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THE UNUSUAL SUSPECTS: JOURNALISTS AS THIEVES

William E. Lee*

The publication of confidential information by the press stands in stark contrast to the press' dedication to protecting the confidentiality of sources. While the Supreme Court has taken the position that the press may publish confidential information acquired through "routine" newsgathering methods, the contours of the phrase "routine" newsgathering methods are poorly defined. In this Article, Professor Lee describes the link between the manner in which information is obtained and the First Amendment's protection of the publication of the information. He concludes that the proper analysis would separate the interests affected by publication from the interests affected by illegal newsgathering.

* * *

INTRODUCTION

The discovery process in *Jones v. Clinton*¹ elicited an extraordinarily detailed account of President Clinton's sex life.² To protect potential jurors from "salacious" publicity,³ Judge Susan Wright imposed a pretrial confidentiality order on the participants.⁴ Nonetheless, Peter Baker of the *Washington Post* wrote a news story

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¹ 990 F. Supp. 657 (E.D. Ark. 1998).

² See *id.* at 664.

³ Peter Baker, *Judge Lifts Gag Order in Paula Jones Case: Sealed Material May Embarrass Clinton*, WASH. POST, July 1, 1998, at A12.

⁴ Judge Wright imposed the order on October 30, 1997. See James Bennet, *Seal is Placed on Documents in Clinton Suit*, N.Y. TIMES, Oct. 31, 1997, at A22. Nonetheless, the order in large part was widely violated. See Paul M. Barrett, *Leaks Continue in Paula Jones Case Despite Gag Order*, WALL ST. J., Jan. 29, 1998, at B1; Gregory C. Baumann, *Judge's Gag Order in Jones Case Falls By Wayside*, LEGAL TIMES, Jan. 26, 1998, at 24; David E. Rovella, *Jones Suit Shows Gag Weakness*, NAT'L L.J., Feb. 23, 1998, at A1. Despite the detailed media accounts of President Clinton's deposition, Judge Wright refused to lift the confidentiality order. See *Jones v. Clinton*, 993 F. Supp. 1217, 1219 (E.D. Ark. 1998).

The Court of Appeals for the Eighth Circuit ordered Judge Wright to reconsider unsealing the discovery materials after she granted the defendant's motion for summary judgment. See *Jones v. Clinton*, 138 F.3d 758, 758 (8th Cir. 1998). On June 30, 1998, Judge Wright concluded that the order was no longer necessary because so much detailed information had been made public through court filings or by leaks published by the media. See *Jones v. Clinton*, 12 F. Supp. 2d 931 (E.D. Ark. 1998). President Clinton's attorneys asked her to reconsider this decision, but Paula Jones' attorneys supported the unsealing. See Linda Friedlieb, *Jones Rethinks, Asks Judge to Lift Gag Order*, ARK. DEMOCRAT-

about Clinton's deposition that drew extensively from the sealed transcript and provided readers with an eyewitness view.⁵ Baker wrote:

For Clinton, the deposition was an excruciatingly long and intimate look into his past, as lawyers questioned him not just about Jones and Lewinsky but also about five other women who were named by the Jones team. The President's mood seemed generally sober, but as the hours wore on there were moments of pique as well. His voice was so low at times that he was asked repeatedly to speak up. At a couple of points, Clinton seemed agitated, once complaining about conservative attacks on him and later seeming to dare the Jones lawyers to throw any question at him that they could come up with.⁶

Although Baker did not disclose the identity of his source, these details could come only from someone who was subject to the confidentiality order. In response to readers' criticism for Baker's refusal to identify his source, the *Post*'s managing editor, Robert Kaiser, explained that granting anonymity to a source who would face sanctions if identified was a necessary journalistic practice.⁷ Furthermore, the *Post* believed its role was to seek out and publish sealed information; Kaiser explained, "We expend much of our energy on finding information of public interest that others don't want published in a newspaper: That's what the Pentagon Papers case was

GAZETTE, July 23, 1998, at A1. On October 8, 1998, Judge Wright announced that she would begin releasing the Jones and Clinton depositions on October 19. *See Jones v. Clinton*, 16 F. Supp. 2d 1054 (E.D. Ark. 1998). Judge Wright later indicated that she would hold in contempt anyone who violated her gag order. *See Paul Kuntz & David S. Cloud, Judge Considers Holding Clinton In Contempt*, WALL ST. J., Feb. 17, 1999, at A4. President Clinton was found to be in contempt for willful violation of the court's discovery orders. *See Jones v. Clinton*, 36 F. Supp. 2d 1118 (E.D. Ark. 1999).

⁵ *See* Peter Baker, *Clinton Deposition Focused on Lewinsky*, WASH. POST, Mar. 5, 1998, at A1.

⁶ *Id.* After the story was printed, both sides in the case disclaimed any responsibility for the leak. *See White House Scandal: Who Leaked Clinton Depo?* THE HOTLINE, Mar. 6, 1998, available in LEXIS, Nexis Library, Cumwts file. *See generally* Stuart Taylor, Jr., 'Illegal' Leaks That Aren't, N.Y. L.J., May 26, 1998, at 2 (discussing leaks in *Jones v. Clinton* and the Monica Lewinsky investigation). A federal judge has ordered Independent Counsel Kenneth Starr to show that his office was not the source of "serious and repetitive" leaks of grand jury information to the news media. David S. Cloud, *Starr Ordered to Show He Wasn't Source of Leaks*, WALL ST. J., Aug. 10, 1998, at A16 (quoting U.S. District Judge Norma Holloway Johnson); *see also* Theodore J. Boutrous, Jr., *Rule 6(e) and the Public's Right to Know*, WALL ST. J., Aug. 17, 1998, at A15.

⁷ *See* Robert G. Kaiser, *A Word to Post Readers: More About Our Sources and Methods*, WASH. POST, Mar. 15, 1998, at C1.

about. And there are countless more mundane examples. . . . When we succeed, we publish it.”⁸

The *Post*'s defense of its action presents a strange canon of contemporary American journalism—journalists regard a promise of confidentiality to a source as sacred, but see nothing wrong with asking a source to break an obligation of confidentiality.⁹ This canon rests upon the premise that it is not illegal for the press

⁸ *Id.* at C5.

⁹ In regards to the acquisition of confidential information, Stephen Shepard, as *Business Week*'s editor, stated, “We’re free to ask for things, and they’re free to say no.” Keith Hammonds & Catherine Yang, *Business Week vs. the Judge*, BUS. WK., Oct. 16, 1995, at 114.

Throughout this Article, the term obligation of confidentiality will refer to legally enforceable restrictions on disclosure of information. These restrictions include the following: (1) government employment agreements, *see, e.g.*, *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam) (finding that a former CIA agent breached an agreement not to publish information about the CIA without prepublication clearance); (2) statutes aimed at anyone with access to a particular type of information, *see, e.g.*, 42 U.S.C. § 2274 (1996) (prohibiting the disclosure of “Restricted Data”); (3) restrictions aimed at certain individuals who participate in government proceedings, *see, e.g.*, *Butterworth v. Smith*, 494 U.S. 624 (1990) (finding that a grand jury witness may not be prohibited from disclosing his or her testimony, but may be prohibited from disclosing the testimony of another witness); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 n.12 (1978) (citing state rules governing members of judicial review commissions or witnesses); (4) judicially imposed restrictions on attorneys and litigants, *see, e.g.*, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (considering the validity of a protective order prohibiting disclosure of information obtained during discovery); (5) relationships covered under torts such as breach of confidentiality, *see, e.g.*, *Doe v. Roe*, 400 N.Y.S.2d 668 (N.Y. Sup. Ct. 1977) (issuing permanent injunction preventing publication of book based upon psychiatrist's notes concerning an identifiable patient); and (6) contracts between private parties, such as those governing trade secrets, *see, e.g.*, *Garth v. Staktek Corp.*, 876 S.W.2d 545 (Tex. Ct. App. 1994) (holding that an injunction protecting trade secrets did not violate the Texas Constitution which protects free speech more extensively than the First Amendment).

Although journalists have been found liable under the tort of promissory estoppel for breaking promises of anonymity to sources, *see Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), that topic has been extensively examined elsewhere and is only briefly discussed in this Article. *See generally* Jeffrey Richards, *Confidentially Speaking: Protecting the Press from Liability for Broken Confidentiality Promises*, 67 WASH. L. REV. 501 (1992); Michael Dicke, Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553 (1989). For a discussion of *Cohen* and its impact on newsgathering, *see* Eric B. Easton, *Two Wrongs Mock a Right: Overcoming the Cohen Maledicta That Bar First Amendment Protection for News-gathering*, 58 OHIO ST. L.J. 1135 (1997).

Apart from the discussion of *Doe*, *see infra* notes 153-203 and accompanying text, this Article is not concerned with the First Amendment rights of a party to a nondisclosure agreement, such as an employment contract, who wishes to disclose confidential

to ask for confidential information, nor is the press liable for publishing that information.¹⁰ At first blush, there are several Supreme Court decisions supporting the position that the press is free to publish information it acquires through "routine" newsgathering methods.¹¹ However, a closer reading of these cases, reveals that the contours of the phrase "routine" newsgathering methods are poorly defined. The Court's cases only tell us that the following are legal newsgathering methods:

- 1) Monitoring police radio transmissions and "simply" asking for information from witnesses to a crime¹²
- 2) Acquiring information from court proceedings or court documents open to public inspection¹³
- 3) Acquiring information from police reports made available to the public, even when the police err and include information that should not be a matter of public record.¹⁴

The only instance in which the Court has pronounced the newsgathering methods of the press possibly illegal was when a newspaper acquired information by promising anonymity to the source and then published the source's identity.¹⁵ The

information. See generally Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261 (1998) (discussing the enforcement of nondisclosure contracts). For a discussion of non-disclosure agreements in the context of government employment, see *Barnard v. Jackson County*, 43 F.3d 1218 (8th Cir. 1995) (finding a government employee's First Amendment right to leak information to be dubious). See also Alan M. Katz, Comment, *Government Information Leaks and the First Amendment*, 64 CAL. L. REV. 108 (1976) (suggesting tests courts can use to determine the extent of First Amendment protection for employees who leak information); Note, *Plugging the Leak: The Case for a Legislative Resolution of the Conflict Between the Demands of Secrecy and the Need for An Open Government*, 71 VA. L. REV. 801 (1985) (suggesting that criminalizing leaking and publishing of classified information is necessary to protect national security).

¹⁰ See, e.g., *Landmark Communications*, 435 U.S. at 829 (holding that Virginia statute making it a crime to divulge information regarding judicial review commission proceedings cannot be applied to nonparticipants).

¹¹ See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308 (1977); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). Although the record was silent on the manner in which the newspaper acquired the information in *Landmark Communications*, see 233 S.E. 2d 120, 123 n.4 (1977) *rev'd* 435 U.S. 829 (1978), the Court regarded that case as one in which the information was lawfully obtained. See *Cohen*, 501 U.S. at 669 (discussing cases involving "publication of truthful, lawfully obtained information").

¹² See *Daily Mail*, 443 U.S. at 103.

¹³ See *Oklahoma Publishing*, 430 U.S. at 311; *Cox Broadcasting*, 420 U.S. at 496.

¹⁴ See *Florida Star*, 491 U.S. at 536.

¹⁵ See *Cohen*, 501 U.S. at 663. The Court stated:

Court's cases are of little value in answering the questions of whether it is legal for a reporter to induce a grand juror to violate an oath of secrecy,¹⁶ or for a reporter to receive information with knowledge that the source stole it¹⁷ or acquired it tortiously.¹⁸ Nor do these cases answer the provocative question of whether the illegal acquisition of information affects the analysis of prior restraint and post-publication penalty issues.¹⁹

As illustrated by Food Lion's high profile attack on ABC's information-gathering techniques,²⁰ lawsuits challenging the manner by which the press obtains its

[I]t is not at all clear that respondents obtained Cohen's name "lawfully" in this case, at least for purposes of publishing it. Unlike the situation in *Florida Star*, where the rape victim's name was obtained through lawful access to a police report, respondents obtained Cohen's name only by making a promise that they did not honor.

Id. at 671.

¹⁶ See, e.g., *State v. Heltzel*, 552 N.E.2d 31 (Ind. 1990) (treating reporters' acts as unprotected newsgathering activities, but ruling that the acts were not contemptuous because the grand jury's term had expired).

¹⁷ See, e.g., *People v. Kunkin*, 507 P.2d 1392 (Cal. 1973) (reversing conviction against the press because evidence that the defendants knew the information was stolen was insufficient); see also *infra* notes 208-23 and accompanying text.

¹⁸ See, e.g., *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969) (addressing a situation in which journalists received copies of documents from office of a United States Senator with knowledge that the Senator did not consent to the copying of the documents); see also *infra* notes 224-48 and accompanying text.

¹⁹ The Court in *Florida Star* indicated that when information has been acquired illegally, it is an open question as to whether the press may be punished for both acquiring and publishing the information. See *Florida Star*, 491 U.S. at 535 n.8. See also *Landmark Communications*, 435 U.S. at 837 (noting that the Court was not addressing the applicability of a state law criminalizing disclosure of judicial misconduct investigations in circumstances where the information is obtained illegally). Moreover, as the discussion of *New York Times Co. v. United States*, 403 U.S. 713 (1971), reveals, the way in which the case was presented to the Court precluded a direct consideration of the circumstances under which information-gathering methods are relevant to prior restraint analysis. See *infra* notes 26-106 and accompanying text.

This Article examines the relevance of newsgathering conduct for both prior restraint and publication damages issues. The latter issue has attracted the most attention by commentators. See, e.g., John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111 (1996). Commentators have also addressed the First Amendment's protection for newsgathering activities, without concern for the impact illegal newsgathering has had on either prior restraint or publication damages issues. See, e.g., Note, *And Forgive Them Their Trespasses: Applying the Defense of Necessity to the Criminal Conduct of the Newsgatherer*, 103 HARV. L. REV. 890 (1990).

²⁰ See *Food Lion Inc. v. Capital Cities/ABC Inc.*, 984 F. Supp. 923, 927 (1997) (finding that jury's punitive damage award for illegal newsgathering did not violate the First Amendment but reducing the amount awarded on due process grounds), *aff'd in part and*

information have emerged recently as a novel litigation strategy. *Ashcraft v. Conoco*²¹ and *Procter & Gamble Co. v. Bankers Trust Co.*²² reveal that judges increasingly are interested in how the press acquires sealed court documents.²³ The media's heightened sensitivity to newsgathering is further demonstrated by the *Cincinnati Enquirer's* stunning payment of \$10 million to Chiquita to avoid being sued.²⁴ The settlement was triggered by the newspaper's admission that a series of unflattering articles about Chiquita were based on voice mail messages stolen from Chiquita by a reporter.²⁵

This Article explores the link between the manner in which information is obtained and the First Amendment's protection of that information's publication. Prior restraint cases are discussed first. Courts usually regard information-gathering techniques as irrelevant to prior restraint analysis, a position with which this Article generally agrees. This Article demonstrates, however, that there are rare circumstances in which analysis of how the information came into the possession of the communicator helps to illuminate the consequences of publication. This Article's analysis of post-publication penalty cases concludes that courts should segregate the interests affected by publication from the interests affected by illegal information gathering. Newsgathering affects content-neutral interests, allowing claims for damages from newsgathering to include damage for the communicative impact of a subsequent publication distorts those interests.

I. PRIOR RESTRAINTS

A question arises as to whether the manner in which information is obtained is relevant to whether publication can be enjoined. Recently, a federal judge, guided by a suggestion made by Justice Stevens acting as circuit justice,²⁶ ruled that the manner

rev'd in part, 1999 U.S. App. LEXIS 26373 (4th Cir. Oct. 20, 1999) (setting aside judgment on fraud claim and affirming breach of loyalty and trespass judgment); *infra* notes 390-470 and accompanying text.

²¹ *Ashcraft v. Conoco*, No. 7:95-CV-187-BR(3), 1998 U.S. Dist. LEXIS 4092 at *1 (E.D.N.C. Jan. 21, 1998); see also *infra* notes 286-323 and accompanying text.

²² 900 F. Supp. 186 (S.D. Ohio 1995), rev'd 78 F.3d 219 (6th Cir. 1996).

²³ See *Ashcraft* 1998 U.S. Dist. LEXIS 4092 at *15-23; *Procter & Gamble* at 189-90.

²⁴ See Alix M. Freedman & Rekha Balu, *How Cincinnati Paper Ended Up Backing Off From Chiquita Series*, WALL ST. J., July 17, 1998, at A1.

²⁵ See *id.*; see also Laurence Zuckerman, *Paper Forced to Apologize For Articles About Chiquita*, N.Y. TIMES, June 29, 1998, at A10. The reporter subsequently pleaded guilty to one count of unlawful interception of wire communications and one count of unauthorized access to computer systems. See *Reporter Pleads Guilty in Theft of Voice Mail*, N.Y. TIMES, Sept. 25, 1998, at A16.

²⁶ See *McGraw-Hill Cos. v. Procter & Gamble Co.*, 515 U.S. 1309, 1311 (Stevens, Circuit Justice 1995). In this case, the petitioner stated that the documents it obtained were attached to a motion that bore no notations that it was filed under seal. Justice Stevens

in which *Business Week* obtained information filed under a protective order was highly relevant to whether the publication was permissible.²⁷ The Court of Appeals for the Sixth Circuit sharply disagreed.²⁸ In addition to the Sixth Circuit, the courts of appeals for the First and Ninth Circuits have ruled that inappropriate information gathering is irrelevant to prior restraint analysis.²⁹ These appellate courts cited *New York Times v. United States*³⁰ ("*Pentagon Papers*") as support for this proposition.³¹ However, the *Pentagon Papers per curiam* opinion does not directly address the issue of information-gathering. Among the Justices' separate opinions, only Justice Harlan's dissent regarded the method of acquisition as a relevant factor.³² A discussion is necessary to determine whether the Court's decision in *Pentagon Papers* is appropriately regarded as dismissing information gathering from prior restraint analysis. This section of the Article will discuss how the information-gathering issues were treated by courts throughout the *Pentagon Papers* litigation.

stated that this "seems to acknowledge that the manner in which petitioner came into possession of the information it seeks to publish may have a bearing on its right to do so." *Id.*

²⁷ See *Procter & Gamble Co. v. Bankers Trust Co.*, 900 F. Supp. 186, 188 (S.D. Ohio 1995), *vacated*, 78 F.3d 219 (6th Cir. 1996). For a detailed description of the legal proceedings that discovered how *Business Week* obtained the document, see Keith Hammonds & Katherine Yang, *Business Week vs. the Judge*, BUS. WK., Oct. 16, 1995, at 114; John E. Morris, *How Could Anyone Lose This Case?*, AM. LAW., Nov. 1995, at 5.

²⁸ *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (asserting that while inquiries into how *Business Week* obtained the documents "might be appropriate lines of inquiry for a contempt proceeding or a criminal prosecution, they are not appropriate bases for issuing a prior restraint"). See also *In re King World Prod., Inc.*, 898 F.2d 56, 59 (6th Cir. 1990) (stating that no matter how inappropriate the acquisition of information, the right to disseminate it is protected). Recently, Ford Motor Company alleged that Robert Lane, the operator of a Web site, improperly acquired Ford trade secrets and posted them on his site, blueovalnews.com. Drawing heavily upon *Procter & Gamble*, the United States District Court for the Eastern District of Michigan denied Ford's request for a preliminary injunction enjoining Lane from publishing Ford's trade secrets. Lane was enjoined from soliciting Ford employees to provide Ford trade secrets. See *Ford Motor Co. v. Lane*, 1999 U.S. Dist. LEXIS 13736 (E.D. Mich. Sept. 7, 1999).

²⁹ See *Berger v. Hanlon*, 129 F.3d 505, 518 (9th Cir. 1997), *vacated and remanded on other grounds*, 119 S.Ct. 1706 (1999); *In re Providence Journal Co.*, 820 F.2d 1342, 1349 (1st Cir. 1986).

³⁰ 403 U.S. 713 (1971) (*per curiam*).

³¹ See *Berger*, 129 F.3d at 518; *Providence Journal*, 850 F.2d at 1349.

³² *Id.* at 754 (Harlan, J., dissenting). See *infra* note 80 and accompanying text.

A. Pentagon Papers

The facts of the Pentagon Papers case are well-known and need only be briefly recounted here.³³ Daniel Ellsberg, who had appropriate security clearances, made copies of a classified Department of Defense history of American involvement in Vietnam.³⁴ Ellsberg leaked this information to the *New York Times* which began publishing a lengthy series of articles on June 13, 1971.³⁵ After the *Times* refused to comply with Attorney General Mitchell's June 14 request to cease publication of the series, the government obtained a temporary restraining order on June 15.³⁶ On June 18, the *Washington Post* began publishing stories based on copies of the leaked documents it also had obtained from Ellsberg, and the government obtained a temporary restraining order against the *Post*.³⁷ After separate appellate proceedings, the two cases were combined for Supreme Court consideration.³⁸ The Court ruled on June 30 that the restraints were invalid because the government had failed to meet the heavy burden of proof.³⁹ Although several justices stated in their separate opinions that post-publication actions against the newspapers for violation of the espionage laws would be acceptable,⁴⁰ the government's subsequent criminal action targeted only Ellsberg and several of his associates.⁴¹ This criminal action, the first to apply espionage statutes to someone who leaked classified information to the press,⁴² was

³³ See generally DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE* (1996); HARRISON E. SALISBURY, *WITHOUT FEAR OR FAVOR: THE NEW YORK TIMES AND ITS TIMES*, 57-79 (1980) (describing the series of events which led Daniel Ellsberg to leak information to the *Times*); PETER SCHRAG, *TEST OF LOYALTY: DANIEL ELLSBERG AND THE RITUALS OF SECRET GOVERNMENT* (1974) (same); SANFORD J. UNGER, *THE PAPERS & THE PAPERS: AN ACCOUNT OF THE LEGAL AND POLITICAL BATTLE OVER THE PENTAGON PAPERS* (1989). Documents from the case are compiled in, *THE NEW YORK TIMES COMPANY V. UNITED STATES: A DOCUMENTARY HISTORY* (James C. Goodale, compiler, 1971) [hereinafter cited as *PENTAGON PAPERS HISTORY*]. Subsequent page references will be to this compilation rather than to the pagination of the original document.

³⁴ See UNGER, *supra* note 33, at 4.

³⁵ See *id.* at 11-12.

³⁶ See 1 *PENTAGON PAPERS HISTORY*, *supra* note 33, at 27.

³⁷ See 2 *PENTAGON PAPERS HISTORY*, *supra* note 33, at 651.

³⁸ See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

³⁹ See *id.* at 714.

⁴⁰ See *id.* at 737 (White, J., concurring); *id.* at 752 (Burger, C.J., dissenting); *id.* at 759 (Blackmun, J., dissenting). In their early analysis of potential legal problems, the *Times'* attorneys were concerned with criminal prosecution after publication, not prior restraint. See SALISBURY, *supra* note 33, at 242.

⁴¹ See UNGER, *supra* note 33, at 6-7.

⁴² See Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 937 (1973). One of the most interesting documents produced in the *Pentagon Papers* case is the affidavit by Max Frankel, the

compromised by government misconduct, such as the notorious White House Plumbers' burglary of the office of Ellsberg's psychiatrist.⁴³

In its case against the *Times*, the government initially characterized the documents as "stolen,"⁴⁴ but as the case progressed, the method of acquisition became increasingly tangential. By the time the case was presented to the Supreme Court, the issues had been narrowed to focus on the consequences of publication.⁴⁵

The government's memorandum in support of its motion for a preliminary injunction against the *Times* claimed that the classified information would not be lawfully obtainable through the Freedom of Information Act.⁴⁶ Thus, the newspaper could not "contend that it [had] any greater right to possession and dissemination of those documents because of the illegal manner in which they were purloined and received."⁴⁷ This statement was followed by a citation analogizing the case at hand to *Maas v. United States*,⁴⁸ a 1966 case in which the Court of Appeals for the District of Columbia sustained a preliminary injunction preventing publication of a manuscript prepared by a federal prisoner.⁴⁹ *Maas* was not an appeal of a final judgment, so the appellate court did not explore the merits of the appellants' First

Times' Washington bureau chief. Frankel gave extensive examples of how government officials regularly leak classified information to the press. He concluded that without this process, "there could be no adequate diplomatic, military and political reporting of the kind our people take for granted, either abroad or in Washington and there could be no mature system of communication between the Government and the people." 1 PENTAGON PAPERS HISTORY, *supra* note 33, at 397 (affidavit by Max Frankel).

⁴³ For a discussion on the prosecution of Ellsberg and his associates, see SCHRAG, *supra* note 33, at 224-77. For analysis of the legal questions raised by the case, see Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974).

⁴⁴ 1 PENTAGON PAPERS HISTORY, *supra* note 33, at 264 (transcript of June 17, 1971 hearing before Judge Gurfein); *id.* at 477 (transcript of June 18, 1971 hearing before Judge Gurfein); *id.* at 614 (same). The *Times* responded by claiming that it had done nothing illegal. See *id.* at 284 (transcript of June 17, 1971 hearing before Judge Gurfein); *id.* at 630 (transcript of June 18, 1971 hearing before Judge Gurfein).

⁴⁵ See *New York Times*, 703 U.S. at 714.

⁴⁶ See 5 USCS § 552 (1974).

⁴⁷ 1 PENTAGON PAPERS HISTORY, *supra* note 33, at 317 (plaintiff's memorandum in support of motion for preliminary injunction).

⁴⁸ 371 F.2d 348 (D.C. Cir. 1966).

⁴⁹ See *id.* at 352-53. A federal regulation prohibited publication of manuscripts by prisoners if criminal activities were discussed. An exception was made for organized crime figure Joe Valachi, subject to approval of the manuscript by the Department of Justice. After Valachi's agents sought to send excerpts of the manuscript to prospective publishers without government approval, the Attorney General decided not to allow publication. The government obtained a preliminary injunction preventing dissemination of the manuscript in any form. The court of appeals sustained the preliminary injunction, finding no abuse of discretion by the trial court. See *id.* at 351-52.

Amendment argument other than to conclude that the district court did not abuse its discretion.⁵⁰ Because *Maas* involved a prisoner, whose right to communicate was subject to substantial governmental control, the case was a dubious precedent for an injunction against a newspaper. The citation of *Maas* reveals the paucity of case law to support the government's claim that the *Times*' method of newsgathering was relevant to prior restraint analysis.

The *Times*' memorandum in opposition to the issuance of the preliminary injunction quoted at length from the one case that was directly on point, *Liberty Lobby, Inc. v. Pearson*.⁵¹ In that case, a disenchanted employee of a controversial political organization gave copies of letters and documents to journalists Jack Anderson and Drew Pearson.⁵² Liberty Lobby sought a preliminary injunction preventing publication of the contents of the documents.⁵³ Judge Holtzoff of the District Court for the District of Columbia rejected the request, stating:

[F]reedom of the press is not limited to such information as is personally obtained by newspaper men by observation or from official statements, or in any other open way. The mere fact that a newspaper man obtained information in a clandestine fashion or in a surreptitious manner or because someone unguardedly and unwittingly reveals confidential information, or even through a breach of trust on the part of a trusted employee, does not give rise to an action for an injunction. The courts may not review the manner in which a newspaper man obtains his information and may not restrain the publication of news merely because the person responsible for the publication obtained it in a manner that may perhaps be illegal or immoral. It would be a far-reaching limitation on the freedom of the press if courts were endowed with the power to review the manner in which the press obtains its information and could restrain the publication of news that is obtained in a way that the Court does not approve. If such were the law, we would not have a free press; we would have a controlled press. Such, however, is not the law.⁵⁴

This intriguing passage treated these issues as though they were long settled, yet *Liberty Lobby* was a case of first impression.⁵⁵ Also, in *Liberty Lobby*, no complicity between the journalists and the employee was shown, but Judge Holtzoff's opinion

⁵⁰ See *id.* at 352.

