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ARTICLES

PROTECT THE PRESS: A FIRST AMENDMENT STANDARD FOR SAFEGUARDING AGGRESSIVE NEWSGATHERING

Erwin Chemerinsky *

I. INTRODUCTION

Few occupations or professions rank lower than reporters in public esteem. In July 1999, Justice Stephen Breyer participated as a panelist at the Ninth Circuit Judicial Conference and was challenged by Associated Press reporter Linda Deutsch about the absence of cameras in the Supreme Court. Justice Breyer explained that the Court did not want to risk its relatively high level of public esteem by placing itself on television. Justice Breyer noted the lack of respect for the media and said that the Court did not want to see its esteem ratings lowered to that of the press.

The audience's laughter at Justice Breyer's statement masked the larger significance about the Court's attitude to the press. The Supreme Court's low esteem for the press, which is shared by judges at all levels, is reflected in constitutional doctrine.¹ The judiciary, at all levels of courts, has refused to provide any special protection for newsgathering activities by the press.

The failure to provide protection is reflected in recent court cases holding the media liable for the surreptitious use of cameras in undercover reporting. Recently, in *Sanders v. American Broadcasting Cos.*,² the Supreme Court of California held that a media company could be held liable for invasion of privacy for an under-

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1. See Allison Lynn Tuley, Note, *Outtakes, Hidden Cameras, and the First Amendment Privilege: A Reporter's Privilege*, 38 WM. & MARY L. REV. 1817, 1819 (1997) (arguing that courts are biased against television reporter work product). I would agree with Tuley as to the bias, but argue that it exists against all the press, print and broadcast alike.

2. 978 P.2d. 67 (Cal. 1999).

cover television news reporter's covert videotaping that exposed fraud by a telepsychic company.³ Similarly, in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,⁴ a federal district court upheld a jury's finding of liability against a media company for the undercover reporters' use of hidden cameras to expose unsafe practices by a food chain.⁵ The jury found the defendants liable for fraud, trespass, and breach of the duty of loyalty and awarded \$1,402 in compensatory damages and a total of \$5,545,750 in punitive damages.⁶ The district court reduced the award of punitive damages to \$50,000 against the corporate parent, \$250,000 against the network, and \$7,500 each from the executive producer and senior producer.⁷ Although the Fourth Circuit recently reversed the amount of punitive damages, it relied on state tort law and did not find the damages to violate the First Amendment.⁸

These cases are reflective of the lack of judicial protection for newsgathering by the press. Surprisingly, most scholars have defended the courts' approach, though some have urged a limit on punitive damages awards, while a few have argued for much more protection for the press.⁹ The consensus, though, appears to be that the media is liable when it commits torts such as intrusion and invasion of privacy, even when its actions are necessary to expose serious threats to the public's health and safety.

In this article, I challenge that consensus and argue for greater First Amendment protection for newsgathering by the media. In particular, there is a need for First Amendment safeguards for undercover media operations that serve an important public purpose. Specifically, I argue that the application of general laws

3. See *id.* at 69-70.

4. 984 F. Supp. 923 (M.D.N.C. 1997).

5. See *id.* at 939-40.

6. See *id.* at 927.

7. See *id.* at 938-39.

8. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520-22 (4th Cir. 1999).

9. See, e.g., Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895 (1998); David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161 (1997); Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U. L. REV. 507 (1998); John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111 (1996). But see Paul A. LeBel, *The Constitutional Interest in Getting the News: Towards a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145 (1996) (arguing for First Amendment protection for newsgathering).

to impose media liability should be required to meet, at least, intermediate scrutiny and thus only be upheld if it is proven to be substantially related to achieve an important government purpose.

In Part II of this article, I argue that current doctrine provides no constitutional protection for newsgathering. This trend is reflected in both Supreme Court decisions and recent lower court rulings concerning undercover media operations. In Part III, I argue in favor of greater First Amendment protection for newsgathering and specifically advocate the use of at least intermediate scrutiny when laws of general applicability are used to create media liability for reporting activity. Based on this test, I contend that recent rulings in cases such as *Sanders* and *Food Lion* were wrongly decided.

II. THE FAILURE TO PROTECT NEWSGATHERING

The Supreme Court has proclaimed that “without some protection for seeking out the news, freedom of the press could be eviscerated.”¹⁰ The Court likewise has declared that “the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”¹¹

These pronouncements, however, are empty rhetoric from the Court. Its rulings, without exception, have failed to provide any First Amendment protection for newsgathering. Indeed, the Court has declared that there is no exemption for the press from general laws. In other words, while engaged in newsgathering, the press is not exempt from tort liability or criminal laws, no matter how compelling the need for reporting to protect the public’s health and safety.

*Cohen v. Cowles Media Co.*¹² offers the strongest statement by the Court that the press is not exempt from general laws. In *Cohen*, a newspaper published the identity of a source who was promised that his name would not be disclosed.¹³ The Court rejected the argument that holding the newspaper liable for breach of contract would violate the First Amendment.¹⁴ The Court stressed that the case

10. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

11. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

12. 501 U.S. 663 (1991).

