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# **MEDIA MISBEHAVIOR AND THE WAGES OF SIN: THE CONSTITUTIONALITY OF CONSEQUENTIAL DAMAGES FOR PUBLICATION OF ILL-GOTTEN INFORMATION**

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*Driven by competitive forces and enabled by technological advances such as hidden cameras, the media have become increasingly intrusive in their newsgathering techniques. Claims against the media for unlawful acts such as invasion of privacy, trespass, and fraud highlight the severe tension existing between the rights of the victims of media misconduct and the principles of the First Amendment. The authors contend that by acting unlawfully in their newsgathering, the media forfeit First Amendment protection. They emphasize that the newsworthiness of the information unlawfully obtained by the media should not be considered when determining liability, and conclude that the media should be held liable for all damages, including consequential damages, that arise from their tortious or unlawful acts.*

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## **INTRODUCTION**

Newsgatherers do not have special access to information not available to the public, nor do any of society's rules, including the constitutional protection of free speech, immunize the media from sanctions for the commission of unlawful acts.<sup>1</sup> This Article takes these principles a step further, and

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<sup>1</sup> See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991) (acknowledging the "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news," and holding that the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law); *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972) (holding that the First Amendment is not violated by requiring reporters to testify before grand juries); *Associated Press v. NLRB*, 301 U.S. 103, 130-33 (1937)

argues that the First Amendment does not shield the media against claims for damages arising out of the publication of the ill-gotten fruits of intentional, illegal newsgathering activity.<sup>2</sup>

New information-gathering techniques used by the media, such as surveillance, posing, audio or videotaping with concealed devices, and eavesdropping, may violate civil or criminal law with respect to individual or corporate rights of privacy. This Article will discuss the increasingly intrusive, and, in the view of many, irresponsible behavior of the media in newsgathering activities, and will argue that victims of such conduct should not be limited to damages for the initial wrongful act—for example, an act of trespass or deception—but should also be permitted to recover *all* consequential damages resulting from the publication of the information gained thereby. Recent cases involving claims against the media for invasion of privacy, trespass, fraud, misrepresentation, breach of contract, and broken promises, to name a few, suggest that damages flowing from publication by the tortfeasor or law-breaker are not constitutionally barred, *even where the published material is truthful*.<sup>3</sup>

The logical underpinning of our thesis is that once the media, with the objective of obtaining material to publish, intentionally engage in an activity violative of general laws, they forfeit all First Amendment protection to which they would be entitled if the news was gathered lawfully.<sup>4</sup> We argue

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(noting that enforcement of labor laws against the press does not violate the First Amendment).

<sup>2</sup> For purposes of this Article, “intentional, illegal newsgathering activity” includes deliberate acts violative of civil or criminal law, such as trespass, intrusion, fraud, misrepresentation, breach of contract, tortious interference with contract, and broken promises by media personnel while gathering news. “News” includes information in the broadest sense, and “gathering” refers to all conceivable methods, from simple observation to surreptitious electronic recording.

<sup>3</sup> See, e.g., *Cohen*, 501 U.S. at 669-70. In *Cohen*, the published information was true (i.e., the identity of a source who was promised anonymity), yet the Supreme Court held that compensatory damages may be constitutionally awarded on a theory of promissory estoppel. *Id.* at 670. The Supreme Court concluded that the characterization of the payment of damages “makes no difference for First Amendment purposes when the law being applied is a general law.” *Id.*

<sup>4</sup> Even the so-called “reporter’s privilege” has not yet been recognized by the Supreme Court. See *Branzburg*, 408 U.S. at 681 (denying a privilege to a reporter called as a grand jury witness in a criminal investigation, but leaving open the question of whether such a privilege is otherwise available by its recognition that “without some protection for seeking out the news, freedom of the press could be eviscerated”); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249-50 (9th Cir. 1971) (stating that constitutional privileges “developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication”). But see *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 594-96 (1st Cir. 1980) (interpreting *Branzburg* as recog-

that the inevitable consequence of this point is that newsgatherers should not then be permitted to claim the shield of the First Amendment to protect them from damages consequential to the publication of the illegally or tortiously obtained material. Thus, the truth or falsity of what is published as a result of such activity should not be the determinative factor. Nor should the "public interest" in the dissemination of information so obtained outweigh the compelling public interest in compliance with the law by all citizens and its evenhanded application, including the common law rules of compensatory damages.

Part I of this Article will discuss the conflict between the First Amendment freedoms of speech and the press and an individual's right to privacy. Part II will review common law bases for newsgatherer liability, such as intrusion, trespass, fraud, and breach of contract, and will analyze the cases interpreting the interaction between such illegal activities and the First Amendment. Finally, Part III will discuss the arguments for and against awarding compensatory damages arising from the publication of illegally obtained material. We conclude that the First Amendment, properly construed, should not override laws of general applicability, including general principles of damages, and should not preclude courts from taking the effects of publication into account in their assessment of damages.

## I. THE CONFLICT BETWEEN TWO PROTECTED INTERESTS: FREEDOM OF SPEECH AND PRESS AND THE PROTECTION OF PRIVACY

### A. *Theoretical Conflict*

Numerous commentators have argued that the First Amendment and the public's "right to know"<sup>5</sup> immunize newsgatherers from liability for damages resulting from the publication of illegally obtained material.<sup>6</sup> Others, equally concerned with securing the rights protected by the First Amendment, but also troubled by the media's disregard of other protected interests, contend that damages resulting from a newsgatherer's invasion of an individual's right to privacy,<sup>7</sup> in their person and property, should be fully

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nizing a conditional privilege found by balancing the potential harm to the free flow of information that might result by granting a privilege against the public's need for the information).

<sup>5</sup> Justice Douglas noted in his dissent in *Branzburg* that "[t]he press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the *public's right to know*." *Branzburg*, 408 U.S. at 721 (Douglas, J., dissenting) (emphasis added).

<sup>6</sup> See, e.g., Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976); David F. Freedman, Note, *Press Passes and Trespasses: Newsgathering on Private Property*, 84 COLUM. L. REV. 1298 (1984).

<sup>7</sup> See *infra* note 24 and accompanying text (discussing the four recognized privacy

compensated, including recovery of all consequential damages resulting from subsequent publication.<sup>8</sup> This controversy can be summarized as a clash between two sets of traditionally protected and cherished interests: freedom of speech and press, combined with the public's right to know, against an individual's right to personal privacy and the protection of property. The United States Supreme Court's decision in *Cohen v. Cowles Media Co.*<sup>9</sup> supports the conclusion that the latter value should prevail in the courts when the party claiming First Amendment protection has deliberately violated the law to gather information.

### B. First Amendment Protections and Limitations

The First Amendment of the Constitution of the United States provides, in part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>10</sup> The Fourteenth Amendment renders this prohibition equally applicable to the states,<sup>11</sup> and thus state laws impacting upon the operation of the press must, when challenged, pass constitutional muster.<sup>12</sup> In addition, many states have their own constitutional provisions protecting freedom of speech and the press, some of which provide even broader protection than the First Amendment.<sup>13</sup>

The heightened protection of speech afforded by the First Amendment has been held to apply to those torts that include publication as a requisite element, the most common of which is defamation.<sup>14</sup> Thus, for example, in

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torts).

<sup>8</sup> See, e.g., Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329 (1979).

<sup>9</sup> 501 U.S. 663 (1991); see also *supra* note 1.

<sup>10</sup> U.S. CONST. amend. I.

<sup>11</sup> See *Stromberg v. California*, 283 U.S. 359, 368 (1931) (noting that the rights protected by the First Amendment are applied to the states through the Fourteenth Amendment).

<sup>12</sup> See *Gitlow v. New York*, 268 U.S. 652, 664 (1925).

<sup>13</sup> See, e.g., *Immuno AG v. Moor-Jankowski*, 567 N.E.2d 1270, 1278 (N.Y.) (interpreting New York's constitutional free speech provision as offering separate and distinct protections from the First Amendment of the Federal Constitution), *cert. denied*, 500 U.S. 954 (1991). The free speech clause in California's constitution is almost identical to that of New York's. Compare CAL. CONST. art. I, § 2(a) with N.Y. CONST. art. I, § 8. Both provisions provide that all citizens given the freedom to speak, write, and publish must be "responsible for the abuse of [that] right." See CAL. CONST. art. I, § 2(a); N.Y. CONST. art. I, § 8. We make no attempt in this Article to address the potentially broader protections granted by state free speech provisions.

<sup>14</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), brought the award of money damages for defamation within the protections of the First Amendment. The Supreme Court interpreted the First Amendment as prohibiting states from enforcing libel judgments in favor of public officials without proof that the defendant acted with "actu-

a defamation case, it is necessary to prove that the defendant acted with "actual malice" with respect to the truth or falsity of published information about public officials or "public figures."<sup>15</sup> Further, although proof of the "truth" of published material has always been a defense to all claims of defamation, First Amendment considerations have now placed on such "public official" or "public figure" defamation plaintiffs the burden of proving falsity.<sup>16</sup> These First Amendment protections, however, are not applicable to prepublication events associated with newsgathering, and it is generally understood that the First Amendment does not immunize the media from liability for illegal acts committed in their pursuit of information.<sup>17</sup> We recognize that a necessary prerequisite to publishing the news is the right to gather it,<sup>18</sup> but we submit that this truism does not give newsgatherers license to engage in unlawful conduct in their pursuit of something to publish.

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al malice," that is, with knowledge of the statement's falsity or with reckless disregard of its truth. *Id.* at 279-80; see also RESTATEMENT (SECOND) OF TORTS § 580A (1977). In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Court extended the *Sullivan* standard to encompass money damage awards for "false light" invasion of privacy actions, in which publication is a requisite element. *Id.* at 387 (holding that a private plaintiff involved in a matter of public interest must prove that the material was published with "actual malice"). It is unclear whether *Sullivan*'s "actual malice" standard is applicable to other privacy actions that include publication as a requisite element. See RESTATEMENT (SECOND) OF TORTS § 652A-E; see also James E. King & Frederick T. Muto, *Compensatory Damages for Newsgatherer Torts: Toward a Workable Standard*, 14 U.C. DAVIS L. REV. 919, 948 (1981) (arguing that although "the method used to acquire the information should not be the sole determinant of the damages for publication issue, it should not be wholly ignored either"). Publication is not a requisite element of the privacy tort of intrusion. See RESTATEMENT (SECOND) OF TORTS § 652A-E.

<sup>15</sup> See *supra* note 14.

<sup>16</sup> See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-76 (1986) (noting that a public figure plaintiff must show falsity of media defendant's statements, and holding that a private figure plaintiff alleging defamation also has the burden of proving the falsity of a media defendant's speech on matters of public concern).

