

NOTE

First Amendment Protection for Newsgathering: Applying the Actual Malice Standard to Recovery of Damages for Intrusion

BY MERRIT JONES*

Courts are split over whether to allow plaintiffs who claim journalists have intruded upon their privacy¹ in gathering news to recover damages based on injury from publication of the intrusively gathered information. While the First Amendment restricts damages available for reputational torts,² the United States Supreme Court has held that such constitutional protection does not apply to intrusive

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1. The privacy tort of intrusion is defined as the intentional invasion “upon the solicitude or seclusion of another or his private concerns . . . if the intrusion would be highly offensive to a reasonable person.” RESTATEMENT (SECOND) OF TORTS § 652B (1977).

Intrusion is one of four privacy torts identified by William L. Prosser in his article, *Privacy*, 48 CAL. L. REV. 381, 389 (1960), and later adopted by the RESTATEMENT (SECOND) OF TORTS, § 652A-E (1977). The other privacy torts are public disclosure of private facts, publicity putting a person in a false light, and misappropriation of a person’s name or likeness. *See id.*

2. For example, in order to recover any amount of damages for libel, a public figure must show that the press published a false fact with actual malice, or knowledge of falsity or reckless disregard for truth or falsity. *See New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). A private individual only has to show actual malice in order to recover presumed or punitive damages. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-350 (1974).

newsgathering.³ The rationale is that intrusion claims do not directly involve protected speech.⁴ The California Supreme Court has justified this absence of constitutional protection against intrusion claims by stating that the intrusion tort “does not subject the press to liability for the contents of its publications.”⁵ In light of the nature of many intrusion claims, however, it seems likely that an increasing number of plaintiffs seek to recover damages from the publication of intrusively gathered information rather than the underlying intrusion.⁶ In fact, the Ninth Circuit Court of Appeal has explicitly held that such publication can enhance damages for intrusion without offending the First Amendment:

No interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired. Assessing damages for the additional emotional distress suffered by a plaintiff when the wrongfully acquired data are purveyed to the multitude chills intrusive acts. It does not chill freedom of expression guaranteed by the First Amendment.⁷

As a result, intrusion claims not only frequently succeed where reputational torts fail, they allow recovery of damages for the same types of injury, making them increasingly popular among a public fed up with the press.⁸

3. See *Branzburg v. Hayes*, 408 U.S. 665, 682-83 (1972) (plurality opinion).

4. See *Miller v. Brooks*, 472 S.E.2d 350, 354 (N.C. App. 1996) (“Unlike the privacy torts based on public disclosure and false light privacy, the intrusion tort does not implicate the First Amendment concerns addressed in [earlier cases].”).

5. See *Shulman v. Group W Productions, Inc.*, 18 Cal. 4th 200, 240 (1998). *Accord* *Marich v. QRZ Media*, 73 Cal. App. 4th 299, 317 (1999) (“The same deference is not due, however, when the issue is not the media’s right to publish or broadcast what they choose, but their right to intrude into secluded areas or conversations in the pursuit of publishable material.”).

6. See, e.g., *Miller v. National Broadcasting Co.*, 187 Cal. App. 3d 1463, 1488 (1986) (holding that a widow could recover, based on trespass and intrusion claims, for emotional distress caused by broadcast of her husband’s dying moments); *Sanders v. American Broadcasting Co.*, 20 Cal. 4th 907, 919 (1999) (holding that telephone psychic could recover for intrusion where he could be seen and overheard by co-workers).

7. *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971).

8. “Intrusion claims related to newsgathering appear to be the most active and troublesome area of litigation, principally because of the lesser degree of constitutional protection accorded to the newsgathering process.” Dennis F. Hernandez, *Libel & Newsgathering Litigation—Getting & Reporting the News: Current Developments in*

Allowing intrusion plaintiffs to recover for injury from publication, without meeting the heightened burden of proof required for torts based on publication, undermines constitutional protection for the press. The United States Supreme Court attempted to avoid such a result in *Hustler Magazine v. Falwell* when it held that a public figure could not recover for emotional distress, based on the magazine's publication of a parody of him, without satisfying the constitutional standards for libel.⁹ Recently, the Fourth Circuit Court of Appeal applied this principle in *Food Lion, Inc. v. Capital Cities/ABC, Inc.* to bar recovery, based on intrusive newsgathering methods, for damage to a grocery chain's reputation stemming from a report on its food-handling practices.¹⁰

This note argues that allowing intrusion plaintiffs to recover for damages from publication, without satisfying the heightened standard of proof required for reputational torts, circumvents First Amendment protection for the press. Part I traces the progression of cases holding that generally applicable laws can restrict newsgathering. Part II describes disparate cases, starting with *Hustler Magazine v. Falwell*, that hold that the First Amendment restricts recovery of any damages caused by publication, regardless of the nature of the claim. It suggests one way to reconcile these conflicting principles would be to require intrusion plaintiffs who seek to recover for injury from publication to show that journalists in the pursuit of newsworthy information acted with actual malice – knowledge or reckless disregard that their intrusion violated an objectively reasonable expectation of privacy.

I. Allowing Publication or Broadcast to Enhance Damages for Intrusive Newsgathering

A. Journalists Are Not Immune From Generally Applicable Laws Restricting Newsgathering

The United States Supreme Court has not definitively held whether the First Amendment provides any protection for newsgathering. The Court has held that where generally applicable laws¹¹ restrict newsgathering, the First Amendment does not privilege

Privacy Litigation, 523 PLI/PAT 263, 263 (1998).

9. 485 U.S. 46, 56 (1988).

10. *See Food Lion, Inc.*, 194 F.3d at 522-24.

