

2000

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Recommended Citation

Rodney A. Smolla, *Qualified Intimacy, Celebrity, and the Case for a Newsgathering Privilege*, 33 U. Rich. L. Rev. 1233 (2000).

Available at: <http://scholarship.richmond.edu/lawreview/vol33/iss4/7>

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QUALIFIED INTIMACY, CELEBRITY, AND THE CASE FOR A NEWSGATHERING PRIVILEGE

Rodney A. Smolla*

I. INTRODUCTION

In this symposium issue Robert Nagel, Diane Zimmerman, Robert O'Neil, and Erwin Chemerinsky explore the intersection of privacy and freedom of the press. In his fascinating inquiry into privacy and celebrity in modern American life, Robert Nagel demonstrates the connection between the American public's strong commitment to privacy and its simultaneous passion for robust protection of freedom of speech.¹ Among his most important insights is the exposure of "pseudo-intimacy" as a principal currency of contemporary celebrity status. Diane Zimmerman,² Robert O'Neil,³ and Erwin Chemerinsky⁴ all investigate the legal principles that ought to surround aggressive and surreptitious newsgathering techniques, each in their own way drawing the conclusion that some legal protection ought to extend to at least some exercises in surreptitious newsgathering. Spurred by these efforts, my aim here is to look for links among the themes in this scholarship, and to offer some comment of my own on the cultural and legal issues presented.

II. CELEBRITY, PSEUDO-INTIMACY, AND PSEUDO-NEWS

Starting at the broadest level with Robert Nagel's intriguing exposure of pseudo-intimacy as the hallmark of modern celebrity, I am struck by how the qualities of modern celebrity described by Robert Nagel coincide so perfectly with accepted legal doctrines regarding the levels of constitutional protection media reportage on

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1. See Robert F. Nagel, *Privacy and Celebrity: An Essay on the Nationalization of Intimacy*, 33 U. RICH. L. REV. 1121 (2000).

2. Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. RICH. L. REV. 1185 (2000).

3. Robert M. O'Neil, *Ride-alongs, Paparazzi, and Other Media Threats to Privacy*, 33 U. RICH. L. REV. 1167 (2000).

4. Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143 (2000).

the lives of celebrities should receive. I doubt the coincidence is coincidental. I also doubt that it is sound.

Speaking not in legal terms-of-art, but in simple colloquial cultural descriptions, we might very plausibly divide the world into noncelebrities, minor celebrities, and major celebrities. Such a cultural description would conveniently track current First Amendment doctrine, at least as it has been articulated in defamation law. The First Amendment doctrines governing defamation created in *Gertz v. Robert Welch, Inc.*⁵ divide the world of potential plaintiffs into three principal categories: private figures, limited-purpose public figures, and all-purpose public figures.⁶ A person in any of these three categories might find himself the subject of news coverage that he deems libelous, an invasion of his privacy, or the product of illegal or tortious newsgathering methods. At least for the purposes of defamation, *Gertz* instructs that three different legal standards will apply to our private figures (the noncelebrities), our limited-purpose public figures (the minor celebrities), and our all-purpose public figures (the major celebrities). Private-figure defamation plaintiffs must normally establish only negligence by the defendant to recover for libel.⁷ Limited-purpose public figures and all-purpose public figures must establish "actual malice," defined as knowledge of falsity or reckless disregard for truth or falsity.⁸

The difference between the "limited-purpose" and "all-purpose" public figure is in the "relevancy" or "germaneness" concept. The limited-purpose public figure is usually understood as a person who enters a particular public controversy.⁹ The plaintiff is deemed a public figure only for stories germane to that controversy. Some-

5. 418 U.S. 323 (1974).

6. In its historic ruling in *Gertz*, the Supreme Court held that in defamation actions brought by private figures in which the defamatory speech involves issues of public concern, states are free to predicate liability on a showing of ordinary negligence. See *id.* at 347. Unlike public officials and public figures who may recover for defamation only after demonstrating that the defendant published the defamatory statement with "actual malice," defined as knowledge of falsity or reckless disregard for truth or falsity, see *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), mere negligence will support a verdict in favor of private-figure plaintiffs. See *Gertz*, 418 U.S. at 347.

7. See *Gertz*, 418 U.S. at 347.

8. See *Sullivan*, 376 U.S. at 279-80.

9. See *Gertz*, 418 U.S. at 345. In *Gertz*, the Court explained:

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

Id.

times courts further tighten the requirements, emphasizing the extent to which the person's entry into the controversy was "voluntary" and the extent to which the entry was made to "influence" the outcome of the controversy.¹⁰ The link between limited-purpose public figure status and the notion of "public controversy" might also be thought of as a link between the decision to provide higher levels of First Amendment protection for speech germane to "public controversies" and the idea of protecting "public discourse."¹¹ The limited-purpose public figure category in *Gertz* seemed quite directly linked to conceptions of the First Amendment that are relatively high-minded, conjuring up images of public debate and deliberation on "controversial" subjects in which parties are attempting to influence outcomes.

