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I Spy: The Newsgatherer Under Cover

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I. INTRODUCTION

Hysteria about the press, like the flu, breaks out periodically, and when it does, few of us are better off for having lived through the experience. We are currently on what I sincerely hope will prove to be the receding edge of the latest epidemic of public outrage about the press, and, as usual, the frenzied state has not brought out the best in either the media or its critics.[1]

Disgust over the gross and moronic photographic frenzy that preceded and memorialized the dying moments of Britain's Princess Diana (and perhaps contributed to the accident that killed her) added fuel to efforts by celebrities in the United States to pass laws to stifle the ever-present paparazzi (and, perhaps predictably, to hamper what many would argue is valuable investigative reporting in the process).[2] Investigative reporting, many allege, has become

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1. Samuel Warren and Louis Brandeis were inspired by the excesses of "yellow" journalism in the last quarter of the 19th century to write their famous law review article advocating a right of privacy. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Journalistic historians Michael and Edwin Emery note that yellow journalists of that time shared characteristics in common with modern tabloid journalism–exaggeration, "made up" material, and sensationalism. *See* MICHAEL EMERY & EDWIN EMERY, THE PRESS AND AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA 194 (7th ed. 1992). Crusaders, labeled "muckrakers" by Theodore Roosevelt, sought to reveal misconduct in institutions and misbehavior by public figures in the early years of the twentieth century. *See id.*; JAMES H. DYGERT, THE INVESTIGATIVE JOURNALIST: FOLK HEROES OF A NEW ERA viii (1976). The 1920s brought back a wave of sensationalism in the press–so-called "jazz journalism." At the time, say the Emerys, the press was "preoccupied . . . with sex, crime, and entertainment, reflect[ing] the spirit of the times." EMERY & EMERY, *supra*, at 265. The 1960s and 1970s brought back the same fervor for investigative reporting that animated the muckrackers half a century before, and with it, an active rebirth of criticism of the media from within and without the press. *See generally* DYGERT, *supra*; EDWIN DIAMOND, GOOD NEWS, BAD NEWS (1978).

2. In 1998, the California legislature passed a so-called anti-paparazzi statute. *See* CAL. CIV. CODE §1708.8 (West 1999). Although the ostensible purpose of the law was to reduce the risk that photographers would engage in harassment of and spying on the rich and famous

a euphemism for aggressive and blatant prying that leaves no institution or person safe from massive public exposure. The intensity of the reportage about Monica Lewinsky's relationship with President Clinton, Anita Hill's claim that she was sexually harassed by (now) Justice Clarence Thomas, and O. J. Simpson's alleged murder of his former wife contributed to arguments about the "dumbing down" of the press, its preference for lurid detail and sensational footage over substance, and its lack of respect for personal privacy.

Interestingly, however, much of the fight over the press in this decade has revolved not so much around the content of its reportage–is it fair, is it true, is it the public's business, is it injurious to national security or the system of justice?–but rather, around the methods used by the press to get its information. While dismay over the content often hovers visibly in the background, the specific focus more often is on the process of newsgathering rather than on the news itself.

The emblematic case in this genre is the suit filed against ABC by the Food Lion supermarket chain.[3] Food Lion did not contest the truth of the allegations about its mishandling and misdating of perishable foods, as reported by the news magazine *PrimeTime Live*.[4] Rather the entire attack was on the way the reporters went about getting the material they aired: they concealed their identity as journalists to get jobs with the supermarket chain, and they documented their findings by videotaping what they saw with hidden cameras.[5] The "unfairness" of the techniques, not the content of the story, was what allowed a jury to award the plaintiff company some $1400 in compensatory damages and to assess punitive damages against the defendant in excess of $5.5 million.[6] Of course, the trial judge subsequently reduced the punitive damages award to $315,000,[7] and, in the last quarter of 1999 the Fourth Circuit further reduced Food Lion's total recovery to a mere

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in the privacy of their homes, the vagaries of the language used in the law open the possibility that a whole range of photographic and recordation activities will be illegal because they are accomplished during something that can be defined by a court as a "trespass." *See id.* Similar legislation was also introduced in Congress by Senators Boxer, Feinstein, and Hatch. *See* Personal Privacy Protection Act, S. 2103, 105th Cong. (1998).

3. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923 (M.D.N.C. 1997), *rev'd in part and aff'd in part,* 194 F.3d 505 (4th Cir. 1999).

4. *See* 984 F. Supp. at 927.

5. *See id.*

6. *See id.*

7. *See id.* at 940.

two dollars.[8] But the size of the original award, the years the case took to litigate, and a steady drumbeat of other cases in which the reporting methods of the press have been attacked as trespass, fraud, violation of eavesdropping statutes, physical harassment, theft of information, RICO claims, theft of images, violation of wiretapping laws, violations of federal civil rights laws, violation of copyright, and the theft of trade secrets have left many in the media shaken and others convinced that the overly aggressive modern press is finally getting its come-uppance.[9]

Only hindsight will provide the wisdom and restore the dispassion necessary to judge the claims and counterclaims in each of these individual controversies fairly. But, while the dust is settling and the controversies remain clearly in mind, it may be useful to try to disaggregate the multiplicity of issues that are jumbled together under a heading like "aggressive newsgathering" and to pick out a few of them for individual examination. I focus my comments on a theme that seems to recur over time in the cases and the commentary about the news and how it is gathered–namely, the legitimacy of subterfuge as a newsgathering technique.

Is it ever legitimate for investigative reporters to use the tools of disguise and concealment? Is it fraud to pretend to be someone other than a reporter to get a story? Is it trespass or theft or some other tort–or even a crime–to supplement what the reporter can see

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8. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 524 (4th Cir. 1999).

9. *See, e.g.*, 984 F. Supp. at 928. For a discussion of whether ABC employees' misrepresentations about their identity provided for a fraud claim, see *id.* at 929. *But see* 194 F.3d at 513, 514 (fraud claim fails because not proximate cause of injury to plaintiff). For a discussion of whether ABC employees' entrance under false pretenses constituted trespass, see *id.* at 518. *See also* Medical Lab. Management Consultants v. American Broad. Cos., No. Civ-95-2494-PHX-ROS, 1997 WL 405908, at *2-4 (D. Ariz. Mar. 27, 1997) (discussing whether secret recordings violate federal wiretapping laws); Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 817 (M.D.N.C. 1995) (discussing whether RICO statute applied to Capital Cities); New Kids On The Block v. News America Pub., Inc., 745 F. Supp. 1540, 1543-44 (C.D. Cal. 1990) (discussing whether the use of information from a singing group's pay telephone number in a news article was copyright infringement); Boddie v. American Broad. Cos., 694 F. Supp. 1304, 1309-10 (N.D. Ohio 1988) (discussing if a violation of federal wiretapping statutes is also a violation of federal civil rights); United States v. Morrison, 604 F. Supp. 655, 663 (D. Md. 1985) (discussing whether release of classified photographs to a magazine is a theft of information); Sanders v. American Broad. Cos., 978 P.2d 67, 79 (Cal. 1999) (concluding there is a theft of image tort for surreptitious video recording); Shulman v. Group W Prods., Inc., 955 P.2d 469, 491-92 (Cal. 1998) (discussing whether recording a conversation in a public spot violated California's eavesdropping statutes); Metro Traffic Control, Inc. v. Shadow Traffic Network, 27 Cal. Rptr. 2d 573, 576-78 (Cal. Ct. App. 1994) (discussing whether using a competitor's traffic information constituted use of a trade secret); State v. Lee, 917 P.2d 159, 164-66 (Wash. Ct. App. 1996) (discussing whether aggressive reporting was a form of physical harassment).

or hear with tape recordings, videotapes, or still photographs if the subject of the report is unaware of being recorded?

These are not new questions, and they are not driven in any but the most insignificant ways by the advent of new technologies like infrared cameras or ultrapowerful telephoto lenses.[10] They are not cases about wiretapping or the use of devices to permit the press to snoop on people in places where they reasonably believe they are safe from prying ears and eyes.[11] These disputes are not about the ability of subjects to withdraw from sight into secluded places.[12]

Rather, the genuinely intriguing cases are those where the subject knows or could readily discover that other parties are present (often parties who are not intimates like family and close friends), and where what is captured is behavior in which the subject willingly engages in the presence of others–that is, she has not been entrapped into acts in which she would ordinarily not participate. These are situations in which the reporter assumes a false identity or secretly records what she observes because she believes it is the only way to uncover the truth, because she wants hard evidence to back up her word, or, increasingly, because she needs sound and images to illustrate her story for the audiovisual media.

Although the legal complaints against this kind of behavior take a variety of forms,[13] what is at issue in all of them is a special kind of privacy claim that is difficult to capture in a brief phrase. These are cases where it would ordinarily be difficult for the plaintiff to

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10. Miniaturization of standard recording devices, however, is a modification of older technologies that permits reporters to record more easily without the awareness of their subjects. *See* Tom Mashberg, *Nowhere to Hide–In Today's High Tech Spy Game, It's Us Against Us*, BOSTON HERALD, Mar. 22, 1998, at 1; *see also* Ken Ringle, *Your Secret's Not Safe With Spy Gadgets*, AUSTIN AMERICAN-STATESMAN, Aug. 22, 1992, at F3. On the other hand, secret recording with hidden microphones and cameras is not new. *See, e.g.*, Dietemann v. Time, Inc., 449 F.2d 245, 246 (9th Cir. 1971).

11. The classic case of this type is *Hamberger v. Eastman*, 206 A.2d 239, 242 (N.H. 1964), in which the state supreme court recognized a cause of action against a landlord who concealed a listening device in the bedroom of the house he rented to the plaintiffs.

12. Cases where the party under observation is unaware of anyone watching or listening and believes that he is in a private space are what I would characterize as call espionage cases. The invisible eye or ear comes in an increasing variety of forms. For example, consider the recent dispute over the use of the identification codes that were imbedded in the Intel Pentium III chip and in Windows 98. The average user would not know that these identifiers are there, but a person with a sufficient degree of computer sophistication could use the numbers to put together an amazingly detailed profile of the computer user's activities. *See, e.g.*, Hiawatha Bray, *Privacy Advocates Decry Digital 'Fingerprints' Step Up Call for Federal Protection in Wake of Microsoft Disclosure*, BOSTON GLOBE, Mar. 9, 1999, at C1. These cases are legitimately troubling but beyond the scope of consideration in this article.

13. *See supra* note 9 and accompanying text.

argue that the press had no right to publish the information at issue. It is generally of at least modest public significance, and rarely, if ever, reveals the sort of genuinely intimate material that a reasonable person of ordinary sensitivity might be horrified to have published.[14] Nor can the subject complain that the story is untrue and/or libelous. Rather, what the plaintiff argues, stripped of detail, can be summarized as follows: this person (the reporter) had no right to observe me and report on my doings–even if my coworkers or friends or patients or customers could do so, and even if those persons would be entirely within their rights to tell a reporter what I did.[15] Or, conversely, the complaint might be that, although the reporter was free to observe my conduct[16] (and could freely report about it based on her recollections and notes), she was not entitled to memorialize what she saw and heard with mechanical recording devices unless she obtained my prior permission. In other words, the argument is that the method of gathering the news, and not its publication, is the legal wrong. Although this distinction between information that is legally reported but illegally obtained will strike many observers as intuitively correct and can quite intelligibly be defended in certain situations, in a growing number of recent court decisions, a clear rationale for the lines being drawn is not easy to discern. This does not, of course, mean that cases are being wrongly decided–they could simply be poorly justified. But at the very least, this seems the right moment to take a step back, think about where we are on these issues, and ask how we have gotten there.

II. HOW THE ISSUE GOT FRAMED

None of the techniques discussed in this article have been newly invented by journalists at the end of the millennium. Although the ethics of assuming a false identity (or at least of not revealing that

14. One might imagine, for example, that photographs of nudity or sexual relations would be in this category. *See* RESTATEMENT (SECOND) OF TORTS § 652 (1976); *see also* William B. Prosser, *Privacy*, 48 CAL. L. REV. 383, 396 (1960); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 299 (1983) [hereinafter Zimmerman, *Farewell to Privacy Tort*].

15. Almost never has an action for privacy been found when the plaintiff voluntarily revealed the information in the presence of others. *See, e.g.*, Virgil v. Sports Illus., 424 F. Supp. 1286, 1288 (S.D. Cal. 1976); Sipple v. Des Moines Register & Tribune Co., 147 Cal. Rptr. 59, 61 (Cal. Ct. App. 1978).

16. These would be cases, for example, where the reporter observed something in a public place, a place of public accommodation where the press was allowed to be, or where the reporter disclosed her identity and the subject knowingly spoke with the reporter.

the reporter is a reporter) have recently been a subject of debate in the journalistic community,[17] the technique is a venerable one. Elizabeth Cochrane, more commonly known as Nelly Bly, pretended to be a patient so she could write about conditions in mental institutions in New York in the 1890s.[18] Upton Sinclair gathered the material for his novel, *The Jungle*, by going undercover and obtaining a job in a meat packing plant.[19] The conditions he uncovered led to the creation of the federal Food and Drug Administration.[20] Over the years, many journalists who assumed false identities to get their stories have earned prestigious prizes, including the Pulitzer.[21]

Similarly, hidden recording devices are nothing new. A reporter for the *New York Daily News* won notoriety (and a place in journalism history) in the 1920s by sneaking a camera into Sing-Sing prison to photograph an execution.[22] In the 1960s and 1970s, surreptitious filming brought to light such matters as the operation of bookie parlors in St. Louis and judges who associated with bookmakers and members of organized crime.[23] I have found little

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17. *See, e.g.*, Gina Lubrano, *Ethics and Information Gathering (Opinion)*, SAN DIEGO UNION & TRIB., Feb. 3, 1997, at B7. Lubrano, who serves as her paper's reader representative, argues that there is no ethical distinction between a reporter who fakes interviews and one who hides his identity to obtain a job with a company and spy on its activities. *See id.* In her view, it was clear that the reporters hired by Food Lion breached their duty of good faith to their unsuspecting employer. *See id.* If they knew about the sale of unfit food, their responsibility was to prevent its sale, not to report on it. *See id.*; *see also* Steven Perry, *Hidden Cameras, New Technology, and the Law*, COMM. LAW., Fall 1996, at 1, 21 (describing the controversy); Susan Paterno, *The Lying Game*, AM. JOURNALISM REV., May 1997, at 40, 42 (same and discussing guidelines issued by the Society of Professional Journalists).

