

THE RIGHT TO SOLITUDE IN THE UNITED STATES AND SINGAPORE: A CALL FOR A FUNDAMENTAL REORDERING

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I. INTRODUCTION

The right to privacy is being assaulted on all fronts. The line between private and public has blurred to an unacceptable degree. Talk show hosts like Jerry Springer, Jenny Jones, and Sally Jessy Raphael win ratings by pandering to the voyeuristic demands of society.¹ Even respectable media sources are guilty of violating traditional zones of privacy.² Media “ride-alongs,” where camera crews accompany police on distress calls, have become commonplace.³ Videographers use the excuse of newsgathering to accompany law enforcement or medical personnel into the sacred precincts of the home to obtain footage of the distressed, dying, and injured.⁴ In addition, television and print journalists increasingly think little of using deception and misrepresentation to get the inside scoop.⁵

This has to stop. This Article calls for a long hard look at what has been allowed to go on for far too long. The right to privacy has to be reassessed and restrengthened. If ordinary citizens are to regain what is

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1. See, e.g., Jo Tavener, *Media, Morality, and Madness: The Case Against Sleaze TV*, CRITICAL STUD. MEDIA COMM., Mar. 1, 2000, 2000 WL 19325164.

2. See, e.g., Maria Elizabeth Grabe, Shuhua Zhou & Brooke Barnett, *Explicating Sensationalism in Television News: Content and the Bells and Whistles of Form*, 45 J. BROAD. & ELEC. MEDIA 635 (2001).

3. *Wilson v. Layne*, 526 U.S. 603, 626 (1999) (explaining that ride-alongs are opportunities for reporters and camera crews to accompany deputies on operational missions).

4. See *id.* at 607. Allowing members of the media to accompany police into private homes may violate the Fourth Amendment. See, e.g., *Hanlon v. Berger*, 526 U.S. 808 (1999); *Wilson v. Layne*, 526 U.S. 603 (1999); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994); *Miller v. NBC*, 232 Cal. Rptr. 668 (1986).

5. Lyriisa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 178 (1998).

rightfully theirs, bright lines have to be drawn and the door firmly shut in the faces of entertainment and media personnel.⁶ Places where people can be themselves—safe in the knowledge that they are not being watched by hungry media eyes, must be reclaimed.

This Article focuses on one aspect of privacy rights—the right to be free from unreasonable intrusion on personal solitude. This right is the focal point of much controversy because it erects a barrier against the newsgathering efforts of the entertainment and media industries.⁷ While the core of the right to solitude is well established in most states,⁸ its penumbra poses many legal and policy challenges. The right to solitude is likely to face two major challenges in the new millennium. First, it must find a way to cope with the rising trend of investigative journalism.⁹ Investigative journalism has exacted a cost on the right to solitude that has been hitherto ignored to an unacceptable degree.¹⁰ Second, our actions in public are increasingly being captured against our will on camera and film.¹¹ This intrusion can be keenly felt as a violation of the private sphere. Tort law must begin to recognize and accommodate the fact that intrusions on solitude can take place in both public and private places.

This Article examines these issues from the perspective of the United States and Singapore. These two countries form an interesting contrast for several reasons. While most states in America recognize a right to privacy, Singapore does not.¹² Yet, violations of privacy are not phenomena unique to the United States,¹³ nor are they unique to the entertainment and media industries.¹⁴ There is, therefore, much that Singapore can learn from the way the United States handles intrusions on solitude.

6. In this article, the words “entertainment,” “media,” and “press” are used interchangeably. This is due in large part to the difficulty often encountered in attempting to distinguish between these sectors. For example, while the press may seek to inform and educate, it can entertain as well. Conversely, entertainment can inform and educate.

7. See Lidsky, *supra* note 5, at 175–76 (discussing legitimate newsgathering efforts in the service of public interest).

8. See RESTATEMENT (SECOND) OF TORTS § 652B (1977).

9. Lidsky, *supra* note 5, at 179.

10. *Id.* at 213–16.

11. See *id.* at 173.

12. Compare RESTATEMENT (SECOND) OF TORTS § 652B, with David Banisar & Simon Davies, *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*, 18 J. MARSHALL J. COMPUTER & INFO. L. 1, 86 (1999).

13. See, e.g., *Douglas v. Hello! Ltd*, [2001] 2 All E.R. 289 (Eng.).

14. See, e.g., *Bernstein v. Skyviews & Gen. Ltd.*, [1975] 1 Q.B. 479 (Eng.) (providing an example of a claim alleging a violation of a landowner’s rights in the airspace above his land).

At the same time, the legal issues facing Singapore's entertainment and media industries contrast nicely with the issues facing these industries in the United States. The entertainment and media industries in Singapore are almost puritan compared to those in America.¹⁵ For this reason, violations of privacy in Singapore may not take place as often or on such an egregious scale as they do in America. This contrast highlights areas of privacy law that must be addressed in the United States.

This Article addresses these issues in two parts. Part II outlines the social and legal cultures influencing the shape of privacy law in the United States and Singapore. Part III turns to the two challenges that the tort of intrusion must handle in the new millennium. This part first discusses whether investigative journalists should be allowed to intrude on one's solitude in the name of public interest. The issue of privacy in public spaces is then examined. Part IV concludes with the proposition that the legislature and judiciary should recognize a limited right to solitude in public places.

II. MEDIA AND THE LAW: A COMPARISON OF THE UNITED STATES AND SINGAPORE

A. The United States

The right of privacy is recognized by most states.¹⁶ Typically, the tort of invasion of privacy is comprised of four distinct causes of action: (1) intrusion on personal solitude; (2) publication of true but embarrassing facts; (3) publicly placing one in a false light in the public eye; and (4) appropriation of one's name and likeness.¹⁷ An unreasonable intrusion on one's solitude occurs where a defendant intentionally intrudes, physically or otherwise, upon the solitude or seclusion of the plaintiff's private affairs or concerns in a manner that would be highly offensive to a reasonable person.¹⁸ Publication of the information acquired is not needed to give rise to a claim.¹⁹ It would thus be a violation of privacy to enter into another's home uninvited or eavesdrop on private conversations through the use of

15. See Monroe E. Price, *The Market for Loyalties: Electronic Media and the Global Competition for Allegiances*, 104 YALE L.J. 667, 697 (1994) (discussing ban on satellite dishes designed to keep out unapproved Western or "American" programs).

16. See RESTATEMENT (SECOND) OF TORTS § 652B.

17. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

18. RESTATEMENT (SECOND) OF TORTS § 652B.

19. See *id.* at § 652B cmt. a.

wiretapping devices.²⁰

The recognition of the right of privacy in the United States probably stems from a long tradition of respect for individual rights:

The traditional and casual interpretation of British-American philosophy has been that it is sternly opposed to the corporate view, defining the political structure as a collectivity the legitimacy of which derives from and depends upon the private, individual judgments of those who are comprised in that collectivity. Hence, in this interpretation of our political philosophy, privacy is assumed to be a right justified by utility if not by nature. The right of privacy therefore seems to be an integral and essential ingredient of our political philosophy, a right to be protected by law.²¹

The right of privacy recognizes “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”²² The concept of privacy has been described as containing three elements: (1) *secrecy*, which relates to the need to control the information known about oneself; (2) *anonymity*, which relates to the desire to limit the attention paid to oneself; and (3) *solitude*, which relates to the need to control the physical access others have to oneself.²³

In sum, the right to solitude acknowledges a person’s desire to carve out a space to call one’s own—a space where affairs can be kept private, and remain free from the attention and clamor of a curious public. The right to solitude helps to promote important social functions. For instance, it buffers individuals from societal pressures to conform, and protects them from ridicule and censure.²⁴ Further, it gives individuals the opportunity to relax, reflect, and experiment.²⁵

20. *See id.* at § 652B cmt. b, illus. 3.

21. Glenn Negley, *Philosophical Views on the Value of Privacy*, 31 LAW & CONTEMP. PROBS. 319, 321 (1966).

22. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

23. Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 428 (1980).

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

25. *See id.*; *see also* Gavison, *supra* note 23, at 442.

B. Singapore

As a former British colony, Singapore has traditionally tracked England's legal position.²⁶ Singapore does not recognize a general right of privacy, much less a right to solitude.²⁷ Plaintiffs aggrieved by intrusions on their solitude are forced to resort to a patchwork of laws to vindicate their claims.²⁸ Causes of action that have been used as proxies for claims of intrusion on solitude are the torts of nuisance,²⁹ harassment,³⁰ and trespass.³¹ This fragmentary protection of the right of solitude is undesirable:

[M]any aspects of the human personality and privacy are protected by a multitude of existing torts but this means fitting

26. See Banisar & Davies, *supra* note 12, at 86. It remains to be seen what impact the recent U.K. case of *Douglas v. Hello! Ltd* will have on Singapore law. [2001] 2 All E.R. 289 (Eng.). In this case, Michael Douglas and Catherine Zeta-Jones had struck a deal with *OK!* magazine to publish exclusive photographs of their wedding. *Id.* at 299. *Hello!* magazine managed to obtain some photographs and would have been able to publish these three days ahead of *OK!*. *Id.* at 295. The couple immediately sought an injunction. *Id.* at 293. The English Court of Appeal refused to grant an injunction. *Id.* at 331. However, the Court of Appeal held that the couple would likely succeed in a breach of privacy claim against *Hello!*. *Id.* at 329–30. It remains unclear what impact this ruling is likely to have on Singapore law because it is evident from the three judgments that the Court was strongly influenced by the 1998 Human Rights Act recently enacted. See, e.g., *id.* at 320–24. However, there was some indication from the judgments of Lord Justice Sedley and Lord Justice Keene that they would have been prepared to find an independent right of privacy based on the common law alone. *Id.* at 320, 330. More recently, however, the English Court of Appeal has held that a right to privacy does not exist at common law. *Home Office v. Wainwright* [2001] EWCA Civ 2081, 2001 WL 1535397.