<sup>17</sup> See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (noting that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"); *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972) (holding that the First Amendment does not grant the press immunity from the application of "general laws"); *Galella v. Onassis*, 487 F.2d 986, 995-96 (2d Cir. 1973) (holding that crimes and torts committed in newsgathering are not constitutionally protected, and that "[t]here is no threat to a free press in requiring its agents to act within the law"); *Dietemann v. Time Inc.*, 449 F.2d 245, 249-50 (9th Cir. 1971) (recognizing that First Amendment protections covering publication are "not relevant in determining liability for intrusive conduct antedating publication").

<sup>18</sup> See, e.g., *Allen v. Combined Communications Corp.*, 7 Media L. Rep. (BNA) 2417, 2420 (Colo. Dist. Ct. July 22, 1981).

The argument for holding the media liable for all consequences of their unlawful conduct finds helpful and meaningful analogy in Fourth Amendment search and seizure jurisprudence. Evidence, physical or testimonial, obtained in violation of the Fourth Amendment must be suppressed—the state is not permitted to use such evidence in its case against a defendant who suffered the constitutional violation.<sup>19</sup> Furthermore, evidence that is uncovered subsequent to, and by reason of, the initial violation may be deemed “fruit of the poisonous tree” if found to be derived from the initial unconstitutional seizure.<sup>20</sup> The Supreme Court has consistently recognized that one of the purposes of the Fourth Amendment’s exclusionary rule is to deter unreasonable searches, no matter how probative their fruits.<sup>21</sup> This justification for excluding illegally obtained evidence from the state’s case is similar to the reasoning behind refusing to free the media from the damaging consequences of illegal newsgathering activity. Both rules deter illegal activity (in one case by society’s agents, in the other by the media’s agents) and protect privacy rights, even when there are other competing and laudable goals (in one case prosecuting crime, in the other, furthering the public’s right to know).

### C. *Protection of Privacy*

A law review article by Samuel D. Warren and Louis D. Brandeis entitled *The Right to Privacy*<sup>22</sup> is generally credited as the first compelling assertion that a cause of action in tort should be recognized for an invasion of “privacy.” Warren and Brandeis described this right as the “right to be let alone.”<sup>23</sup> From this basic concept have evolved four distinct kinds of common law invasion of privacy torts: (1) intrusion upon one’s physical solitude or seclusion; (2) public disclosure of private facts; (3) publicity that places someone in false light in the public eye; and (4) appropriation of one’s name or likeness for another’s benefit.<sup>24</sup> Several states have incorporated a “right to privacy” in their state constitutions.<sup>25</sup> One court decision even recognized a corporation’s right to keep private business information within

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<sup>19</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that “all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible”).

<sup>20</sup> *Wong Sun v. United States*, 371 U.S. 471 (1963). Evidence obtained by independent means not connected to the poisonous tree, however, may still be used. *Nix v. Williams*, 467 U.S. 431 (1984) (describing the “independent source” doctrine).

<sup>21</sup> See *Oregon v. Elstad*, 470 U.S. 298, 306 (1985); *Mapp*, 367 U.S. at 655.

<sup>22</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>23</sup> *Id.* at 195.

<sup>24</sup> RESTATEMENT (SECOND) OF TORTS § 652A-E (1977).

<sup>25</sup> For example, California and Illinois provide individuals with certain constitutional guarantees of privacy. See CAL. CONST. art. I, § 1; ILL. CONST. art. I, § 6.

the corporation.<sup>26</sup> With respect to privacy actions, this Article will focus on only the most egregious conduct of newsgatherers, that of intrusion, which includes, among other conduct, eavesdropping, taping, surveillance, hidden cameras, and trespass.

#### D. Case Law

The Supreme Court in *Branzburg v. Hayes*<sup>27</sup> specifically noted that the press possess no "constitutional right of special access to information not available to the public generally."<sup>28</sup> Thus, newsgatherers' access to information is subject to the same limitations as is access by the general public. Many cases preceding and following *Branzburg* have similarly refused to extend any additional or special protection to media defendants in tort or contract suits involving newsgathering.

In *Dietemann v. Time, Inc.*,<sup>29</sup> for example, the Ninth Circuit held that two *Life* magazine employees who used false identities to gain access to the home of the plaintiff—an alleged medical "quack"—and subsequently recorded their conversations with him, were completely unprotected by the First Amendment.<sup>30</sup> Similarly, in *Galella v. Onassis*,<sup>31</sup> the Second Circuit refused to hold that the First Amendment set up a wall of immunity protecting newsgatherers from liability while gathering news. To the contrary, the Second Circuit held that "[t]here is no such scope to the First Amendment right. Crimes and torts committed in newsgathering are not protected."<sup>32</sup>

More recently, in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,<sup>33</sup> a federal district court in North Carolina held that ABC did not have immunity

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<sup>26</sup> In *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, *vacated*, 737 F.2d 1170 (D.C. Cir. 1984), Judge Tamm discussed precluding the *Washington Post* from using Mobil corporate information obtained in discovery, and suggested that a corporation may have a recognizable protected interest, similar to a right to privacy, to keep its information private. *Id.* at 1019-22. Although the decision was subsequently vacated due to an intervening Supreme Court decision, Judge Tamm's discussion is interesting to note because he considered a corporation's privacy interests under the Fourth Amendment, and suggested a balancing approach as against competing interests. *Id.* at 1022-29.

<sup>27</sup> 408 U.S. 665 (1971).

<sup>28</sup> *Id.* at 684.

<sup>29</sup> 449 F.2d 245 (9th Cir. 1971).

<sup>30</sup> *Id.* at 249. The reporters in *Dietemann* acted in concert with law enforcement authorities and posed as prospective patients to gain entrance to plaintiff's home and speak to him in a room he used as an office. The reporters took photographs and recorded conversations that were subsequently used in an article describing the doctor as a "quack." *Id.* at 245-46.

<sup>31</sup> 487 F.2d 986 (2d Cir. 1973).

<sup>32</sup> *Id.* at 995.

<sup>33</sup> 887 F. Supp. 811 (M.D.N.C. 1995).



under the First Amendment from damages for alleged wrongful and illegal acts under state law, notably fraud and trespass, committed during its undercover "investigation" of Food Lion supermarkets.<sup>34</sup> According to this court, "the First Amendment does not prevent a plaintiff from recovering damages when the press has violated a law of general applicability."<sup>35</sup>

Following the lead of the Supreme Court in *Branzburg*, it is evident that most lower courts that have considered the issue have refused to extend First Amendment protection where state law proscribes all or some of the actions taken in the newsgathering process.<sup>36</sup> These courts have demonstrated that they will not readily interfere with state-proscribed unlawful conduct to grant the press constitutional immunity from tort or contract liability incurred while gathering news. In a nutshell, the First Amendment is no defense to such violations.<sup>37</sup>

## II. UNLAWFUL CONDUCT AND THE MEDIA: STATE LAWS PROSCRIBING INTRUSION, TRESPASS, BREACH OF CONTRACT, AND FRAUD

Today, competitive pressures among the media have created a frenzy in reporters, editors, correspondents, and producers to catch a sensational story.<sup>38</sup> The new technology that gives the media the ability to capture dramatic or otherwise marketable images on tape or film also creates incentives to use illegal methods to position people where that technology can be employed, often secretly. Thus, state laws, particularly those protecting privacy, have recently been invoked with greater frequency and success to place limits on the media and to protect an individual's, and even a business's, zone of privacy.<sup>39</sup>

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<sup>34</sup> *Id.* at 822.

<sup>35</sup> *Id.* at 821.

<sup>36</sup> *But cf. Scheetz v. Morning Call, Inc.*, 747 F. Supp. 1515, 1527 (E.D. Pa. 1990) (granting defendant's motion for summary judgment after balancing the press's First Amendment rights against the individual's right of privacy), *aff'd*, 946 F.2d 202 (3d Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992).

<sup>37</sup> *But see infra* Part II.A (discussing some courts' balancing of First Amendment interests).

<sup>38</sup> Many articles have been written about the scathing competition among newsmagazine shows. *See, e.g.*, Frederic M. Biddle, *Viewers Can't Get Enough of News Magazines*, BOSTON GLOBE, Mar. 23, 1994, at 65 (remarking that "the pressure is on. From 'Prime Time Live' to Fox's 'Front Page', the newsmagazines are fighting for an identity"); *see also* Marc Gunther, *Prime-Time News Blues; Magazine Shows Try to Regroup After a Bad Year*, WASH. POST, Sept. 17, 1995, at G7 (reporting that "the competition and rating pressure drove down the quality of journalism on the magazines [and that] ABC, in particular, has been hit with a flurry of lawsuits, particularly over hidden-camera reporting").

<sup>39</sup> As noted previously, California's constitution recognizes an individual's right to privacy. *See supra* note 25. *Kersis v. Capital Cities/ABC, Inc.*, 22 Media L. Rep.

## A. Intrusion and Trespass

### 1. Intrusion

Claims involving media liability based on newsgathering activities often arise in the context of allegations that a newsgatherer intruded into an individual's seclusion or solitude, either by physical or electronic means. Unlike other invasion of privacy claims that hinge on the publication of information gathered by a journalist, a claim of intrusion is more akin to the traditional torts of harassment, trespass, wiretapping, and assault and battery.<sup>40</sup> For those states that recognize a cause of action for "intrusion,"<sup>41</sup> liability will attach where a newsgatherer "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . [and where] the intrusion would be highly offensive to a reasonable person."<sup>42</sup> A claim for intrusion is different from other privacy

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(BNA) 2321 (Cal. Super. Ct. Apr. 25, 1994), a case decided under this provision, held that ABC's surreptitious videotaping of plaintiffs' office conversation gave rise to a cause of action under the California constitution. *Id.* at 2330-31. With respect to the argument that a corporation may have a right to privacy, see *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010 (D.C. Cir.), *vacated*, 737 F.2d 1170 (D.C. Cir. 1994), where Judge Tamm described Mobil corporate information as private. *Id.* at 1019-22; *see also supra* note 26.

<sup>40</sup> See Thomas J. Groger, Annotation, *First Amendment As Immunizing Newsmen from Liability for Tortious Conduct While Gathering News*, 28 A.L.R. FED. 904, 905 n.3 (1976).

<sup>41</sup> Almost all states recognize some form of privacy rights, and only approximately nine states do not recognize the tort of intrusion. LIBEL DEFENSE RESOURCE CENTER, 50-STATE SURVEY 1994-95 (Henry R. Kaufman ed., 1994). New York, Minnesota, Montana, and Virginia, for example, are some of the states that do not recognize the common law privacy tort of intrusion. *See, e.g., Hurwitz v. United States*, 884 F.2d 684 (2d Cir. 1989) (noting that New York does not recognize any common law privacy torts, but recognizes several express statutory causes of action—for example, "false light"—none of which are akin to "intrusion"), *cert. denied*, 493 U.S. 1056 (1990).