10. In *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1976), the Supreme Court held that the plaintiff, Wolston, who was brought before a grand jury investigation in connection with an espionage inquiry, was a private figure. *See id.* at 162-64. Wolston ignored a subpoena requiring him to appear before a grand jury in 1958, and subsequently pleaded guilty to a charge of criminal contempt. *See id.* at 162-63. Wolston's episode with the grand jury investigation and his subsequent conviction for criminal contempt resulted in 15 newspaper articles in New York and Washington, D.C. *See id.* at 163. Emphasizing that Wolston had not invited controversy by entering into the public arena to influence public debate, the Supreme Court held Wolston to be a private figure. *See id.* at 167-68.

11. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Supreme Court ruled that Mary Alice Firestone, wife of Russell Firestone and a member of the wealthy Firestone family, was a private figure, despite being embroiled in bitter and highly publicized divorce litigation. *See id.* at 453-57. She had done nothing to invite public controversy other than to participate in the litigation, the Court reasoned, and this was not enough to bring her within the definition of a public figure. *See id.* at 454-55 n.3. Firestone's prominence in what the Court depicted as "the sporting set" did not qualify her as a person of "especial prominence in the affairs of society." *Id.* at 453. Even though Mrs. Firestone initiated litigation in a public court of law, the Court held that her action was not a purposeful insertion into a matter of public controversy, since state law compelled her to resort to legal process in order to obtain lawful release from the bonds of matrimony. *See id.* at 454. Although the Court conceded that some participants in some litigation may be legitimate public figures, either generally or for the limited purpose of press coverage concerning the litigation, the majority would regard Mary Alice Firestone as "drawn into a public forum largely against [her] will in order to attempt to obtain the only redress available to [her] or to defend [herself] against actions brought by the State or by others." *Id.* at 457. *See also* Lerman v. Flynt Distrib. Co., 745 F.2d 123, 136-37 (2d Cir. 1984) (adopting a four-part test for determining limited-purpose public figure status, requiring defendant to prove plaintiff: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media); Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982) (adopting a five-part test for determining limited-purpose public figure status, requiring defendant to prove: (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the time of the alleged defamation).

But the all-purpose public figure category seems quite different. It is not grounded in any nexus to public controversy, or any conception of public discourse. The all-purpose public figure is the major celebrity, the cultural superstar, a person distinguished more by raw power and influence than by contribution to the marketplace of ideas.¹² And herein lies the first ironic twist: The very highest levels of First Amendment protection are awarded to that most unlikely and seemingly unworthy of recipients, the *tabloid*.

The all-purpose public figure category in *Gertz* is, in one sense, the "tabloid public figure" category. This can be put in cultural or legal terms; either way the essential notion is the same. Culturally, it is when a celebrity makes the tabloids that true stardom has arrived. If you're not in the tabloids, you haven't quite fully made it as a *celebrity*, or at least as a mega-celebrity, a phenomenon, a cultural force. It's when the tabloids start writing about you that you know you've hit the big time in this culture. This is expressed in legal doctrine in *Gertz* and its all-purpose public figure doctrine precisely in the message that for the all-purpose public figure, *every* aspect of life is deemed a matter of public concern.¹³ No nexus between the subject of a story and the public figure's entry into a public controversy is required—indeed the notion of "public controversy" that is central to the limited-purpose public figure concept in *Gertz* completely drops out of the calculation when we are dealing with the all-purpose public figure. No concept of "relevancy" or "germaneness" exists for the all-purpose public figure because everything about the all-purpose public figure is relevant and germane.¹⁴

The all-purpose public figure concept in *Gertz* is thus entirely divorced from any serious notion of "public discourse." So are most tabloids.¹⁵

This invites such questions as why this seems to be so and whether it should be so. We might start with the simple cultural question of why it is that appearance in tabloids largely *defines* a person's ascendance to mega-celebrity (or all-purpose public figure) status. The mega-celebrity will, to be sure, still appear in non-tabloid publications. Michael Jordan, Madonna, Tom Cruise, and

12. See *Gertz*, 418 U.S. at 345 ("For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.").

13. See *id.* at 344-45.

14. See *id.*

15. See Rodney A. Smolla, *Will Tabloid Journalism Ruin the First Amendment for the Rest of Us?*, 9 DEPAUL J. ART & ENT. 1, 4-6 (1998).

Bill Clinton are all mega-celebrities who appear in mainstream non-tabloid media daily. (I mean to include a broad spectrum of non-tabloid culture, from the *New York Times* or CNN to *Sports Illustrated* or *Esquire*.) But I am suggesting that it is the fact that they also appear daily in tabloid culture (the *National Enquirer* on the print side or *Hard Copy* on the broadcast side) that essentially marks them as mega-celebrities.

Now *why* is this true? Robert Nagel's discussion of the relationship between privacy and celebrity provides some revealing clues. Mega-celebrity is a form of false intimacy.¹⁶ The mega-celebrity creates the appearance of genuine connection with the mass public, but the events that generate the sense of connection are pseudo-events and the connection itself lacks authenticity.¹⁷

Celebrities who affirmatively desire to maintain or enhance their celebrity status naturally want to encourage this form of false intimacy. It's called publicity. Fame and fortune are linked to it. To be sure many celebrities *purport* to despise tabloid journalism because tabloids distort the truth about their lives and invade their privacy. Most celebrities who say they despise tabloids are probably sincere. They at least *think* they despise tabloids. What they may not entirely perceive, however, is how closely their status as celebrities is linked to what the tabloids do.

