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Intrusion and the Investigative Reporter*

Men with the muckrake are often indispensable to the well-being of society, but only if they know when to stop raking the muck.
—Theodore Roosevelt[1]

The investigative reporter,[2] like the spy and the sociologist, must sometimes go under cover to gather information.[3] Because going under cover allows the reporter to witness events from the inside, as a participant-observer, undercover newsgathering has proven effective[4] in exposing fraud, corruption, and illegal activity in government and industry.[5] Indeed, in some instances, the use of subterfuge may be the only means of uncovering serious abuses and spurring reform. A recent exposé produced by the television program *20/20* graphically illustrates this point.[6] In an award-winning series of *Houston Chronicle* articles, reporter Nancy Stancill

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* The author thanks Professor David Anderson and Howard Lidsky.

1. STEPHEN KLAIDMAN & TOM L. BEAUCHAMP, THE VIRTUOUS JOURNALIST 10 (1987) (quoting Theodore Roosevelt, Address on the Laying of the Cornerstone of the House Office Building (Apr. 14, 1906)).

2. One basic-reporting textbook describes investigative reporting as follows: "Any good reporting is investigative reporting. But the term has come to mean reporting in depth to reveal public or private behavior that otherwise might go unseen—usually criminal or antisocial behavior, but not always." MITCHELL V. CHARNLEY & BLAIR CHARNLEY, REPORTING 337 (4th ed. 1979). James King and Frederick Muto note that investigative journalism is intrinsic to the "new journalism," *i.e.*, journalism "through which reporters attempt to use the communications media to influence society directly." James E. King & Frederick T. Muto, *Compensatory Damages for Newsgatherer Torts: Toward a Workable Standard*, 14 U.C. DAVIS L. REV. 919, 919 n.1 (1981).

3. PHILIP MEYER, ETHICAL JOURNALISM 78 (1987).

4. The effectiveness of undercover investigative reporting stems from the fact that "[a] reporter whose identity is not known . . . is uninhibited, has no worry about offending news sourees, and has the clandestine privilege of observing news figures when they are off guard." CHARNLEY & CHARNLEY, *supra* note 2, at 344-45.

5. Charnley and Charnley provide examples of the uses of undercover or "infiltration" reporting and note that the results of undercover newsgathering "are almost always admired and frequently of high public service." *Id.* at 337. Undercover newsgathering is just one of the tools of the investigative reporter. Regardless of the method used, investigative reporting is a powerful tool for social reform. *See* Estes v. Texas, 381 U.S. 532, 539 (1965) ("The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . ."); LEONARD DOWNIE, JR., THE NEW MUCKRAKERS 255-56 (1976) (arguing that the new muckrakers have brought major governmental reforms); Haynes Johnson, *A Ruling the Muckrakers Would Decry*, WASH. POST, Apr. 14, 1985, at A3 (defending "muckrakers" as having "relentlessly exposed pervasive corruption").

6. *20/20: Victims of Greed*, (ABC television broadcast, Oct. 25, 1991).

HeinOnline -- 71 Tex. L. Rev. 433 1992-1993

uncovered shocking conditions in Texas nursing homes.[7] However, reforms were not implemented until *20/20*, following Stancill's lead, conducted a three-month, undercover investigation of the treatment of elderly residents at Texas state and private nursing home facilities.[8] The resulting photos, taken with a hidden camera, were horrifying: residents were tied to their beds, starved, abused, and left to lie in filth.[9] Some even died because of the subhuman treatment they received.[10] As a result of the *20/20* investigation and the public outrage it provoked, prompt reform measures ensued. A member of the Texas Board of Health who chaired the subcommittee on nursing home policy resigned, and Governor Ann Richards called for a state investigation of all nursing home facilities.[11] By employing subterfuge to gather news, the *20/20* reporters enhanced the immediacy and credibility of the resulting story. As one journalist argued, "[J]ust describing the conditions wouldn't have cut it. They had to be seen."[12] Without the use of subterfuge, it is doubtful whether *20/20* could have obtained the graphic footage that gave the story its gut-wrenching impact. Subterfuge represents a potent weapon in the fight for social reform.

A recent *60 Minutes* exposé provides a convincing, if less dramatic, case for the efficacy and importance of subterfuge as a newsgathering method.[13] Posing as a potential investor, reporter Steve Kroft uncovered an illicit odometer rollback scheme at a Houston car dealership.[14] The hidden camera crew captured the perpetrator of the rollback scheme, the singularly unrepentant Bill Whitlow, boasting of his illegal activity.[15] As a result of the *60 Minutes* sting, federal investigators prosecuted Whitlow and four other participants for their crimes.[16] District Judge John Rainey, who sentenced Whitlow, conceded that the "crisis of confidence created by that broadcast demanded a stiff prison term."[17] Hence, both of the preceding examples underscore the important role of undercover newsgathering in safeguarding the public welfare.[18]

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7. Nancy Stancill, *Deadly Neglect: Texas and Its Nursing Homes* (pts. 1-5), HOUS. CHRON., July 22-26, 1990, at A1, *available in* LEXIS, Nexis Library, Omni File.

8. Ann Hodges, *Texas Nursing Home Woes Focus of* 20/20, HOUS. CHRON., Oct. 24, 1991, at 3, *available in* LEXIS, Nexis Library, Omni File.

9. *20/20, supra* note 6.

10. *Id.*

11. *Id.*

12. Hodges, *supra* note 8, at 3. *20/20* reporter Hugh Downs likewise stated: "[O]ur only way to show what's really happening was to go in with hidden cameras." *20/20, supra* note 6.

13. *60 Minutes: Cream Puff* (CBS television broadcast, Sept. 8, 1991).

14. *Id.*

15. *Id.*

16. Jim Zook, *Man Given 7-Year Term for Odometer Tampering*, HOUS. CHRON., Jan. 11, 1992, at A29 (2-star ed.), *available in* LEXIS, Nexis Library, Omni File.

17. *Id.*

18. An additional example demonstrates the importance of this newsgathering technique in cases

HeinOnline -- 71 Tex. L. Rev. 434 1992-1993

Despite the salutary effects of these innovative reporting techniques, however, the investigative freedom of the reporter "collides head-on"[19] with the individual's right of privacy.[20] As the outcry sparked by the revelation of Arthur Ashe's AIDS status revealed,[21] private individuals are becoming increasingly concerned about press abuses. In fact, modern observers have criticized the press for being "far more interested in finding sleaze and achieving fame and fortune than in serving as an honest broker of information between citizens and government."[22] Such criticism of the press is not new. In 1890, Samuel Warren and Louis Brandeis argued in "perhaps the most famous and certainly the most influential law review article ever"[23] that "[t]he press is overstepping in every direction the obvious bounds of propriety and of decency."[24] In an attempt to curb such perceived abuses, the authors called upon the common law to create a "right to be let alone."[25] Hence, their article, *The Right to Privacy*,[26] formed the basis for the common-law tort of invasion of privacy.[27]

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where the victims may be powerless against abuses committed by those in positions of authority. In a *Houston Chronicle* investigation, reporters posing as patients unveiled shocking and unethical practices at a private psychiatric hospital. As a result of the investigation, the Texas Attorney General filed suit for "medical fraud and abuse, kickbacks, illegally recruiting patients and falsely billing a state compensation fund for crime victims." *Psychiatric Hospitals: Money-Spinners*, ECONOMIST, Feb. 22, 1992, at 24-25.

19. Don R. Pember & Dwight L. Teeter, Jr., *Privacy and the Press Since* Time, Inc. v. Hill, 50 WASH. L. REV. 57, 59 (1974); *cf.* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 119 (1992) ("Freedom of expression and the right to privacy are often thought of as natural enemies, but it is better to think of them as jealous siblings.").