⁵¹ 261 F. Supp. 726 (D.D.C. 1966), *aff'd*, 390 F.2d 489 (D.C. Cir. 1968); see also 1 PENTAGON PAPERS HISTORY, *supra* note 33, at 335-36.

⁵² See *Liberty Lobby*, 261 F. Supp. at 727.

⁵³ See *id.*

⁵⁴ *Id.* at 727.

⁵⁵ See *id.* Judge Holtzoff cited no cases in his opinion, perhaps because it was an oral ruling from the bench.

went far beyond the facts of the case. Instead of dealing with only those instances in which the press is the passive recipient of information, Judge Holtzoff's sweeping statement that "courts may not review the manner in which a newspaper man obtains his information,"⁵⁶ included cases in which the press plays an active role in the commission of newsgathering crimes.⁵⁷ His antipathy towards prior restraints was so strong that he completely eliminated all newsgathering techniques as a factor to be considered in prior restraint cases.

The appellate opinion in *Liberty Lobby*⁵⁸ markedly contrasted with the lower court opinion. Justice Warren Burger, then on the Court of Appeals for the District of Columbia Circuit, noted that the right of publication is not absolute, but, "the balance is always weighted in favor of free expression."⁵⁹ He believed the appellants had failed to show ownership of the papers, unlawful taking, or any involvement of the journalists other than receiving copies of the documents.⁶⁰ Significantly, he left open the possibility that under certain circumstances these factors might be relevant to a prior restraint case, stating, "Upon a proper showing the wide sweep of the First Amendment might conceivably yield to an invasion of privacy and deprivation of rights of property in private manuscripts."⁶¹ This passage would prove to be a

⁵⁶ *Id.*

⁵⁷ Professor Cox has suggested the following analysis where the press publishes information obtained from a source who breaches an obligation of confidentiality:

Might not a publisher likewise be charged with participation in the wrong? The argument would be strongest when the publisher induced the violation; weaker when the publisher was a passive recipient [but had knowledge of the condition of confidentiality]; and probably untenable in the unlikely event that the publisher had no notice of the agreement.

Archibald Cox, *The Supreme Court, 1979 Term, Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 11 (1980). *But see infra* note 202.

⁵⁸ 390 F.2d 489 (D.C. Cir. 1968). The *Times* cited the appellate opinion in *Liberty Lobby* for the proposition that prior restraints bear a heavy burden. *See* 1 PENTAGON PAPERS HISTORY, *supra* note 33, at 335 (defendant's memorandum in opposition to issuance of preliminary injunction). The government also cited the appellate opinion in *Liberty Lobby*, but for the proposition that prior restraints are permissible in certain circumstances. *See id.* at 316 (plaintiff's memorandum in support of motion for a preliminary injunction).

⁵⁹ *See Liberty Lobby*, 390 F.2d at 491.

⁶⁰ *See id.*

⁶¹ *Id.* Judge Skelly Wright, concurring, stated that the idea that the lobbying organization had property rights in the copies sufficient to justify a prior restraint "leaves me cold." *Id.* at 492 (Wright, C.J., concurring). He believed monetary damages would be sufficient compensation to any harm the organization may have suffered. *See id.* (Wright, C.J. concurring). Wright would later criticize the Solicitor General for advancing a property rights argument in the *Washington Post* portion of the *Pentagon Papers* case. *See infra* note 73.

significant part of the government's argument when the *Pentagon Papers* case was heard by the Second Circuit.

Despite the government's persistent claims of stolen documents throughout the district court proceedings, Judge Gurfein's opinion denying the preliminary injunction made no mention of any linkage between prior restraints and how information is obtained. To Gurfein, the validity of a prior restraint turned on the impact the publication would have on national security.⁶²

In its brief submitted to the Second Circuit, the government again referred repeatedly to the documents as stolen, and insisted that "courts have the power to enjoin publication of stolen classified documents."⁶³ In the oral argument, Whitney North Seymour, Jr., the United States Attorney, referred to *Liberty Lobby* stating:

[A] close reading of that opinion indicates that there are a number of exceptions [to the right to publish], including the exception in the case of documents which have come into the possession of the person under circumstances where they had reason to believe that they were not authorized to have them.⁶⁴

By analogy, he argued that if a judge's memoirs were stolen by a law clerk and given to the *Times*, "there might at least be a question . . . as to whether the New York Times was free to publish that, knowing that they had been stolen."⁶⁵ This prompted Judge Kaufman to say, "I want to make sure I understand you, Mr. Seymour. Are you arguing that if the documents are stolen documents from a government office or agency, the newspaper under no conditions has any right to publish them?"⁶⁶ Seymour admitted that stolen documents were not suppressible in

⁶² See 2 PENTAGON PAPERS HISTORY, *supra* note 33, at 665-66 (June 19, 1971 decision by Judge Gurfein denying government's motion for a preliminary injunction).

⁶³ *Id.* at 714 (brief for the United States). Assistant Attorney General Robert Mardian, who participated as giving the case its "Kafka-like quality," SALISBURY, *supra* note 33, at 287, could not understand how the *Times* could copyright its stories based on stolen government property. See *id.* at 298. President Nixon, who saw the case as a "PR problem," *id.* at 322 note *, sought to emphasize that the documents were stolen government property. John Ehrlichman's notes of a June 19, 1971 conversation with President Nixon reveal that Nixon proposed the catchlines, "Do you approve of the theft of government papers? Should a thief be punished?" *Id.* at 322.

⁶⁴ 2 PENTAGON PAPERS HISTORY, *supra* note 33, at 897 (transcript of oral argument before the Court of Appeals for the Second Circuit). Although he referred to the opinion of the district court, Seymour most likely meant to refer to the opinion by the court of appeals. As noted, the district court opinion did not speak in qualified terms, while the appellate opinion was more in line with Seymour's argument. See *supra* notes 51-61 and accompanying text.

⁶⁵ 2 PENTAGON PAPERS HISTORY, *supra* note 33, at 898.

⁶⁶ *Id.*

all circumstances, adding that "it is a proper element for the Court to consider the circumstances under which the documents came into the newspaper's possession, and that it is a weight in the scales."⁶⁷ Alexander Bickel, counsel for the *Times*, began his argument by noting that there was no evidence that the *Times* stole the documents or that anybody stole them.⁶⁸ Judge Friendly responded, "Nobody says the *Times* went into the Department of Defense with a chisel. It is equally clear that someone gave it to the *Times* when he had no authority to do so. Why not go on from there?"⁶⁹ Bickel admitted he wanted to get the word "stolen" out of the discourse because it was a "highly colored word."⁷⁰ None of the judges followed up on North's suggested line of analysis and questioned Bickel about how much weight should be given to the circumstances of acquisition.

Neither the Second Circuit in the *Times* case nor the District of Columbia Circuit in the *Washington Post* case addressed the government's claim that the method of acquisition affected prior restraint analysis.⁷¹ At the Supreme Court, the government's brief stated that the case hinged on whether publication of the documents would pose a grave and immediate danger to the security of the United States:

The answer to this narrow question does not depend upon the fact that all of the material . . . is classified either 'top secret' or 'secret,' that all of it was obtained illegally from the government and that both the *Times* and the *Post* hold such material without any authorization from the government.⁷²

⁶⁷ *Id.* at 898-99. Solicitor General Griswold made a similar argument before the Court of Appeals for the District of Columbia Circuit in the case against the *Post*. See RUDENSTINE, *supra* note 33, at 245.

⁶⁸ See 2 PENTAGON PAPERS HISTORY, *supra* note 33, at 923 (transcript of oral argument before the Court of Appeals for the Second Circuit).

⁶⁹ *Id.* at 924.

⁷⁰ *Id.*

⁷¹ See *United States v. New York Times Co.*, 444 F.2d 544 (2nd Cir. 1971); *United States v. Washington Post Co.*, 446 F.2d 1327 (D.C. Cir. 1971). The Second Circuit remanded the *Times* case to the district court for further *in camera* proceedings to determine if publication of certain items specified by the government would pose grave and immediate danger to the security of the United States. No directions were given to reconsider the relevance of how the *Times* acquired the documents. See *Pentagon Papers*, 444 F.2d at 544. After the Court of Appeals for the District of Columbia directed the district court to hold a hearing at which the government could prove the harm caused by publication in the *Washington Post*, the appellate court agreed with the district court that the government failed to meet the required burden of proof. See *Washington Post*, 446 F.2d at 1327.

⁷² 2 PENTAGON PAPERS HISTORY, *supra* note 33, at 1167 (brief for the United States). Professor Rudenstine has stated that this change in strategy was made by Solicitor General Griswold. See RUDENSTINE, *supra* note 33, at 273. In its brief, the *Times* no longer quoted the lengthy passage from *Liberty Lobby* about the irrelevance of information gathering to

However, at the oral argument, Solicitor General Griswold argued that prior restraints were permissible in a variety of circumstances and gave as an illustration a hypothetical situation in which the press acquires an unpublished Hemingway manuscript through theft, breach of fiduciary responsibility by a secretary, or by finding it on the sidewalk. "If the New York Times sought to print that, I have no doubt that Mr. Hemingway or now his heirs, next of kin, could obtain from the courts an injunction against the press printing it."⁷³ Griswold then claimed that the newspapers were intentionally participating in a breach of trust: "They know that this material is not theirs. They do not own it. I am not talking about the pieces of paper which they may have acquired. I am talking about the literary property, the concatenation of words, which is protected by the law of literary property."⁷⁴ This prompted the following bizarre colloquy between Justice Stewart and Solicitor General Griswold:

Justice Stewart: Secondly, I understand, and tell me if I am wrong again, that your case really does not depend upon any assertion of property rights, by analogy to copyright law. Your case would be the same if The New York Times had acquired this information by sending one of its employees to steal it, as it would if it had been presented to The New York Times on a silver platter by an agent of the Government. Am I correct?"

Griswold: Yes, Mr. Justice, but I don't think that literary property is wholly irrelevant here. But my case does not depend upon it.

Justice Stewart: Your case depends upon the claim, as I understand it, that the disclosure of this information would result in an immediate grave threat to the security of the United States.

Griswold: Yes, Mr. Justice.

Justice Stewart: However it was acquired, and however it was classified.

prior restraint cases. See 2 PENTAGON PAPERS HISTORY, *supra* note 33, at 1166-71 (brief for the United States).

⁷³ 2 PENTAGON PAPERS HISTORY, *supra* note 33, at 1218 (transcript of oral argument before Supreme Court). It is surprising that Solicitor General Griswold would use this example in arguing before the Supreme Court. As noted, the government's brief admitted the issue was narrow. See *supra* text accompanying note 72. In addition, while making a similar argument to the District of Columbia Circuit, Judge Skelly Wright reacted negatively to claims that this case was like a copyright case. See RUDENSTINE, *supra* note 33, at 245. For further commentary on how this case did not involve property issues similar to copyright, see *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring); *id.* at 731 n.1 (White, J., concurring).

⁷⁴ 2 PENTAGON PAPERS HISTORY, *supra* note 33, at 1218 (transcript of oral argument before Supreme Court).

Griswold: Yes, Mr. Justice, but I think the fact that it was obviously acquired improperly is not irrelevant to the consideration of that question. I repeat, obviously acquired improperly.⁷⁵

Griswold conceded that harm stemming from disclosure was the relevant issue, regardless of whether the information was acquired by theft or gift, but he waffled by saying that improper acquisition is not irrelevant to the analysis. In doing so, he failed to specify how much weight improper acquisition should have or how it should be factored into the analysis, just as Seymour had done at the Second Circuit. Given the government's admission that the consequences of publication were the keystone, the references to improper acquisition appear as rhetorical hyperbole.

By a six to three vote, the Court ruled the government had not met the heavy burden necessary to justify the prior restraints.⁷⁶ Of the Justices in the majority, only Justice White mentioned the method of acquisition, and this was merely to note its irrelevance. White's restatement of the case was as follows:

The Government's position is simply stated: The responsibility of the Executive for the conduct of the foreign affairs and for the security of the Nation is so basic that the President is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens "grave and irreparable" injury to the public interest; and the injunction should issue whether or not the

⁷⁵ *Id.* at 1220. Later in the oral argument Justice Stewart again sought to have Solicitor General Griswold frame the issue in the case:

Justice Stewart: Mr. Solicitor General . . . this brings me back to my original question of a few minutes ago as to what the real basic issue in this case is. As I understand it, you are not claiming that you are entitled to an injunction simply or solely because this is classified material.

Griswold: No.

Justice Stewart: Nor do I understand it that you are claiming that you are entitled to an injunction because it was stolen from you, that it is your property. You are claiming rather and basically that whether or not it is classified or however it is classified, and however it was acquired by these newspapers, the public disclosure of this material would pose a grave and immediate danger to the security of the United States of America, period.

Griswold: Yes, Mr. Justice.

Id. at 1222. During his argument on behalf of the *Post*, William R. Glendon described the record as replete with examples of instances in which government officials leaked classified documents to the press. *See id.* at 1229. In response, Justice White asked about the consequences of theft of government documents by the press. Glendon replied, "I don't think the source of how we obtained them features in this case." *Id.* Justice White stated that if theft was irrelevant, leaking was also irrelevant. *See id.*; *infra* text accompanying note 77.

⁷⁶ *See New York Times*, 403 U.S. at 725-27.

material to be published is classified, whether or not publication would be lawful under relevant criminal statutes enacted by Congress, and *regardless of the circumstances by which the newspaper came into possession of the information.*⁷⁷

To Justice White, and by implication those Justices who focused on the “grave and irreparable danger” standard,⁷⁸ the issues were properly framed in the government’s brief. Griswold’s references to “improper acquisition” at oral argument⁷⁹ were discounted. The only Justice to regard the acquisition of the documents as a relevant concern was Justice Harlan, who in dissent criticized the frenzied pace of the litigation which prevented a proper assessment of a number of questions, including: “Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents . . . were purloined from the Government’s possession and that the newspapers received them with knowledge that they had been feloniously acquired.”⁸⁰ Justice Harlan’s brief reference stands against the collective weight of the Justices in the majority who indicated that in *this type of case*, the technique of information gathering does not illuminate the consequences of publication.

The way in which Justice Harlan phrased his question misstated the record; there were no findings by either district court concerning how the information was acquired, let alone findings that the newspapers knew that the information had been “feloniously acquired.”⁸¹ As Chief Justice Burger stated, “We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts.”⁸² This absence of facts shows up in the individual opinions of the Justices; none were able to comment on the newspapers’ methods of newsgathering, apart from the rhetorical pronouncements of the three dissenters concerning

⁷⁷ *Id.* at 732 (White, J., concurring) (emphasis added). *See also id.* at 717 (Black, J., concurring) (stating that “the press must be left free to publish news, *whatever the source*, without censorship”) (emphasis added).

⁷⁸ *Id.* at 732.

⁷⁹ 2 PENTAGON PAPERS HISTORY, *supra* note 33 at 1220.

⁸⁰ *New York Times*, 403 U.S. at 754 (Harlan, J., dissenting). This statement was followed with a citation analogizing *Pentagon Papers* to the court of appeals’ opinion in *Liberty Lobby*. *See id.* Chief Justice Burger believed the press should have returned the documents to the government, but did not address any link between the method of acquisition and prior restraint analysis. *See id.* at 751 (Burger, C.J., dissenting).

⁸¹ *Id.* at 754 (Harlan, J., dissenting). The *Times* successfully resisted the Government’s request that it produce the documents, claiming the copies bore handwritten notations that would facilitate identification of the *Times*’ source. 1 PENTAGON PAPERS HISTORY, *supra* note 33, at 281 (transcript of June 17, 1971 hearing before Judge Gurfein). The *Times* did provide the Government with an inventory of the documents it possessed. *See id.* at 292-94.

⁸² *New York Times*, 403 U.S. at 748 (Burger, C.J., dissenting).

"purloined documents."⁸³ The absence of facts helps explain why the *Pentagon Papers* case should not be regarded as a definitive analysis of when the circumstances of acquisition are relevant to requests for injunctions. Given the record, it would have been inappropriate for the Court to address the legal consequences of how the newspapers came into possession of the documents.

There are additional reasons why the case should not be regarded as definitive. The case presented complex separation of powers issues. The government argued that the Executive Branch had inherent power to prevent publication that would harm national security, even in the absence of a specific legislative declaration.⁸⁴ To Justices Stewart, White, Marshall, and, to a lesser extent, Justice Black, the absence of a relevant statute was troublesome.⁸⁵ If a statute dealing with publication by unauthorized parties had existed,⁸⁶ Justices Stewart, White, and Marshall might have voted differently. Also, the case involved the government seeking to prevent speech about the government. As Justices Brennan and White acknowledged, prior restraint issues vary in circumstances involving other categories of speech or where "private rights," such as copyright, are involved.⁸⁷ The *Pentagon Papers* case surely does not

⁸³ *Id.* at 749. *See also id.* at 754 (Harlan, J., dissenting) (referring to the documents as "feloniously acquired"); *id.* at 759 (Blackmun, J., dissenting) (referring to "unauthorized possession").

⁸⁴ *See* 2 PENTAGON PAPERS HISTORY, *supra* note 33, at 1172-77 (Brief for the United States). The absence of statutory authority was one of the grounds upon which the *Times* attacked the injunction. *See id.* at 1172. This prompted Justice Douglas to state during the oral argument, "That is a very strange argument for The Times to be making. The Congress can make all of this illegal by passing laws." *Id.* at 1226 (transcript of oral argument).

⁸⁵ *See New York Times*, 403 U.S. at 730 (Stewart, J., concurring) (noting that the Court was asked "neither to construe specific regulations nor to apply specific laws"); *id.* at 732 (White, J., concurring) (stating that in the absence of legislation, he was unable to find that the inherent powers of the Executive authorized prior restraints against the press); *id.* at 742 (Marshall, J., concurring) (concluding that the Constitution does not provide for "government by injunction in which the courts and the Executive Branch can 'make law' without regard to the action of Congress"). Despite his absolutist interpretation of the First Amendment, Justice Black did comment, "The Government does not even attempt to rely on any act of Congress." *Id.* at 718 (Black, J., concurring).

One of the grounds upon which the *Pentagon Papers* case was distinguished from the restraint of atomic weapon information in the *Progressive* case was the specific statutory provision authorizing an injunction against communication of "restricted data". *See United States v. The Progressive, Inc.*, 467 F. Supp. 990, 994 (W.D. Wis. 1979).

⁸⁶ In his opinion denying the Government's request for a preliminary injunction, Judge Gurfein held that 18 U.S.C. § 793(e), a statute governing "communication" of national defense information by those in unauthorized possession of the information, prohibited "secret or clandestine communication" and did not apply to newspaper publication. 2 PENTAGON PAPERS HISTORY, *supra* note 33, at 661 (June 19, 1971 order).

⁸⁷ *See New York Times*, 403 U.S. at 726 (Brennan, J., concurring) (distinguishing allegedly obscene materials from those at issue in the *Pentagon Papers*); *id.* at 731 n.1 (White, J., concurring) (distinguishing injunctions aimed at coercive labor practices, unfair

control injunctions involving trade secrets, where the method of acquisition is often a critical factor.⁸⁸

In two cases subsequent to the *Pentagon Papers* case, Justices Brennan and Blackmun treated the method of information gathering as irrelevant to general prior restraint analysis. Justice Brennan wrote that prior restraints on publications about pending judicial proceedings were disfavored "no matter how shabby the means by which the information is obtained."⁸⁹ Justice Blackmun stated in a case in which a company sought to restrain broadcast of a videotape about a meat-packing plant on the grounds that the tape was acquired through "calculated misdeeds," that the prior restraint doctrine was applicable even if misdeeds occurred during newsgathering.⁹⁰ In both cases, Justices Brennan and Blackmun stated that subsequent civil or criminal proceedings, rather than prior restraints, were the appropriate sanction for crimes or torts committed during newsgathering.⁹¹ In contrast, Justice Stevens has twice raised the possibility that the method of information-gathering affects the right to publish.⁹²

Justices Brennan and Blackmun's preference for post-publication sanctions for newsgathering crimes reflects the view that prior restraints are the "least tolerable infringement on First Amendment rights."⁹³ However, there are other powerful reasons, unarticulated by members of the Court, why enjoining speech should generally not be tied to the method of newsgathering.

methods of competition, and copyright infringements from "an injunction against publishing information about the affairs of government").

⁸⁸ RESTATEMENT (FIRST) OF TORTS § 757 (1939); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40 (1993); and UNIFORM TRADE SECRETS ACT § 1(2), 14 ULA 438 (1985) have common elements in their treatment of trade secrets, including liability based upon acquisition with notice that the information was a trade secret or that it was improperly obtained. See Giles T. Cohen, Comment, *Protective Orders, Property Interests and Prior Restraints: Can Courts Prevent Media Nonparties from Publishing Court-Protected Discovery Materials?* 144 U. PA. L. REV. 2463 (1996) (analyzing injunctions to protect trade secrets that are disclosed during the discovery process and arguing that the scope of a court's injunctive power depends upon how non-litigants acquire material that is subject to a protective order). Nonetheless, a federal district court recently found that under the broad holdings of the *Pentagon Papers* case and *Procter & Gamble*, the Michigan Uniform Trade Secrets Act, MICH. STAT. ANN. § 19.901 (law. Co-op. 1999), did not justify enjoining publication of trade secrets in the absence of a confidentiality agreement or fiduciary duty between the parties. See *Ford Motor Co. v. Lane*, 1999 U.S. Dist. LEXIS 13736 (E.D. Mich. Sept. 7, 1999). See generally Bruce T. Atkins, Note, *Trading Secrets in the Information Age: Can Trade Secret Law Survive the Internet?*, 1996 U. ILL. L. REV. 1151 (analyzing the liability issues raised by use of trade secrets obtained from the Internet).

⁸⁹ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 588 (1976) (Brennan, J., concurring).

⁹⁰ See *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (Blackmun, Circuit Justice 1994).

⁹¹ See *Davis*, 510 U.S. at 1318; *Nebraska Press*, 427 U.S. at 588 n.15.

⁹² See *McGraw-Hill Cos. v. Procter & Gamble Co.*, 515 U.S. 1309, 1311 (Stevens, Circuit Justice 1995); *Nebraska Press*, 427 U.S. at 617 (Stevens, J., concurring).

⁹³ *Nebraska Press*, 427 U.S. at 559.

First, a prior restraint case involving a category of speech that is presumptively protected by the First Amendment requires a particularized inquiry into the consequences stemming from publication.⁹⁴ The method by which the publisher acquired the information generally does not illuminate the consequences of its publication.⁹⁵ In an injunction proceeding such as the *Pentagon Papers* case, words like "stolen documents" are rhetorical tricks designed to color the analysis. However, the majority of the Court refused to assign any weight to the fact that the documents were labeled "classified," and also properly ignored the label "stolen."⁹⁶

Second, inquiries into the method of gathering information are time consuming and any temporary injunction in place while a court examines information-gathering methods extracts an irreparable toll on society's interest in timely information. In the *Pentagon Papers* case, inquiries by the trial courts into how the newspapers acquired the documents would have only lengthened the amount of time the illegitimate restraints were in effect. While a temporary restraining order was in effect in the *Business Week* case, the judge devoted two days of hearings—six days apart—to ascertain how the magazine acquired a document covered by a protective order, and took another six days before issuing an opinion.⁹⁷ The Court has emphasized the importance of very timely judicial decisions in the context of restraints of allegedly obscene material,⁹⁸ and highly protected categories of expression require even shorter periods.⁹⁹ If the state claimed that a newsgathering crime had been committed, it

⁹⁴ Whether phrased as 1) clear and present danger; 2) direct, immediate, and irreparable danger; or 3) grave and irreparable danger, the analysis is largely the same—precisely specifying the harm and determining the likelihood that publication will cause the harm to occur.

⁹⁵ See, e.g., *United States v. Noriega*, 752 F. Supp. 1045 (S.D. Fla. 1990) (analyzing whether a broadcast of attorney-client telephone conversations would jeopardize a criminal defendant's rights to a fair trial). In this case, CNN came into possession of tape recordings of General Noriega's telephone conversations with his attorney. The judge conducted the analysis mandated by *Nebraska Press Association* and did not even consider how CNN acquired the tapes. See *id.*

⁹⁶ See *supra* text accompanying note 70.

⁹⁷ As the Court of Appeals for the Sixth Circuit noted:

Weeks passed with the 'gag order' in effect, while the court inquired painstakingly into how *Business Week* obtained the documents and whether or not its personnel had been aware that they were sealed. While these might be appropriate lines of inquiry for a contempt proceeding or a criminal prosecution, they are not appropriate bases for issuing a prior restraint.

Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225 (6th Cir. 1996); see also *supra* note 27 (citing sources of background material regarding the case).

⁹⁸ See *Marcus v. Search Warrant*, 367 U.S. 717, 737-38 (1961) (contrasting the statute at issue in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), which required a prompt trial and judicial determination of obscenity within two days of trial, with a statute which required a prompt trial but imposed no time limit on judicial determination of obscenity).

⁹⁹ See *Freedman v. Maryland*, 380 U.S. 51, 59 (1965) (requiring a prompt judicial

would be unacceptable to restrain publication during the length of time necessary to conduct a full investigation and criminal trial. Additionally, if an injunction were issued against one outlet that was being investigated for criminal activity such as receipt of stolen property, it is quite possible that other communication outlets would obtain the information, as happened in the *Pentagon Papers* and *Progressive* cases.¹⁰⁰

Third, exploring information-gathering methods raises complex evidentiary issues. The *Business Week* case was somewhat simplified by a law firm's admission that one of its partners provided the sealed document to a reporter.¹⁰¹ Despite this admission, the judge wanted to know if *Business Week*'s reporters were aware of the protective order when they received the document.¹⁰² Many news stories do not involve a single source—information may come from a variety of sources, and one can easily imagine the difficulty and time necessary for a judge to review a news story line-by-line and to determine the source or method used to obtain different statements. Such inquiries are especially problematic because they probe into sensitive matters such as the identity of sources who have been offered promises of confidentiality. These inquiries place journalists in a highly conflicted position—to get a temporary

decision in the special context of film licensing). The Court in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 n.22 (1968), interpreted a requirement for prompt judicial determination as being satisfied by a nine-day period between the licensing board's decision and the trial court's ruling. *But see* *Carroll v. President and Commrs. of Princess Anne*, 393 U.S. 175, 180-82 (1968) (finding that an order, issued *ex parte*, restraining a rally for 10-day period was unconstitutional). Professor Blasi has suggested that the time period between denial of a permit for a demonstration and a judicial decision should be less than the Court authorized for film licensing. *See* Vince Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1548 (1970); *see also* *A Quantity of Books v. Kansas*, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting) (stating that a "delay of even a day or two may be of crucial importance in some instances").

