Newsgathering after the Death of a Princess: Do American Laws Adequately Punish and Deter Newsgathering Conduct That Places Individuals in Fear or at Risk of Bodily Harm

Alissa Eden Halperin

Follow this and additional works at: https://digitalcommons.law.villanova.edu/mslj

Part of the Entertainment, Arts, and Sports Law Commons, and the First Amendment Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/mslj/vol6/iss1/7

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
Comments

NEWSGATHERING AFTER THE DEATH OF A PRINCESS:
DO AMERICAN LAWS ADEQUATELY PUNISH AND DETER
NEWSGATHERING CONDUCT THAT PLACES INDIVIDUALS
IN FEAR OR AT RISK OF BODILY HARM?

I. INTRODUCTION

On August 31, 1997, Princess Diana of Wales died from injuries she suffered in a car accident.\(^1\) Investigators believed that several factors contributed to the crash, including the pursuit of Princess Diana’s car by several members of the paparazzi.\(^2\) French magistrates, however, have since ruled that the pursuing paparazzi played no role in the accident.\(^3\) Rather, the magistrates determined that the accident “was caused by the fact that the driver of the car was

cious’, S.F. Examiner, Aug. 31, 1997, at A4; Craig R. Whitney, Diana Killed in a Car Accident in Paris; In Flight from Paparazzi—Friend Dies, New York Times, Aug. 31, 1997, at A1. Diana and companion Dodi Al Fayed were in a limousine, driven by chauffeur Henri Paul, traveling through a Paris tunnel. \textit{See Diana’s Chauffeur Drank at Bar as She and Dodi had Last Meal}, Atence France-Presse, Dec. 13, 1997, available in 1997 WL 13453797. Also in the car was the Princess’ bodyguard, Trevor Reese Jones. \textit{See id.} The limousine had just left a hotel owned by Al Fayed’s family, where the couple had dashed out a back door to avoid media members gathered at the front. \textit{See The Death of Princess Diana}, New York Times, Sept. 4, 1997, at A40. Photographers on motorbikes and in cars caught up with the limousine and pursued the couple in search of headlines. \textit{See Paparazzi Relentless in Pursuit of Their Famous Prey Princess Diana: 1961-1997, supra at A4.} While inside the tunnel, the limousine crashed. \textit{See id.} Al Fayed and Paul died on impact. \textit{See id.} Diana was given medical assistance on the scene and at a French hospital where she later died. \textit{See id.} The bodyguard suffered horrendous injuries. \textit{See Diana’s Chauffeur Drank at Bar as She and Dodi had Last Meal, supra.} Mr. Jones underwent extensive surgery and has since been able to remember more about the night of the crash but nothing about the actual crash. \textit{See id.}


inebriated and under the effects of drugs incompatible with alcohol." Regardless of legal causation and ultimate liability, people from all over the world were saddened by the sudden death of the Princess. Moreover, people were alarmed by the activities of the paparazzi who pursued Princess Diana’s car before the accident, and subsequently photographed the accident scene.

Although further investigation has revealed that the media was not solely to blame for the accident, the initial reaction and residual effect of the tragedy has been widespread concern that the media’s conduct may have contributed to Princess Diana’s death. The media has been flooded with comments about privacy protections and media accountability.

4. Paul Webster and Stuart Miller, *Diana Verdict Sparks Fayed Appeal*, The Guardian, Sept. 4, 1999 (citations omitted). The father of Dodi Al Fayed vowed to appeal the decision of the French magistrates, claiming that the paparazzi shared responsibility for the accident. See id. Although the elder Fayed is entitled to an appeal of the magistrates’ decision under French law, few expect a reversal. See Dahlburg, supra note 3, at A6.


6. See *New Zealand Prime Minister Says Diana Hounded by Media*, supra note 2; *Good Morning America: Paparazzi Legislation* (ABC television broadcast, Feb. 18, 1998)(discussing Personal Privacy Protection Act proposed by Senators Feinstein and Boxer and Representative Hatch before 105th Congress in May 1998). In the aftermath of the death of Princess Diana, there was a lot of talk about the paparazzi. See id. Six months later, “it’s still not clear what role they played in the accident that killed the Princess in Paris last August. But the ensuing controversy that involved the paparazzi may lead to new laws in this country.” Id.; see also *Philippine Press in Soul-Searching After Diana’s Death*, Agence France-Presse, Sept. 1, 1997.

7. See *Report Puts Small Car Near Diana Crash Scene*, supra note 2, at A13. Henri Paul, the limousine’s driver, had a blood alcohol level of approximately three times the legal limit. See id. Many believe that his drunken state while driving caused the accident. See id. Others believe that the driver under the influence of alcohol and under the conditions created by the photographers on motorcycles and in cars caused the accident. See id.


Photographers and reporters had long hounded Princess Diana.\(^\text{10}\) They had a history of invading the Princess’ private moments.\(^\text{11}\) It is uncontested that the accident occurred while her limousine driver was trying to escape the photographers who were chasing the limousine.\(^\text{12}\) Consequently, commentators worldwide declared that increased privacy protections are essential to prevent similar tragedies.\(^\text{13}\) For example, just a few days after Diana’s death, was stirred by Princess Diana’s death while in flight from a pack of paparazzi wolves. . . . Since Diana’s accident, proposals to legally curb and punish newspapers guilty of invading privacy have proliferated.” Id.; see also Kurtz, Public to Press: Just Play Fair, supra note 9, at B4; Roy Greenslade, British Press Dips Its Toes in Ethical Waters—For Now Media: Are the Tabloids Really Sincere in Mending Their Ways or Just Ducking the Public Salvo?, L.A. TIMES, Sept. 29, 1997, at B5; Nat Henoff, Who Calls the Shots if Photographers Face New Curbs?, STAR-LEDGER, Sept. 29, 1997, at 25; Joseph Perkins, Intrusions Demand a New Federal Privacy Law, FLORIDA TODAY, Sept. 19, 1997, at A9; James C. Goodale and Jeremy Feigelson, Greater Legal Restrictions on the Paparazzi? No, N.Y.L.J., Sept. 22, 1997, at 2, col. 4; Jennifer Joyce, Lost Photo Opportunities: First Amendment Experts Question Constitutionality of Proposals to Prevent Harassment by Paparazzi, 83-NOV A.B.A.J. 36 (1997); Robert M. O’Neil, Revive News Council to Curb Press, Nat’l L.J., Sept. 22, 1997, at A23, col. 1; Paparazzi Overreaction, TIMES UNION, Sept. 22, 1997, at A6; Alison Boshoff, New Code of Practice for the Press Unveiled, DAILY TELEGRAPH LONDON, Dec. 19, 1997.

Throughout the media, journalists urged the public to distinguish serious journalists from the paparazzi. See Face the Nation, (CBS television broadcast, Aug. 31, 1997). Guest Gloria Borger, of US News and World Report, commented that the paparazzi are mutants and stalkers, not journalists. See id. Not only did mainstream or “respectable” journalists seek to distance themselves from the paparazzi but even tabloid news magazine editors, like Steve Coz of the National Enquirer, tried to distance their papers. See id. Also a guest on Face the Nation, Coz asserted that a difference exists between media who would photograph Princess Diana waving from Al Fayed’s boat and the paparazzi who would chase her down by car. See id. Coz claimed that only a small contingent of paparazzi around the world engage in this chauvinistic behavior and that his paper discouraged chasing. See id.

10. See New Zealand Prime Minister Says Diana Hounded by Media, supra note 2. At a luncheon a few weeks before her death, the Princess told Andrew Roberts, a reporter with The Sunday Times, that she would leave England because of its relentless reporters, were it not for her sons. See id.

11. See Paparazzi Relentless in Pursuit of Their Famous Prey: Princess Diana 1961-1997, supra note 1. Photographs of Diana and Al Fayed had recently appeared in London newspapers. See id. Certainly, the night of the accident was believed to have been one of those private moments upon which the paparazzi intruded. Apparently, Dodi Al Fayed had planned the romantic evening to end with a marriage proposal. See Elaine Ganley, Death of Princess Diana: Princess was Given Diamond Ring Hours Before Death, THE PATRIOT LEDGER, Sept. 4, 1997, at 7. Al Fayed had in fact given Diana a $204,500 diamond ring hours before the fatal crash. See id. The ring was found in the limousine and turned over to Diana’s sisters. See id.

12. See Kurtz, Pictures at a High Price, supra note 2, at A1. The routine and relentless pursuit of famous figures by paparazzi turned “chillingly dangerous . . . where a car accident killed Princess Diana and her friend Dodi Al Fayed as their driver raced to elude several paparazzi on cars and motorcycles.” Id.; see also Faye Fiore, Senator, Actors Focus on Bill to Curb Paparazzi, L.A. TIMES, Feb. 16, 1998, at A1.

two California lawmakers proposed measures to increase the state's protections for celebrities hooded by paparazzi.  

Specifically, the tragedy of Princess Diana's death has sparked debate about media conduct that places individuals in fear or at risk of bodily harm. There are two issues involved: First, whether such conduct can be punished; and second, whether proposed paparazzi legislation was first considered two years before. See id. The bill was put on hold until the death of the Princess "brought the seriousness of the problem home with a blunt force that stunned the world." Id.; see also Fiore, supra note 12, at A1.

Senator Feinstein has argued that state laws are too unpredictable to adequately protect victims. See Statement of Senator Dianne Feinstein Upon Introduction of the Personal Privacy Protection Act, May 20, 1998 http://www.senate.gov/member/ca/feinstein/general/speeches/paparazzi2.html. This unpredictability is due to the fact that some laws are not codified or not well defined due to a lack of precedent. See id. Arguably, both the press and their subjects may suffer harm as a result of unpredictable laws. See Lynissa C. Barnett, Note: Invasion and the Investigative Reporter, 71 Tex. L. Rev. 433, 449 (1992) (discussing dangerous ramifications of ill-defined legal boundaries between legitimate and illegitimate newsgathering techniques). Of course, the countervailing concern exists that unpredictable tort doctrine in this area will chill speech. See Stephen M. Stern, Witch Hunt or Protected Speech: Striking a First Amendment Balance Between Newsgathering and General Laws, 37 Washburn L.J. 115, 116 (1997) ("This was the same concern that compelled the Court in New York Times Co. v. Sullivan to provide First Amendment safeguards.").

Public figures demanded increased privacy protections in the newsgathering context long before Diana's death, partly because Diana's death was not the first time the media had endangered its subjects. See Michelle DeArmond, Paparazzi Clash with Celbs: Stars Fight Back When it's Their Privacy v. Profit, Rocky Mountain News, Aug. 31, 1997, at A78. Four months before Diana's fatal accident, "Arnold Schwarzenegger and his wife, Maria Shriver, were ambushed by celebrity photographers and trapped in their Mercedes Benz between two cars piloted by paparazzi." Id. At the time, "Shriver was pregnant and Schwarzenegger had recently been released from the hospital after heart surgery." Di Mari Ricker, The Wild, Wild Press, 26 Student Lawyer, vol. 6, at 27 (1998). Some commentators believe that the media's newsgathering conduct has gotten worse. See Andrew Jay McClurg, Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places, 73 N.C. L. Rev. 989, 1010 (1995). "We live in an increasingly intrusive, uncivil society" where outrageousness by the media and public interest in outrageousness feed each other. See id. at 1009-17. "The media's willingness to print just about anything about just about anybody carries over to the methods media representatives use to gather information." Id. at 1013.

14. See Cassandra Sweet, Death Prompts California Lawmakers to Seek More Celebrity Protection, AP Newswire, Sept. 2, 1997 (available at http://www.dnai.com/qqbruno/diana.htm). "Amidst outrages from movie stars that what happened to Diana could happen to them, Sens. Tom Hayden . . . and Charles Calderon . . . have announced separate proposals to better protect celebrities from the often-ruthless pursuit of paparazzi." Id. While slightly different in their approaches, both state Senators' proposals included a "physical space barrier between the unwilling subject and photographers." Id.

15. See, e.g., Face the Nation, (CBS television broadcast, Aug. 31, 1997); Proposed US Bill Would Rein in Paparazzi, supra note 13; Ricker, supra note 13, at 26; Spiegelman, supra note 8; The Today Show, (NBC television broadcast, Sept. 1, 1997).
methods will deter such conduct. Because commentators have responded to Princess Diana’s accident by asserting that existing laws are inadequate to prevent future tragedies, it is important to determine the efficacy of the existing measures as well as the potential success of alternative measures.\textsuperscript{16}

Section II of this Comment provides background on the Supreme Court’s balancing of free speech and privacy issues with respect to media conduct.\textsuperscript{17} Section III of this Comment addresses the laws currently in place in the American legal system for punishing media conduct that places an individual in fear or at risk of bodily harm.\textsuperscript{18} Section IV discusses the measures currently existing to deter media conduct that places an individual in fear or at risk of bodily harm.\textsuperscript{19} Section V concludes that existing laws are sufficient to punish, but insufficient to deter, dangerous media conduct. Section V suggests additional deterrent measures.\textsuperscript{20}

II. BACKGROUND

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”\textsuperscript{21} The history of these freedoms are long and extensive, reflecting the importance of these freedoms as “cornerstone[s] of liberty and basic to the existence of constitutional democracy.”\textsuperscript{22}

\textsuperscript{16} See Proposed US Bill Would Rein in Paparazzi, supra note 13. Senator Feinstein, for example, asserts that there is a line between legitimate newsgathering and invasion of privacy, that is being crossed more and more frequently today. See id. With inadequate laws on the books to curb the media, the actor and not the photographer has sometimes wound up on the wrong side of the law. See Fiore, supra note 12, at A1. The actor needs some recourse other than violence. See id.

\textsuperscript{17} For a discussion of some background on the Court’s balancing of free speech and privacy issues with respect to media conduct, see infra notes 28-68 and accompanying text.

\textsuperscript{18} For a discussion of the laws currently in place in the American legal system for punishing the media for conduct that places an individual in fear of or at risk of bodily harm, see infra notes 69-217 and accompanying text. This section explores the scope and application of these laws to determine the extent to which there are gaps in the protection they provide.

\textsuperscript{19} For a discussion of mechanisms currently in place in the American legal system, see infra notes 218-91 and accompanying text. Section IV assesses both whether current laws are sufficient and comprehensive enough to deter such conduct and what additional and alternative measures are worth considering. Section IV also explores the extent to which the threat of punishment generally deters conduct.

\textsuperscript{20} See infra, notes 291-327 and accompanying text.

\textsuperscript{21} U.S. Const. amend. 1.