11. Generally applicable laws are those that apply to the general public rather than target a particular group, such as the press, and whose purposes are unrelated to

the press.¹² For example, the Court held in *Branzburg v. Hayes* that journalists are not immune from the legal duty to testify before a grand jury concerning information they have gathered.¹³ The press receives “no special immunity from the application of general laws” and “no special privilege to invade the rights and liberties of others.”¹⁴ “[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”¹⁵ At the same time, however, the Court recognized in dicta that gathering news is essential to publishing it, conceding that “newsgathering is not without its First Amendment protections.”¹⁶ “[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”¹⁷ Justice Stewart apparently thought such protection should suffice to guide the majority to a different result about whether the reporter could be compelled to testify. In his dissent, he emphasized that “without freedom to acquire information the right to publish would be impermissibly compromised.”¹⁸

Though *Branzburg* is often cited for the proposition that the press lacks a newsgathering privilege, it did not concern newsgathering per se but whether a reporter must testify before a grand jury concerning confidential sources.¹⁹ The Court recognized its decision implicated newsgathering because it would affect the ability of reporters to get information by promising confidentiality to sources who might become the subjects of grand jury investigations.²⁰ The Court’s holding was narrow: By one vote, it refused to “grant

restriction of the press. See *Branzburg*, 408 U.S. at 682-83.

12. See *id.*

13. *Id.*

14. *Id.* at 683 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937), which held that the Associated Press was not exempt from complying with the National Labor Relations Act).

15. *Id.* at 684.

16. *Id.* at 681.

17. *Id.*

18. *Id.* at 728 (Stewart, J., dissenting).

19. *Id.* at 668. The case involved three challenges to grand jury subpoenas: Branzburg, a Louisville reporter, declined to testify before a state grand jury in order to protect people he had seen possessing marijuana or making hashish while investigating a story on drug activities. See *id.* In addition, a television reporter who had spent time at a Black Panthers headquarters and a New York Times reporter who interviewed Black Panther leaders also refused to appear before grand juries. See *id.*

20. See *id.*

newsmen a testimonial privilege that other citizens do not enjoy.”²¹ Although the Court had alluded in dicta to constitutional protection for newsgathering,²² it did not reveal when such protection might apply.

Subsequent decisions upheld the principle that generally applicable laws could restrict newsgathering. For example, the Court held in *Cohen v. Cowles Media Co.* that “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”²³ “[E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.”²⁴ *Cohen* concerned whether a plaintiff could recover damages for a reporter’s breach of a promise of confidentiality.²⁵ The majority cast *Cohen* as a newsgathering case because the reporter had promised his source anonymity in order to obtain information.²⁶ Four dissenting justices viewed the decision as impinging on the right to publish, however, because it punished the newspaper for printing the source’s name.²⁷ Justice Blackmun, joined by Justices Marshall and Souter, thought the actual malice standard should apply.²⁸ Justice Souter, joined by Justices Marshall, Blackmun and O’Connor, would have applied a balancing test to conclude that “the State’s interest in enforcing a newspaper’s promise of confidentiality [is] insufficient to outweigh the interest in unfettered publication of the information revealed.”²⁹ The substance of the dissents implies that the constitutional protection to which *Branzburg* alluded is particularly relevant when newsgathering claims serve as the basis for recovering punitive damages for intrusion.

Subsequent decisions refusing to privilege the press concerned access to information rather than recovery of damages for publishing it. In *Houchins v. KQED*, the Court upheld restrictions limiting prison access for both the general public and the press to a monthly

21. *Id.* at 690.

22. *See id.* at 681.

23. 501 U.S. 663, 669 (1991).

24. *Id.* at 670.

25. *Id.* at 665, 669.

26. *Id.* at 655.

27. *See id.* at 674-76 (Blackmun, J., dissenting); *id.* at 679 (Souter, J., dissenting).

28. *See id.* at 677 (Blackmun, J., dissenting).

29. *Id.* at 679 (Souter, J., dissenting).

guided tour and prohibiting all camera equipment on that tour.³⁰ “[Until] the political branches decree otherwise, [the media have] no right of special access to the [jail] different from or greater than that accorded the public generally,” Justice Burger wrote for a seven-member Court.³¹ “[There] is an undoubted right to gather news ‘from any source by means within the law,’ but that affords no basis for the claim that the First Amendment compels others—private persons or governments—to supply information.”³² Justice Stewart, however, took issue with the ban on camera equipment.³³ The First Amendment provides adequate justification for treating the press differently from the general public when laws of general applicability would preclude newsgathering, he argued in dissent.³⁴ “[E]qual access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public [T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.”³⁵

Similarly, decisions in *Pell v. Procunier*³⁶ and *Saxbe v. Washington Post*³⁷ upheld generally applicable bans on interviews of prisoners. The Court reiterated in *Pell* that although the First Amendment bars “government from interfering in any way with the free press,” it does not “require government to accord the press access to information not shared by members of the public generally.”³⁸ Justice Powell’s dissent in *Saxbe*, however, recognized that practical differences in the way the press and the public gather information necessitates preserving rights of access under both the Free Press and the Free Speech clauses.³⁹ He insisted that an absolute ban on interviews “impermissibly restrains the ability of the press to perform constitutionally established functions” of reporting on

30. 438 U.S. 1, 15 (1978).

31. *Id.*

32. *Id.* at 13 (quoting *Branzburg v. Hayes*, 408 U.S. at 665, 681-82 (1972)).

33. *See id.* at 16 (Stewart, J., dissenting).

34. *See id.*

35. *Id.*

36. 417 U.S. 817, 834 (1974).

37. 417 U.S. 843, 849 (1974).

38. 417 U.S. at 834.