¹⁰⁰ Daniel Ellsberg made portions of the Pentagon Papers available to nearly twenty other newspapers and a number of them, such as the *Los Angeles Times*, *Philadelphia Inquirer*, *Miami Herald*, and *Chicago Sun-Times*, published excerpts while the *Times* and *Post* were enjoined from publishing. This prompted Judge Roger Robb, of the Court of Appeals for the District of Columbia Circuit, to ask Solicitor General Griswold if the Government was "asking us to ride herd on a swarm of bees?" SALISBURY, *supra* note 33, at 322. In *United States v. The Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), the Government abandoned its effort to obtain a permanent injunction because similar information was published by others while *The Progressive* was enjoined. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 1357 n.3 (13th ed. 1997).

¹⁰¹ *See* *Procter and Gamble Co. v. Bankers Trust Co.*, 900 F. Supp. 186, 189 (S.D. Ohio 1995). The magazine's reporter refused to identify her source, but the admission that the source was located in New York State and that she obtained the sealed document on the same day as she requested it led Sullivan & Cromwell to discover that one of its partners was the source of the leak. *See* Morris, *supra* note 27 at 6.

¹⁰² *See* *Procter and Gamble*, 900 F. Supp. at 188. The judge concluded that *Business Week* was aware of the protective order before it obtained the document. *See id.* at 191.

restraint lifted, or prevent the imposition of a restraint, journalists must disclose how information was obtained, including the identity of a source who has been promised anonymity. Failure to identify the source or to cooperate with these inquiries may result in a contempt sanction.¹⁰³

Fourth, there must be a distinction between acts of good fortune, such as finding confidential materials on the sidewalk, to use Solicitor General Griswold's hypothetical example, and intentional acts such as burglary. These distinctions are appropriately established in legislation, rather than on an *ad hoc* basis by courts. If the legislative branch authorizes an injunction against publication of information stolen by a journalist, the issues become clearer. The Government or private litigant is no longer able to claim, unlike in the *Pentagon Papers* case, that the method of acquisition is a weight in the scales, albeit an undefined weight.¹⁰⁴ Courts are presented with a clear legislative judgment that the interest in protecting property, for example, outweighs the right to publish as opposed to the equity issues presented in the *Pentagon Papers* case. A legislative judgment permits a court to focus on core issues such as whether the interest in property or confidentiality outweighs the interest in free expression, and whether less restrictive measures, such as post-publication proceedings, are more appropriate.

The necessary compromise between freedom of expression and control of confidential information has largely been drawn in the following terms: the publication process is protected in almost all circumstances, but post-publication sanctions are applicable to sources who violate confidentiality agreements, or to journalists who act illegally while gathering information.¹⁰⁵ This resolution reflects our society's aversion to prior restraints. To add a point of nuance, there are rare

¹⁰³ As one attorney commented on the *Business Week* proceedings:

The problem that this underscores is what is wrong with the entire procedure of a hearing about "How did you get this material?" says one First Amendment specialist who asked not to be identified. "As soon as you get a reporter on the stand to talk about newsgathering, your source is at risk. I have no doubt that in this case the reporter thought that she would be able to protect her source.

"I am more concerned by the hearings on 'Where did you get this?' than by the prior-restraint issues. The proceedings are unprecedented and terrifying," the lawyer says, adding, "If worst comes to worst, you go into contempt on the grounds that it doesn't matter [where you got the material] and take your appeal from that."

Claudia MacLachlan, *Did Business Week Fold Too Easily?*, NAT'L L.J., Oct. 23, 1995, at A1, A21 (alteration in original).

¹⁰⁴ See *New York Times v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring).

¹⁰⁵ See, e.g., *Ford Motor Co. v. Lane*, 1999 U.S. Dist. LEXIS 13736 (E.D. Mich. Sept. 7, 1999) (denying request for preliminary injunction but noting that the operator of a Web site may be subject to criminal prosecution for improperly acquiring information).

instances in which the method of information gathering illuminates the nature of the information and the consequence of its publication.¹⁰⁶

Two prior restraint cases provide insight into instances when information-gathering methods should or should not be considered. In the first case, the information-gathering methods diverted attention from the appropriate issues, and in the second case, the manner in which the information was acquired was an appropriate part of the analysis.

B. *Titicut Follies*

The Bridgewater Correctional Institution, run by the Massachusetts Department of Corrections, is a unique facility housing civilly committed mentally ill patients with criminally insane inmates.¹⁰⁷ The “repulsive reality”¹⁰⁸ of Bridgewater is captured in “Titicut Follies,” a documentary film produced by Frederick Wiseman.¹⁰⁹ The rawness of “Titicut Follies” is reflected in the following passage from the film journal *Sight & Sound*:

In another sequence, an emaciated old man who hasn't eaten in two days is led naked to a room where the same doctor informs him that he has a choice of eating voluntarily or being force-fed. When he doesn't respond, four guards hold him down by twisting towels round his wrists and ankles while the doctor inserts a tube into his nose and down his throat. The doctor then stands on a chair and pours liquid down a funnel connected to the tube, all the while holding a cigarette in his mouth, the ash getting precariously longer. In the middle of the sequence, Wiseman cuts to a shot of the man being shaved meticulously a few days later; it takes a while for us to realize that we are watching a corpse being prepared for burial. The body is laid out in a coffin, dressed in an ill-fitting suit; better cared for, one might think, in death than in life.¹¹⁰

The film received critical acclaim when it was shown in 1967, but state officials quickly objected to the film's “excessive nudity.”¹¹¹

¹⁰⁶ See *infra* text accompanying notes 153-203.

¹⁰⁷ See *Commonwealth v. Wiseman*, 249 N.E.2d 610, 612 (Mass. 1969).

¹⁰⁸ *Id.* at 614 n.5.

¹⁰⁹ See *id.* at 612.

¹¹⁰ Charles Taylor, *Titicut Follies*, SIGHT AND SOUND, Spring 1988, at 100, 102.

¹¹¹ *Wiseman*, 249 N.E.2d at 613. For discussion of the political outcry surrounding “Titicut Follies,” see Taylor, *supra* note 110, at 100-01; *Tempest in a Snakepit*, NEWSWEEK, Dec. 4, 1967, at 109.

Two legal actions seeking to prevent exhibition of the film were brought, each resulting in distinct outcomes. In the first, *Cullen v. Grove Press, Inc.*,¹¹² four correctional officers sought a preliminary injunction on the ground that the film violated *their* right of privacy.¹¹³ A federal district court found that the film was not a false report of the conditions at Bridgewater and thus, its exhibition was protected by the First Amendment.¹¹⁴ In the second case, *Commonwealth v. Wiseman*,¹¹⁵ state officials claimed that the film invaded the inmates' privacy and that Wiseman violated contract provisions concerning the production and exhibition of the film.¹¹⁶ A state superior court prohibited all exhibitions of the film, but the Massachusetts Supreme Judicial Court modified the decree to allow exhibitions to specialized audiences such as sociologists, social workers, and psychiatrists.¹¹⁷ Both the *Cullen* and *Wiseman* opinions are troubling, albeit for different reasons.

Cullen involved the same New York privacy statute¹¹⁸ that had been at issue in *Time, Inc. v. Hill*.¹¹⁹ Based upon the Supreme Court's *Hill* opinion, the court in *Cullen* believed the appropriate test was whether the subject matter was of public interest and whether the film gave a recklessly false account of the conditions at Bridgewater.¹²⁰ Judge Mansfield regarded the public's need to be informed of the government's treatment of the mentally ill as "both legitimate and healthy."¹²¹ Additionally, he concluded the film was an accurate portrayal of the "gruesome and depressing" environment at Bridgewater.¹²² The district court's preference for open

¹¹² 276 F. Supp. 727 (S.D.N.Y. 1967).

¹¹³ See *id.* at 728.

¹¹⁴ See *id.* at 731.

¹¹⁵ 249 N.E.2d 610 (Mass. 1969).

¹¹⁶ See *id.* at 613-14.

¹¹⁷ See *id.* at 618.

¹¹⁸ See N.Y. CIV. RIGHTS LAW § 50 (Consol. 1982).

¹¹⁹ 385 U.S. 374 (1967) (ruling that false light invasion of privacy claims concerning matters of public interest require proof that the defendant acted with knowledge of falsity or reckless disregard of the truth).

¹²⁰ See *Cullen*, 276 F. Supp. at 729.

¹²¹ *Id.* Judge Mansfield continued:

Quite aside from the fact that substantial sums of taxpayer's money are spent annually on such institutions, there is the necessity for keeping the public informed as a means of developing responsible suggestions for improvement and of avoiding abuse of inmates who for the most part are unable intelligently to voice any effective suggestions or protests. Distasteful as the subject matter may often be, it represents an ever-increasing phenomenon in our society that cannot be swept under the rug.

Id.; see also *Commonwealth v. Wiseman*, 398 U.S. 960, 962 (1970) (Harlan, J., dissenting from denial of cert.) ("It is important that conditions in public institutions should not be cloaked in secrecy, lest citizens may disclaim responsibility for the treatment that their representative government affords those in its care.").

¹²² *Cullen*, 276 F. Supp. at 730.

discussion of matters of public interest, like that of the Supreme Court in *Hill*, appropriately discounted the guards' privacy claim.¹²³ However, the *Hill* test was designed for post-publication actions and its application to a request for a preliminary injunction was misplaced because it left open the possibility of an injunction if falsity were found. Apart from that flaw, the fundamental conclusion of the opinion was sound—government officials have limited expectations of privacy concerning their on-the-job actions and true reports of those actions do not justify prior restraints.¹²⁴ Though it dealt with the issue only briefly, the district court stated that even if Wiseman violated an understanding with the guards about what would be portrayed and where the film would be exhibited, a prior restraint would still be impermissible.¹²⁵

In *Wiseman*, state officials claimed that Wiseman was granted access to Bridgewater based upon conditions, such as requiring that only legally competent inmates who signed written releases be portrayed and that the film would not be released without approval from state officials.¹²⁶ These conditions were not written

¹²³ The court stated that inmates could bring privacy suits. *See id.* at 731; *infra* note 133 and accompanying text.

¹²⁴ Commentators and courts have generally disfavored injunctions as remedies for invasion of privacy cases. *See, e.g.,* *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971) (invasion of privacy is not a sufficient basis for an injunction prohibiting peaceful distribution of literature concerning real estate broker's practices); *In re Providence Journal Co.*, 820 F.2d 1342, 1350 (1st Cir. 1986) (an infringement upon privacy is an insufficient basis for a prior restraint) *modified by* 820 F.2d 1354 (1st Cir. 1987) (en banc); *Gilbert v. National Enquirer, Inc.*, 51 Cal. Rptr. 2d 91, 98 (Cal. Ct. App. 1996) (harm to right of privacy and reputation "are not the sort of 'extraordinary circumstances' required to justify a prior restraint") (quoting *Wilson v. Superior Court*, 532 P.2d 116 (Cal. 1975)); Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 349 (1979) (discussing that prior restraint is inappropriate in a privacy case); John W. Wade, *The Tort Liability of Investigative Reporters*, 37 VAND. L. REV. 301, 340 (1984); *cf. Wilson v. Superior Court*, 532 P.2d 116, 121 (Cal. 1975) (holding that prior restraint was inappropriate in a defamation case). *But see Huskey v. National Broad. Co.*, 632 F. Supp. 1282, 1294-96 (N.D. Ill. 1986) (concluding that injunctive relief is not improper to prevent a private wrong such as invasion of privacy).

In *Near v. Minnesota*, 283 U.S. 697 (1931), Chief Justice Hughes noted that with certain categories of expression, such as obscenity, prior restraints were permissible. *Id.* at 716. After noting that these categories were not at issue in *Near*, Chief Justice Hughes added, "Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity." *Id.* This statement was followed with a citation to Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916). Justice Harlan later read this passage as rejecting Pound's argument "that if the material was unprotected the time of suppression was immaterial." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149 (1967).

¹²⁵ *See Cullen*, 276 F. Supp. at 731.

¹²⁶ *See Wiseman*, 249 N.E.2d at 612.

and Wiseman sharply disputed their existence at trial.¹²⁷ It is clear that Wiseman was constantly accompanied by guards during the 29 days he filmed at Bridgewater.¹²⁸ Wiseman thought that the guards would prevent him from filming inmates who were incompetent to consent to the filming.¹²⁹ Significantly, no government officials objected to Wiseman's methods while he was filming.¹³⁰ Reviews of the film, praising Wiseman and condemning the conditions at Bridgewater, set in motion a political firestorm in which politicians condemned Wiseman for exploiting naked inmates for profit.¹³¹

The trial judge regarded Wiseman's motives as crassly commercial and believed the film trafficked on the "loneliness, on the human misery, degradation and sordidness in the lives of these unfortunate humans."¹³² Although no inmates or their relatives testified against the film, the trial judge concluded that any releases obtained

¹²⁷ See Comment, *The "Titicut Follies" Case: Limiting the Public Interest Privilege*, 70 COLUM. L. REV. 359, 360 (1970); *Judge Lifts Ban on "Titicut Follies" Film*, NEWS MEDIA & LAW, Fall 1991, at 36.

Wiseman initially approached the Superintendent of Bridgewater with the idea of a film in 1965. The superintendent thought a film would improve conditions at Bridgewater by helping obtain increased allocations from the legislature. Wiseman outlined the approach he would take in a letter to the Commissioner of Corrections: "No people would be photographed who do not have the competency to give a release. . . . The question of competency would in all cases be determined by the superintendent and his staff and we would completely defer to their judgment." Taylor, *supra* note 110 at 100 (quoting letter from Frederick Wiseman to John Gavin, Aug. 1965). Permission to film at Bridgewater was given to Wiseman after the Attorney General wrote an advisory opinion that "consenting" inmates could be filmed. While filming, Wiseman was accompanied by a guard and he assumed that the guard, as a representative of the superintendent, was making judgments as to who was competent to give releases. See Taylor, *supra* note 110, at 100.

On the issue of whether he agreed not to release the film without approval from state officials, Wiseman stated that only an "absolute fool" would "contract away" First Amendment rights. Taylor, *supra* note 110, at 101. "I mean particularly to three such undistinguished 'filmmakers' as the Commissioner of Corrections, the superintendent and the Attorney General. You'd have to be totally out of your mind to give them, or anybody else, but particularly them, final cut." *Id.*

¹²⁸ See Taylor, *supra* note 110, at 102.

¹²⁹ See *id.* at 100. The trial court concluded that valid releases were obtained from only a small number of the inmates shown in the film. See *Commonwealth v. Wiseman*, 249 N.E.2d at 613.

¹³⁰ See Taylor, *supra* note 110, at 102.

¹³¹ See *id.* at 100-101; *You Start Off with a Bromide: Conversation with Film Maker Frederick Wiseman*, CIV. LIBERTIES REV., Winter/Spring 1974, at 52, 65-66 [hereinafter *Conversation with Wiseman*].

¹³² Comment, *supra* note 127, at 361 (quoting *Commonwealth v. Wiseman*, No. 875-38 (Mass. Super. Ct. Jan. 4, 1968) (unpublished superior court opinion)). Wiseman stated that Judge Harry Kalus "hated me and hated the movie, from the first day. The moment the thing got started, I knew I was cooked." Taylor, *supra* note 110, at 101.

were invalid, that the film would cause humiliation, and that the Commonwealth was obligated to protect the right of privacy of the inmates against "exploitation."¹³³ In addition to prohibiting exhibition, the superior court ordered Wiseman to surrender the film and unused footage to the Attorney General so that it could be destroyed.

The Supreme Judicial Court's opinion treated the case as presenting both breach of contract and invasion of privacy issues,¹³⁴ but neither analysis is satisfactory. The appellate court agreed with the trial court that Wiseman had not obtained written releases from those who were competent to understand a release.¹³⁵ The court imposed a virtually impossible standard upon documentary film makers, indicating it would not regard a release from a competent person as valid until the person "giving it had seen the film and fully understood how he was to be portrayed."¹³⁶ This standard vastly exceeds anything Wiseman and state officials discussed. Moreover, this standard allows subjects who have second thoughts about portrayals that turn out to be unflattering to sharply restrict speech about themselves. As a consequence, the documentary form would be converted into a public relations tool, rather than a form of social criticism.

Even more troubling is the appellate court's belief that the contract provision concerning consent was a condition sufficient to override Wiseman's First Amendment right to exhibit the film. The appellate court regarded Bridgewater as a place that was not "open for public inspection and photography,"¹³⁷ apparently an attribute which allowed the state to attach conditions to entry. Yet, this proves too much. Even the state's power to deny Wiseman access to Bridgewater would not mean that *any* condition, no matter how burdensome, could be imposed upon him.

¹³³ See *Commonwealth v. Wiseman*, 249 N.E.2d 610, 614 (Mass. 1969) (quoting *Commonwealth v. Wiseman*, No. 875-38 (Mass. Super. Ct. Jan. 4, 1968) (unpublished superior court opinion)). One inmate was listed as a plaintiff through the superintendent as his guardian. See *id.* at 613 n.3. The irony of regarding the state as the guardian of an inmate's privacy, when the state's otherwise callous treatment of inmates is depicted by the film, escaped Judge Kalus.

¹³⁴ See *id.* at 616.

¹³⁵ See *id.* at 614-15.

¹³⁶ *Id.* at 617 n.9. Consider, for example, Wiseman's 1974 discussion of his method of getting consent from his subjects:

Wiseman: I don't get written releases, but I do get consents. Either before the sequence is shot or just after, I explain to the participants that I'm making a film that's going to be shown on television . . . I ask whether they object to my using the sequence in the film. And I tape record the question and the answer. [Civil Liberties Review]: Do they ever object?

Wiseman: Very rarely. And if they do object, I don't use the sequence. *But the objection has to be registered at that time. In other words, I don't go back and look for people a year after the film is edited and ask permission then.*

Conversation with Wiseman, *supra* note 131, at 64 (emphasis added).

¹³⁷ *Wiseman*, 249 N.E.2d at 617.

Assume for example, that instead of a contract, the state had a statute governing portrayals of inmates. It is difficult to imagine an appellate court not examining the constitutionality of the statute. Yet, the Supreme Judicial Court was uninterested in pursuing any substantive First Amendment analysis of the contract issues and quickly shifted to privacy issues.¹³⁸

Even assuming "Titicut Follies" portrayed inmates without their consent, the branch of privacy known as public disclosure acknowledges that nonconsensual disclosures of embarrassing true facts are protected if newsworthy. The Massachusetts appellate court did not regard exhibition of "Titicut Follies" with the same public importance that the *Cullen* court had.¹³⁹ Instead, it concocted the premise that limited exhibitions of the film to restricted audiences of professionals, such as sociologists and social workers, would benefit the public interest.¹⁴⁰ To the Massachusetts Supreme Judicial Court, members of the general public would merely be interested in the film out of curiosity, while exhibition to specialized audiences, "with potential capacity to be helpful," overrode any humiliation of inmates.¹⁴¹ Apart from discounting the benefits from voter pressure on government officials to improve Bridgewater,¹⁴² it is extraordinary, under the First Amendment, to carve out "information elites" while distrusting the general public's use of information.

Wiseman marks the first judicial recognition of a right of privacy by Massachusetts courts. The appellate court viewed privacy as a single concept, probably because of its unfamiliarity with the development of the distinct branches of privacy in other states. In the development of the privacy tort, courts have treated intrusion issues as being distinct from disclosure of private facts.¹⁴³ To the extent that the inmates were made available to *Wiseman* and his film crew, this raises

¹³⁸ See *id.* at 616 (stating that privacy concerns, combined with *Wiseman*'s failure to comply with the consent requirement, justify injunctive relief). In dissenting to the Supreme Court's denial of certiorari, Justice Harlan claimed that the injunction was not "a mere remedy for a breach of contract," but that "invasion of privacy underpins the Massachusetts court's action and that the failure to obtain releases served only to underscore that invasion." *Wiseman*, 398 U.S. at 964 (1970) (Harlan, J., dissenting from denial of cert.).

¹³⁹ Compare *Wiseman*, 249 N.E.2d at 618, with *Cullen v. Grove Press, Inc.*, 276 F. Supp. 727 (S.D.N.Y. 1967).

¹⁴⁰ See *Wiseman*, 249 N.E.2d at 618.

¹⁴¹ *Id.*

¹⁴² Curiously, the appellate court rejected the state's request that it impose a constructive trust on the receipts from previous exhibitions of the film because "the film may indirectly have been of benefit to some inmates by leading to improvement of Bridgewater." *Id.* at 619.

¹⁴³ See, e.g., *Pearson v. Dodd*, 410 F.2d 701, 705 (D.C. Cir. 1969) (holding that the question of whether information is genuinely private or is of public interest should not turn on the manner in which it is obtained); DAVID A. ELDER, *THE LAW OF PRIVACY* § 2.4, at 31-32 (1991) (requiring intent to interfere with solitude; disclosure without intent is not enough).

intrusion issues such as whether the filming unreasonably exceeded the normal conditions of confinement.¹⁴⁴ An injunction against exhibition of the film would not rectify any intrusion that occurred during the filming. However, the primary focus of the Massachusetts appellate court was the effects of the film's exhibition. The court's conclusion that exhibitions to specialized audiences were beneficial, while exhibitions to the general public were harmful, is akin to splitting the baby. If limited exposure of the shocking conditions at Bridgewater overwhelms the inmates' privacy because it is likely to result in improvements at the facility, it is strange to believe that citizens would not react to the film by holding government officials accountable for the conditions depicted in "Ticut Follies."

There is a strange dissonance in the Supreme Judicial Court's opinion. The court acknowledged that public officials consented to production of the film because they thought it "might arouse public interest and lead to improvement" at Bridgewater.¹⁴⁵ However, the court did not recognize that the true beneficiaries of the injunction against general exhibition of the film were government officials. As Wiseman stated, the concern of government officials about privacy was "high-winded pomposity."¹⁴⁶ He added that if the "politicians in Massachusetts were genuinely concerned about the privacy and dignity of the inmates of Bridgewater, they would not have allowed the conditions that are shown in the film to exist. They were more concerned about the film and its effect on their reputations than they were about Bridgewater."¹⁴⁷

Speech about government is widely recognized as being at the core of the First Amendment's protection,¹⁴⁸ yet this value is utterly unacknowledged in the Supreme Judicial Court's opinion. Furthermore, the Massachusetts court referred to no prior

¹⁴⁴ Any serious analysis of whether the filmmaking process was intrusive must acknowledge the fact that Bridgewater was open for tours by visitors. Wiseman claims that in the year before the "Ticut Follies" litigation, 9000 to 10,000 visitors toured the facility. See Taylor, *supra* note 110, at 101. See also *Huskey v. National Broad. Co.*, 632 F. Supp. 1282, 1288-89 (N.D. Ill. 1986) (stating that the determination of whether or not a broadcaster's act of filming a prison inmate is objectionable depends upon the inmate's degree of seclusion).

In *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978), Chief Justice Burger wrote, "Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others." For criticism of this passage, see William E. Lee, *Privacy Intrusions while Gathering News: An Accommodation of Competing Interests*, 64 Iowa L. Rev. 1243, 1279 (1979).

¹⁴⁵ *Wiseman*, 249 N.E.2d at 617.

¹⁴⁶ *Conversation with Wiseman*, *supra* note 131, at 66.

¹⁴⁷ *Id.*; see also *Quantity of Books v. Kansas*, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting) ("If controversial political writings attack those in power, government officials may benefit from suppression although society may suffer.").

¹⁴⁸ See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression, it is the essence of self-government.").

restraint precedents, except to briefly cite a case for the proposition that injunctions must be narrowly tailored.¹⁴⁹ The opinion is out of step with the generally recognized remedy for public disclosure of private facts—a post-publication suit for damages.¹⁵⁰ Interestingly, after the injunction was in place, a group of inmates brought suit for invasion of privacy and a superior court judge ruled that the film had caused no harm to the plaintiffs and had actually benefitted them.¹⁵¹ The prohibition on public exhibitions of the film was lifted in July 1991, when a superior court judge concluded, “As each year passes, the privacy issue of this case is less of a concern to the court than the prior restraint issue.”¹⁵²

C. *In Search of a Response*

From 1956 to 1963, Jane Doe, her husband, and their son were patients of Dr. Roe, a psychiatrist.¹⁵³ In 1973, Roe and her husband, psychologist Peter Poe, published *In Search of a Response*, a three-section book focusing solely on the treatment of the Does.¹⁵⁴ The first section is a monologue by the son, who is labeled “autistic.”¹⁵⁵ The second section is a 354-page account of Jane Doe’s treatment for schizophrenia.¹⁵⁶ The third section is a 613-page description of the husband’s treatment for schizophrenia.¹⁵⁷ The sections concerning the married couple are nearly verbatim discourses of the patients’ conversations with the doctor.¹⁵⁸ The patients disclose exceptionally intimate feelings and emotions, the character of which is revealed in the following brief passage by Jane Doe:

This is the way I have been achieving orgasms—it is frightening. I have a sense of loss of immediate contact—it is not happening between me and Henry, but between me and the fantasy. Will I need the fantasy for the rest of my life to enjoy sex? Henry’s body is not stimulating to me any more—something is robbing me of becoming excited by him. I just want

¹⁴⁹ See *Wiseman*, 249 N.E.2d at 618 (citing *Carroll v. President & Commrs. of Princess Anne*, 393 U.S. 175, 183-84 (1968)).

¹⁵⁰ See *supra* notes 91 & 124 and accompanying text.

¹⁵¹ See Letter from Blair L. Perry, attorney for Frederick Wiseman, to the author (Feb. 14, 1998) (on file with author).

¹⁵² *Judge Lifts Ban on “Titicut Follies” Film*, NEWS MEDIA & LAW, Fall 1991, at 36, 37 (quoting a Suffolk, Massachusetts, Superior Court judge).

¹⁵³ See Respondent’s Brief at 5, *Roe v. Doe*, 417 U.S. 907 (1974) (No. 73-1446).

¹⁵⁴ See *id.* at 1-2.

¹⁵⁵ See *Amici Curiae* Brief for the American Psychiatric Association, the American Psychoanalytic Association, and the American Orthopsychiatric Association at 6, *Roe* (No. 73-1446) [hereinafter APA Brief].

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See *id.* at 6-7.

to be more sinful with him—lewd—I like to say things to him, or if I do say—he should respond—but he doesn't. I would like to have a homosexual relationship—then I wouldn't have to have a fantasy or be lewd or sinful.¹⁵⁹

In addition to the patients' dialogues, there are 1,716 footnotes providing the authors' explanations and commentary.¹⁶⁰

Jane Doe's husband died prior to publication of the book,¹⁶¹ but she brought suit, claiming she was identified by the book and did not consent to its publication.¹⁶² The authors argued that they disguised the identity of the patients by changing their names and the number of their children¹⁶³ and that Jane Doe orally consented to publication earlier while she was undergoing therapy.¹⁶⁴ A New York supreme court issued a preliminary injunction limiting circulation of the book to scientific readers.¹⁶⁵ The court ruled that "[w]hen confidential information is learned, in confidence, under a contract that it shall not be disclosed," the doctrine of prior restraint did not apply.¹⁶⁶ The appellate division of the supreme court, drawing upon privacy and the confidentiality of the physician-patient relationship, modified the injunction to preclude all distribution of the book during the litigation.¹⁶⁷ The United States Supreme Court granted certiorari, but after hearing oral argument, the Court dismissed the writ as improvidently granted.¹⁶⁸ The New York Supreme Court then issued a permanent injunction against any distribution of the book and awarded \$20,000 in compensatory damages.¹⁶⁹

The manuscript was prepared while the Does were being treated by Roe, and written consent to a waiver of confidentiality was sought at that time but not obtained.¹⁷⁰ Roe claimed that oral consent was obtained during the therapy process,

¹⁵⁹ Respondent's Brief at 7-8, *Roe* (No. 73-1446).