In United States v. New York Times Co.,23 the Supreme Court noted that the free flow of information and opinions to the public is essential to a constitutional democracy and can only be guaranteed by "[a] vigorous press even a 'cantankerous press, an obstinate press, [and] an ubiquitous press.'"24 Furthermore, democracy requires that "[d]ebate on public issues should be uninhibited, robust, and wide-open."25 The right to publish or broadcast news without prior restraint is at the core of the First Amendment.26 The Supreme Court has frequently stated a heavy presumption against constitutionality for statutes that constitute prior restraints on speech.27 Statutes that punish speech once spoken are not presumed to be unconstitutional, but are usually subjected to strict scrutiny.28

Newsgathering is a critical part of a free press.29 The ability to gather news is, for obvious reasons, integral to the ability to report

23. 328 F. Supp. 324, 331 (S.D.N.Y.) rev'd, 444 F.2d 544 (2d Cir. 1971) (en banc), rev'd, 403 U.S. 713 (1971) (per curiam) (state seeking prior restraint on publication of Vietnam study failed to meet heavy burden to justify imposition of prior restraint).
24. Id. at 331.
25. New York Times v. Sullivan, 376 U.S. 254, 273 (1964) (open criticism of important government conduct does not lose unconstitutional protections merely because it is effective criticism and may diminish official reputations).
28. See Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841-42 (1978). When a state punishes publication after the event it must demonstrate that punishment is necessary to further its interests. See id.; see also Smith, 443 U.S. at 102.
29. See Branzburg v. Hayes, 408 U.S. 665, 681 (1972). "Without some protection for seeking news, freedom of the press could be eviscerated." Id.; see also Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (stating that there is an "undoubted right to gather news 'from any source by means within the law.'"). Focusing on newsgathering conduct, thus, does not divorce this inquiry from the established principles involving free speech—the public's right to know and the media's right to publish. See generally Barnett, supra note 14, at 433 (defending use of subterfuge, such as undercover, as valuable means in uncovering serious abuses and spurring reform); see also Paul A. Lebel, Symposium: Undercover Newsgathering Techniques: Issues
the news. The right to publish or broadcast news does not, however, carry with it the unrestrained right to gather information.

While newsgathering is integral to a free press and to free speech, both of which are broadly protected rights contained within the First Amendment, the right to gather news is limited. There are two reasons for this. First, the Supreme Court has held that only speech and publication of information which is lawfully obtained will be protected from tort liability. Accordingly, if information is unlawfully obtained, neither the publication of the information nor the gathering of the information is protected from liability by the

---


30. See Houchins, 438 U.S. at 11; Branzburg, 448 U.S. at 665; A.A. Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971). "While newsgathering is an integral part of news dissemination, hidden mechanical devices are not indispensable tools of newsgathering . . . . Investigative reporting is an ancient art." Id. Cf. Barnett, supra note 13, at 433; Lebel, supra note 29, at 1154.

Some commentators feel that newsgathering should be afforded the same First Amendment protection as that afforded to the publication of news. See, e.g., Lebel, supra note 29, at 1152.

A truly robust debate contemplates something richer than a purely formal exchange of fixed positions. The notion of public debate anticipates an openness to the consideration of new ideas and a willingness to accommodate new information. . . . If the ideas and opinions in the public debate are to compete for public acceptance, and if their strength depends on the quality of the supporting evidence, then the process of acquiring that evidence should be understood to share in the constitutional attention at least to the extent that is given to speech that injures reputation and invades privacy.

Id.; see also Dyk, supra note 29, at 928.

31. See, e.g., Zemel v. Rusk, 381 U.S. 1, 17 (1965) (holding that First Amendment freedom of press affords media members no greater access to information than is afforded average members of public). Some commentators believe that the press should have greater access to information. See Dyk, supra note 29, at 929.

32. See Von Bulow v. Von Bulow, 811 F.2d 136, 142 (2d Cir. 1987). "This qualified right . . . emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public." Id.

33. See Smith, 443 U.S. at 102-03 (noting that state action to punish publication of truthful, lawfully obtained information will seldom withstand constitutional challenge under strict scrutiny); see also Cox Broadcasting v. Cohn, 420 U.S. 469, 469 (1975) (lawful acquisition of rape victim's name from public records prevents tort liability for publication). Early Supreme Court cases support the notion that if a "newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." Id.; see also Eduardo W. Gonzalez, "Get That Camera Out of My Face! An Examination of the Viability of Suing "Tabloid Television!" for Invasion of Privacy, 51 U. MIAMI L. REV. 935, 945 (1997).
First Amendment. In addition, the Supreme Court has refused to construe the First Amendment as immunizing media defendants for violations of generally applicable criminal and civil laws. The "lawfully obtained" requirement has been employed in conjunction with the concept of generally applicable laws to hold the media accountable for newsgathering conduct that violates generally applicable civil and criminal laws.

An extensive line of cases illustrates that the press is wholly subject to generally applicable laws. These Supreme Court decisions form the framework for analyzing claims of media newsgathering conduct which places an individual in fear of or at risk of bodily harm. One of the most famous of these decisions is Branzburg v. Hayes. In Branzburg, a newsman refused to comply with a grand jury subpoena on the ground that his First Amendment right to gather and report news required that he be protected from testifying and from being forced to disclose his confidential sources to a grand jury. In ruling that the First Amendment does not protect

34. See Smith, 443 U.S. at 102-03; Cox, 420 U.S. at 496 (suggesting that improper means of gathering information may vitiate First Amendment Protections against tort liability); see also, Jeffrey Grossman, First Amendment Implications of Tort Liability for News-Gathering, 1996 Ann. Survey of Amer. Law 583, 592 (1996).


36. See Cohen, 501 U.S. at 669; Wolfson, 924 F. Supp. at 1417 (noting that media defendant's violation of generally applicable law renders information gathered "unlawfully" obtained and not protected). Smith supports the notion that the First Amendment protects journalists' rights to use "routine newspaper reporting techniques" to lawfully obtain information. See Smith, 443 U.S. at 103.

37. See Associated Press, 301 U.S. at 132 (First Amendment does not immunize press from regulatory provisions enacted to protect employees in workplace); Associated Press v. United States, 326 U.S. 1, 7 (1945) (First Amendment does not immunize press from anti-trust provisions); Oklahoma Press Pub'l'g Co. v. Walling, 327 U.S. 186, 193 (1946) (First Amendment does not immunize press from application of Fair Labor Standards Act); Citizens Pub'l'g Co. v. United States, 394 U.S. 131, 139 (1969) (First Amendment does not immunize press from anti-trust provisions); Branzburg v. Hayes, 408 U.S. 665, 665 (1972) (reporters have same obligation to testify before grand jury as do all other citizens); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 562 (1977) (First Amendment does not immunize press from appropriation of right to publicity when press broadcasts performer's entire act without performer's consent thus limiting performer's customers); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 575 (1983) (First Amendment does not immunize press from economic regulations such as use taxes on paper and inks); Cohen, 501 U.S. at 663.

38. See infra notes 69-217.


40. See Branzburg, 408 U.S. at 665.
a reporter who refuses to comply with a grand jury subpoena, the Court held that the media is not immune from the application of general laws regardless of whether a general law places an incidental burden on the press.\textsuperscript{41} In other instances, the Court has held that the press is subject to generally applicable laws such as copyright laws,\textsuperscript{42} the National Labor Relations Act,\textsuperscript{43} the Fair Labor Standards Act,\textsuperscript{44} antitrust regulations,\textsuperscript{45} and non-discriminatory taxes.\textsuperscript{46}

The most recent Supreme Court affirmation of the general applicability standard came in 1991 with the decision in \textit{Cohen v. Cowles}.\textsuperscript{47} The \textit{Cohen} Court held that it is “beyond dispute” that the press has no special immunity from the application of general laws.\textsuperscript{48} Specifically, the \textit{Cohen} Court ruled that where the press makes and subsequently breaches an express promise of confidentiality, the press could be subjected to the general laws governing promissory estoppel.\textsuperscript{49} The Court noted that Minnesota’s doctrine of promissory estoppel “does not target or single out the press. Rather, insofar as we are advised, the doctrine is generally applicable to the daily transactions of all citizens of Minnesota. The First Amendment does not forbid its application to the press.”\textsuperscript{50}

Where the existing generally applicable laws reach the newsgathering conduct employed by a media defendant, the defendant

\begin{itemize}
\item \textsuperscript{41} See \textit{id.} The Supreme Court has consistently held that content-based regulations must withstand strict scrutiny. See \textit{Turner Broad. Systems v. FCC}, 512 U.S. 622, 622 (1994); \textit{R.A.V. v. St. Paul}, 505 U.S. 377, 377 (1992). Content-based regulations suppress, disadvantage, or impose differential burdens upon speech because of its content. See \textit{Turner}, 512 U.S. at 642. Content-neutral regulations, even if they have an incidental burden on First Amendment rights, need only withstand intermediate scrutiny. See \textit{id.}
\item \textsuperscript{43} See \textit{Associated Press v. NLRB}, 301 U.S. 103 (1957).
\item \textsuperscript{44} See \textit{Oklahoma Press Publ'g Co. v. Walling}, 327 U.S. 186 (1946).
\item \textsuperscript{45} See \textit{Associated Press v. United States}, 326 U.S. 1 (1945); \textit{Citizens Publ'g Co. v. United States}, 394 U.S. 131 (1969).
\item \textsuperscript{46} See \textit{Murdock v. Pennsylvania}, 319 U.S. 105 (1943); \textit{Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue}, 460 U.S. 575 (1983).
\item \textsuperscript{47} 501 U.S. 663, 670 (1991). The Court reminded the media that generally applicable laws are not offensive to the First Amendment simply because their enforcement against the press might have an incidental effect on its ability to gather and report the news. See \textit{id.} at 668. The Court noted that “the truthful information sought to be published must have been lawfully acquired.” \textit{Id.} “The press may not with impunity break and enter an office or dwelling to gather news.” \textit{Id.}
\item \textsuperscript{48} See \textit{id.} at 670.
\item \textsuperscript{49} See \textit{id.}
\item \textsuperscript{50} \textit{Id.} The \textit{Cohen} Court found that the Minnesota promissory estoppel doctrine was a law of general applicability. See \textit{id.} The \textit{Cohen} Court also noted that general laws need not withstand any stricter level of scrutiny when applied to the press than when applied to other persons or organizations. See \textit{id.}
\end{itemize}
may face liability.\textsuperscript{51} Recently, an increasing amount of newsgathering conduct has been challenged as unlawful.\textsuperscript{52} There are also an increasing number of recent examples of newsgathering conduct that has gone too far.\textsuperscript{53}

While a responsible press is undoubtedly desirable, "press responsibility is not mandated by the Constitution, and like many other virtues it cannot be legislated."\textsuperscript{54} State and federal courts employing laws of general application, however, have begun demanding press responsibility.\textsuperscript{55} This can be seen in cases which have held

\begin{itemize}
  \item \textsuperscript{51} See O'Neil, supra note 29, at 1013.
  \item \textsuperscript{52} See Gonzalez, supra note 33, at 937. While tabloid television shows are a relatively recent phenomenon, concerns about an over-intrusive press have enveloped legal debate for over a century. See id. Samuel D. Warren and Louis D. Brandeis declared that "[t]he press is overstepping in every direction the obvious bounds of propriety and of decency." Id. Warren and Brandeis concluded that the law is to protect "the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds." Id.; see also Ricker, supra note 13, at 25. The discussion of media accountability has also focused on "today's advanced electronic gadetry that enables paparazzi to snatch images of celebrities' private moments from farther and farther away." Id. "The law is lagging behind the technology. But no matter how much technology has changed since 1789, the First Amendment hasn't changed, and that's what our laws are based on." Id. (quoting Kent Raygor, a partner with Sheppard, Mullin, Richter & Hampton, a Los Angeles entertainment and intellectual property law firm).
  \item \textsuperscript{53} See Symposium: Current Issues in Media and Telecommunications, "Panel I: Accountability of the Media in Investigations," 7 FORDHAM INT'L. PROP. MEDIA & ENT. L.J. 401 (1997); see also Kurtz, Pictures at a High Price, supra note 2, at A1. National Enquirer editor, Steve Coz, commented that some photographers are going too far. See id. People are angry about the lying and hidden cameras "which is why a North Carolina jury hit ABC . . . for secretly filming inside a Food Lion. . . . Folks are mad about phony theatrics, which is why 'Dateline NBC' was forced to apologize for staging the fiery crash of a General Motors truck." Kurtz, Press to Public: Just Play Fair, supra note 9, at B4. Recently, courts have found that the press has gone too far in both its treatment of Maria Shriver and Arnold Schwarzenegger and in its treatment of the Wolfson family in the Philadelphia area. For a further discussion of cases in which courts have decided that the press has gone too far, see infra notes 107-217 and accompanying text.
  \item \textsuperscript{54} Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) (holding that state cannot constitutionally force newspaper to publish which it would otherwise not publish).
  \item \textsuperscript{55} See Sandra Davidson, Blood Money: When Media Expose Others to Risk of Bodily Harm, 19 HASTINGS COMM. & ENT. L.J. 225, 228 (1997).
\end{itemize}
the media liable, making them pay for exposing others to the risk of bodily harm.\textsuperscript{56} The increase in instances of newsgathering conduct that overstepped professional bounds is believed to be due, in part, to technological advancements.\textsuperscript{57} Recently, technological advancements in electronic surveillance have expanded the media's ability to photograph, tape record, and disseminate information and, consequently, have made it easier for news enterprises to invade the sacred precincts of private life.\textsuperscript{58} But, while technology has changed, the First Amendment remains the same.\textsuperscript{59} Following Princess Diana's death, several commentators urged that existing generally applicable laws were insufficient to punish and prevent conduct like that of the photographers present on the night that Diana died, and thus, insisted that greater privacy protections were required to prevent similar tragedies.\textsuperscript{60} Other commentators asserted that the existing generally applicable laws were sufficient.\textsuperscript{61}

\textsuperscript{56} See id. at 229.

\textsuperscript{57} See Gonzalez, supra note 33, at 937; see also Victor A. Kovner, Suzanne L. Telsey, Giana M. McCarthy, Recent Developments in Newsgathering, Invasion of Privacy and Related Torts, 460 P.R. 507, 517 (1996) (noting that advances in electronic surveillance technology has limited application of some First Amendment defenses to claims based on publication, and that aggressive conduct of electronic media has led to increase in claims based on newsgathering). This may now form the most serious threat to media defendants of any of the traditional privacy torts. See id. This is not a new concern. Justices Warren and Brandeis lodged their concerns over the effects that technological advancements would have on the right to privacy and the ability to invade others' privacy. See id.; see also Ricker, supra note 13, at 25. The discussion of media accountability has also focused on "today's advanced electronic gadgetry that enables paparazzi to snatch images of celebrities' private moments from farther and farther away." Id.

\textsuperscript{58} See id. In contrast, some commentators note that the media's increased ability to gather news through investigative techniques has been instrumental in exposing fraud, corruption, and illegal activity and in informing the public as to this wrongdoing. See Barnett, supra note 13, at 434. For example, in one instance, mere description of horrible conditions in a nursing home may not have had the outrage-provoking effect as did the graphic footage which reporters acquired by subterfuge, including hidden cameras. See id.

\textsuperscript{59} See Ricker, supra note 13, at 25. This argument is premised on the fact that certain bodies of law like the tort of trespass, for example, still require antiquated elements such as a physical trespass—regardless of the degree to which the electronic revolution affords one the ability to view places that could never before be viewed without a physical trespass. See Statement of Dianne Feinstein, supra note 13.

\textsuperscript{60} See Spiegelman, supra note 8; see also Ricker, supra note 13, at 25. This position is based on the premise that, if the existing law provided a sufficient threat of punishment, the threat would have deterred the conduct. See id.

\textsuperscript{61} See, e.g., Goodale and Feigelson, supra note 9, at 2, col. 4; Joyce, supra note 9, at 36; O'Neil, supra note 9, at 228, col. 1; Paparazzi Overreaction, supra note 9, at A6.

Speaking directly about the Princess Diana tragedy, commentators noted that laws prohibiting trespassing, harassment, and stalking along with laws against tailgating and aggressive driving are already on the books. Paparazzi Overreaction,
In light of these assertions, the following discussion considers whether the generally applicable privacy laws currently in effect are sufficient to punish the media for newsgathering conduct that places individuals in fear or at risk of bodily harm.

