Extreme Departure Test as a New Rule for Balancing Surreptitious and Intrusive Newsgathering Practices with Competing Interests: The Use of Hidden Cameras vs. the Right to Be Let Alone

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I. INTRODUCTION

Equipped with modern communication technologies such as sophisticated recording devices and miniaturized video cameras, the news media have increasingly engaged in surreptitious and intrusive methods of newsgathering[1] in order to expose malfeasance and to gain higher ratings and increased profits.[2] There is no doubt that newsgathering is an indispensable tool for exercising the guaranteed right of freedom of the press. Without First Amendment protection for seeking out the news, as Justice Byron White recognized, "freedom of

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[1] *See, e.g.*, Wilson v. Layne, 526 U.S. 603 (1999); Cohen v. Cowles Media Co., 501 U.S. 663 (1991); Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999); Hanlon v. Berger, 129 F.3d 505 (9th Cir. 1997), *vacated by* 626 U.S. 808 (1999); Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996); Desnick v. ABC, Inc., 44 F.3d 1345 (7th Cir. 1995); Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994); Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Wolfson v. Lewis, 924 F. Supp. 1413 (E.D. Pa. 1996); Sanders v. ABC, Inc., 978 P.2d 67 (Cal. 1999); Miller v. NBC, Inc., 232 Cal. Rptr. 668 (Cal. Ct. App. 1986); Copeland v. Hubbard Broad., Inc., 526 N.W.2d 402 (Minn. Ct. App. 1995); *see also* Sandra S. Baron et al., *Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 WM. & MARY BILL RTS. J. 1027 (1996); Henry H. Rossbacher et al., *An Invasion of Privacy: The Media's Involvement in Law Enforcement Activities*, 19 LOY. L.A. ENT. L. REV. 313 (1999); Lyrissa C. Barnett, Note, *Intrusion and the Investigative Reporter*, 71 TEX. L. REV. 433 (1992).

[2] *See* Dynn Nick, Note, *Food (Lion) for Thought: Does the Media Deserve Special Protection Against Punitive Damage Awards When It Commits Newsgathering Torts?*, 45 WAYNE L. REV. 203, 215 (1999).

the press could be eviscerated."[3] If news could not be gathered at its source, the constitutionally guaranteed right to publish would be "impermissibly compromised."[4] In other words, the right to newsgathering is a necessary "corollary of the right to publish."[5] Thus, if constitutional protection is not afforded to newsgathering activities, investigative reporting will be severely chilled from exposing the potential damages for offensive activities.[6] Positive results of some investigative reporting, especially those that led to social changes, bolster the need for constitutional protection for newsgathering.[7]

However, there also exists a compelling right of individuals to be allowed to protect themselves, and their privacy, from unreasonable activities, including unlawful newsgathering. Privacy advocates claim that ethically and legally questionable newsgathering activities should be prohibited to shield individuals' right to privacy.[8] Furthermore, journalists must be forced to obey all laws, including those of appearing and testifying before courts and grand juries in criminal investigations.[9] The law is buttressed in court rulings that include decisions on employing hidden cameras to disclose unsanitary food handling[10] and tele-psychic activities,[11] using mosaic images of

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[3] Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (holding that a newspaper has no special immunity from the application of general laws). Justice White said that "[n]or is it suggested that news gathering does not qualify for First Amendment protection; without some protection . . . freedom of the press could be eviscerated." *Id.*

[4] *Id.* at 728 (Stewart, J., dissenting).

[5] *Id.* at 727.

[6] Nick, *supra* note 2, at 206.

[7] *See, e.g.*, THE BIG CHILL: INVESTIGATIVE REPORTING IN THE CURRENT MEDIA ENVIRONMENT 4 (Marilyn Greenwald & Joseph Bernt eds., 2000).

[8] *See* John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111 (1996).

[9] Branzburg v. Hayes, 408 U.S. at 692-96.

[10] *E.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999) (holding that two reporters of ABC's "PrimeTime Live" breached their duty of loyalty and committed a trespass when they used hidden cameras and microphone to record unsanitary meat handling practices at a supermarket chain after obtaining their jobs with false resumes).

celebrities,[12] and riding along with law enforcement officers to videotape raids on private property.[13] In short, even though the media have a right under the First Amendment to gather information for news, that right does not extend to illegal conduct,[14] and "a reporter must accept limits on how far into another person's privacy he or she may intrude."[15]

Of course, each of the two distinct views of newsgathering activities, which are not necessarily in opposition, is based on solid and legitimate grounds. First Amendment scholars, lawyers, and critics have long argued about intrusive newsgathering activities with different perspectives and have come to different conclusions.[16] One cardinal rule that has emerged, however, is that neither right can

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[11] Sanders v. ABC, Inc., 978 P.2d 67 (Cal. 1999).

[12] Hoffman v. Capital Cities/ABC, Inc., 33 F. Supp. 2d 867 (C.D. Cal. 1999), *rev'd*, 255 F.3d 1180 (9th Cir. 2001).

[13] Wilson v. Layne, 526 U.S. 603 (1999).

[14] Hanlon v. Berger, 526 U.S. 808 (1999); Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

[15] United States v. Sanusi, 813 F. Supp. 149, 160 (E.D.N.Y. 1992).

[16] *See, e.g.*, Sandra S. Baron et al., *Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 WM. & MARY BILL RTS. J. 1027 (1996); John P. Borger, *New Whines in Old Bottles: Taking Newsgathering Torts Off the Food Lion Shelf*, 34 TORT & INS. L.J. 61 (1998); Tracy Dreispul, *Circumventing* Sullivan*: An Argument Against Awarding Punitive Damages for Newsgathering Torts*, 103 DICK. L. REV. 59 (1998); Eric B. Easton, *Two Wrongs Mock a Right: Overcoming the* Cohen *Maledicta That Bar First Amendment Protection for Newsgathering*, 58 OHIO ST. L.J. 1135 (1997); Jane E. Kirtley, *Vanity and Vexation: Shifting the Focus to Media Conduct*, 4 WM. & MARY BILL RTS. J. 1069 (1996); Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward A First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145 (1996); Tracey L. Mitchell, *Smile! You're on Candid Camera: Media Presence and the Execution of Warrants*, 50 S.C. L. REV. 949 (1999); Robert M. O'Neil, *Tainted Sources: First Amendment Rights and Journalistic Wrongs*, 4 WM. & MARY BILL RTS. J. 1005 (1996); Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U. L. REV. 507 (1998); Andrew B. Sims, *Food Lion and the Media's Liability for Newsgathering Torts: A Symposium Preview*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 389 (1997); Stephen M. Stern, Note, *Witch Hunt or Protected Speech: Striking A First Amendment Balance Between Newsgathering and General Laws*, 37 WASHBURN L.J. 115 (1997).

completely override the other. Thus, balancing tests are needed to determine how far the media can go to gather news.

Privacy is not the only issue involved in newsgathering. The violation of professional rules and ethics codes[17] in the name of freedom of the press also implicates social concerns. These debates became particularly heated when Princess Diana was killed, allegedly while attempting to avoid paparazzi photographers.[18] This incident raised concerns, among the general public and inside the media itself, about the use of questionable methods of information gathering. The question to be addressed is whether the end justifies the means, even if laws and ethical codes must be broken during the course of newsgathering.

As an area of mixed constitutional, statutory, criminal, and civil offenses, some newsgathering practices have attracted intense attention. The rulings of the Fourth Circuit in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,[19] the Seventh Circuit in *Desnick v. ABC, Inc.*,[20] and the California Supreme Court in *Sanders v. ABC, Inc.*[21] have stimulated discussions about the use of hidden cameras as well as other surreptitious and intrusive methods of newsgathering.[22]

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[17] Ethics codes provide professional and ethical guidelines for members of the news media to follow in gathering and publishing news. Such guidelines deal with ideal behavior of journalists while law deals with the minimal standards journalists obey. *See* JAY BLACK ET AL., DOING ETHICS IN JOURNALISM: A HANDBOOK WITH CASE STUDIES 14 (2d ed. 1995).

[18] *See, e.g.*, Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097 (1999); Alissa Eden Halperin, Comment, *Newsgathering after the Death of a Princess: Do American Laws Adequately Punish and Deter Newsgathering Conduct that Places Individuals in Fear or at Risk of Bodily Harm?*, 6 VILL. SPORTS & ENT. L. J. 171 (1999); Jamie E. Nordhaus, Note, *Celebrities' Rights to Privacy: How Far Should the Paparazzi Be Allowed to Go?*, 18 REV. LITIG. 285 (1999). The articles discuss various proposals and legislations to curb paparazzi style newsgathering.

[19] 194 F.3d 505 (4th Cir. 1999).

[20] 44 F.3d 1345 (7th Cir. 1995).

[21] 978 P.2d 67 (Cal. 1999).

[22] *See, e.g.*, Victor A. Kovner, *Recent Developments in Newsgathering, Invasion of Privacy and Related Torts*, 581 PLI/PAT 411 (1999); Rebecca Porter, *Media 'Ride-Alongs' Violate the Constitution, Supreme Court Rules*, 35 TRIAL 120 (July 1999);

This study examines significant newsgathering cases that involve hidden cameras and their impact on investigative journalism. It also discusses journalistic codes of ethics to discover what types of newsgathering practices constitute an extreme departure from standards of news reporting and investigation. Finally, this study proposes a new rule for balancing surreptitious and other intrusive newsgathering practices with the right to privacy.

II. NEWSGATHERING AND THE RIGHT TO BE LET ALONE

A. *Development of the Right to Privacy*

The origin of a right to privacy is often attributed to the 1890 *Harvard Law Review* article, *The Right to Privacy*, by two young Boston lawyers, Samuel D. Warren and Louis D. Brandeis. In their article, which became a watershed in the development of American common law, Warren and Brandeis advocated the legal protection of privacy against the unjustifiable exposure of private affairs without consent.[23] They wrote that "[t]he intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world . . . so that solitude and privacy have become more essential to the individual."[24] Nevertheless, the press has overstepped and has invaded the sacred precincts of private individuals and "subjected [them] to mental pain and distress, far greater than could be inflicted by mere bodily injury."[25] To protect individuals, therefore, Warren and Brandeis argued that the tort of invasion of privacy must necessarily be recognized.

Under the influence of Warren and Brandeis, courts and legal

Henry H. Rossbacher et al., *An Invasion of Privacy: The Media's Involvement in Law Enforcement Activities*, 19 LOY. L.A. ENT. L. REV. 313 (1999); Eve Klindera, Note, *Qualified Immunity for Cops (and Other Public Officials) with Cameras: Let Common Law Remedies Ensure Press Responsibility*, 67 GEO. WASH. L. REV. 399 (1999).

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

[24] *Id.* at 196.

[25] *Id.*

researchers stretched the tort to accommodate other kinds of invasion of privacy cases. Courts, which had never expressly recognized the right to privacy before the publication, started recognizing such a legal right and based their rulings on that article. About 40 years later, Brandeis, then a Supreme Court Justice, articulated the right to privacy as "the right to be let alone" and described it as "the most comprehensive" and valued right of the people.[26]

B. *Rise of Intrusive Newsgathering*

For many years, newsgathering through the use of intrusive methods has been one of the most important techniques that the news media have utilized in obtaining information on important public issues.[27] "Today, intrusive newsgathering threatens privacy more ominously than ever before. Media intrusions are on the rise, and new technologies make them more invasive than ever before."[28] The most convincing explanations for the rise of intrusive newsgathering are first, the competitive nature of the media market;[29] second, the tradition of investigative reporting; and third, the advance of communication technologies.[30]

Regarding the first explanation, the trial court in *Food Lion* made an interesting observation:

> *Prime Time Live* . . . airs in prime viewing time in order to capture the

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[26] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[27] Nick, *supra* note 2, at 210.

[28] Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 179 (1998); *see also* James Boylan, *Punishing the Press: The Public Passes Some Tough Judgments on Libel, Fairness, and Fraud*, 35 COLUM. JOURNALISM REV., Mar.-Apr. 1997, at 24; David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161 (1997); 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, 1009-17 (1995).

[29] Lidsky, *supra* note 28, at 179.

[30] *See* C. THOMAS DIENES ET AL., NEWSGATHERING AND THE LAW 593 (1997) (noting that the availability of miniaturized cameras and other technologies have increasingly provided the media with incentives to employ intrusive newsgathering techniques); Lidsky, *supra* note 28, at 180.

