University of Richmond Law Review

Volume 33 | Issue 4 Article 5

2000

Ride-Alongs, Paparazzi, and Other Media Threats to Privacy

Robert M. O'Neil

RIDE-ALONGS, PAPARAZZI, AND OTHER MEDIA THREATS TO PRIVACY

Robert M. O'Neil *

I. INTRODUCTION

When the Supreme Court first addressed the status of "ride-alongs"[1] in late May of this year, the role of the news media could have been treated in any of several ways. The law enforcement officers, who were sued for invasion of privacy because they invited reporters to accompany them while serving an arrest warrant in a private home, offered several extenuations.[2] The presence of journalists, they argued, would provide direct information to the general public about important news events.[3] Moreover, reporters who took part in the arrest could, in a sense, keep the police honest, or at least make them more accountable to the citizenry.[4] Finally, the defendants candidly claimed that the participation of reporters on such a mission might enhance the image of the law enforcement agency itself.[5] Thus, far from justifying civil liability in privacy suits brought by aggrieved suspects, the ride-along practice should warrant commendation.

The Supreme Court would hear none of this. The media presence, in fact, seemed much more part of the problem than the solution. The fact that those who "rode along" on the arrest were journalists seemed at best irrelevant and at worst venal. The key to the case was the privacy of the suspect citizen, a constitutional interest "at the core of the Fourth Amendment."[6] While the First Amendment clearly "protect[s] press freedom from abridgment by government," that guarantee was of no avail here.[7] None of the interests that the law enforcement defendants advanced deserved more than passing mention. As for the plausible claim that inviting reporters on such

---

* Professor of Law, University of Virginia; Director, Thomas Jefferson Center for the Protection of Free Expression; President, Virginia Coalition for Open Government.

1. *See* Wilson v. Layne, 119 S. Ct. 1692 (1999).
2. *See id.* at 1698.
3. *See id.*
4. *See id.* at 1699.
5. *See id.* at 1698.
6. *Id.*
7. *Id.*

a mission might make police officers more accountable, the Court reasoned that this goal could be equally well served by videotaping the entry.[8] Moreover, in the coup de grace, Chief Justice Rehnquist cautioned that "the *Washington Post* reporters in the . . . [suspects'] home were working on a story for their own purposes. They were not present for the purpose of protecting the officers, much less the [suspects]."[9]

The tone of the opinion was as revealing as the result. While the case did not directly implicate First Amendment interests of the news media, the press was inescapably involved and unmistakably affected by the outcome.[10] Whatever the frequency of ride-alongs of this type, the practice seems to have become a legitimate source of crime news, if less than universally endorsed.[11] That the Justices refused to credit any of the media-related claims in exoneration of the police hosts in a civil damage suit may not be surprising. What was perplexing, however, was the Court's tone and its view of the media role in such a venture. Notably, the observation that *Washington Post* reporters "were working on a story for their own purposes"[12] is the unkindest of cuts. It seems to relegate media interests to a substantially lower stature than in previous conflicts between privacy and the press, to which we shall shortly turn. The reporters' "purpose," presumably, was to prepare a story that would inform readers of the national capital's major daily newspaper about a major police raid. That "purpose" could best be served by being present at the scene. Reporters could, moreover, keep an eye on law enforcement activities during a sensitive confrontation. Yet none of these factors seemed to mitigate the high Court's belief that journalists had no more business than ordinary police buffs–perhaps even less–in riding along when the arrest warrant was served.

---

8. *See id.* at 1699.

9. *Id.*

10. A week later, the Court declined, without comment, to review a case in which a federal appeals court deemed journalists who accompanied law enforcement agents on such a mission to be "government actors" and thus potentially liable in damages, along with the police, to the persons whose privacy had been invaded. *See* Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1998), *cert. denied sub nom.*, Cable News Network v. Berger, 119 S. Ct. 2039 (1999). *New York Times* reporter Linda Greenhouse observed that this action "had little significance if any because the Ninth Circuit was already obliged to reconsider the case under the Court's ruling [in *Wilson v. Layne*] last week." Linda Greenhouse, *Justices Raise the Bar for Convicting Drug Kingpins*, N.Y. TIMES, June 2, 1999, at A18.

11. *See, e.g.*, Adam Sandler & Cynthia Littleton, *High Court Handcuffs Media on 'Ride-Alongs'*, DAILY VARIETY, May 25, 1999, at 4.

12. *Wilson*, 119 S. Ct. at 1699.