### III. Punishing Dangerous Conduct

This section discusses some of the causes of action available for punishing media conduct which places an individual in fear or at risk of bodily harm in order to determine whether the existing laws of general applicability are sufficient to punish such conduct.

#### A. Imposing Liability

Where newsgathering conduct has placed an individual in fear or at risk of bodily harm, a media defendant may be subject to a variety of tort and criminal claims. A plaintiff might assert such torts as intrusion, assault, battery, false imprisonment, negligence or intentional infliction of emotional distress. Similarly, the state might pursue criminal charges such as harassment, criminal trespass, stalking, disorderly conduct, and reckless endangerment.

Supra note 9, at A6. Were these laws to actually be enforced, the argument continues, they could effectively keep packs of photographers at bay. See id.; see also Goodale and Feigelson, supra note 9, at 2. They claim that “[w]orldwide, it is well settled that newsgathering needs do not excuse media lawbreaking. A journalist who stalks, speeds or assaults should be punished, and can be punished without new legislation.” Id.; see also Jonathan B. Becker, The First Amendment Goes Tactical: News Media Negligence and Ongoing Criminal Incidents, 15 Loy. L.A. Ent. L.J. 626, 648 (1995). “The imposition of liability for torts committed during newsgathering is nothing more than a law of general applicability that clearly falls outside the scope of First Amendment protection.” Id.

62. See Thomas J. Goger, First Amendment as Immunizing Newman from Liability for Tortious Conduct While Gathering News, Annotation, 28 ALR Fed. 904 (1976). 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. See A.A. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971). “[C]rimes and torts committed in news gathering are not constitutionally protected” and there can be no “threat to free press in requiring its agents to act within the law.” Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973).


64. See, e.g., Goger, supra note 62 (discussing numerous claims that could be brought against reporters). These lists, however, are by no means exhaustive, especially in light of the creative lawyering efforts now being employed in actions alleging media misconduct. See Thomas S. Leatherbury, Media Law: Explosion of Lanham Act Cases, 14 SPG Comm. Law. 1 (1996). There are numerous possibilities and potential causes of action that could be asserted. Publication related claims “designed to circumvent the constitutional strictures of defamation” have been increasingly viewed as disguised libel claims. See id. Consequently, plaintiffs’ attorneys have begun to “tweak their pleadings to include claims based on how the
Notwithstanding the foregoing, there is little case law wherein some of these causes of action have, in fact, been employed against media defendants. Existing cases support the argument that no further laws are needed to hold the media accountable for this specific conduct.\textsuperscript{65} Yet, while such laws regarding media defendants exist, there are gaps in the protection they provide.\textsuperscript{66} These gaps are evident in the ways that courts have construed and applied existing laws.\textsuperscript{67} Because of these differing interpretations and applications, some claims are likely to fail.\textsuperscript{68}

1. \textit{The Right to Privacy}

Some commentators urge that increased privacy protection is essential to prevent future tragedies like Princess Diana’s death.\textsuperscript{69} More precisely, some commentators assert that privacy torts represent an ideal cause of action for plaintiffs to invoke against tabloid media defendants.\textsuperscript{70} In light of these assertions, this Comment analyzes the privacy protections currently in place in the United States.

There are two notions of the Right of Privacy.\textsuperscript{71} One is the privacy right that has been construed as emanating from the Bill of Information is gathered." Id. Claims based on newsgathering activity have a higher profile than ever before. See id. Mr. Leatherbury has noted that the newest “end-run around the libel laws shifts the focus back to content, as a growing number of plaintiffs seek to extend the reach of the Lanham Act, demanding both damages for and injunctions against the use of registered or unregistered trademarks in newstories . . . .” Id.; see also Kovner, et al., supra note 57, at 511 (noting creative lawyering efforts as possible end-runs around strict torts laws of defamation); Stern, supra note 13, at 116; see also Symposium: Current Issues in Media and Telecommunications, "Panel 7: Accountability of the Media in Investigations," \textit{7 FORDHAM INTELL. PROP. MEDIA \& ENT. L.J.} 401 (1997). In Food Lion v. Capital Cities/ABC Inc., where ABC sent undercover reporters to work at a Food Lion Grocery Store and then broadcast a story including unauthorized footage of food mishandling, Food Lion did not allege defamation, the more obvious or likely claim. See Food Lion v. Capital Cities/ABC Inc., 887 F. Supp. 811 (M.D.N.C. 1995). Instead, Food Lion alleged violations of fourteen various state and federal laws stemming from ABC’s newsgathering activities. See Stern, supra note 13, at 117.

\textsuperscript{65} For a further discussion of these cases, see infra notes 75-187 and accompanying text.

\textsuperscript{66} See McClurg, supra note 13, at 997. For a further discussion of the gaps in coverage of these laws, see infra notes 188-217 and accompanying text.

\textsuperscript{67} See McClurg, supra note 13, at 997.

\textsuperscript{68} See id.

\textsuperscript{69} See Senate Bill 2103, Purpose and Findings.

\textsuperscript{70} See Gonzalez, supra note 39, at 941. This is because the privacy torts “in their original formulation centered on the notion that an individual’s privacy warranted some form of lawful protection against the actions of an over-intrusive press.” Id. (citing Samuel D. Warren & Louis D. Brandeis, \textit{The Right to Privacy}, \textit{4 HARV. L. REV.} 193, 196 (1890)).

\textsuperscript{71} See Dennis F. Hernandez, \textit{Litigating the Right to Privacy: A Survey of Current Issues}, 446 PLI/Pat 425, 430 (June 20-21, 1996). Both of these notions have
Rights, a limitation on the government's ability to intrude upon certain zones of privacy. The other is the common law privacy tort developed in the 1890s involving the personal right to be left alone. Because the media is not an official branch of government, only the common law privacy tort is related to the issue of media accountability.

The common law privacy tort can be traced to a law review article written in 1890 by Samuel D. Warren and Louis D. Brandeis. These authors reported a trend in the law wherein courts were extending tort protection beyond property rights to privacy rights, which they described as "inviolate personality." Warren and Brandeis asserted that the right to be left alone, as impliedly recognized by the courts in the surveyed decisions, should be expressly recognized as an independent tort. Warren and Brandeis noted the increasing need for privacy protection in the wake of the Industrial Revolution and all the technological advancements it brought with it.

evolved over the last century. See id. at 425 (noting that prior to 1890, no English or American court had ever granted relief based expressly upon invasion of privacy).

72. See Hernandez, supra note 71, at 430-31. In cases such as Griswold v. Connecticut, the Supreme Court recognized zones of privacy constitutionally encompassed in the First, Fourth, Fifth, Ninth and Tenth Amendments to the Bill of Rights. See id. (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

73. See Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890). Some scholars report that the most common views of what the right to privacy entails are 1) the right to be left alone, 2) the right to exercise autonomy or control over significant personal matters and 3) the right to limit access to the self." See id.

74. Absent state action, constitutional protection is unavailable. See, e.g., Hernandez, supra note 72, at 430.

75. See Gonzalez, supra note 33, at 997. "Concerns about an over-intrusive press, however, have enveloped legal debate for over a century." Id. Justices Warren and Brandeis declared that "[t]he press is overstepping in every direction the obvious bounds of propriety and of decency." Id. (citing Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890)).

76. Warren & Brandeis, supra note 73, at 193; see also McClurg, supra note 13, at 997. Upon surveying decisions in numerous areas of law, such as defamation, breach of confidentiality, and breach of implied contract, the authors concluded that the decisions represented a recognition of a right to privacy. See id. at 997; see also Hernandez, supra note 72, at 435-37. Justices Brandeis and Warren wrote of the right to determine the extent to which a "person's thoughts, sentiments, and emotions shall be communicated to others." Id. This seminal article noted that the trend in the common law was a recognition of a "quiet zone" in each person's life that is immune from the prying of neighbors, the press and the public. Martin P. Hoffman, The Rights of Publicity and Privacy, 227 ALI-ABA 227, 229 (1997).

77. See McClurg, supra note 13, at 997.

78. See Hernandez, supra note 72, at 429.
In 1960, Professor Prosser divided the right of privacy into four distinct categories based on the different types of interferences with the rights of the individual.\textsuperscript{79} According to Prosser, courts were imposing tort liability where a defendant intruded into private matters,\textsuperscript{80} disclosed private facts,\textsuperscript{81} published claims that placed a plaintiff in a false light,\textsuperscript{82} and misappropriated a person's name or likeness.\textsuperscript{83} Prosser's four prongs of the right of privacy have been generally accepted by the courts and were even incorporated into both the Restatement (Second) of Torts of 1977 and several states' statutes.\textsuperscript{84} While the fundamental aspects of these torts have been widely accepted, courts appear to differ in their interpretation and application.\textsuperscript{85}

\textsuperscript{79} See Hoffman, supra note 76, at 230; see also Hernandez, supra note 72, at 435-36. To the extent there is a common denominator among the four Prosser prongs, it appears to be the improper interference, by means of observation or communication, with the personal and private spheres, as consigned by strong and widely shared social norms. See Hernandez, supra note 72, at 436.

\textsuperscript{80} See id. at 435-36. “[I]nvasion of privacy by intrusion . . . may be physical in nature, or may be an intrusion into one’s private affairs; examples are police entering one’s home to search same without a warrant; ‘peeping toms’ or stalkers; eavesdroppers; relentless pestering by bill collectors. . . .” Hoffman, supra note 76, at 230.

\textsuperscript{81} See Hernandez, supra note 72, at 453. “One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that would be highly offensive to a reasonable person and is not of legitimate concern to the public.” Id. Newsworthiness is a defense to this tort. A logical nexus should exist between the private facts disclosed, e.g. in rape cases, to what is newsworthy. The extent of the newsworthiness defense is not unlimited. “The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake.” Restatement (Second) of Torts, § 652D.

\textsuperscript{82} See Hernandez, supra note 72, at 435-36. The Restatement (Second) of Torts defines the false light tort as follows:

[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy if (1) the false light in which the other was placed would be highly offensive to a reasonable person, and (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts, § 652E. A number of states do not allow this cause of action—it is highly controversial and rarely well defined. See Hernandez, supra note 72, at 435-36.

\textsuperscript{83} See id. One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy. See id. at 471.

\textsuperscript{84} See Hoffman, supra note 76, at 231. For a further discussion of how courts differ in their interpretation and application of the tort of intrusion, see infra notes 188-217 and accompanying text.

\textsuperscript{85} Some commentators argue that some of these torts have been interpreted into oblivion. See McClurg, supra note 13, at 1002. McClurg writes that after the Supreme Court decision in Florida Star v. B.J.F., the tort of public disclosure of
Intrusion, the first of Prosser's four prongs, directly addresses newsgathering conduct. The other three causes of action require some form of publication. Consequently, this Comment discusses only the intrusion prong of the privacy tort. Since a cause of action for intrusion can be brought regardless of publication, this is "probably the most problematic area of privacy law for the media." Recently, the intrusion tort has been asserted more frequently. This is a result of the increasing use of hidden cameras by the broadcast media. Intrusion claims have accompanied claims of trespass, fraud, RICO and others in recent creative lawyering efforts. The Restatement (Second) of Torts imposes liability for intrusion on "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, . . . if the intrusion would be highly offensive to a reasonable person." Broad as this seems, courts have applied this Restatement definition narrowly. For example, both the Re-

---

private facts "is for most practical purposes dead. . . . The test the Court adopted in Florida Star for when a state may constitutionally punish the publication of true speech is so stringent that Justice White, writing in dissent, argued that the Court had "‘obliterate[d]’ the tort of public disclosure of private facts.” Id. at 1002 (discussing Florida Star v. B.J.F., 491 U.S. 524 (1989)).

86. See Stern, supra note 13, at 133. The intrusion prong of the privacy tort evolved from the common law trespass tort. See Kovner, et al., supra note 57, at 549. Trespass and intrusion claims are similar and are usually brought simultaneously. See Hernandez, supra note 72, at 441. A claim of trespass "can usually be found to accompany intrusion claims.” Id. While the intrusion tort is derived from the trespass tort, in an intrusion claim there need not be a physical trespass but the intrusion must be highly offensive. See id. at 441.

87. See Stern, supra note 13, at 135-36. False light and appropriation, do not directly pertain to the balancing question of First Amendment protection at the newsgathering stage. See id. “False light is strictly a harm to reputation, based on publication. Appropriation . . . [is] also publication-triggered.” Id.

88. In fact, commentators note that the assertion of all different forms of intrusion claims has increased in recent years. See, e.g., Kovner, et al., supra note 57, at 511.

89. Kovner, et al., supra note 57, at 511. This is primarily because the constitutional protection of free press focuses on publication, notwithstanding the fact that newsgathering is a necessary aspect of a free press.

90. See id. at 511.
91. See id.
92. See Kovner, et al., supra note 57, at 511.
93. RESTATEMENT (SECOND) OF TORTS, § 652B.
94. See McClurg, supra note 13, at 1055; see also Kovner, et al., supra note 57, at 511. The Restatement and most courts preclude liability, however, where the defendant can demonstrate that the plaintiff consented to the defendant’s conduct. See id. Consent can be express or implied. See id. Consent is the most effective defense to a claim of intrusion. See Hernandez, supra note 72, at 435-36.
statement and case law expressly limit application of this claim of intrusion upon private places.95

There are three general categories of intrusion claims: 1) media defendant intruded by surreptitious surveillance of plaintiff;96 2) media defendant engaged in a traditional trespass which also amounted to a highly offensive intrusion upon plaintiff’s solitude or seclusion;97 or 3) media defendant was given express or implied

95. See generally McClurg, supra note 13.

96. See Hernandez, supra note 72, at 435-36. Examples of surreptitious surveillance claims include “peeking into windows, electronically recording conversations without consent of all parties and unauthorized reproduction of private documents.” Kovner, et al., supra note 57, at 517. See, e.g., A.A. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Cassidy v. ABC, 60 Ill. App. 3d 831 (1st Div. 1978); see also Desnick v. Capital Cities/ABC, Inc., 44 F.3d 1345 (7th Cir. 1995). In Desnick, an investigative TV news program sent “undercover” patients accompanied by “friends” who concealed cameras and taped the examination of the undercover patient. See Desnick, 44 F.3d at 1348. The district court dismissed the claims of trespass, common law intrusion, state promissory fraud and federal wiretapping. See id. at 1347. The Seventh Circuit expressly distinguished Desnick’s claims against ABC as two distinct types of claims. See id. at 1355. The first type arose from the broadcast and the second type arose from the news gathering, the means by which ABC obtained the information. See id. Because the doctor consented, even though consent was fraudulently induced, the trespass claim had to fall. See id. at 1352. The intrusion claims were also dismissed because the conversations recorded were between the fake patients and the doctors and no personal facts were elicited. See id. at 1353; see also Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811 (M.D.N.C. 1995).

Some intrusion and surreptitious surveillance claims have been brought in concert with claims based on federal wiretapping prohibitions. See Kovner, et al., supra note 57, at 559-60. The Federal Wiretap Statute, prohibits the interception and disclosure of “any wire or oral communication” except where the interceptor and divulger are participants to the communication. See Federal Wiretap Statute, 18 U.S.C. §§ 2510-20. This exception may preclude many claims against undercover investigative newsgatherers. There is, however, an exemption to this exception where the participant’s conduct was for the “purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.” Id. at 560 (citing 18 U.S.C. § 2511(2)(d)). In cases where the media defendant is protected by the statute’s exception, state laws may fill the gaps. See Kovner, et al., supra note 57, at 567 (noting at least 10 states where recording communication is not lawful merely because reporter recording communication is participant). For example, in Dickerson v. Raphael, the Michigan eavesdropping statute, a generally applicable law, made the information a media defendant published to be unlawfully obtained and thus actionable. See Dickerson v. Raphael, 564 N.W.2d 85, 90 (Mich. App. 1997).

