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The Tort Liability of Investigative Reporters

John W. Wade

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*John W. Wade**

* Dean and Distinguished Professor of Law Emeritus, Vanderbilt University School of Law; B.A., 1932, J.D., 1934, University of Mississippi; L.L.M., 1935, S.J.D., 1942, Harvard University.

I. INTRODUCTION

Some years back they were given the name of muckrakers,[1] as a term of derision. Far from being shamed or deterred, however, they began to wear their title as a badge of honor and to engage more actively and vigorously in exposing corruption, oppression, abuse of authority, and other kinds of wrongdoing. Given by now the more professionally sounding appellation of investigative reporters, they reached an apex of fame and admiration at the time of Watergate. Today they serve a valuable purpose in our society. Their exposès often lead to cleanups and provide a deterrence against wrongdoing, especially at the governmental level, that no other agency of our society can furnish so effectively.[2] The law has taken into account this valuable service and affords reporters privileges and leeways somewhat broader than the prerogatives that other citizens possess. Contrary to the viewpoint of some members of the news media, however, these privileges are not, and should not be, absolute.

Investigative reporters operate in areas in which there are sharply conflicting personal and social interests. In seeking to promote the social interest in the public's right to know, an investigative reporter may injure or impair an important personal interest of an individual. Suppose, for example, that the Watergate crew had been composed of reporters and their agents seeking information to publish. Would their conduct have been justifiable and, therefore, immune from legal sanction? Again, suppose that a newspaper, supporting one candidate for sheriff, on the day before election knowingly published a false charge that the other candidate had been convicted of incest in his youth. These are extreme examples, I know. Their purpose, however, is to indicate that a line-dividing process is necessary and that the line is drawn on the basis of balancing of conflicting interests.

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1. Historians have credited President Theodore Roosevelt with using the term. President Roosevelt took it from John Bunyan's *Pilgrim's Progress*, in which Bunyan described the man with the muckrake as one "who could look no way but downward, with a muckrake in his hands; who was offered a celestial crown for his muckrake, but who would neither look up nor regard the crown he was offered, but continued to rake to himself the filth of the floor."

2. For a popular portrayal of the accomplishments of current leading examples, see L. DOWNIE, THE NEW MUCKRAKERS (1976).

In the whole of the common law, the law of torts most concerns the balancing of interests. Sometimes this balancing is done in laying down a rule of law. Sometimes the balancing process is more individualized, and the rule of law incorporates a standard that requires discretionary application depending upon the individual facts in the case. In the United States, however, first amendment constitutional concerns for freedom of speech and freedom of the press affect the common law balancing process in many tort cases concerning investigative reporters. The field of constitutional law is another one in which the courts have much experience in the balancing of interests.

What occurs here, therefore, is a combination balancing process, involving the principles of both tort law and constitutional law.[3] If the two come into direct conflict, the principle of constitutional law, of course, prevails. But there is an interplay here that affords due weight to common law principles.

While the law addressing reporters' rights draws upon two fields, the law also addresses two different activities of investigative reporters. These activities are obtaining the "information," or newsgathering, and publishing that information. Newsgathering and publication usually trigger different torts, but some torts may stem from either activity. While publication is the primary concern of the first amendment, the United States Supreme Court has indicated that the first amendment also protects "newsgathering."[4]

II. DEFAMATION

A. *The Cause of Action*

The tort of defamation[5] concerns the publication aspect of the investigative reporter's activities.[6] The interest that the tort seeks to protect is the reputation of the plaintiff. Damages, therefore,

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3. For an elaboration on this combination balancing process, see Wade, *The Communicative Torts and the First Amendment*, 48 MISS. L.J. 671 (1977); *see also* Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785 (1979).

4. "The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. . . . Finally, as we have earlier indicated, newsgathering is not without its First Amendment protections . . . ." Branzburg v. Hayes, 408 U.S. 665, 681, 707 (1972); *see also* Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974).

5. Defamation encompasses libel and slander. Libel, which is the written form, is the form that is of primary concern in this Article.

6. The investigative reporter generally works for a newspaper, which, as the principal, normally is also liable for the agent's tort.

include compensation for "actual harm" to the reputation, and emotional disturbance arising from that harm. Under the common law, strict liability was imposed upon the defendant if the published statement was defamatory and false and the defendant intended to publish it. Whether the defendant was at fault or innocent with respect to the falsity of the publication made no difference. The rationale was that the injury to the plaintiff's reputation was just as great regardless of whether the defendant was to blame for the falsity of the communication.[7]

In the 1964 landmark case of *New York Times Co. v. Sullivan*,[8] the Supreme Court held for the first time that the first amendment applied to an action for defamation and might restrict some of the traditional common law features. Specifically, the Court held that a government official, as plaintiff, could not recover without showing, "with convincing clarity,"[9] "that the statement was made with 'actual malice'— that is with knowledge that it was false or with reckless disregard of whether it was false or not."[10] The *New York Times* decision and its progeny have reshaped completely the law of defamation.[11]

In *St. Amant v. Thompson*,[12] the Court sought to clarify the meaning of its expression, "actual malice." It explained that "reckless disregard for truth or falsity" of a publication requires proof justifying the conclusion that "the defendant in fact entertained

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7. These early strict liability cases, both in England and the United States, usually concerned newspapers or book publishers. *See, e.g.*, Washington Post Co. v. Kennedy, 3 F.2d 207 (D.C. Cir. 1925); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920); E. Hulton & Co. v. Jones, 1910 A.C. 20 (H.L.); Morrison v. John Ritchie & Co., 1902 Sess. Cas. (Fr.) 645 (Scot. 2nd Div.).

8. 376 U.S. 254 (1964).

9. *Id.* at 285-86.

10. *Id.* at 279-80.

11. The circumstances under which *New York Times* arose appear to have forced the hand of the Court. In the midst of the turmoil surrounding school desegregation efforts, the *New York Times* carried an "editorial advertisement" seeking contributions of funds. The advertisement referred, among other matters, to an episode at Alabama State College, in Montgomery, and contained some minor factual errors. Plaintiff, police commissioner for the city of Montgomery, sued the *Times* for libel and obtained judgment for $500,000. *Id.* at 256. The editorial advertisement made no reference to the plaintiff by name or position. Other government officials in the state brought similar suits, apparently to prevent the *New York Times* and other newspapers from carrying critical comment about the state's racial situation. The Supreme Court, in reversing the lower court's judgment, held that the reference to the plaintiff-police commissioner was not adequate to meet the constitutional test of convincing clarity. *Id.* at 287-88. For more on the factual background, see Pierce, *The Anatomy of an Historic Decision:* New York Times Co. v. Sullivan, 43 N.C.L. REV. 315 (1965).

12. 390 U.S. 727 (1968).

serious doubts as to the truth of the publication."[13] The Court also used other expressions carrying a similar meaning, such as whether defendant exhibited a "high degree of awareness of . . . probable falsity,"[14] or "whether the publication was indeed made in good faith."[15] That the test laid down is subjective rather than objective is obvious.

The nature of the reckless-disregard test has created a distinct irony for the investigative reporter. As the title indicates, the investigative reporter's professional obligation is to investigate—to check on the reliability of sources and the accuracy of information obtained. This test, however, creates an incentive not to investigate if any question at all exists about the accuracy of the "information," since the investigation might turn the question into "serious doubts" and make the publication a violation of the *New York Times* standard. The Court expressly recognized this risk,[16] but made no effort to avoid it.[17]

The subjective nature of the test for reckless disregard, unfortunately for journalists, gave rise to encroachments upon the journalists' state of mind. In *Herbert v. Lando*,[18] an Army officer, suing for defamation in a production of *Sixty Minutes* and having to prove "serious doubts," sought to depose the defendant-reporter on his state of mind and obtain discovery of relevant editorial communications. The Second Circuit held that the defendant was entitled to an absolute privilege under the first amendment,[19] but the Supreme Court reversed. The Court held *unanimously* that defendant must answer under oath questions on state of mind and by a *majority* that the lower court should have permitted discovery of the editorial communications. The Court could have avoided, or at least alleviated, these encroachments if it had made the test of reckless disregard objective rather than subjective. The opinion in *St. Amant* itself suggests one way to make the test objective when

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13. *Id.* at 731.

14. *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

15. *Id.* at 732.

16. "It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity." *Id.* at 731.

17. *Id.* at 731-32. The recent motion picture *Absence of Malice* vividly illustrated that the risk is not an idle one. In that movie, a newspaper attorney advised the newspaper not to investigate in order to avoid potential liability.

18. 441 U.S 153 (1979).

19. 568 F.2d 974, 975 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979).

it states that professions of good faith will not "be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation."[20] Why not use that as the standard itself?

After *New York Times* and *St. Amant,* the Court quickly moved to enhance the barriers to libel actions. In *Curtis Publishing Co. v. Butts,*[21] a badly divided Court extended the constitutional restriction on the availability of a libel action brought by a government official under *New York Times* to plaintiffs who might be characterized as "public figures." Four years later, a plurality of the Court in *Rosenbloom v. Metromedia, Inc.*[22] extended the knowledge-or-reckless-disregard test beyond particular plaintiffs to the subject matter of the publication. *Rosenbloom* held that the knowledge-or-reckless-disregard requirement applied if the published material was a "matter of general or public interest." Three years later, however, the Court rejected the *Rosenbloom* standard in *Gertz v. Robert Welch, Inc.,*[23] its second landmark libel case. The *Gertz* Court stated that the determination should not be left to "state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not."[24] As Justice Powell commented, "We doubt the wisdom of committing this task to the conscience of judges."[25] Translation: it is not feasible to draw up a definition of public or general interest that will guide the several courts to reach decisions on an organized, consistent basis, and the Supreme Court will not fall into the trap of undertaking it on a case-by-case basis. *Rosenbloom,* therefore, no longer has significance.

In addition to abandoning *Rosenbloom*'s high fault standard based on the subject matter of the publication, the Court in *Gertz* laid down two significant constitutional rules applicable to a libel action brought by a private, rather than a public, plaintiff. First, the Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate

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20. 390 U.S. at 732.

21. 388 U.S. 130 (1967). The opinions were widely scattered, with no single opinion having the full concurrence of five justices. Indeed, the opinion of Chief Justice Warren, which prevailed on the results reached in the two cases, did not have the full concurrence of any other member of the bench.

22. 403 U.S. 29, 45 (1971) (Court found the arrest of a person for allegedly selling obscene literature to be an "issue of public or general interest").

23. 418 U.S. 323 (1974).

24. *Id.* at 346.

25. *Id.*

standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[26] This pronouncement abolished the common law rule of strict liability for defamation. As a result, most states have adopted a negligence standard, while some states have adopted a higher test including the knowledge-or-reckless-disregard standard. Second, *Gertz* held that the states "may not permit recovery of presumed or punitive damages . . . when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth . . . . It is necessary to restrict . . . plaintiffs who do not prove knowledge of falsity or reckless disregard . . . to compensation for actual injury."[27]

Finally, the Court in *Gertz* narrowed the definition of the term public figure and, thus, limited the impact of *Butts*. Subsequent Supreme Court decisions have continued this trend.[28] Now that it is necessary for even a private plaintiff to show fault on the part of the defendant the suggestion may be offered that the Court has had second thoughts and no longer has the zeal it showed in *Butts* and *Rosenbloom* to expand the coverage of the reckless-disregard standard.[29]

B. Defenses

Certain defenses available to the tort action for defamation have important implications for the media.[30] The first of these is the privilege of fair report or the reporter's privilege, which concerns the reporting of official governmental proceedings or ac-

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26. *Id.* at 347.

27. *Id.* at 349.

28. *See* Hutchinson v. Proxmire, 443 U.S. 111 (1979); Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976).

29. The Court's zeal arguably was not so great at the time it decided these cases. The Court was woefully divided, *see supra* notes 21 & 22 and accompanying text; two members had taken the position that all defamation actions were unconstitutional, and the Court bad not yet decided *Gertz*, which held that all plaintiffs must show fault. The Court since has repudiated *Rosenbloom*, and could have classified the plaintiffs in *Butts* and *Walker* as government officials.

30. Several absolute and general privileges exist that this Article does not address because they have no particular application to actions against the news media. These privileges include (1) absolute privileges for judicial officials and persons participating in a trial, legislators, and certain administrative officials; and (2) conditional privileges for persons seeking in good faith to protect their own interests or those of others. These general privileges, when combined with the elements of a cause of action for defamation, illustrate very aptly the balancing of interests that takes place in the substance and application of the law of defamation. *See* RESTATEMENT (SECOND) OF TORTS §§ 585-592A (absolute privileges), §§ 593-605A (conditional privileges) (1976).

tions.[31] In this context, the primary issue shifts from the question of whether the defendant was at fault in ascertaining whether the defamatory charge was false to the question of whether the report was accurate and fair.[32] Even though the reporter has serious doubts about the truth of the charge or does not believe it himself, no liability exists if the report is accurate and fair. A verbatim report would, of course, be accurate; but it is often found necessary to summarize. The summary may raise the issue of whether the reporter has interpreted accurately the original report or statement. The summary must also be fair; the reporter cannot take a charge out of context if it would give an erroneous impression, or state the charge accurately, but fail to report the rebuttal to it.[33] Some recent decisions have broadened the scope of the reporter's privilege, extending coverage beyond reports of official proceedings and actions to reports of public meetings, provided the meetings are open to the general public and deal with a matter of public concern.[34]

How has the first amendment affected this common law privilege? In *Time, Inc. v. Pape,*[35] the defendant summarized parts of a report of the United States Commission on Civil Rights regarding police brutality. Defendant *Time,* referring to one incident of alleged brutality, stated the allegations as facts rather than as alleged facts. The Court declared that the "omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities" and decided that the "deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough

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31. *See id.* § 611; *see also* RESTATEMENT (SECOND) OF TORTS App. § 611 (1976 & Supp. 1983) (citations to cases); L. ELDREDGE, THE LAW OF DEFAMATION §§ 79-80 (1978); Barnett, *The Privilege of Defamation by Private Report of Public Official Proceedings,* 31 OR. L. REV. 185 (1952); Bryson, *Publication of Record Libel,* 5 VA. L. REV. 513 (1918); Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report,* 54 N.Y.U. L. REV. 469 (1979).

32. *See, e.g.,* Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975).

