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"Get That Camera Out of My Face!" An Examination of the Viability of Suing "Tabloid Television" for Invasion of Privacy

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COMMENT

“Get That Camera Out of My Face!” An Examination of the Viability of Suing “Tabloid Television” for Invasion of Privacy

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I. INTRODUCTION

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right ‘to be let alone.’ Instantaneous photographs and newspaper enterprises have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’¹

A suicidal teenager puts an emergency call into 911. When the police arrive, they are accompanied by the camera crew of a television tabloid show following the real life events of police officers. Police arrive at a rock star’s house accompanied by a camera crew of NBC’s

1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

Hard Copy. Employees at a psychic hotline business have their private conversations secretly recorded and videotaped by a hidden camera located in the black felt hat of an undercover reporter working for a news magazine show.

These scenarios are based on actual lawsuits brought by plaintiffs against "tabloid television"² programs.³ In most of these cases, plaintiffs sued tabloid television defendants for intentional infliction of emotional distress⁴ or invasion of privacy.⁵ Although an invasion of privacy cause of action seems the most direct response against the intrusions of tabloid television, uncertainty persists whether plaintiffs can recover using this approach. Tabloid television producers defend against such lawsuits by waving the First Amendment flag, arguing that these lawsuits are "precluded by [their] constitutionally recognized and protected First Amendment right to gather news."⁶ Media defendants further argue that Supreme Court decisions protect the publication and broadcast of truthful information and that imposing liability would have a "chilling effect" on the exercise of their First Amendment rights.⁷

This Comment analyzes whether an individual's privacy rights in the types of situations described in the opening scenarios are sufficiently protected by an invasion of privacy tort action without infringing the First Amendment rights of tabloid television defendants. Specifically, the Comment will analyze the viability of suing the tabloid media defendant under an "intrusion upon seclusion"⁸ approach and/or a "public disclosure of private facts"⁹ claim.

2. The meaning I attach to the term "tabloid television" is what Andrew Jay McClurg describes as "reality television:" "a genre of television programming often featuring live video coverage of dramatic events. Popular segments include footage of police officers stopping, questioning, searching, or arresting motorists, and emergency response teams, such as firefighters or paramedics, responding to calls for assistance." Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 991 n.1 (1995).

3. See David Kidwell, *Girl Sues TV Show for Airing Rescue Call*, MIAMI HERALD, Jan. 23, 1994, at 1B; Gail Diane Cox, *Privacy Frontiers at Issue: Unwilling Subjects of Tabloid TV Are Suing*, NAT'L L.J., Dec. 27, 1993, at 1; Gail Diane Cox, *'Psychic' Staffers Vanquish ABC*, NAT'L L.J., July 18, 1994, at A8 [hereinafter Cox, *'Psychic' Staffers*].

4. See *KOVR-TV, Inc. v. Superior Court*, 37 Cal. Rptr. 2d 431, 433-35 (Cal. Ct. App. 3d Dist. 1995) (holding that issue of material fact existed as to whether reporter's disclosure to minor children that their neighbor murdered her children who were playmates of the minors and then committed suicide constituted outrageous and extreme conduct intended to cause emotional distress); *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668, 681-82 (Cal. Ct. App. 2d Dist. 1986).

5. See *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. at 678-81.

6. *Id.* at 683.

7. See *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

8. See Restatement (Second) of Torts § 652B (1977).

9. See *id.* § 652D.

Part II of the Comment discusses the privacy tort's original formulation and evolution into four distinct causes of action. Part III of the Comment briefly demonstrates how the "intrusion upon seclusion" and "public disclosure of private facts" approaches may be successfully used against the tortious acts commonly associated with tabloid television defendants. Part IV discusses the internal constraints and constitutional limitations placed on invasion of privacy actions. Part V analyzes how, despite these limitations, the invasion of privacy action remains a viable option for plaintiffs. The Comment concludes with the realization that while Supreme Court decisions weaken the effectiveness of the "public disclosure" claim, recent state and federal court decisions and the Supreme Court's narrow holdings in invasion of privacy cases make the "intrusion" cause of action an effective weapon against tabloid television defendants.

II. THE ORIGINAL FORMULATION OF THE PRIVACY TORT AND THE ENSUING HISTORY

Tabloid television shows devoted to hidden cameras, live camera ride alongs, and dramatic recreations are a relatively recent phenomenon. Concerns about an over-intrusive press, however, have enveloped legal debate for over a century.¹⁰ In their historic law review article, Samuel D. Warren and Louis D. Brandeis declared that "[t]he press is overstepping in every direction the obvious bounds of propriety and of decency."¹¹ Warren and Brandeis concluded that the law "affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds."¹² In essence, Warren and Brandeis argued for a tort cause of action which would be invoked to protect an individual's privacy.