> largest possible audience. [*Prime Time Live*] is not a "straight news" program; instead, [*Prime Time Live*] presents "undercover," "investigative" and "inside" stories of a sensational nature designed to attract large audiences and Nielsen ratings, with the commensurate financial rewards and status within the television industry.[31]

The trial court further stated that

> [*Prime Time Live*] seeks one "amazing" piece per week. Undercover investigations are one important means by which [*Prime Time Live*] obtains such "amazing" stories as necessary to meet its goal of attracting large prime time audiences . . . . The use of hidden cameras requires the use of falsehoods, misrepresentations and deceit in order to position recording equipment and to entice persons into actions or statements which can be recorded.[32]

These observations highlight the current competitive media environment. A television news magazine, for example, has to compete with similar programs on other networks to attract large audiences. Larger audiences generally mean more advertising revenue. Television stations, except a few publicly owned and operated stations, exist for commercial gain, and need programs that can draw the largest numbers of viewers. Such "competitive pressures among the media have created a frenzy in reporters, editors, correspondents, and producers to catch a sensational story."[33] This competitive media environment has encouraged journalists to employ more intrusive and legally or ethically questionable methods of newsgathering such as the live filming of police raids on private homes or the use of hidden cameras to capture thrilling and sensational pictures.[34]

The second factor, the tradition of investigative reporting, is closely related to the notion of the public function of the media. Many

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[31] Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 813 (M.D.N.C. 1995).

[32] *Id.*

[33] John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111, 1118 (1996).

[34] A number of articles discuss the frequent use of questionable methods of newsgathering. *See, e.g.*, Russ W. Baker, *Truth, Lies, and Videotape:* PrimeTime Live *and the Hidden Camera*, 32 COLUM. JOURNALISM REV. July – Aug. 1993, at 25; Louis W. Hodges, *Undercover, Masquerading, Surreptitious Taping*, 3 J. MASS MEDIA ETHICS 2, 26 (1988).

journalists believe that modern society depends heavily on the press for enlightenment and "[e]nlightened choice by an informed citizenry is the basic ideal upon which our open society is premised . . . ."[35] Put another way, journalists, through their investigations, bring wrongdoing to public attention. The informed public may respond to this newfound knowledge by demanding reforms from their representatives and the policymakers may respond by taking corrective action.[36]

This public function of the news media was emphasized by Justice Lewis Powell in his dissenting opinion in *Saxbe v. Washington Post Co.*:

> No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as the agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.[37]

In order to serve the essential societal function, the news media should be free from any governmental interference and feel free to engage in reporting fully and accurately on serious public issues rather than serving up frivolous or unsubstantiated information.[38]

There are occasional circumstances, however, when newsgathering requires very unique methods. For instance, in *Food Lion*, "PrimeTime Live" reporters needed to be inside the supermarket stores

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[35] Houchins v. KQED, Inc., 438 U.S. 1, 17 (1978) (quoting Branzburg v. Hayes, 408 U.S 665, 726 (Stewart, J., dissenting)). The Court said that "[t]hough not without its lapses, the press 'has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . .'" *Id.* (quoting Estes v. Texas, 381 U.S. 532, 539 (1965)).

[36] DAVID L. PROTESS ET AL., THE JOURNALISM OF OUTRAGE: INVESTIGATIVE REPORTING AND AGENDA BUILDING IN AMERICA 3 (1991).

[37] 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

[38] *Id.* at 864-65.

to investigate alleged unsanitary meatpacking practices.[39] After using fake resumes to get jobs, the reporters videotaped and audio recorded evidence of such practices with hidden electronic devices.[40] The reporters argued at trial that this story was of great public interest and would not have been broadcast without undercover reporting.[41] Numerous investigative reporting cases since Upton Sinclair and Nellie Bly have shown that the use of investigative newsgathering with deceptions is often indispensable and has been honored by many journalists.[42] Undercover reporting sometimes fulfills the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[43] In short, journalists' perception and the practice of the public function of the press have contributed to the rise of intrusive newsgathering.

The advance of technology has enabled the media to capture dramatic images while it has also "created incentives to use illegal methods to position people where that technology can be employed, often secretly."[44] For decades, reporters used a pencil, a notebook, and a typewriter as their reporting equipment. Usually, reporters took notes while they were gathering information. However, as technology developed, sophisticated communication equipment became available, and reporters started using high-technology devices "enabling reporters to capture the things they saw and heard more comprehensively and accurately than they could with memory or pen."[45]

Digital technology has enabled cameras and recording devices to be miniaturized and customized. As a result, "cameras . . . can fit within a pair of eyeglasses" and capture vivid images at a distance, and "microphones . . . can hear through walls from afar to pick up . . . sighs and whispers."[46] Likewise, digitalized computer technology based on

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[39] Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 510 (4th Cir. 1999).

[40] *Id.* at 510-11.

[41] Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 814 (M.D.N.C. 1995).

[42] Susan Paterno, *The Lying Game*, AM. JOURNALISM REV. 40, 44-45 (1997).

[43] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[44] Walsh et al., *supra* note 33, at 1118.

[45] Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. RICH. L. REV. 1185, 1208 (2000).

[46] Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67

digitalization has empowered individuals to easily perform with ease what was once impossible. This has certainly raised privacy concerns despite the advantages such technology provides to society. The observation has been made that "[a] wearable computer that enabled the wearer to record or transmit visual images of third parties wishing to be alone will raise 'physical privacy' concerns, particularly if the transmissions are more than momentary, are of identifiable parties, and are non-consensual."[47]

For example, in *Dietemann v. Times, Inc.*, *Life* magazine reporters armed with hidden cameras and microphones secretly took pictures and recorded conversations that were electronically transmitted to a nearby van in an attempt to investigate A. A. Dietemann for practicing medicine without a license.[48] In *Food Lion,* "PrimeTime Live" reporters used hidden miniaturized cameras and highly sensitive recording devices to capture images and voices to document evidence of unsanitary meat handling practices.[49] The secret recordings in both cases were possible because of the newly available technology. The availability of this advanced technology has provided reporters with the incentive to use surreptitious and intrusive means to go farther and deeper for desired information.

C. *Protection for Newsgathering under* Branzburg v. Hayes

The Supreme Court in *Branzburg v. Hayes* considered whether requiring reporters "to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment."[50] *Branzburg v. Hayes* was a consolidation of four cases that involved journalists' claims of First Amendment protection for their refusal to identify confidential sources when subpoenaed before a

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GEO. WASH. L. REV. 1097, 1098 (1999); *see also* Zimmerman, *supra* note 45, at 1209.

[47] RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW: CASES AND MATERIALS 335 (1999).

[48] 449 F.2d 245, 246 (9th Cir. 1971).

[49] Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 510-11 (4th Cir. 1999).

[50] 408 U.S. 665, 667 (1972).

grand jury.[51]

Two of the cases involved Paul Branzburg, a staff reporter for the *Courier-Journal*, a daily newspaper published in Louisville, Kentucky.[52] In 1969, the *Courier-Journal* carried a story, based on Branzburg's observations of two young men, with a photograph describing in detail how to synthesize hashish from marijuana.[53] The article stated that Branzburg promised not to disclose the identity of the hashish makers.[54] When a county grand jury subpoenaed Branzburg, he refused to identify the individuals he had observed.[55] On another occasion, the *Courier-Journal* published a similar story written by Branzburg about the drug scene in Frankfurt.[56] This time, Branzburg interviewed and made observations of several dozen drug users over a two-week period.[57] Branzburg was subpoenaed before the county grand jury "to testify [about the] violation of statutes concerning [the] use and sale of drugs."[58] He refused to identify his sources.[59]

The third case, *In re Pappas*,[60] arose when Paul Pappas, a newsman-photographer for a television station in New Bedford, Massachusetts, was subpoenaed to testify about what he witnessed in a Black Panther headquarters.[61] Pappas was assigned to report on civil disorder and turmoil, and he attempted to cover a Black Panther conference, taking place at the headquarters.[62] As a condition of entry, Pappas promised not to disclose anything he saw and heard.[63] Although Pappas stayed for three hours, he did not do a story on what

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[51] Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970); Branzburg v. Meigs, 503 S.W.2d 748 (Ky. 1971); *In re* Pappas, 266 N.E.2d 297 (Mass. 1971); Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

[52] Branzburg v. Pound, 461 S.W.2d 345; Branzburg v. Meigs, 503 S.W.2d 748.

[53] Branzburg v. Hayes, 408 U.S. at 667.

[54] *Id.* at 668.

[55] *Id.*

[56] *Id.* at 669.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 670.

[60] 266 N.E.2d 297 (Mass. 1971).

[61] Branzburg v. Hayes, 408 U.S. at 672-73.

[62] *Id.* at 672.

[63] *Id.*

he observed.[64] Nevertheless, Pappas was summoned before a county grand jury to answer any questions concerning what had happened inside of the headquarters.[65] He refused to testify about what he had witnessed.[66]

The fourth case, *Caldwell v. United States*,[67] arose from grand jury subpoenas issued to *New York Times* correspondent Earl Caldwell, who was assigned to cover the Black Panther Party and other black militant groups in the San Francisco – Oakland area.[68] The *Times* published Caldwell's story based on his interviews with officers and spokesmen of the Black Panthers.[69] A federal court ordered Caldwell to testify about his observations, but he refused to appear before a grand jury and was held in contempt of the court.[70] The Ninth Circuit reversed the trial court decision, holding that the First Amendment provides protections for newsmen "to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy."[71] The court also said that the First Amendment provides a constitutional privilege to decline to appear before a grand jury investigating dissenting groups.[72]

The Supreme Court affirmed the decisions of the state courts but reversed the Ninth Circuit decision.[73] The Court held that journalists bear the obligation to appear before a grand jury, the same as citizens generally do.[74] The Court did say that "[n]or was it suggested that

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[64] *Id.*

[65] *Id.* at 673.

[66] *Id.* at 673-74.

[67] 434 F.2d 1081 (9th Cir. 1970).

[68] Branzburg v. Hayes, 408 U.S. at 675.

[69] *Id.* at 677. The story stated that "[i]n their role as the vanguard in a revolutionary struggle the Panthers have picked up guns." *Id.* It quoted an officer as declaring: "We advocate the very direct overthrow of the Government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle." *Id.*

[70] *Id.* at 675-76.

[71] Caldwell v. United States, 434 F.2d at 1084-85.

[72] *Id.* at 1089.

[73] Branzburg v. Hayes, 408 U.S. at 708-09.

[74] *Id.* at 682.

newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[75] However, the Court rejected Branzburg's claims for a First Amendment privilege to refuse to reveal the identity of his confidential sources.[76] "The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law."[77] Yet, reporters are also obligated to respond to grand jury subpoenas like other citizens.[78] The Court emphasized, in a plurality opinion, that "the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task."[79] Justice Byron White, writing the plurality opinion, stated that, "neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence."[80] Journalists are not an exception in bearing the duty of appearing before a grand jury and in answering questions relevant to a criminal investigation. White further stated that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[81]

Joined by Justice Brennan and Marshall in a dissenting opinion, Justice Potter Stewart wrote that the "'delicate and vulnerable' nature . . . [of] First Amendment rights require[s] special safeguards."[82] Reporters should have a limited First Amendment right to refuse to identify their sources under some circumstances because the right stems from society's interest "in a full [and free] flow of information to the public."[83] Justice Stewart went on to say that even though there is no claim for an absolute privilege by the newsmen in this case,

> [a] reporter should not be forced either to appear or to testify before a

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[75] *Id.* at 681.
[76] *Id.* at 692.
[77] *Id.* at 681-82.
[78] *Id.* at 682.
[79] *Id.* at 691.
[80] *Id.* at 682.
[81] *Id.*
[82] *Id.* at 738 (Stewart, J., dissenting) (citation omitted).
[83] *Id.* at 727.

> grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure.[84]

In addition, Stewart believed that the confidentiality of sources is sometimes necessary to the newsgathering process.[85] Confidential sources are particularly crucial for sensitive stories involving political figures, government officials, and minority groups. "A public-spirited citizen inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoing."[86] When forced, journalists may have to choose "between risking exposure by giving information or avoiding the risk by remaining silent."[87] In other words, newsgathering is a corollary to publication,[88] and "the right to gather news implies . . . a right to a confidential relationship between . . . reporter[s] and [their] source[s]."[89] If the news were cut off at its source and if no protection were afforded to newsgathering, the free flow of information to the public protected under the First Amendment would be severely curtailed.[90] This proposition requires, Stewart explained, recognizing the logic of three factual predicates:

> (1) [N]ewsmen require informants to gather news; (2) confidentiality – the promise or understanding that names or certain aspects of communications will be kept off the record – is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power – the absence of a constitutional right protecting, in *any way*, a confidential relationship from compulsory process – will either deter sources from divulging information or deter reporters from gathering and publishing information.[91]

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84 *Id.* at 680.
85 *Id.* at 729 (Stewart, J., dissenting).
86 *Id.* at 731.
87 *Id.*
88 *Id.* at 727.
89 *Id.* at 728.
90 *Id.* at 727.
91 *Id.* at 728.

