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To Catch a Lawsuit: Constitutional Principles at Work in the Investigative-Journalism Genre

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ABSTRACT

This Note examines two causes of action, civil rights violations under 42 U.S.C. § 1983 and IIED claims, in the context of lawsuits against investigative journalists. Examining two recent cases in particular, Tiwari v. NBC Universal, Inc. *and* Conradt v. NBC Universal, Inc., *which arise out of NBC's conduct in its primetime series* To Catch a Predator, *this Note concludes that legal standards governing conduct by investigative journalists are currently unclear. Investigative journalists are not adequately on notice as to when they might be liable under § 1983 for violating a subject's civil rights. And district courts have failed to appreciate journalists' First Amendment rights when analyzing IIED claims. Ultimately, this Note advocates for a "media influence" test that analyzes whether a journalist should be liable for civil rights violations under § 1983 and concludes that courts must exclude journalists' ability to widely disseminate information as a "position of power" when analyzing outrageousness alleged in IIED claims.*

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On October 25, 2011, a federal district court in the Northern District of California permitted plaintiff Anurag Tiwari's lawsuit against NBC Universal, Inc. (NBC) to proceed past summary judgment.[1] Tiwari, who appeared as an alleged child predator on the *Dateline NBC* (*Dateline*) primetime series, *To Catch A Predator* (*TCAP*), asserted, *inter alia*, that NBC committed civil-rights violations under 42 U.S.C. § 1983.[2] Tiwari also asserted a state-law claim for intentional infliction of emotional distress (IIED).[3] NBC was in familiar territory,[4] having been sued recently by the estate of another "predator," Louis Conradt.[5] Conradt, an assistant district attorney in Texas, committed suicide as police sought entry into his home while *TCAP* host Chris Hansen and the *TCAP* camera crew waited outside.[6]

The *Conradt* and *Tiwari* lawsuits highlight questions that investigative journalists face on a regular basis. When does a journalist violate a subject's privacy rights guaranteed by the Fourth Amendment? When do First Amendment principles protect the journalist's conduct? Currently, journalists operate without a clear

1. Tiwari v. NBC Universal, Inc., No. C–08–3988 EMC, 2011 WL 5079505 (N.D. Cal. Oct. 25, 2011). The parties have since settled all outstanding claims on private terms. *See* Stipulation and Order for Voluntary Dismissal of Plaintiff's Claim for Intentional Infliction of Emotional Distress, Tiwari v. NBC Universal, Inc., No. 03:08–CV–03988 EMC (N.D. Cal. Nov. 22, 2011) (08-cv-03988-EMC), ECF No. 117.

2. *Tiwari*, 2011 WL 5079505, at *1, *3. See also the federal statute establishing a civil cause of action for deprivation of constitutional rights, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2006). The statute has two goals: deterring use of state authority to deny constitutionally guaranteed rights and relief for any such violations. *E.g.*, Wyatt v. Cole, 504 U.S. 158, 161 (1992).

3. *Tiwari*, 2011 WL 5079505, at *3.

4. *See, e.g.*, Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 380 (S.D.N.Y. 2008).

5. *Id.*; Brian Stelter, *NBC Settles with Family that Blamed a TV Investigation for a Man's Suicide*, N.Y. TIMES, June 26, 2008, http://www.nytimes.com/2008/06/26/business/media/26nbc.html.

6. Tim Eaton, *Prosecutor Kills Himself in Texas Raid over Child Sex*, N.Y. TIMES, Nov. 7, 2006, http://www.nytimes.com/2006/11/07/us/07pedophile.html.

understanding of either their own rights or those of their subjects. This uncertainty has allowed tragic events to transpire, such as those giving rise to *Conradt*.[7] Indeed, investigative journalists have the ability to deprive an individual of his privacy, to destroy his reputation in the community, and to damage him psychologically. But journalists also have a countervailing responsibility to disseminate law enforcement information to the community. As investigative journalism grows increasingly popular in the reality-television genre, courts should establish clearer standards delineating when the Constitution will protect journalists' conduct as they discover and report crimes, and when journalists' conduct violates an individual's constitutional rights.

This Note analyzes the First and Fourth Amendment rights at stake in investigative journalism and advances a clearer framework for courts to use while analyzing cases like *Tiwari*. Part I discusses the recent surge of investigative journalism and the attendant constitutional issues, using *TCAP* as a case study. Part II focuses on two relevant causes of action arising out of aggressive investigative journalism—§ 1983 claims based on Fourth Amendment violations and IIED claims—and argues that the law is unclear as to when journalists' conduct gives rise to either of these claims. Finally, Part III advances a simple framework for courts to apply when deciding First and Fourth Amendment issues, which will clarify the law and thereby protect private individuals and journalists alike.

I. "WHY DON'T YOU HAVE A SEAT": THE RECENT SURGE IN INVESTIGATIVE JOURNALISM

A. The Marriage of Entertainment and Law Enforcement

In 2004, *Dateline*, faced with deflated ratings, collaborated with the Perverted Justice Foundation (PJF) to set up its first sting operation in Bethpage, New York.[8] *Dateline*'s first show was premised on dramatic confrontations between its host, Chris Hansen, and various unwitting "sexual predators" who believed they were rendezvousing with underage youths they met in online chat rooms.[9] PJF provided the online decoys—adults posing as thirteen- to fifteen-year-old youths—and *Dateline* provided the cameras, capturing

7. *See infra* Part II.A.2.

8. Amy Adler, *To Catch a Predator*, 21 COLUM. J. GENDER & L. 532, 537 (2011).

9. Tiwari v. NBC Universal, Inc., No. C–08–3988 EMC, 2011 WL 5079505, at *1 (N.D. Cal. Oct. 25, 2011).

each shocking confrontation.[10] Eighteen men came to the decoy house in less than three days.[11] The segment aired under the title *Dangerous Web*[12] and was extremely popular.[13] In response, *Dateline* organized a series of additional "predator" investigations throughout the country.[14]

Prior to the third investigation, which *Dateline* and PJF conducted in Mira Loma, California, local law enforcement agents contacted PJF and requested permission to conduct "parallel" investigations of the "predators."[15] PJF notified *Dateline*, and both agreed to involve members of local law enforcement in the program.[16] Police would wait until the end of Hansen's verbal reproach, then arrest the "predator" as he left the scene.[17] *Dateline*'s cameramen would capture the arrest on film, showing the "predator" falling into a trap of overaggressive law enforcement personnel.[18] These confrontations became routine, and a compilation of the operation's twelve investigations, which led to over 256 arrests, aired under the title *To Catch a Predator*.[19]

The show was tremendously popular, netting an average of seven million viewers for each of the eleven episodes that aired during the 2006–2007 season.[20] Some fans lauded the show for increasing parental awareness and highlighting the online-predator issue for policymakers; other fans stayed tuned for entertainment and even

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10. *Id.*

11. Chris Hansen, *Dangers Children Face Online*, DATELINE NBC (Nov. 11, 2004, 11:19 AM), http://www.msnbc.msn.com/id/6083442.

12. *Watch Dateline NBC Season 1 Episode 1 Bethpage, Long Island*, OVGUIDE, http://www.ovguide.com/tv_episode/dateline-nbc-season-1-episode-1-bethpage-long-island-14704 (last visited Oct. 24, 2012) ("The first in the series aired in November 2004 as a Dateline NBC segment called Dangerous Web. The operation was set up in a home in Long Island, NY, to which 18 men came over two-and-a-half days after making an appointment for sex with a minor. One of the men in the investigation was a New York City firefighter, who was later fired by the FDNY.").

13. *The 26th Annual News and Documentary Emmy Award Nominees Announced Today by the National Television Academy*, NAT'L TELEVISION ACAD. (July 18, 2005), http://www.emmyonline.org/releases/pdf/26thNewsNominationsReleaseFinalRevised(7.18.05).pdf (receiving a vote in favor of a 2004–2005 News and Documentary Emmy nomination for "Outstanding Investigative Journalism In a News Magazine").

14. *See* Stelter, *supra* note 5.

15. Luke Dittrich, *Interview with Chris Hansen: The Transcript*, ESQUIRE (Aug. 2, 2007, 2:00 PM), http://www.esquire.com/features/hansen-transcript.

16. *See* Sandra Stokley, *'To Catch a Predator' Sex Stings Net Mixed Results*, PRESS-ENTERPRISE, Sept. 28, 2007, *available at* http://www.willdefendu.com/Resources/Articles/to-catch-a-predator-sex-stings-net-mixed-results.

17. Adler, *supra* note 8, at 539.

18. *See id.*

19. Stelter, *supra* note 5.

20. *Id.*

comedic value.[21] But despite its popularity, the show also received severe criticism.[22]

Critics accused *Dateline* of violating journalism ethics and standards by *creating* stories rather than *following* them.[23] They argued that *Dateline* sought and engaged in vigilante justice rather than simply reporting the news.[24] Other critics, particularly legal experts, accused PJF of failing to keep adequate records of its online conversations with predators and of entrapping alleged predators without sufficient evidence.[25] Additionally, many critics noted PJF's conflict of interest, as NBC paid it consulting fees, which potentially incentivized overzealous enforcement.[26]

TCAP's negative attention peaked on November 5, 2006, in Murphy, Texas, when the *TCAP* crew surrounded the house of suspected predator and assistant district attorney Louis Conradt.[27] While local law enforcement agents sought entry into Mr. Conradt's house to execute an arrest warrant, Mr. Conradt took his own life.[28] Mr. Conradt's sister, Patricia Conradt, sued NBC for $105 million on behalf of Mr. Conradt's estate, alleging that Hansen illegally persuaded Murphy police to seek a warrant to arrest Mr. Conradt at

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21. *See* Marcus Baram, *Turning the Tables on 'To Catch a Predator'*, ABC NEWS (June 5, 2007), http://abcnews.go.com/US/story?id=3235975&page=1 (discussing *TCAP*'s peaking criticism after the suicide); *Fabolous Speaks on His Appreciation for MSNBC*'s To Catch a Predator, XXL NEWS (Jan. 26, 2011, 4:26 PM), http://m.xxlmag.com/v/News/FabolousSpeaksOnHis (excerpting an interview with Brooklyn rapper Fabolous, where he discusses how *TCAP* is "hilariously funny" to him); MADtv, *To Catch a Predator*, YOUTUBE (Nov. 15, 2007), http://www.youtube.com/watch?v=oUcw7XIWISI (parodying *TCAP* and netting over one-million hits); *South Park: Le Petit Tourette* (Comedy Central broadcast Oct. 3, 2007) (parodying an episode of *TCAP*).

22. *See, e.g.*, Baram, *supra* note 21 (discussing the lawsuit filed by Marsha Bartel, a journalist who formerly worked for *Dateline* on *TCAP* and who alleged that she was fired after complaining about ethical breaches).

23. *See, e.g.*, David Anderson, *To Entrap a Predator*, COUNTERPUNCH (Feb. 7, 2008), http://www.counterpunch.org/2008/02/07/nbc-s-quot-to-entrap-quot-a-predator. *But see* Stone Phillips, *Inside Dateline: Why It's Not Entrapment*, DATELINE NBC (Feb. 1, 2006, 3:21 PM), http://www.msnbc.msn.com/id/11131562/ns/dateline_nbc/t/inside-dateline-why-its-not-entrapment (arguing that PJF entices, but does not entrap, the predators).

24. *See supra* note 23.

25. *See* Associated Press, *DA Refuses to Prosecute 'Catch a Predator' Cases*, NBC NEWS (June 28, 2007, 3:01 PM), http://www.msnbc.msn.com/id/19486893/ns/us_news-crime_and_courts/t/da-refuses-prosecute-catch-predator-cases ("As for the rest of the cases, [the District Attorney] said neither police nor NBC could guarantee the chat logs were authentic and complete.").

26. *See, e.g.*, Baram, supra note 21 (discussing former *Dateline* and *TCAP* journalist Marsha Bartel's allegations that *TCAP* paid PJF, giving it "financial incentive to lie to trick targets of its sting" (internal quotation marks omitted)).