33. Many cases hold that no privilege exists to report the contents of a complaint filed in a lawsuit before an answer is filed or the court has ruled on it. The purpose is to prevent the abuse of the privilege through collusive action between the person filing the suit and the reporter. *See* Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 61 N.E.2d 5 (1945); Nadelmann, *The Newspaper Privilege and Extortion by Abuse of Legal Process,* 54 COLUM. L. REV. 359 (1954). *But see* Campbell v. New York Evening Post, 245 N.Y. 320, 157 N.E. 153 (1927).

34. *See, e.g.,* Pulvermann v. A.S. Abell Co., 228 F.2d 797 (4th Cir. 1956); Borg v. Boas, 231 F.2d 788 (9th Cir. 1956); Phoenix Newspapers v. Choisser, 82 Ariz. 271, 312 P.2d 150 (1957). It is generally agreed that the meeting must regard a matter of general concern.

35. 401 U.S. 279 (1971).

to create a jury issue of 'malice' under *New York Times.*"[36]

In *Time, Inc. v. Firestone,*[37] following a sensational divorce trial between two socialites, the Supreme Court found that the trial court granted a divorce to the husband in a decree that invited misunderstanding.[38] *Time* reported the divorce as a paragraph in its "Milestones" section, stating that it was granted "on grounds of extreme cruelty and adultery."[39] Contending that the court did not find her guilty of adultery, the wife sued for libel. The Supreme Court, finding the wife to be a private figure, held that the state court judgment would be "entirely consistent with *Gertz,*" if *Time* was found to be at fault in publishing the account[40] and remanded the case for a determination of whether *Time* was negligent.

On the issue of fair and accurate report, the apparent explanation of the two cases is that the Court in *Pape* construed the reckless-disregard standard of *New York Times* to mean that the defendant's interpretation of the official proceeding is not subject to liability if it is a rational one. In *Firestone,* the Court construed the fault requirement of *Gertz* to mean that the defendant is liable for a negligent interpretation. These cases, it would seem, amount to a recognition of constitutional protection of the privilege of fair report.

Suppose an investigative reporter interviews several persons and receives some answers that defame the plaintiff. In publishing a news report, can he avoid all liability by quoting the persons he interviewed and stating that he takes no responsibility for the truth or falsity of their statements? At common law, the answer to this clearly has been "no"; one who repeats a defamatory statement is liable even though he says he does not believe it.[41] The

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36. *Id.* at 290.

37. 424 U.S. 448 (1976).

38. *Id.* at 458-59.

39. *Id.* at 452.

40. *Id.* at 463.

41. RESTATEMENT (SECOND) OF TORTS § 578 (1976); *see also* Dixon v. Newsweek, Inc., 562 F.2d 626 (10th Cir. 1977); RESTATEMENT (SECOND) OF TORTS App. § 578 (1976 & Supp. 1983) (citations to relevant cases); Painter, *Republication Problems in the Law of Defamation,* 47 VA. L. REV. 1131 (1961). As one court noted, "tale-hearers are as bad as tale-makers." Harris v. Minvielle, 48 La. Ann. 908, 915, 19 So. 925, 928 (1896) (quoting M. NEWELL, THE LAW OF DEFAMATION, LIBEL AND SLANDER IN CIVIL AND CRIMINAL CASES 350 (1st ed. 1890). Common law prohibits one from repeating defamatory rumors even as rumors. In a situation giving rise to a conditional privilege, the privilege may extend to publishing a defamatory rumor under the restrictions set forth in the RESTATEMENT (SECOND) OF TORTS § 602 (1976).

Supreme Court implicitly recognized this common law rule in *St. Amant v. Thompson.*[42] Defendant, delivering a televised political speech, read some questions that he had put to an individual and then the latter's answers. The Court noted that one of the state court's reasons for judgment against St. Amant, was that "he mistakenly believed he had no responsibility for the broadcast because he was merely quoting [the individual's] words."[43]

The Second Circuit, however, in *Edwards v. National Audubon Society,*[44] espoused what it called the privilege of neutral reportage, which would constitute a change in the common law rule of liability for repeating a defamatory statement if the Supreme Court should decide to adopt the concept. In *Edwards,* a publication of the Audubon Society had charged that scientists who were claiming that increases in the size of annual Christmas bird counts demonstrated that DDT was not injurious to bird life, were either lying for pay or ignorant on the subject. A newspaper reporter induced the author of the Audubon publication to name the scientists whom he had in mind, and then published the story in the *New York Times,* together with denials of those named scientists that the reporter was able to contact.

The court of appeals reversed a jury verdict for the plaintiff-scientists in a libel action against the *Times* and dismissed the complaint. Without making any reference to the common law privilege of fair report or rule of liability for repetition of a defamatory statement, the court laid down a "fundamental principle" that

> [W]hen a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. . . . What is newsworthy about such accusations is that they were made. . . . The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.[45]

While the concept of neutral reporting has received the approval of a number of law review commentators,[46] the courts have

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42. 390 U.S. 727 (1968).

43. *Id.* at 730. This, of course, was not a formal ruling.

44. 556 F.2d 113 (2d Cir.), *cert. denied,* 434 U.S. 1002 (1977).

45. *Id.* at 120 (citations omitted).

46. *See* Sowle, *supra* note 31; Note, *Protecting the Public Debate: A Proposed Constitutional Privilege of Accurate Republication,* 58 TEX. L. REV. 623 (1980); Note, Edwards v. National Audubon Society, Inc.: *The Right to Print Known Falsehoods,* 1979 U. ILL. L.F. 934; Note, *The Developing Privilege of Neutral Reportage,* 69 VA. L. REV. 853 (1983); Note, *Libel and the Reporting of Rumor,* 92 YALE L.J. 85 (1982); Comment, *Constitutional Privi-*

received it less enthusiastically.[47] Although the Supreme Court denied certiorari in the *Edwards* case,[48] it seems unlikely that the Court will be ready to adopt the *Edwards* principle of neutral reporting. Observe the equivocal expressions of *Edwards*: (1) "serious charges," (2) made by a "responsible, prominent organization," (3) "against a public figure," and (4) given "accurate and disinterested reporting." A single ambiguous term of similar nature caused the Court in *Gertz* to repudiate *Rosenbloom v. Metromedia, Inc.*[49] As Justice Powell said in *Gertz*, "We doubt the wisdom of committing this task to the conscience of judges."[50] Perhaps the Court could reduce this list of ambiguities by recoguizing the neutral reportage privilege only in cases concerning the reporting of a preexisting public debate, with the reporter playing no part in provoking the defamatory statement or taking sides as to its resolution. Even this limitation, however, probably would be insufficient for the purpose of reducing ambiguity. In short, *Pape* and *Firestone* are likely to be treated as establishing the equivalent of a constitutional privilege of fair report, but the privilege of neutral reportage is not likely to muster constitutional protection. It remains to be

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lege to Republish Defamation, 77 COLUM. L. REV. 1266 (1977). *But see* Comment, Edwards v. National Audubon Society, Inc.: *A Constitutional Privilege to Republish Defamation Should be Rejected*, 33 HASTINGS L.J. 1203 (1982); Comment, *"The Privilege of Neutral Reportage"*—Edwards v. National Audubon Soc'y, 1978 UTAH L. REV. 347.

47. For cases rejecting the privilege of neutral reportage, see Dickey v. CBS, 583 F.2d 1221 (3d Cir. 1978); Tunney v. American Broadcasting Co., 109 Ill. App. 3d 769, 441 N.E.2d 86 (1982); Newell v. Field Enters., 91 Ill. App. 3d 735, 415 N.E.2d 434 (1980); McCall v. Courier-Journal and Louisville Times Co., 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982); Postill v. Booth Newspapers, Inc., 118 Mich. App. 608, 325 N.W.2d 511 (1982); Hogan v. Herald Co., 84 A.D.2d 470, 446 N.Y.S.2d 836, *aff'd*, 58 N.Y.2d 630, 444 N.E.2d 1002, 458 N.Y.S.2d 538 (1982).

For cases recognizing the privilege, see Kraus v. Champaign News Gazette, 59 Ill. App. 3d 745, 375 N.E.2d 1362 (1978); Schermerhorn v. Rosenberg, 73 A.D.2d 276, 426 N.Y.S.2d 274 (1980); *cf.* Weingarten v. Block, 102 Cal. App. 3d 129, 162 Cal. Rptr. 701, *cert. denied*, 449 U.S. 899 (1980).

On whether the privilege of neutral reportage should apply specifically to the activities of investigative reporters, compare Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977) (apparently yes), with McManus v. Doubleday & Co., 513 F. Supp. 1383 (S.D.N.Y. 1981) (apparently no). The Second Circuit itself indicates that the *Edwards* principle does not apply to a publisher who "espouses or concurs in" a report of charges made by the newspaper. *See* Cianci v. New York Times Publishing Co., 639 F.2d 54, 68 (2d Cir. 1980). In Medico v. Time, Inc., 643 F.2d 134, 145 n.38 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981), the court declared that its rejection of the neutral reportage privileges in Dickey v. CBS, 583 F.2d 1221 (3d Cir. 1978), was only dictum.

48. It also denied certiorari in McCall v. Courier-Journal and Louisville Times Co., 456 U.S. 975, and in Medico v. Time Inc., 454 U.S. at 836. *See supra* note 47.

49. *See supra* notes 22-25 and accompanying text.

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

seen whether the Court will extend the privilege of fair report under *Pape* and *Firestone* beyond official proceedings to public meetings of general concern and to official actions.

C. *Some Legal Issues*

1. Expression of Opinion

At common law, a "privilege" of fair comment existed under which persons might comment on something like a book, a play, a record, or a performance offered to the public for its inspection and approval. So long as the comment was a fair expression of honest opinion and not a statement of fact, no liability ensued even if the opinion was derogatory. This common law privilege now appears to have been absorbed in a broader rule, derived from statements and holdings in three Supreme Court cases, leading to the position that there can be no recovery for a mere expression of opinion.[51] Although none of the cases rules authoritatively on the matter, the *Second Restatement of Torts* also has adopted this position as a rule, but has added that a statement, although in the form of an opinion, will be actionable if the statement implies the existence of undisclosed defamatory facts as the basis for the opinion.[52] To come within the protection of the *Restatement*'s expression-of-opinion privilege, an investigative reporter must state clearly the established nondefamatory or true facts on which he

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51. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Gertz v. Robert Welch, Inc., 418 U.S. at 339 (footnote omitted). Two other cases indicating adoption of the expression-of-opinion privilege are Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974), and Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970). None of these cases contains an express holding to this effect.

For other perspectives on the privilege, see RESTATEMENT (SECOND) OF TORTS § 566 (1976); *see also* Christie, *Defamatory Opinions and the* Restatement (Second) of Torts, 75 MICH. L. REV. 1621 (1977); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1227-45 (1976); Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221 (1976).

52. A substantial number of cases have adopted and applied the *Restatement* position. *See, e.g.*, Cianci v. New York Times Publishing Co., 639 F.2d at 54; Good Gov't Group of Seal Beach, Inc. v. Superior Court, 22 Cal. 3d 672, 586 P.2d 572, 150 Cal. Rptr. 258 (1978), *cert. denied*, 441 U.S. 961 (1979); Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976); Mashburn v. Collin, 355 So. 2d 879 (La. 1977); National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220, 396 N.E.2d 996 (1979), *cert. denied*, 446 U.S. 935 (1980); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977).

bases his opinion, which he must present only as a personal opinion.

Three other reasons often used in interplay with the opinion rule may support a finding that a statement is not actionable because it does not state defamatory facts. First, the statement may use amorphous or ambiguous language, so that it does not make a specific charge.[53] Second, the statement may amount to no more than name-calling or abusive language that clearly is not intended to be taken literally.[54] Third, the statement may have been made in ridicule or jest, again clearly not intended to make a literal defamatory charge.[55] In all three instances, the statement cannot be interpreted reasonably as a clear statement of defamatory facts.

2. Burden of Proof

Who has the burden of proof for truth or falsity in defamation cases? At common law, the law presumed a defamatory statement was false and required the defendant to raise truth as an affirmative defense. The constitutional requirement that a public person must show knowledge or reckless disregard as to falsity and a private person must show negligence as to falsity may have the effect, not only as a practical matter, but also as a constitutional requirement, of putting the burden of showing falsity on the plaintiff.[56]

3. Retraction

What is the effect of a retraction or refusal to retract on a defendant's liability? Before the *New York Times* decision, when courts imposed strict liability, many states had retraction statutes that played an important part in defamation suits. A defendant who had defamed the plaintiff innocently might avoid liability by retracting. Now that the Court requires fault, however, a retraction is not as significant, except as a practical matter in working out an amicable, out-of-court arrangement. A retraction also may be im-

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53. *See* Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *see also* Cianci v. New York Times Publishing Co., 639 F.2d at 54; National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp., 379 Mass. at 220, 396 N.E.2d at 996.

54. *See* Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); Moriarty v. Lippe, 162 Conn. 371, 294 A.2d 326 (1972).

55. *See* Berry v. City of New York Ins. Co., 210 Ala. 369, 98 So. 290 (1923); Blake v. Hearst Publications Inc., 75 Cal. App. 2d 6, 170 P.2d 100 (1946).

56. The Sixth Circuit held that the plaintiff carried the burden of proof for showing truth or falsity in Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir. 1981). The Supreme Court granted certiorari, 454 U.S. 962 (1981), but the case was settled. *See* RESTATEMENT (SECOND) OF TORTS §§ 581A, 613 caveat (1976).

portant under other circumstances. In *Time, Inc. v. Firestone*,[57] for example, the defendant, after learning that the divorce decree legally could not have declared the plaintiff guilty of adultery if the trial judge awarded alimony to her, might well have retracted, declaring that it had not known this fact. In light of the absence of a retraction, a court could have viewed the defendant's refusal to retract after learning that the charge was erroneous as supplying the fault. In other words, courts may or may not infer malice from whether the defendant offered a retraction.

4. Nonmedia Defendants

Another outstanding question is whether the constitutional protection of *New York Times* and *Gertz* applies to a nonmedia defendant as well as to a member of the press. On the merits the answer clearly should be "yes." The first amendment speaks of "freedom of speech, and of the press." Granting the same protection to the private individual as to the press will not discriminate against the press or impair in any way its newly found security. Instead, to hold that the professional, engaged in the activity as a business and providing for far wider dissemination than the ephemeral oral publication of a private individual, is entitled to greater protection under the first amendment sounds truly anomalous. Similarly, the common law privilege of fair report and the doctrine of no liability for an expression of mere opinion should apply to an individual as well as to the media.