39. *Id.* at 857.

government conduct.⁴⁰ “I cannot follow the Court in concluding that any government restriction on press access to information, so long as it is nondiscriminatory, falls outside the purview of First Amendment concern,” he wrote.⁴¹ “At some point official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that it is both appropriate and necessary to require the Government to justify such regulations in terms more compelling than discretionary authority and administrative convenience.”⁴²

When a majority of the Court eventually applied the elusive constitutional protection for newsgathering alluded to in *Branzburg*, it did not recognize a press privilege but a general public right of access.⁴³ In *Richmond Newspapers, Inc. v. Virginia*, the Court held that the public had a right to attend criminal trials.⁴⁴ The decision was a turning point for newsgathering jurisprudence: It recognized that a law of general application may impermissibly restrict access to information in violation of the First Amendment, and it reclaimed access not just for the press but for the public at large. In a concurring opinion, Justice Stevens characterized the decision as recognizing for the first time a broad First Amendment right of access to newsworthy matter.⁴⁵ Justice Brennan wrote in another concurring opinion that the First Amendment “has a structural role to play in securing and fostering our republican system of self government The structural model . . . entails solicitude not only for communication itself, but for the indispensable conditions of meaningful communication.”⁴⁶ Subsequent decisions concerning access to information expanded this view that the First Amendment protects all activities essential to operation of a free press. For example, in *Globe Newspaper Co. v. Superior Court*, the Court struck down a Massachusetts law excluding both the press and the general public from a courtroom during a minor’s testimony about alleged sex offenses.⁴⁷ It held that the “First Amendment is . . . broad enough to encompass those rights that, while not unambiguously enumerated in

40. *Id.*

41. *Id.*

42. *Id.*

43. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

44. *Id.*

45. See *id.* at 582 (Stevens, J., concurring).

46. *Id.* at 587 (Brennan, J., concurring).

47. 457 U.S. 596, 604 (1982).

the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.”⁴⁸

Thus, the Court’s jurisprudence concerning constitutional protection for newsgathering can be summarized in the following way: The press is not immune from liability for violating generally applicable laws, but generally applicable laws must not prevent the press from performing its essential functions. As will be discussed,⁴⁹ the Court has further held that where laws create liability based on publication, the First Amendment requires certain defenses in order to offset the potential chilling effect on those functions. The following lower court decisions, however, justified recovery of publication damages for intrusive newsgathering on the absence of constitutional protection for newsgathering to justify recovery of publication damages, without considering that in doing so, they were actually punishing publication and circumventing its constitutionally required protections.

B. Does Lack of Constitutional Protection for Newsgathering Justify Recovery of Punitive damages for intrusion or Broadcast?

If the First Amendment does not protect newsgathering, some courts have reasoned that plaintiffs can recover for the publication or broadcast of intrusively gathered information without meeting the constitutional burden for publication torts. In California, *Fairfield v. American Photocopy Equipment Company* set the precedent for recovery of punitive damages for intrusion in a privacy action.⁵⁰ *Fairfield* concerned the privacy tort of appropriation, but it laid the foundation for recovery of publication damages for violation of other privacy torts. The appellate court in that case held that damages for invasion of privacy should include mental suffering and anguish from publication:

“The gravamen of the action here charged is the injury to the feelings of the plaintiff, the mental anguish and distress *caused by the publication*. In an action of this character, special damages need not be charged or proven, and if the proof disclosed a wrongful invasion of the right of privacy, substantial damages for mental anguish alone may be recovered.”⁵¹

48. *Id.* The Court applied strict scrutiny to its analysis of the statute and held that a more narrowly tailored law would allow case-by-case determinations of whether respect for a minor’s privacy merited closure.

49. *See* Part II.

50. 138 Cal. App. 2d 82, 89 (1955).

51. *Id.* (quoting *Reed v. Real Detective Pub. Co., Inc.*, 63 Ariz. 294, 305-06 (1945)).

Perhaps it was logical for the *Fairfield* court to award punitive damages for intrusion, because tortious appropriation does not exist without it.⁵² Subsequent courts, however, applied its holding to the tort of intrusion, even though intrusion does not require publication.⁵³

For example, the Ninth Circuit Court of Appeals expressly allowed publication to enhance damages for intrusive newsgathering.⁵⁴ In *Dietemann v. Time, Inc.*, it upheld a damage award for injury to the plaintiff's "feelings and peace of mind" after Life Magazine surreptitiously photographed him in his home.⁵⁵ Police had suspected Mr. Dietemann of practicing medicine without a license for attempting to heal people with clay, minerals and herbs.⁵⁶ Acting in conjunction with police, two Life employees posed as patients to gain access to Mr. Dietemann's home and photographed him using a hidden camera.⁵⁷ One of the employees said she had a lump in her breast, and Mr. Dietemann concluded the lump was from rancid butter eaten 11 years, 9 months and 7 days earlier.⁵⁸ Life Magazine ran an article called "Crackdown on Quackery" that depicted Mr. Dietemann as a quack and included two photographs, one of which showed Mr. Dietemann with his hand on the upper portion of the reporter's breast "while he was looking at some gadgets and holding what appeared to be a wand."⁵⁹ Mr. Dietemann sued for invasion of privacy, and the district court awarded him \$1,000 for injury to his "feelings and peace of mind."⁶⁰

On appeal, the Ninth Circuit held the First Amendment did not immunize the defendant from liability for violating the plaintiff's privacy in the course of gathering news.⁶¹ "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

52. See RESTATEMENT (SECOND) OF TORTS § 652C (1977).

53. "Despite some variations in the description and the labels applied to the tort [of invasion of privacy], there is agreement that publication is not a necessary element of the tort, that the existence of a technical trespass is immaterial, and that proof of special damages is not required." *Dietemann v. Time, Inc.*, 449 F.2d 245, 247 (9th Cir. 1971).

54. See *id.* at 250.

55. *Id.* at 245, 250.

56. See *id.*

57. See *id.* at 246.

58. See *id.*

59. *Id.* at 245-46.

60. *Id.* at 247.