There is speculation that the impetus behind Warren and Brandeis' article sprang from Warren's displeasure over press coverage surrounding his social life.¹³ In a deeper sense, however, noted scholar Robert Post argues that Warren and Brandeis' right of privacy refers "to the forms of respect that [individuals] owe to each other as members of a common community."¹⁴ The different privacy tort claims that arise

10. See Warren & Brandeis, *supra* note 1, at 195-96.

11. *Id.* at 196.

12. *Id.* at 206.

13. See Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 295-96 (1983).

14. Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 651 (1991).

from Warren and Brandeis' article, Post also notes, protect a community's "rules of civility."¹⁵ For example, a landlord who installs an eavesdropping device in the bedroom of his neighbors, a husband and wife, violates the community "rules of civility" and may be held liable for an invasion of privacy.¹⁶

In this vein, Warren's and Brandeis' argument can be read as a normative articulation of what levels privacy and respect an individual should receive in the community. A violation of this sense of normative privacy and respect by the "too enterprising press" directly harms "the mental peace and comfort of the individual and may produce suffering much more acute than that produced by mere bodily injury."¹⁷ Thus, in one of its earliest formulations the privacy tort was a direct response to what was deemed an over-intrusive and over-prying media, whose actions went beyond gathering news and stepped into the private life of the individual.

By 1905, the Georgia Supreme Court accepted the Warren-Brandeis formulation and recognized the existence of a distinct right of privacy action.¹⁸ In *Pavesich v. New England Life Insurance Co.*, an insurance company was sued because it made use of the plaintiff's name as well as a false testimonial without his consent.¹⁹ The Georgia Supreme Court reversed the lower court's dismissal of the plaintiff's complaint and declared "[a] right of privacy . . . is . . . derived from natural law."²⁰ With the recognition of the "invasion of privacy" tort in the 1939 *Restatement of Torts*, more states began to follow the lead of the *Pavesich* decision in recognizing a privacy right cause of action.²¹

With the inception of the *Restatement (Second) of Torts* in the 1960s, William L. Prosser earmarked four distinct invasion of privacy causes of action:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.

15. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 959 (1989).

16. See *id.* at 959-61 (citing *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964)).

17. Post, *supra* note 14, at 652 (quoting Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 363 (1915)).

18. See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

19. See *id.* at 68-69.

20. *Id.* at 70.

21. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 386-88 (1960).

4. Appropriation, for the defendant's advantage, of the plaintiff's name and likeness.²²

These four privacy torts still constitute the modern "privacy" causes of action. Moreover, the "intrusion" and "public disclosure of private facts" torts are specifically applicable against the tabloid TV show riding along with the police and paramedics.

III. APPLICATION AND ANALYSIS OF THE PRIVACY TORTS

The *Restatement (Second) of Torts* section 652B states that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."²³ *Comment b* to the *Restatement* states that the "invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home."²⁴ The *Restatement (Second) of Torts* section 652D defines another tort which may cause concern for tabloid media defendants:

[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not a legitimate concern to the public.²⁵

Both of these torts, arguably state a valid cause of action against tabloid TV defendants. For example, in *A.A. Dietemann v. Time, Inc.*,²⁶ the Ninth Circuit Court of Appeals, applying California law, affirmed a district court's finding of liability against Life Magazine under an invasion of privacy theory.²⁷ Photographers of the defendant news magazine, entered the office portion of the defendant's house by subterfuge, and without consent, photographed, recorded and transmitted his conversations to third persons.²⁸

In *Miller v. National Broadcasting Co.*,²⁹ a heart attack victim's wife sued a television network and a local television news producer

22. See *RESTATEMENT (SECOND) OF TORTS* § 652A (1977).

23. *Id.* § 652B.

24. *Id.* at cmt. b.

25. *Id.* § 652D. I will hereinafter refer to this cause of action as the "public disclosure of private facts" or "public disclosure" tort.

26. 449 F.2d 245 (9th Cir. 1971).

27. See *id.* at 250.

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

29. 232 Cal. Rptr. 668 (Cal. Ct. App. 2d Dist. 1986).

when a camera crew entered her apartment and bedroom without consent to film the activities of the Los Angeles Fire Department.³⁰ The paramedics were called to the plaintiff's home to administer lifesaving techniques to her husband. The California appellate court held that the plaintiff's complaint stated a valid cause of action against the television network and the news producer for invasion of privacy.³¹