27. Eaton, *supra* note 6; *see* Baram, *supra* note 21 (discussing criticism of *TCAP* after the suicide).

28. Eaton, *supra* note 6.

his home.[29] Although the Conradt estate ultimately settled with NBC,[30] the lawsuit shone a spotlight on the questionable influence *Dateline* may have had over law enforcement personnel, as well as the insidious impact that investigative journalism can have on the integrity of the criminal-justice system.[31]

The negative press surrounding *TCAP* continued when police, working with the program, allegedly used excessive force when arresting a suspected predator named Anurag Tiwari.[32] Subsequently, NBC cancelled *TCAP*.[33] Mr. Tiwari sued NBC, and the parties have since settled on private terms.[34]

Although NBC canceled *TCAP*, the program's aggressive brand of investigative journalism has survived. For example, *Dateline* subsequently aired shows such as: *To Catch a Con Man*, *To Catch an ID-Thief*, *To Catch a Car Thief*, and *To Catch an i-Jacker*.[35] Similarly, A&E's "truTV," formerly "Court TV," currently airs law enforcement programs such as: *The First 48*, which covers the early stages of homicide investigations; *Beyond Scared Straight*, which captures juvenile interventions; and *The Peacemaker: L.A. Gang Wars*, which follows a negotiator who seeks peace between Los Angeles gangs.[36] While these networks have undoubtedly taken note of *Dateline*'s missteps, each new program is relatively blind to governing legal standards and is therefore bound to encounter claims of liability.[37]

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29. *See* Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 389 (S.D.N.Y. 2008); Stelter, *supra* note 5.

30. Stelter, *supra* note 5.

31. *See Conradt*, 536 F. Supp. 2d at 383.

32. Tiwari v. NBC Universal, Inc., No. C–08–3988 EMC, 2011 WL 5079505, at *2 (N.D. Cal. Oct. 25, 2011).

33. *See* Steve Rendall, *The Online Predator Scare*, FAIRNESS & ACCURACY IN REPORTING, http://www.fair.org/index.php?page=3752 (last visited Aug. 30, 2012). Mr. Tiwari has subsequently settled his IIED claim with NBC. *See* Stipulation and Order for Voluntary Dismissal of Plaintiff's Claim for Intentional Infliction of Emotional Distress, Tiwari v. NBC Universal, Inc., No. 03:08–CV–03988 EMC (N.D. Cal. Nov. 22, 2011) (08-cv-03988-EMC), ECF No. 117.

34. Case Management Scheduling Order, Docket, Tiwari v. NBC Universal, Inc., No. 3:C–08–3988 EMC, (N.D. Cal. Jan. 25, 2012), ECF No. 121.

35. Kim Zetter, *NBC Dateline's "Catch a Predator" Series Pays Cops and Undercover "Victims" – Updated*, WIRED (Aug. 8, 2007, 4:42 PM), http://www.wired.com/threatlevel/2007/08/nbc-datelines-c.

36. Jon Caramanica, *Squad Cars, Sirens and Gangs, and the Cameras that Love Them*, N.Y. TIMES, Jan. 17, 2011, http://tv.nytimes.com/2011/01/17/arts/television/17crime.html. The genre has even spread to Europe. *See* Scott Roxborough, *Scandal Surrounds German 'To Catch a Predator' Show*, HOLLYWOOD REPORTER (Oct. 18, 2010, 7:14 AM), http://www.hollywoodreporter.com/news/scandal-surrounds-german-catch-predator-31007 (discussing disappearance of suspect who appeared on the German analog of *TCAP*).

37. *See, e.g.*, Caramanica, *supra* note 36; *see also* Patterson v. NBC Universal, Inc., No. 1:11CV-P68-R, 2011 U.S. Dist. LEXIS 81701, at *5-6 (W.D. Ky. July 26, 2011) (claiming intentional infliction of emotional distress by NBC for conduct in *TCAP*); Armstrong v. NBC

B. Investigative Journalists' Role in Society

1. Important Duty to Disseminate Information

While it is undesirable for journalists to violate individuals' rights, it is also undesirable for journalists to be uncertain of their own rights, as uncertainty may chill investigative reporting. Investigative journalists traditionally have served the important function of informing the public, often by exposing injustices.[38] Investigative journalist Robert Parry, perhaps best known for his work in exposing Oliver North's role in the Iran-Contra Affair,[39] declared: "Investigative reporting is to journalism what theoretical research is to science[. It has] the potential to present new realities and shatter old paradigms—how people see and understand the world around them—which, in turn, can transform politics."[40] Journalists are uniquely situated to inform the public about important matters that often escape the public eye.[41] And, as Parry averred, investigative journalists have undoubtedly played an important role throughout history in alerting policymakers to problems that need attention.[42]

Dateline's *TCAP*, for example, informed the public about the online-predator issue in myriad ways.[43] First, *TCAP* raised parental awareness.[44] Middle-aged adults represent the greatest portion of the primetime viewing public, and parents of young children undoubtedly constituted a significant portion of the 9.1 million average viewers.[45]

Universal, Inc., No. 1:11CV-P67-M, 2011 U.S. Dist. LEXIS 60119, at *5 (W.D. Ky. June 6, 2011) (claiming intentional infliction of emotional distress by NBC for conduct in *TCAP*); Complaint, Jones v. A&E Television Network, No. 2:10-cv-14942-RHC-RSW (E.D. Mich. Dec. 14, 2010), ECF No. 1 (alleging § 1983 violation stemming from the accidental shooting death of seven-year-old by a police officer while police were searching for a murder suspect during the filming of A&E's reality crime-drama *The First 48*).

38. Robert Parry, *Why We Need Investigative Reporting*, CONSORTIUMNEWS.COM (July 29, 2005), http://www.consortiumnews.com/2005/072905.html.

39. *See Robert Parry*, ALTERNATIVE RADIO, http://www.alternativeradio.org/collections/spk_robert-parry (last visited Oct. 18, 2012).

40. Parry, *supra* note 38.

41. *See id.* (describing a number of scandals broken by investigative journalists in the 1970s and 1980s, and contrasting them with the reporting of "conventional wisdom" in the 1990s and 2000s).

42. *Id.*

43. *See, e.g.*, MSNBC, *To Catch a Predator with Chris Hansen*, NBC NEWS, http://www.msnbc.msn.com/id/10912603/ns/dateline_nbc-to_catch_a_predator (last visited Sept. 4, 2012) (providing links to resources and articles addressing the risk of online predators).

44. *See id.*

45. *See* Allen Salkin, *Web Site Hunts Pedophiles, and TV Goes Along*, N.Y. TIMES, Dec. 13, 2006, http://www.nytimes.com/2006/12/13/technology/13justice.html ("Ratings for the 'Dateline' broadcasts, a series called 'To Catch a Predator' that has become a network franchise,

Second, *Dateline* created an informative website for parents.[46] The website has numerous links to educational materials, including a video interview with Robert De Leo of the Polly Klaas Foundation[47]—a foundation devoted to abduction prevention and recovery of missing children—that provides tips for parents.[48] It also includes links to webpages with specific content: "Warnings signs of kids' online risky behavior," "For parents: tips for kids of different ages," and "Experts answer frequently asked questions."[49] Thus, the website promotes additional learning and may help prevent online predation.[50] Through its television show and website, *TCAP* provided a service to the community by informing the public and members of law enforcement about a societal problem.[51]

2. Entertainment as Information: Issue Distortion

Although *Dateline* performs a public service by informing viewers about an important issue, its simultaneous role as an entertainment platform renders its journalists susceptible to committing abuses.[52] Issue distortion is one negative byproduct of programs operating at the intersection of journalism and

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have averaged 9.1 million viewers, compared with 7 million viewers for other 'Dateline' episodes, according to Nielsen Media Research."). Commentators have noted that parental awareness can be key to solving the online-predator problem. *See, e.g.*, Alice S. Fisher, *Sexual Exploitation Over the Internet: What Parents, Kids and Congress Need to Know About Child Predators*, DEP. JUSTICE (May 3, 2006), http://www.justice.gov/criminal/ceos/CT/downloads/AAG%20Testimony%205032006.pdf ("[A] key to preventing this victimization of children is educating the public. The American people need to appreciate the scope, the nature, and the impact of this problem on our youth.").

46. *See* MSNBC, *supra* note 43.

47. *See id.*; *Staying Ahead of 'Predators'*, NBC NEWS (Oct. 6, 2006, 3:45 PM), http://www.msnbc.msn.com/id/15157979/ns/dateline_nbc/#.TrbBLGbgJlA (providing article and video interview with Robert De Leo).

48. *See About Us*, POLLY KLAAS FOUND., http://www.pollyklaas.org/about (last visited Feb. 24, 2012).

49. *See* MSNBC, *supra* note 43 and accompanying text. Hansen has published a book to further instruct parents about prevention. CHRIS HANSEN, TO CATCH A PREDATOR: PROTECTING YOUR KIDS FROM ONLINE ENEMIES ALREADY IN YOUR HOME (2007). The PJF similarly uses its website to educate parents, providing very long and explicit chat logs of conversations between its decoys and suspected online predators. *See* PERVERTED JUSTICE FOUND., http://www.perverted-justice.com (last visited Sept. 4, 2012) (also providing an updated "conviction counter" listing the number of convictions secured with the help of PJF since PJF began operating in 2004).

50. *See* MSNBC, *supra* note 43; *Potential predators go south in Kentucky*, MSNBC.COM, http://www.msnbc.msn.com/id/10912603 (last visited Aug. 6, 2012).

51. *See* MSNBC, *supra* note 43.

52. *See* Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 397 (S.D.N.Y. 2008). As suggested by the trial court in *Conradt*, representatives of the media, such as *Dateline*, have a significant power—the power to disseminate—which is attended by the responsibility to inform the public. *Id.*

entertainment; sensational broadcasting can overstate the prevalence or intensity of an issue, causing a disproportionate reaction from the public and policymakers.[53]

Entertainment reporters straddle two duties that are in tension with each other. On the one hand, journalists have a responsibility to report events with factual accuracy.[54] On the other hand, primetime television programs must attract and entertain viewers to ensure vitality, which can encourage exaggeration and sensationalism.[55] As Carl Bernstein, of the Bernstein-Woodward duo that unearthed the Watergate scandal,[56] lamented, "The conflict between the bottom line of truth and profit . . . has become a terrible conflict, and the bottom line is winning . . . . Increasingly, sensationalism, gossip, [and] manufactured controversy have become our agenda instead of the best obtainable version of the truth."[57] Because *Dateline* is a news program, viewers, including policymakers, may improperly assume its reports are objective. Sensational reporting can lead to policymaking that is incommensurate with the severity of a reported issue and can misinform the public.[58]

a. Problematic Influence over Policymakers

When a news organization reports in a sensational manner, perhaps to increase ratings during primetime, it can distort issues at the highest levels of government.[59] For example, in his speech announcing the DOJ's new Project Safe Childhood initiative, Attorney General Alberto Gonzales stated, "[i]t has been estimated that, at any given time, 50,000 predators are on the Internet prowling for children," and referred to the problem as an "epidemic."[60] Gonzales's

53. *See infra* notes 60-62 and accompanying text.

54. *See, e.g., SPJ Code of Ethics*, SOC'Y PROF'L JOURNALISTS, *available at* http://www.spj.org/ethicscode.asp (last visited Aug. 30, 2012) [hereinafter *SPJ Code of Ethics*] ("Journalists should . . . [t]est the accuracy of information from all sources and exercise care to avoid inadvertent error. . . . [And] [n]ever distort the content of news photos or video.").

55. *See, e.g., Interviews—Carl Bernstein*, FRONTLINE (Feb. 13, 2007), http://www.pbs.org/wgbh/pages/frontline/newswar/interviews/bernstein.html.

56. *See The Watergate Story: The Post Investigates*, WASH. POST, http://www.washingtonpost.com/wp-srv/politics/special/watergate/part1.html (last visited Oct. 18, 2012).

57. *See supra* note 55; *see also* RAJMOHAN JOSHI, ENCYCLOPEDIA OF JOURNALISM AND MASS COMMUNICATION 256 (Gyan Publishing House 2006) (noting that sensationalism is a common contemporary ethical complaint).

58. *See infra* notes 60-62.

59. *See* Pierre Thomas, *Epidemic Online: 50,000 Predators a Minute*, ABC NEWS (May 17, 2006), http://abcnews.go.com/US/story?id=1973031#.TrbjFWbgJlA.

60. *See id.*

source for this statistic was *TCAP*.[61] But as Columbia Journalism Review contributor Douglas McCollom pointed out in his article, *The Shame Game*, *Dateline*'s source for the statistic was a retired FBI agent it hired as a consultant.[62] When *Legal Times* reporter Jason McLure asked the consultant about the statistic, he answered that it was a "Goldilocks" figure—"not small and not large."[63] *Dateline* has since stated that solid statistics are difficult to find but that the problem seems to be getting worse.[64]

While the onus to consider empirical research rests with policymakers, journalists also have an ethical obligation to seek reliable sources and report the facts.[65] Indeed, even if officials can be trusted to rely on empirical information, programs like *TCAP* have the ability to influence policymakers indirectly by causing concern and panic among an official's constituency, spurring a legislative response.[66] For example, as Professor Adler points out in her article, *To Catch a Predator*, *TCAP* influenced Congress by precipitating the passage of the Adam Walsh Child Protection and Safety Act of 2006.[67] Sponsoring Senator Bill Frist acknowledged that the issue "didn't really hit, to be honest, until I saw *To Catch a Predator*. . . . [A]ll of a sudden I started seeing these faces themselves, and I started relating it back to the fact that I'm a parent, and I've got three children. They've come up in this Internet age."[68] In fact, Senator Frist thanked host Hansen, and Senator Orrin Hatch thanked PJF for "directly impacting" passage of the Act.[69]

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61. Ben Radford, *Predator Panic: A Closer Look*, THE COMMITTEE FOR SKEPTICAL INQUIRY (Sept.–Oct. 2006), http://www.csicop.org/si/show/predator_panic_a_closer_look.