If part of what *defines* celebrity status in modern life is a "larger-than-life" sense of intimacy and connection that celebrities are able to achieve with the mass public, tabloids are an important medium for the creation of that perceived intimacy. Celebrities and tabloids have a symbiotic relationship. Celebrities need tabloids to fully realize their celebrity status. Tabloids need celebrities to have something to write about. Without celebrities, tabloids would not be viable.

The argument that celebrities *need* tabloids to "fully realize" their celebrity status is not without its caveats and complications. The "realization" being talked about here is arguably hollow, crass, and unbecoming. It is, as I have already ventured, largely divorced from any central notion of public discourse. Perhaps more profoundly, however, it seems divorced from genuine achievement, merit, effort, or spirituality.

16. See Nagel, *supra* note 1, at 1131.

17. See *id.*

If tabloids undoubtedly need celebrities, the reverse is not so obviously true. Celebrities *would* exist without tabloids, and perhaps be happier for their absence. Celebrities who are sports figures, entertainers, artists, politicians, or religious leaders would still be doing their work, after all, and find such respectable news outlets as the *New York Times* or CNN reporting on them daily, without the unwelcome addition of salacious tabloid reporting. Michael Jordan's slashing drives to the basket, Madonna's voice, Tom Cruise's acting, and Bill Clinton's political savvy would all be *the same* if tabloids did not exist. What *really* ought to give cultural meaning to their lives, one would think, are their talents and performances. Celebrities don't need tabloids to display their talents and performances, and the public doesn't need tabloids to appreciate them.

If this is true, then one of the defining aspects of modern celebrity, the craving for false intimacy, is exposed as highly pathological and dysfunctional, an addictive drug not good for either the celebrity or the mass public.

At this point, the all-purpose public figure status begins to look like a highly dubious doctrine. If the national desire to protect privacy and the national commitment to robust protection of freedom of speech both spring from a common devotion to liberty, that devotion appears only perversely served by the all-purpose public figure status. To bless with high levels of First Amendment protection stories about public figures that are salacious and seamy but not in any plausible way connected to the public figure's public role is to bestow heavy levels of protection for speech that provides only the most trivial payoff for public discourse.¹⁸ If the perceived payoff is the illumination of the "non-discourse" side of life, such as the exploration of human nature through exposure of sexual foibles, enhancing our collective intimacy and interconnection, that intimacy and connection appear on closer review to be largely ersatz.

This discussion seems to lead to serious consideration of abandoning the all-purpose public figure status, and leaving tabloids out in the cold for much of the content they produce. Yet, as might be expected, this course also has many pitfalls.

18. I am again speaking nontechnically here, to include within the notion of "public role" such roles as playing professional basketball or acting in a movie as much as serving as the President of the United States.

There is, first, the general blurring in modern culture of the distinction between tabloid and mainstream journalism.¹⁹ One of the hallmarks of mega-celebrity status is that, even when the mega-celebrity appears in the mainstream *non*-tabloid media, the subject matter of the story will sometimes be *tabloid* in nature. That is to say, it will appear to focus heavily on aspects of the mega-celebrity's life not obviously germane to any public controversy.²⁰

Take the recurring question of sexual impropriety by political leaders, such as stories about alleged illicit liaisons that plagued the political careers of Gary Hart, Senator Charles Robb, and Bill Clinton. In all three of these examples, the sexual liaisons alone did not appear to bear much direct connection to fitness for or performance in office. In all three cases the alleged sexual activity was, eventually, widely reported in mainstream media. And in all three cases, the mainstream media was heavily criticized in many quarters for having abandoned appropriate journalistic standards. When an NBC story reported Senator Robb's alleged assignation with a beauty queen, for example, NBC initially came under more criticism than Senator Robb.²¹

The rap on the media in such cases is that the respectable press has "gone tabloid" and thus broken a taboo: the requirement of relevancy. If these sexual escapades are not genuinely newsworthy, the media outlets presenting them are no longer genuinely news organizations. Like tabloids, they are presenting pseudo-news, feeding the public's dysfunctional craving for pseudo-intimacy.²²

Once the taboo is shattered, intense debate follows over whether the relevancy requirement has or has not been satisfied by some connection between the report on sex and some other independently newsworthy aspect of the story. One of the remarkable aspects of the Bill Clinton/Monica Lewinsky story, for example, was the apparently overwhelming consensus that the sexual behavior of the two would truly have *not* been anybody else's business if it had stood alone. Most public discussion centered not on whether sexual impropriety *alone* would have merited public exposure and official censure (since the consensus on this point was that it would not), but rather whether in Clinton's case the sexual impropriety did or did not stand alone. Thus the argument turned on whether this was

19. See Smolla, *supra* note 15, at 6-10.

20. See *id.* at 7-9.

21. See Howard Kurtz, *The Robb Story Snowball: NBC Report Pushes Senator onto Front Page*, WASH. POST, Apr. 30, 1991, at C1.

