but to praise it, and lament its stunted growth. The ambition of this article is to try to account for the generally anemic performance of privacy law, and in the process to suggest a number of palliatives that might modestly rejuvenate it.

## II. ACCOUNTING FOR THE WEAKNESS OF THE FIRST THREE PRIVACY TORTS

Consider these weaknesses in the first three privacy torts: 1) false light; 2) publication of private facts; and 3) intrusion. First, false light is not much

---

contraceptives); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (affirming “core” of abortion right recognized in *Roe v. Wade*, 410 U.S. 113 (1973), but modifying that right through imposition of “undue burden” standard). In this article, I use the term exclusively to refer to tort law causes of action that purport to protect privacy.

2. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). This four-part taxonomy of privacy law was originally ordained by the tort oracle William Prosser, who first labored to bring structure to privacy law by creating these four categories.

3. See *infra* notes 150–51 and accompanying text. Throughout this article, I frequently engage in a kind of legal anthropomorphizing—that is, I treat the “law of privacy” or the cause of action for “false light” or the “law of defamation” as if it were human, with ambition for “success.” Of course this is a fiction, and I employ it merely as an economical and vivid narrative device.

4. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

5. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 351 (1983) (citing Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)).

more than defamation warmed-over. Second, publication of private facts is a powerful cause of action constantly trumped by a more powerful First Amendment. Lastly, intrusion, while a reasonably strong cause of action for plaintiffs when establishing liability, usually proves paltry when it comes to awarding damages.

#### A. *False Light*

False light invasion of privacy, which consists of placing someone “in a false light” in the public eye, has always occupied an inherently ambivalent niche in privacy law, primarily because it is so difficult to distinguish the false light tort from good old-fashioned defamation. Many of the elements of false light and defamation overlap.<sup>6</sup> While defamation requires that the defendant publish a “false statement of fact” about the plaintiff; false light uses a somewhat mushier terminology. However, both causes of action require that a palpable falsehood be published, something capable of proof or disproof, and something more than mere epithet, hyperbole, or opinion.<sup>7</sup> A plaintiff’s lawyer is naturally drawn to the false light tort when the case involves a “false” portrayal of a client that has an impressionistic character to it—a portrayal in which it is difficult to nail down a hard explicit “false statement of fact” upon which to rest a defamation claim.<sup>8</sup> Yet the false light tort is not properly understood as a reserve tank for defamation suits that have run out of gas. The requirement of a false statement of fact in defamation law is not merely part of the common law—it is now of

---

6. RESTATEMENT (SECOND) OF TORTS § 652E (1977). The RESTATEMENT (SECOND) OF TORTS define this tort as follows:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

*Id.*

7. RODNEY A. SMOLLA, LAW OF DEFAMATION § 10:10, at 10–15 (2d ed. 2002) [hereinafter SMOLLA I]. See *Goodrich v. Waterbury Republican-Am., Inc.*, 448 A.2d 1317 (Conn. 1982).

8. This tactic is sometimes successful. See *Moore v. Sun Publ’g Corp.*, 881 P.2d 735 (N.M. Ct. App. 1994) (holding that false light claim could be maintained even though statements at issue were not actionable in defamation because they were opinion). However, for reasons stated in the text above, it is my opinion that viewed objectively, holdings, such as the one in *Moore*, are unsound. *Id.*

constitutional dimension.<sup>9</sup> A change of terminology ought not result in a change of constitutional principle. In addition, a plaintiff ought not be able to recover for a statement that would be deemed non-actionable in a defamation suit because it is merely opinion, hyperbole, or insult, by merely re-casting the cause of action as false light invasion of privacy. This must be the rule if the First Amendment doctrine requiring a falsehood is to have any genuine meaning.<sup>10</sup>

So too, the fault requirements now imposed on defamation law by First Amendment holdings must be understood to apply with *at least* equivalent vigor when the suit is cast as false light.<sup>11</sup> Again, this is a forced move, for if we do not calibrate fault rules for false light invasion of privacy with at least the same rigor that we require for defamation, false light would become a pleading loophole allowing the facile avoidance of constitutional imperatives.

Thus, if the false light tort requires fault and falsehood in the defamation sense, what real good is it? How is it not entirely duplicative of defamation law, and thus superfluous? From a plaintiff's perspective, there are three potential strategic advantages to invoking the false light tort as an alternative or add-on to a defamation claim. Admittedly, these advantages may make the tort marginally more attractive than a defamation claim in some instances, but none of them are enormously impressive.

First, returning to the problem of falsehood, an enterprising plaintiff's lawyer may find the looser terminology of false light more attractive than defamation's stern insistence on a "false statement of fact," even if the

9. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

10. See SMOLLA I, *supra* note 7, at 10–15.

11. The fault rules required for false light are at least as demanding as those applicable to defamation. See *Chic Magazine, Inc. v. Braun*, 469 U.S. 883 (1984); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984); *Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984); *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285 (D.D.C. 1984); *Cantrell v. Am. Broad. Cos.*, 529 F. Supp. 746 (N.D. Ill. 1981) [hereinafter *Cantrell I*]; *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70 (W. Va. 1983). See also, Michael P. Lehmann, *Triangulating the Limits on the Tort of Invasion of Privacy: The Development of the Remedy in Light of the Expansion of Constitutional Privilege*, 3 HASTINGS CONST. L.Q. 543, 593 (1976); Jerry J. Phillips, *Defamation, Invasion of Privacy and the Constitutional Standard of Care*, 16 SANTA CLARA L. REV. 77, 99 (1975). There is also substantial authority for the proposition that fault rules for false light claims exceed those for defamation, in that all false light claims must be supported by proof of actual malice, whether or not the plaintiff is a public figure or public official. See *Little Rock Newspapers, Inc. v. Dodrill*, 444 U.S. 1076 (1980); *Dodrill v. Ark. Democrat Co.*, 590 S.W.2d 840 (Ark. 1979); *Goodrich v. Waterbury Republican-Am., Inc.*, 448 A.2d 1317 (Conn. 1982); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981).

formal doctrine for the two torts, and the jury instructions, are identical. It just *feels* smoother to say that the defendant has placed my client in a “false light in the public eye” than to say that the defendant has made “false factual statements” about my client. Many modern defamation cases are grounded not in the literal falsehood of some publication or broadcast, but in what is implied, or communicated “between the lines.” This is a vexing and difficult problem that constantly appears in defamation cases, and plaintiffs frequently fight desperately to attempt to convince a court to allow a case to go to a jury based on alleged innuendo and implication.<sup>12</sup> This whole battle simply has a more inviting patina when the language is “false light.” At best, however, this is but a small tactical advantage in some cases, more a matter of nuance and atmosphere rather than real substance.

A second possible advantage to the false light tort is that the damages available to a plaintiff are not tied to loss of reputation, the traditional lodestar of defamation law, but rather to the internal emotional and mental

---

12. Commonly, defamatory statements are communicated not in the literal language that is spoken or written, but implied or insinuated. When this happens, the legal question is whether a suit may be maintained on the basis of what has been implied. The issues surrounding defamation through implication have, for several years, been among the most hotly contested in defamation litigation across the United States. Some jurisdictions have shown substantial hostility to defamation by implication, while others have treated it as a natural and legitimate way in which to construe what is actually communicated by a statement, and are quite permissive in allowing plaintiffs to base cases on what statements imply. The issue of defamation through implication is closely linked to another common-law concept, the term “innuendo,” which has both a highly technical meaning referring to common-law pleading rules, and a more general common sense meaning referring to the insinuation or implication carried by a literal statement. *See Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 499 n.7 (3d Cir. 1978),

The term “innuendo” has two possible meanings in the law of defamation, one of which is technical and the other of which is not. The narrow, technical meaning of the term is associated with the common law system of pleading, under which an “innuendo” was an explanation of the defamatory meaning of a communication in light of extrinsic circumstances, the existence of which was averred to in a prefatory statement called an “inducement.” That is not the meaning of the word as employed in this opinion. The second, and here the relevant, meaning of “innuendo” is that which it has in common language, namely, the insinuation or implication which arises from the literal language used in a statement or set of comments.

*Id.* (internal citation omitted). *See also Dunlap v. Philadelphia Newspapers, Inc.*, 448 A.2d 6, 15 (Pa. Super. Ct. 1982) (holding “[a] publisher is, of course, liable for the *implications* of what he has said or written, not merely the specific, literal statements made.”). The court stated “we are free to adopt, and have concluded that we should adopt, the approach of sister states, and hold that the literal accuracy of separate statements will not render a communication ‘true’ where, as here, the implication of the communication as a whole was false.” *Id.*

harm caused to the plaintiff by being placed in a false light.<sup>13</sup> Whereas defamation law is classically understood to compensate a plaintiff primarily for a form of “external” injury, to an “asset” we call “reputation,” privacy law is classically understood to look inward, inside the person, making the plaintiff whole for damage to the soul.<sup>14</sup>

Again, however, there is less here than meets the eye. Despite the traditional understanding that defamation cases primarily exist to compensate for external reputational injury, both the formal doctrines and the real world practices in fact are quite porous and permissive in allowing defamation plaintiffs to recover for what are largely internal emotional injuries. Take first, the magnanimous First Amendment definition of “actual harm,” established in *Gertz v. Robert Welch, Inc.*<sup>15</sup> Take second, the holding in *Time, Inc. v. Firestone*,<sup>16</sup> that there is *no* constitutional requirement that reputation injury be *an element* of a claim for defamation; a holding that effectively renders the First Amendment irrelevant on the “external” versus “internal” damages question.<sup>17</sup> Take third, that in practice, we have always dealt largely in euphemism when proving the monetary harm that flows from an injured reputation. “Special damages,” a term-of-art in defamation law, is construed extremely narrowly, requiring evidence of actual pecuniary loss in certain specialized circumstances.<sup>18</sup> The general practice in defamation cases as to how a plaintiff establishes his or her “general damages” for injury to reputation is that a plaintiff introduces evidence that his or her reputation has been tarnished, and the jury is then left to deduce a sum of money that will fairly compensate the plaintiff.<sup>19</sup> In short, the damages question is more

13. *Themo v. New England Newspaper Publ'g Co.*, 27 N.E.2d 753, 755 (Mass. 1940).