18. *See* LOUIS FILLER, MUCKRAKING AND PROGRESSIVISM IN THE AMERICAN TRADITION 234 (1996).

19. *See* WILLIAM A. BLOODWORTH, JR., UPTON SINCLAIR 45-48 (1977).

20. *See id.* at 57.

21. For example, in the 1970s, William Sherman of the *New York Daily News* won a Pulitzer Prize, as well as the Polk and the Newspaper Guild awards, for posing as a patient (in cooperation with government authorities) to expose Medicaid fraud. *See* DYGERT, *supra* note 1, at 23-25. For additional examples of undercover reporting involving disguised identity, see Kyle Neiderpruem, *Food Lion Case May Punish Future Journalists: Undercover Only Way to Get Some Stories*, QUILL, May 1997, at 47. Neiderpruem points out that the technique was used by a *Consumer Reports* staffer, Trudy Lieberman, to check on nursing homes. *See id.* Ben Bagdikian spent a week as a prisoner to report on conditions inside the jail. *See id.* An Asbury Park paper sent two teams of journalists, black and white, to report on housing discrimination. *See id.* Neiderpruem argues that many important stories could not be covered if the press were discouraged from going undercover. *See id.*

22. *See* EMERY & EMERY, *supra* note 1, at 283.

23. *See* DYGERT, *supra* note 1, at 166-67.

evidence, however, that these practices caused the press much in the way of legal difficulties up until 1971.

It is true, however, that technological means of seeing, hearing, and memorializing have long been treated with suspicion and have a venerable history of regulation in a number of arenas. Many states and the federal government have laws on the books, for instance, criminalizing unauthorized wiretapping; as will be discussed further below, the main objective seemed to be to discourage private snoops who were not parties to the discussion and whose presence could not readily be detected.

In general, the visual and aural technologies behind television and radio have been subject to a variety of regulations that go well beyond what was necessary to allocate frequencies on the air waves. Concern about the power and influence of media using sight and sound and fears about their impact on children, have led periodically to efforts to regulate the content of the programming.[24] Historically, the use of cameras and broadcasting equipment has also been disfavored in certain settings, such as in courts. Although reporters were allowed to attend trials and even sketch parties as they testified, in the aftermath of the Lindbergh kidnapping trial in the 1930s and the notorious trial of Dr. Sam Shephard in the 1950s, photography, recordation, and broadcasting equipment were barred from the courts of most states and of the federal government, a situation that did not begin to reverse itself until twenty years ago.[25] The objections to the use of recording devices were not based solely on such concerns as whether cameras were too noisy and distracting; a variety of other claims, including the fear that televising sensational trials would have an adverse impact on public morals, were put forward.[26]

Virtually the only injunction against a piece of reportage that withstood judicial review was issued against a filmmaker, Frederick

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24. *See, e.g.*, FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING (1975); *see also* F.C.C. v. Pacifica Found., 438 U.S. 726 (1978).

25. The history of television and still cameras in courtrooms is given in Jack B. Weinstein & Diane L. Zimmerman, *Let the People Observe Their Courts*, 61 JUDICATURE 156 (1977), and Diane L. Zimmerman, *Overcoming Future Shock:* Estes *Revisited, or a Modest Proposal for the Constitutional Protection of the News-gathering Process*, 1980 DUKE L.J. 641, 678-81 (1980) [hereinafter Zimmerman, *Overcoming Future Shock*]. For a current account of the status of televising trials, see RONALD L. GOLDFARB, TV OR NOT TV: TELEVISION, JUSTICE AND THE COURTS (1998), and Dolores K. Sloviter, *If Courts are Open, Must Cameras Follow?*, 26 HOFSTRA L. REV. 872 (1998).

26. *See* Zimmerman, *Overcoming Future Shock*, *supra* note 25, at 695.

Wiseman, for his powerful documentary, *Titicut Follies*.[27] The film, virtually without dialogue, was said by the Massachusetts Supreme Judicial Court to be a "massive, unrestrained invasion of the intimate lives of these State patients . . . in situations which would be degrading to a person of normal mentality and sensitivity."[28] The injunction, which permitted the movie to be shown to certain professionals with prior approval of the court, was not lifted until 1991.[29] It is not at all clear–in fact, I would deem it quite unlikely–that a written report about the abysmal conditions in a state facility for the criminally insane would have met with a similar reaction. In some way, the camera changed the balance.[30]

Attention to the technology of newsgathering and particularized concern with subterfuge merged two important cases in the 1970s. The best known of these is *Dietemann v. Time, Inc.*[31] In *Dietemann*, the plaintiff was practicing medicine without a license, a charge on which he was subsequently convicted. He provided his services in his house rather than in an office.[32] When reporters for *Life Magazine* armed themselves with hidden cameras and microphones and posed as patients seeking treatment from Dietemann, they were engaging in behavior that was common,[33] even if not universally approved by journalists.[34]

The *Dietemann* court was not willing to say that the reporters were legally liable for failing to identify themselves honestly. Instead, it struck out against their use of the recording equipment, calling secret recording a form of invasion of privacy, an intrusion into a physical space where the plaintiff had a reasonable expectation of solitude.[35] The court reasoned that:

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

28. *Id.* at 615.

29. *See For the Record: Legal Newsbriefs, Massachusetts–"Follies" Can Be Shown*, NAT'L L.J., Aug. 19, 1991, at 6 (reporting dissolution of 20-year-old ban on public exhibition of film).

30. One obvious issue in the case was that individuals were photographed so that they could be recognized easily by anyone who knew them. Although there is no general right not to be photographed, arguments were made about the lack of competence of several subjects to consent and to the shockingly intimate quality of the subject matter – inmates crouched nude along walls and a dying man being force-fed. *See Wiseman*, 249 N.E.2d at 613, 615.

31. 449 F.2d 245 (9th Cir. 1971).

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

33. *See id.* at 246.

34. *See* DYGERT, *supra* note 1, at 153; *see also* SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS, *in* CODES OF PROFESSIONAL RESPONSIBILITY 196, 199-201 (Rena A. Garlin ed., 1999).

35. *See Dietemann*, 449 F.2d at 248.

> One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select. A different rule could have a most pernicious effect upon the dignity of man and it would surely lead to guarded conversations and conduct where candor is most valued, e.g., in the case of doctors and lawyers.[36]

Although intrusion was a recognized subdivision of the tort of invasion of privacy,[37] it was not at the time a highly developed branch of the law. Intrusion up to then had been used almost entirely to deal with situations where the intruder was an unanticipated and invisible presence, but one who had not committed a traditional trespass–for example, a landlord who bugged a tenant's bedroom.[38] What was surprising about the *Dietemann* holding was that this "intruder" had been invited in by the plaintiff and was, by the court's own admission, free to report to the public about the plaintiff's healing methods.[39] Perhaps even more surprising was the fact that the court's solicitousness had been called forth on behalf of a plaintiff who was not entrapped into engaging in illegal activity but who rather engaged of his own volition in the illegal practice of medicine on a regular basis.[40]

The second case, decided seven years later in New York, did not involve subterfuge, but it did make clear that newsgathering techniques could become a source of liability even in rather public places.[41] In that instance, a television crew arrived, with cameras rolling, to photograph the inside of a famous French restaurant that had just been cited for health code violations.[42] Although the reporter and crew left the premises when requested to do so, the court ruled that their presence in a place of public accommodation

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36. *Id.* at 249.

37. In 1960, William Prosser wrote a law review article that reviewed all privacy tort cases decided up to that time; he concluded that they really broke down into four separate causes of action, one of which was the tort of intrusion. *See Prosser, supra* note 14, at 389. The quadripartite scheme was then adopted by the American Law Institute in its Restatement (Second) of Torts and has been widely adopted by state courts. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1976).

38. *See* Hamberger v. Eastman, 206 A.2d 239, 241 (N.H. 1964).

39. *See Dietemann*, 449 F.2d at 249.

40. *See id.* at 246.

41. *See* Le Mistral, Inc. v. Columbia Broad. Sys. 402 N.Y.S.2d 815 (1978).

42. *See id.* at 816.

was a tort–not intrusion, but a physical trespass.[43] The court never stated this directly, but the discussion in the case strongly suggests that the outcome was influenced by the defendant's use of television cameras.[44] But, unlike *Dietemann*, the New York court did not focus on the equipment. Instead, the basis of liability was the physical presence of the reporters themselves.[45] The court concluded that the reporter and camera crew committed a trespass merely by entering the restaurant because they had come there to get a story rather than a lunch.[46]

As did *Dietemann*, the *Le Mistral* case suggested that a court so inclined could easily wrench apart the newsgathering of the press from the information that was gathered by them, characterize the techniques as tortious conduct, and have a basis for awarding damages against the press–all the while "steering clear" of the limitations on direct regulation of speech imposed by the First Amendment. The underlying normative system was one that, however labeled, recognized a fairly broad physical arena of "privacy" within which the plaintiff could exercise considerable, if not total, control over when and how journalists, as opposed to "ordinary" people, could observe him.

Kicking around under *Dietemann* and *Le Mistral* were some quite serious questions about the relationship between newsgathering conduct and the First Amendment of the United States Constitution. It would be difficult to entertain the suggestion for even a moment that journalists, in the interest of getting their story, are protected by the Constitution against civil or criminal liability for

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43. *See id.* at 817. The trespass rationale in *Le Mistral* is an odd one. Places of public accommodation carry with them an implied invitation to enter. The invitation can, of course, be withdrawn, but the normal expectation is that the unwelcome visitor will withdraw, not that she will be liable for damages simply for incurring the displeasure of the owner. It is hard to imagine that a passerby who stopped to ask to use a telephone or a restroom would have similarly been subjected to a successful trespass claim.

44. That some sort of privacy concern was an issue in *Le Mistral* is clear from the opinion. The court noted that the cameras caused a stir among the patrons:

> Patrons waiting to be seated left the restaurant. Others who had finished eating, left without waiting for their checks. Still others hid their faces behind napkins or table cloths or hid themselves beneath tables. (The reluctance of the plaintiff's clientele to be video taped was never explained, and need not be. Patronizing a restaurant does not carry with it an obligation to appear on television.)

Id. at 816 n.1. Clearly, the patrons were quite visible to one another and the court does not suggest that, had another diner chosen to reveal to the world who was lunching at Le Mistral that day, the patrons would have had cause to complain; the problem seems to have been the press getting the information directly.

45. *See id.* at 817.

46. *See id.*

anything they do in the process of reporting. A reporter may not commit an assault or break into a house simply because doing so would enable her to acquire information that would otherwise be unavailable. Reporters are subject to the same laws as the rest of us. But the behavior in these two cases cannot so easily be characterized as wrongdoing. Going undercover or showing up with camera rolling might be offensive and irritating, but was it the sort of clearly recognized bad act for which *any* citizen should expect to answer in a court of law?[47] This was not clear. What was clear, however, was that courts could, if they chose, nudge the line between wrongdoing and permissible behavior significantly enough to the left or right to catch in the net of the tort system a variety of newsgathering practices that historically had aided the press in acquisition of publishable information.[48]

This raised interesting issues. Were the subtle and not so subtle adjustments in the tort law ones explicable and justifiable on wholly neutral grounds? Or were they really indirect attempts to regulate the press? As the Supreme Court gradually cut off direct ways to attack the content of press reports by announcing a set of First Amendment privileges, would redefined or new torts–facially applicable to one and all, but as a practical matter most likely to be used only against the press–become the indirect but effective alternative route to content control? These uses of tort law clearly impacted on First Amendment activity. But neither the *Dietemann* nor the *Le Mistral* courts accepted the argument that indirect impediments to reportage were constitutionally significant.[49]

At the time, there was virtually no guidance from either the Supreme Court or the highest state courts about where protection

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47. Some commentators have concluded that the answer to this question is unambiguously "yes." *See, e.g.*, John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111 (1996). Walsh and his co-authors argue that the press should be liable not only for their tortious acts during newsgathering but for consequential damages that flow from the ensuing publication. *See id.* at 1112.

48. This point was made by Professor Paul LeBel in a recent article. He wrote:

> Stating that an act committed while newsgathering is a legal wrong–and is therefore afforded no constitutional protection–ignores the extent to which the initial characterization of the act as a wrong begs the ultimate question. What constitutes wrongdoing, whether tortious or criminal in nature, is a function of positive common and statutory law with a constitutional overlay.

Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145, 1148 (1996).

49. *See* Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971); *Le Mistral*, 402 N.Y.S.2d at 817.

under the Bill of Rights left off and the civil and criminal system could properly take over. Or, to put it differently, whether newsgathering was in any sense a protected activity was a question that was up for grabs. In 1972, between *Dietemann* and *Le Mistral*, the Supreme Court took one cut at the problem of protecting newsgathering but did not clarify the situation very much. In *Branzburg v. Hayes*,[50] the Court reviewed several cases in which reporters were called to testify before grand juries about alleged criminal activities they had witnessed.[51] The reporters resisted appearing, arguing that their ability to gather news would be damaged if they were required to reveal the identity of their sources or other confidential material in a criminal proceeding.[52] The Court was deeply divided on the issue; four Justices dissented,[53] and Justice Powell, although he voted with the majority, expressed the view that the state could only call journalists to testify in good faith and for good cause because to do otherwise would risk turning the press into an arm of the state.[54] Even among the majority, no one was entirely willing to place newsgathering entirely outside the framework of the Constitution.[55] In an oft-quoted line, the Court said, "without some protection for seeking out the news, freedom of the press could be eviscerated,"[56] but it left blank what might be encompassed by "some protection."

The blank has not been filled in the years since *Branzburg*. The Court has, however, stated repeatedly both that the press is not entitled to First Amendment privileges denied the ordinary citizen, and that it must abide to the same laws that apply to others. The most dramatic example of this equality principle in operation can be found in the Court's 1991 decision in *Cohen v. Cowles Media Co.*[57]

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50. 408 U.S. 665 (1972).
51. *See id.* at 672-79.
52. *See id.*
53. The dissenters were Justices Brennan, Douglas, Marshall, and Stewart.
54. *See Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring).
55. *See id.* at 681.
56. *Id.* An important previous case in the same genre is *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam). In *Snepp*, the Court summarily approved the imposition of a constructive trust on all the profits from a book that had been published in violation of a government contract requiring that the manuscript be submitted for security preclearance. *See id.* at 508. The government complained only of the breach of contract; it did not allege that the author, a former agent of the Central Intelligence Agency, revealed any classified information in the book. *See id.* at 508-09.
57. 501 U.S. 663 (1991). Writing for a five-person majority, Justice White said that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669.