13. *See id.* at 665-66.

14. *See id.* at 672.

involved the application of a general law that in no way was motivated by a desire to interfere with the press.¹⁵ The Court said:

[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. . . . [E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.¹⁶

This philosophy, that laws of general applicability can be used against the press when it is engaged in newsgathering, is reflected in two major sets of Supreme Court decisions: (1) efforts by the media to protect confidential sources and (2) efforts by the media to gain access to places. In both areas, the Court has rejected protection for newsgathering under the First Amendment.

In *Branzburg v. Hayes*,¹⁷ the Court expressly rejected a privilege for journalists to keep their sources confidential.¹⁸ *Branzburg* presented several cases to the Court where reporters had refused to appear before state and federal grand juries and disclose the identity of confidential sources.¹⁹ In a 5-4 decision, with the majority opinion written by Justice White, the Court rejected the claim that the First Amendment creates a shield for reporters that immunizes them from having to disclose their sources.²⁰

Although the Court spoke of the need for constitutional protection for newsgathering,²¹ the Court also said that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."²² Justice White noted that the press is regularly kept from many places from which the public is excluded, ranging from grand jury proceedings to the Supreme Court's conferences to crime and disaster scenes.²³

The Court concluded that "the public interest in law enforcement and in ensuring effective grand jury proceedings"²⁴ is sufficient "to

15. *See id.* at 670.

16. *Id.* at 669-70.

17. 408 U.S. 665 (1972).

18. *See id.* at 702-03.

19. *See id.* at 668-79.

20. *See id.* at 702-03.

21. *See id.* at 681.

22. *Id.* at 684.

23. *See id.*

24. *Id.* at 690.

override the consequential, but uncertain, burden on newsgathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.”²⁵

Justice Powell, the fifth vote in the majority, wrote a concurring opinion in which he urged that a balancing test be used in particular cases to decide whether the First Amendment protected the ability of the press to keep its sources confidential.²⁶ Powell said that:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.²⁷

Some lower courts have relied on Justice Powell’s concurring opinion as the crucial fifth vote creating a reporter’s privilege, while other courts have rejected this position and found that no such privilege exists under the First Amendment.²⁸

The *Branzburg* decision reflects the principle described above that the press is not entitled to exemptions from general laws; anyone else would have to answer questions from a grand jury, so a reporter must also do so. But *Branzburg* can be criticized for failing to give adequate weight—or any weight—to the importance of confidential sources in informing the public and, at times, checking government. Although the Court was correct that there is not empirical proof of how many sources would vanish without assurances of confidentiality, this is something that would be impossible to measure. In fact, the Court has accepted the importance of other privileges, such as the attorney-client privilege, even though it is impossible to prove

25. *Id.* at 690-91.

26. *See id.* at 710 (Powell, J., concurring).

27. *Id.* (Powell, J., concurring).

28. *Compare, e.g., In re Grand Jury Proceedings*, 810 F.2d 580, 583 (6th Cir. 1987) (rejecting a reporter’s privilege under the First Amendment), *with Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436 (10th Cir. 1977) (finding a reporter’s privilege). *See also* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH, §§ 25:19 n.2 to :26 n.27 (3d ed. 1996) (listing cases accepting and rejecting a reporter’s privilege).

how many conversations would not occur without the promise of confidentiality.²⁹

The Supreme Court has followed *Branzburg* in other cases in refusing to find a First Amendment exemption for the press in court proceedings and law enforcement actions.³⁰ In *Zurcher v. Stanford Daily*,³¹ the Court upheld the ability of the police to search press newsrooms to gather information to aid in criminal investigations.³² A student newspaper published stories about a violent confrontation between students and the police at a demonstration.³³ The police then obtained a warrant to search the newspaper's offices for negatives, films, and pictures that would help to identify the demonstrators.³⁴ The search was conducted, though it did not yield any information that had not already been published.³⁵

The newspaper then sued the police for violating the First Amendment.³⁶ The Court held that the First Amendment does not protect the press from valid searches pursuant to valid warrants.³⁷ Justice White, again writing for the Court and once more rejecting the claim of any special protection for the press under the First Amendment, noted that:

Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.

... Nor are we convinced, any more than we were in [*Branzburg*], that confidential sources will disappear.³⁸

29. See *Swidler & Berlin v. United States*, 524 U.S. 399, 406 (1998) (holding that the attorney-client privilege survives death and stressing the importance of the attorney-client privilege in encouraging clients to speak candidly with their attorneys).

30. See, e.g., *Herbert v. Lando*, 441 U.S. 153, 169 (1979) (finding that the First Amendment does not protect the press from having to answer questions concerning its editorial process in defamation actions; the need for a public figure to prove "actual malice" warrants requiring the press to answer the questions).

31. 436 U.S. 547 (1978).