Stewart said that government officials should meet "a heavy burden of justification" in order to force reporters to testify before a grand jury.[92] The government should show probable cause to believe that a reporter has information clearly relevant to violation of law, and no other alternative means are available to obtain the information sought. The government also ought to demonstrate "a compelling and overriding interest in the information."[93]

The Court rejected any explicit constitutional privilege for reporters to refuse to testify before a grand jury. Yet, Justice Lewis Powell's concurring opinion, along with the dissenting opinions, created a qualified constitutional privilege.[94] Powell said that the Court did not hold that reporters "are without constitutional rights with respect to the gathering of news or in safeguarding their sources."[95] He further said that

> [t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.[96]

This concurring opinion thus became the foundation of a qualified privilege for reporters. Powell's concurring opinion, combined with the dissents, including that of Stewart, has been influential in providing not only a First Amendment privilege, but also constitutional protection for other newsgathering practices as well. In short, *Branzburg v. Hayes* set out basic, but crucial, guidelines for the newsgathering activities for journalists.

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92 *Id.* at 739.
93 *Id.* at 743.
94 *Id.* at 709-10 (Powell, J., concurring).
95 *Id.* at 709.
96 *Id.* at 710.

D. *Protection for Lawfully Acquired Truthful Information*

1. Lawful Acquisition of Truthful Information and Its Publication

The United States Supreme Court has recognized that the First Amendment provides protection for the publication of information acquired through lawful newsgathering practices. To qualify for the constitutional protection, "the truthful information sought to be published must have been lawfully acquired."[97]

a. *Cox Broadcasting Corp. v. Cohn*

The Supreme Court in 1975 said that the First Amendment provides protection for the publication of lawfully acquired public records. In *Cox Broadcasting Corp. v. Cohn*, a television station owned by Cox Broadcasting Corporation reported the name of a seventeen-year-old girl who was raped and murdered by six youths.[98] The station learned the name of the victim from court files.[99] Martin Cohn, the father of the victim, brought an action for monetary damages based on a Georgia statute making it a misdemeanor to publish the name of a victim of sexual assault.[100] Cohn claimed that the station invaded his daughter's right to privacy by broadcasting her name.[101] The trial court ruled in favor of Cohn, and the state supreme court, holding that the victim's name is not a matter of public interest,

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[97] Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991).

[98] 420 U.S. 469, 471 (1975).

[99] *Id.* at 472-73.

[100] The statute provided that:

> [I]t shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

Id. at 472 n.1 (quoting GA. CODE ANN. § 26-9901 (1972)).

[101] Cox v. Cohn, 420 U.S. at 474.

sustained the verdict.[102]

Reversing the lower court's decision, the Supreme Court held that damages could not be awarded for publishing information contained in a public judicial record.[103] Justice White, writing the opinion for the Court, said that "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."[104] By their very nature, public records "are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media."[105] Privacy rights are clearly rooted in the traditions and significant concerns of the society.[106] Nevertheless, the First Amendment prohibits the states from punishing the press for publication of truthful information contained in judicial proceedings open to the public.[107] "If there are privacy interests to be protected in [court] proceedings, the States must respond by means which avoid public documentation or other exposure of private information."[108] Once the information is in the public domain, the press cannot be punished for publishing it, the Court said.[109]

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[102] *Id.* at 474-75.

[103] *Id.* at 491-97.

[104] *Id.* at 492. To emphasize that court proceedings are public events, the Court quoted Justice Douglas's opinion in *Craig v. Harney*, 331 U.S. 367, 374 (1974):

> A trial is a public event. What transpires in the courtroom is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Cox v. Cohn, 420 U.S. at 492 (quoting Craig v. Harney, 331 U.S. at 374 (1974)).

[105] Cox v. Cohn, 420 U.S. at 495.

[106] *Id.* at 491.

[107] *Id.* at 495.

[108] *Id.* at 496.

[109] *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 652 D cmt. b (1977) ("[T]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public.").

b. *Oklahoma Publishing Co. v. Oklahoma County District Court*

Two years later, the Court in *Oklahoma Publishing Co. v. Oklahoma County District Court*[110] touched on the issue of newsgathering in the context of a prior restraint. There, the Court invalidated a state court injunction that prohibited the press from disseminating the name of a juvenile.[111]

Newspapers and TV/radio stations in Oklahoma City, including three newspapers of Oklahoma Publishing Co., published the name and photograph of an 11-old-year boy who was charged with murder for the shooting of a railroad switchman.[112] Reporters learned the boy's name from a detention hearing and took pictures of the boy as he was escorted from the courthouse to a vehicle.[113] Later, the judge enjoined the press from publishing the name.[114] Oklahoma Publishing filed a motion to quash the order, but the motion was denied by both the district court and the state supreme court,[115] relying on state statutes that provide that any juvenile proceedings and records are private unless a court opens them.[116]

In a brief *per curiam* opinion, the Supreme Court reversed the lower court decision, holding that once truthful information is publicly revealed or otherwise in the public domain, its further dissemination could not be constitutionally restrained.[117] The order, the Court said, "abridge[d] the freedom of the press in violation of the First and Fourteenth Amendments."[118] Affirming its decision in *Cox Broadcasting*, the Court clearly stated that the press should not be prohibited from publishing truthful information obtained at court proceedings that were open to the public.[119]

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110 430 U.S. 308 (1977).
111 *Id.* at 308-09.
112 *Id.* at 309.
113 *Id.*
114 *Id.* at 308.
115 *Id.* at 309.
116 *Id.* at 309-10 (citing OKLA. STAT. ANN. tit. 10, §§ 1111, 1125 (West 1976)).
117 *Id.* at 310.
118 *Id.* at 312.
119 *Id.* at 311.

c. *Landmark Communications Inc. v. Virginia*

In *Landmark Communications, Inc. v. Virginia*,[120] the Court considered the constitutionality of Virginia's general statute imposing criminal sanctions for divulging information regarding proceedings of a state judicial review commission.[121]

The *Virginian Pilot*, a Landmark newspaper, published an article about a judicial review commission investigation and identified a state judge whose conduct was being investigated.[122] At trial, Landmark was found guilty of violating the statute and fined $500 plus the costs of prosecution; the state supreme court affirmed.[123]

The Court said that even though confidentiality of the commission proceedings served legitimate state interests, these interests were not sufficient to justify the infringement of First Amendment guarantees.[124] The Court found that "neither the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality."[125] "[A] major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs,"[126] including discussion of court proceedings and judicial conduct, and the article

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[120] 435 U.S. 829 (1978).

[121] *Id.* at 830. The Virginia statute provides that:

> All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11, 2.1-37.12), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character . . . . Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor.

Id. at 830 n.1 (quoting VA. CODE ANN. § 2.1-37.13 (Michie 1973)).

[122] *Id.* at 831.

[123] *Id.* at 832.

[124] *Id.* at 841. The Court found that "more than 40 states having similar commissions have not found it necessary to enforce confidentiality by use of criminal sanctions against nonparticipants" such as Landmark. *Id.*

[125] *Id.*

[126] *Id.* at 838 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

served the interest of public scrutiny by providing accurate factual information about a judicial inquiry.[127] Justice Potter Stewart in his concurring opinion wrote,

> [i]f the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish. Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press . . . .[128]

d. *Smith v. Daily Mail Publishing Co.*

In *Smith v. Daily Mail Publishing Co.*,[129] the Court once again dealt with the issue of whether punishing the press for its publication of truthful information about a juvenile offender advances state interests.[130]

The Daily Mail, by monitoring a police radio and by questioning witnesses, published the name of a juvenile who was arrested for the killing of another youth.[131] *The Daily Mail* was indicted for violating a West Virginia statute that made it a crime to publish the name of any juvenile offender without the approval of the court.[132] A state appeals court ruled that the statute violated the First Amendment.[133]

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[127] *Id.* at 838-39.

[128] *Id.* at 849 (Stewart, J., concurring).

[129] 443 U.S. 97 (1979). Unlike *Cox* and *Landmark*, *Daily Mail* did not involve public records or proceedings; instead, it involved a normal way of newsgathering, which is by monitoring police radio. *Id.* at 99.

[130] *Id.* at 98.

[131] *Id.* at 99.

[132] *Id.* at 100. The statute provided that:

> [Nor] shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court . . . . A person who violates . . . a provision of this chapter for which punishment has not been specifically provided, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment.

Id. at 98-99 (quoting W. VA. CODE §§ 49-7-3, 49-7-20 (1976)).

[133] *Id.* at 100.

Finding that the statute was not sufficient to justify criminal sanctions, the Court struck it down as unconstitutional.[134] The Court stated that "if a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[135] Even when a state attempts to punish the press for its publication after the event, the state "must nevertheless demonstrate that its punitive action was necessary to further the state interests asserted."[136] The sole purpose of the statute is to protect the anonymity of the juvenile offender.[137] This state interest, the Court said, is not sufficient to justify the application of a criminal statue.[138] The Court added that a state cannot, consistent with the First Amendment, punish the truthful publication of the identity of a juvenile that is lawfully obtained by a newspaper.[139] In short, First Amendment rights prevail absent a state interest of the highest order.[140]

e. *Florida Star v. B. J. F.*

A weekly newspaper, *The Florida Star*, published the name of a victim of sexual assault, B.J.F., which was acquired from the press release of a county sheriff's department.[141] B.J.F. sued both the department and the *Star* for violation of Sec. 974.03 of the Florida statute that makes it unlawful to print a sexual assault victim's name.[142]

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[134] *Id.* at 104-05.

[135] *Id.* at 103.

[136] *Id.* at 102 (citing Landmark Communications, Inc., v. Virginia, 435 U.S. 829, 843 (1978)).

[137] *Id.* at 104.

[138] *Id.*

[139] *Id.* at 106.

[140] *Id.* at 105-106.

[141] Florida Star v. B. J. F., 491 U.S. 524, 527 (1989).

[142] *Id.* at 526. The statute provides that it is unlawful to publish or broadcast information identifying a sexual offense victim.

> No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

The jury awarded B.J.F. $100,000 in compensatory and punitive damages and the appeals court affirmed the trial decision.[143] Accordingly, the state supreme court denied review of the case.[144]

Reversing the lower court's ruling, the Supreme Court held that "punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act."[145] Such imposition of liability is a "too precipitous" means of furthering the state interests to protect the victim of a sexual offense.[146] The Court also said that "depriving protection to those who rely on the government's implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication."[147] Therefore, the publication of lawfully gained truthful information can be punished only when a narrowly tailored state interest of the highest order is shown.[148] In other words, "[w]hen a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant."[149]

These five Supreme Court cases, from *Cox* to *Florida Star*, suggest that if the media lawfully obtain truthful information about a matter of public significance, the publication of the information is entitled to the highest constitutional protection. This line of cases is frequently cited as authority by journalists who engage in surreptitious and intrusive newsgathering in defending themselves in legal actions.

Id. at 526 n.1 (quoting FLA. STAT. § 794.03 (1987)).

143 *Id.* at 529.

144 *Id.*

145 *Id.* at 535.

146 *Id.* at 538.

147 *Id.* at 536.

148 *Id.* at 541.

149 *Id.* at 540.

III. USE OF HIDDEN CAMERAS TO CAPTURE VIVIDLY EVIDENTIARY IMAGES

As noted in the introduction, the news media have engaged in surreptitious and intrusive newsgathering practices for a variety of reasons—to gain higher ratings and profits and to practice investigative reporting. Advances in modern communication technologies have contributed to the use of questionable newsgathering practices. The use of hidden cameras by network televisions for vividly evidentiary pictures has drawn both the public's attention and criticism.

A. *Use of Hidden Cameras*

Advanced communication technology has enabled journalists to arm themselves with sophisticated and miniaturized cameras, which can be used to secretly videotape what was previously hidden from public eyes.[150] "The availability of such technology and the vivid images it often yields, has arguably increased the news media's incentive" to employ surreptitious and intrusive newsgathering methods.[151] A number of newsgathering cases involving hidden cameras have shown this increasing trend.

Much of the contemporary law regarding newsgathering that has centered on the use of hidden cameras seems to have its basis in *Dietemann v. Time, Inc.*, in which the Ninth Circuit held that the First Amendment does not give a constitutional privilege to reporters who trespass and violate the privacy of their subjects.[152]

In *Dietemann*, *Life* magazine reporters pretended to be in need of medical treatment and secretly took photographs and voice recordings that were subsequently used in a story about A. A. Dietemann, who was practicing medicine without a license.[153] Upholding a judgment for intrusion, the Ninth Circuit said that "clandestine photography of the plaintiff in his den and the recordation and transmission of his conversation without his consent resulting in his emotional distress

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[150] DIENES ET AL., *supra* note 30, at 710.

[151] *Id.*

[152] 449 F.2d 245, 249-50 (9th Cir. 1971).