The facts of these two cases demonstrate that the defendants could be held liable under the privacy tort of intrusion. In both cases, members of the media intentionally entered the plaintiffs' home without consent. And in both, the defendants recorded and transmitted images of the plaintiffs in their private settings. The *Miller* court concluded that "reasonable people could regard the NBC camera crew's intrusion into [the plaintiff's] bedroom at a time of vulnerability and confusion occasioned by [the plaintiff's husband's heart attack] as 'highly offensive' conduct."³² The *Dietemann* court also discussed the "invasion of privacy" action within the contours of an intrusion claim concluding that it was "convinced that California will 'approve the extension of the tort of invasion of privacy to instances of *intrusion*, whether by physical trespass or not, into spheres from which an ordinary man in plaintiff's position could reasonably expect that the particular defendant should be excluded.'"³³

Plaintiffs could also sue the media under a "public disclosure" cause of action. Although the plaintiff ultimately argued an "intrusion" claim in *Miller*, publicity was given to a matter concerning the private life of the plaintiff. Mrs. Miller's private residence and the paramedics' attempts to revive her dying husband were broadcast on the local news.³⁴ The widespread broadcast and filming of individuals in acutely private settings incurs liability under a "public disclosure" cause of action. For example, an unconsented publication of a photograph depicting a nude person represents a situation where an invasion of privacy action based on a "public disclosure" may lie.³⁵ A Massachusetts case held that the filming of nude prison inmates while they were desperately trying to hide their genital areas constituted an invasion of privacy.³⁶

30. *See id.* at 673-74.

31. *See id.* at 678-81.

32. *Id.* at 679.

33. *A.A. Dietemann v. Time, Inc.*, 449 F.2d at 249 (quoting *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Cir. 1969)) (emphasis added).

34. *See Miller v. National Broadcasting Co.*, 232 Cal. Rptr. at 674.

35. *See generally Myers v. U.S. Camera Publ'g Corp.*, 167 N.Y.S.2d 771, 774 (N.Y. City Ct. 1957) (arguing that nudity is a private fact giving rise to damages when shown beyond persons to whom consent is given).

36. *See Commonwealth v. Wiseman*, 249 N.E.2d 610, 615 (Mass. App. Ct. 1969).

The privacy torts seem to represent an ideal cause of action for plaintiffs to invoke against tabloid media defendants. The very underpinnings of the privacy torts in their original formulation centered on the notion that an individual's privacy warranted some form of lawful protection against the actions of an over-intrusive press.³⁷ Filming the actions of individuals in times of confusion, disorientation and personal crisis can be deemed offensive to a reasonable person.³⁸ A subsequent broadcasting and disclosure of these actions to a large television audience arguably creates an additional cause of action. Thus, a ride-along camera crew of a tabloid TV show or a local news station entering a private home without consent may be subject to an "intrusion" and/or a "public disclosure" action.

IV. THE INTERNAL AND FIRST AMENDMENT LIMITATIONS

A. *The Internal Limitations of the Privacy Torts*

From its very inception, however, the reach of the invasion of privacy cause of action was limited. The original Warren-Brandeis formulation listed some general limitations to the privacy tort. Warren and Brandeis declared that "[t]he right to privacy does not prohibit any publication of matter which is of public or general interest."³⁹ To illustrate this point, Warren and Brandeis used the example of an individual who suffers from a speech impediment and has trouble spelling words correctly. If a newspaper publishes these facts and the individual is a "modest and retiring individual," in other words, if such individual is a private person trying to lead a private life, such a publication, represents an "unwarranted . . . infringement of [the individual's] rights."⁴⁰ On the other hand, if the individual was a public official or running for public office, the publication of such facts "could not be regarded as beyond the pale of propriety."⁴¹

Warren and Brandeis listed two other limitations that are well-grounded in tort law. First, "[t]he right to privacy ceases upon the publication of the facts by the individual, or with his consent."⁴² This is nothing more than a reiteration of the consent defense to intentional torts.⁴³ For example, producers of a tabloid television show that accom-

37. See Warren & Brandeis, *supra* note 1, at 196.

38. See *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. at 679.

39. Warren & Brandeis, *supra* note 1, at 214.

40. *Id.* at 215.

41. *Id.*

42. *Id.* at 218.

43. The Florida Supreme Court, in *Florida Publ'g Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977), did not hold reporters and photographers of a newspaper

panied police officers into the home of an individual calling for assistance, would not be held liable if that person knowingly signed a consent form allowing the tabloid show to tape and broadcast any of the events occurring in the home.⁴⁴ Second, Warren and Brandeis stated that there would probably be no redress for an invasion of privacy in the absence of damages.⁴⁵

The *Restatement (Second) of Torts* also significantly limits invasion of privacy actions with respect to events occurring in public places. *Comment c* to section 652B ("intrusion upon seclusion") states that there is no liability "for observing [an individual] or even taking [the individual's] photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye."⁴⁶ Similarly, *comment b* to section 652D ("public disclosure of private facts") states that "there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye."⁴⁷

Thus, photographs of a man kissing a woman in a public market or a man acting drunk in a public street do not create an "intrusion" or "public disclosure" cause of action. Under the *Restatement's* approach, when a tabloid TV show films a person having a heart attack in a public park or a highway patrol officer administering a sobriety test to a drunk driving suspect on a interstate road, neither individual will be able to sue for "intrusion" or "public disclosure of private facts."