14. *See id.* (holding “[t]he fundamental difference between a right to privacy and a right to freedom from defamation is that the former directly concerns one’s own peace of mind, while the latter concerns primarily one’s reputation. . . .”)

15. 418 U.S. 323, 350 (1974) (stating “the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.”).

16. 424 U.S. 448 (1976) [hereinafter *Time I*].

17. *Id.* at 460 (noting that “Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff’s reputation,” and holding that under the Constitution, states are free to predicate defamation awards entirely on internal anguish or humiliation).

18. *See, e.g.*, *Tacket v. Delco Remy*, 959 F.2d 650 (7th Cir. 1992), *rev’d on the other grounds by Tacket v. GMC, Delco Remy Div.*, 93 F.3d 332 (7th Cir. 1996).

19. This is not to say that an experienced plaintiff’s lawyer will not rely on much more than such self-serving evidence from family or friends. John Walsh, one of the nation’s

an academic point than a real one, and does nothing to particularly distinguish false light.

The most important doctrinal difference between false light and defamation is that the falsehood in false light need not be the kind of falsehood that necessarily damages a plaintiff's reputation. This is related to the damages issue, but different from it, in that it goes to the substance of what is said about the plaintiff. In theory, a plaintiff may recover in a false light case even when the false things said about the plaintiff make the plaintiff look *good*, if the falsehood would nonetheless be highly offensive to a reasonable person.<sup>20</sup> This, of course, corresponds to the orthodoxy that the gravamen of the false light action is "internal" damage to the plaintiff rather than "external" injury to the plaintiff's standing in the community.<sup>21</sup> A plaintiff may thus be deeply offended and anguished by a falsehood that to others, particularly those who do not know the plaintiff personally, seems either positive or at worst, neutral. To the extent that this is the only genuine "value-added" by the false light tort, however, it is not much, simply because there does not appear to be that many cases with which what is said about a plaintiff is positive or neutral in terms of reputation, and is still highly offensive. It can happen, but it does not happen often.<sup>22</sup>

Indeed, it does not seem that this kind of recovery for a portrayal that is "offensive" but not reputation-injuring is truly an "invasion of privacy" in the ordinary sense of that term. It is more a form of infliction of emotional

---

premier plaintiff's lawyers, thus cautions against use of such informal anecdotal evidence. See SMOLLA I, *supra* note 7, at 9–17.

20. Two false light cases that have reached the United States Supreme Court seem to fit this paradigm. In *Time, Inc. v. Hill*, the Hill family had been held hostage for nineteen hours by three escaped convicts. 385 U.S. 374, 378 (1967) [hereinafter *Time, II*]. The abductors treated the Hills civilly. *Id.* A novel was written about the event, followed by a Broadway play. *Id.* *Life* magazine did a pictorial article on the play, which it said was inspired by the Hill family episode. *Id.* The article and the accompanying pictures (from the play) portrayed the convicts as violent and abusive toward the Hills and the Hills as bravely facing up to them. *Id.* at 374. There were fictionalizations and errors in the play, but it was not a particularly negative portrayal of the Hills. *Time, II*, 385 U.S. at 374. In *Cantrell v. Forest City Publ'g Co.*, the plaintiff's husband had been killed in a bridge collapse disaster. 419 U.S. 245, 247 (1974) [hereinafter *Cantrell II*]. A newspaper reporter had visited her home, but had not actually seen her. *Id.* at 248. The reporter painted her as proudly and stoically bearing her grief in the face of abject poverty. *Id.* By manufacturing the emotions and conditions of her life the story placed her in a false light. *Id.* at 245.

21. See *supra* notes 13–16 and accompanying text.

22. Some courts have rejected the false light cause of action entirely, finding no cogent policy reasons for adding a tort to the books that appears so largely to overlap defamation. See *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405 (N.C. 1984).



distress.<sup>23</sup> False light does not involve an “invasive” action by a defendant, nor does it reveal information or activity that our society commonly regards as intimate, confidential, or personal. Instead, it is a tort that provides a remedy for the anger, resentment, and outrage that a plaintiff may experience for having been lied about, or “portrayed falsely;” whether the falsehood lowered the esteem in which the plaintiff was held in the eyes of others. Conceptually, the false light tort is a little more than a suit for infliction of emotional distress plus the element of falsity. Seen this way, false light is simply too close to the torts of defamation and infliction of emotional distress to ever amount to much, and does very little to advance any strong social interests in the protection of our core concepts of privacy. William Prosser once expressed the fear that the false light tort was “capable of swallowing up and engulfing the whole law of public defamation.”<sup>24</sup> In effect, the reverse has occurred; false light has not done the swallowing, but has itself been devoured.

#### B. *Publication of Private Facts*

In contrast to false light, the tort of publication of private facts is in some respects the quintessential cause of action for invasion of privacy. This tort truly deals with the core. Here the weakness comes not from the tort itself, which is strong, but from the defenses that are arrayed against it, which are stronger. The tort is classically designed to give a plaintiff a cause of action for the public revelation of some fact about the plaintiff that, in the eyes of the community, is simply nobody else’s business.<sup>25</sup>

One might think that this tort would be a virtual gold mine for a plaintiff and his or her lawyer, since a large part of our modern media seems to exist primarily for the purpose of revealing private facts about people. Yet, it is not so. The cases in which plaintiffs have succeeded with this tort are not legion, but rare, and there are many notorious examples of courts refusing to allow recovery for the revelation of facts that most reasonable people would regard as private.

For plaintiffs there are two main barriers. First, one of the elements of the tort is that the facts disclosed must be “private” and not “public.”<sup>26</sup> There

---

23. See *infra* notes 49–51 and accompanying text.

24. Prosser, *supra* note 2, at 401.

25. See *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762 (Ct. App. 1983) (sustaining award of \$250,000 for newspaper story revealing that the plaintiff, a female college student body president, was a transsexual).

26. See RESTATEMENT (SECOND) OF TORTS § 652D (1977).

can be a circularity here. In any publication of private facts scenario, virtually by definition some ostensibly private fact has leaked into the general culture. This usually means that someone other than the plaintiff already knew about it. If enough other people already knew about the putatively “private” fact, a court may treat the fact as no longer private but public, and the cause of action is cut off at the knees. Perhaps the best example of this is the case of Oliver Sipple, the off-duty police officer, “who was in the crowd at Union Square, San Francisco” the day that “Sara Jane Moore [tried] to assassinate President Gerald R. Ford” with a pistol.<sup>27</sup> Sipple spotted Moore drawing her gun, and heroically grabbed her arm, probably causing her to miss, and probably saving the President.<sup>28</sup> In the media coverage about Sipple’s valiant act that followed, it was revealed that he was gay.<sup>29</sup> Sipple lost his invasion of privacy suit, and one of the grounds invoked by the appellate court was that too many people already knew Sipple was gay.<sup>30</sup> His modest visibility and activism in the gay community was deemed sufficiently public to render his sexual orientation a fact about him that could no longer be characterized as “private.”<sup>31</sup>

More formidably, however, the tort of public disclosure of private facts is frustrated by the “newsworthiness” defense; a defense usually deemed to be both incorporated in common-law doctrine and mandated by the First Amendment,<sup>32</sup> and a defense that tends to present plaintiffs with colossal difficulties.<sup>33</sup> We seem to live in an increasingly tabloid culture, and much of what is revealed in modern media about the private lives of people is offensive to many in the community; offending our collective sense of

---

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, 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.

*Id.*

27. *Sipple v. Chronicle Publ’g Co.*, 201 Cal. Rptr. 665, 666 (Ct. App. 1984).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *See Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

33. *See Geoff Dendy, Note, The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 148 (1997). “But the general case is that many courts provide media with the extraordinarily broad newsworthiness defense, leaving the public disclosure tort effectively impotent.” *Id.*

decency.<sup>34</sup> But this does not mean the revelation is not newsworthy.<sup>35</sup> Thus, one constantly encounters causes of action for publication of private facts that might otherwise be deemed worthy ingloriously vanquished by the newsworthiness defense.<sup>36</sup>

It is intriguing to speculate on what drives the strength of the “newsworthiness” defense, and the concomitant weakness of the publication of private facts tort. Privacy law has suffered from a peculiarly frustrating experience with the “newsworthiness” concept. The frustration is especially fascinating when compared to the very different history of defamation law, which also has a “newsworthiness” doctrine of sorts, though it goes by a different name.<sup>37</sup> Defamation law has been strikingly successful in developing its version of the “newsworthiness” doctrine, evolving relatively objective and workable doctrinal contours through a rich body of case law. Why has privacy law failed where defamation law has not? Why is it that in defamation law, courts appear perfectly comfortable evolving standards for defining such factors as what is or is not a “public controversy” and the role the plaintiff has or has not played in the controversy, while courts appear very reluctant to engage in a similar second-guessing of journalistic judgment in privacy cases? Why is the “newsworthiness” pill easier for courts to swallow in defamation cases than in privacy cases—that is, why are courts willing to embark on “objective” definitions of “newsworthiness” that may often second-guess journalistic judgment when it comes to defamation, but not when it comes to privacy?