Shortly before an election, a source, in return for an oral promise of confidentiality, gave reporters information about the arrest record of a Democratic candidate for Lieutenant Governor of Minnesota.[58] The arrests turned out to be fairly trivial, and when editors from some of the publications realized that Cohen, who was leaking this damaging information, was an agent of the opposing candidate, they decided to ignore the promise and publish the full story.[59] The Supreme Court ruled that the source was not barred by the First Amendment from recovering under state law on a promissory estoppel theory even if, as the majority conceded, the result is an "incidental" burden on the press's newsgathering ability.[60]

The vacant territory left by *Branzburg* and the tough tenor of *Cohen* have undoubtedly made it easier for plaintiffs to make aggressive uses of the models provided by *Dietemann* and *Le Mistral*. If a dispute with the press can be characterized as a violation of laws of general applicability, plaintiffs have a greater chance of convincing courts to use the conduct as a basis of liability–even when, one suspects, the underlying discontent is more about content than it is about conduct. Certainly, there has been a burgeoning number of "conduct" litigations, of which the *Food Lion* case is the most prominent representative, and I can think of no other explanation for this clustering. History simply does not support the alternate hypothesis that the modern press has suddenly and unexpectedly changed to become for the first time ever either lawless or, at the very least, heedless of the rights of others.[61]

III. THE APPLICATION OF "SPEECH-NEUTRAL" RULES OF GENERAL APPLICABILITY TO NEWSGATHERING

Are the modern newsgathering tort cases legitimately a subject of controversy and concern? Is it insufficient to say, now that the Supreme Court has spoken in *Cohen*, that courts can do as they please in this area? Is it not clear that the First Amendment is simply not implicated by lawsuits against the press that do not penalize the defendants for what they say, but rather for behavior that would also be tortious if it were engaged in by a priest or an

58. *See id.* at 665.

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

60. *See id.* at 671-72. An interesting discussion of the Supreme Court's jurisprudence in this area can be found in Robert M. O'Neil, *Tainted Sources: First Amendment Rights and Journalistic Wrongs*, 4 WM. & MARY BILL OF RTS. J. 1005 (1996).

61. *See supra* note 1 and accompanying text.

auto mechanic or a railroad conductor? The answer, I would suggest, is not that simple.

First of all, it is not impossible that the courts, in applying tort law, could choose, at least in limited ways, to distinguish the press from ordinary members of the public on the ground that the press has a role as a surrogate gatherer and disseminator of information on behalf of the general public.[62] Nor does it seem out of the question that the Supreme Court might eventually conclude that at least some laws of "general applicability" demand a higher level of scrutiny in their application to the press if blind adherence to the neutrality principle in the context of newsgathering turns out to prevent or substantially limit the quantity and quality of information that can be made available to the public about matters of social concern. Although they tipped in the opposite direction, *Branzburg* and *Cohen* were cases on which the Court was deeply divided; it would not, therefore, be at all surprising if, in the future, some narrowing of *Cohen* and some further elucidation of *Branzburg*'s elusive language about a newsgathering privilege were to occur. States, too, may be inclined to use their own constitutions to elaborate protections for the newsgathering process, should it seem necessary. This is not, however, the place to muse over the desirability or scope of some new and separate newsgathering privilege; I merely want to note that the matter has never been conclusively resolved and, furthermore, that the newsgathering cases of the past decade challenge easy assumptions about the clarity of the divide between content and process in applying the First Amendment.[63]

Second, it is important to remember that *Cohen* simply says that the press can be subjected to the same laws that apply to the public at large.[64] It does not hold that restrictions may be imposed on the conduct of the press that state and federal courts might hesitate to apply to ordinary members of the public. Thus, if hiding one's identity or secretly recording what one obviously and openly can see

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62. The late Chief Justice Warren Burger described the press as "surrogates for the public" in his opinion in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), a case announcing a First Amendment right of access to court proceedings. *See also* Houchins v. KQED, Inc., 438 U.S. 1, 17 (1978) (Stewart, J., concurring).

63. Some scholarly thinking about this subject has already been done. *See* Steven Helle, *The News-gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1 (1982); LeBel, *supra* note 48; *see also* Zimmerman, *Overcoming Future Shock*, *supra* note 25 (positing a constitutional protection for newsgathering that would allow use of cameras and other recording devices at trials and other open government proceedings).

64. *See Cohen*, 501 U.S. at 669-70.

and hear is a tort for a reporter, we need to agree that it would also be a tort were the same action to be performed by a next-door neighbor. In other words, these cases need to rest on intelligible and generalizable policy grounds. Interestingly, however, when the cases, the literature, and other pertinent sources of learning are examined, surprisingly little can be found in them that actually tries to set out a neutral, normative basis for finding these activities tortious. Let me clarify. The cases and the literature do reveal that, to many, undercover tactics, when used by the press, are extremely distasteful. That attitude is not difficult to understand in some regards. I would be the first to admit that the very thought that someone might unsuspectedly be recording what I assume is an "ordinary" conversation with an intent to publish it to the world at large gives me pause. It feels like a violation of my privacy; it bears the sting of existence in an Orwellian world of omniscient watchers. But the question that ought to be addressed is whether the strong psychological or emotional reaction that I clearly share with many others is a sound basis for legal restraint. Distaste, after all, is not the necessary equivalent of legally cognizable harm.

The first thing that stops me from immediately leaping to the conclusion that the conduct of the undercover reporter is *ipso facto* a wrong, is the enormous complexity and inconsistency of human attitudes (my own included) regarding expectations of privacy. I think it is safe to say that all of our opinions about the value of privacy are highly contingent. A few examples may help explain what I mean.

As anyone who has not been rivaling Rip Van Winkle in marathon unconsciousness of late is aware, the public has been the recipient of volumes of highly explicit transcripts of telephone calls, videotaped testimony, and other forms of evidence relating to the sexual relationship between a young White House intern and a President of the United States. I doubt that the quantity and quality of intimate revelation has ever been rivaled and much of the reason the material became public was a result of decisions by special prosecutor Kenneth Starr. I was, however, party to a conversation with Mr. Starr about privacy several years ago while he was still a federal appellate judge. In the course of this conversation, Judge Starr admonished me for my skepticism about the viability of offering legal protections against publishing information that plaintiffs want to keep private. What decent person, he queried, would be willing to run for public office if he could not assure that no detail of his private life would remain undisclosed? (The example he had in mind was the experience of his colleague on the appellate

bench, Robert Bork. Judge Bork's video rental habits and even his garbage were sorted through and reported on by the press during his confirmation hearings for United States Supreme Court.)

To use a second example, police in several communities around the United States have reportedly positioned cameras on city streets to conduct video surveillance of the public as they go about their daily business.[65] The city of Tacoma, Washington, started using these cameras in 1993, and a while later, the city of Baltimore installed them over a sixteen block corridor in the downtown area.[66] The police view the cameras as important crime fighting equipment. It is unlikely that most people are aware they are being watched, and one might have supposed, would be upset to know their every gesture was being recorded. But civil libertarians have apparently found it a challenge to generate significant concern among the public about the potential of this practice to become a serious governmental incursion into personal privacy.[67]

I have also observed that even when people clearly know better, they frequently act in blithe disregard of their own privacy. Bill Gates and his colleagues at Microsoft, who can scarcely be said to be naive about the risks, used e-mail for numerous damaging communications about the company's desire to flatten its competitors.[68] And a group of Republican leaders in the House of Representatives held sensitive discussions about former House Speaker Newt Gingrich's possible responses to a House Ethics probe using a cellular telephone, despite widespread knowledge of how readily such calls could be intercepted by outsiders.[69]

In light of such inconsistencies, and because of the potential impact on newsgathering, the rationality and moral force of proscriptions against undercover reporting are at least worth some examination and debate.

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65. *See* Mark Hansen, *No Place to Hide*, A.B.A. J., Aug. 1997, at 44.

66. *See id.*

67. *See id.* at 47.

68. *See* Steve Lohr, *U.S. Presents Documents in Case Against Microsoft*, N.Y. TIMES, Jan. 21, 1999, at C16.

69. The facts are discussed in *Boehner v. McDermott*, No. CIV.98-594 TFH, 1998 WL 436897, at *1 (D.D.C. July 28, 1998).

A. *Hidden and False Identities*

The use of false identities (or failure to identify oneself as a reporter) is a common theme in the newsgathering cases of the last decade or so.[70] The award of compensatory and punitive damages by the jury in the *Food Lion* case, to give one example, rested almost entirely on the fact that Lynne Dale and Susan Barnett, two ABC television producers, constructed false identities (complete with false employment backgrounds and fake letters of reference) to get themselves hired by the supermarket chain.[71] Their use of hidden cameras was obviously also offensive to the jury, but seems to have been treated mostly as evidence that the pseudo-employees were deficient in their duty of loyalty to Food Lion. The Fourth Circuit ultimately reversed the damage award based on fraud because it concluded that although the defendants acted knowingly and with an intent to deceive, Food Lion could not show that it was injured by the fraud.[72] The jobs in question were at-will employment, subject to termination by either side at any time; they were ones in which employee turnover was generally high; and the reporters actually performed their work as meat wrapper and deli clerk in a satisfactory way while they were employed.[73]

But the fact that only two dollars in damages were left at the end should not be read as a resounding victory for the press. In the first place, had Food Lion been able to make a credible showing of harm proximately caused by its reliance on the false identities constructed by the reporters (for example, if it had a reasonable expectation that

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70. *See, e.g.*, Desnick v. American Broad. Cos., Inc., 44 F.3d 1345 (7th Cir. 1995) (persons posing as patients); Baugh v. CBS, Inc., 828 F. Supp. 745 (N.D. Cal. 1993) (involving a plaintiff who is led to believe that members of a television crew are employees of district attorney's office); Sanders v. American Broad. Cos., 978 P.2d 67 (Cal. 1999) (undercover reporter gets work as telepsychic); Copeland v. Hubbard Broad., Inc., 526 N.W.2d 402 (Minn. 1995) (involving a reporter who poses as a veterinary student); State v. Cantor, 534 A.2d 83 (N.J. Super. Ct. App. Div. 1987) (involving a reporter who is prosecuted for impersonating a public official).

71. The jury found that the television network and its employees had perpetrated a fraud against the supermarket chain by "utilizing representations about prior, nonexistent work experience," submitting them to obtain work for the two producers, and not revealing to Food Lion that its new "employees" actually worked for ABC and were engaged in investigative reporting. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 1997 U.S. Dist. LEXIS 13391, at *5 (M.D.N.C. July 25, 1997); *see also* Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923, 935-36 (M.D.N.C. 1997) (discussing relationship between fraudulent conduct and punitive damages).

72. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 524 (4th Cir. 1999).

73. *See id.* at 510-11.

"employees" in this sort of job would not leave after only a few weeks), the court would have been quite willing, as far as I can tell, to treat concealment of a reporter's identify as fraud. Furthermore, ABC *was* found liable to Food Lion for its undercover activities. The appellate court said that by entering "areas of the store that were not open to the public" and videotaping there, the reporters breached their duty of loyalty to Food Lion, thereby converting their status from that of invitees to that of trespassers.[74] Because Dale and Barnett would not have been able to get into nonpublic areas of the store had they not hidden the fact that they were reporters, it seems as if their decision to conceal their identities was a critical factor in finding liability for breach of loyalty as well.[75] As a result, the victory won by ABC may well turn out in the long run to be somewhat Pyrrhic for the press, leaving open, as it does, considerable room to argue in future cases that not owning up to being a reporter can give rise to tort liability. Because the breach of the duty of loyalty, as interpreted by the Fourth Circuit, seems inherent in this type of situation, future plaintiffs will probably pay more attention to it as a viable case of action. Food Lion made what is clearly in retrospect an error of judgment by seeking only nominal damages for the breach of loyalty and for trespass, but subsequent plaintiffs will no doubt be more aggressive.

The notoriety surrounding the Food Lion litigation and the Court of Appeals's guarded language in its partial reversal could encourage future courts to conclude that members of the press who go under cover to gather information are engaging in conduct that is

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74. *Id.* at 519.

75. The court wrote that the interests of ABC and of Food Lion were opposed in "a fundamental way" because ABC wanted to expose unsanitary practices in food handling and deceptive packaging, while (presumably) Food Lion preferred to have these activities remain unknown to the public. *Id.* at 516. Hence, an ABC employee who exposes wrongdoing while under cover as an employee of the putative miscreant would seem, under the court's reasoning, *ipso facto* to be engaging in tortious conduct. Although the court tried to keep the holding narrow by emphasizing that the truly problematic aspect of the reporters' behavior was their videotaping in parts of the store not open to the general public, the effort is unlikely to be successful. Many places of business have no areas open to the public at large so that, if one were to adopt this line of thought, any activities of an undercover investigative reporter/employee would be open to challenge. Furthermore, the court made no effort to explain why it picked out videotaping, as opposed to observing and reporting based on notes and memory, as the egregious behavior that turned the reporters into tortfeasors. As a rational matter, either form of encoding and reporting the information would cause the interests of the news operation and the plaintiff to be in opposition. A court, therefore, that wants to rule against a reporter for assuming a false or misleading identity, would find much in the Fourth Circuit's opinion to support its view, whether or not videotaping had also occurred. The independent significance of the videotaping will be examined later in this article.

per se tortious. It would be unfortunate if this sort of reductionistic approach were to be followed. Although there are circumstances where the use of false identities probably should, absent extraordinary circumstances, subject the press to liability, in many others it would be hard to justify that result. The dividing line is not a perfect one, but to me, the distinction between the tortious and the nontortious makes sense only if it is drawn by attending to such issues as power, authority, and the mantle of professionalism. Or to put it differently, whose identity has been assumed and for what purpose?[76]

A source confronted by a reporter masquerading as someone like a law enforcement official may feel that he has a duty or even that he has no choice except to cooperate in providing information he would otherwise be reluctant to share. A case decided in New Jersey some years ago is a perfect example.[77] A reporter pretending to be "someone from the morgue" went to interview the mother of a homicide victim.[78] The reporter got the distraught interviewee to give her a considerable amount of information about the deceased, but was subsequently prosecuted for impersonating a public official.[79] The court rejected an attempted First Amendment defense, noting that the reporter's sole purpose in assuming the guise of an official was "to induce another to submit to her pretended official authority."[80] Similarly, a reporter who assumes the identity of a healthcare professional or an attorney could use that assumed position to gain access to information that an actual professional would be required to treat as a confidence. This, too, distorts the relationship between reporter and source by allowing

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76. Although many readers would, at this point, also add a distinction relating to place–asserting that subterfuge cannot be used to gain access to private dwellings–circumstances may exist where treating a private house or apartment as off-limits seems unduly artificial. Although courts tend to be protective of people's right to be free of intrusions in their dwellings, *see, e.g., Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402, 402 (Minn. Ct. App. 1995) (reporter sued for failing to reveal her identity when she accompanied veterinarian to plaintiffs' home); *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668, 670 (Cal. Ct. App. 1986) (reporters entered plaintiff's home as apparent members of paramedical team), the appropriate outcome may well depend upon what is going on in the private dwelling. It might, for example, be used as the operational center of an illegal gambling or drug ring. In *Dietemann*, the plaintiff conducted his unlicensed practice of medicine from his house. *See Dietemann v. Time, Inc.*, 449 F.2d 245, 245-46 (9th Cir. 1971). Thus, bright line rules about deception that turn on the location to which the reporter gains access may not always be satisfactory.