[153] *Id.* at 246.

warrants recovery for invasion of privacy."[154] The court rejected *Life*'s First Amendment defense by stating that even though newsgathering is an integral part of news dissemination, "hidden mechanical contrivances are [not] 'indispensable tools' of newsgathering."[155] The court said that "[i]nvestigative reporting is an ancient art; its successful practice long antecedes the invention of miniature cameras and electronic devices."[156] But the First Amendment neither is "a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office"[157] nor has it ever "been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering."[158]

1. *J.H. Desnick v. ABC, Inc.*

One of the primary hidden camera cases in which a major television network is involved arose out of ABC's investigative newsgathering and reporting.[159] In 1995, ABC's "PrimeTime Live" sent its crew with concealed video recorders to obtain footage of an ophthalmologist performing cataract surgery.[160] "PrimeTime Live" promised not to involve hidden or undercover surveillance at the main office and that its coverage would be balanced and fair. Upon this promise, James Desnick, owner of Desnick Eye Center, allowed "PrimeTime Live" to videotape the center's main office in Chicago. However, unbeknown to Desnick, "PrimeTime Live" dispatched test patients equipped with hidden cameras to branches of the center in Wisconsin and Indiana, and later aired a program using the footage gathered from the undercover investigation.[161] The program alleged that Desnick manipulated patients' medical records to show they

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[154] *Id.* at 248.

[155] *Id.* at 249.

[156] *Id.*

[157] *Id.* The court said that even if "the person subjected to the intrusion is reasonably suspected of committing a crime" the First Amendment does not become such a license. *Id.*

[158] *Id.*

[159] *J.H. Desnick v. ABC, Inc.*, 44 F.3d 1345 (7th Cir. 1995).

[160] *Id.* at 1347-48.

[161] *Id.*

needed eye examinations and cataract surgery when they did not.[162] Desnick brought an action for trespass and intrusion against ABC. The federal district court ruled that there was no claim for defamation because the alleged harm did not arise from the intrusion itself but from the subsequent broadcast.[163]

The Seventh Circuit found no invasion of privacy.[164] Instead, the court said that the center's offices were open to anyone wanting to have ophthalmic services and the test patients videotaped physicians engaged in professional, not private, practices and conversations with customers.[165] The court stated that no intimate details were revealed by the program, and no eavesdropping was conducted on any private conversation.[166] In addition, the test patients' entry was not intrusive, in that it was not an interference with the ownership, and their activities did not disturb the offices.[167]

Rejecting fraud claims for using false promises to gain entry to a commercial site, the court said that some promises, not intended to induce reliance, are "puffery, bragging, 'mere words,' and casual bonhomie, rather than . . . serious commitment."[168] Often, journalists give promises to gain entry or to obtain information. The court also mentioned that if breaching such promises constitutes a fraud, journalists would be easily exposed to unjustifiable liability for potential damages.[169]

Recognizing the intrusiveness of modern newsgathering, the court held that

> [i]nvestigative journalists [are] well known for ruthlessness promise to wear kid gloves. They break their promise, as any person of normal

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[162] *Id.* A professor in a segment of the program said that Desnick's behavior is "near malpractice." *Id.*

[163] *Id.* at 1349-50.

[164] *Id.* at 1353.

[165] *Id.* at 1352-53. The court distinguished *Dietemann*. *Id.* According to the court's analysis, *Dietemann* involved a home, and Dietemann was not in business, did not advertise his services, nor charge for them. *Id.* "His quackery was private." *Id.* at 1353.

[166] *Id.*

[167] *Id.* at 1352.

[168] *Id.* at 1354.

[169] *Id.*

> sophistication would expect. If that is "fraud," it is the kind against which potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods.[170]

Oftentimes, the tabloid style of newsgathering, although it is "shrill, one-sided, and offensive," plays an important role in a vigorous market for information and ideas.[171] It is entitled to constitutional safeguards under the First Amendment regardless of "whether the tort suit is aimed at the content of the broadcast or the production of the broadcast."[172] The Court further held that

> [i]f the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it (for the media have no general immunity from tort or contract liability . . .), then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly.[173]

This ruling suggests that the intrusive newsgathering and the subsequent publication are separable.

2. *Sanders v. ABC, Inc.*

Once again, ABC's "PrimeTime Live" was involved in a case implicating the freedom of press to conduct intrusive investigative measures.[174] In a California case, *Sanders v. Capital Cities/ABC, Inc.*, a "PrimeTime Live" reporter conducted an undercover investigation into the "tele-psychic" industry.[175] The reporter, hired as an employee of the Psychic Marketing Group, secretly videotaped Sanders and other tele-psychics with a so-called "hat cam."[176] ABC subsequently televised the footage on "PrimeTime Live."[177] Sanders sued ABC for

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170 *Id.*

171 *Id.* at 1355.

172 *Id.*

173 *Id.* (citations omitted).

174 Sanders v. ABC, Inc., 978 P.2d 67 (Cal. 1999).

175 *Id.* at 69.

176 *Id.* at 70. The reporter used a camera concealed in her hat and a microphone concealed in her brassiere. *Id.*

177 *Id.* at 70 n.1.

invasion of privacy and was awarded a judgment of $1.2 million.[178] A state appeals court found that the tele-psychics had no objectively reasonable expectation of privacy and that secret videotaping was not sufficient, by itself, to claim damages under the tort of invasion of privacy.[179]

Reversing the appeals court, the state supreme court held that employees may enjoy a limited expectation of privacy in a workplace, in that their conversations will not be secretly recorded by undercover reporters, even if their conversations were not completely private.[180] Privacy is "not a binary, all-or-nothing characteristic," for the purpose of intrusion.[181]

There are certain degrees of societal recognition of the expectation of privacy.[182] The fact that "the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law."[183] Under these circumstances, employees enjoy some degree of reasonable expectation of privacy against a visual or aural electronic intrusion by a stranger, despite the fact that the conversations could be overheard by coworkers or by an employer.[184] Therefore, the court held, an absolute or complete expectation of privacy was not an essential element of an intrusion claim.[185] "Privacy . . . must be evaluated with respect to the identity of

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[178] *Id.* at 70-71.

[179] *Id.* at 71.

[180] *Id.* at 77. The court held that

> in an office or other workplace to which the general public does not have unfettered access, employees may enjoy a limited, but legitimate, expectation that their conversations and other interactions will not be secretly videotaped by undercover television reporters, even though those conversations may not have been completely private from the participants' coworkers.

Id. at 69.

[181] *Id.* at 72.

[182] *Id.*

[183] *Id.*

[184] *Id.* at 74-75. The court went on to say that "the fact that coworkers may have observed a workplace interaction does not as a matter of law eliminate all expectations of privacy the participants may reasonably have had vis-à-vis covert videotaping by a stranger to the workplace." *Id.* at 78.

[185] *Id.*

the . . . intruder and the nature of the intrusion."[186] The court further held that liability in an intrusion tort claim requires that "the invasion be highly offensive to a reasonable person, considering, among other factors, the motive of the alleged intruder."[187]

In *Sanders*, ABC was unsuccessful in persuading the court to admit its First Amendment argument that the court's adoption of "a doctrine of *per se* workplace privacy" would severely chill the news media from investigating anti-social crimes in open work areas.[188] The court emphasized that employees enjoy a reasonable expectation of privacy in workplaces, and secret videotaping of workplace interactions without consent violates privacy, unless the workplace is regularly open to the public/press, or interaction is with a customer.[189]

3. *Food Lion v. Capital Cities/ABC, Inc.*

About four months after *Sanders* was decided, ABC's intrusive methods of newsgathering resulted in a well publicized legal battle with a supermarket food chain.[190] This case arose when ABC's "PrimeTime Live" televised an undercover story that used hidden cameras to expose unsanitary meatpacking practices at Food Lion stores.[191]

In 1992, after receiving allegations that Food Lion stores were engaging in unsanitary meat-handling practices, "PrimeTime Live" sent two undercover reporters, Lynne Dale and Susan Barnett, to investigate.[192] Both Dale and Barnett applied for jobs with the food chain, but their applications did not mention their current employment with ABC.[193] They also contained false information about their educational backgrounds and job experiences.[194] Both were hired

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186 *Id.* at 73.

187 *Id.* at 69 (citations omitted).

188 *Id.* at 77.

189 *Id.*

190 Food Lion v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999).

191 *Id.* at 510-11.

192 *Id.* at 511.

193 *Id.* at 510.

194 *Id.*

based on their applications: Barnett as a deli clerk at a South Carolina store and Dale as a meat wrapper at a North Carolina store.[195] Barnett worked for two weeks and Dale for only one week.[196] While working, they used miniaturized hidden cameras and microphones to record what they observed.[197] A total of 45 hours of camera footage from different places at the stores was gathered, some of which was later used in a broadcast of "PrimeTime Live."[198]

Food Lion brought an action for fraud, breach of duty of loyalty, trespass, and unfair competition against ABC and its producers and reporters.[199] Food Lion also sought to recover damages for loss of good will, lost sales and profits, and diminished stock value caused by the broadcast.[200] Finding that the two reporters had committed fraud, trespass, unfair trade practices, and breach of loyalty, a jury in 1997 awarded Food Lion $5.5 million in punitive damages for non-reputational injuries.[201] The amount was reduced to $315,000 by the judge.[202] The district court rejected Food Lion's publication damage claim and said that "the First Amendment bars Food Lion from recovering publication damages for injury to its reputation as a result of the 'PrimeTime Live' broadcast."[203] Food Lion could, the court said, recover damages caused by the alleged wrongful and illegal acts. However, relying on the Supreme Court's analysis in *Hustler Magazine v. Falwell*,[204] the court said that the alleged injuries caused by the broadcast of "PrimeTime Live" were reputational in nature. Therefore, Food Lion could not recover publication damages without

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195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.* at 511.

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.*

203 Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 822-24 (M.D.N.C. 1995).

204 Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (holding that public figures may not collect damages for intentional infliction of emotional distress inflicted by the publication unless they meet the requirement of actual malice).

proving the *Sullivan* requirement of actual malice.[205]

In 1999, the Fourth Circuit overturned the trial court's judgment of fraud and unfair trade practices but affirmed the judgment of breach of duty of loyalty and trespass.[206] The court also affirmed the district court's refusal to award publication damages.[207]

The court first examined the fraud claim under North Carolina law, which states that the plaintiff, to prove fraud, must demonstrate that the defendant "(1) made a false representation of material fact, (2) knew it was false (or made it with reckless disregard of its truth or falsity), and (3) intended that the plaintiff rely upon it. In addition, (4) the plaintiff must be injured by reasonably relying on the false representation."[208]

Here, Food Lion sought to recover the administrative costs and wages it paid to Dale and Barnett, arguing that it was fraudulently induced to hire them and pay such costs because it relied on their applications. It was not disputed that Dale and Barnett knowingly falsified their resume, and Food Lion relied on them. Therefore, the issue rested on the fourth element of fraud, which is injurious reliance. The court found that even though the two journalists misrepresented their backgrounds, they did not make any representations about how long they would work at the stores.[209] Also, the jobs of meat wrapper trainee and deli clerk "were ones with high turnover," the court said, and both parties agreed on the applications that they could terminate the employment at any time. The court further said that Food Lion must prove "injury proximately caused by its reasonable reliance on a misrepresentation."[210] In other words, Food Lion had to show that the administrative costs and wages were an injury of reasonable reliance on the misrepresentations. Indeed, the court found that Dale and Barnett were paid because of their presence for work and performance of their assigned tasks.[211] In sum, the court said that Food Lion had not

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[205] Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. at 823-24.

[206] Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 510 (4th Cir. 1999).

[207] *Id.* at 511.

[208] *Id.* at 512; *see also* Ragsdale v. Kennedy, 209 S.E.2d 494, 500 (N.C. 1974); Britt v. Britt, 359 S.E.2d 467, 471 (N.C. 1987).

[209] Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d at 513.

[210] *Id.* at 512-13.

[211] *Id.* at 514.

been injured by the misrepresentations, as the employees did their jobs as assigned and the company acknowledged that the jobs for which they were hired were high-turnover positions.[212]

Regarding the issue of the breach of duty of loyalty, the court stated that employees, in general, are disloyal when their performances are "inconsistent with promoting the best interest of their employer at a time when they were on its payroll."[213] The court then considered three tortuous circumstances to which the tort laws of breach of loyalty in North Carolina and South Carolina applies. The tort applies 1) "when an employee competes directly with her employer, either on her own or as an agent of a rival company"; 2) "when the employee misappropriates her employer's profits, property, or business opportunities"; and 3) "when the employee breaches her employer's confidences."[214] Applying these circumstances, the court found that the reporters' interests to expose unsanitary meat handling practices to the public were adverse to the interests of Food Lion, and the reporters served the interests of ABC while they were on payroll of the company. Once hired by Food Lion, they were obligated to promote their new employer's interests even though they worked for ABC. Yet, the reporters did not serve Food Lion faithfully and their conduct was "sufficient to breach the duty of loyalty and trigger tort liability."[215]

The appeals court moved on to the issue of trespass. At the trial, the jury held Dale and Barnett liable for trespass based on two grounds. First, Food Lion's consent given to the reporters was invalid in that it was based on misrepresentations, and second, the consent was vitiated when the reporters breached the duty of loyalty. The appeals court further said that the jury's finding of trespass on the basis of misrepresentation could not be sustained. Instead, the court affirmed

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[212] *Id.* at 512, 514.