Despite this, the authorities leave some uncertainty about the first amendment protection available to the nonmedia defendant. *New York Times*, laying down the knowledge-or-reckless-disregard standard, was an action not only against a leading member of the news media, but also against four individuals whose names the advertisement listed as endorsing the editorial. The Court applied the same standard of knowledge or reckless disregard of falsity to both sets of defendants, with the result that the Court held no one liable. In at least four other cases the Supreme Court applied the *New York Times* standard to nonmedia defendants without expressly adverting to the issue.[58] In the later case of *Hutchinson v.*

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57. 424 U.S. 448 (1976). *See supra* notes 37-40 and accompanying text.

58. The four cases, presented chronologically, are Garrison v. Louisiana, 379 U.S. 64 (1964); Henry v. Collins, 380 U.S. 356 (1965); St. Amant v. Thompson, 390 U.S. 727 (1968); Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1973).

Proxmire,[59] however, the Court declared in a footnote that it never had decided "whether the *New York Times* standard can apply to an individual defendant rather than a media defendant."[60] *Hutchinson* at least raises a doubt about the constitutional protection afforded nonmedia defendants.

The Supreme Court also has failed to indicate whether the *Gertz* standard of negligence for private plaintiffs applies to nonmedia defendants. State cases are divided, but a majority of state courts have applied the *Gertz* standard to nonmedia defendants.[61] Other courts, oddly enough, want to revive the strict liability rule and apply it to nonmedia defendants, even though courts under the traditional common law had applied strict liability only against media defendants.

III. Invasion of Privacy

The tort of invasion of privacy concerns the newsgathering as well as the publication aspects of the investigative reporter's activities. Unreasonable invasion of the right of privacy developed in the current century.[62] Early cases carried long discourses on whether the courts should recognize the tort at all; but a majority of the states recognized the tort fairly quickly. Today all but two or three of the states recognize the tort, and those states may join the

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59. 443 U.S. 111 (1979).

60. *Id.* at 133-34 n.16.

61. *See, e.g.*, Bryan v. Brown, 339 So. 2d 577 (Ala. 1976), *cert. denied*, 431 U.S. 954 (1977); Millsaps v. Bankers Life Co., 35 Ill. App. 3d 735, 342 N.E.2d 329 (Law Div. 1976); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); Rogozinski v. Airstream by Angell, 152 N.J. Super. 133, 377 A.2d 807 (Law Div. 1977), *modified on other grounds*, 164 N.J. Super. 465, 397 A.2d 334 (App. Div. 1979); Ryder Truck Rentals v. Latham, 593 S.W.2d 334 (Tex. Civ. App. 1979). *But see* Rowe v. Metz, 195 Colo. 424, 579 P.2d 83 (1978); Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 568 P.2d 1359 (1977); Greenmoss Builders v. Dun & Bradstreet, Ine., 461 A.2d 414 (Vt.), *cert. granted*, 104 S.Ct. 389 (1983). The last case was overruled in another respect in Lent v. Huntoon, 470 A.2d 1162 (Vt. 1983). Some of these cases concern the actual-damages rule of *Gertz* rather than the strict-liability rule.

62. Observers commonly ascribe its origin to the law review article, Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). The New York Court of Appeals, in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), first gave express judicial consideration to whether a tort action for invasion of the right of privacy exists. The majority declined to recognize the tort, although there was a strong dissenting opinion. The legislature quickly passed a statute to cover the situation of commereial appropriation of name or likeness.

Three years after *Roberson*, the Supreme Court of Georgia, in Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), judicially recognized a common law action. Other states since have fallen in line.

others soon.[63]

It is now generally recognized that four separate torts constitute the concept of invasion of the right of privacy. These torts are: (1) appropriation of name or likeness of another; (2) unreasonable intrusion upon the seclusion of another; (3) unreasonable publicity given to another's private life; and (4) publicity unreasonably placing another in a false light before the public.[64] Considerable overlap between the four exists, but significant differences necessitate treating them separately.

A. Appropriation

The courts first expressly recognized the tort of appropriation of the name or likeness of another.[65] This tort usually concerns some commercial exploitation of the plaintiff's name or likeness, or some other aspect of his personality or background. The appropriation, however, need not be for a commercial purpose.[66] If the plaintiff is himself newsworthy or participates in a newsworthy event and the media treat him as a matter of news, there is no tortious appropriation. Similar treatment apparently is given to a biography or feature article regarding the plaintiff.[67] Although newspapers, magazines, and books are published for the purpose of making money, no appropriation is considered to occur, commercial or otherwise. This form of invasion of privacy, therefore, has no particular relationship to the tort liability of investigative reporters.[68]

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63. In the great majority of states, the courts have recognized the tort; two or three states have statutes. Reception of the tort in other common law countries has not been as enthusiastic.

64. Dean Prosser presented this breakdown into four disparate torts in Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). The *Second Restatement* adopted the Prosser approach. RESTATEMENT (SECOND) OF TORTS §§ 652A-652I (1976). A large number of cases have utilized the approach.

65. *See* Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905). On this form of the invasion of privacy tort, see Felcher & Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979); Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U.L. REV. 553 (1960); Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637 (1973).

66. *See, e.g.*, Hamilton v. Lumbermen's Mutual Casualty Co., 82 So. 2d 61 (La. Ct. App. 1955) (advertising in plaintiff's name for witnesses to an accident); Vanderbilt v. Mitchell, 72 N.J. Eq. 910, 67 A. 97 (1907) (using plaintiff's name as father of child in birth certificate); Hinish v. Meier & Frank Co., 166 Or. 482, 113 P.2d 438 (1941) (plaintiff's name signed to telegram petition to governor).

67. False statements about the plaintiff may trigger the tort of defamation or false-light privacy.

68. Instead of invasion of right of privacy, this invasion often constitutes a misappro-

B. *Intrusion*

The second form of privacy violation, intrusion on the seclusion of another,[69] applies to the newsgathering aspect of investigative reporting and, therefore, does not require publication for the action to lie.[70] According to the *Restatement*, one is "subject to liability," if he "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, . . . [and] the intrusion would be highly offensive to a reasonable person."[71]

As the *Restatement* indicates, the intrusion-privacy tort includes both physical and figurative forms. Physical intrusion may take the form of trespass—for example, when one enters another's home without consent or privilege.[72] Another form of physical in-

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priation of a "right of publicity." Many plaintiffs are prominent individuals able to sell an endorsement, charge for an interview, or otherwise profit from the appropriation that the defendant bas committed. They are not suing because of damage to tbeir privacy, but to insure that they receive suitable pay. This suit attempts to protect a property interest rather tban a dignitary personal interest and is frequently in restitution rather than tort. *See, e.g.*, Ausness, *The Right of Publicity: A "Haystack in a Hurricane,"* 55 TEMP. L.Q. 977 (1982); Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 202 (1954); Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123 (1953); Recent Decision, 41 GEO. L.J. 583 (1953). A Supreme Court case on this type of action is Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (TV station takes film of plaintiff's performance as "human cannonball" and puts it on a newscast).

69. For various discussions of tbis form of invasion of privacy tort, see RESTATEMENT (SECOND) OF TORTS § 652B (1976); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 807-09 (4th ed. 1971); Ezer, *Intrusion on Solitude: Herein of Civil Rights and Civil Wrongs*, 21 LAW IN TRANSITION 63 (1961); Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509 (1969); Comment, *The Emerging Tort of Intrusion*, 55 IOWA L. REV. 718 (1970); Recent Cases, 17 VAND. L. REV. 1342 (1964); 5 ARK. L. REV. 388 (1951).

For a comprehensive treatment of intrusion-privacy as it applies to newsgathering, see Lee, *Privacy Intrusions While Gathering News: An Accommodation of Competing Interests*, 64 IOWA L. REV. 1243 (1979).

70. *E.g.*, McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939); Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964); Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1958).

71. RESTATEMENT (SECOND) OF TORTS § 652B (1976) (Comment d says that the interference with plaintiff's seclusion must be substantial.). For the requirement that the intrusion must be bighly offensive to a reasonable person, see Froelich v. Werbin, 219 Kan. 461, 548 P.2d 482 (1976); Munley v. ISC Financial House, Inc., 584 P.2d 1336 (Okla. 1978); McLain v. Boise Cascade Corp., 271 Or. 549, 533 P.2d 343 (1975). What is highly offensive to a reasonable person may be a question for the jury. Harms v. Miami Daily News, Inc., 127 So. 2d 715, 718 (Fla. Dist. Ct. App. 1961). On the other hand, the court may decide this issue. *See, e.g.*, Stilson v. Reader's Digest Ass'n, 28 Cal. App. 3d 270, 104 Cal. Rptr. 581 (1972), *cert. denied*, 411 U.S. 952 (1973).

72. *See, e.g.*, Thompson v. City of Jacksonville, 130 So. 2d 105 (Fla. Dist. Ct. App. 1961), *cert. denied*, 147 So. 2d 530 (Fla. 1962) (search of home without warrant); Welsh v. Roehm, 125 Mont. 517, 241 P.2d 816 (1952) (landlord moving in on tenant); *see also infra* note 106.

trusion on privacy occurs when the defendant obtains consent to enter a home by means of fraud or trickery.[73] Physical intrusion also includes unwarranted entry into a place of temporary seclusion, such as a hotel room,[74] unwarranted search of one's person or belongings, such as a purse, wallet, or package,[75] and the improper opening and reading of a private letter.[76]

Indirect or figurative intrusions constituting privacy violations include peering into windows,[77] continuing the shouting of threats or insults into a person's home or mailing repeated threatening letters to the home,[78] and eavesdropping, especially by electronic means or by wiretapping.[79] The tort generally does not apply to activities like the taking of photographs in public places;[80] it may lie, however, if the conduct is distinctly harassing and persistent,[81] or if the photograph is under especially embarrassing circumstances.[82] Oppressive methods of surveillance[83] or debt collection[84]

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73. *See, e.g.*, Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Nohel v. Sears, Roehuck and Co., 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (1973).

74. *See, e.g.*, Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905 (1924) (bedroom on steamboat); Newcomb Hotel Co. v. Corbertt, 27 Ga. App. 365, 108 S.E. 309 (1921) (hotel room); *cf.* Froelich v. Adair, 213 Kan. 357, 516 P.2d 993 (1973) (hospital orderly persuaded to obtain samples of plaintiff's hair from a hair brush and a piece of adhesive tape to which the plaintiff's hair was attached); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942) (hospital room).

75. *See, e.g.*, Bennett v. Norban, 396 Pa. 94, 151 A.2d 476 (1959); Sutherland v. Kroger Co., 144 W. Va. 673, 110 S.E.2d 716 (1959).

76. *See* Vernars v. Young, 539 F.2d 966 (3d Cir. 1976); Birnbaum v. United States, 436 F. Supp. 967 (E.D.N.Y. 1977), *modified on other grounds*, 588 F.2d 319 (2d Cir. 1978).

77. *See* Alabama Elec. Co-op, Inc. v. Partridge, 284 Ala. 442, 225 So. 2d 848 (1969) (binoculars and camera); Souder v. Pendleton Detectives, Inc., 88 So. 2d 716 (La. Ct. App. 1956).

78. *See* Pritchett v. Board of Comm'rs, 42 Ind. App. 3, 85 N.E. 32 (1908) (profanity from jail next door); Adams v. Rivers, 11 Barb. 390 (N.Y. 1851).

79. *See* Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931); *see also* Elson v. Bowen, 83 Nev. 515, 436 P.2d 12 (1967); Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964); Roach v. Harper, 143 W. Va. 869, 105 S.E. 2d 564 (1958).

The action may lie although the information obtained is not used, Fowler v. Southern Bell Tel. & Tel. Co., 343 F.2d 150 (5th Cir. 1965), and is not published. *Contra* Corcoran v. Southwestern Bell Tel. Co., 572 S.W.2d 212 (Mo. Ct. App. 1978).

80. *See, e.g.*, Man v. Warner Bros., 317 F. Supp. 50 (S.D.N.Y. 1970); Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948); Gill v. Hearst Publishing Co., 40 Cal. 2d 224, 253 P.2d 446 (1953) (embracing wife in public market); De Lury v. Kretchmer, 66 Misc. 2d 897, 322 N.Y.S.2d 517 (N.Y. Sup. Ct. 1971).

81. The classic case is Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973), in which the court enjoined a photographer who had seriously harassed Jacqueline Onassis and her children. *See also* Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956); *cf.* Harms v. Miami Daily News, 127 So. 2d 715 (Fla. Dist. Ct. App. 1961) (newspaper column invited people to call plaintiff if they wanted to hear a sexy voice).

82. *See* Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1969) (plain-

also may come within the scope of intrusion, although these violations usually produce other tort actions. Finally, the intrusion form of invasion of privacy has expanded to cover improper attempts to pry into private affairs, such as efforts to obtain the balance of plaintiff's private bank account[85] or to obtain the information in an income tax return.[86] This extension does not apply to the inspection of public records, but could apply to the wrongful acquisition of access to private records, not available to the public. Unreasonable intrusion, therefore, might apply to wrongful use of a computer to gain access to a private computer system of information.

C. *Publicity*

The third form of the tort of invasion of privacy is the unreasonable giving of publicity[87] to true facts about the plaintiff's life. The statements being true, an action for defamation will not lie.[88] The plaintiff thus brings this action not for injury to reputation, but for mental and emotional distress. The objectionable true facts

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tiff photographed in "Fun-House," where unexpected jet of air raised her dress over her head). *Contra* Neff v. Time, Inc., 406 F. Supp. 858 (W.D. Pa. 1976) (football player photographed with his consent, but without his knowledge that his fly was open, denied recovery).

83. *See* Pinkerton Nat'l Detective Agency v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119 (1963); Souder v. Pendleton Detectives, Inc., 88 So. 2d 716 (La. Ct. App. 1956); Moore v. New York Elevated R.R. Co., 130 N.Y. 523, 29 N.E. 997 (1892); *see also* Chappell v. Stewart, 82 Md. 323, 33 A. 542 (1896).

84. *See* Bowden v. Spiegel, Inc., 96 Cal. App. 2d 793, 216 P.2d 571 (1950); Duty v. General Finance Co., 154 Tex. 16, 273 S.W.2d 64 (1954); Berger, *The Bill Collector and the Law—A Special Tort, at Least For a While*, 17 DE PAUL L. REV. 327 (1968).

85. *See* Zimmermann v. Wilson, 81 F.2d 847 (3d Cir. 1936); State *ex rel.* Clemens v. Witthaus, 360 Mo. 274, 228 S.W.2d 4 (1950) (overturned discovery order for "any and all letters, manuscripts and other documents"); Brex v. Smith, 104 N.J. Eq. 386, 146 A. 34 (1929). In these cases, defendants sought to obtain information through inappropriato conduct. On the other hand, courts have held mere inquiries of neighbors about the plaintiff's financial condition not actionable. *See, e.g.*, Munley v. ISC Financial House, Inc., 584 P.2d 1336 (Okla. 1978).