62. *See* Adler, *supra* note 8, at 546 (citing Douglas McCollam, *The Shame Game*, COLUM. JOURNALISM REV. Jan.–Feb. 2007, at 28).

63. *See* Andy Carvin, *Online Predators: Much Ado About . . . What Exactly?*, PBS TEACHERSLEARNING.NOW (May 23, 2006, 11:31 AM), http://www.pbs.org/teachers/learning.now/2006/05/online_predators_much_ado_abou.html.

64. *See* Adler, *supra* note 8, at 546 (citing Douglas McCollam, *The Shame Game*, COLUM. JOURNALISM REV. Jan.–Feb. 2007, at 28).

65. *See SPJ Code of Ethics*, *supra* note 54 ("The duty of the journalist is to further those ends by seeking truth and providing a fair and comprehensive account of events and issues.").

66. *See* Radford, *supra* note 61 and accompanying text.

67. *See* Adler, *supra* note 8, at 544-45.

68. *Id.* (quoting 152 CONG. REC. S4089 (daily ed. May 4, 2006) (statement of Sen. Frist)). Incidentally, not everyone responds with such fear. In *United States v. Courtright*, 632 F.3d 363 (7th Cir. 2011), the defendant indicated that he had not considered sex with a minor until seeing *TCAP*. *Id.* at 366. Surely, this is an especially rare reaction; however, it illustrates that viewers often react in unique and significant ways to such extreme reality television. *See id.*

69. *See* Adler, *supra* note 8, at 545.

b. Influence of Sensational Reporting on Viewers Generally

Investigative-journalism programs, such as *TCAP*, strongly influence viewers, as their sensationalist style makes them more memorable, as compared to more objectively reported stories.[70] Consider *TCAP* through the prism of Dr. John Newhagen of the Philip Merrill College of Journalism's "approach-avoidance metaphor."[71] According to Professor Newhagen, an emotional response to television images is linked to memory of those images.[72] Newhagen identifies anger as the strongest negative response, and one that is "usually the result of a territorial violation."[73] Thus, if a viewer feels a territorial violation when viewing *TCAP*, she will have a greater propensity for anger and therefore a marginally greater memory of the episode.[74]

The emotional response to a sensationalized event can raise a viewer's awareness of the risk that she may experience the event.[75] In his 1993 book, *Responding to Community Outrage: Strategies for Effective Risk Communication*, risk-communication specialist Dr. Peter Sandman argues that risk is a function of hazard and outrage.[76] Although experts assess risk by multiplying the magnitude of the event by the probability of the event occurring, often using data, Sandman argues that the public assesses risk by considering the probability of the event occurring—which Sandman refers to as the "hazard"—and the sense of outrage, adding an emotional-response component to risk assessment.[77] As a result, a program investigating a potential sexual predator can cause a viewer to apprehend a greater

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70. *See infra* notes 72-75 and accompanying text.

71. *See* John E. Newhagen, *TV News Images that Induce Anger, Fear, and Disgust: Effects on Approach-Avoidance and Memory*, 42 J. of BROAD. & ELEC. MEDIA 265 (1998).

72. *Id.* The "approach-avoidance metaphor" focuses on how emotional responses play an adaptive role in deciding whether to approach or avoid a threatening force in the person's environment. *Id.*

73. *Id.*

74. *See id.*

75. *See* BETTY H. MORROW, RISK BEHAVIOR AND RISK COMMUNICATION: SYNTHESIS AND EXPERT INTERVIEWS 12 (2009), *available at* http://www.csc.noaa.gov/digitalcoast/_/pdf/risk-behavior-communication-report.pdf ("Some types of risk cause moral outrage beyond that expected by their incidence—such as child molestation."); *see also* Bruce Schneier, *Drawing the Wrong Lessons from Horrific Events*, CNN (July 31, 2012, 10:57 AM), http://edition.cnn.com/2012/07/31/opinion/schneier-aurora-aftermath/index.html ("Horrific events, such as the massacre in Aurora, can be catalysts for social and political change. . . . People tend to base risk analysis more on stories than on data. Stories engage us at a much more visceral level, especially stories that are vivid, exciting or personally involving.").

76. PETER M. SANDMAN, RESPONDING TO COMMUNITY OUTRAGE: STRATEGIES FOR EFFECTIVE RISK COMMUNICATION 6-7 (2012) (1993), *available at* http://psandman.com/media/RespondingtoCommunityOutrage.pdf.

77. *Id.*

risk than objective statistics would indicate.[78] Much like publication of an incorrect statistic,[79] increased risk perception can cause a disproportionate response by the viewing public.[80]

C. Journalists as Poor Self-Regulators: The Need for Courts to Establish Clearer Legal Standards

Journalists' codes of ethics do little to protect individual suspects.[81] These codes, published by various professional journalism organizations, typically embody principles of objectivity, harm limitation, accuracy, and timely distribution of information in the public interest.[82] They provide guidance to journalists and news organizations, and they are often formulated or based upon past problems and incidents.[83] These codes are merely advisory, which is problematic for two reasons. First, different journalists and news organizations are free to operate under differing value systems depending on their objectives.[84] For instance, a public radio station's values will diverge from a tabloid's values.[85] These divergences are meaningful in the investigative journalism genre.[86]

Second, the codes provide little protection to individuals because they are not enforceable.[87] Unlike a bar association, which can disbar a member lawyer and exclude him from the practice of law,

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78. *See id.* at 8.

79. *See supra* notes 72-75 and accompanying text.

80. *See supra* notes 72-75 and accompanying text.

81. *See* Fred Brown, *Using the SPJ Code*, SOC'Y PROF. JOURNALISTS, http://www.spj.org/ethics-papers-code.asp (last visited Sept. 4, 2012) ("The code is entirely voluntary. It is not a legal document; it has no enforcement provisions or penalties for violations, and SPJ strongly discourages anyone from attempting to use it that way.").

82. *See* JOSHI, *supra* note 57, at 251-56.

83. *See id.* at 251.

84. *See Code of Conduct*, NAT'L UNION JOURNALISTS (Sept. 28, 2011), http://www.nuj.org.uk/innerPagenuj.html?docid=174; *Code of Ethics and Professional Conduct*, RADIO TELEVISION DIGITAL NEWS ASS'N, http://www.rtnda.org/pages/media_items/code-of-ethics-and-professional-conduct48.php (last visited Aug. 8, 2012); *SPJ Code of Ethics*, *supra* note 54; *supra* note 81 and accompanying text.

85. See Joshi writing on differing values in reporting, stating:

> Laws with regard to personal privacy, official secrets, and media disclosure of names and facts from criminal cases and civil lawsuits differ widely, and journalistic standards may vary accordingly. Different organizations may have different answers to questions about when it is journalistically acceptable to skirt, circumvent, or even break these regulations.

JOSHI, *supra* note 57, at 259. Disagreement between journalists in the face of a profitable story can be seen in the lawsuit of Marsha Bartel, who alleged she was fired from *Dateline* after objecting to what she saw as unethical journalism. *See* Bartel v. NBC Universal, Inc., 543 F.3d 901, 902 (7th Cir. 2008).

86. *See* JOSHI, *supra* note 57, at 259.

87. *See infra* notes 95-97 and accompanying text.

there is no enforcing body in the journalism community that mandates compliance with an ethical code.[88] An individual harmed when a journalist fails to act ethically has little recourse: he must either boycott the publication, which is unlikely to influence the journalist's behavior, or resort to legal action.

Although the relevant legal standards are unclear, tort law has the greatest potential to deter overstepping journalists.[89] The public will rarely punish journalists for violating an individual's rights, especially if that individual is unpopular, which is common in an investigative program like *TCAP*. Without fear of public backlash for violating the rights of an individual, the investigative journalist can deal with an individual suspect nearly uninhibitedly so long as the journalist has not broken any laws—unless the journalist incurs civil liability for the conduct.[90] Tort law should protect individuals when a journalist violates their rights. The problem is that current legal standards, such as when an investigative journalist has violated a suspect's Fourth Amendment rights, or committed an IIED tort, remain unclear.[91]

II. THE LACK OF CLARITY IN CURRENT LEGAL STANDARDS GUIDING INVESTIGATIVE JOURNALISTS

Journalists operate freely in the United States, compared to other countries, especially when reporting about the government,[92] but

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88. *See infra* notes 95-97 and accompanying text.

89. The accidental shooting of Stanley-Jones by police in A&E's *The First 48* evinces a rare exception where a public outcry results. *See* Caramanica, *supra* note 36. Police raided the home of Stanley-Jones in May 2010 in search of a murder suspect and killed Stanley-Jones accidentally. *See* Gina Damron, *Trial Set for Detroit Police Officer, TV Photographer in Aiyana Stanley-Jones' Death*, DET. FREE PRESS, Oct. 28, 2011, http://www.freep.com/article/20111028/NEWS01/111028049/Trial-set-Detroit-police-officer-TV-photographer-Aiyana-Stanley-Jones-death.

90. *See, e.g.*, Tiwari v. NBC Universal, Inc., No. C–08–3988, 2011 WL 5079505, at *3 (N.D. Cal. Oct. 25, 2011) (alleging § 1983 violation and IIED claims against NBC for conduct in *TCAP*); Patterson v. NBC Universal, Inc., No. 1:11CV-P68-R, 2011 U.S. Dist. LEXIS 81701, at *4 (W.D. Ky. July 26, 2011) (alleging IIED claim against NBC for conduct in *TCAP*); Armstrong v. NBC Universal, Inc., No. 1:11CV-P67-M, 2011 U.S. Dist. LEXIS 60119, at *5 (W.D. Ky. Jun. 6, 2011) (stating IIED claim against NBC for conduct in *TCAP*); Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 389 (S.D.N.Y. 2008) (alleging § 1983 violation and IIED claims against NBC for conduct in *TCAP*); Complaint at 6-9, Jones v. A&E Television Network, No. 2:10-cv-14942-RHC-RSW (E.D. Mich. Dec. 14, 2010) (alleging § 1983 violation stemming from the May 2010 accidental shooting death of seven-year old Aiyana Stanley-Jones by a Detroit police officer while police were searching for a murder suspect during the filming of A&E's reality crime-drama, *The First 48*).

91. *See, e.g.*, *Tiwari*, 2011 WL 5079505, at *10; *Conradt*, 536 F. Supp. 2d at 396.

92. The journalistic experience elsewhere in the world differs greatly:

> Cambodia, meanwhile, continues to struggle with traditional media rights. . . . Twelve journalists were killed in Cambodia between 1995 and 2008, but no perpetrators have

courts bear the responsibility of protecting individual rights. Courts must establish workable standards that put journalists on notice before they unknowingly violate an individual's rights. As Professor Alan Dershowitz suggests, the relationship between the media's rights and the individual's rights is not zero-sum.[93] Dershowitz describes the media's attainment of rights as a "one-way ratchet" rather than a "two-way pendulum."[94] Courts can jettison this stigma by fairly balancing the important interests at stake between the public's need to obtain information and the individual's constitutional right to privacy vouchsafed by the Fourth Amendment.[95]

Two instances where courts currently have the opportunity to establish clearer standards of liability are in § 1983 claims and IIED claims against journalists. These two causes of action are discussed below in the context of *Dateline*'s role in *Tiwari* and *Conradt*.[96]

A. Unreasonable Media Intrusions into an Individual's Privacy

When a journalist investigates a suspect, the suspect may have grounds to claim that the journalist violated his Fourth Amendment guarantee against unreasonable searches and seizures and seek recourse under 42 U.S.C. § 1983.[97] This section explains the basic elements of a § 1983 claim and argues that the proper application of

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> been arrested in any of those cases. . . . Critics of the new penal code say defamation and disinformation should be civil suits, not criminal, and should not carry jail penalties. Such charges have been used in recent years to try and jail journalists who have written unflatteringly of public officials or powerful business interests.

Sok Khemara, *Fear Among Journalists Hindering Freedom*, VOICE OF AM. (Apr. 25, 2011, 7:00 AM), http://www.voanews.com/khmer-english/news/Fear-Among-Journalists-Hindering-Freedom-Analysts-120605319.html; *see* JOSHI, *supra* note 57, at 258 ("Very often non-free media are prohibited from criticizing the national government, and in many cases are required to distribute propaganda as if it were news.").