Privacy and the press have, in fact, coexisted with increasing uneasiness in recent months. Since the tragic death of Princess Diana, widely believed to have been caused by aggressive paparazzi, public and political pressure for legal protection of personal privacy has been steadily mounting. The United States Congress has actively considered several bills that would impose new restraints–in one instance, sending photographers to jail for "persistently" pursuing a subject to obtain unconsented footage or photo images for commercial gain.[13] The California legislature, often the leader in national policy and hardly likely to be reticent in this area, enacted a directly responsive law that took effect on January 1, 1999.[14] That law targets photographers who aggressively pursue subjects or intrude upon their privacy–even by nonphysical means and from public places–to capture unconsented images or words.[15]

In a sense, such legislation may already be redundant. Shortly before it passed, the Supreme Court of California extended existing privacy laws to provide recourse against "offensive intrusion" by the media into private areas through the use of electronic devices without a physical trespass.[16] Yet the political pressures in the Golden State demanded something new from the legislature, despite loud and persistent media pleas that such a law would have an inescapably chilling effect on coverage of important news events.[17] Even so, the popular demand for protection was not fully satisfied. Barely had the new anti-paparazzi law gone into effect than the California legislature turned its attention to yet another privacy-based restraint–a bill that would greatly expand protection for

13. *See* H.R. 2448, 105th Cong. (1997); H.R. 97, 106th Cong. (1999); *see also* Anne E. Hawke & Bruce D. Brown, *No Pictures, Please: Anti-Paparazzi Legislation Threatens All Those Paid to Take Photos*, LEGAL TIMES, Feb. 15, 1999, at S34.

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

15. *See id.*; *see also* Peter Sheridan, *Muzzling the Snappers*, EVENING STANDARD, Apr. 7, 1999, at 54.

16. *See* Shulman v. Group W Prods., Inc., 955 P.2d 469, 490 (Cal. 1998). A later Supreme Court of California decision reaffirmed and extended this view. In *Sanders v. American Broadcasting Cos.*, 978 P.2d 67 (Cal. 1999), the court sustained a privacy claim against a television station for broadcasting conversations that had been videotaped in the workplace by a reporter posing as a coworker. *See id.* at 69. The appellate court rejected such a claim because the conversations could have been overheard by others at the site, even though the general public could not have entered. *See id.* at 71. The supreme court ruled, however, that even in the workplace employees enjoyed a "limited, but legitimate" expectation of privacy that the reporter's and the station's newsgathering methods had breached. *Id.* at 69.

17. *See, e.g.*, Ann Oldenburg, *Photographers Fear Privacy Law May Cloud View of Shooting Stars*, USA TODAY, Jan. 4, 1999, at 3D.

celebrities' heirs against any commercial use of the image of a famous or notable person after his or her death.[18]

That such pressures to protect privacy have steadily mounted seems beyond dispute. Why those pressures have risen so sharply is less clear. A recent survey of popular attitudes invokes polls and other survey data for the view that "Americans are edgier about privacy because it seems more threatened than ever."[19] Princess Diana's death surely was a major catalyst, though hardly the only one. New technologies have contributed their share of anxiety. Take the now-pending California celebrities' heirs bill, for example. Screen Actors' Guild President Richard Masur testified in support of this proposal, noting that digital technology increased the urgency of such measures since it is now possible for the first time to "morph" a dead person back to life, and thus to make the deceased do and say things on a screen that he or she never would have said or done–or at least never did.[20] A central premise of the new California anti-paparazzi law was the incredible reach of long-focus lenses and parabolic microphones; such devices for the first time make it possible to transcend long distances and penetrate once impenetrable barriers to capture images and words long assumed to be private. Richard Masur again offers helpful insight:

> We feel the people of this country are really, really nervous about their privacy. That it's being undermined in a variety of ways–the Internet, surveillance in every store, every bank, even driving down the street. There's real concern about abuse by the press or anyone else of that kind of technology. There are infrared cameras that can not only get a usable photo right through a window with a sheer curtain but tremendously detailed photos through venetian blinds.[21]

Then, with an ominous view of evolving technology, Masur warned that "[s]oon they'll be able to shoot right through a wall."[22] As though to provide bizarre confirmation of the potential of such technologies, Michael Moore recently announced on *Larry King Live* that he had just made available to viewers of his television program, *The Awful Truth*, a new Web site that offered, among other tantalizing images, around-the-clock surveillance of the interior of