[213] *Id.* at 515 (quoting Lowndes Prods., Inc. v. Brower, 191 S.E.2d 761, 767 (S.C. 1972)).

[214] *Id.* at 515-16.

[215] *Id.* at 516. The court said that an employee is disloyal when he "deliberately acquired an interest adverse to his employer." *Id.* (citing Long v. Vertical Techs., Inc., 439 S.E.2d 797, 802 (N.C. App. 1994)). "Because the reporters had "the requisite intent to act against the interests of their second employer, Food Lion, for the benefit of their main employer, ABC, they were liable in tort for their disloyalty." *Id.*

the finding of trespass based on the second ground, the breach of duty of loyalty.[216] The court reasoned that consent is not valid for trespass "if the person consenting to the conduct of another . . . is induced by the other's misrepresentation."[217] Even the consented entry can be trespass "if a wrongful act is done in excess of and in abuse of authorized entry."[218] Yet, if the person enters a place open to anyone, does not disrupt the peaceable possession of the place or "invade anyone's private space," and "[does] not reveal the intimate details of anybody's life,"[219] the entry is "not an interference with the ownership or possession" of the place.[220] Nevertheless, in this case, the areas of the stores into which the reporters went were not open to the general public, and the reporters surreptitiously videotaped unwholesome activities directly adverse to the interests of Food Lion. Consequently, they breached the duty of loyalty while their videotaping exceeded the scope of their permission to be in nonpublic areas of the store.[221] In other words, the reporters committed trespass because the consent was "nullified when they tortiously breached their duty of loyalty to Food Lion."[222]

The court rejected ABC's argument that the newsgathering conduct engaged in by its two reporters should receive First Amendment protection. Even though First Amendment protection exists for newsgathering, and freedom of the press could be eviscerated without some protection, "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."[223] The

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[216] *Id.* at 518-19.

[217] *Id.* at 518 (citing RESTATEMENT (SECOND) OF TORTS § 892B(2) (1965)).

[218] *Id.* at 517 (quoting Miller v. Brooks, 472 S.E.2d 350, 355 (N.C. Ct. App. 1996), citing Blackwood v. Cates, 254 S.E.2d 7, 9 (N.C. 1979)).

[219] *Id.* at 518 (citing Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1352-53 (7th Cir. 1995)).

[220] *Id.*

[221] *Id.* at 519.

[222] *Id.*

[223] *Id.* at 520-22 (citing Shain v. United States, 978 F.2d 850, 855 (4th Cir. 1992) (Wilkonson, J., concurring); Branzburg v. Hayes, 408 U.S. 665, 681 (1972); Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991)).

torts that the reporters committed, breach of the duty of loyalty and trespass, do not target or single out ABC. They apply "to the daily transactions of the citizens" of the two states, and "applying these laws against the media will have [no] more than an incidental effect on newsgathering."[224] The court went on to say that the media are able to perform their public missions effectively without committing "run-of-the-mill torts."[225] Based on this reasoning, the court affirmed a damage award of two dollars for breach of the duty of loyalty and trespass, but reversed the punitive damages awarded on the fraud claim.[226]

Finally, the court ruled on the claims of publication damages of Food Lion and affirmed the trial court's decision to disallow damages. Food Lion argued that the trial court erred by "refusing to allow it to use its non-reputational tort claims" to recover compensatory damages for the "PrimeTime Live" broadcast.[227] Noting that the claimed damages, such as loss of good will and lost sales, were closely related to Food Lion's reputation, the court said that what Food Lion was trying to do was "to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim."[228] Therefore, the court stated that Food Lion cannot expect to recover damages for harm to its reputation caused by a subsequent story without showing that the information disclosed was false and that the party reporting it knew it

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[224] Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d at 521 (citing Cohen v. Cowles Media Co., 501 U.S. 663, 670-72 (1991)).

[225] *Id.*

[226] The reduction of the jury award was because of the Supreme Court's recent ruling that excessive punitive damages violate the Fourteenth Amendment's due process clause. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996), where the Court adopted a three-part test to determine whether a punitive damage award is unconstitutionally excessive. The three factors are: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive to compensatory damages; and (3) the civil or criminal penalties that could be imposed for comparable misconduct. *Id.*

[227] *Food Lion,* 194 F.3d at 523.

[228] *Id.* at 522. The court cited New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that public officials as a plaintiff must prove actual malice, that is, reckless disregard for the truth, to win damages).

was false or recklessly disregarded the truth.[229]

IV. BALANCING NEWSGATHERING WITH COMPETING INTERESTS

A. *Media Ethics Codes*

Beyond legal issues, there are ethical concerns about secret and intrusive newsgathering practices. Newspapers, for example, have occasionally identified teenage sexual victims[230] and carried pictures of scorched bodies of fire victims amid the debris of a burnt house.[231] Television stations have videotaped and televised the bloody victims of an automobile accident as the victims are rushed to the hospital.[232] Often, photographers aggressively pursue subjects they think are newsworthy.[233] These are just a few examples of intrusive newsgathering practices that unavoidably raise ethical concerns. Some might argue that there is nothing wrong in engaging in such newsgathering activities. They may argue that the public has a right to know about significant incidents surrounding them, like disasters and crimes, and reporting such incidents is the media's duty. Yet, many media ethicists and critics might condemn the media for employing ethically questionable newsgathering practices, arguing that there are other ways for journalists to achieve their objectives. The media's use of deceptive and intrusive newsgathering methods that harm people cannot be ethically justified, even though the incidents that the media cover are of significant public interest. This is particularly so when journalists violate professional codes of ethics that proscribe certain types of newsgathering.

Most professional news organizations create or adopt codes of ethics to guide their reporters and editors in gathering information and

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229 *Food Lion*, 194 F.3d at 523.

230 *See, e.g.*, Florida Star v. B.J.F., 491 U.S. 524 (1989).

231 *See, e.g.*, Florida Publ'g Co. v. Fletcher, 340 So.2d 914 (Fla. 1976).

232 *See, e.g.*, Shulman v. Group W Prods., Inc., 955 P.2d 469 (Cal. 1998).

233 *See, e.g.*, Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973). Paparazzi style photographers are common these days. They follow celebrities and take pictures of intimate private facts. *Id.*

writing stories. Codes of ethics "fulfill the function of publicly expressing a group's commitment to some moral standard" and increase "the likelihood that people will behave in certain ways."[234] Also, they can "identify useful lists of sins, and to some extent outline truly noble behavior."[235] Additionally, ethics codes should "strive to describe ideals, goals, responsibilities, and evils."[236]

Ethics are fundamentally different from law. While the law is enacted to resolve conflicts between parties involved and carries authority to enforce itself, a code of ethics is designed not only to recommend ideal behaviors that journalists should follow but also to proscribe certain activities that journalists ought to avoid. A group of scholars explained the differences between the two. They said that

> ethics is not the same as law, and ethical constraints are not the same as legal rules. Ethics articulates what we ought to do in order to be moral individuals and professionals, while law concentrates on the bottom line below which we should not fall. Ethics deals with ideal behaviors, while law deals with minimal standards.[237]

Major professional journalism organizations and news services such as the Society of Professional Journalists (SPJ),[238] American Society of Newspaper Editors (ASNE),[239] and Radio-Television News Directors Association[240] have adopted codes of ethics. SPJ's code of ethics states that journalists should show respect for the dignity, privacy, rights, and well-being of people encountered in the course of gathering and presenting the news.[241] It says that the news media

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[234] Judith Lichtenberg, *What are Codes of Ethics for? in* CODES OF ETHICS AND THE PROFESSIONS 13, 24 (Margaret Coady & Sidney Bloch eds., 1996).

[235] JAY BLACK ET AL., DOING ETHICS IN JOURNALISM: A HANDBOOK WITH CASE STUDIES 13, 14 (2d ed. 1995).

[236] Bruce W. Sanford, *Ethic Codes and the Laws*, QUILL, Nov./Dec. 1994, at 43.

[237] BLACK ET AL., *supra* note 235, at 14.

[238] SOC'Y OF PROF'L JOURNALISTS CODE OF ETHICS (1996) [Hereinafter SPJ], *available at* http://www.spj.org/ethics_code.asp (last visited Nov. 20, 2003).

[239] AM. SOC'Y OF NEWSPAPER EDITORS STATEMENT OF PRINCIPLES (2002) [Hereinafter ASNE], *available at* http://www.asne.org/kiosk/achive/principl.htm (last visited Nov. 20, 2003).

[240] RADIO-TELEVISION NEWS DIRS. ASS'N CODE OF ETHICS AND PROF'L CONDUCT (2002) [Hereinafter RTNDA], *available at* http://www.rtnda.org/ethics/coe.shtml (last visited Nov. 20, 2003).

[241] SPJ, *supra* note 238. The SPJ's code of ethics was adopted in 1926 and

should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply. The news media must guard against invading a person's right to privacy. Particularly, SPJ's code discourages using surreptitious newsgathering activities. The codes suggest to "[a]void undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public. Use of such methods should be explained as part of the story."[242]

Under "Minimize Harm," the SPJ code suggests journalists respect individuals' right to privacy. According to the guidelines, newsmen should "[r]ecognize that private people have a greater right to control information about themselves than do public officials and others who seek power, influence or attention. Only an overriding public need can justify intrusion into anyone's privacy."[243]

In addition, journalists should be accountable to their readers, listeners and viewers. Journalists should "[a]dmit mistakes and correct them promptly, [e]xpose unethical practices of journalists and the news media, [a]nd abide by the same high standards to which they hold others."[244]

Recognizing the increased use of hidden cameras and other deceptive newsgathering, SPJ promulgated guidelines to articulate when hidden cameras are journalistically acceptable.[245] The guidelines say that hidden cameras are acceptable when information is of great public importance, when no other alternatives for obtaining the information is available, when reporters are willing to unveil "the nature of the deception and the reason for it," when a news organization demonstrates a pledge of all resources necessary to pursue the story, when "the harm prevented by the information revealed through deception outweighs any harm caused by the act of deception,"

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revised several times. The present version was revised in 1996.

242 *Id.*

243 *Id.*

244 *Id.*

245 *Cited* in Alison Lynn Tuley, Note, *Outtakes, Hidden Cameras, and the First Amendment: A Reporter's Privilege*, 38 WM. & MARY L. REV. 1817, 1850 (1997); Russ W. Baker, *Truth, Lies, and Videotape:* PrimeTime Live *and the Hidden Camera*, 32 COLUM. JOURNALISM REV., 25, 28 (1993).

and when reporters have engaged in a deliberate decision-making process.[246]

ASNE adopted a set of ethical principles that encourages the "highest ethical and professional performance."[247] The code recognizes that journalists are privileged to serve public interests. Thus, "[n]ewspapermen and women who abuse the power of their professional role for selfish motives or unworthy purposes are faithless to that public trust."[248] Article VI of ASNE's code of ethics recommends recognizing the rights of individuals involved in news and keeping confidentiality of news sources when journalists pledge it in exchange for information:

> Journalists should respect the rights of people involved in the news, observe the common standards of decency and stand accountable to the public for the fairness and accuracy of their news reports. Persons publicly accused should be given the earliest opportunity to respond. Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly. Unless there is clear and pressing need to maintain confidences, sources of information should be identified.[249]

The Radio-Television News Directors Association's code of ethics suggests that its members gather and report information of importance accurately, honestly, and impartially.[250] According to the code, journalists should respect the dignity, privacy, and the well-being of people with whom they deal and should not mislead the public by presenting as spontaneous news any material that is staged or rehearsed. Also, journalists should guard against using audio or video material in a way that deceives the audience.[251]

The National Press Photographers Association ("NPPA"), which is a professional society for photojournalists, requires its members to "maintain the highest standards of ethical conduct in serving the public interest."[252] The NPPA code stresses that "the guidelines for fair and

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246 BLACK ET AL., *supra* note 235, at 28.

247 ASNE, *supra* note 239.

248 *Id.*

249 *Id.*

250 RTNDA, *supra* note 240.

251 *Id.*

252 NAT'L PRESS PHOTOGRAPHERS ASS'N BYLAWS, art. XVII., *available at*

accurate reporting should be the criteria for judging what may be done electronically to a photograph."[253] It is wrong and prohibited, according to the code, "to alter the content of a photograph in any way (electronically or in the darkroom) that deceives the public."[254] The code further rejects any business promotions that are "untrue statements of any nature."[255]

All these codes of ethics emphasize that truthful and honest journalistic activities should be used during the course of gathering and disseminating news. If journalists faithfully abide by these principles, these recommended practices should effectively protect the media from criminal sanctions and civil damages, including multi-million dollar punitive damages.