¹⁶⁰ See APA Brief at 6, *Roe* (No. 73-1446).

¹⁶¹ See *id.* at 5.

¹⁶² See *id.* at 5-6.

¹⁶³ See Petitioner's Brief, at 4 n.2, *Roe* (No. 73-1446).

¹⁶⁴ See *id.* at 4.

¹⁶⁵ See *id.* at 5.

¹⁶⁶ Petition for Writ of Certiorari, app. C at 4a, *Roe* (No. 73-1446) [hereinafter *Doe Petition*].

¹⁶⁷ See *Doe v. Roe*, 345 N.Y.S.2d 560 (N.Y. App. Div. 1973) (per curiam), *aff'd mem.*, 307 N.E.2d 823 (1973), *amended by*, 34 N.Y.2d 562 (1974) (granting motion to amend remittitur).

¹⁶⁸ See *Roe v. Doe*, 420 U.S. 307, 307 (1975) (per curiam).

¹⁶⁹ See *Doe v. Roe*, 400 N.Y.S.2d 668, 679 (1977). The court stated that a physician "impliedly covenants to keep in confidence all disclosures made by the patient concerning the patient's physical or mental condition as well as all matters discovered by the physician in the course of examination or treatment." *Id.* at 674.

¹⁷⁰ See APA Brief at 8-9, *Roe* (No. 73-1446).

but the court issuing the preliminary injunction ruled: "A doctor who wishes to publish confidential material about his patient and relies on the patient's consent should take care to get that consent in clear, unambiguous written form."¹⁷¹ The court issuing the permanent injunction found that the authors were "well aware" that they did not have consent for publication.¹⁷² Due to the extraordinary nature of the physician-patient relationship that develops during psychotherapy, consent obtained during therapy has little likelihood of being informed and voluntary; the patient becomes emotionally dependent upon the therapist and this may make it difficult for the patient to resist the doctor's request.¹⁷³ Given the lengthy period of time between preparation of the manuscript and its publication, the extraordinary nature of the revelations, and Jane Doe's protests through her attorney when she learned of the planned publication,¹⁷⁴ the requirement of written consent obtained in noncoercive circumstances seems reasonable.

Lack of consent, of course, is only an issue if Doe is identified. The field of psychiatry depends upon publication of case studies, but the custom in the field is to disguise the identity of patients and where disguise is not possible, the obligation of confidentiality prevails.¹⁷⁵ As Josef Brauer and Sigmund Freud wrote in the introduction to their pathbreaking *Studies on Hysteria*,

[T]he subject matter with which we deal often touches upon our patients' most intimate lives and history. It would be a grave breach of confidence to publish material of this kind, with the risk of the patients being recognized and their acquaintances becoming informed of facts which were confided only to the physician. It has therefore been impossible for us to make use of some of the most instructive and convincing of our observations.¹⁷⁶

¹⁷¹ Doe Petition, app. C at 6a, *Roe* (No. 73-1446).

¹⁷² *Doe*, 400 N.Y.S.2d at 671. In the portion of the book dealing with the husband's treatment, he is quoted as saying, "Who do you think you are, writing a book? . . . My life has been wrecked by you, you lousy stinking analyst. The treachery of it to make such a book. . . . You are a mad scientist." APA Brief at 28 n.26, *Roe* (No. 73-1446).

¹⁷³ See Case note, *Roe v. Doe: A Remedy for Disclosure of Psychiatric Confidences*, 29 RUTGERS L. REV. 190, 194-95 (1975).

¹⁷⁴ Prior to the book's publication, Doe learned through a colleague that Roe was about to publish a book. When the contents were described, Doe recognized it as the manuscript that had been prepared while she was in therapy with Roe. Doe's attorney then wrote to Roe, asking for an opportunity to review the manuscript to determine whether it contained a violation of the physician-patient confidentiality. See APA Brief at 5-6, *Roe* (No. 73-1446).

¹⁷⁵ See *Doe*, 400 N.Y.S.2d at 677 n.9 (referring to standards of the Group for the Advancement of Psychiatry).

¹⁷⁶ JOSEF BREUER & SIGMUND FREUD, *STUDIES ON HYSTERIA* at xxix (Hogarth Press 1955).

The court issuing the preliminary injunction found that the defendants took reasonable steps to disguise the patients' identities and the book would not "really identify plaintiff as the patient to someone who did not already know that plaintiff was the patient."¹⁷⁷ There are two problems with this approach. First, the book was not published under a pseudonym, and because psychotherapists, like Jane Doe, often reveal their psychiatrists' names to their professional colleagues, many of Doe's colleagues would readily become aware of Doe's identity.¹⁷⁸ Second, Jane Doe was unconcerned that the book would identify her to all readers of the book. Rather, her concern was that her acquaintances, who were familiar with distinguishing characteristics of her life, would recognize her.¹⁷⁹ In addition to accurately listing characteristics such as the ages, education, and religious affiliation of the Does, the book left undisguised the following rather unusual circumstances that would readily allow identification by those who knew the Does: the son was an autistic child who had written three operas while young; the husband went to Harvard Law School, dropped out to become a speech writer, then resumed the study of law at the age of 50 and became an attorney; the wife was a psychotherapist whose first husband died and her father attempted to hang himself; and after the Doe's divorce, the former husband married a physically disabled practicing lawyer.¹⁸⁰ The court issuing the preliminary injunction concluded that the authors met the "usual standards" for disguising patient identities,¹⁸¹ but professional organizations such as the American Psychiatric Association argued to the contrary. To these organizations, if a case study is published without consent, there must be no reasonable likelihood that the subject can be identified.¹⁸²

¹⁷⁷ See Doe Petition, app. C at 5a, *Roe* (No. 73-1446).

¹⁷⁸ See APA Brief at 30, *Roe* (No. 73-1446).

¹⁷⁹ See Respondent's Brief at 33, *Roe* (No. 73-1446).

¹⁸⁰ See APA Brief at 30, *Roe* (No. 73-1446); Respondent's Brief at 2, *Roe* (No. 73-1446). In addition, the book disclosed that some treatment took place at the psychiatrist's summer home in Katonah, New York. See *id.* at 7 n.4.

¹⁸¹ See Doe Petition, app. C at 5a, *Roe* (No. 73-1446).

¹⁸² See APA Brief at 30, *Roe* (No. 73-1446). According to Dr. Jeremy A. Lazarus, chairman of the American Psychiatric Association's ethics committee, a patient's right to confidentiality survives even death. See Alessandra Stanley, *Poet Told All; Therapist Provides the Record*, N.Y. TIMES, July 15, 1991, at A1. This explains the outcry surrounding Diane Middlebrook's biography of the late poet Anne Sexton. Middlebrook was granted access to tape recordings and other materials relating to Sexton's therapy with Dr. Martin Orne. See Martin T. Orne, *Foreward* to DIANE W. MIDDLEBROOK, ANNE SEXTON, at xvi-xvii (1991); see also Martin T. Orne, *The Sexton Tapes*, N.Y. TIMES, July 23, 1991, at A21 (responding to criticism of his decision to release information regarding Anne Sexton's psychiatric treatment). See generally Sharon Carton, *The Poet, the Biographer and the Shrink: Psychiatrist-Patient Confidentiality and the Anne Sexton Biography*, 10 U. MIAMI ENT. & SPORTS L. REV. 117 (1993) (analyzing the decision to release information regarding Anne Sexton's psychiatric treatment); Tamar R. Lehigh, *To Bedlam and Part Way Back: Anne Sexton, Her Therapy Tapes, and the Meaning of*

Roe argued that the book was a sufficiently important contribution to medical knowledge to justify the breach of the confidential relationship.¹⁸³ The court issuing the permanent injunction expressed discomfort about judicial competence to evaluate a book's contribution to scientific knowledge,¹⁸⁴ a curious view given judicial assessment of elusive matters such as artistic or scientific value in obscenity cases. More to the point is the court's view that exceptions to confidentiality, such as the obligation to report gunshot wounds, are not based on the education of the medical profession.¹⁸⁵ Thus, the court was unwilling to balance the educational value of a book, based upon a violation of a confidential relationship, against the benefits of confidentiality. This is a highly defensible position. Few patients, if any, would be open with their psychiatrist if the remotest prospect of a book loomed in the background.¹⁸⁶ In addition, the scientific knowledge gleaned by Roe from the treatment of the Does could have been presented without the extensive identifying characteristics.

The court issuing the permanent injunction denied that its action was a prior restraint or "censorship within constitutional meaning."¹⁸⁷ The court offered two reasons to support its conclusion: 1) the book had been published, and 2) it "offend[s] against the plaintiff's right of privacy, contractual and otherwise, not to have her innermost thoughts offered to all for the price of this book."¹⁸⁸ The first point is

Privacy, 2 UCLA WOMEN'S L.J. 165 (1992) (analyzing the debate over the release of information regarding Anne Sexton's psychiatric treatment as a challenge to conventional notions of privacy).

¹⁸³ See *Doe*, 400 N.Y.S.2d at 677 (1977).

¹⁸⁴ See *id.* Nonetheless, the court found that the defendants failed to show that the book was a major contribution to scientific knowledge. See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ As the American Psychiatric Association stated, an atmosphere of strict confidentiality is essential to effective mental health therapy:

[P]atients in psychotherapy are often required to disclose intimate and embarrassing acts, thoughts, feelings and fantasies. These revelations include material that belongs to people's irrational and primitive selves, and which people often quite appropriately decline to share even with their closest loved ones. Indeed, some of these matters are so painful to the patient himself that they have been repressed—*i.e.*, removed from his own conscious memory and stored in his unconscious. In the therapeutic process this intimate and painful material is brought to consciousness and articulated only because it is essential for treatment. If, however, this material were disclosed to family, colleagues or friends the result would be devastating. Thus, unless assured of absolute confidentiality, patients will be unwilling to seek the psychotherapeutic treatment necessary for restoration of mental health.

APA Brief at 3, *Roe* (No. 73-1446).

¹⁸⁷ *Doe*, 400 N.Y.S.2d at 678.

¹⁸⁸ *Id.*

based upon *Kingsley Books, Inc. v. Brown*,¹⁸⁹ an early obscenity case in which the Court affirmed a state law allowing an injunction against further distribution of obscene material.¹⁹⁰ In *Kingsley Books*, Justice Frankfurter distinguished the law at issue from that which had been ruled invalid in *Near v. Minnesota*¹⁹¹ because the latter involved "censorship," injunctions prohibiting future issues of a newspaper because past issues had been found scandalous.¹⁹² While the *Doe* court was correct in that its injunction was not aimed at material not yet published,¹⁹³ it erred in its claim that state actions seeking to prevent further distribution of published material are not prior restraints. For example, in *Bantam Books, Inc. v. Sullivan*,¹⁹⁴ the Court found an informal system aimed at preventing further distribution of allegedly obscene books and magazines to be an impermissible prior restraint.¹⁹⁵

In addition, prior restraint analysis should not be irrelevant because there was a contractual obligation of nondisclosure. Although *Doe* was decided before the Court developed the "lawfully obtained" doctrine, one could argue that the information acquired from the patient was only "lawfully acquired" to the extent that the agreement of nondisclosure was observed. Conceivably, this would mean that any time an agreement of nondisclosure was violated, enforcement of the agreement would not trigger substantive First Amendment analysis. This approach proves too much; contracts should be enforced because they comport with public policy, not because they were made.

Assuming that the injunction is properly categorized as a prior restraint, the analysis shifts to whether the interest in protecting Doe's privacy justified the

¹⁸⁹ 354 U.S. 436 (1957). It is a mistake to read *Kingsley Books* as resting solely on the fact that the injunction targeted previously published material. As the Court noted in *Marcus v. Search Warrant*, 367 U.S. 717 (1961), the statute in *Kingsley Books* had important procedural safeguards. See *id.* at 734-38. Furthermore, *Kingsley Books* is an obscenity case; the Court regards the social interest in potentially obscene materials to be less than with political or other forms of social expression. See *Carroll v. President and Commrs. of Princess Anne*, 393 U.S. 175, 182 (1968).

¹⁹⁰ See *Kingsley Books*, 354 U.S. at 445.

¹⁹¹ 283 U.S. 697 (1931); see also *supra* note 124 and accompanying text.

¹⁹² See *Kingsley Books*, 354 U.S. at 445 (quoting Justice Hughes in *Near*, 283 U.S. at 713). Furthermore, the speech at issue in *Near* dealt with public officials rather than obscenity. See *Near*, 283 U.S. at 713; see also *New York Times Co. v. United States*, 403 U.S. 713, 726 note * (1971) (Brennan, J., concurring) (distinguishing between restraints aimed at allegedly obscene materials and those aimed at speech about government); *supra* note 187.

¹⁹³ The book was published in February 1973, see *Doe* Petition at 3, and the injunction against all distribution pending the outcome of the litigation was issued on June 28, 1973, see *Doe v. Roe*, 345 N.Y.S.2d 560, 561 (App. Div. 1973) (per curiam). During this period, 220 copies of the book were sold. See *Doe*, 400 N.Y.S.2d at 679.

¹⁹⁴ 372 U.S. 58 (1963).

¹⁹⁵ See *id.* at 71-72.

extraordinary remedy of a permanent injunction. The court in *Doe* offered an extensive analysis of the nature and sources of the physician's confidentiality obligation,¹⁹⁶ and at points touched on the compelling necessity of preserving patient confidentiality, but seemed satisfied to find a contractual obligation of confidentiality.¹⁹⁷ The existence of a contract, however, represents only the beginning of analysis of questions such as the following: 1) whether violation of the contract causes irreparable harm that cannot be adequately remedied through less restrictive methods such as monetary damages or a constructive trust;¹⁹⁸ and 2) whether enforcement of the contract through an injunction, serves an interest of the highest order. The irreparable harm is readily apparent—revelation of Doe's incestuous fantasies about her son, for example, would scar their relationship, and public knowledge of her innermost thoughts would be the most extreme assault on her dignity.¹⁹⁹ This case is one of those extraordinary situations where monetary damages or a constructive trust would do little to compensate for the harm caused by the breach. Secondly, enforcement of the contract would not only benefit Doe, it also would serve a compelling social interest by encouraging those needing mental therapy to seek treatment. A candid discussion of the inner-self, including exposure of repressed or unconscious anti-social thoughts and urges, obviously requires an expectation of confidentiality. Absent this expectation, prospective patients would be deterred from seeking treatment, or treatment would be prolonged or ineffective due to a lack of candor.

An especially intriguing aspect of *Doe* is the treatment of the psychiatrist's husband, Peter Poe, who co-authored the book but did not have a contractual relationship with Doe. The court held that Poe knew that the source of the book

was the patient's production in psychoanalysis. He knew, as well, and perhaps better than Roe, of the absence of consent, of the failure to

¹⁹⁶ See *Doe*, 400 N.Y.S.2d at 671-75.

¹⁹⁷ See *id.* at 675. The court cited two cases involving contractual duties to maintain a confidence: *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), and *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972). *Kewanee Oil* is a trade secrets case which did not entail any First Amendment analysis. See *Kewanee Oil*, 416 U.S. at 474. *Marchetti* involved a CIA secrecy agreement and the Fourth Circuit did little analysis of the breadth of the agreement restraining disclosure of classified information. See *Marchetti*, 466 F.2d at 1316. Although neither case seems directly on point for *Doe*, one can understand that a preexisting agreement not to disclose information, without which the information would not have been obtained, is a factor that helps illuminate the consequences of disclosure.

¹⁹⁸ Cf. *Snepp v. United States*, 444 U.S. 507, 515-16 (1980) (holding that a constructive trust is an appropriate remedy for a breach of trust by a former CIA employee).

¹⁹⁹ The court issuing the permanent injunction found that Doe suffered economic loss, required medical treatment, had insomnia and nightmares, became reclusive, and suffered acute embarrassment on learning close associates had read the book. See *Doe*, 400 N.Y.S.2d at 679.

disguise. If anyone was the actor in seeing to it that the work was written, that it was manufactured, advertised and circulated, it was Poe. He is a co-author of the [book] and a willing, indeed avid, co-violator of the patient's rights and is therefore equally liable.²⁰⁰

This view veers sharply away from contract law and treats Poe as a joint tortfeasor in a breach of confidence.²⁰¹ This theory could apply, for example, to a journalist who received leaked information with the knowledge that the leaker was breaking a confidential relationship.²⁰² The tort of breach of confidence is in too rudimentary a form to justify application to members of the press who publish information with knowledge that it was originally divulged to the journalist's source under an expectation of confidentiality. This passage in *Doe* is best understood as being limited to the extraordinary circumstance of co-authorship of a book based upon the most intimate disclosures of personal thoughts that the subjects, and society, reasonably believed would not be disclosed.

Doe illustrates that the provenance of information should not be the determinative factor in cases where an injunction against publication is sought. Rather, it is properly considered only insofar as it clarifies the nature of the interest advanced by

²⁰⁰ *Id.* at 678.

²⁰¹ See Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1449 (1982). For additional analysis of the breach of confidence tort, see Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1 (1995).

²⁰² In his proposal for a breach of confidence tort, G. Michael Harvey argues that no obligation of confidentiality should "attach to third parties who receive information subject to an obligation of confidence, but who have not explicitly assumed this obligation themselves." G. Michael Harvey, Comment, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2430 (1992). Harvey adds that "to hold a journalist liable depending upon her 'knowledge' of the confidentiality of the information received from a source would have an impermissible chilling effect upon the publication of legitimate news." *Id.* at 2431. See also Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1280 (1976) (stating that the values of the First Amendment would be harmed if its protection "were withdrawn on the ground of knowledge on the part of the media that the truth had come to light through legally reprehensible means employed by others."). Both Harvey and Professor Hill are writing about circumstances where the press receives information with knowledge that the source is violating an obligation of confidentiality. For commentary on the right of the press to do more than passively receive information, including the right to induce a source to break a non-disclosure contract, see Mark J. Chasteen, Comment, *In Search of a Smoking Gun: Tortious Interference with Nondisclosure Agreements as an Obstacle to Newsgathering*, 50 FED. COMM. L.J. 483 (1998). For an argument that the publisher as well as the source of a leak should be liable for invasion of privacy, see Joseph Elford, Note, *Trafficking in Stolen Information: A "Hierarchy of Rights" Approach to the Private Facts Tort*, 105 YALE L.J. 727 (1995).

the injunction and the harm stemming from publication. This is not the same argument as that advanced by the Government in the *Pentagon Papers* case where the presence of a so-called illegitimate provenance was an undefined "weight in the scales."²⁰³ The alternate analysis of this Article subsumes the origin of the information into consideration of the consequences of publication. Thus, the presence of a contract in *Doe* does not define by itself whether publication of the book would cause harm, nor should it be an undefined weight that is primarily a rhetorical facade for unarticulated premises. Instead, consideration of how the psychiatrist in *Doe* acquired the information and the expectations of the parties concerning use of the information helps answer questions about the consequences of publication.

II. POST-PUBLICATION PENALTIES

In *Smith v. Daily Mail Publishing Co.*,²⁰⁴ the Court stated 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."²⁰⁵ This test raised the prospect that unlawful acquisition of information leaves the press open to punishment for both the illegal acquisition and the subsequent publication of information.²⁰⁶ This begs the question of what constitutes unlawful acquisition of information. This section first addresses those instances where the press does no more than merely ask for information or receives information from a willing source. Second, it addresses those situations where the press uses technology such as hidden cameras to acquire information. Both analyses question whether improper acquisition may be linked to the issues concerning publication.

²⁰³ 2 PENTAGON PAPERS HISTORY, *supra* note 33, at 898 (statement of United States Attorney Whitney North Seymour, Jr., at oral argument before the Court of Appeals for the Second Circuit).

²⁰⁴ 443 U.S. 97 (1979).

²⁰⁵ *Id.* at 103 (emphasis added).

²⁰⁶ In *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the Court noted that this is an open question. *See id.* at 535 n.8; *see also* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 (1978) (noting that the Court was not addressing the applicability of a state law criminalizing disclosure of judicial misconduct investigations in circumstances where the information is obtained by illegal means). Professor Edelman has criticized the *Daily Mail* test, arguing that, in the privacy context, the "constitutionality of punishing publication cannot be determined by whether the information is lawfully obtained." Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1204 (1990). He suggests that the common law privacy defenses, such as newsworthiness, provide a better standard for balancing competing interests. *See id.*

A. *Receiving Confidential Information as a Crime*

Is it illegal to receive information from a willing source? Does illegality turn on the reporter's awareness of a source's obligation not to divulge the information? The press is the frequent beneficiary of unauthorized leaks of confidential information, and while the leakers have been subject to criminal prosecutions,²⁰⁷ the press has rarely been prosecuted for the crime of receiving stolen information. The problems of prosecuting the press for receiving stolen information are manifest in *People v. Kunkin*.²⁰⁸

In *Kunkin*, Gerald Reznick, an employee of the California Attorney General, removed a copy of a list of the names, home addresses, and telephone numbers of undercover narcotics agents from the office.²⁰⁹ After Reznick left the employment of the Attorney General, he took the copy of the list to the *Los Angeles Free Press*.²¹⁰ Although a reporter could not promise publication of the list, Reznick left it on the reporter's desk and asked that his identity not be revealed.²¹¹ The *Free Press* published the list verbatim, along with an editorial decrying secret police.²¹² After publication, the list was returned to the Attorney General's office and Reznick's fingerprints were found on it.²¹³ Reznick was found guilty of violating a state law concerning theft or removal of government records.²¹⁴

The state successfully prosecuted the editor and a reporter of the *Free Press* for receiving stolen property.²¹⁵ Convictions were sustained by the court of appeals, which concluded that the First Amendment did not bar application of general criminal laws to information-gathering activities.²¹⁶ The California Supreme Court reversed and, without addressing the constitutional questions, concluded that there was insufficient evidence that the defendants knew the roster was stolen.²¹⁷ Reznick maintained throughout all of his dealings with the *Free Press* that the roster had to be returned to him and that the defendants were not aware that Reznick was no longer

²⁰⁷ See, e.g., *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988) (an Espionage Act prosecution of a government employee who leaked classified defense information to the press).

²⁰⁸ 507 P.2d 1392 (Cal. 1973).

²⁰⁹ See *id.* at 1394.

²¹⁰ See *id.*

²¹¹ See *id.*

²¹² See *id.* at 1395.

²¹³ See *id.*

²¹⁴ See *id.* at 1398.

²¹⁵ See *People v. Kunkin*, 100 Cal. Rptr. 845, 848 (Cal. Ct. App. 1972).

²¹⁶ See *id.* at 859-60.

²¹⁷ See *Kunkin*, 507 P.2d at 1400.

an employee of the Attorney General and were thus unable to conveniently return the roster to the Attorney General's office.²¹⁸

Although the First Amendment did not color the California Supreme Court's analysis, there are several features of its decision which reduce the prospect of similar prosecutions of the press. The court assumed, without deciding, that a copy of the roster was property within the meaning of the receipt of stolen property statute, but read the statute as requiring an intent to permanently deprive the owner of the property.²¹⁹ Since a copy or an abstract of a document does not deprive the owner of use of the original, it is highly unlikely that receipt of a copy or abstract would constitute permanent deprivation.²²⁰ The court was unwilling to infer that the journalists' knew the roster was stolen because they perceived that government officials would be displeased by publication of its contents.²²¹ Finally, the court referred to the difficulty of fitting "journalistic conduct to the elements of a receiving statute in this or similar circumstances," mentioning that the legislature had recently enacted a statute punishing the malicious publication of the residential address and telephone number of a peace officer.²²²

The enactment of the malicious publication statute reveals the state's real concern about this information. It seems highly unlikely that the journalists would have been prosecuted if they had not published the list. The state's readily apparent concern was Reznick's unauthorized disclosure and the publication of the information, not its mere receipt.²²³

²¹⁸ See *id.* at 1399.

²¹⁹ See *id.* at 1395-96.

²²⁰ See *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300, 303 (7th Cir. 1990) ("[P]ossession of copies of documents—as opposed to the documents themselves—does not amount to an interference with the owner's property sufficient to constitute conversion."); *Harper & Row Publishers, Inc. v. Nation Enter.*, 723 F.2d 195, 201 (2d Cir. 1983) (stating that the unauthorized removal for a short period of time of a literary manuscript, copying parts of it, and returning it undamaged, is too insubstantial an interference with property rights to be conversion), *rev'd on other grounds*, 471 U.S. 539 (1985); *Scheetz v. Morning Call, Inc.*, 747 F. Supp. 1515, 1526 (E.D. Pa. 1990) (holding that a reporter who copied by hand information from a copy of a confidential police report is not the receiver of stolen goods).

Of course, information can be treated as property, apart from concerns such as possession of documents that are raised in conversion or theft cases. See, e.g., *Carpenter v. United States*, 484 U.S. 19 (1987) (involving misappropriation of an employer's information by an employee).

²²¹ See *Kunkin*, 507 P.2d at 1399.

²²² *Id.* at 1400 n.14; see also CAL. PENAL CODE §146(e) (Deering 1997).

²²³ See Michael E. Tigar, *The Right of Property and the Law of Theft*, 62 TEX. L. REV. 1443, 1462 (1984) (stating that government prosecutions of leakers have "nothing to do with loss of information: it wants to warn those with access to government files that serious consequences attend unauthorized use").

Although journalists who obtained copies of the Pentagon Papers were not prosecuted

B. *Receiving Confidential Information as a Tort*

In 1965, James Boyd, then an administrative assistant to United States Senator Thomas J. Dodd, decided that he would make copies of Dodd's office files and provide these copies to newspaper columnist Jack Anderson.²²⁴ Boyd hoped that the information in the files would prove that Dodd had engaged in a pattern of unethical practices.²²⁵ Boyd later described this decision in the following manner:

For months the key to Dodd's office, which lay beside my telephone, had been a daily reminder of what was ahead. Now that moment had come. To invade Dodd's office and remove his files was an ugly business. Anderson had always stopped short of recommending it; but there was no other way to get the proof. I was aware of the ethical questions involved, if not legal. What about Dodd's right to privacy, the inviolability of a Senator's official papers, the precept that the end does not justify the means? . . . Rightly or wrongly, I judged that the larger ends of justice would be served by my trespassing in Dodd's office and removing all files containing evidence of misconduct.²²⁶

The original documents were returned to Dodd's files after copies were made.²²⁷ Anderson and his colleague, Drew Pearson, published a series of newspaper columns about Dodd, resulting in an investigation and censure of Dodd by the Senate.²²⁸ Dodd brought suit for libel,²²⁹ conversion, and invasion of privacy against the columnists, but not against Boyd and the others who removed and copied the documents.²³⁰ Although the complaint claimed that the columnists instigated or induced the copying of the documents,²³¹ the district court found only that the columnists knew the documents had been removed and copied without Dodd's consent.²³²

A motion for partial summary judgment was heard by Judge Holtzoff, who authored the *Liberty Lobby* opinion, which held that the method by which information

under a theory of receipt of stolen property, the prosecution of Daniel Ellsberg and his associates raised issues similar to those addressed in *Kunkin*. For a discussion of these issues, see Nimmer, *supra* note 43.

²²⁴ See JAMES BOYD, ABOVE THE LAW 104-14 (1968).