Media defendants have won invasion of privacy claims in state courts under this "no invasion of privacy in a public place" rationale.⁴⁸ For example, in *Mark v. Seattle Times*,⁴⁹ the Washington Supreme Court concluded that a television cameraman filming the actions of a pharmacist indicted for Medicaid fraud through the window of a locked pharmacy did not constitute an intrusion.⁵⁰ The Court reasoned, in part, that the locus of the filming was open to the public and anyone passing by the pharmacy could have viewed the actions taped on film.⁵¹ Similarly, an Ohio court held that a media defendant was not liable for intrusion

liable for intrusion and trespass. The Florida Supreme Court reasoned that landowners impliedly consent to such intrusions because it is customary for photographers and reporters to accompany police or firemen. *See id.* at 917-18.

44. *See generally* *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668, 673 (Cal. Ct. App. 2d Dist. 1986) (media defendant "testified that it was standard practice in the television industry to secure consent before entering someone's home to film").

45. *See* Warren & Brandeis, *supra* note 1, at 217.

46. *RESTATEMENT (SECOND) OF TORTS* § 652B cmt. c (1977).

47. *Id.* § 652D cmt. b.

48. *See infra* notes 49-52 and accompanying text.

49. 635 P.2d 1081 (Wash. 1981), *cert. denied*, 457 U.S. 1124 (1982).

50. *See id.* at 1095.

51. *See id.*

for photographing a drug felony suspect in a public hallway in the sheriff's department.⁵²

One of the most significant limitations on the "public disclosure" tort is described in the comments to section 652D stating that "[w]hen the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy."⁵³ This reflects one of the original limitations enunciated by Warren and Brandeis.⁵⁴ *Comment g* to section 652D states that "[i]ncluded within the scope of legitimate public concern are matters of the kind customarily regarded as 'news.'"⁵⁵ This scope of legitimate public concern also extends to "giving information to the public for purposes of education, amusement, or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published."⁵⁶ If a matter is deemed "newsworthy" there can be no invasion of privacy based upon a "public disclosure."

Furthermore, *Comment h* extends the newsworthiness privilege to allow private facts of individuals to be publicized.⁵⁷ "The extent of the authority to make public private facts is not, however, unlimited."⁵⁸ The *Restatement* limits this authority where "the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern."⁵⁹

In *Virgil v. Time, Inc.*,⁶⁰ a federal appellate court accepted the *Restatement's* standard for newsworthiness. The plaintiff in *Virgil* was a body surfer who sued the defendant magazine because of its article about body surfers in California.⁶¹ The article contained references to events in the plaintiff's non-surfing life, such as extinguishing lighted cigarettes with his tongue, eating insects, and diving head first down a flight of stairs.⁶² The court overturned the district court's summary judgment for the defendant and remanded the case.⁶³ Although the court concluded that body surfing could be considered a matter of general public interest and, thus, newsworthy, it reasoned that "it does not neces-

52. See Haynik v. Zimlich, 508 N.E.2d 195, 201 (C.P. Cuyahoga County Ohio 1986).

53. RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977).

54. See *supra* notes 39-41 and accompanying text.

55. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977).

56. *Id.* at cmt. j.

57. See *id.* at cmt. h.

58. *Id.*

59. *Id.*

60. 527 F.2d 1122 (9th Cir. 1975).

61. See *id.* at 1123-24.

62. See *id.* at 1124 n.1.

63. See *id.* at 1132.

sarily follow that it is in the public interest to know private facts about the persons who engage in that activity.”⁶⁴

On remand, however, the federal district court concluded that the magazine’s coverage of the plaintiff’s odd habits and actions was “included as a legitimate journalistic attempt to explain [the plaintiff’s] extremely daring and dangerous style of body surfing” and not “for any inherent morbid, sensational, or curiosity appeal they might have.”⁶⁵ The district court, therefore, did not hold the defendant magazine liable for its publication of the arguably private facts of an individual.

