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# Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places

Andrew Jay McClurg

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# BRINGING PRIVACY LAW OUT OF THE CLOSET: A TORT THEORY OF LIABILITY FOR INTRUSIONS IN PUBLIC PLACES

ANDREW JAY MCCLURG\*

*In this Article, Professor McClurg posits that the right to privacy in tort law must be expanded. His proposal offers relief to a class of plaintiffs that are routinely denied a forum for litigation—those who suffer invasions of privacy in a “public” place. McClurg asserts that this lack of protection is ironic: while the right to privacy in tort law has been limited by courts in recent years, the excesses of modern journalism and the proliferation of video camcorders have greatly increased the threat that individual privacy might be invaded, particularly in public places. Consequently, McClurg argues for legal recognition of a right of “public privacy.” While some courts have intuitively recognized such a right, McClurg asserts that express recognition of a right of action is necessary. McClurg’s proposal redefines the tort of intrusion (as incorporated in the RESTATEMENT (SECOND) OF TORTS) to allow recovery for highly offensive instances of public intrusion. He enlists a multifactored standard to assess the offensiveness of intrusive conduct, a standard that balances privacy interests against the countervailing interests of free social interaction and free speech.*

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## I. INTRODUCTION

One lesson of modern privacy law in the tort arena is that if you expect legal protection for your privacy, you should stay inside your house with the blinds closed. Tort law clings stubbornly to the principle that privacy cannot be invaded in or from a public place. However sound this rule once may have been, it is flawed in a modern technological society where the video camcorder has become

a permanent fixture and where invasive tabloid and reality television<sup>1</sup> programming have become standard forms of journalism and entertainment. Instances of intrusive conduct in public places are becoming increasingly common and more brazen.<sup>2</sup>

This Article posits that invasion of privacy law should be modified to allow a cause of action in limited circumstances for the tort of "public intrusion."<sup>3</sup> The tort of intrusion is one of four invasion of privacy torts widely recognized by American courts.<sup>4</sup> It is intended to protect against intrusions, physical or otherwise, "upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person."<sup>5</sup> As interpreted by almost all courts, the tort does not protect persons in places accessible to the public.<sup>6</sup> Thus, tort law

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1. "Reality" television is a label used to describe a genre of television programming often featuring live video coverage of dramatic events. Popular segments include footage of police officers stopping, questioning, searching, or arresting motorists, and emergency response teams, such as firefighters or paramedics, responding to calls for assistance. See *infra* notes 117-25 and accompanying text for a discussion of the threat that reality television programming poses to privacy.

2. This Article discusses many examples of such intrusions. A notorious recent illustration involved the publication of photographs of Princess Diana of Wales taken as she exercised at a London fitness club. The camera was hidden in the ceiling and captured the Princess in various suggestive poses as she exercised on a leg press machine. See *WOW! Di as you've never seen her before*, STAR, Nov. 23, 1993, at 1, 35-37 (publishing several of the photographs).

As used in this Article, the term "public place" refers broadly to any place accessible to one or more members of the public. This categorization includes health clubs, restaurants, shopping malls, and other businesses, as well as public parks and streets.

3. This Article involves only the right to privacy under tort law. It does not address constitutional rights to privacy.

4. The four invasion of privacy torts are intrusion, public disclosure of private facts, appropriation, and false light. See *infra* notes 39-42, 56-66 and accompanying text for a general discussion of these torts. Most states that recognize the four privacy torts adhere to the definitions offered in the RESTATEMENT (SECOND) OF TORTS §§ 652B-652E (1977) [hereinafter RESTATEMENT (SECOND) OF TORTS]. See *infra* note 41 and accompanying text (citing cases).

5. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B. The full text of the Restatement definition of intrusion reads: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Id.*

6. See, e.g., *Hartman v. Meredith Corp.*, 638 F. Supp. 1015, 1018 (D. Kan. 1986) ("The plaintiffs must show that there has been some aspect of their private affairs which has been intruded upon and does not apply [sic] to matters which occur in a public place or place otherwise open to the public eye."); *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081, 1087 (E.D. Pa. 1980) ("[T]his tort does not apply to matters which occur in a public place or a place otherwise open to the public eye."); *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1116-17 (Md. Ct. Spec. App. 1986) ("There is no liability for observing him in public

currently provides little protection from intrusive videotaping, photography, or surveillance, so long as the activity occurs in a public place.

The steadfastness with which courts have clung to the rule that what occurs in public cannot be private traditionally has meant that most instances of public intrusion do not result in litigation. When they do, the plaintiffs lose early and often. Consider the results in the following cases:

- Without her consent, a woman who belonged to a health club was videotaped while exercising at the club. A portion of the video was shown on television as part of a commercial for the health club. Summary judgment for the defendant was upheld.<sup>7</sup>
- Police conducted surveillance (for no legitimate purpose discernible from the opinion) of employees of a company who were meeting to organize a union. The police recorded and traced the license numbers of those in attendance and provided the names to the employer. The plaintiffs' complaint was dismissed for failure to state a cause of action.<sup>8</sup>
- Suspecting a security guard of fraternizing with a company employee contrary to company policy, the employer watched the guard's house and ran license checks on visiting cars. When the guard sued the employer, summary judgment for the defendant was granted.<sup>9</sup>
- A fourteen-year-old girl was photographed in a classroom and hallway by a teacher who served as the "unofficial" school photographer. The teacher required her to assume various poses, including sitting in a chair with her legs open. An appellate court

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places, 'since he is not then in seclusion.' "); *Forster v. Manchester*, 189 A.2d 147, 150 (Pa. 1963) ("It should also be noted that all of the surveillances took place in the open on public thoroughfares where appellant's activities could be observed by passers-by. To this extent appellant has exposed herself to public observation and therefore is not entitled to the same degree of privacy that she would enjoy within the confines of her own home."); *see also infra* note 13 (citing additional cases making this point).

7. *Foster v. LivingWell Midwest, Inc.*, No. 88-5340, 1988 WL 134497, at \*1 (6th Cir. Dec. 16, 1988).

8. *International Union v. Garner*, 601 F. Supp. 187, 189, 191-92 (M.D. Tenn. 1985) (mem.).

9. *Fayard v. Guardsmark, Inc.*, Civ. A. No. 89-0108, 1989 WL 145958, at \*2 (E.D. La. Nov. 29, 1989).

held that the defendant teacher was entitled to summary judgment on the plaintiff's invasion of privacy claim.<sup>10</sup>

- Without consent, three boys were photographed on a city sidewalk while talking to a policewoman. The policewoman posed nude for *Playboy*, and the photograph of her with the three boys was published alongside the nude photographs. The complaint filed on behalf of the boys was dismissed.<sup>11</sup>

- During a company conference, plaintiff was photographed at the moment a fellow employee approached her from behind and cupped his hands over her breasts. The photograph was used in a company slide show and repeatedly shown to other employees. Plaintiff's privacy claims for intrusion and public disclosure of private facts were dismissed. Only her false light claim survived pretrial dismissal.<sup>12</sup>

In each of these cases, the plaintiffs lost in large part because the invasions of privacy occurred in places accessible to the public.<sup>13</sup>

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10. Jarrett v. Butts, 379 S.E.2d 583, 585 (Ga. Ct. App. 1989).

11. Jackson v. Playboy Enters., Inc., 574 F. Supp. 10, 11 & n.1, 14 (S.D. Ohio 1983).

12. Borton v. Unisys Corp., Civ. A. No. 90-4793, 1991 WL 915, at \*2, \*11 (E.D. Pa. Jan. 4, 1991) (mem.).

13. Foster v. LivingWell Midwest, Inc., No. 88-5340, 1988 WL 134497, at \*2-3 (6th Cir. Dec. 16, 1988) ("No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation."); Borton, Civ. A. No. 90-4793, 1991 WL 915, at \*10 ("In my opinion, the photograph in this case does not disclose such an [sic] private, intimate detail. The photograph was taken in a public place and in full view of other Unisys employees."); Fayard, Civ. A. No. 89-0108, 1989 WL 145958, at \*2 ("The defendant alleges that the only surveillance that took place, was of activities in the public view. Since this was not controverted by the plaintiff, these facts are considered admitted. The alleged surveillance of watching plaintiff's house and running license checks on cars, constituted activities which were entirely open for public viewing."); International Union v. Garner, 601 F. Supp. 187, 191 (M.D. Tenn. 1985) (mem.) ("[I]f the plaintiffs truly wanted their participation in the meeting to be private, they would not have left their cars in front of the meeting hall. The cars were in plain view for all to see . . . . In sum, the Court finds that a person does not have a legitimate expectation of privacy, solitude, or seclusion in being free from the dissemination of inferences drawn from observations readily perceivable in public view."); Jackson, 574 F. Supp. at 13 ("Plaintiffs have not alleged that Defendant intruded into a private place or private seclusion; nor does it appear that Plaintiffs could. Rather, the photograph of which Plaintiffs complain clearly shows that policewoman Schantz and Plaintiffs were on a city sidewalk in plain view of the public eye."); Jarrett, 379 S.E.2d at 585 ("The photographs were taken in the classroom and hallway of a school building during regular school hours when other students were present, and did not reveal any aspect of Cynthia Butts' person that was not readily visible to anyone who saw her during

Moreover, all of the claims were dismissed without trial, a telling indication of the dismal protection that privacy law affords to persons in public.

There are some indications that privacy law may be poised for a change as plaintiffs' attorneys become cognizant of the gap between existing law and the public's perception of what constitutes reasonable expectations of privacy.<sup>14</sup> For instance, a spate of recent lawsuits based upon intrusive videotaping has been filed against producers of tabloid television shows.<sup>15</sup> However, while plaintiffs have obtained favorable rulings in a few cases where the videotaping occurred inside private residences,<sup>16</sup> the "no privacy in public" rule continues to be a roadblock for plaintiffs whose privacy is invaded in a public place.

An unreported California case illustrates this roadblock quite vividly. In *Shulman v. Group W*,<sup>17</sup> the Shulman family sued the syndicated television program *On Scene: Emergency Response* for videotaping and broadcasting the aftermath of an automobile accident. The family was driving on a freeway when their 19-year-old daughter lost control of the automobile, causing it to plunge one hundred feet and overturn.<sup>18</sup> Ruth Shulman and her 18-year-old son were trapped inside the vehicle when a paramedic team, accompanied by a cameraman working for the defendant, arrived to render assistance.<sup>19</sup> According to the plaintiffs' attorney, the paramedic wore a hidden microphone while he rendered aid to Ms.

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the day.").

14. See Gail D. Cox, *Privacy's Frontiers At Issue: Unwilling Subjects of Tabloid TV Are Suing*, NAT'L L.J., Dec. 27, 1993, at 1, 34 ("Such a gap between the public perception and the law is attractive to the plaintiffs' attorneys who increasingly are suing to 'update'—that is, tighten—the century-old legal concept of privacy.").

15. See *id.* (discussing several recent lawsuits of this type). A review of court records in Los Angeles found five recent lawsuits against television producers for invasion of privacy. *Id.* at 34.

16. See *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668, 679 (Cal. Ct. App. 1987) (reversing summary judgment on intrusion claim granted to defendant broadcasting company against wife of heart attack victim who was filmed in his home without consent as paramedics unsuccessfully attempted to resuscitate him); *Rogers v. Buckel*, No. 180799, 1992 WL 487187 (Ohio Ct. App. Nov. 16, 1992) (reversing summary judgment on intrusion claim granted to television station that filmed plaintiffs during drug raid at apartment); Cox, *supra* note 14, at 34 (discussing suit against television network for sending camera crew to accompany crisis intervention team into plaintiff's living room while team responded to a 911 domestic disturbance call; trial court denied defendant's motion for summary judgment as to invasion of privacy claim).

17. No. BC31250 (L.A. Super. Ct. Nov. 16, 1993). For a discussion of this unreported case, see Cox, *supra* note 14, at 34-35.

18. Cox, *supra* note 14, at 34.

19. *Id.* at 34.

Shulman, who was critically injured.<sup>20</sup> As reported by the *National Law Journal*, "Ruth Shulman can be clearly heard on the broadcast tape moaning, asking to be allowed to die and begging to be told it is all a dream. Blood, bare parts of her body distorted by injury, and the lower half of her face are visible."<sup>21</sup> The trial court granted summary judgment for the defendants.<sup>22</sup> The case is currently on appeal.<sup>23</sup>

The rigidity with which courts adhere to the rule that privacy cannot be invaded in a public place demonstrates an incomplete comprehension of the nature of privacy and the interests it is designed to protect. This Article will show that persons do have a limited legitimate expectation of privacy even when they are visible in or from places open to the public. In other words, there is such a thing as "public privacy" that tort law should recognize and protect.

To afford this protection, this Article proposes the adoption of a multifactor test that would allow persons to recover in appropriate instances for public intrusions, while also recognizing the importance of protecting the substantial countervailing interests of free social interaction and free speech.<sup>24</sup> By requiring a balancing of all relevant factors, the proposal is actually a modest one. It would not open the courthouse doors to victims of any and all public affronts, but only to those subjected to highly offensive public intrusions of a serious nature.

Part II of this Article discusses the current state of privacy law, concluding that the right of privacy in tort law has shrunk con-

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20. *Id.* at 34-35.

21. *Id.* at 35.

22. *Id.* at 34. The trial court apparently accepted the defendant's argument that the public interest in automobile accidents shielded the defendant under the First Amendment. *Id.* at 35. A critical problem for privacy plaintiffs is overcoming the First Amendment implications of tort liability based upon the public dissemination of information. This problem is most acute in connection with the privacy tort known as the public disclosure of private facts. The United States Supreme Court has severely limited, if not abrogated, this tort out of a concern for protecting free speech. See *infra* notes 447-58 and accompanying text. The tort of intrusion, which is the subject of this Article, does not directly implicate the First Amendment because it focuses upon the manner in which information is acquired, rather than the dissemination of such information. See *infra* notes 420-31 and accompanying text. However, in proposing expansion of the tort of intrusion to make actionable some intrusions in public places, this Article asserts in Part VI that public dissemination of images or other information acquired during an intrusive act is a factor courts should consider in imposing liability. See *infra* notes 420-58 and accompanying text.

23. Cox, *supra* note 14, at 35.

24. See *infra* notes 374-495 and accompanying text.



siderably, and explains that this provides support for recognizing a tort of public intrusion.<sup>25</sup> Part III discusses the growing threat to public privacy, focusing on the trend towards excess in the mass media and the impact of video technology.<sup>26</sup> Part IV posits a theory of public privacy, explaining how the narrow focus of current law upon private physical space fails to take account of important aspects of privacy.<sup>27</sup> Part V examines how, despite the rigidity of the rule that privacy cannot be invaded in public, some courts have instinctively recognized that there should be recovery for incidents of public intrusion.<sup>28</sup> Part VI proposes a redefinition of the tort of intrusion, using a multifactor test that would allow recovery for public intrusions in appropriate cases.<sup>29</sup>

## II. THE SHRINKING RIGHT OF PRIVACY IN TORT LAW

Regrettably for those who care about privacy and believe tort law should protect it,<sup>30</sup> the right of privacy in tort law is shrinking. Indeed, it is not hyperbole to suggest that the right may be approaching extinction, at least in some of its variants. Judges have been the engineers of the tort's destruction, both by the rules of positive law they have fashioned<sup>31</sup> and, just as significantly, in the way they administer the tort.<sup>32</sup> The shrinking right of privacy is important to this Article because of the gap in the law that has resulted with respect to intrusive conduct that occurs in public places. Some context is necessary to understand this point.

There have been two great developments in the history of privacy law, both of them emanating from works of legal scholarship. The

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25. See *infra* notes 30-99 and accompanying text.

26. See *infra* notes 100-204 and accompanying text.

27. See *infra* notes 205-89 and accompanying text.

28. See *infra* notes 290-364 and accompanying text.

29. See *infra* notes 365-95 and accompanying text.

30. These are two different issues. Professor Kalven, for example, has written that he believes privacy to be "a great and important value," but that "tort law's effort to protect the right of privacy seems . . . a mistake." Harry Kalven, Jr., *Privacy In Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966). Other commentators have questioned whether the privacy torts "are worth the candle," Harvey L. Zuckman, *Invasion of Privacy—Some Communicative Torts Whose Time Has Gone*, 47 WASH. & LEE L. REV. 253, 253 (1990), and whether the "elegant vessel" constructed by Samuel Warren and Louis Brandeis in their landmark article *The Right To Privacy* "is in fact a leaky ship which should at long last be scuttled." Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 294 (1983).

31. See *infra* notes 56-66 and accompanying text.

32. See *infra* notes 67-92 and accompanying text.

first was the article published by Samuel Warren and Louis Brandeis in 1890 entitled *The Right To Privacy*,<sup>33</sup> in which the idea of a tort remedy for invasions of privacy was conceived.<sup>34</sup> The Warren and Brandeis article has been analyzed by many able commentators<sup>35</sup> and no useful purpose would be served by reanalyzing it here. In short, Warren and Brandeis surveyed a number of decisions in the areas of defamation, property, implied contract, and copyright law and concluded that, in reality, they represented recognition of a right to privacy.<sup>36</sup> They asserted that this right, which they characterized as "the right to be let alone,"<sup>37</sup> should be recognized as an independent tort.

The second great monument in the development of privacy law occurred when Dean William Prosser published his famous article on the subject in 1960.<sup>38</sup> Prosser reviewed court decisions in invasion of privacy cases and determined that the law of privacy actually comprised four distinct torts. He described the four torts as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs [referred to in this Article as "intrusion"];
2. Public disclosure of embarrassing private facts about the plaintiff ["public disclosure of private facts"];
3. Publicity which places the plaintiff in a false light in the public eye ["false light"];
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness ["appropriation"].<sup>39</sup>

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33. Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890). The article has been described as "the very fount of learning on the subject." Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well?*, 46 TEX. L. REV. 611, 611 (1968). A Justice of the United States Supreme Court has called it "the most famous of all law review articles." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 80 (1971) (Marshall, J., dissenting). Other accolades for the article are collected in James H. Barron, Warren & Brandeis, "*The Right To Privacy*," 4 HARV. L. REV. 193 (1890); *Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875, 876 (1979).

34. See *infra* notes 101-05, 147-49 and accompanying text for additional discussion of the Warren and Brandeis article.

35. See, e.g., Barron, *supra* note 33; Bloustein, *supra* note 33; Kalven, *supra* note 30; Zimmerman, *supra* note 30.

36. Warren & Brandeis, *supra* note 33, at 197-213.

37. *Id.* at 195 (attributing the origin of the phrase to THOMAS M. COOLEY, TORTS 29 (2d ed. 1888)).

38. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

39. *Id.* at 389.

Prosser's definitions of the four privacy torts were subsequently adopted by the *Restatement (Second) of Torts*.<sup>40</sup> Courts in at least twenty-eight states have explicitly or implicitly accepted each of the four torts delineated by Prosser, almost always relying upon the *Restatement* definitions.<sup>41</sup> Several other states have adopted the

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40. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, §§ 652A-652E. This is not surprising, because Dean Prosser served as Reporter for the project. The Reporter for a *Restatement* project prepares all drafts pertaining to the subject undertaken. AMERICAN LAW INSTITUTE, RESTATEMENT IN THE COURTS: HISTORY OF THE INSTITUTE AND THE RESTATEMENT 5 (permanent ed. 1945). While the final *Restatement* represents the successive composite work of all members of the American Law Institute, "[i]n relation to any subject of the Restatement the most important person is the Reporter. The ultimate result is his work as discussed, changed and developed by group consideration." *Id.* at 6.

Dean Prosser served as Reporter for the *Restatement (Second) of Torts* until poor health forced him to resign in June 1970. Upon Prosser's resignation, Dean John Wade became the Reporter. RESTATEMENT (SECOND) OF TORTS vii (Tentative Draft No. 22, 1976). Although the volume of the *Restatement* containing Chapter 28A (pertaining to invasion of privacy) was not published until 1977, Chapter 28A was prepared by Prosser and approved by the American Law Institute in 1967. *Id.* at 11; see RESTATEMENT (SECOND) OF TORTS §§ 652A-652J (Tentative Draft No. 13, 1967). Intervening changes in the constitutional limitations upon defamation law required some substantive changes in section 652D (pertaining to the tort of public disclosure of private facts) and section 652E (pertaining to the tort of false light). RESTATEMENT (SECOND) OF TORTS 11 (Tentative Draft No. 22, 1976). However, review of the black letter law and comments regarding the tort of intrusion as adopted in the *Restatement (Second) of Torts* reveals that only minor changes were made from the draft submitted by Dean Prosser to the American Law Institute in 1967 and approved at that time. Compare RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B (and comments) with RESTATEMENT (SECOND) OF TORTS § 652B (and comments) (Tentative Draft No. 13, 1967). Accordingly, for all practical purposes, there is no separate identity between Prosser's observations concerning the tort of intrusion in his law review article and the text of the *Restatement (Second) of Torts* pertaining to intrusion.

41. See *International Union v. Garner*, 601 F. Supp. 187, 189 (M.D. Tenn. 1985) (stating that no Tennessee court has adopted the four-part division, but nevertheless proceeding to apply it); *Jackson v. Playboy Enterps., Inc.*, 574 F. Supp. 10, 12 (S.D. Ohio 1983) (stating that Ohio has adopted *Restatement* provisions); *Johnson v. Corporate Special Servs., Inc.*, 602 So. 2d 385, 387 (Ala. 1992); *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 784-85 (Ariz. 1989); *Dodrill v. Arkansas Democrat Co.*, 590 S.W.2d 840, 844 (Ark. 1979); *Forsher v. Bugliosi*, 608 P.2d 716, 725 (Cal. 1980); *Goodrich v. Waterbury Republican-American, Inc.*, 448 A.2d 1317, 1329 (Conn. 1982); *Barbieri v. News-Journal Co.*, 189 A.2d 773, 774 (Del. 1963); *Yarbray v. Southern Bell Tel. & Tel. Co.*, 409 S.E.2d 835, 836 (Ga. 1991); *Near East Side Community Org. v. Hair*, 555 N.E.2d 1324, 1334-35 (Ind. Ct. App. 1990); *Winegard v. Larsen*, 260 N.W.2d 816, 822-23 (Iowa 1977); *Dotson v. McLaughlin*, 531 P.2d 1, 6 (Kan. 1975); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 887 (Ky. 1981); *Norris v. King*, 355 So. 2d 21, 23 (La. Ct. App. 1978); *Berthiaume v. Pratt*, 365 A.2d 792, 795-96 (Me. 1976); *Hollander v. Lubow*, 351 A.2d 421, 424-25 (Md. 1976); *Beaumont v. Brown*, 257 N.W.2d 522, 527 (Mich. 1977); *Sofka v. Thal*, 662 S.W.2d 502, 509-10 (Mo. 1983); *N.O.C., Inc. v. Schaefer*, 484 A.2d 729, 731 (N.J. Super. Ct. Law Div. 1984); *Smith v. City of Artesia*, 772 P.2d 373, 374-75 (N.M. Ct. App. 1989);

privacy torts of intrusion, public disclosure of private facts and appropriation, but not the tort of false light.<sup>42</sup> Virtually all states have recognized a tort cause of action for invasion of privacy in some form.<sup>43</sup> Rhode Island appears to be the sole exception, adhering to the position that recognition of the tort should be a matter of legislative determination.<sup>44</sup>

However, while courts in most states purport to recognize the four privacy torts, they do not receive them favorably. Indeed, a review of court decisions involving privacy claims raises doubts as to whether there really is a tort remedy for invasion of privacy. It is noteworthy that, in the six cases summarized at the beginning of this Article,<sup>45</sup> the plaintiffs not only lost on their privacy claims, but they lost without the opportunity to present their claims to juries.<sup>46</sup>

This pattern is disturbingly widespread in invasion of privacy cases. Courts too often preempt jury consideration of privacy claims

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McCormack v. Oklahoma Publishing Co., 613 P.2d 737, 740 (Okla. 1980); Anderson v. Fisher Broadcasting Co., 712 P.2d 803, 808 (Or. 1985) (applying the four-part division for convenience, but stating that it is not necessarily an authoritative statement of Oregon law); Vogel v. W.T. Grant Co., 327 A.2d 133, 136 (Pa. 1974); Montgomery Ward v. Shope, 286 N.W.2d 806, 808 (S.D. 1979); Cox v. Hatch, 761 P.2d 556, 563 (Utah 1988); Lemnah v. American Breeders Serv., 482 A.2d 700, 703-04 (Vt. 1984) (applying the four-part division because it was applied by lower court, but cautioning that Vermont has not specifically adopted it); Mark v. Seattle Times, 635 P.2d 1081, 1094 (Wash. 1981) (en banc); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 82-83 (W.Va. 1983).

42. See, e.g., Prescott v. Bay St. Louis Newspapers, Inc., 497 So. 2d 77, 79-81 (Miss. 1986) (refraining from adopting the tort, but stating that plaintiff failed to establish its elements as delineated in the law of other jurisdictions); Sullivan v. Pulitzer Broadcasting Co., 709 S.W.2d 475, 478-81 (Mo. 1986) (en banc) (leaving door open for future recognition, but quoting extensive criticism of the tort); Renwick v. News & Observer Publishing Co., 312 S.E.2d 405, 413 (N.C.) (explicitly rejecting the tort), *cert. denied*, 469 U.S. 858 (1984); Snakenberg v. Hartford Casualty Ins. Co., 383 S.E.2d 2, 5 (S.C. Ct. App. 1989) (stating that South Carolina recognizes three invasion of privacy torts, omitting any reference to false light); Diamond Shamrock Ref. & Mktg. Co. v. Mendez, 844 S.W.2d 198, 200-01 (Tex. 1992) (refusing to decide whether the tort exists in Texas because the issue was not adequately briefed by either party); Zinda v. Louisiana Pac. Corp., 440 N.W.2d 548, 555 (Wis. 1989) (discussing Wisconsin statute which corresponds to Prosser's four-part division, except that it omits a false light provision).

43. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 117, at 851 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

44. Kalian v. People Acting Through Community Effort, Inc., 408 A.2d 608, 609 (R.I. 1979).

45. See *supra* notes 7-12 and accompanying text.

46. The only exception was the plaintiff's false light claim in Borton v. Unisys Corp., No. Civ. A. 90-4793, 1991 WL 915, at \*8-11 (E.D. Pa. Jan. 4, 1991). See *supra* note 12 and accompanying text for discussion of this case. In the several states that fail to recognize the tort of false light invasion of privacy, this claim would not be available to the plaintiff. See *supra* note 42 for a listing of those states.

by granting pretrial motions for summary judgment or dismissal. A survey of every reported invasion of privacy case decided in the state and federal courts in 1992<sup>47</sup> provides somewhat startling support for this proposition. Of the forty-nine invasion of privacy cases reported by state courts in 1992,<sup>48</sup> trial courts granted summary judgment to the defendant in twenty-one of the cases,<sup>49</sup> and granted the defendant's motion to dismiss the complaint in fifteen of the cases.<sup>50</sup> In other words, in thirty-six of the forty-nine cases (73 percent) trial

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47. I selected 1992 rather than 1993 to allow adequate time for full appellate review of the cases surveyed.

48. Search of Westlaw, Allstates database (Aug. 1, 1993) (search term "invasion of privacy").

49. *Hoover v. Tuttle*, 611 So. 2d 290, 294 (Ala. 1992); *Johnson v. Corporate Special Servs., Inc.*, 602 So. 2d 385, 386 (Ala. 1992); *D.D. v. C.L.D.*, 600 So. 2d 219, 220 (Ala. 1992); *Hall v. Van's Photo, Inc.*, 595 So. 2d 1368, 1370 (Ala. 1992); *Spitler v. Children's Inst. Int'l*, 14 Cal. Rptr. 2d 197, 199 (Cal. Ct. App. 1992); *Barker v. Huang*, 610 A.2d 1341, 1342 (Del. 1992); *Jackson v. Nationwide Credit, Inc.*, 426 S.E.2d 630, 632 (Ga. Ct. App. 1992); *Kennedy v. Johnson*, 421 S.E.2d 746, 747 (Ga. Ct. App. 1992) (affirming grant of summary judgment to one defendant and denying it to others); *Doe v. Anoka County Bd. of Comm'rs.*, No. C8-92-544, 1992 WL 238373, at \*1 (Minn. Ct. App. Sept. 29, 1992); *Salek v. Passaic Collegiate Sch.*, 605 A.2d 276, 279 (N.J. Super. Ct. App. Div. 1992); *M.J. Dicorpo, Inc. v. Sweeney*, No. 61017, 1992 WL 356382, at \*7 (Ohio Ct. App. Dec. 3, 1992); *Rogers v. Buckle*, 615 N.E.2d 669, 671 (Ohio Ct. App. 1992) (reversing summary judgment for defendant); *Linley v. DeMoss*, 615 N.E.2d 631, 632 (Ohio Ct. App. 1992); *Anthony v. Wonnell*, No. 91AP-995, 1992 WL 230583, at \*9 (Ohio Ct. App. Apr. 7, 1992); *Cramton v. Brock*, No. CA91-05-011, 1992 WL 56765, at \*5 (Ohio Ct. App. Mar. 23, 1992); *Cook v. Carrigan & Mains Funeral Home, Inc.*, 607 N.E.2d 466, 468 (Ohio Ct. App. 1992); *Hadnot v. Shaw*, 826 P.2d 978, 979 (Okla. 1992); *Jenkins v. Bolla*, 600 A.2d 1293, 1294 (Pa. Super. Ct. 1992); *Mitre v. Brooks Fashion Stores, Inc.*, 840 S.W.2d 612, 623 (Tex. Ct. App. 1992); *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 898 (Utah 1992) (reversing summary judgment for defendant); *Hodgdon v. Mt. Mansfield Co.*, 624 A.2d 1122, 1124 (Vt. 1992).