²²⁵ See *id.*

²²⁶ *Id.* at 166.

²²⁷ See *Dodd v. Pearson*, 277 F. Supp. 469, 470 (D.D.C. 1967).

²²⁸ See S. REP. NO. 90-193 (1967).

²²⁹ After the district court denied Dodd's motion for summary judgment, see *Dodd*, 277 F. Supp. at 469, Dodd dropped his libel claim. See BOYD, *supra* note 224, at 200-02.

²³⁰ See *Dodd*, 277 F. Supp. at 470.

²³¹ See *id.* at 470.

²³² See *Dodd v. Pearson*, 279 F. Supp. 101, 102 (D.D.C. 1968).

is gathered is irrelevant to prior restraint analysis.²³³ In *Dodd*, Holtzoff cast freedom of the press in pure Blackstonian terms:

Freedom of the press comprizes [sic] freedom to publish
Nevertheless, the publisher is subject to the consequences of his act
For example, the publication of a libel may not ordinarily be enjoined, but having published a defamatory statement, the publisher is subject to an action for damages. Similarly, freedom of the press does not comprize [sic] an unrestrained and untrammelled right of access to sources of information for use in publication.²³⁴

To Judge Holtzoff, Dodd's former employees were guilty of trespass and conversion.²³⁵ The journalists were also guilty of conversion because they received and used Dodd's property with knowledge that it had been wrongfully obtained.²³⁶ Judge Holtzoff apparently assumed that the content of the documents was Dodd's property; the fact that copies and not originals were at issue was considered to be immaterial. Yet, the conversion cases cited by Holtzoff all involved actions either permanently or seriously depriving the owner of use of the property in question.²³⁷ As to Dodd's claim that the journalists invaded his privacy, Judge Holtzoff ruled that publication of information relating to a Senator's activities was a matter of public interest.²³⁸

The Court of Appeals for the District of Columbia sustained the lower court's ruling on privacy, but reversed on conversion.²³⁹ Publication of information about Dodd's fitness for office was a "paradigm example" of speech that was a matter of public interest.²⁴⁰ Nor was the mere receipt of the information, with knowledge that it had been obtained without Dodd's consent, sufficient to establish joint liability for the branch of privacy known as intrusion. Judge Skelly Wright wrote:

A person approached by an eavesdropper with an offer to share information gathered through the eavesdropping would perhaps play the

²³³ See *Liberty Lobby, Inc. v. Pearson*, 261 F. Supp. 726 (D.D.C. 1966); see also *supra* notes 51-57 and accompanying text.

²³⁴ *Dodd*, 279 F. Supp. at 103.

²³⁵ See *id.* at 104.

²³⁶ See *id.* The value of the information was to be determined at trial, along with whether Dodd could recover for embarrassment and mental anguish under the conversion tort. See *id.* at 105-06.

²³⁷ See *id.* at 104 (citing cases involving conversion of a scow, a ship, timber, and stock certificates).

²³⁸ See *id.* at 105.

²³⁹ See *Pearson v. Dodd*, 410 F.2d 701, 708 (D.C. Cir. 1969).

²⁴⁰ See *id.* at 703.

nobler part should he spurn the offer and shut his ears. However, it seems to us that at this point it would place too great a strain on human weakness to hold one liable in damages who merely succumbs to temptation and listens.²⁴¹

Significantly, Wright stated that there was no connection between the public disclosure and intrusion branches of privacy; public disclosure actions did not depend upon the manner in which the information was obtained and intrusion actions did not depend upon the content or publication of material obtained through actions such as eavesdropping.²⁴²

Unlike the district court, the court of appeals approached Dodd's conversion claim by examining the nature of the information to determine if it was property protected by the law of conversion.²⁴³ The information, in the form of office records and letters, was not a literary work, scientific invention, nor material whose economic value depends upon being kept secret. Consequently, it was not regarded as property under the law of conversion.²⁴⁴ Moreover, since conversion requires either complete or very substantial deprivation of possession of property,²⁴⁵ the photocopying of Dodd's files did not fit the contours of the tort. Those documents were removed from the files at night, photocopied, and returned to the files undamaged before office operations resumed in the morning. Insofar as the documents' value to appellee resided in their usefulness as records of the business of his office, appellee was clearly not substantially deprived of his use of them.²⁴⁶

²⁴¹ *Id.* at 705.

²⁴² *See id.*; *see also id.* at 704 ("The tort [of intrusion] is completed with the obtaining of the information by improperly intrusive means."); *id.* at 705 (stating that "injuries from intrusion and injuries from publication should be kept clearly separate"). Professor Andrew McClurg argues that dissemination of information is a factor to be considered in analysis of intrusion cases. *See* Andrew J. McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1070-78 (1995). For criticism of McClurg's approach on the grounds that it would single out individuals engaged in expressive activity, *see* Note, *Privacy, Photography, and the Press*, 111 HARV. L. REV. 1086, 1091-94 (1998).

²⁴³ *See Pearson*, 410 F.2d at 706 n.23.

²⁴⁴ *See id.* at 707-08.

²⁴⁵ *See* RESTATEMENT (SECOND) OF TORTS § 222 A.

²⁴⁶ *See Pearson*, 410 F.2d. at 707. Assuming that the information in Dodd's files had been protected by conversion, and assuming that Boyd and Anderson had received the originals, they would have been liable for conversion even though they did not take the files. *See FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300, 305 (7th Cir. 1990) (holding that although ABC was not directly responsible for the loss of FMC's documents, its possession of the originals, or the only known copies of the originals, constituted conversion).

The injuries for which Dodd sought compensation, such as harm to reputation, were the result of publication of the information; efforts to use either conversion or intrusion as a link to this type of damage are strained. The court of appeals ruled that injuries of this type are properly addressed through an action such as defamation where liability "can be established under the limitations created by common law and by the Constitution."²⁴⁷

Although the court of appeals decision is based upon tort law principles,²⁴⁸ one can easily foresee the harm to constitutional values if the press were liable for torts such as intrusion or conversion merely for receiving information taken improperly by others. The case rests upon the important factual finding that the journalists did not induce the copying of the documents. This Article now turns to the question of whether a journalist's request for information, even with awareness of the source's confidentiality obligations, is tortious or criminal.

C. "Simply" Asking for Information

1. *Nicholson v. McClatchy Newspapers*

California law requires the Governor to submit the names of all potential judicial appointees or nominees to a judicial qualifications commission; evaluations of this commission are required to be confidential.²⁴⁹ In July 1983, two newspapers published the commission's conclusion that George Nicholson, a recently unsuccessful candidate for Attorney General, was unqualified for judicial office.²⁵⁰ Nicholson filed suit alleging that the information was acquired through intrusion, thereby making publication illegal.²⁵¹ The media defendants demurred to the complaint on the ground that the publication was privileged under the First Amendment; the trial court sustained the demurrers.²⁵² The court of appeals affirmed.²⁵³

Nicholson claimed he had an expectation that the commission's negative evaluation would remain confidential and its disclosure to the press was illegal.²⁵⁴ This case closely resembled *Landmark Communications, Inc. v. Virginia*²⁵⁵ and the

²⁴⁷ *Pearson*, 410 F.2d at 708.

²⁴⁸ Judge Wright indicated that because the publication was protected under common law principles, he did not reach constitutional questions. *See id.* at 703 n.6.

²⁴⁹ *See Nicholson v. McClatchy Newspapers*, 177 Cal. App.3d 509, 512-13 (1986).

²⁵⁰ *See id.* at 512.

²⁵¹ *See id.* at 514.

²⁵² *See id.* at 514 n.1.

²⁵³ *See id.* at 521.

²⁵⁴ *See id.* at 516.

²⁵⁵ 435 U.S. 829 (1978). In *Landmark Communications*, the record was silent on the manner in which the newspaper acquired the information about the judicial commission's

state court of appeals concluded that the state could not impose liability upon a nonparticipant for the breach of confidentiality.²⁵⁶ However, Nicholson claimed that the press instigated the breach by "soliciting, inquiring, requesting and persuading" members of the commission to disclose the evaluation.²⁵⁷ The court of appeals acknowledged that the press had no immunity for crimes or torts committed during the course of newsgathering, but believed that newsgathering was protected to the extent that it "involve[d] 'routine . . . reporting techniques.'"²⁵⁸ "Such techniques, of course, include asking persons questions, including those with confidential or restricted information."²⁵⁹ The court of appeals acknowledged that the government may seek to preserve confidentiality by imposing a duty upon commission participants, but it may not impose liability upon the press for publishing material it obtained merely by asking for it.²⁶⁰

This opinion indicates that even when the press knows a potential source is under an obligation of confidentiality, merely asking for information is not illegal. This also means potential sources alone bear the burden of legal consequences for their breach of confidentiality, while the press is free to ask for information. Yet, what activities go beyond simply asking? The circuit court of appeals used the circumstances in *Dietemann v. Time, Inc.*²⁶¹ and *Galella v. Onassis*²⁶² as illustrations of impermissible information gathering. *Dietemann* involved subterfuge and technology such as hidden cameras and microphones.²⁶³ *Galella* entailed constant surveillance by a photographer, including actions such as bumping into Mrs. Onassis and her children.²⁶⁴ This presents the issue of whether there is a ground between the extremes of merely asking and using hidden cameras where the actions of the reporter can also be considered illegal.

inquiry. See *Landmark Communications*, 223 S.E.2d 120, 123 n.4 (Va. 1977), *rev'd.*, 435 U.S. 829 (1978).

²⁵⁶ See *Nicholson*, 177 Cal. App. 3d at 518.

²⁵⁷ *Id.* at 520.

²⁵⁸ *Id.* at 519. (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (omission in original)). The court of appeals also used as synonyms "normal newsgathering activities," *id.* at 520, and "ordinary reporting techniques," *id.* at 521 n.6.

²⁵⁹ *Id.* at 519.

²⁶⁰ See *id.* at 519-20; see also Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 636 (1975) ("So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can.").

²⁶¹ 449 F.2d 245 (9th Cir. 1971); see also *infra* notes 319-44 and accompanying text.

²⁶² 487 F.2d 986 (2d Cir. 1973).

²⁶³ See *Dietemann*, 449 F.2d at 245.

²⁶⁴ See *Galella v. Onassis*, 353 F. Supp. 196, 235 (S.D.N.Y. 1972).

2. *Scheetz v. Morning Call*

Shortly after Kenneth Scheetz was named "Officer of the Year" of the Allentown, Pennsylvania Police Department, the *Morning Call* published an article revealing that Scheetz's wife had accused him of assault, but that police had not conducted an investigation.²⁶⁵ The details of the assault were based upon information contained in police reports acquired from a confidential source by a reporter, Terry Mutchler.²⁶⁶ The reports were not considered public records under Pennsylvania law,²⁶⁷ and Mutchler was denied access to them by the chief of police.²⁶⁸ Mutchler then asked several sources within the police department if they had access to the reports, and one source showed her originals which she copied by hand.²⁶⁹ The Scheetzes filed suit against the newspaper, the reporter, and the unnamed source, contending that the newspaper and its reporter had conspired with a state actor to deprive the plaintiffs' of their constitutional right to privacy.²⁷⁰ The United States District Court for the Eastern District of Pennsylvania granted the newspaper and reporter's motion for summary judgment,²⁷¹ and the Court of Appeals for the Third Circuit affirmed.²⁷²

District Court Judge Cahn ruled that the publication dealt with matters at the core of the First Amendment's protection, while most of the facts raised only modest privacy interests.²⁷³ Because the only evidence before the court was the reporter's affidavit, the court was able to conclude only that the evidence suggested no crime had been committed in gathering the information.²⁷⁴ Nonetheless, Judge Cahn's comments about information gathering are troubling. The plaintiffs argued that civil sanctions can be imposed when the press publishes unlawfully obtained truthful information.²⁷⁵ Judge Cahn acknowledged that the Supreme Court had not resolved the issue, but concluded that the press did not have absolute protection to publish truthful information that was unlawfully obtained.²⁷⁶ After noting that those who supply confidential information to the press can be criminally prosecuted, Judge Cahn added the following:

²⁶⁵ The article and a follow-up story appear as appendices to the district court's opinion. See *Scheetz v. Morning Call, Inc.*, 747 F. Supp. 1515, 1536-40 (E.D. Pa. 1990).

²⁶⁶ See *id.* at 1517.

²⁶⁷ See *id.* at 1531.

²⁶⁸ See *id.* at 1517.

²⁶⁹ See *id.* at 1526.

²⁷⁰ See *id.* at 1517.

²⁷¹ See *id.* at 1526.

²⁷² See *Scheetz v. Morning Call, Inc.*, 946 F.2d 202 (3rd Cir. 1991).

²⁷³ See *Scheetz*, 747 F. Supp. at 1535.

²⁷⁴ See *id.* at 1525.

²⁷⁵ See *id.*

²⁷⁶ See *id.* Judge Cahn's position was based in part on a reading of the opinions in the *Pentagon Papers* case, from which he gleaned that the Court "would probably have upheld a statute making illegal the publication of information unlawfully obtained." *Id.* at 1524.

There is a distinction between punishing an individual who breaks the law in order that a story may be published and punishing the publisher who prints the story, knowing the information to have been obtained unlawfully. There is also a distinction in the criminal law between thieves and receivers of stolen goods, but both are criminals. This court does not mean to say that the media are liable to the same degree as those who act improperly for it, or those who supply it with improperly obtained material. But the distinctions are of degree, not of kind.²⁷⁷

The beginning of this passage recognizes the difference between punishing both sources who break obligations of confidentiality and the press for publishing that

²⁷⁷ *Id.* at 1525 n.15. Judge Cahn's views may be contrasted with those of Judge Thomas Hogan of the United States District Court for the District of Columbia who concluded that "information, even if initially garnered through illegal means, is lawfully obtained by anyone who did not himself break the law to obtain it." *Boehner v. McDermott*, No. 98-594, 1998 U.S. Dist. LEXIS 11509, at *14 (D.D.C. July 27, 1998). In *Boehner*, Representative James McDermott received from John and Alice Martin a tape recording they made of a cellular telephone call involving several House Republican leaders. McDermott leaked the tape to the *New York Times* which published its contents. See Adam Clymer, *Gingrich Is Heard Urging Tactics in Ethics Case*, N.Y. TIMES, Jan. 10, 1997, at A1. The Martins pled guilty to charges of violating federal law prohibiting the interception of cellular telephone calls, and Representative John Boehner, one of the parties to the telephone conversation, sued McDermott for disclosing the tape. Although Judge Hogan expressed concern about criminals laundering illegally intercepted information, see *Boehner*, 1998 U.S. Dist. LEXIS 11509, at *10, he ruled that McDermott lawfully obtained the tape. See *id.* at *12. Furthermore, he found that Boehner's privacy interest was insufficient to override McDermott's First Amendment right to disclose the tape. See *id.* at *21-23.

The Court of Appeals for the District of Columbia Circuit recently reversed the judgment, concluding that the First Amendment did not protect McDermott's actions. See *Boehner v. McDermott*, No. 98-7156, 1999 U.S. App. LEXIS 23135 (D.C. Cir. Sept. 24, 1999). The court of appeals distinguished between the newspaper's actions, which it labeled "speech" and McDermott's disclosure, which it labeled "conduct." *Id.* at *45. By "accepting the tape from the Martins, McDermott participated in their illegal conduct." *Id.* at *40. Circuit Justice Sentelle dissented because the distinction drawn by the majority was "without substance or force." *Id.* at *67 (Sentelle, C.J., dissenting). He added, "as the court holds today that the state can punish the release by McDermott based on the manner in which his source obtained that information, in a later day the state can burden the publishers of newspapers . . . on the same basis." *Id.* at *66.

Although the *New York Times*, was not a defendant in *Boehner*, the court of appeals noted that it was not concerned with whether the statute could be constitutionally applied to newspapers who published stories about the illegally-intercepted conference call. See *Boehner*, 1999 U.S. App. 23135 at *12, *45. For a claim that the First Amendment protects the newspaper's action, see Victor A. Kövner, *Not Whom You Tell, But How You Know*, NAT'L L.J., Feb. 10, 1997, at A19.

information, a distinction at the heart of the decision in *Landmark Communications*. The latter part of this passage is troublesome for its suggestion that the press can be categorized as a receiver of stolen goods when it obtains information from a source. For the reasons discussed in *Kunkin*, fitting journalistic conduct into receipt of stolen property is difficult. Most importantly, if receipt of information is improper, then under the district court's view, publication of the information is potentially illegal. This exemplifies the problem of linking information gathering with publication issues—if improper information gathering is defined in terms such as receipt of confidential information, then a wide array of material, the publication of which serves First Amendment values, will no longer be protected.

The Third Circuit affirmed *Scheetz* on the grounds that the information was not protected by the confidentiality branch of the constitutional right of privacy; Mrs. Scheetz had no reasonable expectation that the information she provided to police would remain secret.²⁷⁸ Judge Mansmann dissented, and would have remanded to determine if the newspaper unlawfully acquired the information.²⁷⁹ Although Judge Mansmann admitted that the Supreme Court's cases provide little guidance as to how to factor unlawful acquisition into First Amendment analysis, she concluded that unlawful acquisition would mandate a finding for the plaintiffs.²⁸⁰ She called unlawful acquisition a "bright line" test which would provide clear guidance to journalists as to what could be published without the fear of legal sanction.²⁸¹ To the contrary, Judge Mansmann's vague definition of unlawful acquisition is likely to trigger a significant chilling effect. For example, Judge Mansmann was troubled by the newspaper's disclosure that the couple had received marital counseling, a fact obtained from the confidential police materials.²⁸² Yet, Judge Mansmann believed that it would have been lawful for the press to interview sources to whom the Scheetzes had confided this information.²⁸³ She indicated that "[c]onfiding in one's friends, family, or religious leader, for example, would not suffice to diminish a reasonable expectation of privacy against disclosure to the public at large."²⁸⁴ It is difficult to understand how a reporter's questioning of family members, whom the Scheetzes expected would preserve confidentiality, would be legal while asking a source to show a set of documents is illegal. Furthermore, Judge Mansmann reasoned that because the reporter was aware of the confidential nature of the reports and the fact that the Chief of Police regarded them as "stolen," the reports were unlawfully

²⁷⁸ See *Sheetz v. Morning Call, Inc.*, 946 F.2d 202, 207 (3rd Cir. 1991).

²⁷⁹ See *id.* at 212 (Mansmann, C.J., dissenting).

²⁸⁰ See *id.* at 212-14 (Mansmann, C.J., dissenting).

²⁸¹ See *id.* at 214 (Mansmann, C.J., dissenting).

²⁸² See *Scheetz v. Morning Call, Inc.*, 747 F. Supp. 1515, 1532 (1990).

²⁸³ See *Sheetz*, 946 F.2d at 209-10 (Mansmann, C.J., dissenting).

²⁸⁴ *Id.* at 209 (Mansmann, C.J., dissenting).

acquired.²⁸⁵ An official's displeasure with a leak, and a reporter's awareness of confidentiality are insufficient conditions to establish illegal newsgathering.

3. *Ashcraft v. Conoco*

On August 26, 1997, Conoco agreed to settle a lawsuit brought by 178 residents of a mobile home park who claimed that a leak at a Conoco gasoline facility contaminated their drinking water.²⁸⁶ The terms of the settlement were not publicly announced, and on September 22, the court entered an order sealing the settlement agreement.²⁸⁷ Cory Reiss, a reporter for the Wilmington, North Carolina, *Morning Star*, who had been covering the lawsuit, began canvassing the mobile home residents, seeking to "induce someone to violate the court's order."²⁸⁸ Reiss' efforts were successful; two sources agreed to reveal the terms of the settlement on condition of anonymity.²⁸⁹ On October 15, the *Morning Star* reported, under Reiss' byline, that Conoco had agreed to settle the case for \$36 million.²⁹⁰

If the *Morning Star* had published the article based solely upon Reiss' confidential sources, it is highly unlikely that any legal action would have resulted against the newspaper.²⁹¹ The editors set in motion, however, a unique legal action when they inserted the following sentence in Reiss' article: "A document confirming the settlement amount was among public documents given to a *Morning Star* reporter Tuesday by a clerk at the federal courthouse in Raleigh."²⁹² This sentence, which Judge Earl Britt regarded as adding "the imprimatur of the court's credibility" to the paper's anonymous sources,²⁹³ resulted in a \$500,000 fine for civil contempt of court

²⁸⁵ See *id.* at 213. (Mansmann, C.J., dissenting). The Chief of Police's comments about the documents appear in the *Morning Call's* initial story about the Scheetz. See *Scheetz* 747 F. Supp. at 1537-38.

²⁸⁶ See Cory Reiss, *The Conoco Settlement \$36 Million*, WILMINGTON MORNING STAR, Oct. 15, 1997, at 1A.

²⁸⁷ *Ashcraft v. Conoco, Inc.*, No. 7:95-CV-187-BR(3), 1998 U.S. Dist. LEXIS 4092, at *9-10 (E.D.N.C. Jan. 21, 1998).

²⁸⁸ *Id.* at *15.

²⁸⁹ See *id.* at *8.

²⁹⁰ See Reiss, *supra* note 286, at 1A.

²⁹¹ Judge Britt stated, "Had the *Morning Star* printed only Reiss' story, without the paragraph 'confirming' the agreement from sealed court documents, it would not have violated any order of this court." *Ashcraft*, 1998 U.S. Dist. LEXIS 4092, at *24-25; see also *id.* at *20 (stating that if the newspaper had stuck with the original disclosure by the unnamed sources, "this matter might never have reached this stage"). Reiss was subsequently ordered by Judge Britt to identify his sources. See *Ashcraft v. Conoco, Inc.*, No. 7:95-CV-187-BR(3), 1998 U.S. Dist. LEXIS 16371, at *12-13 (E.D.N.C. Sept. 3, 1998).

²⁹² Reiss, *supra* note 286, at 1A.

²⁹³ *Ashcraft*, 1998 U.S. Dist. LEXIS 4092, at *20.

against the newspaper and a reporter, Kirsten Mitchell, who was inadvertently given the sealed settlement agreement by a deputy clerk.²⁹⁴

Mitchell, the Raleigh Bureau Chief for the *Morning Star*, was asked by her editors on October 14 to visit the court clerk's office to review the Conoco case documents that had been filed since the settlement.²⁹⁵ The deputy court clerk brought a stack of documents to the counter, and before handing them to Mitchell, pulled a brown envelope from the stack, stating, "You can't have this, this is a sealed document."²⁹⁶ Within the stack of materials provided to Mitchell was a white envelope containing the judge's September 22 sealing order, clipped on top of the settlement agreement. The front of the envelope had the following warning:

CONFIDENTIAL SETTLEMENT AGREEMENT
FILED UNDER SEAL
TO BE OPENED ONLY BY THE COURT²⁹⁷

The back of the envelope had a flap with a cellophane window in which the word "OPENED" appeared.²⁹⁸ Adjacent to the flap appeared the following: "Caution: The word "OPENED" appears in the window panel to indicate that the envelope has been opened."²⁹⁹ Although the envelope had been opened several times before it was provided to Mitchell, its flap was sealed when she received it.³⁰⁰ Mitchell opened the envelope and on the fourth page discovered the settlement amount.³⁰¹ She informed an editor of the amount, adding that it came from a document that was sealed or had previously been sealed.³⁰²

Shortly after Mitchell's visit to the clerk's office, Reiss telephoned one of the plaintiff's attorneys and a Conoco public affairs officer, revealing the amount of the

²⁹⁴ Mitchell was also found guilty of criminal contempt and fined another \$1000. See John Gibeaut, *Secret Justice*, A.B.A. J., Apr. 1998, at 50. Attorney fees and costs were added to the civil judgment, bringing the amount to \$599,681. See Appellants' Brief at 5, *Ashcraft v. Conoco, Inc.*, No. 98-1212(L) (4th Cir. filed Apr. 30, 1998). See generally Amy Singer, *The Envelope, Please*, AM. LAW., June 1998, at 66 [hereinafter Singer, *Envelope*].

²⁹⁵ See *Ashcraft*, 1998 U.S. Dist. LEXIS 4092, at *11.

²⁹⁶ *Id.* at *12.

²⁹⁷ *Id.* at *10.

²⁹⁸ See *id.*

²⁹⁹ *Id.* at *10-11.

³⁰⁰ See *id.* at *12. Some press accounts of the case claim that the envelope's flap was open when it was received by Mitchell. See Lee Hickling, *The Unsealed Envelope: A First Amendment Fight*, COLUM. JOURNALISM REV., Mar/Apr. 1998, at 12. This account is contrary to the judge's finding of facts and the appellants did not claim in their brief that the envelope was open. See Appellant's Brief at 7-8, *Ashcraft* (No. 98-1212(L)).

³⁰¹ See *Ashcraft*, 1998 U.S. Dist. LEXIS 4092, at *12.

³⁰² See *id.* at *13.

settlement agreement and asking for comment.³⁰³ On the evening of October 14, three of the plaintiff's attorneys spoke with a *Morning Star* editor and informed him that the settlement amount was under seal.³⁰⁴ After consulting with the newspaper company's in-house attorney, the editor inserted the sentence about public documents confirming the settlement amount into Reiss' story.³⁰⁵

The district court's decision to find Mitchell and the *Morning Star* in contempt is confusing. There are three possible bases for this action. First, Mitchell violated the confidentiality order by opening and reading the contents of the sealed envelope. For example, the court stated, "The file containing that agreement was, until otherwise ordered, for the eyes of the court only. Mitchell opened it. That act, not her speech, is the subject of this order."³⁰⁶ The problem with this approach is that Mitchell would be in contempt even if she never disclosed the settlement terms to her editor or anyone else. Thus, a second basis for the decision is that Mitchell violated the confidentiality order by telling her editor what she found at the courthouse. The district court stated that "when Mitchell read the settlement *and* disclosed its contents to her editor, she violated the court's express directive to maintain the agreement under seal."³⁰⁷ However, if the *Morning Star*'s editors had decided not to attribute the settlement amount to the court document, it is difficult to perceive how Conoco would be harmed by a communication that is part of a newspaper's internal editorial decision-making process. Because the district court assessed damages based upon the increased costs Conoco would incur defending similar cases as a result of the publication of the settlement agreement,³⁰⁸ it is unlikely that the court was truly concerned about Mitchell reading the settlement agreement and telling her editor about it. Also, because disclosed the settlement terms with attribution solely to Reiss's confidential sources, the court was not properly concerned with mere disclosure. Finally, a third possible basis for the decision is the newspaper's attribution of the settlement amount to the court document. The court stated that when the newspaper "printed this information and attributed it to a court document that was under seal," it subjected itself to contempt.³⁰⁹ In addition, the most telling comment is the court's statement that the attribution to the court document added "greater weight and credibility" to the newspaper's story, thus enhancing the damage

³⁰³ See Singer, *Envelope*, *supra* note 294, at 67.

³⁰⁴ See *id.*

³⁰⁵ See *id.*

³⁰⁶ *Ashcraft*, 1998 U.S. Dist. LEXIS 4092, at *22; see also *id.* at *18 ("No one was permitted by law to read or even skim the documents."); *id.* at *19 ("Mitchell . . . took the affirmative step of opening a sealed document.").

³⁰⁷ *Id.* at *17-18 (emphasis added).

³⁰⁸ See *id.* at *31-32.