27. Banisar & Davies, *supra* note 12, at 86.

28. Ng-Loy Wee Loon, *Emergence of a Right to Privacy from Within the Law of Confidence?*, 18 EUR. INTELL. PROP. REV. 307, 307 (1996).

29. See *Bernstein v. Skyviews & Gen. Ltd.*, [1975] 1 Q.B. 479, 489 (Eng.). The plaintiff placed a nuisance claim against the defendant for flying “over the plaintiff’s land for the purpose of taking an aerial photograph of the plaintiff’s country house.” *Id.* at 479. *Bernstein* held that a single act could not constitute a nuisance. *Id.* at 489. However, Judge Griffiths did state:

[I]f the circumstances were such that a plaintiff was subjected to the harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity, I am far from saying that the court would not regard such a monstrous invasion of his privacy as an actionable nuisance for which they would give relief.

Id. at 489.

30. *Khorasandjian v. Bush*, [1993] 1 Q.B. 727 (Eng. C.A.); *Burnett v. George*, [1992] 1 Fam. 156 (Eng.). The Singapore High Court has recently explicitly recognized that the tort of harassment exists. *Malcomson Nicholas Hugh Bertram & Anor v. Naresh Kumar Mehta* [2001] 4 SLR 454, 473–74.

31. *Hickman v. Maisey*, [1900] 1 Q.B. 752, 753 (Eng.). The defendant, a “racing tout,” was found guilty of trespass when he crossed onto the plaintiff’s property to observe and take notes of racehorse trials being held on the land. *Id.* at 754–55.

the facts of each case in the pigeon-hole of an existing tort and this process may not only involve strained constructions; often it may also leave a deserving plaintiff without a remedy.³²

The English case of *Kaye v. Robertson*³³ is a particularly egregious example of “pigeon-holing.”³⁴ The plaintiff, Gordon Kaye, was the star of a popular television comedy series.³⁵ Kaye suffered massive injuries to his head and brain in a car accident.³⁶ As he lay recuperating in the hospital, a journalist and photographer from *The Sunday Sport* ignored the notices prohibiting entry and entered his private hospital room.³⁷ Despite knowing that Kaye was in no condition to give informed consent, they interviewed him at length and took photographs displaying the substantial scars to his head.³⁸ Kaye, through his next friend, sued for an interlocutory injunction to restrain publication.³⁹ Fortunately, his argument based on malicious falsehood succeeded because the intended article falsely gave the impression that Kaye had consented to the interview.⁴⁰ Without the threatened publication, however, Kaye probably would not have succeeded in his *de facto* invasion of privacy claim.⁴¹

There are both legal and social reasons for this lacuna in English law. The legal concept of privacy is rather vague and incoherent.⁴² English courts have established only an “underdeveloped, complicated, and fragmentary” legal framework recognizing the general right of privacy.⁴³ The jurisprudence of other countries, by comparison, provides much more

32. *Kaye v. Robertson*, [1991] F.S.R. 62, 70 (Eng. C.A.) (citing MARKESINIS, *THE GERMAN LAW OF TORTS* 316 (2d ed. 1990)).

33. [1991] F.S.R. 62 (Eng. C.A.).

34. *Id.* at 62.

35. *Id.*

36. *Id.*

37. *Id.* at 64.

38. *Id.*

39. *Kaye*, [1991] F.S.R. at 62.

40. *Id.* at 68.

41. *Id.* at 70.

If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief under English law.

Id.; cf. *Barber v. Time, Inc.*, 159 S.W.2d 291, 294 (Mo. 1942) (stating that a right to privacy exists based on natural law and guaranteed by the U.S. Constitution where the plaintiff alleged that defendant magazine violated her privacy by publishing her picture with an article about a physical ailment for which she was being treated).

42. See Ng-Loy, *supra* note 28, at 307.

43. B.S. MARKESINIS & S.F. DEAKIN, *TORT LAW* 648 (4th ed. 1999).

effective remedies for invasions of this right.⁴⁴

Moreover, the protection of privacy is not considered a major issue in Singapore.⁴⁵ Singapore has no strong tradition of individual rights,⁴⁶ nor is the individual the primary focus in Singapore.⁴⁷ The needs of the individual tend to be subordinated to the needs of the greater community.⁴⁸ Indeed, one of Singapore's five "shared values" is "[n]ation before community and society above self."⁴⁹ While there is no reason to regard the right of privacy as necessarily inconsistent with Singapore's community and societal values, the country's emphasis on the greater good, nonetheless, means that less attention is devoted to addressing individual needs.

While violations do occur, they do not seem to take place on a scale and with such frequency that they attract intense social attention. The entertainment and media industries in Singapore are not as developed nor as aggressive as in the United States.⁵⁰ There are six local English newspapers in Singapore: *The Straits Times*, *Streets*, *Today*, *Project Eyeball*, *The Business Times*, and an afternoon daily, *The New Paper*.⁵¹ While *The New Paper* has been called a "tabloid" in local parlance, it is definitely not a paper in the mold of the *National Enquirer*.⁵² Its stories are simply written in a more breezy and accessible manner, and focus on the human element to a greater extent than its more staid counterparts.⁵³

Singaporean television has no local confessional talk shows, nor are any imported from America based on the author's recent observations. Singapore's shows on current affairs achieve their purpose with interviews

44. See *id.* at 647 (providing as examples the Federal Republic of Germany, France, and the United States).

45. See *The Five Shared Values*, SINGAPORE INFOMAP, at <http://www.sg/flavour/values-5.html> (last visited Jan. 22, 2002).

46. See *id.* (stating that willingness to make temporary individual sacrifices for the sake of the whole leads to greater success over the long term).

47. *Id.*

48. *Id.*

49. *Id.*

50. Dalton Camp, *Singapore Must Have Flaws but Darned if I Can Find Any*, TORONTO STAR, Mar. 29, 1992, at B3.

51. Richard Lim, *Bad News to Have More Papers?*, STRAITS TIMES (Singapore), June 11, 2000, 2000 WL 2975735. The publication of *Project Eyeball* was suspended on June 28, 2001. See *Loss-making SPH Tabloid Suspended*, STRAITS TIMES (Singapore), June 28, 2001, at 6.

52. Shin Min, *Wanbao Editors: We Have Never Neglected Social Duty of Media*, STRAITS TIMES (Singapore), Aug. 17, 1994, LEXIS, News, News Group File, All; cf. Wang Hui Ling, *3 Papers Rapped Over Sex and Crime Reports*, STRAITS TIMES (Singapore), Aug. 17, 1994, LEXIS, News, News Group File, All.

53. *Telling It Like It Is: What the Editors Say*, STRAITS TIMES, March 24, 2001, at H15.

and re-enactments rather than “ride-alongs” or aggressive investigative journalism. As one commentator put it, “investigative journalism is not among the growth industries here, and there is less hard-nosed political reporting in the local media than would be found between the covers of *Anne of Green Gables*.”⁵⁴ The media’s efforts at so-called “investigative journalism” are innocuous compared to the high stakes game played in America. Local journalists have gone only so far as to pose as potential customers of a radio-taxi operation to test the efficiency of public services.⁵⁵ The most sensational instance of investigative journalism was in 1990 when *The Straits Times* sent two individuals to pose as a modern day “Mary” and “Joseph” to test the compassion of the major hotels in Singapore on Christmas Eve.⁵⁶

Unlike the American press, Singapore’s press does not view itself as the “fourth estate.”⁵⁷ Indeed, Singapore’s government frowns upon any effort by the press to act as an adversarial watchdog because that style of journalism challenges the government’s “goal of consensus politics, of getting Singaporeans to row as a team.”⁵⁸ As Prime Minister Goh Chok Tong stated, “the press should not be the one setting the political agenda for the country because they are not in politics. There are severe, grave consequences for the country, which you may not be aware of, if you are setting the national agenda and you are not answerable.”⁵⁹ In fact, Goh has further asserted, “it is better to abridge the freedom of the press in Singapore than to let it run wild as in some countries.”⁶⁰

These legal and social factors combine to put consideration of the right of privacy low on Singapore’s agenda. It is submitted, however, that individuals should not be denied a right to privacy simply because violations of privacy are not widespread. There are independent reasons

54. Camp, *supra* note 50.

55. See, e.g., *Faster Phone-Answering, but Cabs Still Scarce*, STRAITS TIMES (Singapore), Mar. 24, 1996, 1996 WL 14665872 (reporting how nine reporters were assigned to investigate the difference between premium taxi service and regular taxi service).

56. Denyse Yeo, *The Kindness of (Some) Strangers*, ELECTRIC NEW PAPER (Dec. 26, 2001), <http://newspaper.asia1.com.sg/news/nplo306.html>.

57. Chua Lee Hoong, *How Should the Press Be Positioned?*, STRAITS TIMES (Singapore), Nov. 6, 1999, 1999 WL 8266330; Chua Mui Hoong, *No Lackey or Adversary, the Media’s a Partner*, STRAITS TIMES (Singapore), Nov. 27, 1999, 1999 WL 8270461.