---

18. *See* Amy Pyle, *New Fight for Celebrities' Heirs*, L.A. TIMES, Mar. 17, 1999, at A3.
19. Frank James, *Privacy Legislation Popular on Capitol Hill*, CHI. TRIB., May 31, 1999, at 3.
20. *See* Pyle, *supra* note 18.
21. Oldenburg, *supra* note 17.
22. *Id.*

a Manhattan apartment owned by Monica Lewinsky confidant and literary agent, Lucianne Goldberg.[23]

Such concerns about privacy and the need for legal protection are, of course, hardly new. Well over a century ago, Warren and Brandeis wrote the seminal *Harvard Law Review* article in which they called for redress against a "press [that] is overstepping in every direction the obvious bounds of propriety and decency"[24] and lamented that "[t]o satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers."[25] That the impetus for this manifesto was as seemingly trivial as unwelcome publicity about the guest list for a Beacon Hill dinner party takes nothing from the majesty, or the prescience, of the article's central thesis. A major national movement was launched, reflecting a concern of utmost importance.

Warren and Brandeis were, however, to achieve only partial success in their quest for legal recognition of a right of privacy. Most states do respect and enforce such a right in some form; Minnesota recently joined the fold, leaving North Dakota and Wyoming as the only two holdouts.[26] Yet, for several reasons, including the potentially chilling effect of privacy-based suits against the media, courts have remained reluctant to grant recovery for the accurate and truthful, even if highly unwelcome, disclosure of information or images that may embarrass or even devastate people who wish for privacy.

This article first examines the central premise for protection of privacy, then reviews some countervailing considerations, and concludes by examining some of the uneasy accommodations that courts have reached in these turbulent times.

II. THE CASE FOR PRIVACY

Given a choice, most people would wish to retain complete control of the public release of private information or images. Take the poignant case of the late tennis star Arthur Ashe. He had known for

---

23. *Larry King Live* (CNN television broadcast, May 21, 1999), *available in* LEXIS, News, Library, Transcripts File.

24. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

25. *Id.*

26. *See* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998); *see also Minnesota High Court Grants Right to Privacy*, N.Y. TIMES, Aug. 2, 1998, at 23.

many months that he had AIDS as the result of a blood transfusion administered just before technology made detection and removal of such impurities from donated plasma possible. He must have known that his secret would someday become public, if only through his inevitable death. But Ashe was ill prepared for the call he received one spring day from a sports writer, who claimed to have reliable information about Ashe's condition and gave him, in effect, a few hours to break the news himself or have it broken for him. Ashe decided to take the initiative. He quickly convened a press conference at the studio where he had been a frequent commentator.[27] The editor's inquiry obviously forced Ashe's hand in a dramatic way.

Though Arthur Ashe, like many people with well-kept secrets, must have known that the news would eventually come out, he fervently wished to control the timing and the manner of any announcement in order to protect his family, close friends, and business associations. Indeed, his concern was quite similar to that of Messrs. Warren and Brandeis, albeit of a graver and more urgent quality. It was, quite simply, the basic human desire to control one's life and destiny in ways that media intrusion or preemption may completely undermine or destroy. Such a wish for control of one's life seems to deserve legal protection of a fairly high order.

There are various sources that provide formal support for such an interest. The Constitution protects privacy in myriad ways, as the Supreme Court recently reminded us in the ride-along case. Most obvious is the Fourth Amendment's guarantee of the sanctity of the home against improper searches.[28] Those searches are increasingly executed by means that do not entail a physical entry or trespass, but, as the California legislature and supreme court have recently recognized, may be no less invasive.

One might easily forget that this amendment also protects one's "papers and effects" as well as one's place of residence.[29] The Fifth Amendment's self-incrimination clause, as the Supreme Court stressed, "enables the citizen to create a zone of privacy which

---

27. This event has a poignant personal quality. During the entire morning and early afternoon of this fateful day, I sat next to Arthur Ashe in Manhattan as a fellow director of a New York-based foundation. Ironically, much of our agenda involved health care funding and research. None of his board colleagues had any inkling of Arthur Ashe's disease until we received urgent calls from the foundation's president that evening.

28. U.S. CONST. amend. IV.

29. *See* Wilson v. Layne, 119 S. Ct. 1692, 1697-98 (1999).

government may not force him to surrender to his detriment."[30] By implication, the Bill of Rights encompasses such personal privacy as the marital relationship, specifically the use of contraceptives,[31] and will undoubtedly in time extend beyond heterosexual marriage to the realm of sexual orientation and preference as well.