³⁰⁹ *Id.* at *25.

to Conoco.³¹⁰ Yet, according to the district court's reasoning, attribution to the court document can only be illegal if the document was improperly obtained.³¹¹

Whether Mitchell's actions were illegal depends upon how two significant facts are viewed. The first fact is that the court clerk inadvertently gave Mitchell the settlement document. The other is Mitchell's awareness of the sealing order before she disclosed the contents of the agreement to her editors.³¹² If one believes that the constitutionally significant fact is that Mitchell acquired the settlement agreement from the clerk, then her awareness of the sealing order becomes irrelevant. By contrast, if one believes that Mitchell's awareness of the sealing order is paramount, then the fact that she received the document from the clerk becomes less important.³¹³ Treating the acquisition of the information from the clerk as the key fact yields the following observations. First, this position rests upon the somewhat startling premise that bureaucratic mistakes completely erode the government's interest in secrecy.³¹⁴

³¹⁰ *Id.* at *20.

³¹¹ *See id.* at *24 ("The inescapable facts are that the newspapers' employee intentionally violated the terms of a known court order and that the newspaper itself knowingly published information obtained in violation of that order.").

³¹² Whether or not Mitchell saw the warning on the exterior of the envelope before she opened it is disputed by the parties. *See* Appellants' Brief at 37, *Ashcraft* (No. 98-1212 (L)) (stating that at the time she opened the envelope, Mitchell had no information that it was confidential); Appellee's Brief at 4 n.1, *Ashcraft* No. 98-1212(L) (describing Mitchell's testimony that she did not see the warnings before opening the envelope as "self-serving"). However, Mitchell's admission that the sealing order was the first thing that one would see after opening the envelope, and her statement to her editor, indicate that she was aware of the seal.

³¹³ It should be no surprise, then, that the appellants emphasize Mitchell's acquisition of the document from the clerk, *see* Appellants' Brief at 37, *Ashcraft* (No. 98-1212 (L)) (arguing that the constitutionally significant event was the handing of the envelope to Mitchell by the clerk, not her opening of it), while the appellees emphasize her awareness of the seal, *see* Appellees' Brief at 22-27 *Ashcraft* (No. 98-1212 (L)) (discussing proof that Mitchell had actual notice and constructive knowledge of the sealing order).

³¹⁴ Professor Edelman's discussion of *Florida Star* concluded that it is absurd to allow bureaucratic mistakes to nullify an interest in confidentiality. *See* Edelman, *supra* note 206, at 1203. He cited administrative law cases for the proposition that the government is not bound by mistakes made by low-level bureaucrats. *See id.* at 1203 n.55. *But see* Boettger v. Loverro, 587 A.2d 712, 718 (Pa. 1991) (stating that assistant district attorney's filing of wiretap transcript with court clerk, in violation of state law, meant that the transcript was "in the public domain, irrespective of whether or not the action of the assistant district attorney was inadvertent").

Recently, a court clerk in the Los Angeles Superior Court inadvertently allowed a reporter for the *Los Angeles Daily Journal* to see a sealed document relating to an insurance fraud lawsuit. After the reporter prepared a story, a restraining order was issued. *See Judge Blocks Story About Sealed Suit*, LEGAL INTELLIGENCER, Aug. 17, 1999, at 4. Another judge lifted the order a few days later. *See Judge Lifts Order Blocking Story About Sealed Insurance Lawsuit*, LEGAL INTELLIGENCER, Aug. 18, 1999, at 4.

Because the press and government are adversaries, one of the central rules of engagement is that the government may “guard mightily” against leaks, “yet must suffer them if they occur.”³¹⁵ Second, there is a bright line test to guide reporters; if truthful information is made available intentionally or inadvertently by a government official, it may be published regardless of its government classification.

Placing paramount importance on the reporter’s awareness of the seal brings the following observations to the foreground. First, the awareness factor must be confined by geography and source, such as obtaining the document from the clerk at the courthouse.³¹⁶ Otherwise, a reporter’s awareness of a seal unacceptably expands a court’s contempt power to reach the press in situations such as those in which an attorney leaks a sealed document to a reporter. Second, even when confined by geography and source, awareness of a seal does not create a bright line. Reporters may not fully understand the legal restrictions on information they receive from government officials. For example, a reporter may not know whether the seal is binding only upon the parties and court personnel.³¹⁷ Another question is whether notice of the government’s classification imposes an obligation upon a reporter to ascertain whether publication is permissible.³¹⁸ An answer to whether the press should be so burdened is suggested by *Florida Star v. B.J.F.*³¹⁹ in which the Court feared a chilling effect would occur from the “onerous obligation” the press would have in defining which information obtained from the government could be lawfully published.³²⁰

³¹⁵ ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 80 (1975).

³¹⁶ The peculiarity of the *Ashcraft* case is illustrated by changing its facts slightly. Consider how the outcome might have changed if instead of reviewing the documents in the courthouse, Mitchell had telephoned the court clerk and asked for photocopies to be made and mailed to her. Inadvertently or deliberately, a copy of the sealing order and the settlement agreement are mailed to Mitchell. Even with awareness of the court order on behalf of Mitchell and her editors, it is difficult to believe the court’s contempt power would extend to a nonparty in this circumstance. See Appellee United States’ Brief at 6-7 & 11-12, *Ashcraft* (No. 98-1212(L)) (emphasizing the court’s power to control what occurs within the courthouse).

³¹⁷ The appellants argued that the sealing order was not applicable to Mitchell and the newspaper, see Appellants’ Brief at 13-14, *Ashcraft* (No. 98-1212 (L)), while the appellees claimed that the court’s order applied to anyone who inspected the court’s files, see Appellees’ Brief at 14-17, *Ashcraft* (No. 98-1212 (L)).

³¹⁸ Based on her experience from a prior case in which her newspaper sought to have a settlement agreement unsealed, Mitchell was familiar with the procedure for unsealing documents. See *Ashcraft*, 1998 U.S. Dist. LEXIS 4092, at *12. While the motion to seal and the sealing order were among the documents provided to Mitchell, neither she nor her editors sought to determine if an unsealing order had been issued. See *id.* at *13, *22.

³¹⁹ 491 U.S. 524 (1989).

³²⁰ See *id.* at 536.

There is an additional factor from *Florida Star* that guides the appropriate outcome of this case. In *Florida Star*, the Court stated, "Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts."³²¹ The less drastic method requires the government to focus on its internal procedures for safeguarding information in its custody. This line between secrecy and openness in the affairs of government was concisely drawn by Justice Stewart in *Landmark Communications*: "Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press"³²²

Judge Britt felt that "[t]o absolve Mitchell of civil contempt would afford her special treatment merely because of her media status."³²³ Yet, this case does not have to be viewed as resting upon any special rights for the press; instead, anyone who obtains information from court files is free to disseminate that information. Just as reporters have no greater right of access to the information in possession of the government than do other citizens, the press has no greater right to disseminate that information once it is obtained.

One of the disturbing aspects of *Ashcraft* is the linkage between the right to publish and the method of information gathering. Conceptually, this Article questions why these two should be linked. For example, the right to publish should not immunize the antecedent acts of information gathering. If this makes sense, the act of information gathering should not affect the right to publish. It is a far stretch to regard the damage Conoco suffered by attribution to the document as categorically different from the damage that would have been suffered without attribution. Thus, this is really a case about harm from publication. That is to say, whether the nature of the source really affects the harm suffered. For example, assume Mitchell had asked the court clerk for the amount of the settlement (as Reiss had done with the plaintiffs), and the paper had added, "An informed source at the courthouse confirmed the settlement amount." Would the paper's attribution constitute contempt? In this hypothetical case, to regard the journalist as liable for the clerk's breach of duty turns *Landmark Communications* on its head.

³²¹ *Id.* at 534. The Court added:

To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination.

Id.

³²² *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 849 (1978) (Stewart, J., concurring).

³²³ *Ashcraft*, 1998 U.S. Dist. LEXIS 4092, at *21.

D. *Acquiring the Information Improperly*

There are consequences when the press does more than ask for information. It is clear that illegal information gathering, by itself, is actionable without any element of publication.³²⁴ The question is whether illegal information gathering affects the protection afforded the publication of that information.

1. *Dietemann v. Time, Inc.*

Life magazine arranged with police officials that its employees would visit Antone Dietemann's home, where he was suspected of practicing medicine without a license.³²⁵ *Life* agreed that the information it gathered could be used in a criminal prosecution, and later published by the magazine.³²⁶ Two *Life* magazine employees gained entrance to the home through a ruse, claiming they were sent there by a Mr. Johnson.³²⁷ During the course of Dietemann's examination of Jackie Metcalf, the female employee of *Life*, Bill Ray, a *Life* photographer posing as Metcalf's husband, used a concealed camera to take photographs.³²⁸ Metcalf had a transmitter hidden in her purse and her conversation with Dietemann was transmitted to a parked car where it was recorded.³²⁹ Dietemann was later arrested for practicing medicine without a license.³³⁰

Subsequently, *Life* published an article entitled, "Crackdown on Quackery," which discussed three criminal investigations, including that of Dietemann.³³¹ In the portion of the article dealing with Dietemann, two photographs were published. One, taken outside Dietemann's home, showed him at the time of his arrest.³³² The second photograph, taken inside the home, showed Dietemann with his left hand on Metcalf's breast while "waving his magic wand with his right hand over an array of bottles that

³²⁴ See, e.g., *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (holding that a photographer's harassment was unprotected by the First Amendment); *Wolfson v. Lewis*, 924 F. Supp. 1413 (E.D. Pa. 1996) (holding that harassing conduct by a television news crew was unprotected by the First Amendment); cf. *United States v. Sanusi*, 813 F. Supp. 149 (E.D.N.Y. 1992) (holding that trespass by a television news crew affected analysis of whether broadcaster must surrender tape of police search).

³²⁵ See *Dietemann v. Time, Inc.*, 284 F. Supp. 925, 927 (C.D. Cal 1968), *aff'd*, 449 F.2d 245 (9th Cir. 1971).

³²⁶ See *id.*

³²⁷ See *id.*

³²⁸ See *id.*

³²⁹ See *id.*

³³⁰ See *id.*

³³¹ See *Crackdown on Quackery*, LIFE, Nov. 1, 1963, at 76.

³³² See *id.*

contain body tissues."³³³ The accompanying text further described Dietemann's procedure:

"I told him I had a lump in my breast," says Mrs. Metcalf. "He began beating that wand and rubbing me. He finally decided I had butter poisoning because I ate rancid butter exactly 11 years, nine months and seven days ago. The poison settled in my leg, causing the lump in my breast. He gave me some clay pills for it."

The practitioners of quackery range all the way from out-and-out charlatans like Dietemann to those with a facade of respectability. But whatever their spiel and however implausible their claims, they seem to have no trouble finding eager patients willing to lay their money on the line. But the greatest harm quacks do is not monetary. By raising false hopes, they often keep patients from being treated by competent doctors.³³⁴

Dietemann brought suit for invasion of privacy.³³⁵ Two distinct privacy questions were presented in the case: whether the information-gathering methods were intrusive; and whether the publication disclosed private facts of a highly embarrassing nature.³³⁶ In its murky analysis of these claims, the district court apparently concluded that because the information was improperly obtained, publication was also improper. The district court was troubled by the subterfuge used to gain entrance to the home and the use of hidden cameras and microphones.³³⁷ News relating to criminal charges could be disseminated once it became a matter of public record, but the press could not "prepare a dossier on persons by illegal means . . . then await a prosecution and publish everything which might in some degree relate to the offense charged . . ."³³⁸

The district court awarded Dietemann \$1,000 for "injury to his feelings and peace of mind."³³⁹ The court did not segregate the harm from publication and intrusion; instead, it stated that the publication of the "plaintiff's picture taken without his

³³³ *Id.*

³³⁴ *Id.* at 77.

³³⁵ *See Dietemann*, 284 F. Supp. at 927-28.

³³⁶ *See id.* at 930-32.

³³⁷ *See id.* at 930-31.

³³⁸ *Id.* at 931.

³³⁹ *Id.* at 932. *But see Marks v. Bell Telephone Co.*, 331 A.2d 424, 433 (Pa. Sup. Ct. 1975) (Pomeroy, J., concurring) ("The tort of intrusion is designed to protect an individual, not against what other human beings may know or think of him, but rather against the very act of interfering with his seclusion."); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 392, 398 (1960) (describing the interest protected in intrusion cases as a mental one, while the interest in public disclosure actions is reputation).

consent in his home" justified the award of damages.³⁴⁰ The district court refused to award punitive damages, however, because *Life's* efforts were "directed toward the elimination of quackery, an evil which has visited great harm upon a great number of gullible people."³⁴¹ This passage is significant because it rests upon a distinction between intrusion to satisfy mere curiosity and intrusion motivated by a desire to expose criminal or socially harmful activity. The extremely modest size of the general damages award may have been influenced by the social value of disclosing Dietemann's criminal activities. However, if punitive damages were disallowed because of the value of disclosure, then any amount of damages for harm caused by publication should be questioned. A cleaner analysis would segregate the newsgathering issues from publication issues; where publication is a matter of public interest, no damages tied to the effect of the publication should be allowed. This analysis continues to allow awards for harm suffered from intrusive acts as such awards pose little danger to First Amendment interests because they rarely occur and generally have been minuscule in amount.³⁴²

The Ninth Circuit affirmed, but unlike the trial court, the appellate court was untroubled by the subterfuge used to gain entry into Dietemann's home. Dietemann's reasonable privacy expectation was only that "eavesdropping" newsmen would not invade his home with hidden cameras and electronic devices.³⁴³ Interestingly, the court of appeals treated the action by the reporters, who were participants in conversation with Dietemann, as akin to actions by third parties who place electronic bugs in bedrooms, hospital rooms, or in telephones.³⁴⁴ In addition, the appellate court accepted the trial court's characterization of Dietemann's home as a private place, despite precedent indicating that the offering of an illegal service substantially diminishes a homeowner's expectation of privacy.³⁴⁵

³⁴⁰ *Dietemann*, 284 F. Supp. at 932. *But see* *Morgan v. Celender*, 780 F. Supp. 307, 310 (W.D. Pa. 1992) (stating in regards to a public disclosure claim, "It matters not, in our judgment, that the information and photograph may have been obtained illegally, unethically or deceptively by the reporter.").

³⁴¹ *Dietemann*, 284 F. Supp. at 933.

³⁴² *See* REX HEINKE, *MEDIA LAW* 198 (1994).

³⁴³ *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971). By implication, if the reporters had used subterfuge, but had not used the hidden devices, there would have been no intrusion. *See id.* ("One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves.").

³⁴⁴ *See id.* at 247-48 (citing cases involving intrusive acts by nonparticipants to conversations).

³⁴⁵ *See, e.g., Lewis v. United States*, 385 U.S. 206, 211 (1966) (noting that illegal drug transactions in a home lessen the expectation of privacy). In addition, as Professor Middleton has pointed out, the fact that the reporters were acting with the police should have strengthened the legality of their surreptitious electronic monitoring of their conversation with Dietemann. *See* Kent R. Middleton, *Journalists and Tape Recorders:*

The magazine publisher argued that publication of news insulated it from liability for any newsgathering activities, thus inverting the notion that illegal newsgathering affects the right to publish.³⁴⁶ The Ninth Circuit responded, "The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering."³⁴⁷ This passage is correct insofar as it rejects a blanket license for the press to engage in any activity under the rubric of newsgathering. It is incorrect because it treats the First Amendment as completely irrelevant in the application of tort or criminal law to newsgathering activities.³⁴⁸ The lack of nuance to the Ninth Circuit's approach is illustrated by its citation of an article by Professor Nimmer in which he casually disclaimed the presence of First Amendment issues in intrusion cases because these cases involved "observation of the private affairs of another and not by the publication of such observations."³⁴⁹ It is true that publication is not an essential element of intrusion cases,³⁵⁰ but it would be a strange doctrine not to distinguish the activities of "peeping toms" from those involved in activities associated with dissemination of speech.³⁵¹

Does Participant Monitoring Invade Privacy?, 2 HASTINGS COMM./ENT. L.J. 287, 312 (1979).

³⁴⁶ See *Dietemann*, 449 F.2d at 249.

³⁴⁷ *Id.* at 249. See also *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 756 (N.D. Cal. 1993) (distinguishing between claims based on the broadcast of a television news program and claims based upon physical entry into the plaintiff's home). The court added that constitutional protections for publication of information "do not immunize pre-publication activities. For example, even a public figure is entitled to prevent news reporters from entering a private home. That public figure can maintain a trespass action against a news reporter who climbs his fence, no matter how newsworthy the ultimate story published by the reporter." *Id.* at 756 n.5. But see Note, *And Forgive Them Their Trespasses*, *supra* note 19 (suggesting "necessity" defense in trespass actions involving newsgathering).

³⁴⁸ See, e.g., *Desnick v. American Broad. Co.*, 44 F.3d 1345, 1355 (7th Cir. 1995) (stating that investigative broadcast journalism is entitled to First Amendment protection "regardless of whether the tort suit is aimed at the content of the broadcast" or its production); *Galella v. Onassis*, 487 F.2d 986, 995 (2d Cir. 1973) ("[L]egitimate countervailing social needs may warrant some intrusion despite an individual's reasonable expectation of privacy."); Hill, *supra* note 202, at 1285 ("[T]he First Amendment requires that the communications media be allowed investigative methods that are somewhat offensive, and that in a case of relative public importance they must be allowed a greater degree of offensiveness than in others.").

³⁴⁹ Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 957 (1968).

³⁵⁰ See *Dietemann*, 449 F.2d at 247.

³⁵¹ By analogy, the common law of intrusion recognizes a difference between peeping toms and professional investigators who are observing personal injury litigants and insurance claimants. Litigants and claimants must expect a reasonable investigation. Courts have found that the social interest in preventing fraudulent claims and suits places limits on an individual's expectation of privacy. See ELDER, *supra* note 143, at 125-30; see also *Shulman v. Group W Prod., Inc.*, 955 P.2d 469, 493 (Cal. 1998) (noting that the

The Ninth Circuit rejected the publisher's claim that *New York Times v. Sullivan*³⁵² and its progeny protected its actions. The court of appeals regarded that line of cases as irrelevant because they dealt with torts where publication was an essential element.³⁵³ A central premise of *Sullivan*, however, was that First Amendment considerations, such as the reduction of chilling effects on publicly important speech, affect the application of tort law to public communicators.³⁵⁴ Because the district court concluded that the press did not have protection for the publication of information that was improperly acquired, it is hard to ignore the chilling effect presented by the expansive definition of the right to be left alone. Moreover, *Sullivan* and its progeny reveal that the level of protection for speech depends upon its subject matter. One way of infusing these First Amendment concepts into the tort of intrusion is to allow liability for compensatory damages, but to disallow punitive damages in cases where the information sought is of public importance.³⁵⁵

offensiveness of information collecting techniques depends in part on motivation); Hill, *supra* note 202, at 1285 ("Our law is replete with instances in which conduct ordinarily deemed tortious or even criminal is fully legitimated by circumstances that bring into existence a privilege.").

³⁵² 376 U.S. 254 (1964).

³⁵³ See *Dietemann*, 449 F.2d at 249-50.

³⁵⁴ See *Sullivan*, 376 U.S. at 265.

³⁵⁵ See Lee, *supra* note 144, at 1257. One court has claimed that measuring "the degree of the intrusion against the newsworthiness of the story is a test that is too vague and subjective to counter-balance the predominant interest served in protecting the rights of individuals in a free society against invasion of their privacy or their home." *Anderson v. WROC-TV*, 441 N.Y.S.2d, 220, 224 (N.Y. Sup. Ct. 1981). Yet, there are very few bright lines in privacy cases. Courts routinely assess extraordinarily subjective factors, such as the definition of private facts in public disclosure actions. Consider, for example, the following:

In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. *The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.* The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.

RESTATEMENT (SECOND) OF TORTS § 652D cmt.h, (1977) (emphasis added). Although the Supreme Court in *Gertz v. Welch*, 418 U.S. 323 (1974), raised questions about *ad hoc* determinations of matters of public interest, see *id.* at 346, the Court's defamation cases continue to rest on a distinction between speech about private matters and public matters. See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (common law standards do not apply to defamation cases involving a private figure portrayed in a matter

The Ninth Circuit acknowledged a chilling effect in a curious manner. The publisher argued that even if there were liability for intrusion, *Sullivan* and its progeny prevented harm from publication in consideration of the computation of damages.³⁵⁶ The Ninth Circuit held that allowing damages for intrusion to be enhanced by later publication "chills intrusive acts. It does not chill freedom of expression guaranteed by the First Amendment."³⁵⁷ Further, the Ninth Circuit claimed that acceptance of the publisher's argument would "deny to the injured plaintiff recovery for real harm done to him without any countervailing benefit to the legitimate interest of the public in being informed."³⁵⁸ These passages rest upon two questionable propositions. The first is that publication damages chill intrusion, which the Ninth Circuit regarded as unprotected by the First Amendment, but do not chill the act of publication. The Ninth Circuit was too quick to dismiss the relevance of *Sullivan* and its progeny, a line of cases built upon the Court's belief that, unless constrained by rules designed to protect freedom of expression, the threat of awards for damages stemming from publication causes speakers to engage in self-censorship.³⁵⁹ There is no reason to believe that editors subject to the *Dietemann* rule would be inhibited only from engaging in intrusive acts, and not from publishing information acquired from potentially intrusive activities. The second questionable proposition is that the publication was not of legitimate interest to the public. Here the Ninth Circuit casually dismissed the news value of the article because of the method by which the information was obtained. Yet, an article about police investigations of criminal activity does benefit the public, regardless of the method used to obtain some of its contents.

This is not to say that damage from publication can never be compensated when the publisher, or its agents, have also engaged in intrusion.³⁶⁰ The privacy tort has

of public concern); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (common law defamation standards govern cases involving speech about matters of private interest); see also *Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 321 N.E.2d 580, 590 (Ind. Ct. App. 1974) (stating that concern that the judiciary will prove inadequate in defining matters of public interest is allayed by the sizable body of cases that have employed the concept). Moreover, the *Gertz* Court's definition of a public figure does not lead to predictable results. See, e.g., *Rosanova v. Playboy Enters.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978) ("Defining public figures is like trying to nail a jellyfish to the wall.").

³⁵⁶ See *Dietemann*, 449 F.2d at 250.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ See, e.g., *Sullivan*, 376 U.S. at 277 ("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.").

³⁶⁰ For additional views, see Hill, *supra* note 202, at 1281-85 (discussing instances in which damages awarded for intrusion should not include any component for the harm caused by publication, and instances when damages could include the harm from intrusion and publication); James E. King & Frederick T. Muto, *Compensatory Damages for*

developed, however, distinct tests for defining intrusion and public disclosure. Such tests should be considered independently. Otherwise, as *Dietemann* reveals, judicial or jury antipathy to information-gathering methods may color the analysis of the publication issues.

One final aspect of *Dietemann* warrants discussion. An important theme in the case is that journalists do not have special legal status by virtue of their role in gathering and disseminating news.³⁶¹ This theme is analytically misleading and only partly right. A more appropriate statement is that while the press may have no constitutional status distinct from other communicators, some laws can impermissibly burden all communicators.³⁶² This construction presents a stronger First Amendment

Newsgatherer Torts: Toward a Workable Standard, 14 U.C. DAVIS L. REV. 919, 948-53 (1981) (proposing a damages standard that falls between the extremes of *Dietemann* and *Costlow v. Cusimano*, 311 N.Y.S.2d 92, 94 (N.Y. App. Div. 1970) (finding that damage awards from trespass should not include harm from publication)).

³⁶¹ See *Dietemann*, 449 F.2d at 249.

³⁶² Whether the press has special status also diverted the Court's attention in *Cohen v. Cowles Media*, 501 U.S. 663 (1991), where the Court ruled that the First Amendment did not bar application of a promissory estoppel action against a newspaper that published the name of a source who had been promised confidentiality by a reporter. See *id.* at 670. In *Cohen*, Justice White's majority opinion emphasized that the "publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Id.* (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)). Consequently, enforcement of general laws like promissory estoppel "is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.* Justice Blackmun, in a dissenting opinion, joined by Justices Marshall and Souter, felt that the subject matter of the speech, rather than the identity of the speaker, was critical. See *id.* at 673 (Blackmun, J., dissenting). In addition, he felt that the First Amendment protection available to the press would be equally available to non-media defendants. See *id.* Finally, he stated that the majority's admonition that the press has no special status was misplaced. See *id.* at 673-74.

The impact of a generally applicable law on freedom of expression can be addressed without the overtones and shadings of special status for the press, as *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), illustrates. In *Hustler*, the Court found that the significance of free debate on public figures outweighed the state's interest in punishing publications intended to cause emotional distress. See *id.* at 53. *Hustler* also illustrated that some generally applicable laws are capable of seriously burdening expressive activities. In contrast, the Court in *Cohen* found the application of promissory estoppel to a promise between a reporter and a source to be the "constitutionally insignificant consequence of applying to the press a generally applicable law." *Cohen*, 501 U.S. at 672. Justice White regarded this case as not involving a sanction for publication of truthful information, but merely involving a sanction for breaking a promise. See *id.* at 670-71. Yet, as Justice Blackmun observed, "publication of important political speech is the claimed violation." *Id.* at 675 (Blackmun, J., dissenting). The types of inquiries necessary under promissory estoppel, such as whether a promise should be enforced to avoid an injustice, are not neutral to the First Amendment because they require comparing the interest in publication against the interest in confidentiality. Thus, despite promissory estoppel's general applicability, the

claim and requires a more thoughtful analysis than that provided by the Ninth Circuit.

2. *Shulman v. Group W Productions, Inc.*

On Scene: Emergency Response is a television program depicting dramatic emergency rescues.³⁶³ On September 29, 1990, the program featured a segment showing an emergency-rescue helicopter crew's response to an automobile accident in which two occupants of an overturned car had to be cut free from the car with the tool known as "the jaws of life."³⁶⁴ Among audience members for this broadcast was Ruth Shulman, who was hospitalized as a result of injuries she sustained in an automobile crash several months earlier.³⁶⁵ Ruth was shocked to learn that the program was showing *her* rescue and transport to the hospital in the helicopter.³⁶⁶ The flight nurse wore a wireless microphone and her conversations with Ruth at the accident scene and during the helicopter ride were recorded and broadcast without Ruth's knowledge or consent.³⁶⁷

Ruth and her son³⁶⁸ brought suit against the program's producers, claiming the videotaping of the rescue was an intrusion and the broadcast was public disclosure of private facts.³⁶⁹ The trial court granted the defendant's summary judgment motion,³⁷⁰ but the court of appeals reversed and remanded, concluding that triable issues existed on both the intrusion and public disclosure claims.³⁷¹ The California Supreme Court agreed that triable issues existed concerning the nonconsensual recording of Ruth's conversations with the nurse and the nonconsensual presence of the camera operator in the helicopter when transporting Ruth and her son to the hospital.³⁷² However, the state supreme court found the broadcast to be newsworthy and sustained the trial court's judgment for the defendant on the public disclosure claim.³⁷³

Court should have recognized the tort's serious impact on communicators.

³⁶³ See *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 475 (Cal. 1998).

³⁶⁴ See *id.*

³⁶⁵ See *id.*

³⁶⁶ See *id.* at 476.

³⁶⁷ See *id.*

³⁶⁸ Wayne Shulman was also trapped in the overturned car. The broadcast showed only a glimpse of Wayne and his features were not identifiable nor was his voice heard. The state supreme court regarded this portrayal as inoffensive. See *id.* at 475. However, Wayne did have an expectation of privacy when placed inside the helicopter and was permitted to proceed with his intrusion claim. See *id.* at 477.