Arguably, unlike those in other professions, such as law and medicine, media ethics codes have very little influence nor direct impact on journalists and their decisions and practices.[256] Codes are supposed to be obeyed because "individuals willingly subject themselves to ethical standards above and beyond their own personal beliefs or because the code has specific provisions for enforcement which they fear should they violate it."[257] However, in reality, they are not uniformly applicable or enforceable.[258] If an accused member quits his organization, that is all. He can practice his trade in other news organizations or professional associations. Normally, news organizations' ethics codes carry more authority than those of professional journalism organizations. If a reporter violates his newspaper's codified ethical guidelines, the newspaper can terminate

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http://www. nppa.org/members/bylaws/default.htm (last visited Nov. 20, 2003).

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] ROY L. MOORE, MASS COMMUNICATION LAW AND ETHICS 17 (2d ed. 1999); David Pritchard & Madelyn Peroni Morgan, *Impact of Ethics Codes on Judgments by Journalists: A Natural Experiment*, 66 JOURNALISM Q. 934 (1989).

[257] BLACK ET AL., *supra* note 234, at 25.

[258] Some journalists resist the adoption of more enforceable codes of ethics arguing that the plaintiff will use them in libel suits to impose liability on the press. *See, e.g.*, Lynn Wickham Hartman, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 677 (1987).

his employment or otherwise discipline him. Mike Barnicle of the *Boston Globe*,[259] Fox Butterfield of the *New York Times*,[260] Gregory Freeman of the *St. Louis Post-Dispatch*,[261] and Mark Hornung the *Chicago Sun-Times*[262] are the examples of reporters that have faced discipline for their actions. They all were involved in unethical practices, such as fabricating facts or plagiarizing others' works. Their newspapers suspended the journalists or, in some cases, terminated them from their employment. However, most professional journalism organizations cannot exercise such prerogatives, even if they can revoke a membership. The power to terminate an employment and the authority to revoke a membership with voluntary organizations are not reasonably comparable. In general, the lack of enforcement is one of the major weaknesses with the various ethics codes.

Imposing criminal liability on reporters, based on a newspaper's internal codes of ethics, is another issue that must be considered in discussing balancing methods. This issue was raised in *United States v. Winans*,[263] in which a *Wall Street Journal* reporter was found guilty of conspiracy, securities fraud, and mail and wire fraud for disclosing details of his column prior to publication to others who used the information for making profits.[264] The *Journal* had rules prohibiting such misconduct. The Second Circuit upheld the fraud conviction, holding that Winans fraudulently misappropriated the Journal's property and the revelation of the prepublication information harmed the newspaper's reputation.[265] Affirming the lower court decisions, the United States Supreme Court said that Winans breached a fiduciary relationship with his employer, the *Journal*, and his conspiracy to

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[259] *See* Robert Phelps, *Barnicle: A Consequence of Not Enforcing A Code*, 74 THE AMERICAN EDITOR 10, n.i2 (1999); *Mike Barnicle: Popular Columnist of the Boston Globe Resigns, Following Charges of Plagiarism and Fabrication*, U.S. NEWS & WORLD REP., Aug. 31, 1998, at 10.

[260] Trudy Lieberman, *Plagiarize, Plagiarize, Plagiarize: Only Be Sure to Always Call It Research*, 34 COLUM. JOURNALISM REV. 21, 23 (1995).

[261] *See id.*

[262] *See id.* at 22.

[263] 612 F. Supp. 827 (S.D.N.Y. 1985).

[264] *Id.* at 840-50.

[265] United States v. Carpenter, 791 F.2d 1024, 1027-36 (2d Cir. 1986), *aff'd*, 484 U.S. 19 (1987).

disclose the confidential information is "not outside the reach of the mail and wire fraud statutes."[266] The Court held that the *Journal*'s "business information that it intended to be kept confidential was its property; the declaration to that effect in the employee manual merely removed any doubts on that score and made the finding of specific intent to defraud that much easier."[267] Winans appropriated the Journal's confidential information "while pretending to perform his duty of safeguarding it."[268]

Winans allows internal codes of ethics to be criminalized and liability to be imposed on reporters who violate them. As the Reporters Committee joining Winans in the case has argued, there is little doubt that criminalizing voluntary ethics codes would chill the freedom of the press and violate the First Amendment. When criminalized, voluntary codes become no longer voluntary; they become the law. Imposition of criminal liability based on internal ethics codes will have more than an incidental effect. Winans's behavior substantially deviated from journalistic standards embedded in the *Journal*'s codes of ethics. An extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible journalists can provide a cause of action for a lawsuit.[269] Courts should apply the appropriate laws in imposing liability for journalistic misconduct rather than criminalizing voluntary ethics codes.

Codes of ethics set an ideal standard by which members of the media can measure and evaluate their own values and performances.[270] Thus, codes can "act as the conscience of the professional, of the organization, or the enterprise."[271] Put another way, even if ethics codes are not universally enforceable, they can still serve an important purpose by providing normative standards that journalists ought to follow. In addition, the codes

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266 Carpenter v. United States, 484 U.S. 19, 28 (1987).

267 *Id.*

268 *Id.*

269 Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967).

270 A. DAVID GORDON ET AL., CONTROVERSIES IN MEDIA ETHICS 69 (1996).

271 BLACK ET AL., *supra* note 235, at 13.

> can also help keep attention directed toward principles that are particularly important as guidelines to appropriate behavior. Codes can also serve as a starting point—a threshold, if you will—for considering which principles deserve to be honored by ethical practitioners in the mass media. Indeed, because ethics deals with normative behaviors as well as philosophy, codes of ethics can be a major factor in helping to establish those norms, especially if they provoke discussion as to what they should cover and how that coverage should be worded.[272]

In short, codes provide the ideal standards and reasonable guidelines for reporters to follow and for the public to measure the media's performance. In this regard, codes can also help "to protect the mass media and media practitioners from unrealistic expectations, demands, and criticism. On the other side of that coin, they can help the public express reasonable demands and criticism of the media when that is warranted."[273]

Beyond individual codes of ethics, collective professional efforts have been made in an attempt to address the increasing media involvement in costly lawsuits. In 1973, the National News Council ("NNC") was founded as a private and independent institution

> (1) to give the public a forum for complaints about media performance; (2) to give the media feedback concerning how the public perceives their role in a democratic society; and (3) to give society unbiased reports on how the media respond to responsibilities individual members of a democratic society have to the whole.[274]

The council died in 1984, due largely to the lack of media support and cooperation, which limited the power of the institution. The council could not impose fines or force any type of apology or compensation from its members that were found to have violated ethical guidelines. This limited power "created standards of conduct that had no teeth."[275]

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[272] GORDON ET AL., *supra* note 270, at 69.

[273] *Id.* at 70.

[274] Louise W. Hermanson, *The National News Council Is Not a Dead Issue*, *in* BEYOND THE COURTROOM: ALTERNATIVES FOR RESOLVING PRESS DISPUTES 15, 20-21 (Richard T. Kaplar ed., 1991).

[275] Alissa Eden Halperin, *Newsgathering after the Death of a Princess: Do American Laws Adequately Punish and Deter Newsgathering Conduct That Places Individuals in Fear or at Risk of Bodily Harm?*, 6 VILL. SPORTS & ENT. L. J. 171, 209-10 (1999).

Unlike the NNC, the Minnesota News Council ("MNC"), founded in 1971, has been successfully performing its duties and achieving its goals. The council began as "an independent, nongovernmental, non-profit, [and] voluntary organization that serves as a forum through which individuals and/or corporations can present a complaint when they feel an injustice has been done because of inaccurate and/or unfair reporting of the news."[276] An equal number of media members and the public comprise the MNC. To present a complaint before the council, individuals who bring an action must waive their rights to appeal to any court or to the Federal Communications Commission.[277] The MNC evaluates each case by reviewing written documents from two parties and by conducting public hearings. When the council reaches a conclusion, members of the state news media publish the decision.[278] In 1988, the council expanded to review complaints from other states.

The MNC has been successful because it provides an alternative to the courts in libel and privacy cases. One commentator said that "[m]edia defendants are frustrated because they lose significant amounts of money even when they win a libel [or privacy] suit."[279] They need alternatives to deal with complicated and costly media problems. The MNC has been functioning as this alternative and has garnered support from its members in the media.[280]

Balancing competing interests requires prevention based on voluntary codes of ethics rather than after-the-fact treatments that may involve substantial costs. Resolutions through media councils should be considered as an alternative to costly litigation. In addition, methods of effective enforcement of codes of ethics should be discussed as a way to balance competing interests.

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[276] Ronald Farrar, *News Councils and Libel Actions*, 63 JOURNALISM Q. 509 (1986).

[277] Dennis Hale, *ADR and the Minnesota News Council on Libel*, 49 DISP. RESOL. J. 77, 79 (1994).

[278] *Id.*

[279] *Id.* at 78.

[280] *Id.* at 79.

V. NEW CONSTITUTIONAL RULE FOR BALANCING COMPETING INTERESTS

Not all newsgathering practices are constitutionally protected. Some activities may be acceptable in certain circumstances while others may not be tolerated at all. A balancing test is needed to determine the legitimacy of newsgathering practices. This study proposes, as a means of balancing newsgathering with other competing interests, the "extreme departure from the standards of investigation and reporting" test announced in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.[281] The extreme departure test, applied to various circumstances by its progeny as a test for actual malice, can provide the standard for determining what types of newsgathering behaviors are constitutionally acceptable.

A. *An Extreme Departure from the Standards of Investigation and Reporting*

In *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, the United States Supreme Court said that, in order to infer actual malice, public figures must prove that there has been "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[282] *Curtis* was decided in the context of defamation and was an attempt to prove actual malice defined as knowledge of falsity or reckless disregard for the truth.[283] Actual malice is a subjective standard that requires objective evidence of the defendant's state of mind at the time of publication. The subjective standard can be inferred from certain types of journalistic behaviors.[284]

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[281] 388 U.S. 130, 155 (1967).

[282] *Id.*

[283] New York Times Co. v. Sullivan, 376 U.S. 254, 279-278 (1964). Shortly after *Sullivan*, the Court in *Garrison v. Louisiana* said that reckless disregard can be demonstrated by proving "a high degree of awareness of their probable falsity." 379 U.S. 64, 74 (1964). Four years later, the Court in *St. Amant v. Thompson* refined reckless disregard as entertaining serious doubts about the truth of the publication. 390 U.S. 727 (1968).

[284] Solano v. Playgirl, Inc., 292 F.3d 1078, 1084-85 (9th Cir. 2002), stated that the subjective determination of whether [a defendant] in fact entertained serious

In *Curtis*, the Court consolidated two cases involving journalistic standards. In the first case, Wallace Butts, athletic director at the University of Georgia, sued the *Saturday Evening Post* for an article that accused him of conspiring to fix a football game between the University of Georgia and the University of Alabama.[285] The story was based on a telephone conversation alleged to have been accidentally overheard due to an electronic error, by an Atlanta insurance salesman. Butts won a federal court verdict of $460,000.[286] In the second case, Edwin A. Walker, a retired major general, sued the Associated Press ("AP") for a 1962 story claiming that he assumed command of a crowd and led it against federal marshals during riots at the University of Mississippi. Walker won a verdict of $500,000 in a Texas state court.[287]

After analyzing the facts of Butts's case, the Court noted that the *Post* did not do any basic fact-checking about the truth of the story. Even when Butts called the *Post*, contending that the story was false, no *Post* reporters listened to his assertion or reviewed the videotape of the Georgia-Alabama game.[288] The Court said this was ample evidence of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[289] The Court emphasized that journalistic standards required that an implausible story from a shady

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> doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts . . . . A court typically will infer actual malice from objective facts . . . . These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice.

Id.

[285] *See Curtis Publ'g Co.*, 388 U.S. at 136. The article was entitled "The Story of a College Football Fix" and prefaced by a note from the editors stating,

> Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one . . . . Before the University of Georgia played the University of Alabama . . . Wally Butts . . . gave [to its coach]. . . Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed.

Id.

[286] *Id.* at 135-38.

[287] *Id.* at 142.

[288] *Id.* at 157.

[289] *Id.* at 158.

source be verified.[290]

However, the Court found that *Walker* involved a considerably different news-processing situation from *Curtis*. The Court said that the story about a riot at the University of Mississippi was hot news that required immediate dissemination. The story was phoned in by an AP stringer who witnessed the incidents at the scene and provided detailed and trustworthy descriptions about the incidents, as reasonable journalists would do.[291]

Justice John M. Harlan, writing the opinion of the Court, used several criteria in distinguishing *Curtis* from *Walker*, including: deadline pressure, credibility of news sources, standard journalistic practice, the believability of the story, and motivation.[292]

First, there was the issue of deadline pressure in *Walker*. While the story about the riot at the University of Mississippi was hot news requiring immediate dissemination, the story about the football game was not. Second, there was the credibility of the sources used. The AP's riot story came from a stringer witnessing the events first hand, and "gave every indication of being trustworthy and competent."[293] However, the *Post*'s story of fixing the football game was from a person who had a criminal record. The differences should have raised doubts about the credibility of the person who provided the information.[294]

Third, there was standard journalistic practice. While no evidence indicated that AP editors failed to follow journalistic standards, the *Post* editors did not investigate the story, even after Butts told them it was false.[295] They should have at least performed the routine practices used by journalists before the publication. Fourth, there was the believability of the story. The AP editors did not have a reason to question the story of riots because the dispatches from the reporter

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290 *Id.*

291 *Id.* at 158-59.