93. See noted constitutional law scholar Alan Dershowitz's statement on media rights:

> The situation with the media is quite different. They do have the power to preserve—indeed, to expand—rights once those rights are given to them. An apt metaphor for media rights is the one-way ratchet, not the two-way pendulum. The media use these rights to enhance their power. They can use their right of expression to persuade the general public that it is in the interest of that public to preserve, indeed enhance, the freedom of the press—that media rights are not a zero-sum game, but rather a win-win situation. It is far more difficult, therefore, to take away or diminish a right once it is given to the media.

ALAN DERSHOWITZ, FINDING JEFFERSON: A LOST LETTER, A REMARKABLE DISCOVERY, AND THE FIRST AMENDMENT IN AN AGE OF TERRORISM 104 (1st ed. 2007).

94. *Id.*

95. *Conradt*, 536 F. Supp. 2d at 389 (quoting United States v. Knights, 534 U.S. 112, 118-19 (2001)).

96. Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1068 (2009).

97. 42 U.S.C. § 1983 (2006).

these elements to a journalist's investigation of a suspect is currently unclear, rendering the question of liability unclear as well.

1. Basics of a 42 U.S.C. § 1983 Claim

a. Elements

Congress enacted 42 U.S.C. § 1983 during Reconstruction in conjunction with § 1 of the Civil Rights Act of 1871.[98] A plaintiff may seek relief in federal court under § 1983 if the plaintiff can prove by a preponderance of the evidence that a person violated the plaintiff's federally protected rights under color of state law.[99] The plaintiff must satisfy four elements: "(1) a violation of rights protected by the federal Constitution or created by federal statute or regulation, (2) proximately caused (3) by the conduct of a 'person' (4) who acted under color of any statute, ordinance, regulation, custom[,] or usage, of any State or Territory or the District of Columbia."[100]

b. The Constitutional Right: Protection from Unreasonable Searches and Seizures

In the investigative-journalism context, the federal right allegedly violated is the constitutional protection against unreasonable searches and seizures guaranteed by the Fourth Amendment.[101] Generally, when police are executing a warrant, the search or seizure must be within the scope of the warrant to be reasonable; the execution is unreasonable if it "exceeds that permitted by the terms of [the] validly issued warrant or the character of the relevant exception from the warrant requirement."[102] Additionally,

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98. MARTIN A. SCHWARTZ, SECTION 1983 CLAIMS AND DEFENSES § 1.01 (2d ed. 2012).

99. *Id.*; *see* Gomez v. Toledo, 446 U.S. 635, 638 (1980); Brown v. Budz, 398 F.3d 904, 908 (7th Cir. 2005); Jenkins v. Medford, 119 F.3d 1156, 1159-60 (4th Cir. 1998); Eagleston v. Guido, 41 F.3d 865, 872 (2d Cir. 1994).

100. *See, e.g.*, Summum v. City of Ogden, 297 F.3d 995, 1000-01 (10th Cir. 2002) (quoting SCHWARTZ, *supra* note 98, § 1.4 (internal quotation marks omitted)). The Fifth Circuit adds the element that the acts proximately caused the injuries sustained by the plaintiff. *See* FIFTH CIRCUIT PATTERN CIVIL JURY INSTRUCTION § 10.1 (2006).

101. The amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV.

102. *See* Wilson v. Layne, 526 U.S. 603, 611 (1999) (quoting Horton v. California, 496 U.S. 128, 140 (1990)).

the execution must further the objectives of the warrant.[103] A plaintiff can sue members of the media if they are involved in a search or seizure executed by or with law enforcement personnel, so long as the media's conduct is "under color of law," discussed in the next section.[104] But, unlike law enforcement personnel, who may be entitled to qualified immunity from suits for unreasonable searches and seizures, journalists enjoy no such entitlement, even when law enforcement personnel sanction their conduct.[105]

c. "Under Color of Law" in the Investigative-Journalism Context

Courts typically decide the fourth element of the federal claim, the "under color of law" element, as a matter of law when the defendant is a state official;[106] however, when the defendant is a private actor, such as a journalist, the court engages in a fact-specific inquiry to determine whether she satisfies the requirement.[107] Courts

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103. *Id.* (citing Arizona v. Hicks, 480 U.S. 321, 325 (1987)) ("[T]he Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion.").

104. *See, e.g.*, Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 389 (S.D.N.Y. 2008) (quoting 42 U.S.C. § 1983 (2006)).

105. See *Wyatt v. Cole*, 504 U.S. 158 (1992), which states, "Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions. . . . In short, the qualified immunity . . . acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Id.* at 167-68. The Court held that private defendants were not entitled to qualified immunity in connection with a § 1983 suit for invoking a state replevin, garnishment, or attachment statute. *Id.* at 168-69. In *Conradt*, the court noted that the media defendants are not entitled to qualified immunity. *See Conradt*, 536 F. Supp. 2d at 391 (citing *Wilson*, 526 U.S. at 617-18).

106. Adickes v. S.H. Kress & Co., 398 U.S. 144, 212 (1970) (Brennan, J., concurring) ("[A] public official acting by virtue of his official capacity always acts under color of a state statute or other law, whether or not he overtly relies on that authority to support his action, and whether or not that action violates state law."); Screws v. United States, 325 U.S. 91, 111 (1945) ("Acts of officers who undertake to perform their official duties are included [within the reach of the phrase 'under color of state law'] whether they hew to the line of their authority or overstep it.").

107. The Court states its fact-finding inquiry as:

> Our cases have identified a host of facts that can bear on the fairness of such an attribution. We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," when the State provides "significant encouragement, either overt or covert," or when a private actor operates as a "willful participant in joint activity with the State or its agents[.]" We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," when it has been delegated a public function by the State, when it is "entwined with governmental policies," or when government is "entwined in [its] management or control[.]"

Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2002) (alteration in original) (citations omitted). The Second Circuit remarked, "whether conduct of a fundamentally private institution . . . constitutes 'state action,' [is] one of the more slippery and troublesome areas of civil rights litigation." Int'l Soc. for Krishna Consciousness, Inc. v. Air Canada, 727 F.2d

have applied a number of tests to determine if a private actor acts under color of law.[108] In the context of *TCAP* and other live investigations by journalists in concert with law enforcement, the "joint-participation doctrine" is probably the most appropriate test.[109] According to this doctrine, a private actor acts under color of law when that actor conspires with state officials to deprive another of federal rights.[110] Thus, if members of the media conspire with police to commit a search or seizure pursuant to a warrant, those members of the media have probably acted under color of law.[111]

2. Three Principles that Govern Whether an Investigative Journalist Has Violated a Suspect's Fourth Amendment Right to Privacy

This subsection extrapolates from important investigative-journalism cases three crucial principles of Fourth Amendment law regarding when a journalist has violated a suspect's Fourth Amendment rights. Part III.A synthesizes these principles into a workable Fourth Amendment test that should help courts determine when an investigative journalist has violated a suspect's Fourth Amendment rights.

253, 255 (2d Cir. 1984) (alteration in original) (quoting Graseck v. Mauceri, 582 F.2d 203, 204 (2d Cir. 1978) (internal quotation marks omitted)).

108. *See, e.g.*, *Brentwood Acad.*, 531 U.S. at 298 (applying a "pervasive entwinement" test); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991) (stating a public-function test which examines whether the private actor is engaged in a "traditional function of government"); Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (enunciating the "close nexus" test, where "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself"); Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961) (establishing the "symbiotic relationship" test later named in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972), that examines whether there is an "interdependent" relationship between the state and the private actor); *see also* SCHWARTZ, *supra* note 98 §§ 5.10-5.17.

109. *See* Tower v. Glover, 467 U.S. 914, 920 (1984) (citing Dennis v. Sparks, 449 U.S. 24, 27-28 (1980)); *see also* the Court outlining the "fair attribution as:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

110. *See Tower*, 467 U.S. at 920.

111. *Id.*

a. Principle 1: Whether the media's conduct is within the scope of the warrant may determine the constitutionality of the media's conduct during a search or seizure

Conradt is informative of the difficulties courts face when trying to apply Fourth Amendment principles to a journalist's conduct. Based on the court's discussion of warrants in *Conradt*, warrants may determine the reasonableness of a journalist's conduct during a search or seizure, and, if the warrant contemplates such conduct, it may cleanse that conduct of Fourth Amendment violations.[112]

In *Conradt*, the US District Court for the Southern District of New York stated that the plaintiff would need to prove that NBC, under color of law, committed an unreasonable search or seizure, and did so in a fashion that exceeded the terms of the warrant, not including actions that are related to the objectives of the authorized intrusion.[113] The court denied NBC's motion to dismiss, finding that if the plaintiff can prove the allegations contained in the Complaint, a reasonable jury could find NBC liable.[114] The court stated:

> [A] reasonable jury could find that NBC crossed the line from responsible journalism to irresponsible and reckless intrusion into law enforcement. Rather than merely report on law enforcement's efforts to combat crime, NBC purportedly instigated and then placed itself squarely in the middle of a police operation, pushing the police to engage in tactics that were unnecessary and unwise, solely to generate more dramatic footage for a television show.[115]

The court struck at the heart of the sensational-journalism controversy.[116] Normatively, journalists *cover* stories, not *create* them.

The *Conradt* investigation began when Mr. Conradt communicated with one of PJF's online decoys who posed as a thirteen-year-old boy in Murphy, TX, in November 2006.[117] *Dateline* had hoped to include Mr. Conradt in the show, as he was both an assistant district attorney and the "chief felony prosecutor" for a neighboring county; however, Mr. Conradt decided not to travel to the sting house.[118] Undeterred, on November 5, 2006, Hansen, the host of *TCAP*, allegedly requested that police accompany him to Conradt's home.[119] Hansen declared: "if he won't come to us, we'll go to him."[120]

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112. *See infra* notes 124-30 and accompanying text.

113. *See* Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 389-91 (S.D.N.Y. 2008).

114. *Id.* at 383.

115. *Id.*

116. *See id.*

117. *Id.* at 385.

118. *Id.*

119. *Id.*

120. *See* Complaint at 8, Conradt v. NBC Universal, Inc., No. 1:07-cv-06623-DC (S.D.N.Y. Oct. 4, 2007) [hereinafter Conradt Complaint].

A detective acquiesced and acquired a warrant for the search of Mr. Conradt's home and for Mr. Conradt's arrest.[121] The judge who issued the warrant was apparently unaware of *Dateline*'s plan to involve itself in the execution of the warrant, later claiming that he would not have issued the warrant if he had been aware.[122] This claim of ignorance is supported by the November 5 warrant application, which makes no mention of *Dateline*.[123]

The *Conradt* case raises the question of when a warrant must contemplate media involvement. The court suggested that the warrant itself might have been void because the judge was not "apprised" of *Dateline*'s involvement.[124] But the court also posited that it would not be fair to hold the media accountable for police actions in withholding material information from the judge issuing the warrant, since the media was not privy to the application.[125] But this may not matter; *Dateline*'s intrusion was outside the scope of the warrant, and thus its conduct, if it was a search or seizure, was likely unreasonable.[126] Unfortunately, the *Conradt* court added little clarity to the Fourth Amendment reasonableness question, as the court did not go so far as to indicate how and when *Dateline* "intru[ded] into law enforcement."[127]

But the court's observation about the legitimacy of the warrant suggests that if a law enforcement agent who applies for a warrant informs the judge of the media's anticipated role, the warrant may cleanse the media's participation. In considering such information, the judge will likely approve the warrant only if the media's conduct strictly serves the narrow governmental interest of public dissemination of information. In that event, the warrant will protect members of the media from § 1983 claims after the search, so long as the warrant contemplates media involvement.[128]

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121. *See Conradt*, 536 F. Supp. 2d at 386.

122. *Id.* at 386 (citing Conradt Complaint, *supra* note 120, ¶¶ 31-32).

123. Affidavit of Peace Officer for Evidentiary Search Warrant, Conradt v. NBC Universal, Inc., No. 1:07-cv-06623-DC (S.D.N.Y. Oct. 24, 2007), ECF No. 19.

124. *See Conradt*, 536 F. Supp. 2d at 391-92 (citing Wilson v. Layne, 526 U.S. 603, 606 (1999); Berger v. Hanlon, 129 F.3d 505, 510-12 (9th Cir. 1997); Ayeni v. Mottola, 35 F.3d 680, 685 (2d Cir. 1994)).

125. *See Conradt*, 536 F. Supp. 2d at 391-92.

126. *See id.*

127. *Id.* at 383.