In defamation law, the “newsworthiness” notion is tied to fault and falsity. In privacy law, it is not. These distinctions have made all the difference. In defamation, the question of whether the case involves “public” or “private” matters enters formal legal doctrine in at least three

34. See Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185 (1979).

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

36. See, e.g., *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir. 1989); *Gilbert v. Med. Econs. Co.*, 665 F.2d 305 (10th Cir. 1981); *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980); *Pasadena Star-News v. Superior Court*, 249 Cal. Rptr. 729 (Ct. App. 1988); *Sipple v. Chronicle Publ’g Co.*, 201 Cal. Rptr. 655 (Ct. App. 1984); *McNutt v. N. M. State Tribune Co.*, 538 P.2d 804 (N.M. Ct. App. 1975); *Freihofer v. Hearst Corp.*, 480 N.E.2d 349 (N.Y. 1985); *Anderson v. Fisher Broad. Cos.*, 712 P.2d 803 (Or. 1986).

37. See *infra* notes 149–51 and accompanying text.

different places. At the threshold, defamation law generally requires that the allegedly defamatory speech be on issues of “public concern” to qualify for the speaker any heightened First Amendment protection at all.<sup>38</sup> Defamation law then divides between public plaintiffs and private plaintiffs, requiring that the “actual malice” standard of knowing or reckless falsity be satisfied for public official and public figure plaintiffs, but permitting private plaintiffs to recover on the lesser showing of mere negligence.<sup>39</sup> In turn, there are two types of public figures, the all-purpose public figure, deemed so famous that he or she is treated as public for all purposes; and the far more common “limited public figure,” treated as “public” only for purposes of speech germane to that plaintiff’s participation in a “public controversy.”<sup>40</sup> There is a substantial body of case law defining the term “public

---

38. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). In *Dun & Bradstreet*, the credit reporting agency, Dun & Bradstreet, issued an inaccurate credit report about the plaintiff, Greenmoss Builders, a residential and commercial building contractor. *Id.* at 751. The Supreme Court, in a plurality opinion by Justice Powell, held that the First Amendment damages rules applicable to defamation actions involving issues of public concern did not apply when the defamation arose in the context of speech not on issues of public concern. *Id.* at 762.

39. *Id.* at 766. Fault standards in modern defamation law are largely dictated by First Amendment doctrines emanating from the Supreme Court’s landmark 1964 decision, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) [hereinafter *New York Times I*]. In the *New York Times I*, the Court held that in defamation actions brought by public officials for defamatory speech germane to the official’s performance in or fitness for office, the public official plaintiff must demonstrate that the defendant published the defamation with “actual malice,” defined as knowledge of falsity or reckless disregard for truth or falsity. *Id.* at 279–80. In a series of decisions following *New York Times I* decision the constitutional rules evolved to include “public figures” as among the plaintiffs who must demonstrate actual malice. The capstone of this evolution came in the 1974 decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The case involved a libel action brought by Elmer Gertz, a well-known Chicago attorney and law professor, against Robert Welch, Inc., the publisher of the monthly magazine, *American Opinion*, an organizer of the John Birch Society. *Id.* at 325. The defendant claimed that Gertz was a public figure and that the magazine was thus entitled to the protection of the *New York Times* actual malice standard. *Id.* The Supreme Court disagreed, holding that Gertz was a private figure, and further holding that in private figure cases, the actual malice standard was not required by the First Amendment. *Id.* The Court in *Gertz* left it to state courts to develop for themselves the proper standard of liability in suits brought by private plaintiffs, so long as they did not dip below the floor requirement of negligence. *Id.*

40. *Gertz*, 418 U.S. at 345.

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those

controversy,” and a substantial body of case law defining the relationship a plaintiff must have to such a “public controversy” in order to be deemed a “limited public figure” in a defamation suit.<sup>41</sup> There are, of course, many close cases, many fact patterns on the cusp, in which deciding whether there is a “public controversy” at stake, or whether the plaintiff may be fairly said to have voluntarily entered that controversy, is an extremely close call.<sup>42</sup> But a close call is not the same as bad law. The fact that there may be frequent cases close to a line does not mean that the existence of the line is illegitimate. While I do not agree with every decision by the courts, I do believe time has proven that the basic legal standards which have evolved are coherent and functional.

A fundamental axiom of modern defamation law is that the media cannot “bootstrap” itself into the higher level of First Amendment protection granted in public figure cases by *itself* turning the plaintiff into a public figure by focusing attention on the plaintiff.<sup>43</sup> The plaintiff must *already* be

---

classified as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

*Id.*

41. See generally SMOLLA I, *supra* note 7, at §§ 2:15–2:77.

42. This sometimes seems exasperating. See *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976) (stating that the demarcation between public and private figures “is much like trying to nail a jellyfish to the wall.”).

43. *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157, 162–64 (1979). In *Wolston*, the Supreme Court held that the plaintiff, Wolston, who had been brought before a grand jury investigation in connection with an espionage inquiry, was a private figure. *Id.* at 161. Wolston ignored a subpoena requiring him to appear before a grand jury in 1958, and subsequently pled guilty to a charge of criminal contempt. *Id.* at 162–63. Wolston’s episode with the grand jury investigation and his subsequent conviction for criminal contempt resulted in fifteen newspaper articles in New York and Washington, D.C. *Id.* at 163. Emphasizing that Wolston had not invited controversy by entering into the public arena to influence a public debate, the Supreme Court held Wolston to be a private figure. *Id.*; see also *Outlet Co. v. Int’l Sec. Group, Inc.*, 693 S.W.2d 621, 626 (Tex. App. 1985) (stating “[n]or can we agree with the broadcaster’s contention that Medlin was shown to be a public figure. There is no evidence that he assumed any role of special prominence in society. . . .”) Similarly, in *Time, Inc. I*, the Supreme Court ruled that Mary Alice Firestone, wife of Russell Firestone, a member of the wealthy Firestone family, was a private figure, despite being embroiled in bitter and highly publicized divorce litigation. 424 U.S. at 453–57. The Court reasoned that she had done nothing to invite public controversy other than to participate in the litigation, which was not enough to bring her within the definition of a public figure. *Id.* at 453–54. Firestone’s prominence in what the Court depicted as “the sporting set” did not qualify her as a person of “especial prominence in the affairs of society.” *Id.* at 453, 487. Even though Mrs. Firestone initiated litigation in a public court of law, the Court held that her action was not a purposeful insertion into a matter of public controversy, since “state law compelled her to

a public figure when the allegedly defamatory statement is made, a public figure by virtue of *voluntary* entry into a *pre-existing* public controversy.<sup>44</sup>

This is solid law in defamation cases.<sup>45</sup> Yet such bootstrapping often appears to happen *as a matter of course* in privacy cases. In a genuine

resort to legal process in order to obtain lawful release from the bonds of matrimony.” *Id.* at 454. Although the Court conceded that some participants in some litigation may be legitimate public figures, either generally or for the limited purpose of press coverage concerning the litigation, the majority would regard Mary Alice Firestone as “drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others.” *Id.* at 457.

44. Thus in *Hutchinson v. Proxmire*, the Supreme Court held that an academic who had received substantial federal grants for research was a private figure for purposes of criticism of those grants by a United States Senator, William Proxmire. 443 U.S. 111, 136 (1979). The plaintiff, Ronald Hutchinson, was the Director of Research at Kalamazoo State Mental Hospital, in Michigan, who had received more than \$500,000 in federal funds for scientific research. *Id.* at 114. Despite his position and the substantial federal funding his work received, he was deemed a private figure by the Supreme Court. *Id.* at 134. The Supreme Court found that Hutchinson was not a public figure, squarely holding that Senator Proxmire could not turn Hutchinson into a public figure by virtue of Proxmire’s own allegations, because that would permit a defendant to create a public figure defense through the defendant’s own conduct. *Id.* at 135–36. Echoing its holding in *Wolston*, the Court again emphasized that Hutchinson did not thrust himself into the public eye “to influence others.” *Id.* at 135.

45. See, e.g., *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136–37 (2d Cir.1984). The Court in *Lerman* adopted a four-part limited public-figure test, requiring defendant to prove plaintiff:

- (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.

*Id.*; see also, *Fitzgerald v. Penthouse Int’l, Ltd.*, 691 F.2d 666, 668 (4th Cir.1982); *Durham v. Cannan Communications, Inc.*, 645 S.W.2d 845, 850 (Tex. App. 1982). The Court in *Fitzgerald* adopted a five-part limited public figure test, requiring defendant to prove:

- (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the time of the alleged defamation.

*Fitzgerald*, 691 F.2d at 668.