61. *Id.* at 249.

electronic means into the precincts of another's home or office."⁶² The court then extended that rationale to allow Mr. Dietemann to recover for injury from publication of the photographs.⁶³ "No interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired. Assessing damages for the additional emotional distress suffered by a plaintiff when the wrongfully acquired data are purveyed to the multitude chills intrusive acts. It does not chill freedom of expression guaranteed by the First Amendment."⁶⁴

Drawing on this precedent, a California appellate court applied the same rationale to allow recovery of damages from broadcast in a trespass claim.⁶⁵ In *Miller v. National Broadcasting Co.*, the court let the plaintiff recover all damages flowing from NBC's trespass into her home, including her emotional distress from its broadcast of her husband's dying moments.⁶⁶ In that case, an NBC news crew had accompanied paramedics to the plaintiff's home and videotaped, without her consent, unsuccessful efforts to resuscitate her husband after he suffered a heart attack.⁶⁷ The plaintiff sued NBC for trespass, intentional and negligent infliction of emotional distress, and invasion of privacy after she saw a news report including the video.⁶⁸ On appeal of a grant of summary judgment for NBC, the appellate court held that she had stated a cause of action for trespass, invasion of privacy and intentional infliction of emotional distress.⁶⁹ It further held that she could recover for all consequences flowing from trespass and intrusion,⁷⁰ including for "her emotional distress when NBC broadcast her husband's dying moments."⁷¹ Both *Dietemann* and *Miller* allowed the plaintiffs to recover for harm from publication or broadcast. Both decisions involved press intrusions into the home, where the plaintiffs unquestionably had reasonable expectations of privacy, as required for tortious intrusion. The obvious privacy

62. *Id.*

63. *See id.* at 250.

64. *Id.*

65. *See Miller v. National Broad. Co.*, 187 Cal. App. 3d 1463, 1481 (1986).

66. *Id.*

67. *See id.* at 1469-70, 1474-75.

68. *See id.* at 1470.

69. *See id.* at 1481-88.

70. *See id.* at 1481, 1484.

71. *Id.* at 1481.

expectation and the highly offensive nature of intrusions into the home, however, make it difficult to discern whether damages in such cases stem from the actual intrusion or from a later publication or broadcast.

C. Where Privacy Expectations Are Uncertain, Damages Likely Flow from Publication Rather Than Intrusion

More recently, the California Supreme Court has considered several cases in which it was not clear whether the plaintiffs had the requisite reasonable expectation of privacy for tortious intrusion.⁷² For example, in *Shulman v. Group W Productions, Inc.*, the plaintiffs sued for invasion of privacy after a camera crew videotaped and broadcast their extrication from a car crash and helicopter rescue.⁷³ On appeal of a grant of summary judgment for the defendant, the Court held that triable issues of fact concerning whether the plaintiffs had an objectively reasonable expectation of privacy in their conversations with rescue workers while being extricated, and in their images and conversations while in the helicopter, barred summary judgment.⁷⁴

Similarly, in *Sanders v. American Broadcasting Companies, Inc.*, a telephone psychic sued ABC for intrusion, among other claims, after an undercover reporter recorded their workplace conversations using a hidden video camera and included a short segment in an investigative report.⁷⁵ The jury found ABC liable and awarded Mark

72. See *Shulman v. Group W Prod., Inc.*, 18 Cal. 4th 200 (1998); *Sanders v. American Broad. Cos.*, 20 Cal. 4th 907 (1999).

73. 18 Cal. 4th at 210-12.

74. See *id.* at 233, 235.

75. *Id.* at 911-12. In addition to alleging intrusion, the plaintiff alleged violation of California Penal Code section 632 against secret recording of a confidential communication. See *id.* at 912. The statute's definition of confidential communication excludes communications made in circumstances "in which the parties to the communication may reasonably expect that the conversation may be overheard or recorded." § 632(c) (West 1999). The conversations in question took place at a cubicle in a large room filled with 100 or more such cubicles. See *Sanders*, 20 Cal. 4th at 912. During one of the conversations, a passing co-worker joined in. See *id.* During the other conversation, a co-worker interrupted to offer a snack. See *id.* In a special verdict form, the jury found that the plaintiff did not meet section 632's required expectation of confidentiality in these conversations. See *id.* Based on this verdict, the trial court ordered judgment entered for defendants on the section 632 cause of action. See *id.* ABC moved for summary judgment based on its argument that the plaintiff's expectation that others could hear his recorded conversations barred finding tortious intrusion, which requires a reasonable expectation of privacy. See *id.* The court denied ABC's motion for summary judgment, and the jury found ABC liable for invasion of privacy by intrusion. See *id.*

Sanders \$335,000 in compensatory and \$300,000 in punitive damages.⁷⁶ The appellate court reversed, holding that Mr. Sanders could not expect his conversations at a workplace cubicle to be private when coworkers could overhear them.⁷⁷ It stated that his real argument was that he had a right not to be videotaped without his consent, even when he was not in private. On appeal, the California Supreme Court held that the fact that coworkers might overhear his conversations did not mean Mr. Sanders lacked any expectation of privacy.⁷⁸ It explained that “mass media videotaping may constitute an intrusion even when the events and communications recorded were visible and audible to some limited set of observers at the time they occurred.”⁷⁹ It held that “the possibility of being overheard by coworkers does not, as a matter of law, render unreasonable an employee’s expectation that his or her interactions within a nonpublic workplace will not be videotaped in secret by a journalist.”⁸⁰

While the Court did not explicitly address the propriety of publication damages in *Shulman* or *Sanders*, which both concerned whether the plaintiffs had enough of a privacy expectation to support liability for intrusion, it is likely that any injury resulted from the embarrassment of broadcast or publication rather than the intrusiveness of a journalist’s presence. In fact, in another lawsuit arising out of the same facts as in *Sanders*, the plaintiffs admitted in depositions that their damages were caused solely by the ABC broadcast rather than the intrusion.⁸¹ “In deposition after deposition, Plaintiffs state in frank terms that their damages were caused solely by the ABC broadcast and by nothing else.”⁸² The court barred the

76. *See id.* at 912-13.