50. *Nahrstedt v. Lakeside Village Condominium Ass'n.*, 11 Cal. Rptr. 2d 299, 301 (Cal. Ct. App. 1992) (reversing decision dismissing complaint); *Trolle v. City of Danbury*, No. 30-73-71, 1992 WL 17114, at \*2 (Conn. Super. Ct. Jan. 24, 1992); *Martin v. Widener Univ. Sch. of Law*, Civ. A. No. 91C-03-255, 1992 WL 153540, at \*19 (Del. Super. Ct. June 4, 1992), *appeal dismissed*, 612 A.2d 158 (Del. 1992); *Kolegas v. Heftel Broadcasting Corp.*, 607 N.E.2d 201, 210 (Ill. 1992) (reversing decision dismissing complaint); *Beverly v. Reinert*, 606 N.E.2d 621, 622 (Ill. App. Ct. 1992); *Geick v. Kay*, 603 N.E.2d 121, 129 (Ill. App. Ct. 1992), *cert. denied*, 113 S. Ct. 3040 (1993); *Furno v. Citizens Ins. Co. of Am.*, 590 N.E.2d 1137, 1141 (Ind. Ct. App. 1992); *Veydt v. Lincoln Nat'l Life Ins. Co.*, 614 A.2d 1318, 1328 (Md. Ct. Spec. App. 1992); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 317 (Mo. 1993) (en banc) (affirming dismissal of privacy claim); *Brandt v. Medical Defense Assocs.*, No. 60267, 1992 WL 77537, at \*1 n.1 (Mo. Ct. App. Apr. 21, 1992); *Carlson v. Chain*, No. A-92-042, 1992 WL 479526, at \*5 (Neb. Ct. App. 1992); *Levine v. Board of Educ.*, 589 N.Y.S.2d 181, 183 (N.Y. App. Div. 1992); *Howell v. New York Post Co.*, 581 N.Y.S.2d 330, 331 (N.Y. App. Div. 1992); *Majebe v. North Carolina Bd. of Medical Examiners*, 416 S.E.2d 404, 409 (N.C. App.), *disc. rev. denied*, 421 S.E.2d 355 (N.C. 1992); *Rooks v. State*, 842 P.2d 773, 777 (Okla. Ct. App. 1992).

judges deprived plaintiffs the opportunity to have their privacy claims heard by a jury. Only four of these pretrial dispositions that were reviewed at the appellate level were reversed.<sup>51</sup>

The situation was almost identical in the federal courts. Of forty-three reported federal cases involving invasion of privacy claims decided in 1992,<sup>52</sup> defendants obtained summary judgment in twenty of the cases,<sup>53</sup> and succeeded in having the complaints dismissed in an additional eleven cases.<sup>54</sup> Thus, defendants won thirty-one of the

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51. *Nahrstedt*, 11 Cal. Rptr. 2d at 301 (reversing decision dismissing complaint); *Kolegas*, 607 N.E.2d at 210 (same); *Rogers*, 615 N.E.2d at 671 (same); *Russell*, 842 P.2d at 898 (same).

52. Search of Westlaw, Allfeds database (Aug. 1, 1993) (search term "invasion of privacy").

53. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (reversing summary judgment for defendant), *cert. denied*, 113 S. Ct. 2443 (1993); *Munson v. Milwaukee Bd. of Sch. Directors*, 969 F.2d 266, 268 (7th Cir. 1992); *Sharp v. United States Dep't of Health & Human Servs.*, 961 F.2d 1578, 1578 (6th Cir. 1992); *Baggs v. Eagle-Picher Indus., Inc.*, 957 F.2d 268, 269 (6th Cir.), *cert. denied*, 113 S. Ct. 466 (1992); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 324 (7th Cir. 1992); *Jackson v. Village of Bellwood*, No. 91C-7089, 1992 WL 396443, at \*1 (N.D. Ill. Dec. 23, 1992) (mem.); *Dow v. Teramara, Inc.*, No. 90-1412-PFK, 1992 WL 403093, at \*8 (D. Kan. Dec. 4, 1992) (granting summary judgment on privacy claim in favor of plaintiff-counterdefendant); *Mayne v. B. Green & Co.*, Civ. A. No. HAR-92-431, 1992 WL 356122, at \*1 (D. Md. Nov. 20, 1992) (mem.); *Estiverne v. Sak's Fifth Ave.*, No. CIV.A.91-4691, 1992 WL 364776, at \*1 (E.D. La. Nov. 19, 1992), *aff'd*, 9 F.3d 1171 (5th Cir. 1993); *Wesley v. WISN Division-Hearst Corp.*, 806 F. Supp. 812, 815 (E.D. Wis. 1992); *Vocal New York Mid-Hudson Chapter v. Dutchess County Dep't of Social Servs.*, No. 91-CIV-5826, 1992 WL 170584, at \*1 (S.D.N.Y. July 9, 1992); *Matrix Essentials, Inc. v. Karol*, No. 89-C-9611, 1992 WL 166926, at \*2 (N.D. Ill. July 8, 1992); *Booth v. Electronic Data Sys. Corp.*, 799 F. Supp. 1086, 1091 (D. Kan. 1992); *Watkins v. United Parcel Serv., Inc.*, 797 F. Supp. 1349, 1360 (S.D. Miss.), *aff'd*, 979 F.2d 1535 (5th Cir. 1992); *Joplin Enters. v. Allen*, 795 F. Supp. 349, 352 (W.D. Wash. 1992); *Sparks v. Regional Medical Ctr. Bd.*, 792 F. Supp. 735, 748 (N.D. Ala. 1992); *Norris v. Bd. of Educ.*, 797 F. Supp. 1452, 1466 (S.D. Ind. 1992); *Cambridge Title Co. v. Transamerica Title Ins. Co.*, 817 F. Supp. 1263, 1278 (D. Md. 1992); *Kersey v. Dennison Mfg. Co.*, No. 89-2650-MA, 1992 WL 71390, at \*13 (D. Mass. Feb. 21, 1992); *Moldea v. New York Times Co.*, 793 F. Supp. 335, 335 (D.D.C. 1992), *aff'd*, 22 F.3d 310 (D.C. Cir. 1994).

54. *Lockard v. Lockard*, 977 F.2d 589, 589 (9th Cir. 1992) (reversing trial court decision granting defendant's motion to dismiss); *Beck v. Interstate Brands Corp.*, 953 F.2d 1275, 1276 (11th Cir. 1992); *All the Answers, Inc. v. Amtelco*, No. CIV.A.92-5177, 1992 WL 392590, at \*1 (E.D. Pa. Dec. 18, 1992) (motion to dismiss granted as to one defendant, denied as to other); *Kinard v. National Tea Co.*, No. 92-0099-B-M, 1992 WL 459572, at \*4 (S.D. Ala. Dec. 11, 1992); *Torretto v. I.B. Diffusion, L.P.*, No. 92-C-2758, 1992 WL 345048, at \*7 (N.D. Ill. Nov. 12, 1992); *Watkins v. General Refractories Co.*, 805 F. Supp. 911, 918 (D. Utah 1992); *Suarez Corp. v. CBS, Inc.*, No. 1:92CV0045, 1992 WL 503593, at \*2 (N.D. Ohio June 24, 1992); *Jeff Isaac Rare Coins, Inc. v. Yaffe*, 792 F. Supp. 13, 18 (E.D.N.Y. 1992); *Bruss Co. v. K & S Brokerage, Inc.*, No. 91-C-1561, 1992 WL 80537, at \*3 (N.D. Ill. Apr. 14, 1992); *Ferragamo v. Signet Bank*, No. CIV.A.WN-88-3333, 1992 WL 219826, at \*8 (D. Md. Mar. 17, 1992); *Smith v. Bendix Field Eng'g Corp.*, No. 91-896-CIV-J-16, 1992 WL 316313, at \*3 (M.D. Fla. Jan. 29, 1992).

forty-three cases (or seventy-two percent) at the trial level via dispositive pretrial motions. Only two of these decisions reviewed at the appellate level were reversed.<sup>55</sup>

Much of the defendants' success can be explained by the fact that the current state of privacy law simply does not favor plaintiffs. For example, the tort of public disclosure of private facts,<sup>56</sup> with which Warren and Brandeis were concerned,<sup>57</sup> is for most practical purposes dead, laid to rest by the United States Supreme Court in *Florida Star v. B.J.F.*<sup>58</sup> The test the Court adopted in *Florida Star* for when a state may constitutionally punish (through the award of tort damages) the publication of true speech is so stringent that Justice White, writing in dissent, argued that the Court had "obliterate[d]" the tort of public disclosure of private facts.<sup>59</sup>

The other privacy torts also present substantial legal obstacles to plaintiffs. The tort of appropriation<sup>60</sup> has evolved into a property-based claim unrelated to the protection of personal privacy. It is used primarily as a tool for helping celebrities protect the commercial value

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55. *Lockard*, 977 F.2d at 589 (reversing trial court decision granting defendant's motion to dismiss); *White*, 971 F.2d at 1399 (reversing summary judgment for defendant).

56. This tort is intended to protect against the revelation of true, embarrassing details concerning a person's life. It is defined in the *Restatement (Second) of Torts* as follows:

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.

RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652D.

57. See Warren & Brandeis, *supra* note 33, at 196, 215-16.

58. 491 U.S. 524, 541 (1989). *Florida Star* is discussed *infra* notes 447-58 and accompanying text.

59. *Id.* at 550 (White, J., dissenting) ("[T]he Court accepts appellant's invitation . . . to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts.")

60. This tort is designed to protect against appropriations of a person's name or likeness for one's own use or benefit. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652C. The first invasion of privacy case to reach an appellate court in the wake of the Warren and Brandeis article involved appropriation. In *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 442 (1902), the defendant used a photograph of a young girl without her consent to advertise its flour. The New York Court of Appeals rejected her claim, causing a public outcry that prompted the New York legislature to enact a statute making it a tort and a misdemeanor to use a person's name or photograph for "advertising purposes or purposes of trade" without her consent. See Prosser, *supra* note 38, at 385 (discussing *Roberson*). Three years later, the Georgia Supreme Court became the first state high court to recognize the tort of appropriation in a case involving an insurance company that used the plaintiff's name and picture as part of a bogus testimonial. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 73 (Ga. 1905).

of their "right of publicity."<sup>61</sup> False light, a sickly stepchild of defamation,<sup>62</sup> has been rejected by several states<sup>63</sup> and even where accepted, "the chances of a plaintiff ultimately prevailing on a false light claim are slim."<sup>64</sup> Intrusion is limited in some jurisdictions by

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61. The original purpose of the tort was to protect against injured feelings resulting from interferences with the solitude or anonymity of the plaintiff. Christopher Pesce, Note, *The Likeness Monster: Should the Right of Publicity Protect Against Imitation?*, 65 N.Y.U. L. REV. 782, 789 (1990). However, most appropriation cases filed today seek to protect pecuniary rather than emotional interests. See Prosser, *supra* note 38, at 406 ("The interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity."). The cases usually involve claims by celebrities or their surviving relatives against one who has, without consent, profited from commercial exploitation of the celebrity's identity. See, e.g., Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988), *cert. denied sub nom.* Young & Rubicam, Inc., v. Midler, 112 S. Ct. 1513 (1992) (suit by singer Bette Midler); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir. 1983) (suit by comedian Johnny Carson); Lugosi v. Universal Pictures, 603 P.2d 425, 427 (Cal. 1979) (suit by relatives of actor Bela Lugosi); see also Lee Goldman, *Elvis Is Alive, But He Shouldn't Be: The Right of Publicity Revisited*, 1992 B.Y.U. L. REV. 597, 597 n.1 (1992) (collecting several other celebrity cases).

In this latter form, the tort of appropriation has nothing to do with protecting personal privacy. Celebrities suing for commercial exploitation of their identities are not complaining about unwanted publicity. They *want* publicity; they simply want to maintain exclusive control over its proprietary value. See Richard Ausness, *The Right of Publicity: A "Haystack in a Hurricane"*, 55 TEMP. L.Q. 977, 981 (1982) ("Celebrities and entertainers who have actively sought publicity cannot honestly claim to be offended by public exposure alone."). Thus, properly characterized, the modern tort of appropriation is more a kind of property claim than a privacy claim. Pesce, *supra*, at 791. Recognizing this, many courts have approved an independent cause of action for interfering with a person's "right of publicity." For general discussion of this tort, see Barbara A. Burnett, *The Property Right of Publicity and the First Amendment: Popular Culture and the Commercial Persona*, 3 HOFSTRA PROP. L.J. 171, 174 (1990); Goldman, *supra*, at 602; Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1202 (1986); Barbara Singer, *The Right of Publicity: Star Vehicle or Shooting Star?*, 10 CARDOZO ARTS & ENT. L.J. 1, 6 (1991); J. Stephen Bingman, Comment, *A Descendible Right of Publicity: Has the Time Finally Come for a National Standard?*, 17 PEPP. L. REV. 933, 935 (1990); Pesce, *supra*, at 789.

62. The tort of false light is intended to protect against objectionable false portrayals of a person. It is defined in the *Restatement (Second) of Torts* 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.

RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652E.

63. See *supra* note 42 (citing cases).

64. Diane L. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 366-67 (1989). Professor Zimmerman explains that this is due to the overlap between defamation and false light. Plaintiffs suing for false light usually also sue for defamation. *Id.* at 367 n.16. When they prevail, it is usually on the defamation claim.



the requirement of a physical trespass,<sup>65</sup> and in virtually all jurisdictions by the rule that no intrusion can occur in a public place.<sup>66</sup>

However, it is not only restrictive legal definitions that hinder privacy plaintiffs. Review of the case law discloses a judicial wariness of—if not outright hostility towards—the invasion of privacy torts. In disposing of invasion of privacy cases through pretrial mechanisms, courts often decide on their own what would appear to be questions of fact more appropriate for jury resolution. *Dempsey v. National Enquirer*<sup>67</sup> serves as an illustrative example.<sup>68</sup> The plaintiff filed several tort claims against the *National Enquirer* arising out of an article concerning plaintiff's remarkable escape from injury after he fell out of an airplane.<sup>69</sup> One of the counts pleaded by plaintiff was

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*Id.* The conceptual difficulties involved with the claim of false light are obvious: If a false statement damages reputation, it is actionable as defamation; if it does not damage reputation, one may ask whether there is any point in providing a legal remedy.

65. *E.g.*, *Pierson v. News Group Publications, Inc.*, 549 F. Supp. 635, 640 (S.D. Ga. 1982) (holding that "[a]n essential element of this tort is a physical intrusion analogous to a trespass"); *Nelson v. Maine Times*, 373 A.2d 1221, 1223 (Me. 1977) ("[A] complaint should minimally allege a physical intrusion upon premises occupied privately by a plaintiff for purposes of seclusion.").

66. *See supra* notes 6, 13 (collecting cases).

67. 702 F. Supp. 927, 932-33 (D. Me. 1988).

68. *See also Aisenson v. American Broadcasting Co.*, 269 Cal. Rptr. 379, 387-88 (Cal. Ct. App. 1990) (affirming summary judgment for defendant who videotaped plaintiff outside his home as part of news story, implicitly holding as a matter of law that intrusion was not highly offensive to a reasonable person); *Mastroberti v. Hall*, No. 058336, 1993 WL 58277, at \*2 (Conn. Super. Ct. Feb. 18, 1993) (granting motion to strike complaint because allegations that defendant intruded upon and photographed portions of plaintiff's business which were closed to the public were insufficient as a matter of law to show highly offensive conduct); *Wallace v. Capital Cities/ABC, Inc.*, 1989 WL 100423, at \*1 (Del. Super. Ct. Aug. 4, 1989) (granting summary judgment for defendant based upon court's determination that broadcast footage of exterior and portion of interior of plaintiff's home was not highly offensive to an ordinary person); *Lewis v. Dayton Hudson Corp.*, 339 N.W.2d 857, 860 (Mich. Ct. App. 1983) (affirming summary judgment for defendant whose employee spied on suspected shoplifter in dressing room from grille in ceiling, deciding as a matter of law that signs outside dressing room warning that area was under surveillance immunized defendant's conduct); *Bitsie v. Walston*, 515 P.2d 659, 663-64 (N.M. Ct. App. 1973) (deciding as a matter of law that printing sketch of Navajo child in newspaper, which offended traditional beliefs of Navajo tribe, was not offensive to persons of ordinary sensibilities; dissent argued courts should "not be frightened to allow a jury to play its role—to determine issues of fact").

69. *Dempsey*, 702 F. Supp. at 928 n.1. The plaintiff also sued News America Publishing, Inc., publisher of the *Star* (another tabloid newspaper) in connection with a story about the incident which appeared in that publication. *Dempsey v. National Enquirer*, 702 F. Supp. 934, 935 (D. Me. 1989). Both the *National Enquirer's* and the *Star's* accounts of the incident contained fabricated quotations attributed to the plaintiff. *Id.* at 935, 937. The *Star* went so far as to report the story as a first-person narrative under a byline using the plaintiff's name. *Id.* at 935.

an intrusion claim alleging the following conduct by an *Enquirer* reporter:

She allegedly came to his house and continued to press for an interview even after the plaintiff refused, repeatedly drove past his house for more than three-quarters of an hour after the refusal, returned to the plaintiff's house two days later and was again rebuffed, followed the plaintiff to a restaurant and again requested an interview, attempted to photograph the plaintiff at the restaurant, and then left after the plaintiff threatened to call the management.<sup>70</sup>

In concluding that the plaintiff failed to state a claim upon which relief could be granted, the court stated that although the contacts may have been annoying, they could not "reasonably be seen as highly offensive."<sup>71</sup> This conclusion addressed the generally accepted element of the tort of intrusion that the defendant's conduct must "be highly offensive to a reasonable person."<sup>72</sup> However, objective reasonable person tests are usually for the fact finder to apply and resolve.<sup>73</sup> Undoubtedly, there are cases involving trivial invasions in which it would be appropriate for a court to make this determination as a matter of law;<sup>74</sup> however, *Dempsey* does not appear to be one of them. Construing the complaint in the light most favorable to the plaintiff and resolving every doubt on his behalf, as the court is required to do in passing upon a motion to dismiss,<sup>75</sup> the allegations set forth a colorable claim of intrusion. It is likely that many reasonable persons would find it highly offensive to be placed under surveillance, followed about and accosted at their homes and in restaurants.

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70. *Dempsey*, 702 F. Supp. at 931.

71. *Id.*

72. See RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B; see *supra* note 5 for complete text of the *Restatement* definition of intrusion.

73. See, e.g., PROSSER & KEETON ON TORTS, *supra* note 43, § 37, at 237 (discussing the determination of the standard of reasonable conduct to govern in a negligence case, the authors state that "[u]nder our system of procedure, this question is to be determined in all doubtful cases by the jury").

74. See *Bennett v. Columbia Broadcasting Sys., Inc.*, 798 F.2d 1413, 1413 (6th Cir. 1986) (upholding the granting of defendant's motion to dismiss based upon determination that plaintiff's receipt of two pieces of "junk mail" from defendant after requesting not to receive any did not constitute an intrusion which a reasonable person would find highly objectionable).

75. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

The judicial animus towards privacy claims probably stems in part from a desire to exert jury control over a tort that has been criticized as having no "legal profile."<sup>76</sup> Particularly because of the free speech implications of many privacy cases, courts no doubt feel obliged to screen privacy cases carefully before sending them to juries. However, it also appears that some judges simply "don't get it" when it comes to complaints of invasion of privacy. This lack of perception is reflected in *Albright v. United States*.<sup>77</sup> The plaintiffs, a group of Social Security Administration employees, were denied promotions.<sup>78</sup> At the request of the employees, the Bureau of Hearings and Appeals of the Social Security Administration ("Bureau") held a meeting to explain the employment decision.<sup>79</sup> When the employees arrived at the meeting, they discovered that the proceedings were being videotaped.<sup>80</sup> Afterwards, the employees sued under the federal Privacy Act, claiming emotional injuries resulting from the videotaping.<sup>81</sup>

The court of appeals upheld the dismissal of the plaintiffs' claims, agreeing with the district court that the plaintiffs failed to establish a causal connection between the videotaping and their asserted emotional distress.<sup>82</sup> Despite several of the plaintiffs' direct testimony on this issue,<sup>83</sup> the district court stated that the plaintiffs presented "no credible evidence . . . linking the adverse [emotional] effects with the videotaping."<sup>84</sup>

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76. Kalven, *supra* note 30, at 333. Professor Kalven was referring specifically to the invasion of privacy tort known as public disclosure of private facts, but similar observations have been made concerning other privacy torts. See, e.g., Zimmerman, *supra* note 64, at 369 (arguing that the tort of false light is "a conceptually empty tort"); *id.* at 371 (commenting that there is a "surprising vagueness" regarding the interests the tort is intended to protect); *id.* at 371-72 (stating that "[t]he common law has yet to provide a coherent answer" to the question of what kinds of false depictions should be remedied by the tort).

77. 732 F.2d 181, 183 (D.C. Cir. 1984).

78. *Id.* at 182.

79. *Id.*

80. *Id.* at 183-84.

81. *Id.* at 182. The Privacy Act proscribes the Bureau from maintaining a "record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained . . . ." 5 U.S.C. § 552a(e)(7) (1988).

82. *Albright*, 732 F.2d at 186-88. The court also held that the plaintiffs did not show that the defendants acted intentionally or willfully as required by the Privacy Act. *Id.* at 188-90.

83. *Id.* at 187.

84. *Id.* at 186.

In recounting the testimony of three of the plaintiffs regarding the adverse effects they suffered as a result of the videotaping, the court of appeals stopped just short of openly ridiculing them. One plaintiff analogized the taping to intrusive state repression in totalitarian countries;<sup>85</sup> the second testified that the videotaping evoked the same feeling of invasion as when the plaintiff's home had been burglarized;<sup>86</sup> the third testified that "I felt like I was a nonentity, that I was just a person there that things could be done to me without my knowledge, approval or say or anything . . . ."<sup>87</sup> Citing these examples, the court characterized the plaintiffs' testimony as so exaggerated as to make "their whole case . . . unbelievable."<sup>88</sup> The court also commented that "[i]f the videotaping had truly been so offensive," the plaintiffs should have left the meeting.<sup>89</sup>

The tone of the court's opinion reveals its insensitivity to the possibility that a person could be legitimately and seriously offended by nonconsensual videotaping. This was a meeting held by management to discuss what amounted to job demotions of the affected employees. According to the court, "[t]ensions . . . ran high" at the meeting and "there were several heated exchanges" between the employees and management.<sup>90</sup> It is not unreasonable to believe that the employees, already in a vulnerable position, would feel violated and suffer adverse effects by having their attendance, comments, and even facial expressions captured on permanent videotape by their superiors. This is particularly true because the employees had no advance notice that the meeting would be videotaped and had no control over what would happen to the videotape.<sup>91</sup> Nor is it unreasonable that the employees would feel compelled to remain at the meeting despite their repugnance to being videotaped. The analogy to intrusive behavior by totalitarian regimes

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85. *Id.* at 187.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* The court did not go so far as to hold that the employees consented to the videotaping, which would be a defense under the Privacy Act, *see supra* note 81, as well as under the common law tort of invasion of privacy. *See Prosser, supra* note 38, at 419 ("Chief among the available defenses is that of the plaintiff's consent to the invasion, which will bar his recovery as in the case of any other tort.").

90. *Albright*, 732 F.2d at 183.

91. *Id.* at 184. After the meeting, the agency offered to destroy the videotape, but the analysts refused the offer in order to preserve the videotape as evidence in their suit. *Id.*

was not, as the court implied, ridiculous.<sup>92</sup>

The shrinking right of privacy in tort law is important to this Article not only because of the dismal prospects it presents for privacy claimants generally, but also because of the specific impact it has upon those whose privacy is invaded in public. The four privacy torts are closely interrelated. Most privacy plaintiffs assert claims based upon more than one of the four torts and sometimes all four of them. If the other three privacy torts were strong, it would be less objectionable that the tort of intrusion is weak. More liberal judicial treatment of the torts of public disclosure of private facts, appropriation and, to a lesser extent, false light would permit recovery in appropriate cases involving invasions of privacy that occur in public without the necessity of redefining the tort of intrusion. But that has not occurred.

Consider the case of the three boys who were photographed without their consent while they spoke with a policewoman on a public sidewalk.<sup>93</sup> The photo subsequently appeared in *Playboy* magazine next to nude photos of the policewoman, and the three boys sued the magazine for invasion of privacy.<sup>94</sup> Their position evokes sympathy. It seems wrong for one to secretly photograph a person without his consent and then to disseminate the photo to a wide audience, particularly in a manner and publication many would find objectionable. However, the court held that the facts fell short of satisfying the requirements of any of the four invasion of privacy torts and dismissed the plaintiffs' complaint.<sup>95</sup>

The court ruled that no intrusion occurred because the photo was taken on a public sidewalk "in plain view of the public eye."<sup>96</sup> Appropriation failed because the boys did not allege "that their likenesses have value in and of themselves" that could be taken by someone else for commercial benefit.<sup>97</sup> A claim for public disclosure of private facts did not lie because "[t]here is no liability when the defendant merely gives further publicity to information about the

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92. Cf. Lena H. Sun, *Chinese Government Takes Ambivalent Approach to Released Dissidents*, WASH. POST, Oct. 3, 1992, at A13 (discussing plainclothes police of Chinese regime following dissident and filming him with video camera hidden inside a shoulder bag).

93. *Jackson v. Playboy Enters.*, 574 F. Supp. 10, 11 (S.D. Ohio 1983).

94. *Id.* at 11.

95. *Id.*

96. *Id.* at 13.

97. *Id.*

plaintiff that is already public.' <sup>98</sup> Finally, a false light claim was not available because the plaintiffs did not allege that the photograph was a false depiction of their appearances or that it attributed false characteristics or conduct to them.<sup>99</sup>

This case reveals that restrictive interpretation of the four privacy torts has left a large gap in the law with respect to invasive behavior that occurs in public places. Before discussing how that gap should be filled, it is important to discuss *why* it needs filling; that is, to understand the magnitude of the threat to privacy in public places.

### III. THE GROWING THREAT TO PRIVACY: REVISITING THE FEARS OF WARREN AND BRANDEIS

While the right to privacy in tort law shrinks, the threat to privacy is growing. We live in an increasingly intrusive, uncivil<sup>100</sup> society. To appreciate how much so, we need only summon up the ghost of privacy law past and make some comparisons. In their landmark article *The Right To Privacy*,<sup>101</sup> Warren and Brandeis identified two principal threats to privacy. The first was the press, which they saw as "overstepping in every direction the obvious bounds of propriety and of decency."<sup>102</sup> The second was the development of "numerous mechanical devices" which "threaten[ed] to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' "<sup>103</sup>

#### A. *The Uncivil Media*

If the fears of Warren and Brandeis were well grounded in the late nineteenth century, they are much more so today. Indeed, the empirical basis for their anxiety about privacy seems almost trivial

98. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652D cmt. b).

99. *Id.* at 14.

100. Professor Robert Post advanced the theory that invasion of privacy tort law safeguards societal "civility rules," which he defines as normative expectations of decency toward one another. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 962-63 (1989).

101. Warren & Brandeis, *supra* note 33.

102. *Id.* at 196. They continued:

Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.

*Id.*

103. *Id.* at 195 (source of internal quotation not cited in original).

when compared to modern events. Consider first their concern over the gossipy press. In his own classic article on the subject of privacy, Dean Prosser gave credence to the theory that the Warren and Brandeis article was motivated by Warren's annoyance with the Boston newspaper coverage of parties hosted by his socialite wife and by publicity given to the wedding of a family member.<sup>104</sup> If Warren was annoyed by the newspaper revelation that the Warrens "gave a handsome wedding breakfast after the ceremony" or the observation that there were "no bridesmaids" at the wedding,<sup>105</sup> one can imagine he would be apoplectic reading and viewing media coverage concerning the private lives of citizens in modern times.

While the press has been attacked before<sup>106</sup> and since<sup>107</sup> the time of Warren and Brandeis, it seems fair to conclude that things are getting worse. Recent times have produced more than one notable example of invasive journalism,<sup>108</sup> but the low point seems to be the

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104. Prosser, *supra* note 38, at 383-84. This theory has been debunked by others. See Barron, *supra* note 33, at 892-93. Barron and other researchers have concluded that Warren and Brandeis greatly overstated their case with regard to the press. *Id.* at 895-97. Barron states that while there were instances in which the press showed little regard for the privacy of individuals, Boston newspapers in the late nineteenth century were actually quite tame and, in fact, this period represented "the golden age of Boston journalism." *Id.* at 895. He concluded that references to the Warren family, which supposedly sparked the Warren and Brandeis article, "were virtually nonexistent, let alone lurid." *Id.* at 896.

105. Barron, *supra* note 33, at 893-94. These quotations are from the only two descriptions of the wedding that appeared in Boston newspapers. *Id.* The articles revealed no details more personal than those quoted in the accompanying text. See *id.*

106. See *id.* at 889 ("[S]ignificant criticism of the irresponsible excesses of the American press had been published before the Warren-Brandeis article appeared in the *Harvard Law Review*.").

107. See, e.g., *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957, 960 (D. Minn. 1948) ("[O]thers contend that the Press has overstepped the bounds of propriety in pursuing the trade of gathering all trivial gossip and sensational stories which may be unfolded in any court trial in order to cater to the lowest tastes in our citizenry and thereby increase the sale of their newspapers.").

108. See, e.g., Alexander Cockburn, *A Ruritanian Plot Against Prince Charles: Scotland Yard Bodyguards had the Equipment to Overhear Royal Phone Indiscretions*, L.A. TIMES, Jan. 17, 1993, at M5 (quoting a secretly taped conversation in which Prince Charles, the Prince of Wales, tells his alleged mistress that he would like to "live inside [her] trousers"); Alex S. Jones, *Report of Ashe's Illness Raises an Old Issue for Editors*, N.Y. TIMES, Apr. 10, 1992, at A25 (describing ethical debate regarding whether media should have disclosed that former tennis star Arthur Ashe had contracted AIDS).

Of course, if one considers the tabloid press, the examples of invasive reporting multiply quickly. The following headlines concerning the private lives of entertainment celebrities appeared on the covers of three popular tabloids published during the week of July 6, 1993: *Burt's 4-Year Affair With Waitress!*, GLOBE, July 6, 1993, at 1; *Oprah's Hot Love Secrets*, *id.*; *Danson Romance Turns Ugly Duckling Whoopi Into A Beautiful Swan*, *id.*; *Angry Loni: I Want \$15 Million—Her Side of Burt Reynolds Divorce Drama*, NAT'L ENQUIRER, July 6, 1993, at 1; *Shannen Strikes Again! Cops Called As She Battles Fiance's*

media's continuing obsession with President Bill Clinton's sex life. During the 1992 presidential campaign, the media fed voraciously on allegations of President Clinton's sexual indiscretions. To measure societal changes in civility since the time of Warren and Brandeis, try to picture an editor in the 1890s giving the green light to an article detailing the sexual prowess of a United States president. It is ludicrous to imagine reading that Benjamin Harrison rated "9 out of 10" as a lover or that Grover Cleveland performed oral sex "like a champ." Yet these were among the titillations offered to readers about Bill Clinton in 1992.<sup>109</sup> The "no holds barred" campaign coverage was not limited to Clinton. Innocent, private figures were also swept into the fray.<sup>110</sup>

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*Mom*, STAR, July 6, 1993, at 1; *Conway Twitty's Shocking \$50M Will: Country King Forgot to Include His Wife!*, *id.*; *Loni Begs Burt: Let's Start Over*, *id.*; *Sexy Secrets Oprah Doesn't Want You To Read*, *id.*

Total forfeiture of one's private life seems too high a cost for the decision to seek the public limelight in a professional capacity. As Stanley Benn commented in his essay *Privacy, Freedom, and Respect for Persons*:

If a person is in the public eye for some performance that he intends to be public or that is in its nature public . . . this may . . . make "human interest stories" about him more entertaining and exciting than similar stories about an unknown. But the fact that many people enjoy that kind of entertainment is no reason at all for overriding the principle of privacy . . . . To treat even an entertainer's life simply as material for entertainment is to pay no more regard to him as a person than to an animal in a menagerie. . . . [M]erely to be a celebrity—even a willing celebrity—does not disable someone from claiming the consideration due to a person.

Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, in NOMOS XIII: PRIVACY 14 (J. Roland Pennock & John W. Chapman eds., 1971).

109. See *Flowers In Bloom*, MACLEAN'S, Nov. 23, 1992, at 11 (recounting details of an interview published in *Penthouse* magazine with Gennifer Flowers, the former nightclub singer who claimed to have carried on a twelve-year extramarital affair with Bill Clinton while he was governor of Arkansas).

110. Former Little Rock journalist Deborah Mathis was named in the *Star* tabloid as one of then-candidate Bill Clinton's extramarital lovers. Eleanor Clift et al., *Surviving the Smear: One Woman's Story*, NEWSWEEK, Feb. 10, 1992, at 26. Mathis told Newsweek how she had to sit down with her children and explain to them: "'A sleazy publication is about to print lies about your mama. Some idiot might come up to you and offer you money to tell lies. Some kids you know might taunt you about your mama.'" *Id.* at 27.

The intrusion into Mathis's life cannot be dismissed simply as sleazy tabloid journalism. While the Mathis story originated in a tabloid, Mathis said she subsequently received calls from several "mainstream reporters" as well. *Id.* This reflects the disturbing " 'symbiotic relationship [that] has arisen between the two extremes of American journalism, with charges trumpeted by supermarket tabloids picked up by serious news organizations and converted from dross to journalistic gilt.'" Christopher Clausen, *Culture Watching: Reading the Supermarket Tabloids*, NEW LEADER, Sept. 7, 1992, at 11 (quoting an article from the *New York Times*).



At the end of Clinton's first year in office, when the clamor concerning his sex life had quieted down, an article in *The American Spectator*<sup>111</sup> reignited the furor. The article detailed lurid accusations of sexual misconduct made by two Arkansas state troopers who served on Clinton's security detail while he was governor of Arkansas. A NEXIS computer search revealed an astounding 13,210 newspaper articles written about President Clinton and his sex life,<sup>112</sup> as well as 1,394 magazine articles.<sup>113</sup> To appreciate the magnitude of these figures, consider that print coverage of the Brady Bill,<sup>114</sup> involving a controversial public policy issue that generated

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Even if invasive stories were limited to tabloids, they could not be dismissed as insignificant. The *National Enquirer* has a weekly circulation of 3.8 million, the largest of any newspaper in the United States. *Id.* at 10 (reporting also that the *Wall Street Journal* is second with a circulation of 1.8 million and *USA Today* is third at 1.4 million).

111. David Brock, *His Cheatin' Heart: David Brock in Little Rock*, AM. SPECTATOR, Jan. 1994, at 18. The state troopers told Brock

their "official" duties included facilitating Clinton's cheating on his wife. This meant that, on the state payroll and using state time, vehicles, and resources, they were instructed by Clinton on a regular basis to approach women and to solicit their telephone numbers for the governor; to drive him in state vehicles to rendezvous points and guard him during sexual encounters; to secure hotel rooms and other meeting places for sex; to lend Clinton their state cars so he could slip away and visit women unnoticed; to deliver gifts from Clinton to various women . . . ; and to help Clinton cover up his activities by keeping tabs on Hillary's whereabouts and lying to Hillary about her husband's whereabouts.

*Id.* at 21.

112. Search of NEXIS, News library, Papers file (November 31, 1994) (search term "Clinton and sex! but not homosexual! or gay or sex! discrimination").

113. Search of NEXIS, News library, Mags file (November 31, 1994) (search term "Clinton and sex! but not homosexual! or gay or sex! discrimination").

In what might be characterized as the ultimate illustration of psychological denial, an apparently serious *Newsweek* reporter recently wrote: "The national press has been restrained in its accounts of Bill Clinton's private life. . . ." Joe Klein, *The Politics of Promiscuity*, NEWSWEEK, May 9, 1994, at 16. Some of the articles written about President Clinton's sex life (although only a small percentage) pertain to the lawsuit filed against him by Paula Jones, a former Arkansas state employee who alleges that Clinton made unwanted sexual advances towards her in 1991 while he was Governor of Arkansas. See generally Stephen Labaton, *Suit Accuses President of Advance*, N.Y. TIMES, May 7, 1994, at 9 (describing allegations of lawsuit). While it is reasonable to expect the press to report any lawsuit filed against the President of the United States, query whether the lawsuit ever would have been filed but for the tabloid climate concerning Clinton's sex life created by the media.

114. The Brady Bill is the popular name of a federal law that created a five day waiting period for handgun purchases, during which law enforcement agencies must conduct background checks upon buyers to determine whether they are convicted felons or otherwise legally prohibited from purchasing firearms. Brady Handgun Violence Protection Act, 18 U.S.C.A. § 922(s)(1) (West 1994). For a thorough analysis of the controversy surrounding the Brady Bill, see Andrew J. McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53 (1992).

fierce debate for seven years before its passage, has produced a comparatively meager 5,733 newspaper articles<sup>115</sup> and 328 magazine articles.<sup>116</sup>

The media's willingness to print just about anything about just about anybody carries over to the methods media representatives<sup>117</sup> use to gather information. This, in turn, has direct implications for the tort of intrusion, including intrusions in places accessible to the public. In television today, life does not just imitate art; it is the art, as demonstrated by the seemingly endless supply of so-called "reality shows"<sup>118</sup> on the air, such as *I Witness Video*, *Cops*, *Firefighters*, *Real Stories of the Highway Patrol*, *On Scene: Emergency Response* and *Rescue 911*.<sup>119</sup> It appears that the goal of these programs is to compress as much human suffering and failing as possible into the allotted thirty- or sixty-minute time slot. In its premiere episode in the fall of 1992, *I Witness Video* showed footage of four real-life slayings,<sup>120</sup> prompting a weekly newsmagazine to label it "TV's first 'snuff' show."<sup>121</sup>

Much footage for the reality shows comes from camera crews who travel with police, firefighters, and emergency rescue personnel

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115. Search of NEXIS, News library, Papers file (November 31, 1994) (search term "Brady Bill").

116. Search of NEXIS, News library, Mags file (November 31, 1994) (search term "Brady Bill").

117. "Media representatives" is a more appropriate term than "journalists." Though the public may not always recognize the distinction, the tabloid and reality television shows are entertainment programs rather than news programs. See Jane Hall, *Ruling May Affect Taping of Searches: Television Executives Say Sending TV Crews Out With Law-Enforcement Agents Will Be Looked At On A Case-By-Case Basis*, L.A. TIMES, Nov. 28, 1992, at F1 (quoting John Langley, co-executive producer of the Fox Network series *Cops*: "We don't claim to be journalists operating under the aegis of the news—we're considered entertainment."); see also *Perspectives*, NEWSWEEK, Oct. 11, 1993, at 19 (quoting CBS anchorperson Dan Rather: "It's the ratings, stupid, don't you know? They've got us putting more fuzz and wuzz on the air, cop-shop stuff, so as to compete not with other news programs but with entertainment programs—including those posing as news programs—for dead bodies, mayhem and lurid tales.").

118. See *supra* note 1 for definition of reality television programming.

119. These programs appeared in the *TV Guide* for the week of Aug. 14-20, 1993. TV GUIDE, Vol. 41, No. 33, Issue No. 2107. See, e.g., *Cops* (CBS television broadcast); *Firefighters* (KASN (Little Rock; Ind.) television broadcast); *I Witness Video* (NBC television broadcast); *On Scene: Emergency Response* (KASN (Little Rock; Ind.) television broadcast); *Real Stories of the Highway Patrol* (KTVT (Fort Worth; Ind.) television broadcast); *Rescue 911* (CBS television broadcast).

120. *I Witness Video* (NBC television broadcast).

121. Harry F. Walters et al., *Networks Under the Gun*, NEWSWEEK, July 12, 1993, at 64, 65.

and videotape persons unlucky enough to suffer a heart attack,<sup>122</sup> have an automobile accident,<sup>123</sup> or be the subject of a search warrant<sup>124</sup> on that particular evening. At least one of the programs regularly features videotape of hapless drunk drivers being pulled over by the police and humiliating themselves while they botch field sobriety tests and slur denials of being drunk.<sup>125</sup>

A second disturbing trend in modern television relevant to the tort of intrusion is the increasingly widespread use of hidden microphones and cameras. A writer for the *Washington Post* labeled the use of hidden video cameras as the "hottest trend in television."<sup>126</sup> A representative of CBS News recently stated that the use of hidden cameras is "up considerably in the industry,"<sup>127</sup> a disturbing prospect in light of a survey ten years earlier showing that sixty-four percent of television stations doing investigative stories were using hidden cameras and microphones.<sup>128</sup>

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122. See *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668 (Cal. Ct. App. 1986) (reversing summary judgment on intrusion claim which had been entered by trial court in favor of defendant broadcasting company against wife of heart attack victim who was filmed in his home without consent as paramedics unsuccessfully attempted to resuscitate him).

123. See *supra* notes 17-23 and accompanying text (discussing intrusive filming of accident victim by camera crew working for syndicated program *On Scene: Emergency Rescue*).

124. See *Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 222 (Sup. Ct. 1981) (suit by owner of home filmed during search by Humane Society for mistreated animals); *Rogers v. Buckel*, 615 N.E.2d 669, 670 (Ohio Ct. App. 1992) (suit by bystander and child filmed during drug raid); *Magenis v. Fisher Broadcasting, Inc.*, 798 P.2d 1106, 1107-08 (Or. Ct. App. 1990) (suit by family filmed during drug raid); Hall, *supra* note 117, at F1 (describing raid of fraud suspect's home by U.S. Secret Service, which was filmed by crew for television program *Street Stories*, and during which suspect's wife tried to shield herself and five-year-old child from filming).

125. E.g., *Real Stories of the Highway Patrol* (KTVT (Fort Worth; Ind.) television broadcast). The producers of the programs seem to have become much more careful about blurring the faces of many of the subjects. This may be in response to the increasing number of tort suits being filed against the programmers. See Cox, *supra* note 14, at 34-35 (describing several recent lawsuits).

126. Howard Kurtz, *Hidden Network Cameras: A Troubling Trend? Critics Complain of Deception as Dramatic Footage Yields High Ratings*, WASH. POST, Nov. 30, 1992, at A1.

127. Kenneth R. Clark, *Secret Cameras, Mikes Arouse Ethical Dilemma*, ORLANDO SENTINEL, July 9, 1992, at E6 (quoting David Corvo, vice-president of public affairs for CBS News).

128. Alvin P. Sanoff, *Ethics, Bias, Accuracy: Fresh Attacks on TV News*, U.S. NEWS & WORLD REP., Sept. 5, 1983, at 55 (discussing survey by Charles Burke, associate professor of journalism at the University of Florida).

Although in some situations the "greater good" may justify using hidden cameras,<sup>129</sup> more often than not the practice may amount to lazy journalism and an unwarranted invasion of privacy. In Minneapolis, a television news team placed unlocked bicycles around the city and then waited with hidden cameras for people to steal them.<sup>130</sup> They filmed and followed the thieves, who were usually youths.<sup>131</sup> In another incident, ABC and correspondent Geraldo Rivera sought to interview a woman in connection with an investigation of a judge who allegedly exchanged leniency in criminal cases for sexual favors.<sup>132</sup> The woman agreed to be interviewed for the program, but refused to appear on camera.<sup>133</sup> Betraying this condition, the defendants secretly videotaped the interview and broadcast a portion of it.<sup>134</sup> In another incident that led to a lawsuit, representatives of the *Sally Jessy Raphael* show secretly taped a confrontation between a group of adult children and their mother

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129. A well-publicized incident involving misrepresentation and hidden cameras has fostered debate on this point. In November 1992, a woman working for ABC's *Prime Time Live* program applied for a job in the meat department of a Food Lion supermarket as part of an investigation into meat handling practices. The reporter stated on the application: "I really miss working in a grocery store, and I love meat wrapping. I would like to make a career with the company." *Lies and Videotape*, ST. PETERSBURG TIMES, Dec. 7, 1992, at 12A. She quit eleven days later, stating that she had to care for a grandparent. *Id.* While she was an employee she used a hidden video camera to film unsanitary meat handling practices. See Kurtz, *supra* note 126, at A1 (stating that the broadcast charged the supermarket chain with repackaging old meat). Food Lion has sued ABC News over the incident. *Id.* at A4; see also Marc Gunther, *Hidden Cameras Catch All: In Its Quest To Perfect Investigative-TV Journalism, 'Prime Time Live' Is Pushing the Limits of Concealed Minicams*, ORLANDO SENTINEL, June 14, 1991, at E1 (referring to other examples of journalists using video cameras hidden in such items as hats, handbags, and teddy bears).

Don Hewitt, executive producer of the television news program *60 Minutes*, admits to being "troubled" by such practices, but states: "It's the small crime versus the greater good. . . . If you can catch someone violating 'thou shalt not steal' by your violating 'thou shalt not lie,' that's a pretty good trade-off." Kurtz, *supra* note 126, at A1, A4. Others have condemned misrepresentation and the use of hidden cameras by journalists. See *id.* at A4 (quoting Tom Goldstein, dean of the journalism school at the University of California at Berkeley: "I just think it's wrong.")

To ward off a hidden camera investigation, Tyson Foods, Inc., the nation's largest poultry producer, filed suit against the news magazine program *20/20*, seeking to enjoin representatives of the program from taking hidden cameras into the company's processing plants. D.R. Stewart, *Tyson Sues '20-20' to Stop Hidden-Camera Bid*, ARK. DEMOCRAT-GAZETTE, Nov. 24, 1993, at D1.

130. Sanoff, *supra* note 129, at 54.

131. *Id.* at 55.

132. *Boddie v. American Broadcasting Co.*, 881 F.2d 267, 268 (6th Cir. 1989).

133. *Id.* at 268.

134. *Id.* The dismal state of invasion of privacy law is demonstrated by the fact that the woman lost her lawsuit on all counts. *Id.* at 271-72.

over how the mother's participation in the Church of Scientology had disrupted the family relationship.<sup>135</sup> Without the mother's consent, one of the children transmitted their conversation to a hidden camera crew using a miniature microphone hidden in her clothing.<sup>136</sup> The mother, a Scientology instructor, sued.<sup>137</sup>

All of this appears to be part of a trend toward excess in mass communication generally. Outrageousness seems to be the name of the game. Whether it be "shock jock" Howard Stern sitting on a toilet surrounded by scantily clad women vying to be Miss Howard Stern 1994,<sup>138</sup> rap artist Ice-T singing about killing police officers,<sup>139</sup> or actress Demi Moore posing nude on the cover of a national magazine while eight months pregnant,<sup>140</sup> the goal seems to be to go farther than anyone has gone before.<sup>141</sup> Nothing, apparently, is off limits.

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135. See Cox, *supra* note 14, at 35 (citing *Sally Jesse Raphael* (CBS television broadcast)).

136. *Id.*

137. *Id.* A jury returned a verdict against the mother after a month-long trial. *Id.* Prior to the encounter, legal counsel for the defendant advised the children to hold the meeting in a public park. *Id.*

138. *Ring Out the Old, Gross Out the New*, NEWSWEEK, Jan. 17, 1994, at 33 (containing a video still shot of this scene from Stern's New Year's Eve pay-per-view special on cable television; the picture included the superimposed caption "cause our breasts are the best"). Stern offered \$50,000 in prize money to beauty contestants willing to perform stunts such as eating maggots. *Id.*

In December 1992, the Federal Communications Commission ("FCC") imposed a record \$600,000 fine against a company that employed Stern, who has built a reputation upon "explicit references to genitals, homosexuals, and masturbation and other sexual activity." Paul Farhi, *FCC to Levy Record Indecency Penalty: \$600,000 Fine Expected On Howard Stern Broadcasts*, WASH. POST, Dec. 18, 1992, at D1, D2. In response to a separate fine handed down by the FCC earlier in the year, Stern stated on the air that he hoped FCC Chairperson Alfred C. Sikes's "prostrate cancer would spread and that the other FCC commissioners would die in a car wreck." *Id.* at D2.

139. See Eric Snider, *Ice T Takes the Plunge and Wins*, ST. PETERSBURG TIMES, Aug. 1, 1992, at 1D (discussing controversial rap singer's song "Cop Killer," which contains lyrics such as "I'm about to bust some shots off; I'm about to dust some cops off").

140. The actress posed for the cover of *Vanity Fair*. Bo Emerson, *It's No Apparition, Just More of Demi: Vanity Fair Covers All As Actress, Proud of Pregnancy, Covers Little*, ATLANTA J. & CONST., July 11, 1991, at D1. An editorial writer commented on the change in attitude represented by her bold move: "Society has come a long way since pregnant women were referred to discreetly as being 'in the family way' or 'with child.' In 1952, the nation's most famous mother-to-be, Lucille Ball, couldn't even say the word pregnant on television." *Sexes Watch: Picture Perfect*, L.A. TIMES, July 22, 1991, at B6.

141. See Martha Bayles, *The Shock-Art Fallacy*, ATLANTIC, Feb. 1994, at 18, 20 ("The compulsion to shock dominates popular music, movies, television, publishing, talk radio, stand-up comedy, and video games. Never before in the history of culture has obscenity been so pervasive.").

Of course, the responsibility for this excess cannot be placed solely upon those who pander it. If it did not sell, it would cease to exist. Regrettably, the American public has proven to be an all too willing consumer of shocking, titillating, and voyeuristic entertainment. In August 1993, five of the top ten rated network programs in the United States were newsmagazine shows, many of which rely upon hidden camera investigations to spice up their fare.<sup>142</sup> Two hundred reporters attended the trial of Lorena Bobbitt, the woman charged with cutting off her abusive husband's penis.<sup>143</sup> The Cable News Network broadcast the trial live and doubled its ratings.<sup>144</sup> The network was flooded with viewer complaints when it cut away from the trial to cover President Clinton's Moscow Summit with Russian Leader Boris Yeltsin.<sup>145</sup> Some 375,000 viewers paid \$39.95 each to watch Howard Stern's repulsive New Year's Eve beauty pageant on pay-per-view.<sup>146</sup> Clearly, the public is interested in this kind of entertainment.

#### B. Video Cameras: The Newest Threat to Privacy

The second threat to privacy identified by Warren and Brandeis a hundred years ago—technology—looms even larger today. Warren and Brandeis did not specify the particular “mechanical devices” that concerned them when they expressed their fear that “what is whispered in the closet shall be proclaimed from the house-tops.”<sup>147</sup> Film and magnetic sound recording were not invented until the twentieth century,<sup>148</sup> and while “detective cameras” concealed in items such opera-glasses, revolvers, and books were popular toys among the rich in the 1890s, they had little practical use because of their poor quality.<sup>149</sup>

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142. Jonathan Alter, ‘Candid Camera’ Gone Berserk?, *NEWSWEEK*, Aug. 30, 1993, at 36.

143. Davie A. Kaplan, *Bobbitt Fever: Why America Can't Seem To Get Enough*, *NEWSWEEK*, Jan. 24, 1994, at 52.

144. *Id.*

145. *Id.*

146. See *Ring Out the Old, Gross Out the New*, *supra* note 138, at 33.

147. Warren & Brandeis, *supra* note 33, at 195.

148. 7 A HISTORY OF TECHNOLOGY 1263-64 (Trevor I. Williams ed., 1978).

149. 5 A HISTORY OF TECHNOLOGY 732 (Charles Singer et al. eds., 1958). It is possible that Warren and Brandeis were referring to the development of printing presses and other technology which facilitated the mass dissemination of news and information, rather than to snooping devices. See Barron, *supra* note 33, at 890 n.72 (discussing impact of Industrial Revolution upon printing techniques). However, their reference to the threat from “mechanical devices” follows conjunctively from their reference to “[i]nstantaneous photographs and newspaper enterprise.” Warren & Brandeis, *supra* note 33, at 195

Whatever snooping devices concerned Warren and Brandeis, it is safe to say they are to modern surveillance technology what the slide rule is to the personal computer. Anyone with the inclination to intrude upon the lives of others may choose from a frightening array of surveillance devices:<sup>150</sup> video cameras built into briefcases,<sup>151</sup> tie-tacs,<sup>152</sup> clocks,<sup>153</sup> smoke detectors,<sup>154</sup> and ceiling sprinklers;<sup>155</sup> microphones and transmitters that can "hear thru walls"<sup>156</sup> and at great distances,<sup>157</sup> and that come concealed in everything from writing pens<sup>158</sup> to electrical outlets;<sup>159</sup> telephone

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("Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' ") (emphasis added).

150. Orwellian adjectives are not required to describe the threat to privacy posed by modern technology. The following excerpt from the catalog of a company specializing in surveillance equipment speaks volumes:

COVERT VIDEO SURVEILLANCE  
INSTALLATION & RENTAL AVAILABLE  
Catch Them In the Act! Video Provides Solid Proof!

*EPPI's expertise and equipment enables you to solve more cases.*

We will configure a covert video system to meet your operational needs and RENT you the system by the Week or Month. Our experience has taught us that every covert video surveillance is a little bit different and requires equipment that is specific to that particular installation. For example, in one situation you may need a camera hidden in a clock, in the next situation the clock doesn't fit your environment but an emergency light camera will; or possibly you will need a pinhole lens kit, not a disguised camera, and so on.

EXECUTIVE PROTECTION PRODUCTS, INC. PROFESSIONAL CATALOG, 1993, at 2 [hereinafter EPPI CATALOG] (copy on file with author). The company includes a warning inside the front cover that the equipment is "[n]ot to be used for surreptitious interception of oral communication." *Id.* at 1 (citing 18 U.S.C. § 2511 (1988) (prohibiting the interception of wire and oral communications)). Purchasers are admonished that it is their responsibility and not the seller's "to consult legal counsel for interpretation of any laws applicable to the area of intended use." *Id.* I do not intend to single out this company for negative attention. It is only one of several companies that sell such products.

151. *Id.* at 2.

152. *Id.*

153. *Id.* at 2-3.

154. *Id.* at 2.

155. *Id.* at 3.

156. *Id.* at 6. A similar product called the "Sound Detector" is touted as being capable of hearing through "glass, wood, plaster, brick, or even 12 [inch] concrete walls." COUNTER INTELLIGENCE APPLICATIONS, INC., 1993, at 3 [hereinafter CIAI CATALOG] (copy on file with author).

157. EPPI CATALOG, *supra* note 150, at 7 (describing microphone that can "hear at distances up to 100 yards and beyond").

158. *Id.* at 12 (transmitter built into writing pen).

159. *Id.* at 13 (transmitter built into electrical outlet).

tapping devices;<sup>160</sup> night vision scopes;<sup>161</sup> electronic lock picks;<sup>162</sup> and even devices to track the movement of vehicles.<sup>163</sup> For those uninitiated in surveillance skills, helpful reference books are available. *How to Get Anything on Anybody* explores topics such as "eleven devices for listening through walls," and "expert ways to secretly bug any target."<sup>164</sup> The ultimate in high-tech invasion of privacy may come from photographs taken by space satellites "that can pinpoint a back yard barbecue or distinguish between a Buick and a Volkswagen Beetle."<sup>165</sup> The Central Intelligence Agency recently ended its long-standing opposition to the private sale of satellite photographs, a move that United States firms estimate will generate as much as \$1 billion in annual revenues.<sup>166</sup>

While this prospect is perhaps chilling, a more realistic threat to privacy comes from a much more mundane device: the video camcorder. Video technology has changed the way we view the world

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160. *Id.* at 9.

161. These are sophisticated light amplification devices that allow a person to see at night. Judging from advertisements in magazines appealing to survivalists and gun enthusiasts, the instruments are quite popular. Indeed, there appears to be something of a price war going on among sellers of night vision devices, with advertisements boasting "Now You Can Afford Night Vision!" *SOLDIER OF FORTUNE*, July 1993, at 68, and "Brand-New Military Night Vision Scopes: Now—From As Low As \$495 Each." *AM. SURVIVAL GUIDE*, June 1993, at 49. The latter advertisement boasts that its product is "used by the KGB, Russian commandos and military." *Id.* The seller offers the following list of potential uses for its product: "Camp, fish, hunt, play games in the dark & see an intruder before he sees you!" *Id.* In the same issue in which this advertisement appeared, the publisher of the magazine offered readers a chance to win a "model MPN 1000-I enhanced Russian night vision scope." *Id.* at 51.

162. *AM. SURVIVAL GUIDE*, *supra* note 161, at 78 (advertisement promoting the "Cobra II Electronic Pick," billed as "a technological dream come true"; buyers receive a copy of *Lock Picking Simplified* as "an added bonus").

163. *CIAI CATALOG*, *supra* note 156, at 11.

164. *Id.* at 14 (advertising *LEE LAPIN, HOW TO GET ANYTHING ON ANYBODY*). The advertisement explains that the book can be used to "get the goods on others like they are getting the goods on you." *Id.* The book apparently was popular enough to prompt Lapin to write a "long-awaited follow-up." *Id.* (advertising *LEE LAPIN, BOOK II: HOW TO GET ANYTHING ON ANYBODY: THE ENCYCLOPEDIA OF PERSONAL SURVEILLANCE*). Some other book and video titles offered for sale by the company include: *Counter-measures—How to Protect Yourself from Electronic Surveillance*; *Covert Surveillance and Electronic Penetration*; *Electronic Surveillance—A Technical Manual*; *People Tracking: You Can Find Anyone*; *Investigating by Computer*; *Serious Surveillance for the Private Investigator*; *Spycraft: Inside Secrets of Espionage and Surveillance*; *Shadowing and Surveillance: A Complete Guidebook*; *Spygame: Winning through Super Technology*; *Wiretapping and Electronic Surveillance*. *Id.* at 13-14.

165. John Mintz & R. Jeffrey Smith, *CIA to Allow Firms to Sell Satellite Photos*, *WASH. POST*, Nov. 13, 1993, at C1.

166. *Id.*



around us and, in turn, the way we are viewed. The odds are high that today, and every day, some part of our daily routine will be captured by a video camera, whether it be at a hotel,<sup>167</sup> in a parking lot,<sup>168</sup> in a courthouse,<sup>169</sup> at a rock concert,<sup>170</sup> at a sporting event,<sup>171</sup> on a school bus,<sup>172</sup> at work,<sup>173</sup> at a highway toll booth,<sup>174</sup> or perhaps even at church.<sup>175</sup> Much of this videotaping

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167. Joanne Ball Artis, *Sheraton Official Urged To Quit*, BOSTON GLOBE, Feb. 16, 1993, at 39. A security chief at Boston Sheraton Hotel allegedly secretly videotaped workers in a hotel locker room. *Id.* A spokesperson for ITT Sheraton stated that the corporation uses surveillance cameras to protect guests and employees, but denied that they are used in employee locker rooms. *Id.*

168. Jonathan Rabinovitz, *Shopping Malls Beefing Up Security Systems to Reassure Skittish Public*, CHI. TRIB., Dec. 13, 1992, at 1C (zone N) (describing hidden video cameras in parking lot of shopping mall that "can zoom in on license plates in the farthest reaches of the [10,000 car] lot").

169. Joseph Sjostrom, *Bar Group Sues County; Courthouse's Surveillance Systems Worry Lawyers*, CHI. TRIB., June 7, 1988, at 1 (zone D) (discussing lawsuit filed by county bar association seeking information regarding audio and video surveillance system installed at courthouse).

170. Christopher John Farley, *Latter-Day Grunge*, TIME, July 12, 1993, at 17 (discussing video surveillance by Utah police of teenagers debating public issues at a "speaker's tent" set up at the Lollapalooza rock concert).

171. *Hooligans Beware: America On Lookout For Fan Invasion*, ARK. DEMOCRAT-GAZETTE, June 19, 1993, at 2C (discussing closed circuit video security system at Silverdome sports arena in Pontiac, Michigan).

172. Lisa Leff, *New Video Camera Boxes On Pr. George's School Buses Help Keep Students In Line*, WASH. POST, Mar. 22, 1993, at D5 (discussing video cameras installed on school buses to monitor students' behavior); *Unruly Students on the Bus Can't Hide From a Camera*, N.Y. TIMES, Sept. 9, 1993, at A13 (reporting that "[h]undreds of school districts around the country are turning to video surveillance to stop students' misbehaving on buses").

173. *Amoco Petroleum Additives Co. v. Jackson*, 964 F.2d 706, 707 (7th Cir. 1992) (employer installed video camera in ceiling of hallway leading to women's locker room to verify rumors that male supervisor was visiting the locker room with a female employee); Jim Doyle, *Judge Dismisses Lawsuit By 33 Concord Police*, SAN FRAN. CHRON., Feb. 17, 1993, at A11 (video surveillance camera installed in rafters of men's restroom to catch vandal who was clogging urinals with toilet paper); see also Martha Neil, *Women Settle Suit Over Surveillance In Store*, ST. PETERSBURG TIMES, Apr. 12, 1987, at 4 (reporting that three department store detectives alleged that while they were dressing in a store office they were taped by a video surveillance system which was installed to ensure that the detectives were not loafing).

174. Eric Zorn, *You Better Smile When You Pay Toll*, CHI. TRIB., Jan. 15, 1991, § 2, at 1 (zone C) (reporting on plan to install video cameras at highway toll booths which would record faces and license numbers of persons passing through the unattended booths).

175. David E. Pitt, *Dignity Sues St. Patrick's Over Taping*, N.Y. TIMES, Feb. 29, 1988, at B1, B2. A gay rights group filed suit against a Catholic church for videotaping persons who appeared at Sunday mass to protest church policies relating to gays and AIDS. *Id.* at B1. New York Deputy Police Commissioner Robert Goldman asked, "What's wrong with having a large event, and having the capacity of being able to videotape it in the event of criminal activity?" *Id.* at B2.

occurs for security purposes, fueled at least in part by the fear of tort liability for negligently failing to protect customers from criminal attack. Nevertheless, while security surveillance systems may serve a worthy purpose, they are subject to abuse.<sup>176</sup>

Prospects for maintaining personal privacy are dimmed further by the millions of video camcorders now owned by Americans. Introduced in 1985, the video camcorder<sup>177</sup> has the potential to become "the greatest leveler of human privacy ever known."<sup>178</sup> Fourteen million camcorders have been sold in the United States,<sup>179</sup> with statistics showing consistently large sales increases each year.<sup>180</sup> Camcorders have become fixtures at weddings, graduations, parties, parks, zoos, beaches, amusement parks, scenic sites, and other places open to the public. An editor of a video magazine analogized the impact of the camcorder to that of the Walkman portable stereo, stating that "it will become increasingly hard to imagine society without the camcorder."<sup>181</sup>

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176. See, e.g., *Doe v. B.P.S. Guard Servs., Inc.*, 945 F.2d 1422, 1423 (8th Cir. 1991) (security guards used surveillance cameras to videotape fashion show participants while they were dressing); *Turner v. General Motors Corp.*, 750 S.W.2d 76, 78-79 (Mo. Ct. App. 1988) (security guards videotaped son of plaintiff, who was an employee of defendant corporation, while he masturbated in parking lot, then exhibited the tape to numerous employees).