20. Even though privacy is a central concept in our culture, it is exceedingly amorphous. As Judith Jarvis Thomson has noted, "Perhaps the most striking thing about the right to privacy is that nobody seems to have any clear idea what it is." Judith J. Thomson, *The Right to Privacy*, *in* RIGHTS, RESTITUTION, & RISK 117, 117 (1986). Even though privacy is difficult to define, however, few doubt its importance in modern society. According to Rodney Smolla, "Laws protecting privacy are the means through which the collective acknowledges rules of civility that are designed to affirm human autonomy and dignity." SMOLLA, *supra* note 19, at 119.

21. Alex S. Jones, *News Media Sharply Divided on When Right to Know Becomes Intrusion*, N.Y. TIMES, Apr. 30, 1992, at B11.

22. LARRY J. SABATO, FEEDING FRENZY: HOW ATTACK JOURNALISM HAS TRANSFORMED AMERICAN POLITICS 2 (1991).

23. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 203 (1954).

24. Samuel D. Warren & Louis D. Brandeis, *The Right to Privaey*, 4 HARV. L. REV. 193, 196 (1890). The tort of invasion of privacy originated with this article. The first case recognizing the existence of the privacy tort is from this century. *See* Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 71 (Ga. 1905). It should be noted, however, that the first case to consider the right of privacy rejected it. *See* Roberson v. Rochester Folding Box Co., 64 N.E. 442, 447 (N.Y. 1902).

25. Warren & Brandeis, *supra* note 24, at 193.

26. *Id.*

27. *See* Nimmer, *supra* note 23, at 203 (saying that it is "primarily due to the persuasiveness of [the Warren and Brandeis] article" that 15 state courta have recognized a common-law rigbt of privacy); *cf.* William L. Prosser, *Privaey*, 48 CAL. L. REV. 383, 384-88 (1960) (crediting a "long line of law review discussions of the right of privacy" to *The Right to Privacy*).

HeinOnline -- 71 Tex. L. Rev. 435 1992-1993

In its modern incarnation, invasion of privacy consists of four separate torts:[28] (1) intrusion upon the plaintiff's seclusion or solitude, (2) publicity that places the plaintiff in a false light, (3) publication of private facts, and (4) commercial exploitation or misappropriation of the plaintiff's name or likeness.[29] It is the first category, intrusion upon seclusion,[30] that most affects newsgathering. An intrusion is essentially a "psychic trespass."[31] As defined by the widely adopted *Restatement (Second) of Torts* section 652B, the intrusion tort imposes liability upon a reporter (or a private individual)[32] if she "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns."[33] In addition, the defendant's conduct must be "highly offensive to a reasonable person."[34] The intrusion tort thus makes actionable conduct that exceeds "tolerable bounds of social deportment."[35] By creating a qualified "right to be let alone,"[36] the tort seeks to protect the individual's sphere of privacy,[37] whether locational or psychological,

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28. Prosser, *supra* note 27, at 389 (articulating for the first time this division of the privacy tort). Some commentators question the wisdom of Prosser's fourfold division of the privacy tort. *See, e.g.*, Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964) (arguing that invasion of privacy is a single tort whose purpose is the protection of human dignity); Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966) (criticizing the tort as purposeless except in cases of commercial appropriation).

29. Prosser, *supra* note 27, at 389. The privacy tort is unique in the sense that it is largely a creation of law review articles, originating with the Warren and Brandeis article. However, an equally influential contribution to its development was Prosser's fourfold categorization, which has become integral to discussion of privacy issues and is reflected in the *Restatement (Second) of Torts* §§ 652A-652E (1977).

30. Examples of intrusion include "[e]avesdropping, peeping through windows, and surreptitiously opening another's mail." SMOLLA, *supra* note 19, at 145.

31. *Id.* Dean Prosser describes intrusion as having been created primarily to "fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights." Prosser, *supra* note 27, at 392.

32. This Note focuses primarily upon the effect of the intrusion tort upon the newsgatherer. However, the cases dealing with media defendants are actually a minority of the intrusion cases. In fact, a five-year survey (1986-1990) of all intrusion cases appearing in West's reporters reveals that media comprise a fairly small portion of defendants (10%). A. Lynn Boswell & Lyrissa C. Barnett, An Empirical Analysis of Intrusion 22 (June 1, 1990) (unpublished manuscript, on file with the *Texas Law Review*).

33. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

34. *Id.*

35. Munley v. ISC Fin. House, Inc., 584 P.2d 1336, 1338 (Okla. 1978).

36. *See* THOMAS M. COOLEY, LAW OF TORTS 29 (2d ed. 1888) (articulating for the first time a right "to be let alone"); *see also* Public Utils. Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting) ("The right to be let alone is indeed the beginning of all freedom."); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (describing the right to privacy as "the most comprehensive of rights and the right most valued by civilized men").

37. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971) (describing the expansion of this sphere of privacy beyond mere physical seclusion to the right to be free from practices such as eavesdropping and persistent phone calls).

HeinOnline -- 71 Tex. L. Rev. 436 1992-1993

from the obtrusive and obnoxious delving of others. Publication is not an element of the tort.[38]

At what cost has tort doctrine carved out this zone of privacy? As the intrusion doctrine is currently formulated, its "highly offensive" standard offers only a "nebulous guidepost" to a newsgatherer "interested in knowing how far he or she can push into the private realm of another."[39] Moreover, the case law evinces a strong suggestion that investigative reporters who employ unconventional means of newsgathering may face liability for intrusion.[40] Neither First Amendment jurisprudence[41] nor tort law achieve a satisfactory mediation of the conflicts between individual privacy and press freedom: one that protects beneficial press activities without sacrificing the individual's right of privacy and separates legitimate newsgathering techniques from unwarranted intrusion. Due to the uncertain nature of the constitutional and common-law limitations upon newsgathering, even the most conscientious editors, reporters, and media lawyers may not be able to determine the boundaries of protected investigative activity.[42] In the case of the *20/20* exposé, for example, neither First Amendment analysis nor the decisional law clearly answers the question whether that use of subterfuge was a legitimate reporting tool.[43]

Using the *20/20* case as a paradigm, this Note argues that, in order to distinguish protected newsgathering activity from intrusion, a brighter line must be drawn between individual privacy and the press's duty to gather news. Part I surveys constitutional doctrine and state tort law, which, on balance, offer little protection to a newsgatherer employing novel or "nonroutine" newsgathering techniques. Part II details the dangers of current doctrine to the newsgatherer and to the free flow of information that affects public welfare. To remedy these dangers, Part III advocates the adoption of a qualified common-law privilege. This privilege would permit a newsperson to employ subterfuge (and other innovative reporting techniques) to monitor the work-related activities of those engaged in the public business. The privilege would not, however, give the press free rein to employ subterfuge to pry into individuals' private lives. The privilege would attach only in cases where the press could

38. RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977).

39. BRUCE W. SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION § 11.2.1, at 430 (1987).

40. *See infra* subpart I(B).

41. *See infra* subpart I(A).

42. *See* King & Muto, *supra* note 2, at 924 ("Unfortunately, the few cases which have discussed newsgatherer tort liability . . . provide few guidelines for reporters to assess the legal consequences of their investigative conduct.").

43. *See infra* Parts I & II.

HeinOnline -- 71 Tex. L. Rev. 437 1992-1993

demonstrate that it had probable cause (as currently applied in malicious prosecution cases) to believe that the plaintiff was engaged in illegal or harmful activities. The privilege would provide corresponding protection to the private individual by completely barring press intrusions into the home. Finally, the privilege would be delimited by the doctrine of abuse of privilege, which would prevent the press from employing the privilege for inappropriate or abusive purposes. Thus, the creation of a qualified common-law privilege would provide the needed mediation between the individual's right to be free from intrusion upon seclusion and the investigative freedom of the reporter.