86. *See* Frey v. Dixon, 141 N.J. Eq. 481, 58 A.2d 86 (N.J. Ch. 1948) (invalid court order for production of tax returns); *cf.* Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (N.J. Ch. 1940) (refused to authorize compulsory blood test), *disapproved in* Cortese v. Cortese, 10 N.J. Super. 152, 76 A.2d 717 (1950).

87. Defamation requires publication to only one person. Publication to one person also may be sufficient for this form of invasion of the right of privacy; the cases, however, are not clear. The *Restatement* uses the term "publicity" when referring to this and the false-light forms of invasion of privacy. The distinction is not important for the investigative reporter, whose "publications" are normally in a form of news medium and, therefore, amount to "publicity."

88. At one time a criminal prosecution for libel might lie, but courts now regard the Constitution as precluding this. *See* Garrison v. Louisiana, 379 U.S. 64 (1964); Farnsworth v. Tribune Co., 43 Ill. 2d 286, 253 N.E.2d 408 (1969).

(1) must pertain to matters not of general knowledge and must be so embarrassing that the publicity would be highly offensive to a reasonable person; and (2) must be not of legitimate public concern.[89] Consistent with the latter requirement, the early cases made clear that no recovery exists for publicity given to facts that customarily are regarded as newsworthy and proper subjects of public concern. The status of the plaintiff as a public official or public figure is, therefore, a significant consideration in determining what information is newsworthy and not actionable.[90]

From the constitutional standpoint, the only Supreme Court case directly on point is *Cox Broadcasting Corp. v. Cohn.*[91] This case held specifically that the first amendment does not permit a publicity action to lie against a television broadcaster that discloses the name of a rape victim[92] when an indictment and the trial record of certain accused persons already have disclosed the name. The Court found, quoting the *Restatement,* that "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus, there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record."[93] The Court proceeded to adopt the second sentence as a matter of constitutional law.

The Court abstained from giving any further indication of whether this form of action for invasion of the right of privacy is actionable at all under the Constitution, and, if actionable, the restrictions that apply. The opinion in *Cox*, however, plus the holdings in three Supreme Court cases concerning the right of privacy and other forms of invasion,[94] suggest that the Court will be willing to recoguize the action for embarrassing publicity sometime in the

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89. *See* RESTATEMENT (SECOND) OF TORTS § 652D (1976); W. PROSSER, *supra* note 69, at 809-12; Hill, *supra* note 51, at 1255-69, 1286-90; Prosser, *supra* note 64, at 392-98; Swan, *Publicity Invasion of Privacy: Constitutional and Doctrinal Difficulties With a Developing Tort,* 58 OR. L. REV. 483 (1980).

90. For citations, see RESTATEMENT (SECOND) OF TORTS App. § 652D reporter's notes (1976).

91. 420 U.S. 569 (1975).

92. Although a state statute existed making it a crime to disclose the name, the state supreme court held that the civil action for invasion of privacy was a matter of the state common law on the right of privacy. Cox Broadcasting Corp. v. Cohn, 231 Ga. 60, 200 S.E.2d 127 (1973).

93. 420 U.S. at 494 (quoting RESTATEMENT (SECOND) OF TORTS § 652D comment c (Tent. Draft no. 13, 1967)). The provision is now in RESTATEMENT (SECOND) OF TORTS § 652D comment b (1976).

94. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (commercial appropriation); Cantrell v. Forest City Publishing Co., 419 U.S. 245, 253-54 (1974) (false-light privacy); Time, Inc. v. Hill, 385 U.S. 374, 389-90 (1967) (false-light privacy).

future.[95] The possibility remains, however, that the Court may find that the test for liability contains too many ambiguous expressions incapable of precise definition and, thus, may lead to ad hoc decisions that produce numerous appeals and result in undesirable self-censorship.[96]

The tort of embarrassing publicity raises some more generic questions that a single authoritative decision probably could settle. For example, can a public official, particularly an important one, have any aspect of his life so private that it is not a matter of legitimate public concern?[97] Should the courts treat a public official differently from a public figure? What if either of them now has retired from public activities, and is leading a very private life?

A second unsettled question is how far an investigative reporter can delve into the past and publicize discoveries. Suppose a newsworthy event occurred many years ago and a participant has moved to a different location, and now is living a private life under a different name. Is it actionable to recall the earlier occurrence and identify the participant? If the event is a matter of public record or was of widespread knowledge and interest at the time, the media, of course, may revive the event as a historical presentation. Whether or not the media may identify the plaintiff, however, is a different matter[98]—and one that requires Supreme Court action

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95. Two recent decisions have carefully studied the matter and concluded that the embarrassing publicity tort is constitutional. The first was the California case of Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 540-41, 483 P.2d 34, 42-43, 93 Cal. Rptr. 866, 874-75 (1971) (decided before *Cox*); the second was the Ninth Circuit case of Virgil v. Time, Inc., 527 F.2d 1122, 1128-29 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1975) (certiorari denied after *Cox*).

96. This was a primary reason why the Supreme Court repudiated its plurality opinion of Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *See supra* notes 23-25 and accompanying text.

97. Suppose, for example, that the mayor of the city has a private collection of pornographic pictures in his home, or that he and his wife occasionally engage in bitter disputes and he sometimes strikes her in anger, or that he has an embarrassing disease—none of which is known to the public.

In Cassidy v. American Broadcasting Co., 60 Ill. App. 3d 831, 377 N.E.2d 126 (1978), a policeman engaged in undercover work, viewing a "deluxe" lingerie show, was filmed in an embarrassing situation, and the film was broadcast. As a public officer engaged in duty, he was held not able to recover. *Id.* at 839, 377 N.E.2d at 131-32.

98. The courts have disagreed on whether publication is actionable under these circumstances. In Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931), following a famous murder trial of plaintiff in which she was aquitted, plaintiff married and moved to another state. Defendant produced a motion picture, *The Red Kimono*, based on plaintiff's experiences, using her true name and advertising the film as a true account. The court held for plaintiff based on a privacy action for publicity. *Id.* at 292, 297 P. at 93-94. In Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), plaintiff partici-

for resolution, at least from the constitutional standpoint.

D. False Light

The fourth and final form of invasion of the right of privacy is the publication of a statement about the plaintiff that places him in a false light before the public.[99] This form of privacy invasion is like defamation; indeed, it may provide an alternative remedy for a defamatory publication.[100] The primary significance of a false light action, however, exists when the false statement or implication is not defamatory in nature and this action is the only remedy available.

The attributes of a false light action are derived from the features of both an action for defamation and the standards for invasion-of-privacy actions. The primary basis of the recovery mirrors privacy actions. In defamation, the plaintiff recovers for damage to reputation; in false light, the plaintiff recovers for mental distress and injury to sensibilities. Some objective standard for determining an actionable injury must exist, and courts have utilized the usual privacy standard of "highly offensive to a reasonable per-

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pated in a hijacking episode in his youth. He was convicted, served his sentence, moved from Kentucky to California, and lived as a responsible family man for many years when the Reader's Digest published an article on hijacking in which it referred to plaintiff by name. The court again held for plaintiff. *Id.* at 543, 483 P.2d at 44, 93 Cal. Rptr at 876.

On the other hand, Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940), concerned a famous child prodigy in mathematics who disappeared from public view and became an ordinary accountant with a pathetic desire for obscurity. The *New Yorker* discovered the plaintiff years later and published a "profile" on him entitled "April Fool." The court denied recovery. *Id.* at 811. Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981), concerned an NBC "documentary" on the famous Scottsboro rape trials of the 1930's. Victoria Price Street, the prosecuting witness in the case, was thought to be dead, but she appeared and contended that NBC defamed her and invaded her right of privacy. Despite this, NBC broadcast the documentary again. Failing to recover in the trial court and the court of appeals, she sought and obtained certiorari from the Supreme Court. *Id.* at 1236-37. The Court dismissed the case, however, when the parties reached a settlement. *See* 454 U.S. 1095 (1981). *Accord*, Barbieri v. News-Journal Co., 56 Del. 67, 189 A.2d 773 (1963).

Finally, the discussion of this form of invasion of privacy assumes that the reporter obtained the information that he is publishing in a legal manner. A discussion of what the court should do if the defendant obtained the information wrongfully appears in this Article at notes 105-69 and accompanying text.

99. *See generally* RESTATEMENT (SECOND) OF TORTS § 652E (1976); W. PROSSER, *supra* note 69, at 812-18; Prosser, *supra* note 64, at 422; Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962); Note, *The Ambush Interview: A False Light Invasion of Privacy?*, 34 CASE W. RES. 72 (1983).

100. The plaintiff, however, cannot recover double damages by bringing both actions. Brink v. Griffith, 65 Wash. 2d 253, 259, 396 P.2d 793, 797 (1964).

son."[101] On the other hand, the falsity aspect of the tort means that the constitutional requirement of fault regarding falsity in defamation suits is pertinent. The Supreme Court expressly recognized its pertinence in *Time, Inc. v. Hill*[102] by adopting the *New York Times* standard of knowledge-or-reckless-disregard for falsity. Four years later, a plurality of the Court in *Rosenbloom v. Metromedia, Inc.* adopted the same standard for application in defamation actions concerning matters of public or general interest, but then a majority in *Gertz* repudiated the *Rosenbloom* decision by adopting the equivalent of a negligence standard for private plaintiffs.

Most authorities were inclined to believe that when the opportunity arose, the Supreme Court, therefore, would modify the holding in *Hill* and adopt instead the public-private plaintiff dichotomy of *Gertz* in false light cases. In *Cantrell v. Forest City Publishing Co.*,[103] however, a case concerning a private plaintiff, the Court held that the lower court properly found the defendant guilty of reckless disregard toward the falsity of some statements. The lower court's finding satisfied the *New York Times* standard, which the Supreme Court regarded as sufficient to decide the case. Thus, the applicability of the *Gertz* standard of negligence for private plaintiffs in false light cases remains open.[104]

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101. For representative cases, see Leverton v. Curtis Publisbing Co., 192 F.2d 974 (3d Cir. 1951) (illustration 8 in RESTATEMENT (SECOND) OF TORTS § 652E (1976)); Strickler v. National Broadcsting Co., 167 F. Supp. 68 (S.D. Cal. 1958) (illustration 9 in RESTATEMENT (SECOND) OF TORTS § 652E (1976)); Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905) (illustration 7 in RESTATEMENT (SECOND) OF TORTS § 652E (1976)); Koussevitzky v. Allen, Towne & Heath, Inc., 188 Misc. 479, 68 N.Y.S.2d 779 (1947), *aff'd*, 272 A.D. 759, 69 N.Y.S.2d 432 (1947), *appeal denied*, 272 A.D. 794, 71 N.Y.S.2d 712 (1947) (illustration 6 in RESTATEMENT (SECOND) OF TORTS § 652E (1976)).

102. 385 U.S. 374, 387-91 (1967). A play, *The Desperate Hours*, which was based on an actual event in which escaping prisoners occupied a home for some time, portrayed some events not in accordance with the actual occurrence. Subsequently, *Life* magazine had a layout, with pictures of the actors and actual characters, indicating that the play was accurate. A holding for the plaintiffs was reversed and the case was sent back for a new trial. *Id.* at 398.

103. 419 U.S. 245, 252-53 (1974).

104. *See* RESTATEMENT (SECOND) OF TORTS § 652E (1976) (carrying a caveat on the matter). In Rinsley v. Brandt, 446 F. Supp. 850-56 (D. Kan. 1977), the court in a privacy case applied the *Gertz* public-private distinction. The Supreme Court may hold that since the interests at stake in privacy are different from those in defamation, the *Gertz* distinction need not apply. My personal opinion, however, is that the Court ultimately will decide that the *Gertz* rule for private plaintiffs applies in privacy actions.

IV. Other Tort Actions

Like the intrusion form of invasion of the right of privacy, the torts discussed in this section concern conduct of a reporter engaged in discovering and collecting information, or "newsgathering." The discussion of these torts does not give consideration to the possible liability for subsequent publication of the information, which will be treated in part V of this Article.

A. Tortious Entry on Real Property

Tortious entry on real property, or trespass, overlaps the intrusion form of invasion of privacy but is of much earlier origin and is more precise in its attributes. One who surreptitiously enters a home or an office is liable for trespass, whether he takes a tangible object away or obtains information.[105] In this respect, the law treats a reporter like any other citizen; the law does not provide a privilege for him as a consequence of his profession.[106] The first amendment does not create a constitutional privilege for trespass in newsgathering.[107]

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105. A reporter also is liable for trespass if instead of making the entry himself, he employs or persuades someone else to enter for him. *See* Restatement (Second) of Torts § 158 comment k (1963). In Prahl v. Brosamle, 98 Wis. 2d 130, 154-55, 295 N.W.2d 768, 782 (Wis. Ct. App. 1980), a police lieutenant, properly entering a building to investigate a disturbance, was held liable for trespass because he gave consent to a reporter to accompany him.

106. There are numerous cases in which the courts have held a newsgathering reporter liable for trespass. *See, e.g.*, Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971) (reporters with hidden camera and recorder entered home of person suspected of illegal practice of medicine; reporters pretended to be prospective patients); Rafferty v. Hartford Courant Co., 36 Conn. Supp. 239, 243, 416 A.2d 1215, 1217 (1980) (reporters crashed mock "unwedding" ceremony); Belluomo v. KAKE TV & Radio, Inc., 3 Kan. App. 2d 461, 471-72, 596 P.2d 832, 842 (1979) (television film crew accompanied inspection of restaurant by food inspector; crew liable if obtained consent by fraud); Le Mistral, Inc. v. Columbia Broadcasting Sys., 61 A.D.2d 491, 494-95, 402 N.Y.S.2d 815, 817 (1978), *appeal dismissed*, 46 N.Y.2d 940 (1979) (CBS film crew crashed restaurant, uninvited, with cameras rolling); Anderson v. WROC-TV, 109 Misc. 2d 904, 912-13, 441 N.Y.S.2d 220, 226-27 (1981) (television crew accompanied Humane Society inspection of plaintiff's house, despite her objection); Prahl v. Brosamle, 98 Wis. 2d 130, 151, 295 N.W.2d 768, 780-81 (Wis. Ct. App. 1980) (TV reporter entered private premises relying on consent of police investigating disturbance). *But cf.* Florida Publishing Co. v. Fletcher, 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977) (holding no recovery under a trespass theory due to implied consent by custom). *See also* Stahl v. Oklahoma 665 P.2d 839 (Okla. 1983), *cert. denied*, 104 S. Ct. 973 (1984) (reporters accompanied nuclear protestors on nuclear generator site, despite being expressly forbidden; guilty of criminal trespass).