32. See *id.* at 568.

33. See *id.* at 551.

34. See *id.*

35. See *id.* at 551-52.

36. See *id.* at 552.

37. See *id.* at 567-68.

38. *Id.* at 565-66.

Zurcher is obviously consistent with *Branzburg* and the other cases that refuse to recognize special protection for the press. Yet *Zurcher* is troubling because the search was not for evidence of any crimes committed by the newspaper or its reporters; the police were searching the newsroom so they could obtain the information that the paper gathered as the press and use it in law enforcement.³⁹ There is reason for concern that such searches would chill aggressive reporting and the willingness of confidential sources to speak to the press if their identity could be learned easily through the search of a newsroom. For this reason, almost immediately after *Zurcher*, Congress enacted the Privacy Protection Act of 1980⁴⁰ to protect the press from searches of newsrooms. The law prohibits law enforcement officers or agents from engaging in searches of those reasonably believed to be engaged in disseminating information to the public unless there is probable cause to believe that the person committed a crime or that giving notice by subpoena likely would result in the loss of evidence.⁴¹

The other area where the Supreme Court has had the opportunity to protect newsgathering is in cases involving a claim by the press to a right of access to prisons to inform the public about prison conditions and the treatment of prisoners. The Court has expressly rejected such a right for the press and has specifically ruled that the press is not entitled to any greater rights than the general public.⁴² In *Pell v. Procunier*⁴³ and *Saxbe v. Washington Post Co.*,⁴⁴ the Court upheld state and federal prison regulations that prohibited press interviews with particular inmates.⁴⁵ The Court accepted the government's claim that such interviews created a "star" within the prison that undermined effective discipline and order.⁴⁶ The Court in *Pell* also more generally declared: "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord to the press special access to information not shared by members of the public generally."⁴⁷ The Court expressly rejected the

39. See *id.* at 551 (stating the purpose for the search warrant used by the officers).

40. 42 U.S.C. § 2000aa (1994 & Supp. III 1997).

41. See *id.*

42. See, e.g., *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974).

43. 417 U.S. 817 (1974).

44. 417 U.S. 843 (1974).

45. See *Pell*, 417 U.S. at 834-35; *Saxbe*, 417 U.S. at 850.

46. See *Pell*, 417 U.S. at 831-32; *Saxbe*, 417 U.S. at 848-49.

47. *Pell*, 417 U.S. at 834.

view that "the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."⁴⁸

The Court followed this reasoning in *Houchins v. KQED*.⁴⁹ In *Houchins*, the press sought access to the Greystone facility in the Alameda County Jail at Santa Rita.⁵⁰ The jail had a no-access policy except for monthly official tours of the facility.⁵¹ The press sought access to the jail to report on its conditions.⁵² The plurality opinion written by Chief Justice Burger rejected the media's claim and again emphasized the lack of any special right of access for the press under the First Amendment.⁵³ The Chief Justice wrote:

This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within governmental control.

....
There is an undoubted right to gather news "from any source by means within the law," but that affords no basis for the claim that the First Amendment compels others—private persons or government—to supply information.⁵⁴

Justice Stewart, in a concurring opinion, explicitly declared that the press is entitled to no greater privileges than the general public.⁵⁵ He wrote:

The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.⁵⁶

48. *Id.*

49. 438 U.S. 1 (1978). *Houchins* was a 4-3 decision, with two Justices not participating. The majority's opinion consisted of a plurality of three and a concurring opinion written by Justice Stewart.

50. *See id.* at 3.

51. *See id.* at 4-5.

52. *See id.* at 3-5.

53. *See id.* at 9-11.

54. *Id.* at 9, 11 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972)).

55. *See id.* at 16 (Stewart, J., concurring).

56. *Id.* (Stewart, J., concurring).

This opinion is notable because Justice Stewart, in other writings, has urged special protection for the press under the First Amendment.⁵⁷

Thus *Houchins*, like the other prison cases, contains strong language rejecting a First Amendment right of access to government places and any preferred rights for the press. Yet *Houchins* can be criticized for failing to recognize the importance of the press in informing the public about prison conditions. Without press access to the prisoners and prison facilities, the public might never learn of serious abusive conditions and be able to hold this aspect of government accountable.

Indeed, the only area where the Court has recognized a First Amendment right of access to government proceedings is in criminal trials.⁵⁸ In *Richmond Newspapers v. Virginia*,⁵⁹ the Court held that there is a First Amendment right for the public and the press to attend criminal trials.⁶⁰ Although *Richmond Newspapers* and subsequent cases hold that the press and public have a First Amendment right to attend criminal proceedings, they do not hold that the press has a preferred right of access to judicial proceedings. If there are only a limited number of seats in a courtroom, must some of them be reserved for reporters? The values underlying the First Amendment would seem to require this because the public can only learn about what occurred in court if the press is present to observe and report.