I. Constitutional and Common-Law Constraints on Newsgathering

Both First Amendment jurisprudence and the intrusion tort may inhibit novel methods of newsgathering because they do not delineate what types of newsgathering activities are protected. The earnest newsperson or media lawyer who seeks to avoid liability for intrusion will find few clear guidelines. Although the Supreme Court has indicated that "news gathering is not without its First Amendment protections,"[44] its First Amendment jurisprudence establishes that these protections do not include immunity from tort liability.[45] Thus, the newsperson must look to state tort law to assess the legal consequences of his newsgathering conduct. But the case law dealing with media intrusions is relatively sparse, and the extant decisions never make explicit whether newsgathering techniques such as subterfuge constitute intrusive invasions of privacy. Instead, the "sparse, inchoate rules"[46] force the newsperson to engage in a dangerous guessing game when employing innovative or nonroutine reporting techniques.

A. *The Legacy of* Branzburg v. Hayes

Despite the indisputable logic of the proposition that news cannot be disseminated without first being gathered,[47] the Supreme Court's First Amendment jurisprudence provides the press no immunity from liability for torts committed in the course of newsgathering.[48] In the leading case of

44. Branzburg v. Hayes, 408 U.S. 665, 707 (1972).

45. *Id.* at 691-92; *cf.* MARC A. FRANKLIN & DAVID A. ANDERSON, MASS MEDIA LAW 679 (4th ed. 1990) (observing that in defamation and privacy cases involving *publication* rather than newsgathering, otherwise tortious conduct is sometimes constitutionally protected).

46. King & Muto, *supra* note 2, at 921.

47. *Branzburg*, 408 U.S. at 727 (Stewart, J., dissenting) ("A corollary of the right to publish must be the right to gather news."); Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971) ("We agree that newsgathering is an integral part of news dissemination."); *see also In re* Mack, 126 A.2d 679, 689 (Pa. 1956) (Musmanno, J., dissenting) (commenting that, absent a right to gather news, "freedom of the press becomes a river without water"), *cert. denied*, 352 U.S. 1002 (1957).

48. The refusal to grant the press immunity from torts or crimes committed in the course of

HeinOnline -- 71 Tex. L. Rev. 438 1992-1993

Branzburg v. Hayes,[49] the Court acknowledged that "without some protection for seeking out the news, freedom of the press could be eviscerated."[50] Yet having recognized the *existence* of a constitutional right to gather news, the Court went on to strictly limit its application by insisting that the press possesses no "constitutional right of special access to information not available to the public generally."[51] Moreover, the Court rejected as "frivolous" the argument that the First Amendment should immunize newsgatherers from criminal liability.[52]

Supreme Court cases since *Branzburg* have given little content to the constitutional right to gather news. In the cases addressing press access to prisons and prisoners, the Supreme Court held that no balancing of First Amendment interests was necessary where state and federal restrictions on access applied equally to the press and to the general public.[53] In cases dealing with courtroom access, the Court established that both the press *and* the public have a right of access to criminal trials absent an overriding state interest.[54] The Supreme Court has never extended any additional or special protection to media defendants in tort suits involving newsgathering.

Similarly, media arguments for special protection for newsgathering have fallen largely on deaf ears in the lower courts. Lower courts addressing intrusion claims generally refuse to weigh any First Amendment interest in gathering news in the balance. In *Dietemann v. Time, Inc.*,[55] the Ninth Circuit held that, when two media defendants used false identities to gain access to the plaintiff's home and subsequently recorded their conversations with him, the reporters were completely unprotected by the First Amendment.[56] In language that has been widely cited and followed,[57] the *Dietemann* court stated:

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newsgathering stems from the principle that the press is subject to the "application of general laws." *Branzburg*, 408 U.S. at 683 (quoting Associated Press v. NLRB, 301 U.S. 103, 132 (1937)).

49. 408 U.S. 665 (1972) (holding that a journalist has no First Amendment privilege to withhold from a grand jury information he has received in confidence).

50. *Id.* at 681.

51. *Id.* at 684. *Branzburg* endorsed the view of *Zemel v. Rusk* that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." Zemel v. Rusk, 381 U.S. 1, 17 (1965) (holding that the U.S. government could impose restrictions on a citizen's right to travel to Cuba to inform himself of world affairs).

52. *Branzburg*, 408 U.S. at 691.

53. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978); Saxbe v. Washington Post Co., 417 U.S. 843, 849 (1974); Pell v. Procunier, 417 U.S. 817, 834-35 (1974).

54. *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) ("[T]he State's justification in denying access [to criminal trials] must be a weighty one."); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion) (holding that the right to attend criminal trials is "implicit in the guarantees of the First Amendment").

55. 449 F.2d 245 (9th Cir. 1971).

56. *Id.* at 249.

57. *See, e.g.*, Le Mistral, Inc. v. CBS, 402 N.Y.S.2d 815, 817 (App. Div. 1978) (observing that

> The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.[58]

Thus, following the Supreme Court's lead, lower courts have not recognized the need to extend First Amendment protections where state tort law proscribes certain newsgathering behaviors.[59] One court even noted the "apparent hopelessness" of a defendant's arguments that the First Amendment shielded the media from liability for trespass.[60]

The Second Circuit has somewhat more generously acknowledged that a balancing of First Amendment interests may be warranted where there is an "overriding public interest" in the information being gathered.[61] In *Galella v. Onassis*, the court considered the defendant's argument for First Amendment protection, noting that the plaintiff was "a public figure and thus subject to news coverage."[62] The defendant Galella was a *paparazzo* who used unconventional means to photograph Jacqueline Onassis and her children.[63] Nonetheless, the court held that "when weighed against the *de minimis* public importance of the daily activities of the defendant, Galella's constant surveillance, his obtrusive and intruding presence, was unwarranted and unreasonable."[64] The court even stated that the First Amendment does not provide a "wall of immunity protecting

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the First Amendment is not "a shibboleth before which all other rights must succumb"); Prahl v. Brosamle, 295 N.W.2d 768, 781 (Wis. Ct. App. 1980) (concluding that members of the press do not have a constitutional privilege to trespass); Anderson v. WROC-TV, 441 N.Y.S.2d 220, 225 (Sup. Ct. 1981) (noting that privilege concepts do not apply in determining liability for torts committed prior to publication).

58. *Dietemann*, 449 F.2d at 249.

59. *But cf.* Scheetz v. Morning Call, Inc., 747 F. Supp. 1515, 1527 (E.D. Pa. 1990) (granting defendant's motion for summary judgment after balancing the press's First Amendment rights against the individual's constitutional right of privacy), *aff'd*, 946 F.2d 202 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1171 (1992); New Kids on the Block v. News Am. Publishing, Inc., 745 F. Supp. 1540, 1546 (C.D. Cal. 1990) (recognizing that "gathering information for dissemination to the public" is a protected First Amendment activity), *aff'd*, 971 F.2d 302 (9th Cir. 1992).

60. Allen v. Combined Communications, 7 Media L. Rep. (BNA) 2417, 2418 (Dist. Ct., Denver County, Colo., 1981) (dismissing on other grounds a trespass action against press representatives who entered the defendant's premises to cover a news event).

61. Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973).

62. *Id.* at 995.

63. *Id.* at 991-92. Galella often "jumped and postured around" while taking pictures of Mrs. Onassis and her children; upon one occasion, Galella even jumped into the path of John Kennedy, Jr. while he was riding his bicycle, forcing him to "swerve his bike dangerously." *Id.*

64. *Id.* at 995.