77. *See* State v. Cantor, 534 A.2d 83 (N.J. Super. Ct. App. Div. 1987).

78. *See id.* at 84.

79. *See id.*

80. *Id.* at 86.

the reporter the benefit of a false mantle of authority.[81] Although these abuses are most likely to arise in the context of press coverage, it would make sense to sanction them as well, when engaged in by private investigators or the merely nosy.[82] Finally, a type of abusive "authority" can sometimes be exercised in the guise of some intimate relationship. One might, therefore, also remain concerned about information that is gained by conniving, solely or largely for the purposes of investigation, to achieve the position of a lover or other intimate relation.

But when a reporter does not try to assume additional authority or an unusual degree of intimacy by means of her "constructed" persona, the case for finding that going undercover violates a law of general applicability is harder to make out. Interestingly, although the Ninth Circuit in deciding *Dietemann* a quarter century ago made no bones about its disapproval of surreptitious recording, it did not react similarly to the fact that the reporters had obtained access to the plaintiff's home by misidentifying themselves.[83] Similarly, in *Desnick v. American Broadcasting Cos.*,[84] Chief Judge Posner, writing for the Seventh Circuit, refused to allow a plaintiff to sue the press for trespass or invasion of privacy on the ground that the reporters gained access to the plaintiff's offices by pretending to be patients.[85] Of course, in neither case was the venue fully private. Thus, one could assume that the expectation of seclusion held by a reasonable plaintiff under such circumstances is qualitatively different from that which would pertain at one's kitchen breakfast table or in one's bedroom alone or with family or intimate acquaintances. In both cases, the plaintiffs were making a place and services available to members of the public, and the reporters did no more than to avail themselves of experiences that were similar to those accessible to a wide range of other people.

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81. Something like this reasoning might satisfactorily explain the outcome in *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668 (Cal. Ct. App. 1986). In *Miller*, the reporters, without identifying themselves, entered the plaintiff's home with the paramedics when her husband suffered a heart attack. *See id.* at 670.

82. One of the earliest privacy cases was an example of nosiness. *See* De May v. Roberts, 9 N.W. 146 (Mich. 1881). The case arose when a person curious to see a human birth convinced a doctor friend to let him come along on his next delivery. *See id.* at 146. The patient was horrified when she discovered that the second man in her room was not the medical assistant he was represented to be, and she sued. *See id.*

83. *See Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971). *See also supra* note 31 and accompanying text.

84. 44 F.3d 1345 (7th Cir. 1995).

85. *See id.* at 1352-53.

This does not mean, of course, that it would be impossible to find, as the *Food Lion* court intimated, that obtaining access to a quasi-public area under false pretenses is a kind of tortious invasion of privacy.[86] But why did neither *Dietemann* nor *Desnick* do so? The two courts answered that question in different ways. The Ninth Circuit almost seemed to treat the false identity issue as a form of harmless error.[87] The court recognized that Dietemann had no legal protection under tort law against the possibility that any patient he treated might decide to reveal publicly the details of the therapy.[88] Hence, it did not view the reporters as posing a risk to Dietemann different in kind from that posed by anyone he might see in treatment.[89] Also, it was clear that the reporters did not entrap Dietemann by inducing him to engage in conduct that he would not have entered into on his own.[90] Under the circumstances, the Ninth Circuit seemed unconvinced that a mistake about the true identity of the patient was significant enough to warrant a tort remedy.

Chief Judge Posner, in typical fashion, addressed the question in some detail and honed in immediately on the nub of the problem. In *Desnick*, the undercover reporters disclosed questionable practices at a chain of eye clinics that performed thousands of cataract operations on the elderly each year.[91] The court concluded that finding an undercover reporter liable for pretending to be a patient at the clinics would serve none of the privacy-related interests that torts like trespass and intrusion are meant to support.[92] The reporters did not eavesdrop on the unwary or invade the plaintiffs' personal lives or intimate relations.[93] Rather, they used subterfuge to find out about the clinics' operations and its diagnostic procedures–things that clinic personnel displayed freely

86. The Fourth Circuit's entire holding on breach of the duty of loyalty seemed to turn on the fact that the reporters gathered information for ABC in nonpublic areas of the store, suggesting at least implicitly that a privacy interest had been invaded. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999). The court did, however, indicate that it had sympathy for the reasoning in *Desnick,* and indicated that it did not believe that in all cases, use of a false identity or other misrepresentation ought to be tortious. *See id.* at 517-18.

87. *See Dietemann*, 449 F.2d at 246.

88. The publication of private facts requires a revelation that would be offensive to persons of ordinary sensitivity; I have never encountered a case with facts comparable to this one in which a plaintiff prevailed on a private facts theory.

89. *See id.* at 249.

90. *See id.*

91. *See Desnick*, 44 F.3d at 1347-48.

92. *See id.* at 1352-53.

93. *See id.* at 1353.

in front of real patients.[94] If the use of undisclosed or false identities was per se wrongful as a form of fraud, then, he pointed out, we would have to be willing to allow restaurants to sue restaurant critics (who frequently dine out undercover) for trespass, landlords to sue fair housing testers, and stores to sue browsers who have, as it turns out, no real intention to buy.[95]

The complicating fact is that however many silly examples of shock and schlock journalism to which critics can point, society as a whole often gains great value from learning things that only undercover work is likely to reveal. In 1999, as courts, legal commentators, and journalists fuss about the legality and ethics of self-misidentification in newsgathering, I came across a review of a television news show in which a reporter took a job in a private for-profit mental hospital and catalogued a veritable inferno of abuses–gross mistreatment of patients (in some cases, leading to their death), possible financial wrongdoing, and other serious faults.[96] When the evidence of the abuses was presented to federal authorities and accreditation agencies, they agreed to take action – admitting, however, that without the report, they would have been unaware of the abuses.[97] The result has been action by the federal government against several hospitals in the chain;[98] accrediting agencies, too, have now begun to reexamine the hospitals.

Whether or not some stories that are acquired by means of disguised identities could be gotten in other ways, it seems likely that at least some significant percentage of them would not be discoverable by anyone who admits to being an outside observer.[99] Simply put, people do not always tell the truth when they are asked about their activities, and important things that happen behind closed doors can be hard to understand or to verify.

Realtors and landlords do not admit to race discrimination; only the use of testers is likely to tell us whether it is really true that only whites can buy or rent in particular neighborhoods. If Upton Sinclair had not gone to work in the meat-packing houses of Chicago under an assumed identity, the need for a federal Food and Drug

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94. *See id.*
95. *See id.* at 1351.
96. *See* Walter Goodman, *Restraint as a Euphemism in Psychiatric Hospitals*, N.Y. TIMES, Apr. 21, 1999, at E8.
97. *See id.*
98. *See id.*
99. *See* Howard Rosenberg, *Food Lion, ABC and Tricks of the Trade*, L.A. TIMES, Jan. 24, 1997, at F1.

Administration might have taken far longer to recognize. And even when people act in the best of faith, the efficacy of their practices can sometimes only be evaluated by the presence of "spies." In a famous psychiatric study, David Rosenhan arranged to have eight psychiatrically healthy persons pose as mentally-ill individuals to gain admission to twelve different hospitals.[100] Despite the fact that, upon admission, the testers behaved in a perfectly normal way, none were detected by the medical staff as being "fakes."[101] In fact, they averaged nineteen days per hospitalization before being deemed well enough for release.[102]

Not all uses of assumed identities, of course, can be justified as attempts to get at the truth that others prefer to hide or to serve some other purpose. At least one example of a "media" outlet that made use of disguised identity is, under the circumstances, pretty amusing. A reporter for the *Los Angeles Times* wrote that, during the *Food Lion* litigation, he received numerous faxes about the case, filled with background information and recounting the substance of the testimony by various witnesses.[103] The faxes were identified as coming from something called the "Media Hotline."[104] When the reporter decided to find out what Media Hotline was, he discovered it was actually Food Lion.[105]

To the extent that, as a society, we do not wish to condemn undercover exercises of this kind across the board, but, rather, view many of them as having a valid, and sometimes even a valiant, purpose, the finding that using assumed identifies to go undercover is potentially tortious, in the absence of some highly unusual factor, should be undertaken with great care. Certainly there will be circumstances where failure to identify oneself accurately should be treated as a wrongful behavior, but courts should be careful as they reach out to remedy occasional discrete abuses that the rules they evolve do not turn out to be de facto proscriptions against newsgathering. Purportedly, general rules that in practice and intent rarely affect anyone but the press do not, I believe, fairly meet the standard set by the Supreme Court in *Cohen*.

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100. *See* David Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250, 251 (1973).
101. *See id.* at 252.
102. *See id.*
103. *See* Rosenberg, *supra* note 99, at F1.
104. *See id.*
105. *See id.*

B. *Surreptitious Recording*

In a number of cases, starting with *Dietemann* and culminating with the recent Fourth Circuit ruling in *Food Lion*, courts have also shown severe disapproval of another investigative reporting technique; namely, the use of cameras and tape recorders (often miniaturized and concealed) to back up or supplement the reporter's eyes and ears. In most instances, the material recorded was not in any ordinary sense secret or deeply personal, at least raising the question, why is the fact of recording itself something that converts acceptable behavior into a tortious, or even a criminal act? I have puzzled over this question for a long time, and although I still have no answer to the question, and cannot always square my instincts with my reason, here is at least an effort to explore what is going on, and why.

For decades, the classic equipment of a reporter was a notebook and a typewriter. Usually, the reporter would take notes while the source spoke in an interview, at a press conference, or on the scene of a breaking news event. If time pressures or the objections of the source prevented simultaneous note-taking, notes might be scribbled down or typed up at the first opportunity after the fact, while the reporter's memory of what was said and done was still reasonably fresh. The notes would then be used as the building blocks of the ultimate report. As technology became more sophisticated, a reporter could use a tape recorder or a video camera, rather than a pen or pencil, to take notes, enabling reporters to capture the things they saw and heard more comprehensively and accurately than they could with memory or pen. If one thinks of recording as a form of note-taking, it is not at all obvious why one form is increasingly treated as a tort, while the other is widely accepted as appropriate–indeed, possibly protected by the First Amendment.[106] One might argue, plausibly, that note-taking, however it is done, is

106. Although there is very little directly on point, Justice Clark's opinion for the Court in *Estes v. Texas*, 381 U.S. 532, 539-40 (1965), seems to assume that taking notes is ordinarily a part of what is protected under the First Amendment. *See also* CBS, Inc. v. Lieberman, 439 F. Supp. 862, 866 (N.D. Ill. 1976) (finding no authority suggesting that press is not protected by First Amendment in taking notes); Sigma Delta Chi v. Speaker, Maryland House of Delegates, 310 A.2d 156, 160 (Md. 1973) (ban on note-taking unconstitutional because it would "frustrate *all* effective communication"). More recently, the Sixth Circuit implied that note-taking by reporters was protected, concluding that a series of restrictions on the press in covering a criminal trial were acceptable in part because note-taking was not prohibited. *See* United States v. Beckham, 789 F.2d 401, 410 (6th Cir. 1986).

so intimately connected to the ability to speak and write that, unless it is independently disruptive and is barred on that ground, the press in fact ordinarily has a right to use cameras and tape recorders in lieu of simultaneous or delayed hand writing of notes.[107]

Recording devices are also more than sophisticated note-taking equipment. Their use can provide the press with content that can be communicated directly to the public. This latter reason to use recording devices further complicates the question of whether video and audio recording ought to be treated as forms of speech activity or instead as ancillary behaviors subject to laws of general applicability. Logic is not stretched by distinguishing between content and method when a reporter breaks into a house and then reports what she has seen in it. But, if the behavior is using some sort of recorder and if what is recorded is part of the content to be conveyed, it is not obvious whether a tort rule or criminal statute that prohibits recordation of something that can legally be heard or observed is a neutral regulation of an action or a direct restriction on speech. The problem is somewhat comparable to the one we would face if we were to argue that the First Amendment protects paintings, but that the state can enforce, as a law of general applicability, a prohibition of the purchase and use of canvas, brushes, and pigment. The method and the result do not segment so conveniently into discrete parts.

Perhaps, in fairness, the problem is not the use of the technology per se, but the fact that today, tape recording devices and cameras are small enough to be concealed. As a result, a reporter can memorialize what she sees or hears without the subject being aware of it, even though the subject *is* aware of the presence of others, including the person doing the recording. Most of the cases about undercover news reporting have involved hidden cameras and tape recorders, and one might posit that this is the distinction that makes all the difference. People ought not to be photographed or have their conversations taped if they do not know about it or have not consented. But, again, life is not that simple. First of all, if the issue is consent, the fact that the camera is hidden or obvious is not

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107. Most of the discussion on this issue has taken place in the context of televising trials. The primary, but not the exclusive, basis for restricting coverage in courtrooms has been the problem of disruption caused by lights and large equipment. As television cameras have grown smaller and more able to operate in ordinary lighting conditions, more and more states have significantly loosened their proscriptions against televising trials. *See* Zimmerman, *Overcoming Future Shock*, *supra* note 25, at 673-84; *see also* GOLDFARB, *supra* note 25, at 75-81, 175-88.

an especially relevant consideration. Many prominent cases in which unconsented photography was an issue–*Le Mistral*, for example–involved cameras that were very obvious.[108] But, the lack of consent also does not provide an explanation for why recording is a tort. People are often recorded or photographed without knowing about it at the time, just as their activities may be observed as reported on by more conventional, verbal means. But, at least where this happens in a reasonably public setting, most courts have been loath to say that the subject has a right to damages because he did not know he was being observed or taped.[109] What is visible to the general public, except in highly unusual cases, is simply not thought to evoke legal concern about privacy and may be memorialized more or less at will–without requiring the prior consent of the subject to do so.[110]

Alternatively, perhaps the problem really is that the settings in which the recording takes place are not ones that cannot fairly be described as "public." Again, the logic is not so obvious. In some cases, recording might clearly invade privacy because it takes place at a site to which the plaintiff has withdrawn (alone or with intimates) with a reasonable expectation of hiding himself from exposure. An uninvited snooper (or even someone who breaches the trust that underlies a private moment by secretly recording it[111])

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108. *See also* Belluomo v. KAKE TV & Radio, Inc., 596 P.2d 832, 836 (Kan. Ct. App. 1979) (reporters became trespassers when permission to film granted by one restaurant owner was revoked the following day by the second); *cf.* Albertson v. TAK Communications, Inc., No. 89-0052, 1989 WL 129270, at *1 (Wis. Ct. App. 1989) (unpublished table decision) (news reporter carried visible camera but told subject the camera was not rolling).