But the Court has not yet recognized a preferred right for the press and has generally rejected any special protections for the press.⁶¹ In fact, in *Seattle Times Co. v. Rhinehart*,⁶² the Court held that the press did not have a right of access to information produced in discovery in a civil suit that was covered by a protective order.⁶³ Specifically, the press wanted to obtain a list of contributors to a controversial religious organization.⁶⁴ The Court unanimously ruled against the newspaper and said that the press was not entitled to the information because the public would not have had a right to

57. See Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636-37 (1975).

58. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580-81 (1980).

59. 448 U.S. 555 (1980).

60. See *id.* at 580-81.

61. See *Seattle Times v. Rhinehart*, 467 U.S. 20, 37 (1984).

62. 467 U.S. 20 (1984).

63. See *id.* at 37.

64. See *id.* at 24-25.

it.⁶⁵ The Court concluded that “where . . . a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.”⁶⁶

The Supreme Court’s refusal to protect newsgathering under the First Amendment is reflected in the decisions of lower courts. Most notably, in recent years, courts have held that the First Amendment does not shield the media from tort liability for the undercover activities of reporters who expose fraud and threats to public health and safety.

In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,⁶⁷ a jury awarded compensatory and large punitive damages for the undercover actions of reporters who surreptitiously videotaped conduct in the workplace that threatened public health.⁶⁸ *PrimeTime Live* had two of its undercover reporters apply for jobs at Food Lion, Inc., a major supermarket chain.⁶⁹ Lynne Litt, an investigative journalist, and Susan Barnett, an associate producer at ABC, had independently received information concerning Food Lion’s practices.⁷⁰ The two *PrimeTime Live* employees obtained jobs with Food Lion by submitting false information on employment applications, including false employment backgrounds, false references, and other false documentation.⁷¹

Once they were hired, each of the *PrimeTime Live* employees wore a hidden microphone while on the job and recorded some of the events that took place.⁷² They worked at Food Lion for approximately ten days and recorded significant activity that threatened public health, including changing the expiration dates on meat so as to allow its sale and dirty, unhealthy conditions.⁷³ The reporters also found that Food Lion ground out-of-date beef together with new beef and bleached rank beef to remove its odor.⁷⁴ Of the forty-five

65. *See id.* at 37.

66. *Id.*

67. 194 F.3d 505 (4th Cir. 1999).

68. *See id.* at 510.

69. *See id.*

70. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 814 (M.D.N.C. 1995) (ruling on defendant’s motions to dismiss).

71. *See Food Lion*, 194 F.3d at 510.

72. *See id.*

73. *See id.* at 511.

74. *See id.*

hours of tape obtained, five to six minutes of the footage were in a report broadcast on the ABC television show.⁷⁵ *PrimeTime Live's* producers indicated that the show would not have aired without the footage.⁷⁶ The district court denied the defendant's motion to dismiss.⁷⁷ The jury returned a verdict finding the defendants liable for fraud, trespass, and breach of the duty of loyalty and awarded Food Lion \$1,402 in compensatory damages and a total of \$5,545,750 in punitive damages.⁷⁸ The district court reduced the award of punitive damages to \$50,000 against the corporate parent, \$250,000 against the network, and \$7,500 each from the executive producer and senior producer.⁷⁹

The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision in part and reversed in part.⁸⁰ The Fourth Circuit reversed the large award of punitive damages, but it did so entirely based on its interpretation of state tort law and not the First Amendment.⁸¹ The Fourth Circuit reversed the finding of fraud against ABC, concluding that "the district court erred in upholding the verdict on this claim because Food Lion did not prove injury caused by a reasonable reliance on the misrepresentations made by [the ABC reporters] on their job applications."⁸² The Fourth Circuit explained that the "main component" of Food Lion's fraud claim was its costs resulting from employing the reporters.⁸³ The court concluded that the harms to Food Lion resulted almost entirely from the reporters' working for just a short time.⁸⁴ The court said that since they were at-will employees, they could have been fired or quit at any time.⁸⁵

The court stressed that "[t]heir performance was at a level suitable to their status as new, entry-level employees."⁸⁶ Thus, the court said that the reporters "were not paid their wages because of misrepresentations on their job applications. Food Lion therefore cannot assert wage payment to satisfy the injurious reliance

75. See *Food Lion*, 887 F. Supp. at 816.

76. See *id.*

77. See *id.* at 824.

78. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 984 F. Supp. 923, 927 (M.D.N.C. 1997).

79. See *id.* at 940.

80. See *Food Lion*, 194 F.3d at 510.

81. See *id.* at 522.

82. *Id.* at 512.