HeinOnline -- 71 Tex. L. Rev. 440 1992-1993

newsmen from any liability for their conduct while gathering news."[65] The press, like the general public, will be liable for torts or crimes committed while newsgathering.[66]

The courts have thus made it clear that they will not easily interfere with state tort law to grant the press constitutional immunity from tort liability.[67] Although the cases contain a strong implication that routine reporting techniques will receive constitutional protection,[68] this gives little consolation or guidance to the investigative reporter employing nonroutine reporting techniques.

B. *The Intrusion Tort and Nonroutine Reporting Techniques*

Consider, then, the dilemma of an investigative reporter who has discovered reliable evidence that a congressperson is accepting bribes. May the reporter impersonate a lobbyist to investigate this claim? Although the discovery and airing of such information would be socially beneficial, constitutional law affords the reporter no protection if the congressperson sues for intrusion.[69] Consequently, the investigative reporter attempting to determine whether to go under cover to gather news must look to tort law for the answers that constitutional law does not provide.[70] But tort law provides no clear answer to his dilemma.[71] If he decides to employ subterfuge, he must do so at the peril of possible tort liability.

Neither general principles of privacy law nor specific cases dealing with subterfuge reveal whether it is a legitimate (nontortious) newsgathering technique. The *Restatement* definition of intrusion does little to circumscribe the bounds of protected activity. According to this definition,

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65. *Id.*

66. *Id.*

67. *See, e.g.*, Dietemann v. Time, Inc., 449 F.2d 245, 249-50 (9th Cir. 1971) (stating that constitutional privileges "developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication").

68. *See, e.g.*, Nicholson v. McClatchy Newspapers, 223 Cal. Rptr. 58 (Ct. App. 1986) ("[T]he news gathering component of the freedom of the press—the right to seek out information—is privileged at least to the extent it involves 'routine . . . reporting techniques.'").

69. However, the reporter will not be liable if he merely accepts tortiously acquired materials. In *Pearson v. Dodd*, several members of Senator Dodd's staff took confidential information from the Senator's files and gave it to newspaper columnists Drew Pearson and Jack Anderson. The columnists were held not liable for invasion of Dodd's privacy. Pearson v. Dodd, 410 F.2d 701, 703, 706 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

70. *See* Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1285 (1976) (criticizing the dominant role of tort law by arguing that "[w]here first amendment values are at stake, the state cannot be allowed the last word in determining what is an appropriate privilege").

71. *See* King & Muto, *supra* note 2, at 924 (stating that the intrusion cases "provide few guidelines for reporters to assess the legal consequences of their investigative conduct").

a newsgatherer will be liable where she "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . [and] the intrusion would be highly offensive to a reasonable person."[72] The reporter does not have to publish the information gathered to incur liability.[73] As a doctrinal matter, the intrusion tort protects the individual's sphere of privacy, whether locational or psychological;[74] it redresses injury to the individual's feelings and sensibilities, his "emotional sanctum."[75] Moreover, by adopting the "highly offensive to a reasonable person" standard, the intrusion tort evinces a broader purview: it safeguards societal norms of conduct,[76] making actionable conduct that "has clearly exceeded tolerable bounds of social deportment."[77]

Even so, the privacy interest protected by the intrusion tort is not absolute.[78] Individuals cannot be protected from every invasion; they must learn to deal with the "inevitable concomitants of life in an industrial and densely populated society."[79] Hence, a defendant will ordinarily not be liable for observing and recording "matters which occur in a public place or a place otherwise open to the public eye"[80] unless his actions are unusually obtrusive[81] or highly embarrassing to the plaintiff.[82] These principles, however, do not directly address the dilemma of the reporter who desires to use surreptitious surveillance[83] to gather information that

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72. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

73. *Id.* cmt. b.

74. *See* PROSSER, *supra* note 37, § 117 (listing both physical and psychological intrusions that have been held actionable).

75. Phillips v. Smalley Maintenance Servs., Inc., 435 So. 2d 705, 711 (Ala. 1983).

76. *See generally* Robert C. Post, *The Social Foundations of Privacy*, 77 CAL. L. REV. 957, 963 (1989) (discussing the relationship between privacy law and "civility rules" in our culture).

77. Munley v. ISC Fin. House, Inc., 584 P.2d 1336, 1338 (Okla. 1978).

78. Shorter v. Retail Credit Co., 251 F. Supp. 329, 330 (D.S.C. 1966).

79. Nader v. General Motors Corp., 255 N.E.2d 765, 768 (N.Y. 1970).

80. Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1087 (E.D. Pa. 1980) (citations omitted). Courts appear to use the terms "public place" and "place otherwise open to the public eye" synonymously in the intrusion context. *See id.* (failing to distinguish the two concepts); *see also* Gill v. Hearst Publishing Co., 253 P.2d 441, 444 (Cal. 1953) (equating appearing in a "public market place" with exposing oneself "to public gaze in a pose open to the view of any persons who might then be [nearby]"). I will use the term "public" in a different sense in Part III of this Note.

81. *See* Galella v. Onassis, 487 F.2d 986, 994-95 (2d Cir. 1973) (describing the plaintiff's "inexcusable" conduct, including "intentional touching" of Mrs. Onassis and her children and endangering the safety of the children while they were swimming, waterskiing, and horseback riding).

82. *See* Daily Times Democrat v. Graham, 162 So. 2d 474, 478 (Ala. 1964) (upholding a judgment in favor of a woman who was photographed with her skirt blown over her head while she was exiting a funhouse).

83. Intrusion claims against media defendants commonly fall into three categories: "surreptitious surveillance, traditional trespass, and instances where consent to enter into a secluded setting for one purpose has been exceeded by the invitee." Victor A. Kovner & Harriette K. Dorsen, *Recent Developments in Intrusion, Private Facts, False Light and Commercialization Claims*, *in* 3 PRACTISING LAW INSTITUTE, COMMUNICATIONS LAW 1990, at 775, 783. Surreptitious surveillance claims "have

HeinOnline -- 71 Tex. L. Rev. 442 1992-1993

cannot be obtained in a public place.

In fact, courts have never specifically stated whether subterfuge constitutes an actionable intrusion. *Dietemann v. Time, Inc.*,[84] the seminal case in this area, strongly suggested that the use of subterfuge might subject reporters to tort liability; however, the court did not provide newsgatherers with an adequate conceptual framework to determine when they may "take unconventional investigative steps without invoking the sanctions of tort law."[85] In *Dietemann*, two *Life* reporters, claiming they had been sent by a friend of the plaintiff,[86] posed as patients to gain access to the home of Mr. Dietemann, "a disabled veteran with little education . . . engaged in the practice of healing with clay, minerals, and herbs—as practiced, simple quackery."[87] Once inside Mr. Dietemann's home, the *Life* reporters recorded their conversations using a hidden camera and transmitter.[88] They later used this information for an exposé entitled "Crackdown on Quackery."[89]

Although the *Dietemann* court held that the reporters' actions constituted intrusion,[90] it never signified the decisive factor in its decision. The court noted that the intrusion occurred in the plaintiff's home, albeit in the office portion of his home; that the reporters gained entrance by subterfuge; and that they recorded the plaintiff's conversation without his consent using electronic recording devices.[91] But it did not indicate which factor or combination of factors triggered liability. The court particularly emphasized and condemned the reporters' use of "hidden mechanical contrivances."[92] Judge Shirley Hufstedler argued that the "successful practice [of investigative reporting] long antecedes the invention of miniature cameras and electronic devices."[93] This comment is very telling, for it suggests that perhaps the real basis for the judge's decision

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arisen in the context of peering into windows, electronically recording conversations without the consent of all parties, unauthorized reproduction of private documents, and obtaining information through false pretenses." *Id.*

84. 449 F.2d 245 (9th Cir. 1971).

85. King & Muto, *supra* note 2, at 928. King and Muto also note that *Dietemann* provides little guidance to "an editor or attorney who must decide whether or not to authorize a reporter's act." *Id.* at 929.