128. *See id.* at 391-92 (citing Wilson v. Layne, 526 U.S. 603, 606 (1999); Berger v. Hanlon, 129 F.3d 505, 510-12 (9th Cir. 1997); Ayeni v. Mottola, 35 F.3d 680, 685 (2d Cir. 1994)).

b. Principle 2: Searches that promote only media interests are inherently unreasonable

Given that the media's goals and interests are often distinct from law enforcement interests, if members of the media participate in the execution of a warrant, they increase the probability that they will violate the suspect's rights.[129] The *Conradt* court relied on two 1999 Supreme Court cases that analyze media participation in the Fourth Amendment context to support this point: *Wilson v. Layne* and *Hanlon v. Berger*.[130] In those cases, the Court recognized that the media can serve a governmental interest, but this interest must be weighed against the suspect's privacy interests.[131]

Wilson and *Hanlon* differentiate between the pursuit of law enforcement goals and the pursuit of the media's goals—a distinction that is determinative of the reasonableness of an intrusion under the Fourth Amendment.[132] In *Wilson*, the Court held that there was a Fourth Amendment violation when police permitted a reporter and photographer from the *Washington Post* to accompany police during the execution of an arrest warrant.[133] Neither the print reporter nor the photographer was "involved in the execution of the Warrant," but the pair observed and photographed it nonetheless.[134] The Court found that the reporter and photographer were "working on a story for their own purposes," and therefore were in the suspect's house in violation of the suspect's Fourth Amendment rights.[135] In *Wilson*'s companion case, *Hanlon*, the Court similarly found a Fourth Amendment violation when CNN camera crews entered the plaintiff's property with federal agents during the execution of a warrant.[136] Although the crew did not enter the home, they recorded an agent's conversations with the plaintiff.[137] The Court affirmed the US Court of Appeals for the Ninth Circuit's decision, which reasoned that, "[b]ecause the media was present for 'a major purpose other than law enforcement,' that is, to obtain 'material for . . . commercial programming,' the intrusion was unreasonable and the search violated

129. *See id.* at 390.

130. *Id.* at 390-91 (citing Berger v. Hanlon, 526 U.S. 808 (1999); Wilson v. Layne, 526 U.S. 603 (1999)).

131. *See infra* notes 141-50 and accompanying text.

132. *See Berger*, 526 U.S. at 809-10; *Wilson*, 526 U.S. at 605-06 (1999).

133. *Wilson*, 526 U.S. at 605-06.

134. *Id.* at 608.

135. *Id.* at 613.

136. *Hanlon*, 526 U.S. at 809.

137. *Id.*

the Fourth Amendment."[138] The media's non-governmental interest in the search rendered the search unreasonable.[139]

In *Conradt*, the court followed *Hanlon*, concluding that, "[A]lthough the amended complaint does not allege that *Dateline* representatives entered the house, it does plausibly allege, in substance, that *Dateline* personnel were 'active participants in planned activity that transformed the execution of [the warrants] into television entertainment.'"[140]

The Supreme Court has acknowledged that law enforcement has an important governmental interest in allowing the media certain liberties; however, courts must balance those liberties against the individual's privacy interests.[141] In *Wilson*, the Court recognized the importance of the press in "informing the general public about the administration of criminal justice."[142] And the media has a responsibility to convey this information.[143] Quoting *Cox Broadcasting Corp. v. Cohn*, the *Wilson* Court declared, "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations."[144] Nonetheless, the Court implicitly subscribed to a tenet

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138. *Conradt*, 536 F. Supp. 2d at 391 (citing Berger v. Hanlon, 129 F.3d 505, 510-11 (9th Cir. 1997) *vacated and remanded*, 526 U.S. 808 (1999), *aff'd in part, rev'd in part, and remanded in part*, 188 F.3d 1155 (9th Cir. 1999)).

139. *See id.*

140. *Id.* (quoting *Hanlon*, 129 F.3d at 512). Police prepared to execute the warrant at Conradt's residence on the afternoon of November 5, 2006. *Id.* at 386 (citing Conradt Complaint, *supra* note 120, ¶¶ 34-36). Hansen and ten personnel from *TCAP*, as well as one official from PJF, were on location at Conradt's house. *Id.* (citing Conradt Complaint, *supra* note 120, ¶ 36). Cameras were rolling as police discussed how they would execute the warrant, at times speaking with NBC personnel and addressing the camera. *Id.* (citing Conradt Complaint, *supra* note 120, ¶ 36). The Murphy police chief told Hansen that there would be a delay as a SWAT team was coming to the location despite the fact that a sergeant who knew Conradt for twenty years informed police that he did not think Conradt owned a gun. *Id.* (citing Conradt Complaint, *supra* note 120, ¶ 37). When the SWAT team entered the house and announced itself, Conradt said "I'm not gonna hurt anyone [sic]," and shot himself. *Id.* (citing Conradt Complaint, *supra* note 120, ¶ 41). A police officer reported on camera that Conradt had shot himself, and another officer allegedly told a *Dateline* producer "That'll make good TV." *Id.* (citing Conradt Complaint, *supra* note 120, ¶ 42). Conradt died at a Dallas hospital less than an hour later. *Id.* (citing Conradt Complaint, *supra* note 120, ¶ 42). Under these circumstances, the court in *Conradt* held "that a reasonable jury could find that the intrusion on Conradt's privacy substantially outweighed the promotion of legitimate governmental interests." *Id.* at 390. The court based this judgment in part on the alleged facts that "Dateline was camped outside Conradt's house with cameras and crew, waiting to film his arrest for a national television show, as a SWAT team entered his home," despite the fact that Conradt did not even travel to the sting house. *Id.*

141. *E.g.*, Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999).

142. Wilson v. Layne, 526 U.S. 603, 612 (1999).

143. *See* discussion *supra* Part I.B.

144. *Wilson*, 526 U.S. at 612-13 (quoting Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491-92 (1975)).

of the social-responsibility theory of the press,[145] finding that the media's role must be judged against the suspect's Fourth Amendment rights.[146] Consequently, the Court opined, "And even the need for accurate reporting on police issues in general bears no direct relation to the constitutional justification for the police intrusion into a home in order to execute a felony arrest warrant."[147] Thus, the Court held that the police violated the suspect's Fourth Amendment rights when it brought members of the media into the suspect's home during the execution of the warrant and not *in aid* of the warrant.[148] In balancing the governmental interest in allowing the media to report on law enforcement issues against the individual's privacy rights, the Court seemed to draw a line at the front door of a suspect's private residence.[149] *Wilson* leaves unsettled whether *any* media conduct that is under color of law can be reasonable.

Although the media's interests are sometimes consonant with law enforcement's interests, the media's exclusive interests—that is, interests that the media alone has—carry no weight in Fourth Amendment balancing.[150] In other words, if a § 1983 plaintiff can prove that a media intrusion does not support the narrow governmental interest in dissemination of information to the public, the plaintiff will have proven that the media's intrusion is unreasonable.[151] Thus, the best way members of the media can avoid rendering the execution of a warrant unreasonable is by reducing their participation in a "search" or "seizure," ensuring that their participation serves the narrow governmental interest of informing the public.[152]

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145. *See* FRED S. SIEBERT ET AL., FOUR THEORIES OF THE PRESS 73 (1963).

146. *Wilson*, 526 U.S. at 613.

147. *Id.*

148. In support of its conclusion, the Court stated:

> But the Fourth Amendment also protects a very important right, and in the present case it is in terms of that right that the media ride-alongs must be judged. . . . We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.

Id. at 613-14. Traditionally, the Court had held that a third party is a permissible aid only when its presence is necessary to the execution of the warrant, such as when the third party can identify stolen property. *Id.* at 611-12 (citing Boyd v. United States, 116 U.S. 616, 628 (1886)). The media's role, the acquisition and dissemination of information related to the warrant, is probably unnecessary to its execution. Thus, it is difficult to imagine a situation where the media would constitute a permissible third party. *See id.*

149. *See id.* at 613-14.

150. *See id.* at 612-13.

151. *See id.* at 613-14.

152. *See id.*

For instance, if a journalist passively observes law enforcement from outside a suspect's property, the intrusion is minimal. And passive observation from outside the suspect's property is probably not under color of law, as there is no conspiracy under the joint-participation doctrine.[153] Indeed, the under-color-of-law element correlates to the degree of intrusion, such that when the intrusion is minimal, the journalist's conduct probably will not be under color of law. This is because, for lesser intrusions, members of the media probably do not need to act in concert with law enforcement agents; and, if they do not need to act in concert with law enforcement agents to commit the intrusion, they have no incentive to potentially incur liability by doing so. In *Wilson*, media entry into a suspect's house was unreasonable because the suspect's privacy rights outweighed the governmental interest in informing the public.[154] If the *Washington Post* reporter and photographer had remained passively outside the suspect's property, the Court probably would have reached a different result.[155] Although the *Wilson* Court did not indicate what level of journalist participation is reasonable for discovery of reportable law enforcement information,[156] it should be minimal, given the suspect's countervailing privacy interests.

c. Principle 3: Filming may constitute a search or seizure, and therefore may be inherently unreasonable if it does not promote solely governmental interests

Members of the media should limit their conduct to passive observation—and avoid filming—when operating in tandem with law enforcement. Although the media can narrowly promote a governmental interest, it is no surprise that the potential for members of the media to violate a suspect's Fourth Amendment rights is great when the media participates in the execution of a warrant.[157] The media's passive filming of the execution of a warrant from outside the suspect's property will probably not incur liability because, if it is independent of law enforcement, it is not under color of law.[158] But because the act of filming may constitute a search, and the film itself a

153. *See supra* notes 109-13 and accompanying text.

154. *See supra* notes 109-12 and accompanying text.

155. *See Wilson*, 526 U.S. at 609-10 (emphasizing the heightened privacy expectations in a home).

156. *See generally id.* at 603.

157. *See, e.g., id.*

158. *See* Ayeni v. Mottola, 35 F.3d 680, 683-84 (2d Cir. 1994).

seizure, the conduct may still be actionable under § 1983 if it is sanctioned by law enforcement.[159]

The Second Circuit in *Ayeni v. Mottola* held that a film crew's "video and sound recordings were 'seizures' under the Fourth Amendment" because they were "unnecessary to the purpose of the search."[160] In *Ayeni*, journalists recorded law enforcement activity in the plaintiff's home.[161] The Second Circuit held that this was a particularly egregious violation of the Fourth Amendment because the home is where utmost privacy is expected.[162] But a crucial component of this holding is that, regardless of the location of the filming, the filming itself may be a seizure.[163] Thus, a court could extrapolate from *Ayeni* that members of the media violate a suspect's rights every time they film the execution of a warrant, so long as the filming does not strictly promote a governmental interest.[164] The question then becomes whether filming can promote a governmental interest, and it would be difficult for a journalist to convincingly argue that dramatic footage is necessary to disseminate sufficient information.

Based on *Ayeni*, *Dateline* may have violated predators' Fourth Amendment rights while producing *TCAP*. Although privacy expectations are diminished in a sting house,[165] based on *Ayeni*,

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159. *See id.* at 688-89.

160. *Id.* at 688.

161. *Id.* at 683.

162. *Id.* at 689. See also the Second Circuit's history of the Fourth Amendment, stating:

> The Fourth Amendment seizure has long encompassed the seizure of intangibles as well as tangibles. Although "[i]t is true that . . . at one time . . . th[e] [Fourth] Amendment was thought to limit only searches and seizures of tangible property . . . '[t]he premise that property interests control the right of the Government to search and seize has been discredited.'" The Supreme Court has "expressly held that the Fourth Amendment governs not only the seizure of tangible items," but also extends to the seizure of intangibles.

Caldarola v. Cnty. of Westchester, 343 F.3d 570, 574 (2d Cir. 2003) (citation omitted) (quoting Katz v. United States, 389 U.S. 347, 352-53 (1967)).

163. *See Ayeni*, 35 F.3d at 688.

164. *See id.* at 688-89.

165. The *Tiwari* court noted that the fact that the intrusion occurred in a sting house and in a pre-booking room at the Petaluma Airport—where the reasonable expectation of privacy is arguably diminished—does not preclude the possibility of a Fourth Amendment violation. Tiwari v. NBC Universal, Inc., No. C–08–3988, 2011 WL 5079505, at *7 (N.D. Cal. Oct. 25, 2011) (citing Lauro v. Charles, 219 F.3d 202 (2d Cir. 2000)). The court stated,

> In *Lauro*, the issue was whether a staged "perp walk"—i.e., a transfer of an arrestee by the police from one location to another, done at the request of the press and for no reason other than to allow the arrestee to be photographed—violated the Fourth Amendment. . . . This was clearly a public area over which the arrestee lacked dominion and control, and not a private home. The court, however, rejected the defendant's contention that there could be no Fourth Amendment violation because the arrestee had no reasonable expectation of privacy outside of a private home. . . . [B]ut prior case law, the court emphasized, did not "turn solely on the special status of the home" or say that "the Fourth Amendment's privacy protections end at the door of one's house."