177. Portable home video cameras were introduced in the early 1980s, but were expensive and bulky, requiring the user to shoulder a separate camera and recording unit. *Roll 'Em: Video Camera Explosion*, *FORTUNE*, Feb. 6, 1984, at 13. Camcorders combine the video camera and video recorder in one unit. The introduction of eight millimeter video in the mid-1980s allowed manufacturers to make camcorders even smaller and lighter. See generally William D. Marbach & Connie Leslie, *Video's New Focus*, *NEWSWEEK*, Dec. 30, 1985, at 56 (describing the capabilities and specifications of eight millimeter video). More than 30 brands of camcorders are currently sold in the United States. Douglas C. McGill, *The Media Business: Camcorders Spread Video's Power*, *N.Y. TIMES*, June 26, 1989, at D1.

178. The phrase is borrowed from Justice Douglas's dissenting opinion in *United States v. White*, 401 U.S. 745, 756 (1971) (Douglas, J., dissenting). In that case the Supreme Court held that consensual audio recording of a conversation does not constitute a "search" under the Fourth Amendment. *Id.* at 753 (plurality opinion). Justice Douglas was referring to electronic surveillance in general. *Id.* at 756 (Douglas, J., dissenting); see also *United States v. Mittleman*, 999 F.2d 440, 443 (9th Cir. 1993) (analogizing intrusiveness of video surveillance to wiretapping); *United States v. Torres*, 751 F.2d 875, 882 (7th Cir. 1984) (Posner, J.) ("[T]elevision surveillance is exceedingly intrusive . . . and inherently indiscriminate, and . . . could be grossly abused—to eliminate personal privacy as understood in modern Western nations.").

179. John Koch, *Quick! Somebody Hit 'Pause,'* *BOSTON GLOBE*, Feb. 23, 1992, at B27.

180. U.S. DEPT OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 764 (1991) (showing camcorder sales figures for the years 1986-89 as follows: 1986: 1,090,000 units; 1987: 1,600,000 units; 1988: 2,108,000 units; 1989: 2,348,000 units).

181. McGill, *supra* note 177, at D1 (quoting Art Levis, editor of *Video Magazine*).

Camcorders are being heralded as "a democratization of technology"<sup>182</sup> and a tool for "empowering people."<sup>183</sup> Police laud neighborhood crime-fighting volunteers who "perch in the dark on rooftops or crouch in vacant apartments" with their camcorders, calling their activity "the crime-fighting technique of the future."<sup>184</sup> A college professor extols video cameras as a "new truth-telling device that can cut through lies," analogizing them to the six-gun of the Wild West as a "great equalizer."<sup>185</sup> There have been a few notable instances in which surreptitious filming with a camcorder arguably served the public good. The most celebrated was George Holliday's videotape of Los Angeles police officers beating Rodney King. Other well-publicized examples include an environmentalist who filmed fishermen slaughtering dolphins caught in tuna nets,<sup>186</sup> a suspicious parent who taped his baby sitter abusing his child,<sup>187</sup> and a gay man in California who, fed up with abusive taunting from his neighbor, set up a camcorder and filmed the neighbor assaulting him in his front yard.<sup>188</sup>

For every laudable episode of surreptitious videotaping, however, there are many more instances in which camcorders have been used to intrude unreasonably upon privacy. It is becoming clear that video cameras have provided a new tool for achieving sexual gratification for many people. Rock and roll legend Chuck Berry has been sued for allegedly installing a video camera in the restroom of a friend's restaurant.<sup>189</sup> The plaintiffs alleged that Berry taped more than 250 women using the restroom, some as young as six years old.<sup>190</sup> Comedian Rich Little is being sued by his former girlfriend for

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182. *Id.* at D7 (quoting Stuart Ewen, professor of media studies at Hunter College).

183. *Id.*

184. Jim H. Zamora, *Gotcha! Citizen Volunteers Take Lead In Catching Crime In the Act*, HOUSTON CHRON., Mar. 21, 1993, at A11 (quoting Los Angeles police lieutenant Kyle Jackson); see also Christine Bertelson, *Neighbors Suffer In Question of Taste In Tenants*, ST. LOUIS POST-DISPATCH, May 5, 1994, at 1B (describing neighbors videotaping rowdy teenagers across the street); Tom Coakley, *Street Vigilance Continues; Metro Update*, BOSTON GLOBE, Mar. 20, 1994, at 30 (describing residents videotaping "street walkers, drug dealers and the license plates of cars believed to be driven by their customers").

185. Melinda Beck, *Video Vigilantes*, NEWSWEEK, July 22, 1991, at 42, 43 (quoting Jack Nachbar, a professor of popular culture at Bowling Green State University).

186. *Id.* at 42.

187. *Id.* at 45.

188. *Id.* at 42.

189. Ann Trebbe, *Berry: Child Abuse, Drug Charges False*, USA TODAY, Aug. 30, 1990, at 2D.

190. *Id.*

secretly taping their sexual encounters.<sup>191</sup> Actor Rob Lowe was sued by the mother of a sixteen-year-old girl who alleged that Lowe lured the girl and a second woman to his hotel room, where he videotaped a sexual encounter with them.<sup>192</sup> However, it is not just prurient entertainers who engage in this kind of activity.<sup>193</sup> Many non-celebrity video-voyeurs have been accused of similar conduct.<sup>194</sup>

191. Roger Anderson, *Seen, Heard, Said*, SEATTLE TIMES, Jan. 24, 1992, at E2.

192. Barry Koltnow, *Rob Lowe Bounces Back After Scandal*, ORLANDO SENTINEL TRIB., Mar. 15, 1990, at E1.

193. For sharing this information regarding celebrity sex scandals, I may be subject to the same criticism that I have so enthusiastically bestowed on the media. See *supra* notes 104-41 and accompanying text. However, the examples are offered not to titillate, but to support an important premise of the Article: that video camcorders are being employed in abusive and intrusive ways.

194. See, e.g., *In re Thomas*, 118 B.R. 421, 422 (Bankr. S.C. 1990) (bankruptcy case involving claims by two women against debtor for intentional infliction of emotional distress and invasion of privacy arising from debtor secretly videotaping sexual encounters with the women and displaying the tapes at his bachelor party); *Miller v. Willis*, No. 92AP-1410, 1993 WL 76303, at \*1 (Ohio Ct. App. Feb. 16, 1993) (suit for videotaping plaintiff through peephole while she used tanning bed); *Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 4 (S.C. Ct. App. 1989) (suit against man who advertised for swimsuit models and then videotaped them while they were changing clothes); *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993) (suit against defendant who made secret videotape of sexual intercourse with plaintiff and showed it to others); *Gallun v. Soccer U.S.A., Inc.*, No. 92-1268, 1994 WL 133053, at \*1 (Wis. Ct. App. Apr. 19, 1994) (suit based upon employee's secret videotaping of woman changing clothes in locker room); Anna Cekola, *Orange County Focus: Huntington Beach; Neighbor Sued Over Videotape of Woman*, L.A. TIMES, Apr. 2, 1994, at B-2 (describing lawsuit against neighbor who videotaped undressed woman through her window); Zachary R. Dowdy, *McNeil, Pleading Guilty, Receives 7 1/2-to-9-Year Term For Bribery*, BOSTON GLOBE, Mar. 5, 1993, at 80 (discussing defendant's indictment for secretly videotaping his 15-year-old godson having sexual intercourse with 19-year-old nanny of defendant's child); Philip Hager, *High Court OKs Drug Tests of Job Applicants; Law: Justices Reject A Challenge To A Court of Appeal Ruling On the Constitutionality of A Mandatory Urinalysis*, L.A. TIMES, Mar. 16, 1990, at A3 (referring to a state court of appeals decision upholding defendant's criminal conviction for secretly videotaping sexual encounters with three women); Laura A. Kiernan, *Exeter Teacher Sentenced To 5 Years*, BOSTON GLOBE, Jan. 14, 1993, at 25 (discussing respected prep school teacher who set up "video camera in his dormitory apartment and secretly filmed male students in their bathrooms and bedrooms"); Kimberly D. Kleman, *Insurance Fund Sues To Cancel Dubin's Policies*, ST. PETERSBURG TIMES, Nov. 3, 1987, at 2 (discussing physician who made secret videotapes of patients in various stages of undress); *Mississippi*, USA TODAY, Nov. 25, 1991, at 8A (referring to lawsuits being prepared by three models against man who allegedly secretly videotaped them as they changed clothes in his studio); Patricia Nealon, *Weymouth Officer Charged With Secretly Taping Sex*, BOSTON GLOBE, Sept. 25, 1992, at 21 (describing case in which police officer was charged with making videotapes of sexual encounters with two women and offering to show the tapes to a fellow officer); *St. Paul: Man Charged With Video Voyeurism*, STAR TRIB., Feb. 18, 1994, at 2B (St. Paul Edition) (discussing case in which man was charged with making secret video of neighbor through her window); *South Bay: Arrest Warrant Issue In Nude Photo Case*, SAN FRAN. CHRON., Dec. 9, 1992, at A24 (describing secret videotaping of 16-year-

Surreptitious videotaping has been abused in other ways. University officials have videotaped coaches and athletes to detect violations of NCAA rules.<sup>195</sup> Law enforcement officials have made surreptitious videotapes of attorney-client conferences.<sup>196</sup> Business executives have secretly videotaped competitors' products.<sup>197</sup> One may reasonably assume that, because surreptitious video surveillance is intended to be secret, these reported incidents are only a small part of a far wider pattern of conduct.

Television news organizations contribute to incidents of surreptitious videotaping by encouraging viewers to send them amateur videos of newsworthy events.<sup>198</sup> Everyone, it seems, wants to be the next George Holliday.<sup>199</sup> The tabloid media, not surprisingly, are more directly involved in the problem, as exemplified by the media coverage of the Amy Fisher scandal.<sup>200</sup> The television program

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old model changing clothes).

195. *Sports People: Pro Basketball; From Rebels to Sonics*, N.Y. TIMES, Mar. 18, 1992, at B14 (discussing incident where officials of the University of Nevada at Las Vegas secretly videotaped an assistant basketball coach holding a conditioning class one week before NCAA's starting date for basketball practice).

196. Michelle Hiskey, *Sheriff Admits Taping Inmates' Conversations; Possible Violation of Civil Rights Laws*, ATLANTA J. & CONST., Feb. 5, 1991, at D2 (describing claims of secret videotaping of attorney visits with client inmates).

197. John Markoff, *Apple Mixes Desktop, Laptop*, CHI. TRIB., Oct. 20, 1992, at 7 (zone C) (reporting that head of Apple Computer's portable computing division sent a product manager to an industry trade show to videotape competitors' products).

198. See Tom Blackwell, *We Are A Camera*, *Canadiens Say*, TORONTO STAR, Nov. 14, 1992, at D4 (stating that many television stations actively encourage viewers to submit amateur videotapes); Bill Lohmann, *A Call For Amateur News Hounds*; *UPI Arts & Entertainment*, UPI, Feb. 13, 1987, available in NEXIS, NEWS library, MAJPAP file (discussing program established by Cable News Network to solicit amateur videos); see also Beck, *supra* note 185, at 45 ("The threats to individual rights and reputations are all the more worrisome when TV news becomes involved, instantly disseminating tapes of incriminating scenes nationwide."); Bill Stamets, *When Is Recording a Protected Right, And When Is It an Invasion of Privacy?*, CHI. SUN-TIMES, Mar. 4, 1994, at 54 (Weekend Plus section) (quoting George Washington University law professor Jonathan Turley: "'The media and the police have, in a way, encouraged a dangerous voyeuristic tendency in people.'").

199. George Holliday filmed the police beating of Rodney King. Retired Los Angeles Superior Court Judge Robert Weil commented: "It reminds me of Watergate—when everyone wanted to be an investigative reporter turning over all the stones in government. . . . After Rodney King, everyone with a video camera wants to be a George Holliday." Beck, *supra* note 185, at 43.

200. Amy Fisher was a seventeen-year-old woman who shot Mary Jo Buttafuoco. Fisher allegedly was having an affair with the victim's husband, Joseph Buttafuoco. *Judges Refuse to Lower Bail for L.I. Teen-Ager*, N.Y. TIMES, June 5, 1992, at B4. The shooting captured the attention of not only the tabloid media, but also the respected press. A NEXIS search showed 221 stories appearing in the *New York Times* mentioning Amy Fisher. Search of NEXIS, NEWS library, MAJPAP file (July 21, 1993) (search term "Amy

*Hard Copy* allegedly paid \$100,000 to a former boyfriend of Fisher who secretly videotaped a conversation with her in which they discussed sex in jail and her prospects for capitalizing upon her notoriety.<sup>201</sup>

Others suffered from the tabloid coverage flowing from Fisher's misfortunes. Representatives of the program *A Current Affair* stopped students at Fisher's high school and asked them to view a videotape of an apparent act of prostitution by a young woman.<sup>202</sup> A camera hidden in a van parked across the street secretly filmed the students as they identified the woman in the videotape as Fisher.<sup>203</sup> According to the principal of the high school, the event left some students "shaken, angered and saddened."<sup>204</sup>

The high school students, like many of the subjects described above, were filmed in public places. Should that fact deprive them of a legal right to complain about the secret taping? Does one surrender all right to be free from surreptitious surveillance and videotaping when she ventures outside her home? Existing tort law provides affirmative answers to these questions. The next section explains why these answers are wrong.

#### IV. PROTECTION IN PUBLIC: A THEORY OF "PUBLIC PRIVACY"

Courts have held almost uniformly that the tort of intrusion cannot occur in a public place or in a place that may be viewed from a public place.<sup>205</sup> In reaching this conclusion, judges take their cue from Dean Prosser. In his landmark article delineating the four separate privacy torts,<sup>206</sup> Prosser stated:

On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no intrusion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see.<sup>207</sup>

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Fisher").

201. *Sharing the Bucks From 'Hard Copy'*, *NEWSDAY*, Jan. 13, 1993, at 3.

202. Fred Cohen, *The Tabloid Press Abuses Children*, *N.Y. TIMES*, Mar. 13, 1993, at 21 (opinion piece by principal of the high school).

203. *Id.*

204. *Id.*

205. See *supra* notes 6, 13 (citing cases).

206. Prosser, *supra* note 38.

207. *Id.* at 391-92.

The *Restatement (Second) of Torts* incorporated these views in the comments to section 652B, which defines the tort of intrusion.<sup>208</sup>

To the extent Prosser was endorsing the view that legitimate privacy interests do not exist in public places (as opposed to merely surveying existing law), I suggest that he was wrong.<sup>209</sup> Privacy in public places does exist, or at least people expect it to exist, albeit with obvious limitations. To test this proposition, one need only imagine the following hypothetical.

A man we will call the Watcher parks in front of Joe's house and observes it. Whenever Joe or a member of his family comes or goes, the Watcher films them with a video camcorder. The Watcher does not try to conceal his conduct. To the contrary, he behaves quite openly, waving to Joe with a friendly smile every time he leaves the house. Joe approaches the man and questions him about his activity. The Watcher assures Joe that he means no harm to anyone, and, in fact, this is true. He simply wants to videotape Joe and his family. Perhaps he is a modern anthropologist studying household migration patterns. Whatever the reason for his observations, we may assume for purposes of our hypothetical that Joe is satisfied that the Watcher presents no physical threat. Nevertheless, Joe does not want himself and his family to be watched and videotaped, so he calls the police. The police explain to Joe that so long as the Watcher does not trespass or make some threatening or harassing gesture, he is

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208. The *Restatement* comments provide in pertinent part:

c. The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. . . . Nor is there liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye.

RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B cmt. c; see also PROSSER & KEETON ON TORTS, *supra* note 43, § 117, at 855-56 (reiterating these principles). Prosser served as Reporter for the *Restatement (Second) of Torts* and, as such, was responsible for preparing all drafts for the project. See *supra* note 40 (discussing the dominant role served by the Reporter to a *Restatement* project).

The *Restatement* comments recognize a narrow exception to the general rule that an intrusion cannot occur in public. Following the portion of comment c quoted above, the comment states: "Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters." RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B cmt. c. For discussion of this exception, see *infra* notes 290-98 and accompanying text.

209. Perhaps it would be fair to say that Prosser's conclusions may have been valid when written, but have lost force in light of declining social civility and technological advances. See *supra* notes 100-204 and accompanying text.

breaking no law.<sup>210</sup> Several days pass and the Watcher gives no sign that he intends to discontinue his activity.

Has Joe's privacy been invaded? Reasonable people presumably would agree that the Watcher's intrusive conduct is highly offensive<sup>211</sup> and that the law should provide a remedy. However, to make this concession is to agree that there is such thing as a right to privacy in public. If one accepts that the Watcher's conduct should be actionable under tort law,<sup>212</sup> the dispute over the existence of a

210. This would be true in most jurisdictions. Only one state has enacted a statute that explicitly regulates videotaping, and it is limited to conduct that occurs "in any private place and out of public view." GA. CODE ANN. § 16-11-62(2) (Michie 1992). One interesting legal development in recent years has been the wave of so-called "stalking statutes" passed by state legislatures. The statutes prohibit activities such as following, surveilling, or harassing another person and, to this extent, may constitute implicit recognition of the concept of public privacy. See, e.g., GA. CODE ANN. § 16-5-90(a) (Michie Supp. 1993) ("A person commits the offense of stalking when he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person. For the purpose of this Article, the term 'place or places' shall include any public or private property occupied by the victim other than the residence of the defendant."); IDAHO CODE § 18-7905(a) (Michie Supp. 1993) ("Any person who wilfully, maliciously and repeatedly follows or harasses another person or a member of that person's immediate family is guilty of the crime of stalking . . .").

The problem with applying stalking statutes to the Watcher (in addition to overcoming questions concerning their constitutionality) is that they are directed at activity presenting a risk of physical harm. This is usually expressed as a statutory requirement that the stalker make a "credible threat" of death or serious bodily injury to the victim. See, e.g., ALA. CODE § 13A-6-90a (Supp. 1993) ("A person who intentionally and repeatedly follows or harasses another person and who makes a credible threat, either expressed or implied, with the intent to place that person in reasonable fear of death or serious bodily harm is guilty of the crime of stalking."); CAL. PENAL CODE § 646.9(a) (West Supp. 1994) ("Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family, is guilty of the crime of stalking. . ."); IOWA CODE ANN. § 708.11(1)(a) (West 1993) ("A person commits stalking when the person, on more than one occasion, willfully follows, pursues, or harasses another person and, while doing so and without legitimate purpose, makes a credible threat against the other person.").

Because we are operating under the assumption that the Watcher presents no physical danger to Joe or his family and that Joe realizes this fact, it is unlikely that the stalking statutes could be invoked against the Watcher.

211. This is the standard for intrusion under the *Restatement* definition. See *supra* note 5.

212. Apart from claims grounded in invasion of privacy, Joe might seek tort relief for intentional infliction of emotional distress. However, such a claim would likely fail due to the requirement that the plaintiff prove the conduct was "extreme and outrageous." RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 46. Most courts have accepted the stringent definition of extreme and outrageous conduct set forth in comment d of *Restatement* section 46: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of



right of public privacy becomes only a question of degree.<sup>213</sup>

### A. Defining Privacy

By holding in intrusion cases that actions that occur in public places cannot be private, courts place primary emphasis upon physical areas in defining the scope of privacy.<sup>214</sup> However, as demonstrated

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decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* § 46 cmt. d. This standard has proven to be a difficult obstacle for privacy plaintiffs to overcome. See *Thorpe v. Mutual of Omaha Ins. Co.*, 984 F.2d 541, 545 (1st Cir. 1993) (holding surveillance of personal injury claimant by private detective "did not even arguably rise to the level of 'extreme and outrageous conduct,' and the issue was properly withdrawn from the jury"); *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1115 (Md. Ct. Spec. App. 1986) (defendant employer placed plaintiff employee under surveillance, sent mug shot and police record of plaintiff stemming from fourteen year-old-criminal conviction to fifty union employees, and sent evidence of plaintiff's marital infidelity to wife; court held conduct was not sufficiently extreme and outrageous to constitute intentional infliction of emotional distress); *Forster v. Manchester*, 189 A.2d 147, 151 (Pa. 1963) (surveillance by private detectives not sufficiently outrageous to amount to intentional infliction of emotional distress).

Plaintiffs raising claims of intentional infliction of emotional distress also must prove that they suffered "severe emotional distress." RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 46. Comment j to *Restatement* section 46 explains that "[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 46 cmt. j. This requirement would likely present proof problems for most victims of public intrusion. See *Forster*, 189 A.2d at 149, 151 (plaintiff's evidence that surveillance caused her to become extremely nervous and upset and to have frequent nightmares and hallucinations which required medical treatment insufficient to show severe emotional distress).

213. Interestingly, the first *Restatement of Torts* might allow tort recovery in this instance. The first *Restatement* contained only one section pertaining to invasion of privacy. It stated: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." RESTATEMENT OF TORTS § 867 (1939). While the comments to the section state that one may not complain of the "casual observation of his neighbors" or "the possibility that he may be photographed as a part of a street scene or a group of persons," *id.* § 867 cmt. c, they do not preclude liability for public intrusions that go beyond these situations. Indeed, one of the illustrations to section 867 strongly suggests that liability for invasion of privacy could be imposed upon the Watcher: "A, seeking to describe for the Sunday paper the habits of different kinds of people, follows B without B's knowledge, and publishes a statement of every act of B which A could observe for a period of a week. B has a cause of action against A." *Id.* § 867 cmt. d, illus. 1.

214. See *supra* note 65 and accompanying text. Most courts today do not require a physical penetration of a private area. Wiretapping, bugging rooms with microphones, and peering into windows have all been held to constitute actionable intrusions. See PROSSER & KEETON ON TORTS, *supra* note 43, § 117, at 854-55 (citing cases). However, most successful intrusion cases do involve invasions into zones of privacy delineated by physical boundaries. See, e.g., *Dietmann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (invasion of plaintiff's home); *Rogers v. Buckel*, No. 180799, 1992 WL 328676 (Ohio Ct. App. Nov. 5, 1992) (invasion of home where plaintiff was a guest); *Snakenberg v. Hartford Casualty Ins. Co.*, 383 S.E.2d 2 (S.C. Ct. App. 1989) (invasion of closed bedroom in defendant's home

by the above hypothetical, this view is too restrictive. Most modern definitions of privacy offered by scholars are expansive enough to allow recognition of a right to privacy in public. The classic definition comes from Alan Westin's book, *Privacy and Freedom*: "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."<sup>215</sup> Under this broad definition, Joe, and his family have lost privacy by the Watcher's conduct because they have lost control over when, how, and to what extent information about them is communicated to others. Westin himself recognized that expectations of privacy can exist in public places.<sup>216</sup> Other modern definitions of privacy lead to the same conclusion.<sup>217</sup> Constitutional criminal law also has transcended the notion that privacy is defined by physical boundaries only.<sup>218</sup>

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by hidden video camera). Some states limit the tort to situations involving physical intrusions. See *supra* note 65 (citing cases); see also Post, *supra* note 100, at 971 ("Certainly in common usage a basic meaning of privacy is that of a private space, like a bathroom or a home, from which others may be excluded.")

215. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967); see also Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 426 n.19 (1980) (collecting several other definitions of privacy that focus upon this aspect of self-determination over disclosure of information).

216. Westin recognized in 1967 that privacy could be invaded in public:

When people go into stores, hotels, restaurants and other places of public accommodation, they do not expect solitude and total freedom from observation. However, they do not expect to be under secret surveillance, especially in those times and places for which social custom has set some norms of privacy, even in 'public' situations.

WESTIN, *supra* note 215, at 112.

217. See, e.g., Richard Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 280-81 (1974) (defining privacy as control over who senses us); Ernest Van Den Haag, *On Privacy*, in NOMOS XIII: PRIVACY 149 (J. Roland Pennock & John W. Chapman eds., 1971) (defining privacy as the exclusive access of a person to a realm of his own, which includes the right to exclude others from watching, utilizing or invading his private realm).

218. In *Katz v. United States*, 389 U.S. 347, 349-50 (1967), the United States Supreme Court was confronted with the issue of what constitutes a "search" within the meaning of the Fourth Amendment. The issue is a critical one for Fourth Amendment jurisprudence because conduct qualifying as a search is subject to the protection of the Fourth Amendment, whereas conduct not deemed to be a search is left wholly unregulated by the Constitution. The narrow issue in *Katz* was whether the attachment of an electronic listening device to the outside of a phone booth, which involved no physical penetration of the booth, was a search. Prior cases had focused upon whether the police conduct invaded a constitutionally protected area. E.g., *Berger v. New York*, 388 U.S. 41, 57-59 (1967); *Lopez v. United States*, 373 U.S. 427, 438-39 (1963); *Silverman v. United States*, 365 U.S. 505, 510, 512 (1961). In holding that the attachment of the listening device constituted a search, the Court rejected this limited view of Fourth Amendment protection. The Court stated:

Professor Ruth Gavison, in her article *Privacy and the Limits of the Law*,<sup>219</sup> offered a comprehensive "neutral" definition of privacy that demonstrates the flaws in the narrow view of privacy that courts take in intrusion cases. By "neutral," she meant a definition of when loss of privacy occurs without regard to whether such loss should be considered undesirable or actionable under the law.<sup>220</sup> She considered separately which losses of privacy are undesirable and which warrant legal protection.<sup>221</sup>

Professor Gavison defined privacy as "a limitation of others' access to an individual."<sup>222</sup> She divided this into three components: (1) *secrecy*, which relates to the information known about a person;<sup>223</sup> (2) *anonymity*, which has to do with the attention paid to a person;<sup>224</sup> and (3) *solitude*, which relates to physical access to a person.<sup>225</sup> The rule that an actionable intrusion under tort law cannot occur in a public place focuses too narrowly upon the last aspect of Professor Gavison's definition: solitude, or physical access to a person.<sup>226</sup> This is apparent from the definition of intrusion in the *Restatement (Second) of Torts*, which speaks specifically in terms of intrusions upon "the solitude or seclusion" of another.<sup>227</sup> However, the other two components of privacy delineated by Professor Gavison—secrecy and anonymity—are also important. To

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[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

*Katz*, 389 U.S. at 351-52 (citations omitted). Justice Harlan, in his concurring opinion, set forth what has become the modern standard for determining when police conduct constitutes a search: The subject must have exhibited an actual (subjective) expectation of privacy in the place searched or the items seized and the expectation must be one that society is prepared to recognize as reasonable. *Id.* at 361 (Harlan, J., concurring).

219. Gavison, *supra* note 215, at 428.

220. *Id.* at 423.

221. *Id.* A similar approach will be used here. At this point, my goal is to establish that privacy does exist and can be invaded in public places. Part VI will discuss the circumstances under which invasions of privacy in public places should be actionable under tort law. See *infra* notes 365-495 and accompanying text.

222. Gavison, *supra* note 215, at 428.

223. *Id.* at 429-32.

224. *Id.* at 432-33.

225. *Id.* at 433.

226. See Post, *supra* note 100, at 971 ("The intrusion branch of the privacy tort has intuitively obvious connections to ordinary understandings of privacy. Certainly in common usage a basic meaning of privacy is that of a private space, like a bathroom or a home, from which others may be excluded.").

227. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B.

appreciate why this is so, let us return to Joe and the Watcher and analyze the impact of the Watcher's conduct under Professor Gavison's definition of privacy.

### 1. Solitude—Physical Access to a Person

Professor Gavison defined "solitude" as the interest in preventing "physical access" to a person, which she in turn defined broadly to mean "physical proximity."<sup>228</sup> This definition includes being close enough to a person to touch or observe him through the normal use of the senses,<sup>229</sup> which is a much broader definition of privacy than that contemplated by the *Restatement* definition of intrusion.<sup>230</sup> Under Professor Gavison's definition of solitude, Joe lost privacy simply by the Watcher's physical presence across the street from Joe's house. However, if this were the sole basis for objecting to the Watcher's conduct, he could avoid invading Joe's privacy simply by parking farther down the street and using the zoom lens that is standard equipment on most camcorders. Professor Gavison acknowledged that technologically enhanced observation would not constitute "physical access" to a person.<sup>231</sup> Accordingly, it is likely that the intuitive conclusion that the Watcher has invaded Joe's privacy is more closely connected to the remaining two components of Professor Gavison's definition of privacy.

### 2. Secrecy—Information Known About a Person

The amount of information known about a person can result in a loss of privacy. As Professor Gavison noted, this is not a new insight.<sup>232</sup> Indeed, the right to "informational privacy" is one of the most discussed privacy issues in modern times.<sup>233</sup> Less discussed,

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228. Gavison, *supra* note 215, at 433.

229. *Id.*

230. Professor Gavison offered the following examples of situations in which physical access to an individual results in a loss of privacy: "(a) a stranger who gains entrance to a woman's home on false pretenses in order to watch her giving birth; (b) Peeping Toms; (c) a stranger who chooses to sit on 'our' bench, even though the park is full of empty benches; and (d) a move from a single-person office to a much larger one that must be shared with a colleague." *Id.* (citations omitted).

231. *Id.* ("The ability to watch and listen, however, is not in itself an indication of physical access, because Y can watch X from a distance or wiretap X's telephone.").

232. *Id.* at 429 (citing sources that have defined privacy in this way).

233. See, e.g., Glenn C. Smith, *We've Got Your Number! (Is It Constitutional To Give It Out?)*: *Caller Identification Technology and the Right to Informational Privacy*, 37 UCLA L. REV. 145, 169-71 (1989); George B. Trubow, *Protecting Informational Privacy in the Information Society*, 10 N. ILL. U. L. REV. 521, 522 (1990); Richard C. Turkington,

though still not novel, is the idea that information about an individual obtainable in a public place may be properly subject to a claim of privacy.

In *Relations In Public*,<sup>234</sup> Erving Goffman analyzed the claims human beings make with regard to various "territories."<sup>235</sup> These include everything from the claim to maintain one's personal space<sup>236</sup> to the claim to one's turn in line.<sup>237</sup> The prototypical territory or preserve is spatial,<sup>238</sup> although the concept is not so limited. Important to this Article is Goffman's identification of what he called "information preserves";<sup>239</sup> that is, "[t]he set of facts about [one's] self to which an individual expects to control access while in the presence of others."<sup>240</sup> Goffman mentioned several varieties of information preserves, but concluded that the "most important . . . is what can be directly perceived about an individual, his body's sheath and his current behavior, the issue here being his right not to be stared at or examined."<sup>241</sup>

Scrutinizing and filming Joe and his family severely intruded upon their personal information preserves. Monitoring the comings and goings at Joe's house would likely reveal a tremendous amount of private information. Who are Joe's friends? How does he like to dress? What kind of hours does he keep? Does he drink? Smoke?