The U.S. Supreme Court has indicated that we should not consider post-defamation press coverage in determining whether or not an individual is a public figure. We think this logical. To do otherwise would be to permit the press to turn a person into a public figure by publicizing the defamation itself. We, therefore, cannot consider this story in determining whether or not appellant was a public figure.

publication of private facts scenario, the fact that has been revealed about the plaintiff was by definition not previously revealed to the public.<sup>46</sup> The plaintiff cannot be said to have voluntarily encouraged the fact's release—to the contrary, the plaintiff has by hypothesis guarded against its general disclosure.<sup>47</sup> Notwithstanding the fact that the plaintiff may not have sought attention, and may not have invited media scrutiny, courts at times appear willing to treat the fact as “newsworthy.” Indeed, the mere fact that the material *has* appeared in a media publication often seems to go a long way, if not all the way, in establishing that the material is newsworthy.<sup>48</sup>

The operative impact of the “newsworthiness” judgment in defamation law (a judgment that goes under the formal doctrinal label of “public figure” status) is more limited than in privacy law. In defamation cases, the decision to characterize the plaintiff as “public” (and the subject of the defamation, in that sense, “newsworthy”) does not mean the plaintiff loses the case; it merely means the defendant is saddled with the burden of establishing a higher level of fault.<sup>49</sup> In privacy cases, in contrast, the judgment is all or nothing. If the material is newsworthy, the plaintiff loses.

If privacy law were to “mature,” if you will, on lines more akin to the structure of defamation law, the newsworthiness judgment in privacy cases might become more nuanced, and its impact on the cause of action less draconian. In defamation law, we routinely draw a distinction between “matters of public interest,” and matters “the public is interested in.” Precisely the same judgment is appropriate in privacy law. That a fact that is

*Durham*, 645 S.W. 2d at 850, n.\* (citation omitted).

46. See *supra* note 25 and accompanying text.

47. Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change: 1890–1990*, 74 CAL. L. REV. 789 (1986); RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 117–50 (1992).

48. *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665, 670 (Ct. App. 1984). The RESTATEMENT (SECOND) OF TORTS § 652D, comment f states,

[t]here are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become “news.” . . . These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them. As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private.

§652D cmt.f.

49. *New York Times I*, 376 U.S. at 279–80.

revealed is “true” and that its publication might be “of interest” to the public ought not mean that the fact is truly about a matter of “public interest” or “public concern” in the First Amendment sense.<sup>50</sup> The publication of private facts tort cannot survive if this is to be the rule.

If the private facts tort is to survive, and certainly if it is to flourish, it may thus be helpful to borrow from defamation concepts. Fault plays a role in defamation. Fault, however, is harder to “plug in” to the privacy tort. The reason is that fault in defamation is always tied to a “defect” in the information—its falsity. Fault in this sense is coherent, as it is in a products liability case. There is something wrong with what the defendant has produced—it is factually incorrect—and we can thus talk intelligently about the defendant’s level of culpability in relation to that error: was it entirely innocent, was it negligence, was it the result of reckless indifference to truth or falsity, or was it knowingly false? These are intelligible gradations on a rational spectrum.

In a privacy case, the information released is not “defective” in the same sense. The information is accurate. The formal definition of the tort tries nonetheless to capture some sense of “fault” in the requirement that liability is predicated on a revelation that would be “highly offensive” to a reasonable person. Fault calibrated in terms of *offensiveness*, however, is inherently in greater tension with central First Amendment principles than fault calibrated in terms of *falsity*. Offensiveness has an inherently subjective quality. In most of First Amendment law, the mere fact that speech is offensive to most people in the community does not justify its abridgment.<sup>51</sup> The one glaring exception is obscenity, in which the

---

50. See *Barbouti v. Hearst Corp.*, 927 S.W.2d 37, 48 (Tex. App. 1996).

A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. . . . [E]ssentially private concerns or disagreements do not become public controversies simply because they attract attention.

*Einhorn v. LaChance*, 823 S.W.2d 405, 411–12 (Tex. App. 1992).

51. The central principle animating the First Amendment is that the government may not censor speech on the basis of viewpoint. *Texas v. Johnson*, 491 U.S. 397, 406 (1989). Even expression as offensive and disturbing to most citizens as the burning of the American flag is protected under the Constitution. *Id.* at 414. The Court stated, “[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Id.*; see *United States v. Eichman*, 496 U.S. 310 (1990) (same). The same principle applies to such reprehensible expression as hate speech. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down the conviction for cross-burning under the hate speech law); *Black v. Commonwealth*, 553 S.E.2d 738 (Va. 2001) (striking down the conviction of Ku Klux Klan leader under the state anti-cross-burning law).



requirement that the material be “patently offensive” to local community standards is an element of the current First Amendment standard.<sup>52</sup> Indeed, it was the fact that the emotional distress tort was tied to such subjective notions of “offensiveness” that led the Supreme Court in the *Hustler* case to strike down its application in Jerry Falwell’s claim against Larry Flynt and *Hustler Magazine*.<sup>53</sup>

There are numerous legal and cultural forces at work here. First, there is the ingrained skepticism in our constitutional tradition for permitting the imposition of any civil or criminal liability for the mere publication of *truthful* facts that are lawfully obtained.<sup>54</sup> Second, there is a reflexive wariness in our constitutional tradition of any regime that permits government actors to second-guess the editorial judgment of journalists or other speakers as to what is or is not worthy of being said.<sup>55</sup> Third, there is strong *cultural* ambivalence about the revelation of private facts, and ambivalence that works very powerfully to differentiate the private facts tort from the

52. See *Miller v. California*, 413 U.S. 15 (1973).

53. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988); see also Paul A. LeBel, *Emotional Distress, the First Amendment, and "This Kind of Speech": A Heretical Perspective on Hustler Magazine v. Falwell*, 60 U. COLO. L. REV. 315 (1989); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990); RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* (Illini Books ed., 1990) (1988) [hereinafter SMOLLA II].

54. See, e.g., *Butterworth v. Smith*, 494 U.S. 624 (1990) (refusing to enforce the traditional veil of secrecy surrounding grand jury proceedings against a reporter who wished to disclose the substance of his own testimony after the grand jury had terminated, holding the restriction inconsistent with the First Amendment principle protecting disclosure of truthful information); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding unconstitutional the imposition of liability against a newspaper for publishing the name of a rape victim in contravention of a Florida statute prohibiting such publication in circumstances in which a police department inadvertently released the victim’s name); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 104 (1979) (finding unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender, where the newspapers obtained the name of the alleged juvenile assailant from witnesses, the police, and a local prosecutor, stating that “[t]he magnitude of the State’s interest in this statute is not sufficient to justify application of a criminal penalty. . . .”); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (overturning criminal sanctions against newspaper for publishing information from confidential judicial disciplinary proceedings leaked to the paper); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (holding unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape-murder victim obtained from the courthouse records).

55. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

defamation tort.<sup>56</sup> Defamation involves the publication of falsehoods. The private facts tort involves the publication of truths. Everybody dislikes a liar. The opprobrium that attaches to bearing false witness against one's neighbor is of biblical stature, a moral proposition one is taught from childhood.

The social opprobrium that attaches to spreading *true* information about others, even if the information is maligned as "dirt," is far less intense than the social opprobrium that attaches to spreading lies. This is because almost everybody *does* gossip. Some gossip more, some gossip less, but only a few exceptionally saintly or reclusive souls do not gossip at all. Gossip is the junk food of knowledge, a guilty indulgence. Most of us practice it as much as we condemn it. Indeed, trafficking in gossip is considered gainful employment that may be honorably pursued as a profession. Most newspapers publish gossip columnists. There are no newspapers that, to my knowledge, publish libel columnists.

These factors have conspired to severely stunt the growth of the publication of private facts tort. The Supreme Court's latest foray into privacy, in *Bartnicki v. Vopper*,<sup>57</sup> is a prime example. While *Bartnicki* dealt with the revelation of conversations obtained by eavesdropping on a cellular phone conversation in violation of electronic eavesdropping statutes,<sup>58</sup> the case applies well to common law invasion of privacy suits. The Court, in *Bartnicki*, ruled that various state and federal laws making it illegal to disclose material acquired through the illegal interception of cellular phone messages are unconstitutional; at least when those laws are applied against defendants who do not themselves engage in the acts of interception, who receive the material from anonymous sources, *and* when the subject-matter of the intercepted conversations are deemed to be "matter[s] of public concern."<sup>59</sup>

The case involved a statute passed by Congress in 1968, Title III of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>60</sup> The statute made illegal not only the interception of electronic communications, but also subsequent disclosure or use of the contents of the communication by any

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

57. 532 U.S. 514, 514 (2001).

58. *Id.*

59. *Id.* at 535.

60. 18 U.S.C. § 2510 *et seq.*

person knowing or having reason to know that the communication was obtained illegally.<sup>61</sup> The law also created a civil action, essentially a statutory tort claim, against any person who intentionally violated the Act.<sup>62</sup> More than forty states,<sup>63</sup> including Pennsylvania<sup>64</sup> (where *Bartnicki* arose),

---

61. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, provides in pertinent part that it is a violation of law when any person:

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection.

*Id.*

62. 18 U.S.C. § 2520(a). In such a suit the plaintiff may obtain equitable or declaratory relief, damages (calculated as the greater of actual damages or specified statutory damages), punitive damages, and attorney's fees and costs. 18 U.S.C. §§ 2520(b), (c).