83. *Id.*

84. See *id.* at 512-13.

85. See *id.* at 513.

86. *Id.* at 514.

element of fraud. The fraud verdict must be reversed.⁸⁷ The punitive damages were reversed because they were based on the fraud claim.⁸⁸

The Fourth Circuit, however, did uphold the liability against the defendants for breach of the duty of loyalty and for trespass.⁸⁹ Most importantly, the Fourth Circuit expressly rejected ABC's First Amendment defense to liability.⁹⁰ The court relied on *Cohen v. Cowles Media Co.* and held that liability was constitutionally permissible because it was pursuant to laws of general applicability.⁹¹ The court explained that the torts of "breach of duty of loyalty and trespass fit neatly into the *Cowles* framework. Neither tort targets or singles out the press. Each applies to the daily transactions of the citizens of North and South Carolina."⁹² The court concluded that "[h]ere, as in *Cowles*, heightened scrutiny does not apply because the tort laws (breach of loyalty and trespass) do not single out the press or have more than an incidental effect upon its work."⁹³

Although the Fourth Circuit's decision in *Food Lion* is regarded as a victory for the press because the court overturned the large punitive damages judgment, actually the ruling provides no constitutional protection for newsgathering. In fact, the court upheld state tort law liability for breach of the duty of loyalty and for trespass.⁹⁴

In *Sanders v. American Broadcasting Cos.*,⁹⁵ the Supreme Court of California unanimously held that undercover reporters could be held liable for the tort of intrusion.⁹⁶ Stacy Lescht, an ABC reporter, obtained employment as a "telepsychic" with the Psychic Marketing Group ("PMG").⁹⁷ While working at PMG, Lescht wore a small video camera hidden in her hat and covertly taped her conversations with several coworkers, including Mark Sanders.⁹⁸

87. *Id.*

88. *See id.* at 522.

89. *See id.*

90. *See id.* at 520.

91. *See id.* (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991)).

92. *Id.* at 521.

93. *Id.* at 522.

94. *See id.*

95. 978 P.2d 67 (Cal. 1999).

96. *See id.* at 77.

97. *See id.* at 70.

98. *See id.*

Lescht and ABC were sued by Sanders on several grounds, including the tort of invasion of privacy by intrusion.⁹⁹ The focus of the suit was two conversations between Sanders and Lescht. The trial court rejected the defendants' motion to dismiss and ruled that Sanders could proceed on the theory that a limited right of privacy existed in the workplace that prohibited a journalist from covertly videotaping his actions, even though his communications with the journalist could have been witnessed and may have been overheard by coworkers.¹⁰⁰ The jury found the defendant liable for invasion of privacy by intrusion and awarded compensatory damages of \$335,000 and punitive damages of \$300,000.¹⁰¹

The California Court of Appeals reversed the judgment on the ground that Sanders had no reasonable expectation of privacy in the conversations because they could be overheard by others.¹⁰² The Supreme Court of California reversed the court of appeals and held that the media could be held liable for surreptitious taping in the workplace.¹⁰³ The court stated:

In an office or other workplace to which the general public does not have unfettered access, employees may enjoy a limited, but legitimate expectation that their conversations and other interactions will not be secretly videotaped by undercover television reporters, even though those conversations may not have been completely private from the participants' coworkers.¹⁰⁴

The court did not reject the possibility of a First Amendment limit on liability. The court said, "[n]othing we say here prevents a media defendant from attempting to show, in order to negate the offensiveness element of the intrusion tort, that the claimed intrusion, even if it infringed on a reasonable expectation of privacy, was 'justified by the legitimate motive of gathering the news.'"¹⁰⁵ The court did not elaborate on the content or scope of a possible First Amendment defense.

Food Lion and *Sanders* are recent cases allowing liability for undercover reporting; earlier cases followed the same approach. In

99. *See id.* at 69.

100. *See id.* at 70.

101. *See id.* at 70-71.

102. *See id.* at 71.

103. *See id.* at 77.

104. *Id.* at 69.

105. *Id.* at 77 (quoting *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998)).

Dietemann v. Time, Inc.,¹⁰⁶ the Ninth Circuit affirmed a finding of invasion of privacy and intrusion against reporters for *Life* magazine.¹⁰⁷ The reporters used deception to gain access to the home of an individual who claimed to be able to heal disease with the use of clay, minerals, and herbs.¹⁰⁸ The reporters surreptitiously took pictures and recorded conversations that were then used in a magazine story.¹⁰⁹ The subject of the story was later arrested for practicing medicine without a license.¹¹⁰

The magazine and its reporters appealed the judgment, contending that the imposition of liability violated the First Amendment.¹¹¹ The Ninth Circuit expressly rejected this claim:

We agree that newsgathering is an integral part of news dissemination. We strongly disagree, however, that the hidden mechanical contrivances are 'indispensable tools' of newsgathering. . . . The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.¹¹²

Nor have courts followed this reasoning just when the intrusion was into the home, as in *Dietemann*. In *Le Mistral, Inc. v. Columbia Broadcasting System*,¹¹³ a New York appellate court upheld a damage award against a reporter and camera crew that visited restaurants to expose health code violations.¹¹⁴ The reporter and photographer in *Le Mistral* did not engage in surreptitious videotaping and entered a place open to the public.¹¹⁵

There are very few cases that have protected the media from liability for aggressive newsgathering. The leading case rejecting liability is *Desnick v. American Broadcasting Cos.*¹¹⁶ In *Desnick*,

106. 449 F.2d 245 (9th Cir. 1971).