Dateline committed a seizure when it captured footage of the predator under arrest.[166] As the *Tiwari* court noted, even though the subsequent broadcasting of the footage enjoys First Amendment protections, the production is not "so inherently intertwined" with broadcasting that the two acts should "be treated as a single uniform act."[167] But even if the filming constitutes a search or seizure, the court was unclear about whether it was an *unreasonable* search or seizure.[168]

If the media's conduct increased the magnitude of the search or seizure—such as by filming—a court should find that the resulting search or seizure is unreasonable because the modification of the search or seizure does not promote a governmental interest or objective of the warrant.[169] But the *Conradt* and *Tiwari* courts have struggled to apply this standard.[170] Furthermore, it is not intuitive to journalists. Members of the media are untrained in civil rights law and may believe that when law enforcement personnel sanction their conduct, the conduct is per se lawful. Thus, they may be surprised to learn that the cooperation of law enforcement personnel does not preclude them from incurring liability, but rather exposes them to it, as they may be acting under color of law. Additionally, while members of law enforcement are entitled to qualified immunity when a constitutional right is not clearly established, members of the media enjoy no such protection.[171] Therefore, to aid judges, journalists, and private individuals, courts should adopt a clearer standard. Part III.A advances a "media influence" test, which is a workable, unambiguous

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Id.; *see also id.* at *9 (quoting Caldarola v. Cnty. of Westchester, 345 F.3d 570, 576 (2d Cir. 2003)) ("A careful reading of *Lauro* . . . reveals that it was not the magnitude of *Lauro*'s privacy interest that enabled him to prevail on his claim, but instead the lack of any legitimate purpose served by 'an inherently fictional dramatization of an event that transpired hours earlier.'"). But if the show were ever brought back, given the widespread viewership and popular references to *TCAP*, it may be that the expectation of privacy in the sting houses will have decreased over time, as any potential "predator" assumes a certain risk when he pursues an online lead in spite of knowledge of the show. *See supra* Part I and *infra* Part III.A. This dynamic expectation of privacy is best illustrated in the case of one predator who was a "predator" on *TCAP* in two separate instances. *See* Chris Hansen, *A repeat 'predator' in our eighth investigation*, MSNBC.COM (Jan. 29, 2007), http://insidedateline.nbcnews.com/_news/2007/01/29/4374238-a-repeat-predator-in-our-eighth-investigation?lite.

166. *See Ayeni*, 35 F.3d at 688.

167. *Tiwari*, 2011 WL 5079505, at *5.

168. *See generally id.*

169. *See* Wilson v. Layne, 526 U.S. 603, 613-14 (1999).

170. *See Tiwari*, 2011 WL 5079505, at *4; Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 389-91 (S.D.N.Y. 2008).

171. *See* Wyatt v. Cole, 504 U.S. 158, 161, 167-68 (1992) (reasoning that qualified immunity for government officials that is necessary to protect their ability to act in the public good is not transferable to private parties); RESTATEMENT (SECOND) OF TORTS § 46 (1965).

test for determining whether and when journalists violate the Fourth Amendment.[172]

B. Intentional Infliction of Emotional Distress (IIED)

Unlike the prescriptive purposes of constitutional law, tort law serves a more remedial purpose.[173] It is for this reason that courts should distinguish clearly between what conduct is protected by the First Amendment and, conversely, what conduct exposes a journalist to liability for Intentional Infliction of Emotional Distress (IIED).[174] Otherwise, an IIED cause of action—often considered a "gap-filler" tort[175]—may have the unintended consequence of authorizing juries with varying conceptions of "outrageousness" to instigate a recession of First Amendment protections on which journalists reasonably rely.[176]

An IIED cause of action generally exists when "[o]ne, who by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another . . . ."[177] Under the cause of action, the defendant "is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily

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172. *See* discussion *infra* Part III.A.

173. The following describes differences between tort law and constitutional law:

> In tort law, telling people what they should do is a secondary enterprise; whatever effect tort law has in guiding conduct arises from what it does post facto in the course of adjusting losses. Precision, clarity, and certainty therefore seem, at least, to be less important than they would be if tort law were in the business of explicitly prescribing conduct. Constitutional law is in that business, however; it exists to tell government actors what they must or must not do, and the importance of clarity and certainty are therefore obvious. Tort law is majoritarian (or perhaps populist): It assumes that lay people are at least as likely as judges to make good decisions on many of the questions that ultimately determine tort liability. Because of its countermajoritarian purposes, that assumption is unavailable in much of constitutional law.

David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 765 (2004).

174. *See id.*

175. *See Conradt*, 536 F. Supp. 2d at 396 (quoting Creditwatch, Inc. v. Jackson, 157 S.W.3d 814, 816 (Tex. 2005)).

176. In support of this proposition, Anderson notes:

> In contrast, a central tenet of First Amendment law is distrust of juries. The jury, once thought to be the chief protector of free speech, is now considered one of its chief threats. The Court has made its First Amendment limitations on tort law effective primarily by limiting the jury's power. In defamation, the First Amendment takes away much of the jury's power to find actual malice, presume harm, and determine what is defamatory. It diminishes a jury's power to decide when public figures should be able to recover for intentional infliction of emotional distress or when disclosures of private facts should be actionable as invasion of privacy.

Anderson, *supra* note 173, at 764 (footnotes omitted).

177. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

harm."[178] Given the investigative and often adversarial role members of the media play when pursuing a story, members of the media are naturally more likely to expose themselves to IIED claims than are private individuals.[179] And yet members of the media are still liable for IIED under the same analysis as lay persons.[180] IIED causes of action rely on subjective determinations by judges and juries, but this subjectivity leads to unclear standards for journalists who push the envelope of what is acceptable in the field.[181]

While Part II.A argued for clearer standards to control investigative journalists, this section counsels toward protection of the investigative journalist in the context of IIED liability. This section discusses the implications of IIED causes of action for investigative journalists and concludes that courts need to carefully establish standards regarding when the First Amendment protects a journalist's conduct from the vagaries of IIED liability so as not to chill First Amendment exercise.

1. IIED Claims Generally

Although the elements of the claim vary in each state, IIED claims traditionally consist of the following four elements: (1) the defendant's conduct is extreme and outrageous; (2) the defendant's conduct is intentional or reckless; (3) the defendant's conduct causes the plaintiff emotional distress; and (4) the emotional distress is severe.[182] In the context of investigative journalism, an analysis of what conduct is "extreme and outrageous" is especially important, as it will substantially influence the media's pre-broadcast conduct.[183] As the media performs an important societal function, courts should distinguish between "outrageous" *media* conduct and "outrageous" conduct in general. In other words, when analyzing the first element of the IIED claim, courts should appreciate (1) the media's

178. *Id.*; *see* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 45 (Tentative Draft No. 5, 2007) ("An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional disturbance to another is subject to liability for that emotional disturbance . . . .").

179. *See* Ayeni v. Mottola, 35 F.3d 680, 688-89; RESTATEMENT (SECOND) OF TORTS § 46 (1965).

180. *See Wyatt*, 504 U.S. at 167-68.

181. *See* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 51-52 (1982).

182. *See* John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 852 app. B (2007) (analyzing elements of IIED in each state).

183. *See supra* note 84 and accompanying text.

unique—yet valuable—ability to disseminate information about a suspect, and (2) the media's heightened First Amendment protections.

2. What Constitutes "Outrageous" Media Conduct?

If members of the media are investigating a suspect for a crime, the suspect might consider their investigation "outrageous," especially if the suspect knows that he is innocent. And the suspect might be more susceptible to emotional distress—knowing that a member of the media has the power to disseminate information about the suspect. But courts must be careful not to allow a suspect's susceptibility to IIED chill First Amendment rights, and should therefore exclude notions of the journalist's public duty to disseminate information from the court's "outrageousness" analysis.

a. The Restatement

The *Restatement (Second) of Torts* provides some guidance on the meaning of "outrageousness"; however, this guidance invariably leads to subjective judgments by a jury or judge.[184] The *Restatement* suggests that "insults, indignities, threats, annoyances, petty oppressions, or other trivialities" do not constitute outrageous conduct, and that "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[185] In addition, the conduct is outrageous if an average member of society who has heard the facts responds, "Outrageous!"[186] The *Restatement* also lists four descriptive categories of conduct that can lead to IIED:

> (1) abusing a position of power; (2) emotionally harming a plaintiff known to be especially vulnerable; (3) repeating or continuing conduct that may be tolerable when committed once but becomes intolerable when committed numerous times; and (4) committing or threatening violence or serious economic harm to a person or property in which the plaintiff is known to have a special interest.[187]

Journalists are most susceptible to the first two categories, because of journalists' inherent power to disseminate information to the public about a subject, and because of journalists' typical informational advantage over potentially vulnerable subjects.[188]

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184. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965); Givelber, *supra* note 181.

185. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

186. *Id.*

187. Kircher, *supra* note 182, at 803.

188. *See id.*

b. Outrageousness and the Media

Because what actually constitutes "outrageous" conduct is subjective, it is difficult to construct common-law standards that substantially inform members of the media, especially in situations that may be "close calls."[189] As Professor Daniel Givelber noted, an IIED claim

> differs from traditional intentional torts in an important respect: it provides no clear definition of the prohibited conduct. . . . It does not objectively describe an act or series of acts; rather, it represents an evaluation of behavior. The concept thus fails to provide clear guidance either to those whose conduct it purports to regulate, or to those who must evaluate that conduct.[190]

The consequent ambiguity subjects the media to the whims of judges and juries whose mere instincts determine the propriety of the media's conduct.[191]

While courts that describe "outrageousness" may have provided sufficient guidance such that a reasonable person can conduct his affairs in a way that avoids liability, members of the media often must be more confrontational than private persons.[192] Thus, an ordinary private citizen will typically regulate his conduct in accordance with a social code that does not tolerate "outrageous" conduct. But a journalist will be ineffective if she adheres to universal social norms. Notwithstanding the *Conradt* court's suggestion that journalists' ethical codes are relevant to outrageousness,[193] those standards should not inform the "outrageousness" standard. This is because, similar to a private citizen's social code, journalism codes are typically conservative and draw the line of what constitutes ethical behavior far below "outrageousness."[194] For instance, if a journalist violates codes of journalistic ethics, the conduct is surely unprofessional, but the violation may not rise to the level of being "outrageous," especially in

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189. *See* Givelber, *supra* note 181, at 51-53.

190. *Id.* at 51.

191. *See* Kircher, *supra* note 182, at 799 ("In the Restatement's view, the court determines whether the defendant's conduct can reasonably be viewed as so outrageous as to permit recovery, and where reasonable minds might differ, the jury decides.").

192. *See* Anderson, *supra* note 173, at 803 ("Such [speech-tort] conflicts implicate values of the highest order: freedom of speech and freedom of the press on one side, and on the other, reputation, honor, privacy, civility, personal integrity, and physical safety.").

193. The court stated:

> The reporter-subject relationship is not monitored by statute, but the profession is guided by self-enforced principles and standards of practice. Although unethical conduct, by itself, does not necessarily equate to outrageous conduct, the failure to abide by these journalistic standards may indeed be relevant to the jury's determination of whether Dateline acted in a reckless and outrageous manner.

Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 397 (S.D.N.Y. 2008).

194. *See Code of Conduct*, *supra* note 84.

light of the high bar recognized by courts with respect to IIED claims.[195] Moreover, a conservative journalistic code of ethics may be incompatible with contemporary investigative-journalism practices and may be too static to govern nuanced situations in the rapidly evolving world in which members of the media operate.

The resulting ambiguity and lack of guidance for the media as to what conduct may lead to IIED liability is problematic. Courts should be concerned particularly in the context of media IIED liability, as the absence of clear standards can chill media members' journalistic efforts. There is also a correlative concern for the individuals affected by the media's potentially "outrageous conduct," as members of the media are repeat players and therefore have the ability to injure numerous future subjects.[196]

c. The Media's "Position of Power" in Conradt *and* Tiwari

Tiwari and *Conradt* shed some light on when a journalist's conduct gives rise to an IIED claim.[197] The district courts both concluded that NBC's conduct could be outrageous if NBC sensationalized the events.[198] The *Tiwari* court took note of *Conradt*'s ruling: "In *Conradt*, Judge Chin noted that, as alleged, NBC did not simply conduct an investigation and inform law enforcement of the decedent's suspected criminal activity."[199] The court in *Conradt* pointed to the first two of the four categories in which IIED claims often arise:

> Significantly, two of the circumstances that give rise to a finding of outrageousness are arguably present here: NBC was in a position of power, both with its ability to disseminate information to the public and with its apparent influence over the police, and NBC knew or should have known that Conradt was peculiarly susceptible to emotional distress and suicide.[200]

The categories identified by the *Conradt* court, position of power and susceptibility of plaintiff, are particularly relevant to

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195. *See* JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS (MB) § 7.10 (2012) ("The case reports carry numerous judicial approvals of the exercise of the trial judge's refusal to entertain a cause of action. Too numerous to merit citation, these decisions should suffice to carry the message that this tort-of-outrage cause of action is not lightly recognized.").