22. See Smolla, *supra* note 15, at 8-10.

about more than sex. Those who claimed that the story was newsworthy and that the President deserved to be punished grounded their arguments in such alleged offenses as perjury or obstruction of justice.

Clinton's case, in my view, thus may have represented a modest shift in the center of gravity of public debate over the relevancy question. In Gary Hart's case, there was no real claim of perjury or obstruction of justice. He was exposed for cheating on his wife, pure and simple. The argument was that this exposure was newsworthy because he was "reckless," because he had a habit of using women for meaningless affairs, because he had issued his infamous "go ahead and tail me" challenge, and most amorphously of all, because it exposed a weakness in his character. A person who will lie to his or her spouse may well lie to the nation. A person who will not abide his or her wedding vows may not abide the constitutional oath.²³

It was interesting that while all of these arguments *did* surface in Clinton's case, they were far more muted. Kenneth Starr did not attempt to justify his investigation of the President on such "character" grounds, nor did many members of the House of Representatives who voted for impeachment, or senators who voted for removal. Although in Clinton's case journalists were not driving the story but following official events, journalists and other pundits did engage in extended and intense discussion of the relevancy question, and that discussion seemed, like the official discussion of prosecutors and members of Congress, to be centered on issues *other* than sex, infidelity, and sexual character flaws alone.

Returning to Robert Nagel's insights, the Clinton episode may then be a sign that at least a modest cultural corrective is underway. If this is so—and we are in the midst of at least a small retrenchment of the values of genuine privacy, as opposed to the pseudo-intimacy that characterizes modern celebrity—one interesting question is whether this cultural movement will push any parallel retrenchment of legal doctrine. Libel and privacy law may both be battlegrounds on which this issue is played out, and it is here that the questions posed by Robert Nagel's article intersect in fascinating ways with the work of Diane Zimmerman, Robert O'Neil, and Erwin Chemerinsky.

23. For a discussion of the Hart case and the relevancy issues applicable to it, see RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL 237-41 (Univ. of Ill. Press 1990) (1988).

III. SEX, LIES, AND VIDEOTAPE

If the real gravamen of the plaintiff's complaint is *what* is revealed, then the touchstone for designing legal rules will be newsworthiness and the relevancy problem (the issues discussed in Part II, above). But if the gravamen is not *what* is revealed but *how* the revelation was obtained, then the touchstone is not substantive relevancy so much as the perceived offensiveness of the newsgathering process.

Diane Zimmerman very persuasively isolates the act of surreptitiously *recording* the conversations or behavior of another as one of the principal triggers for liability in current privacy suits predicated on surreptitious newsgathering techniques.²⁴ What she focuses on is the intriguing fact that it is often not *simply* the perceived intrusiveness into a zone of seclusion that seems to drive a privacy suit so much as the fixation of the information gathered in a tangible video or audio recording.²⁵ It is this fixation element that is prominent in so many recent cases arising from allegedly tortious intrusions into situations that are not traditionally regarded as "intimate" or entirely "private," such as business settings in which the reporter is talking about matters in a workplace with other employees nearby.²⁶

24. See Zimmerman, *supra* note 2, at 1208.

25. See *id.*

26. In *Sanders v. American Broadcasting Cos.*, 978 P.2d 67 (1999), the Supreme Court of California dealt with the question of whether there could be an actionable intrusion for electronic surveillance inside a business premises. See *id.* at 69. A reporter for the defendant ("ABC") obtained employment at the Psychic Marketing Group ("PMG") as a telepsychic in order to do an undercover investigation of the telepsychic industry. See *id.* at 70. The telepsychics at PMG worked in five-foot high, three sided cubicles that were set up in one large work area. See *id.* at 69. The facility consisted of the large work area, offices for the managerial staff, and a separate lunchroom. See *id.* PMG did not allow nonemployees into the office without specific permission. See *id.*

Once ABC's reporter was hired as a telepsychic, she sat at a cubicle like the other employees and gave readings over the phone to customers. See *id.* at 70. The reporter testified that she was easily able to overhear other employees' conversations from her work station, and when not on the phone, she talked to some of the psychics. See *id.* The reporter's conversations with the psychics were secretly videotaped and recorded. See *id.* Two of the conversations recorded were with Mark Sanders, the plaintiff. See *id.* The first of the two conversations was held outside the reporter's cubicle and included a third employee. See *id.* This conversation was conducted in moderate tones, and Sanders conceded that the psychic at the neighboring cubicle may have overheard the conversation if he were eavesdropping. See *id.* The second conversation was held at Sanders's cubicle. See *id.* It was longer, more in depth, and included only Sanders and the reporter. See *id.*