<sup>42</sup> RESTATEMENT (SECOND) OF TORTS § 652B (1977); *see also Rifkin v. Esquire Publishing*, 8 Media L. Rep. (BNA) 1384 (C.D. Cal. Feb. 24, 1982) (holding that "intrusion" must go beyond the limits of decency and finding that a reporter's mere solicitation of plaintiff's friends and family members for assistance in contacting plaintiff was not actionable). In *Magenis v. Fisher Broadcasting, Inc.*, 798 P.2d 1106 (Or. Ct. App. 1990), a news company that accompanied police on a search pursuant to a warrant, filmed and later broadcast the police raid on plaintiff's house. *Id.* at 1107-08. The court held that mere trespass is not enough to sustain an intrusion claim; the conduct must have been both highly intrusive and highly offensive to a reasonable person. *Id.* at 1110.

torts<sup>43</sup> because it does not require publication as a requisite element of the offense. The tort is committed and completed upon the intrusion.<sup>44</sup>

One of the first cases to discuss liability for intrusion with respect to a media defendant was *Pearson v. Dodd*.<sup>45</sup> In *Pearson*, Senator Thomas Dodd sued newspaper columnists Drew Pearson and Jack Anderson for publishing information from documents that were removed and copied by two members of Dodd's staff, without permission, from the Senator's office.<sup>46</sup> The documents revealed financial misdeeds and led to the Senator's admonition by the Senate.<sup>47</sup> The court held for the defendants on the theory that mere publication of material obtained by *another's* intrusion does not render the publisher liable.<sup>48</sup>

Subsequent cases have held the media liable for intrusion, despite claims of First Amendment protection. For example, in *Dietemann v. Time, Inc.*, the Ninth Circuit held that "[n]o interest protected by the First Amendment is adversely affected by permitting damages for intrusion."<sup>49</sup> The court sustained a cause of action for invasion of privacy upon proof that defendants, by subterfuge, gained entrance to the plaintiff's home, photographed the plaintiff, and electronically recorded and transmitted to third persons the plaintiff's conversation without his consent.<sup>50</sup> The Ninth Circuit did not measure the newsworthiness of, or the "public interest" in, the subject matter, but rather focused on the method of newsgathering, and opined that no First Amendment interest protects the news media from "calculated misdeeds."<sup>51</sup> The court further noted: "The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing

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<sup>43</sup> See *supra* note 24 and accompanying text (discussing the four recognized privacy torts); see also RESTATEMENT (SECOND) OF TORTS § 652A. This Article limits its discussion of privacy torts to intrusion.

<sup>44</sup> Thus, a plaintiff can recover for intrusion even if the footage is never broadcast or the information never published. See *Ayeni v. CBS Inc.*, 848 F. Supp. 362 (E.D.N.Y.), *aff'd sub nom. Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995). Intrusion claims in the newsgathering context are often coupled with claims for trespass, fraud, and misrepresentation.

<sup>45</sup> 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

<sup>46</sup> *Id.* at 703.

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

<sup>48</sup> *Id.* at 705. The court noted, however, that intrusion could be found by "unauthorized bugging of a dwelling, tapping a telephone, snooping through windows, and overzealous shadowing . . . whether or not accompanied by trespasses to property." *Id.* at 704 (footnotes omitted).

<sup>49</sup> *Dietemann v. Time, Inc.*, 449 F.2d 245, 249-50 (9th Cir. 1971).

<sup>50</sup> *Id.* at 249.

<sup>51</sup> *Id.* at 250 (citing *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9, 389-90 (1967)).

a crime.”<sup>52</sup> Thus, although the court recognized that “newsgathering is an integral part of news dissemination,” it refused to hold that the First Amendment shielded newsgatherers from liability for invasion of privacy.<sup>53</sup>

Twenty-five years later, *Dietemann* resonates in the technological “star wars” of media competitors striving to capture the hearts and minds of the reading and viewing public.<sup>54</sup> Following *Dietemann*’s lead, the Second Circuit, in *Galella v. Onassis*, refused to extend a First Amendment privilege to a photographer who, “intrusively” and in a “harassing manner,” attempted to photograph Mrs. Onassis and her family.<sup>55</sup> Mrs. Onassis subsequently obtained an order requiring Galella to remain a certain distance away from them. Galella argued that the First Amendment set up “a wall of immunity protecting newsmen from any liability for their conduct while gathering news.”<sup>56</sup> The Second Circuit gave him short shrift, holding that “[t]here is no such scope to the First Amendment right. Crimes and torts committed in news gathering are not protected.”<sup>57</sup> The court thus affirmed the injunction curtailing Galella’s behavior. The court further noted that the injunction was particularly compelling in light of the “*de minimis* public importance” of the daily activities of Mrs. Onassis<sup>58</sup> and because of Galella’s “inexcusable” conduct toward Mrs. Onassis’s minor children.<sup>59</sup>

#### a. Public Place

Those courts that have refused to find an actionable intrusion usually have done so because the subject was in a public place or was viewed from a public vantage point. For example, the Southern District of New York found no intrusion where a television reporter’s attempted interview of a company president was in a semi-public place outside the company’s building, and the company president was visible to the public eye.<sup>60</sup> Similarly,

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<sup>52</sup> *Id.* at 249.

<sup>53</sup> *Id.* at 250. Because the First Amendment was inapplicable, the court in *Dietemann* held that state law applied. *Id.*

<sup>54</sup> See *supra* note 38 and accompanying text (reporting on the immense pressures and heightened competition between news magazines).

<sup>55</sup> 487 F.2d 986, 993 (2d Cir. 1973). In one of his many attempts to photograph the family, Galella jumped out in front of Mrs. Onassis’s son John while he was riding his bicycle in Central Park, causing him to swerve dangerously. *Id.*

<sup>56</sup> *Id.* at 995.

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

<sup>58</sup> *Id.* This statement evidences the Second Circuit’s consideration of the “newsworthiness” of the material, and hence that court’s engagement of a First Amendment balancing analysis. See *infra* part III.B for a discussion of “newsworthiness.”

<sup>59</sup> *Id.*

<sup>60</sup> *Machleder v. Diaz*, 538 F. Supp. 1364 (S.D.N.Y. 1982) (applying New Jersey law), *later proceeding*, 618 F. Supp. 1367 (S.D.N.Y. 1985), *aff’d in part, rev’d in part*, 801 F.2d 46 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987).

no claim for intrusion was found by the Eighth Circuit where a journalist tape-recorded boisterous complaints made by a former municipal judge while the former judge was detained in jail on a charge of driving while intoxicated,<sup>61</sup> or by a federal court in Oregon where two journalists photographed an arrestee inside a county jail during a booking procedure.<sup>62</sup> Moreover, in *Mark v. Seattle Times*,<sup>63</sup> the Washington Supreme Court found that the actions of a television cameraman, who filmed a pharmacist indicted for Medicaid fraud through the window of a locked pharmacy, did not constitute an "intrusion" because the locus of the filming was open to the public and any passerby could have viewed the scenes recorded by the camera.<sup>64</sup>

The common thread among these cases that refuse to find an intrusion is that the plaintiff was not subjected to a "physical intrusion analogous to a trespass."<sup>65</sup> Thus, where a person is in a public place or is viewed from a public vantage point, the courts seem less likely to find that tortious conduct has occurred. These cases make it very clear that there is a whole range of media activity that does not rise to the level of an actionable "intrusion." Accordingly, we need not fear that a rule which holds the media liable for consequential damages arising from an actionable intrusion will chill all newsgathering. Only the most egregious newsgathering conduct will rise to the level of an intrusion or trespass, and only in these situations would a court be faced with the issue of awarding compensable damages.

#### b. *Balancing of the First Amendment: Newsworthiness*

Although newsgatherer conduct is examined to determine whether it reaches the level of an actionable intrusion, some courts have also inquired into the "newsworthiness" of the subject matter, sometimes holding that "newsworthiness" triggers the protections of the First Amendment.<sup>66</sup> Ac-

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<sup>61</sup> *Holman v. Central Ark. Broadcasting Co.*, 610 F.2d 542 (8th Cir. 1979).

<sup>62</sup> *Huskey v. Dallas Chronicle, Inc.*, 13 Media L. Rep. (BNA) 1057 (D. Or. June 10, 1986).

<sup>63</sup> 635 P.2d 1081 (Wash. 1981), *cert. denied*, 457 U.S. 1124 (1982).

<sup>64</sup> *Id.* at 1095. The court also added that the pharmacist was visible on the film clip for only 13 seconds, was not shown in any embarrassing positions, and his facial features were not recognizable. *Id.* at 1094-95.

<sup>65</sup> See Mary Ann L. Wymore, *Modernizing the Law of Privacy*, 40 FED. B. NEWS & J. 374, 376 (1993) (arguing for the abolition of the intrusion cause of action because it is subsumed by trespass). Our Article rejects the premise that intrusion is a superfluous tort, and argues that the "highly offensive" requirement of an intrusion cause of action clearly distinguishes it from trespass, thus protecting different and separable interests.

<sup>66</sup> See *Costlow v. Cusimano*, 311 N.Y.S.2d 92, 95 (App. Div. 1970) (holding that "once the subject matter is found suitable for public concern, the constitutional guarantees attach, and liability may be premised only on falsification resulting from ac-

cordingly, in *Cox Communications, Inc. v. Lowe*,<sup>67</sup> the Georgia Court of Appeals, in holding that a physical intrusion analogous to a trespass was required to recover for an intrusion upon seclusion, also analyzed and discussed the newsworthiness of the story.<sup>68</sup> In *Cox Communications*, a prisoner was videotaped through a prison fence from a public parking lot for a news story on the improper use of prison labor. The court held that there was no actionable intrusion, in part because the story was "newsworthy."<sup>69</sup> Similarly, in *Haynik v. Zimlich*,<sup>70</sup> in holding that there was no liability for intrusion where the media merely observes, films, or records a person in public, the Ohio Court of Appeals stated that there was no "intrusion upon seclusion" where the subject matter of the news report "ha[d] absolutely nothing to do with plaintiff's secret, secluded, or private concerns," but instead concerned only "matters falling within the realm of legitimate public interest, and not within the domain of any private seclusion which plaintiff has thrown about his person or affairs."<sup>71</sup> Finally, as mentioned above, the Second Circuit in *Galella* noted the "*de minimis* public importance" of the photographed activities, and may have used this as a basis for justifying the injunction.<sup>72</sup>

## 2. Trespass

Another common cause of action against newsgatherers is trespass, defined as any unauthorized entry onto another's premises.<sup>73</sup> Trespass jurisprudence with respect to newsgathering has developed along similar lines as that of intrusion. Although newsgatherers will, with few exceptions, usually be held liable for their trespasses, courts have split over whether private property rights need to be balanced against asserted First Amendment inter-

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tual malice").