B. *The First Amendment Protections*

In addition to the invasion of privacy tort’s internal limitations, media defendants possess a powerful sword to defend against invasion of privacy suits. This sword is the First Amendment. In a comment following the *Restatement’s* description of the “public disclosure of private facts” tort, the drafters acknowledged that “[i]t has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment to the Constitution, as applied to state law through the Fourteenth Amendment.”⁶⁶

In fact, one can read the Supreme Court’s decision in *New York Time Co. v Sullivan*⁶⁷ as providing almost absolute First Amendment protection to the media’s publication of truthful speech. The plaintiff in *Sullivan*, a Montgomery, Alabama City Commissioner, sued the *New York Times* for libel and defamation.⁶⁸ The plaintiff complained that inaccuracies contained in an advertisement published by the *New York Times* defamed him.⁶⁹ The Alabama Supreme Court affirmed a damages award for the plaintiff on the tort theories of libel and defamation.⁷⁰ The Supreme Court held, however, that the state law as applied by the Alabama courts was constitutionally deficient because it failed to provide safeguards for freedom of speech and the press.⁷¹

The Court concluded that the First and Fourteenth Amendments still protected the *New York Times’* publications even if the statements

64. *Id.* at 1131.

65. *Virgil v. Sports Illustrated*, 424 F. Supp 1286, 1289 (S.D. Cal. 1976).

66. RESTATEMENT (SECOND) OF TORTS § 652D special note on relation of § 652D to the First Amendment of the Constitution (1977).

67. 376 U.S. 254 (1964).

68. *See id.* at 256-57.

69. *See id.*

70. *See id.* at 256.

71. *See id.* at 264.

contained in the *Times* were untrue. Justice Brennan, writing for the majority, reasoned that:

[t]he state rule of law is not saved by its allowance of the defense of truth . . . [a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amounts—leads to a comparable ‘self-censorship.’⁷²

Three years later in *Time, Inc. v. Hill*,⁷³ the Supreme Court held that under constitutional guarantees of free speech and press, defendant *Life* news magazine was entitled to a jury instruction such that it could be held liable only upon the finding of its knowing or reckless falsity in publishing an article which allegedly defamed and violated the privacy rights of the plaintiffs.⁷⁴ In *Hill*, the plaintiffs brought an action under a New York right of privacy statute, alleging that *Life* magazine falsely reported that a theatrical play accurately portrayed the experiences suffered by the plaintiff and his family at the hands of escaped convicts.⁷⁵ Once again, as in *Sullivan*, the Court refused to impose liability on the media defendant.⁷⁶

In both *Sullivan* and *Hill*, the Court expanded First Amendment protection to *untruthful* speech. Only upon a finding of knowing or reckless falsity in publication by the media would the Supreme Court allow state courts to impose common law tort liability on members of the news media. If a newspaper publishes an untruthful accusation it still avoids liability unless a court determines that the newspaper recklessly published the accusation. Thus, even an untruthful accusation printed or broadcast by the media retains constitutional protection. This constitutional protection accorded to false speech suggests that the publication, recording, or broadcasting of accurate events, of truthful speech, has overriding First Amendment protection.

This argument has significant consequences for the *Restatement's* privacy torts. The “public disclosure” cause of action may stand in a tenuous position in light of *Sullivan* and *Hill*. For example, returning to our 911 call scenario, if the suicidal person sues for an invasion of privacy under a “public disclosure” theory, one prong of the cause of action is that the private matter is “given publicity.” Counsel for the tabloid TV show can argue that the live filming of the events surrounding the 911 call is the most accurate depiction of the event possible and, thus, represents the epitome of truthful speech. Therefore, under *Sullivan* and

72. *Id.* at 278-79.

73. 385 U.S. 374 (1967).

74. *See id.* at 387-88.

75. *See id.* at 377-78.

76. *See id.* at 394-98.

Hill, the First and Fourteenth Amendments arguably insulate the live camera tabloid "news" media from tort liability because of the First Amendment's almost overriding protection of truthful speech.

The Supreme Court decisions in *Cox Broadcasting Corp. v. Cohn*⁷⁷ and *The Florida Star v. B.J.F.*⁷⁸ also support this argument. In *Cox*, a Georgia television station broadcast the name of a deceased rape victim in violation of a Georgia rape-shield statute.⁷⁹ The father of the deceased rape victim brought suit against the television station.⁸⁰ The Georgia Supreme Court held that the plaintiff's complaint stated a valid cause of action for the invasion of the plaintiff's right of privacy under the tort of "public disclosure."⁸¹

The Supreme Court reversed the Georgia Supreme Court's decision. The Supreme Court centered on the fact that the defendant's broadcast of the rape victim's name was an accurate republication of information contained in public court records.⁸² The Court reasoned that a law sanctioning the truthful publication of public court records because of its offensiveness to privacy "would invite timidity and self-censorship" on the media's part.⁸³

Similarly, in *The Florida Star v. B.J.F.*,⁸⁴ a privacy action was brought against a news media defendant for publishing a rape victim's name in violation of Florida's rape-shield statute.⁸⁵ The name of the rape victim was inadvertently disclosed in a police incident report placed in the sheriff's department press room.⁸⁶ The rape victim sued the sheriff's department and *The Florida Star* newspaper.⁸⁷ The Supreme Court reversed damages award to the plaintiff from defendant newspaper.⁸⁸ The Court based its holding on the fact that the information published was "truthful" and "lawfully obtained."⁸⁹

Arguably, *Cox* and *The Florida Star* enhance the protection of truthful speech announced in *New York Times v. Sullivan*. In fact, *Cox* and *Florida Star* represent a greater blow to the "privacy torts" because both decisions protected truthful broadcasts and publications in the face

77. 420 U.S. 469 (1975).