107. *See id.* at 250.

108. *See id.* at 245-46.

109. *See id.* at 246.

110. *See id.*

111. *See id.* at 249.

112. *Id.*

113. 402 N.Y.S.2d 815 (N.Y. App. Div. 1978).

114. *See id.* at 818.

115. *See id.* at 816; *see also* *Huskey v. National Broad. Co.*, 632 F. Supp. 1282, 1291-92 (N.D. Ill. 1986) (holding the media liable for invasion of privacy).

116. 44 F.3d 1345 (7th Cir. 1995).

investigative journalists working for *PrimeTime Live* posed as patients at an ophthalmic clinic and surreptitiously videotaped their examinations with hidden cameras and microphones.¹¹⁷ The program sent seven individuals, with concealed cameras, to the doctors' offices to investigate allegations that they were recommending and performing unnecessary cataract surgery.¹¹⁸

The United States Court of Appeals for the Seventh Circuit, in an opinion by Chief Judge Posner, rejected the plaintiffs' claims of trespass, invasion of privacy, and violation of state and federal wiretap laws.¹¹⁹ For example, the court found that there was no trespass because there was consent to the individuals entry on to the premises, and the court concluded that there was no claim for invasion of privacy because no private information had been revealed.¹²⁰ Chief Judge Posner wrote:

[I]f the broadcast . . . does not contain actionable defamation, and no established rights are invaded in the process of creating it (for the media have no general immunity from tort or contract liability), then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly.¹²¹

It is important to note that *Desnick* did not find that the First Amendment shielded the media from tort liability. To the contrary, the court rejected the notion that there is First Amendment immunity for torts committed in newsgathering.¹²² Instead, the Seventh Circuit interpreted the torts themselves in a manner as to not allow liability.¹²³

Thus, the Supreme Court and the lower courts consistently have rejected First Amendment protection for newsgathering. Cases such as *Food Lion* and *Sanders* are representative of an attitude and approach that has been consistently followed.

117. *See id.* at 1348.

118. *See id.*

119. *See id.* at 1351-54.

120. *See id.* at 1351-53.

121. *Id.* at 1355.

122. *See id.*

123. *See id.*

III. PROTECTING NEWSGATHERING: A FIRST AMENDMENT STANDARD

Academics who defend the absence of protection for news-gathering do so by narrowly defining the scope of the Constitution's protection for freedom of the press. In an especially thoughtful article on the subject, Professor Randall P. Bezanson defended holding ABC liable in the *Food Lion* case, and argued that the First Amendment simply does not offer protection for the press in its newsgathering activities.¹²⁴ Professor Bezanson writes:

The syllogism I would apply is: (1) freedom of the press means *independence* from government in *decisions* about whether and what to publish; (2) newsgathering, as such, has little to do with independent editorial judgment, and is thus only incidentally related to press freedom; (3) restrictions on newsgathering, if generally applicable, do not threaten press independence, but restrictions applicable *only* to the press, as well as exemptions directed narrowly to the press, *do* threaten independence by making the press a formal and distinct legal actor and by risking dependence, or entanglement, between the press and government; and (4) generally applicable restrictions on newsgathering should be presumed constitutional, with the press bearing a heavy burden of proof to justify an exception or exemption, much like civil disobedients must bear a heavy burden in making out the defense of necessity.¹²⁵

In this section, I disagree with Professor Bezanson's premise and his conclusion. Unlike Professor Bezanson, I believe that the First Amendment's protection for freedom of the press safeguards more than just the ability to print what the press chooses. News-gathering itself should be regarded as a First Amendment-protected activity. As such, the presumption should be in favor of the media and against liability, not, as Professor Bezanson would have it, the other way around.

Although the Supreme Court has not followed it in its rulings, the Court has declared that "without some protection for seeking out the news, freedom of the press could be eviscerated."¹²⁶ The press is not engaged in newsgathering for its own sake; rather, of course,

124. See Bezanson, *supra* note 9.

125. *Id.* at 896-97 (footnotes omitted).

126. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

newsgathering exists to provide the information that the press then publishes.

Newsgathering thus directly serves core purposes of the First Amendment. Above all, it is agreed that the First Amendment is essential for the effective functioning of the political process. Alexander Meiklejohn wrote that freedom of speech “is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”¹²⁷ He argued that “[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”¹²⁸ Newsgathering can gain information about government and the political process that would not otherwise be available.

Professor Vincent Blasi argued that freedom of speech serves an essential “checking value” on government.¹²⁹ He wrote that free speech checks the abuse of power by public officials and said that through speech voters “retain a veto power to be employed when the decisions of officials pass certain bounds.”¹³⁰ Freedom of the press in general, and aggressive newsgathering in particular, directly advances this checking function. If newsgathering is protected, the media might gain information that would not otherwise be available.