Finally, it would be easy but dangerous to forget that the First Amendment itself protects privacy in two important ways. For half a century, government has been barred from forcing citizens to declare or express an abhorrent belief, whether by having to salute the flag[32] or display the state motto on one's license plate.[33] To that extent, one's innermost thoughts and beliefs remain private, beyond government's capacity to know, much less to have publicly declared. In a way that also serves the interest of privacy, the First Amendment implies a freedom of association, permitting a citizen to keep private the organizations to which he or she belongs, supports, or whose meetings he or she attends.[34]

This impressive litany of constitutional privacy precepts, however, strongly implies a corollary: Where privacy is not formally protected, conflicts between privacy-based claims and other constitutional safeguards (notably freedom of the press) should be resolved in favor of the non-privacy interest. Beyond the home, or one's "papers and effects," beyond freedom of association and freedom not to speak, the rationale for privacy protection is far less compelling and weighs less forcefully against other constitutional interests that may be of no higher order, but have more explicit underpinning. That is where freedom of the press enters the equation.

III. THE CASE FOR THE PRESS

Where privacy and the press come directly into conflict, the Supreme Court has repeatedly recognized the need for sensitive accommodation. Through a series of cases, the Justices have set forth three guidelines that are helpful, if not dispositive. First, the Court has found highly suspect any government effort to suppress the truth, or to deter its publication by prior restraint or even by subsequent punishment.[35] "[S]tate action to punish the publication

30. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
31. *See id.* at 485-86.
32. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
33. *See* Woolley v. Maynard, 430 U.S. 705, 717 (1977).
34. *See* NAACP v. Alabama, 357 U.S. 449, 460-63 (1958).
35. *See* Smith v. Daily Mail Pub. Co., 443 U.S. 97, 102 (1979).

of truthful information," the Court cautioned, "seldom can justify constitutional sanctions."[36] Second, however, the word is *"seldom"* and not *"never"*; the justices have always stopped short of creating an absolute privilege for publishing the truth. Third, in the most relevant cases, the Court has set three essential conditions that will cause a decree or a judgment prohibiting or restricting publication to fail. The information must be truthful, have been lawfully obtained, and be of interest to the public.[37] Thus, even when state law may, for example, purport to forbid or punish publication of the name of a sexual assault victim,[38] a juvenile offender,[39] or the adverse report of an appraisal of the performance of a state court judge,[40] the First Amendment intercedes and thwarts such sanctions. In such cases, recognizing a "sphere of collision between claims of privacy and those of the free press,"[41] the justices have underscored the Jeffersonian value of a free press "to our type of government in which the citizenry is the final judge of the proper conduct of public business."[42]

These prescriptions leave unanswered two tantalizing questions. The Court has never indicated whether a *failure* to meet any one of these three desiderata would be fatal to a free press claim; the facts of the relevant cases all came well within the rules. The other issue, the focus of much that follows, is whether there may be some truthful and newsworthy disclosures of information that was lawfully obtained, which nonetheless may warrant some legal redress to protect basic interests in personal privacy.

IV. ACCOMMODATION: PRIVATE INFORMATION

Striking a balance between these two sets of interests has posed a special challenge in the realm of information, from the Beacon Hill guest list in the 1880s, to Arthur Ashe's HIV status in the 1980s, to many issues that persist and will surely be with us well into the new millennium. Normally, information that becomes public despite efforts to conceal or withhold it would be protected unless that information is false, in which case libel claims might avail, or

36. *Id.*
37. *See* Florida Star v. B.J.F., 491 U.S. 524, 533 (1989).
38. *See id.* at 532.
39. *See Smith*, 443 U.S. at 104.
40. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842 (1978).
41. Cox Broad. Co. v. Cohn, 420 U.S. 469, 491 (1975).
42. *Id.* at 495.

has been unlawfully obtained, in which case not only the publisher but also the one who obtained it would presumably face sanctions. Yet the case of Arthur Ashe, indeed the whole issue of HIV status and AIDS, supremely tests our assumptions about where properly to draw the line.

The inescapable question is whether disclosure of AIDS infection or HIV status is somehow different from other facts that people fervently wish not to be publicly disclosed. There are obvious differences of degree: the stigma that such news almost automatically creates, deep and pervasive societal fear about a contagious and potentially fatal disease, and the possibly devastating effects on family, professional, personal, and business relationships.