78. 491 U.S. 524 (1989).

79. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 472-74.

80. See *id.* at 471, 474.

81. See *id.* at 474.

82. See *id.* at 496-97.

83. *Id.* at 496.

84. 491 U.S. 524 (1989).

85. See FLA. STAT. § 794.03 (1993).

86. See *The Florida Star v. B.J.F.*, 491 U.S. at 526-27.

87. See *id.* at 528.

88. See *id.* at 529.

89. *Id.* at 536.

of a plaintiff's invasion of privacy tort action. Therefore, Supreme Court decisions, one can argue, lead to the conclusion that "truth is a defense in a . . . right of privacy action."⁹⁰

V. RESPONDING TO THE LIMITATIONS

In the face of First Amendment limitations and broad definitions of "newsworthiness," it may seem that the privacy torts will not serve as viable causes of action for plaintiffs against tabloid television defendants. Four powerful responses to this conclusion, however, do exist.

A. *Tabloid Television Shows Are Not "News"*

First, the "newsworthiness" privilege as applied to tabloid television shows is questionable. The *Restatement's* definition of "public interest" does not include those matters which only represent a "sensational prying into private lives."⁹¹ Legal scholar, Edward Bloustein, argues that "'[p]ublic interest,' taken to mean curiosity, must be distinguished from 'public interest,' taken to mean value to the public of receiving information of governing importance."⁹² The only "public interest" gained from broadcasting a frantic suicidal person in her home or a dying middle-aged man suffering a heart attack is either an interest in the actions of police officers and paramedics or the mere curiosity of staring into others' private lives. Public interest in the activities of police officers and paramedics can be satisfied through broadcasts in public places. The internal limitations of the *Restatement's* privacy torts prevent an individual from suing a show following the real-life events of police officers responding to an attempted suicide in a public park, or filming paramedics responding to a car accident in a public street. "Mere curiosity" to pry into the private misfortunes of others, however, remains unprotected under the *Restatement's* "newsworthiness" standard.

Critics respond to privacy tort advocates by noting that most courts are reluctant to engage "in line drawing over newsworthiness and simply accept the press' judgment about what is and is not newsworthy."⁹³ The argument is "that the press must in the nature of things be the final

90. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.36, at 1106 (5th ed. 1995). See also *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (holding that a state may not punish a newspaper's truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper).

91. See *supra* notes 55-56 and accompanying text.

92. Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 56-57 (1974).

93. Zimmerman, *supra* note 13, at 353.

arbiter of newsworthiness."⁹⁴ Thus, because the newsworthiness standard may be difficult for judges to impose, the press should internally decide its own standards.

This argument ignores that the newsworthiness standard was formulated and accepted by the *Restatement*⁹⁵ and *Virgil v. Time, Inc.*⁹⁶ Mere difficulty in applying a legally recognized standard does not extinguish its legal existence.

Furthermore, even accepting that the press should be the judge of newsworthiness, this provides no guidelines on which institutions are to be accepted as agents of the news media and the press. If television viewers watch the television show *COPS* only for educational reasons, or a general interest in the lives of police officers, a television show presenting dramatic recreations of the real life events of police officers can fulfill these very same purposes.

Therefore, if one accepts the proposition that *COPS* is an agent of the news media, then the dramatization show is likewise an agent of the press, as is any other type of entertainment programming satisfying the public's most general educational interests. The dramatization show provides the same educational interests as does *COPS*. The only difference between the two shows is the presence of a live TV camera in *COPS*. The mere inclusion of live camera crews does not automatically elevate television coverage into "news."

If a dramatization show is "news," then most entertainment programming qualifies as "news." Thus, to prevent an overbroad categorization of what is considered "news," a dramatization show cannot be classified as "news." If a dramatization show is not considered "news" then, logically, neither can *COPS*, which serves the same educational and entertainment purposes, considered "news." Therefore, a tabloid television show such as *COPS* should be precluded from asserting a newsworthiness defense because it does not represent "news" programming.

B. *Supreme Court Decisions Do Not Bar Invasion of Privacy Tort Actions*

Second, the argument that *Sullivan* immunizes the media from liability for the publication or broadcasting of truthful speech is overbroad. The *Sullivan* holding was explicitly limited to protecting critics of offi-

94. Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 336 (1966).