The First Amendment, of course, is not limited to protecting speech related to the political process. Speech can benefit people with information relevant to all aspects of life. The media, through newsgathering, can obtain information and then disseminate it to the public. The cases described in Part II are striking in terms of the public benefit of the information gathered. In *Food Lion*, the reporters documented unsafe practices in a major supermarket chain, including changing the expiration date after the product was no longer salable. Such practices threaten public health.¹³¹ *Sanders* involved purported psychics who were fraudulently taking money from people.¹³² The earlier cases, *Dietemann* and *Le Mistral*,

127. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27 (1948).

128. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1966).

129. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523 (1977).

130. *Id.* at 542 (footnote omitted).

131. See *supra* notes 67-94 and accompanying text.

132. See *supra* notes 95-105 and accompanying text.

involved, respectively, a person practicing medicine without a license and health code violations at a restaurant.¹³³ There is enormous public benefit in exposing such threats. This public benefit is unlikely to occur except through the media and undercover reporting techniques.

Indeed, this fulfills a central purpose of the First Amendment: informing people about matters important to their lives. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹³⁴ the Court explained that commercial speech is protected by the First Amendment because of its significance in people's lives.¹³⁵ The Court declared unconstitutional a Virginia law that prohibited pharmacists from advertising the prices of prescription drugs.¹³⁶ Justice Blackmun's opinion stressed the importance of commercial speech:

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . . When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.¹³⁷

Speech is protected because it matters in people's lives, and aggressive newsgathering is often crucial to obtaining the information. The very notion of a marketplace of ideas rests on the availability of information.¹³⁸ Aggressive newsgathering, such as by undercover reporters, is often the key to gathering the information. People on their own cannot expose unhealthy practices in supermarkets or fraud by telemarketers or unnecessary surgery by doctors. But the media can expose this, if it is allowed the tools to do so, and the public directly benefits from the reporting.

The problem, though, is how to draw the line: What actions by the media in newsgathering are permissible and which are impermissible? Protecting newsgathering cannot mean that the media has license to violate any law or commit any tort. Yet nor should the media be subjected to liability without respect to the impact on

133. See *supra* notes 106-15 and accompanying text.

134. 425 U.S. 748 (1976).

135. See *id.* at 764.

136. See *id.* at 770.

137. *Id.* at 763-64.

138. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (providing a classic explanation of the marketplace of ideas metaphor).

newsgathering. Thus there is a need to balance the media's interests against the government's need for enforcing its criminal and tort laws.

Many scholars have considered this issue and their proposals range from allowing no exemptions for the press, to allowing exemptions only in particularly compelling circumstances, to allowing compensatory but not punitive damages, to applying express balancing. I suggest another alternative, one that has been largely absent from the voluminous law review literature on the topic: the use of intermediate scrutiny. In other words, the government should be able to impose liability on the media only if it can prove that this is necessary to achieve an important government purpose.¹³⁹

Indeed, using intermediate scrutiny in this context is consistent with well-established First Amendment doctrine.¹⁴⁰ The Court has made it clear that general laws that burden First Amendment activities must meet intermediate scrutiny. In *Turner Broadcasting System v. Federal Communication Commission*,¹⁴¹ the Court said that the general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulation only need meet intermediate scrutiny.¹⁴² Justice Kennedy, writing for the Court, explained that “[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right.”¹⁴³ Justice Kennedy thus noted, “[f]or these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals.”¹⁴⁴ Hence, the Court endorsed a two-tier system of review. The Court uses “the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”¹⁴⁵ But, “[i]n contrast, regulations that are unrelated

139. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (defining intermediate scrutiny as requiring the regulation “serve important governmental objectives and . . . be substantially related to achievement of those objectives”).

140. See, e.g., *Turner Broad. Sys. v. Federal Communication Comm’n*, 512 U.S. 622, 662 (1994).

141. 512 U.S. 622 (1994).

142. See *id.* at 662.

143. *Id.* at 641.

144. *Id.*

145. *Id.* at 642.

to the content of speech are subject to an intermediate level of scrutiny."¹⁴⁶

Imposing tort liability on the media for its newsgathering activities is applying a content-neutral law in a manner that burdens First Amendment conduct. Intermediate scrutiny is thus appropriate. This is important because it explains why *Cohen v. Cowles Media Co.* is mistaken in holding that the First Amendment cannot be used to challenge neutral laws of general applicability.¹⁴⁷ *Turner Broadcasting* is explicit that neutral laws burdening First Amendment activities must meet intermediate scrutiny. In *Cohen*, the Court expressly found that allowing breach of contract liability for the broken promise of confidentiality would have only an "insignificant" effect on the First Amendment.¹⁴⁸ Moreover, the Court in *Cohen* stressed that the obligation on the press was self-imposed by its own promise of secrecy.¹⁴⁹ *Cohen* thus stands for a proposition that is quite different from tort liability for newsgathering, which involves the government imposing significant liability and creates significant constitutional implications.