86. *Dietemann*, 449 F.2d at 246.

87. *Id.* at 245.

88. *Id.* at 246.

89. *See Crackdown on Quackery*, LIFE, Nov. 1, 1963, at 72B. The article identifies Joseph Bride as "making notes" and Bill Ray as "taking photos" while investigating. *Id.*

90. *Dietemann*, 449 F.2d at 248 ("[W]e have little difficulty in concluding that clandestine photography of the plaintiff in his den and the recordation and transmission of his conversation without his consent resulting in his emotional distress warrants recovery for invasion of privacy in California." (footnote omitted)).

91. *Id.* at 247.

92. *Id.* at 249.

93. *Id.*

HeinOnline -- 71 Tex. L. Rev. 443 1992-1993

is her bias against a new technology and an unorthodox means of newsgathering.[94] The judge even posited that:

> One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording . . . to the public at large . . . .[95]

Yet the mere fact that the *Life* reporters recorded their conversations, standing alone, should not have been enough to create liability for intrusion. The consensus at common law is that, absent statutory prohibition,[96] recording a private conversation by a party to that conversation is not barred.[97] Therefore, if the basis of *Dietemann*'s holding is the fact that the reporters used concealed electronic devices, it is of questionable value as precedent.

In contrast to the appellate court, the *Dietemann* trial conrt was much more concerned with the trick used by the *Life* reporters to gain entrance to the plaintiff's home than with their use of the hidden recording devices.[98] The trial court judge roundly condemned the subterfuge: "If a person's home, or even his business premises, is to be subjected to invasion by subterfuge for the purpose of obtaining facts concerning his private life, then privacy would not exist."[99] This condemnation seems somewhat at odds with the Ninth Circuit's caveat that one takes the risk that his "visitor may not be what he seems."[100] Because these contradictions are never resolved and because the circuit court never sets out a cogent basis for its holding, it is of little guidance to reporters or to future

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94. *Cf.* MEYER, *supra* note 3, at 81 (suggesting that a possible reason for the reluctance of journalists to tape-record their interviews is "an emotional response to a new technology").

95. *Dietemann*, 449 F.2d at 249.

96. An increasing number of states have passed statutes prohibiting recording of a conversation unless both parties consent. *See, e.g.*, CAL. PENAL CODE § 632 (West 1991). For an excellent discussion of these statutes and their potentially harmful effect on the investigative reporter, see Kent R. Middleton, *Journalists and Tape Recorders: Does Participant Monitoring Invade Privacy?*, 2 HASTINGS COMM. & ENT. L.J. 287, 304-09, 321-31 (1979) (arguing that surrepititious tape recordings made by a party to a conversation should be allowed when public roles are being played, whether the roles are governmental or not, because the right to privacy exists only in private roles).

97. *See* Becker v. Computer Sciences Corp., 541 F. Supp. 694, 702-06 (S.D. Tex. 1982) (holding that Texas does not recognize a cause of action where one party to a telephone conversation surreptitiously records the conversation without the other party's consent); *see also* United States v. Phillips, 540 F.2d 319, 327 n.5 (8th Cir.) (rejecting the defendant's argument that the recording constituted a tortious invasion of privacy regardless of the purpose for recording the conversation), *cert. denied*, 429 U.S. 1000 (1976).

98. Dietemann v. Time, Inc., 284 F. Supp. 925, 929-30 (C.D. Cal. 1968) (describing the subterfuge but not the use of hidden recording devices), *aff'd*, 449 F.2d 245 (9th Cir. 1971).

99. *Dietemann*, 284 F. Supp. at 929-30.

100. *Dietemann*, 449 F.2d at 249.

HeinOnline -- 71 Tex. L. Rev. 444 1992-1993

courts in assessing potential liability for subterfuge. As a result, its ambiguous message may exert a chilling influence on newsgatherers wary of tort liability.[101]

Dicta in several subsequent cases do little to clarify *Dietemann* and, in fact, suggest that courts harbor hostility toward media defendants who use subterfuge to gather information, at least in cases where the person who is a victim of the subterfuge is also the subject of the interview. Two cases have implied that an interviewee might have a cause of action for invasion of privacy against a reporter employing subterfuge.[102] However, both cases ultimately held that gathering information about a plaintiff from third parties, "even if pursued using subterfuge and fraud, cannot constitute . . . an intrusion upon *plaintiff's* solitude or seclusion."[103]

In another case, *In re King World Productions, Inc.*,[104] the Sixth Circuit expressed its hostility to the use of subterfuge even though ultimately holding that a prior restraint on information thus gathered violated the First Amendment.[105] In that case, a producer of the television program *Inside Edition* posed as a patient and videotaped the purported "medical malpractice and unethical behavior"[106] of a doctor.[107] The Sixth Circuit held that the trial court's granting of a temporary restraining order to prevent broadcast of the surreptitiously acquired videotape was invalid on First Amendment grounds: "No matter how inappropriate the acquisition, or its correctness, the right to *disseminate* that information is what the Constitution intended to protect."[108] However, said the court, this holding was "not intended to constitute an approval of the surreptitious means used to gather [the] information about

101. *See* Allen v. Combined Communications, 7 Media L. Rep. (BNA) 2417, 2420 (Dist. Ct., Denver County, Colo., 1981) ("[A] chilling effect on speech could occur whenever there is a substantial risk of liability for activities necessary to acquisition of the story.").

102. *See* Rifkin v. Esquire Publishing, Inc., 8 Media L. Rep. (BNA) 1384, 1386 (C.D. Cal. 1982); Wolf v. Regardie, 553 A.2d 1213, 1218 (D.C. 1989).

103. *Rifkin*, 8 Media L. Rep. (BNA) at 1386 (emphasis in original); *see also Wolf*, 553 A.2d at 1218 (citing *Rifkin*). In addition to these cases, one state trial court has explicitly distinguished *Dietemann* on the ground that the defendant who taped a conversation with her attorney had not gained access to his office by subterfuge. McCall v. Courier Journal, 4 Media L. Rep. (BNA) 2337, 2339-40 (Ky. Cir. Ct. 1979), *aff'd*, 6 Media L. Rep. (BNA) 112 (Ky. Ct. App. 1980), *rev'd in part on other grounds*, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982). The intermediate appellate court affirmed the trial court's grant of summary judgment of plaintiff's intrusion claim; the Kentucky Supreme Court instead considered plaintiff's false light claim in reversing the lower courts.

104. 898 F.2d 56 (6th Cir. 1990).

105. *Id.* at 59-60.

106. *Id.* at 58.

107. *Id.* at 57-58.

108. *Id.* at 59 (emphasis added). The court's holding is consistent with the bias of First Amendment jurisprudence against prior restraint and its differential treatment of the dissemination of news as opposed to newsgathering.

HeinOnline -- 71 Tex. L. Rev. 445 1992-1993

Dr. Berger, and *in no way affects [the plaintiff's] ability to seek redress under New York state tort law.*"[109] Though not binding, this dictum suggests that courts will not protect undercover newsgathering even where reporters use this technique to procure socially beneficial information. Because these cases never deal directly with the subterfuge issue, they provide little guidance to the newsperson seeking to conform his conduct to the law.