63. Depending on exactly what statutes one counts, as many as forty-four states prohibited interception and disclosure of electronic communications in some circumstances, in statutory provisions that were often patterned closely after Title III. *See, e.g.*, ALA. CODE §§ 13A-11-31, -35 (1994); ALASKA STAT. §§ 42.20.300-330 (Michie 2000); ARIZ. REV. STAT. §§13-3005, -3006(2001); CAL. PENAL CODE §§ 631, 632 (West 1999); COLO. REV. STAT. §18-9-303 (2001); CONN. GEN. STAT. ANN. §§ 53a-187, -188, -189, 54-41r (West 2001); DEL. CODE ANN. tit. 11, § 1336 (1995); GA. CODE ANN. §§ 16-11-62, -66.1 (1999); HAW. REV. STAT. § 803-42 (1993); IDAHO CODE § 18-6702 (Michie 1997 & Supp. 2001); 720 ILL. COMP. STAT. 5/14-2 (1993 & Supp. 2001); IND. CODE ANN. § 35-45-2-4 (Michie 1998); IOWA CODE §§ 808B.2, .8 (1994); KAN. STAT. ANN. § 21-4002 (1995); KY. REV. STAT. ANN. §§ 526.020, .060 (Michie 1998); LA. REV. STAT. ANN. §§ 15:1303, :1312 (West 1992 & Supp. 2002); ME. REV. STAT. ANN. tit. 15, §§ 710, 711 (West 1964 & Supp. 2001); MD. CODE ANN. CTS. & JUD. PROC. § 10-402 (1998); MASS. GEN. LAWS ANN. ch. 272, § 99(c) (West 1990); MICH. COMP. LAWS ANN. §§ 750.539c, .539e, .539h (West 1991 & Supp. 1995); MINN. STAT. ANN. §§ 626A.02, .13 (West 1998); MO. REV. STAT. §§ 542.402, .418 (1996); MONT. CODE ANN. § 45-8-10 (1997); NEB. REV. STAT. §§ 86-702, -707.02 (1995); NEV. REV. STAT. 200.620, .630, .650, .690 (1994); N.H. REV. STAT. ANN. § 570-A:2 (1995); N.J. STAT. ANN. §§ 2A-156A-3, -24 (West 1985 & Supp.2002); N.M. STAT. ANN. §§ 30-12-11, -14 (Michie 1994); N.Y. PENAL LAW §§ 250.05, .25 (McKinney 1999); N.C. GEN. STAT. § 15A-287 (2002); N.D. CENT. CODE § 12.1-15-02 (1997); OHIO REV. CODE ANN. §§ 2933.52, .65 (Anderson 1999); OKLA. STAT. ANN. tit. 13, §§ 176.2-176.5 (West 2002); OR. REV. STAT. §§ 165.540, .543 (2001); 18 PA. CONS. STAT. ANN. §§ 5703, 5725 (West 2000); R.I. GEN. LAWS § 11-35-21 (2000); TENN. CODE ANN. §§ 39-13-601-603 (1997); TEX. PENAL CODE ANN. §§ 16.02, .05 (Vernon 1994); UTAH CODE ANN. §§ 77-23a-4, -11 (1999); VA. CODE ANN. §§ 19.2-62, -69 (Michie 2000); W. VA. CODE §§ 62-1D-3, -12 (2000); WIS. STAT. ANN. § 968.31 (West 1998); WYO. STAT. ANN. §§ 7-3-602, -609 (Michie 2001). *See also* ARK. CODE ANN. § 5-60-120(a) (Michie

had laws on the books similar to the federal provision. The dispute in *Bartnicki* arose from an intercepted conversation between two persons actively involved in a labor dispute, Gloria Bartnicki and Anthony Kane.<sup>65</sup> Gloria Bartnicki was a principal labor negotiator for a teachers' union in Pennsylvania, the Pennsylvania State Education Association.<sup>66</sup> Anthony Kane, a high school teacher at Wyoming Valley West High School, was president of the union.<sup>67</sup> In May of 1993, Bartnicki and Kane had a telephone conversation concerning the ongoing labor negotiations with a local school board.<sup>68</sup> Kane was speaking from a land phone at his house.<sup>69</sup> Bartnicki was talking from her car, using her cellular phone.<sup>70</sup> Strategies and tactics were discussed, including the possibility of a teacher strike.<sup>71</sup> The talk was candid, and included some blunt, characterizations of their opponents in the labor controversy, at times getting personal.<sup>72</sup> One of the school district's representatives was described as "too nice," another as a "nitwit," and still others as "rabble rousers."<sup>73</sup> Among the opposition tactics that raised the ire of Bartnicki and Kane was the proclivity, in their view, of the school district to negotiate through the newspaper, attempting to pressure the teachers' union by leaks to the press.<sup>74</sup> The papers had reported that the school district was not going to agree to anything more than a pay raise of

---

1997) (while not directly prohibiting subsequent disclosure, the statute does make it a crime to "record or possess a recording of such communication"); D.C. CODE ANN. §§ 23-542, -554 (2001).

64. See Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 PA. CONS. STAT. ANN. § 5703 (West 2000) *et seq.* (making it a felony when any person "intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication" or "intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.").

65. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

66. *Id.* at 518.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Bartnicki*, 532 U.S. at 518.

71. *Id.*

72. *Id.*

73. *Bartnicki v. Vopper*, Brief of Petitioner, 2000 WL 1280378 at \*4.

74. *Bartnicki v. Vopper*, 532 U.S. 514, 518-19 (2001).

three percent.<sup>75</sup> As they discussed this position, Kane stated: “If they’re not gonna move for three percent, we’re gonna have to go to their homes . . . [t]o blow off their front porches, we’ll have to do some work on some of those guys.”<sup>76</sup>

The direct wrongdoer—the actual “intruder,” so to speak—is not known, or at least was not identified in the record.<sup>77</sup> This anonymous person intercepted the conversation, presumably using a scanner that picked up the cellular phone transmissions, recording it on a cassette tape.<sup>78</sup> An unknown person (who may or may not have been the interceptor) then proceeded to place the tape in the mailbox of the president of a local taxpayer’s group that was opposed to the teachers’ union and its bargaining positions, a man named Jack Yocum.<sup>79</sup> Yocum listened to the tape, recognized the voices of Bartnicki and Kane, and took the tape to a local radio station talk show host, Frederick Vopper.<sup>80</sup> Vopper received the tape in the Spring of 1993, but waited until late September to broadcast it, which he did a number of times.<sup>81</sup> At first Vopper broadcast a part of the tape that revealed Bartnicki’s phone numbers.<sup>82</sup> Other media outlets also received copies of the tape, including a newspaper in Wilkes-Barre, but no other broadcaster or publisher played the tape or disclosed its contents until Vopper initially broadcast the material on the tape.<sup>83</sup> Once Vopper broke the story, however, secondary coverage of the events, including the contents of the tape, appeared in other media outlets.<sup>84</sup> Invoking a federal statute and a very similar Pennsylvania law, Bartnicki and Kane sued Yocum, Vopper, and the radio stations that carried Vopper’s show, for having used and disclosed the tape of their intercepted telephone conversation.<sup>85</sup>

In an opinion written by Justice Stevens, the United States Supreme Court ruled that the prohibitions against intentional disclosure of illegally intercepted communication, which the disclosing party knows or should know was illegally obtained, were “content-neutral law[s] of general

---

75. *Id.*

76. *Id.*

77. *Id.* at 514.

78. *Id.* at 519.

79. *Bartnicki*, 532 U.S. at 519.

80. *Id.* The host of the show was named Frederick Vopper, though he appeared on the air under the name “Fred Williams.”

81. *Id.*

82. *Bartnicki v. Vopper*, Brief of Petitioner, 2000 WL 1280378 at \*4.

83. *Id.* at \*4–5.

84. *Bartnicki v. Vopper*, 532 U.S. 514, 514 (2001).

85. *Id.* at 520.

applicability.”<sup>86</sup> The court added that application of those provisions against the defendants violated their free speech rights, since the taped conversations concerned matters that the Court deemed to be of public importance.<sup>87</sup> Critical to the Court’s ruling was its assumption that the defendants had not played a part in the illegal interception.<sup>88</sup> The Court in *Bartnicki* emphasized that it was *not* answering the ultimate question of whether the media may *ever* be held liable for publishing truthful information lawfully obtained, but was rather addressing what it described as “a narrower version of that still-open question,”<sup>89</sup> which it put as: “Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?”<sup>90</sup> The purpose of the law, the Court explained, was to protect the privacy of wire, electronic, and oral communications, and it singles out such communications by identification of the fact that they were illegally intercepted by virtue of the source, rather than the subject matter.<sup>91</sup> On the other hand, the Court held, the prohibition against disclosures was still fairly characterized as a regulation of speech.<sup>92</sup> The Court held that the first interest identified by the Government in support of the law—removing an incentive for parties to intercept private conversations—could not justify the

---

86. *Id.* at 526.

87. *Id.* at 534.

88. *Id.* at 530.

89. *Bartnicki*, 532 U.S. at 528.

90. *Id.* (quoting *Boehner v. McDermott*, 191 F.3d 463, 484–85 (D.C. Cir. 1999) (Sentelle, J., dissenting) *rev’d* by *McDermott v. Boeher*, 532 U.S. 1050 (2001)). The Court observed that its unwillingness to construe the question before it any more broadly was consistent with the “Court’s repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.” *Id.* at 529.

91. *Id.* at 526.

92. *Id.*

On the other hand, the naked prohibition against disclosures is fairly characterized as a regulation of pure speech. Unlike the prohibition against the “use” of the contents of an illegal interception in § 2511(1)(d), subsection (c) is not a regulation of conduct. It is true that the delivery of a tape recording might be regarded as conduct, but given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of “speech” that the First Amendment protects. As the majority below put it, [i]f the acts of “disclosing” and “publishing” information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.