Sanders filed suit against the reporter and ABC for two causes of action based on the videotaping, one claiming a violation of section 632 of the California Penal Code and the second alleging the common-law tort of invasion of privacy by intrusion. See *id.* At trial, the

jury decided that the conversation between Sanders and the reporter was conducted "in circumstances in which the parties to the communication may reasonably have expected that the communications may have been overheard," and judgment was entered for the defendants on the section 632 cause of action. *Id.* Sanders prevailed, however, on the invasion of privacy by intrusion cause of action, and the jury subsequently entered a substantial damages award in his favor. *See id.* at 70-71. The court of appeals reversed the decision entered for the plaintiff reasoning that the privacy tort requires that the invasion must occur in a secluded area where one has a reasonable expectation of privacy. *See id.* at 71. The court found that the jury's finding for the defendant on the section 632 cause of action barred the plaintiff from recovering for invasion of privacy. *See id.*

The Supreme Court of California reversed, holding that Sanders might well have had reasonable expectations of privacy violated by ABC's actions. *See id.* at 77. "There are degrees and nuances to societal recognition of our expectations of privacy," the court stated, and "the fact the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law." *Id.* at 72. The court noted that even though the intrusion tort is often defined in terms of "seclusion," absolute seclusion is not required. *See id.* Quoting scholar J. Thomas McCarthy, the court observed that "[l]ike 'privacy,' the concept of 'seclusion' is relative. The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone." *Id.* (quoting MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5.10[A][2], at 5-120.1 (West Group 1998)).

The court noted that the reporter, in contrast to bona fide employees, was only employed at PMG long enough to meet, talk to, and videotape PMG's employees. *See id.* at 76. While she may have acted as a PMG employee when she took phone calls, the reporter was acting as an agent of ABC, not PMG, during her recorded conversations with the other psychics. *See id.* The court distinguished this situation from the decisions in *Commonwealth v. Alexander*, 708 A.2d 1251 (1998) and *Desnick v. American Broadcasting Cos.*, 44 F.3d 1345 (7th Cir. 1995). *Alexander* and *Desnick* involved investigations, by the Philadelphia police and ABC, respectively, into the alleged misconduct of doctors. *See Sanders*, 978 P.2d at 76. The court recognized that the cases were similar to Sanders's plight because the doctors were either videotaped or recorded without their consent. *See id.* at 76-77. However, they differed because the only conversations recorded were those between the doctor and the person making the recording, the offices were open to anyone seeking treatment, and the content of the recordings were restricted to solely professional communications. *See id.*

The court in *Sanders* thus concluded that "in the workplace, as elsewhere, the reasonableness of a person's expectation of visual and aural privacy depends not only on who might have been able to observe the subject interaction, but on the identity of the claimed intruder and the means of intrusion." *Id.* at 77. Thus "a person who lacks a reasonable expectation of complete privacy in a conversation, because it could be seen and overheard by coworkers (but not the general public), may nevertheless have a claim for invasion of privacy by intrusion based on a television reporter's covert videotaping of that conversation." *Id.* The court rejected the claim that "the adoption of a doctrine of per se workplace privacy would place a dangerous chill on the press' investigation of abusive activities in open work areas, implicating substantial First Amendment concerns," disclaiming any intention to adopt any "such per se doctrine." *Id.* The court stated that it was merely holding that

the possibility of being overheard by coworkers does not, as a matter of law, render unreasonable an employee's expectation that his or her interactions within a nonpublic workplace will not be videotaped in secret by a journalist. In other circumstances, where, for example, the workplace is regularly open to entry to observation by the public or press, or the interaction that was the subject of the alleged intrusion was between proprietor (or employee) and customer, any expectation of privacy against press recording is less likely to be deemed reasonable. Nothing we say here prevents a media defendant from attempting to show, in order to negate the offensiveness element of the intrusion tort, that the claimed intrusion, even if it infringed on a reasonable

What is the difference between listening to a conversation and recording it? Diane Zimmerman raises the ingenious argument that, to the extent that lower court decisions often seem to focus on the *recording itself* as the key element in the privacy invasion, this focus appears to discriminate against newsgathering.²⁷ Her exploration of the cultural and psychological reasons that we place greater emphasis on recorded images, particularly *visual* images, than on mere word-of-mouth repetition of a person's statement, is illuminating, insightful, and rings true.

I find myself stuck, however, on a far more cynical and pragmatic plane. The main reason we may often be more offended by someone who deceives and betrays us by surreptitiously *recording* our face-to-face conversation than by someone who deceives and betrays us by merely *repeating* our face-to-face conversation is that the recorder has "got the goods" on us in a way the repeater has not. We can lie and deny the repeater's story. It's your word against mine, he-said-she-said, plausible deniability land.

But when there's a recording, you're nailed. Without the Watergate tapes, Richard Nixon would have finished out his presidential term. Without the Linda Tripp tapes, the Monica Lewinsky story would have been a nonstarter. Without the Food Lion tapes, no story would have been run on ABC, no Food Lion stock would have dropped, no lawsuit would have been filed.

I believe it probably gets even deeper. If I am talking to a person who is wearing a hidden recording device, I am being deceived. Yet, I am also being deceived if the person I am talking to is planning to later repeat what I say for the purpose of getting me in trouble. On one level, it can be argued that once I decide to talk to the person, I'm surrendering any claim to privacy. After all, I am talking to the person, and I know there is *always* the risk that this person may tell others. The first rule of keeping a secret is that everybody talks. So, if an ABC News reporter is disguised as a meatpacker and gets a Food Lion employee to talk to him about poor sanitation practices at Food Lion for the purpose of disseminating that information to the public, the ABC reporter is engaged in deception, whether or not

expectation of privacy, was "justified by the legitimate motive of gathering the news."