<sup>67</sup> 328 S.E.2d 384 (Ga. Ct. App.), *cert. denied*, 474 U.S. 982 (1985).

<sup>68</sup> *Id.* at 386.

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

<sup>70</sup> 508 N.E.2d 195 (Ohio Ct. C.P. 1986).

<sup>71</sup> *Id.* at 200. In *Haynik*, a drug suspect was filmed in a public hallway of the sheriff's department. *Id.* at 196.

<sup>72</sup> *Galella v. Onassis*, 487 F.2d 986, 995 (1973). The Second Circuit noted that legitimate countervailing social needs may, at times, warrant some intrusion despite an individual's reasonable expectation of privacy and freedom from harassment. *Id.*

<sup>73</sup> See *Desnick v. Capital Cities/ABC, Inc.*, 44 F.3d 1345, 1351 (7th Cir. 1995) (noting that "[t]o enter upon another's land without consent is a trespass" and refusing to recognize a "journalists' privilege" to trespass). Because most intrusion cases emphasize the protection of the home, there often is overlap between trespass and intrusion in the newsgathering context. In fact, some courts treat the torts identically. See *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977); see also *supra* note 65 (discussing the similarities and differences between the two torts).

ests. Most of the cases have eschewed such a balancing approach, taking their cue from the Ninth Circuit's clear declaration in *Dietemann* that the First Amendment "is not a license to trespass."<sup>74</sup> Thus, many subsequent cases involving media trespass have refused to acknowledge, or balance, any special First Amendment interests.

a. *No Balancing of the First Amendment*

Cases following *Dietemann* have found an actionable trespass without balancing First Amendment concerns. In *Le Mistral, Inc. v. CBS Inc.*,<sup>75</sup> CBS television reporters entered an expensive restaurant without consent.<sup>76</sup> CBS was found liable for trespass because its camera crew entered plaintiff's restaurant with "cameras rolling" in a "noisy and obtrusive fashion" after learning that the restaurant had been cited for health code violations.<sup>77</sup> The restaurant was open to the public, but the reporters entered without intent to obtain service and without consent to tape or broadcast.<sup>78</sup> The jury awarded the restaurant owner \$1200 in compensatory damages and \$250,000 in punitive damages for the reporters' trespass and alleged damage to the business.<sup>79</sup> The appellate court, relying on *Dietemann*, quickly disposed of CBS's First Amendment defense and affirmed the lower court decision, noting that "the First Amendment is not a shibboleth before which all other rights must succumb."<sup>80</sup>

Similarly, the criminal appellate court in *Stahl v. Oklahoma*<sup>81</sup> refused to balance any First Amendment interests. *Stahl* involved a mass protest by anti-nuclear power activists at the construction site of a nuclear power plant. Nine reporters followed 339 protesters across the boundary fence, ignoring a "no trespassing" sign, to cover the demonstration.<sup>82</sup> The reporters later published accounts of an encounter between the protesters and the sheriff which they were only able to see because they had unlawfully crossed the fence.<sup>83</sup> The reporters were charged and subsequently found liable for trespass. The trial court rejected the reporters' First Amendment defense, although it balanced the First Amendment interest in access against the owner's property

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<sup>74</sup> *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (1971).

<sup>75</sup> 402 N.Y.S.2d 815, 817 (App. Div. 1978).

<sup>76</sup> *Id.* at 816.

<sup>77</sup> *Id.* at 816 & n.1.

<sup>78</sup> *Id.* at 816 n.1.

<sup>79</sup> *Id.* at 818.

<sup>80</sup> *Id.* at 817.

<sup>81</sup> 665 P.2d 839 (Okla. Crim. App. 1983), *cert. denied*, 464 U.S. 1069 (1984).

<sup>82</sup> *Id.* at 840.

<sup>83</sup> *Oklahoma v. Bernstein*, 5 Media L. Rep. (BNA) 2313, 2323-24 (Okla. Dist. Ct. Jan. 21, 1980), *aff'd sub nom. Stahl v. Oklahoma*, 665 P.2d 839 (Okla. Crim. App. 1983), *cert. denied*, 464 U.S. 1069 (1984).

rights.<sup>84</sup> In affirming the convictions, however, the Oklahoma Court of Criminal Appeals followed the no-balancing methodology of the *Dietemann* line of cases.<sup>85</sup>

More recently in *Ayeni v. CBS Inc.*,<sup>86</sup> a CBS *Street Stories* camera crew, with Secret Service agents' permission, followed agents while they executed a search warrant in the home of a man suspected of credit card fraud.<sup>87</sup> A federal court in New York held that CBS's taping of the suspect's wife and child, despite their on-camera objections, exceeded the limited purpose of the warrant and constituted an illegal seizure under the Fourth Amendment.<sup>88</sup> CBS's motion to dismiss the trespass claim was denied because there was no "qualified immunity" for the media, even when acting with government's permission.<sup>89</sup>

Finally, in *United States v. Sanusi*,<sup>90</sup> a criminal case related to *Ayeni*, a New York federal district court, in ruling on CBS's motion to quash a subpoena on First Amendment grounds, noted that "[w]hile the First Amendment provides the press with a shield from government censorship, the press may not use this protection to justify otherwise illegal actions."<sup>91</sup> CBS could not assert a privilege with respect to the subpoena which sought production of their illegally obtained tapes.<sup>92</sup> Citing a litany of cases, including *Dietemann*, the court refused to let the First Amendment shield the media from laws of general applicability.<sup>93</sup>

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

<sup>85</sup> *Stahl*, 665 P.2d at 841-42.

<sup>86</sup> 848 F. Supp. 362 (E.D.N.Y.), *aff'd sub nom.* *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995).

<sup>87</sup> *Id.* at 364-65. The crew filmed the suspect's wife cowering in her nightgown, hiding her face with a magazine, and pleading not to be filmed. The suspect's pre-school age son was also filmed during the search, hiding behind a couch crying. *Id.*

<sup>88</sup> *Id.* at 368.

<sup>89</sup> *Id.* The civil claim against CBS was thereafter settled, and the settlement was sealed. This case is particularly noteworthy because it was the first case to find that the media, under certain circumstances, can become so closely intertwined with government operations that they can be treated as a "state actor" with consequent constitutional liability under the Fourth Amendment. Cases such as *Ayeni*, and *WROC-TV, Baugh*, and *Fletcher*, discussed *infra*, flow from the current popularity of the news and feature segments known as "ride-alongs," showing live footage of police or emergency authorities in action.

<sup>90</sup> 813 F. Supp. 149 (E.D.N.Y. 1992).

<sup>91</sup> *Id.* at 155.

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

<sup>93</sup> *Id.* at 155-56.



b. *Balancing of the First Amendment: Newsworthiness*

Nevertheless, some courts have still applied a balancing approach with respect to media trespass actions. In *Allen v. Combined Communications Corp.*,<sup>94</sup> for example, plaintiffs brought a trespass and defamation suit against a television station whose reporters entered plaintiffs' property to report on a city official's investigation of their business.<sup>95</sup> The court refused to dismiss the trespass claim on First Amendment grounds, but rejected the *Dietemann* conclusion that the First Amendment was entirely inapplicable.<sup>96</sup> Instead, the court held that in order to avoid summary judgment, plaintiffs had to show that the reporters knowingly and intentionally had committed a trespass, that they had committed a trespass in reckless disregard of such knowledge, or that the plaintiff had suffered damage because of the trespass.<sup>97</sup> The court found newsgathering inseparable from news publication and declared the necessity of "open[ing] the umbrella of the First Amendment to all of these activities which are necessary to the publication of the news story."<sup>98</sup>

We submit that to engage in this "newsworthiness" analysis in cases of newsgatherer wrongdoing only obscures the simple but powerful principle that newsgatherers are not immune from laws of general applicability. By measuring the newsworthiness of the subject matter against the plaintiff's right to privacy, courts will surely be creating dangerously subjective and ad hoc exceptions.<sup>99</sup> The First Amendment's protections have historically been applied to only a limited number of torts, the most well-known of which is defamation.<sup>100</sup> Those courts that have balanced newsworthiness against the level of intrusion have allowed the First Amendment to shield media wrongdoing outside of the defamation context, and have permitted newsgatherers to violate laws of general applicability without sanction. This flies in the face of well-settled Supreme Court jurisprudence requiring that wrongdoers, including the media, be held liable for their wrongful acts, and carves out an unwarranted exception to the general rules of liability and damages.

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<sup>94</sup> 7 Media L. Rep. (BNA) 2417 (Colo. Dist. Ct. July 26, 1981).

<sup>95</sup> *Id.* at 2417-18.

<sup>96</sup> *Id.* at 2419.

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

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

<sup>99</sup> Justice Marshall, dissenting in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), warned against the dangers of letting judges ascertain "newsworthiness." *Id.* at 81 (Marshall, J., dissenting).

<sup>100</sup> See *supra* note 14 and accompanying text.

*B. Media Defenses to Intrusion and Trespass: Consent*

Consent to a newsgatherer's activity may bar a later claim for intrusion or trespass. Consent implied by custom was found to be a valid defense in *Florida Publishing Co. v. Fletcher*.<sup>101</sup> In *Fletcher*, a news photographer was invited by a fire marshal to accompany him into a burned-out home, where, at the request of the marshal, he took a picture of a silhouette left on the floor after removal of a dead body.<sup>102</sup> The reporter subsequently published the picture.<sup>103</sup> The mother of the deceased brought claims of trespass, invasion of privacy, and intentional infliction of emotional distress against the newspaper.<sup>104</sup> The Supreme Court of Florida held that there was no valid claim of trespass due to consent predicated upon "common custom and usage," namely, it was standard practice for the media to accompany officials to crime and accident scenes.<sup>105</sup> *Fletcher*, however, has been held to be unique on its facts.<sup>106</sup>

Some courts have held consent to be a valid defense even though the newsgatherer may have exceeded the scope of the consent and/or fraudulently misrepresented his or her publication intentions. In *Baugh v. CBS Inc.*,<sup>107</sup> a CBS television news crew accompanied and videotaped a crisis intervention team during a meeting at the plaintiff's home.<sup>108</sup> The plaintiff claimed that she did not know the crew was taping for a television show, and that the police had told her the news crew was from the DA's office and there to help her.<sup>109</sup> Plaintiff said that she let them stay only after they agreed that the film would not be televised.<sup>110</sup> The court held that under California law, even when consent is fraudulently induced, an individual has no trespass or intrusion claim, but may have a fraud or intentional misrepresentation claim.<sup>111</sup>

The current popularity of ride-alongs and other news and feature segments showing live footage of police or emergency authorities in action

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<sup>101</sup> 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977).