Applying intermediate scrutiny in this area would place the presumption in favor of the media when it is engaged in newsgathering activity. Obviously, the press should not have license to violate any criminal law or commit any tort simply because it is gathering the news. Nor, though, should the Constitution fail to provide any protection to the media. The need is to balance a state's interests, as reflected in its tort laws, against the media's interest in newsgathering and the public's right to know.

A simple balancing test gives courts little guidance as to how to weigh the competing interests. It also gives the media a relatively minimal sense of what is likely to be held liable under what circumstances. Applying intermediate scrutiny in this area informs courts and the press that newsgathering is constitutionally protected unless it can be proven that there is an important interest gained by allowing liability.

146. *Id.* (emphasis added).

147. For an excellent argument that it is incorrect to interpret *Cohen* as precluding protection for newsgathering activities, see Eric B. Easton, *Two Wrongs Mock a Right: Overcoming the Cohen Maledicta that Bar First Amendment Protection for Newsgathering*, 58 OHIO ST. L.J. 1135 (1997).

148. 501 U.S. 663, 671-72 (1991).

149. *See id.* at 671.

Obviously, a state's general interest in enforcing its tort law should not be regarded as sufficient to justify imposing liability. This approach would eviscerate constitutional protection for newsgathering. Instead, the question in any case must be whether imposing liability would serve an important government interest.

In the cases described above, the public's interest in being informed is much more significant than the state's interest in upholding its tort law. In *Food Lion*, the public's interest in health and safety is served by undercover reporting that documents a supermarket chain engaging in dirty and dangerous practices. In *Sanders*, the public's interest in exposing fraud is more important than an intrusion by one coworker upon another's privacy. In *Dietemann*, there is the public's interest in exposing a person practicing medicine without a license. In none of these instances is there an important interest sufficient to justify allowing tort liability.

What would be the constitutionality of California's recently adopted Privacy Protection Act¹⁵⁰ under this standard?¹⁵¹ The law creates liability for anyone who uses technological enhancement equipment, such as telephoto lenses, to obtain images of personal or family activity, where there is a reasonable expectation of privacy, if the images otherwise only could have been gained through a physical trespass.¹⁵² In other words, the California law applies only if the following requirements are met: (a) images or sound must be obtained through technological enhancement equipment; (b) the images or sound must be of personal or family activity where there is a reasonable expectation of privacy; and (c) the images or sound otherwise only could have been obtained through a physical trespass.¹⁵³

Although the law is described as an anti-paparazzi statute, it applies to all who engage in the activity described. Despite strongly believing in First Amendment protection for newsgathering, I believe that this law is constitutional. The government has an important interest in protecting the privacy of the home. Fourth Amendment cases have recognized the special privacy interests

150. CAL. CIV. CODE § 1708.8 (West Cum. Supp. 1999).

151. I should disclose that I played a role in conceiving this law and assisted in the legislative process, including testifying in favor of it.

152. See CAL. CIV. CODE § 1708.8 (West Cum. Supp. 1999).

153. See *id.*

surrounding the home.¹⁵⁴ Additionally, in the First Amendment area, the Court has expressly protected the privacy of the home.¹⁵⁵ In *Frisby v. Schultz*,¹⁵⁶ the Court sustained an ordinance that prohibited picketing "before or about" any residence.¹⁵⁷ Although the law was adopted in response to targeted picketing by anti-abortion protestors of a doctor's home, the Court concluded that the law was permissible because it was content neutral and narrowly tailored to protect people's tranquility and repose in their homes.¹⁵⁸ Justice O'Connor, writing for the Court, said that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech. The target of the focused picketing banned by the . . . ordinance is just such a 'captive.' The resident is figuratively, and perhaps literally, trapped within the home."¹⁵⁹

The California Privacy Protection Act says that people, no matter how famous, should be able to shut their door and close out the media and the world. If the image could not have been gained except through a trespass, the media should not be able to obtain it through technological enhancement equipment. Simply put, the law is constitutional because it substantially advances the government's interest in safeguarding privacy in the home.

Thus the protection for the press in newsgathering is surely not absolute. However, there is a need for express judicial protection and the intermediate scrutiny test would accomplish this objective.

IV. CONCLUSION

In few areas of constitutional law is there a greater divergence between rhetoric and reality than the difference between the Supreme Court's proclamation of the need to protect newsgathering and its failure to do so. Recent cases, such as *Food Lion* and *Sanders*, show that courts continue to fail to provide First Amendment protection for newsgathering.

154. See, e.g., *Wilson v. Layne*, 119 S. Ct. 1692, 1698 (1999).

155. See *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

156. 487 U.S. 474 (1988).

157. *Id.* at 488.

158. See *id.* at 482.

159. *Id.* at 487.

In this article, I have argued for such protection. It will help to ensure that the press can perform its essential functions in the American system of democracy.