58. *Western Press Criticism the Result of a Clash of Ideas*, AGENCE FRANCE PRESSE, July 16, 1995, LEXIS, News, News Wire Services.

59. *Media ‘Should Not Set National Agenda,’* STRAITS TIMES (Singapore), Nov. 4, 1999, 1999 WL 8266111.

60. *Western Press Criticism the Result of a Clash of Ideas*, AGENCE FRANCE PRESSE, July 16, 1995, LEXIS, News, News Wire Services.

why it is desirable to adopt such a right.⁶¹ One aggrieved individual should not be denied compensation simply because the majority is fortunate enough not to experience violations of their privacy. The right to privacy, however, has been so long disregarded in Singapore that now, only recognition by the legislature would legitimize it.⁶² Should Singapore's Parliament ever decide to take up the challenge, it can draw inspiration from the formulation in the *American Restatement (Second) of Torts*.⁶³

C. A Common Challenge

As conservative as Singapore's entertainment and media industries may be, they face some challenges common to their American counterparts. Competition and technology make it increasingly tempting and lucrative to intrude on the solitude of others. Singapore's media has seen at least four new players enter the scene in the year 2000 alone.⁶⁴

61. See discussion *supra* Part II.A.

62. If the latest pronouncements of the Singapore High Court are anything to go by, this may no longer necessarily be true. The Singapore High Court has explicitly recognized that the tort of harassment exists. *Malcomson Nicholas Hugh Bertram & Anor v. Naresh Kumar Mehta* [2001] 4 SLR 454, 473–74. In the course of his judgment, Justice Lee Seiu Kin demonstrated remarkable sensitivity to privacy concerns. See *id.* at 472–74.

In Singapore we live in one of the most densely populated countries in the world. And the policy of the government is to further increase the population. It will make for an intensely uncomfortable living environment if there is no recourse against a person who intentionally makes use of modern communication devices in a manner that causes offence, fear, distress and annoyance to another. . . . In the law of negligence, a person has a duty to ensure that he does not cause any damage others. Such acts are unintentional but they result in physical harm to the victim. Surely in respect of intentional acts that cause harm in the form of emotional distress, the law is able to provide a recourse. The fact that in such cases it is difficult to quantify damages should not, in my opinion, hinder the court from giving the appropriate relief. . . .

I would note that there appears to be an increasing number of cases of what is known as 'stalking', ie [sic] the harassment by individuals of the objects of their fantasies or desire. The latter are mostly celebrities, ie [sic] people such as entertainment figures who are glamorized by the mass media. In some countries such cases sometimes end tragically. Although that situation does not obtain in the present case, recognition of a tort of harassment could nip many of those cases in the bud. . . .

In my opinion that time has come in Singapore.

Id.

63. RESTATEMENT (SECOND) OF TORTS § 652B ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

64. See Press Release, Singapore Press Holdings, Singapore Press Holdings Announces Plans for Second New Publication (June 7, 2000), at <http://www.sph.com.sg/news.nsf>; News Release, Atex Media Solutions, Inc., Atex Media Solutions Products Help Launch Newest Singapore Newspaper (Nov. 27, 2000), at <http://www.atex.com/news/pr/2000/today.htm>

These came in the form of three new English dailies (*Streets, Today, and Project Eyeball*)⁶⁵ and a new television broadcasting company (*MediaWorks*).⁶⁶ In addition, Singapore's media must compete with foreign newspapers, periodicals, and programs.⁶⁷ Singapore's local television media must also compete with recently introduced cable television.⁶⁸ While Singaporeans may not be guilty of many privacy violations themselves, they remain avid for scandal and gossip.⁶⁹ Technology now makes it possible to satisfy this hunger. Threats to privacy do not merely come from a long telephoto lens, video camcorder, or binoculars:

Anyone with the inclination to intrude upon the lives of others may choose from a frightening array of surveillance devices: video cameras built into briefcases, tie-tacs, clocks, smoke detectors, and ceiling sprinklers; microphones and transmitters that can "hear thru walls" and at great distances, and that come concealed in everything from writing pens to electrical outlets; telephone tapping devices; night vision scopes; electronic lock picks; and even devices to track the movement of vehicles. For those uninitiated in surveillance skills, helpful reference books are available. *How to Get Anything on Anybody* explores topics such as "eleven devices for listening through walls," and "expert ways to secretly bug any target."⁷⁰

This is enough to shake any Singaporean out of complacency. Singapore must not wait to address the pressures facing its entertainment and media industries.

III. CHALLENGES FOR THE TWENTY-FIRST CENTURY

While the core of the right to solitude is well established in America, it is not clear whether either investigative journalism in the name of public

[hereinafter *Singapore Press Holdings*]; Leong Weng Kam, *It's About Time Everyone Wins*, STRAITS TIMES INTERACTIVE, at <http://straitstimes.asia1.com.sg/life/story> (Jan. 21, 2002).

65. *Singapore Press Holdings*, *supra* note 64.

66. Kam, *supra* note 64.

67. See Asad Latif, *Asia Deserves More Media Power*, STRAITS TIMES INTERACTIVE, at <http://straitstimes.asia1.com.sg/columnist> (May 21, 2001).

68. See Chen Huifen, *SCV Sees 30% Jump in Cable Modem Subscribers*, BUS. TIMES, http://it.asia1.com.sg/newsarchive/10/news001_20011008.html (Oct. 8, 2001).

69. See, e.g., Goh Sui Noi, *Man in Sex VCD Has Not Escaped Public's Interest*, STRAITS TIMES INTERACTIVE, at <http://straitstimes.asia1.com.sg/asia/story/0,1870,97542,00.html> (Jan. 19, 2002) (reporting on the marital affairs of a female politician).

70. 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, 1018-19 (1995).

interest or a right to solitude in public should be allowed.⁷¹ In resolving these issues, the right to solitude must be balanced against the public's right to know and the media's First Amendment right to gather news.⁷² In Singapore, the media's right to free speech under Article 14(1)(a) of the Singapore Constitution applies.⁷³

One argument is that "[i]ntrusion does not raise First Amendment difficulties since its perpetration does not involve speech or other expression. It occurs by virtue of the physical or mechanical observation of the private affairs of another, and not by the publication of such observations."⁷⁴ With all due respect, this approach is too simplistic. It ignores the fact that the right to solitude does have effects on First Amendment rights. Although it may not directly involve speech or some other form of expression, it affects the ability of the press to gather news. The media's First Amendment rights, however, do not warrant a curtailment of the individual's right to solitude. While there are valid arguments against an expansion of the right to solitude, the law has already given too much leeway to the press at the expense of the solitude of others.

A. Investigative Journalism in the Name of Public Interest

1. Investigative Journalism: A Social and Legal Problem

To some extent, all good journalism involves some degree of investigation in the form of a persistent and intense pursuit of the truth. There is, however, a form of investigative journalism that has very disturbing implications for the right of solitude—journalism employing subterfuge. There are many spectacular instances of American journalists going undercover, committing trespass, or practicing deception and misrepresentation to nab the "inside story."⁷⁵ Often this involves surveillance devices secreted about journalists' bodies.⁷⁶ Such actions often involve a breach of the target individual's privacy rights. Indeed, intrusion claims against the media commonly fall under three categories:

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

72. *Id.* at 938.

73. SING. CONST. pt. IV art. 14(1)(a).

74. Nimmer, *supra* note 71, at 957.

75. See, e.g., Victor A. Kovner & Harriette K. Dorsen, *Recent Developments in Intrusion, Private Facts, False Light and Commercialization Claims*, 3 COMM. LAW 775, 783–88 (1990).

76. *Id.* at 784; see, e.g., *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 884 (Ky. 1981).

(1) surreptitious surveillance; (2) traditional trespass; and (3) “instances where consent to enter into a secluded setting for one purpose has been exceeded by the invitee.”⁷⁷

It is acknowledged that the power of such investigative journalism can be “a potent weapon in the fight for social reform.”⁷⁸ One example is a three-month undercover investigation by “20/20” into the treatment of the elderly at Texas state and private nursing home facilities.⁷⁹ This investigation revealed stunning evidence that the residents were subject to subhuman and degrading treatment.⁸⁰ Residents were “tied to their beds, starved, abused and left to lie in filth.”⁸¹

The investigative report was instrumental in prompting reform measures.⁸² A member of the Texas Board of Health who chaired the subcommittee on nursing home policy resigned and the Governor called for a state investigation of all nursing home facilities.⁸³ The undercover footage created an emotional impact that could not have been replicated in print.⁸⁴ Indeed, the problem had been ignored despite a previous series of articles in the *Houston Chronicle* describing the inhumane conditions.⁸⁵

Yet another example is an exposé by “PrimeTime Live” on unsanitary practices at Food Lion stores.⁸⁶ Following a tip-off that the supermarket was engaging in unsanitary meat practices, the program sent two reporters to work undercover in the grocery chain.⁸⁷ The reporters obtained jobs using false identities, references, and fictitious local addresses.⁸⁸ As they worked, the reporters used tiny cameras and microphones concealed on their bodies to obtain footage from the meat cutting room, the deli counter, the employee break room, and a manager’s office.⁸⁹ The broadcast that eventually aired showed Food Lion employees apparently “repackaging and redating fish that had passed the expiration date, grinding expired beef with fresh beef, and applying barbecue sauce to chicken past its expiration

77. Kovner & Dorsen, *supra* note 75, at 783.

78. Lyrissa C. Barnett, *Intrusion and the Investigative Reporter*, 71 TEX. L. REV. 433, 434 (1992).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Barnett, *supra* note 78, at 434.