109. *See, e.g.*, Deteresa v. American Broad. Cos., 121 F.3d 460, 463-68 (9th Cir. 1997) (rejecting a number of causes of action for secret videotaping and recording of plaintiff as she stood in the doorway of her condominium); Shulman v. Group W Prods., Inc., 955 P.2d 469, 490 (Cal. 1998) (plaintiffs not entitled to object to photography at scene of accident); Aisenson v. American Broad. Cos., 269 Cal. Rptr. 379, 388 (Cal. Ct. App. 1990) (surreptitious videotaping of plaintiff in his driveway not actionable); Howell v. New York Post Co., 612 N.E.2d 699, 705 (N.Y. 1993), *aff'd in part*, 619 N.E.2d 650 (N.Y. 1993) (plaintiff had no cause of action against photographer who used telephoto lens to take her picture on the grounds of a hospital).

110. *See* RESTATEMENT (SECOND) OF TORTS § 652D, cmt. b (1977). The most famous exception is *Daily Times Democrat v. Graham*, 162 So.2d 474 (Ala. 1964). In *Graham*, a woman whose skirt was blown up around her waist as she stepped out of a funhouse at a fair was able to sue a newspaper that ran a photograph of this undisputedly "public" occurrence. *See id.* at 474-75.

111. I have in mind as an example a lover who secretly records sexual activity and later attempts to sell the video for public distribution. The proper line between those who fall into this narrow category of "trust relationships" and those who do not may be difficult to determine, and I do not attempt to do so here. Obviously, situations like this are uncommon, but in recent years, cases somewhat on point have arisen regarding figure skater Tonya Harding and television star Pamela Anderson Lee. *See* Michaels v. Internet Entertainment

may properly be said to invade some genuine interest in seclusion.[112] But the fact patterns in such successful cases as *Dietemann, Food Lion, Le Mistral,* and *Sanders* are not of this kind. In each, the location was a place of business, and what went on there was something that, legally, could be described to the public by anyone who witnessed it.[113] The plaintiff was fully aware of the presence of people who owed neither an obvious legal nor moral duty to keep confidential whatever they observed and experienced. Thus, no easy answer exists to the question of why it is a legal wrong to record that which would invade no protected interest if it were communicated to others in some way other than by taping it.[114]

How then can we explain the harm represented by recordation? What is it that renders making an audio or a videotape different from offering a verbal recounting? A number of courts now seem

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Group, Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998); Mary Schmich, *Tonya Finally Lands that XXXel*, CHI. TRIB., Sept. 28, 1994, at 1.

112. *See, e.g., Shulman*, 955 P.2d at 490-91. Here, the court found some parts of the press activity actionable because it invaded this narrow private sphere. *See id.* at 494. Reporters attached a small microphone to the lapel of a nurse so that otherwise inaudible conversations with an injured person could be recorded, and a press photographer took pictures of a victim without her consent in an evacuation helicopter that was carrying her to the hospital. *See id.* at 475. The court compared this behavior to invading a hospital room or jumping aboard an ambulance without permission; it found that the plaintiffs had under such circumstances a reasonable expectation of seclusion. *See id.* at 490.

113. The same was true in *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 795 (Minn. Ct. App. 1998), a case permitting the owners of residential facilities for the mentally retarded to recover for emotional distress caused by the secret videotaping in their facilities that revealed instances of questionable care. In another recent instance in which a court agreed that unconsented videotaping was wrongful, the plaintiff was an inmate in a prison and was what filmed in a place where he could readily be seen by others. *See* Huskey v. National Broad. Co., 632 F. Supp. 1282, 1291-92 (N.D. Ill. 1986). Although a line might plausibly be drawn at the door of a private dwelling occupied only by members of a family or intimate friends, with rare exceptions, courts have been unwilling to recognize a legitimate expectation of privacy for things that occur at social events, in the workplace, or even for information that the plaintiff gives to others with the hope that it will not be shared. *See, e.g.*, Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976) (involving plaintiff's bizarre behavior that occurred at parties and other semi-private gatherings); Sanders v. American Broad. Cos., 978 P.2d 67, 71-73 (Cal. 1999) (recognizing that conversations in a workplace that could be overheard might legitimately be repeated or publicized without invading privacy); *cf.* Cummings v. Walsh Constr. Co., 561 F. Supp. 872, 884-85 (S.D. Ga. 1983) (finding that once plaintiff revealed fact of her sexual relations with defendant to others, she had no expectation of privacy in that information). *But see* Rafferty v. Hartford Courant Co., 416 A.2d 1215, 1221 (Conn. Super. Ct. 1980) (refusing to grant summary judgment to defendant who reported on events at large outdoor party).

114. Obviously, not everyone would agree that the wrongfulness of the behavior is hard to understand. A cogent and highly critical article by Professor Andrew McClurg attacks the use of hidden cameras and other forms of intrusive behavior by the press and does not express any of the skepticism that pervades this author's thinking. *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 (1995).

convinced that such a difference does exist. Clearly, for example, it mattered to the Fourth Circuit in *Food Lion* that secret video recording had occurred. Nevertheless, the courts provide little in the way of help in understanding why the practice should be sanctioned. The two most fulsome attempts at explaining what is wrong with recording are found in *Dietemann* and in *Sanders v. American Broadcasting Cos.*,[115] a recent decision from Supreme Court of California, but neither is satisfying.

The explanation in *Dietemann* seems to have two parts. First, the court concluded that "hidden mechanical contrivances" are not "'indispensable tools' of newsgathering," and therefore do not need First Amendment protection.[116] Second, the court reasoned that permitting hidden cameras and tape recorders "could have a most pernicious effect upon the dignity of man and it would surely lead to guarded conversations and conduct where candor is most valued, *e.g.*, in the case of doctors and lawyers."[117] The latter observation is puzzling, to say the least,[118] and the former is not highly explanatory.

Sanders is permeated by a similarly obscure quality. In *Sanders*, an employee of the Psychic Telemarketing Group sued when a supposed fellow employee turned out to be a television reporter working as a telepsychic to get an insider's perspective on the phenomenon.[119] The reporter wore a video camera in her hat and filmed what went on in the office.[120] The jury at trial awarded the plaintiff compensatory damages of $335,000 and punitive damages of $300,000.[121] The intermediate appellate court reversed.[122] The Supreme Court of California, however, reinstated the trial court's result, concluding that an actionable intrusion into seclusion could occur by virtue of secret videotaping, even though the plaintiff

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115. 978 P.2d 67 (Cal. 1999).

116. Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971).

117. *Id.*

118. Presumably, the policy of the law is to encourage patients and clients to be open and honest with their physicians and lawyers, an objective that would not seem at risk when the "patient" tapes the doctor or lawyer. The reverse–secret videotaping and publication by the doctor or lawyer–would breach a right of confidentiality as well as the ethical obligation of these professionals, suggesting that the facts of *Dietemann* posed no threat to the patient's or client's interests.

119. *See Sanders*, 978 P.2d at 67. For those not familiar with the phenomenon, telepsychics can be reached at a 900 number and give "readings" over the telephone for a "per-minute" fee. *See id.* at 69.

120. *See id.*

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

122. *See id.*

occupied a cubicle in an open office and it would not have been a tort to report, based on memory and, presumably, notes, what goes on in such an establishment.[123]

Why? Well, the court tells us it is because people like the plaintiff have "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 participant's coworkers."[124] Although the opinion then went on to line up the precedent that supported its result and carefully distinguished away that which did not, the entire thing has a rather *ipse dixit* quality.[125] Where the expectation comes from and why it is a legal wrong to disappoint is not explained; all is assumed.[126]

In another case, a judge argued that it is wrong to secretly record because it deprives the speaker of the "'right to control the extent of his own firsthand dissemination.'"[127] Exactly what that right is and where it originates is puzzling, since the common law of privacy has severely limited the control plaintiffs have over dissemination of information about themselves.[128]

Another court found that the unconsented photography was tortious because the subject matter–tattoos covering the torso of a male prisoner–was private, despite the fact that such decoration

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123. *See id.* at 73-74.

124. *Id.* at 69.

125. *Id.* at 71-73.

126. In that regard, the *Sanders* decision does not exist in isolation. *See, e.g.*, CBS, Inc. v. Davis, 510 U.S. 1315, 1318 (1994) (Blackmun, Circuit Justice) (lower court found surreptitious videotaping to be tort; Justice Blackmun stayed preliminary injunction against airing the film); Huskey v. National Broad. Co., 632 F. Supp. 1282, 1291-92 (N.D. Ill. 1986) (prisoner in exercise cage who is filmed without his permission has a reasonable expectation of privacy); Shulman v. Group W Prods., Inc., 955 P.2d 469, 492 (Cal. 1998) (reversed grant of summary judgment to defendant where accident victim's conversation with rescue team recorded); Copeland v. Hubbard Broad., Inc., 526 N.W.2d 402, 405 (Minn. Ct. App. 1995) (finding that secret videotaping of veterinarian on house-call violated homeowners' privacy and could be legal grounds for trespass action).

127. Deteresa v. American Broad. Cos., 121 F.3d 460, 470 (9th Cir. 1997) (Whaley, D.J., concurring in part and dissenting in part) (quoting Warden v. Kahn, 160 Cal. Rptr. 471, 476 (Cal. Ct. App. 1980)). In another attempt at offering a rationale, an intermediate appellate judge wrote that surreptitious videotaping of a person's facial features and expressions is a violation of something that he called, rather unhelpfully, "autonomy privacy." Sanders v. American Broad. Cos., 60 Cal. Rptr. 2d 595, 600 (Ct. App. 1997) (Spencer, P.J., dissenting), *rev'd*, 978 P.2d 67 (Cal. 1999).

128. *See* Zimmerman, *Farewell to Privacy Tort, supra* note 14, at 320-24, 344-47, 320-24, 344-47; *see also,* Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (First Amendment requires citizens to give up control over much of the information about themselves they might prefer to keep private).

would be readily visible to any observer under several circumstances, including on a public beach.[129]

In *Sanders*, the dissenting judge of the appellate court, Presiding Justice Spencer, tried to explain what the wrong was by arguing that, "[w]hile plaintiff could not reasonably expect the information . . . to be confidential and thus had no enforceable 'informational privacy' interest, he may have retained an 'autonomy privacy' interest."[130] The term "autonomy privacy" is not common in the parlance of privacy tort law, and what the judge meant by it was not fully explicated. Justice Spencer went on to explain that the plaintiff deserved to prevail because visual identification of the plaintiff, with his facial expressions and gestures captured, "gave a heft to defendants' broadcast that would otherwise have been lacking" and caused the plaintiff greater distress.[131] What he meant by this is open to interpretation. Perhaps the objection was that the recording made the report more believable than it otherwise would have been, thereby increasing the plaintiff's embarrassment about his job.[132] Perhaps it means that the film made what might have seemed a frivolous story into a more important or weighty one. In either case, the reasoning suggests a potential conflict with the First Amendment because it seems motivated more by dissatisfaction with the content rather than the methodology of newsgathering.

In another case, the court openly admitted that, in its view, the defendant broadcasters might have had a defense to a tort action for unwanted photography if the story they were pursuing had been of greater moment,[133] presenting another example of a judgment that seems to relate more to the content than the methodology of the report.

The notion that some separate privacy right is implicated when the capture of information comes from surreptitious recording rather than from memory or notes is not, of course, a universally

129. *See Huskey*, 632 F. Supp. at 1289.

130. *Sanders*, 60 Cal. Rptr. 2d at 599 (Spencer, P.J., dissenting).

131. *Id.* at 600 (Spencer, P.J., dissenting).

132. Other judges have hinted, too, that the problem with surreptitious recording is that it makes the reporter's account more believable and diminishes the plaintiff's ability to deny the asserted facts. *See Deteresa*, 121 F.3d at 470. (Whaley, D.J., concurring in part and dissenting in part). It is difficult to fathom a serious claim that the greater the credibility of the report, the greater the legal wrong.

133. *See Huskey*, 632 F. Supp. at 1291 n.13.

accepted truth. Courts remain quite divided on this issue.[134] The Seventh Circuit, in a case where secret videotaping took place in an eye clinic, concluded that, so long as no traditional right of privacy was traduced,[135] the plaintiffs should have no remedy merely because reporters taped what they were free to see and hear.[136] Even *Sanders* shows some concern over the potential breadth of the principle it enunciates, stressing that the court did not intend to create a per se rule against secret recording.[137]

Furthermore, state and federal wiretapping laws, which criminalize some forms of secret recording, do not take anything like a uniform position against such activities. Although an exact count is difficult,[138] it seems that there are about three times as many

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134. Several courts have refused to recognize a tort for surreptitious recording. *See Deteresa*, 121 F.3d at 467-68 (9th Cir. 1997) (secret recording of interview not a tort); Desnick v. American Broad. Cos., 44 F.3d 1345, 1353-54 (7th Cir. 1995) (reporters who pose as patients and record practices in eye clinics not liable for fraud or invasion of privacy); Aisenson v. American Broad. Cos., 269 Cal. Rptr. 379, 387-88 (Cal. Ct. App. 1990) (surreptitious filming of plaintiff in public place is not tortious); Howell v. New York Post Co., 612 N.E.2d 699, 704 (N.Y. 1993) (use of telephoto lens to photograph patient on hospital grounds not tortious).