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

27. See Zimmerman, *supra* note 2, at 1208-10, 1212-15.

the reporter is wired with recording devices.²⁸ Under this logic, the Food Lion employee has assumed the risk of possible deception and betrayal by choosing to talk at all. For all the gabbing Food Lion employee knows, the other person may be a reporter in disguise, or even a bona-fide employee who, overcome with disgust by what he or she has learned, will blow the whistle, reporting Food Lion to health officials, or running to the press. The risk that the employee may also be wired is a "lesser included risk" of talking at all.²⁹

But is this really the case? Or is there something about the *addition* of the recording device that multiplies the deception and betrayal? I think there is a multiplier—indeed, an exponential one. Most of us do not behave the same way when talking into a recording device as we do when talking under the assumption that we are not being recorded, particularly when there is only one person in the room. The difference in behavior is rooted in one raw and basic fact: the recording will make it hard for us to later lie and cover-up. We talk more freely when we think we are talking to only one person, or to a small group of people because we believe that in such conversations the potential damage if our statements are ever revealed is relatively limited. If the conversation is recorded, however, we can run, but we can't hide.

Deception in the surreptitious recording cases now is shown to cut both ways. Yes, the wired journalist is engaged in deception in getting the story. But the object of the story who is complaining about the recording is also arguing, in a curious way, for a *right* to deceive. For if the real harm here is that the person who was recorded knows that he or she *never would have said those things if*

28. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 515-16 (4th Cir. 1999); see also Randall Bezanson, *Means and Ends and Food Lion: The Tension Between an Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895 (1998).

29. In *Food Lion*, the United States Court of Appeals for the Fourth Circuit affirmed in part and reversed in part a lower court decision arising from ABC's use of undercover investigative reporters who took jobs as Food Lion employees for the purpose of obtaining film footage from hidden cameras documenting alleged health abuses by Food Lion stores in the preparation of food. See *Food Lion*, 194 F.3d at 524. The court of appeals found that there was no First Amendment privilege sheltering the defendants from torts of "general applicability." See *id.* at 520. The court held that because employment in North Carolina and South Carolina was "at will," there was no fraud by the ABC employees in taking a job that they only intended to occupy temporarily, while they were gathering information on the story. See *id.* at 513. The court also held, however, that the ABC employees were guilty of trespass and breach of loyalty to the employer because the consent that Food Lion gave to the ABC employees to enter its work areas did not include a consent to surreptitiously videotape events. See *id.* at 518. The ABC employees were not exercising loyalty to their nominal employer, Food Lion, but to ABC. See *id.* Because the award of damages against the defendants on those counts was only an award of two dollars in nominal damages, see *id.* at 524, the net financial effect of the ruling was a victory for ABC.

they had known a recorder was on, the real reason they never would have said those things is that they would have realized that since they were being recorded, they could not lie and deny the statement later on.

If this rationale is accurate, then the question becomes one of why it might be that we are, in some circumstances, so concerned about the invasion of privacy that we are willing to condemn it legally even though it seems primarily to serve the plaintiff's seemingly undeserving interest in preserving the right to deny what he said. Perhaps the answer lies in having some sympathy for the deception, or a willingness to excuse or even empower the deception in some circumstances because of a judgment that there are overriding interests in maintaining the inviolate integrity of certain settings. Are courts, in effect, sometimes saying: "Yes, the reason you wanted this to not be recorded is that you wanted to be capable of denying or hiding your statements or your behavior. What you were about was deception. Your motives may not have been entirely admirable, but you were entitled."?

The question then becomes whether this entitlement is truly one the law ought to bestow. The case for protecting privacy in this situation is, in my view, highly ambivalent. Traditionally our social intuitions and legal doctrines protecting privacy have tended to emphasize much weightier values.

We often protect conversations, for example, in which we have reached the social judgment that the interest in permitting the parties to discuss the issues at hand with entire candor is so strong that we wish to arm those parties with a privilege (absolute or qualified) against forced revelation. We protect attorney-client

conversations³⁰ and conversations in the White House,³¹ to facilitate candor in the service of larger social interests.

So too, we protect privacy in certain settings because of the unique intimacy those settings pose. As we are socially habituated to treating such matters as sexuality, love, physical health, or medical procedures as uniquely private, our legal doctrines are predictably more likely to treat such activities as within the ambit of protected privacy. This is as true in tort as it is in constitutional doctrine.³² Finally, through such devices as trade secret law, proprietary interests in information may receive a commercial variant of "privacy" protection to vindicate legitimate property and entrepreneurial interests highly valued by society.³³

In the typical privacy suit of the sort Diane Zimmerman has identified, however, plaintiffs cannot credibly claim that any of these interests are being vindicated. ABC's surreptitious recording of Food Lion employees allegedly demonstrating unhealthy food preparation practices did not implicate any settings justifying enhanced solicitude for candor, any aspects of human intimacy, or any legitimate proprietary business secrets.