97. See Kovner, et al., supra note 57, at 570. A traditional trespass occurs where the defendant intentionally enters upon the plaintiff’s property. See Steven Perry, Hidden Cameras, New Technology, and the Law, 14-FALL COMM. LAW. 1, 20-21 (1996). The greatest obstacle to trespass claims, regardless of whether they amount to an intrusion, is that consent to the trespass is an absolute defense. See Baugh v. CBS, Inc., 828 F. Supp. 745, 756 (N.D. Cal. 1993). Consent can be express or implied, it need not be knowing or intended, and it may have legal effect even where it is procured by fraud. See id. at 756-57.
consent to "intrude" but exceeded the scope of that consent. Conduct falling into one of these three categories may expose the media to liability.

In Wolfson v. Lewis, technological advancements aided journalists at the television tabloid news show, Inside Edition, to engage in the first two of the previously described types of intrusion. These journalists staged an intense and wide-ranging surveillance of the Wolfson family. Upon being denied an interview, the journalists began surveying and monitoring the family's every move. Despite pleas from the family to be left alone, the journalists persisted.

98. See Perry, supra note 97, at 20-21. "Whether the scope of the consent is exceeded will depend on a number of factors. If the plaintiff consented to taping, even if the defendant misrepresented the purpose of the taping, there should be no liability." Id. This includes instances where consent to enter into a private setting for a specified purpose has been exceeded, as where a reporter gains access to information through false pretenses. See Kovner, et al., supra note 57, at 549. In Baugh v. CBS, Inc., defendant specifically told plaintiff, the victim of domestic violence at the hands of her husband, that it was videotaping plaintiff's interview by a victim specialist for the District Attorney's office. See Baugh, 828 F. Supp. 745 at 756. Because plaintiff consented to the video crew's presence and videotaping, her claim for trespass and intrusion failed. See id.

99. See infra notes 106-28 for a further discussion of cases involving intrusion claims.


101. See Kovner, et al., supra note 57, at 511. "Based upon the intensity and variety of surveillance alone, Wolfson v. Lewis, provides the most challenging development in the law of intrusion." Id. (citing Wolfson, 924 F. Supp. at 1415). Journalists from Inside Edition were investigating high executive salaries at U.S. Healthcare. See Wolfson, 924 F. Supp. at 1415. The journalists sought interviews and film footage of plaintiffs, Richard Wolfson, a senior executive at U.S. Healthcare, and his wife Nancy Wolfson also an executive and the daughter of Leonard Abramson, chairman of the board and principal executive officer. See id. Inside Edition is a "syndicated daily television news program." Id.

102. See id. at 1416. The journalists drove along side the Wolfson's cars photographing the Wolfsons and recording their conversations with shotgun mikes (microphones which are capable of recording conversations and sounds at a distance of about sixty yards). See id. at 1423-31. The journalists followed every member of the Wolfson family, including the children, vowing not to stop until the requested interviews were granted. See id. Unbeknownst to the journalists and for unrelated reasons, the family had previously received death threats and the initial stress from the journalists' surveillance was immense. See id. Once the family learned the identity of those following them they were somewhat relieved but no less uncomfortable. See id. They begged the journalists to stop. See id.

103. See id. at 1435. The journalists asserted that their conduct was lawful, declined to stop, and continued to press for an interview promising that they would not relent until the interview was granted. See id. at 1423-31. The journalists even followed the family from Pennsylvania to Florida for their family vacation. See id. While in Florida, the journalists continued their surveillance from boats outside the family home, employing their shotgun mikes and other technology in an effort to catch anything they could. See id.
The Federal District Court for the Eastern District of Pennsylvania granted the Wolfsons a preliminary injunction.\(^{104}\) Finding that the purpose of the harassing efforts was to get the family to grant the interview, and not a more legitimate purpose such as trying to get background material for a story, the conduct was held not to be "routine newsgathering."\(^{105}\) First Amendment protection, the court held, is limited in that it protects the "right of journalists to lawfully obtain information using 'routine newspaper reporting techniques.'"\(^{106}\) The court concluded that the techniques employed by these journalists were neither lawful nor routine.\(^{107}\)

In \textit{Shulman v. Group W Productions, Inc.},\(^{108}\) the court held that the media's videotaping at the scene of plaintiff's car accident was not an intrusion because the site could be observed by anyone and because the traumatic accident was newsworthy.\(^{109}\) The California Supreme Court held that the lower courts improperly granted summary judgment because they should have allowed a jury to determine whether a reasonable person would have found highly

\(^{104}\) \textit{See id.} at 1422.
In ruling on a motion for a preliminary injunction, the district court must consider (1) the likelihood that the plaintiff will prevail on the merits at trial (2) the extent to which plaintiffs will suffer irreparable harm in the absence of an injunction (3) the extent to which the defendant will suffer irreparable harm if the preliminary injunction is issued, and (4) the public interest.

\textit{Id.} The court found that all four of these factors were met with respect to the intrusion claims. \textit{See id.} The court could not grant the injunction with respect to the trespass claim relating to the photographs taken from the edge of the plaintiffs' driveway because the state law was unclear as to whether trespass law allowed such a claim. \textit{See id.} at 1423-31. The court granted the preliminary injunction upon finding that plaintiffs had established a reasonable likelihood of succeeding on their intrusion claim. \textit{See id.}

\(^{105}\) \textit{Id.} Furthermore, the court held that the journalists' use of the shotgun mikes was actionable but use of cameras placed on the roadway outside the plaintiff's house was not. \textit{See id.}

\(^{106}\) \textit{Wolfson}, 924 F. Supp. at 1417 (citing \textit{Smith v. Daily Mail Publ'g Co.}, 443 U.S. 97, 103 (1979)).

\(^{107}\) \textit{See id.} The \textit{Wolfson} court relied on \textit{Galella v. Onassis} and A.A. Dietemann v. Time in reaching this conclusion. This part of the decision was wholly unprecedented. \textit{See id.} A defense expert testified that the journalists activities "were consistent with journalistic standards, and that 'stakeouts' of subjects homes and photographs of subjects in public places without their knowledge was 'completely routine newsgathering.'" Kovner, et al., \textit{supra} note 57, at 515. In fact, it should be noted that much of the journalists' conduct in the \textit{Wolfson} case is not unusual; however, much of it was "outrageous and troubling." \textit{Id.}

\(^{108}\) 74 Cal. Rptr. 2d 843 (June 1, 1998).

\(^{109}\) \textit{Id.} at 862 (June 1, 1998). The California Supreme Court noted that the accident scene was not visible from the road thus making it even less likely that the accident could really have been observed by anyone on the road and buttressing the argument that those on the road were unlikely to have been able to hear plaintiff's conversations with her rescuers. \textit{See id.} at 864.
offensive the media's presence, tape recording and videotaping of
the activities in the rescue helicopter. The court believed that a
jury could well have found that the media's presence and conduct
in the helicopter as well as the media's tape recording of the vic-
tim's conversations with the rescue team during on the scene treat-
ment was highly offensive and possibly an intrusion. Accordingly,
those issues were remanded for trial.

In Miller v. NBC, the California Court of Appeals for the Sec-
do District found NBC liable for trespass and intrusion. In
Miller, an NBC television camera crew entered the Miller home
without consent to film paramedics who had been called to try to
save Mr. Miller's life. NBC then broadcast the footage of Mr.
Miller's fatal heart attack without Mrs. Miller's consent. Finding
that NBC had not been given consent to enter the premises and
that a reasonable person could find NBC's conduct "highly offen-
sive," the court determined that Mrs. Miller had successfully stated
a cause of action that could go to a jury for factual determina-
tions.

In A.A. Dietemann v. Time, Inc., reporters from Life magazine
used subterfuge to enter the office portion of Dietemann's house
and, without consent, proceeded to photograph, record and trans-
mit his conversations with other people. The reporters were
found liable for trespass and intentional infliction of emotional
distress. The Ninth Circuit warned that the First Amendment has
"never been construed to accord newsmen immunity from torts or

110. See id. at 868.
111. See id. at 871-72.
112. 292 Cal. Rptr. 668 (1986).
113. See id. at 677-79. Here the defendants engaged in the second kind of
invasion, the trespass that also amounts to a highly offensive intrusion upon the
seclusion and solitude of an individual.
114. See id. at 670.
115. See id. In fact, NBC broadcast the footage without consent and without
giving notice to the family the first time and then re-broadcast the footage after an
express request that it not be broadcast. See id.
116. See id. at 679. Mrs. Miller also prevailed on her claim of intentional inf-
liction of emotional distress. For a further discussion of this claim, see infra notes
173-87 and accompanying text.
117. 49 F.2d 245 (9th Cir. 1971).
118. See id.; see also Gonzalez, supra note 33, at 939. Here the media defend-
ants engaged in the first and third kind of intrusions, surreptitious surveillance
and exceeding consent.
119. See Dietemann, 449 F.2d at 249. Commentators have noted that while the
Ninth Circuit held the newsgathering conduct in Dietemann to be an intrusion, it
did not provide an adequate conceptual framework for what newsgathering con-
don卓 will and will not subject the newsgatherer to tort liability. See Garnett, supra
note 13, at 443. Accordingly, "the investigative reporter attempting to determine
crimes committed during the course of newsgathering."120 Furthermore, the court advised that 
"[t]he First Amendment does not become a license to trespass, steal or intrude into the 
precincts of another's home or office simply because the person subjected to the 
intrusion is reasonably suspected of committing a crime."121

2. Stalking and Disorderly Conduct

Stalking and disorderly conduct are two criminal sanctions that states can pursue against media defendants.122 Stalking was not a crime until California prohibited it in a 1992 statute.123 Stalking legislation evolved out of an inability of existing legislative remedies to protect victims from their stalkers.124 The elements of stalking legislation vary among the states.125 Typical statutes require intentional, willful or knowing intent to put the victim in reasonable fear of bodily harm or death, coupled with the act of harassing or following.126 As most statutes require an intent to harm, and most

whether to go undercover . . . must do so at the peril of possible tort liability." Id. at 441.

120. Id.

121. Dietemann, 449 F.2d at 249. The court was convinced that Californians would approve of the extension of the tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in plaintiff's position could reasonably expect that the particular defendant should be excluded. See Gonzalez, supra note 33, at 940.

122. See, e.g., Goodale and Feigelson, supra note 9, at 2; Paparazzi Overreaction, supra note 9, at A6. While many commentators responding to Princess Diana's fatal accident included stalking among the generally applicable laws already in effect to punish such newsgathering conduct, no cases were found wherein a media defendant had been charged with stalking.

123. See CAL. PENAL CODE § 646.9 (West 1992); see also Suzanne L. Karbarz, The First Amendment Implications of Anti-Stalking Statutes, 21 J. Legis. 333, 335 (1995).

124. See id.

125. See Karbarz, supra note 123, at 336. For example, state statutes differ with respect to the degree of intent required for conviction. See id. Some states have broad proscriptions whereas others are very specific. See id.

126. See id. at 336-37. Some commentators assert that anti-stalking provisions are ideally suited to combat newsgathering conduct that places the individual in fear or at risk of bodily harm. See Joyce, supra note 9, at 36. "Media lawyers . . . say threats posed by aggressive photographers can be addressed by anti-stalking statutes, in effect in all 50 states. Laws prohibiting trespass and assault also can be used." Id. Commentators have noted, however, that courts are applying anti-stalking laws without fear of chilling expressive conduct. See Karbarz, supra note 123, at 333.

Anti-Stalking statutes were enacted to protect men and women from harassing, threatening activity. The activity being proscribed by the statutes transcends mere expressive conduct. Stalkers place their victims in fear of them. This type of activity is not worthy of constitutional protection. States have the right to protect their citizens from those who place them in fear.

Id. at 350.
members of the media engage in conduct with an intent to profit rather than to harm, stalking laws may not provide sufficient coverage or prove a viable remedy in the media context.

Several states have convicted reporters for disorderly conduct for actions undertaken in the course of newsgathering.\textsuperscript{127} Disorderly conduct is not only subject to a generally applicable criminal statute; the same conduct can be the basis of civil liability for various tort claims.\textsuperscript{128}

3. Assault, Battery and Harassment

Generally, a civil battery is an intentional harmful or offensive contact, and a civil assault is the placing of another in reasonable apprehension of a battery.\textsuperscript{129} Actual physical harm is not a necessary element of either tort.\textsuperscript{130} If a reasonable person would find the contact offensive, the contact will be offensive under either tort.\textsuperscript{131} To prevail on an assault claim, the plaintiff must be placed in reasonable fear of an imminent battery.\textsuperscript{132} Unlike the law concerning assault and battery, which is well established, the law of harassment is not always well defined in case law or in statutes.\textsuperscript{133}

In \textit{Galella v. Onassis},\textsuperscript{134} former first lady Jacqueline Kennedy Onassis was sued by a reporter against whom she had obtained a restraining order.\textsuperscript{135} The reporter asserted that Mrs. Onassis’ re-

\textsuperscript{127} See, e.g., City of Oak Creek v. King, 436 N.W.2d 285, 285 (Wis. 1989) (denying newsgatherer access to airplane crash site did not violate First Amendment but newsgathering conduct did constitute disorderly conduct and warrant conviction); State v. Cantor, 534 A.2d 83, 83 (N.J. Super. 1987) (reporter impersonation of public official to gain information from homicide victim’s mother constituted disorderly conduct and lead to conviction); State v. Lashinsky, 404 A.2d 1121, 1121 (N.J. 1979) (press photographer’s refusal to heed police order to clear accident scene for ambulance and other emergency access constituted violation of state disorderly conduct statute).

\textsuperscript{128} For example, the reporter’s conduct in State v. Lashinsky is virtually identical to the conduct commentators warn can constitute negligence and subject newsgatherers to civil liability. See Becker, \textit{supra} note 14, at 625-26. For a further discussion of negligence, see \textit{infra} notes 157-72 and accompanying text.


\textsuperscript{130} See id.

\textsuperscript{131} See id.

\textsuperscript{132} See id. Threats of future harm are not sufficient for a claim to stand.

\textsuperscript{133} See Feinstein, \textit{supra} note 13. Similar complaints are lodged against reckless endangerment and stalking prohibitions. See id. The reckless endangerment statutes are applied inconsistently at best. See id. Anti-stalking ordinances do not usually apply to activities undertaken for commercial purposes or require proof of criminal intent to cause fear. See id.