Three early cases involving AIDS disclosure in the workplace stopped short of recognizing an actionable privacy claim, though on grounds that reflected either very limited dissemination of the news or uncertainty about the identity of the subject.[43] All three courts recognized that revealing AIDS or HIV status is different, at least in degree, from almost anything else that might truthfully be said about a person's private life.[44]

As we await the first case that will squarely test this issue, should the media be concerned? Or can they continue to rely comfortably on a First Amendment defense for telling the truth? Courts will surely be sympathetic to any AIDS victim whose life has been altered and career quite possibly ruined by a disclosure that (as in Arthur Ashe's case) may serve a purpose no nobler than selling more newspapers or raising the Nielsen rating. Thus, despite the general presumption in favor of truth, media equities in such cases will be tempered by an emotional presumption that favors, to an unusual degree, the person who seeks legal protection for his privacy.

There are several caveats, even for the boldest and most callous of publishers. Such highly sensitive information about personal health and disease does not normally come to light unless an adversary has had access to legally privileged medical files. The invasion need not, in order to defeat the free press claim, have been perpetrated by the editor or on his or her orders. It would suffice to show that the media were simply willing beneficiaries of someone

43. *See* Doe v. City of New York, 15 F.3d 264, 269-70 (2d Cir. 1994); Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371, 379-80 (Colo. 1997); Doe v. Methodist Hosp., 690 N.E.2d 681, 693 (Ind. 1997).

44. *See City of New York*, 15 F.3d at 267; *Ozer*, 940 P.2d at 377; *Methodist Hosp.*, 690 N.E.2d at 684.

else's trespass, larceny, or hacking, even if the editor was unaware of the means by which the story came to light and failed to inquire.[45]

Closely related would be a potential concern about going beyond the basis on which, or purpose for which, the infected person revealed his condition. One federal case offers an apt illustration. A Delta Airlines agent in New York City sought the aid of the city's human rights commission to recover the job he lost when the airline learned he was HIV-positive.[46] The commission prevailed, and the employee was soon back at work.[47] Flush with victory, the agency issued a press release about the case.[48] Though the affected employee was not named, he argued in his suit against the city that intimate details in the release unmistakably identified him to co-workers and friends.[49]

The core of the agent's case was that he revealed his condition to the agency for a very limited purpose–getting his job back–and that the commission went far beyond that purpose with its self-serving press release.[50] While the federal courts stopped short of awarding damages against the city, they recognized this as an unusually appealing privacy claim.[51]

We might go one step further: Suppose a New York newspaper or TV station wrote or produced a story on the basis of the press release, inflicting far greater damage on the Delta employee than the agency's own relatively obscure announcement. Conventional wisdom says that the media may not be penalized for reporting truthfully the official acts of a public agency. Yet there is something hauntingly different about this case–both in the devastating nature of the information and the way in which a disclosure made for one purpose was used, without permission or even warning, for a different and far riskier purpose.

The Delta-HIV case had a loosely analogous precursor where recovery was allowed.[52] A sexual assault victim filed a complaint at

---

45. Such a conclusion is buttressed by the other recent "ride-along" case, in which the Ninth Circuit treated reporters accompanying an invasive arrest as "government actors" for purposes of possibly shared civil liability. *See* Berger v. Hanlon, 129 F.3d 505, 514-16 (9th Cir. 1998), *cert. denied sub nom.*, Cable News Network v. Berger, 119 S. Ct. 2039 (1999).

46. *See City of New York*, 15 F.3d at 265.

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.* at 268-69.

51. *See id.* at 269-70.

52. *See* York v. Story, 324 F.2d 450 (9th Cir. 1963).

a Los Angeles police station.[53] She agreed to be photographed in the area of impact for evidentiary purposes.[54] She did not expect, and was startled to learn, that within a few days some graphic photos of her private parts replaced *Penthouse* and *Hustler* across the desks of the Los Angeles Police Deparment ("LAPD").[55] She sued the LAPD and the culpable officers in federal court, and prevailed, partly because the way the intimate photos were used far exceeded the purpose for which she understood they would be used, and on the basis of which she consented to quite intimate images.[56]

Several other legal remedies should concern our AIDS-insensitive publisher. Beyond libel, which requires proof of falsehood, reputation is protected in some states by the closely related doctrine of "false light privacy."[57] Even a truthful disclosure may be reported in such a way as to *imply* or *suggest* something damaging or offensive about a person. In the AIDS context, the "false-light" risk seems especially acute–an implication, for example, that either sexual promiscuity or drug injection brought about the disease. Only where, as in Arthur Ashe's case, there exists a well-known *benign* explanation for the condition could the media rest comfortably on their First Amendment protection for truthful reporting.