Cassidy v. ABC[110] is less hostile to the use of subterfuge. The defendant in *Cassidy* surreptitiously filmed a policeman conducting an undercover sting at a massage parlor.[111] Unlike the *King World* court, which ignored the plaintiff's status and the information obtained, the court in *Cassidy* took into account the fact that the plaintiff was a public official performing a public duty.[112] Because of his status, therefore, the court held that "no right of privacy against intrusion can be said to exist with reference to the gathering and dissemination of news concerning discharge of public duties."[113] *Cassidy* suggests a possible framework for analysis in the subterfuge cases, since it hinges on a functional definition of public and private spheres.[114] One author has even argued that *Cassidy* has "chipped away at some of the fears the press had after the *Dietemann* case."[115] When read in conjunction with the other cases dealing with subterfuge, however, even *Cassidy* cannot resolve the uncertainty regarding the legitimacy of subterfuge as a newsgathering technique. What is troubling about this area of the law is not the certain threat of liability, but the danger of the unknown and the fact that "[n]o broad, general proposition can be stated"[116] with regard to media intrusions. As the law now stands, the only certain way to avoid liability is to eschew surreptitious reporting methods altogether.[117] Perhaps, then, it is fair to say of the tort law addressing media use of subterfuge what Professors Pember and Teeter have said of privacy law generally: "This area of the law continues, to borrow James Thurber's phrase, to be as 'disorderly as a whore's top drawer.'"[118]

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109. *Id.* at 60 (emphasis added).

110. 377 N.E.2d 126 (Ill. App. Ct. 1978).

111. *Id.* at 128.

112. *Id.* at 131-32.

113. *Id.* at 132.

114. *Id.* at 131.

115. DON R. PEMBER, MASS MEDIA LAW 235 (4th ed. 1987).

116. *Id.* at 231.

117. *See* Pember & Teeter, *supra* note 19, at 91 ("If reporters maintain traditional means of investigative reporting and eschew hidden cameras, microphones, bugs and similar surreptitious devices, the mass media can avoid exposure to actions claiming unlawful intrusion.").

118. *Id.* at 57 (paraphrasing George Plimpton, Max Steele & James Thurber, *James Thurber*, *in* WRITERS AT WORK: THE PARIS INTERVIEWS 83, 86 (Malcom Cowley ed., 1959)). The authors elaborate: "To say that the law of privacy is not a great hallmark of logic and clarity in American law

II. The Consequences of Doctrinal Uncertainty

This disorderliness in the tort doctrine has serious consequences. Because the line between protected newsgathering and tortious newsgathering is difficult to draw, a reporter is likely to eschew certain nonroutine newsgathering methods such as subterfuge and to engage in rational self-censorship even in cases where his conduct would ultimately be lawful and would produce valuable information. Although the precise extent of such a chilling effect is difficult to determine, individuals faced with potentially large damage awards "steer far wider of the unlawful zone."[119] Moreover, media lawyers, who are generally hired by owners of newspapers, television stations, or radio stations, are apt to be conservative in the advice they give.[120] As one author has noted, editors tend to be "fearful . . . of the contemporary world of invasion of privacy,"[121] even though privacy suits are far less common than those for libel.[122] Thus, unless it appears that the investigation will uncover a very important piece of news or unless the media defendant can easily bear the cost of potential liability (as in the case of a highly popular and lucrative production such as *60 Minutes*), media lawyers are likely to advise clients to stay well away from the potential danger zone. Hence, the uncertainty in the tort doctrine of intrusion may deter use of novel newsgathering methods.

Self-censorship by investigative reporters and their editors is rational: the liability of a reporter and his newspaper for employing subterfuge may be substantial. The probem is compounded by the fact that courts have never settled on the proper measure of damages in intrusion cases.[123] In *Dietemann*, the court held that a plaintiff could recover damages for both the underlying intrusion upon his seclusion, as well as for the publication of information tortiously acquired.[124] On the other hand, in *Costlow v. Cusimano*,[125] the court limited the plaintiff's damages to those stemming from the intrusion only.[126]

The *Dietemann* damages rule obviously encourages extreme caution. Consider again the dilemma of the *20/20* reporters considering whether to

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is to indulge in egregious understatement." *Id.*

119. Speiser v. Randall, 357 U.S. 513, 526 (1958).

120. *Cf.* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 118-19 (1991) (repeating an argument made by the press that the risk of high pretrial discovery costs may have a chilling effect on what it publishes).

121. SANFORD, *supra* note 39, § 11.1, at 427.

122. *Id.*

123. *See* King & Muto, *supra* note 2, at 937.

124. Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971) (affirming the trial court's $1000 damage award based on the harm caused by the intrusion that was "enhanced" by the subsequent publication of the tortiously aequired information).

125. 311 N.Y.S.2d 92 (App. Div. 1970).

126. *Id.* at 97.

HeinOnline -- 71 Tex. L. Rev. 447 1992-1993

use subterfuge to uncover the abuses at the Texas nursing homes. If the reporters do employ subterfuge and a court applying the *Dietemann* damages rule declares their conduct tortious, the reporters and the network may be liable for any damages, including those caused by publication, that proximately result from the intrusion. Presumably, therefore, the owners of private nursing homes might recover for any loss of business caused by the exposé as well as for any mental distress caused by the intrusion and the subsequent publication.

Professors King and Muto present a scenario that is even more frightening to the investigative reporter:

> Assume that [Woodward and Bernstein] had committed a trespass [or an intrusion] for which President Nixon could maintain an action. . . . [Damages based on publication] could be substantial if they included the mental distress caused by having to resign the Presidency in disgrace.[127]

But it is not just the fear of large damage awards that may cause a reporter to err on the side of "safe" or conventional reporting techniques—techniques that may not bring forth the desired information. Even if the reporter expects to be the ultimate victor in an intrusion suit, the fear of incurring substantial litigation costs may exert a chilling effect on his newsgathering.[128] Current tort doctrine, therefore, may have the perverse effect of punishing the reporter whose stories promote public welfare. It is precisely in those situations where the results of publication or broadcast may be the most dramatic that the press will face the largest specter of liability.[129]

Equally as important, the lack of a bright line between legitimate and illegitmate newsgathering techniques means that individual privacy is not adequately safeguarded. Because both the *Restatement* definition of intrusion and the tort doctrine are amorphous, some reporters may decide to proceed with investigations that invade privacy to the point of being tortious. The best means for protecting individual privacy is to provide a clear liability rule to prevent the intrusion from occurring in the first place.

Obviously, this analysis of the detrimental effects of uncertainty in the tort law shapes the path of possible reform of this particularly unpredictable area of the law. In order to foster investigative reporting while protecting individual privacy, a brighter line must be drawn—one that distinguishes protected from unprotected newsgathering methods. An ad hoc balancing of the two interests is inadequate, since it involves the

127. King & Muto, *supra* note 2, at 942.

128. As one commentator has noted, "the more complicated the law, the more expensive the legal fees." RODNEY A. SMOLLA, SUING THE PRESS 250 (1986).

129. Of course, not all stories that produce dramatic results involve the use of subterfuge.

HeinOnline -- 71 Tex. L. Rev. 448 1992-1993

application of vague, subjective criteria[130] and, consequently, suffers from the same uncertainty that plagues the current intrusion doctrine. This Note therefore advocates the extension of a qualified common-law privilege to allow newsgatherers to employ subterfuge in certain narrowly confined contexts.

III. The Newsgathering Privilege

The qualified common-law privilege[131] espoused by this Note would protect the newsgatherer who employs subterfuge to investigate the work-related activities of those engaged in public business. Under this privilege, a newsgatherer who employs subterfuge will prevail in an intrusion action based on the subterfuge if she can show that she had probable cause to believe that the plaintiff was engaged in illegal, fraudulent, or potentially harmful conduct. Though offering newsgatherers considerable protection, this privilege has several limiting features. First, the probable cause standard requires a newsgatherer to establish that she had a reasonable belief that the plaintiff was engaged in illegal, fraudulent, or potentially harmful activities before she conducted her undercover investigations. Thus, the privilege does not allow subterfuge to be used by the press to conduct "fishing expeditions." Second, the privilege is limited in scope. While it recognizes the valuable role of the journalist acting as participant-observer, the privilege does not permit the press to employ subterfuge to pry into private lives; nor does it allow the press to use subterfuge to gain access to private homes. Third, the privilege is limited by the abuse-of-privilege doctrine, which prevents the reporter from employing the privilege for a purpose other than that for which it was intended. Therefore, unlike current tort doctrine, the newsgathering privilege clearly delineates a sphere of protected newsgathering activity, thereby striking a balance between the competing interests of the press, the individual, and society.