85. *Id.* at 434–44.

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

87. *Id.*

88. *Id.*

89. *Id.* at 510–11.

date in order to mask the smell and sell it as fresh in the gourmet food section.”⁹⁰

Investigative journalism, however, is a double-edged sword. It can just as easily be used to satisfy the public’s prurient curiosity about the private lives of others. For example, the *Globe* tabloid allegedly paid a former flight attendant \$75,000 to seduce sports commentator Frank Gifford, husband of television celebrity Kathie Lee Gifford, in a hotel room, while a hidden camera filmed their rendezvous.⁹¹ Dick Morris, a key advisor to President Clinton, was subjected to a similar undercover operation.⁹²

There are no concrete guidelines as to the permissible extent of undercover subterfuge. Clearly there is no social utility achieved by using undercover subterfuge merely to satisfy the prurient curiosity of the public.⁹³ It remains unclear, however, whether the press enjoys a qualified privilege to intrude upon the solitude of others and employ subterfuge to obtain a story that is at least arguably in the public interest and could advance social welfare.

A number of cases categorically state that the press is not privileged to commit crimes and torts in the course of newsgathering activities.⁹⁴ For example, the court in *Dietemann v. Time, Inc.*⁹⁵ held that the publication of tortiously gathered news did not insulate the publisher from liability in any action for invasion of privacy.⁹⁶ In *Dietemann*, two reporters from *Life Magazine* posed as patients to gain access to the home of the plaintiff, reported to be “a disabled veteran with little education, [who] was engaged in the practice of healing with clay, minerals, and herbs—as practiced, simple quackery.”⁹⁷ They recorded their conversation with him using a hidden transmitter and took clandestine photographs.⁹⁸ The court had no doubt that the reporters were guilty of an egregious intrusion on

90. *Id.* at 511.

91. Richard Cohen, *Blind-Sided by the Sleazepapers*, WASH. POST, May 22, 1997, at A25; Steve Coz, *When Tabloids Cross the Line*, N.Y. TIMES, May 29, 1997, at A21; Howard Kurtz, *Gifford Tumbles into Tabloid Trap*, WASH. POST, May 17, 1997, at H1.

92. Richard Cohen, *Wired Eyes: How Tapes and Technology Freeze Our Times—and Sometimes the Blood Itself*, WASH. POST, Feb. 22, 1998, at W20; Howard Kurtz, *Tabloid Rings Up Another Hot Scoop*, WASH. POST, Aug. 30, 1996, at A38.

93. See Barnett, *supra* note 78, at 442.

94. See *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972); *Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 63 (Ct. App. 1986); *Miller v. NBC, Inc.*, 232 Cal. Rptr. 668, 684–85 (Ct. App. 1986).

95. 449 F.2d 245 (9th Cir. 1971).

96. See *id.* at 249.

97. *Id.* at 245 (quoting *Dietemann v. Time, Inc.*, 284 F. Supp. 925, 926 (C.D. Cal. 1968)).

98. See *id.* at 246.

Dietemann's solitude:

One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select.⁹⁹

The court rejected *Time's* defense based on the First Amendment as specious:

The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.¹⁰⁰

On the other hand, a number of courts have accepted that an intrusion on solitude may be justified by the legitimate motive of newsgathering.¹⁰¹ After all, the tort of intrusion requires that the intrusion must be "highly offensive to a reasonable person."¹⁰² Arguably, this requirement is expansive enough to accommodate an exception for newsgathering activities. Indeed, what "may be highly offensive when done for socially unprotected reasons—for purposes of harassment, blackmail or prurient curiosity, for example—may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story."¹⁰³

This approach was applied in the case of *Cassidy v. ABC, Inc.*,¹⁰⁴ where the plaintiff policeman was surreptitiously filmed conducting an undercover sting in a massage parlor.¹⁰⁵ His intrusion claim failed on the basis that no right of privacy against intrusion existed "with reference to the gathering and dissemination of news concerning discharge of public

99. *Id.* at 249.

100. *Id.*

101. See generally *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983); *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762 (Ct. App. 1983); *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

102. RESTATEMENT (SECOND) OF TORTS § 652B.

103. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998).

104. 377 N.E.2d 126 (Ill. App. Ct. 1978).

105. *Id.* at 128.

duties.”¹⁰⁶

In light of this doctrinal uncertainty, the topic of investigative journalism demands a closer look. When the law is this vague, both the media and the public interest are negatively affected. The media is unable to make an educated determination as to the extent of their liability and the public cannot be safeguarded from covert surveillance.

2. Investigative Journalism Does Not Deserve Qualified Immunity from Legal Liability

Some have argued that the media is entitled to qualified immunity from an action for intrusion on solitude when it employs subterfuge to investigate issues in the public interest.¹⁰⁷ Professor Barnett, for example, argues that a newsgatherer who employs subterfuge will prevail in an action for intrusion “if she can show that she had probable cause to believe that the plaintiff was engaged in illegal, fraudulent, or potentially harmful conduct.”¹⁰⁸

Similarly, the “least-intrusive-means” test proposed by Litwin¹⁰⁹ would allow the media to justify intrusive newsgathering by demonstrating that less intrusive means were unavailable or impractical under the circumstances.¹¹⁰

The press should not enjoy a qualified privilege in any of these forms to intrude on the solitude of others. At best, it should only have a privilege on the basis of necessity—if the impending harm that the media is investigating is of a nature so imminent that there are no reasonable alternatives. This exception, however, must be narrowly construed. The defense of necessity, for example, excuses intrusion where a person is injured or dying and there is no other help at hand.¹¹¹

Calls for a more expansive press privilege are based on erroneous assumptions and ignore social costs. These assumptions are discussed below.

106. *Id.* at 132.

107. *See* Barnett, *supra* note 78, at 449.

108. *Id.*

109. Ethan E. Litwin, Note, *The Investigative Reporter’s Freedom and Responsibility: Reconciling Freedom of the Press with Privacy Rights*, 86 GEO. L.J. 1093, 1100 (1998).

110. *Id.* at 1100–01. The least-intrusive means test “has the dual benefit of protecting the reasonable privacy concerns of the journalist’s subjects and providing the court with a judicially manageable standard for analyzing such cases.” *Id.* at 1101. The court must decide “(1) if the means chosen were in fact intrusive of the subjects’ privacy interest and (2) if any practical and less intrusive means existed.” *Id.* n.49.

111. *See* Ploof v. Putnam, 71 A. 188, 189 (Vt. 1908).

a. The Trust in the Press Is Misplaced

The call for a qualified privilege is often predicated upon the assumption that the press serves a valuable function as the “fourth institution” of the realm, i.e., as an adversarial watchdog of the government and public affairs.¹¹² The following characterization of the press is fairly typical: “Beyond question, the role of the media is important; acting as the ‘eyes and ears’ of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business.”¹¹³ Furthermore, “because newsgathering is often difficult, expensive, and time-consuming, the organized media are often in a better position than the public to observe closely and document the events and institutions that surround us.”¹¹⁴ In sum, a free press provides “organized, expert scrutiny of government.”¹¹⁵

This trust in the press is misplaced. It assumes that the press is driven by altruism when it is often driven by a lust for profits. As CBS anchorperson Dan Rather stated, “[i]t’s the ratings, stupid, don’t you know? They’ve got us putting more fuzz and wuzz on the air, cop-shop stuff, so as to compete not with other news programs but with entertainment programs—including those posing as news programs—for dead bodies, mayhem and lurid tales.”¹¹⁶ Indeed, producers have an “insatiable hunger for the kind of documentation that looks good on screen . . . [S]ecretly recorded video, where the viewers see the action with their own eyes, may be the tastiest delicacy of all.”¹¹⁷

Further, it is no coincidence that programs employing the use of subterfuge peak during the seven days that comprise television ratings sweeps week.¹¹⁸ In fact, ABC allegedly withheld its Food Lion story for six months so that it could be broadcast during the November sweeps period to pull in greater advertising revenue.¹¹⁹

The press cannot be trusted to serve as a neutral watchdog in such circumstances. They may be tempted to go for the most titillating, but not

112. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

113. *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978).

114. David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161, 170 (1997).

115. Stewart, *supra* note 112.

116. *Perspectives*, NEWSWEEK, Oct. 11, 1993, at 19.

117. Russ W. Baker, *Truth, Lies, and Videotape: PrimeTime Live and the Hidden Camera*, COLUM. JOURNALISM REV., July–Aug. 1993, at 25, 26.

118. Lidsky, *supra* note 5, at 180.

119. See Scott Andron, *Food Lion Versus ABC: Journalism World Trying to Sort Meaning of Messages from North Carolina Jury*, QUILL, Mar. 1, 1997, at 15–16.

necessarily most important, story. Even when pursuing an important story, there are no guarantees that the press will not exaggerate, sensationalize, or distort the facts for maximum effect. There are some doubts, for example, as to the complete accuracy of the “PrimeTime Live” story on Food Lion.¹²⁰ The tip-off came from the United Food & Commercial Workers International Union (“UFCW”),¹²¹ hardly an unbiased source. The UFCW had been waging an unsuccessful campaign to unionize Food Lion employees.¹²² It had leveled accusations of legal and regulatory violations against Food Lion.¹²³ Further, the UFCW actively courted media attention to gain publicity for its charges.¹²⁴

Segments of unedited footage shown during the trial showed the reporters cursing when Food Lion employees did their jobs by discarding expired produce and cleaning the premises or machines.¹²⁵ Allegedly, the undercover reporters were responsible for much of the food handling mischief captured on the cameras and even attempted to bait Food Lion employees into violating the company’s rules on sanitation.¹²⁶ Thus, how much “PrimeTime Live” edited their footage to tell the story as they wanted is an open question. The risk of the media running wild is therefore too great to warrant qualified immunity.

b. Qualified Immunity Cannot Be Properly Limited

Indeed, qualified immunity is prone to abuse.¹²⁷ It has been held that “[t]he privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general.”¹²⁸ This definition is so wide and nebulous that it threatens to swallow the entire tort. Moreover, courts traditionally give tremendous deference to editorial discretion.¹²⁹

120. See Amy Singer, *Food, Lies, and Videotape*, AM. LAW., Apr. 1997, at 57–58.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 62.