<sup>102</sup> *Id.* at 916.

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

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

<sup>105</sup> The law was "well-settled" in Florida that there was no trespass where peaceable entry was made under this common custom and usage. *Id.* The court in *Fletcher*, however, failed to discuss whether consent was exceeded, thereby rendering it ineffective.

<sup>106</sup> See *Prahl v. Brosamle*, 295 N.W.2d 768, 780-81 (Wis. 1980) (finding no First Amendment privilege to trespass where reporter followed police onto private property, and distinguishing *Fletcher* on the facts).

<sup>107</sup> 828 F. Supp. 745 (N.D. Cal. 1993).

<sup>108</sup> *Id.* at 750.

<sup>109</sup> *Id.* at 751.

<sup>110</sup> *Id.* at 752.

<sup>111</sup> *Id.* at 757.

have produced new bases for newsgatherer intrusions. With few exceptions,<sup>112</sup> courts have consistently found the media liable for trespass, intrusion, or fraud, and have not readily embraced defenses of express and implied consent in these situations. In *Anderson v. WROC-TV*,<sup>113</sup> for example, a New York court found that an invitation to enter a dwelling given to a reporter by an officer executing a search warrant was not a valid defense to a claim of trespass. In *WROC-TV*, an investigator for The Humane Society of Rochester and Monroe County invited three television stations to send newscasters and photographers to accompany him in executing a search warrant of plaintiff's house.<sup>114</sup> The television stations filmed the interior of the house despite the plaintiff's repeated requests to the television personnel to stay out of his home.<sup>115</sup> The video footage was subsequently broadcast on the evening news.<sup>116</sup> The plaintiff brought a trespass action, and defendants asserted numerous defenses, including, *inter alia*, absolute privilege, the public's right to access to information of public interest, and that the entry was constitutionally protected under the First Amendment.<sup>117</sup> The court granted plaintiff's motion to dismiss these defenses in all respects, holding that "[t]here is no threat to a free press in requiring its agents to act within the law."<sup>118</sup> The court further noted:

Although otherwise trespassory conduct may be legalized or justified by lawful authority, such as an officer of the law acting in the performance of his duty, such authority does not extend by invitation, absent an emergency, to every and any other member of the public, including members of the news media.<sup>119</sup>

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<sup>112</sup> See, for example, *Belluomo v. KAKE TV & Radio, Inc.*, 596 P.2d 832 (Kan. Ct. App. 1979), in which the appellate court in Kansas recognized the media's defense of consent. In *KAKE TV*, television reporters accompanied and filmed a state inspection of plaintiffs' restaurant. *Id.* at 835. The reporters filmed nonpublic areas, and the filming was initially consented to by one of the restaurant owners. *Id.* at 836. Consent was withdrawn by the other partner the following day. *Id.* Because the civil trespass action was based on the actual entry and filming of the premises, and not the broadcast, the withdrawal of consent was held to be irrelevant with respect to the trespass action. *Id.* The court affirmed the jury's determination that the first partner's consent was not fraudulently obtained. *Id.* at 843.

<sup>113</sup> 441 N.Y.S.2d 220 (Sup. Ct. 1981).

<sup>114</sup> *Id.* at 222.

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

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

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

<sup>118</sup> *Id.* at 224 (quoting *Galella v. Onassis*, 487 F.2d 986, 995-96 (2d Cir. 1973)).

<sup>119</sup> *Id.* at 223 (citation omitted).

Thus, courts have viewed consent as a defense to media intrusion with increasing skepticism, and, guided by the *Dietemann* rationale, have limited its application to situations of express consent or emergency situations.

### C. Other Causes of Action

#### 1. Contract Actions: Breach of Contract and Promissory Estoppel

Interests protected by certain laws of general applicability, such as "[t]he right to contract freely with the expectation that the contract shall endure according to its terms," have been held to be as fundamental to our society as the right to speak and write without restraint.<sup>120</sup> It follows that constitutional rights, including those protected by the First Amendment, can be waived through contractual agreements.<sup>121</sup> A constitutional defense to a breach of contract claim is also difficult because such claims, unlike claims in the tort context, usually arise from situations where the media has voluntarily agreed to certain limitations in exchange for information.

A court will usually uphold breach of contract claims if it finds that the promise was clear and supported by consideration. For example, a New York court upheld a claim against a newspaper that published a photograph of an AIDS patient because the newspaper had made and broken a clear promise to make him unidentifiable.<sup>122</sup> A federal court in the Fifth Circuit, however, found against a plaintiff who brought a declaratory judgment action to stop further distribution of a film based on a promise by the documentary film maker to "refrain from making the interview available to any other media outlet,"<sup>123</sup> because the court found the contract to be ambiguous.<sup>124</sup> In *Ruzicka v. Conde Nast Publications, Inc.*,<sup>125</sup> however, the Eighth Circuit reinstated a promissory estoppel claim based on an alleged broken promise that plaintiff would not be "identified or identifiable"<sup>126</sup> in a magazine article about therapist-patient sexual abuse, because the alleged promise was sufficiently clear and definite.<sup>127</sup>

In *Cohen v. Cowles Media Co.*, the Supreme Court held that a promissory estoppel claim, arising out of the *truthful* publication of the name of a

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<sup>120</sup> See *Blount v. Smith*, 231 N.E.2d 301, 305 (Ohio 1967).

<sup>121</sup> See, e.g., *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam) (finding that CIA employment contract forbidding CIA employees to publish anything without CIA prepublication review did not violate the First Amendment).

<sup>122</sup> *Anderson v. Strong Memorial Hosp.*, 573 N.Y.S.2d 828 (Sup. Ct. 1991).

<sup>123</sup> *Wildmon v. Berwick Universal Pictures*, 803 F. Supp. 1167, 1171 (N.D. Miss.), *aff'd*, 979 F.2d 21 (5th Cir. 1992).

<sup>124</sup> *Id.* at 1174-75.

<sup>125</sup> 999 F.2d 1319 (8th Cir. 1993).

<sup>126</sup> *Id.* at 1320.

<sup>127</sup> *Id.* at 1322.

source who had been promised confidentiality, was not barred by the First Amendment.<sup>128</sup> The majority distinguished *Smith v. Daily Mail Publishing Co.*<sup>129</sup> and *Florida Star v. B.J.F.*<sup>130</sup> as involving certain content-based restrictions, and held that "[t]he parties themselves . . . [must] determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information."<sup>131</sup> Thus, the Supreme Court in *Cohen* seems to have excised, quite deliberately, the applicability of *New York Times Co. v. Sullivan* and its progeny to certain contractual, and perhaps tortious, causes of action against the media.<sup>132</sup>

In an interesting recent development which occurred during the fall of 1995, CBS News abruptly canceled a segment of *60 Minutes* regarding the tobacco industry. The segment would have featured Dr. Jeffrey Wigand, former head of research for the Brown & Williamson Tobacco Corporation, who purportedly would have disclosed tobacco industry secrets, notwithstanding a confidentiality agreement between Dr. Wigand and his former employer that was still in force.<sup>133</sup> CBS announced that it canceled the segment because of the risk of a suit claiming substantial damages for tortious interference with contract.<sup>134</sup> Apparently, the threat of financial liability for interfering with a third party contract forced CBS to rethink its producers' broadcast plans. By its decision not to broadcast information disclosed by a contractually bound person in breach of that contract, CBS's counsel may have recognized that CBS could be potentially liable for all

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<sup>128</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991).

<sup>129</sup> 443 U.S. 97 (1979). In *Daily Mail*, the Supreme Court discussed a line of cases which suggest that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at 103.

<sup>130</sup> 491 U.S. 524 (1989). In *Florida Star*, the Supreme Court, citing *Daily Mail*, protected the publication of lawfully obtained information, but limited its holding by expressly leaving open the question whether the publication of *unlawfully obtained* information may be constitutionally punished. *Id.* at 535 n.8 (noting that "the *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well").

<sup>131</sup> *Cohen*, 501 U.S. at 671.

<sup>132</sup> See Joseph W. Ragusa, Comment, *Biting the Hand That Feeds You: The Reporter-Confidential Source Relationship in the Wake of Cohen v. Cowles Media Co.*, 67 ST. JOHN'S L. REV. 125 (1993) (noting that after *Cohen*, only those common law claims whose actionability rests solely on an act of expression and/or publication—e.g., defamation or false light—will be subject to *Sullivan*-type constitutional scrutiny).

<sup>133</sup> See Barnaby J. Feder, *Former Tobacco Executive to Begin Telling Secrets to Grand Jury*, N.Y. TIMES, Dec. 13, 1995, at A21.

<sup>134</sup> Howard Kurtz, '60 Minutes' Kills Piece on Tobacco Industry; CBS Fears Law Suit, Cites ABC Settlement, WASH. POST, Nov. 10, 1995, at A3.

damages consequential to the broadcast, including damage to the reputation and financial well-being of a member of the tobacco industry.<sup>135</sup>

## 2. *Fraud and Misrepresentation*

Fraud and misrepresentation claims also are frequently invoked by the victims of intrusive reporting. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, two producers for ABC's *Prime Time Live* show submitted falsified employment applications and were subsequently hired at Food Lion stores in North and South Carolina.<sup>136</sup> The ABC producers used their own names and social security numbers on their employment applications, but completed the rest of the applications with concocted employment histories, prearranged references, and false personal backgrounds and reasons for seeking the position.<sup>137</sup>

After gaining entry to the stores, the producers wore concealed video and audio equipment to obtain approximately fifty-five hours of tape of, among other things, Food Lion employees in non-public areas of Food Lion stores.<sup>138</sup> The false backgrounds and references provided in the employment applications were assembled and coordinated using the U.S. mails and interstate wire facilities. Food Lion alleged that these were predicate acts of mail and wire fraud in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>139</sup> Food Lion also alleged various state law claims for trespass, fraud, civil conspiracy, and violation of the North Carolina Unfair Trade Practices Act.<sup>140</sup> On motion to dismiss, although dismissing the RICO claim because it found no "pattern," the court rejected ABC's First Amendment-based "newsgathering" claim of immunity and allowed Food Lion's state common law claims to go forward, based in part on its interpretation of *Cohen and Branzburg*.<sup>141</sup>

In *Albertson v. TAK Communications, Inc.*,<sup>142</sup> a reporter falsely told the plaintiff that the camera was off, and filmed plaintiff without her consent while she rolled a marijuana cigarette.<sup>143</sup> The court noted that the

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<sup>135</sup> Although *60 Minutes* later broadcast the interview, it only did so after the *Wall Street Journal* published excerpts of Dr. Wigand's grand jury testimony. *CBS News Wins Judge's Ruling in Tobacco Suit*, WASH. POST, Feb. 29, 1996, at A12.