\textsuperscript{135} See id. at 199.
fusal to allow him to photograph her impeded his First Amend-
ment right to gather news.156 Mrs. Onassis cross-complained,
alleging outrageous newsgathering conduct, including claims of
assault and battery and harassment.137 The court concluded that the
First Amendment "does not immunize all conduct designed to
gather information about or photographs of a public figure. . . .
[T]here is no constitutional right to assault, harass, or unceasingly
shadow or distress public figures."138 On appeal, the Second Cir-
quet affirmed, concluding that "[c]rimes and torts committed in
newsgathering are not protected" and that "[t]here is no threat to
a free press in requiring its agents to act within the law."139
Galella's persistent threats to Mrs. Onassis, including "jumping
from concealed locations, following her at close distances at high
speeds and otherwise carrying out the paparazzi attack, consti-
tute[d] civil assault."140 Where his conduct amounted to an offen-
sive contact, Galella had committed a battery.141 Although this is
one of the few cases in which individuals have successfully alleged
assault and battery claims against media defendants, courts and
commentators have repeatedly affirmed that a member of the me-
dia cannot avoid liability for assault or battery by presenting a new-
gathering defense.142

136. See id. at 220. The court sought to assess whether the First Amendment
rights to photograph and gather news would be infringed by injunctive relief. See
id. Galella asserted that the First Amendment provided him with a complete de-
fense to the counterclaim and intervenor complaint. See id. The court rejected
this contention because the First Amendment does not give the press the liberty to
engage in any sort of conduct, no matter how offensive, in order to gather news.
See id. at 220.

137. See Galella, 353 F. Supp. at 199.
138. Id. at 223.
139. Galella I, 487 F.2d at 995-96.
140. Id.
141. See Galella, 353 F. Supp. at 226. Galella's conduct included flicking Onas-
sis with a camera strap, bumping her, and brushing up against her. See id.
142. In California v. Harrison and O'Brien, one photographer pushed aside a
person who tried to help the photographer's subject. See Court TV Verdicts, infra
note 146; See also O'Neil, Tainted Sources, supra note 51, at 1013.
Newsgathering conduct does not absolve journalists from direct liability
for damages caused by aggressive pursuit of information. If a reporter
tramples a flower bed, breaks a window, or assaults a person in pursuit of
a story, no court in the country would entertain a First Amendment de-
fense to a suit for direct damages. The journalistic goal would, in fact, be
irrelevant to most such claims.
Id. Where a reporter commits an assault or battery to acquire information, it does
not impede the ability of the First Amendment to hold the media liable for the
injuries. See id. The newspaper or television station may still be able to use the
story, but will likely be held accountable for the crimes committed. See id.
Some commentators imply that Galella is settled law that has been on the
books, undisturbed for twenty-five years. See Goodale and Feigelson, supra note 9,
4. False Imprisonment

Where the media’s conduct physically restrains the person against her will and without lawful justification, the media may be found liable for false imprisonment.145 Such conduct can be the basis of both criminal and civil liability.

In May 1997, Arnold Schwarzenegger and his wife Maria Shriver were run off the road by photographers who surrounded the couple’s car.144 Mr. Schwarzenegger had recently undergone heart surgery, Ms. Shriver was five months pregnant and their young son was in the car.145 In February 1998, the photographers were convicted of false imprisonment, reckless driving and battery.146

In Delan v. CBS, Inc.,147 a mental patient sued CBS alleging false imprisonment because a CBS reporter filmed the patient in a mental institution.148 Although the civil claim in Delan failed because the patient could not establish that he was restrained by CBS, a plaintiff who can establish the elements of false imprisonment may succeed in bringing such a cause of action.149

5. Negligence

The tort of negligence includes the following four elements: (1) the defendant must have a duty to use reasonable care with

at 2. Galella essentially held that the rule “that a photographer has no more right than anyone else to physically menace a subject, has been on the books for many years without unduly disturbing the work of either mainstream or tabloid journalists.” Id. Perhaps one of the reasons there are not more cases reported that decide whether liability for assault and battery can be imposed upon the media is because the lines, in Galella, are clearly drawn. See id.

143. See Court TV Verdicts, infra note 146. Threats of future restraint are generally not actionable.

144. See Ricker, supra note 13, at 27.

145. See id. “While the incident ended without physical harm, it was an eerie precursor to the Diana tragedy months later.” Ricker, supra note 13, at 27.

146. See Court TV Verdicts, “California v. Harrison and O’Brien: ‘The Arnold Schwarzenegger Paparazzi Trial,’” http://www.courttv.com/verdicts/paparazzi.html. Gilles Harrison was charged with reckless driving and two counts of false imprisonment. See id. Andrew O’Brien was charged with four counts of false imprisonment (because he had boxed the couple in twice that day) and battery for shoving aside people who tried to help the couple. See id.; see also Robert W. Welkos, Two Photographers Sentenced to Jail: Judge Says Their Conduct in Pursuing Actor Arnold Schwarzenegger and Wife Maria Shriver was “Morally Wrong,” L.A. TIMES, Feb. 24, 1998, at B3. O’Brien was sentenced to 90 days in jail, while Harrison was sentenced to 60 days. See id. Both were fined $500 and placed on “informal” probation for two years. See id.


148. See id. at 900-01.

149. See id. at 903.
respect to the plaintiff; (2) the defendant must breach that duty; (3) the defendant's breach of that duty to use reasonable care must be the proximate and actual cause of plaintiff's injury; and (4) the plaintiff must suffer actual damages from the injury. The cases in which negligence has been alleged have focused on the extent to which newsgathering conduct of the media is unreasonable in light of the foreseeable risks involved.

"Foreseeability' has consistently referred to what a 'reasonably prudent person' would 'reasonably' foresee under similar circumstances." While parties regularly dispute foreseeability, courts have begun to impose liability on members of the media found to engage in behavior in which a reasonably prudent person would not engage because of the foreseeability that harm would result.

Some courts have been willing to impose liability on the media for the foreseeable consequences of newsgathering activities which interfere with law enforcement efforts. Such impositions of liability indicate that courts are responding to the media's ever-increasing technological ability to report stories as they happen.


152. Davidson, supra note 55, at 231.

153. See id. at 255-37. Courts that have dealt with claims that media negligence has caused physical harm have been cautious in determining what comprises a foreseeable result of newsgathering conduct. See id. For example, the court could not find foreseeable harm when one guest murdered another guest 12 days after their joint appearance on the Jenny Jones television show. See id. The court stated that irrational or outrageous behavior on the part of a talk show guest fails to evoke media liability absent specific circumstances making such behavior foreseeable. See id.

154. See Risenhoover, 936 F. Supp. at 404-11; see also Becker, supra note 14, at 626 (discussing incidents where media have interfered with law enforcement efforts and have been held liable). In 1987, a San Diego news team interfered with a police department attempt to catch a fleeing criminal. See id. at 625-26. When an officer realized that a reporter was dangerously situated right in the line of fire, he withdrew his weapon and was shot by the escaping suspect. See id. Similar conduct in New Jersey subjected a reporter to criminal liability for disorderly conduct. See State v. Lashinsky, 404 A.2d 1121, 1121 (N.J. 1979). For a further discussion of disorderly conduct charges, see supra note 128 and accompanying text.

155. See Becker, supra note 15, at 627-28. With the advent of new technologies such as satellite uplinks and remote camera crews, television has displaced newspapers and radio as the predominant news medium. This shift has enabled the media to bring stories to the public as they happen rather than reporting them the next day. By sending out a remote camera crew, the news media is able to report breaking stories live, allowing the public to see first-hand everything from terrorist attacks to natural disasters.
Increased media efforts to report "live and late-breaking news" have clearly resulted in increased carelessness and occasional negligence.\textsuperscript{156} There is often less time for the media to assess safety issues involved when selecting newsgathering methods.\textsuperscript{157} In \textit{Risenhoover v. England}, news trucks surrounded the Branch Davidian compound about an hour before federal agents intended to raid it.\textsuperscript{158} An injured federal agent sued members of the media, alleging negligence.\textsuperscript{159} The reporters were found negligent and liable because the court concluded that it was foreseeable that media presence would alarm the Branch Davidians that something would soon take place.\textsuperscript{160}

Liability under claims of negligence has also been imposed where a member of the media reported the name and address of a victim or witness to a crime before the perpetrator was in custody.\textsuperscript{161} If the facts indicate that further criminal action by the perpetrator was a foreseeable result of the disclosure, liability may be imposed.\textsuperscript{162}

The Supreme Court has not yet decided a case involving newsgathering conduct and alleged negligence. The Court, however, has never granted immunity to members of the media who publish information that a reasonably prudent journalist would not print.\textsuperscript{163} If a foreseeable harm does occur, the media may face lia-

\textit{Id.} at 627; \textit{see also} Katherine Graham, \textit{Terrorism \& the Media}, L.A. Daily J., Daily J. Rep., May 2, 1986, at 10, 16. "The electronic media in the U.S. live or die by their ratings, the number of viewers they attract. As a result, each network wants to be the first with the most on any big story." \textit{Id.; see also} Becker, supra note 14, at 628. "The intense competition between networks to be the first to report a particular story sometimes leads reporters to engage in dangerous newsgathering and broadcasting activities." \textit{Id.} at 628.

\textsuperscript{156} \textit{See id.} at 627. "The media now aggressively pursues breaking stories and demands complete access to ongoing situations." \textit{Id.} While the benefit of live coverage has been a better informed public, the costs have been serious problems for law enforcement and, in some cases, the lives of hostages and responding officers have been put at risk. \textit{See id.}

\textsuperscript{157} \textit{See id.}

\textsuperscript{158} \textit{See Risenhoover}, 936 F. Supp. at 408.

\textsuperscript{159} \textit{See id.} at 396.

\textsuperscript{160} \textit{See Davidson, supra} note 55, at 246. The media's conduct, the court said, allowed the Branch Davidians time to prepare and forcibly resist. \textit{See id.} Not only can media outfits eliminate the element of surprise but, as commentators note, they can increase the danger of stand-off type situations. \textit{See Becker, supra} note 14, at 630. Despite police restrictions, media members cross police lines seeking a superior point of view. \textit{See id.} Suspects may perceive the media as being in a safe zone, into which the police will not fire. \textit{See id.} Police may have to change their focus from capturing a fleeing suspect to protecting a media member. \textit{See id.}

\textsuperscript{161} \textit{See Davidson, supra} note 55; \textit{see also} notes 104-12 and accompanying text.

\textsuperscript{162} \textit{See id.} at 252-56.

\textsuperscript{163} \textit{See id.}
bility for negligence even if the information was lawfully obtained.\textsuperscript{164} Thus, negligence suits constitute an increasing risk to the financial health of the media.\textsuperscript{165}

6. Intentional Infliction of Emotional Distress

Members of the media may be found liable for intentional infliction of emotional distress, as well as for any bodily harm resulting from a plaintiff’s distress.\textsuperscript{166} The plaintiff must show that the defendant engaged in extreme and outrageous conduct with the intention or with reckless disregard for the likelihood of causing emotional distress, and that defendant’s conduct was the actual or proximate cause of the plaintiff’s extreme or severe emotional distress.\textsuperscript{167} Where the claim arises from publication, additional burdens of proof are placed on the plaintiff.\textsuperscript{168} Jacqueline Onassis prevailed in such a claim against photographer Galella.\textsuperscript{169}

In \textit{Green v. Chicago Tribune Co.},\textsuperscript{170} the court allowed the plaintiff, Mrs. Green, to proceed with a claim of intentional infliction of emotional distress against \textit{The Chicago Tribune} because a reasonable jury could have found \textit{The Tribune} liable.\textsuperscript{171} In this case, \textit{The Chicago

\textsuperscript{164} See id. at 256.

\textsuperscript{165} See id. at 230.


\textsuperscript{167} See, e.g., Miller, 232 Cal. Rptr. at 681; see also Green, 675 N.E.2d at 256 (holding that extreme and outrageous conduct sufficient to create liability for intentional infliction of emotional distress is conduct exceeding all possible bounds of decency).

\textsuperscript{168} See id; see also Hustler, 485 U.S. at 46. This additional burden stems from the reporter’s First Amendment right to publish truthful information about a matter of public importance. See \textit{Green}, 675 N.E.2d at 257.


\textsuperscript{170} 675 N.E.2d 249 (Ill. 1996). In \textit{Green}, Chicago Tribune reporters published statements they overheard Mrs. Green say to her dying son. See id. at 251. Mrs. Green had refused to give a public statement and had refused to allow the Tribune to photograph her dying son. See id. Not only did the Tribune publish her statement over her objection, it also prevented Mrs. Green from entering her son’s hospital room while it photographed her dying son. See id.

\textsuperscript{171} See id. at 256. The lower court had dismissed the claim based on the newspaper’s First Amendment Rights to gather news. See id.
Tribune entered her dying son's hospital room, over his and Mrs. Green's objections, and taped their conversations. Because the conduct that allegedly caused the emotional distress to Mrs. Green involved both publication and newsgathering, Mrs. Green was required to meet the additional burden of proving that the information published by The Tribune was not of legitimate public importance.

In Baugh v. CBS, Inc., CBS reporters accompanied a domestic violence counselor into the house of the plaintiff, Mrs. Baugh, immediately following an attack on her by her husband, and filmed Mrs. Baugh's interview with the counselor. The court declined to dismiss the claim because the defendants knew that they were entering the plaintiff's home and filming her during a moment of extreme emotional vulnerability.

In Miller v. NBC, NBC reporters followed a paramedic team into the home of the plaintiff, Mrs. Miller, and filmed the paramedics' effort to resuscitate her husband Mr. Miller during a fatal heart attack. NBC broadcast the footage on more than one occasion. The court found NBC's conduct in entering the home and in airing the footage to be arguably outrageous and definitely reckless in its disregard for Mrs. Miller's probable emotional distress. Accordingly, the court sent the case to a jury to decide liability.

172. See id.
173. See id. at 257-58. The newsgathering and the publication provided the factual basis of the claim for intentional infliction of emotional distress. See id. This requirement evolved from the Supreme Court's decision in Hustler Magazine v. Falwell, 485 U.S. 46 (1988). In Hustler, the injury to Reverend Jerry Falwell resulted only from publication. See id. at 50. In this situation, Hustler published a parody of Falwell. See id. at 47-48. Falwell could only prevail on a claim against the magazine under the generally applicable laws regarding intentional infliction of emotional distress if he could also show actual malice. See id. at 52-53. "The Hustler opinion stood for the proposition that violations of general laws emanating from publication also require proof of actual malice." See Stern, supra note 13, at 117. The Court seemed to require that generally applicable laws will be subjected to heightened scrutiny where publication is the conduct that allegedly violated a generally applicable law. See id.
175. See id. at 758. For a discussion of the intrusion claims based on the means employed to procure entry into Mrs. Baugh's home, see supra notes 98-99 and accompanying text.
176. See Baugh, 828 F. Supp. at 758.
177. 292 Cal. Rptr. 668 (1986).
178. See id. at 682.
179. See id.
180. See id. NBC entered Miller's home without consent and broadcast Mr. Miller's fatal heart attack once without consent and a second time despite pleas
B. Gaps in Protection Due to Application and Interpretation

On its face, this line of cases strongly suggests that existing generally applicable laws are sufficient to hold the media accountable where its newsgathering conduct has placed an individual in fear or at risk of bodily harm. A more thorough evaluation, however, reveals significant gaps in the protection provided by generally applicable laws. For example, the tort of intrusion is limited to invasions of privacy that occur in private places. Courts have rigidly adhered to this rule to the detriment of plaintiffs and the right of privacy.

Media defendants have won several cases in state courts under this “no invasion of privacy in a public place” rationale. For example, in Mark v. Seattle Times, the Washington Supreme Court from the family that the footage not be broadcast. Accordingly, the court believed that a jury could find intentional infliction of emotional distress. The court left it to a jury to determine whether the conduct was actually outrageous, overturning the lower court’s dismissal of Mrs. Miller’s claim. See id.