126. Singer, *supra* note 120, at 61.

127. Deborah Daniloff, Note, *Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace*, 40 HASTINGS L.J. 687, 709–11 (1989) (discussing the courts’ unsuccessful attempts to define the boundaries of qualified immunity and to evenly apply such a standard in the context of employer defamation).

128. *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 506 (Sup. Ct. 1968).

129. *Shulman*, 955 P.2d at 485.

This problem should not be solved by confining the definition of “public interest” to only a few, select issues. Any selection is bound to have an element of arbitrariness. What is important to one may be trivial to another. Professor Barnett has tried to solve this problem by limiting qualified immunity to only “illegal, fraudulent, or potentially harmful conduct.”¹³⁰ The phrase “potentially harmful conduct” is so elastic that it can be used to justify an expansion of the newsgathering privilege.¹³¹ It is not likely to operate as a sufficient constraint on undercover subterfuge given the reluctance of the judiciary to effectively legislate what is and should not be matters of legitimate concern.¹³²

The threshold standard that the media should satisfy in order to earn the privilege of intruding on the solitude of another is also problematic. Professor Barnett recommends that the press must be able to show “probable cause” that the target was engaged in suspect conduct.¹³³ This standard fails to adequately protect the solitude of others. Because the media does not have the same power as law enforcement agencies, the media may be limited to building a case of probable cause based on rumor, innuendo, or paid or biased informants. To deny the media qualified immunity simply because it did not have a prior case built on evidence that would hold up in court would therefore be unfair. On the other hand, lowering the threshold would make the right to solitude so vulnerable that it would be almost worthless.

c. Qualified Immunity Is Prone to Abuse

Assuming these problems could be solved, there is still the danger that the media would abuse its privilege. There is no reason why the press should be free of the constraints placed on everyone else.¹³⁴ Procedural and substantive restrictions have been put in place because the private sphere is considered so inviolate that none but the most compelling reasons can pierce it:

130. Barnett, *supra* note 78, at 449.

131. *See id.*

132. *See id.* at 443 (noting that the court in *Dietemann* “did not provide newsgatherers with an adequate conceptual framework to determine when they may ‘take unconventional investigative steps without invoking the sanctions of tort law’”) (quoting James E. King & Frederick T. Muto, *Compensatory Damages for Newsgatherer Torts: Toward a Workable Standard*, 14 U.C. DAVIS L. REV. 919, 928 (1981)).

133. *Id.* at 449.

134. 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, 1138–39 (1996).

Our society has chosen to protect an individual's sphere of privacy with various common laws and statutes, and our Constitution requires that the people's own surrogates, the police, obtain appropriate search warrants and subpoenas before they may investigate an incident. In light of this, the media should not then be permitted to substitute, with impunity, illegal investigative procedures for lawful ones under the guise of "newsgathering."¹³⁵

Indeed, a special exemption would imply that the media is entitled to operate in a world of lawlessness and would create the temptation for vigilante law enforcement. To make matters worse, the media is not held accountable to any public body.¹³⁶ If anything, it is a slave to the profit margin.¹³⁷ There is no guarantee that the media will observe the same levels of scrupulousness expected of law enforcement agencies. Thus, there are no cogent reasons why the media should be released from the constraints under which even law enforcement agencies must act.

The creation of a special exemption for the media leads down a slippery slope. In fact, the arguments in favor of qualified immunity for intrusions on solitude are equally applicable to other torts or even crimes.¹³⁸ There is also no reason to limit the qualified immunity to the media. If the rationale behind a proposal for qualified immunity is to ensure that issues of public concern are addressed,¹³⁹ that same immunity should be accorded to those individuals and organizations that have the time and money to investigate alleged wrongs. This would create a nightmare of lawlessness.

d. Better Means to Address Issues of Public Interest

Qualified immunity would not give appropriate weight to the need to protect the solitude of others. "Instead of a zone of privacy protecting our secluded moments, a climate of fear might surround us instead."¹⁴⁰ However, this Article does not argue that individuals should be allowed to get away with contemptible wrongs under the cover of secrecy. Rather, its position is that the task of investigating issues of public concern should be left to law enforcement agencies where substantive and procedural protections have been put in place to protect the individual from abuse and

135. *Id.* (citation omitted).

136. BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM* 180 (2001).

137. Walsh, *supra* note 134, at 1144.

138. See generally discussion *supra* Part III.A.2.a-b.

139. Barnett, *supra* note 78, at 451.

140. Miller, 232 Cal. Rptr. at 685.

oppression.¹⁴¹

Some argue that it is inadvisable to rely exclusively on the government to monitor and investigate wrongs:

[T]he target of an investigation often may be the government itself. To restrict public debate to information that public officials choose to interject into that debate would be to provide a disproportionate advantage to the holders of public office. Second, to the extent that the target of an investigation is a private rather than a public person or entity, even when the target is engaged in criminal wrongdoing, there may well be insufficient attention paid to the problem by the government officials charged with enforcing the relevant provisions of the criminal code. In a world of limited investigatory and prosecutorial resources, even the most benignly motivated decisions about where to devote time and energy necessarily depend on efficiency calculations and on assessments of how to achieve the broadest public good. Media activity, particularly in the form of investigative journalism, can be a valuable supplement to official conduct. The press can help not only to shape the agenda of law enforcement authorities, but also to alert the public about the threat posed by the target of the investigation.¹⁴²

Moreover, the media has the ability to act with a speed that the authorities cannot match.¹⁴³

However, these advantages would come at too high a cost. Although government agencies may not be as efficient or as honest as we may like, the best solution is to examine reform options, not put the power of vigilante law enforcement in the hands of a loose cannon.

e. Denying Qualified Immunity Does Not End Investigative Journalism

Strong stories can be uncovered without the aid of subterfuge. As the court in *Dietemann* pointed out, “[i]nvestigative reporting is an ancient art; its successful practice long antedates the invention of miniature cameras

141. See U.S. CONST. amend. IV–V.

142. 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, 1153–54 (1996).

143. 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, 526 (1998).

and electronic devices.”¹⁴⁴ There are often viable alternative ways of getting the story. “PrimeTime Live,” for example, did not have to go undercover to get the Food Lion story.¹⁴⁵ It spoke to over twenty witnesses who testified as to the store’s unsanitary practices.¹⁴⁶ Some of these were actually former employees.¹⁴⁷ In such circumstances, hidden-camera footage is just a frill, a “cute gimmick that attracts a profitably large audience share and garners great ratings.”¹⁴⁸

Arguably, visual impact is necessary to galvanize support for social reform. However, allowing the media to violate others’ privacy for what is essentially just the “icing on the cake” is impermissible. The dangers that would accompany such a qualified privilege are simply too great.

Moreover, even without a qualified privilege, there is still a narrow band within which the media can conduct undercover journalism. Here, cases involving the tort of trespass serve as a useful guide. The tort of intrusion need not involve physical trespass.¹⁴⁹ The tort of trespass protects one’s possessory interest in land, not one’s privacy rights.¹⁵⁰ Nevertheless an analogy to the tort of trespass is still useful for two reasons. First, trespass helps to delineate the physical boundaries of one’s privacy rights.¹⁵¹ Second, it can be used as a proxy for an invasion of privacy claim.¹⁵² This is true of Singapore where there is no established right to privacy.¹⁵³ It is also true of the United States where trespass can be usefully employed by corporate entities because they have no recognized right of privacy.¹⁵⁴

The twin cases of *Desnick v. ABC, Inc.*¹⁵⁵ and *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,¹⁵⁶ establish that journalists posing as clients to

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

145. Lidsky, *supra* note 5, at 233 n.303.

146. *Id.*

147. *Id.*

148. Irene L. Kim, *Defending Freedom of Speech: The Unconstitutionality of Anti-Paparazzi Legislation*, 44 S.D. L. REV. 275, 305 (1998–99) (quoting Clay Calvert, *Sifting Through the Wreckage of ABC Reportage: Little Victories, Big Defeats & Unbridled Media Arrogance*, 19 HASTINGS COMM. & ENT. L.J. 795, 818 (1997)).

149. *See* Litwin, *supra* note 109, at 1113–14.

150. *Id.* at 1118.

151. *See id.* at 1113–14.

152. *See id.*

153. Banisar & Davies, *supra* note 12, at 86.

154. *Desnick v. Capital Cities/ABC, Inc.*, 851 F. Supp. 303, 307 (N.D. Ill. 1994); *CNA Fin. Corp. v. Local 743, Int’l. Bhd. of Teamsters*, 515 F. Supp. 942, 946 (N.D. Ill. 1981).

155. 44 F.3d 1345 (7th Cir. 1995).