*Bartnicki v. Vopper*, 532 U.S. 514, 526–27 (2001) (internal citations omitted).

statute.<sup>93</sup> The normal method of deterring unlawful conduct, the Court argued, is to punish the person engaging in it, and it would be remarkable, the Court claimed, to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.<sup>94</sup> The Government's second interest—minimizing the harm to persons whose conversations have been illegally intercepted—was in the view of the Court considerably stronger.<sup>95</sup> Privacy of communication, the Court accepted, is an important interest.<sup>96</sup> Nevertheless, the Court reasoned, because the statements made by Bartnicki and Kane would have been matters of "public concern" had they been made in a public arena, they were also matters of public concern when made in private conversation.<sup>97</sup> Invoking the long line of precedents granting the media a First Amendment right to print truthful information on matters of public concern that is "obtained lawfully,"<sup>98</sup> the Court held that the newsworthiness of the information revealed trumped the privacy rights of the parties to the conversation.<sup>99</sup>

The decision in *Bartnicki* was crucially influenced by the judgment that the purloined conversations were, in effect, "newsworthy," because they were on matters of public concern.<sup>100</sup> This was an extremely generous understanding of speech of "public concern" from the defendants' perspective, and seemed heavily influenced by the roughness of the

93. *Id.* at 529.

94. *Id.* at 530.

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

*Id.* at 529–30.

95. *Id.* at 532.

96. *Bartnicki*, 532 U.S. at 532 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985)).

97. *Id.* at 525.

98. *Id.*; *see, e.g., Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102, (1979) (stating that "state action to punish the publication of truthful information seldom can satisfy constitutional standards"); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*).

99. *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001).

100. *Id.*

conversation, and its ostensible reference to criminal violence.<sup>101</sup> This influence was most visible in the concurring opinions of Justice Breyer and Justice O'Connor.<sup>102</sup> Justices Breyer and O'Connor came down hard on the fact that the conversation between Bartnicki and Kane appeared to contemplate violent and illegal action.<sup>103</sup> In the views of those two concurring Justices, it was only this added element of illegality that provided the special circumstances that warranted application of a newsworthiness defense to the disclosure of the intercepted conversation.<sup>104</sup> Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented.<sup>105</sup> The laws at issue, he argued, were content neutral because they sought to restrict only the disclosure of information that was illegally obtained in the first instance, placed no restrictions on republication of material already in the public domain, did not single out the media for especially unfavorable treatment, utilized a scienter requirement to avoid being sprung to trap the unwary, and promoted both the privacy interests and the free speech interests of those using devices such as cellular telephones.<sup>106</sup>

The *Bartnicki* decision, however, while a major press victory in its outcome, is not an entirely anti-privacy decision. Although on the facts of the case the newsworthiness defense won again, there were signals from a majority of the Justices that it would not win all the time.<sup>107</sup> Given the narrower concurring views of Justices Breyer and O'Connor, a better understanding of *Bartnicki* is to treat the expansive remarks of Justice Stevens, writing for the nominal majority, as really expressing only the views of a four-Justice plurality. The pivotal concurring opinion of Justice Breyer made it clear that he was only applying "intermediate scrutiny" to the statute,<sup>108</sup> and that in a future case, a case not implicating speech that posed

101. *Id.* at 535–36.

102. *Id.* at 536 (Breyer, J. concurring).

103. *Id.* at 539 (Breyer, J. concurring) (stating "the speakers had little or no *legitimate* interest in maintaining the privacy of the particular conversation. That conversation involved a suggestion about 'blow[ing] off . . . front porches' and 'do[ing] some work on some of these guys,' . . . thereby raising a significant concern for the safety of others.").

104. *Bartnicki*, 532 U.S. at 539 (Breyer, J. concurring).

105. *Id.* at 541 (Rehnquist, C.J., dissenting).

106. *Id.* at 548 (Rehnquist, C.J., dissenting).

107. *Id.* at 525.

108. *Id.* at 536 (Breyer, J., concurring).

I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the



the specter of criminal violence, he would be willing to sustain the types of disclosure limits imposed by eavesdropping laws.<sup>109</sup>

As discussed in the concluding section of the article,<sup>110</sup> *Bartnicki* may provide some valuable clues as to the types of doctrinal developments that might well evolve to generally strengthen privacy torts.

### C. *Intrusion*

From a plaintiff's perspective, the tort of intrusion has been more of a success story than false light or publication of private facts, because the tort of intrusion is largely inculcated against any strong First Amendment defense. Intrusion is typically defined as requiring an intentional intrusion into the solitude or seclusion of another that "would be highly offensive to a reasonable person."<sup>111</sup> The intrusion tort is complete before any material obtained from the intrusion is ever disseminated—indeed, there is no requirement that any material even be gathered or observed from the intrusion, let alone published. In this sense, intrusion appears to involve only "conduct," and not "speech" at all, and thus raises no serious First Amendment issues.<sup>112</sup>

This is a somewhat artificial understanding of intrusion, however, because, in fact, most high-profile intrusion cases involve a media defendant who has allegedly intruded in the course of gathering news. On the

---

extent of these benefits, as well as the need for the restrictions in order to secure those benefits? What this Court has called 'strict scrutiny'—with its strong presumption against constitutionality—is normally out of place where, as here, important competing constitutional interests are implicated.

*Id.*

109. *Bartnicki*, 532 U.S. at 537–38 (Breyer, J., concurring).

As a general matter, despite the statutes' direct restrictions on speech, the Federal Constitution must tolerate laws of this kind because of the importance of these privacy and speech-related objectives. Rather than broadly forbid this kind of legislative enactment, the Constitution demands legislative efforts to tailor the laws in order reasonably to reconcile media freedom with personal, speech-related privacy.

*Id.* (Breyer, J. concurring) (internal citations omitted); see Warren & Brandeis, *supra* note 4, at 196; RESTATEMENT (SECOND) OF TORTS § 652D (1977); *Katz v. United States*, 389 U.S. 347, 350–51 (1967) (stating "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States").

110. See *infra* notes 153–55 and accompanying text.

111. See RESTATEMENT (SECOND) OF TORTS § 652B (1977).

112. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 521 (4th Cir. 1999).

hypothesis that the First Amendment ought to be understood as providing at least some protection for the newsgathering process *antecedent* to the dissemination of news,<sup>113</sup> there is arguably at least some role for the First Amendment in fashioning the contours of the intrusion tort. The matter can be pressed further. A major function of modern *investigative* journalism is the revelation of corruption and malfeasance. Whether the journalist is trying to uncover wrongdoing by the government, or wrongdoing by individuals or corporations in the private sector, virtually by definition, investigative journalists seek to reveal what others would rather keep secret.<sup>114</sup> One strategy for doing this is to be sneaky. Some journalists, like some cops, operate best undercover.<sup>115</sup>

Thus far the law has mediated these tensions through a series of doctrinal devices, which create the surface impression that the intrusion tort is a valuable legal device for protecting privacy, when in fact it renders the tort relatively ineffectual and a meaningless remedy for privacy invasions. The deceptive surface is the product of a time-honored strain of First Amendment jurisprudence that defiantly and consistently avows that the media is not the beneficiary of any special constitutional exemption from laws of “general applicability.”<sup>116</sup> This doctrine was applied most famously

113. See Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631 (1975).

114. See *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998) (stating “[i]nformation collecting techniques that may be highly offensive when done for socially unprotected reasons—for purposes of harassment, blackmail or prurient curiosity, for example—may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story.”).

115. There is, of course, a critical moral and legal difference between cops and journalists. Cops act formally on behalf of society, and are subject to the strictures of constitutional limitations on their undercover activity, including the Fourth Amendment’s protection from unreasonable search and seizure. In our society we generally reserve the right to use force to enter the private spaces of another for the purposes of policing wrongdoing to—of course—the police. See Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895 (1998).

116. See, e.g., *Citizen Publ’g Co. v. United States*, 394 U.S. 131 (1969) (sustaining application of antitrust laws to the press); *Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186 (1946) (sustaining application of Fair Labor Standards Act to the press); *Associated Press v. United States*, 326 U.S. 1 (1945) [hereinafter *Associated Press I*]; *Associated Press v. NLRB*, 301 U.S. 103 (1937) [hereinafter *Associated Press II*] (sustaining application of National Labor Relations Act to the press); see also *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990) (sustaining generally applicable sales tax even as applied to religious books and merchandise).

in *Cohen v. Cowles Media Co.*,<sup>117</sup> in which a newspaper was sued by a source for breaking a promise to keep the source's name confidential, where the newspaper revealed the source because it came to the judgment that the source's name had become newsworthy.<sup>118</sup> The newsworthiness defense did not help the defendant in *Cohen*, because the breach of promise was deemed a breach of generally applicable law that occurred independent of any act of publication.<sup>119</sup> The Court thus announced that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."<sup>120</sup> The surface power of this proposition, however, is depleted in many intrusion cases through a combination of other common-law and First Amendment doctrines. Intrusion claims require some invasion of a plaintiff's "solitude" or "seclusion;" concepts that are consistently interpreted to *bar* recovery for investigative efforts that involve surveillance of a plaintiff in a public space, or surveillance of a plaintiff in a non-public space where the plaintiff nonetheless did not have any reasonable expectation of privacy.<sup>121</sup> The mere fact that the defendant has used a hidden camera or secret microphone, for example, will usually not render an act an "intrusion" when the setting is deemed a non-private space.<sup>122</sup> This has the practical effect of largely limiting actionable "intrusions" to situations in which other torts designed to protect "space" will do the trick just as well, if not better. Many intrusions are just fancy forms of trespass.<sup>123</sup>

117. 501 U.S. 663 (1991).

118. *Id.* at 665.