It is thus important, I believe, to distinguish the kind of commercial privacy case posed by *Food Lion* and privacy suits involving private figures who have at least a colorable claim to a genuine

30. See *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2084 (1998) ("The [attorney-client] privilege is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 399 (1981))).

31. See *United States v. Nixon*, 418 U.S. 683, 708 (1974). In discussing presidential communications, the Court found that:

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

Id.

32. See Nagel, *supra* note 1, at 1122-26; see also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 895 (1992) (affirming "core" of abortion rights recognized in *Roe v. Wade*, 410 U.S. 113 (1973), but modifying that right through imposition of "undue burden" standard).

33. See, e.g., *United States v. O'Hagan*, 521 U.S. 642 (1997).

"intimacy" invasion. In *Shulman v. Group W Productions, Inc.*,³⁴ for example, the Supreme Court of California sustained an invasion of privacy action arising from news coverage of accident victims' medical treatment by a rescue helicopter squad.³⁵ The court held that the story of rescue was of legitimate public interest, as was the victims' appearance and words, and that the cameraman's presence and filming of events at the accident scene was not an intrusion on the victims' seclusion.³⁶ The court also held, however, that the victims may have had reasonable expectations of privacy once they were placed in a rescue helicopter, and that they were also entitled to a degree of privacy in conversations with medical rescuers.³⁷ The recording of communications between the victims and the medical rescuers, as well as the filming of one of the victims in the helicopter ambulance, may have been highly offensive to a reasonable person, and thus actionable.³⁸

Setting aside cases implicating confidentiality settings, intimacy, or proprietary interests, the question then again becomes why should Food Lion have *any* remedy for the actions taken by ABC? The answer usually proffered is that ABC was guilty of deceptions that would be tortious if performed by a nonjournalist, and thus must also be tortious if performed by a journalist. Citing the shibboleth that journalists enjoy no exemption from criminal or civil laws of general applicability,³⁹ the argument is simply made that tort doctrines such as trespass, fraud, or intrusion protect even commercial enterprises from entry under false pretenses. Since undercover journalism will, by definition, involve various shades of deception, the law of torts has free reign to punish that deception, and the First Amendment simply ought not be part of the conversation.

34. 955 P.2d 469 (Cal. 1998).

35. *See id.* at 488-89.

36. *See id.*

37. *See id.* at 490-91.

38. The court adopted the definition of the intrusion tort articulated in the RESTATEMENT (SECOND) OF TORTS, § 652B (1977), and held that the cause of action has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person. *See id.* at 490. The first element, the court held, is not met when the plaintiff has merely been observed, or even photographed or recorded, in a public place. *See id.* Rather, "the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source." *Id.*

39. *See* *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671-72 (1991); *Zurcher v. Stanford Daily*, 436 U.S. 547, 567 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974).

As Erwin Chemerinsky and Diane Zimmerman both point out, however, undercover investigative reporting is often the only way to get at the truth about stories of profound public interest.⁴⁰ Erwin Chemerinsky, in turn, quite persuasively observes that First Amendment doctrine often treats even the content-neutral regulation of speech as deserving of significant levels of protection through some variant of "intermediate scrutiny" review.⁴¹ Under the familiar intermediate scrutiny standard of *United States v. O'Brien*,⁴² for example, a governmental regulation is adequately justified despite its incidental impact upon First Amendment interests, if

it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁴³

That newsgathering torts do not directly predicate liability on *content*, in short, is no reason why substantial levels of First Amendment protection ought nevertheless apply to the application of such torts.⁴⁴

The question then becomes how one would translate the doctrinal notion of "intermediate scrutiny" into tort doctrine so as to create a "surreptitious newsgathering privilege" that could be interposed by defendants in situations such as the *Food Lion* case.

Without attempting to fully develop the contours of such a privilege, I venture the following rough outline. First, one would carefully cross-examine the plaintiff's claim of tortious invasion of privacy to determine if anything that might plausibly be treated as a "substantial" interest is at stake. The preservation of candor and confidentiality in settings calling for such protection (settings analogous to the attorney-client privilege paradigm) would certainly qualify. So would settings invoking genuine claims of intimacy or bona fide proprietary interests, such as the preservation of trade

40. See Chemerinsky, *supra* note 4, at 1144-45; Zimmerman, *supra* note 2, at 1189-91, 1206-07, 1227.

41. See Chemerinsky, *supra* note 4, at 1162.

42. 391 U.S. 367, 376-77 (1968)

43. *Id.* at 377.

44. See Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 57-58 (1987) ("[T]he Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to communicate their views to others.").

secrets. When no such interests are implicated, however, the social interest in vindicating the plaintiff's privacy claim strikes me as relatively anemic.