95. See *supra* notes 53-59 and accompanying text.

96. See *supra* notes 60-64 and accompanying text.

cial conduct and public officials from libel judgments.⁹⁷ If, on the other hand, the media is covering a story about a private individual, a constitutional privilege against liability for the media does not arise.

This point is explicitly made in *Gertz v. Robert Welch, Inc.*⁹⁸ In *Gertz*, the Supreme Court differentiated between the status of its plaintiff, a private lawyer, and the plaintiff in *Sullivan*, a public official.⁹⁹ The Court held that a news magazine could be held liable for publishing a defamatory falsehood about someone who was not a public official if it was negligent in publishing the falsehood.¹⁰⁰

Additionally, despite the real limitations that *Cox* and *The Florida Star* impose on "public disclosure" claims, both decisions explicitly avoided any claims that its holdings would obliterate invasion of privacy actions.¹⁰¹ In *Cox*, the Court stated that there are "impressive credentials for a right of privacy"¹⁰² action and purposefully avoids the "broader question of whether truthful publications may ever be subjected to civil . . . liability."¹⁰³ Rather, the Court narrows its holding to providing First Amendment protection for the media's publication or broadcast of truthful information obtained from official court records open to public inspection.¹⁰⁴ This limitation does not narrow the scope of the privacy torts of "intrusion" and "public disclosure of private facts" as they are drafted in the *Restatement*. Comments to both of the above torts state that liability does not attach for an "examination" or "publication" of public records.¹⁰⁵ The Supreme Court would have reached the same decision in *Cox* applying the *Restatement's* current approach.

In *The Florida Star*, the Court explicitly declared that its holding in no way mandates "that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press."¹⁰⁶ Thus, in both *Florida Star* and *Cox* the Court carefully reached narrow holdings that would not preclude future recognition of an invasion of privacy "public disclosure" claim.

97. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

98. 418 U.S. 323 (1974).

99. *Id.* at 345-46.

100. *See id.* at 347.

101. *See infra* notes 102-06.

102. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489 (1975).

103. *Id.* at 491.

104. *See id.*

105. *See* RESTATEMENT (SECOND) OF TORTS §§ 652B cmt. c, 652D cmt. b (1977).

106. *The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989).

C. *Supreme Court Decisions Protect an Individual's Home as a Zone of Privacy*

Third, the tendency of tabloid television shows to accompany police officers and paramedics into individuals' private homes strengthens the arguments of potential plaintiffs. Supreme Court decisions reflect the conception of the home as a location commanding a heightened right of privacy.¹⁰⁷ For example, in *Boyd v. United States*, the Court interpreted the Fourth and Fifth Amendments as protections "of the sanctity of a man's home and the privacies of life."¹⁰⁸ In *Mapp v. Ohio* the Court referred to the right to be free of a warrantless search of the home as a right of privacy.¹⁰⁹ Justice Harlan's concurring opinion in *Katz v. United States* declared that a "man's home is . . . a place where he expects privacy."¹¹⁰

Media advocates may argue that these Supreme Court decisions have no place in an analysis of privacy tort actions because they only apply to state intrusions against individuals' privacy rights. That, however, misses the point. These Supreme Court decisions serve as a reiteration and recognition of the importance of the individual's home as a zone where there exists high expectations of a right to privacy. At its base, these decisions highlight the idea that an action by agents that reach into an individual's home is an intrusive offense against that individual's privacy.

D. *First Amendment and "Newsworthiness" Limitations Do Not Apply to an "Intrusion" Privacy Action*

Lastly, limitations imposed by a broad newsworthiness standard or by Supreme Court decisions providing First Amendment protection for the publication of lawfully obtained truthful information, do not apply to invasion of privacy "intrusion" actions. The newsworthiness standard described in the *Restatement* and the *Virgil* case applies only to "public disclosure" claims.¹¹¹ The *Restatement* comments following section 652B ("intrusion upon seclusion") contain no newsworthiness privilege absolving potential defendants from liability.

This is because the concept of newsworthiness is a standard which evaluates the importance or non-importance of published or broadcasted

107. See *infra* notes 108-10 and accompanying text.

108. *Boyd v. United States*, 116 U.S. 616, 630 (1886).

109. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

110. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

111. *Virgil v. Time, Inc.* was a "public disclosure claim brought against a news magazine. See *supra* notes 60-64 and accompanying text. Recall, also that the "newsworthiness" approach accepted in *Virgil* was the standard described in the comments following the "public disclosure" cause of action in *RESTATEMENT (SECOND) OF TORTS* § 652D (1977).

material. Because an "intrusion upon seclusion" cause of action does not require a publication or broadcast of information, the newsworthiness analysis is irrelevant. Thus, while the California appellate court in *Miller v. National Broadcasting Co.* acknowledged "that public education about paramedics, as well about the use of . . . (CPR) as a lifesaving technique . . . qualifies as 'news,'" this conclusion did not prevent the plaintiff from stating a valid invasion of privacy "intrusion" claim.¹¹²

Similarly, while the Supreme Court refused to impose liability on news media defendants publishing or broadcasting "truthful information" in *Cox* and *Florida Star*, courts are prevented from reaching this same conclusion when confronted with an invasion of privacy "intrusion" claim. An "intrusion" claim does not lead to "timidity" and "self-censorship" because the publication and/or broadcast of information and events attaches no liability in an "intrusion" claim. As noted constitutional law scholar Melville Nimmer points out: "[i]ntrusion does not raise first amendment difficulties since its perpetration does not involve speech or other expression. It occurs by virtue of the physical or mechanical observation of the private affairs of another, and not by the publication of such observations."¹¹³

This principle is supported by *Baugh v. C.B.S., Inc.*,¹¹⁴ a 1993 California federal district court decision. In *Baugh*, plaintiffs sued a national television broadcaster after being filmed by news reporters in their home following a domestic violence incident.¹¹⁵ The court held that the plaintiffs' tort claims that relied solely on the actual broadcast of the domestic violence incident were constitutionally barred.¹¹⁶ The court also reasoned, however, that First Amendment protections did not immunize the defendant's prepublication activities, such as physically intruding into the plaintiffs' home with news reporters and television cameras.¹¹⁷ Both the *Miller* and *Baugh* decisions indicate that courts remain open to some invasion of privacy actions brought against an intrusive tabloid media.

VI. CONCLUSION

The Supreme Court has concluded that the press "[h]as no special privilege to invade the rights and liberties of others."¹¹⁸ Tabloid televi-

112. *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668, 684 (Cal. Ct. App. 2d Dist. 1986).

113. Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 957 (1968).

114. *See Baugh v. CBS, Inc.*, 828 F. Supp 745 (N.D. Cal. 1993).

115. *Id.* at 750-52.

116. *See id.* at 756.

117. *See id.*

118. *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972) (quoting *Associated Press v. NLRB*, 301

sion invades privacy rights and liberties when it accompanies police or paramedics into an individual's home or secretly tapes conversations without consent. Because almost all states have recognized a tort cause of action for invasion of privacy in some form,¹¹⁹ an invasion of privacy action is a direct and viable method¹²⁰ of attacking the actions of the tabloid TV media.

Privacy actions, however, relying solely on the publication or broadcast of an individual's otherwise accurate private information may be barred either on constitutional grounds or because it constitutes privileged "newsworthy" information. Even assuming, however, that a tabloid television program is a member of the constitutionally protected press, if its intrusive camera or microphone films, records, or photographs the individual in the private seclusion of his home, hotel room, or employment office, no First Amendment protections or news privilege defenses can work to shield the media defendant. The tabloid TV show will not be held liable for its publication or broadcasting of information, but, rather, for its prepublication activities.

To deny holding the tabloid media liable for an intrusive invasion of privacy is similar to holding a local television news crew immune from tort liability for its van intentionally running over someone on its way to cover a big story. The Constitution does not provide the news media this type of overencompassing immunity. In neither case did civil liability attach for the publication and reporting of the news, but, rather, liability only attached for unlawful tortious conduct occurring before the news was reported.

Unconsented entries into the private homes and lives of individuals are protected by the "intrusion" action. On the other hand, privacy tort law still protects potential tabloid media defendants in a sufficient number of ways. *Hard Copy* can still film a rock star kissing his or her new romantic partner while walking down Beverly Hills Boulevard. *A Current Affair* can still broadcast the name of a sports star and the alleged facts involving a drug arrest lawfully obtained from police records and public court documents. The law, however, in the form of

U.S. 103, 132-133 (1937)). See also *Galella v. Onassis*, 487 F.2d 986, 995 (2d Cir. 1973) (concluding that the First Amendment does not establish a wall of immunity which protects newsmen from any liability for their conduct while gathering news).

119. See *State-by-State Guide to Privacy Law*, NEWS MEDIA & L., Summer 1994, at S5 (noting that most states recognize all four privacy torts).

120. Because invasion of privacy torts are intentional torts, plaintiffs are able to recover punitive damages against a tabloid television defendant. Recently, plaintiffs have been awarded damages of approximately half a million dollars in invasion of privacy suits against media defendants. See Cox, *'Psychic' Staffers*, *supra* note 3, at A8 (plaintiffs successful in invasion of privacy suit against ABC television show *Prime Time Live*).

an “intrusion” cause of action must and does provide an individual protection from the tabloid media’s most egregious behavior.

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