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*Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. ILL. U. L. REV. 479, 519-20 (1990); Bruce E. Falby, Comment, *A Constitutional Right to Avoid Disclosure of Personal Matter: Perfecting Privacy Analysis in J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981), 71 GEO. L.J. 219, 224-25 (1982); Jonathan P. Graham, Note, *Privacy, Computers, and the Commercial Dissemination of Personal Information*, 65 TEX. L. REV. 1395, 1397 (1987); John A. McLaughlin, Comment, *Intrusions Upon Informational Seclusion in the Computer Age*, 17 J. MARSHALL L. REV. 831, 833-36 (1984).

234. ERVING GOFFMAN, *RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER* (1971).

235. *Id.* at 28-61.

236. Goffman defined personal space as "[t]he space surrounding an individual, anywhere within which an entering other causes the individual to feel encroached upon, leading him to show displeasure and sometimes to withdraw." *Id.* at 29-30 (footnote omitted).

237. Goffman defined "The Turn" as "[t]he order in which a claimant receives a good of some kind relative to other claimants in the situation." *Id.* at 35. It is represented in Western society most often by the principle of "first come, first served." *Id.* at 36.

238. *Id.* at 29.

239. *Id.* at 38.

240. *Id.* at 38-39 (footnote omitted).

241. *Id.* at 39 (footnote omitted). Goffman observed that our concern with spatial preserves is tied to our concern with protecting informational preserves, the former supporting the latter. *Id.* at 39 n.16.

Exercise? Is he seeing anyone? Is it a woman or a man? How does he treat his children? All of these types of information, and more, may be obtained by watching someone in a public place.

The example of the Watcher is an extreme one because it hypothesizes observation of Joe's public activity for several days. While prolonged surveillance is not uncommon among private detectives or personal injury investigators,<sup>242</sup> most public intrusions do not extend for long periods of time. However, even brief observations may seriously invade a person's private information preserve. One tactic of abortion protesters has been to videotape or photograph women entering abortion clinics. Though this intrusion may be brief in duration, it obviously captures an extremely intimate fact about the person filmed: that she is getting or considering an abortion. Lawsuits filed against abortion protesters employing this tactic have resulted in injunctions prohibiting the activity, suggesting at least limited recognition under state constitutional law of the concept of public privacy.<sup>243</sup>

### 3. Anonymity—Attention Paid to a Person

Perhaps Professor Gavison's most important contribution in defining privacy is her discussion of anonymity as an essential component of privacy.<sup>244</sup> In obscurity, there is privacy. When no one is paying attention to us, we are free to go about our business even in public with little concern for relinquishing personal information about ourselves to others. Personal information is still disclosed, but to the air only, much like the sound of that tree falling in the forest. The freedom enjoyed in anonymity disappears,

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242. See, e.g., *McClain v. Boise Cascade Corp.*, 533 P.2d 343, 345 (Or. 1975) (private detectives took eighteen rolls of movie film of a worker's compensation claimant engaged in activities outside of his home). Despite the fact that the detectives physically trespassed on plaintiff's property, the plaintiff lost his invasion of privacy suit because "[a]ll the surveillance in this case was done during daylight hours and when plaintiff was exposed to public view by his neighbors and passersby." *Id.* at 347.

243. *Planned Parenthood v. Aakhus*, 17 Cal. Rptr. 2d 510, 515 (Ct. App. 1993) ("[B]y photographing and videotaping respondent's clients, appellants actually did deny them their right of privacy under the California Constitution."); *Chico Feminist Women's Health Ctr. v. Scully*, 256 Cal. Rptr. 194, 196-97 (Ct. App. 1989) (upholding provisions of injunction prohibiting abortion protesters from photographing persons or license plates of persons entering or leaving abortion clinic).

244. Professor Gavison was not the first to recognize this aspect of privacy. Alan Westin stated many years earlier that "[a] major aspect of privacy for individuals . . . is the ability to move about anonymously from time to time." WESTIN, *supra* note 215, at 69.

however, the moment someone begins paying attention to us.<sup>245</sup>

The moment the Watcher began focusing attention on Joe, a substantial loss of privacy occurred. No longer could Joe count on his obscurity to provide cover for his daily activities. Whereas he formerly was free to "be himself" in public, secure in the knowledge that he was conveying information about himself only in a metaphysical sense, Joe now must act in light of the awareness that this information is being conveyed to another (and possibly many others in light of the Watcher's camcorder). He must now confront the choice of either allowing the Watcher to acquire this information or modifying his conduct.

This latter option is the most likely choice. All of us have traits, characteristics, habits, and quirks which we would prefer not be exhibited to others. On this point, I take issue with the observations made by Professor Harvey Zuckman in his article regarding the tort of public disclosure of private facts.<sup>246</sup> In noting that this tort protects the interest of persons in not "having their true and more complete personas exposed to public view,"<sup>247</sup> Professor Zuckman stated that "[w]hile no doubt persons embarrassed by publicity [of private information] would prefer 'to be let alone,' their interest in presenting a false or incomplete image to others is not one that seems very compelling."<sup>248</sup>

Professor Zuckman's comment ignores the fact that *all* persons present a false or incomplete image of themselves to others, because we all keep some aspects of ourselves hidden.<sup>249</sup> Alan Westin's

245. As stated by Professor Gavison:

We enjoy our privacy not because of new opportunities for seclusion or because of greater control over our interactions, but because of our anonymity, because no one is interested in us. The moment someone becomes sufficiently interested, he may find it quite easy to take all that privacy away. He may follow us all the time, obtain information about us from a host of data systems, record our conversations, and intrude into our bedrooms. What protects privacy is not the difficulty of invading it, but the lack of motive and interest of others to do so. The important point . . . is that if our privacy is invaded, it may be invaded today in more serious and more permanent ways than ever before.

Gavison, *supra* note 215, at 469.

246. Zuckman, *supra* note 30, at 260.

247. *Id.*

248. *Id.*

249. Some of these aspects are hidden even from ourselves. Carl Jung recognized that everyone carries a "shadow" side to his psyche, which he defined as "the 'negative' side of the personality, the sum of all those unpleasant qualities we like to hide, together with the insufficiently developed functions and the content of the personal unconscious." *Introduction to Part I in MEETING THE SHADOW: THE HIDDEN POWER OF THE DARK SIDE OF HUMAN NATURE* 3 (Connie Zweig & Jeremiah Abrams eds., 1991) [hereinafter

words on this point eloquently refute Professor Zuckman's conclusion:

Each person is aware of the gap between what he wants to be and what he actually is, between what the world sees of him and what he knows to be his much more complex reality. . . . Every individual lives behind a mask in this manner; indeed, the first etymological meaning of the word "person" was "mask" . . . . If this mask is torn off and the individual's real self bared to a world in which everyone else still wears his mask and believes in masked performances, the individual can be seared by the hot light of selective, forced exposure.<sup>250</sup>

To maintain this mask, persons who know they are being watched (or that there is a possibility that they are being watched) may be forced to modify or curtail their behavior.<sup>251</sup> "We act differently if we believe we are being observed," wrote Hubert Humphrey. "If we can never be sure whether or not we are being watched and listened to, all our actions will be altered and our very character will change."<sup>252</sup> When Joe knows that his conduct is being monitored,

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MEETING THE SHADOW] (quoting Jung's 1917 essay *On the Psychology of the Unconscious*). The editors of the cited work offer a more modern definition of the shadow:

Each of us contains both a Dr. Jekyll and a Mr. Hyde, a more pleasant persona for everyday wear and a hiding, nighttime self that remains hushed up much of the time. Negative emotions and behaviors—rage, jealousy, shame, lying, resentment, lust, greed, suicidal and murderous tendencies—lie concealed just beneath the surface, masked by our more proper selves. Known together as the *personal shadow*, it remains untamed, unexplored territory for most of us.

Connie Zweig & Jeremiah Abrams, *Introduction: The Shadow Side of Everyday Life*, in *MEETING THE SHADOW*, *supra*, at xvi.

250. WESTIN, *supra* note 215, at 33. Stanley Benn made similar observations in his essay *Privacy, Freedom, and Respect for Persons*:

We are all under strong pressure from our friends and neighbors to live up to the roles in which they cast us. If we disappoint them, we risk their disapproval, and what may be worse, their ridicule. For many of us, we are free to be ourselves only within that area from which observers can legitimately be excluded. We need a sanctuary or retreat, in which we can drop the mask, desist for a while from projecting on the world the image we want to be accepted as ourselves, an image that may relect the values of our peers rather than the realities of our natures.

Benn, *supra* note 108, at 24-25.

251. See Van Den Haag, *supra* note 217, at 151-52 ("The formation of an image of me in the minds of others, which includes involuntary contributions of my private realm, may also force me to modify my private acts, or otherwise to attempt to control the image being formed by others so as to gain the approval of my fellows or, at least, to avoid their contempt or anger.").

252. Hubert H. Humphrey, *Foreword* to EDWARD V. LONG, *THE INTRUDERS* viii (1967). Anyone who disputes the truth of this statement need only consult a parent who has been forced to contend with a disobedient child in a public place. As children intuit



he will be compelled to assess every aspect of his public behavior with a view towards modifying it.

The above discussion demonstrates that persons have a legitimate, albeit limited, privacy interest even while they are in places accessible to the public or open to public view. Existing tort law fails to recognize this fact by adhering flatly to the rule that there is no privacy in public places. The next subsection analyzes and criticizes the underpinnings of this rule.

### *B. Refuting Dean Prosser's Premises*

The near unanimous acceptance by courts of the rule that no actionable intrusion can occur in a public place derives from Dean Prosser's early observations on the issue,<sup>253</sup> as incorporated into the comments to the *Restatement (Second) of Torts*.<sup>254</sup> Perhaps curiously, judicial analysis of the issue of intrusions in public places seldom progresses beyond rote recitation of these observations. Thus, careful examination of Dean Prosser's comments is warranted.

Prosser's conclusion that there can be no intrusion in a public place depends upon the acceptance of two premises, one implicit and one explicit. The implicit premise is that one assumes the risk of public inspection when she ventures into a public place. The explicit premise is Prosser's statement, adopted by the comments to the *Restatement (Second) of Torts*,<sup>255</sup> that there is no difference between merely observing a person in a public place and taking her photograph. Because most of the public intrusions that I believe should be actionable under tort law will involve either photographing or videotaping, this is a critical assumption. Close scrutiny shows that both of these premises are flawed.

#### 1. Assumption of the Risk

Underlying the rule that there is no legitimate expectation of privacy in public places is the idea that persons effectively assume the risk of scrutiny when they venture from private sanctuaries such as

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early on, most parents are reluctant to discipline their children in public with the same level of firmness as they would in private. *See also* Stamets, *supra* note 198, at 54 (discussing video surveillance conducted by private citizens: "All those lenses aimed at us inflict a chilling effect on everyday behavior.").

253. *See supra* text accompanying note 207 for text of Prosser's comments.

254. *See supra* note 208 for text of the *Restatement* comments. *See also supra* note 41 (listing citations of cases adopting definitions of the four privacy torts described by Prosser and incorporated into the *Restatement*).

255. *See supra* note 208.

dwelling or offices. This assumption of risk analysis is clearly discernible in *Gill v. Hearst Publishing Co.*,<sup>256</sup> a famous privacy case relied upon by Dean Prosser as support for his comments regarding the non-existence of privacy in public places.<sup>257</sup> The case arose from a photograph taken of a couple sitting together at their confectionery and ice cream stand in the Farmer's Market in Los Angeles.<sup>258</sup> The

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256. 253 P.2d 441 (Cal. 1953).

257. Prosser, *supra* note 38, at 391 n.81.

258. *Gill* actually involved two separate lawsuits and three separate opinions by the California Supreme Court: *Gill v. Curtis Publishing Co.*, 239 P.2d 630 (Cal. 1952), and *Gill v. Hearst Publishing Co.*, 239 P.2d 636 (Cal. 1952) [hereinafter *Gill v. Hearst I*], *reh'g after remand*, 253 P.2d 441 (Cal. 1953) [hereinafter *Gill v. Hearst II*].

*Gill v. Curtis Publishing Co.* arose from publication of the couple's photograph in the *Ladies Home Journal* to illustrate an article entitled "Love." 239 P.2d at 632. Under the picture appeared the caption: "Publicized as glamorous, desirable, 'love at first sight' is a bad risk." *Id.* The article suggested that love at first sight is based solely upon sexual attraction and is the "wrong" kind of love. *Id.* The California Supreme Court reversed the trial court's judgment on the pleadings in favor of the defendants, recognizing for the first time a tort cause of action for invasion of privacy. *Id.* at 632-33. The court failed to articulate the specific nature of the privacy invasion it recognized (the case was decided prior to Prosser's article delineating the four separate privacy torts). Various language in the opinion suggests that the cause of action recognized by the court could be characterized alternatively as intrusion, public disclosure of private facts and false light. *See id.* at 634-35. However, as subsequently refined in the court's later opinions in *Gill v. Hearst I* and *Gill v. Hearst II*, it appears that the claim recognized in *Gill v. Curtis Publishing Co.* was grounded not simply in the taking of the photograph (which might be characterized as intrusion) or the publication of the photograph (which might be characterized as public disclosure of private facts), but in the use of the photograph to illustrate the unflattering article about the "wrong" kind of love. *See Gill v. Hearst I*, 239 P.2d at 637; *Gill v. Hearst II*, 253 P.2d at 443. This suggests that the true basis of the court's holding was false light. It has been so construed. *See WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS* 974 (8th ed. 1988) (citing *Gill v. Curtis Publishing Co.* as a "representative" false light case).

In *Gill v. Hearst I*, the plaintiffs initially sued Hearst Publishing Co. for publishing the same photograph in an issue of *Harper's Bazaar* to illustrate an article entitled "And So the World Goes Round," a paean to the wonders of love. 239 P.2d at 636. The complaint was dismissed because the statute of limitations had run. *Id.* at 637. An amended complaint was grounded in the allegations that a Hearst photographer shot the photograph and that Hearst gave consent for Curtis Publishing Co. to publish the photo in the *Ladies Home Journal* to illustrate the article concerning the "wrong" kind of love. *Id.* Defendants filed a demurrer, asserting that plaintiffs failed to expressly allege that the defendants had given consent for the photograph to be used specifically in connection with the unflattering *Ladies Home Journal* article, as opposed to consenting generally to publication of the photograph. *Id.* The trial court, recognizing no relevant distinction in the nature of the consent given, dismissed the amended complaint without leave to amend. *Id.*

The California Supreme Court reversed, stating:

[P]laintiffs have stated a cause of action for an infringement on their right of privacy by the publication without their consent of the photograph standing alone. Members of opposite sexes engaging in amorous demonstrations should

picture portrayed the couple "sitting romantically close to one another, the man with his arm around the woman."<sup>259</sup> Only one year earlier, the California Supreme Court had held in the same case that the couple had a cause of action for publication of the photograph, reasoning that "[m]embers of opposite sexes engaging in amorous demonstrations should be protected from the broadcast of that most intimate relation,"<sup>260</sup> and that this "should be true even though the display is in a public place."<sup>261</sup> Upon reconsideration after remand, however, the court held that "mere publication of the photograph standing alone does not constitute an actionable invasion of plaintiffs' right of privacy."<sup>262</sup>

The court grounded much of its reasoning in a kind of assumption of risk analysis, commenting that the plaintiffs were "in a pose voluntarily assumed in a public market place";<sup>263</sup> that they "had voluntarily exposed themselves to public gaze in a pose open to the view of any persons who might then be at or near their place of business";<sup>264</sup> that "[b]y their own voluntary action plaintiffs waived their right of privacy so far as this particular public pose was assumed";<sup>265</sup> and that the plaintiffs' right of privacy ceased by "their own voluntary assumption of this particular pose in a public place."<sup>266</sup>

While the affirmative defense of assumption of risk in tort law does not apply in this context,<sup>267</sup> the principles underlying the doctrine are highly relevant. The *Restatement (Second) of Torts* defines implied assumption of risk in pertinent part as follows: "[A]

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be protected from the broadcast of that most intimate relation. Nothing could be more intrinsically personal or more within the area of a person's private affairs than expressions of the emotions and feelings existing between such persons.

*That should be true even though the display is in a public place.*

*Id.* at 638 (emphasis added). The court did an about face in *Gill v. Hearst II*. See *infra* note 262 and accompanying text.

259. *Gill v. Hearst II*, 253 P.2d at 445.

260. *Gill v. Hearst I*, 239 P.2d at 638. See *supra* note 258 for discussion of the prior case.

261. *Gill v. Hearst I*, 239 P.2d at 638.

262. *Gill v. Hearst II*, 253 P.2d at 443.

263. *Id.* at 444.

264. *Id.*

265. *Id.*

266. *Id.*

267. Assumption of risk is an affirmative defense to claims based upon negligent or reckless conduct. See RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 496A (stating the general principle that one "who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm").

plaintiff who fully understands a risk of harm to himself . . . caused by the defendant's conduct . . . and who nevertheless voluntarily chooses to . . . remain within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk."<sup>268</sup> Thus, assumption of risk is grounded in the notion of consent. Under negligence law, when a person assumes the risk she consents to relieve the defendant of the duty to exercise reasonable care toward her.<sup>269</sup> However, as the *Restatement* provision recognizes, to find true consent, the plaintiff must have full knowledge of the risk and voluntarily choose to encounter it.

Judged by these standards, the court's assumption of risk analysis in *Gill v. Hearst II* breaks down. First, the plaintiffs did not have knowledge of the risk in any meaningful sense. While they presumably knew it was *possible* that someone might stop to scrutinize them and take their photograph, they had no particular reason to believe that would happen. Using negligence law as an analogue, it cannot be said that a pedestrian assumes the risk of being hit by a negligent driver simply because he knows such an event is possible. To satisfy the knowledge element of assumption of risk, the plaintiff "must not only be aware of the facts which create the danger, but must also appreciate the danger itself and the nature, character, and extent which make it unreasonable."<sup>270</sup> If the risk, though known, is "so slight as to be negligible," the knowledge component of the assumption of risk equation is not satisfied.<sup>271</sup>

More importantly, it surely cannot be said that the *Gill* plaintiffs *voluntarily* consented to the risk of the defendant taking their photograph, much less publishing it in a national magazine. The excerpts from the *Gill* opinion quoted above show that the court emphasized the voluntariness of the plaintiffs' conduct at four separate points.<sup>272</sup> However, the court's analysis was flawed for failing to distinguish between merely voluntarily appearing in a public

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268. *Id.* § 496C(1).

269. See PROSSER & KEETON ON TORTS, *supra* note 43, § 68, at 480 ("In its most basic sense, assumption of risk means that the plaintiff, in advance, has given his *express* consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone.").

270. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 496D cmt. b.

271. See *id.* § 496D cmt. b ("[T]he condition of premises upon which he enters may be quite apparent to him, but the danger arising from the condition may be neither known nor apparent, or, if known or apparent at all, it may appear to him to be so slight as to be negligible. In such a case the plaintiff does not assume the risk.").

272. See *supra* text accompanying notes 263-66.

place and voluntarily consenting to be stared at, photographed, and publicized. It is not enough that the plaintiffs voluntarily engaged in some conduct. They must have voluntarily consented to the specific risk at issue.

To decide, as the *Gill* court did, that one who voluntarily appears in public also voluntarily consents to be stared at, photographed, and publicized is unrealistic and places an unfair burden on those who value their privacy. There is nothing "voluntary" about assuming a public pose except in the most trivial sense. Merely to survive in society requires that people spend a considerable amount of their time in places accessible to the public. Under the *Gill* rationale, the only way one may avoid "voluntarily" exposing herself to unwarranted scrutiny would be to not hold a job, go to the grocery store, obtain medical help, take children to school, seek outdoor recreation, etc.; in other words, harkening back to the opening sentence of this Article, to stay inside with the blinds drawn.

The notion of voluntariness withers even further when one takes account of cultural and economic factors that force some people to conduct a much larger portion of their activities outdoors. Affluent persons can purchase refuge in large houses with fenced yards hidden from view, but "people in crowded living quarters find privacy outdoors—in the streets of cities, in the corners of bars, in motion-picture houses, and in a host of 'public' places where the necessary solitude, intimacy, anonymity and reserve can be found."<sup>273</sup> Increasing numbers of American citizens live their entire lives on the streets.<sup>274</sup> To say that homeless people have "voluntarily" consented to any and all public inspection, no matter how intrusive, would be insensitive and inappropriate.

Dean Prosser implicitly adopted the *Gill* assumption of risk analysis when he stated that "[o]n the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about."<sup>275</sup> This approach, however, which treats privacy as an all-or-nothing

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273. WESTIN, *supra* note 215, at 41; see also David E. Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 MINN. L. REV. 563, 586-88 (discussing "cultural criticism" of Fourth Amendment jurisprudence which places primary emphasis upon physical trespasses in determining reasonable expectations of privacy).

274. A 1990 Census Bureau survey counted 220,000 homeless Americans. William P. Cheshire, *Don't Trust Everything You Hear*, ARIZ. REPUBLIC, Aug. 1, 1993, at C1. Unofficial estimates of homeless people in the United States have ranged as high as five million. *Id.*

275. Prosser, *supra* note 38, at 391.

concept, is too rigid. Privacy is a matter of degree. Although persons surrender much privacy when they venture to a public place, it does not follow that they automatically forfeit *all* privacy.<sup>276</sup> There is a difference, which the law should recognize, between being "seen" in public and being closely scrutinized or, as discussed below, recorded on film or videotape.<sup>277</sup>

## 2. The Relevance of Photography and Videotaping

After commenting that it is not an invasion of privacy to follow a person about in a public place,<sup>278</sup> Dean Prosser stated: "Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see."<sup>279</sup> In other words, Prosser saw no distinction between observing a person with the naked eye and making a permanent photographic record of that observation.

Prosser cited *Gill* as support for this proposition.<sup>280</sup> However, the difference between observing the couple in *Gill* with the naked eye and photographing them was large and dramatic. A photograph intensifies an invasion of privacy in three important ways. First, because it makes a permanent record of a scene, it allows the invader to, in effect, take a part of the subject with him. The victim loses control over an aspect of her self.<sup>281</sup> The temporal limitations that

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276. It is logically fallacious to characterize a matter requiring a relative judgment as all one thing or all something else. This all-or-nothing fallacy has been described as follows:

Where a situation requires a relative judgment, it is a fallacy to wrap up a judgment on it into one hasty bundle labeled All or Nothing, Good or Bad, Blameworthy or Blameless. . . .

The all-or-nothing mistake assumes a naked dichotomy where no such simplification is warranted. Mr. Justice Frankfurter has called this "the great either-or."

W. WARD FEARNSIDE & WILLIAM B. HOLTHERR, FALLACY: THE COUNTERFEIT OF ARGUMENT 30 (1959).

277. Stanley Benn made this observation: "Anyone who wants to remain unobserved and unidentified, it might be said, should stay at home or go out only in disguise. Yet there is a difference between happening to be seen and having someone closely observe, and perhaps record, what one is doing, even in a public place." Benn, *supra* note 108, at 4-5.

278. Prosser, *supra* note 38, at 391. See *supra* text accompanying note 208 for the full text of relevant comments by Prosser.

279. Prosser, *supra* note 38, at 391-92.

280. *Id.* at 391 n.81.

281. See WESTIN, *supra* note 215, at 62. Discussing aural and optical recording, Westin stated:

are otherwise inherent in public intrusions are eliminated. Absent a camera, even the most voyeuristic of visitors attending the Farmers' Market that day would probably be limited to a brief observation of the couple. Prolonged staring draws attention to oneself, and is thus discouraged by the fear of public embarrassment. Even if the observer were not sufficiently motivated by self-consciousness to avoid discovery, once noticed, he most probably would continue on his way rather than risk confrontation with the subjects or the police. Even assuming the person was in a position to concentrate his observation upon the couple undetected, however, the observation necessarily would terminate when the couple changed location. A photograph, however, allows the scrutiny to be extended indefinitely.

Second, because of this permanent record, information may be revealed that would not be noticed by transitory observation with the naked eye. Because we can study a photograph at leisure, we may be able to detect subtleties not otherwise discernible. We know the Mona Lisa smiles with her eyes because we can study her famous portrait. It is doubtful one would notice such a nuance passing her on the sidewalk. In *Gill*, the court commented that the photograph of the couple in the Farmers' Market disclosed their "sentimental mood,"<sup>282</sup> something a casual passerby would be likely to miss.

Most important, because a photograph creates a permanent record of a scene, it has the potential to multiply the impact of the original invasion through wide dissemination. In *Gill*, the court stated that the photograph of the couple in the Farmers' Market "did not disclose anything which until then had been private, but rather only extended knowledge of the particular incident to a somewhat larger public than had actually witnessed it at the time of occurrence."<sup>283</sup> To label these words an understatement is itself an understatement. In the absence of the photograph, few persons would have taken notice of the couple, perhaps only the photographer himself. Assuming the Farmers' Market in Los Angeles is like most busy outdoor markets, the couple reasonably could count upon their obscurity and anonymity among the moving crowd as protection from scrutiny. Instead, with the photograph, the "somewhat larger public"

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It is almost as if we were witnessing an achievement through technology of a risk to modern man comparable to that primitive men felt when they had their photographs taken by visiting anthropologists: a part of them had been taken and might be used to harm them in the future.

*Id.*

282. *Gill v. Hearst Publishing Co.*, 253 P.2d 441, 445 (Cal. 1953).

283. *Id.*

to which they were displayed as an object of attention was the nationwide audience of a popular magazine.<sup>284</sup>

Moreover, a photograph permits dissemination of an image not just to a larger audience, but to *different* audiences than the subject intended. Persons dress and behave differently depending upon their immediate social environment. Conduct which would be appropriate for one environment may be inappropriate and embarrassing in another. For example, although many persons are willing to expose their flesh at the beach or poolside, most would not willingly expose the same image to other audiences or in other contexts.

In short, because photography creates a permanent record of an event, one which may be disseminated far and wide,<sup>285</sup> it substantially intensifies the original privacy invasion. Dean Prosser was wrong when he equated observation by the naked eye with photography.

The already large difference between merely observing a person and photographing the person is magnified considerably when the recording is by means of videotaping.<sup>286</sup> The same basic concerns voiced above with regard to photography—permanence and dissemination—apply to videotaping, but they are accentuated by the nature of videotape. Videotape has the capacity to capture not just a single image of a person, but much of her personality. All of the external aspects of personhood may be permanently recorded and reproduced: appearance, facial expressions, gestures, gaze, posture, and even speech. These, in turn, may reveal important internal aspects of the self as well. In speech, of course, we are likely to reveal tremendous amounts of private information. While many persons would be careful to curtail their private speech in the

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284. As one writer stated:

If one's image, voice, or activity is displayed to a wider public . . . than could reasonably be expected to perceive it, one's privacy is violated. Sitting in a restaurant or walking along a street, one has no reason to expect that his filmed image will be made available to TV viewers. Such a filming or recording violates one's reasonable expectations of limited privacy, even if unreleased or unused—although in practice the matter is likely to come to notice only if some use is made of the material.

Van Den Haag, *supra* note 217, at 158.

285. Dissemination is one of the factors I include in my proposal to expand the tort of intrusion to include certain public intrusions. See *infra* notes 420-58 and accompanying text.

286. See *supra* notes 147-05 and accompanying text for discussion of the threat to privacy posed by video cameras. Video cameras did not exist when Prosser wrote his article, but movie cameras did. There is nothing in Prosser's words to suggest he would make a distinction between single-frame photography and multiple-frame movie film or videotape.



presence of a video camcorder, enhanced technology permits audio recording from greater and greater distances.<sup>287</sup> Moreover, even non-verbal communication captured on videotape can disclose important information about a person, such as mood (anxiety, depression, happiness), attitude towards others (anger, love, wariness, boredom, impatience), mental state (concentration, puzzlement, self-confidence), or bodily state (fatigue, alertness, hunger).<sup>288</sup> Social scientists have long recognized that while "[w]e speak with our vocal organs[,] . . . we converse with our whole body."<sup>289</sup>

"Public privacy" sounds like an oxymoron, but only because we tend to think of the words "public" and "private" in absolute terms. "Public" connotes community; hence, to think of something as public is to think of it as the community's business. "Private," on the other hand, evokes images of fences, walls, drawn shades and other physical barriers that block out the community. However, privacy is not an all or nothing concept. While a person necessarily surrenders a great deal of privacy when she ventures from a place of physical solitude into the light of public view, it does not follow that she forfeits all legitimate expectations of privacy. As the preceding discussion demonstrates, there are important components of privacy that have nothing to do with physical solitude. When these components are invaded in a highly offensive manner, even in a public place, tort law should recognize a remedy.

#### V. INDIRECT RECOGNITION OF A REMEDY FOR PUBLIC INTRUSION UNDER CURRENT LAW

Thus far, this Article has focused upon the resoluteness of courts in refusing to acknowledge a remedy for public intrusion. In disposing of claims arising in public intrusion contexts, courts are generally content to recite the rule that a person in public has no cognizable privacy claim. However, in several cases courts have intuitively recognized a right to recover for invasion of privacy under circumstances amounting to a public intrusion. The opinions in these

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287. See *supra* notes 156-60 and accompanying text (discussing audio surveillance equipment, including a microphone that can hear at a distance of 100 yards).

288. See generally MICHAEL ARGYLE, *BODILY COMMUNICATION* 105-345 (1975) (containing extensive analysis of the different forms and uses of non-verbal communication).

289. John Galvin, *Out on a Limb; Your Body Speaks Volumes; Body Language*, British Telecommunications PLC (England), Sept. 1990, available in NEXIS, News library, Arcnws file (quoting a behavioral scientist).

cases are radically underwritten and recognition of the right is usually by implication only. Nevertheless, the cases are important for their acknowledgement, however indirect, of a right to public privacy.

An early case of public intrusion caused the drafters of the *Restatement* to include an exception to their comments regarding the nonexistence of a right of privacy in public: "Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters."<sup>290</sup>

The illustration cited to support this proposition is patterned after the facts of *Daily Times Democrat v. Graham*.<sup>291</sup> In *Graham* the defendant's photographer took a picture of a woman inside a carnival "Fun House" when her skirt was blown over her head by a concealed air jet.<sup>292</sup> The defendant published the photo, which showed the woman's underwear, on the front page of its newspaper.<sup>293</sup> The Alabama Supreme Court affirmed a judgment in favor of the plaintiff on her invasion of privacy claim.<sup>294</sup> Though the specific basis for the holding is not made clear, the court referred to " 'wrongful intrusion[s] into one's private activities, in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.' "<sup>295</sup> The court rejected the defendant's argument that its conduct was not actionable because the plaintiff's photograph "was taken at the time she was a part of a public scene . . . ."<sup>296</sup>

Accordingly, *Graham* recognized a cause of action for public intrusion, albeit a very limited one. In dismissing the defendant's argument that the plaintiff was entitled to no privacy protection because she was part of a public scene, the court emphasized that the embarrassing image captured by the defendant's camera was

290. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B cmt. c.