181. See McClurg, supra note 13, at 990-95.
182. See McClurg, supra note 13, at 994, 1009. “Tort law clings stubbornly to the principle that privacy cannot be invaded in or from a public place.” Id. Even if this rule was once sound, it is outdated “in a modern technological society where the video camcorder has become a permanent fixture and where invasive tabloid and reality television programming have become standard forms of journalism and entertainment.” Id. at 990-91. “Instances of intrusive conduct in public places are becoming increasingly common and more brazen.” Id. at 991.

183. See McClurg, supra note 13, at 990 (noting that almost all courts interpret intrusion tort not to protect individuals in places accessible to public); see also, Gonzalez, supra note 33, at 942; Hernandez, supra note 72, at 442 (arguing that claims of intrusion where plaintiff is in public place are wholly unavailing). The comments to the Restatement (Second) of Torts § 652B, regarding the tort of intrusion, discuss the limits of the tort with respect to public places. RESTATEMENT (SECOND) OF TORTS § 652B.

184. See McClurg, supra note 13, at 994-96. The courts’ rigid adherence to this rule “demonstrates an incomplete comprehension of the nature of privacy and the interests it is designed to protect.” Id. at 995. With courts holding on to this rule, plaintiffs “lose early and often.” Id. at 992.

It is interesting to note that the statutory right of privacy in France is not absolute. See Jeanne M. Hauch, Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris, 68 Tul. L. Rev. 1219, 1225-46, 1249 (1994). Even with strong protection from intrusion upon personal life, there are limits on privacy in public. See id.

In marked contrast to personal life, disclosures of one’s professional and public life are not protected. When a person is participating in public life in the sense of being out and about, he can expect his activities to be public knowledge. If a person is featured at a public event, occupies a background spot in a representation of a public place, or is part of a group photograph, the person cannot complain of the use of his image. Id. at 1249. Nevertheless, there is greater privacy in public, provided that one is engaged in one’s personal life, than there is in the United States. See id.

185. See Gonzalez, supra note 33, at 942.
concluded that a television cameraman’s filming of the inside of a store from the sidewalk outside did not constitute an intrusion.\(^\text{187}\) The Court reasoned that the site of the “filming was open to the public and anyone passing by the pharmacy could have viewed the actions taped on film.”\(^\text{188}\)

There are, however, several cases where courts have permitted plaintiffs to recover for invasions of privacy in public places by implication or through tort theories other than intrusion.\(^\text{189}\) In recent years, courts have more explicitly recognized public or semi-public privacy.\(^\text{190}\) For example, in Wolfson, the Eastern District of Pennsylvania departed from precedent to find that an intrusion could exist in a “public or semi-public place.”\(^\text{191}\) The court held that conduct that “amounts to a persistent course of hounding, harassment and unreasonable surveillance,” could reach the “level of invasion of privacy based on intrusion upon seclusion.”\(^\text{192}\) Notwithstanding this part of the decision, the Wolfson court refused to grant an injunction with respect to the plaintiffs’ trespass claim due to its uncertainty as to whether, under state law, an actionable trespass could occur in a public place.\(^\text{193}\) Other cases, such as Shulman v. Group W Productions, Inc.\(^\text{194}\) and Green v. Chicago Tribune Co.,\(^\text{195}\) support the conclusion that intrusion claims can withstand

\(^{187}\) See Mark v. Seattle Times, 635 P.2d 1081 (Wash. 1981), cert. denied, 457 U.S. 1124 (1982). The photographer was not just filming the inside of the store, the photographer was filming through the window of his locked pharmacy, the actions of a pharmacist who had been indicted for Medicaid fraud. See id.

\(^{188}\) Id. at 1095; see also Kovner, et al., supra note 57, at 255; Haynie v. Zimlich, 508 N.E.2d 195, 201 (Ohio Com. Pl. 1986).

\(^{189}\) See McClurg, supra note 13, at 1044-55. In several cases, courts have impliedly recognized a right of privacy in public. See id. For example, in Galella v. Onassis, the “district and appellate court judges assumed that Galella invaded the privacy of Onassis and her children, even though most of his conduct occurred in public places.” Id. at 1048.

\(^{190}\) See McClurg, supra note 13, at 1044-49.

\(^{191}\) Wolfson v. Lewis, 924 F. Supp. at 1420. The Dietemann case is also noteworthy in that it is the case wherein the Ninth Circuit first recognized the tort of intrusion, “an invasion of privacy, whether by physical trespass or not, into spheres from which an ordinary man in plaintiff’s position could reasonably expect that the particular defendant should be excluded.” Gonzalez, supra note 33, at 940 (citing Dietemann, 444 F.2d at 249; quoting Pearson v. Dodd, 410 F.2d 701, 704 (D.C. Cir. 1969)).

\(^{192}\) Wolfson, 924 F. Supp. at 1420.

\(^{193}\) See id.

\(^{194}\) 74 Cal. Rptr. 2d 843 (June 1, 1998).

\(^{195}\) 675 N.E.2d 249, 256 (1996).
challenges where the intrusion took place in semi-public places like a hospital room and a rescue helicopter.196

Many commentators believe that people have a legitimate expectation of a certain degree of privacy “even when they are visible in or from places open to the public.”197 These commentators maintain that “public privacy” must be recognized to protect those who are subjected to highly offensive public intrusions yet currently have no recourse in the legal system.198

Another criticism levied against generally applicable laws is that judges are generally wary, if not hostile, towards the privacy tort.199 This wariness flows from the problem of defining the common-law right of privacy.200 A cause of action that eludes definition

196. See Shulman, 74 Cal. Rptr. 2d at 864; Green, 675 N.E.2d at 256. In addition, the Shulman decision indicates that the surrounding circumstances instead of mere location, may determine whether an intrusion has occurred. See Shulman, 74 Cal. Rptr. at 867. Specifically, the Shulman court found that a jury might conclude that media intrusion upon an injured plaintiff’s conversations with rescue workers would be highly offensive to a reasonable person. See id.

197. McClurg, supra note 13, at 995.

198. See id.

199. See id. at 1004. Some commentators argue that judicial ambivalence towards the privacy tort has to do with inherent ambiguities of the tort. See id. at 1006. Partially due to the “free speech implications of many privacy cases, courts no doubt feel obliged to screen privacy cases carefully before sending them to juries. However, it also appears that some judges simply ‘don’t get it’ when it comes to complaints of invasion of privacy.” Id.; see also Hauch, supra note 184 at 1225-26. Some commentators believe that by erring on the side of First Amendment caution, courts shrink potential press liability but eliminate the chilling effect of uncertainties. See id.

200. See Hauch, supra note 184, at 1225-26. Critics argue that in the pluralistic, multicultural democracy of the United States, it is impossible to develop workable standards that achieve a proper balance between the flow of free information and the privacy interests of individuals. See id.
is dangerous to a free press, which may be chilled by the fear of liability.\textsuperscript{201} It also presents a danger to the right to privacy.\textsuperscript{202}

A recent Seventh Circuit case, \textit{Desnick v. ABC},\textsuperscript{203} illustrates that courts tend to err on the side of First Amendment caution.\textsuperscript{204} The \textit{Desnick} court stated that regardless of how "shrill, one-sided and offensive" tabloid investigative reporting can be, if the broadcast contains no actionable defamation and no invasion of "established" rights, the plaintiff has no legal remedy.\textsuperscript{205} Absent actionable defamation, the court elected not to view privacy as an established right.\textsuperscript{206} Accordingly, all the plaintiff's other claims fell into the gaps.\textsuperscript{207} The \textit{Desnick} case reflects both the reluctance of courts to

\textsuperscript{201} See id. Hauch notes that in France, where the right to privacy has long been recognized by both the courts and the legislature, the governing bodies acknowledge the fact that precise definition is impossible. See id. "The right is meant to provide each individual with the security that he will be free from unwarranted intrusions so that he may enjoy a certain liberty as he lives his private life in a free society." Id. at 1222. The chosen method is an enumeration within designated categories of information. See id. The basic areas covered include family life, sexual activity and orientation, illness and death, and even private repose and leisure. See id.

One commentator, Gonzalez, argues around the problems in defining privacy by claiming that the information sought by many paparazzi is not sufficiently newsworthy to be granted protection by the First Amendment. See Gonzalez, \textit{supra} note 33, at 947. Warren and Brandeis excluded from the right of privacy information that is of legitimate concern. See id. at 943. This exclusion, referred to as the newsworthiness privilege, has been understood such that "if a matter is deemed 'newsworthy' there can be no invasion of privacy based upon a [publication]." Id. Gonzalez argues that newsworthiness has always excluded "mere curiosity" and "sensational prying into private lives." Id. at 947. If the information sought is not of legitimate public concern, there can be no protection for the right to gather the information. See id. For this reason, some commentators believe that the intrusion cause of action is an effective weapon against paparazzi press. See id. at 936.

\textsuperscript{202} See id.

\textsuperscript{203} 44 F.3d 1345 (7th Cir. 1995). ABC assured Desnick that its investigation of his ophthalmology clinic would be fair and balanced, involving no ambush interviews or undercover surveillance. See id. After Desnick agreed to the investigation, however, ABC dispatched undercover patients equipped with concealed cameras and recording devices. See id. Desnick alleged defamation, violations of federal and state wiretapping statutes, trespass, invasion of privacy, and fraud. See id. at 1350-51. The district court's decision granting summary judgment on the defamation claim was remanded. See id.

\textsuperscript{204} See Stern, \textit{supra} note 13, at 141. According to Stern, the \textit{Desnick} decision involved deference to the First Amendment protections for newsgathering, where absent defamation, the newsgathering is not deemed to be challengeable. See id.

\textsuperscript{205} See Desnick, 44 F.3d at 1355. This is so regardless of how "surreptitious, confrontational, unscrupulous, and ungentlemanly" the investigative tactics may be. See id. The court went on to hold that no "established right under either state law or federal . . . law was infringed by the making of the broadcast. . . ." Id.

\textsuperscript{206} See id.

\textsuperscript{207} See id. at 1352. The trespass claim failed because the entry into a business was "not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects, it was not an interference with the ownership or
define privacy and a trend wherein courts will not allow plaintiffs to prevail on newsgathering claims unless they can prevail on their defamation claims.208

In sum, cases that have considered generally applicable laws suggest that measures available in the United States to hold the media civilly or criminally accountable are only sufficient to punish certain harms.209 While some of these causes of action have the potential to redress paparazzi intrusions, the ultimate success of suits brought under these theories remains uncertain.210 The following section discusses whether existing criminal and civil measures will be sufficient to deter and prevent dangerous media conduct in the future.

IV. Prevention

What will it take to prevent future tragedies similar to the one which killed Princess Diana? Some lawmakers propose stringent legislation to specifically address privacy invasions by the media, including intrusions and trespasses, to prevent future tragedies.211 Others suggest that the issue is one of economics.212 Adherents to possession of land." Id. at 1355. The wiretapping claims failed because one party to the conversation (the undercover reporters) consented to the taping. See id. The privacy claims failed because there was no disclosure of private facts or intrusion into legitimately private activities. See id.

208. See Medical Laboratory Mgmt. Consultants v. ABC, Inc. 931 F. Supp. 1487 (D. Ariz. 1996) (citing Unelko v. Rooney, 912 F.2d 1049 (9th Cir. 1990)).

209. See McClurg, supra note 13, at 990-95.

210. See Gonzalez, supra note 33, at 936. Tabloid television producers consistently defend such lawsuits by arguing that Supreme Court decisions protect the publication of truthful information, and that imposing liability would have a "chilling effect" on the exercise of their First Amendment rights. See id.

211. See, e.g., Feinstein, supra note 13. The press is not subject to external regulation. See Everette E. Dennis, Internal Examination: Self-Regulation and the American Media, 13 CARDOZO ARTS & ENT. L.J. 697, 698 (1995). The American news media has, however, "experimented with a wide range of [voluntary] self-regulatory approaches to accountability, ranging from commission-style critiques and recommendations to codes of ethics, press councils, media criticism projects, insider assessment vehicles, public opinion polling, and even the education and training of journalists and other media people." Id.

212. See Dennis, supra note 211, at 704. Voluntary efforts at accountability have often been the result of public opinion research and the resulting concerns about the profit motive. See id. Even as early as 1947, when the Commission on Freedom of the Press published its Hutchins Commission Reports, the media’s concern with profit motive was criticized. See Lee C. Bollinger, A Free and Responsible Press: Why There Should Be an Independent Decennial Commission on the Press, 1993 U. CHI. LEGAL F. 1, 5 (1993). The profit motive is frequently criticized as overwhelming or overpowering professional journalistic judgment; see id.; see also Neil Hickey, Money Lust: How Pressure for Profit is Perverting Journalism, COLUM. JOUR. REV., July 8, 1998, at 28. Increased sensitivity to profit and all things financial has changed the face of news, reporting and journalism resulting in the tabloidization
the latter view believe that where the liability and costs of placing individuals in fear or at risk of bodily harm outweigh the benefits of acquiring and publishing the photographs, economics will curb the conduct.\textsuperscript{213} Others suggest that the economics of consumer choice and public opinion can halt the conduct.\textsuperscript{214} Others suggest that juries, more sensitive as a result of tragedies like the death of Princess Diana, will help to rein in the media.\textsuperscript{215} Still others suggest that only internal mechanisms within the journalism industry will work.\textsuperscript{216}

The theory of deterrence is intuitively appealing.\textsuperscript{217} Many believe, of course, that if the penalties for committing proscribed conduct were swift, certain and severe, crime would diminish.\textsuperscript{218} The scientific theory of deterrence involves a number of assumptions such as the notion that offenders are rational actors who weigh the relative costs and benefits of criminal acts and are knowledgeable of much reporting and the subordination of journalistic values to the maximization of short-term profits. See id. at 29-30.

\textsuperscript{213} See Paparazzi Relentless, supra note 1. Currently, profits are huge and money is driving the market. See id.; see also, Susan Caba, Public Points Finger at Press, YORK DAILY RECORD, Sept. 1, 1997. For example, just one day after Princess Diana's fatal car crash, "photographs of Diana dying in her wrecked Mercedes Benz reportedly were being peddled to publishers with price tags of anywhere between $250,000 to $1 million." Id. The theory that adjusting the cost benefit equation will change the media's behavior presupposes a theory of deterrence, which may or may not be viable. See infra, notes 219-22 and accompanying text; see Tim Jones, Backlash Could Force Scrutiny of Media Intrusion, THE FLORIDA TIMES-UNION, Sept. 1, 1997, at A1.

\textsuperscript{214} See McClurg, supra note 13, at 1017. Some argue that the blame for such newsgathering conduct must be shared by those who engage in it and by those who perpetuate it by purchasing the finished product. See id. "If it did not sell, it would cease to exist. Regrettably, the American public has proven to be an all too willing consumer of shocking, titillating, and voyeuristic entertainment." Id.; see also Jones supra note 213, at A1. Even after the Princess' fatal crash and during the condemnation of the press, the public's appetite remained. See id. In fact, in the week after Diana's death many British papers, including tabloids, broke prior sales records. See Brian MacArthur, Unease Hardens into a New Code, THE TIMES OF LONDON, Sept. 24, 1997, at 25.

\textsuperscript{215} See Ricker, supra note 13, at 26-27. "Jurors, reflective of growing anti-paparazzi public sentiment, tend to see the celebrity as the victim in a paparazzi confrontation regardless of the circumstances, say many media lawyers." Id.