Thus, this Note argues that a qualified common-law tort privilege should be created to remove the shadow of tort liability that looms over the reporter who uncovers through the use of subterfuge abuses committed by those who serve the public. As conceived, this privilege would apply to

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130. *See* Anderson v. WROC-TV, 441 N.Y.S.2d 220, 224 (Sup. Ct. 1981) (explicitly declining to invoke a privilege based on the balance between the scope of a newsgatherer's intrusion and the newsworthiness of the story obtained through that intrusion).

131. *See* FRANKLIN & ANDERSON, *supra* note 45, at 254 (discussing the "conditional" or "qualified" privilege at common law, under which a defendant will prevail in a defamation action unless the plaintiff can show that the speaker "abused" his privilege).

HeinOnline -- 71 Tex. L. Rev. 449 1992-1993

newsgathering activities[132] aimed at anyone conducting public business. Kent Middleton has defined public business as follows:

> Public business includes the work-related activities, whether legal or illegal, of public officials, public figures, businessmen and professionals. Anyone who offers a product or service to another or exercises a public responsibility carries out public business.[133]

This definition rejects the traditional public/private sector distinction. For purposes of this privilege, the concept of "serving the public" includes not only private sector business; it also includes the services provided by charitable institutions. Thus defined, "public business" allows the press to "monitor not only the activities of government, but also the activities of non-government institutions which increasingly affect the public welfare."[134] However, this definition is limited in scope. It permits the use of subterfuge to gather information only about the *work-related* activities of those engaged in public business. Consequently, it seeks to protect not only private locations, most notably the home, but also the private roles and private lives of those engaged in public business.

The argument for the creation of this privilege is not so radical as one might suppose; rather, the privilege would merely provide an advance statement of judicial policy with regard to certain limited contexts of media newsgathering activity. This definition is analogous to, although broader than, the one employed by the *Cassidy* court.[135] That court refused to find that the media's use of subterfuge had invaded the plaintiff's right of privacy where the plaintiff, a police officer, "was not a private citizen engaged in conduct which pertained only to himself"[136] and was instead a "public official performing a laudable public service and discharging a public duty."[137] The *Cassidy* court's approach to the intrusion claim embodies a frank recognition that the press plays a vital role in promoting public monitoring of public servants and that the press should be protected when performing that role. Yet the court's reasoning considered the identity of the plaintiff as only a factor relevant to whether a tort had occurred; the newsgathering privilege espoused by this Note would instead

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132. Although this privilege is primarily aimed at protection of the so-called institutional press, a functional definition of newsgatherers might be adopted that extends the privilege to those who perform the monitoring function envisioned for the press in the creation of this privilege. For a good discussion of this issue, see David F. Freedman, Note, *Press Passes and Trespasses: Newsgathering on Private Property*, 84 COLUM. L. REV. 1298, 1321-25 (1984).

133. Middleton, *supra* note 96, at 321.

134. *Id.* at 323.

135. *See* Cassidy v. ABC, 377 N.E.2d 126, 131 (Ill. App. Ct. 1978).

136. *Id.*

137. *Id.*

HeinOnline -- 71 Tex. L. Rev. 450 1992-1993

draw a predictable, bright-line rule to protect newsgatherers who use subterfuge to monitor those engaged in public business.

This broader privilege is justified by a pragmatic recognition of the role of the modern press. The press is the chief information broker in modern society;[138] it acts as (1) a "neutral finder[] and conveyor[] of information,"[139] (2) a watchdog of government,[140] and (3) an advocate of social reform.[141] By protecting this third role, the newsgathering privilege acknowledges the detriment to the public welfare engendered by crime, corruption, and fraud in the so-called private sector as well as in the public sector. Moreover, permitting monitoring in the private sector acknowledges the increasing interaction between government and private industry and the "rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds."[142] More precisely, "[m]uch activity . . . which was once exclusively part of the private sector, is now so intertwined with government and the public welfare that it must be subject to public scrutiny fully as much as government activity."[143]

Yet this privilege is not without limits. As expressed previously, the privilege seeks to protect individual privacy as well as freedom of the press. Reporters may abuse their power of information-gathering to delve into private lives. One critic has expressed his criticism of the press metaphorically as follows: "Investigative reporters . . . are the guard dogs of society, but the trouble with guard dogs is that they sometimes attack with equal fervor the midnight burglar and the midday mailman."[144] The privilege advocated by this Note does not loose the guard dog on unsuspecting private citizens. The reporter's ability to employ subterfuge is circumscribed in at least three ways.

First, the newsgathering privilege should not attach to the reporter's conduct absent a showing of probable cause. As applied, the probable cause standard would be analogous to that employed in malicious prosecution cases. Hence, "[p]robable cause is a reasonable ground for belief in the guilt of the party"[145] the reporter investigates. In other

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138. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (quoting Grosjean v. American Press Co., 297 U.S. 233, 250 (1936)).

139. Paul H. Weaver, *The New Journalism and the Old—Thoughts After Watergate*, PUB. INTEREST, Spring 1974, at 67, 74.

140. *See* Nick D. Williams, *America's Third Force: The Watchdog Press*, *in* THE RESPONSIBILITY OF THE PRESS 169, 170-71 (Gerald Gross ed., 1966).

141. Weaver, *supra* note 139, at 74.

142. Curtis Publishing Co. v. Butts, 388 U.S. 130, 163 (1967) (Warren, C.J., concurring).

143. Middleton, *supra* note 96, at 323.

144. MICHAEL J. ARLEN, THE CAMERA AGE: ESSAYS ON TELEVISION 172-73 (1981).

145. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 119, at 876 (5th ed. 1984).

HeinOnline -- 71 Tex. L. Rev. 451 1992-1993

words, probable cause is an objective standard:[146] the newsgatherer must establish that his belief that the plaintiff was engaged in illegal, fraudulent, or potentially harmful activities was reasonable.[147] The "traditional test of probable cause . . . focuses on the evidence known to the accuser [or, in this case, the reporter] and the reasonable inferences to be drawn from it."[148] In order to establish probable cause, thereby obtaining the protection of the privilege, a reporter must present the information upon which he relied in determining whether to conduct an undercover investigation. Mere speculation on the part of the reporter will be insufficient to establish probable cause.[149] However, if he can show that he based his decision to investigate on reliable information that reasonably led him to suspect wrongdoing,[150] then the court should apply the newsgathering privilege to protect his use of subterfuge.[151] The probable cause standard thus prevents the reporter from employing subterfuge in an irresponsible manner.

The reporter is similarly restricted by the limited scope of the privilege. The privilege does not extend to the use of subterfuge to gain access to private homes or to investigate private matters about an individual, such as his or her AIDS status. If privacy is to have any meaning, it must protect the individual in his private dealings and in his home.[152] In our private roles, we let our guard down. Relationships in the private, as opposed to the public, sphere are characterized by intimacy and trust. Therefore, intrusive prying into the home should not be permitted, even where, as in *Dietemann*, one might argue that the plaintiff was really using his home as a business. Drawing a bright line to protect the home acts as a prophylactic rule, and, while the line may shield some abuses from press scrutiny, the strong interest in protecting the individual in his innermost sanctum, his "castle," justifies barring the use of subterfuge in the home.[153]

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146. *See, e.g.*, Ray v. City Bank & Trust Co., 358 F. Supp. 630, 638 (S.D. Ohio 1973); Masterson v. Pig'n Whistle Corp., 326 P.2d 918, 926 (Cal. Dist. Ct. App. 1958).