77. *See id.* at 912. The appellate court reasoned that the jury’s special verdict that the plaintiff lacked a reasonable expectation of confidentiality for purposes of section 632 barred finding ABC liable for the tort of intrusion. *See id.* at 913.

78. *See id.* at 922. The Court held that the jury’s verdict that the conversation was not confidential for purposes of section 632 did not bar finding a privacy interest sufficient to support the intrusion claim. *See id.* at 913-14.

79. *Id.* at 914.

80. *Id.* at 919. The Court explicitly avoided holding that employees have a per se expectation of privacy in the workplace. *See id.* The Court also did not decide whether the intrusion in this particular case was offensive enough to trigger liability. *See id.* In fact, it suggested that the offensiveness prong of the intrusion tort may afford a newsworthiness defense to the media, who could negate an intrusion’s offensiveness by arguing that it was “justified by the legitimate motive of gathering the news.”

81. *See Sussman v. American Broad. Cos.*, 971 F. Supp. 432, 434 (C.D. Cal. 1997) (citing Dec. of Steven M. Perry).

82. *Id.*

plaintiffs' recovery of damages from the broadcast, not out of deference for First Amendment protection but because all damages arising from the ABC broadcast were time-barred by the Uniform Publication Act.⁸³ In an attempt to avoid summary judgment for ABC, the plaintiffs submitted new declarations, "created solely for the purpose of [the summary judgment] motion," alleging injury from the intrusion.⁸⁴ The court rejected their validity, recognizing that "[i]n these declarations of convenience, Plaintiffs attempt to salvage a cause of action that they have all but admitted do [sic] not exist."⁸⁵ The fact that damages stemmed from the broadcast rather than the intrusion is not surprising, considering that the courts disagreed over whether the plaintiffs could expect privacy in the workplace setting at issue. It is precisely in such cases where constitutional hurdles to publication damages are most important: Where courts disagree, journalists must guess about whether an undercover investigation will subject them to liability. As technological advances force us to redefine our expectations of privacy, such dilemmas will be more and more commonplace. Without a breathing space in which to make such decisions, the result will be a chilling effect on a free press.

II. Barring Recovery of Publication Damages Where Intrusion Plaintiffs Fail to Clear Constitutional Hurdles

A. The First Amendment Creates Defenses to Libel and Defamation Because They Punish Publication

Laws that punish publication directly implicate First Amendment freedom of the press,⁸⁶ not as a general public right but as protection for an institution. In such cases, constitutional protection may manifest itself in a variety of forms, from requiring malicious intent for libel of a public figure⁸⁷ to allowing a newsworthiness defense for publication of private facts.⁸⁸ For example, the Supreme Court in *New York Times v. Sullivan* reversed the Alabama Supreme Court decision affirming liability for an ad,⁸⁹ which criticized those who used

83. *See id.* at 434.

84. *Id.*

85. *Id.* (footnote omitted).

86. *See* U.S. CONST. amend. I. The First Amendment states, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

87. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 278 (1964).

88. *See, e.g., Cox Broad. Co. v. Cohn*, 420 U.S. 469, 491 (1975).

89. Headed "Heed Their Rising Voices," the ad said in part: "In Montgomery, Ala.,

violence against black demonstrators, on the grounds that it libeled Montgomery Police Commissioner L. B. Sullivan.⁹⁰ The ad contained factual inaccuracies,⁹¹ making the only issue under state law whether it identified and disparaged Sullivan.⁹² The Court held that in a world where absolute truth is sometimes impossible to discern under deadline, even libel must receive some constitutional protection in order to avoid paralyzing the press. Any other conclusion would “shackle the First Amendment.”⁹³

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection.⁹⁴

Upon this platform, the Court held that the First Amendment excuses some falsehoods in the heat of debate over the conduct of public officials. Justice Brennan concluded, quoting James Madison,

after students sang ‘My Country, ‘tis of Thee’ on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear gas ringed the Alabama State College campus. When the entire student body protested to state authorities by refusing to register, their dining hall was padlocked in an attempt to starve them into submission . . .

Again and again, the Southern violators have answered Dr. [Martin Luther] King’s peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for ‘speeding,’ ‘loitering,’ and similar ‘offenses.’ And now they have charged him with ‘perjury,’—a felony under which they could imprison him for 10 years.” *New York Times*, 376 U.S. at 256-58.

90. *Id.* at 278.

91. Witnesses testified that the students had not sung “America” but “The Star-Spangled Banner.” Only nine students were expelled, but not for leading the demonstration at the Capitol. Only part of the student body had protested the expulsions, but by boycotting class instead of refusing to register. The campus dining hall was not padlocked at any time. Police were deployed near the campus, but at no time did they ring it. Dr. King had been arrested four times, not seven. Although he said he had been assaulted when he was arrested for loitering outside a courtroom, one of the officers involved denied that there had been an assault. Dr. King’s house had been bombed, but no evidence ever implicated police. Dr. King was indicted on two counts of perjury, for which the maximum penalty was five years, not ten, but he had been acquitted on both charges. *See id.* at 258-59.

92. Sullivan argued that the ad’s general references to “police” pointed a finger at him as supervisor of the police force. Six witnesses testified that they had read the ad and concluded it was referring to Sullivan in a derogatory way. *See id.* at 258.

93. *Id.* at 266.