<sup>136</sup> *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 814-15 (M.D.N.C. 1995).

<sup>137</sup> *Id.* at 815.

<sup>138</sup> *Id.* at 816.

<sup>139</sup> 18 U.S.C. §§ 1961-1968 (1994).

<sup>140</sup> *Food Lion*, 887 F. Supp. at 822.

<sup>141</sup> *Id.* at 821-23.

<sup>142</sup> *Albertson v. TAK Communications, Inc.*, No. 89-0052, 1989 WL 129270 (Wis. Ct. App. Aug. 15, 1989).

<sup>143</sup> *Id.* at \*2.

plaintiff was "entitled to recover compensation for injury resulting from publication acquired through tortious conduct."<sup>144</sup> The court granted summary judgment to defendants, however, because the plaintiff could show no damages to her reputation resulting from the alleged fraud because she had already publicly admitted to marijuana use.<sup>145</sup>

Similarly, in *New Jersey v. Cantor*,<sup>146</sup> a reporter's ruse to obtain an interview with the mother of a homicide victim resulted in a criminal conviction for "impersonating a public official" because the reporter falsely told the subject that she was "from the morgue."<sup>147</sup> In affirming the conviction, the court specifically rejected the reporter's First Amendment defenses, and as in *Dietemann*, noted that "defendant's status as a newsperson cannot protect her from the application of the criminal laws."<sup>148</sup>

### III. CONSEQUENTIAL DAMAGES RESULTING FROM SUBSEQUENT PUBLICATION

As noted repeatedly throughout this Article, courts generally agree that the First Amendment does not shield the media from liability for their wrongful conduct. A logical system of justice, then, should hold the media accountable for all damages proximately caused by their unlawful conduct.<sup>149</sup> The courts are still divided, however, regarding the appropriate scope of damages to be awarded to a victim of unlawful media conduct where there is subsequent publication.

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

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

<sup>146</sup> 534 A.2d 83 (N.J. Super. Ct. App. Div. 1987), *cert. denied*, 540 A.2d 1274 (N.J. 1988).

<sup>147</sup> *Id.* at 84.

<sup>148</sup> *Id.* at 86.

<sup>149</sup> In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), the Supreme Court held that the First Amendment prohibited evangelist Jerry Falwell from recovering damages from *Hustler* magazine under Virginia's general law of intentional infliction of emotional distress. *Id.* at 53-54. In reviewing the Fourth Circuit's decision, the Supreme Court held that although Falwell had proven all the elements of that state law cause of action, allowing Falwell to recover damages without proof of a higher standard of fault would chill protected expression. *Id.* Unlike its later decision in *Cohen*, however, the Supreme Court in *Hustler* did not focus on whether *Hustler* had violated a general state law and thus lost its First Amendment protection. *Id.* at 51-52. Instead, the Court in *Hustler* readily recognized that Falwell had established his state claim and suffered damages from emotional distress, but focused on the chilling effect that awarding damages to *Hustler* would have on the expression of satirical or political commentary. The Court thus found the "actual malice" test of *Sullivan* applicable. *Id.* The difference between *Hustler* and *Cohen* is that the claim in *Hustler*, unlike that in *Cohen*, rested solely on published expression. See also *supra* note 132.

In *Costlow v. Cusimano*,<sup>150</sup> for example, a New York state court held that a plaintiff could not recover subsequent publication damages even though the defendant obtained the published information by trespassing on the plaintiff's property.<sup>151</sup> In *Costlow*, the defendant entered plaintiff's property and photographed plaintiff's two children who had suffocated in a refrigerator.<sup>152</sup> The court refused to award the plaintiff damages arising from publication of the photographs on the basis of the trespass claim, stating that the publication was a separable act from the trespass, "more properly allocated under other categories of liability."<sup>153</sup> The court reasoned that the complaint failed to allege damages proper to a trespass action—a trespasser may only be liable for physical harm done while on another's land.<sup>154</sup> Because the tort of trespass is designed to protect interests in possession of property, the court held that "damages for trespass are limited to consequences flowing from the interference with possession and not for separable acts more properly allocated under other categories of liability."<sup>155</sup> The court distinguished other cases where the harms arose *directly* from the trespass, and noted that here, the "harm rose as a consequence of acts performed *after* the trespass."<sup>156</sup>

The Ninth Circuit in *Dietemann*, however, viewed the situation differently, and noted that the failure to award damages resulting from publication would undercompensate the plaintiff for the "real harm done to him."<sup>157</sup> Thus, the court held that a plaintiff could recover damages resulting from subsequent publication of information obtained by a reporter's tortious intrusion.<sup>158</sup> The court in *Dietemann* noted that "[n]o interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired."<sup>159</sup> The court did not even award any damages for the actual intrusion. Rather, it merely affirmed the trial court's \$1000 verdict which was based solely upon the *publication* of the information acquired by the intrusion.<sup>160</sup> Absent the award of damages based upon

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<sup>150</sup> 311 N.Y.S.2d 92 (App. Div. 1970).

<sup>151</sup> *Id.* at 97.

<sup>152</sup> *Id.* at 93.

<sup>153</sup> *Id.* at 97.

<sup>154</sup> *Id.* The court also noted that an action under New York's statutory right to privacy could not stand absent a showing of subject matter not suitable for public concern and falsification resulting from actual malice. *Id.* at 95 (citing N.Y. CIV. RIGHTS LAW § 51 (Consol. 1976)).

<sup>155</sup> *Id.* at 97.

<sup>156</sup> *Id.* (emphasis added).

<sup>157</sup> 449 F.2d 245, 250 (9th Cir. 1971).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*



the publication, the plaintiff in *Dietemann* would have gone completely uncompensated for the intrusion.<sup>161</sup>

Unfortunately, because both courts looked outside the general rules of damages to justify their results, the inquiry in those cases was misplaced, and the results unnecessarily confusing. Both courts weighed First Amendment interests and asked whether the First Amendment precluded the damage award and whether the damage award would interfere with or jeopardize "the public's right to know." Instead, the courts simply should have heeded the Supreme Court's maxim: "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."<sup>162</sup> General rules of damages require that a victim be compensated for all consequential damages proximately caused by the breach of a duty to that individual.<sup>163</sup> It follows that media defendants, who are not exempt from laws of general applicability, should be liable, like everyone else, for all consequential and proximate losses resulting from their unlawful activities,<sup>164</sup> including, where appropriate, punitive damages.<sup>165</sup> Put another way, once the media

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<sup>161</sup> *Id.*

<sup>162</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). *See generally supra* Part I.

<sup>163</sup> *See* RESTATEMENT (SECOND) OF TORTS § 917 (1977).

<sup>164</sup> This is especially true in light of the Supreme Court's aversion to granting prior restraints to publication. *See, e.g., CBS Inc. v. Davis*, 114 S. Ct. 912 (Blackmun, Circuit Justice 1994) (refusing to sustain an injunction barring CBS from airing a videotape of operations at a meat-packing plant, and noting that the appropriate remedy should be a damage claim in a defamation or trespass action); *see also Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996) (holding that a temporary restraint on pure speech is improper absent the most compelling circumstances). In *Bankers Trust*, *Business Week* magazine had obtained documents from the Bankers Trust/Proctor & Gamble litigation that were under seal. *Id.* at 222. Bankers Trust and Proctor & Gamble sought and received an injunction from the district court prohibiting *Business Week* from publishing an article disclosing the contents of these secret documents. *Id.* at 222-23. On subsequent appeal, the Sixth Circuit vacated the order and noted that "in the case of a prior restraint on pure speech, the hurdle is substantially higher [than a general temporary restraining order]: publication must threaten an interest more fundamental than the First Amendment itself." *Id.* at 226-27. The Sixth Circuit also criticized the district court for inquiring into "how" *Business Week* obtained the documents. *Id.* at 225. As in *Davis*, the extraordinary nature of the prior restraint doctrine makes it singularly inappropriate to inquire into the means by which the information was obtained. But, as noted above, Justice Blackmun stated in *Davis* that it is entirely appropriate to make this inquiry in a damages action for defamation or trespass.

<sup>165</sup> Punitive damages can be awarded for intentional torts such as intrusion, trespass, and fraud. The court in *Le Mistral* noted that if the tort is "aggravated by evil or a wrongful motive or . . . there was wilful and intentional misdoing, or a reckless indifference equivalent thereto," punitive damages may be awarded, as long as the defendant is allowed to explain his motivation. *See Le Mistral, Inc. v. CBS Inc.*, 402 N.Y.S.2d

engage in unlawful conduct, the First Amendment no longer shields the defendant from such liability. The First Amendment should not then resurface in the case to limit recoverable damages.

### A. Proximate Cause

The basic rule of tort damages is that a victim may recover any loss that was "proximately caused" by the tort.<sup>166</sup> In cases of intrusion, this usually includes damages to the plaintiff's privacy interest, peace of mind, and any specifically provable or special damage.<sup>167</sup> In trespass cases, recovery often includes harm to the owner's interest in his or her exclusive possession of property. The plaintiff may also recover any additional loss "proximately" or "naturally" caused by the trespass.<sup>168</sup> Similarly, a victim of fraud is entitled to recover all consequential damages proximately caused by the fraudulent conduct.<sup>169</sup> Because trespass, intrusion, and fraud are intentional torts, the same considerations apply when determining what is a "proximate" or compensable result of the defendant's conduct.<sup>170</sup> As with all intentional torts, the defendant need only to have intended the act, not the resulting damages, to be permitted to recover damages that were a proximate or direct result of the intended wrongdoing.<sup>171</sup> Furthermore, in determining the issue of direct or proximate causation for intentional torts, the courts implicitly or explicitly have adopted the general doctrine that there is "extended liability" for intentional torts, and thus the rules of proximate causation are more liberally applied in cases of intrusion, trespass, and fraud, for example, than in cases of mere negligence.<sup>172</sup>

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815, 817 (App. Div. 1978). Similarly, in *Belluomo v. KAKE TV*, 596 P.2d 832, 842 (Kan. Ct. App. 1979) and *Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 222 n.1 (Sup. Ct. 1981), the state courts noted that punitive damages may be awarded against media defendants for intentional torts such as intrusion, trespass, and fraud. Nevertheless, there may be no liability where the defendant committed an actionable intentional tort without bad faith or improper motivation. See DAVID A. ELDER, *THE LAW OF PRIVACY* § 2:10 (1991).