107. "Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded." Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972). "That right [of free speech] has . . . never been held to confer upon the press a constitutionally protected right of access to sources of information not available to others." United Press

Of course, a reporter is not liable if he has consent from the owner or possessor to enter. The consent may be express, or it may be implied from habits of the parties to the action or general customs regarding the activity.[108] The consent is effective only if someone who has authority gives the consent. Ordinarily, the police do not have the authority to consent on behalf of the owner.[109] The fact that the reporter mistakenly thinks he has consent is said not to be sufficient.[110] Finally, if the reporter obtains consent by fraud, as by impersonation of a police officer or by pretending to have a search warrant, the consent is vitiated and the entry is a trespass.[111]

The common law rule does not require the plaintiff to show actual damage for recovery.[112] The court may grant nominal damages. In cases in which the plaintiff sustains actual damages, compensatory damages depend upon the manner and method of the entry, and punitive damages are permissible in suitable cases. The ambit of recovery for consequential damages is very broad since trespass is an intentional tort.[113]

Ass'ns v. Valente, 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954); *see also* Tribune Review Publishing Co. v. Thomas, 254 F.2d 883, 884-85 (3d Cir. 1958).

"The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971). The court has applied this trespass prohibition to government property not open to the public and upheld a $25 fine under a criminal trespassing statute in Stahl v. Oklahoma, 665 P.2d 839 (Okla. 1983), *cert. denied*, 104 S. Ct. 973 (1984).

108. Under general custom, one calling at a home or office simply to seek information or ask questions has implied consent and is not guilty of a trespass if he does no more. This custom would apply to a reporter. The Florida Supreme Court, in Florida Publishing Co. v. Fletcher, 340 So. 2d 914, 917-19 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977), held that common custom gives permission to news representatives to enter private premises to report on events of public interest. Other states, however, have not followed *Fletcher*, and some bave expressly repudicated it.

109. *See, e.g.*, Prahl v. Brosamle, 98 Wis. 2d 130, 154, 295 N.W.2d 768, 782 (Wis. Ct. App. 1980).

110. RESTATEMENT (SECOND) OF TORTS § 164(b) (1963). The reporter would not be liable for a harmless intrusion if the mistake was "induced by the conduct of the possessor." *Id.* § 164 comment b. *Cf.* Allen v. Combined Communications Corp., 7 MEDIA L. REP. (BNA) 2417 (Colo. Dist. Ct. July 22, 1981) (no liability unless reporter knew he was trespassing or caused damage).

111. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (reporters trespassed by pretending to be prospective patients and gaining entry to premises of person engaged in illegal practice of medicine); Belluomo v. KAKE TV & Radio, Inc., 3 Kan. App. 2d 461, 473-74, 596 P.2d 832, 844 (1979) (permission to film inspection of restaurant by food inspector constitutes trespass if reporters obtained consent by misrepresentation).

112. RESTATEMENT (SECOND) OF TORTS § 163 (1963).

113. *See* Wyant v. Crouse, 127 Mich. 158, 160, 86 N.W. 527, 528 (1901) (trespasser

B. Tortious Interference with Personal Property

Tortious interference with personal property includes a congeries of tort actions, but there are difficulties about the availability or adequacy of most of them. Consider first actions stemming from interference with tangible personal property. Replevin or specific restitution in equity may lie to recover the chattel. If the defendant already has published a picture or information from abstracted papers, however, restitution accomplishes nothing for the plaintiff. Trespass to personal property, unlike trespass to real property, requires actual damage. It lies for minor damages to the property itself or for temporary deprival of use of that property, and is unlikely to be available in an action against a reporter.[114] Conversion, on the other hand, is somewhat more suitable in an action against a reporter.

Conversion affords compensation for the value of the chattel if the defendant intentionally claims dominion or exercises such control over it that he seriously interferes with the rights of the owners. When this is true, the court may justly require the defendant to pay the full value of the chattel.[115] In an action against a reporter, however, the items claimed to have been converted are not likely to have inherent value justifying the bringing of a tort action. The relief needed is compensation for the injury to the plaintiff arising from the publication, and an action for conversion does not supply that relief. Perhaps it can be argued by analogy to trespass to real property, that courts should treat the injury arising from the publication as consequential damages and, thus, recoverable in an action for conversion, but courts are not likely to lend this argument much credence.

The difficulties with an action for interference with personal property are exacerbated when the thing "converted" is not in tangible form at all. Suppose that the reporter has taken from a file the papers containing the information in question, duplicated and returned them, or has simply read the papers without any duplica-

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liable for consequences naturally arising from his trespass); Derosier v. New England Tel. & Tel. Co., 81 N.H. 451, 461, 130 A. 145, 151 (1925) (applying a rule of reasonable anticipation).

114. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 216-220 (1976) (liability to the possessor of the chattel conditioned to actual dispossession of the chattel; impairment of the chattel's condition, quality, or value; deprivation of the possessor's use of the chattel for a substantial period of time; or bodily harm caused to the possessor or legally protected interest of the possessor).

115. *Id.* § 222A.

tion, or has obtained the information over the telephone by impersonating someone. How is it possible to envision a conversion of the information alone?[116]

Some cases *have* held defendants liable for wrongfully obtaining information in this fashion, but the suits were not based on the tort of conversion. In *International News Service v. The Associated Press*,[117] the Supreme Court granted an injunction against defendant INS who wrongfully[118] obtained news compiled by plaintiff The Associated Press and supplied the news to its own customers.[119] Numerous other cases have granted relief against a competitor who wrongfully obtained a valuable trade secret held by another and used it to his own advantage.[120] These cases, however, concerned a taking and using of the intangible idea or infor-

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116. Unlike the actions for replevin and trespass to chattels, the action for conversion has been brougbt against investigative reporters. In Dodd v. Pearson, 279 F. Supp. 101 (D.D.C. 1968), *aff'd in part and rev'd in part*, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969), Senator Thomas Dodd brought suit against Drew Pearson and Jack Anderson based on their charges of corruption in their column, *The Washington Merry-Go-Round*. The charges ultimately resulted in Dodd's resignation from the Senate. Pearson and Anderson based their charges on papers that former employees had taken from Dodd's files, duplicated, and delivered to the defendants. The trial court held that an action for conversion would lie. *Id.* at 104. The court, however, cited ouly conversion cases concerning tangible chattels with inherent value and declared: "What the measure of damages should be and whether substantial damages may be recovered under the circumstances, is a matter to be determined at a later stage of this litigation." *Id.*

The court of appeals reversed the conversion ruling. Pearson v. Dodd, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969). The appellate court drew a careful distinction between trespass to chattels and conversion, and held that conversion would not lie because (1) the plaintiff had not been deprived of his files, and (2) "the information taken from those files [did not fall] . . . under the protection of the law of property, enforceable by a suit for conversion." *Id.* at 708.

117. 248 U.S. 215 (1918); *see also* Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co., 411 Pa. 383, 192 A.2d 657 (1963) (holding that the tort of unfair competition includes misappropriation of another's property); Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411 (1983).

118. The defendant was "pirating" the news by bribing employees of newspapers subscribing to AP and inducing breach of contract by some of those newspapers themselves. 248 U.S. at 231.

119. Commentators have sharply criticized the remedy as a prior restraint. If the court had confined the remedy to damages, the case would have received less criticism.

120. *See, e.g.*, Herold v. Herold China & Pottery Co., 257 F. 911, 913 (6th Cir. 1919); Wireless Specialty Apparatus Co. v. Mica Condenser Co., 239 Mass. 158, 162-63, 131 N.E. 307, 309 (1921); Hyde Corp. v. Huffines, 158 Tex. 566, 586-87, 314 S.W.2d 763, 776-77, *cert. denied*, 358 U.S. 898 (1958); Cooper & Co. v. Anchor Sec. Co., 9 Wash. 2d 45, 64-66, 113 P.2d 845, 854-55 (1941); *see also* 2 R. CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 14.02 (4th ed. 1982).

The significance of the trade secret cases for the present purpose is that they recognize the intangible information as property and give legal protection to it.

mation for the commercial benefit of the wrongdoer. Plaintiffs brought suit to obtain compensation for the benefit that the defendant wrongfully obtained, and not solely for the injury that the plaintiff incurred. Thus, the courts based the remedy on the law of restitution rather than tort law. Perhaps some day the law by analogy will develop to the point of recognizing a cause of action for obtaining information in a fashion that would amount to conversion if it were a tangible chattel of monetary value. Of course, it has not done this yet.[121]

C. *Harm to the Person*

Most of the cases in which a reporter's newsgathering activities have harmed the person of the plaintiff concern the intrusion form of invasion of the right of privacy. Other specific torts, however, may come into play. A reporter may subject himself to the tort of intentional infliction of mental distress[122] by persistent har-

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121. Several similar cases provide useful analogies. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (divided Supreme Court declined to enjoin publication of the Pentagon Papers); Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974) (discussion of possible criminal liability under federal statute for copying Pentagon Papers and seeing that they reached the news media); *see also* United States v. Truong Dinh Hung, 629 F.2d 908, 922-28 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982) (espionage and conversion by copying classified files); Harper & Row, Publishers v. Nation Enterprises, 557 F. Supp. 1067 (S.D.N.Y.) (conversion by copying memoirs), *aff'd in part and rev'd in part*, 723 F.2d 195 (2d Cir. 1983); United States v. Hubbard, 474 F. Supp. 64, 79-80 (D.D.C. 1979) (copies made of government papers constituted theft).

Somewhat more on point is the California courts' treatment of a criminal statute on receiving stolen property. In People v. Kunkin, 100 Cal. Rptr. 845 (1972), *rev'd and vacated*, 9 Cal. 3d 245, 507 P.2d 1392, 107 Cal. Rptr. 184 (1973), an employee of the state attorney general's office stole a roster of the personnel of the Bureau of Narcotic Enforcement, including names, addresses, and telephone numbers of 80 undercover narcotic agents, and offered to lend it to the *Los Angeles Free Press*. The *Press* took it and printed the details about the undercover agents. The majority opinion of the court of appeals, affirming the convictions of employees of the paper, thoroughly treated the nature of property, 100 Cal. Rptr. at 850-51, the effect of photocopying, 100 Cal. Rptr. at 851-52, and the significance of the fact that the accused were newsmen engaged in newsgathering, 100 Cal. Rptr. at 855-62.

The state supreme court, however, reversed the convictions and vacated the opinion, on the ground that the statute required "knowledge" that the property was stolen. People v. Kunkin, 9 Cal. 3d 245, 256, 507 P.2d 1392, 1399-1400, 107 Cal. Rptr. 184, 191-92 (1973). The court held that evidence raising strong suspicion of theft is not sufficient, especially when the person supplying the roster indicates that he wants it back, since theft requires a specific intent permanently to deprive the rightful owner of his property. *Id.* at 254, 507 P.2d at 1398, 107 Cal. Rptr. at 190.

122. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1963); Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956); Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950).

assment[123] or threats of highly unpleasant consequences unless the plaintiff provides certain information or makes certain admissions.[124] Harassment also may become a nuisance, private or public.[125] In *Davis v. Schuchat*,[126] a self-styled investigative journalist seeking information from certain people about the plaintiff, a public figure, told them falsely that the plaintiff had been convicted of a felony in New York. The journalist did this in accordance with his "admitted technique of 'throwing a lot of things out in an interview just to get a response.' " The court upheld the trial court's finding of knowledge or reckless disregard of falsity and affirmed an award of punitive damages for slander.[127]

D. Inducing Breach of Fiduciary or Confidential Obligation

Certain relationships establish a fiduciary or confidential obligation between the parties. If a person who owes that obligation—frequently termed the duty of loyalty—acts in violation of it and acquires a profit or other benefit as a result, the law declares him to be a constructive trustee, holding the benefit in trust for the other party.[128] This restitutionary remedy may not be particu-

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123. *See, e.g.*, Bowden v. Spiegel, Inc., 96 Cal. App. 2d 793, 794-95, 216 P.2d 571, 572-73 (1950) (bill collector); Boyle v. Wenk, 378 Mass. 592, 596-98, 392 N.E.2d 1053, 1056-57 (1979) (private investigator); Continental Casualty Co. v. Garrett, 173 Miss. 676, 682-83, 161 So. 753, 755 (1935) (insurance adjustor); Duty v. General Fin. Co., 154 Tex. 16, 20, 173 S.W.2d 64-66 (1954) (bill collector).

124. *See, e.g.*, Johnson v. Sampson, 167 Minn. 203, 206-07, 208 N.W. 814, 815-16 (1926) (school authorities); Janvier v. Sweeney, [1916] 2 K.B. 316 (private detective).

125. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 821A-821E (1976) (defining types of nuisances and who can recover in an action for nuisance). An action for both types of nuisance might have existed in Galella v. Onassis, 353 F. Supp. 196 (S.D.N.Y. 1972), *aff'd*, 487 F.2d 986 (2d Cir. 1973) (action by photographer against president's widow and secret service agents for false arrest with defendant Onassis' counterclaim seeking injunctive relief of alleged invasion of privacy occasioned by the photographer's attempt to photograph her and her children). Only the privacy right, however, received attention.

126. 510 F.2d 731 (D.C. Cir. 1975).

127. *Id.* at 736, 738. Two arguments of the defendant are worth mentioning. First, the "First Amendment mandates a complete immunity from liability for a slander made to a limited number of people by a reporter in the ordinary course of his preparations for a news story on a subject of general or public interest." *Id.* at 733. The defendant argued this by way of analogy to the absolute immunity for judges and legislators; this limited immunity would provide more protection than *New York Times v. Sullivan*. Second, "statements made in private cause less harm and are more easily rebutted than public statements, and . . . therefore statements made in private are entitled to greater protection." *Id.* at 734. The *Davis* court responded seriously to these arguments in dismissing them.

128. RESTATEMENT OF RESTITUTION § 166 (1936). Sometimes the action is at law, in quasi-contract, for the value of the benefit. *Id.* § 138.