119. *Id.* at 671–72.

120. *Id.* at 669; *see also* *Citizen Publ'g*, 394 U.S. at 131 (sustaining application of antitrust laws to the press); *Associated Press I*, 326 U.S. at 1; *Associated Press II*, 301 U.S. at 103 (sustaining application of National Labor Relations Act to the press); *Oklahoma Press Publ'g*, 327 U.S. at 186 (sustaining application of Fair Labor Standards Act to the press).

121. *See* *O'Connor v. Ortega*, 480 U.S. 709, 715–17 (1987) (finding a psychiatrist's office was place at which a psychiatrist had reasonable expectation of privacy); *Frankel v. Warwick Hotel*, 881 F. Supp. 183, 188 (E.D. Pa. 1995) (finding a father's meddling in son's marriage was not an intrusion where there was no "physical or sensory penetration of a person's zone of seclusion"); *Green v. Chicago Tribune Co.*, 675 N.E.2d 249, 255–56 (Ill. App. Ct. 1996); *Barber v. Time, Inc.*, 159 S.W.2d 291, 295 (Mo. 1942) (stating that "[c]ertainly if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital . . . without personal publicity.").

122. *See* *PETA v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1280–81 (Nev. 1995) (rejecting an intrusion claim by an animal trainer who allegedly engaged in abuse of monkeys in a backstage preparation area).

123. *See* *Simmons v. Miller*, 970 F. Supp. 661, 668 n.2 (S.D. Ind. 1997) (noting an intrusion "typically entails an 'intrusion upon the plaintiff's physical solitude or seclusion'").

Damages rules play an even more significant role. Many courts appear determined to draw a line between the damages that flow from the actual intrusion itself, and the damages that flow from the subsequent publication of the material obtained during the act of intrusion. Damages that come from the dissemination of the material, courts reason, are subject to First Amendment restraints, such as the newsworthiness defense.<sup>124</sup> If the undercover television news crew captures scenes of unsanitary food preparation practices during a behind-the-scene expose of a restaurant in which a journalist has fraudulently taken a job as a waiter; the restaurant may recover, free of any First Amendment constraint, for the damage caused to it by the employment of the confederate waiter and the waiter's secret filming of the back kitchen. However, the restaurant may *not* recover free of First Amendment restraint for the subsequent broadcast of that video footage. To recover for what was disseminated, the restaurant must invoke the law of defamation (or its privacy cousin, false light) or the privacy tort of publication of private facts. Defamation and false light will not work as causes of action if the material broadcast is substantially true.<sup>125</sup> While it is not correct that "the camera does not lie"—for we know that sometimes the camera does lie—it is correct that the camera does not lie often. As long as the journalists do not edit the material or otherwise present it in a manner that is false in some material sense, there can be no recovery. As to the publication of private facts tort, if in fact the restaurant was engaged in unhealthy food preparations, this will be deemed newsworthy, and under application of that defense, the plaintiff will again lose.

---

124. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 521 (4th Cir. 1999).

125. Under First Amendment principles established by the United States Supreme Court, the plaintiffs have the burden of proving that the allegedly defamatory statements made are false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). Minor, trivial, technical falsehoods will not support a defamation action. *Masson v. New Yorker Magazine*, 501 U.S. 496, 516–17 (1990). Rather, the test is whether the "gist" or the "sting" of the allegedly defamatory statements was different than publication of the literal truth would have been. *Id.* The defendants are protected from liability for minor or trivial inaccuracies, but may be held liable for statements that deviate in a material way from the truth. *Id.* at 516. The concept is a simple one: a charge is not "substantially true" if the average reader thinks differently of the plaintiff had the actual facts been presented correctly. As the Supreme Court in *Masson* explained: "Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.* at 517 (citing ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 138 (1980)); see *Wehling v. Columbia Broad. Sys.*, 721 F.2d 506, 509 (5th Cir. 1983); SMOLLA II, *supra* note 7, at § 5.8.

Once we disqualify all damages from the dissemination of the material, the plaintiff is relegated to those damages that flow in some direct sense from the intrusion itself. These damages are likely to be nominal, if they exist at all.<sup>126</sup>

It must be admitted that occasionally there are successful intrusion claims. These usually involve an intrusion of unusually brazen insensitivity into a scene of grief, violence, or injury in which society is outraged by the distress caused to the victim or the victim's family. The plaintiff in such a case is usually innocent of any wrongdoing, so that whatever newsworthiness inures in the portrayal of the plaintiff, comes from the plaintiff's own misfortune or victimization—as when a television news crew films a patient in a hospital bed or in a rescue helicopter.<sup>127</sup> There are also some recent statutory elaborations on common-law intrusion, such as California's new electronic trespass laws that modestly revitalize the tort. On balance, however, one would be hard pressed to rate the tort at much higher than a "C" average. This much can clearly be said: when one considered how widespread and common hidden camera style reporting is in modern media, what is most striking about intrusion is how rarely plaintiffs are able to use it to get an "A."

### III. WHEN PRIVACY AND PROPERTY CONVERGE

The one privacy tort that truly exceeds market expectations is appropriation, or the right of publicity. This tort, in fact, is living beyond its means. Courts have, with some frequency, applied it in ways that not only stretch the credulities of sound public policy, but also in ways that seem downright unconstitutional. Any number of examples might be cited, but I will describe three holdings that strike me as symptomatic of the tendency of some courts and legislatures, seemingly star struck, to extend lavish protection to the personas of celebrities. The cases involve personalities that, on the face of things, could not be more different: Vanna White, Muhammad Ali, and the comic triumvirate of Larry, Curly, and Moe, known collectively as "The Three Stooges."

Muhammad Ali (then named Cassius Clay), in his prime, was not only the world's greatest heavyweight boxer; he was the world's greatest celebrity. When he left boxing, his celebrity faded, and debilitated by the effects of Parkinson's disease, he largely left the public eye. Ali's fame was

---

126. *Id.*; see *Veilleux v. National Broad. Co.*, 206 F.3d 92, 128 (1st Cir. 2000).

127. See *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998).

rejuvenated when he was chosen to light the Olympic torch at the Centennial Olympic Games in Atlanta. It was also rejuvenated through the portrayal of his life in a well-regarded feature film in which he was played by Will Smith. My children, all of whom were under the age of thirteen in 2002, were not alive when Muhammad Ali defeated Sonny Liston for the heavyweight crown; not alive when Ali changed his name from Cassius Clay to Ali; not alive when he bantered with Howard Cosell once a month on ABC's *Wide World of Sports*; not alive when he refused to report for the draft in Vietnam; not alive when he was stripped of his heavyweight title; and not alive when he regained it. Some of my children had been born by the time Ali lit the Olympic Torch in 1996, though they only vaguely remember that moment. At the time the torch was being lit, they had to ask who Ali was, and why their dad had tears in his eyes, and why Ali had been chosen to light the torch, and why Ali's hand shook so strongly with palsy. But all my children know Will Smith. And because of the movie (whether they saw it or not), they now know Ali. Indeed, more people know Ali, and his legend, than know the name of the current heavyweight champion of the world. There are probably people who still think of Ali as the champion.

In the late 1970s, when Ali was still at the apex of his fame, he sued *Playgirl Magazine*.<sup>128</sup> Ali's dispute with *Playgirl* arose from a fictional sexual fantasy and an accompanying sketch of a boxer run by the magazine in its February 1978 issue. Ali's name was not used in the piece, nor was any photograph of him taken. Rather, his image was conjured up through fiction and an impressionistic sketch, as part of a sexual fantasy.<sup>129</sup> The court ruled that Ali should prevail against the magazine for its violation of his right of publicity. The court even imposed the harsh remedy of an injunction against any further distribution of the issue. However, on closer examination of this fight, it looks like Ali may have won it with a phantom punch. The case is an insult in search of a cause of action. While

---

128. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

129. *Id.* In the words of the court:

Even a cursory inspection of the picture which is the subject of this action strongly suggests that the facial characteristics of the black male portrayed are those of Muhammad Ali. The cheekbones, broad nose and wideset brown eyes, together with the distinctive smile and close cropped black hair are recognizable as the features of the plaintiff, one of the most widely known athletes of our time. In addition, the figure depicted is seated on a stool in the corner of a boxing ring with both hands taped and outstretched resting on the ropes on either side. Although the picture is captioned "Mystery Man," the identification of the individual as Ali is further implied by an accompanying verse which refers to the figure as "the Greatest[.]"

*Id.* at 726-27.

undoubtedly the sexual fantasy may have conjured up the image of Muhammad Ali in the minds of readers, what was the nature of the “right” held by Ali that this effort violated? There was no false statement of fact expressed or implied, for no reasonable reader could have understood the fictionalized sexual fantasy as an actual assertion that Ali had engaged in sexual activity with the fantasizer.<sup>130</sup>

To the extent that the “offense” was the emotional distress suffered by Ali for finding himself the object of such a fantasy, the subsequent decision of the United States Supreme Court in *Hustler Magazine, Inc. v. Falwell*,<sup>131</sup> would preclude recovery for that distress alone.<sup>132</sup> There was no “intrusion” into Ali’s solitude. It was the case, of course, that his *identity* was in a sense appropriated by *Playgirl*. But this appropriation was not an appropriation of Ali’s “privacy” in any normal sense, for nothing he *actually* did was described; nor can it be plausibly maintained that Ali’s “property” in his name or likeness (or more broadly, his “identity”) was appropriated, in the sense that our law ought to recognize appropriation. Ali’s identity, as with virtually all intellectual property, is, in part, owned by the property-owner, and, in part, dedicated to the public domain: this is the place where property, privacy, and public goods converge.