156. 194 F.3d 505 (4th Cir. 1999).

test the efficacy and integrity of public services is perfectly permissible.¹⁵⁷ The case of *Desnick* arose out of the “PrimeTime Live” exposé of medical malpractice committed by the Desnick Eye Center.¹⁵⁸ The director of the eye center agreed to allow “PrimeTime Live” to interview his staff and patients as well as film the performance of cataract surgery after extracting a specific promise from the producer that he would take a serious look at ophthalmological services and not conduct “ambush” interviews or engage in “undercover” surveillance.¹⁵⁹

Despite those promises, the program sent in fake patients accompanied by supposed friends or relatives who surreptitiously filmed and recorded the consultations.¹⁶⁰ “PrimeTime Live” used the footage to demonstrate that the eye center was guilty of Medicare fraud.¹⁶¹ Chief Justice Posner threw out the eye center’s trespass claim against “PrimeTime Live,” reasoning that the eye center was open to the public.¹⁶² The test patients entered offices “that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves).”¹⁶³

Chief Justice Posner dismissed the fact that “PrimeTime Live” lied in order to obtain Desnick’s trust:

Investigative journalists well known for ruthlessness promise to wear kid gloves. They break their promise, as any person of normal 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. Desnick, needless to say, was no tyro, or child, or otherwise a member of a vulnerable group. He is a successful professional and entrepreneur. No legal remedies to protect him from what happened are required, or by Illinois provided.¹⁶⁴

Food Lion arose out of the “PrimeTime Live” investigation of Food Lion’s alleged unsanitary food practices.¹⁶⁵ In contrast to *Desnick*, Food

157. *Desnick*, 44 F.3d at 1354; *Food Lion*, 194 F.3d at 520.

158. *Desnick*, 44 F.3d at 1349.

159. *Id.* at 1348.

160. *Id.*

161. *Id.*

162. *Id.* at 1352.

163. *Id.*

164. *Desnick*, 44 F.3d at 1354.

165. *Food Lion*, 194 F.3d at 510.

Lion succeeded in its trespass claim.¹⁶⁶ The court held that the reporters' filming of Food Lion's activities in non-public areas constituted a breach of loyalty¹⁶⁷—a wrong that far exceeded the scope of the consent that Food Lion had granted.¹⁶⁸ The court distinguished *Desnick* on the basis that the eye center had been open to the public.¹⁶⁹ In contrast, the reporters in *Food Lion* conducted their investigations in areas not open to the public.¹⁷⁰

As a result, restaurant critics can still conceal their identities and reporters can still pose as potential homebuyers to gather evidence of housing discrimination.¹⁷¹

For the foregoing reasons, the media should not be exempted from legal liability except in clear cases of necessity. The confusion created by the cases, however, has become so great that it must be resolved by state legislatures. They must act now as covert journalism continues to exact costs on the sanctity of our solitude. Singapore's parliament should pass preemptive legislation, making it clear that the media does not enjoy a special privilege to intrude on the solitude of others.

B. The Right to Privacy in Public Places

1. Privacy in Public Spaces: An Issue Ripe for Reevaluation

As used in this paper, the term "public place" refers to any place where a member of the public has the right of access whether upon payment or not.¹⁷² This definition therefore includes not only public streets and parks, but also restaurants, shopping malls, and sports stadiums.¹⁷³

Violation of one's solitude in a public place is a growing problem, not just in America, but in Singapore as well.¹⁷⁴ Public figures, however, are not the only subjects of intense scrutiny. Even private individuals are being photographed and videotaped against their will.¹⁷⁵ The Internet has

166. *Id.* at 519.

167. *Id.* at 516.

168. *Id.* at 516–17.

169. *Id.* at 518.

170. *Id.*

171. *See Desnick*, 44 F.3d at 1351, 1353.

172. McClurg, *supra* note 70, at 991 n.2.

173. *Id.*

174. *See generally* Maria O'Daniel, *Live Web Cams' Promise for Online Peeping Toms*, NEW STRAITS TIMES (Malaysia), Jan. 22, 2001, 2001 WL 9500284.

175. *See generally* Steve Dawson, *Girlwatch Moves On*, STRAITS TIMES (Singapore), Oct. 14, 1999, 1999 WL 8264918; Melissa Ong Choi Hua, *What's the Policy on Girl Watcher Site?*, STRAITS TIMES (Singapore), Oct. 14, 1999, 1999 WL 8264887; Eugene Wee, *Click! Your*

exacerbated this problem. An Internet search turns up hundreds of websites featuring webcams displaying live footage of everything from tourist destinations to school and office interiors.¹⁷⁶ In an interesting development in Singapore, one local took photographs of young women in the shopping district without their consent and posted them on the Internet.¹⁷⁷ One series of photographs showed a girl adjusting her bra strap while another displayed a girl squatting in a short skirt.¹⁷⁸ The photographs were accompanied by “humorous, provocative or naughty captions” like “[g]reat bod!” and “[c]heck out that low neckline.”¹⁷⁹ The Internet service provider ultimately removed the website for violating its policies on privacy regarding vulgar and obscene material.¹⁸⁰

It is clear, however, that in both the United States and Singapore, there is no general right to privacy in public.¹⁸¹ As Prosser noted:

On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description of a public sight, which any one present would be free to see.¹⁸²

There have been several limited encroachments on this general principle. Courts may hold a defendant liable for an intrusion on another’s privacy for actions that are “unusually obtrusive” or “highly embarrassing to the plaintiff.”¹⁸³ An example of the former is the case of *Galella v. Onassis*.¹⁸⁴ The defendant paparazzo was found guilty of touching Mrs. Onassis and her daughter in his frenzy to get their pictures, following the family too closely in an automobile, and endangering the safety of the

Picture’s Taken. Click! It’s on the Net (Some With Naughty Captions), NEW PAPER (Singapore), Oct. 11, 1999 (on file with the Loyola of Los Angeles Entertainment Law Review) [hereinafter *Click! Your Picture’s Taken*]; Eugene Wee, *It’s Not Funny. I’m Seeking Legal Advice*, NEW PAPER (Singapore), Oct. 14, 1999 (on file with the Loyola of Los Angeles Entertainment Law Review).

176. O’Daniel, *supra* note 174.

177. *Click! Your Picture’s Taken*, *supra* note 175.

178. *Id.*

179. *Id.*

180. Foo Kim Leng, *Offensive Website Removed*, STRAITS TIMES (Singapore), Oct. 16, 1999, 1999 WL 8264977; Dawson, *supra* note 175.

181. Prosser, *supra* note 17, at 391–92 (citations omitted).

182. *Id.*

183. Lidsky, *supra* note 5, at 209.

184. 487 F.2d 986 (2d Cir. 1973).

Kennedy children while they were swimming, water skiing, and horseback riding.¹⁸⁵ The court enjoined Galella from harassing or endangering Mrs. Onassis and her children.¹⁸⁶ An example of an intrusion that is highly embarrassing can be found in *Daily Times Democrat v. Graham*¹⁸⁷ where the newspaper was held liable for photographing the plaintiff with her dress blown up above her waist by an air jet.¹⁸⁸

Some legislatures are also presently considering new anti-harassment or anti-paparazzi laws.¹⁸⁹ However, the existing exceptions and proposed legislation do not go far enough. A general right to privacy in public should be recognized because the denial of this right has been based on five erroneous assumptions.

First, there is the theory that individuals voluntarily assume the risk of being observed, photographed, or filmed when they go out in public.¹⁹⁰ This was the basis of the court's reasoning in *Gill v. Hearst Publishing Co.*,¹⁹¹ which involved an invasion of privacy claim based on the publication of a photograph showing the plaintiffs embracing in a Los Angeles farmers' market.¹⁹² The court dismissed their claim on the basis that they had voluntarily assumed the risk of being photographed:

[The plaintiffs] had voluntarily exposed themselves to public gaze in a pose open to the view of any persons who might then be at or near their place of business. By their own voluntary action plaintiffs waived their right of privacy so far as this

185. *Id.* at 994.

186. *Id.* at 998–99.

187. 162 So.2d 474 (Ala. 1964).

188. *Id.* at 476.

189. Kim, *supra* note 148, at 276–77.

New legislation is likely to be forthcoming. In the wake of Princess Diana's death, Representative Sonny Bono, a Republican from California introduced a bill aimed at paparazzi that would impose criminal fines on journalists who "persistently" follow or chase a person who has a "reasonable expectation of privacy." California State Senator Tom Hayden proposed a "Paparazzi Harassment Act" that would impose fines on journalists "threatening, intimidating, harassing, or causing alarm, harm or the potential of harm to any person who is the subject of media interest." Similarly, California Senate Majority Leader Charles Calderon has drafted a "Personal Privacy Act" that broadly defines intrusions on privacy and alters the law to protect victims of defamation.

Lidsky, *supra* note 5, at 183–84 (citations omitted). A law enacted in 1998 now authorizes triple damages, punitive damages, and the disgorgement of profits for trespassing (or for using image or sound enhancing technology as an alternative to trespassing) to record or observe "personal or familial activity" of a person who has a reasonable expectation of privacy. CAL. CIV. CODE § 1708.8 (Supp. 2002).

190. Lidsky, *supra* note 5, at 209.

191. 253 P.2d 441 (Cal. 1953).