³⁶⁹ See *id.* at 476-77.

³⁷⁰ See *id.* at 477.

³⁷¹ See *Shulman v. Group W Prod. Inc.*, 59 Cal. Rptr. 2d 434 (Cal. Ct. App. 1996), *aff'd in part and rev'd in part*, 955 P.2d 469 (Cal. 1998).

³⁷² See *Shulman*, 955 P.2d at 477.

³⁷³ See *id.*

The California Supreme Court's analysis of the public disclosure claim was not influenced by the possible intrusion committed during the newsgathering process. Instead, the court analyzed the public disclosure claim solely on newsworthiness grounds, concluding that the subject matter was of legitimate concern to the public and disclosure of Ruth's injured physical condition and medical treatment was substantially relevant to the subject matter.³⁷⁴ The only instance when newsgathering and publication were intertwined was in a footnote on damages. After noting that the Supreme Court in *Florida Star* left open the possibility that cases involving publication of unlawfully acquired information could involve sanctions not only for the newsgathering but also for the ensuing publication, the state supreme court stated, "We do not decide that question in the present case, regarding it as going to the extent of allowable damages for intrusion."³⁷⁵ Although the California court did not have a damage award before it, and in some cases both intrusion and public disclosure could be present, it is odd that a constitutionally protected publication can affect damages for intrusion. Stated differently, public disclosure cases involve content-based interests while intrusion cases involve content-neutral interests. Claims for each type of case require separate analysis and damage awards for intrusion should be enhanced by publication only when the material published is not newsworthy.

Despite its rather off-hand remark about damages, the California Supreme Court acknowledged that sensitive content-based questions were presented in public disclosure cases while intrusion cases involved content-neutral questions about the impact of generally applicable laws. The state court was hesitant to sit as "superior editors" to define which details were not important to a story.³⁷⁶ Such authority would "assert impermissible supervisory power over the press."³⁷⁷ Yet, the court's reluctance to second-guess journalistic decisions about which facts were essential to the narrative³⁷⁸ did not extend to questions such as how or where to gather information. The court averred, "A reasonable jury could conclude the producers' desire to get footage that would convey the 'feel' of the event—the real sights and sounds of a difficult rescue—did not justify either placing a microphone on Nurse

³⁷⁴ See *id.* at 479.

³⁷⁵ *Id.* at 489 n.11; see also *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 793 n.2 (Minn. Ct. App. 1998) (noting that a plaintiff alleging fraud and trespass should be allowed to present evidence and arguments on publication damages).

³⁷⁶ See *Shulman*, 955 P.2d at 488. The court asked, "How can the courts fashion and administer meaningful rules for protecting privacy without unconstitutionally setting themselves up as censors or editors?" *Id.* at 474.

³⁷⁷ *Id.* at 495.

³⁷⁸ For example, in response to the plaintiffs' claim that the images and sounds that identified Ruth as the accident victim were irrelevant, the court stated, "It is difficult to see how the subject broadcast could have been edited to avoid completely any possible identification without severely undercutting its legitimate descriptive and narrative impact." *Id.* at 488.

Carnahan or filming inside the rescue helicopter.”³⁷⁹ This lack of deference may be explained by the court’s belief that the intrusion tort did not “subject the press to liability for the contents of its publications.”³⁸⁰ In other words, the interest in privacy is at its zenith in intrusion cases³⁸¹ and the press has no special exemption from generally applicable content-neutral laws.³⁸²

However, the court did not intend to hold that the First Amendment was irrelevant in intrusion cases. The court measured the “offensiveness” of any intrusion³⁸³ by the intruder’s motivation and method of investigation. The court distinguished between journalists gathering information about socially important matters and those who intrude for purposes such as harassment or prurient curiosity.³⁸⁴ But even pursuit of an important story did not justify the use of methods such as wiretapping.³⁸⁵ Thus, to the California Supreme Court, the method of newsgathering was critical; “routine” techniques such as asking questions about confidential matters, as in *Nicholson*,³⁸⁶ would not be highly offensive, while trespass or wiretapping would be. In between these two extremes lie cases involving hidden cameras and microphones for which there were no bright lines.³⁸⁷ In *Shulman*, the court did not believe that the concealed microphone was an “indispensable” reporting device.³⁸⁸

The question remains as to what constitutes an “indispensable” reporting tool. The court did not base its conclusion that the concealed microphone was dispensable on an analysis of the communicative power of various tools of communication. Instead, this conclusion was based on an analysis of the depth of the intrusion permitted by the technology in this instance. Especially important to the court in

³⁷⁹ *Id.* at 494.

³⁸⁰ *Id.* at 496.

³⁸¹ *See id.* at 489 (noting the “conceptual centrality” of the intrusion tort).

³⁸² *See id.* at 495.

³⁸³ The court described intrusion as involving two elements: “(1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person.” *Id.* at 490.

³⁸⁴ *See id.* at 493. Although referring specifically to journalists, an undefined class, the court’s concern for motivation should also apply to non-media personnel who seek information for public dissemination.

³⁸⁵ *See id.* at 494.

³⁸⁶ *See supra* notes 249-64 and accompanying text.

³⁸⁷ *See Shulman*, 955 P.2d at 494-95. After *Shulman*, the California Supreme Court in *Sanders v. American Broad. Co.*, 1999 Cal. LEXIS 3900 (Cal. June 24, 1999), again noted the *ad hoc* nature of intrusion cases involving hidden cameras and microphones. The court stated that secret recording by journalists was not necessarily an intrusion. “Whether a reasonable expectation of privacy is violated by such recording depends on the exact nature of the conduct and all the surrounding circumstances. In addition, liability under the intrusion tort requires that the invasion be highly offensive to a reasonable person, considering, among other factors, the motive of the alleged intruder.” *Id.* at *4.

³⁸⁸ *See Shulman*, 955 P.2d at 495.

Shulman was the defendant's calculated exploitation of Ruth's vulnerability: "A reasonable jury could find that defendants, in placing a microphone on an emergency treatment nurse and recording her conversation with a distressed, disoriented and severely injured patient, without the patient's knowledge or consent, acted with highly offensive disrespect for the patient's personal privacy" ³⁸⁹

While *Shulman* arguably leaves open the possibility of a damage award for intrusion to include harm from publication, the state court's concern for the motivation of newsgathering activities should mitigate an award of compensatory damages and bar punitive damages. The standards for punitive damages play a major role in the two cases discussed next.

3. *Food Lion v. ABC*

On November 5, 1992, *PrimeTime Live* reached the largest audience in its history with a program that included a story about the food handling and sanitation practices of the Food Lion grocery chain.³⁹⁰ The Food Lion segment included about six minutes of video footage shot by two ABC employees who had worn hidden video cameras during a brief period of time when they had also worked at Food Lion stores.³⁹¹ To gain employment at Food Lion, the two ABC employees did not disclose that they were ABC employees and falsely represented their employment histories, including false references, to appear as though they had relevant food handling experience.³⁹² Their intent was to deceive Food Lion in order to gain access to areas of stores not open to the public.³⁹³ ABC's news policy requires that employees not disguise their identity without prior approval of management.³⁹⁴ Accordingly, the

³⁸⁹ *Id.* at 494. Similarly, the court held that "entering and riding in an ambulance" with seriously injured patients could reasonably be regarded as "an egregious intrusion on a place of expected seclusion." *Id.*

³⁹⁰ The broadcast "described many unsanitary—and distinctly unappetizing—food handling practices at Food Lion: workers preparing sandwiches without gloves and altering expiration dates on deli products; old chicken tarted up with barbeque sauce; stinky fish rinsed with bleach." Amy Singer, *Food, Lies, and Videotape*, AM. LAW., Apr. 1997, at 57 [hereinafter Singer, *Food*]. Food Lion sought to obtain an injunction against the broadcast of the videotape, but this request was denied. Opening Brief for Capital Cities/ABC, Inc. at 5, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 97-2492, 1999 U.S. App. LEXIS 26373 (4th Cir. Oct. 20, 1999) [hereinafter cited as Opening Brief for ABC].

³⁹¹ See Singer, *Food*, *supra* note 390, at 57-58.

³⁹² See *id.* at 58.

³⁹³ For a more detailed discussion of ABC's efforts to place its employees in Food Lion facilities, see *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 814-16 (M.D.N.C. 1995), *aff'd in part and rev'd in part*, 1999 U.S. App. LEXIS 26373.

³⁹⁴ See Singer, *Food*, *supra* note 390, at 58.

Food Lion undercover investigation was approved by senior management of ABC, including an attorney.³⁹⁵

After the broadcast, Food Lion brought suit for a variety of torts, such as intentional misrepresentation, deceit, fraud, negligent supervision, trespass, breach of fiduciary duty, civil conspiracy, and unfair and deceptive trade practices.³⁹⁶ Although publicly disputing the truthfulness of ABC's portrayal, Food Lion did not bring a defamation action.³⁹⁷ Ruling on ABC's motion to dismiss all of the claims on First Amendment grounds, the federal district court refused to dismiss the fraud, trespass, and civil conspiracy claims, dismissed claims such as wiretapping, and deferred ruling on claims such as unfair trade practices.³⁹⁸

The district court ruled that the First Amendment did not bar recovery for damages stemming from acts that violated generally applicable laws like fraud.³⁹⁹ However, the court rejected Food Lion's claim that the alleged wrongful methods of obtaining information allowed Food Lion to recover for damage to its reputation.⁴⁰⁰ "[A]ny publication damages for injury to its reputation" were barred unless Food Lion established the defamation requirements of actual malice and falsity.⁴⁰¹ To the

³⁹⁵ See *Food Lion*, 887 F. Supp. at 815.

³⁹⁶ See *id.* at 812-13. Food Lion also claimed, unsuccessfully, that it owned the copyright to the material obtained through the use of hidden cameras. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 946 F. Supp. 420 (M.D.N.C. 1996), *aff'd mem.*, 116 F.3d 472 (4th Cir. 1997).

³⁹⁷ Food Lion's lawyers did not feel they had obtained enough evidence prior to the time limit imposed by the statute of limitations to prove a defamation claim. See *Singer, supra* note 390, at 58. Later, they discovered that ABC had deleted material from the copy of the raw videotape footage provided to Food Lion. They sought to amend their complaint to add a claim of defamation, but the magistrate judge denied this request, stating:

In open court during oral argument, the court saw and heard the video and audio out takes described by Food Lion in its brief as possible bases for bringing a libel claim. There simply is no relation whatsoever between the out takes and any possible libel action Food Lion may have contemplated over two years ago.

Food Lion, Inc. v. Capital Cities/ABC, Inc., 165 F.R.D. 454, 457 (M.D.N.C. 1996).

³⁹⁸ See *Food Lion*, 887 F. Supp. at 824.

³⁹⁹ See *id.* at 823.

⁴⁰⁰ See *id.*

⁴⁰¹ *Id.* The district court was guided by *Cohen* and *Hustler*. In *Cohen*, damages for promissory estoppel were allowed because the cause of action was not being used to avoid the strict requirements for establishing a defamation claim. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991). But see *infra* note 517. In contrast, the Court, in *Hustler* ruled that public figures seeking damages for intentional infliction of emotional distress from satirical publications must establish actual malice. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). The district court stated:

Where a plaintiff sought recovery for non-reputational or non-state of mind injuries, the *Cohen* Court indicated that such a plaintiff could recover these damages without offending the First Amendment. Where, however, a plaintiff

district court, First Amendment standards governed the type of damages Food Lion could recover, but the First Amendment did not affect the application of generally applicable torts that were not tied to the communicative impact of the broadcast.⁴⁰²

The case was presented to the jury in three phases; in none did the jury see the *PrimeTime Live* story on Food Lion.⁴⁰³ The jury first considered ABC's liability for fraud, trespass, and breach of the duty of loyalty.⁴⁰⁴ The judge's instructions on these torts included the following:

You should not concern yourself in any way with what ABC broadcast or did not broadcast about Food Lion. You have not heard any evidence about the content of the broadcast. This is intentional. It is immaterial what was or was not broadcast by ABC. The claims of fraud, trespass and breach of duty do not have anything to do with the content of the broadcast.⁴⁰⁵

The jury found the defendants liable on all counts.⁴⁰⁶ Prior to beginning the compensatory damages phase, the judge ruled that proof of damages stemming from the broadcast, such as "'lost profits, lost sales, diminished stock value or anything of that nature' would not be permitted."⁴⁰⁷ The jury awarded \$1400 in compensatory

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. To the extent that Food Lion is attempting to recover reputational damages without establishing the requirements of a defamation claim, this case more closely resembles *Hustler*.

Food Lion, 887 F. Supp. at 823; see also *Veilleux v. NBC*, 8 F. Supp. 2d 23 (D. Me. 1998) (refusing to dismiss plaintiff's claim of negligent infliction of emotional distress based on promises made to induce cooperation in the production of a television news magazine story because the claim was not an effort to avoid the requirements of a defamation claim).

⁴⁰² See *Food Lion*, 887 F. Supp. at 823.

⁴⁰³ See Transcript of Proceedings at 1804, *Food Lion* (No. 6:92CV00592).

⁴⁰⁴ See *id.* at 1791.

⁴⁰⁵ *Id.* at 1804.

⁴⁰⁶ See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 958 (M.D.N.C. 1997).

⁴⁰⁷ *Food Lion*, 964 F. Supp. at 958 (M.D.N.C. 1997) (quoting Transcript of Proceedings at 1848, *Food Lion* (No. 6:92CV00592)). The court found that these types of damages were not proximately caused by the fraud, trespass, and breach of duty. See *id.* at 959. On the fraud and trespass claims, the court found that while the tortious activities of ABC's employees enabled access to store areas in which the public was not allowed, "it was the food handling practices themselves—not the method by which they were recorded or published—which caused the loss of consumer confidence." *Id.* at 963. On the duty of loyalty claim, the court ruled that if the ABC employees had staged scenes which were later broadcast, the "breach of their duty could be the proximate cause of 'publication damages.'"

damages on the fraud claim, and nominal damages of \$1 each on the trespass and breach of duty claims.⁴⁰⁸

In the punitive damages phase, the jury was urged by Food Lion to become "the policeman on the media highway . . ."⁴⁰⁹ ABC countered that deception is sometimes justified in newsgathering and that the network had a higher moral purpose for telling the lies.⁴¹⁰ The judge again instructed the jury that the content of the broadcast was not at issue.⁴¹¹ He also instructed the jury that the use of hidden cameras by a participant was legal, and did not by itself constitute conduct that would justify an award of punitive damages.⁴¹² The jury awarded a total of \$5,545,750 in punitive damages on the fraud claim, which the judge considered to be excessive and reduced to \$315,000.⁴¹³ In post-trial interviews, jurors revealed that they had considered punitive damages ranging from \$1 to \$1 billion.⁴¹⁴ The focus of the debate was when, if ever, lying is justified. The juror who advocated the \$1 billion award felt that it was never justified.⁴¹⁵ At the other extreme, another juror was willing to forgive ABC "for trying to bring a good story."⁴¹⁶ As a compromise, the jurors agreed upon \$5.5 million, with one juror persuading the others that the two employees who went undercover should not be liable for any punitive damages.⁴¹⁷

Id. During the liability phase of the trial, Food Lion presented evidence about the staging of various incidents. Several of these incidents were not presented on the broadcast and therefore were incapable of causing publication damages. *See id.* at 964. In the other incidents, the ABC employees did not create situations which would not otherwise have existed. *See id.* at 964-65.

⁴⁰⁸ *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., No. 6:92CV00592, 1997 U.S. Dist. LEXIS 11344, at *17 (M.D.N.C. July 9, 1997). The jury also recommended an award of \$1,500 on the unfair trade practices claim. The district court ruled that Food Lion had to choose between recovery on its common law claims or its statutory unfair trade practices claim. *See id.* Food Lion elected the damages on its common law claims. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., No. 6:92CV00592, 1997 U.S. Dist. LEXIS 13391, at *7 (M.D.N.C. July 25, 1997).

⁴⁰⁹ Singer, *Food*, *supra* note 390, at 63.

⁴¹⁰ *See id.*; *see also* Robert Lissit, *Gotcha*, AM. JOURNALISM REV., Mar. 1995, at 17 (discussing circumstances when some journalists believe deception is justified).

⁴¹¹ *See* Transcript of Proceedings at 3237, *Food Lion* (No. 6:92CV00592). The judge's instructions stated, "For purposes of your deliberations, the broadcast must be assumed to be true and you may not consider any effect the broadcast may have had upon the viewing public or upon Food Lion's sales or profits in considering punitive damages." *Id.*

⁴¹² *See id.* at 3236-37.

⁴¹³ *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923, 937-40 (M.D.N.C. 1997).

⁴¹⁴ *See* Singer, *Food*, *supra* note 390, at 64.

⁴¹⁵ *See* Barry Meier, *Jury Says ABC Owes Damages of \$5.5 Million*, N.Y. TIMES, Jan. 23, 1997, at A1, B1.

⁴¹⁶ Singer, *Food*, *supra* note 390, at 64.

⁴¹⁷ *See id.*

The jurors believed they were sending ABC a message that it needed to gather information in a "different way."⁴¹⁸

Three distinct First Amendment issues were presented in this case. The first issue was whether the First Amendment was irrelevant for purposes of establishing liability.⁴¹⁹ The second issue was whether ABC's information-gathering methods entitled Food Lion to recover publication damages without meeting the constitutional requirements for a defamation claim.⁴²⁰ The third was the question of whether there were any First Amendment barriers to an award of punitive damages, even if the First Amendment were irrelevant for purposes of liability.⁴²¹

On the first issue, the district court quoted *Cohen v. Cowles Media Co.*,⁴²² for the proposition 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."⁴²³ *Cohen* is notable for the Court's belief that application of promissory estoppel to the press did not trigger any First Amendment analysis.⁴²⁴ The *Food Lion* district court similarly was satisfied with the general applicability of torts such as fraud, simply noting that applying these torts to ABC did not violate the First Amendment.⁴²⁵

The identification of a law as generally applicable usually triggers either no First Amendment scrutiny or relaxed scrutiny, such as in the test articulated in *United States v. O'Brien*.⁴²⁶ Only on rare occasions does the Court find such a law invalid as applied to expressive activities.⁴²⁷ Those rare occasions, though, mean that the generally applicable label should be read with caution; it does not always signal an absence of serious constitutional questions.⁴²⁸ One type of generally applicable law is that which does not reach acts covered by the First Amendment. Examples include antitrust or labor laws that are aimed at the business practices of a range of

⁴¹⁸ Meier, *supra* note 415, at B11 (quoting juror Tony Kuton).

⁴¹⁹ *Food Lion*, 984 F. Supp. at 929. *See also Food Lion*, 1997 U.S. Dist. LEXIS 11344, at *14) (ruling that state unfair trade practices law does not implicate the First Amendment).

⁴²⁰ *See Food Lion*, 984 F. Supp. at 932.

⁴²¹ *See id.* at 931-32.

⁴²² 501 U.S. 663 (1991); *see also supra* note 362 & *infra* note 434.

⁴²³ *Food Lion*, 984 F. Supp. at 929 (quoting *Cohen*, 501 U.S. at 669).

⁴²⁴ *See Cohen*, 501 U.S. at 669.

⁴²⁵ *See Food Lion*, 984 F. Supp. at 929.

⁴²⁶ 391 U.S. 367 (1968). *O'Brien* held that because of the substantial interest in protecting the selective service process, and the narrow means available to protect the process, the conviction of *O'Brien* was merited. *See id.* at 382.

⁴²⁷ *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 461 (1958) (recognizing that the abridgment of First Amendment rights, "even though unintended, may inevitably follow from varied forms of governmental action.").

⁴²⁸ *See Employment Div. v. Smith*, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring) ("[T]here is nothing talismanic about neutral laws of general applicability . . .").

enterprises.⁴²⁹ A distinct type of generally applicable law, includes within its scope both acts covered and not covered by the First Amendment. Examples of such include noise ordinances and public indecency laws that reach actions intended to convey messages as well as actions not intended to convey messages.⁴³⁰ When applied to expressive activities, or activities "commonly associated with expression,"⁴³¹ these laws are subjected to a weighing of the state's interest against the burden on expression.

The district court in *Food Lion* treated torts such as fraud as not reaching acts covered by the First Amendment, yet ABC's activities were designed to gather news on a matter of public importance. The district court was satisfied that the torts did not "target or single out the press,"⁴³² while acknowledging that the press does not have special rights.⁴³³ However, the concern for the press having special exemptions from laws of general applicability is, as previously noted, only partly correct. Instead of rejecting the First Amendment out of hand, the district court should have been concerned with the application of these torts to communicators. Just as it is erroneous to regard newsgathering as a carte blanche license to engage in any behavior, it is also fallacious to discount completely the constitutional values served by newsgathering. For the purposes of determining liability, the district court should have engaged in content-neutral analysis.⁴³⁴ Under this analysis, the significance of the state's interests and the question of whether enforcement of the law is properly tailored to serve those interests are examined. For purposes of liability, application of torts such as fraud to ABC's conduct narrowly serves substantial content-neutral interests. However, the burden on expressive activities varies according to the type and amount of damages that are allowed. The district court acknowledged the First Amendment implications of these issues, which are addressed next.

⁴²⁹ See, e.g., *Associated Press v. NLRB*, 301 U.S. 103 (1937) (finding that application of the National Labor Relations Act to businesses involved in the dissemination of news did not interfere with freedom to publish news).

⁴³⁰ See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570-71 (1991) (noting that a public indecency law is aimed at public nudity whether or not it is combined with expressive activity).

⁴³¹ *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988) (describing placement of newsboxes on public property as conduct associated with expression).

⁴³² *Food Lion*, 887 F. Supp. at 822 (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991)).

⁴³³ See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 6:92CV00592, 1997 U.S. Dist. LEXIS 13214 at *11 (M.D.N.C. 1997).

⁴³⁴ Content-neutral analysis is triggered by the fact that the torts at issue in *Food Lion* are not tied to communicative impact and the harm from ABC's newsgathering exists regardless of whether or not ABC broadcast the surreptitiously obtained videotapes. This analysis is distinct from *Cohen* where the Court did not acknowledge that promissory estoppel was triggered by publication of Cohen's name. See *supra* note 362. Moreover, analysis of promissory estoppel involves questions which are not content neutral.

Despite the court's belief that the First Amendment was irrelevant to liability issues, it issued two key rulings that limited the type of damage Food Lion could seek as having resulted from ABC's newsgathering methods. The first was the court's ruling that Food Lion could not recover damage to its reputation without proving falsity and actual malice.⁴³⁵ In effect, Food Lion claimed that illegal information-gathering methods were sufficient to make the publication of that information, even if true, fall outside the protection of the First Amendment. The district court rejected this, drawing largely upon *Hustler*,⁴³⁶ in which the Court ruled that constitutional libel standards applied to intentional infliction of emotional distress claims.⁴³⁷ Although the court in *Food Lion* did not expand upon this ruling, one can easily see the havoc to defamation law that would result from allowing recovery without meeting constitutional standards.

Some information-gathering methods, such as the deliberate distortion of an event,⁴³⁸ would be helpful in establishing the presence of knowledge of falsity in a defamation case, but it is untenable to believe that trespass, for example, would override the constitutional protections surrounding the act of publication. To allow punishment for trespass or similar newsgathering acts to engulf constitutional standards for publication would not be a narrowly tailored method of protecting the interests served by trespass law. The concern for First Amendment tailoring mandates that an act such as trespass be punished as just that—trespass—without outrunning the interest served by the underlying tort. Stated differently, trespass serves content-neutral interests, and to allow a trespass claim to include damage for the communicative impact of a subsequent publication distorts those interests.

The district court also prevented Food Lion from seeking recovery for "lost sales, lost profits, or diminished stock value."⁴³⁹ The district court's ruling was based on a proximate cause analysis rather than a First Amendment analysis.⁴⁴⁰ Nonetheless, as with damages relating to reputation, damages such as lost profits are tied to communicative impact. Allowing a jury to entertain the prospect of awarding

⁴³⁵ See *Food Lion*, 887 F. Supp. at 823-24.

⁴³⁶ See *id.* at 823.

⁴³⁷ See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

⁴³⁸ Food Lion sought to prove that the ABC employees staged certain events during their Food Lion employment. See *Food Lion*, 964 F. Supp. at 963-66. The impact of staged video presentations in defamation actions is illustrated by NBC's settlement of a defamation suit brought by General Motors in which GM discovered that NBC had rigged a fiery pickup truck crash for a *Dateline NBC* broadcast. See *How GM One-Upped An Embarrassed NBC On Staged News Event*, WALL ST. J., Feb. 11, 1993, at A1. Once GM acquired evidence of the staging, NBC agreed to issue an on-air apology and to reimburse GM for the money it spent investigating the *Dateline* report. See *id.*

⁴³⁹ *Food Lion*, 964 F. Supp. at 958 (quoting Transcript of Proceedings at 1848, *Food Lion* (No. 6:92CV00592)).

⁴⁴⁰ See *supra* note 401.

damages for lost profits and the like, which Food Lion believed were in the "neighborhood" of \$5.5 billion,⁴⁴¹ without proof of falsity and actual malice, would enable juries to use compensatory damages as a guise for their dislike of the information-gathering methods or the truth of the publication. The jury was instructed that Food Lion was only entitled to recover costs from the fraud, such as the expense of hiring and training the employees, placing them on the payroll, and terminating them from the payroll.⁴⁴²

The district court did believe First Amendment standards were relevant for punitive damages. The jury was instructed in the liability portion of the trial that one of the elements of fraud is intent to deceive.⁴⁴³ In the punitive damages phase, the court instructed the jury that any findings of fraud already made may support the necessary "consciousness of wrongdoing" standard for punitive damages.⁴⁴⁴ Ruling on ABC's post-trial claim that the First Amendment precluded the award of punitive damages, the district court drew upon defamation cases which required that in situations involving matters of public concern, punitive damages are available only where actual malice is shown.⁴⁴⁵ The district court wrote:

For the jury to award punitive damages in this case, it was required to find that Defendants acted with a consciousness of wrongdoing. Therefore, the jury was required to find a form of intent in the actions taken by Defendants in order for them to award punitive damages. The relationship of consciousness of wrongdoing to the torts in this case is, in the view of this Court, the same type of relationship that actual malice has to the tort of libel. The higher threshold that must be reached before punitive damages are awarded satisfies the dictates of *Gertz* and provides protection for a member of the press who acts negligently or without intent to violate generally applicable laws.⁴⁴⁶

⁴⁴¹ See *Food Lion*, 964 F. Supp. at 965.

⁴⁴² See Transcript of Proceedings at 1921, *Food Lion* (No. 6:92CV00592). Food Lion did not contend that it suffered actual damages from the trespass. See *id.* Similarly, it sought only nominal damages for the breach of the duty of loyalty claim. See *id.* at 1922.

⁴⁴³ See *id.* at 1794.

⁴⁴⁴ See *id.* at 3233. The only difference between the relevant state laws was that South Carolina requires proof by clear and convincing evidence while the standard in North Carolina is proof by a preponderance of the evidence. See *id.* at 3232-34.

⁴⁴⁵ See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (acknowledging that in cases involving private matters, punitive damages are available without proof of actual malice); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (noting that cases involving speech about public matters require proof of actual malice before punitive damages are awarded).