135. Chief Judge Posner ran through things that might have been problematic had they been present:

> No embarrassingly intimate details of anybody's life were publicized . . . . There was no eavesdropping on a private conversation; the testers recorded their own conversations with the Desnick Eye Center's physicians. There was no violation of the doctor-patient privilege. There was no theft, or intent to steal, trade secrets; no disruption of decorum, of peace and quiet . . . . Had the testers been undercover FBI agents, there would have been no violation of the Fourth Amendment, because there would have been no invasion of a legally protected interest in property or privacy.

Desnick, 44 F.3d at 1353.

136. Somewhat comparable reasoning can be found in *Deteresa*, 121 F.3d at 465-66. A Michigan intermediate appellate court, considering a state law, concluded that a person was not an illegal eavesdropper simply by secretly recording a conversation to which he was a party. *See* Sullivan v. Gray, 324 N.W.2d 58, 60-61 (Mich. Ct. App. 1982). The court pointed out that a recording is merely an accurate record of what was said. *See id.* at 60. It is never certain that a participant in a conversation will not reveal what was said to others; no firmer basis than mere hope can be found for an expectation of confidentiality. *See id.* For that reason, the court wrote, a person should decide what to reveal in a conversation based on the "individual's relation to the other participant. The individual may gauge his expectations according to his own evaluation of the person to whom he speaks." *Id.*

137. *See* Sanders v. American Broad. Cos., 978 P.2d 67, 79 (Cal. 1999). The court also indicated that it might entertain a newsworthiness defense in future cases, although the issue had not been decided below and presented for proper review. *See id.* at 79-80.

138. Some states, for example, have laws that say one thing, but judicial opinions that interpret the statutes to impart a different gloss. *Compare, e.g.*, LA. REV. STAT. ANN. § 14:322, (West 1986) (prohibiting private parties, but not law enforcement officials, from recording a conversation without the permission of all parties), *with* Kirk v. Louisiana, 526 So. 2d 223, 226-27 (La. 1988) (holding that it is a violation of equal protection to allow prosecutors to obtain the powerful evidence that recorded conversations can provide and deny that chance

jurisdictions that allow a participant to a conversation to tape it without the permission or knowledge of other parties as there are those requiring permission from all participants.[139] A number of

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to a defendant).

139. One-Party Jurisdictions (thirty-two states and the District of Columbia):

Alabama:	ALA. CODE § 13A-11-31 (1977).
Alaska:	The Alaskan State Constitution makes Alaska a one-party state. ALASKA CONST. art. I, § 22.
Arizona:	ARIZ. REV. STAT. § 13-3005 (1989).
Colorado:	COLO. REV. STAT. §§ 18-9-303 to -305 (1998).
District Of Columbia:	D.C. CODE ANN. § 23-542 (1981).
Georgia:	GA. CODE ANN. § 16-11-62 (1999). This statute was clarified in *State v. Birge*, 241 S.E.2d 213 (Ga. 1978).
Hawaii:	HAW. REV. STAT. § 711-1111 (1993).
Idaho:	IDAHO CODE § 18-6702 (1998).
Iowa:	IOWA CODE ANN. § 727.8 (West 1998).
Kansas:	KAN. STAT. ANN. §§ 21-4001 to -4002 (1995). This statute was clarified in *State v. Roudybush*, 686 P.2d 100 (Kan. 1984).
Kentucky:	KY. REV. STAT. ANN. §§ 526.010, 526.030 (Michie 1990).
Louisiana:	LA. REV. STAT. ANN. § 14:322 (West 1986). This is a two-party statute that was declared unconstitutional in part in *Kirk v. State*, 526 So. 2d 223, 227 (La. 1988), thereby making Louisiana a one-party consent state.
Maine:	ME. REV. STAT. ANN. tit. 15, §§ 709-10 (1964 & West Supp. 1998).
Michigan:	MICH. COMP. LAWS §§ 750.539a-c (1991). The statute is ambiguous and was clarified in *Sullivan v. Gray*, 324 N.W.2d 58, 60-61 (1982), which defined the law as being a single party consent law.
Minnesota:	MINN. STAT. ANN. § 626A.02 (1999).
Mississippi:	MISS. CODE ANN. § 41-29-531 (1972).
Missouri:	MO. REV. STAT. § 542.402 (1972).
Nebraska:	NEB. REV. STAT. § 86-702 (1994).
Nevada:	NEV. REV. STAT. § 200.620 (1997).
New Jersey :	N.J. STAT. ANN. § 2A:156A-4 (West 1998).
New Mexico:	N.M. STAT. ANN. §§ 30-12-1, 30-12-122 (Michie 1978).
New York :	N.Y. PENAL LAW § 250.00 (Consol. 1984).
North Dakota:	N.D. CENT. CODE § 12.1-15-02 (1997).
Ohio:	OHIO REV. CODE ANN. § 2933.52 (West 1998).
Rhode Island:	R.I. GEN. LAWS § 11-35-21 (1998).
South Dakota:	S.D. CODIFIED LAWS §§ 23A-35A-21 (Michie 1998).
Tennessee:	TENN. CODE ANN. § 39-13-601 (1997).
Texas:	TEX. CIV. PRAC. & REM. CODE ANN. § 123.002 (West 1998); TEX. PENAL CODE ANN. § 16.02 (West 1998).
Utah :	UTAH CODE ANN. § 77-23a-4 (1995).
Virginia:	VA. CODE ANN. § 19.2-62 (Michie 1995).
West Virginia:	W. VA. CODE § 62-1D-3 (1998).
Wisconsin:	WIS. STAT. § 968.27 (1998).
Wyoming:	WYO. STAT. ANN. § 7-3-602 (Michie 1999).

Two-Party Jurisdictions (thirteen states):

California:	CAL. PENAL CODE §§ 631, 632 (West 1999).
Connecticut:	CONN. GEN. STAT. § 52-570d (1999) (statutory tort enabled); CONN. GEN. STAT. § 53a-189 (1998) (felony listed).
Delaware :	DEL. CODE ANN. tit. 11, § 1336 (1997).

courts that have examined eavesdropping statutes have expressed the view that, as one put it, "[o]ne party to a telephone communication has no right to force the other to secrecy, and, in fact, takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation."[140] Interestingly, the federal wiretapping law[141] at one time required consent of all parties in order to record a conversation.[142] The statute was changed in 1986 to permit one party to tape without consent.[143] The reason given for the changes was that Congress did not want to criminalize interceptions by journalists used to gather information for news stories.[144]

Florida:	FLA. STAT. ch. 934.03 (1980).
Illinois:	720 ILL. COMP. STAT. 5/14-2 (West 1993)
Maryland:	MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (1998).
Massachusetts:	MASS. GEN. LAWS ch. 272, § 99 (1968).
Montana:	MONT. CODE ANN. § 45-8-213 (1999).
New Hampshire :	N.H. REV. STAT. ANN. § 570-A:2 (1973).
Oklahoma:	OKLA. STAT. ANN. tit. 13, § 176.4 (West 1998).
Oregon:	OR. REV. STAT. § 165.540 (1998).
Pennsylvania:	18 PA. CONS. STAT. § 5704(4) (1981).
Washington :	WASH. REV. CODE § 9.73.030 (1978)

Five states have no law on this point: Arkansas, Indiana, North Carolina, South Carolina, and Vermont.

140. Coates v. United States, 307 F. Supp. 677, 679 (E.D. Mo. 1970); *see also* Commonwealth v. Eason, 694 N.E.2d 1264, 1267 (Mass. 1998); People v. Lucas 470 N.W.2d 460, 467 (Mich. Ct. App. 1991).

141. 18 U.S.C. § 2511 (1993).

142. *See* ELECTRONIC COMMUNICATIONS PRIVACY ACT, Pub. L. No. 99-508, § 101(b) (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3571.

143. *See id.*

144. *See* S. REP. NO. 99-541, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3571. That report provides:

> Many news stories have been brought to light by recording a conversation with the consent of only one of the parties involved–often the journalist himself. . . . The present wording of Section 2511 (2) (d) not only provides [the other party] with a right to bring suit, but it also makes the actions of the journalist a potential criminal offense under Section 2511, even if the interception was made in the ordinary course of responsible news-gathering activities and not for the purpose of committing a criminal act or a tort. Such a threat is inconsistent with the guarantees of the first amendment.

Id. In the past several years, legislation has been introduced that would once again change federal law, this time by creating a uniform federal law outlawing the recording of phone conversations without the consent of all parties. *See* The Telephone Privacy Act of 1999, S. 781, 106th Cong. (1999); The Telephone Privacy Act of 1998, S. 1973, 105th Cong.; The Telephone Privacy Act of 1993, S. 311, 103d Cong (1993). The sponsors of the legislation have argued that a uniform law on wiretapping would be desirable to replace the potpourri of state legislation, but they have not offered particularly clear rationales for why the preferred form of the legislation should be one that requires all parties to consent. The legislators emphasized the need to maintain the "intimacy" of phone conversations. In a press release, Senator Diane Feinstein argued that secret recording "violates individual privacy and offends common decency. Phone calls remain one of the few avenues of communication where people

All of this suggests the deeply controversial nature of the intuition that a legally cognizable privacy right of some kind is invaded whenever undisclosed recording takes place. Of course, controversial or not, the intuition may be correct. Perhaps the only problem is that lawmakers have simply lagged behind in their ability to articulate the precise nature of the harm. On that theory, one might look to other bodies of expertise, particularly on psychology, photography, art, and film, to see whether other disciplines may provide insights that have eluded the law. Hypothetically, courts might be segmenting the voice and the image from written or spoken narrative because they sense that the capture of actual voices and images of people and their surroundings occupies a subtle but importantly different territory and the explanation may lie in one of these other disciplines. Reference to this literature could explain why recording ought to require separate consent, virtually without regard to the circumstances or the location.

I cannot claim to have thoroughly mined the vast amount of literature on film, photography, or recorded sound to its depths, but after a fairly conscientious effort, I can say that I did not turn up the missing piece. On the other hand, what I did find suggests some additional considerations to weigh before deciding whether to continue down the path staked out by *Dietemann* and retrod most recently by *Sanders* and *Food Lion*.

1. A Search for Understanding

Visual and aural communications have always been a crucial part of how we understand our world and the system of taboos through which we try to control it. In a preliterate era, history and the product of imagination were both conveyed from generation to

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still feel safe enough to have intimate conversations. We should protect this expectation of privacy." Sen. Diane Feinstein, *Senator Feinstein Introduces Two Measures to Protect Telephone Privacy*, Press Release (Apr. 14, 1999) (transcript available at <http://www.senate.gov/feinstein/releases/phoneprivacybills.html>). It seems that Feinstein is not bothered so much by the act of taping as by the revelation of intimate details, yet such revelations can occur regardless of the legality of taping conversations.

It is already illegal to intercept phone calls on cellular phones. *See* 18 U.S.C. 2511(4)(b)(ii) (1999). But this sort of eavesdropping is distinguishable from the sort of recording at issue in this article. It involves a classic case of the invisible third party whose presence is not detectable by anyone involved in the conversation.

generation by storytellers.[145] One can imagine that the sound of the human voice, its inflections and its intonations, carried much of the freight of the magic and mystery as tales were conveyed that, in the oral tradition, carried forward the insights of a people into their history and mythology. On a more prosaic level, modern lawyers, too, invest the sound of the human voice with high significance, recognizing that intonation and inflection are part of what differentiates levels of meaning and conveys psychological clues about sincerity or certainty or passion.[146] Despite the importance vested in the sound of the human voice, however, most of the literature dealing with the effects of mechanical recordation of the world around us seems to have focused not on sound but on the psychic and political significance of images in still photographs, film, and television. Hence most of this discussion will center on the issue of recorded imagery and what the richness of writing reveals about attitudes toward its social and cultural significance.

Long before the camera was dreamed of, the making of images had powerful and controversial significance. Depictions of humans and animals have carried special meaning in spiritual life, in some cases being greatly revered, while in others feared[147] or avoided on religious grounds.[148] Figurative imagery–the graven images of the

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145. Perhaps the most famous practitioner of this oral tradition was Homer. Although modern scholars have begun to suspect that Homer may have been literate and that he wrote down at least some of the *Iliad*, he is generally agreed to have been a product of "a long tradition of oral poetry." Bernard Knox, *Introduction* to HOMER, THE ILIAD 3, 19 (Robert Fagles trans., Penguin Books 1990) (1488). Knox discusses the oral tradition in poetry and the dispute over whether Homer wrote or transmitted the epic poem orally in his scholarly introduction. *See id.* at 3-22.

146. For commentary on the "oral tradition" in law, see NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS 18-20 (1985).

147. Susan Sontag wrote:

> As everyone knows, primitive people fear that the camera will rob them of some part of their being. In the memoir he published in 1900, at the end of a very long life, Nadar reports that Balzac had a similar "vague dread" of being photographed. His explanation, according to Nadar, was that "every body in its natural state was made up of a series of ghostly images superimposed in layers to infinity. . . .[E]ach Daguerreian operation was therefore going to lay hold of, detach, and use up one of the layers of the body on which it focused."

SUSAN SONTAG, ON PHOTOGRAPHY 158 (1977).

148. The great Paleolithic cave paintings, such as those at Altamira in Spain and Lascaux in France, are thought to have had religious significance. *See, e.g.*, DAVID M. ROBB & J.J. GARRISON, ART IN THE WESTERN WORLD 581-82 (3d ed. 1953). The Marxist critic, Walter Benjamin, wrote of religious or cultic art:

> Artistic production begins with ceremonial objects destined to serve in a cult. One may assume that what mattered was their existence, not their being on view. The elk portrayed by the man of the Stone Age on the walls of his cave was an instrument of magic. He did expose it to his fellow men, but in the main it was meant for the spirits. Today the cult value would seem to demand that

Old Testament–for example, is barred from houses of worship by Jews and Muslims but has traditionally been of great devotional significance in the Roman Catholic Church.[149] And the making of nonreligious representations, even by human hand, has also long carried controversial cultural significance. Although the ancient Greeks excelled in the representative arts, the philosopher Plato was known to be scornful of artists as mere "magicians" and "imitators."[150] At the close of the twentieth century, it is clear that we are still both entranced and troubled by our relationship to images.