94. *Id.* at 270.

that “some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press;” “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive.’”⁹⁵ Thus, the Court held that public officials alleging libel of public figures must prove that the press acted with malicious intent—knowledge of falsity or reckless disregard for truth or falsity.⁹⁶

B. The First Amendment Allows a Newsworthiness Defense for the Privacy Tort of Publication of Private Facts

In the context of privacy torts, the First Amendment affords journalists a defense where publication triggers liability. The United States Supreme Court has refused to find liability for publication of private but newsworthy true facts.⁹⁷ Such a defense applied in *Cox Broadcasting Co. v. Cohn*, where a rape victim sued a television station for broadcasting her name.⁹⁸ In that case, the Court held that the press was not liable for the publication of accurate information obtained from open court records.⁹⁹ In another case involving publication of a rape victim’s name, the Court affirmed its aversion for finding the media liable for publicizing private but newsworthy information.¹⁰⁰ In *Florida Star v. B.J.F.*, a rape victim sued a newspaper that mistakenly published her name in a crime report.¹⁰¹ The newspaper, which had a nondisclosure policy, obtained the victim’s name from a mistakenly released police report.¹⁰² A man called B.J.F.’s mother and said he would again rape B.J.F., who moved and sought psychiatric counseling.¹⁰³ The Court found that the newspaper was not liable because where the press “publishes truthful

95. *Id.* at 271.

96. *See id.* at 279.

97. *See, e.g., Cox Broad. Co. v. Cohn*, 420 U.S. 469, 491 (1975).

98. *Id.* at 469.

99. *See id.* at 491.

100. *See Florida Star v. B.J.F.*, 491 U.S. 524, 550 (1989) (White, J. dissenting) (arguing that the Court’s decision “obliterate[s] one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts”).

101. *Id.* at 533.

102. *See id.* The Court found that B.J.F.’s name was lawfully obtained despite the fact that the police department’s release of the information violated a Florida statute, and despite the fact that the newspaper violated both the Florida statute and its own internal policies by publishing the information. *See id.* at 533, 536.

103. *See id.* at 533.

information which it lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.”¹⁰⁴

While the Court has refused to find liability for publication of newsworthy true facts, it has never answered definitively whether the First Amendment protects publication of invasively gathered information. In *Cox*, for example, the Court declined to answer whether “the State may ever define and protect an area of privacy free from unwanted publicity.”¹⁰⁵ Likewise, in *Florida Star*, the Court avoided deciding whether truthful publication is always constitutionally protected and instead barred tort liability under the facts of the case.¹⁰⁶

C. *Hustler Magazine v. Falwell* Bars Publication Damages for Violation of Generally Applicable Laws

The United States Supreme Court has held that the First Amendment bars recovering publication damages even where it does not create immunity against the underlying tort.¹⁰⁷ In *Hustler Magazine v. Falwell*, the magazine ran a parody of a popular liquor advertisement.¹⁰⁸ The parody depicted the Reverend Jerry Falwell’s first sexual experience as being “a drunken incestuous rendezvous with his mother in an outhouse.”¹⁰⁹ Falwell sued the magazine and its publisher, Larry Flynt, seeking damages for libel, invasion of privacy and intentional infliction of emotional distress.¹¹⁰ At the close of the evidence, the district court granted Hustler’s motion for a directed verdict on the privacy claim.¹¹¹ The jury found against Falwell on the libel claim, which requires a false statement of fact, because no reasonable person would understand the parody as describing actual facts about Falwell or actual events in which he participated.¹¹² The jury, however, found in Falwell’s favor on the emotional distress claim and awarded compensatory damages of \$100,000 and punitive

104. *Id.* at 554.

105. 420 U.S. at 491.

106. 491 U.S. at 541.

107. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

108. *Id.* at 48.

109. *Id.*

110. *See id.* at 48-49.

111. *See id.* at 49.

112. *See id.*

damages of \$50,000, and the appellate court affirmed.¹¹³ It was obvious that Falwell's emotional distress claim sought "damages for emotional harm caused by the publication of an ad parody offensive to him."¹¹⁴ The issue before the Supreme Court was whether Falwell had to satisfy the heightened burden of proof set forth in *New York Times* in order to recover for emotional distress stemming from publication.¹¹⁵ The Supreme Court first held that the ad parody was protected expression.¹¹⁶ It then held that the constitutional libel standard applied to recovery for emotional distress from publication:

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.¹¹⁷

The Court's extension of First Amendment protection where damages flow from publication provides a basis for lower courts to limit recovery of damages for intrusive newsgathering, despite the absence of explicit constitutional protection for newsgathering.

D. Lower Courts Have Held Constitutional Protection for Publication Restricts Damages for Intrusive Newsgathering

Lower courts have applied the constitutional restriction on recovery of publication damages to a variety of non-publication torts, from intrusion and trespass to tortious interference with prospective business advantage. In each of those cases, what triggered First Amendment protection was the fact that without publication or broadcast, the plaintiffs could not make a sufficient case for damages. For example, in *Costlow v. Cusimano*, the defendant photographed and distributed pictures of the plaintiffs' children after they had suffocated in a refrigerator.¹¹⁸ The plaintiffs sued for invasion of privacy, intentional infliction of mental distress, and trespass.¹¹⁹ The court applied a newsworthiness defense to the claims for invasion of privacy and intentional infliction of emotional distress: It barred

113. *See id.*

114. *Id.* at 50.

115. *See id.*

116. *See id.* at 51-52.

117. *Id.* at 56.

118. 311 N.Y.S.2d 92, 93 (1970).