\textsuperscript{216} See Rush, supra note 9, at 20. Rush proposes a national code of ethics to be adopted by media outlets. See id.


\textsuperscript{218} See id. at 101; see also, James Q. Wilson, THINKING ABOUT CRIME 117 (1985). When one tries to weigh the costs of committing a crime against the benefits of committing crime, it becomes clear that the costs are relative and uncertain, the chances of getting caught and being charged are unpredictable and any resulting penalty will come only after a long delay. See id. at 118.
enough to understand the costs involved. Some theorists, however, believe that the threat of punishment plays a relatively minor role in shaping behavior.

A. External Measures

This section assesses measures external to the journalistic industry that might be imposed on the media, to determine whether media conduct that places an individual in fear or at risk of bodily harm would best be prevented by externally-imposed or self-imposed measures.

1. Application of Existing Laws

Perhaps additional decisions interpreting existing tort laws will provide the parameters within which the media will act. This would serve not only to protect victims of irresponsible newsgathering conduct, but also to protect media defendants from the perils of unpredictable law. As case law that sets the parameters of lawful conduct evolves, the media's conduct should evolve accordingly. For example, the law of defamation may provide a model. Where the Supreme Court has clearly set parameters around defamatory statements with regard to public figures, the media knows where to draw the lines. While the Supreme Court has clearly stated that the media is not immune from liability for violation of

219. See Walker, supra note 217, at 101-02.
220. See id. at 119. "For the moment, . . . we have to conclude that there is no evidence to support the basic assumptions behind deterrence theory: that we can reduce crime, or certain crimes, by increasing either the certainty or severity of punishment." Id.
221. See, e.g., Stern, supra note 13, at 140-45.
222. See Barnett, supra note 13, at 441. The case law regarding investigative reporting and gaining access to information by subterfuge, for example, is so unclear as to be wholly inadequate to provide reporters with guideposts within which to behave. Such unpredictable law results in a chilling effect on all newsgathering conduct. See id. at 441-46. "Because the line between protected newsgathering and tortious newsgathering is difficult to draw, a reporter is likely to eschew certain nonroutine newsgathering methods such as subterfuge and to engage in rational self-censorship even in cases where his conduct would ultimately be lawful and would produce valuable information." Id. at 447; see also Alison Lynn Tuley, Note: Outtakes, Hidden Cameras, and the First Amendment: A Reporter's Privilege, 38 Wm. & Mary L. Rev. 1817, 1849 (1997). In order to protect the First Amendment rights of the media, the existing substantive law should be more rigorously implemented. See id.
223. See id.
224. See Lebel, supra note 29, at 1146. "There is a rich and growing body of case law and scholarly explication on the ways in which the First Amendment protects the publication of material." Id. The Supreme Court has effectively established the contours of the tort of defamation. See id. at 1148-49.
generally applicable laws, there is no comparable Supreme Court
decision directly speaking to newsgathering conduct that violates
generally applicable laws by placing individuals in fear or at risk of
bodily harm. Future Supreme Court decisions expressly af-
firming the type of decisions made in Wolfson, Galella and
Risenhoover would solidify the parameters of the law around new-
sathering and set valuable guidelines for the media.

2. Enacting New Laws

In May 1998, Senator Dianne Feinstein introduced to the Sen-
ate a proposed Personal Privacy Protection Act. This proposed
federal legislation would make it "a federal crime to chase people
'in a manner that causes them to have a reasonable fear of bodily
injury' in order to photograph, film or otherwise record their activi-
ties for commercial purposes." The proposed legislation would
also expand the law of trespass to encompass the use of telephoto
lenses or infrared film "to obtain images that otherwise could not
be captured without trespassing." Senators Feinstein, Boxer and
Hatch introduced the Personal Privacy Protection Act because they
believed that existing laws fail to protect people from dangerous
and abusive newsgathering tactics. The sponsors believed this
legislation was necessary because the "line between legitimate news
gathering and invasion of privacy" is crossed "more and more fre-
quently today by an increasingly aggressive cadre of fortune-seekers
with cameras."

The drafters of this proposed legislation intended the bill to be
narrow, targeting "threatening and endangering harassment and
privacy abuses undertaken by the stalker press." While the draft-

225. See id.
226. See Stern, supra note 13 at 146 (noting that chilling effect of unpredict-
able defamation claims was considered by Supreme Court in New York Times Co.
v. Sullivan in establishing actual malice rule).
227. See Feinstein, supra note 13.
228. Id.
229. Id.
230. See Feinstein, supra note 13.
231. Id.; see also Proposed US Bill Would Rein in Paparazzi, supra note 13.
232. See Feinstein, supra note 13. The drafters cited flaws in harassment, reck-
less endangering, stalking, trespass, and intrusion laws as examples of why a uni-
federal law is needed. See id.; see also Good Morning America: Introducing the
Personal Privacy Protection Act, (ABC television broadcast, Feb. 18, 1998) (broadcast-
ing statement by Erwin Chemerinsky, University of Southern California law profes-
sor who consulted on proposed legislation); see also David Robb, SAC Shoots Back at
Paparazzi, HOLLYWOOD REP., Feb. 18, 1998 (quoting Erwin Chemerinsky). The
Senators insisted that their legislation would not trample on the First Amendment
rights of the press. See id. The drafters sought not to limit legitimate newsgather-
ers recognized that state laws exist that proscribe trespass and reckless endangerment, they stressed the need for the consistency which federal legislation could provide. The drafters claimed that existing laws are too uncertain to adequately protect people in the public eye.

Any such legislation, if enacted, would certainly face constitutional challenges. While Senator Feinstein urges that her team of legal experts labored to ensure a "constitutional bill that fully respects First Amendment and other constitutional rights," judicial scrutiny may prove otherwise. The ACLU clearly opposes this measure as burdening the First Amendment, yet some legal scholars, who found prior legislative attempts at targeting the paparazzi

ing in any way, aiming the legislation not at the vast majority of those in the mainstream media but at the abusive, threatening behavior by some who do not respect the line between public and private. See id.


234. See Feinstein, supra note 13; see also Barnett, supra note 13, at 448-49. Other commentators have warned of the chilling effect unpredictable tort law can have. See Grossman, supra note 34, at 592. Uncertainty in the area of tort liability for newsgathering makes it hard for attorneys to advise media clients about what conduct will generate a lawsuit. See id. As a result, speech can be chilled. See id.; see also Feinstein, supra note 13. State and local harassment laws are not always codified or well ground in precedent. See id. The reckless endangerment statutes are applied inconsistently at best. See id. Anti-stalking ordinances do not usually apply to activities undertaken for commercial purposes or require proof of the criminal intent to cause fear. See id. Senator Feinstein clearly acknowledged that it was Princess Diana's death that propelled this legislation. See id.; see also Feinstein, supra note 13. Proposed US Bill Would Rein in Paparazzi, supra note 13. Anti-paparazzi legislation was first considered two years ago. See id. The bill was put on hold until the death of the Princess "brought the seriousness of the problem home with a blunt force that stunned the world." Id.; see also Fiore, supra note 12, at Al.

235. Commentators already assert that such legislation is likely overbroad and unconstitutionally vague. See Joyce, supra note 9.

236. See Feinstein, supra note 13; see also Note, Privacy, Photography, and the Press, 111 Harv. L. Rev. 1086 (1998). Because this statute, unlike generally applicable laws, is directed towards photographers with commercial purposes, it is arguably content and viewpoint-based; this statute could easily be viewed as singling out the press or certain elements thereof. Such laws are "always subject to at least some degree to heightened First Amendment scrutiny." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 640-41 (1994). In Turner, the Supreme Court held that a provision requiring cable companies to carry network programming imposed special obligations and burdens on cable programmers, thus requiring "some measure of heightened First Amendment scrutiny." Id. at 641; see also Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986). This statute imposes special burdens on commercial photographers and thus should also face heightened First Amendment scrutiny. Additionally, even conduct and speech cannot be regulated in a viewpoint or content based fashion. See R.A.V. v. St. Paul, 505 U.S. 377, 377 (1992). This statute is regulating otherwise tortious and criminal conduct and speech in a viewpoint-based fashion. It is clearly regulating based on the commercial intentions and press interests that may have inspired the conduct.
unconstitutional, believe this bill should survive constitutional scrutiny. 237

B. Internal Changes

This section explores mechanisms that the media can adopt to prevent conduct that places individuals in fear or at risk of bodily harm.

1. Press Councils and Codes of Ethics

a. Press Councils

Various mechanisms have been used to impose controls on the media. 238 In some countries, governments have established press councils authorized to handle press conduct. 239 In other countries, the press has voluntarily convened press councils. 240 The press councils that have existed throughout the years have differed in the degrees of authority they command. 241

Groups have tried various plans to force social responsibility on the American media, including press councils. 242 The press councils that have existed throughout the years in the United States have been wholly voluntary. 243 Only two news councils have possessed

237. See Fiore, supra note 12, at A1. This bill is different because it is not prohibiting speech or affecting First Amendment rights of speech or press. See id. This bill is regulating conduct that state governments have already regulated. See id. Because endangering someone is not protected conduct under the First Amendment, the conduct regulated by this bill is conduct that the government constitutionally can regulate. See id. Federal legislation is necessary, because it "would fill in the gaps and send a message that the problem has grown severe enough to require congressional intervention." Id.


239. See id. As discussed, infra at notes 265-71 and accompanying text, England is one of the countries whose government originally convened its press council.

240. See id.

241. See id. As discussed, infra at notes 245-65, 272-80 and accompanying text, the United States and Germany are countries whose press has voluntarily convened press councils.

242. See Louise W. Hermanson, The National News Council is Not a Dead Issue, BEYOND THE COURTROOM: ALTERNATIVES FOR RESOLVING PRESS DISPUTES 15 (Richard T. Kaplar, ed., 1991). In 1947, the Hutchins Commission warned that for the press to remain free in the United States, it must be more responsible. See id. at 15-16. The Hutchins Commission urged imposing checks and balances on the media through an evaluative body that could discuss newsgathering practices and criticize irresponsible media conduct. See id.

243. See Aviam Soifer, Freedom of the Press in the United States, PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY 115 (Pnine Lahav, ed., 1985). The only significant national press council is the National News Council established in 1973. See id. The Minnesota News Council, begun in 1971, is the only news council re-
adjudicative powers in the United States. Their effect on media performance and responsibility has been questionable because their powers have been limited to issuing and publishing decisions.

The National News Council was founded in 1973 as a private and independent institution under the premise that the function of a news council was: "(1) to give the public a forum for complaints about media performance; (2) to give the media feedback concerning how the public perceives their role in a democratic society; and (3) to give society unbiased reports on how the media responds to responsibilities individual members of a democratic society have to the whole."

The National News Council claimed to be a dispute resolution alternative for viable legal claims and for claims that would never prevail in a court of law. It failed, however, for several reasons. The national scope of the Council's purpose largely contributed to its downfall. The founders quickly realized that the National News Council could not possibly handle "complaints from all citizens about all media organizations throughout the country" and restricted the council to hearing complaints and studying issues of national importance involving national media.

Another factor that contributed to the downfall of the National News Council was its limited power. The council could neither impose fines nor force any type of apology or restitution from a

[244] See id. Most other news councils have held mere advisory positions. See id.

[245] See id. But see Jerome H. Barron, The Search of Media Accountability, 19 Suffolk U.L. Rev. 789, 789-90 (1985). In 1985, studies indicated that libel litigants were suing media defendants more for vindication, reprisal, response and publicity than for damages. See id. This was demonstrated by the fact that "a significant number of individuals . . . believing that they were victimized by the press, [were] willing to sustain great expense to bring libel suits. These individuals [did] this with the knowledge that damages obtained at trial [were] unlikely to survive appeal. In short, they sue[d] even though they [lost]." Id.


[247] See id. at 21. The Council required complainants to stipulate that they were not currently engaged in or contemplating legal action. See id. at 22-23.

[248] See id. at 18.

[249] See id. The National News Council also faced funding problems. See id.

[250] Id.

[251] See Hermanson, supra note 242, at 18. The council could only publish its decisions. See id. at 15.
media member found to have violated journalistic standards. This limited authority, coupled with the fact that internal enforcement of "ethical rules or standards of reporting are rare," created standards of conduct that had no teeth. Several commentators, however, believe that a press council could serve as an alternative forum for dispute resolution in the future, provided that lessons from the failure of the earlier news councils are corrected.

The Minnesota News Council began in 1971 as "an independent, nongovernmental, non-profit, voluntary organization that serves as a forum through which individuals and/or corporations can present a complaint when they feel an injustice has been done because of inaccurate and/or unfair reporting of the news." The Council is comprised of an equal number of media and general public members. To bring a case before the Council, the complainant must waive the right to appeal to any court or to the FCC. The News Council receives written summaries from the parties, conducts a public hearing and issues a decision, which members of the local media agree to publicize.

The British Press Council was established in 1953. In 1962, its purposes were declared to be the preservation of the "established freedom of the British press," the maintenance of the character of the British Press "in accordance with the highest professional and commercial standards," the consideration of complaints about the press and the finding of ways "to deal with these complaints in..."

252. See id. at 18.
253. See Soifer, supra note 243, at 115. Over the past several years, however, many large news organizations have hired "house critics" or "ombudsman." Id. at 117. Sometimes, these individuals publish their findings and criticisms of internal practices. See id. Other newspapers have relied on features like op-ed pages as their internal control mechanisms and forums for criticism. See id.
254. See Hermanson, supra note 242, at 29.
256. See id.
257. See id.
258. See id. The Council has, at times, agreed to hear cases from other states. See id.
259. See Michael Supperstone, Press Law in the United Kingdom, in PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY 46 (Pnina Lahav, ed., 1985). The Press Council was a central recommendation of the 1949 Commission but was not established until legislation requiring it was threatened in 1953. See id. Initially, its membership was limited to members of the press. See id. It was also limited in its financing and in its purpose. See id. After several years, the Press Council was found to be ineffective, partly because of its exclusively media membership, and in response to recommendations of the 1977 Younger Commission, the membership was recomposed to contain an equal number of lay people and media members. See id. at 47.
whatever manner might seem practical and appropriate and record result and action," and the publication of "periodical reports recording the Council's work and to review, from time to time, developments in the press and the factors affecting them."260

The primary duty of the Press Council was to investigate complaints and hold quasi-judicial adjudication.261 The Press Council had no statutory authority to impose fines or suspensions.262 Punishments it could impose were limited to requiring its decisions against a media agency to be published with prominence equivalent to that given the offending conduct.263 In 1991, a quasi-governmental body called the Press Complaints Commission, succeeded the Press Council.264

260. Supperstone, Press Law in the United Kingdom, supra note 259, at 47; see also Ronald J. Krotoszynski, Jr., Autonomy, Community, And Traditions Of Liberty: The Contrast Of British And American Privacy Law. 1990 DUKE L.J. 1398 (1991). The right of privacy does not receive explicit recognition in English law. See id. To the extent that privacy rights exist implicitly in Britain, they are formulated quite differently than in the United States. See id. at 1402. British citizens, in light of Parliament's inaction, have attempted to circumvent the legislature by petitioning the British courts to create a common law right of privacy. See id. Without fail, the courts have refused because Parliament was studying the issue. See id. Ultimately, Parliament took no action, and in the late 1970s the issue of a common law right of privacy remained before the courts. See id. at 1412; see also Frieden, supra note 15, at 156. In fact, the British courts have decided that there is no right at all to prevent taking a person's picture. See id. The courts, however, are likely to take invasion of privacy into account in assessing damages when, for instance, the publication of such pictures damages a person's reputation. See id. In 1977, the Younger Committee on Privacy considered a right to privacy or remedy for invasion of privacy, but no right or remedy was recommended for enactment by the committee. See id. British media does not enjoy a "freedom of the press" protection. See Frieden, supra note 15, at 154. Britain—like the United States, but unlike most European countries—has no special statutes regarding the press. See id. In accordance with the British constitutional principle of residual liberties, rights such as freedom of the press exist even in the absence of written guarantees, unless statutes or common law precedent have imposed restrictions on them. See id. The only British statutes which limit newsgathering are criminal statutes aimed at protecting important state interests, such as information about defense installations. See id. at 154.