291. 162 So. 2d 474 (Ala. 1964). The *Restatement* illustration reads as follows:

7. A, a young woman, attends a "Fun House," a public place of amusement where various tricks are played upon visitors. While she is there a concealed jet of compressed air blows her skirts over her head, and reveals her underwear. B takes a photograph of her in that position. B has invaded A's privacy.

RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B cmt. c, illus. 7.

292. *Graham*, 162 So. 2d at 476.

293. *Id.*

294. *Id.* at 478.

295. *Id.* at 476 (quoting *Abernathy v. Thornton*, 83 So. 2d 235, 236 (Ala. 1955)) (emphasis added).

296. *Id.* at 477-78.

involuntarily assumed.<sup>297</sup> Thus, the assumption of risk rationale—which provides central support to the general rule that no privacy exists in public—did not apply.<sup>298</sup> Nevertheless, the crack in the general rule recognized by *Graham* and the *Restatement* comment endorsing it is significant; for once it is recognized that an actionable intrusion upon privacy may occur in public under one set of circumstances, no logical reason exists for not considering whether other circumstances might also warrant relief.

Some courts have intuitively recognized this. Several cases have allowed relief for public intrusions under circumstances falling outside the scope of the narrow *Graham* exception. Unfortunately, the opinions in these cases lack analysis. They usually fail to clearly specify that intrusion is the basis for recovery, perhaps because the judges, though wishing to allow recovery under the particular facts, did not want to rewrite existing law. In fact, none of the cases allowing recovery in situations involving public intrusions mention the general rule that privacy cannot be invaded in a public place. Accordingly, recognition of a cause of action for public intrusion in these cases usually proceeds by implication only.

One exception is *Rafferty v. Hartford Courant Co.*,<sup>299</sup> in which an uninvited photographer employed by the defendant newspaper took pictures of the plaintiffs as they held a mock “unwedding” ceremony on an open hill.<sup>300</sup> The defendant published a photograph of the ceremony, along with an accurate account of the event.<sup>301</sup> The plaintiffs filed an invasion of privacy complaint raising three claims: intrusion, public disclosure of private facts, and false light.<sup>302</sup> The trial court denied the defendant’s motion for summary judgment on all claims, including the claim of intrusion.<sup>303</sup> Without extensive analysis and without mentioning the general rule that an intrusion cannot occur in a public place, the court stated: “The plaintiffs’ affidavits support an intentional physical intrusion by the defendant’s employees upon the private affairs or concerns of the plaintiffs.”<sup>304</sup> The court opined that it was for a jury to determine whether the

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297. *Id.* at 478.

298. See *supra* notes 256-77 and accompanying text for discussion of assumption of risk.

299. 416 A.2d 1215 (Conn. Super. 1980).

300. *Id.* at 1216. The plaintiffs had recently divorced their respective spouses. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 1221.

304. *Id.* at 1216 (citing RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B, which defines the tort of intrusion).

intrusion was “ ‘highly offensive to a reasonable person’ ” within the meaning of section 652B of the *Restatement (Second) of Torts*.<sup>305</sup>

*Kramer v. Downey*<sup>306</sup> also came close to recognizing an express right to recovery for public intrusion. In *Kramer* the plaintiff sued his former lover for invasion of privacy based upon a long-continuing course of conduct in which she “maintained visual contact with him in public places” after he broke off their relationship.<sup>307</sup> The defendant conceded that she engaged in this conduct, but asserted that it was not actionable “so long as she kept her distance from [the plaintiff], always stayed on public property and always skirted arrest by the police.”<sup>308</sup> A Texas appellate court upheld a judgment against the defendant for money damages and injunctive relief, stating: “[W]e now hold that the right to privacy is broad enough to include the right to be free of those willful *intrusions* into one’s personal life at home and at work which occurred in this case.”<sup>309</sup>

Other cases have implicitly recognized a right of action for public intrusion, without mentioning the tort by name. In *Galella v. Onassis*,<sup>310</sup> Donald Galella, a free lance photographer and self-styled “paparazzo,”<sup>311</sup> filed suit against Jacqueline Onassis and three Secret Service agents for false arrest.<sup>312</sup> Onassis counterclaimed for invasion of privacy, assault and battery, and intentional infliction of emotional distress, seeking damages and injunctive relief.<sup>313</sup> The events arose out of a campaign of harassment by Galella against Onassis, her son (John Kennedy, Jr.), and her daughter (Caroline Kennedy). Examples of the harassment cited by the court included taking pictures of John riding his bicycle, jumping in front of the boy’s path, interrupting Caroline while playing tennis, invading the children’s private schools, driving a power boat close to Onassis while she was swimming, and taking pictures of Onassis and her party in

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305. *Id.* This is the section of the *Restatement* defining the tort of intrusion. See *supra* note 5 for the full text of the definition.

306. 680 S.W.2d 524 (Tex. Ct. App. 1984).

307. *Id.* at 525.

308. *Id.*

309. *Id.* (emphasis added). The court did not specifically discuss the tort of intrusion, nor did it make any reference to the general rule that intrusions in public places are not actionable.

310. 487 F.2d 986 (2d Cir. 1973).

311. As defined by the court, paparazzi are photographers who “make themselves as visible to the public and obnoxious to their photographic subjects as possible to aid in the advertisement and wide sale of their works.” *Id.* at 992.

312. *Id.* at 991.

313. *Id.* at 992.

public places on numerous occasions.<sup>314</sup> Galella's false arrest claim stemmed from his detention by Secret Service agents attempting to prevent Galella from harassing Onassis and her family.<sup>315</sup>

The district court dismissed Galella's false arrest claim<sup>316</sup> and Onassis dropped her claim for damages.<sup>317</sup> However, the court, applying New York law, enjoined Galella from further harassment of Onassis and her family and found Galella "guilty of harassment, intentional infliction of emotional distress, assault and battery, commercial exploitation of defendant's personality, and *invasion of privacy*."<sup>318</sup> The court of appeals narrowed the injunction, but affirmed the basic findings of the district court.<sup>319</sup>

With respect to Onassis's invasion of privacy claim, the federal court of appeals noted that New York courts had not yet recognized a right of privacy beyond a statutorily created cause of action for commercial appropriation.<sup>320</sup> However, the court expressed its belief that the New York courts might well modify their position if faced with the issue again.<sup>321</sup> The appellate judges proved inaccurate as prognosticators. The New York Court of Appeals has reaffirmed that no common law right of privacy exists in the state.<sup>322</sup>

Nevertheless, *Galella* is significant because a federal district judge and three federal appellate judges assumed that Galella invaded the privacy of Onassis and her children, even though most of his conduct occurred in public places. This amounted to implicit acceptance of a cause of action for public intrusion, since intrusion is the only privacy

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314. *Id.*

315. *Id.*

316. *Id.* at 991.

317. *Id.* at 992 n.3.

318. *Id.* at 994 (emphasis added).

319. *Id.* at 998.

320. *Id.* at 995 n.12. Section 50 of the New York Civil Rights Law makes it a misdemeanor to use the name, portrait, or picture of any person without consent "for advertising purposes or for the purposes of trade." N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992). Section 51 authorizes an action for damages and injunctive relief under the same circumstances. *Id.* § 51. These statutes were enacted in response to the famous decision in *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447-48 (N.Y. 1902), in which the New York Court of Appeals rejected the claim of a young girl whose photograph was used by the defendant without her consent to advertise its flour. See *supra* note 60 (discussing *Roberson* and the invasion of privacy tort known as appropriation).

321. *Galella*, 487 F.2d at 995 n.12.

322. See, e.g., *Delan v. CBS, Inc.*, 458 N.Y.S.2d 608, 612 (N.Y. App. Div. 1983) ("At common law, a cause of action for violation of the right of privacy is not cognizable in this State. . ."); see also *Manufacturas Int'l, LTDA v. Manufacturers Hanover Trust Co.*, 792 F. Supp. 180, 193 (1992) (applying New York law).

tort that was even arguably applicable under the facts. There were no allegations that Galella gave publicity to private facts or that he presented Onassis and her children in a false light. Moreover, Onassis prevailed separately on her claim for commercial appropriation.<sup>323</sup>

An older New York case provides a similar example of a court willing to bend existing privacy law to afford relief for a sympathetic victim of public intrusion. In *Blumenthal v. Picture Classics, Inc.*,<sup>324</sup> the defendants made a short movie called *Sight-Seeing in New York with Nick and Tony*, which depicted ordinary street scenes in Manhattan.<sup>325</sup> Six seconds of the film showed the plaintiff, a widow, selling bread and rolls from a basket to passersby.<sup>326</sup> The only privacy claim available in New York is for commercial appropriation under a statute that prohibits use of another's name or likeness "for advertising purposes or for the purposes of trade."<sup>327</sup> Nevertheless, in *Blumenthal*, in an opinion less than one page long, a majority of the New York Supreme Court enjoined the defendant from showing the motion picture, holding that defendants had used plaintiff's likeness "for trade purposes" within the meaning of the New York statute, "even though her trade brings her into public view."<sup>328</sup> On appeal, the New York Court of Appeals affirmed the injunction. The court expressly declined to answer the question of whether use of the plaintiff's likeness was for trade purposes,<sup>329</sup> even though such a use must be found to justify injunctive relief under the New York statute.<sup>330</sup>

In the New York Supreme Court, the dissenters attacked the proposition that the use of the plaintiff's likeness was for trade purposes, characterizing such use as "incidental."<sup>331</sup> Indeed, because plaintiff's likeness had no commercial value, it is doubtful that her claim was predicated upon misappropriation for trade purposes. Rather, the true basis of her claim most likely rested in her allegation

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323. See *supra* text accompanying note 318.

324. 257 N.Y.S. 800, 801 (App. Div. 1932).

325. *Id.* at 801 (O'Malley, J., dissenting).

326. *Id.* at 802 (O'Malley, J., dissenting).

327. N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992).

328. *Blumenthal*, 257 N.Y.S. at 801.

329. *Blumenthal v. Picture Classics*, 185 N.E. 713-14 (N.Y. 1933).

330. N.Y. CIV. RIGHTS LAW § 51 (McKinney 1992) ("Any person whose name, portrait or picture is used within this state for advertising purposes or for purposes of trade without the written consent first obtained . . . may maintain an equitable action . . . to prevent and restrain the use thereof. . ."). There was no assertion in the case that the plaintiff's likeness was used for "advertising" purposes as opposed to "trade" purposes.

331. *Blumenthal*, 257 N.Y.S. at 804 (O'Malley, J., dissenting).

that the movie "depicted her in a foolish, unnatural, and undignified manner, and held her up to public ridicule and the contempt of her neighbors and friends."<sup>332</sup>

Subsequent New York cases have borne out the dissent's view that use of a person's likeness under circumstances similar to those in *Blumenthal* is incidental and not for trade purposes.<sup>333</sup> Moreover, at the same time *Blumenthal* was decided, New York courts were developing a broad privilege protecting the use of one's likeness in a publication concerning a newsworthy event or an event of public interest.<sup>334</sup> Viewed in its full context, the *Blumenthal* decision seems best explained as a court's clumsy attempt to fashion relief for a

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332. *Id.* at 801 (O'Malley, J., dissenting).

333. *See, e.g.,* *Delan v. CBS, Inc.*, 458 N.Y.S.2d 608, 614 (App. Div. 1983) (holding that a four second appearance of plaintiff, a patient at a mental hospital that was the subject of a television documentary, was "too fleeting and incidental to be actionable").

334. *See, e.g.,* *Sarat Lahiri v. Daily Mirror, Inc.*, 295 N.Y.S. 382, 389 (1937) (holding there may be no recovery for publishing a photograph to illustrate an article pertaining to current news or public interest unless "the photograph used has so tenuous a connection with the news item or educational article that it can be said to have no legitimate relation to it and be used for the purpose of promoting the sale of the publication").

A somewhat shocking example of just how broad this privilege is in modern times comes from *Howell v. New York Post, Co.*, 612 N.E.2d 699, 705 (N.Y. 1993). The plaintiff was a patient at a private mental hospital, where Hedda Nussbaum was also hospitalized. *Id.* at 700. Nussbaum was the adoptive mother of six-year-old Lisa Steinberg, whose death from child abuse was highly publicized. *Id.* The defendant's photographer trespassed on the hospital grounds and used a telephoto lens to photograph the plaintiff walking with Nussbaum. *Id.* The photograph was printed to illustrate a story about Nussbaum's emotional and physical recovery from the events, which allegedly included beatings inflicted by her live-in lover, Joel Steinberg, who stood accused of murdering the child. *Id.* The photo of plaintiff and Nussbaum appeared alongside another photo of Nussbaum taken shortly after the child's death. *Id.* In this earlier photo, Nussbaum's face was severely disfigured from the beatings by Steinberg. *Id.*

The plaintiff sued the *New York Post* on a variety of grounds, including invasion of privacy based upon the use of her likeness for trade purposes. *Id.* She alleged that it was imperative that her hospitalization remained a secret from her family and stated that hospital officials had telephoned a *Post* editor requesting that no photographs of patients be printed. *Id.* at 704. Nevertheless, all of the plaintiff's claims, including her invasion of privacy claim, were dismissed. *Id.* at 701.

The New York Court of Appeals affirmed the dismissal. *Id.* With regard to plaintiff's privacy claim, the court stated that because the article concerned a newsworthy event, plaintiff could prevail only if she demonstrated "the picture bore no real relationship to the article, or that the article was an advertisement in disguise." *Id.* at 704. In response to plaintiff's assertion that her photo (as opposed to Nussbaum's) was not related to the article, the court stated that "[t]he visual impact would not have been the same had the *Post* cropped plaintiff out of the photograph" because "[t]he photograph of a visibly healed Nussbaum, interacting with her smiling, fashionably clad 'companion' offer[ed] a stark contrast to the adjacent photograph of Nussbaum's disfigured face." *Id.* Thus, the court concluded there was "a real relationship between the article and the photograph of plaintiff." *Id.*

sympathetic plaintiff whose right to be let alone was intruded upon by being filmed in a public place and having her image disseminated to others without her consent.

In some cases involving public intrusions, courts have allowed plaintiffs to succeed by applying legal theories other than intrusion, with results resembling an effort to force a square peg into a round hole. In *Best v. District of Columbia*,<sup>335</sup> the plaintiffs were a group of prisoners videotaped without their consent while they were being transported by airplane from Washington, D.C., to Spokane, Washington.<sup>336</sup> While the prisoners were seated on the airplane in handcuffs and chains, one of the defendants walked down the aisle and videotaped them.<sup>337</sup> The prisoners sued, raising constitutional claims, as well as a common-law invasion of privacy claim.<sup>338</sup> In a motion to dismiss or, alternatively, for summary judgment, the defendants asserted that the plaintiffs failed to make out a claim for invasion of privacy.<sup>339</sup>

The court denied the motion and allowed plaintiffs to proceed under the theory of public disclosure of private facts.<sup>340</sup> However, the allegations of the plaintiffs' complaint did not support recovery under that theory, at least as it has traditionally been defined. Even if one accepted that the videotape captured private facts concerning the prisoners, which is questionable, the defendant must give *publicity* to the private facts to make out the tort.<sup>341</sup> The comments to the *Restatement* section defining public disclosure of private facts state that "publicity" means communicating the matter "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."<sup>342</sup> While

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335. 743 F. Supp. 44 (D.D.C. 1990).

336. *Id.* at 45.

337. *Id.* "Some of the plaintiffs objected, some hid their faces, some tried to hide their faces but the hand-cuffs and chains prevented them from doing so, and others were sleeping." *Id.*

338. *Id.*

339. *Id.* at 49.

340. The plaintiffs cited a District of Columbia case involving such a claim. *Id.* In *Vassiliades v. Garfinckel's*, 492 A.2d 580, 586-88 (D.C. Cir. 1985), the court reinstated a verdict against a plastic surgeon on a claim of public disclosure of private facts based upon the surgeon's use of "before and after" photographs of the plaintiff's cosmetic surgery in a medical presentation.

341. Section 652D of the *Restatement (Second) of Torts*, which defines the tort of public disclosure of private facts, contains as an element the requirement that the defendant give "publicity" to the private matter. *RESTATEMENT (SECOND) OF TORTS*, *supra* note 4, § 652D cmt. a. See *supra* note 56 for the full text of the *Restatement's* definition of this tort.

342. *RESTATEMENT (SECOND) OF TORTS*, *supra* note 4, § 652D cmt. a.



the defendants conceded that the film was shown to correctional personnel, and the plaintiffs alleged that the video was shown to unknown third parties,<sup>343</sup> there were no allegations that the defendants gave "publicity" to the videotape within the meaning of the *Restatement* definition. Moreover, in discussing the plaintiffs' constitutional privacy claim, the court noted that the "plaintiffs may have a legitimate expectation of privacy in the film itself whether or not it is publicly disclosed."<sup>344</sup>

In *Muratore v. M/S Scotia Prince*<sup>345</sup> the court allowed the plaintiff to recover for intentional infliction of emotional distress under circumstances that seem better analyzed as a case of public intrusion. The plaintiff was a passenger on the defendant's cruise ship, and on several occasions two photographers employed by the defendant took the plaintiff's picture over her objection.<sup>346</sup> On one occasion, one of the photographers made a lewd comment concerning the plaintiff.<sup>347</sup>

The court rejected the plaintiff's claim for intrusion because Maine law requires that the plaintiff allege a " 'physical intrusion upon premises occupied privately by a plaintiff,' "<sup>348</sup> whereas all of the conduct to which the plaintiff objected occurred in public. Instead, the court resorted to the tort of intentional infliction of emotional distress. The court held that the defendant's conduct constituted "extreme and outrageous conduct," despite recognizing that the definition of such conduct in the *Restatement (Second) of Torts* "suggest[s] a rather rigorous test for 'outrageousness.' "<sup>349</sup>

This is indeed true. Comment d to *Restatement* section 46, which defines intentional infliction of emotional distress, states: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."<sup>350</sup> Mere insults or profanity

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343. *Best*, 743 F. Supp. at 48.

344. *Id.*

345. 656 F. Supp. 471 (D. Me. 1987).

346. *Id.* at 473-75.

347. When approached by one of the photographers, the plaintiff turned her back to him. One of the photographers told the other: "Take the back of her—she likes things from the back." *Id.* at 475.

348. *Id.* at 483 (quoting *Nelson v. Maine Times*, 373 A.2d 1221, 1223 (Me. 1977)) (emphasis added in *Muratore*).

349. *Id.* at 481.

350. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 46 cmt. d.

are not sufficient to constitute extreme and outrageous conduct.<sup>351</sup> Apart from one lewd comment,<sup>352</sup> the defendants' objectionable conduct consisted primarily of taking the plaintiff's photograph over her objection. While the court stated that the defendants had knowledge of the plaintiff's unusual sensitivity to being photographed (as indicated by her initial reaction),<sup>353</sup> and that such knowledge may be a factor in assessing the outrageousness of conduct,<sup>354</sup> the court's conclusion that the defendants' conduct constituted extreme and outrageous conduct is out of step with the strict construction most courts apply to that test.<sup>355</sup>

Moreover, the tort of intentional infliction of emotional distress also requires proof by the plaintiff that she suffered "severe emotional distress."<sup>356</sup> The *Restatement* comments to section 46 explain that "[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it."<sup>357</sup> There is no indication in the *Muratore* opinion that the plaintiff suffered the kind of severe emotional distress which courts usually require<sup>358</sup> and

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351. *Id.* § 46 cmt. d ("The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."); see also PROSSER & KEETON ON TORTS, *supra* note 43, § 12, at 59 ("[I]t is generally held that there can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities or threats . . ."). This is not to trivialize the offensiveness of the defendant's lewd comment. However, it did not rise to the level of extreme and outrageous conduct as that standard usually is interpreted.

352. Perhaps to bolster its case for finding extreme and outrageous conduct, the court made reference in its discussion of this issue to "lewd comments" of the defendants. *Muratore*, 656 F. Supp. at 481 (emphasis added). This suggests there was more than one such comment. However, the court mentioned only one specific comment in the detailed factual summary at the beginning of the opinion. *Id.* at 475.

353. *Id.* at 481.

354. *Id.*

355. See, e.g., *Logan v. Sears, Roebuck & Co.*, 466 So. 2d 121, 122, 124 (Ala. 1985) (affirming summary judgment for defendant who had made statement to a fellow employee that plaintiff, who was gay, was "as queer as a three-dollar bill"); *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1115 (Md. Ct. Spec. App. 1986) (holding that conduct was not sufficiently extreme and outrageous to constitute intentional infliction of emotional distress where defendant-employer placed plaintiff-employee under surveillance, sent plaintiff's mug shot and police record stemming from a 14-year-old criminal conviction to 50 union employees, and sent evidence of plaintiff's marital infidelity to his wife).

356. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 46.

357. *Id.* § 46 cmt. j.

358. See, e.g., *Forster v. Manchester*, 189 A.2d 147, 151 (Pa. 1963) (holding plaintiff's evidence that surveillance caused her to become extremely nervous and upset and to have frequent nightmares and hallucinations which required medical treatment was insufficient to show severe emotional distress where there was no evidence that the defendant intended to cause such distress).

which is contemplated by the *Restatement*.<sup>359</sup> Nevertheless, the court found this element satisfied because it was "an appropriate case in which to infer severity from the extreme and outrageous nature of the photographers' conduct alone."<sup>360</sup> Given the court's questionable conclusions concerning the outrageousness of the defendants' conduct,<sup>361</sup> this portion of the holding amounts to little more than bootstrapping.

What *Muratore* and the other cases discussed in this section demonstrate is that some courts *want* to allow recovery in appropriate cases involving public intrusions, but they lack a sufficient vehicle to accomplish the desired result. Thus, they have been forced either (1) to rely upon the tort of intrusion and simply ignore the rule that actionable intrusions cannot occur in public places (as in *Rafferty* and *Kramer*); (2) to speak generally in terms of recovery for invasion of privacy without delineating the particular privacy tort relied upon (as in *Galella* and *Blumenthal*); or (3) to press other legal theories into service which are not applicable (as in *Best* and *Muratore*).

Thus, the situation parallels that faced by Warren and Brandeis when they wrote their seminal article on *The Right To Privacy* in 1890.<sup>362</sup> Warren and Brandeis discerned that lack of recognition of a right to privacy in tort law was forcing courts to stretch other legal theories (defamation, property, copyright, and implied contract) to allow recovery for what were, in truth, invasions of privacy.<sup>363</sup> The solution, in their view, was for courts to be forthright in recognizing "the right to be let alone" as an independent tort.<sup>364</sup>

The time has come for courts to recognize openly and forthrightly the existence of the concept of "public privacy" and to afford protection of that right by allowing recovery for intrusions that occur in or from places accessible to the public. The next section suggests how the tort of intrusion should be redefined to implement this proposal.

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359. The only specific reference to the distress suffered by the plaintiff was that she was "embarrassed" by the defendants' efforts to photograph her. *Muratore v. M/S Scotia Prince*, 656 F. Supp. 471, 475 (D. Me. 1987).

360. *Id.* at 481.

361. See *supra* notes 349-55 and accompanying text.

362. Warren & Brandeis, *supra* note 33.

363. *Id.* at 197-213.

364. *Id.* at 195.

## VI. REDEFINING THE TORT OF INTRUSION TO INCLUDE A RIGHT OF ACTION FOR "PUBLIC INTRUSION"

A majority of American jurisdictions have adopted the definitions of the four invasion of privacy torts, including intrusion, set forth in the *Restatement (Second) of Torts*.<sup>365</sup> The obstacle to making instances of public intrusion actionable under existing law lies not so much in the *Restatement* definition of the tort of intrusion as in the judicial acceptance of the *Restatement* comments that elaborate upon that definition. Section 652B of the *Restatement* defines "Intrusion upon Seclusion": "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."<sup>366</sup>

While both the title of the section and its references to intrusions upon "solitude" and "seclusion" suggest that privacy may be invaded only in a private physical space, the definition goes on to include, disjunctively, intrusions upon a person's "private affairs or concerns." This definition is broad enough to include intrusions in public places. A person's ability to move about in a public place without being followed, photographed, or videotaped could properly be regarded as a "private concern" of the person.

However, the comments to *Restatement* section 652B make it clear that, except under one narrow set of circumstances,<sup>367</sup> a person has no legitimate expectation of privacy in a public place. There is no liability, the comments state, for merely observing a person or taking his photograph in a public place, "since he is not then in seclusion."<sup>368</sup> This view of privacy is too limited because it fails to take account of important aspects of privacy that have little to do with physical solitude.<sup>369</sup> The goal of this section is to offer a workable redefinition of the tort of intrusion that would allow, under appropriate circumstances, recovery for intrusions that occur in or from public places.

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365. See *supra* note 41 and accompanying text (citing cases).

366. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B.

367. See *supra* notes 290-98 and accompanying text (discussing exception).

368. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B cmt. c; see also *supra* note 208 (providing complete text of relevant comments).

369. See *supra* notes 215-52 and accompanying text.

As a point of departure, it must be recognized that neither the right to privacy nor the right to invade privacy is absolute. In identifying legally protectable privacy interests, there is probably unanimous agreement that privacy interests must be balanced against opposing communitarian interests.<sup>370</sup> Obviously, in the area of public privacy, a balance must be struck between privacy and interaction. Members of society must be able to function freely in public, unburdened by the fear of invading others' privacy. Moreover, many situations involving intrusions in public implicate free speech and press issues, so any proposal to expand the tort of intrusion must take these important interests into account.

Currently, the balance is struck by the more or less bright-line rule that privacy cannot be invaded in public. About the only thing commending this rule is its ease of application. While this is not an insignificant virtue, it does not by itself justify maintaining a rule that forecloses privacy rights in public places. The current rule represents not so much a balancing of privacy rights against other rights as a *preclusion* of privacy rights in one of the dominant spheres of civilized life.

Fixed rules do not work well in tort law because the human behavior to which they must be applied comes in infinite varieties.<sup>371</sup> The history of tort law shows that fixed rules invariably lead to one of two undesirable consequences: (1) bad results in cases where application of the rule to the particular facts is harsh and unfair; or (2) judicial manipulation of the rule to avoid such results. In the context of the rule that intrusions in public are not actionable, the former consequence is demonstrated by many of the cases discussed in this Article;<sup>372</sup> the latter is revealed by the several decisions dis-

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370. See, e.g., *Machleder v. Diaz*, 801 F.2d 46, 48 (2d Cir. 1986) (discussing need to balance privacy rights of individuals against constitutional guarantee of freedom of the press); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957, 960 (D.Minn. 1948) (discussing need to balance personal privacy rights against press rights); *Barber v. Time, Inc.*, 159 S.W.2d 291, 295 (Mo. 1942) ("[E]stablishing conditions of liability for invasion of the right of privacy is a matter of harmonizing individual rights with community and social interests."); Post, *supra* note 100, at 996-97 ("From the beginning, . . . the task of the common law has been to balance the importance of maintaining individual information preserves against the public's general interest in information.").

371. For example, fixed rules in negligence law regarding the standard of conduct to be applied in a particular situation "[a]lmost invariably . . . [have] broken down in the face of the necessity of basing the standard upon the particular circumstances, the apparent risk, and the actor's opportunity to deal with it." PROSSER & KEETON ON TORTS, *supra* note 43, § 35, at 218.

372. See, e.g., *supra* notes 7-12, 17-23, 93-99 and accompanying text.

cussed in Section V in which courts either ignored the rule or circumvented it by manipulating other legal theories to allow victims of public intrusions to recover.<sup>373</sup>

Now comes the hard part. Once one casts loose from the relatively secure mooring of the rule that privacy does not exist in public places, is it possible to keep from drifting into a sea where any and all offensive observations in public become the subject of tort litigation? In other words, is it possible to impose a meaningful legal profile upon a tort cause of action for "public intrusion"?

#### A. *A Proposed Multifactor Redefinition*

The tort of intrusion can be redefined in a way that would allow recovery in suitable cases of public intrusion while also accommodating the competing interests of free social interaction and free speech. This can be accomplished by retaining the basic standard of liability included in the current *Restatement* definition of intrusion, which imposes liability for intrusive conduct "highly offensive to a reasonable person,"<sup>374</sup> and adopting a multifactor test for assessing whether this standard has been met. The proposed redefinition set forth below is comprised of two parts. Subparagraph (1) matches the current *Restatement* definition of intrusion, except that it omits the reference to "solitude or seclusion" and makes it clear that an intrusion can occur in a public place.<sup>375</sup> Subparagraph (2) sets forth seven factors for evaluating whether the defendant's conduct was highly offensive to a reasonable person.

Included within these factors are two considerations not traditionally part of the tort of intrusion: (1) whether the defendant disseminated information concerning the plaintiff to others;<sup>376</sup> and (2) whether the subject of the intrusion involved a matter of legitimate public interest.<sup>377</sup> Currently, these factors are elements of the privacy tort known as public disclosure of private facts, rather than the tort of intrusion.<sup>378</sup> Thus, to some extent, the proposed

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373. See *supra* notes 299-61 and accompanying text.

374. The *Restatement's* definition of intrusion requires proof that the "intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B; see also *supra* note 5 (providing complete text of *Restatement* definition of intrusion).

375. See *supra* text accompanying note 366 (providing full text of the current *Restatement* definition).

376. See *infra* notes 41-58 and accompanying text.

377. See *infra* notes 459-95 and accompanying text.

378. See *supra* note 56 and accompanying text.

redefinition constitutes a hybrid of these two torts. The justifications for this, not the least of which is the death blow recently dealt by the United States Supreme Court to the tort of public disclosure of private facts,<sup>379</sup> are discussed extensively below.<sup>380</sup>

With that introduction, I submit that the following redefinition of the tort of intrusion strikes a workable balance between legitimate privacy interests in public places and the competing interests of free social interaction and freedom of speech.<sup>381</sup>

### INTRUSION

- A. One who intentionally intrudes, physically or otherwise, upon the private affairs or concerns of another, whether in a private physical area or one open to public inspection, is subject to liability to the other for invasion of her privacy, if the intrusion would be highly offensive to a reasonable person.
- B. In considering whether an intrusive act is one which would be highly offensive to a reasonable person, the following factors shall be taken into account:
  - 1. the defendant's motive;
  - 2. the magnitude of the intrusion, including the duration, extent, and the means of intrusion;
  - 3. whether the plaintiff could reasonably expect to be free from such conduct under the habits and customs of the location where the intrusion occurred;
  - 4. whether the defendant sought the plaintiff's consent to the intrusive conduct;

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379. See *infra* notes 447-58 and accompanying text.

380. See *infra* notes 420-95 and accompanying text.

381. For the sake of clarity, the terms "plaintiff" and "defendant" are used in the proposed redefinition and throughout the ensuing discussion to denote, respectively, the victim of the intrusive conduct and the perpetrator of the intrusive conduct.

5. actions taken by plaintiff which would manifest to a reasonable person the plaintiff's desire that the defendant not engage in the intrusive conduct;
6. whether the defendant disseminated images of the plaintiff or information concerning the plaintiff that was acquired during the intrusive act; and
7. whether images of or other information concerning the plaintiff acquired during the intrusive act involve a matter of legitimate public interest.