<sup>166</sup> RESTATEMENT (SECOND) OF TORTS § 917.

<sup>167</sup> *Id.*; see also ELDER, *supra* note 165, § 2:10.

<sup>168</sup> RESTATEMENT (SECOND) OF TORTS § 917; see also *KAKE TV*, 596 P.2d at 840 (noting that an injured party in a civil trespass action is entitled to recover at least nominal damages and all damages that are a direct result of the trespass, even though the damages were not sustained until some time after the act of trespass was committed).

<sup>169</sup> See RESTATEMENT (SECOND) OF TORTS § 549.

<sup>170</sup> See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 41-44 (4th ed. 1971).

<sup>171</sup> ELDER, *supra* note 165, § 2:10.

<sup>172</sup> *Id.*

The equivalent of "proximate cause" can also be found in contract cases. Like tort cases, recoverable damages for breach of contract are those damages that are "proximate results of the breach" and "within the contemplation of the defaulting party as determined by the doctrine of foreseeability."<sup>173</sup> In a breach of contract suit, therefore, a plaintiff may usually recover all expectation interests, reliance interests, or restitution interests.<sup>174</sup> Thus, it can be said that recoverable damages are always defined as those proximately caused by the wrong, whether plaintiff's theory of recovery rests in tort or in contract.<sup>175</sup>

To determine whether an act is the "proximate cause" of the alleged harm, the court or jury must determine whether the resulting consequences were "foreseeable" when the defendant initially acted.<sup>176</sup> Some courts follow a "direct consequences" test, which holds a defendant liable for any consequences that "flow directly" from the effect of his acts upon existing or operating conditions and forces.<sup>177</sup>

Applying these general damage rules of causation and foreseeability to intentional illegal newsgathering activities, it seems clear that newsgathering defendants who commit an intrusion, trespass, act of fraud, or break a promise, with the intent of publishing information obtained thereby, could reasonably foresee both certain injuries caused by the antecedent unlawful act as well as additional losses flowing from the publication. If publication of the material was in fact the newsgatherers' intention when the illegal act was committed, damages resulting therefrom are absolutely foreseeable, as well as "a direct consequence" of the initial illegal information-gathering activity.

In *Belluomo v. KAKE TV*,<sup>178</sup> although the court denied plaintiffs' trespass claim based on a defense of consent, it clearly noted that if an actionable trespass had been found, "[t]here was sufficient competent evidence upon which to award compensatory and punitive damages."<sup>179</sup> Plaintiffs had contended that the broadcast on August 28 was the "fruit" of the July 30 filming in the nonpublic areas of their business.<sup>180</sup> The plaintiffs' claim

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<sup>173</sup> 22 AM. JUR. 2D *Damages* § 454 (1988).

<sup>174</sup> *See id.*

<sup>175</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981).

<sup>176</sup> *See* PROSSER, *supra* note 170, § 42; *see also* Galella v. Onassis, 487 F.2d 986, 998 (2d Cir. 1973) (noting that the injunction was warranted because Galella's conduct was "foreseeably or reasonably calculated" to harass).

<sup>177</sup> PROSSER, *supra* note 170, § 42; *see also* Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (1854) (holding, in the quintessential "consequential damages" contract case that a breaching party should be held liable only for foreseeable consequences of the breach).

<sup>178</sup> 596 P.2d 832 (Kan. Ct. App. 1979). For a discussion of the facts of *KAKE TV*, *see supra* note 112.

<sup>179</sup> *Id.* at 840.

<sup>180</sup> *Id.*

for relief included compensatory damages based upon evidence of diminution of the customer patronage and sales following the broadcast date, and punitive damages based upon evidence that fraudulent representation by defendant's newsmen induced the consent.<sup>181</sup> Thus, the court was willing to entertain a request for damages arising out of subsequent publication. Similarly, in *Le Mistral*, a New York court ruling on a trespass claim acknowledged that "[s]crutiny of the record demonstrate[d] an adequate basis to justify the compensatory damage award rendered by the jury."<sup>182</sup> Although the court did not itemize the damage award, it seems likely that part of the \$1200 compensatory damages awarded by the jury related to injury caused by the subsequent broadcast.

In *Desnick v. Capital Cities/ABC, Inc.*,<sup>183</sup> defendant's *Prime Time Live* program sent persons with concealed video recorders to pose as patients to obtain footage of an ophthalmologist performing cataract surgery.<sup>184</sup> Plaintiff subsequently alleged claims for trespass and intrusion. The federal district court held that under Illinois law there was no claim for intrusion because the alleged harm did not arise from the intrusion itself but rather from the subsequent broadcast.<sup>185</sup> This opinion suggests that the intrusion and the subsequent publication are separable and distinct acts, and thus not proximately related.

In *Dietemann*, however, the Ninth Circuit did not separate the antecedent unlawful invasion of privacy from the subsequent publication, and affirmed an award to plaintiff that included damages for the subsequent publication.<sup>186</sup> The *Dietemann* decision squarely and accurately follows prior Supreme Court jurisprudence, and respects the principle that the media shall be subject to all rules of general applicability.

### B. Newsworthiness of the Published Information

In *Dietemann*, the court extended the general rule of compensatory damages to the newsgathering context because it believed this was necessary to protect people from newsgatherer conduct that served no "legitimate interest of the public in being informed."<sup>187</sup> Thus, *Dietemann*'s damage rule for newsgatherer liability may be interpreted as applying the general proximate cause standard for both the antecedent newsgathering act and the subsequent publication *only when* the information published is not of "public inter-

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

<sup>182</sup> *Le Mistral, Inc. v. CBS Inc.*, 402 N.Y.S.2d 815, 817 (App. Div. 1978).

<sup>183</sup> 851 F. Supp. 303 (N.D. Ill. 1994), *aff'd in part, rev'd in part on other grounds*, 44 F.3d 1345 (7th Cir. 1995).

<sup>184</sup> *Id.* at 305.

<sup>185</sup> *Id.* at 306-13.

<sup>186</sup> *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971).

<sup>187</sup> *Id.*

est.”<sup>188</sup> This, unfortunately, would encourage courts to engage in a First Amendment/newsworthiness balancing analysis, thus losing sight of the general and universally applied rules of damages. *Dietemann* need not be read in such a limiting manner.

Some argue that the danger of an across-the-board proximate cause standard—one that would compensate for losses resulting from publication without an inquiry into the “newsworthiness” of the subject matter—is that it may deter socially desirable reporting and interfere with “the public’s right to know,” as well as subject the media to unpredictable and astronomical financial liability.<sup>189</sup> We believe that a distinction should not be made between matters of public versus private interest when determining publication damages in the tort and contract setting, as there is in a cause of action for defamation.<sup>190</sup> Whether a published story is within the “public interest” should not be the determinative factor in permitting or precluding compensatory damages arising from publication of wrongfully obtained material. An analysis of the “newsworthiness” of a publication would only obscure and frustrate the important principle that newsgatherers must be held accountable for *all* of the consequences of their wrongful conduct.

The media does not have a special license to enter private property in search of news. Our society has chosen to protect an individual’s sphere of privacy with various common laws and statutes, and our Constitution requires that the people’s own surrogates, the police, obtain appropriate search warrants and subpoenas before they may investigate an incident.<sup>191</sup> In light

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

<sup>189</sup> See King & Muto, *supra* note 14. Under the *Cohen* and *Dietemann* damages rule, the media arguably may be less willing to investigate possible corruption or other wrongdoing for fear of financial liability after the report, however truthful, is aired. Professors King and Muto present an interesting scenario. They posit, for example, that Woodward and Bernstein had committed a trespass or intrusion during the Watergate investigations, and the *Washington Post* published the illegally obtained information. Under a general “proximate cause” damage rule, President Nixon would theoretically be permitted to recover all damages proximately caused by the trespass, including the emotional and mental disgrace of his subsequent resignation. This, obviously, would not be in the best interests of the public. *Id.* at 942. We argue, however, that media investigations should be conducted legally and through proper channels so as not to violate any laws. Holding newsgatherers accountable for the consequences of unlawful activities—as are government agents and investigators—would not interfere with the overall efficacy of public dissemination of important information any more than constitutional exclusionary rules interfere with society’s need to prosecute criminals. Just as society is, on balance, better off when our government plays by the rules, forcing newsgatherers to do their work within the confines of established laws produces a similar, overall societal good.

<sup>190</sup> For a detailed discussion of the “privilege” to publicize matters of public interest, see PROSSER, *supra* note 170, § 118.

<sup>191</sup> See *United States v. Sanusi*, 813 F. Supp. 149, 158 (E.D.N.Y. 1992) (noting that

of this, the media should not then be permitted to substitute, with impunity, illegal investigative procedures for lawful ones under the guise of "newsgathering." There is no good basis to carve out a special exception to the general rules of damages for wrongful media conduct.

Further, an inquiry into the "newsworthiness" of the published information would mean that the extent of a newsgatherer's liability for damages would depend on the fortuitous event that he or she actually unearthed something of "public concern." Such a standard would encourage fishing expeditions into zones of privacy with hopes of hooking a "newsworthy" story. Accordingly, the court in *Dietemann* did not measure the newsworthiness of the subject matter. Rather, the court assumed a legitimate public interest and focused on the method of newsgathering, concluding that no First Amendment interest protects the news media from "calculated misdeeds."<sup>192</sup> Similarly, in *Miller v. NBC*,<sup>193</sup> the California Court of Appeals held that a television network's constitutionally recognized right to gather news did not preclude a widow's cause of action against the network for invasion of privacy resulting from a network camera crew's accompanying paramedics into her apartment and filming the unsuccessful efforts to revive her spouse who had suffered a heart attack.<sup>194</sup> The court properly ignored the "newsworthiness" of the subject matter and instead focused on the underlying tort—a trespass by means of an unauthorized entry into the private premises of an individual's home.<sup>195</sup>

In *Anderson v. WROC-TV*, a New York court expressly declined to invoke a privilege based on the balance between the scope of a newsgatherer's intrusion and the newsworthiness of the story obtained through that intrusion.<sup>196</sup> The court in *WROC-TV* found a test based on the balancing of the newsworthiness of a story against the degree of intrusion to be inappropriate because a determination of newsworthiness would be subject to "vague, subjective criteria."<sup>197</sup> Similarly, the Supreme Court has

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permitting reporters a privilege to enter dwellings would be equivalent to "the writs of assistance which were so odious to the American colonists"); see also *supra* notes 19-21 and accompanying text (discussing the exclusionary rule of the Fourth Amendment and its meaningful comparison to our argument for subjecting the media to damages for wrongful conduct, including damages arising from subsequent publication).