261. See id. Decisions of the Press Council "constitute a body of case law; yet it is not always clear on which basis they are made." Id. This was a substantial criticism of the 1977 Royal Commission on the Press which recommended drafting of a code of conduct against which the conduct of media and the decision of the Council could be measured. See id.

262. See id. at 48. In fact, a recommendation of the 1977 Royal Commission on the Press to give the Council such authority was expressly rejected. See id.

263. See id. at 48; see also P.S. Atiyah, Tort Law And The Alternatives: Some Anglo-American Comparisons, 1987 DUKE L.J. 1002, 1042 (1987) (noting that councils and ombudsmen are beginning to provide alternatives to litigation).

264. See Supperstone, supra note 259, at 48. This body has been set up and funded by newspaper owners at government request. See id.
The Basic Law of the Federal Republic of Germany provides that "[e]veryone shall have the right freely to express and disseminate his opinion by speech, writing and pictures . . . . Freedom of the press and freedom of reporting by radio and motion pictures are guaranteed. There shall be no censorship."265 There are, however, some limitations in German law.266 General laws limit the rights of free press and free expression, as do "legal provisions for the protection of the youth, and . . . the right to personal honour."267

In 1956, the two largest publishing organizations and the two relevant unions of journalists in Germany formed the Deutscher Presserat, modeled after the British Press Council.268 The Deutscher Presserat was founded as a private association consisting of twenty individuals who were equally divided between publishers and union members.269 The Deutscher Presserat's goals are to

Recognize and eliminate grievances, to investigate complaints about specific publications and if necessary to reprimand the newspaper or magazine, to establish guidelines for ethical standards, to ensure free access to news sources, to counteract dangers to free information and the process of forming public opinion, which monopoly has brought, and to submit proposals to the legislature.270

The Deutscher Presserat has worked to protect the press as well as its subjects.271 For example, the Presserat has established itself as an important advisor to the government and legislature, which has successfully prevented efforts to constitutionally limit press freedom.272 The Presserat has also developed a code of ethics and


266. See id. at 165.


269. See id. at 217. The ultimate aim was to limit bias but, the Presserat has not been devoid of bias by its members. See id. The members are present as delegates of their union or publisher, and thus, have predetermined interests. See id.

270. Id.

271. See Kohl, supra note 268, at 217.

272. See id. The efforts were geared towards limiting press freedom in times of war or internal state of emergency. See id.
guidelines for editorial work, expressly setting forth professional standards for journalists.\textsuperscript{273}

b. Press Codes of Ethics

The British press have responded to the Princess Diana tragedy by creating a Code of Media Conduct.\textsuperscript{274} The Code has been well

\textsuperscript{273} See id. Both the code and the guidelines have been called remarkable. See id.

\textsuperscript{274} See Greenslade, supra note 9, at B5. The code was composed by media editors after politicians threatened a new law. See id.; see also Boshoff, supra note 9. The code of conduct states in pertinent part:

GUIDANCE FOR JOURNALISTS

All members of the press have a duty to maintain the highest professional and ethical standards. This code sets the benchmarks for those standards. It both protects the rights of the individual and upholds the public's right to know. The code is the cornerstone of the system of self-regulation to which the industry has made a binding commitment. Editors and publishers must ensure that the code is observed rigorously not only by staff but also by anyone who contributes to their publications. It is essential to the workings of an agreed code that it be honoured not only to the letter but in the full spirit. The code should not be interpreted so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it prevents publication in the public interest.

It is the responsibility of editors to co-operate with the PCC as swiftly as possible in the resolution of complaints. Any publication which is criticised by the PCC under one of the following clauses must print the adjudication which follows in full and with due prominence.

CODE OF PRACTICE

3 Privacy

(i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent.

(ii) The use of long-lens photography to take pictures of people in private places without their consent is unacceptable.

Note—Private places are public or private property where there is a reasonable expectation of privacy.

4 Harassment

(i) Journalists and photographers must neither obtain nor seek to obtain information or pictures through intimidation, harassment or persistent pursuit.

(ii) They must not photograph individuals in private places (as defined in the note to Clause 3) without their consent; must not persist in telephoning, questioning, pursuing or photographing individuals after having been asked to desist; must not remain on their property after having been asked to leave and must not follow them.

(iii) Editors must ensure that those working for them comply with these requirements and must not publish material from other sources which does not meet these requirements.

5 Intrusion into grief or shock

In cases involving grief or shock, inquiries must be carried out and approaches made with sympathy and discretion. Publication must be handled sensitively at such times, but this should not be interpreted as restricting the right to report judicial proceedings.
received by news editors and politicians. The Press Complaints Commission will administer the Code. The Press Complaints Commission will have little power to sanction press conduct aside from its ability to order a newspaper to publish a condemnatory judgment if a complaint is upheld. The Code is certain to receive close scrutiny. Some believe that politicians and editors in particular will attentively watch the tabloids for deviations from the Code.

Some believe that a Code of Media Conduct like that passed by the Press Complaints Council would be unthinkable in the United States. This is primarily because the Press Complaints Council is a quasi-governmental body, and thus, would be subject to First Amendment challenge in the United States. Organizations currently exist in the United States, such as the Society of Professional Journalists and various media organizations, which have promulgated codes of ethics, with which media members are ethically bound.

8 Listening Devices
Journalists must not obtain or publish material obtained by clandestine listening devices or by intercepting private phone conversations.

9 Hospitals
(i) Journalists or photographers making inquiries at hospitals or similar institutions must identify themselves to a responsible executive and obtain permission before entering non-public areas.
(ii) The restrictions on intruding into privacy are particularly relevant to inquiries about individuals in hospitals or similar institutions.

11 Misrepresentation
(i) Journalists must not generally obtain or seek to obtain information or pictures through misrepresentation or subterfuge.
(ii) Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means.

Id.

275. See Greenslade, supra note 9, at B5. The Code of Ethics "is a laudable attempt to change the culture of the tabloids." Id.

276. See id. This body has been set up and is funded by newspaper owners at government request to "ensure that papers do not trample on people's rights." Id.

277. See id.; see also British Press Congratulates Itself on Backing Tougher Privacy Code, AGENCE FRANCE-PRESSE, Sept. 26, 1997 (avail. at 1997 WL 154002300). While the privacy guidelines are hailed as the toughest in Europe, they fail to recommend sanctions for newspapers that breach the new rules. See id.

278. See Greenslade, supra note 9, at B5.

279. See id.


281. See Press Code of Conduct Unthinkable in the United States, supra note 280; see also British Editors Tackle Broad Press Reforms, supra note 280 at A25.
bound to conform.\textsuperscript{282} Additionally, several news organizations have recently implemented specific ethical guidelines for undercover reporters, some of which require pre-newsgathering approval by several levels of management.\textsuperscript{283} Some commentators believe that a code of ethics addressing newsgathering and privacy rights would be the only means of successfully bringing about change in the American media.\textsuperscript{284}

V. Conclusion

Although some legal measures exist to punish a media defendant for placing an individual in fear or at risk of bodily harm, the practical efficacy of those measures is uncertain.\textsuperscript{285} Commentators and lawmakers have argued that this uncertainty limits the law's deterrent effect in the media context.\textsuperscript{286} Commentators have also argued that the threat of punishment is not a major factor in deterring conduct, especially when the benefits of engaging in the conduct far outweigh the uncertain costs.\textsuperscript{287}

Existing generally applicable laws are sufficient to punish much, but not all, of the conduct that places individuals in fear or at risk of bodily harm.\textsuperscript{288} This inadequacy results from an unrealistic application and interpretation of existing generally applicable laws. These laws would be sufficient to punish much more irresponsible media conduct if courts would extend tort principles to take account of current technology and newsgathering practices.\textsuperscript{289} Certain courts' prohibitions on intrusion claims for conduct in public or semi-public places or intrusion claims that do not accompany actionable defamation claims, further limit the efficacy of generally

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{282} See British Editors Tackle Broad Press Reforms, supra note 280, at A25. The Society of Professional Journalists "code of ethics centers on four main points: 'seek truth and report it, minimize harm, act independently and be accountable.'" Id.
    \item \textsuperscript{283} See Steven Perry, Hidden Cameras, New Technology, and The Law, 14-FALL COMM. LAW. 1, 19 (1996).
    \item \textsuperscript{284} See Rush, supra note 9, at 20.
    \item \textsuperscript{285} See, e.g., Feinstein, supra note 13. The unpredictability and uncertainty of the application of generally applicable laws is one reason she and other Senators have proposed uniform federal legislation. See id. Factors that render the application of these laws uncertain include some courts' unwillingness to extend tort principles to the technology and newsgathering practices of the late 1990s. See McClurg, supra note 13, at 990-91; see also Stern, supra note 13, at 141-42.
    \item \textsuperscript{286} See, e.g., Wilson, supra note 218, at 188; Barnett, supra note 13, at 449; Stern, supra note 13, at 116.
    \item \textsuperscript{287} See Wilson, supra note 218, at 121.
    \item \textsuperscript{288} See McClurg, supra note 13, at 990-95; Stern, supra note 13, at 133-34; Hernandez, supra note 71, at 442.
    \item \textsuperscript{289} See McClurg, supra note 13, at 992-95.
\end{itemize}
\end{footnotesize}
applicable laws. A broader, more realistic application and interpretation of generally applicable laws would provide more comprehensive punishment for outrageous conduct. Recent decisions such as Wolfson, Shulman and Green suggest a movement towards this more realistic interpretation and application. Clearly, the punishment currently provided by generally applicable laws is inadequate without recognition that members of the media can intrude upon the right to be left alone without a physical trespass, absent actionable defamation or in a public place.

It is uncertain whether specialized legislation such as the proposed Personal Privacy Protection Act could withstand judicial scrutiny, because it directly targets the media. The Supreme Court has suggested that generally applicable laws that affect but do not target the media are constitutional, while laws that directly target the media and especially laws that constitute a prior restraint on media will be constitutionally invalid.

Additionally, challengers may argue that the proposed law is content-based or even viewpoint-based and, as such, is not supported by a sufficiently compelling governmental interest to which its means are strictly tailored. Additional deterrence of the prescribed media conduct would not constitute a compelling governmental interest and, moreover, broad federal legislation would not be strictly tailored to achieve the asserted governmental interest.

The proposed law would provide consistency and certainty that would augment the deterrent effects of current state law. If enacted, the federal legislation would certainly increase the penalties

---

290. See id.; Stern, supra note 13, at 134-35; Hernandez, supra note 71, at 442.

291. For a further discussion of Wolfson, Shulman and Green, see supra notes 103-12, 171-74 and accompanying text. In all these cases public or semi-public places have been viewed as places wherein an individual may have a legitimate expectation of privacy.

292. See generally McClurg, supra note 13.

293. See Note, Privacy, Photography, and the Press, 111 Harv. L. Rev. 1086 (1998); supra note 236 and accompanying text.


295. Commentators have pointed to the fact that Princess Diana's fatal accident occurred in France, where French law prohibits chase conduct but clearly did not deter it, as evidence that such legislation would be too broad to have its intended deterrent effect. See Rush, supra note 9, at 20. "That laws are not the answer is proved by the fact that France has a statute prohibiting 'too aggressive invasion of privacy,' which in no way deterred the paparazzi who dogged Diana." Id.

imposed for media conduct that places an individual in fear or at risk of bodily harm.297

Realistically, the media conduct here at issue endangers lives. Consequently, without minimizing the importance of punishment, deterrence should be the more urgent goal. While the proposed federal legislation would provide additional certainty and consistency in punishment, the threat of punishment is decidedly not a major factor in deterrence of this behavior because the costs are far outweighed by financial benefits.298 This balance remains askew and should be adjusted. Legislation will not achieve this balance as effectively as will public scrutiny and self-regulation.299

Press Councils imposing codes of conduct and investigating complaints against the media have had varied levels of success.300 A national press council overseeing state or regional news councils would provide an excellent means of deterring and punishing the egregious conduct at issue.301 Press Councils are especially worthy of consideration in light of the judicial reluctance to enjoin dangerous newsgathering conduct.302 The press council could be comprised of a fair balance of interests or could be solely comprised of media members. Either way, a board empowered 1) to compose professional standards of conduct; 2) to establish due procedure for investigating and hearing alleged violations of such standards;

297. See Spiegelman, supra note 8. Senator Hatch admitted that "the proposed bill would probably not be invoked very often, if at all." Id. Senator Hatch stated he believed that the law would have a preventative effect. See id.

298. See Wilson, supra note 296. Paparazzi can make millions of dollars from a single photograph. See Susan Caba, supra note 213. For example, just one day after Princess Diana’s fatal car crash, “photographs of Diana dying in her wrecked Mercedes Benz reportedly were being peddled to publishers with price tags of any where between $250,000 to $1 million.” Id.

299. See Rush, supra note 9, at 20. “[M]eaningful change in the press can be brought about only from inside the industry. Possibly helpful would be a code of ethics regarding news treatment of privacy rights.” Id.

300. See supra, notes 243-59 and accompanying text.

301. See Rush, supra note 9, at 20. A Press Council and a standardized code of conduct “could well be a project for study and recommendations by the American Society of Newspaper Editors. Adoption could bring about substantial cooperation from the broadsheet press and the legitimate tabloids and could conceivably have some runoff effect on the supermarket scandal sheets as well.” Id.; see also, Hale, supra note 255, at 79-80 (asserting that news councils would provide viable alternative to courts for libel disputes).

302. See O’Neill, supra note 9. “Courts are rightly reluctant to enjoin reporters and photographers from getting at the truth, by any means . . . . Yet there must be some recourse beyond self-restraint.” Id. O’Neill proposes restoring and revisiting the idea of a National News council, where victims of media misconduct that may not be otherwise actionable can seek formal vindication. See id. “Unless we are creative in fashioning a new forum for such disputes, we are likely to face an increasingly hostile array of legal remedies.” Id.
and 3) to publish or broadcast their decisions in the state or regional media would prove a valuable means of protecting First Amendment interests and punishing unprotected conduct.303

The First Amendment interests of the press would also be better served by a code of conduct like the one recently adopted for the British Media, than by federal legislation.304 A mechanism for enforcing such a code of professional conduct beyond a press council investigation and publication is journalists' employment contracts. Media entities could contractually obligate their employees to work within the parameters of a code of conduct that the entities elect to adopt. Such efforts could preserve important First Amendment freedoms, while also protecting individuals from outrageous newsgathering conduct.

**Alissa Eden Halperin**

303. The benefits of such a system arguably could outweigh the costs involved in not having one. The litigation expenses saved by adjudication through a press council, alone, can be enormous. See Hale, supra note 255, at 79-80.

304. See supra note 274 and accompanying text for a further discussion of the recently adopted British Code of Media Conduct.