A recent Supreme Court case illustrates the constructive trust concept in a first amendment context. In Snepp v. United States, 444 U.S. 507 (1980), defendant Snepp became a

larly appropriate for use in connection with either a reporter who simply files a story rather than writes a book, or the newspaper that publishes the story. The constructive trust cases, however, do recognize that the defendant's conduct was wrongful, and for courts to look at this wrongful conduct from the standpoint of the harm done to the plaintiff rather than the benefit acquired by the defendant is certainly possible. This viewpoint, of course, would represent the tort approach, which has sometimes been overlooked because courts have usually treated cases concerning breach of fiduciary obligation as controlled by principles of equity. The breach of a fiduciary obligation, however, also may constitute an equitable tort. The *Restatement of Torts* provides that "[o]ne standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation."[129]

The *Restatement of Agency* reiterates the holding of the constructive trust cases that breach of the duty of loyalty is indeed wrongful:

> The agent . . . has a duty not to use information acquired by him as agent or by means of opportunities which he has as agent to acquire it, or acquired by him through a breach of duty to the principal, for any purpose likely to cause his principal harm or to interfere with his business, although it is information not connected with the subject matter of his agency.[130]

Numerous cases apply this principle to the relationships that exist between trustee and beneficiary,[131] principal and agent,[132] and di-

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CIA agent, signing an agreement recognizing that he was undertaking a position of trust in that agency of the government, and agreeing not to publish any information relating to the Agency without submitting the information for clearance. In violation of the agreement, he wrote and published a book on his CIA experiences without submitting it for clearance. The Supreme Court imposed a constructive trust on his income from the book, declaring that this "remedy is the natural and customary consequence of a breach of trust. It deals fairly with both parties by conforming relief to the dimensions of the wrong . . . . [T]he trust remedy simply requires him to disgorge the benefits of bis faithlessness." *Id.* at 515. The Court regarded an injunction as undesirable, if not improper, but did not regard the constructive trust as in conflict with the first amendment.

129. RESTATEMENT (SECOND) OF TORTS § 874 (1976); *see also* Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982). The Note primarily treats cases in which a disclosure of confidential information occurred. *See, e.g.*, Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961); Doe v. Roe, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (N.Y. Sup. Ct. 1977); Blair v. Union Free School Dist., No. 6, 67 Misc. 2d 248, 324 N.Y.S.2d 222 (1971); *see also* Hill, *supra* note 51, at 1291-99.

130. RESTATEMENT (SECOND) OF AGENCY § 395 comment a (1957).

131. *See generally* RESTATEMENT (SECOND) OF TRUSTS §§ 201-205 (1957) (trustee is chargeable with any loss or depreciation in value of trust estate, any profit made by him, or any profit that would have accrued to the trust if the depreciation or lost profits resulted from a breach of trust).

rector and stockholders.[133] Other decisions recognize the duty in such relationships as employer and employee, attorney and client, and physician and patient to keep confidential certain information acquired through the relationship.[134]

One who induces a person under a fiduciary obligation or a duty to keep certain information confidential to violate the obligation or duty may be subject to tort liability, irrespective of whether the person breaching the fiduciary obligation has committed a tort. Since one who improperly interferes with a contract obligation by inducing another to break the contract or who improperly interferes with a prospective contractual relation or some other form of advantageous economic relation is liable for an independent tort,[135] surely an improper interference with compliance with a fiduciary obligation also will give rise to liability. Thus, a reporter who induces a person to disclose certain injurious information about another, in violation of the former's fiduciary obligation, may be liable in tort for his conduct.[136]

A reporter's liability, however, depends on whether the fiduciary's disclosure of confidential information to him is indeed wrongful and a breach of the obligation. The *Restatement of Agency* states that

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132. *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 403, 407 (1957) (agent's liability for things received in violation of duty of loyalty and the principal's choice of remedies).

133. *See generally* H. HENN, CORPORATIONS §§ 234-241 (3d ed. 1983) (fiduciary duty of officers and directors not to compete with corporation, not to usurp corporate opportunity, not to engage in activities that conflict with the interests of the corporation, not to engage in insider trading, and to exercise unbiased judgment with respect to all shareholders).

134. *See* Horne v. Patton, 291 Ala. 701, 710-11, 287 So. 2d 824, 831-32 (1973) (the duty within the context of physician and patient); RESTATEMENT OF TORTS §§ 757-759 (1939) (the treatment of trade secrets within the employer-employee relationship); *see also* Note, *Action for Breach of Medical Secrecy Outside the Courtroom*, 36 U. CIN. L. REV. 103 (1967).

135. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 766, 766B, 774B (1976) (regarding contractual relations, prospective contractual relations, and other advantageous relations respectively).

136. Section 874 of the *Restatement (Second) of Torts* itself says that "[A] person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused." RESTATEMENT (SECOND) OF TORTS § 874 comment c (1976). This is the liability of a joint tortfeasor, *see infra* note 157, rather than the independent tort liability arising from inducing or causing another to commit a wrong to the plaintiff, such as inducing him to break a contract. *Compare* RESTATEMENT OF RESTITUTION § 138(2) (1936) *with* RESTATEMENT (SECOND) OF TORTS § 874 (1976).

Suppose in Snepp v. United States, 444 U.S. 507 (1980), that the publisher of the book had induced Snepp to let it publish the book without submission to the CIA for clearance. In that case the publisher would have been liable for an independent tort.

> [a]n agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest of himself or of a third person. Thus, if the confidential information is to the effect that the principal is committing or is about to commit a crime, the agent is under no duty not to reveal it.[137]

In addition, the Code of Ethics for Government Service, adopted by House Concurrent Resolution No. 175, provides in part: "Any person in Government service should: 1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government Department. . . . 9. Expose corruption wherever discovered."[138] Thus, in some circumstances, revelation may not constitute a breach of the obligation—and may not create liability for inducement. Several cases illustrate when breach of a fiduciary obligation is not wrongful.[139]

E. Fraud and Trickery

A defendant may commit fraud in two ways. First, he may commit fraud directly on the plaintiff—for example, when the defendant deceives the plaintiff into believing that he is someone else, entitled to the information,[140] or when the defendant falsely tells the plaintiff that he already has the information from someone else and simply wants to discuss it with him, or when the defendant pretends to have legal authority to enter plaintiff's home

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137. RESTATEMENT (SECOND) OF AGENCY § 395 comment f (1957).

138. 72 Stat. B12 (1958). This Code is set forth in the explanatory notes to 5 U.S.C.A. § 7301 (West 1980).

139. *See, e.g.*, Pearson v. Dodd, 410 F.2d 701, 705 n.19 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969); *see also* Lachman v. Sperry-Sun Well Surveying Co., 457 F.2d 850 (10th Cir. 1972). In *Lachman*, the defendant, conducting an oil and gas survey for the plaintiff under a confidentiality provision in the employment contract, discovered that plaintiff's oil well was illegally draining from his neighhor's land, and informed the neighbor. Plaintiff sued for breach of the contract. Holding for defendant, the court said that it is "public policy in Oklahoma and everywhere to encourage the disclosure of criminal activity, and a ruling here in accordance with the argument advanced hy appellants would serve to frustrate this policy." *Id.* at 853.

See also Willig v. Gold, 75 Cal. App. 2d 809, 171 P.2d 754 (1946). In *Willig*, the defendant, agent for plaintiff as his real estate broker, learned that plaintiff had been defrauding his insurance company by undervaluing his business income. Defendant supplied incriminating information about plaintiff for a "fee" to the insurance company. Plaintiff sought to recover the fee stemming from the alleged breach of a confidential obligation, but the court denied recovery, holding that no duty prohibits an agent's disclosure of "his principal's dishonest acts to the party prejudicially affected by them." *Id.* at 814, 171 P.2d at 757.

140. *Cf.* Zimmermann v. Wilson, 81 F.2d 847 (3d Cir. 1936) (defendant served upon plaintiffs' brokers a summons to produce information; summons unreasonable); Brex v. Smith, 104 N.J. 386, 146 A. 34 (1929) (prosecutor inappropriately sought to examine all bank accounts of all members of the Newark police department).

and search.[141] Second, the defendant may exercise similar fraud on a third party to obtain information about the plaintiff.[142] The fraud may be the direct basis for the wrongful conduct, or, if the defendant acts fraudulently to obtain consent, the fraud may vitiate the consent as a defense for otherwise tortious conduct.[143]

F. Threats, Bribery, and Abuse of Process

The use of threats, bribery, or abuse of process also can lead to reportorial liability. The defendant-reporter may threaten to publish a far worse story if he is not supplied the true one. Threats

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141. *Cf.* Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (reporters entering premises pretending to be patients).

142. Suppose, for example, that the defendant, seeking to ascertain the balance in plaintiff's bank account, deceives the bank's employees into thinking that he is the plaintiff.

143. If the action is brought directly for the fraudulent conduct, it would normally be brought for the tort of deceit, although it could possibly be brought for negligent misrepresentation.

On fraud as vitiating consent, see generally RESTATEMENT (SECOND) OF TORTS § 892B(2) (1976); Fischer, *Fraudulently Induced Consent to Intentional Torts*, 46 U. CIN. L. REV. 71 (1977). *See also* Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971). The problems concerning fraud vitiating consent are analogous to the problems arising in criminal law when police induce a suspect's confession by misrepresentations. The constitutional due process ramifications, however, complicate matters in the criminal context. Clearly no per se rule exists that police fraud or trickery requires an exclusion of the confession. *See* Frazier v. Cupp, 394 U.S. 731 (1969) (holding no error in the admission of a confession in a criminal context). On the other hand, if the effect of the fraud is to deprive the suspect of his rights under the fifth or sixth amendment, as set forth in Miranda v. Arizona, 384 U.S. 436 (1966), and Massiah v. United States, 377 U.S. 201 (1964), then to admit the confession in as evidence is error. The Supreme Court's customary practice is to look at the totality of the circumstances surrounding the questioning and to determine whether the confession was "voluntary." For examples of cases in which courts have attempted to make this determination, see Oregon v. Mathiason, 429 U.S. 492 (1977) (false statement that suspect's fingerprints had been found—confession admissible); Frazier v. Cupp, 394 U.S. 731 (1969) (police falsely told suspect that a cosuspect had implicated him and suggested that victim had started the altercation by making homosexual advances; these police actions induced the petitioner's confession, which the Court held to be admissible); Spano v. New York, 360 U.S. 315 (1959) (suspect told his friend, a police officer, about a homicide he had committed; the friend pretended that he was in danger of losing his job, in order to induce suspect to confess and the Court excluded the confession); Leyra v. Denno, 347 U.S. 556 (1954) (after psychiatrist, trained in hypnosis, conferred with suspect while pretending to be medical doctor treating sinusitis the Court excluded the confession); United States *ex rel.* Hall v. Director, Dep't of Corrections, 578 F.2d 194 (7th Cir.), *cert. denied*, 439 U.S. 958 (1978) (suspect confessed after police deceived him into believing his accomplices had confessed and implicated him—court found no significance that deceit was deliberate and held confession admissible); Robinson v. Smith, 451 F. Supp. 1278 (W.D.N.Y. 1978) (after forged confession by cosuspect together with statement that only way to avoid death penalty was to confess induced defendant's confession, the court excluded the confession); State v. Cooper, 217 N.W.2d 589 (Iowa 1974) (after suspect deceived into thinking victim merely hurt, not killed, confession admissible). *See generally* White, *Police Trickery in Inducing Confession*, 127 U. PA. L. REV. 581 (1979).

of physical force, of criminal prosecutions, or of civil litigation also constitute tortious conduct.[144] The reporter additionally may resort to bribery, paying someone to do something that is itself wrongful. This conduct, of course, subjects the wrongdoer to criminal liability.[145]

Abuse of process refers to the intentional use for an improper purpose of a legal process connected with litigation.[146] A current disagreement exists over the propriety of certain uses of the discovery process. In the recent case of *Rhinehart v. Seattle Times Co.*,[147] the newspaper, sued for defamation and invasion of privacy, sought discovery of certain information from the plaintiff. The trial court granted the discovery motion, but also issued a protective order limiting to trial purposes the uses to which the newspaper-defendant could put the information. Contending that this protective order amounted to unconstitutional prior restraint, the newspaper appealed to the state supreme court, which affirmed en banc by a divided court. The supreme court might have avoided the serious hassle regarding prior restraint if it had declared that the discovery process was established for the purpose of aiding the parties to prepare for and conduct the trial in an informed fashion and not for the purpose of obtaining information to publish to the world. The court then could have dismissed the prior restraint argument and pointed out that the protective order merely served to protect the defendant from a potential tort action for abuse of process.

G. Illegal or Wrongful Conduct in General

As to unlawful acts in general, the case of *McCall v. Orville Mercury*[148] almost came to a clear decision. A California statute proved that "[a]ny person, except those specifically referred to in Section 1070 of the Evidence Code, who, knowing he is not authorized by law to receive a record or information obtained from a record, knowingly buys, receives or possesses the record or informa-

144. For the *Restatement*'s treatment of predatory wrongful conduct of this type, see RESTATEMENT (SECOND) OF TORTS § 767 comment c (1976).

145. The scope of the original crime of hribery was confined to payments to a government officer to induce corrupt conduct.

146. *See generally* RESTATEMENT (SECOND) OF TORTS § 682 (1976); Bretz, *Abuse of Process—A Misunderstood Concept*, 20 CLEV. ST. L. REV. 401 (1971).

147. 98 Wash. 2d 726, 654 P.2d 673 (1982), *cert. granted*, 104 S. Ct. 64 (1983); *see also* Tavoulareas v. Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984); *In re* Halkin, 598 F.2d 176 (D.C. Cir. 1979). For Supreme Court action in *Rhinehart*, see *infra* note 198.

148. 142 Cal. App. 3d 805, 191 Cal. Rptr. 280 (1983).

tion is guilty of a misdemeanor."[149] Defendant newspaper published plaintiff's criminal record. Its claim of a constitutional privilege to publish was refuted by citing the statute to claim that defendant acquired the information by criminal conduct. But the court side-stepped the problem by construing the exception clause in the statute to refer to newspapers and their employees.[150] The implication is clear that if it had not been for the exception clause, liability would have been imposed under the statute.

On wrongful conduct in general, an analogous situation may have significance. In the first *Restatement of Torts*, section 759 provides: "One who, for the purpose of advancing a rival business interest, procures by improper means information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information."[151] Comment c defines improper means as follows:

> Among the means which are improper are theft, trespass, bribing or otherwise inducing employees or others to reveal the information in breach of duty, fraudulent misrepresentation, threats of harm by unlawful conduct, wire-tapping, procuring one's own employees or agents to become employees of the other for purposes of espionage, and so forth.[152]

H. Liability for the Tortious Conduct of Another

This final category does not constitute a separate tort, but applies to all torts. For example, if one person directs his agent or employee to perform a tortious act, he is himself liable for the

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149. CAL. PENAL CODE § 11143 (West 1982).