Under the proposed redefinition, it would not be necessary that each factor weigh in the plaintiff's favor to establish liability. On the other hand, no one factor is controlling, although a single factor might predominate in a particular case.<sup>382</sup>

#### *B. Commentary on the Factors for Evaluating "Offensiveness"*

Commentary pertaining to each of the seven factors is offered below. Illustrations similar to those used by the American Law Institute in its various restatements of the law are included to help explain the relevance and application of each factor. While the proposed redefinition would apply to all instances of intrusive conduct, regardless of where they occur, the commentary below focuses exclusively upon intrusions in public places. The commentary and illustrations are not intended to be exhaustive, but rather to provide an analytical framework within which to apply the proposed redefinition. To demonstrate the independent relevance of each factor, the illustrations attempt to isolate the particular factor being discussed. However, the factors are interconnected and overlap inevitably occurs.

##### 1. The Defendant's Motive

More than one hundred years ago, Thomas Cooley stated that "[m]alicious motives make a bad act worse, but they cannot make that

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382. The American Law Institute has adopted similar multifactor balancing tests in several areas of tort law. See, e.g., RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 222A (multifactor test for tort of conversion); *id.* § 339 (multifactor test for assessing liability of possessor of land to child trespasser); *id.* § 520 (multifactor test for determining the existence of an abnormally dangerous activity).



a wrong which in its own essence is lawful.”<sup>383</sup> While one modern writer asserts that this statement “is part of the conventional wisdom of most writers of basic tort texts,”<sup>384</sup> the most popular legal treatise on the subject of torts opines that Cooley’s pronouncement “merely begs the question,”<sup>385</sup> because “unless motive is to be eliminated altogether, it must be taken into account in determining whether the act is ‘in its essence lawful’ in the first place.”<sup>386</sup>

The defendant’s motive or purpose in acting is highly relevant in assessing whether his conduct should constitute an actionable intrusion;<sup>387</sup> specifically, it is important in determining whether his actions meet the standard of conduct “highly offensive to a reasonable person.”<sup>388</sup> A person asked to evaluate the offensiveness of the defendant’s conduct in an intrusion case understandably would be interested in knowing why the defendant acted the way he did. The fact that the defendant acted with a pure motive—that is, lacking any desire either to benefit himself at the plaintiff’s expense or to harm the plaintiff<sup>389</sup>—would help to cast a favorable light on conduct that might otherwise be considered highly offensive. Conversely, if an intrusive actor was motivated by a desire to obtain economic gain or sexual gratification, or by spite, malice, or some other bad motive, such motivation might cause a reasonable person to view otherwise acceptable conduct as highly offensive.

Existing invasion of privacy case law provides examples demonstrating these contrasting influences of motive. In *Elmore v. Atlantic Zayre, Inc.*,<sup>390</sup> the defendant’s employee watched through a crack in the ceiling as the plaintiff engaged in homosexual activity in a restroom furnished by the defendant for customer use. In affirming summary judgment for the defendant on the plaintiff’s

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383. THOMAS M. COOLEY, TORTS 497 (2d ed. 1888).

384. Martin A. Kotler, *Motivation and Tort Law: Acting for Economic Gain as a Suspect Motive*, 41 VAND. L. REV. 63, 64 (1988).

385. PROSSER & KEETON ON TORTS, *supra* note 43, § 5, at 27.

386. *Id.*

387. *Id.* § 117, at 856 (stating that recent cases seem to indicate that the defendant’s purpose in acting is a factor of primary importance in determining whether an intrusion is actionable). *But see* Kalven, *supra* note 30, at 335 (asserting that because motive is not relevant in intentional torts or defamation actions, it should not be considered relevant to invasion of privacy actions).

388. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B (incorporating this standard in defining intrusion).

389. *See generally* Kotler, *supra* note 384, at 65-66 (classifying different types of motive).

390. 341 S.E.2d 905, 905 (Ga. Ct. App. 1986).

invasion of privacy claim, the court stressed that "the observations were made, not for the purpose of personally invading the privacy of others, but while investigating suspected criminal activity on those premises."<sup>391</sup> In other words, the presence of what the court thought to be a legitimate motive worked to immunize conduct that might otherwise have been viewed as highly offensive.

In *Norris v. King*,<sup>392</sup> the presence of a bad motive tipped the balance toward liability. The defendant, owner of a laundromat, used a hidden camera to photograph the plaintiff stealing money from a soda machine at his business establishment.<sup>393</sup> The plaintiff was charged with theft and pled guilty to the offense.<sup>394</sup> Subsequently, the defendant displayed the photographs of the plaintiff on a bulletin board in the laundromat with captions stating the plaintiff's name and making reference to his conviction.<sup>395</sup> The trial court granted judgment in favor of the plaintiff, finding that the defendant displayed the photos as part of an effort to coerce the plaintiff to make restitution.<sup>396</sup> In affirming the judgment over defendant's argument that it violated his constitutional right to free speech, the Louisiana Court of Appeals stated that "[a]ny such right . . . were [sic] lost to

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391. *Id.* at 906-07; *see also* *Johnson v. Corporate Special Servs., Inc.*, 602 So. 2d 385, 387 (Ala. 1992) (finding defendant's purpose important in intrusion cases and noting that personal injury claimants must expect reasonable investigation of their claims even though this means their privacy will be curtailed).

392. 355 So. 2d 21 (La. Ct. App.), *cert. denied*, 439 U.S. 995 (1978).

393. *Id.* at 22.

394. *Id.*

395. *Id.* The captions read in part:

CAUGHT IN THE ACT!

THESE ARE ACTUAL PHOTOGRAPHS TAKEN BY HIDDEN CAMERAS OF A THEFT IN PROGRESS.

ANY THIEVES OR VANDALS OPERATING ON THIS PRIVATE PROPERTY SHOULD REMEMBER TO SMILE . . . THEY'LL BE ON CANDID CAMERA!

HMMM . . . HERE WE HAVE [PLAINTIFF'S NAME AND ADDRESS]. [PLAINTIFF] IS CAREFUL—HE WANTS TO BE SURE NO ONE IS WATCHING!

WOW . . . [PLAINTIFF] IS SWIFT—IF HE RUNS FAST ENOUGH WHILE HOLDING THE MONEY BOX WITH BOTH HANDS—MAYBE HE WON'T GET CAUGHT.

TOO BAD . . . [PLAINTIFF] ISN'T FASTER THAN OUR CAMERAS! AND [PLAINTIFF] ISN'T FASTER THAN THE POLICE!

[PLAINTIFF] PAYS THE COURT \$105.00

[PLAINTIFF] GETS 91 DAYS IN JAIL (suspended).

*Id.*

396. *Id.* at 25.

him when his motives evolved into continued punishment and harassment of the plaintiff."<sup>397</sup>

The following illustrations suggest how the defendant's motive may influence the result in a public intrusion case:

ILLUSTRATIONS:

1. *A* accompanies his family to the beach, bringing his video camcorder to record the event. While panning the beach with his camcorder, *A* pauses with the camera focused upon *B*, who is building a sand castle with her child. *A* records the scene because he is touched by the child's laughter and excitement. *A* is not liable for intrusion.

2. *A* takes his video camcorder to the beach. He records *B*, who is sun bathing. *A*'s purpose in filming *B* is to use the videotape for sexual gratification, which he later does. *A* may be liable for intrusion.<sup>398</sup>

In these two nearly identical illustrations, motive separates non-liability from potential liability. In Illustration 1, *A* should not be liable for intrusion even if *B* was aware of the videotaping and was annoyed by it.<sup>399</sup> Because *A*'s motive was innocent, and none of the other proposed factors support the imposition of liability, *B* did not commit an actionable intrusion. On the other hand, in Illustration 2, which differs significantly from the first illustration only by a change in motive, *B* may be liable for intrusion.

As a practical matter, in many cases of the kind represented in Illustration 2, the plaintiff will be unaware of the intrusion. Obviously, if *B* is not aware the intrusion occurred, no action will be brought. Moreover, even in situations in which *B* is aware of the intrusion, it is doubtful that *A*'s bad motive would be known to her or, if known, that *B* would be able to prove it. Nevertheless, where evidence of bad motive does exist, it should be considered and, in appropriate cases, may be the determinative factor in imposing liability.

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397. *Id.*

398. If this illustration seems implausible, see *supra* notes 189-94 and accompanying text (citing numerous examples in which persons have been discovered using video cameras for sexual purposes).

399. If *A* persisted in filming *B* after *B* made it clear that she wished the filming to cease, factors 4 and 5 would come into play and may dictate a contrary result. See *infra* notes 412-19 and accompanying text.

## 2. The Magnitude of the Intrusive Conduct, Including the Duration, Extent, and the Means of Intrusion

The magnitude of the intrusion, measured by the defendant's conduct and its correlative impact upon the plaintiff's privacy, is a factor of obvious importance in determining liability. Slight interferences with privacy, even if annoying or offensive, do not warrant judicial relief, particularly in light of the substantial countervailing interests in free social interaction and free speech and press. The greater the magnitude of the intrusion, whether because of the means used to accomplish it, the duration of the intrusion, or other factors that accentuate its dimensions, the more likely the act will be considered highly offensive to a reasonable person.<sup>400</sup>

With respect to the means used to accomplish an intrusion, a critical factor in the area of public intrusions is whether the defendant employed mechanical or electronic technology to record the plaintiff, either visually or aurally. Indeed, the author contemplates that most situations involving actionable public intrusions would involve the defendant using some form of technological device (*e.g.*, video camcorder, single-frame camera, audio recording device, binoculars, telescope, night vision scope) to view and/or record the plaintiff.

As discussed extensively in Section IV, creating a permanent record of the plaintiff by photography or videotape carries the potential for magnifying an intrusion in three important ways: (1) it allows the invader to, in effect, take a part of the victim with him, thereby allowing intrusive scrutiny of the victim to continue indefinitely;<sup>401</sup> (2) a permanent photographic image may convey more information about the victim than would observation with the naked eye;<sup>402</sup> and (3) a durable recording by whatever means has the potential to multiply the impact of the intrusion through dissemination.<sup>403</sup> Use of mechanical or electronic means to record the plaintiff is a factor that should carry great weight in assessing whether the defendant's conduct was highly offensive to a reasonable person.

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400. See PROSSER & KEETON ON TORTS, *supra* note 43, § 117, at 856 (stating that means used to accomplish an intrusion are a factor of primary importance in determining whether conduct is actionable).

401. See *supra* note 281 and accompanying text.

402. See *supra* note 282 and accompanying text.

403. See *supra* text accompanying notes 283-84. Dissemination is important enough to be included as a separate factor under the proposed test. See *infra* notes 420-58 and accompanying text (discussing dissemination as a separate factor).

## ILLUSTRATIONS:

1. *A*, a nosy neighbor, spends a considerable amount of time watching *B* and his family through a crack in *A*'s curtains as they go about their normal business. *A* is not liable for intrusion.
2. The same facts as in Illustration 1, except that *A* uses a video camcorder set up on a tripod to record the comings and goings of *B* and his family. *A* may be liable for intrusion.

There is no liability in Illustration 1 because, though we may not like it, we all are aware of the possibility that nosy neighbors may pay too much attention to our business. Indeed, most of us at some time have demonstrated curiosity in our neighbors' behavior. However, it is one thing to say we run the risk of our neighbors spying on us from time to time and quite another to say we run the risk that they are electronically recording our movements. Liability may be appropriate in Illustration 2.

While the use of technology is an important factor in assessing the magnitude of intrusive conduct, it is not the only relevant consideration. Unwarranted surveillance of a person in public, even if unaided by technology, may constitute an actionable intrusion. However, to be actionable, such surveillance must be extensive in duration or repetition.

## ILLUSTRATIONS:

1. *A*, sitting at a table in a restaurant located in a shopping mall, stares at *B*, making *B* feel uncomfortable. *A* is not liable for intrusion.
2. The same facts as in Illustration 1, except that when *B* leaves the restaurant, *A* follows her about the shopping mall. When *B* leaves the shopping mall, *A* attempts to follow her in his automobile. *A* may be liable for intrusion.

As parents teach children at an early age, staring at a person in public is rude. It is likely to cause offense, and, in today's violent society, even fright. However, being the object of another's visual scrutiny, by itself, would not justify tort liability. It is simply one of the many petty annoyances one is forced to endure in a crowded,

often uncivil society. Nevertheless, if the observation progresses into a course of conduct that constitutes harassing surveillance, as in Illustration 2, the conduct may be considered highly offensive to a reasonable person and could constitute an actionable public intrusion.<sup>404</sup>

Allowing recovery in situations like that hypothesized in Illustration 2 could provide important common law assistance in combatting the kind of conduct targeted by criminal "stalking statutes," recently passed by forty-eight states.<sup>405</sup> Stalking statutes usually are directed at persons who engage in a repeated course of surveillance or harassment of another under circumstances raising a credible threat of bodily harm.<sup>406</sup> While criminal stalking statutes have been lauded as "an important anti-crime tool that would save lives,"<sup>407</sup> they have been attacked as unconstitutionally vague or overbroad,<sup>408</sup> too narrow,<sup>409</sup> and insufficiently enforced.<sup>410</sup> With so many problems, they may prove ineffective in accomplishing their deterrent purpose. Recognizing a civil cause of action for public intrusion for episodes of harassing surveillance would help further this deterrent purpose, as well as furnish a vehicle to the victims of such conduct for obtaining compensation.<sup>411</sup>

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404. A good faith motive by the actor may negate liability for public intrusion based upon surveillance, demonstrating how the proposed factors are interconnected. In Illustration 2, if B were a law enforcement officer or private investigator acting reasonably within the scope of an official work assignment, liability would not be appropriate. See, e.g., *McLain v. Boise Cascade Corp.*, 533 P.2d 343, 346 (Or. 1975) (holding that reasonable surveillance of personal injury claimant by private investigator is not actionable).

405. Bill Duryea, *Making Stalking Laws Stick*, ST. PETERSBURG TIMES, Apr. 3, 1994, at B1; see also *supra* note 210 (discussing stalking statutes and quoting the text of several such statutes).

406. See *supra* note 210 (quoting statutory examples).

407. Janan Hanna, *Confusion Clouds Stalking Law; 2 New Slayings Call Police Enforcement Into Question*, CHI. TRIB., Oct. 21, 1993, at N1.

408. Duryea, *supra* note 405, at B1 (discussing constitutional challenges to Florida's stalking statute); Richard Seven, *Stalking Law Too Narrow, Lawyers, Victims Complain*, SEATTLE TIMES, July 6, 1993, at B1 (quoting defense attorney attacking Washington stalking statute as unconstitutionally vague).

409. Seven, *supra* note 408, at B1 (quoting prosecutor commenting upon Washington stalking statute: "The Legislature just has not written a statute that defines stalking as broadly as the public wants. The law isn't very useful.").

410. Gayle Reaves, *Limited Protection; Stalking Victims, Officials Cite Loopholes In New Law*, DALLAS MORNING NEWS, Oct. 16, 1993, at A1 (quoting director of victim protection group commenting upon Texas stalking statute: "The feedback I've gotten is that there's virtually no enforcement at this stage of the game.").

411. Two state stalking statutes expressly provide for a right of civil recovery. CAL. CIV. CODE § 1708.7 (West 1994 Supp.); MICH. COMP. LAWS ANN. § 600.2954 (West 1993). Moreover, it is possible that some states might construe their stalking statutes to give rise

3. Whether the Plaintiff Could Reasonably Expect to be Free from Such Conduct Under the Habits and Customs of the Location Where the Intrusion Occurred

This factor makes it clear that the location of the plaintiff remains an important consideration in determining liability. The essential premise of this Article is that legitimate expectations of privacy do exist in public places; however, those expectations obviously are far more limited than the expectations of a plaintiff secluded in a private physical space such as a home or hotel room. Privacy in private physical places is more or less absolute. Virtually any unwarranted entry into a person's home, for example, would be an actionable intrusion, regardless of the actor's motive or the duration of the intrusion. However, as the factors in the proposed redefinition indicate, privacy in public is a matter of degree. Whether the plaintiff could reasonably expect to be free from the defendant's conduct in the particular location, under the normative standards of conduct for that location, is a significant factor in gauging the offensiveness of the defendant's conduct.

ILLUSTRATIONS:

1. At an amusement theme park, *A* films *B* with her video camcorder as *B* stands in line to board a ride. Absent the applicability of other factors, *A* is not liable for intrusion.
2. *A* films *B* with his video camcorder as *B* sunbathes in the nude in his fenced backyard. *A* may be liable for intrusion.
3. In a remote, wooded section of a state park, *A* films *B* and *C* with her video camcorder as they are lying on a blanket embracing. *A* may be liable for intrusion.

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to an implied right of action for damages. The test for implying a tort cause of action from a statute that does not expressly provide for it "is whether [a tort] remedy is consistent with the legislative provision, appropriate for promoting its policy and needed to assure its effectiveness." RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 874A cmt. h. The *Restatement* lists several factors to be used in making this determination: (1) the nature of the legislative provision; (2) the adequacy of existing remedies; (3) the extent to which a tort action would aid or supplement or interfere with existing remedies; (4) the significance of the purpose that the legislative body is seeking to effectuate; (5) the extent of the change in tort law; and (6) the burden the new cause of action would place on the judicial machinery. *Id.* § 874A. Applying these factors, a strong argument could be made for implying a private right of action for damages from state criminal stalking statutes.

In the video age, persons in crowded public settings, particularly recreational sites where families are likely to gather, must accept the possibility of being captured within the view of the omnipresent camcorder. However, the reasonable expectation is that, to the extent unconsented-to filming or photography occurs, the subject's appearance on the film will be incidental only. If the nonconsenting subject becomes the focus of extensive videotaping or photography, the conduct may transcend the boundary from reasonable to unreasonable. Moreover, other factors, such as the actor's bad motive or subsequent dissemination of the film, may come into play and affect liability.

Not all places that are legally accessible to the public are equally "public" in terms of one's privacy expectations. While one expects his conduct to be viewed and perhaps even scrutinized in a crowded public area, he reasonably expects greater privacy in more isolated settings, even those that are technically open to the public. Persons frequently seek solitude and refuge on empty beaches, nature trails, in meadows, and among trees and shrubbery. While they no doubt are aware of the possibility of encountering others, they reasonably expect that those encountered will, by virtue of the surroundings, exercise greater respect for their privacy than would occur in more populated areas.

#### 4. Whether the Defendant Sought the Plaintiff's Consent to the Intrusive Conduct

Because a fundamental function of the right of privacy is to protect individual autonomy,<sup>412</sup> individuals should have some control over whether and to what extent they wish to surrender their privacy. As Professor Gavison stated in her work on privacy, "the notion that choice should be respected is almost universally accepted as a starting point for practical reasoning."<sup>413</sup> Professor Gavison concluded, however, that this principle of "want-satisfaction"<sup>414</sup> cannot be extended too far in the realm of privacy because it does not help us

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412. See GOFFMAN, *supra* note 234, at 33-34 (recognizing that personal autonomy is a fundamental value in democratic societies and that protection of individual privacy is an important means by which autonomy is maintained); Benn, *supra* note 108, at 8 (suggesting that privacy is grounded in respect for persons); Gavison, *supra* note 215, at 449-50 ("Autonomy is another value that is linked to the function of privacy in promoting liberty.").

413. Gavison, *supra* note 215, at 441.

414. As applied to privacy, "[t]he want-satisfaction argument posits the desirability of satisfying wishes and thus provides a reason to protect all wishes to have privacy." *Id.*



decide why we should prefer one person's desire for privacy over another person's desire to invade privacy.<sup>415</sup> To honor one party's desires in such a situation necessarily involves denying the desires of the other party.

However, because an invasion of privacy involves one party, in effect, taking something important from another without consent and without giving anything in return, it seems reasonable to assert that, absent the intervention of other factors, the desires of the losing party should take precedence over the desires of the taking party. This is not to say that the desires of the party whose privacy is invaded are absolute. As discussed earlier, privacy interests must be balanced against competing social interests.<sup>416</sup> Justifications may exist for invading privacy against one's wishes—such as a need to acquire information in furtherance of the public interest. The only point here is that whether the defendant sought or obtained the plaintiff's consent for the invasion is a proper factor to be balanced with other relevant factors.

Present law recognizes the effect of consent, but skews the analysis by implicitly assuming that a person effectively consents to any and all intrusive conduct once he leaves the protected confines of a private physical area.<sup>417</sup> If this assumption were correct, imposing the burden on the defendant to seek consent would have little effect because one could expect that consent would always be given. On the other hand, if this assumption is erroneous, as it surely is, then invasion of privacy law should be modified to reflect how society really thinks about privacy.

In most situations a defendant would have no justification for persisting in intrusive conduct as to which the subject has refused consent. However, an exception would exist where the subject of the intrusion or his present circumstances are a matter of legitimate public interest.<sup>418</sup> The substantial social interest in free access to information related to matters of public concern, embodied in the free speech and free press protection of the First Amendment, might trump the subject's wish for privacy in appropriate cases. In such cases, it would be unnecessary to seek or obtain consent. This issue

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415. *Id.*

416. *See supra* note 370 and accompanying text.

417. *See supra* notes 256-77 and accompanying text (discussing "assumption of risk" analysis which underlies present rule that there is no privacy in public places).

418. Other justifications might also be recognized. For example, a law enforcement officer or private investigator acting reasonably within the scope of employment would not be expected to obtain consent from the target of an investigation.

is specifically addressed by factor 7 of the proposed redefinition, discussed below.<sup>419</sup>

By obtaining the plaintiff's consent, the defendant could assure herself protection from liability. While it would be desirable for consent to be obtained in advance of the intrusive conduct, the time sequence should not affect the validity of the consent. By consenting after the fact, the subject would, in effect, waive any complaint she might otherwise have had about the conduct.

#### ILLUSTRATIONS:

1. *A* asks *B* for consent to film *B*'s child while the child is climbing on playground equipment at a local park. *B* refuses consent. If *A* proceeds to videotape the child, *A* may be liable for intrusion.

2. Same facts as in Illustration 1, except that *B* consents to the filming. *A* is not liable for intrusion.

#### 5. Actions Taken by Plaintiff Which Would Manifest to a Reasonable Person the Plaintiff's Desire that the Defendant Not Engage in the Intrusive Conduct

This factor is closely related to factor 4 discussed immediately above, but involves situations in which the defendant has not sought the plaintiff's consent to the intrusive conduct. Even in the absence of a specific request for consent by the defendant and refusal by the plaintiff, actions by the plaintiff which would convey to a reasonable person that the plaintiff does not wish to be the subject of another's attention are relevant in assessing the offensiveness of the other's conduct. Such actions may be either explicit or implicit. Faced with an explicit indication that a person wishes to be let alone, akin to an express refusal of consent, a defendant would seldom be justified in persisting in intrusive conduct.

#### ILLUSTRATIONS:

1. *A* uses his video camcorder to film persons sunbathing at the beach. *B*, a sunbather, requests that *A* not videotape her. *A* ignores her request. *A* may be liable for intrusion.

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419. See *infra* notes 459-95 and accompanying text.

2. Same facts as in Illustration 1, except that, instead of making an oral request, *B* covers herself with a towel and scowls at *A*. If *A* persists in filming *B*, *A* may be liable for intrusion.

3. *A* follows *B* about in a shopping mall. *B* requests that he desist, but *A* continues to follow him. *A* may be liable for intrusion.

Less clear cut, but still relevant, are situations in which a person, by his conduct, implicitly indicates a desire to be free from public scrutiny in a manner that would be apparent to a reasonable person.

#### ILLUSTRATION:

1. *A* and *B* visit a public park to have a picnic lunch. Rather than eat their lunch at the well-attended area designated for picnics, they sit on a blanket in a remote corner of the park, sheltered by trees. *C* takes their photograph from a distance using a high-power zoom lens. The action of *A* and *B* in situating themselves in a remote area is a factor to be considered in determining whether *C* may be liable for intrusion.

#### 6. Whether the Defendant Disseminated Images of or Other Information About the Plaintiff Acquired During the Intrusive Act

Under current law, the dissemination of images or other information acquired during an intrusive act is irrelevant to the tort of intrusion. The tort is complete at the moment of the intrusive conduct, "even though there is no publication or other use of any kind of the photograph or information outlined."<sup>420</sup> This is important because it insulates the tort of intrusion from many of the free speech obstacles that infiltrate the other privacy torts, most notably the tort of public disclosure of private facts. The Supreme Court has made it clear that the First Amendment, while it affords broad

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420. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B cmt. b; see also William E. Lee, *Privacy Intrusions While Gathering News: An Accommodation of Competing Interests*, 64 IOWA L. REV. 1243, 1256 (1979) ("Intrusion addresses not the information that is obtained but the *manner* in which it is obtained, and it is clear that publication is not necessary to maintain an intrusion action.").

protection to the publication of information, confers only a limited right to *gather* information. Specifically, the Court has ruled on several occasions that the First Amendment does not grant the press a greater right of access to information than that accorded to the general public.<sup>421</sup>

While the Supreme Court has never addressed the First Amendment issue in an intrusion case, lower courts have held that the Constitution does not preclude tort liability for intrusion. For example, in *Dietemann v. Time, Inc.*,<sup>422</sup> two employees of *Life Magazine*, acting in conjunction with Los Angeles County prosecutors, visited the plaintiff's home pretending to need medical care.<sup>423</sup> Their purpose was to expose the plaintiff as a quack.<sup>424</sup> The *Life* employees used a hidden camera to photograph the plaintiff and a concealed radio transmitter to transmit their conversation to a tape recorder in an automobile outside the house.<sup>425</sup> The plaintiff sued in a federal district court and recovered a judgment after a bench trial.<sup>426</sup>

The Ninth Circuit Court of Appeals, after concluding that California would recognize the tort of intrusion,<sup>427</sup> rejected the

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421. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (plurality opinion of Burger, C.J.) (stating that the First Amendment does not create a right of access to information within governmental control "different from or greater than that accorded the public generally"); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978) (denying to communications organizations the right to copy and sell tape recordings admitted as evidence in trials of Watergate figures on ground that general public was not permitted physical access to the tapes and the First Amendment "generally grants the press no right to information about a trial superior to that of the general public"); *Pell v. Procunier*, 417 U.S. 817, 834 (1974) ("The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally."); see also *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (rejecting argument that government's refusal to validate passport for travel to Cuba violated First Amendment rights of citizen who asserted the travel restrictions inhibited the flow of information, and stating: "The right to speak and publish does not carry with it the unrestrained right to gather information."). But cf. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972) (stating that "news gathering is not without its First Amendment protection").

422. 449 F.2d 245 (9th Cir. 1971).

423. *Id.* at 246.

424. *Id.* at 245-46. The investigation yielded an article entitled *Crackdown on Quackery*, which was published in *Life Magazine*. *Id.* at 245. There apparently was no serious dispute that plaintiff was a quack, and the district court so found. *Id.* Plaintiff, after examining one of the *Life* employees, told her she had a lump in her breast and "concluded that she had eaten some rancid butter 11 years, 9 months, and 7 days prior to that time." *Id.* at 246.

425. *Id.* at 246.

426. *Id.* at 247.

427. *Id.* at 249.

defendant's argument that the First Amendment right to gather news immunized it from liability.<sup>428</sup> "The First Amendment," the court stated, "has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering."<sup>429</sup> Other courts have held similarly.<sup>430</sup> In short, "[i]ntrusion does not raise First Amendment difficulties since its perpetration does not involve speech or other expression."<sup>431</sup>

Given that liability may constitutionally be imposed for intrusion regardless of whether material acquired during the intrusion is disseminated, one might question why it is desirable to cloud matters by introducing dissemination as a relevant factor in the proposed redefinition of the tort. One good reason is that it would help to counter the expansion of intrusion proposed herein. Many intrusive acts may be annoying and offensive but not warrant the imposition of tort liability. By enlarging the tort of intrusion as proposed in this Article to include potential liability for intrusive conduct that occurs in public places, many more acts will potentially fall within the ambit of the tort. Considering dissemination as a factor would help to offset the impact of this expansion. In otherwise close cases involving public intrusions, the lack of any dissemination of material acquired during the intrusion might influence the court to decide against liability. Other important practical reasons for considering dissemination warrant more extensive discussion.

#### i. The Importance of Dissemination in Evaluating Offensiveness

From the victim's point of view, dissemination may be the single most important factor in gauging the magnitude of an intrusive act. Consider as an example the plaintiff in *Daily Times Democrat v.*

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428. *Id.*

429. *Id.*

430. *See, e.g.,* *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668, 685 (Ct. App. 1986) (quoting from *Dietemann*); *Annerino v. Dell Publishing Co.*, 149 N.E.2d 761, 762 (Ill. Ct. App. 1958) (finding that First Amendment protections are not "a license by which various press media may overstep the bounds of propriety and decency and thereby justify an invasion of the solitude of the individual"); *Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 223 (Sup. Ct. 1981) ("The gathering of news and the means by which it is obtained does not authorize, whether under the First Amendment or otherwise, the right to enter into a private home by an implied invitation arising out of a self-created custom and practice.").

431. Melville B. Nimmer, *The Right to Speak From 'Times' to 'Time': First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 957 (1968).

*Graham*, whose photograph was taken in a carnival fun house while her dress was blown up over her head.<sup>432</sup> While most people would be upset to have their picture taken in such a pose, it is doubtful many would be offended enough to go through the trouble and expense of filing a lawsuit based solely on the taking of the photograph. More likely, the defendant's publication of the photograph on the front page of its newspaper prompted the plaintiff to sue.

However, under current law, the intrusion occurred the moment the camera shutter clicked. The subsequent dissemination of the plaintiff's image to hundreds or thousands of newspaper readers is technically irrelevant under intrusion law. Common sense tells us, though, that dissemination is extremely relevant in assessing the offensiveness of an invasion of privacy.

The importance of dissemination in evaluating the offensiveness of invasive conduct is reflected in the sister tort of public disclosure of private facts. Section 652D of the *Restatement (Second) of Torts* makes it actionable to give publicity<sup>433</sup> to the private life of another "if the matter publicized is of a kind that . . . would be highly offensive to a reasonable person, and . . . is not of legitimate concern to the public."<sup>434</sup> Although the quoted language suggests otherwise, the focus of section 652D's "highly offensive" element is upon the *act of giving publicity* to the private matter, rather than the *content* of the matter itself.<sup>435</sup> Thus, invasion of privacy law already acknowledges that dissemination is relevant to assessing the offensiveness of invasive acts.

The impact of dissemination is also considered important in the related, more firmly established area of defamation law, as a factor in

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432. 162 So. 2d 474, 476 (Ala. 1964). For discussion of *Graham*, see *supra* notes 291-98 and accompanying text.

433. "Publicity" is defined in the comments to mean "that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652D cmt. a.

434. *Id.* § 652D. See *supra* note 56 for full text of the *Restatement* definition of the tort of public disclosure.