292 *Id.*

293 *Id.* at 158.

294 *Id.* at 155-157. The Court found that the lower court's jury instruction in considering punitive damages, to assess "the reliability, the nature of the sources of the defendant's information," was relevant. *Id.* at 156.

295 *Id.* at 158.

were consistent. Meanwhile, the *Post* editors should have asked football experts whether the story was credible.[296] The fifth issue was motivation. The *Post* was having financial problems and announced an editorial policy of "sophisticated muckraking" to provoke people and make them mad.[297]

Relying on this analysis, the progeny of *Curtis* have considered what types of behaviors are an extreme departure from the journalistic standards of investigation and reporting and, thus, what may constitute proof of actual malice.

B. *Progeny of* Curtis Publishing Co.

The Seventh Circuit in *Brown & Williamson Tobacco Corp. v. Jacobson* held that the intentional destruction of critical documents relevant to a pending legal action is "strong evidence of actual malice."[298]

In this case, a TV research assistant destroyed a significant amount of documents critical to a pending case, in spite of his station's retention policy.[299] The court said that intentional destruction of critical documents is compelling evidence of actual malice.[300] Actual malice can be inferred from behavior done in bad faith.[301]

Two years later, the United States Supreme Court in *Harte-Hanks Communications v. Connaughton*[302] said that intentional avoidance of investigation or verification of a suspicious story could be evidence of

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296 *Id.*

297 *Id.*

298 827 F.2d 1119, 1134 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988).

299 *Id.* at 1126. The retention policy stated that "once litigation has commenced 'any and all related materials should be retained until specifically released.'" *Id.* It further provided that "[o]bviously if there is a . . . pending legal action, our policy is to retain all pertinent materials unless specifically released by the Law Department." *Id.*

300 *Id.* The court said that Brown & Williamson "proved by clear and convincing evidence that the defendants either knew the Perspective was false or in fact entertained serious doubts as to its truth." *Id.* at 1134.

301 *Id.* at 1134-35.

302 491 U.S. 657 (1989).

actual malice.[303] In this case, a newspaper published a story accusing a candidate for municipal judge of using dirty politics in his campaign.[304] The story said that he had promised local residents jobs and a Florida vacation for their help in the investigation of his opponent.[305] The Court held that the newspaper committed actual malice by intentionally avoiding the truth in its preparation of the story.[306] When the story was challenged by other sources, the newspaper did not take any action to interview key witnesses.[307] "This evidence of an intent to avoid the truth was not only sufficient to convince the plurality that there had been an extreme departure from professional publishing standards, but it was also sufficient to satisfy the more demanding *New York Times* standard . . . ."[308]

In 1991, the United States Supreme Court in *Masson v. New Yorker Magazine, Inc.*[309] said that the manipulation of direct quotations is compelling evidence of actual malice "because it attributes an untrue factual assertion to the speaker" and may "indicate a negative personal trait . . .the speaker does not hold."[310] In this case, a magazine published an article concerning the termination of a psychoanalyst from his position at the Sigmund Freud Archives in London. The article was subsequently reprinted as a book.[311] The story manipulated words in quotation marks.[312] The Court held that there was enough evidence for a jury to find that author Janet Malcolm "deliberately or

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[303] *Id.* at 692-93.

[304] *Id.* at 660.

[305] *Id.*

[306] *Id.* at 693.

[307] *Id.* at 669-70, 683-85, 691-93.

[308] *Id.* at 693. Although failure to investigate the truth does not alone support a finding of actual malice, the Court said that the intentional avoidance of investigation is in a different category. *Id.* at 692.

[309] 501 U.S. 496 (1991).

[310] *Id.* at 511.

[311] *Id.* at 499-501. Janet Malcolm extensively interviewed Masson after he was fired from his position for questioning some of Sigmund Freud's theories. Malcolm's article was later published in *The New Yorker* magazine. Knopf published a book largely based on Malcolm's interview.

[312] *Id.* at 502. Masson argued that the article misquoted him as if he said "I am the greatest analyst who ever lived." *Id.* at 506.

recklessly altered the quotations."[313] Quotation marks around a passage indicate a verbatim reproduction and "add authority to the statement and credibility to the author's work."[314] If altered, quotations inaccurately and negatively reflect the speaker's personal character or attitudes.[315] Such intentional alteration of quotations, the Court emphasized, constitutes actual malice when the manipulation substantially changes the meaning of words within quotation marks.[316]

Curtis and its progeny provide good illustrations of the factors that can be considered when determining whether journalists acted according to journalistic standards. Once deemed as extreme departures, journalistic behaviors fall outside constitutional protection.

C. *Newsgathering Practices Constituting an Extreme Departure*

A new rule for determining what constitutes an extreme departure from the journalistic standards of investigation and reporting necessitates an analysis of both media ethics codes and newsgathering cases that involve surreptitious and intrusive newsgathering practices. Most ethics codes state a number of "dos and don'ts" in relation to investigation and reporting. Some of them articulate specific behaviors that can be inferred as an extreme departure from journalistic

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[313] *Id.* at 521-25.

[314] *Id.* at 511. The Court explained the function of quotations by saying that quotations

> inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author . . . . Quotations allow the reader to form his or her own conclusions and to assess the conclusions of the author, instead of relying entirely upon the author's characterization of her subject.

Id.

[315] *Id.*

> Where . . . a writer uses a quotation, and where a reasonable reader would conclude that the quotation purports to be a verbatim repetition of a statement by the speaker, the quotation marks indicate that the author is not involved in an interpretation of the speaker's ambiguous statement, but attempting to convey what the speaker said. This orthodox use of a quotation is the quintessential "direct account of events that speak for themselves." More accurately, the quotation allows the subject to speak for himself.

Id. at 519 (quoting Time, Inc. v. Pape, 401 U.S. 279, 285 (1971)).

[316] *Id.* at 517-18.

standards.

The ethics codes of the Society of Professional Journalists[317] and the Radio-Television News Directors Association[318] proscribe the use of surreptitious methods of newsgathering when traditional open methods are available to acquire the same information and unless the information sought is of significant public importance. Often, the media employ hidden cameras and recording devices to obtain evidence of allegedly anti-social crimes. The codes ask reporters to be careful in using such devices. If there are alternatives available, it is better to pursue the information through those alternative means. And, if the information sought is about a matter of private interest, it is better to avoid using such methods, particularly when these intrusive and surreptitious methods have the potential to harm people or interfere with the enforcement of the law. Facilitating hidden devices is recommended only when both of the above factors are satisfied.

Many of the unethical behaviors proscribed by the professional ethics codes may constitute an extreme departure from the standards of investigation and reporting. Extreme departures from journalistic standards, under *Curtis* and its progeny, do not enjoy constitutional protection and can be used as evidence against the media in balancing newsgathering with legitimate competing interests. Yet code violations, which are not extreme departures, should be entitled to First Amendment protection.

Extreme departures can be demonstrated by examining different newsgathering cases. Two media ride-along cases involving newsgathering practices have been found to constitute an extreme departure. In *Ayeni v. Mottola*,[319] a CBS camera crew accompanied law enforcement officials in the execution of a search warrant. Despite objections, the cameraman repeatedly focused on a housewife and her five-year-old son.[320] In *Wilson v. Layne*,[321] reporters from the *Washington Post* took a number of pictures at a suspect's home while

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317 SPJ, *supra* note 238.

318 RTNDA, *supra* note 240.

319 35 F.3d 680 (2d Cir. 1994), *cert denied*, 514 U.S. 1062 (1995).

320 *Id.* at 683.

321 526 U.S. 603 (1999).

accompanying federal marshals.[322] The pictures included the suspect's parents still in bed, with his mother dressed in a pair of briefs and a nightgown.[323] No particular codes directly mention anything about filming a woman wearing a pair of briefs. However, the codes of the Radio-Television News Directors Association emphasize that reporters should treat all subjects of news coverage with dignity and respect and exercise special care when children are involved in the story.[324] The manner in which the reporters behaved in these two cases is not even close to comporting with a reasonable standard of dignity and respect. The execution of a warrant may involve a matter of public interest, but photographing a woman in her underwear and videotaping a frightened child is not of public significance and does not conform to the standards of investigation.

In *Barber v. Time, Inc.*,[325] reporters for *Time* magazine took a picture of a woman in bed, being treated for a physical ailment in a hospital.[326] The magazine published the picture, showing her face and upper body with the bedclothes over her chest.[327] Reporters took the pictures without her consent and the magazine used the picture for its articles despite her objection.[328] At trial, *Time* stated that the purpose of the pictures was to provide the public with medical news and developments about the physical ailment. The court found that the picture conveyed no medical information.[329] Even though the physical ailment from which she was suffering may have been a subject of public interest, as it was unusual, the identity of the woman, while in bed for treatment and recuperation, was certainly not a matter of public interest.[330] The reporter's activities in this case were intrusive, violating the woman's right to privacy and constituting an extreme departure from journalistic standards.

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322 *Id.* at 607.
323 *Id.* at 607-08.
324 RTNDA, *supra* note 240.
325 159 S.W.2d 291 (Mo. 1942).
326 *Id.* at 293.
327 *Id.*
328 *Id.* at 295.
329 *Id.*
330 *Id.*

The use of hidden cameras and recording devices is another controversial area of newsgathering in which the extreme departure standard should apply. Television networks often launch undercover investigations to obtain images and sounds that support their allegations. They claim that their use of hidden cameras is necessary because it is the only way to expose anti-social crimes and is, therefore, entitled to constitutional protection.

In *Desnick v. ABC, Inc.*,[331] ABC's "PrimeTime Live" conducted an undercover investigation in which its reporters used concealed video cameras to obtain evidence of unnecessary cataract surgery and possible insurance fraud. The Seventh Circuit said that investigative reporting plays an important role in a vigorous market for information and is entitled to constitutional protection.[332] Without the protection, the media would easily be exposed to unjustifiable liability, which chills First Amendment freedoms. The information sought by "PrimeTime Live" reporters was of significant public import and no alternatives were available for the same information. In short, the investigative practices in this case did not severely depart from the standards of investigation and reporting.

However, the California Supreme Court in *Sanders v. Capital Cities/ABC*[333] distinguished *Desnick* on the constitutional protection for use of hidden cameras. It stated that the use of such devices can violate the right to privacy. In *Sanders*, an ABC reporter, after being hired as a tele-psychic, covertly videotaped her conversations with several coworkers to investigate alleged fraud in the tele-psychic industry.[334] The court held that the use of hidden cameras cannot be justified, as employees may have a reasonable expectation of privacy in their workplaces against electronic intrusion by a stranger.[335] The court heavily relied on its decision in *Shulman v. Group W Productions, Inc.*,[336] in which it held that victims of automobile accidents, being transported to a hospital, have a reasonable

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331 44 F.3d 1345 (7th Cir. 1995).

332 *Id.* at 1355.

333 978 P.2d 67 (Cal. 1999).

334 *Id.* at 69.

335 *Id.* at 74-75.

336 18 Cal. 4th 200 (1998).

expectation of privacy in a rescue helicopter.[337] The court's reliance on *Shulman* was wrong, though, because the images of the victims were not of significant public importance, even though they were newsworthy; whereas, the information about the incidents and victims could have been obtained through official police reports. Videotaping emergency treatment in a rescue helicopter for footage for an entertainment program harms the victims, and their right to privacy overrides the network's interests. By contrast, in *Sanders*, the information sought was about fraud in the tele-psychic industry, an issue which raises public concerns. A great number of anti-social crimes have been exposed to public scrutiny by undercover investigations. Tele-psychic fraud is one such anti-social crime, and the use of hidden cameras in this case was necessary to create impact and credibility.

In *Food Lion*, reporters of ABC's "PrimeTime Live" secretly videotaped unsanitary food handling practices at two Food Lion supermarket stores.[338] While working as employees at the stores, they used miniaturized hidden cameras to secretly videotape the wrongful activities. The Fourth Circuit said that the use of surreptitious methods in this instance to gather information does not enjoy First Amendment protection because generally applicable laws do not offend the constitutional protection "simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[339] The tort laws at issue in this case do not single out or target the press, and applying the laws impose only an incidental effect on newsgathering, the court held.[340]

The use of hidden cameras was not the only way of obtaining the information in *Food Lion*. The workers' union first tipped information about the unsanitary meatpacking practices to ABC. "PrimeTime Live" could have obtained the information by interviewing workers or union members, yet mere interviews could not fully inform the public about the activities. Food Lion stores would deny engaging in the

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337 Id. at 868.

338 194 F.3d 505 (4th Cir. 1999).

339 *Id.* at 520 (quoting Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991)).