<sup>192</sup> *Dietemann*, 449 F.2d at 249-50 (noting that the "First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.") (footnote omitted).

<sup>193</sup> 232 Cal. Rptr. 668 (Ct. App. 1986).

<sup>194</sup> *Id.* at 670.

<sup>195</sup> *Id.* Unfortunately, *Miller's* holding can also be interpreted as applying only where the story is *not* newsworthy.

<sup>196</sup> *Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 224 (Sup. Ct. 1981).

<sup>197</sup> *Id.* at 225; see also *supra* note 99 (discussing Justice Marshall's dissent in

indicated in defamation cases the undesirability of imposing on courts the task of determining "on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not."<sup>198</sup>

In *Smith v. Daily Mail Publishing Co.*,<sup>199</sup> the Supreme Court struck down a West Virginia penal statute prohibiting publication of the name of a child who was the subject of criminal proceedings. Although the Court noted that the newsworthiness of the material was important, it also implied that the newsworthiness may be insufficient to fend off an intrusion claim if the material was not obtained in a lawful manner.<sup>200</sup> The Court stated: "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>201</sup> Although the civil damages context of this Article is certainly different from *Smith's* context of a penal statute, the Court's language seems to imply that if the material was *not* obtained lawfully, remedial consequences such as an award of damages resulting from publication would not offend the Constitution.

C. *Are Reputational Damages Resulting from Publication of Unlawfully Obtained Information Recoverable Without Proof of Sullivan Fault?*

Assuming that damages resulting from publication of the fruits of law violations are recoverable, it is still unclear whether courts would permit a judgment for injuries to "reputation."<sup>202</sup> The Supreme Court in *Cohen*, in

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Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), where he warned against such *ad hoc* determinations).

<sup>198</sup> Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

<sup>199</sup> 443 U.S. 97 (1979).

<sup>200</sup> *Id.* at 103.

<sup>201</sup> *Id.* (emphasis added); see also *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (finding that where a newspaper publishes truthful information lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order).

<sup>202</sup> See ELDER, *supra* note 165, § 2:10 (noting that plaintiffs can usually claim an injury to reputation precipitated by or proximately resulting from an intrusion, and that cases generally have imposed liability on the defendant for any enhancement or aggravation of plaintiff's damages caused by defendant's publication of information garnered by the tortious intrusion); see also *Jorgensen v. Massachusetts Port Auth.*, 905 F.2d 515 (1st Cir. 1990). In *Jorgensen*, a non-media case, the First Circuit declined to hold that damages for injury to reputation may only be recovered in a defamation action, and noted, in dicta, that defamation law does not preempt other claims alleging injury to reputation. *Id.* at 519. The court, however, did not award the plaintiff "reputational damages" in that case because the defendant "could not have foreseen the injury to the pilot's reputation," and plaintiffs had not presented sufficient evidence that defendant's negligence "proximately caused" their reputational injury. *Id.* at 522-27. Some courts have

deciding whether certain damages for promissory estoppel were precluded by the First Amendment, noted:

The payment of compensatory damages in this case is constitutionally indistinguishable from a generous bonus paid to a confidential news source . . . [and] the characterization of the payment makes no difference for First Amendment purposes when the law being applied is a general law and does not single out the press.<sup>203</sup>

In *Cohen*, however, the Court left a very important question unanswered. The Court remanded the issue of damages, stating that "Cohen [is not] attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim."<sup>204</sup> Moreover, the Court continued, "Cohen is not seeking damages for injury to his reputation or his state of mind. He sought damages in excess of \$50,000 for breach of a promise that caused him to lose his job and lowered his earning capacity."<sup>205</sup> On remand, the Minnesota Supreme Court reinstated the \$200,000 compensatory damage award, but did not clearly define the specific composition of the award.<sup>206</sup> The exact nature of what is permissibly recoverable is thus still left unanswered.

If the Court truly followed its own rule that the media is held to laws of general applicability, it would seem that all injuries resulting from an unlawful act, including those injuries to reputation resulting from subsequent publication of the material so obtained, should be recoverable. Again, the only real question a court should ask is to what extent the injury resulting from the subsequent publication was, in fact, proximately caused by the initial, intentional tortious or unlawful act.

In *Belluomo v. KAKE TV & Radio, Inc.*, plaintiffs sought recovery for alleged business losses resulting from the defendant's filming and televising of a health inspector's visit to the plaintiff's restaurant.<sup>207</sup> The court held that the reporters had entered with consent, and thus were not liable.<sup>208</sup> The court noted in dicta, however, that had the defendant's conduct not been privileged, the plaintiffs would have been entitled to recover the losses in

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held that a plaintiff cannot recover for reputational damages arising out of an alleged breach of contract. See 22 AM. JUR. 2D *Damages* § 484 (1988).

<sup>203</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991).

<sup>204</sup> *Id.* at 671.

<sup>205</sup> *Id.*

<sup>206</sup> 479 N.W.2d 387, 392 (Minn. 1992).

<sup>207</sup> 596 P.2d 832, 835 (Kan. Ct. App. 1979).

<sup>208</sup> *Id.* at 843.



business which resulted from publication of the film.<sup>209</sup> Similarly, in *CBS Inc. v. Davis*,<sup>210</sup> Justice Blackmun denied plaintiff Federal Beef's request for injunctive relief, but acknowledged that the company would probably suffer financially if the segment appeared on national television, and noted that Federal Beef could subsequently pursue a damages claim in a civil or criminal trespass suit.<sup>211</sup>

In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, most of plaintiff's damages were not a result of the ABC producers' misrepresentations to obtain jobs, or from the entry of ABC News personnel onto Food Lion premises, or even from the acts of videotaping that took place there. Rather, the massive business losses that Food Lion alleged were the direct results of the subsequent production and broadcast of the story on *Prime Time Live*, containing videotaped elements that were obtained by those premeditated actions. Citing *Cohen*, the court in *Food Lion* indicated that reputational damages are not recoverable, but failed to provide any framework for determining what constitutes "damage to reputation."<sup>212</sup> The court noted that "[a]lthough Food Lion may not recover publication damages for injury to its reputation, it may recover any non-reputational damages it allegedly suffered to the extent recoverable under [state law] and other laws governing the remaining claims."<sup>213</sup> Noting the magistrate's recommendation, the court observed enigmatically that "Food Lion seeks to recover for injuries alleged to have been caused by ABC's *Prime Time Live* broadcast. These alleged injuries are both reputational and non-reputational in nature."<sup>214</sup> Thus, Food Lion's damages from the broadcast were characterized as both "reputational" and "non-reputational." The court appears to have carved out a "non-reputational" subset of publication damages, and has declared that those may be recovered constitutionally.<sup>215</sup>

The court in *Food Lion* was clearly mindful of *Cohen*'s holding that the media are subject to laws of general applicability, but also stressed that the Court had stated that "'Cohen [was not] attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim. . . . Cohen is not seeking damages for injury to his reputation or his state of mind.'"<sup>216</sup> Instead, Cohen was seeking dam-

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<sup>209</sup> *Id.* at 842.

<sup>210</sup> 114 S. Ct. 912 (Blackmun, Circuit Justice 1994).

<sup>211</sup> *Id.* at 914; *see also supra* note 164.

<sup>212</sup> 887 F. Supp. 811, 823 n.3 (M.D.N.C. 1995) (refusing specifically to determine the composition of "reputational" damages).

<sup>213</sup> *Id.* at 822 n.1.

<sup>214</sup> *Id.* at 822.

<sup>215</sup> "Defamation" does not necessarily preempt other common law claims for reputational injury and thus damages for injury to reputation may be constitutionally recovered outside of a defamation context. *See supra* note 202.

<sup>216</sup> *Food Lion*, 887 F. Supp. at 822 (quoting *Cohen v. Cowles Media Co.*, 501 U.S.

ages for loss of employment, which was a direct result of the truthful, but promise-breaking, publication of his identity.

Thus, referring again to *Cohen*, the district court in *Food Lion* noted:

Where a plaintiff sought recovery for non-reputational or non-state of mind injuries, the Court [in *Cohen*] indicated that such a plaintiff could recover these damages without offending the First Amendment. Where, however, a plaintiff seeks to use a generally applicable law to recover for injury to reputation or state of mind while avoiding the requirements of a defamation claim (requiring proof of falsity and actual malice), the *Cohen* holding does not appear to be applicable.<sup>217</sup>

The court in *Food Lion* seemed to have confused, and thus failed to draw a distinction between, publication damages and reputation damages. After a long discussion of why the media should be held accountable for its wrongful conduct and the inapplicability of the First Amendment to such conduct, the court opined that damages, although recoverable, should not include "damages to reputation."<sup>218</sup> Nevertheless, the court then took a non-sequential leap and stated:

Food Lion may recover only those damages resulting from ABC's alleged trespass, fraud, unfair and deceptive trade practices, as well as those from the other remaining claims. However, Food Lion may *not* recover any publication damages for injury to its reputation as a result of the *Prime Time Live* broadcast.<sup>219</sup>

Thus, the court unnecessarily blurred the distinction between reputation damages and publication damages, precluding Food Lion from collecting any damages resulting from the subsequent publication, undoubtedly the bulk of its alleged injury.

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663, 671 (1991)) (emphasis removed).

<sup>217</sup> *Id.* at 823.

<sup>218</sup> *Id.* at 822-23.

<sup>219</sup> *Id.* at 823 (emphasis added). In terms of the court's "may not recover" language, the court arguably meant "may not recover without proof of fault which meets the *Sullivan* test."

## CONCLUSION

Driven by competition, the need for profits, and demands for higher ratings or circulations, and provided with technological marvels such as ever-smaller video cameras and tape machines, the media have shown an increasing willingness to engage in unlawful methods of newsgathering. The need to ensure that all citizens, including newsgatherers, obey all laws of general applicability is a compelling state interest of the highest order that justifies holding the media liable for all damages, including consequential publication damages, arising from their unlawful or tortious acts.

The First Amendment provides important protection for our cherished freedoms of speech and the press, and the public's "right to know." The First Amendment, however, should not be turned into a license to infringe upon the protected privacy or property interests of others and to violate general laws, nor should it be invoked to shield or insulate offenders from liability for the consequences of such wrongdoing. Any rule to the contrary insulates the press from liability for damages consequential to its illegal acts, in violation of the Supreme Court's oft-stated mandate that laws of general applicability apply equally to the press as to any other citizen. Thus, all citizens and institutions, regardless of occupation or calling, must take full responsibility for all the consequences of their transgressions, and pay the "wages of sin."