435. See *id.* § 652D cmt. c (defining "[h]ighly offensive publicity," and stating that the rule protects "only against unreasonable publicity"). Further evidence supporting this conclusion comes from illustration 10, which states that it would be an invasion of privacy to publish without consent a photograph of a woman nursing her child. *Id.* § 652D cmt. c, illus. 10. Because there is obviously nothing highly offensive about a woman nursing her child, it must be the act of giving publicity to such a matter that is the focus of the highly offensive requirement of section 652D; cf. Post, *supra* note 100, at 979-82 (endorsing this interpretation).

distinguishing libel from slander. Under the common law, slander was limited to spoken words, while libel consisted of written words.<sup>436</sup> The distinction was an important one because, unless the slander fit within one of the four categories of slander *per se*,<sup>437</sup> slander required proof of special damages, whereas damages for libel were presumed.<sup>438</sup> While the common-law distinction has been criticized as unprincipled and overly formalistic,<sup>439</sup> the distinction found support in the greater capacity of written words to cause harm.<sup>440</sup> When the common law rules were developed, written words had greater potential to injure than spoken words because of their permanence and, hence, the possibility that they could be disseminated to larger audiences.

As technology progressed, the law took cognizance of the fact that new forms of communication such as radio and television could cause harm as great or greater than written words.<sup>441</sup> The drafters of the *Restatement (Second) of Torts* recognized this development by defining libel broadly to include, in addition to written words, "any . . . form of communication that has the potentially harmful qualities characteristic of written or printed words."<sup>442</sup> The *Restatement* definition specifically emphasizes "[t]he area of dissemination" and "the persistence of the defamation" as relevant factors in distinguishing the greater injury of libel from the lesser injury of slander.<sup>443</sup>

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436. See generally PROSSER & KEETON ON TORTS, *supra* note 43, § 112, at 785 (discussing the distinction between libel and slander).

437. The law recognized four categories of slander *per se* actionable without proof of special damages: (1) imputation of a crime; (2) imputation of a loathsome disease; (3) slander affecting a person in her business or trade; and (4) imputation of unchastity to a woman. *Id.* § 112, at 788-93.

438. *Id.* § 112, at 793, 795. The United States Supreme Court has ruled that the First Amendment imposes restrictions upon when states may allow presumed damages for libel. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (holding that private figure plaintiff may recover presumed and punitive damages if speech does not involve a matter of public concern).

439. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 568 cmt. b.

440. PROSSER & KEETON ON TORTS, *supra* note 43, § 112, at 785.

441. See, e.g., *Shor v. Billingsley*, 158 N.Y.S.2d 476, 481 (Sup. Ct. 1956), *aff'd*, 169 N.Y.S.2d 416 (Ct. App. 1957) (holding that an ad-libbed radio broadcast was libel rather than slander because "it is evident that the broadcast of scandalous utterances is in general as potentially harmful to the defamed person's reputation as a publication by writing").

442. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 568(1).

443. *Id.* § 568(3). Comment d explains:

The wide area of dissemination, the fact that a record of the publication is made with some substantial degree of permanence and the deliberation and premeditation of the defamer are important factors for the court to consider in

One might argue that analogies to the torts of public disclosure of private facts and defamation are inapposite to demonstrate the relevance of dissemination to intrusion, because intrusion is not a communicative tort. Traditionally, of course, this has been true. Existing law is clear that the tort is complete at the moment of the physical intrusion and that subsequent publication of images or other information acquired during the intrusion is not a necessary element.<sup>444</sup>

The proposed redefinition would not change this basic principle. Intrusive acts that are highly offensive to a reasonable person would remain actionable regardless of whether dissemination occurred. However, in close cases, the fact of dissemination or lack thereof might tip the balance one way or the other.<sup>445</sup> To ignore dissemination in assessing the offensiveness of intrusive acts would be like calculating the harm to a person wrongly transfused with HIV-infected blood by focusing upon the pin prick in her arm. To many intrusion victims, the act of dissemination is far more offensive and damaging than the original act.<sup>446</sup>

It might not be necessary to complicate the law of intrusion by incorporating dissemination as a factor if the privacy tort known as the public disclosure of private facts remained viable. However, as

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determining whether a particular communication is to be treated as a libel rather than a slander.

*Id.* § 568 cmt. d. The *Restatement* contains a separate provision specifically stating that the broadcasting of defamatory material by radio or television is libel. *Id.* § 568A. Comment a to section 568A explains that the "wide dissemination" that results from radio and television broadcasting is one reason for characterizing it as libel rather than slander. *Id.* § 568A cmt. a.

444. See *supra* text accompanying notes 420-31.

445. As explained earlier, in many instances, including dissemination as a factor would help to limit the expansion of the proposed enlarged tort. See text following *supra* note 431.

446. A recent case illustrating this point is *Desnick v. Capital Cities/ABC, Inc.*, 851 F. Supp. 303 (N.D. Ill. 1994). Representatives of the television news magazine program *PrimeTime Live* hired "undercover" patients to visit branch offices of the plaintiff eye clinic as part of a segment exposing the clinic's allegedly unethical ophthalmological marketing practices towards senior citizens. *Id.* at 305. The patients were accompanied by persons posing as friends or relatives who carried concealed video cameras and audio recording equipment. *Id.* After the segment was broadcast, a lawsuit was filed asserting, among other things, a claim of intrusion. *Id.* at 305-06. The court dismissed the intrusion claim of the individual doctors because they could not allege any legally cognizable harm arising from the intrusive conduct other than that which resulted from the broadcast itself. *Id.* at 307-08 ("[T]he offensive conduct and the subsequent harm resulted from the broadcast of *PrimeTime Live*, which, according to the Plaintiffs falsely depicted Plaintiffs as unethical and unprofessional.").



discussed below, the demise of that tort has created a huge gap in invasion of privacy law, a gap that could be partially filled by making dissemination a relevant factor in evaluating the offensiveness of the defendant's conduct in intrusion cases.

#### ILLUSTRATIONS:

1. A photographs beach scenes while on vacation in Florida. Included in one photograph is B, who was sunbathing at the time. Without more, A is not liable for intrusion.

2. The same facts as in Illustration 1, except that A later publishes the photograph of B in a men's magazine above a caption which makes sexual references concerning the photograph. A may be liable for intrusion.

#### ii. Filling the Gap Left by the Death of the Tort of Public Disclosure of Private Facts

In *Florida Star v. B.J.F.*,<sup>447</sup> the United States Supreme Court "obliterate[d]" the tort of public disclosure of private facts.<sup>448</sup> As a result, there is no longer any viable tort remedy for injuries resulting from the dissemination of true information concerning an individual, no matter how private the information or how offensive the dissemination would be to a reasonable person.

*Florida Star* involved a rape victim who sued a Florida newspaper for printing her name in a report of the rape, contrary to a Florida statute making it unlawful to publish the names of rape victims.<sup>449</sup> Relying upon the statutory violation as negligence per se, the trial court directed a verdict in favor of the plaintiff and awarded her damages.<sup>450</sup> The Supreme Court reversed, finding that the award was inconsistent with the First Amendment freedoms of free speech and free press.<sup>451</sup> While the Court stopped short of holding that a state may never punish true speech,<sup>452</sup> the test it adopted for

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447. 491 U.S. 524 (1989).

448. *Id.* at 550 (White, J., dissenting) ("[T]he Court accepts appellants' invitation . . . to obliterate one of the most note-worthy legal inventions of the 20th century: the tort of the publication of private facts.")

449. *Id.* at 526 n.1 (quoting text of statute).

450. *Id.* at 528-29.

451. *Id.* at 526.

452. *Id.* at 532-34 ("Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment.").

when a state may do so consistent with the Constitution is so stringent as to be almost impossible to satisfy.

The Court reaffirmed the test it had suggested in an earlier case involving the indictment of two newspapers for printing the name of a juvenile criminal defendant contrary to state law.<sup>453</sup> The test, from *Smith v. Daily Mail Publishing Co.*,<sup>454</sup> is "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."<sup>455</sup> This test erects two formidable obstacles for privacy plaintiffs: (1) the requirement that the published material not concern a matter of public significance; and (2) the requirement that the plaintiff prove that punishment of the defendant through state sanctioned tort damages is necessary to serve a state interest of the highest order.

In *Florida Star*, the Court construed the first requirement so broadly and the second requirement so narrowly as to almost guarantee disappointment for plaintiffs raising claims of public disclosure of private facts. With regard to what constitutes "a matter of public significance," the Court did not consider whether B.J.F.'s name was a matter of public significance. Rather, the Court focused on the general subject matter of the article which, the court said, concerned a matter of public significance because it "involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities."<sup>456</sup> By focusing on the broad subject matter of the published material, rather than the specific fact alleged by the plaintiff to be private (*i.e.*, her identity), the test pulls an incredibly wide range of information under the umbrella of "matter[s] of public significance."

Conversely, the Court indicated that what constitutes a "state interest of the highest order" warranting state punishment of

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453. *Id.* at 533.

454. 443 U.S. 97 (1979).

455. *Florida Star*, 491 U.S. at 533 (quoting *Smith*, 443 U.S. at 103). Writing in dissent, Justice White commented that the rule from *Daily Mail* was introduced "with the cautious qualifier that such a rule was 'suggest[ed]' by our prior cases, '[n]one of [which] . . . directly control[led]' in *Daily Mail*." *Id.* at 545 (White, J., dissenting). Thus, he opined that the *Daily Mail* rule was "offered only as a hypothesis . . . [and] should not be so uncritically accepted as constitutional dogma." *Id.* (White, J., dissenting).

456. *Id.* at 536-37.

dissemination of truthful information is to be construed stringently.<sup>457</sup> The court readily agreed that the state interests supporting punishment for the publication of a rape victim's name (*i.e.*, the privacy and physical safety of the victim and the goal of encouraging victims of sex crimes to report offenses) were "highly significant," but it nevertheless held that the facts in *Florida Star* did not support a need to punish the publication in that case.<sup>458</sup>

The demise of the tort of public disclosure of private facts provides additional justification for introducing dissemination as a relevant factor in intrusion cases. After *Florida Star*, a person has virtually no protection against unwarranted, highly offensive dissemination of images or other information concerning her. Including dissemination as a relevant factor in intrusion cases would help to partially fill this hole in privacy law.

The free speech concerns at issue in *Florida Star* would be substantially diminished by the fact that dissemination would not be a required element of the tort, as in the case of public disclosure of private facts, but only one of seven factors to be weighed in evaluating the offensiveness of the defendant's conduct. Dissemination of private information would never by itself support a cause of action for intrusion. An initial intrusive act would remain the crux of the tort. Any remaining constitutional concerns could be minimized by adopting a more limited, reasonable view as to what constitutes a matter of public significance, as proposed in the next and final factor of the proposed redefinition.

#### 7. Whether Images of or Other Information About the Plaintiff Acquired During the Intrusive Act Involve a Matter of Legitimate Public Interest

Under current law, it is technically irrelevant whether the subject of the intrusion is a public figure and/or whether information acquired

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457. *Id.* at 537-38.

458. *Id.* at 537-41. Three factors influenced the court's decision on this point: (1) the defendant obtained B.J.F.'s name lawfully from the sheriff's office, which inadvertently placed the report including her full name in the press room, *id.* at 538; (2) to allow recovery based upon negligence *per se* for violation of the statute would, in effect, allow the imposition of strict liability for the publication of true speech, *id.* at 539; and (3) the Florida statute was underinclusive because it applied only to " 'instrument[s] of mass communication' " and not to the backyard gossip who maliciously spreads the identity of a rape victim, *id.* at 540.

during the intrusion is a matter of public interest.<sup>459</sup> As Judge Skelly Wright stated in a famous intrusion case:

Where there is intrusion, the intruder should generally be liable whatever the content of what he learns. An eavesdropper to the marital bedroom may hear marital intimacies, or he may hear statements of fact or opinion of legitimate interest to the public; for purposes of liability that should make no difference.<sup>460</sup>

While the above may be true as a matter of hornbook tort law, it is questionable whether it comports with constitutional law. This Article has already noted that the United States Supreme Court has held on several occasions that the primary interest protected by the First Amendment is the publication of information, rather than the gathering of it.<sup>461</sup> Nevertheless, the Court also has said that "news gathering is not without its First Amendment protection."<sup>462</sup> Though the Court did not elaborate on what those protections are, it may be that the First Amendment shields some intrusive conduct from liability if it is directed at acquiring information concerning a matter of legitimate public interest.

As a practical matter, it is hard to imagine that a judge ruling upon an intrusion claim would not be influenced by whether the defendant overheard a couple speaking about marital intimacies or overheard a public official plotting political corruption. This is demonstrated by *Aisenson v. American Broadcasting Co.*<sup>463</sup> The defendant in *Aisenson* polled local attorneys and elicited their opinions concerning the performance of Los Angeles Superior Court criminal judges.<sup>464</sup> The plaintiff received the lowest rating in the poll.<sup>465</sup> Employees of the defendant videotaped the plaintiff as he exited his home one morning and broadcast the tape on television with narration of the poll results.<sup>466</sup>

The judge sued, alleging, among other things, that the unauthorized videotaping constituted an intrusion.<sup>467</sup> The trial court

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459. See *supra* note 5 for the complete text of section 652B of the *Restatement (Second) of Torts*, defining intrusion.

460. *Pearson v. Dodd*, 410 F.2d 701, 705 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

461. See *supra* note 421 (citing cases).

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

463. 269 Cal. Rptr. 379 (Ct. App. 1990).

464. *Id.* at 381.

465. *Id.*

466. *Id.* at 381-82.

467. *Id.* at 387.

entered summary judgment for the defendant.<sup>468</sup> In affirming the summary judgment, the court of appeals held that the defendant's unauthorized videotaping did not rise to the level of conduct which would be highly offensive to a reasonable person.<sup>469</sup> Supporting this conclusion was the belief that "[w]hen the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned . . . ."<sup>470</sup>

*Aisenson* expressly recognized what we already know intuitively: social and constitutional interests in access to information concerning matters of public significance will inevitably invade the tort of intrusion. This will be much more true under the expanded definition of intrusion proposed in this Article. By enlarging the tort to allow recovery for intrusions that occur in public places, more claims will undoubtedly arise against defendants who assert that they were acting in the public interest to gather information of public importance. Accordingly, it is appropriate to help counterbalance this expansion by expressly including as the last factor in the proposed multifactor calculus whether the matter pried into by the defendant was of legitimate public interest.

Attention must be focused on the word "*legitimate*." Many private matters are of interest to the public in the sense that we are all curious about the lives of others, particularly the rich and famous. Simply because the public is interested in a tidbit of lurid or sensational gossip, however, does not make it a matter of *legitimate* public interest. If television executives began broadcasting secret video footage of couples having sex in their bedrooms, one can predict that the ratings would be high. However, such "public interest" would not be legitimate for purposes of privacy law.

The United States Supreme Court acknowledged this distinction in a 1976 defamation case. In *Time, Inc. v. Firestone*,<sup>471</sup> Mary Alice Firestone brought a libel action against *Time* magazine for printing in its "Milestones" section that her husband, heir to the Firestone family fortune, had been granted a divorce on the ground of adultery. *Time* asserted that the plaintiff was a public figure and, therefore, had to

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468. *Id.* at 382.

469. *Id.* at 387. This is the standard for judging actionable intrusions. See RES-STATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B.

470. *Aisenson*, 269 Cal. Rptr. at 387 (quoting *Kapellas v. Kofman*, 81 Cal. Rptr. 360, 370 (Cal. 1969) (en banc)).

471. 424 U.S. 448, 452 (1976).

show "actual malice" to recover.<sup>472</sup> This conclusion was compelled, *Time* argued, by the fact that the divorce had been characterized as a "cause celebre" by the Florida Supreme Court.<sup>473</sup> The United States Supreme Court rejected this argument, refusing to "equate 'public controversy' with all controversies of interest to the public."<sup>474</sup> The Court stated: "Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public."<sup>475</sup>

Though the Supreme Court has waffled back and forth on the issue of whether courts should be involved in drawing distinctions between speech of public concern and speech of private concern,<sup>476</sup> its most recent pronouncements on the issue firmly suggest the distinction is "in" rather than "out." In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>477</sup> the Court held that a private figure defamation plaintiff may recover presumed and punitive damages without having to prove actual malice if the speech does not relate to a matter of public concern.<sup>478</sup> A year later, in *Philadelphia*

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472. *Id.* at 452-53. "Actual malice" is the constitutional fault standard that public officials and public figures are required to prove in defamation cases. The standard, first articulated in *New York Times v. Sullivan*, 376 U.S. 254 (1964), requires a public official or public figure plaintiff to prove the defendant made a false defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held that states are free to decide for themselves the standard of fault that must be shown by a private figure defamation plaintiff, so long as they do not impose liability without fault. *Id.* at 347. Most states have opted for a negligence standard for private figure plaintiffs.

473. *Firestone*, 424 U.S. at 454.

474. *Id.*

475. *Id.*

476. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), Justice Brennan's plurality opinion took the position that even private figure defamation plaintiffs should have to satisfy the "actual malice" fault standard if the subject of the defamation was a matter of public concern. *Id.* at 52. See *supra* note 472 for a definition of the actual malice standard. However, three years later, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court rejected this rule, in part because it would require "judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not . . ." *Id.* at 346. Justice Powell, writing for the majority in *Gertz*, "doubt[ed] the wisdom of committing this task to the conscience of judges." *Id.*

477. 472 U.S. 749 (1985).

478. *Id.* at 761. The Court retreated from a portion of its holding in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which suggested that presumed or punitive damages may never be recovered absent a showing of actual malice. *Gertz* had stated, seemingly in unqualified terms, that "States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless

*Newspapers, Inc. v. Hepps*,<sup>479</sup> the Court again drew a distinction between public and private speech, holding that a private figure libel plaintiff bears the burden of proving falsity against a media defendant if the defamatory speech is of public concern.<sup>480</sup> Unfortunately, the Court has failed to offer much guidance as to how such a distinction should be made. In *Dun & Bradstreet*, the Court said only that one must look to the "content, form and context" of the speech "as revealed by the whole record."<sup>481</sup>

Despite the Supreme Court's indication in its defamation cases that courts can and must distinguish between speech of public concern and speech of private concern, lower courts have been reluctant to tread into this quagmire. The result in most cases has been to "simply accept the press's judgment about what is and is not newsworthy."<sup>482</sup> However, this is not a suitable response in an area requiring the balancing of important competing interests.

In its current definition of the privacy tort known as public disclosure of private facts, the *Restatement (Second) of Torts* states that, in determining what constitutes a matter of legitimate public interest,

account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.<sup>483</sup>

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disregard for the truth." *Gertz*, 418 U.S. at 349.

479. 475 U.S. 767 (1986).

480. *Id.* at 768-69.

481. *Dun & Bradstreet*, 472 U.S. at 761 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

482. Zimmerman, *supra* note 30, at 353 (stating also that "the vast majority of cases seem to hold that what is printed is by definition of legitimate public interest"). Professor Zimmerman tacitly approved of this approach, stating "deference to the judgment of the press may actually be the appropriate and principled response to the newsworthiness inquiry." *Id.*

483. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652D cmt. h. California courts have developed an alternative three-part test for determining newsworthiness: "(a) [t]he social value of the facts published; (b) the depth of the intrusion into ostensibly private affairs; and (c) the extent to which an individual voluntarily acceded to a position of public notoriety." *Maheu v. CBS, Inc.*, 247 Cal. Rptr. 304, 311 (Ct. App. 1988).

This standard was endorsed as constitutional by the Ninth Circuit Court of Appeals in *Virgil v. Time, Inc.*,<sup>484</sup> which also held that it is constitutionally acceptable to submit to juries the question of what constitutes legitimate public speech.<sup>485</sup>

#### ILLUSTRATIONS:

1. *A* is a newspaper reporter investigating *B*, a judge suspected of public corruption. *A* secretly takes photographs of the judge as he eats dinner in a secluded corner of a restaurant with a suspected organized crime figure. Because the subject of *A*'s intrusive act involves a matter of legitimate public interest, *A* may not be liable for intrusion.
2. *A* is a newspaper reporter investigating whether *B*, a Catholic priest who has neither gained nor sought any public notoriety, is involved with a woman in a romantic relationship. *A* secretly takes photographs of *B* as he eats dinner in a secluded corner of a restaurant with a woman. Because the subject of *A*'s intrusive act does not involve a matter of legitimate public interest, *A* may be liable for intrusion.

The *Restatement's* community mores standard is not flawless and no doubt fails to satisfy those with a longing for precision and perfection. However, it is a fallacy of reasoning to demand perfection from a proposal when perfection is unattainable.<sup>486</sup> Drawing lines between those matters that are of legitimate public interest and those that are not is admittedly difficult. To refuse to draw lines, however,

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484. 527 F.2d 1122, 1129 (9th Cir. 1975) ("[S]uch a standard for newsworthiness does not offend the First Amendment . . .").

485. *Id.* at 1130.

486. Fearnside and Holther describe a fallacy of reasoning that they label "Nothing but Objections":

In the complexity of affairs there are few designs or proposals so well considered that objections cannot be raised to them. A man must often choose the lesser of evils and try, if he will accomplish anything at all, to dedicate himself to a course of action in spite of grave misgivings.

Why choose the lesser evil? Why not, in such cases, reject all proposals? The answer is that sometimes there is no escape from choice; to fail to decide is to "decide by default."

FEARNSIDE & HOLTHOR, *supra* note 276, at 129.



is to abdicate judicial responsibility and completely sacrifice the interests on one side of the scales.<sup>487</sup>

Whether the *Restatement* definition of "legitimate public interest" remains constitutional following the United States Supreme Court's decision in *Florida Star v. B.J.F.*<sup>488</sup> is open to question. Though not offering a specific definition of what it referred to as "'matter[s] of public significance,'" <sup>489</sup> the Court took a broad view of such matters in holding that the publication of a rape victim's name was a matter of public significance because the broader issue of violent crime was a matter of public significance.<sup>490</sup>

This approach is misguided. A more reasonable approach would be to look, as some courts have done,<sup>491</sup> at the particular item of information that is the subject of the litigation and ask whether it is a matter of legitimate public interest. Violent crime is indeed a matter of legitimate public interest, but the identity of a particular rape victim is not. As Justice White, writing in dissent, stated in *Florida Star*: "There is no public interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime . . . ." <sup>492</sup> It would appear that a workable, relatively clear line could be drawn by courts between the general subject matter of the published material and the particular private facts at issue in the

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487. As the Ninth Circuit Court of Appeals stated in *Virgil v. Time, Inc.*:

The definition of the "line to be drawn" is not as clear as one would wish, but it expresses the distinction between that which is of legitimate public interest and that which is not as well as we could do. Where competing values are involved . . . , unless one competitor is to be sacrificed outright, those involved with the competition must accept that risks are inherent and the problem lies in attempting to minimize them to the extent that the conflict permits.

527 F.2d at 1129.

488. 491 U.S. 524 (1989); see *supra* notes 447-58 and accompanying text for discussion of *Florida Star*.

489. *Florida Star*, 491 U.S. at 536 (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)).

490. *Id.* at 536-37. See *supra* note 456 and accompanying text for additional discussion of this point. Three of the five Justices who concurred in the majority opinion in *Florida Star* have retired, raising the possibility that were the issue to be revisited, a different result might be reached.

491. See, e.g., *Virgil v. Time, Inc.*, 527 F.2d 1122, 1131 (9th Cir. 1975) (noting that even if it accepted that a general activity relates to the public interest, "it does not necessarily follow that it is in the public interest to know private facts about the persons who engage in that activity"); *Barber v. Time, Inc.*, 159 S.W.2d 291, 295 (Mo. 1942) (finding that even though plaintiff's unusual ailment was a matter of public interest, "[i]t was not necessary to state plaintiff's name in order to give medical information to the public as to the symptoms, nature, causes or results of her ailment").

492. *Florida Star*, 491 U.S. at 553 (White, J., dissenting).

lawsuit in distinguishing speech of public concern from speech of private concern. The following illustrations demonstrate this distinction:

ILLUSTRATIONS:

1. *A*, a television station, broadcasts film of a serious automobile accident showing the mangled automobiles and emergency workers at the scene. *B*, a victim of the accident who is not shown in the broadcast, sees the film footage on television and is deeply offended by being forced to relive the trauma of the event in this manner. *A* is not liable for intrusion.
2. The same facts as in Illustration 1, except that *A* broadcasts close-up footage of *B*, who is bleeding, moaning and asking to be allowed to die. *A* may be liable for intrusion.<sup>493</sup>

Distinctions can and should be drawn between matters which are of proper concern to the public and those in which the public has no legitimate interest. If courts are unwilling to engage in this exercise, they should discard any notion that they are "balancing" interests<sup>494</sup> and be forthright in conceding that they do not consider privacy to be an interest worthy of protection in situations involving the disclosure of information.<sup>495</sup>

## VII. CONCLUSION

This Article has attacked the generally accepted rule of tort law that privacy cannot be invaded in a place accessible to the public. One would expect that a rule which has gained such prominence would be supported by well-reasoned justifications, but one searches judicial opinions in vain to find them. Guided more by reflex than reason, courts espousing the rule have been content to parrot Dean

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493. These are the facts of *Shulman v. Group W*, discussed *supra* at notes 17-23 and accompanying text.

494. See *supra* note 370 (citing cases discussing the balancing of free speech interests against privacy interests).

495. The constitutional implications of attempting to distinguish speech of public concern from speech of private concern are lessened in this context because the inquiry is only one of seven factors to be considered in assessing the offensiveness of the defendant's conduct. An original intrusive act remains the crux of the tort.

Prosser's early observations on the issue (as incorporated into the *Restatement (Second) of Torts*)<sup>496</sup>, observations that themselves were unsupported by analysis or explanation.<sup>497</sup>

Perhaps the best explanation for the rule is an intuitive sense that what is public cannot, by definition, be private. "Public privacy" does sound like an oxymoron, but only because we tend to think of "public" and "private" in black and white terms. However, privacy is not an absolute, all-or-nothing concept. While one necessarily surrenders a great deal of privacy when she ventures from a place of physical solitude into the light of public view, it does not follow that she forfeits all legitimate expectations of privacy. Traditionally, we have defined privacy in terms of physical barriers such as walls, fences, and window shades. The focus on physical boundaries is too narrow, however, because it ignores other important aspects of privacy such as the need to maintain informational preserves<sup>498</sup> and the desire to protect anonymity.<sup>499</sup>

The basic premise of this Article is that the privacy tort known as intrusion should be expanded to recognize and protect limited privacy rights in public places. This modification of the law is mandated by both legal and societal developments. Legally, the protection afforded by the four invasion of privacy torts is shrinking.<sup>500</sup> If the other three privacy torts were strong, the weakness of the tort of intrusion would not be so objectionable, but this is not so. Appropriation has developed into a property-based right, the modern usefulness of which is limited to helping celebrities protect their right of publicity.<sup>501</sup> False light never has been and never will be a viable tort remedy because of its incestuous relationship with defamation.<sup>502</sup> Public disclosure of private facts—a tort that potentially could be useful to victims of public intrusion—has been largely extinguished by the United States Supreme Court.<sup>503</sup> Finally, of course, the tort of intrusion, as currently defined, does not

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496. See *supra* text accompanying note 207 for Prosser's comments and note 209 for the *Restatement* comments.

497. See *supra* notes 253-89 and accompanying text for discussion refuting the premises underlying Prosser's observations regarding the "no privacy in public" rule.

498. See *supra* notes 232-43 and accompanying text for discussion of this aspect of privacy.

499. See *supra* notes 244-52 and accompanying text for discussion of this aspect of privacy.

500. See *supra* notes 30-99 and accompanying text.

501. See *supra* notes 60-61 and accompanying text.

502. See *supra* notes 62-64 and accompanying text.

503. See *supra* notes 447-58 and accompanying text.

permit recovery for intrusions in public.<sup>504</sup> The result is a huge gap in privacy law with respect to invasive conduct in public places.

As legal protection for privacy disappears, the threat to privacy is growing. Two particular developments are combining to endanger public privacy: (1) the decline in social standards of civility and respect for other persons, which has increased the *inclination* of persons to invade the privacy of others;<sup>505</sup> and (2) the ready availability of technology, most notably the video camcorder, which has dramatically magnified the *ability* of persons to invade the privacy of others.<sup>506</sup>

Several courts have instinctively recognized that a remedy should be afforded in appropriate cases for public intrusions.<sup>507</sup> Unfortunately, they have not been inclined to accept the challenge of rewriting existing law, choosing instead to offer murky, radically underwritten opinions that concentrate on results rather than analysis. Nevertheless, their decisions are important for their acknowledgement, however indirect, of a right to public privacy.

This Article proposes a more forthright approach to solving the problem: a comprehensive multifactor redefinition of the tort of intrusion consisting of two parts.<sup>508</sup> The first part tracks the current definition of intrusion incorporated in the *Restatement (Second) of Torts* by retaining the existing standard of liability for conduct "highly offensive to a reasonable person." However, unlike the current definition, the proposed redefinition makes it clear that intrusions in public places may be actionable.

Part two of the proposed redefinition offers seven factors to be weighed in assessing the offensiveness of intrusive conduct: (1) the defendant's motive; (2) the magnitude of the intrusion; (3) the physical location of the plaintiff at the time of the intrusion; (4) whether the defendant sought the plaintiff's consent to the intrusion; (5) actions taken by the plaintiff that reasonably manifest a desire for privacy; (6) whether the defendant disseminated information concerning the plaintiff that was obtained during the intrusion; and (7) whether the subject of the intrusion is a matter of legitimate public concern. The last two factors are borrowed from the now-

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504. See *supra* notes 4-13, 205-08 and accompanying text.

505. See *supra* notes 100-46 and accompanying text.

506. See *supra* notes 147-204 and accompanying text.

507. See *supra* notes 299-61 and accompanying text for discussion of these cases.

508. See *supra* notes 374-495 and accompanying text for discussion of the proposed redefinition.

moribund tort of public disclosure of private facts, rendering the proposed new test for intrusion a sort of hybrid tort.

Formulating invasion of privacy law presents greater difficulties than constructing tort law in other areas because of the need to balance individual privacy rights against important countervailing interests such as free social interaction and free speech. Unfortunately, the current "no privacy in public" rule represents not so much a balancing of rights as a total preclusion of privacy rights in one of the dominant spheres of civilized life. The proposed redefinition strikes a more reasonable balance, one which would allow victims of highly offensive public intrusions to recover tort damages while at the same time protecting the competing community interests of free social interaction and free speech.

Public surveillance in America, particularly by means of the ubiquitous video camera, is becoming commonplace. This Article has documented dozens of instances in which videotaping has been abused by neighbors against neighbors, employers against employees, lovers against lovers, antiabortion activists against abortion clinic patients, police against protesters, businesses against customers, and television programmers against just about everyone. When this occurs in a public place, the victim is remediless under tort law. Those unsympathetic to the plight of such victims would do well to remember that, under current law, one enjoys privacy protection in public places only because no one has found a reason to invade it . . . yet.