147. *See* RESTATEMENT (SECOND) OF TORTS § 662 cmt. c (1977).

148. KEETON ET AL., *supra* note 145, § 119, at 877.

149. *See id.* § 119, at 876 (noting that "[u]nfounded suspicion and conjecture" will not support a finding of probable cause).

150. *Id.* § 119, at 876-77.

151. Courts routinely determine the existence of probable cause in malicious prosecution cases. *Id.* § 119, at 882.

152. The core of privacy is society's recognition that the individual possesses a "privileged territory or domain" within which he is free to include or exclude others. 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 24 (1985) (citation omitted).

153. George Orwell dramatically describes the consequences of invasions into the innermost sanctum of individual privacy: "There was of course no way of knowing whether you were being watched at any given moment. . . . You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and except in darkness, every movement

HeinOnline -- 71 Tex. L. Rev. 452 1992-1993

Finally, courts may check newsgathering abuses by using the abuse-of-privilege doctrine to curb inappropriate newsgathering even in the "privileged" sphere of public businesses. A defendant abuses a privilege when he uses it for a purpose other than that for which it was intended.[154] Thus, for example, abuse of privilege might be found where the defendant newsgatherer employed subterfuge solely to harass or annoy the plaintiff or to gain access to his secret business records. Of course, the failure of the privilege to attach to the defendant's newsgathering activities or his loss of the privilege does not necessarily mean that he will lose if sued for intrusion. It merely makes it more likely that the defendant will have to litigate his claim. What the privilege does, then, is to send a message to newsgatherers like those in *Dietemann* who intrude into private homes that they employ subterfuge at their own peril.

As Professor Post has noted, intrusion protects those rules of conduct, or "rules of civility,"[155] by which we constitute ourselves as a society.[156] Allowing the use of subterfuge in public business would not represent a shocking departure from current social practices, nor would it contravene ordinary expectations of privacy; rather, it would merely make the legal doctrine of privacy consistent with social norms.[157] The intrusion tort protects the individual from unreasonable intrusions upon his seclusion in contexts where he has a justifiable expectation of privacy.[158] Those engaged in public business, however, do not have such an expectation in regard to their work-related activity. Public businesses are characterized by a certain degree of institutional formality and social distance.[159] People deal with one another at arm's length.

Moreover, many such businesses may already be accustomed to monitoring by persons posing as patrons.[160] In the restaurant business, surreptitious monitoring by health inspectors and critics is common. Monitoring occurs frequently in banking and car repair as well.[161] In the

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scrutinized." GEORGE ORWELL, 1984, at 6-7 (Signet Classic 1984) (1949).

154. *See* FRANKLIN & ANDERSON, *supra* note 45, at 254 (noting that a plaintiff may prove abuse by showing that the defendant did not honestly believe what he said, or that the defendant published his statement more widely than was justified by the occasion that provided the privilege).

155. Post, *supra* note 76, at 975-76 (arguing that dissonance between social norms and the intrusion doctrine is manifestly undesirable).

156. *Id.*

157. *See* John Bohannan, *The Differing Realms of the Law*, 67 AM. ANTHROPOLOGIST 33, 37 (Dec. 1965 special issue) ("It is the fertile dilemma of law that it must always be out of step with society, but that people must always (because they work better with fewer contradictions, if for no other reason) attempt to reduce the lack of phase.").

158. *See* RESTATEMENT (SECOND) OF TORTS § 652B & cmt. b (1977).

159. Middleton, *supra* note 96, at 323.

160. SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 201 (Vintage Books 1989) (1978).

161. *Id.*

HeinOnline -- 71 Tex. L. Rev. 453 1992-1993

medical profession, studies by social scientists posing as patients are almost routine.[162] Even in those professions where monitoring is not so pervasive, the person takes the chance that those he serves will repeat everything that he says to the news media. Hence, the creation of a privilege to allow newspersons to observe those who serve the public in the performance of their professional roles should not be deemed an invasion of the privacy rights of those observed, even if the reporter has posed as an "ordinary," nonmedia patron.

The courts have explicitly recognized this precept in the employer-employee context.[163] The courts have consistently held that a plaintiff's job-related conversations or communications are not private. An employee does not commit an intrusion if he records a meeting with his employer concerning his continued employment[164] or even if he records a dispute between himself and his employer.[165] Moreover, an employee has no cause of action for intrusion where his employer, as part of a company policy, monitors his personal calls.[166] In light of the courts' recognition of the impersonal nature of workplace interactions in this line of intrusion cases, the extension of this reasoning to the creation of the limited newsgathering privilege advocated here does not seem farfetched, especially in light of the important benefits that may flow from the press acting as participant-observer.

A final caveat is warranted. This privilege does not obviate the need for journalistic ethics. Cases will arise in which the newsperson must exercise judgment and restraint.[167] Journalists must bear the "important responsibility of keeping themselves honest, and fair."[168] Deception should not become an unanalyzed habit.[169] As Sissela Bok has convincingly argued, the reporter considering whether to use any type of deception should balance his "reasons for and against doing so";[170] he

162. *Id.* at 197.

163. *See, e.g.*, Barr v. Arco Chem. Corp., 529 F. Supp. 1277, 1283 (S.D. Tex. 1982) (holding that an employee's surreptitious recording of a conversation with his employer did not constitute actionable intrusion under either Pennsylvania or Texas law).

164. *Id.* at 1282-83.

165. Kemp v. Block, 607 F. Supp. 1262, 1264 (D. Nev. 1985).

166. Simmons v. Southwestern Bell Tel. Co., 452 F. Supp. 392, 394 (W.D. Okla. 1978).

167. *See* BOK, *supra* note 160, at 121. Recognizing that the use of subterfuge to gather news may involve difficult decisions, the British Press Council, a voluntary regulatory organization, recommends that subterfuge only be employed in cases where there is an overriding public interest. John Authers, *Sources Must Be Protected, Says Press Council*, FIN. TIMES LTD., Mar. 16, 1990, at 10.

168. J. William Fulbright, *Fulbright on the Press*, COLUM. JOURNALISM REV., Nov.-Dec. 1975, at 39, 43.

169. *See* MEYER, *supra* note 3, at 83 ("It is the presence or absence of reflection that is crucial [when determining the morality of a journalist's use of deception], not whether or not intrusive deceptions are ever made.").

170. BOK, *supra* note 160, at 121.

HeinOnline -- 71 Tex. L. Rev. 454 1992-1993

should try to "search for honest alternatives, or to distinguish among different forms and degrees of deception, or to consider whether some circumstances warrant[] it more than others."[171] While the newsgathering privilege advocated by this Note does not solve every ethical dilemma facing the investigative reporter, it does aid the reporter in facing his legal dilemma.

IV. Conclusion

Although sometimes reviled as muckrakers, investigative reporters play a valuable role in exposing societal ills and advancing reform. The success of investigative journalism is due, at least in part, to its use of novel newsgathering techniques. Yet some of these same techniques pose a threat to individual privacy. Current tort doctrine strikes an unsatisfactory balance between these competing interests. The qualified common-law privilege advocated by this Note, in contrast, would protect those newsgathering activities that promote the public welfare. Equally significantly, by sending a clear message to editors, media lawyers, and reporters about the scope of protected newsgathering activity, it would deter newsgathering aimed at individuals in their homes and in their private lives generally. The requirement that a newsgatherer demonstrate probable cause and the abuse-of-privilege doctrine provide additional safeguards against press abuses. Finally, while this Note has specifically addressed creation of the privilege to protect press use of subterfuge, the same analysis might be applied to other novel newsgathering techniques.

—Lyrissa C. Barnett

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171. *Id.*

HeinOnline -- 71 Tex. L. Rev. 456 1992-1993