Once one has seen the ABC broadcast that triggered the *Food Lion* suit, it may be difficult to conjure enormous sympathy for Food Lion, but it may still be possible to engender a deep sense of outrage over ABC's investigative methods. What may well be driving successful plaintiffs' outcomes in these situations is not so much sympathy for the plaintiff as outrage at the perceived misconduct of journalists, who are often caricatured as arrogant and driven entirely by the glory that comes from a juicy scoop or sting, and the profits that come from highly-rated programming featuring investigative reports that are not particularly expensive to produce. The journalists are seen as presumptuously claiming a right to take the law into their own hands, thumbing their noses at civil and criminal limitations that apply to everyone else. If these sentiments are, in fact, supplying the real push behind such plaintiffs' victories, it may expose such suits as not predicated on neutral laws of general applicability at all, but rather on laws that, at least as applied, target the press and the newsgathering process for especially unfavorable treatment.

Yet I doubt that we can, or should, entirely discount the social importance of these anti-media perceptions. If we were to design a test for tortious undercover newsgathering that looked only at the interests of the plaintiff, we would be failing to give any credence whatsoever to the obviously widespread concern among members of the public and among judges crafting legal doctrines that the press is appropriately claiming to be subject to a law unto itself.

Thus a balancing test might be created that would look at the relative strength of the plaintiff's interest in relation to the conduct of the media. In examining the media's conduct, however, it makes no sense to concentrate on either such physically technical matters as whether the entry was or was not a trespass, or on whether the deception was in some sense magnified by tape-recording. Rather, in much the same way that we examine the legitimacy of undercover surveillance efforts by police, I suggest that we focus more on the motive that underlies the media's surreptitious newsgathering.⁴⁵

45. See *Miller v. National Broad. Co.*, 232 Cal. Rptr. 668, 679 (Cal. Ct. App. 1986) (determining offensiveness requires consideration of all the circumstances of the intrusion, including its degree and setting and the intruder's "motives and objectives").

Journalists sometimes speak of "journalistic probable cause" in discussing whether going undercover to get a story is justified. Journalists also sometimes articulate the notion that such tactics are justified only in the pursuit of stories of a high level of public importance. In assessing the perceived "offensiveness" of an allegedly tortious intrusion, an examination by the judge and jury into why the journalist believed that wrongdoing was being committed—an inquiry, if you will, into "probable cause"—is appropriate.⁴⁶ This inquiry, I believe, will often favor the press because the journalist will be able to present objectively reasonable grounds for believing that the institution being investigated was guilty of serious wrongdoing, and for explaining why undercover techniques, including hidden recording devices, were the only viable methods of ferreting out that wrongdoing.

IV. CONCLUSION

Taking these issues full circle, it is worth reflecting on the dynamic between causes of action grounded in libel law and causes of action grounded in some variant of invasion of privacy. In discussing Robert Nagel's exploration of the role of celebrity, I noted the odd parallel between libel law's all-purpose public figure construct and the mega-celebrity phenomenon, with its chintzy celebration of pseudo-intimacy.⁴⁷ The relevancy question in libel law, of course, has its parallel in privacy doctrine. When the cause of action is for publication of private facts, tort doctrine and First Amendment principles trump the privacy claim when the private material is deemed "newsworthy."⁴⁸ The pressure in privacy law on

46. See *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998) ("Information collecting techniques that may be highly offensive when done for socially unprotected reasons—for purposes of harassment, blackmail or prurient curiosity, for example—may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story.")

47. See discussion *supra* Part II.

48. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989); *Gilbert v. Medical Econs. Co.*, 665 F.2d 305 (10th Cir. 1981); *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980); *Pasadena Star-News v. Superior Ct.*, 249 Cal. Rptr. 729 (Cal. Ct. App. 1988); *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 655 (Cal. Ct. App. 1984); *McNutt v. New Mexico State Tribune Co.*, 538 P.2d 804 (N.M. Ct. App.), *cert. denied*, 540 P.2d 248 (N.M. 1975); *Freihoffer v. Hearst Corp.*, 480 N.E.2d 349 (N.Y. 1985); *Anderson v. Fisher Broad. Co., Inc.*, 712 P.2d 803 (Or. 1986).

what is or is not “newsworthy” is the same pressure that exists on the libel side when we ask questions of relevancy.⁴⁹

When the tort is a *newsgathering* tort, however, the newsworthiness concept is often ignored because of the reflex judgment that the tort is not about the content of what was published or broadcast, but about the method of obtaining that content. My suggestion, as amplified in the discussion above, is that this is nearsighted. To the extent that the sound application of newsgathering torts in the context of the constitutionally protected interest in gathering news requires a balance of the interests of the plaintiff against the behavior of the press, the news value of the story, and the necessity of resorting to undercover techniques to obtain it, must be relevant. In such cases, it must be remembered that the plaintiff cannot launch a successful libel suit because the information revealed will, by hypothesis, be true.⁵⁰ At least in cases in which the plaintiff has been caught in serious wrongdoing and no palpable interests in protecting confidential communications, intimacy, or proprietary information are advanced, the journalist who has pursued a story of high public interest on the basis of genuine probable cause deserves a privilege against liability.

49. See generally Robert Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 1007 (1989) (observing that the newsworthiness test “bears an enormous social pressure, and it is not surprising to find that the common law is deeply confused and ambivalent about its application”).

50. See *People for the Ethical Treatment of Animals v. Bobby Berossini, Ltd.*, 895 P.2d 1269, 1272-74 (Nev. 1995).