Finally, some thought should be given to the long recognized tort of intentional infliction of emotional distress. As far as public officials and public figures are concerned, the potential for any such claim was put to rest by the Supreme Court's First Amendment rejection of Reverend Jerry Falwell's claims against *Hustler* magazine and its publisher, Larry Flynt.[58] Such recourse may, however, survive for less notorious plaintiffs. A California appellate court recently sustained just such a claim against a Sacramento television station.[59] Its camera crew interviewed several unsupervised children about the murders of two of their playmates that occurred moments earlier–a tragedy about which the subjects first learned from the reporter, on camera.[60] In allowing recovery of damages for emotional distress, the appeals court observed that the

53. *See id.* at 452.
54. *See id.*
55. *See id.*
56. *See id.* at 456.
57. *See* Time, Inc. v. Hill, 385 U.S. 374, 386-91 (1967).
58. *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988).
59. *See* KOVR-TV, Inc. v. Superior Court, 37 Cal. Rptr. 2d 431, 432 (Cal. Ct. App. 1995).
60. *See id.*

reporter "was bent upon *making* news, not *gathering* it" and might therefore be culpable for the children's emotional trauma.[61]

To conclude on the matter of information, before turning to images, a final comment is in order. Revealing (truthfully) that a seemingly healthy person has AIDS or is HIV-positive seems to present an unusually compelling case for judicial recognition of a claim for invasion of privacy. We can only speculate what courts will do when they encounter the "pure" privacy case. A short answer, possibly sufficient, is that such a case is bound to be emotionally more appealing, but is legally indistinguishable. The longer answer is that many courts will seek ways of granting some relief to victims of such disclosures, consistent with the First Amendment. Courts may treat such revelations as inherently stigmatizing, which could invoke the "false light" doctrine. Other courts may presume that such sensitive information would never come to light unless there were some sort of illegality–breach of a legally protected privilege, for example–or unless reasonable expectations for very limited use of the information were violated or exceeded, as in the Delta employee case. There will almost certainly be a third group of judges, no less sympathetic to privacy plaintiffs, who will balance the equities differently and deny relief. They will remind us that the truth is often painful, and sometimes devastating, but that it is no less the truth when it inflicts such harm.

V. ACCOMMODATION: PRIVACY OF VISUAL IMAGES

Now we turn to the paparazzi, and the currently precarious condition of those who aggressively or surreptitiously gather visual images. Here, of course, the basis for a claim of constitutional protection differs from that which we applied to facts and information. We are now concerned much less about what the media may *publish* and much more about how they may *gather* material. The media have been notably less successful in establishing constitutional status for seeking news than for disseminating it.[62] Reporters may, for example, not withhold the identity of confidential sources from a grand jury.[63]

---

61. *Id.* at 435.

62. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) ("[N]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control.")

63. *See* Branzburg v. Hayes, 408 U.S. 665, 690-91 (1972).

The press can very seldom make a special claim of access to places where news is being made. Even the well-established right of reporters to attend and report on criminal trials is really a right of the general public, from which the media could not be selectively barred.[64] Once in the courtroom, a reporter's access guarantees no more than use of pen and paper. Cameras are admitted by grace rather than by right; tape recorders, laptops, and sketch pads are usually allowed, but by judicial option rather than by First Amendment fiat.

It is in this rather different context that courts have addressed the growing tension between the harried or embattled subject and the aggressive or intrusive paparazzo. The issue is not that of access, but whether the taking or the use of an image or picture may be restrained, or may be the occasion for relief sought by the subject because of the way in which, or the place from which, it was taken. Here, too, there is a simple rule that seems nearly sufficient, but turns out to pose as many problems as it solves. The conventional wisdom is that one has no legal recourse against being photographed in a public place–no matter how embarrassing the image may be, however much the subject might wish he or she had not been there, had dressed or behaved differently, had been with a different person, etc. Simply venturing out onto the street makes one fair game for cameras, whether those cameras are obvious and visible to the subject or concealed in places from which one would never expect to be observed, much less photographed. The rationale, reflected in Dean William Prosser's view and eventually embodied in the *Restatement of the Law of Torts*, is that taking a person's photograph in a public place "amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see."[65]

The clarity of our view on this issue is matched by its novelty. Not much over a year ago, the Supreme Court of Canada reached a strikingly different conclusion. The case involved a woman who, as a teenager in Montreal a decade earlier, was photographed from the street while she was relaxing on the steps of a building.[66] The picture appeared in a magazine article about urban living conditions

64. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980).

65. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 392 (1960); *see* RESTATEMENT (SECOND) OF TORTS §§ 652A-652I (Cum. Supp. 1999).

66. *See* Aubry v. Editions Vice-Versa, Inc., [1998] S.C.R. 591, 610-11 (Can.).

in two Canadian cities.[67] The subject claimed that the publication exposed her to ridicule among her classmates.[68] On that basis, she sought damages from the photographer.[69] Canada's high court, invoking an unusually protective Quebec law, upheld a substantial judgment in the subject's favor.[70]

The court noted that the unconsented use of the picture was "an infringement of the person's right to his or her image," a right available as much to the ordinary citizen as to the celebrity.[71] Such a claim might not have prevailed in other provinces, though the supreme court's judgment leaves them free to recognize it. In fairness, Canadian courts do exempt from privacy claims an unwelcome image of a subject in a large crowd, as at an athletic event or a public demonstration.[72]

Conversely, our legal system makes certain exceptions to the seemingly clear principle of nonprivacy. Pictures, like words, may of course be defamatory.[73] Images may also create so inaccurate and injurious an impression as to trigger the false light doctrine.[74] Most importantly, celebrities have legal power to prevent the unauthorized use for commercial purposes of their likeness, voice, and even name.[75] There are many questions and variations, such as whether such a right survives the demise of the subject, how far it may apply beyond directly commercial uses, and the like.

Moreover, there is a Supreme Court case that is sometimes cited as authority for a broad-based privacy claim.[76] Hugo Zacchini made his living being shot out of canons at county and state fairs.[77] One evening, his entire act, having been filmed earlier that day without his consent, was featured on a Cleveland television news broadcast.[78] Zacchini sued, and the damages he won at trial

---

67. *See id.* at 611.
68. *See id.* at 621.
69. *See id.* at 611.
70. *See id.* at 622-23.
71. *Id.* at 615; *see also Photo Violates Privacy, Canada Court Says*, L.A. TIMES, Apr. 10, 1998, at A10.
72. *See Aubry*, [1998] S.C.R. at 617; *see also Canada Court Rules News Photos Violate Privacy*, MEDIA DAILY, Apr. 10, 1998, *available in* 1998 WL 9943030.
73. *See, e.g.*, White v. Nicholls, 44 U.S. (3 How.) 266, 291 (1845).
74. *See* Time, Inc. v. Hill, 385 U.S. 374, 386-91 (1967).
75. *See, e.g.*, Eastwood v. Superior Court, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983); *see also* Diane L. Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL J. ART & ENT. L. 35, 56-57 (1998).
76. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).
77. *See id.* at 563.
78. *See id.* at 564.

survived a sharply divided Supreme Court.[79] The majority viewed his claim not as one for invasion of privacy–after all, he performed in very public places–but rather as the uncompensated appropriation of very valuable property, resulting in potential dilution of his livelihood.[80] Because it protects property rather than privacy, the *Zacchini* decision provides a footnote and not an exception.

We thus return to the pure privacy claim. The hard cases concern ordinary people under relatively ordinary conditions. There is surprisingly little certainty on how far legal protection against unwanted images intrudes upon First Amendment freedoms of those who gather and publicize photographic images. Perhaps the most appealing case–the one that has triggered much of the recent legislative frenzy–involves a subject so harried or hounded as to be effectively unable to enter or leave home, take children to or from school, shop, worship, or engage in the myriad essential tasks of life.[81] Such was the case with Jacqueline Kennedy Onassis and her children, pursued to the point of paralysis until a federal judge ordered a photographer to keep a certain distance at bay, and refrain from other practices that had effectively immobilized this famous family.[82]

Recently, a California judge provided similar relief to Arnold Schwarzenneger and Maria Shriver after a paparazzo grazed their car and nearly prevented delivery of their child to school.[83] Such victims as these ought to need no special privacy laws, whether the person who makes life miserable for them is a photographer or an extortionist. Existing sanctions against harassing, assault, stalking, and the like should suffice. Using such examples to justify new curbs on paparazzi only serves to confuse and distort.