⁴⁴⁶ *Food Lion*, 984 F. Supp. at 932.

There are two significant aspects to this passage: first, a belief that a higher threshold must be met in cases such as this; and second, the claim that the consciousness of wrongdoing standard is a higher threshold. The district court was correct on the first point but wrong on the second.

If the district court believed that a higher threshold was triggered by defendants' status as members of the press, it was denigrating the First Amendment protections that should be available to nonmedia defendants. However, because the court relied upon *Gertz v. Welch*,⁴⁴⁷ another possible reading of the opinion is that the higher threshold is tied to the subject matter, rather than the identity of the speaker.⁴⁴⁸ This reading is important for three reasons. First, if this reading is applied, the protection to which ABC is entitled would also be available to a nonpress entity, such as a public interest group concerned about food safety, which documented and publicized conditions at Food Lion stores. Second, the subject matter distinction would be useful in analyzing the degree of reprehensibility, a critical component of punitive damages analysis. Third, since the district court believed that the interest in gathering news had to be balanced against the interest in punishing unlawful conduct,⁴⁴⁹ a distinction between conduct aimed at gathering private information and information of public concern creates an appropriate balance.

The consciousness of wrongdoing standard does not meet constitutional standards. To understand this concept, it is necessary to explain the *Gertz* ruling and the constitutional developments that preceded it. With *Sullivan*, the Court began a radical transformation of defamation law to provide "breathing space" for freedom of expression.⁴⁵⁰ One of the Court's concerns was to infuse the First Amendment requirement of tailoring into the standards for damage awards, especially punitive damages.⁴⁵¹ In *Gertz*, the Court distinguished between private figures and public figures in damage awards for harm to reputation.⁴⁵² This distinction between plaintiffs was justified by the Court's belief that private plaintiffs "are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."⁴⁵³ However, punitive damages have been "wholly irrelevant" to the interest in compensating private plaintiffs for harm to reputation; the Court has required all plaintiffs in cases involving public matters to prove *at least* actual malice

⁴⁴⁷ 418 U.S. 323 (1974).

⁴⁴⁸ See *Dun & Bradstreet*, 472 U.S. at 773, n. 4 (White, J., concurring) (stating that none of the Court's cases support the proposition that the press has greater rights than other communicators).

⁴⁴⁹ See *Food Lion*, 1997 U.S. Dist. LEXIS 13214, at *18.

⁴⁵⁰ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 & 298 (1964).

⁴⁵¹ See *id.* at 284 (noting that where the jury was not instructed to differentiate between general and punitive damages, its award is unconstitutional); See also *Gertz*, 418 U.S. at 349 (state remedies for defamation must reach "no farther than is necessary").

⁴⁵² See *Gertz*, 418 U.S. at 349-52.

⁴⁵³ *Id.* at 345.

before receiving punitive damages.⁴⁵⁴ The actual malice standard was necessary to guard against juries selectively punishing unpopular views and awarding amounts which bear no relation to the harm.⁴⁵⁵

Gertz is not a definitive treatment of punitive damages and the First Amendment.⁴⁵⁶ Yet, at a minimum, it means that the First Amendment establishes a barrier to punitive damages that is overcome only in extreme circumstances.⁴⁵⁷ The central problem with the court's jury instructions in *Food Lion* was that the definition of liability seemed to automatically entitle the plaintiff to punitive damages. It also bears repeating that the jury instructions on liability were based on the proposition that the First Amendment was completely irrelevant to torts such as fraud. Moreover, the district court's apparent belief that ABC's intent to violate the law was sufficient to cross the constitutional threshold overlooks the fact that the Court has found in other First Amendment contexts that "many things done with motives that are less than admirable are protected by the First Amendment."⁴⁵⁸

Although the district court reduced the amount of punitive damages on due process grounds, *Gertz* indicated that there is a First Amendment concern for a reasonable relationship between compensatory damages and punitive damages. Given

⁴⁵⁴ See *id.* at 350; see also *Dun & Bradstreet*, 472 U.S. 749, 757 n.4 (1985) (explaining the public speech/private speech dichotomy of *Gertz*). One of the primary themes of *Gertz* was federalism; states were allowed to determine the standard of liability for private figures as long as they did not impose strict liability. See *Gertz*, 418 U.S. at 347. *Gertz* does not require states to allow punitive damages. See, e.g., *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161, 169 (Mass. 1975) (holding that damages for libel are compensatory and subject to special scrutiny). Nor does it prevent states from requiring that both actual malice and common law malice be found before punitive damages are awarded. See, e.g., *DiSalle v. P.G. Publ'g Co.*, 544 A.2d 1345 (Pa. Super. Ct. 1988) (holding that the jury was properly instructed to find both actual and common law malice). For commentary advocating that common law malice and actual malice be proven before punitive damages are awarded, see Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847, 848-62 (1985).

⁴⁵⁵ See *Gertz*, 418 U.S. at 350.

⁴⁵⁶ See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 38 (1991) (Scalia, J., concurring) (stating that punitive damages could violate the First Amendment); *Florida Star v. B.J.F.*, 491 U.S. 524, 541 n.9 (1989) (stating that because liability could not be imposed on a newspaper publisher for publication of truthful information obtained from police records, the Court had no occasion to address the claim that imposition of punitive damages independently violated the First Amendment).

⁴⁵⁷ See *Smith v. Wade*, 461 U.S. 30, 50 (1983) ("Our concern in *Gertz* was that the threat of punitive damages, if not limited to especially egregious cases," would chill the "exercise of First Amendment freedoms' . . ." (quoting *Gertz*, 418 U.S. at 349) (emphasis added)).

⁴⁵⁸ *Hustler Magazine, Inc., v. Falwell*, 485 U.S. 46, 53 (1988). In the defamation context, trial courts have frequently confused the concepts of ill-will malice and actual malice. See, e.g., *Dun & Bradstreet*, 472 U.S. at 754-55 (discussing problems with trial court's instructions concerning malice); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 280-82 (1974) (same).

the modest award of \$1400 compensatory damages, and the fact that ABC was pursuing a story of public concern, even the reduced punitive damage award of \$315,000 seems disproportionate. Although the traditional underpinnings of punitive damages—deterrence of similar behavior and making an example of the wrongdoer—may call for a larger award, the need for narrow tailoring under the First Amendment tugs in the opposite direction. Furthermore, the threat of punitive damages is not the only factor deterring widespread lawbreaking by the press; news organizations depend upon public trust. The extensive criticism of ABC's investigatory methods following the *Food Lion* case surely heightened awareness among journalists of the need to act within legal limits.⁴⁵⁹

The Court of Appeals for the Fourth Circuit reversed the judgment on the fraud and unfair trade practices claims,⁴⁶⁰ affirmed the judgment on the breach of duty and trespass claims,⁴⁶¹ and affirmed the district court's refusal to allow Food Lion to recover publication damages without meeting constitutional standards.⁴⁶² Since Food Lion's punitive damage award was based on its fraud claim, the court of appeals eliminated the award without discussing the First Amendment standards for punitive damages.⁴⁶³ The First Amendment was discussed only in terms of the level of scrutiny necessary when generally applicable torts are enforced against the press and the issue of publication damages.⁴⁶⁴

Drawing upon *Cohen v. Cowles Media Co.*,⁴⁶⁵ the court of appeals did not

⁴⁵⁹ See, e.g., Dorothy Rabinowitz, *ABC's Food Lion Mission*, WALL ST. J., Feb. 11, 1997, at A20.

⁴⁶⁰ See *Food Lion*, 1999 U.S. App. LEXIS 26373, at *17 & *34 (4th Cir. Oct. 20, 1999). The court of appeals found that the two ABC employees were hired by Food Lion as "at-will" employees. Thus, Food Lion's damage claim for administrative costs attributable to these employees was inconsistent with the "at-will" employment doctrine. See *id.* at *12-15. Nor was Food Lion's fraud claim supported by proof that the two employees did not perform their jobs satisfactorily. See *id.* at *16-17. The unfair trade practices verdict was set aside because the misrepresentations did not harm the public and ABC was not competing with Food Lion. See *id.* at *34-36.

⁴⁶¹ On the breach of duty claim, the Fourth Circuit concluded that the ABC employees "did not serve Food Lion faithfully, and their interest (which was the same as ABC's) was diametrically opposed to Food Lion's." *Id.* at *23. Similarly, the court of appeals affirmed the trespass verdict because the ABC employees videotaped in nonpublic areas and this "wrongful act" exceeded their authority to enter Food Lion's premises as employees. See *id.* at *31.

⁴⁶² See *id.* at *43-49; see also *infra* text accompanying notes 468-70.

⁴⁶³ See *id.* at *42.

⁴⁶⁴ See *id.* at *37-40.

⁴⁶⁵ 501 U.S. 663 (1991). See *supra* note 362. ABC argued that *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), demonstrated that content-neutral laws of general applicability may be subject to heightened scrutiny under the First Amendment. The court of appeals, however, distinguished *Barnes* from *Cohen*, because the former involved nude dancing, a form of expression, while the latter involved a breach of promise "and not some form of

believe the torts of breach of duty and trespass triggered First Amendment scrutiny because neither tort targeted the press nor had more than an incidental effect on newsgathering.⁴⁶⁶ As previously shown, the general applicability of a law does not define its constitutionality in all applications. The court of appeals' belief that these torts have a minimal impact on the press is perhaps influenced by the nominal damage awards. Alternatively, the court of appeals implied ABC's methods were dispensable when it stated, "We are convinced that the media can do its important job without resort to the commission of run-of-the-mill torts."⁴⁶⁷

On the issue of publication damages, Food Lion again argued that because ABC obtained the videotapes through unlawful acts, Food Lion was entitled to compensation for lost sales and loss of good will without meeting the actual malice standard. The court of appeals, however, believed "damages resulting from speech"⁴⁶⁸ were distinct from damages stemming from acts such as trespass. Food Lion was trying to make an "end-run around First Amendment strictures" by recovering "defamation-type damages under non-reputational tort claims" and this was foreclosed by *Hustler*.⁴⁶⁹ The court of appeals noted that if state law standards had applied in *Hustler*, the underlying conduct would have been unlawful. "Notwithstanding the nature of the underlying act, the Court held [in *Hustler*] that satisfying *New York Times* was a prerequisite to the recovery of publication damages."⁴⁷⁰

The Fourth Circuit's opinion in *Food Lion* rested upon the premise that illegal newsgathering activities do not reduce the First Amendment's protection for the publication of illegally-acquired information. While this Article disagrees with the Fourth Circuit's belief that torts such as trespass do not trigger First Amendment scrutiny when applied to the press, the appellate court's analysis of damages will likely help other courts separate content-neutral damage claims based on newsgathering activities from content-based publication damage claims.

4. *W.D.I.A. Corp. v. McGraw-Hill, Inc.*

Jeffrey Rothfeder, a *Business Week* editor, wondered how difficult it was to access someone else's credit report. With the approval of McGraw-Hill executives and attorneys, Rothfeder devised a plan to test the security of the credit-reporting

expression." *Food Lion*, 1999 U.S. App. LEXIS 26373, at *42. This view of *Cohen* does not acknowledge that the damages stemmed from publication of Cohen's name. See *infra* note 517. More importantly, though, the court of appeals completely discounted the First Amendment values served by ABC's methods.

⁴⁶⁶ See *Food Lion*, 1999 U.S. App. LEXIS 26373, at *40.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at *46.

⁴⁶⁹ *Id.* at *44.

⁴⁷⁰ *Id.* at *48-49.

industry; Rothfeder would lie to credit-reporting agencies, claiming that McGraw-Hill needed credit reports to screen prospective employees,⁴⁷¹ a permissible purpose under the Fair Credit Reporting Act.⁴⁷² Rothfeder decided not to test the Big Three credit bureaus—TRW, Equifax, and Trans Union; instead, he targeted on-line “superbureaus” which provide businesses with computerized access to the files of the Big Three.⁴⁷³ After speaking with sales representatives of nearly a dozen “superbureaus,” Rothfeder signed up with two firms, identifying himself as an editor at McGraw-Hill.⁴⁷⁴ Following a perfunctory check, both firms gave him access to credit files and a broad range of information such as Social Security numbers, driving records, and credit-card numbers.⁴⁷⁵ Through one “superbureau,” W.D.I.A., Rothfeder obtained information about Vice-President Dan Quayle—Quayle charged more at Sears than at Brooks Brothers.⁴⁷⁶

In the cover story for its September 4, 1989 issue, *Business Week* reported Rothfeder’s test, including disclosure of Rothfeder’s misrepresentation of his purpose to obtain the reports.⁴⁷⁷ In a “highly unusual” move, *Business Week* did not identify W.D.I.A., nor even specify the area of the country in which it was located.⁴⁷⁸ As Rothfeder later testified, the purpose of the test ““was not to point to any particular company that provided the information. The test was of the system. The system turned out to be insecure. That’s what we wrote about in the story.””⁴⁷⁹

Rothfeder’s test was unusual for a journalist, but “mystery shopping,” which tests whether credit-reporting firms comply with legal requirements, is common in the credit-reporting industry.⁴⁸⁰ Six months before Rothfeder’s test, the Associated Credit Bureaus (ACB) conducted a test of W.D.I.A.⁴⁸¹ An ACB staff member fabricated a business, falsified a permissible purpose for obtaining credit reports, and became a W.D.I.A. subscriber.⁴⁸² W.D.I.A.’s failure to prevent a dubious user from obtaining confidential information was reported by ACB to the Federal Trade Commission (FTC) and also to Trans Union, one of W.D.I.A.’s information

⁴⁷¹ See *W.D.I.A. Corp. v. McGraw-Hill, Inc.*, 34 F. Supp. 2d 612, 616 (S.D. Ohio 1998).

⁴⁷² 15 U.S.C. § 1681(b) (1996).

⁴⁷³ See *W.D.I.A.*, 34 F. Supp. 2d at 616.

⁴⁷⁴ The application submitted to W.D.I.A. had false, inconsistent, and incomplete information. See Jeffrey Rothfeder, *Is Nothing Private*, BUS. WK., Sept. 4, 1989, at 82.

⁴⁷⁵ See *W.D.I.A.*, 34 F. Supp. 2d at 616.

⁴⁷⁶ See Rothfeder, *supra* note 474, at 74. The magazine obtained Quayle’s consent to publish this information. Thus, publication of the information did not constitute improper use in violation of McGraw-Hill’s contract with W.D.I.A. See *W.D.I.A.*, 34 F. Supp. 2d at 617.

⁴⁷⁷ See Rothfeder, *supra* note 474, at 82.

⁴⁷⁸ See *W.D.I.A.*, 34 F. Supp. 2d at 622.

⁴⁷⁹ *Id.* at 622 (quoting Jeffrey Rothfeder’s testimony).

⁴⁸⁰ See *id.* at 618.

⁴⁸¹ See *id.*

⁴⁸² See *id.*

suppliers.⁴⁸³ Trans Union cut off W.D.I.A.'s access to Trans Union files for a period of eight weeks.⁴⁸⁴ W.D.I.A. did not believe ACB's secret compliance audit was fraudulent or a breach of contract and actually commended ACB for its actions.⁴⁸⁵

W.D.I.A.'s reaction to the *Business Week* article, however, was quite different. Despite the fact that the firm was not identified in the article, W.D.I.A. executives believed the company's identity was clear to its suppliers and customers.⁴⁸⁶ Mark Hanna, W.D.I.A.'s president, flew to Trans Union's Chicago headquarters to avert being cut off again from Trans Union's information.⁴⁸⁷ At this meeting, Trans Union executives learned W.D.I.A. was the "superbureau" which had allowed Rothfeder to access Trans Union's file containing information about Vice-President Quayle.⁴⁸⁸ Several days after the *Business Week* article was published, the FTC notified W.D.I.A. that it was launching an investigation into the firm's procedures.⁴⁸⁹

W.D.I.A. believed the *Business Week* article triggered the FTC investigation.⁴⁹⁰ Rather than commending Rothfeder's test as it had that of the ACB, the firm brought suit against McGraw-Hill and Rothfeder for fraud and breach of contract.⁴⁹¹ W.D.I.A. sought \$489,241 in compensatory damages to recover costs stemming from the FTC investigation and travel expenses related to damage-control efforts such as the meeting with Trans Union.⁴⁹² It also sought \$45,000,000 in punitive damages.⁴⁹³

Herman J. Weber of the United States District Court for the Southern District of Ohio found McGraw-Hill and Rothfeder guilty of breach of contract and fraud.⁴⁹⁴ He wrote, "For the first time in its illustrious history, McGraw-Hill deliberately and intentionally made misrepresentations and promises to an entity in writing which it had no intention of keeping at the very time the written promises were made."⁴⁹⁵ Rothfeder did the same, Judge Weber added.⁴⁹⁶ The defendants' First Amendment arguments were given cursory treatment by the district court which merely noted that

⁴⁸³ See *id.*

⁴⁸⁴ See *id.*

⁴⁸⁵ See *id.* at 618-19.

⁴⁸⁶ See *id.* at 618.

⁴⁸⁷ See *id.*

⁴⁸⁸ Prior to this meeting, Trans Union executives who had read the *Business Week* article were unaware that W.D.I.A. was connected to the events depicted in the article. See *id.* at 619.

⁴⁸⁹ See *id.* at 619. Although dated September 4, 1989, the Court noted that "[t]he issue of *Business Week* containing the article became available on or about August 29, 1989." *Id.*

⁴⁹⁰ See *id.*

⁴⁹¹ See *id.* at 620.

⁴⁹² See *id.* at 616.

⁴⁹³ See *id.*

⁴⁹⁴ See *id.* at 628.

⁴⁹⁵ *Id.* at 619-20. The defendants were aware they were violating the Fair Credit Reporting Act and their contract with W.D.I.A. See *id.* at 623-24.

⁴⁹⁶ See *id.* at 620.

generally applicable laws incidentally affecting newsgathering do not violate the First Amendment.⁴⁹⁷ Although the district court cited the Ninth Circuit's *Dietemann* opinion, which indicated that damages could be assessed for the publication of improperly obtained information,⁴⁹⁸ its analysis of compensatory damages attempted to segregate harm caused by the defendants' newsgathering techniques from events caused by the publication of the article; only damages proximately caused by the fraud and breach of contract were available.⁴⁹⁹ Judge Weber concluded that W.D.I.A. was entitled to compensation for the expense of the trip to meet with Trans Union officials. This trip was reasonable and necessary because of W.D.I.A.'s prior experience after Trans Union learned of the ACB test.⁵⁰⁰ The question was whether these expenses were the result of the defendants' fraud or harm from publication of the result. Rothfeder accessed Vice-President Quayle's file on July 19, 1989; from that date until publication of the article six weeks later, no one at W.D.I.A. or Trans Union knew that Rothfeder had obtained Quayle's file.⁵⁰¹ If *Business Week* had decided not to publish the results of Rothfeder's test, it is conceivable that neither W.D.I.A. nor Trans Union would have learned of Rothfeder's actions. Judge Weber concluded that W.D.I.A. suffered no damage prior to publication of the article.⁵⁰²

In contrast to the expenses related to Trans Union, Judge Weber disallowed W.D.I.A.'s expenses for trips to Washington and Arizona. Both trips were largely public relations efforts to repair W.D.I.A.'s reputation with industry leaders.⁵⁰³ Judge Weber concluded that these trips "were not proximately caused by the fraud and contract breach committed by the defendants. Those trips were made for reasons unrelated to the breach of contract and fraud. *They were made because of the publication of the article.*"⁵⁰⁴ The line Judge Weber drew is very murky. All of W.D.I.A.'s travel expenses stemmed from *Business Week's* disclosure of its fraud, though Trans Union's prior termination of W.D.I.A.'s access to its files may have made the efforts of W.D.I.A. towards Trans Union appear to be more serious than mere image management.

Judge Weber disallowed all expenses relating to the FTC investigation because there was no proof that Rothfeder had discussed W.D.I.A. with FTC officials while

⁴⁹⁷ See *id.* at 624.

⁴⁹⁸ *Id.*; see also *supra* notes 356-59 and accompanying text.

⁴⁹⁹ See *W.D.I.A.*, 34 F. Supp. 2d at 627.

⁵⁰⁰ See *id.* at 619 & 621.

⁵⁰¹ See *id.* at 617.

⁵⁰² See *id.*

⁵⁰³ For example, W.D.I.A. executives were advised by the head of the ACB to go to Washington "to tell your story about what you do so that . . . you don't leave it to those who want to tell it in their own way . . . you need to be there to take care of the whole reputation, not just the Dan Quayle incident, but the whole reputation." *Id.* at 621 (quoting FTC investigator Barry Connelly).

⁵⁰⁴ See *id.* at 627 (emphasis added).

researching the article,⁵⁰⁵ nor was there proof that the FTC investigation was caused by the defendants' fraud or publication of the article.⁵⁰⁶ Instead, the catalyst for the FTC investigation was ACB's report to the FTC of W.D.I.A.'s failure in the "mystery shopping" test.⁵⁰⁷

Punitive damages were not allowed for several reasons. First, the nondisclosure of W.D.I.A.'s identity in the article demonstrated that the defendants lacked malice.⁵⁰⁸ Notice that this factor is tied to *how* the defendants published the information, not how it was acquired. Second, the defendants' test of the credit-reporting system was not egregious because "it served to inform Congress and the general public about a matter of vital public interest"⁵⁰⁹ This brief passage is striking because it reflects the view that disclosure of information which is tortiously acquired can have social value. Stated differently, the information-collecting activities of those who seek to inform the public are perceived differently from the activities of those who have less socially important aims. Third, the defendants never engaged in newsgathering conduct of this type before or after this case,⁵¹⁰ and were "committed to an enlightened philosophy that they will never again engage in similar conduct and will always publish the truth."⁵¹¹

Although not stated in First Amendment terms, Judge Weber's approach to punitive damages reflects important First Amendment concepts such as limiting such damages to extreme circumstances. Under this approach, illegal newsgathering activities aimed at uncovering information of public value would rarely, if ever, justify punitive damages. Those activities, however, could support an award of compensatory damages insofar as those damages exclude harm from publication.

CONCLUSION

Judge Holtzhoff's statement in *Liberty Lobby* that courts may not "review the manner in which a newspaper man obtains his information"⁵¹² seems quaint as courts

⁵⁰⁵ See *id.* at 618 & 623.

⁵⁰⁶ See *id.* at 619.

⁵⁰⁷ See *id.* at 618.

⁵⁰⁸ See *id.* at 622 & 628.

⁵⁰⁹ *Id.* at 628.

⁵¹⁰ See *id.* at 623.

⁵¹¹ *Id.* at 628. After the decision was announced, McGraw-Hill's general counsel stated that the company would consider engaging in similar conduct on a case-by-case basis. Rothfeder also stated that he would use the same methods again "if that's the only way to tell the story and you're not going to harm anybody." Dean Starkman & Gordon Fairclough, *Report in Business Week Draws Fraud Ruling*, WALL ST. J., Dec. 28, 1998, at A3, A4 (quoting Jeffrey Rothfeder).

⁵¹² *Liberty Lobby, Inc. v. Pearson*, 261 F. Supp. 726, 727(D.D.C. 1966); see also *supra* notes 52-57 and accompanying text.

currently struggle to define the protection for newsgathering.⁵¹³ As this Article has shown, the definition of "routine" newsgathering techniques is obscure.⁵¹⁴ Consequently, there are too many unanswered questions about newsgathering to link it to the protections for publication activities.⁵¹⁵ Even when newsgathering rights are clearly delineated, it makes little sense to allow the content-neutral interests affected by inappropriate investigatory methods to override the First Amendment's aversion to content-based regulation, whether in the form of a prior restraint or a post-publication penalty. Stated differently, just as the protection for publishing does not provide immunity for newsgathering crimes, neither should newsgathering crimes lessen the protection for publishing. The harms caused by illegal newsgathering activities can be properly and narrowly remedied while still allowing compensation for communicative impact if the latter claim is properly proven. Perhaps most importantly, the social benefits of publishing illegally acquired information should preclude punitive damages in most instances.

The most difficult cases are those in which a court defines the legality of newsgathering by whether the information is published. In *Cohen*, for example, the Court completely devalued protection for publication because the act of publishing broke a promise that was made in order to acquire information.⁵¹⁶ The Court sought to treat the case as involving content-neutral interests, although the communicative impact of the publication was the heart of the plaintiff's damage claim.⁵¹⁷ The fallacy

⁵¹³ Compare *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997) (finding that media personnel accompanying federal agents during execution of search warrant are state actors), with *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996) (finding that media personnel accompanying local police during execution of search warrant did not act under color of law). In *Wilson v. Layne*, 119 S. Ct. 1692 (1999), the Court ruled that a media "ride-along" violates the Fourth Amendment. Separately, the Court vacated the Ninth Circuit's *Berger* opinion, see *Hanlon v. Berger*, 119 S. Ct. 1706 (1999), and denied certiorari to a companion case brought by CNN, see *Cable News Network, Inc. v. Berger*, 119 S. Ct. 2039 (1999). On remand, the Ninth Circuit reversed the district court's decision granting summary judgment in favor of the media defendants on the Bergers' *Bivens* claim. See *Berger v. Hanlon*, No. 96-35251, No. 96-35266, 1999 U.S. App. LEXIS 20262, at *3 (9th Cir. Aug. 27, 1999). The court of appeals also reversed the district court's judgment in favor of the media defendants on the Bergers' state law claims for trespass and intentional infliction of emotional distress. See *id.* The district court's grant of summary judgment to the media defendants on the federal wiretap claim and the state law claim for conversion was affirmed. See *id.*

⁵¹⁴ See *supra* text accompanying notes 11-19 & 204-323.

⁵¹⁵ For example, the record in *Food Lion* revealed that ABC "had, on previous occasions, created deliberate deceptions for the purpose of securing jobs with companies which were the target of an investigative report. This case, however, was the first time ABC's actions in this regard were found to be unlawful." *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 984 F. Supp. 923, 935 (M.D.N.C. 1997).

⁵¹⁶ See *supra* note 362.

⁵¹⁷ Justice White claimed that *Cohen* was not "seeking damages for injury to his

of *Cohen* can be avoided by focusing on the consequences of publication, rather than acting on a formalistic regard for broken promises. With this in mind, cases like *Doe* should not be approached as mere contract cases, but should address the communicative impact of breaking the physician-patient contract. The provenance of the physician-patient dialogue does not dictate the outcome of the case, but it helps explain why publication would be harmful. To this limited extent, the provenance of information should be considered as courts grapple with the interplay between information gathering and publishing.

reputation or his state of mind. He sought damages . . . for breach of a promise that caused him to lose his job and lowered his earning capacity." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991). Justice White draws a false distinction here. Defamation law allows recovery for loss of employment and diminished earnings as one of the effects of injury to reputation. *See, e.g., Liquori v. Republican Co.*, 396 N.E.2d 726 (Mass. App. Ct. 1979) (sustaining damage award for defamatory newspaper article that led to loss of income). It may be that Justice White believed the damages available in a promissory estoppel action did not pose the chilling effect created in defamation actions by more open-ended damages for harm to peace of mind. *See Cohen*, 501 U.S. at 670 (treating compensatory damages as similar to payment to a source for newsworthy information). Nonetheless, this Article agrees with Professor Easton who wrote, "Although the promise occurred during newsgathering, the breach depended upon publication. The injury arose from publication, not newsgathering, and the damages, although characterized as nonreputational, were precisely that." Easton, *supra* note 9, at 1179-80.