Both the pleasure gained from imagery and our continuing suspicions of it have been amplified by the invention of mechanical devices that capture, or seem to capture, reality itself. Among some groups today, the taking of photographs is feared because the capture of realistic images of people on films is thought to steal some part of their essential being.[151] Although we understand from this that the products produced by technologies of reproduction may touch and profoundly disturb the people who are its subjects, that insight does not really provide an understanding of why a modern, postindustrial culture like ours–which probably would dismiss such ideation as "primitive"–ought to offer legal protection to people who are photographed without their consent or even help us understand why a claim to such protection has credence.

What may be of more relevance is the evidence of a deep cultural ambivalence about the social and aesthetic changes wrought by still photography, film, and television.[152] Literary and social commenta-

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> the work of art remain hidden. Certain statues of gods are accessible only to the priest in the cella; certain Madonnas remain covered nearly all year round; certain sculptures on medieval cathedrals are invisible to the spectator on ground level.

WALTER BENJAMIN, ILLUMINATIONS 226-27 (Harry Zohn trans., 3d ed. 1968).

149. The ban on graven images might variously be explained as a bar against competing with the creative power of God, or conversely against creating competing objects of worship. On the other hand, imagery has been used to great artistic effect in Roman Catholic churches, both to provides objects of reverence and to convey biblical stories to illiterate Christians. Such was the power of prohibitions against representational art, however, that it took the persuasion of such powerful figures as Pope Gregory I and Saint Thomas Aquinas to overcome the prejudice against images in churches. *See* MITCHELL STEPHENS, THE RISE OF THE IMAGE, THE FALL OF THE WORD 60-62 (1998). An interesting discussion of the relationship between imagery and belief in divinity may be found in Jean Baudrillard, *The Precession of Simulacra*, *in* ART AFTER MODERNISM: RETHINKING REPRESENTATION 253, 255-57 (Brian Wallis ed., 1984).

150. STEPHENS, *supra* note 149, at 60.

151. *See* SONTAG, *supra* note 147.

152. *See* BENJAMIN, *supra* note 148, at 224-25.

tors almost uniformly share the belief that still and motion picture photography is powerful, but they divide radically on whether the power is a force for good or ill. Walter Benjamin, whose writings on photography have become a classic, was captivated by the ability of the camera to "penetrate deeply" into the web of life, rather than maintain a painterly distance.[153] Nevertheless, he also understood the prevalence of the photographic image as a way of depreciating the thing itself.[154] Others have shared this observation, with varying levels of dismay.[155] An early devotee of photography, Oliver Wendell Holmes was nevertheless wistful in his concern that "[m]en will hunt all curious, beautiful, grand objects, as they hunt the cattle in South America, for their *skins* and leave the carcasses as of little worth."[156] The French critic, Jean Baudrillard, has written brilliantly about the way that modern photographic imagery has acculturated us to accept Holmes's "skin" as substitute–perhaps a preferred one–for actual experience.[157] Among his illustrations of the point is the enormous popularity of Disney theme parks, places where many people gather because they prefer the ersatz to the real.[158]

Critics have also engaged in interpreting the "meaning" of photographic images, fascinated and disturbed by the appearance of reality that can easily mask the deeply interpretive nature of the enterprise of making the picture. The task of learning to "read" photographs and to understand their subtle distortions of reality has engaged such perceptive and different writers as Susan Sontag and Roland Barthes.[159]

Film is seen as presenting moral puzzles as well. Does the very act of trying to capture people and events change reality or distort it? Is it possible to capture people's lives on film without also exploiting them?[160] Does exposure to imagery desensitize and

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153. *See id.* at 233-34.

154. *See id.* at 231.

155. *See id.*

156. Oliver Wendell Holmes, *The Stereoscope and the Stereograph*, *in* ON PHOTOGRAPHY: A SOURCE BOOK OF PHOTO HISTORY IN FACSIMILE, 108, 118 (Beaumont Newhall ed., 1956).

157. *See* Baudrillard, *supra* note 149, at 261.

158. *See id.* at 258-62.

159. Roland Barthes, *The Photographic Message*, *in* A BARTHES READER 194 (Susan Sontag ed., 1982).

160. Several troubling examples of the effect of documentary film-making on the lives of the subjects are recounted in Gary Dauphin, *Burden of Dreams: Negotiating the Modern Portrait Doc*, VILLAGE VOICE, May 23, 1995, at 12. In addition to the Louds, he discusses the young boys who were the subject of "Hoop Dreams" and the effect on the life of a woman of an anthropological film made in 1978 by John Marshall, called "N!ai: A Story of a !Kung

deceive its viewers? Volumes have been written on the methodologies of film makers like Frederick Wiseman, who present their work seemingly without comment but who are seen by some as purveyors of hidden commentary and value judgments.[161]

Relationships between the camera and its subjects resist easy understanding. People squirm at the thought of exposure by the pitiless eye of the camera but carry cameras everywhere–as if events that are unrecorded are events that have not occurred. The richest symbol of this confused relationship with film is the Loud family. The Loud family became famous when it let cameramen into their home to produce 300 hours of broadcast on their daily lives–offering the public what Jean Baudillard has termed "the thrill of the real, . . . a thrill of vertiginous and phony exactitude."[162] The implication is that, by hovering around the television set to watch the Louds, we become consumers of objectified others.[163] Like the viewers of the *Truman Show*, we are transformed into a collection of voyeurs, who view prying as entertainment.[164] The other piece of the puzzle, of course, is that, although we might protest if asked that a venture like the film on the Louds is fundamentally exploitative, the family cooperated in the venture, willing to live with the camera as an invisible but all-seeing eye.[165]

What is obvious is that, as a society, we are profoundly unsettled about our relationship with photographic imagery and deeply

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Woman."

161. *See, e.g.*, JACQUES AUMONT, BEYOND DOCUMENT: ESSAYS ON NONFICTION FILM (Charles Warren ed., 1996); JACQUES AUMONT, THE IMAGE (Claire Pajackowska trans., 1997); THOMAS W. BENSON & CAROLYN ANDERSON, REALITY FICTIONS: THE FILMS OF FREDERICK WISEMAN (1989); BARRY KEITH GRANT, VOYAGES OF DISCOVERY: THE CINEMA OF FREDERICK WISEMAN (1992); BILL NICHOLS, BLURRED BOUNDARIES: QUESTIONS OF MEANING IN CONTEMPORARY CULTURE (1994); BILL NICHOLS, REPRESENTING REALITY: ISSUES AND CONCEPTS IN DOCUMENTARY (1991).

162. Baudrillard, *supra* note 149, at 271.

163. *See id.*

164. Journalism critic Russ Baker agrees about the thin line between information and voyeurism, especially when hidden cameras are used to supply the footage. *See* Russ W. Baker, *Truth, Lies, and Videotape: 'PrimeTime Live' and the Hidden Camera*, COLUM. JOURNALISM REV., July-Aug. 1993, at 25.

> Watching someone do virtually anything without their knowing can be titillating. Daydreaming on the job, licking an envelope while looking around nervously – innocent acts can seem dubious, even nefarious. Practitioners know this. "It's no secret to anyone that this hidden-camera stuff intrigues the viewers," says Kelly Ogle, investigative reporter at KWTV, a CBS affiliate in Oklahoma City. "They like to see people doing things when they don't know they're being watched."

Id. at 28.

165. *See* Baudrillard, *supra* note 149, at 271.

ambivalent about its role in our lives. One way to explain this discomfort is as a fear of change. The proliferation of new media in the last century and a half have challenged our understandings of art and intellect and social relations in disturbing ways. It should not be a surprise that much of the legal turmoil over captured sound and images in the press cases has occurred in the context of the most controversial of the new media–television. Nor would it be a surprise if it rose up again in some form as the Internet threatens once more to change and destabilize our conventions of information exchange.

Television has been accused of many crimes against civilization, from changing us into passive dummies to converting our peaceable children into lovers of violence. In intellectual circles–which judges, like academics, inhabit–it is fashionable to decry the debilitating effects of television on the minds and tastes of the public. And that may color the view that is taken of the activities of reporters.

Historian Daniel Boorstin is an articulate representative of the view that television and what it produces is irredeemably trivial.[166] In his famous book, *The Image: A Guide to Pseudo-Events in America*, he commented acerbically:

> A juvenile critic recently said that television was "chewing gum for the eyes." . . . We might say now that chewing gum is the television of the mouth. There is no danger so long as we do not think that by chewing gum we are getting nourishment. But the Graphic Revolution has offered us the means of making all experience a form of mental chewing gum, which can be continually sweetened to give us the illusion that we are being nourished.[167]

And Neil Postman has claimed that our television-moderated "focus on the image has undermined traditional" ways of understanding and thinking about the world in which we live so that we are now capable as a society of little more than "amusing ourselves to death."[168] It would not be at all surprising if some of this uncertainty, disdain, and episodic alarm about modern communica-

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166. *See* DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 254 (Vintage Books 1st ed. 1992) (1961).

167. *Id.* at 258.

168. POSTMAN, *supra* note 146, at 74. Postman writes that "the early decades of the twentieth century were marked by an outpouring of language and literature." *Id.* at 76-77. That brilliance has now been replaced, thanks to the electronic media, with a "peek-a-boo world, where now this event, now that, pops into view for a moment, then vanishes again. It is a world without much coherence or sense." *Id.* at 77. He attributes most of the destructive tendencies of which he speaks to television. *See id.* at 78.

tions technologies might rub off on judges and juries and surface in the form of an instinctive negative reaction to the use of cameras and tape recorders by reporters.

It is important, therefore, to pause for a deep breath before translating "image anxiety" into legal rules. It may well be that most of what seems profoundly disturbing and offensively trivial today in the media reflects a period of cultural dislocation rather than a genuine evil that needs to be controlled. Mitchell Stephens, in a wise new book, makes a persuasive argument that our suspicion of images is indeed a function of this sort of temporary psychic dislocation.[169] And he points out that overreaction, fear, and anger have accompanied each major revolution in communications technologies, whether it be the invention of the printing press or the invention of the Internet.[170] Each change must be processed, often for a century or more, before we can put the virtues and the costs of the new modality into something like appropriate perspective.[171] Stephens wrote:

> Words were born with humankind–perhaps a hundred thousand or even as long as a million years ago. To be human, for those unencumbered by disability, is to use and understand words. Most of what we can sense, feel or imagine we can express through language. Can we think without language? This question has perplexed many generations of undergraduates, but certainly it can be agreed that without language most of us could not think about much. Perhaps that is some of what the Gospel according to John has in mind when it reports, "In the beginning was the Word."
>
> This is the first reason that talk of the fall of the word causes so much anxiety. At stake is not simply one form of communication; at stake is the way we think, where we begin.[172]

Is it possible that the real evil of unconsented filming is its novelty, its "untextness"?

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169. *See* STEPHENS, *supra* note 149.

170. *See id.* at 65-78.

171. That such a sense of dislocation plays a part in the attitude of the courts is hinted at by the opinion in *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998). The opinion made special note of the "problem" posed by recording and transmitting devices in the modern era:

> More generally, the dominance of the visual image in contemporary culture and the technology that makes it possible to capture and, in an instant, universally disseminate a picture or sound allows us, and leads us to expect, to *see* and *hear* what our great-grandparents could have known only through written description.

Id. at 473-74.

172. STEPHENS, *supra* note 149, at 16.

2. A Few Pragmatic Observations

The very fact that visual imagery, particularly film footage, generates such visceral reactions is ample reason to hesitate before acting on those reactions. To the extent that negative attitudes toward mechanically-captured imagery result from our deep psychic ties to the word, or from some temporary cultural identity crisis through the threat they pose to understandings based on the written word, courts are inappropriate arbiters of the conflict. If people fear images because they are a powerful, partial, incompetent, deceptive, or unflattering method of conveying information, that, too, is a cultural debate that I would have thought the First Amendment left to be worked out in the public arena. Deconstructing film is not the realm of law.

Let me add a few other pragmatic considerations, as well. Although it may be tempting to "put down" a preference for visual imagery over text as a sign that the consumer has lamentable taste for sensationalism or a lack of intellectual rigor, to do so ignores the importance of pictures as a way to absorb new information and understand its meaning. Among illiterate people, imagery is especially important because it is, by necessity, a primary medium for the distribution and acquisition of knowledge. Much of the writing of media gurus like Marshall McLuhan was generated by excitement at the possibilities offered by modern photographic and audiovisual media for dissemination of information and values, as well as political ideas, across geographic and cultural lines.[173]

Within societies that are largely literate, however, information conveyed by pictures and images does not lose its saliency. Cognitive psychologists have had a long-standing interest in the ways learning occurs from pictures. They agree that images can be

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173. McLuhan recognized this possibility for the electronic media and captured it in the phrase, "the global village." He wrote:

> Our specialist and fragmented civilization of center-margin structure is suddenly experiencing an instantaneous reassembling of all its mechanized bits into an organic whole. This is the new world of the global village. . . . The electronic age cannot sustain the very low gear of a center-margin structure such as we associate with the past two thousand years of the Western world.

MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 93 (1965). A second major figure in understanding the way in which the modern pictorial and audiovisual media have changed the way we view ourselves and our place in the global context is Ithiel de Sola Pool. *See* POLITICS IN WIRED NATIONS: SELECTED WRITINGS OF ITHIEL DE SOLA POOL (Lloyd S. Etheredge ed., 1998).

an important source of information for people who do not respond well to text. But even for those who learn well from the written word, researchers now suspect that imagery remains an important adjunct to comprehension. A number of researchers are now working on understanding how exposure to images may reinforce, supplement, or perform different cognitive functions than text.[174] Numerous other scholars from a variety of disciplines also either celebrate the potential of modern visual media, or at least acknowledge that, on balance, it makes a positive social contribution. Walter Benjamin, for example, argued that film is a progressive form of expression because it allows an appeal directly to the masses, rather than requiring that the reception of art be mediated through an elitist, intellectual hierarchy.[175] Susan Sontag, in her book on photography, points out that "populist" newspapers like the *New York Daily News* advertise themselves as the "picture newspapers," whereas a more elite publication like *Le Monde* uses no photographs at all.[176] "The information that photographs can give," she wrote, "starts to seem very important at that moment in cultural history when everyone is thought to have a right to something called news. Photographs were seen as a way of giving information to people who do not take easily to reading."[177] Although Sontag takes issue with a simplistic view regarding photographs as "information," she does not quarrel with, or take offense at, the claim that different people respond more or less favorably to different kinds of inputs.[178]

A second, quite different, pragmatic consideration is whether, when the law punishes the press for unconsented recording, the real message is that subjects should have a legal right to deny the accuracy of what the press reports, even though it is entirely correct. In *Sanders*, for example, it seems as if the plaintiff's real objective was to be able to hide how he earned his living from the large segments of the community that would not have found his occupation especially admirable. That is a peculiar interest for the law to protect. The *Sanders* court decided to do so, however, at least in

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174. *See, e.g.*, Sylvie Molitor et al. *Problems in Knowledge Acquisition from Text and Pictures, in* ADVANCES IN PSYCHOLOGY (58): KNOWLEDGE ACQUISITION FROM TEXT AND PICTURES 3, 4-5 (Heinz Mandl & Joel R. Levin eds., 1989). The authors attribute to the Renaissance in Europe a preference for images over "scholastic knowledge in books." *Id.* The task of modern psychology is to understand how learning from imagery takes place and how such learning relates to learning from texts and words. *See id.* at 6.