As the recent ride-along case vividly reminds us, invasion of the home also poses difficult questions. The sanctity of one's home is, after all, at the core of the Fourth Amendment. If a photographer physically breaks into a house to obtain a picture, no claim of "newsworthiness" would avail.[84] Trespassing on the lawn or driveway to obtain an image would also incur potential liability. Less clear is how courts should treat the rapidly emerging challenge

---

79. *See id.* at 578.
80. *See id.* at 567.
81. *See* Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973).
82. *See id.* at 998.
83. *See* John Hiscock, *Paparazzi at Bay as Privacy Law Guards Hollywood Stars*, DAILY TELEGRAPH, Jan. 2, 1999, at 5.
84. *See, e.g.*, Prahl v. Brosamle, 295 N.W.2d 768, 780-81 (Wis. Ct. App. 1980).

of virtual or technological trespass, which involves no physical entry or intrusion. One of the bills recently pending in Congress would ban the use of visual or auditory enhancement devices to obtain words or images.[85]

A federal district court recently granted relief to a harried family against the use of highly sensitive cameras and microphones to obtain images and conversations from inside the home and environs, even though the camera crew remained at all times on a public waterway adjacent to the property.[86] It is too early to tell how far other courts, or even the court of appeals in this case, will extend traditional trespass concepts to such electronic intrusions. If new technologies penetrate the walls of a house, the case for some relief seems appealing, even though no trespass claim would otherwise exist.

Even images gathered in public places may create confusion. A California appeals court recently upheld recovery by the victim of an automobile accident who objected to pictures that had been taken of her, in maimed condition, en route to a hospital.[87] She also protested the concurrent disclosure of sensitive personal information.[88] Such a judgment reminds us that legal protection of privacy may extend beyond the physical confines of one's home. The critical question, which courts have barely begun to address, is where and to what extent reasonable expectations of privacy beyond the home warrant some relief against unwelcome photographic invasions or intrusions.

Two cases at opposite ends of the spectrum seem fairly clear. On one hand, if a camera or tape recorder is surreptitiously placed in an article of clothing or a purse or briefcase or wallet, that would seem as clearly invasive of the subject's privacy as breaking into the home. On the other hand, concealing a camera on a street, or in a park, a store, or some other public place may yield images that are deeply offensive and intrusive, but would not amount to a legally actionable invasion of privacy. The hard cases lie between these two situations. What about a camera concealed in the stall of a washroom, a dressing room, or a locker room, for example? These are places

85. *See* Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. (1997).
86. *See* Wolfson v. Lewis, 924 F. Supp. 1413, 1420-21 (E.D. Pa. 1996).
87. *See* Shulman v. Group W Prods., Inc., 955 P.2d 469, 476 (Cal. 1998).
88. *See id.* at 478.

outside the home or the office where some level of privacy is reasonably expected, whatever the form of intrusion.[89]

If a person spies through a hole in the wall or the ceiling, we view that as an unconscionable (and sometimes unlawful) invasion of privacy. Even though such places do not enjoy the same constitutional presumption of privacy as would the home or office itself, they are not places where one's mere presence should make one fair game for the lens or the microphone.

Whatever qualifications may be recognized in special situations, the basic principle remains firm: There should be no legal recourse for images obtained in a public place, at least in a place where there is no reasonable expectation of privacy for any other purpose. This result may not have been the one Messrs. Warren and Brandeis would have wished. It is surely not one that courts in most other countries observe. Yet no rule less protective of the gathering of information or images comports with our First Amendment values and traditions.

VI. CONCLUSION

The constitutional implications for the yet untested California anti-paparazzi law, and for similar measures under active consideration in Congress and the legislatures of other states, are far less clear than proponents or opponents might wish. On one hand, the historic role of privacy has been to protect only that which is truly not public–the physical sanctity of the home, the integrity of "papers and effects," and the right of citizens to withhold most information they wish not to reveal. Conversely, when a person leaves the home or enters a public place, anything and everything becomes fair game, "private" or not. What troubles us these days is the degree to which rapidly changing technology and novel means of gathering information and images serve to blur these traditional and once clear distinctions. The use of electronic devices on public streets and sidewalks to "invade" the private home, without any physical trespass, most acutely tests our once easy assumptions. If such activities are viewed solely from the place where they occur, they do not invade protected privacy any more than an unwelcome photo taken in a public place or facts overheard in a street conversation.

---

89. For a situation in which the Supreme Court of California found a "limited but legitimate" expectation of privacy in the workplace, against the broadcasting even of conversations that a coworker could well have overheard, see *Sanders v. American Broadcasting Cos.*, 978 P.2d 67 (Cal. 1999).

Yet there is something different about the new technological invasions, if only in terms of the subject's reasonable expectations for what images and information the law protects. How far, we must soon begin to decide, may those expectations serve to extend or reshape the historic line between what is public and what is private? The first case in which courts must resolve that issue cannot be more than months away, and we shall all await its coming with a mixture of curiosity and apprehension.