150. The reference was to the California Confidential Source Statute.

151. RESTATEMENT OF TORTS § 759 (1939). This and other sections on the subject of trade practices were omitted from the *Second Restatement* as being more appropriate to treat in a separate restatement.

152. Similar provisions are found in § 757 (trade secrets) of the *First Restatement*, especially comment f. In the *Second Restatement*, Chapter 37 on interference with contractual relations is very pertinent. The defendant's conduct may give rise to liability, not only when it is otherwise tortious, but also when it is "improper." Section 767 of the *Second Restatement* treats the question of when it is improper. Comment c deals specifically with the nature of the actor's conduct. Comment j summarizes the factors to be taken into consideration in determining when the conduct is improper. It states that "[r]ecognized standards of business ethics and business customs and practices are pertinent, and consideration is given to concepts of fair play and whether the defendant's interference is not 'sanctioned by the "rules of the game."' " The relevance to journalistic ethics and customs is apparent. The double quote is taken from Sustick v. Slatina, 48 N.J. Super. 134, 144, 137 A.2d 54, 60 (1957). *See also* Leonard Duckworth, Inc. v. Michael L. Field & Co., 516 F.2d 952 (5th Cir. 1975); Herron v. State Farm Mut. Ins. Co., 56 Cal. 2d 202, 363 P.2d 310, 14 Cal. Rptr. 294 (1961) (rules of national conference committee on adjusters).

tort.[153] A principal or employer also may be vicariously liable if the agent or employee commits a tortious act not at the direction of the employer, but within the general scope of his employment.[154] Even in the absence of an agency relationship, if one intentionally induces or otherwise intentionally[155] causes another to do a wrongful[156] act harmful to a third party, the first person may be liable to the injured party for the harm incurred.

When two or more persons act in concert in performing a tortious act, each is liable, not only for his own action, but also for the acts of the other.[157] "Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself."[158] Some cases indicate that the concept of concert is broad enough to include persons who further the common plan or tacit agreement by cooperation or request,[159] or lend encouragement to the actor,[160] or ratify the acts and make use of the benefit from them.[161] Some courts have found liability even when a defendant engages in certain conduct, knowing that others are also engaging in that conduct.[162]

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153. RESTATEMENT (SECOND) OF AGENCY § 212 (1957).

154. *Id.* §§ 216, 219.

155. "Intent" is used to mean that the actor either "desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8A (1963).

156. The term "wrongful" indicates that the other party's conduct need not be tortious in itself. Thus, when an actor induces the other party to break his contract, the other has not necessarily committed a tort; the actor, however, has. *See* RESTATEMENT (SECOND) OF TORTS § 877(b) (1976).

157. *Id.* § 876 (1979); *see* Smithson v. Garth, 3 Lev. 324, 83 Eng. Rep. 711 (1691). In the *Smithson* case three persons, acting in concert, set upon the plaintiff. One held him (false imprisonment), a second battered him, and the third stole his silver buttons. The court held each liable for the entire damages.

158. RESTATEMENT (SECOND) OF TORTS § 876 comment a (1976). The classic illustration is that of two persons who get into a drag race without any express agreement. *See* Bierczynski v. Rogers, 239 A.2d 218 (Del. 1968); Ogel v. Avina, 33 Wis. 2d 125, 146 N.W. 2d 422 (1966).

159. *E.g.*, Kirby Lumber Corp. v. Karpel, 233 F.2d 373 (5th Cir. 1956) (trespass); Johnson v. Sartain, 46 Hawaii 112, 375 P.2d 229 (1962) (battery).

160. *E.g.*, Thompson v. Johnson, 180 F.2d 431 (5th Cir. 1950) (battery); Thomas v. Doorley, 175 Cal. App. 2d 545, 346 P.2d 49 (1959) (battery).

161. *E.g.*, Weinberg Co. v. Bixby, 185 Cal. 87, 196 P. 25 (1921) (diversion of flood waters); McBryde v. Coggins-McIntosh Lumber Co., 246 N.C. 415, 98 S.E.2d 663 (1957) (consenting to a trespass for one's own benefit); Stull v. Porter, 100 Or. 514, 196 P. 1116 (1921) (killing plaintiff's dogs).

162. *See* Moses v. Town of Morgantown, 192 N.C. 102, 133 S.E. 421 (1926) (stream pollution). Some of the products liability cases concerning DES pills are also relevant. *See,*

To think of situations in which the conduct of an investigative reporter could come within the scope of these cases is easy. Indeed, several cases exist in which courts have determined the liability of reporters for the tortious conduct of another or for acting in concert with another. In *Pearson v. Dodd,*[163] the trial court found that

> two former employees of [Senator Dodd], at times with the assistance of two members of [his] staff, entered [his] offices without authority and unbeknownst to him, removed numerous documents from his files, made copies of them, replaced the originals, and turned over the copies to the defendant, Anderson, who was aware of the manner in which the copies had been obtained.[164]

The court could have held Anderson, the reporter, liable for intentionally inducing, or tacitly agreeing to cooperate with, the wrongful conduct of Dodd's former employees and staff. That wrongful conduct could have been held to involve a ratification of an intrusion on privacy, a breach of confidence, and perhaps a trespass. The court, however, found no liability.

A different result was reached in *Barber v. Time, Inc.*[165] Plaintiff was in a hospital for tests and treatment of a malady causing her to eat constantly. She refused to have a picture taken when interviewed by reporters, but one reporter took a picture surreptitiously while the other was talking to her. The story, with the picture, appeared in several publications. *Time* magazine verified the story and, assuming that plaintiff had given consent for the picture, carried her picture with an item about her, entitled "Starving Glutton." In her suit for invasion of privacy, the trial court awarded $1,500 compensatory damages and $1,500 punitive dam-

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e.g., Abel v. Eli Lilly & Co., 94 Micb. App. 59, 289 N.W.2d 20 (1979), *aff'd*, 343 N.W. 2d 164 (Mich. 1984); Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981), *aff'd*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982); *cf.* Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W. 2d 37 (1984).

163. 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1967), *aff'g and rev'g* Dodd v. Pearson, 279 F. Supp. 101 (D.D.C. 1968); *see also* Liberty Lobby, Inc. v. Pearson, 261 F. Supp. 726 (D.D.C. 1966).

164. 297 F. Supp. at 102; *see also* 410 F.2d at 705 & n.20. Indeed, in his syndicated column in late April 1966, shortly before other columns disclosed details of the documents, Drew Pearson wrote:

> These witnesses are clean cut young men and women who believe senators are not above the law and that it should not be against the law to document corruption charges against a U.S. senator. They are not disgruntled employees who came running up with information against their boss. We sought them out; it took weeks to persuade them that their first loyalty should be to their country, not to Dodd.

Washington Post, Apr. 25, 1966, at B9, col. 9; *see also* J. BOYD, ABOVE THE LAW 115 (1969) (written by one of the employees). Leads to these last two references came from Comment, *The Emerging Tort of Intrusion*, 55 IOWA L. REV. 718, 723 nn.57-58 (1970).

165. 348 Mo. 1199, 159 S.W.2d 291 (1942).

ages. The state supreme court affirmed the compensatory damages, but required a *remittitur* for the punitive damages.[166]

One may, perhaps, reconcile the *Pearson* and *Barber* cases on the basis of the nature of the publication and its importance as a matter of public interest. Senator Dodd's derelictions as United States Senator were a matter of obvious public interest. On the other hand, even if the nature of Mrs. Barber's illness could be considered of public interest she certainly was entitled to privacy from photographers while in her hospital bed. Neither case, however, gives a clear indication of the appropriate application of the concept of concert of action to reportorial activities.

As a final note, *Prahl v. Brosamle*[167] presents a different twist for persons who attempt to work with reporters. In *Prahl*, police arrived at a scene to investigate charges that someone in a building was firing shots at young boys. The police called the owner out, and then a delegation went in with him to search. The police lieutenant authorized a newscaster to enter with the police delegation. The court held that the newscaster had no privilege to enter and that the police lieutenant was himself liable for trespass in authorizing the newscaster's entry. Other cases resolving the issues of concert of action in a more definitive fashion will surely arise in the future.

V. Cases Concerning Misconduct in Both the Newsgathering and Publicity Stages

When a news medium and its reporters engage in both questionable newsgathering and undesired publicity in a single incident, the relationship between the two elements of conduct comes into question. The newsgathering may involve torts such as invasion of right to privacy from intrusion ("intrusion-privacy"), trespass, inducing breach of confidential relation, or fraud, and the publication may involve invasion of the right to privacy concerning publicity given embarrassing private facts ("publicity-privacy"), invasion of privacy stemming from placing the plaintiff in a false light ("false-light privacy"), or pure defamation. A court may take at least three logical approaches to deal with this potential dilemma of overlapping liability.

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166. "Defendant merely assumed consent of plaintiff because of the prior publication of the article and picture elsewhere. That is not enough to escape liability, but mere lack of further investigation under all the circumstances should not impose punitive damages in this case." *Id.* at 1209, 159 S.W.2d at 296.

167. 98 Wis. 2d 130, 295 N.W.2d 768 (Wis. Ct. App. 1980).

First, the court may treat the two possible torts entirely separately, as independent tort claims. The court can allow recovery for the newsgathering if it finds that conduct tortious; it then will confine the damages to the damages appropriate for that tort. The court also may allow recovery for the publication if it finds that the facts publicized are private and that the public has no legitimate concern with them. Again, damages must be appropriate for that tort. The fact that one aspect of the reporter's conduct constitutes a tort does not provide a basis for augmented damages for the other conduct if the other conduct is not independently tortious.[168]

Second, the court may start with consideration of the newsgathering conduct. If the court finds the newsgathering conduct tortious, a cause of action arises, and it can treat the emotional distress attendant to the subsequent publicity as consequential damages, even though it may regard the publicized facts as newsworthy and not actionable if properly obtained.[169]

Finally, the court may start with consideration of the publication. Even though the facts publicized are highly embarrassing to the plaintiff, their publication is privileged if the facts are true, newsworthy, or of legitimate concern to the public. The privilege, however, may be treated as lost if the reporter obtained the information by wrongful conduct, and the plaintiff may recover for the publication.[170] Both of the latter two approaches place the empha-

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168. The court in Pearson v. Dodd, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947, (1969), apparently took this approach:

> Where there is intrusion, the intruder should generally be liable whatever the content of what he learns . . . . On the other band, where the claim is that private information concerning plaintiff has heen published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained. Of course, both forms of invasion may be combined in the same case.

Id. at 705-06. The court found no liability on either basis.

169. In Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), the court stated:

> No interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired. Assessing damages for the additional emotional distress suffered by a plaintiff when the wrongfully acquired data are purveyed to the multitude chills intrusive acts. It does not chill freedom of expression guaranteed by the First Amendment. A rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him without any countervailing benefit to the legitimate interest of the public in being informed. The same rule would encourage conduct by news media that grossly offends ordinary men.

Id. at 250. The defendant could have published the information in this case, if rightfully obtained, as a matter of legitimate public concern.

170. In Barber v. Time, Inc., 348 Mo. 1119, 159 S.W.2d 291 (1942), the court found the

sis on the nature of the newsgathering conduct.

These three approaches are not necessarily exclusive of each other. When a choice is required, however, I am inclined to think that the second one is the most appropriate.

An analogous problem exists when the defendant directs tortious conduct in newsgathering against a third party but the information obtained and published concerns the plaintiff. Apparently, no case authority exists on whether the misconduct toward the third party is relevant to the plaintiff's suit.[171]

VI. Remedies and Sanctions

Tort remedies have two major purposes: to make the injured party whole, usually by compensating him for his injury, and to punish the wrongdoer and deter wrongful conduct.[172] The remedy of damages may serve both purposes, but the remedy of injunction serves only the second purpose.[173]

A. Injunction

Injunction is available very infrequently as a remedy against the tortious conduct of investigative reporters, especially in the case of a tort concerning publication. Calling it "prior restraint," the media argue that an injunction constitutes a form of censorship and, therefore, is in direct violation of the speech and press clauses of the first amendment. The courts generally have agreed with the media's view and virtually have precluded injunctive relief in defamation and publicity-privacy cases.[174] Possibly an in-

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information to be private, and held that an action of publicity-privacy would lie. The court did not refer to the surreptitious obtaining of a picture, except to say that the act would not warrant punitive damages. The wrongful intrusion was not the act of the defendant—the defendant simply did not inquire about permission to publish.

171. The analogy to other torts, such as tortious interference with prospective relations, would suggest that the cause of action would still lie. *See* Tarleton v. M'Gawley, Peake N.P. 270, 170 Eng. Rep. 153 (1793) (firing at natives to drive them away and prevent trading); Garret v. Taylor, Cro. Jac. 567, 79 Eng. Rep. 485 (1621) (threats of violence against prospective customers). I think the same result would apply here.

In Barber v. Time, Inc., 348 Mo. 1119, 159 S.W.2d 291 (1942), the court encountered, but did not resolve, another analogous situation, in which the defendant's publication was wrongful, and a third party independently had engaged in misconduct in the newsgathering stage. *See supra* note 170.

172. Section 901 of the *Second Restatement of Torts* acknowledges these two principal "purposes for which actions of tort are maintainable," and adds the additional purposes of (3) determining rights, and (4) vindicating parties and deterring retaliation and violent self-help. Restatement (Second) of Torts § 901 (1976).

173. Damages are treated in *id.* §§ 901-932; injunction is treated in *id.* §§ 933-951.

174. The principal case is Near v. Minnesota, 283 U.S. 697 (1931). *See* F. Friendly,

junction might be granted in a case in which the publication previously was determined defamatory and the defendant persisted in publishing it. The Supreme Court presently is considering the question of whether a law, without violating the first amendment, may prohibit a newspaper from publishing material that it has obtained through the use of the discovery process in a pending trial.[175]

The argument that an injunction constitutes censorship through prior restraint is not as strong in regard to torts arising from newsgathering activities. Here the courts would enjoin conduct, not publication. Practical difficulties in utilizing an injunction, however, still exist. A trespass into a person's home to obtain embarrassing papers is completed by the time the action becomes known and nothing remains to enjoin; injunctive relief, then, serves no useful purpose. The court, however, may enjoin repeated trespasses. For example, in the classic case of *Galella v. Onassis*,[176] in which a photographer seriously and continuously harassed Mrs. Onassis and her children whenever they were outside their home, the court resorted to a carefully drafted injunctive order.[177]

B. Damages

In tort cases generally, and particularly in cases concerning the torts treated here, the courts usually grant relief in the form of damages. The common law regards a monetary award as the means of compensation—the device for making an injured plaintiff whole through the substitution of a monetary award for the failure to wipe out the plaintiff's pain and suffering, emotional distress, or the harm to reputation. The legal system depends on the good sense of the factfinder, usually the jury subject to the control of the judge, to determine the appropriate compensation for the injury in specific monetary figures; no standard charts or formulae exist to make this determination.