192. *Id.* at 442.

particular public pose was assumed for “[t]here can be no privacy in that which is already public.” The photograph of plaintiffs merely permitted other members of the public, who were not at plaintiffs’ place of business at the time it was taken, to see them as they had voluntarily exhibited themselves. Consistent with their own voluntary assumption of this particular pose in a public place, plaintiffs’ right to privacy as to this photographed incident ceased and it in effect became a part of the public domain, as to which they could not later rescind their waiver in an attempt to assert a right of privacy. In short, the photograph did not disclose anything which until then had been private, but rather only extended knowledge of the particular incident to a somewhat larger public than had actually witnessed it at the time of occurrence.¹⁹³

As Professor McClurg points out, this reasoning is deeply flawed.¹⁹⁴ The court collapsed the distinction between the voluntary assumption of a pose and the voluntary assumption of a risk.¹⁹⁵ The fact that one voluntarily embraces another in public does not necessarily mean that one assumes the risk of being photographed, videotaped, or otherwise closely scrutinized.¹⁹⁶ One has to voluntarily assume that specific risk.¹⁹⁷ The plaintiffs in *Gill* had not assumed the risk of being photographed.¹⁹⁸ Just because they were aware of the possibility that they *could* be photographed did not mean that they were aware that they *would* be photographed.¹⁹⁹ Under the *Gill* rationale, the only way to avoid voluntarily assuming the risk of intrusion is to cloister oneself at home with the blinds drawn.²⁰⁰ This is clearly untenable. In a crowded society, we are often driven to find peace and solace in public parks, pubs, and other public places.

Second, the court takes a binary approach towards privacy—either you have it or you do not.²⁰¹ However, individuals can and do have relative expectations of privacy. For example, a person invited into another’s home does not implicitly have permission to rifle through the homeowner’s personal belongings. Similarly, someone expecting to be seen in public

193. *Id.* at 444–45 (citations omitted).

194. *See* McClurg, *supra* note 70 at 1037–41.

195. *See id.* at 1039–40.

196. *Id.* at 1040.

197. *Id.* at 1039.

198. *Id.*

199. *Id.*

200. McClurg, *supra*, note 70 at 1040.

201. *Id.* at 1040–41.

does not necessarily expect to be intensely scrutinized, photographed, and videotaped. Individuals in public should not be treated like animals in a zoo—to be pointed at, gawked at, and photographed at will.

The idea of “relative expectations” or “relative spaces” has been judicially recognized in the cases of *Shulman v. Group W Productions, Inc.*²⁰² and *Sanders v. ABC, Inc.*²⁰³ In *Shulman*, the plaintiff was involved in a horrendous car accident.²⁰⁴ The paramedic team that went to Shulman’s aid was accompanied by a ride-along cameraman who had placed a microphone on the nurse’s body.²⁰⁵ The microphone picked up Shulman pleading, “I just want to die. . . . I don’t want to go through this.”²⁰⁶ Shulman was forced to re-live the horror three months later when that segment was aired on the syndicated program, *On Scene: Emergency Response*.²⁰⁷ The court held that recording Shulman’s conversation with the nurse was a potential intrusion on her privacy.²⁰⁸ Just because the cameraman was near enough to hear the conversation did not necessarily mean that the rest of the public should.²⁰⁹

Sanders held similarly to *Shulman*. In *Sanders*, a reporter from ABC obtained employment as a “telepsychic” with the Psychic Marketing Group, which also employed the plaintiff in the same capacity.²¹⁰ The reporter covertly taped her conversations with the plaintiff by using a small video camera hidden in her hat.²¹¹ In an action for invasion of privacy, the court held that the mere fact that the plaintiff’s conversations with the reporter could be overheard by his co-workers did not mean that he consented to being taped or having that recording disseminated to the public.²¹² The court reiterated that the right to privacy is not an all or nothing proposition.²¹³

Although these cases did not consider the right to privacy in public places, their reasoning may be applied by analogy. An individual may not have a legitimate expectation of not being *observed* in public, but an individual may have a legitimate expectation of not being *recorded* in

202. 955 P.2d 469 (Cal. 1998).

203. 978 P.2d 67 (Cal. 1999).

204. *Shulman*, 955 P.2d at 475.

205. *Id.*

206. *Id.* at 476.

207. *Id.* at 475.

208. *Id.* at 491.

209. *Id.*

210. *Sanders*, 978 P.2d at 69.

211. *Id.*

212. *Id.* at 71.

213. *Id.* at 72.

public.

Third, the *Gill* court assumed that there are no qualitative differences between being observed or written about and being photographed.²¹⁴ However, these violations differ in their level of offensiveness. The difference is exemplified when one considers how a photograph or film impinges on the subject's freedom. As the California Supreme Court recognized in *Ribas v. Clark*,²¹⁵ a "substantial distinction" exists between "the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor . . . [S]uch secret monitoring denies the speaker an important aspect of privacy of communication—the right to control the nature and extent of the firsthand dissemination of his statements."²¹⁶

This sentiment was further echoed in the Canadian case of *Les Editions Vice-Versa Duclos v. Aubry*²¹⁷ which recognized that an individual in public retains a residual right to privacy.²¹⁸ The court reasoned that the plaintiff had the right to sue upon the publication of a photograph that was taken of her in public because:

The camera lens captures a human moment at its most intense, and the snapshot "defiles" that moment. The privileged instant of personal life becomes "this object image offered to the curiosity of the greatest number." A person surprised in his or her private life by a roving photographer is stripped of his or her transcendancy and human dignity, since he or she is reduced to the status of a "spectacle" for others . . .²¹⁹

Indeed, a photograph or film exposes the individual to much more intense scrutiny than the written or spoken word. A photograph or film allows the photographer or videographer to capture the subject in tangible form. The picture or film can be scrutinized indefinitely and disseminated to an unintended audience. For example, nudists may be comfortable with letting other bathers observe them unclad on a nude beach. The same nudists, however, might object to photographs of that beach trip being

214. See *Gill*, 253 P.2d at 443–44. The court held that the mere publication of a photograph taken without consent does not constitute an actionable invasion of privacy, but publication of such a photograph, in conjunction with an article unfavorably reflecting on the subjects of the photograph may constitute an actionable invasion of privacy. *Id.*

215. 696 P.2d 637 (Cal. 1985).

216. *Id.* at 640–41.

217. [1998] 1 S.C.R. 591 (Can.).

218. See *id.* at 605.

219. See *id.* at 621 (quoting J. Ravanis, *La Protection Des Personnes Contre la Realisation et la Publication de Leur Image* 388–89 (1978)).

shown to a larger audience.

Moreover, a picture has an indefinable essence that cannot be replicated with mere words. It is true that a “picture speaks a thousand words.”²²⁰ A photograph allows the viewer to discern details that would not have been apparent to a casual observer. Furthermore, events recorded on film can even capture the personality of the subject.²²¹

Fourth, the *Gill* court reasoned that with the exception of indecency, individuals should have no objection to their public activities being captured on film.²²² An individual comfortable enough to do something in public should not object to that act being captured on film. This rationale fails to consider that the cloak of anonymity often allows people to feel enough at ease to do things that they otherwise might not. A stolen kiss and a quick embrace fall into this category.

The *Gill* court did not consider that intensely private moments may take place in public. A woman going to an abortion clinic, for example, would most likely rather not have that fact captured for posterity.²²³ It is unfair to argue that she assumes the risk of scrutiny by going out in public because the only way she can get to the clinic is by using public thoroughfares. In addition, things that one would otherwise prefer to be kept private sometimes unexpectedly happen in public.

Fifth, the *Gill* court impliedly makes the assumption that there is no qualitative difference between one public space and another.²²⁴ The definition of “public space,” however, is so expansive that it sweeps in everything from a public street and park to a restaurant and hospital waiting room.²²⁵ Surely, the expectations of privacy vis-à-vis these areas are very different.

In summary, certain intrusions do undermine the ability to safeguard the secrecy of one’s affairs and maintain anonymity. These are the very aspects that the concept of privacy is supposed to safeguard. It is anomalous for the law to refuse to protect one’s privacy simply because one is in the public. After all, the law “protects people, not places.”²²⁶ Individuals should be comfortable enough to go about their business

220. Holly Johnson, *‘MoneyShot’ Is More Than First Meets the Eye*, OREGONIAN, Dec. 14, 2001, at E08.

221. McClurg, *supra* note 70, at 1043.

222. *Gill*, 253 P.2d at 445.

223. McClurg, *supra* note 70, at 1033.

224. *See Gill*, 253 P.2d at 445.

225. *See People v. McNamara*, 585 N.E.2d 788, 792–93 (N.Y. 1991). *But see United States v. Doe*, 884 F. Supp. 78, 81 (E.D.N.Y. 1995).

226. *Katz v. United States*, 389 U.S. 347, 351 (1967).

without knowing that they can and are being watched.

2. Reform: A Proposal for a Multi-factored Approach²²⁷

Clearly the law must take a more sensitive approach to the issue of privacy in public. In comparison to the issue of privacy in the private sphere, there are many competing considerations. Where private spaces are concerned, the presumption should be against intrusion, even if that intrusion could uncover issues of public interest. This maintains a fundamental core where personal privacy can be enjoyed.

Public spaces, however, are shared spaces and any conferral of the right of privacy in public directly impinges upon the freedom of everyone who shares that space. Moreover, many issues of public interest take place in the public arena.²²⁸ Tourists should remain free to take pictures and journalists free to cover newsworthy events. In addition, the concept of privacy is so nuanced that what may not be an intrusion by written word may be an intrusion in the form of a photograph.²²⁹

The number of competing considerations makes this particular issue inappropriate for legislative attention in either America or Singapore. The doctrine of privacy in public places must be developed incrementally, on a case by case basis. The following proposal outlines certain considerations that the courts should bear in mind.