340 *Id.* at 521.

practices without visual convincing evidence. Verification of such criminal activities needs visual evidence. ABC's undercover investigation was similar to the traditional undercover investigations such as those in the Mirage[341] and Klan[342] cases. Although the methods used in those investigations were ethically questionable, the information exposed was of significant public import, which overrides the other competing interests.

The First Amendment exists to guarantee robust and wide-open debate about matters of public concern. In many situations, the use of hidden cameras should receive constitutional protection. The analysis of the Fourth Circuit in *Food Lion* disregards the importance of public significance issues. The "PrimeTime Live" investigation revealed anti-social crimes that pose a great risk to public health. Conclusively, the use of hidden cameras protected the public by exposing the wrongdoers to public scrutiny. Reasonable journalists would have used the same means to obtain the same information in such circumstances. Punishing the media for exercising reasonable newsgathering practices will impose more than an incidental burden and stifle public debate about matters of public significance.

It is evident that the information sought by the media in *Desnick*, *Sanders*, and *Food Lion* involved matters of public import in which such information has been traditionally available only through

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[341] The *Chicago Sun-Times* launched an undercover investigation with a fixed trap, "the Mirage Bar," to document corruption among police and regulatory city officials. Hidden photographers took pictures of key conversations between *Sun-Times* reporters and various city officials and accountants. The four-month operation ended with substantial evidence, and the Mirage series exposed violations, payoffs, and dereliction of duty by many officials. *See* Paul Galloway, *The Mirage*, QUILL, Feb. 1978, at 13-16; Zay Smith & Pamela Zekman, *The Mirage Takes Shape*, COLUM. JOURNALISM REV., July-Aug. 1979, at 16.

[342] Using undercover techniques, a reporter from the *Tennessean* documented Klan activities at local and regional levels and found that the Klan's violent and illegal activity was widespread. The newspaper also found that Klan leaders actively used the news media, particularly television, to gain a positive image about themselves and their organization, hoping eventually to increase the number of members. After the series appeared, officials in Nashville uncovered plots to bomb a local synagogue and a local television broadcast tower. As a result, several Klan leaders were convicted. *See* Jerry Thompson, *My Life With the Klan*, THE TENNESSEAN, Dec 7, 1980, at 1.

undercover investigation. In the reasoning of their opinions, *Sanders* and *Food Lion* did not properly take into consideration the significance of the information to the public and the purpose of the constitutional protection for the press. Fraud in the tele-psychic industry and unsanitary meat-handling activities are anti-social crimes that raise significant public concerns. No possible alternatives were available for obtaining such information because unlawful activities were taking place in closed areas. In addition, reasonable journalists would employ the same methods in similar circumstances to undercover similar information. When the use of hidden cameras satisfies a test of public significance and there are no reasonable alternatives, it should conform to journalistic standards.

Like the use of hidden cameras, unlawful access to voicemail has become an issue of the departure from journalistic standards. In the *Chiquita* incident,[343] a *Cincinnati Enquirer* reporter illegally accessed Chiquita's internal voicemail system and did a series of stories based on the content of the illegally obtained information. He was later fired, and the newspaper reached a $10 million settlement with the company.[344] It is obvious that unauthorized access to a voicemail system, unbeknownst to the owner, is ethically and legally questionable. Yet, the questions that need to be asked are whether the information involved was of significant public importance and whether there were other means available for obtaining the information. In this case, the information sought (bribery of officials and smuggling cocaine) was of public significance and would less likely be obtained through alternative means. But, the *Enquirer* renounced the series and apologized for the untrue conclusions. It based its apology on the fact that the reporter himself unlawfully accessed the internal voicemail, which is clearly prohibited by law, and that the stories were not proven to be true. If the allegations were substantiated, and unlawful access

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[343] Michael Gallagher, *Chiquita Secrets Revealed*, CIN. ENQUIRER, May 3, 1998, at A1. *See also* Rita Ciolli, *Reporter Admits Computer Break-in / He Used Data in Story Later Retracted*, NEWSDAY, Sept. 25, 1998, at A20 & C1.

[344] Alicia C. Shepard, *Bitter Fruit: How the Cincinnati Enquirer's Hard-hitting Investigation of Chiquita Brands International Unraveled*, AM. JOURNALISM REV., Sept. 1998, at 33.

was the only way to obtain such information, the issue of public importance should be a determinative factor.

Journalists have impersonated public officials to get information they would not normally be able to access. In *New Jersey v. Cantor*,[345] a newspaper reporter pretended to be a local official in order to interview the mother of a homicide victim. The reporter was later convicted for impersonation. The court emphasized that while the reporter "has attempted to wrap herself in the constitutional cloak of press freedom, the rights of the press do not exist in a vacuum."[346] In *Cantor*, impersonation was not the only means to initiate the interview with the victim's mother. By showing her identity, the reporter could have probably conducted the same interview. As the Gannett code proscribes reporters from misstating their identities or intentions of an interview, impersonating a public official cannot be considered a routine newsgathering practice. However, constitutional protection is needed for impersonation if information about a matter of significant public concern is available only through impersonation, and such practices do not harm people.

The extreme departure test would apply to criminal trespass cases in which reporters enter closed areas, sometimes intentionally ignoring police warnings. In *New Mexico v. McCormack*,[347] a freelance journalist crossed a police barricade, even after he had been given warning, in order to cover a demonstration at a nuclear waste disposal site. The court stated that if a person "purposely does an act which the law declares to be a crime," then he is responsible for the consequence of his act.[348] In a similar case, *Stahl v. Oklahoma*,[349] a group of journalists entered a proposed nuclear power plant site that was closed to the public. The court said that the First Amendment does not protect reporters from liability for torts and crimes they commit in the course of newsgathering.[350] In both cases, reporters knew what the police

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[345] 534 A.2d 83 (N.J. Super. Ct. App. Div. 1987), *cert denied*, 540 A.2d 1274 (1988).

[346] *Id.* at 85.

[347] 682 P.2d 742 (N.M. Ct .App. 1984).

[348] *Id.* at 745 (quoting N.M. STAT. ANN. § UJI Crim. 1.50 (1978)).

[349] 665 P.2d 839 (Okla. Crim. App. 1983), *cert. denied*, 464 U.S. 1069 (1984).

[350] *Id.*

barricade meant; nevertheless, they purposely crossed the line for to gather information, following the demonstrators. The information sought in the two cases involved demonstrations of public significance and the newsgathering activities did not harm or endanger the people involved in the demonstration and the proposed site. The demonstrations were hot news that needed immediate dissemination and alternative means would not have held the same news value. Most journalists would cross a police line to cover a demonstration.

Conversion is another area in which the extreme departure test should be applied. Journalists often receive stolen documents from various sources and use them for their stories. Some reporters rely heavily on this method to obtain important information. Yet, the tort of conversion prohibits unauthorized use of stolen documents. The prohibition includes destroying and altering the documents and refusing to return the documents. In *Pearson v. Dodd*,[351] two columnists received copies of stolen documents from the office of Senator Thomas Dodd. Refusing to hold the journalists liable for conversion, the court said that the documents were immediately returned undamaged and the economic value of the documents did not depend on confidentiality.[352] Mere receipt of stolen documents does not constitute an extreme departure from journalistic standards. If receiving stolen documents is the only way of getting information about matters of public significance, it should not be a punishable offense. However, if journalists destroy and alter the documents or refuse to return them when asked, their behavior deviates from routine journalistic practices, and it does constitute an extreme departure.

An analysis of the ethics codes and newsgathering cases justifies the conclusion that some surreptitious and intrusive media practices, not conforming to ethics codes, sometimes can be seen as an extreme departure from the standards of investigation and reporting. As the codes of ethics instruct, journalists must avoid surreptitious newsgathering methods except when the information sought is of public significance and no other reasonable alternatives are available for the same information. An extreme departure occurs when

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[351] 410 F.2d 701 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969).

[352] *Id.* at 707-08.

journalists substantially depart from the journalistic standards ordinarily adhered to by responsible journalists. Under such circumstances, the media advocacy of constitutional protection for newsgathering should not be sustained. The extreme departure test, applied to newsgathering cases, can provide courts with a workable means of balancing the right to gather news with other competing interests.

VI. CONCLUSION

Many plaintiffs in newsgathering cases have tried to circumvent *Sullivan* in order to recover publication damages based on tort actions. *Hustler*[353] and *Food Lion*[354] are examples of such cases. The Supreme Court in *Hustler* shut the door for public officials and public figures to recover damages resulting from the publication of a story without proving actual malice. The Fourth Circuit in *Food Lion* emphasized that public officials and public figures must prove actual malice to recover publication damages. The court found that *Hustler* governs publication damages while *Cohen*, which held that the media can be constitutionally punished if they break generally applicable laws in newsgathering, governs newsgathering practices. In a nutshell, to recover publication damages, public figures must prove actual malice, and reporters are responsible for the torts they commit in the course of newsgathering. Yet, the court did not address the potential issue of publication damages for private figures. Unlike public officials and public figures, private figures generally need only to prove negligence to recover publication damages. In *Food Lion*, no actual malice or negligence could be found in the publication process because the story was true.

The First Amendment provides protection for publication of lawful information acquired through reasonable newsgathering practices, but its protection does not extend to unlawful activities. Its protection is not a license to violate laws and individual rights, nor an impenetrable shield from a sword of the law. There is no doubt that newsgathering

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[353] 485 U.S. 46 (1988).

[354] 194 F.3d 505 (4th Cir. 1999).

typically yields truthful news about significant social concerns.[355] Yet not all activities taken in the course of newsgathering can be protected if they depart extremely from journalistic standards. The media should take into consideration that they enjoy more constitutional protection than any other commercial enterprise and their privilege exists in order to serve the interests of the public. Codes of ethics provide the principles and guidelines under which journalists ideally perform their duties. Following ethical guidelines is an efficient way to follow the traditional belief that "an ounce of prevention is worth a pound of cure," even though journalists must sometimes depart from the guidelines under certain circumstances. Determining whether conduct constitutes a breach of ethical guidelines may be a way of determining whether it constitutes an extreme departure from journalistic standards. As the Minnesota Council illustrates, such news councils can facilitate adherence to ethical guidelines and minimize both chilling effects and costly litigation. Cases, literature, and codes of ethics discussed in the body of this study provide a basis for proposing a new constitutional rule for balancing surreptitious and other intrusive newsgathering practices with important competing interests.

Balancing newsgathering and the right to privacy must not rely solely on court rulings. The news media and journalists should take more affirmative actions in order to fulfill their duty of informing the public and to minimize the potential threats from tort actions and possibly large damage amounts. Journalists ought to abide by the principles and guidelines of ethical codes to which they willingly subject themselves.[356] They may not advocate constitutional protection if their departure from journalistic standards of investigation and reporting is extreme. The Supreme Court in *Curtis* and its progeny clearly said that such an extreme departure can be evidence of actual malice in defamation cases and can be constitutionally punished.[357]

Journalists sometimes use suspect and intrusive newsgathering

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[355] Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U. L. REV. 507, 529 (1998).

[356] *See* BLACK ET AL., *supra* note 234, at 24-26.

[357] Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

methods that may break the law. Such practices, however, must be constitutionally protected when the information sought is of public significance and when no reasonable alternatives are available to receive the same information. Undercover investigations have traditionally exposed serious crimes and anti-social activities that have involved significant public concern. Those types of investigations should be entitled to First Amendment protection while the surreptitious and intrusive newsgathering methods used to investigate these matters must be protected unless there is an extreme departure from journalistic standards. The extreme departure standard can connect codes of ethics to cases by helping define ideal responsible behavior.

Most codes of ethics recommend ideal behaviors and proscribe ethically questionable misbehaviors. If certain newsgathering activities conform to standards of ethical guidelines, then neither compensatory nor punitive damages would be allowed; therefore, the media's astuteness would not be chilled. However, if newsgathering practices constitute an extreme departure from the standards of investigation and reporting normally adhered to by reasonable journalists, they would fall outside of constitutional protection. Violating the prohibitions of the ethics codes can be evidence of an extreme departure.

The proposed extreme departure constitutional rule provides a balancing method between freedom of the press and other legitimate competing interest. Highly unreasonable conduct that reasonable journalists would avoid in similar circumstances constitutes an extreme departure from journalistic standards. Such extreme departure is not entitled to constitutional protection. However, the test emphasizes that some surreptitious and intrusive newsgathering practices would be protected if they are employed only when no reasonable alternatives are available and the information sought is of significant public concern. Imposition of liability for exercising such practices when they serve the public interest not only chills newsgathering but also stifles public debate about matters of public significance.

This extreme departure approach will not only prevent courts from awarding damages for reasonable newsgathering practices but will help the media exercise constitutionally guaranteed expressive freedoms. In addition, this approach will force courts to develop a body of law that

provides constitutional protection for legitimate investigative newsgathering and that rejects such protection for illegal and unreasonable conduct constituting an extreme departure from journalistic standards.