196. Although NBC Universal, Inc. is a defendant in multiple lawsuits, *see* Tiwari v. NBC Universal, Inc., No. C-08-3988 EMC, 2011 WL 5079505 at *1 (N.D. Cal. Oct. 25, 2011); Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 380 (S.D.N.Y. 2008), this has not stopped other networks from airing investigative-journalism programs. *See supra* notes 35-37 and accompanying text.

197. *See Tiwari*, 2011 WL 5079505, at *1; *Conradt*, 536 F. Supp. 2d at 380.

198. *See Tiwari*, 2011 WL 5079505, at *11; *Conradt*, 536 F. Supp. 2d at 396-97.

199. *Tiwari*, 2011 WL 5079505, at *10.

200. *Conradt*, 536 F. Supp. 2d at 397.

investigative journalists.[201] But courts must carefully consider the journalist's unique function when weighing these factors. Investigative journalists often work with, or alongside, law enforcement personnel, giving them a patina of power.[202] And the suspects arguably are more susceptible to emotional distress than ordinary individuals, assuming, as researchers have observed, that criminal suspects represent a less stable segment of society.[203] Of course, the court in *Conradt* was referring to a special susceptibility in Mr. Conradt because he was a public official, not because he was a potential sex offender. But the concept of susceptibility can persuasively apply also to Mr. Tiwari, as a suspected sex offender with particular weaknesses revealed in his chats with PJF.[204] Thus, in *Tiwari*, the court suggested that, "if NBC did, as alleged . . . , direct the police to arrest Mr. Tiwari in a dramatic fashion with guns raised when there was no basis for such an approach, that act alone might be found outrageous."[205] Hence, it is possible to imagine a jury that would find Mr. Tiwari's allegations, if proven, "outrageous."[206]

Another position of power to which the *Conradt* court alluded is the "ability to disseminate information to the public."[207] But courts should not treat this power as carrying with it a greater probability of outrageousness and IIED liability. This is a position of power that is protected by the First Amendment, and courts need to treat it as such. Thus, as proposed in Part III.B, courts should vindicate journalists' crucial First Amendment rights by excluding the "ability to disseminate information to the public" from the "outrageousness" analysis. That way, journalists, who deserve greater First Amendment protection, can carry out their important societal function without fear of recrimination caused solely by the journalist's execution of that function.

III. CLEARER STANDARDS: PRINCIPLES THE COURTS SHOULD ESTABLISH IN TWO RELEVANT CAUSES OF ACTION: § 1983 AND IIED

The district court opinions in *Tiwari* and *Conradt*, discussed in Parts II.A and II.B, demonstrate that the law is currently unclear

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201. *See id.*

202. *See id.* (noting NBC's "apparent influence over the police").

203. *See, e.g.*, Edward J. Ferentz, *Mental Deficiency Related to Crime*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 299, 299-302 (1954) (describing prior studies regarding the relationship between mental deficiency and crime).

204. *See Tiwari*, 2011 WL 5079505, at *11; *Conradt*, 536 F. Supp. 2d at 394-95.

205. *See Tiwari*, 2011 WL 5079505, at *11.

206. *See id.*

207. *Conradt*, 536 F. Supp. 2d at 397.

about when a journalist is liable for her action in concert with law enforcement personnel. This section proposes two ways courts can clearly enunciate the governing law. When adjudicating § 1983 claims, courts should follow the "media influence" test, outlined in Part III.A, to ensure that members of the media are passively observing law enforcement personnel, rather than *participating* in law enforcement. And in the context of IIED claims, courts must be careful not to infringe upon journalists' First Amendment protections, for instance by improperly considering a journalist's ability to disseminate information when deciding the "outrageousness" element of the tort claim.

A. A Workable Fourth Amendment Test

This Note has discussed the media's potential to commit Fourth Amendment violations when interfering with searches and seizures. But it is unclear what conduct is permissible and will not give rise to a § 1983 claim. This is an important question because the media has an obligation to investigate and collect information in order to fulfill its responsibility of informing the public about criminal matters. Courts therefore need to establish standards that guide journalists as to what conduct is permissible so that journalists can simultaneously inform the public and avoid violating individuals' constitutionally protected rights. The "media influence" test enables courts to decide more easily whether journalists are liable under § 1983. It is also easier for investigative journalists—who are untrained in the law—to follow, and will help ensure journalists are aware of what conduct may subject them to liability. Perhaps most importantly, it ensures accuracy by striking a balance between the narrow governmental interest in disseminating law enforcement information to the public, which the media advances, and the suspect's privacy interests.

1. Passive Observation

As an initial matter, a journalist will not be liable under § 1983 so long as the journalist does not act under color of law.[208] Under the "media influence" test outlined in the next section, members of the media will probably be liable for violating § 1983 if they interfere with, or influence, law enforcement decisions, but not if they passively

208. *See supra* Part II.A.1.c.

observe law enforcement.[209] The Ninth Circuit's opinion in *Hanlon* raises the distinction between active involvement and passive observation. The court stated that when members of the media allegedly directed police personnel as to their execution of the warrant in order to promote journalistic goals, which included increased entertainment value, they may have committed an unreasonable intrusion.[210] The court reasoned that the conduct may have been a conspiracy with police (under color of law), and did not promote a significant governmental interest (unreasonable search or seizure).[211] But if members of the media merely filmed events from outside a house being searched pursuant to a warrant, and if they did not interfere with, participate in, or direct the execution of the warrant, then they would probably avoid liability, as the conduct will not be under color of law.[212] Thus, the journalist could still disseminate information about the search in fulfillment of her journalistic duties.[213] In sum, when members of the media passively observe law enforcement, they probably do not satisfy the joint-participation doctrine, discussed in Part II.A.1.c, because they are not in conspiracy with members of law enforcement and therefore should not satisfy the under-color-of-law requirement of a § 1983 claim.

Additionally, passive observation—without more—warrants First Amendment protection and furthers a legitimate governmental interest.[214] Generally, the First Amendment protects the broadcast of events so long as the broadcast does not include speech that is defamatory or violate another established right, such as the Fourth Amendment guarantee against unreasonable searches and seizures.[215] In *Tiwari*, the plaintiff alleged that NBC violated his Fourth Amendment right against unreasonable seizures when NBC invaded his privacy "in a manner designed to cause humiliation to [Mr. Tiwari] with no legitimate enforcement purpose or objective."[216] NBC sought to dismiss this claim, asserting its First Amendment right to broadcast *TCAP*.[217] Tiwari countered that he was "not seeking

209. *See* Berger v. Hanlon, 129 F.3d 505, 512, 514-15 (9th Cir. 1997), *vacated and remanded*, 526 U.S. 808 (1999), *aff'd in part, rev'd in part, and remanded in part*, 188 F.3d 1155 (9th Cir. 1999).

210. *Berger*, 129 F.3d at 510-11.

211. *Id.*

212. *See* Tower v. Glover, 467 U.S. 914, 920 (1984).

213. *See id.*; *supra* notes 141-149 and accompanying text.

214. *See supra* notes 141-149 and accompanying text.

215. *See* Tiwari v. NBC Universal, Inc., No. C–08–3988 EMC, 2011 WL 5079505, at *5 (N.D. Cal. Oct. 25, 2011) (citing Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1355 (7th Cir. 1995)).

216. *Id.* at *3.

217. *Id.* at *4.

damages based on NBC's 'dissemination of information' (which constitutes speech) but rather [sought] damages based on NBC's 'act of information gathering' (which constitutes conduct only)."[218] This raises the question of what degree of involvement in the execution of a warrant is passive, such that the media will avoid liability.[219] As discussed in the next section, this Note suggests that filming, without more, should not give rise to liability because it is not under color of law, whereas filming with participation of law enforcement personnel should give rise to liability, as it is a seizure and does occur under color of law.

2. The "Media Influence" Test

Because the act of filming can be a search, and the recording a seizure,[220] a journalist who films in concert with police will be in violation of § 1983, so long as the filming does not promote a governmental interest.[221] If members of the media have intentionally or recklessly influenced the police so that the *magnitude* of a search or seizure increases as a result—whether through the media's filming or through the police's own conduct—a court should find the consequent search or seizure unreasonable.[222] That is because the marginal increase in the degree of the search or seizure has promoted a non-governmental interest: the interest of the media.[223] This simple articulation, referred to as the "media influence" test, asks whether the media has intentionally or recklessly influenced police to determine whether a journalist has committed an unreasonable search or seizure.[224] The test is simple, yet effective, because it embraces a Fourth Amendment nuance: any increase in the magnitude of a search or seizure that is not counterbalanced by a governmental interest is outweighed by Fourth Amendment privacy interests.[225]

In implementing the test, courts should grant police some leeway to inform the press about searches and seizures—an important

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218. *Id.*

219. *See* Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 389-91 (S.D.N.Y. 2008).

220. *See* Ayeni v. Mottola, 35 F.3d 680, 685 (2d Cir. 1994). *Contra* Caldarola v. Cnty. of Westchester, 142 F. Supp. 2d 431, 439 (S.D.N.Y. 2001) ("Plaintiffs were not 'seized,' unreasonably or otherwise, by virtue of being videotaped.").

221. *See* Tower v. Glover, 467 U.S. 914, 920 (1984).

222. *See* Berger v. Hanlon, 129 F.3d 505, 512 (9th Cir. 1997), *vacated and remanded*, 526 U.S. 808 (1999), *aff'd in part, rev'd in part, and remanded in part*, 188 F.3d 1155 (9th Cir. 1999); *Conradt*, 536 F. Supp. 2d at 390.

223. *See Hanlon*, 129 F.3d at 511-12.

224. *See Conradt*, 536 F. Supp. 2d at 390.

225. *See id.* at 389-90.

part of the administration of law enforcement—but police should maintain, and adhere to, policies that ensure that journalists do not influence police procedures. In other words, courts should require journalists to play a passive role. For instance, informing the media about a "perp walk" may be permissible, but staging a "perp walk" for entertainment, when it serves no governmental purpose, should not be permissible.

If the media is passive and simply observes a "perp walk" in a public place and then accurately reports the event in a news article, the conduct has not violated the suspect's rights and any resulting dissemination of information about the event constitutes protected speech.[226] If members of the media film the event, they may have conducted a search and a seizure under *Ayeni*;[227] however, they importantly have not done so under color of law, because there was no conspiracy or joint participation.[228] But if members of the media direct law enforcement personnel to stage a "perp walk," and then film the walk,[229] courts should consider the media members' conduct to have intentionally resulted in a search or seizure under color of law because the media intensified the magnitude of—or even initiated—the event that constituted a search or seizure. The media in this hypothetical directed law enforcement personnel and thus acted under color of law.[230] Additionally, since police are presumably not advancing a governmental interest when they act under direction from the media, the increase in magnitude of the search or seizure is likely unreasonable.[231]

In practice, the court should permit a plaintiff's § 1983 claim to proceed past the summary judgment stage if the complaint sufficiently pleads that members of the media have intentionally or recklessly acted to influence the police in such a way that the suspect's rights have been violated. The jury instructions should include the same test. Instructions regarding intentional or reckless influence hinge on whether there is a conspiracy, which is determined by the degree of

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226. *See supra* notes 141-149 and accompanying text.

227. Ayeni v. Mottola, 35 F.3d 680, 686 (2d Cir. 1994).

228. *See supra* notes 106-107, 125-127 and accompanying text.

229. *See* Lauro v. Charles, 219 F.3d 202, 213 (2d Cir. 2000).

230. *See* Tower v. Glover, 467 U.S. 914, 920 (1984).