*White v. Samsung Electronics America, Inc.*,<sup>133</sup> the Vanna White case, demonstrates just where the convergence between property, privacy, and publicized goods can lead. In this case, the Samsung electronics company ran an impish and funny commercial featuring a robot dressed in a wig, gown, and jewelry reminiscent of Vanna White’s usual style on the popular game show *Wheel of Fortune*.<sup>134</sup> The robot was posed in front of a *Wheel of Fortune*-like game board.<sup>135</sup> White sued and won on a claim for violation of her rights of publicity, as codified in the California statute.<sup>136</sup> Judge Alex Kozinski dissented from a denial of rehearing *en banc*, in an opinion that was on the money:

---

130. See, e.g., *Pring v. Penthouse Int’l, Ltd.*, 695 F.2d 438 (10th Cir. 1982).

131. 485 U.S. 46 (1988). The Court held that “a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made ‘with knowledge that it was false or with reckless disregard of whether it was false or not.’” *Id.* (quoting *New York Times I*, 376 U.S. at 279–80).

132. See *supra* note 48 and accompanying text.

133. 989 F.2d 1512 (9th Cir. 1993).

134. *Id.* at 1514.

135. *Id.*

136. CAL. CIV. CODE § 3344(a) (West 1997).

Private property, including intellectual property, is essential to our way of life. It provides an incentive for investment and innovation; it stimulates the flourishing of our culture; it protects the moral entitlements of people to the fruits of their labors. But reducing too much to private property can be bad medicine. Private land, for instance, is far more useful if separated from other private land by public streets, roads and highways. Public parks, utility rights-of-way and sewers reduce the amount of land in private hands, but vastly enhance the value of the property that remains.

So too it is with intellectual property. Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.<sup>137</sup>

In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,<sup>138</sup> for example, the Supreme Court of California applied California's statutory right of publicity to prevent exploitation of The Three Stooges comedy act, even though Moe Howard, Curly Howard, and Larry Fein, the stooges, were all dead.<sup>139</sup> The California statute defines "deceased personality" as a person

---

137. *White*, 989 F.2d at 1513.

138. 21 P.3d 797 (Cal. 2001).

139. The right of publicity in California is both a statutory and a common law right. The statutory right originated in *California Civil Code* section 3344, enacted in 1971, which, as originally enacted, authorized recovery of damages by any living person whose name, photograph, or likeness has been used for commercial purposes without his or her consent. In 1979, the Supreme Court of California recognized a common law right of publicity, which it described as a "complement" to the statutory cause of action. *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 n.6 (Cal. 1979). However, the court held that because the common law right was derived from the law of privacy, the cause of action did not survive the death of the person whose identity was exploited and was not descendible to his or her heirs or assignees. *Id.* at 428-30. In 1984, the California Legislature in effect overruled that aspect of *Lugosi*, creating a second statutory right of publicity that was descendible to the heirs and assignees of deceased persons. CAL. CIV. CODE § 990 (West 1982 & Supp. 2002). In *Comedy III Productions* (the Three Stooges case) the Supreme Court of California treated the 1984 statute as modeled on the previous section 3344 and largely identical, but for the provisions extending the right beyond death. Section 990 reads in pertinent part:

Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result. . . .



“whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death,” whether or not the person actually used any of those features for commercial purposes while alive.<sup>140</sup> The statute expressly states that the rights it creates are “property rights” that are transferable before or after the personality dies, by contract, trust, or will.<sup>141</sup> The right to require consent terminates if there is neither a transferee nor a survivor, or fifty years after the personality dies.<sup>142</sup> The court held that neither the California statute’s fair-use-style exemptions, nor the First Amendment, gave others the right to traffic in the personas of The Three Stooges without authorization.<sup>143</sup>

These kinds of decisions undoubtedly take some sustenance from the United States Supreme Court’s decision in *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>144</sup> The case involved the “human cannonball,” Hugo Zacchini, and his act, which involved getting shot from a cannon and flying two hundred feet through the air into a net.<sup>145</sup> Against his will, and without his permission, a local television station filmed his performance at a county fair, and broadcast his entire act, which lasted about fifteen seconds, for viewers.<sup>146</sup> The question before the Supreme Court was whether the First Amendment required the recognition of a “newsworthiness” privilege broad enough to immunize the television station for broadcasting Zacchini’s performance.<sup>147</sup> The Supreme Court held that no such First Amendment privilege existed, specifically analogizing the state-created privacy/property right to federal intellectual property law.<sup>148</sup> The court noted that protection

---

§ 990(a).

140. § 990(h).

141. § 990(b).

142. § 990(e), (g).

143. The law contains a number of exemptions similar to the “fair use” defense in copyright, exempting use. For example, “in connection with any news, public affairs, or sports broadcast or account, or any political campaign,” § 990(j), as well as uses in “[a] play, book, magazine, newspaper, musical composition, film, radio or television program,” § 990(n)(1), a work of “political or newsworthy value,” § 990(n)(2), “single and original works of fine art.” § 990(n)(3).

144. 433 U.S. 562 (1977).

145. *Id.* at 563.

146. *Id.* at 563–64.

147. *Id.* at 565.

148. *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (stating “[i]n our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)

of the privacy/property right in such circumstances actually worked to foster and enhance First Amendment values, in much the same way that federal Copyright and Patent Law is said to advance the progress of the arts and sciences.<sup>149</sup> *Zacchini* was probably correct on its facts. But too often courts seem to have extrapolated too much from the holding, enforcing the right of publicity to extend to the intellectual property holder's rights, which is far more generous than necessary to encourage enterprise, and enormously detrimental to the robust flow of satire, parody, critique, homage, and take-off, that are the hallmarks of a free marketplace of ideas.

#### IV. CONCLUSION: SOME RESTORATIVE SUGGESTIONS

The first lesson that might be drawn from the assessment of the generally sad-sack state of modern privacy law is that privacy torts are generally weakest when the laws are purest and strongest and when the laws are alloyed in some sense with property concepts. The more that privacy law can be crafted in terms that borrow from property concepts, the stronger it will be. The two privacy torts most strongly affiliated with property concepts, intrusion (related to trespass) and appropriation (arguably a species of intellectual property), have already outperformed other privacy causes of action. To the extent that the weakest privacy tort, publication of private facts, is able to evolve with adaptations that are borrowed from property law, the strength and utility of the tort to plaintiffs will increase.

It is my guess that privacy law will strengthen in the future if there is an increasing "convergence" between the intrusion and private facts torts. This has already happened to some degree, and to the extent it continues, privacy protection will gather increased momentum. The convergence I am contemplating here is relatively simple: when an "intrusion" into a sphere of life in which the plaintiff has a reasonable expectation of privacy coincides with the publication of material that is ostensibly a private fact, the plaintiff's overall success in a privacy suit will be strengthened. As it stands now, legal doctrines appear to invite defendants to employ a "divide and

---

(stating "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (stating "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

149. *Zacchini*, 433 U.S. at 576.

conquer” strategy, in which the intrusion side of the claim is entirely severed from the private facts side of the claim.<sup>150</sup> This renders the intrusion action largely meaningless, since only the damages recoverable from the intrusion itself are typically allowed, and it also renders the private facts cause of action subject to the traditional difficulties attendant to the newsworthiness defense.<sup>151</sup>

However, neither the damages limitation nor the newsworthiness device ought to interdict meaningful recovery by a plaintiff in tort when there is both an intrusion and a publication of a private fact, *unless* the private fact that is disclosed reveals criminal misconduct. This is the model recently followed by California in its Electronic Trespass Law.<sup>152</sup> More significantly, in my judgment, it is the model that will eventually evolve as lower courts, and perhaps the United States Supreme Court itself, provide gloss and amplification of the *Bartnicki* decision.<sup>153</sup>

In *Bartnicki*, it must be remembered that it was *only* the judgment of the two concurring Justices, Breyer and O’Connor, that the conduct being discussed in the intercepted conversation was “criminal,” which influenced them to treat the publication of the conversation as sufficiently newsworthy to require First Amendment protection.<sup>154</sup> *Bartnicki* would otherwise have been a true “convergence” case, in the sense that an intrusion like act—interception of a private conversation with a scanner—gave rise to publication of a private fact—a confidential conversation.<sup>155</sup> The “publisher” of the private fact was not the “intruder,” but surely knew that the material was the result of an intrusion. In such instances no privilege to traffic in the private fact ought to exist unless it reveals criminal conduct.<sup>156</sup>

The day will eventually arrive when legal protection of privacy will finally come into its own in America. For all the frustrations that privacy law has endured in the last century, and for all the constant erosion of our privacy we now endure, through the confluence of such factors as new privacy-invading technology and new fears of terrorism, I believe that, in this century, the general societal yearning for a retrieval of the “right to be let alone” will grow steadily more intense. If, as Oliver Wendell Holmes

---

150. See *supra* notes 41–44 and accompanying text.

151. See *supra* notes 123–25 and accompanying text.

152. CAL. CIV. CODE § 1708.8 (West 2002).

153. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

154. *Id.* at 535.

155. See *supra* notes 94–97 and accompanying text.

156. See *supra* notes 99–104 and accompanying text.

2002]

*Smolla*

323

suggested, the law is the witness and external deposit of our moral life,<sup>157</sup> we can expect privacy law to gradually strengthen, as our moral life gradually evolves to demand it.

---

157. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).