119. *See id.* at 94.

recovery for such claims because the subject matter was “within the area of legitimate public interest and publication and exhibition of the story and photographs of the incident accurately portrayed the events.”¹²⁰ The court also denied recovery, based on their trespass claim, of “damages for injury to reputation and for emotional disturbance.”¹²¹ In doing so, it rejected the plaintiffs’ theory that such damages were a natural consequence of the trespass.¹²² It held that “[s]ince the tort of trespass is designed to protect interest in possession of property, damages for trespass are limited consequences flowing from the interference with possession and not for separable acts more properly allocated under other categories of liability.”¹²³

The Seventh Circuit Court of Appeals also rejected the argument that injury to reputation resulted from intrusive newsgathering rather than a subsequent broadcast. In *Desnick v. American Broadcasting Companies, Inc.*, ABC sent test patients to surreptitiously photograph their conversations with ophthalmologists alleged to have prescribed unnecessary cataract surgeries.¹²⁴ The ophthalmologists sued ABC for defamation, trespass, invasion of privacy, illegal wiretapping and fraud.¹²⁵ On appeal of dismissal for failure to state a claim, the Seventh Circuit affirmed dismissal of the trespass claim because ABC’s test patients had only entered clinics open to the public and videotaped their own conversations with the ophthalmologists; thus, the court held “there was no invasion . . . of any of the specific interests that the tort of privacy seeks to protect.”¹²⁶ The court barred the privacy claims because the recorded conversations did not reveal private facts and were recorded by participants.¹²⁷ Likewise, it recognized that the federal wiretapping statute allows one party to record a conversation with impunity, unless his purpose is to commit a crime or a tort.¹²⁸ The Court further held that ABC’s purpose was exposure of misconduct, which is not a crime or a tort, “even if the

120. *Id.*

121. *Id.* at 97.

122. *See id.*

123. *Id.*

124. 44 F.3d 1345, 1347 (7th Cir. 1995).

125. *See id.*

126. *Id.* at 1352.

127. *See id.* at 1353.

128. *See id.* (citing 18 U.S.C. § 211(2)(d) (West 2000)).

program as it was eventually broadcast was tortious.”¹²⁹ Finally, the Court rejected the fraud claim, because plaintiffs had failed to show a scheme to defraud as required under state law.¹³⁰ In closing, the Court noted that claims targeting the program’s production, as opposed to its content, could not entirely skirt First Amendment protection:

Today’s “tabloid” style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market constitutes—although it is often shrill, one-sided, and offensive, and sometimes defamatory—an important part of that market. It is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them regardless of the name of the tort, and, we add, regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast.¹³¹

If constitutional protection applies to newsgathering claims where damage flows from publication, then it certainly applies to torts besides libel arising from publication. A New York district court applied such protection in *Aequitron Medical, Inc. v. CBS, Inc.*¹³²

In that case, CBS broadcast a report on allegedly defective baby heart and respiration monitors produced by the plaintiffs, who sued for defamation and tortious interference with prospective business advantage, among other claims.¹³³ The court dismissed the defamation claim for lack of personal jurisdiction.¹³⁴ Concerning the claim of tortious interference with prospective business advantage, it applied the “actual malice” and “clear and convincing evidence” standards because the claim arose from allegedly defamatory conduct.¹³⁵ Otherwise, every defamation plaintiff could raise a claim

129. *Id.* at 1353. The Court had held that the defendants had stated a claim for defamation, so the broadcast might yet prove tortious. *Id.* at 1349-51.

130. *See id.* at 1354-55.

131. *Id.* at 1355 (footnotes omitted).

132. 964 F. Supp. 704, 709-718 (S.D.N.Y. 1997).

133. *See id.* at 708.

134. *See id.*

135. *Id.* at 709-18. Although only a public figure or official suing for libel must prove actual malice, the court recognized that “[u]nder Minnesota law, the ‘actual malice’ standard also applies when a corporate plaintiff sues a media defendant, if the defamatory material ‘concerns matters of legitimate public interest in the geographic area in which the defamatory material is published, either because of the nature of the business conducted or because the public has an especially strong interest in the investigation at issue.’” *Id.* at 711 (quoting *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 487-88 (Minn. 1985) (footnotes omitted), *rev’d on other grounds*, 390 N.W.2d 437 (Minn. Ct. App. 1986).

of wrongful interference, and thereby make an end run around the constitutional limitations placed on the law of defamation.¹³⁶ The Court then analyzed each of the allegedly defamatory statements and held either that they were substantially true, or that the plaintiff could not show that they were made with actual malice.¹³⁷

Most recently, the Seventh Circuit held the First Amendment bars recovery for injury to reputation from broadcast of information obtained through breach of a duty of loyalty.¹³⁸ In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, two ABC reporters used false resumes to get jobs at Food Lion, Inc. supermarkets and then secretly videotaped unwholesome food handling practices.¹³⁹ Food Lion's suit against ABC and the reporters did not claim defamation but instead focused on how the information was gathered: Food Lion sued for fraud, breach of duty of loyalty, trespass, and unfair trade practices.¹⁴⁰ Food Lion won at trial, and the jury awarded it \$1,400 in compensatory damages on its fraud claim and \$1 each on its duty of loyalty and trespass claims.¹⁴¹ The jury then awarded Food Lion \$5,545,750 in punitive damages.¹⁴² The district court held that such punitive damages were excessive, and Food Lion accepted a remittitur to \$315,000.¹⁴³ ABC appealed the district court's denial of its motion for judgment as a matter of law, and Food Lion appealed the court's ruling that barred its recovery of publication damages.¹⁴⁴

The Seventh Circuit reversed the judgment that ABC committed fraud and unfair trade practices.¹⁴⁵ It held that Food Lion failed to show reasonable reliance on the reporters' misrepresentations: Food Lion could not recover administrative costs from training the reporters because it did not have any guarantee that they would work for a set period of time.¹⁴⁶ Further, it could not recover the wages it had paid the reporters because it had not paid them on reliance of the

136. *See Aequitron*, 964 F. Supp. at 709.

137. *See id.* at 712-18.

138. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522-24 (7th Cir. 1999).

139. *Id.* at 510.

140. *See id.* at 511.

141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.*

145. *See id.* at 514.

146. *See id.* at 513-14.

misrepresentations but for the work they performed.¹⁴⁷ The court therefore reversed the award of \$1,400 in compensatory damages against ABC.