The common law also regards a monetary award as a means of sanction against the tortfeasor. Unduly high awards, however, may

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MINNESOTA RAG (1981).

175. Rhinehart v. Seattle Times Co., 98 Wash. 2d 726, 654 P.2d 673 (1982), *cert. granted*, 104 S. Ct. 64 (1983); *see also* Tavoulareas v. Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984); *In re* Halkin, 598 F.2d 176 (D.C. Cir. 1979), *aff'd sub nom.* Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).

176. 487 F.2d 986 (2d Cir. 1973). For the district court's opinion, see 353 F. Supp. 196 (S.D.N.Y. 1972).

177. *See supra* note 81 and accompanying text.

have a substantially chilling effect, producing self-censorship and thereby violating the first amendment. Almost certainly the size of the award was an important factor in inducing the Supreme Court to act in the case of *New York Times v. Sullivan.* The common law principles that the Alabama court had relied upon in that case had been in effect when the Bill of Rights was adopted.[178]

In the other landmark defamation case, *Gertz v. Robert Welch, Inc.*,[179] the Court laid down an important constitutional rule that "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury."[180] The opinion in *Gertz* left considerable doubt as to whether the courts can award punitive damages when the fault standard of *New York Times* is met. The lower federal courts, however, now seem agreed after early vacillation that punitive damages are available.[181] The Supreme Court has given no sign of unhappiness with the emerging result.

Since astronomical verdicts have become commonplace, the news media appear to have adopted the strategy of the soft drink companies a number of years back in the bug-in-a-bottle cases: defend vigorously every case whether it has merit or not and do everything imaginable, including appeals as far as possible, to delay the trial and to make it more expensive. For this reason, if the court grants a reasonable award in terms of compensation for the injury incurred, the plaintiff actually loses money because of the expenses of the trial. The courts' awareness of this may influence their attitude toward the size of the verdict.

Dietemann v. Time, Inc.[182] illustrates the inadequacies of mere compensatory damages in cases of drawn-out litigation. In that case two reporters gained access to plaintiff's home under a ruse and surreptitiously took pictures and recorded the conversa-

178. New York Times Co. v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd*, 376 U.S. 254 (1964). For a full account of the case, see Pierce, *The Anatomy of an Historic Decision:* New York Times Co. v. Sullivan, 43 N.C.L. REV. 315 (1965).

179. 418 U.S. 323 (1974).

180. *Id.* at 350. The *Gertz* rule provided an opportunity to treat measure of damages as a constitutional fact subject to full appellate review; the Court in Time, Inc. v. Firestone, 424 U.S. 448 (1976), however, failed to seize the opportunity.

181. *See, e.g.*, Maheu v. Hughes Tool Co., 569 F.2d 459 (9th Cir. 1977); Buckley v. Littell, 539 F.2d 882 (2d Cir.), *cert. denied*, 426 U.S. 1062 (1976); Newspaper Publishing Corp. v. Burke, 216 Va. 800, 224 S.E.2d 132 (1976); *see also* Herbert v. Lando, 441 U.S. 153, 162 n.7 (1979) (punitive damages assumed).

182. 284 F. Supp. 925 (C.D. Cal. 1968), *aff'd*, 449 F.2d 245 (9th Cir. 1971).

tion. The defendant published the details in *Life* magazine. The trial judge awarded $1,000, which seems like fairly reasonable compensation for the injury of intrusion and serves gently to characterize the defendants' conduct as tortious. Since the litigation took place over an eight-year period, one may question whether the award adequately "compensated" the plaintiff or whether any plaintiff's attorney would be inclined to take a case of this sort today. On the other hand, the litigation substantially cost the news medium, and may have served as a sanction against letting reporters engage in similar conduct again.

The reference here to sanctions makes this an appropriate place to make brief reference to a very analogous situation. Under the constitutional law of the United States, if the police make an illegal search or engage in illegal interrogation, the government may not make use in a criminal prosecution of evidence or information obtained directly or indirectly from the illegal conduct. The sanction is suppression of the evidence, a very strong and usually effective sanction.[183] The full analogy to tortious newsgathering would be to hold that the information wrongfully obtained by the reporter cannot be published and may be enjoined. That appears not to have been suggested, but cases in the two situations involving a question of whether the conduct was wrongful are largely analogous. For example, if the policeman or the reporter himself does not engage in the wrongful conduct but is given the information by someone else who wrongfully obtained it, what should be the result?[184] Some judges and lawyers, including the Chief Justice, would like to change the sanction in the criminal evidence case and rely instead on the sanction of a tort action against the policeman who conducted the illegal search.[185]

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183. *See* Mapp v. Ohio, 367 U.S. 643 (1961); 3 W. LAFAVE, SEARCH AND SEIZURE § 11.2 (1978). Evidence obtained indirectly as a result of the illegal action is called the "fruit of the poisonous tree." *See* Nardone v. United States, 308 U.S. 338 (1939); W. LAFAVE, *supra*, § 11.4.

184. Compare Pearson v. Dodd, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969), with cases in which the Court holds that under the "private-search" rule, the government can introduce into evidence material obtained by a private illegal search if the government did not participate in the illegal action. *See* Burdeau v. McDowell, 256 U.S. 465 (1921); W. LAFAVE, *supra* note 183, § 1.6. *But cf.* United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1975), in which a nurse who accused a doctor of filing fraudulent medicare claims brought the FBI some duplicated documents. The FBI accepted the documents, but told the nurse not to bring any more; she did and they accepted them.

185. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting). *See generally* W. LAFAVE, *supra* note 183, § 1.6 (1978 & Supp. 1984).

C. Other Remedies

A few other potential remedies have not proved as effective or useful as they might. One remedy is a declaratory judgment finding that a defamatory statement is untrue. The declaratory judgment remedy essentially is a suit for nominal damages that may avoid certain defenses otherwise available.[186] Another remedy is self-help; the plaintiff, if he has a forum, may deny publicly the truth of a defamatory statement. The Supreme Court, however, has held that the right-of-reply statutes, giving the defamed person an opportunity to respond in the newspaper that defamed him, are unconstitutional on the ground that the statutes dictate to the newspaper what it must publish.[187]

VII. CONCLUSION

One of the most significant developments in recent years, in both constitutional and tort law, began with the holding in *New York Times v. Sullivan* that the first amendment places substantial restrictions on the common law tort action for defamation.[188] Although the ramifications of *New York Times* are still developing, that continuing reform of the law of defamation will result is to be expected.

The readjustment of the balancing of conflicting interests that *New York Times* represents came about at the behest of the press, and the press have been the primary beneficiaries of these developments. Indeed, some commentators contend that the major first amendment protections from an action for defamation that now exist apply only to the media, since the first amendment speaks expressly of the press. I find myself in disagreement. The first amendment speaks of both "freedom of speech and of the press."

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186. In this case the plaintiff is seeking only vindication of his reputation. *See supra* note 172. When the plaintiff announces that he will give to charity any award that he obtains, he is seeking not only seeking vindication, but also punishment of the defendant.

187. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). On remedies for defamation in general, see W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 1078-82 (7th ed. 1982).

188. The Court has held that the first amendment also places limitations on the tort action for invasion of the right of privacy. *See supra* notes 65-68 & 87-104 and accompanying text. It also has applied the limitations to an action for injurious falsehood, or disparagement of products. *See* Bose Corp. v. Consumers Union of United States, Inc., 104 S. Ct. 28 (1984).

For the present state of the law of defamation in England, see Bevan, *The Recent Decline and Fall of Freedom of the Press in English Law*, 16 VAND. J. TRANSNAT'L L. 31 (1983).

The constitutional protections should protect the ordinary citizens as well as the media, whether the suit is in slander for an oral statement or in libel for a written one. The privilege of fair report, for example, should apply on behalf of an individual who attends a public meeting and orally describes it accurately and fairly to a friend.[189] This equality of protection will not harm the press, whose members have their protection, which is not endangered. For the press to seek to deny that protection to persons engaged in other types of activities is to take a dog-in-the-manger position.[190]

While the first amendment clearly affords certain protections to the media against tort liability arising from publication, the Supreme Court has not yet addressed directly the protection available to newsgathering. The Court has stated that "newsgathering is not without its First Amendment protections,"[191] but also has stated that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."[192] Lower courts have indicated that a reporter who is engaged in newsgathering is not immune from the tort liability or criminal responsibility to which an ordinary citizen would be subjected.[193] Whether the tort liability of the reporter is exactly the same as the liability for an ordinary citizen who engages in the same conduct but without the motive of seeking to gather information to transmit to the public remains unanswered.

To reach a determination of whether or when the first amendment should provide special protection against tort liability for newsgathering conduct, the courts addressing the problem appear to give tacit consideration to two factors: (1) how bad was the re-

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189. *See* RESTATEMENT (SECOND) OF TORTS § 611 comment c (1976).

190. *See id.* § 580B comment d (1977); Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975); Nimmer, *Is Freedom of the Press a Redundancy: What Does it Add to the Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Shiffrin, *Defamatory Nonmedia Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915 (1978). *See also supra* note 61.

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

192. Zemel v. Rusk, 381 U.S. 1, 17 (1965).

193. *E.g.*, Galella v. Onassis, 487 F.2d 986, 995-96 (2d Cir. 1973); Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971). Several Supreme Court holdings indicate that a prohibition against interviews with prisoners, if general in nature, may constitutionally apply to reporters. *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978) (no special opportunity for reporters to inspect prison conditions); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974); *see also* Lee, *supra* note 69, at 1249-53.

On discrimination between reporters or news media in granting access to sources of news, see Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978) (gender); Los Angeles Free Press, Inc. v. City of Los Angeles, 9 Cal. App. 3d 448, 88 Cal. Rptr. 605 (1970) (newspaper's lack of participation in particular news area).

porter's conduct, and (2) how significant was the nature of the information that he was seeking to obtain. With respect to the first, the defendant's conduct frequently includes trespass. The trespass may constitute a mere technicality or may cause serious physical harm. The common law of trespass provides that a person in an emergency situation may have an incomplete privilege to trespass on another's property for the purpose of saving life or limb or protecting property. For example, a person may enter another's front yard to pick up his hat, which a sudden gust of wind had blown away. Under this incomplete privilege, a person is not liable for the technical trespass, but if he causes damage to the property while trespassing, he is liable for the actual harm done.[194] The Court migbt consider extending the incomplete privilege under the law of trespass to reporters. A reporter would gain an incomplete privilege in regard to a mere technical trespass if his purpose was to obtain important information for the benefit of the public as a whole. Similar analysis could be applied in regard to the tort of inducing breach of confidence by distinguishing between a reporter who cynically persuades a person to disregard a confidential relation and one who merely accepts papers that someone who already had breached the relationship brought to the reporter. In considering the nature of the reporter's conduct, it also might be appropriate to ask whether the reporter resorted to the improper conduct because no other legal means were reasonably available to insure timely disclosure of vital information or whether the information would soon have been disclosed anyway and the reporter simply wanted to obtain a newsbeat over other newspapers.

The second factor affecting a determination of whether to extend first amendment protection to newsgathering conduct is the nature of the information the reporter is seeking to obtain. Information about a "disabled veteran with little education [who] was engaged in the practice of healing with clay, minerals and herbs," but was not soliciting patients and apparently had little clientele[195] may provide interesting and newsworthy reading, but the reading is hardly vital to the public's right to know and, therefore, may not warrant first amendment protection against liability for trespass.

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194. *See* Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910); RESTATEMENT (SECOND) OF TORTS §§ 197, 263 (1963); Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1926).

195. Dietemann v. Time, Inc., 284 F. Supp. 925, 926 (C.D. Cal. 1968), *aff'd*, 449 F.2d 245 (9th Cir. 1971).

On the other hand, a reporter who uncovers evidence that a United States Senator is engaged in corrupt practices and is committing other misdeeds[196] serves a very important purpose by aiding in the effective exercise of self-government—the central reason, according to Professor Alexander Meiklejohn, for our concept of freedom of speech.[197]

When the Supreme Court finally is ready to take a case concerning newsgathering conduct and the first amendment, it may find it useful to consider these two factors in defining the right balance of the conflicting interests between the individual's right to protection from tortious conduct and the public's right to know. Instead of following this approach, the Court may want to lay down a clear "bright line" that will eliminate the need for further appeals, even though the solution is not a "tailor-made," individualized one. This is the kind of decision that requires the give-and-take of vigorous discussion on the part of nine justices, aided by partisan briefs. Perhaps some discussion by commentators will help.[198]

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

197. *See* Wade, *supra* note 3, at 676.

198. The following significant developments have occurred since this Article was set in page proof:

(1) Seattle Times Co. v. Rhinehart, *supra* note 147, was unanimously affirmed by the United States Supreme Court. 52 U.S.L.W. 4612 (U.S. May 21, 1984). Speaking for the Court, Justice Powell said: "As the rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. . . . Thus, continued court control over the discovered information does not raise the same spectre of government censorship that such control might suggest in other situations. . . . [The] protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes. . . . The prevention of the abuse that can attend the coerced production of information under a state's discovery rule is sufficient justification for the authorization of protective orders. . . ." *Id.* at 4616, 4617.

(2) In Boddie v. American Broadcasting Co., 731 F.2d 333 (6th Cir. 1984), the court held that a cause of action was stated under the Federal Wiretap Statute, 18 U.S.C. §§ 2510-20, when investigative reporters, interviewing the plaintiff in a judicial corruption scandal, surreptitiously recorded the interview and used part of it in a television broadcast. §2520 of the statute provided for civil liability, but exempted interception by a party to the communication unless it was done for the purpose of committing a criminal or tortious act, or "for the purpose of committing any other injurious act." § 2511(2)(d). Plaintiff had agreed to the interview in her home but had refused to appear on camera. It was held to be a question of fact for the jury whether defendants' conduct was for the purpose of committing an injurious act.

(3) A Supreme Court decision on Monday, June 11, 1984, is reported to have modified the exclusionary rule to allow evidence to be admitted if the police prove that they would have found the evidence legally. Wall St. J., June 12, 1984, at 2, col. 3.