175. *See* BENJAMIN, *supra* note 148, at 233-35.

176. *See* SONTAG, *supra* note 147, at 22.

177. *Id.*

178. *See id.*

part because it concluded that "outing" the activities of "telepsychics" was too trivial to justify either the reporter's deception or the embarrassment caused by the plaintiff by showing him in a truthful light.

One could quarrel, as I do, with that judgment and with the appropriateness of a court's making it. But I think it would be hard for most people to accept as a right the claim to be defended against the truth where the interest of the plaintiff, bluntly, is to hide from the world as much as possible behavior that is clearly, or at least arguably, genuinely discreditable. Dietemann, whether he thought it was wrong or not, was practicing medicine without a license and was convicted for doing so. Food Lion never disputed that the broadcast scenes showing food being mishandled were accurate.[179] When evidence of criminal, unethical or unsafe practices is captured on film and tape, it can be a powerful force for reform.[180] As a society, we should have some discomfort at the idea that corporations and people who, in their public, commercial and professional roles are themselves engaged in questionable or illegal practices are

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179. *See* Russ W. Baker, *Damning Undercover Tactics as 'Fraud': Can Reporters Lie About Who They Are? The* Food Lion *Jury Says No*, COLUM. JOURNALISM REV., Mar.-Apr. 1997, at 28. Baker makes the point that, although some of the outtakes did suggest that the reporters were looking for material in the *Food Lion* case to support their story line, the footage actually broadcast was legitimately damning of Food Lion's practices. *See id.* at 31. He also notes that the reporters had on-the-record interviews with 70 current and past Food Lion employees attesting to unsafe practices at more than 200 store locations, in addition to other interviews that were off the record. *See id.* at 32. One of the most troubling aspects of Baker's report, however, was the indication that the jury may have been influenced in finding liability by prejudice against the North and New York City, as well as by subtle anti-Semitism. *See id.* at 32-33. Whether or not he is correct, his suspicion supports the argument that courts need to ground their theories of liability, and the damage awards that flow from them, on solid, rational grounds to avoid the risk of serious unfairness and a chilling of future speech. *See id.* at 34.

180. Sontag points out that, to be affected by a photographic image, one needs a "relevant political consciousness" and that photographs alone do not create "moral position[s]." SONTAG, *supra* note 147, at 16-21. I take the point, but do not understand her to belittle the power of photographs by making it. Although unconsented and secret filming is controversial among journalists themselves, many agree that the results are often beneficial. One writer, discussing the aftermath of the *Titicut Follies* injunction, *see supra* note 27 and accompanying text, pointed out that the legal bar to showing the film was lifted only after a suit by the families of inmates who died in the Massachusetts institution for the criminally insane as a result of poor care. "Shunned by most organizations representing the mentally ill, these vulnerable men cannot protect themselves. Prying eyes are their best defense." Miriam Horn, *Shining a Light on Their Follies*, U.S. NEWS & WORLD REP., Apr. 12, 1993, at 20. For a similar example, see Goodman, *supra* note 96, at E8 (describing revelations, partly through use of a hidden camera, of abuses in a for-profit chain of psychiatric hospitals).

nonetheless allowed to use powerful and broadly-defined tort theories as weapons to protect themselves against scrutiny.[181]

An additional pragmatic consideration I would like to raise is the value that inheres in documentation. After all, reporters sometimes lie. In recent history, several prominent journalists have lost jobs, and one was even required to return a Pulitzer prize, because they had made up some or all of their stories.[182] Recordings are proof against that form of deception. Hopefully, however, the more important role for audio and video tapes is to provide protection against unjustified claims that the reporter has lied.[183] Clearly, without documentary proof, a source wishing to back out of a revelation is free to deny that she ever did or said such a thing, or

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181. There are many other examples of possible malfeasance on the part of plaintiffs. *See, e.g.*, Federal Beef Processors, Inc. v. CBS, Inc., Civ. No. 94-590 (S.D. Cir. Ct. Feb. 7, 1994) (granting an order for a temporary injunction), *motion for stay denied sub nom*; CBS, Inc. v. Davis, No. 18637 (S.D. Feb. 8, 1994), *stay granted,* 510 U.S. 1315, 1318 (1994) (Blackmun, Circuit Justice) (holding that footage from an investigation of alleged unsanitary practices in meat industry could not be enjoined because of concern about the constitutionality of prior restraints); Desnick v. ABC, Inc., 44 F.3d 1345 (7th Cir. 1995) (exposing improper treatment in opthalmology clinics); Belluomo v. KAKE TV, 596 P.2d 832 (Kan. Ct. App. 1979) (involving health code violations in restaurant); Special Force Ministries v. WCCO TV, 26 Media. L. Rep. CBNA 2490 (Minn. Ct. App. 1998) (investigating questionable care in residential facilities for the mentally retarded). Journalists disagree over whether a ban on unconsented or secret recording would hamper effective investigative reporting. *See, e.g.,* Paterno, *supra* note 17, at 40; *see also* Perry, *supra* note 17 (also describing the debate). Paterno addresses the debate by both quoting a reporter from the *New York Times* who claimed that undercover reporting was usually bad reporting and, at the same time, pointing to examples of award-winning journalists who engaged in deceptive conduct to get important stories. *See* Paterno, *supra* note 17, at 43-44. Paterno makes the point–true in my experience–that most critics of hidden cameras and undercover reporting are from the print media. *See id.* at 43. "But," she adds, "television needs pictures. And pictures drive reporters undercover for dramatic, indisputable evidence of wrongdoing. 'Often the results are wonderful,' says SUNY press historian [Robert] Miraldi. 'And I don't mean ratings. I mean the changes that result socially.'" *Id.* at 44.

182. A Washington Post reporter, Janet Cooke, won and then lost a Pulitzer prize for making up an article about an eight-year-old heroin addict, entitled *Jimmy's World. See* Robert Reinhold, *Washington Post Gives Up Pulitzer, Calling Article on Addict, Fiction,* N.Y. TIMES, Apr. 15, 1981, at A1. Recently, other reporters, including Boston's Mike Barnicle, have fallen into disrepute for making up characters or other aspects of stories. *See* Felicity Barringer, *Boston Globe Columnist Resigns Over Authenticity of 1995 Story,* N.Y. TIMES, Aug. 20, 1998, at A1.

183. Professor Paul LeBel has said:

> One might hypothesize that there is a significant First Amendment interest in the activity of hidden recording that is different from and perhaps stronger than the interest in mere presence on the part of a reporter. The additional credibility associated with the images and the sounds that are recorded in an encounter of this sort contributes to the public information about the matter in question in a more meaningful and dramatic way than an account of the encounter that is unsupported by film or tape.

LeBel, *supra* note 48, at 1160.

to claim that, if she did say it, she was being facetious.[184] A recording of the exchange allows listeners and viewers (or jurors, if it comes to that) to draw their own conclusions.[185] To use one prominent example, let us think back to the Lewinsky-Tripp tapes that played such a prominent role in the Clinton impeachment proceedings. I would, on balance, have preferred never to have known most of the sordid details they contained. But since I was going to learn about their contents anyway in excruciating detail, it clearly seems better to me to have had the opportunity to examine the transcripts and hear the voices than to allow the information to be filtered to me through the lens of partisan players in the controversy.

In the end, the claim that secret (or unconsented) recording of the kind at issue here is a clear moral and legal wrong is not obvious. That is not to say that, under some circumstances, the behavior probably ought to be proscribed. If the recording and its subsequent publication occurs in a relationship that carries with it some special, clearly understood expectation of confidentiality, for example, the appropriateness of a tort remedy might be clearer. In *Shulman v. Group W Productions, Inc.*,[186] to use one example, the Supreme Court of California was faced with the existence of such a relationship and was able to use it to draw a narrow and intelligible line between the impermissible and the merely controversial.[187] There, the reporters were preparing a documentary on the work done by emergency rescue squads, and arranged to have a cameraman in a

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184. As Judge Posner once trenchantly observed, privacy claims are often attempts on the part of plaintiffs to perpetrate fraud by maintaining a public image they do not "deserve." *See* Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 397-400 (1978).

185. *See* Marc Gunther, *The Lion's Share*, 19 AM. JOURNALISM REV. 18 (1997). This point is actually made by journalism commentators who are not enamored of the tactics discussed in this article. Marc Gunther, for example, does not approve of undercover reporting, but he notes that the public may not agree. *See id.* He reports that ABC, after it lost two cases involving such tactics, took a poll and found that

> network magazine shows get very high ratings for "ethics and honesty," higher than local newspapers and the news media overall and much higher than the Clinton administration or politicians in general. Seventy-two percent of respondents said they thought TV investigative reporters are "careful and fair," and more than half approve of the use of undercover reporters.

Id. at 23. Russ Baker is also critical of the reporting techniques of television news magazines, in particular those of *PrimeTime Live*–a show that uses undercover techniques more than any comparable show. Nevertheless, he concludes: "Viewers of hidden-camera journalism serve as their own eyewitnesses. 'Seeing is believing,' says NBC field producer Bob Windrem, who spent a dozen years each in TV and print. 'That's why television has higher credibility with the public than print.'" Baker, *supra* note 164, at 25, 34.

186. 955 P.2d 469 (Cal. 1998).

187. *See id.* at 477.

rescue helicopter and a wireless microphone attached to a flight nurse.[188] The victim of an automobile accident could be heard speaking with the nurse during her evacuation from the accident scene, presumably unaware that every word was being recorded.[189] Medical personnel owe a special responsibility toward a patient, whether in an ambulance, a rescue helicopter, or a hospital room, that generally includes a respect for the patient's privacy and confidences. A tort recovery against a media entity for invading that special relationship is consistent with basic principles of the law of privacy and would be a wrong with or without the use of hidden recording equipment.[190]

There can be other specific problems with the content of a picture or a sound recording that I suspect would also generally be conceded by all sides to create valid grounds for recovery. For example, use of a recorded voice or face might expose its owner, under some circumstances, to a serious risk of danger.[191] Or it might reveal something that, were the facts merely reported verbally, would not expose the plaintiff so intimately.[192] People might not object to appearing scantily clad in front of people they know well in what they think is the "privacy" of their home but a secret photograph of them in that condition might legitimately be treated as quite a different form of revelation.[193]

But without specific circumstances to justify and render intelligible the court's decision, bans on mechanical recordation of things that can legitimately be reported deserve a skeptical reception.

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188. *See id.* at 475-76.

189. *See id.* at 476.

190. One of the best known privacy cases is *Barber v. Time, Inc.*, 159 S.W.2d 291 (Mo. 1942). The case is generally conceded to involve a genuinely offensive form of intrusion, partaking of all the characteristics that render trespasses into homes or peeping through windows out-of-bounds in our society. *See id.* at 295-96.

191. This problem is occasionally faced by courts when reporters want to televise all or part of a trial. *See* Zimmerman, *Overcoming Future Shock*, *supra* note 25, at 705. It has also been discussed as a factor in some of the covert recording cases.

192. *See id.*

193. Some feeling for what I mean can be gleaned from the facts of one of the so-called ride-along cases recently decided by the Supreme Court. Reporters accompanied law enforcement personnel into a house to execute a warrant. *See* Wilson v. Layne, 141 F.3d 111, 113 (4th Cir. 1998), *aff'd*, 119 S. Ct. 1692, 1695-96 (1999). The occupants, who were sleeping when the police arrived, were photographed dressed in underpants and a sheer nightgown. *See Wilson*, 141 F.3d at 113, *aff'd*, 119 S. Ct. at 1696. Arguably, merely describing the way they were dressed would convey a qualitatively different kind of information from secretly photographing them and making the film public. *Cf.* Harkey v. Abate, 346 N.W.2d 74 (Mich. Ct. App. 1983) (reporting a case where the owner of a roller-skating rink installed see-through panels in the ceiling of the women's restroom).

Focusing on the equipment of reporting as a wrong when the content produced by it is legally impeccable ought to raise a suspicion that courts and juries are simply evading the strictures of the First Amendment to punish the press when they do not approve of the report's conclusions or choice of target.

IV. CONCLUSION

Reason, and not emotion, ought to drive the development of the law about newsgathering. As this article has tried to show, it is difficult at present to be sure that reasoned grounds exist for the harsh treatment that has been meted out in recent years to press entities that have engaged in undercover reporting. That is not to say that penalties for unacceptable behavior ought never be imposed on the press, but rather to counsel caution against the risk of over-reacting to provocative, but not clearly antisocial, behavior in the course of newsgathering. Beyond question, the media uses bad judgment and sometimes indiscriminately wields weapons that squash flies as well as monsters. "Investigative" reportage is often flashy and insubstantial. The desire for profit may drive the take-no-prisoners behavior of an aggressive press as often as a zeal for justice. But distaste for press tactics alone is not a justification for large damage awards. Courts ought to promulgate firm rules against press misconduct only if a convincing rationale can be offered for why the excess in question would be beyond the pale for any of us.

Beyond that, the appropriate approach may be to hold our collective noses and leave the decision about what is fair play to work itself out on the field of ethics and public opinion. Messiness and mendacity are as much a product of a free press as are its valiant crusades and mind-opening revelations, and a mature society probably has to learn to live with that tension, if not exactly to love it.

On this point, I can do no better than to quote from that supreme rationalist, Chief Judge Richard Posner. In a recent decision, declining to overturn a trial court verdict in favor of the defendant where both hidden identities and surreptitious recording were used by investigative reporters, Judge Posner (with or without a hard swallow I cannot tell) wrote: "[I]f the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it . . . then the target has no legal

remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly."[194]

194. Desnick v. American Broad. Cos., Inc., 44 F.3d 1345, 1355 (7th Cir. 1995).