231. *See* Berger v. Hanlon, 129 F.3d 505, 512, 514-15 (9th Cir. 1997), *vacated and remanded*, 526 U.S. 808 (1999), *aff'd in part, rev'd in part, and remanded in part*, 188 F.3d 1155 (9th Cir. 1999); Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 390 (S.D.N.Y. 2008). *But see* Caldarola v. Cnty. of Westchester, 142 F. Supp. 2d 431, 435, 441 (S.D.N.Y. 2001) (distinguishing the situation from *Lauro* because the "perp walk" in *Lauro* served no governmental interest while the "perp walk" at bar was not staged and served the legitimate government interest of informing the public about abuse of disability benefits by public employees).

overt cooperation that exists.[232] If the jury finds that the media has influenced law enforcement in such a way that the journalist has "conspired with state officials to deprive another of federal rights," the media has indeed acted under color of law.[233]

The jury would decide the media's intentionality, and, if the media has not intentionally or recklessly influenced the police conduct, but has nonetheless filmed law enforcement, the media would probably not be liable under § 1983 because the filming was not under color of law.[234]

The injury, in the Fourth Amendment context, is typically an invasion of privacy or property, whether through a search or seizure.[235] If police have altered their conduct and increased the magnitude of the intrusion at the direction of the media, the consequent intrusion is unreasonable since the police will not have intruded in promotion of a governmental interest but instead in promotion of an entertainment interest.[236] An increase in the magnitude of the search or seizure would thus constitute the injury, and the plaintiff should succeed on the claim.[237] For example, under the media influence test, when members of law enforcement stage a "perp walk" at the direction of members of the media, there is an additional privacy intrusion under color of law that serves no governmental purpose. Consequently, the controlling members of the media are liable. If the jury finds intentionality and a conspiracy, then the media has deprived the individual of federal rights so long as an injury has occurred.[238]

The test will allow courts to answer the difficult question that remained after *Wilson*: whether the media's intrusion—if under color of law—should ever be reasonable. By framing the question as one that asks whether the media had any influence over law enforcement, courts can decide on a case-by-case basis whether the media, although acting under color of law, promoted only the narrow governmental interest in disseminating information to the public. If a judge or jury

232. *See* Brunette v. Humane Soc'y of Ventura Cnty., 294 F.3d 1205, 1212 (C.D. Cal. 1997) (affirming the dismissal of a § 1983 claim, finding no implicit coordinated conspiracy between the Humane Society and the media).

233. *See Tower*, 467 U.S. at 920.

234. *See id.*

235. *See* U.S. CONST. amend. IV.

236. *See* Hanlon v. Berger, 526 U.S. 808, 809-10 (1999) (reaffirming that the Fourth Amendment is violated when the police allow the media to accompany them during the execution of a warrant in a home); *cf.* Wilson v. Layne, 526 U.S. 603, 613-14 (1999) (noting that a reporter, who accompanied the police during the execution of the warrant, was "acting for private purposes").

237. *See* Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 390 (S.D.N.Y. 2008).

238. *See Tower*, 467 U.S. at 920.

finds that the media had no influence over the police, but still committed a search or seizure under color of law, then it is indeed possible for the media to operate in conspiracy with police, but without violating the suspect's Fourth Amendment rights.

3. The Media Influence Test Applied to *Conradt* and *Tiwari*

By applying the media influence test to the facts alleged in *Conradt* and *Tiwari*, it appears that the test promotes putative interests of law enforcement, while establishing a standard that protects a zone of First Amendment speech when the media is truly passive. Although the two cases have since settled,[239] this application should guide courts in understanding how to apply the media influence test in future cases. In *Conradt*, if the jury found (1) that police would not have sought and executed a warrant at Mr. Conradt's house, (2) that police would not have acted in an aggressive manner (e.g., with guns drawn), and (3) that *Dateline* intentionally or recklessly encouraged such conduct, *Dateline* would be liable under § 1983. As pleaded, the increase in magnitude served a non-governmental interest—entertainment value—and therefore constituted an unreasonable search and seizure at the direction of the media (under color of law).[240] Similarly, if a jury in *Tiwari* found at trial that police would not have descended upon and seized Mr. Tiwari with such force if not for *Dateline*'s direction and influence, *Dateline* would likewise be liable. If, on the other hand, the jury found that the police acted in conformity with their standard practices, and the media did not influence them, then the media would not be liable for the search and seizure because their actions were not under color of law (no conspiracy).

This standard puts journalists on notice and deters interference with law enforcement, returning journalists to their traditional passive roles of reporting—and not creating—news. The test is simple to apply and removes the non-governmental interest of entertainment from law enforcement. If journalists want to film law enforcement, they must do so without influencing law enforcement personnel in order to avoid acting under color of law. And if a journalist acts in cooperation with law enforcement personnel, the journalist must ensure she does not increase the search or seizure beyond that which is necessary for dissemination of information;

239. *See* Stipulation and Order for Voluntary Dismissal of Plaintiff's Claim for Intentional Infliction of Emotional Distress, Tiwari v. NBC Universal, Inc., No. 03:08–CV–03988 EMC (N.D. Cal. Nov. 22, 2011), ECF No. 117.

240. *See supra* notes 106-111 and accompanying text.

filming during the search or seizure itself will likely be off limits to the media. Not only will this better protect individuals' rights, but it also ensures only trained law enforcement personnel enforce the law, which promotes the integrity and precision of an investigation.[241]

B. First Amendment Protections and "Outrageousness" in IIED Claims

The *Conradt* and *Tiwari* courts failed to carefully address the second "position of power" that can give rise to an IIED claim: "the ability to disseminate information to the public."[242] Courts must not hold journalists' constitutional rights against them when determining IIED liability.

As discussed above, the court in *Tiwari* stated that the production of the broadcast is not "inextricably intertwined" with the broadcast itself, and therefore the production and filming are not entitled to First Amendment protection.[243] The court was correct in declaring that the acts of production and broadcast are not "intertwined" in the sense that they are not one act entitled to the same protections;[244] however, the court should have been equally careful not to treat as intertwined the manner of the filming and the simple act of filming. The act of filming, without more, should not add to "outrageousness" based solely on the suspect's apprehension that the journalist has First Amendment entitlements to disseminate information. Such a construction would be antithetical to the Constitution because it would mean the mere fact that the Constitution guarantees a journalist basic First Amendment rights, and that the suspect apprehended those rights, increases a journalist's probability of incurring liability. This would certainly chill the exercise of First Amendment rights.[245]

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241. Investigations will also not be fruitless, unlike *TCAP* investigations in Texas where:

> [Collin County District Attorney Roach] said neither police nor NBC could guarantee the chat logs were authentic and complete. "The fact that somebody besides police officers were [sic] involved is what makes this case bad," said Roach, who was informed of the sting in advance but did not participate. "If professionals had been running the show, they would have done a much better job rather than being at the beck and call of outsiders."

Associated Press, *supra* note 25.

242. Tiwari v. NBC Universal, Inc., No. C–08–3988 EMC, 2011 WL 5079505, at *10-11 (N.D. Cal. Oct. 25, 2011) (citing *Conradt*, 536 F. Supp. 2d at 397).

243. *Id.* at *5 (citing Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1355 (7th Cir.1995)).

244. *Id.*

245. It is possible that the *Conradt* court actually meant to use the "ability to disseminate information to the public" as applicable to the second IIED category—plaintiff susceptibility—despite describing the circumstance as a "position of power." *Conradt*, 536 F. Supp. 2d at 397. Mr. Conradt arguably had a greater susceptibility to the powers of the media because of his position as a public figure.

1. Courts Should Not Treat a Journalist's Ability to Disseminate Information as a Position of Power Supporting "Outrageousness"

A court's conclusion that the "ability to disseminate information to the public" is a "position of power" circumstance that gives rise to an IIED claim would undoubtedly chill the journalist's First Amendment right to disseminate information to the public. The journalist would think twice about filming anything involving a suspect if she knew that her job function made her inherently more "outrageous" than the private individual. From the start of each workday, the journalist would be more likely to incur IIED liability than the private individual. This is because the journalist has a greater ability to disseminate free speech than the private individual, which arguably makes the journalist more powerful and more likely to be outrageous. It would mean that, even if the journalist acted reasonably, her actions would still be considered outrageous because she has the power to disseminate information to the public.

Under this view, courts may restrain the actions of prominent journalists more than lesser-known journalists, as prominent journalists have a greater ability to disseminate information to the public. For example, a journalist for *60 Minutes*, covering some of the most important news stories, would be exposed to greater IIED liability than a local journalist simply because the *60 Minutes* journalist can exercise her First Amendment rights before a larger audience. This gives her more power, which means a court could more easily label her conduct outrageous.

Additionally, the notion that courts would find that someone has a greater likelihood of liability because that person possesses a right guaranteed by the Constitution is antithetical to tort law. A widely accepted principle of IIED jurisprudence is that one cannot be held liable under IIED for exercising a legal right in a permissible way.[246] One such scenario, as Professor Kircher suggests, may occur where an insurance adjuster informs a widow that she cannot collect on the benefits of her late husband's life insurance, on which she is depending, because the insurer possesses a legally robust policy defense.[247] If a person exercising a legal right in a permissible way does not incur IIED liability, it logically follows that the person should not be liable for merely holding such a right *ex ante*. Just as the insurance adjuster's ability to inform the widow should not be a circumstance that gives rise to IIED liability, the journalist's First Amendment entitlements should not give rise to IIED liability.

246. RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1965).

247. Kircher, *supra* note 182, at 800.

2. Outrageousness: Filming vs. Manner of Filming

Although courts should not consider the mere ability to disseminate information to the public in assessing outrageousness, they should consider the *manner* of the dissemination (i.e., filming). In other words, a suspect's apprehension that a passive journalist who is filming in public has the right to broadcast the recording of the suspect should not increase the journalist's culpability under IIED, but, if the journalist acts in an outrageous manner while filming, she may be subject to liability. For instance, in the example above, if the insurance adjuster goes further than simply informing the widow, and instead excoriates the widow, he may be liable for IIED damages because of the manner in which he abused his position of power. Thus, when NBC cameramen descend upon a shocked suspect in *TCAP* at the culmination of a heated confrontation by Hansen, the suspect's apprehension that NBC has the ability to disseminate information to the public should be immaterial to outrageousness, but the aggressive manner of the filming should be considered.[248] Although society is less sympathetic to suspected predators than to helpless widows, suspected predators should be entitled to the same protections from outrageousness.

Judges and juries may have some difficulty excluding the ability to disseminate information to the public from their evaluation of a journalist's outrageousness, but it is a necessary exclusion since First Amendment entitlement should not increase liability. One way for judges and juries to consider the concept is by imagining the suspect has no apprehension that the journalist is in fact a journalist, as opposed to a private individual. Alternatively, judges and juries can assume that the suspect believes that the cameras are off and not recording. While this conceptualization is no simple task for a judge or a jury, it may be an effective way for judges and juries to analyze behavior for outrageousness without allowing a journalist's First Amendment entitlements to seep into the equation and increase liability.

By distinguishing between the suspect's awareness of the journalist's ability to disseminate information and the journalist's manner of filming, courts will be able to protect the journalist's First Amendment free speech right to broadcast, while condemning and remedying any extra-constitutional conduct that may be outrageous on the part of the journalist. The *ex ante* ability to disseminate

248. Professor Adler refers to the moment in *TCAP* when "a swarm of cameramen surround the predator, pointing their cameras at him" as "the money shot." *See* Adler, *supra* note 8, at 539 (internal quotation marks omitted).

information and the actual dissemination itself are inextricably linked, as the *ex ante* ability facilitates the actual dissemination. By chilling the ability to disseminate information, courts would invariably infringe upon the actual dissemination. Attaching liability to a right to disseminate is akin to prior restraint and will take the teeth out of the First Amendment's protection of the broadcast.

But courts should evaluate the manner of the filming to protect individuals from IIED. The manner can be "outrageous," for instance, if it is intended to sensationalize the unfolding of events before the lens with an obvious risk of emotional distress to the plaintiff. When a phalanx of cameramen surprises a suspect in an alarming manner, a judge or jury can assess the conduct without reference to the concomitant ability to disseminate the broadcast. Indeed, in such a situation, the aggressive cameramen become part of the sensational story, and they do so in a way that is unnecessary to the ultimate dissemination of information. Courts should consider such conduct when determining IIED.

IV. CONCLUSION

As investigative journalism increases in popularity and profitability, investigative journalists must be careful not to abuse their unique positions of power. When a journalist abuses the public's trust, the public can unsubscribe from the publication. But when an investigative journalist violates an individual's rights, the violations may in fact increase subscriptions and viewership in step with the increased sensationalism. Courts are responsible for protecting individuals' rights. To do so, they must establish clearer standards so that journalists know when they might violate a suspect's rights.

The media influence test provides a simple guideline for journalists and juries to follow. And the test will increase protections afforded to suspects because journalists will know whether and when they will incur liability. But journalists need protection as well. Courts need to ensure that IIED claims do not chill the investigative journalist's First Amendment right to disseminate information. Thus, courts must be sure to exclude the journalist's power to disseminate information from the journalist's "outrageousness" analysis. It is not outrageous to be a journalist—journalism is vital to a successful democracy. Investigative journalists have long performed an important function in our society, and it is the responsibility of the

courts to establish clear constitutional standards to balance the rights at stake for the journalist and the suspect.

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