Next, the court considered the claim that the ABC reporters breached their duty of loyalty to Food Lion.¹⁴⁸ It looked at the following traditional bases for finding a breach of such duty: (1) the employee competes directly with her employer, (2) the employee misappropriates her employer's profits, property or business opportunities, or (3) the employee breaches her employer's confidences.¹⁴⁹ Based on these grounds, it extrapolated that the reporters' conduct verged "on the kind of employee activity that has already been determined to be tortious" because "the reporters—in promoting the interests of one master, ABC, to the detriment of a second, Food Lion—committed the tort of disloyalty against Food Lion."¹⁵⁰ "The interests of the employer (ABC) to whom Dale and Barnett gave complete loyalty were adverse to the interests of Food Lion, the employer to whom they were unfaithful. ABC and Food Lion were not business competitors, but they were adverse in a fundamental way."¹⁵¹

The court then affirmed the district court's judgment for Food Lion on the trespass claim. It refused to base its holding on the fact that the reporters had gained access to food handling areas of the supermarket through misrepresentation, recognizing that even consent gained through misrepresentation is sometimes sufficient.¹⁵² Otherwise, "a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretended to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who in an effort to bargain down an automobile dealer falsely claimed to be able to buy the same car elsewhere at a lower price would be a trespasser in a dealer's showroom."¹⁵³ Rather, the court held that the reporters' breach of duty of loyalty vitiated its consent to enter Food

147. *See id.*

148. *See id.* at 515-16.

149. *See id.*

150. *Id.* at 516.

151. *Id.* at 519.

152. *See id.* at 517-18 (citing *Desnick v. American Broad. Cos.*, 44 F.3d 1345, 1351-52 (7th Cir. 1995)).

153. *Id.* at 517.

Lions' non-public food handling areas.¹⁵⁴ "The breach of duty of loyalty—triggered by the filming in non-public areas, which as adverse to Food Lion—was a wrongful act in excess of [the reporters'] authority to enter Food Lion's premises as employees."¹⁵⁵

The court rejected ABC's argument that Food Lion's claims were subject to First Amendment scrutiny.¹⁵⁶ It recognized that "there are 'First Amendment interests in newsgathering'"¹⁵⁷ and that "without some protection for seeking out the news, freedom of the press could be eviscerated."¹⁵⁸ However, it relied on the Supreme Court's rule that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news" to hold that the First Amendment does not bar holding ABC liable for breach of duty of loyalty or trespass.¹⁵⁹ It therefore affirmed the damages award against ABC for these torts in the amount of \$2.¹⁶⁰

Finally, the court considered Food Lion's appeal of the district court's refusal to let it recover, based on non-reputational tort claims, for injury to its reputation from the broadcast.¹⁶¹ Food Lion sought publication damages for loss of goodwill and lost sales following broadcast of the report.¹⁶² The district court had reasoned that such damages resulted from Food Lion's food handling practices, "not the method by which they were recorded or published."¹⁶³ The court thus held that the non-reputational torts on which Food Lion based its claim did not proximately cause the publication damages.¹⁶⁴ The Seventh Circuit also barred Food Lion's recovery of publication damages, but on other grounds. The court held that "an overriding (and settled) First Amendment principle precludes the award of publication damages in this case."¹⁶⁵ Namely, "Food Lion attempted to avoid the First Amendment limitations on defamation claims by

154. *See id.* at 518-19.

155. *Id.* at 518.

156. *See id.* at 520-21.

157. *Id.* (citing *In re Shain*, 978 F.2d 850, 855 (4th Cir. 1992) (Wilkinson J., concurring)).

158. *Id.* (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

159. *Id.*

160. *See id.* at 522.

161. *See id.* at 522-24.

162. *See id.* at 522.

163. *Id.*

164. *See id.*

165. *Id.* at 522-24.

seeking publication damages under non-reputational tort claims, while holding to the normal state law proof standards for these torts.”¹⁶⁶ The court held that such a result was precluded by the United States Supreme Court’s holding in *Hustler Magazine v. Falwell*.¹⁶⁷ Relying on that decision, the court reiterated that “when a public figure plaintiff uses a law to seek damages resulting from speech covered by the First Amendment, the plaintiff must satisfy the proof standard of *New York Times*.”¹⁶⁸

The court pointed to the fact that Food Lion acknowledged it did not sue for defamation because it could not prove ABC acted with actual malice.¹⁶⁹ In other words, Food Lion could not prove that ABC had made a false statement of fact with knowledge that it was false or reckless disregard for whether it was true or false.¹⁷⁰ “What Food Lion sought to do, then, was to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim. We believe that such an end-run around the First Amendment strictures is foreclosed by *Hustler*.”¹⁷¹ Thus, the Seventh Circuit acknowledged that the First Amendment protects against punishing publication, even where the underlying claim allegedly targets intrusive newsgathering.

Conclusion: Courts Should Apply the Actual Malice Standard to Recovery of Publication Damages for Intrusive Newsgathering

Decisions that allow recovery of punitive damages for intrusion or broadcast, based on intrusive newsgathering, allow plaintiffs to circumvent constitutional hurdles to liability based on publication. Such decisions often cite United States Supreme Court precedent that the First Amendment does not grant journalists immunity against generally applicable laws as justification for recovery of publication damages in intrusive newsgathering cases. They fail, however, to reconcile ambiguous protection for newsgathering with explicit protection for publication. In contrast, decisions imposing a heightened burden of proof for recovery of publication damages,

166. *Id.* at 522.

167. *Id.* (citing *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)).

168. *Id.*

169. *See id.* (citing Appellee’s Opening Br. at 44).

170. *See id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

171. *Id.*

regardless of the nature of the underlying claim, preserve constitutional protection for publication. Thus, this note advocates applying the actual malice and clear and convincing evidence standards to restrict recovery of publication damages for intrusive newsgathering.