The courts should be guided by an overall test of “offensiveness.”²³⁰ A defendant should be found liable for an unreasonable intrusion on the plaintiff’s solitude if the defendant’s actions are highly offensive to a reasonable person.²³¹ In determining what would be “highly offensive to a reasonable person,”²³² the court should consider several factors as discussed below.

227. The following proposal draws upon, and attempts to improve upon, McClurg’s approach. See McClurg, *supra* note 70, at 1057–88.

228. See *Jesse Jackson Returns to Public Life After Revelation of Extramarital Affair*, JET, Feb. 5, 2001, at 5.

229. See Johnson *supra* note 220.

230. See McClurg, *supra* note 70, at 1057.

231. See e.g., *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (applying Justice Harlan’s concurrence in *Katz*, 389 U.S. at 361).

232. RESTATEMENT (SECOND) OF TORTS § 652A.

a. The Legitimate Public Interest

Individual restraint and sound judicial policy generally preclude a court from determining what is or is not in the public interest.²³³ This determination should be left to the marketplace of ideas. Nevertheless, certain bright lines should be drawn.

First, the court should prohibit prying into the private lives of others to satisfy the prurient curiosity of the public. Second, while there is no doubt that private individuals are often propelled into the public eye by events, the court should frown upon any attempt by the media itself to thrust private individuals into the limelight. The New York courts recognized this proposition in *Smith v. Goro*.²³⁴ There, the author Herb Goro wrote a book on the living conditions of a slum block in the Bronx in the hope that it would generate some social reform.²³⁵ Some residents sued for invasion of their privacy on the ground that their names and pictures had been used without their authorization and that quotes attributed to them were fictitious.²³⁶ The court refused to dismiss the case because “there was nothing particular about the lives of these plaintiffs that separated them from their fellows as peculiar subjects of public interest so as to preclude their right of privacy.”²³⁷

Under the *Smith* rationale, the plaintiffs in *De Gregorio v. CBS*²³⁸ should have succeeded in their invasion of privacy claim. In that case, two construction workers were filmed holding hands on Madison Avenue to illustrate a segment on “Couples in Love” in New York.²³⁹ The plaintiff objected to the broadcast because he was already married and the woman was engaged.²⁴⁰ Even though the topic of romance was in the public interest,²⁴¹ the plaintiff should have succeeded on the basis that there was nothing so unusual about him that he should be singled out for attention.

233. See *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 341–44 (1986) (deferring to the legislature as to what is in the public interest). But see *44 Liquormart v. Rhode Island*, 517 U.S. 484, 510 (1996) (questioning *Posadas* and declining to extend its decision to the *44 Liquormart* facts).

234. 323 N.Y.S.2d 47, 51–52 (Sup. Ct. 1970).

235. *Id.* at 49.

236. *Id.* at 48–49.

237. *Id.* at 51.

238. 473 N.Y.S.2d 922 (Sup. Ct. 1984).

239. *Id.*

240. *Id.*

241. *Id.* at 924.

Third, the courts should require the media to treat even *bona fide* subjects of public interest with more sensitivity. “Grief reporting,”²⁴² for example, needs to be handled more circumspectly than it is now. The *Boston Globe*, for example, should have shown more restraint in its coverage of the EgyptAir crash in October 1999.²⁴³ Following the crash, it published a “photo gallery” on its website of the distraught and grieving relatives of the victims.²⁴⁴ This goes beyond the pale of reasonableness. Even in times of great public interest and concern, some individuals still deserve to retain their privacy. In such cases, the media should ask the intended subjects for their consent. It is impermissible otherwise to turn their grief into a public spectacle.²⁴⁵

This expectation of sensitivity should extend to the media’s treatment of public figures. Public figures, by virtue of their status and the fact that many have courted publicity, cannot expect the same degree of privacy as a private individual.²⁴⁶ However, this does not mean that the media need not observe basic standards of decency and civility in their coverage of these individuals.

The press has been guilty of the most shocking transgressions where celebrities are concerned. Arnold Schwarzenegger and his wife Maria Shriver were once forced off the road by two cars driven by photographers as they were driving their son to nursery school.²⁴⁷ The photographers then proceeded to take their photographs from the hood of the Schwarzenegger vehicle.²⁴⁸ At Tony Curtis’ outdoor wedding, the paparazzi helicopters were so numerous that the guests “[could not even] hear the ceremony.”²⁴⁹ More tragically, Princess Diana died in a car accident while being pursued by a horde of paparazzi photographers.²⁵⁰

The courts should lay down categorically that even public figures should be left alone when they are engaged in legitimately private

242. See DECKLE MCLEAN, *PRIVACY AND ITS INVASION* 114 (Praeger Publishers 1995) (“grief reporting” is the exercise of capturing crisis and reporting victims’ emotional displays as a result of crisis).

243. See generally David Briscoe, *Last Transmission from Egypt Air 990: ‘Good Morning,’* BOSTON GLOBE, <http://boston.com/news/packages/egyptair> (May 16, 2000).

244. See *id.*

245. See MCLEAN, *supra* note 242, at 114–15.

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

247. Kim, *supra* note 148, at 276.

248. *Id.*

249. John Horn, *Hollywood Actors Call for Curbing Paparazzi*, SAN DIEGO UNION-TRIBUNE, Sept. 1, 1997, at A19.

250. Anne Swardson & Charles Trueheart, *Headlong Flight from Paparazzi Ends in Carnage*, WASH. POST, Sept. 1, 1997, at A25.

activities. The media, of course, is not prohibited from reporting the comings and goings of celebrities. They should, however, be prohibited from subjecting celebrities to the hot glare of the camera as they go about their daily chores or when they are engaged in intensely private moments such as weddings. At the very least, the press should be required to keep a safe distance from their targets.

The social value of the facts published must be weighed against the depth of the intrusion into ostensibly private affairs and the extent to which the party voluntarily acceded to a position of public notoriety.²⁵¹ Generally, the social value of the public's need to know the details of the target's daily activities is *de minimis*, failing to warrant an intrusion on the target's solitude.

In addition, even celebrities should be able to retain their dignity. On the facts of *Taylor v. KVTB*,²⁵² therefore, the plaintiff Otis Taylor should have been able to sue for an intrusion on his solitude.²⁵³ In that case, the television station taped a naked Taylor being arrested on the street.²⁵⁴ Taylor's private parts were exposed.²⁵⁵ Future Taylors should be able to succeed on the theory that the advancement of the public interest hardly requires the recordation of a person's indecency.²⁵⁶

b. The Duration, Extent, and Means of Intrusion

The courts, of course, should retain the causes of action they have created for serious, highly intrusive invasions of privacy.²⁵⁷ However, they should go even further and recognize the qualitative differences between the different means of intrusions. As a general rule, films and photographs should be considered more intrusive than the written word. At times, however, even the written word should be considered unreasonably intrusive. A female private individual, for example, would not appreciate her abortion being reported in newspapers.²⁵⁸ However, the plaintiff should

251. *Capra v. Thoroughbred Racing Ass'n of N. Am., Inc.*, 787 F.2d 463, 464 (9th Cir. 1986).

252. 525 P.2d 984 (Idaho 1974).

253. *See contra id.* at 988 (holding that the media are immune from liability for invasion of privacy even if embarrassing private facts are disclosed, unless it can be shown that the disclosure was made with malice).

254. *Id.* at 985.

255. *Id.*

256. *Contra id.* at 988.

257. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 655 (Cal. 1994).

258. *See McClurg*, *supra* note 70, at 1033. *See generally* Matthew D. Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 592 (1993) (discussing that records of abortions

generally not be allowed to complain when captured only inadvertently, incidentally, or fleetingly.²⁵⁹

Where webcams are concerned, given the present state of technology, the plaintiff should generally have no cause of action. It is true that the webcam is capable of disseminating the plaintiff's image to a wider audience.²⁶⁰ However, the image is often grainy and small.²⁶¹ At best, only a fleeting image of the individual is captured as he walks past the camera. Moreover, some of these web pages are incapable of handling streaming video and require the user to go through the hassle of constantly refreshing the page.²⁶² Furthermore, the speed at which most users access the Internet is so slow that it takes patience to wait for the image to download.²⁶³ These factors make it highly unlikely that a person would be closely scrutinized.

It may well be a different story if one individual was the focus of a webcam.

c. The Defendant's Motive

The defendant's motive should be relevant only if the intrusion was motivated by a desire to advance public interest. For example, this would be true of the individual who taped the Rodney King beating.²⁶⁴ Arguably, this videotape was necessary to raise the public's awareness of police brutality.

Where the intrusion is for private purposes, however, the defendant's motive should make no difference. It should make no difference whether the defendant captured the plaintiff's image because he fell in love with her at first sight or because he wanted the image for sexual gratification. Its social utility is not weighty enough to justify the intrusion on the subject's solitude.

performed are a matter of public record, therefore allowing newspapers access to them).

259. See generally WESTIN, *supra* note 22, at 19–21 (discussing that an individual's propensity to be curious about others is acceptable and is at times considered socially beneficial).

260. See Lance E. Rothenberg, Comment, *Re-thinking Privacy: Peeping Toms, Video Voyeurs, and Failure of the Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space*, 49 AM. U. L. REV. 1127, 1128 n.4 (2000).

261. *Webcams Product Reviews and Reports by Consumer Search*, at <http://www.consumersearch.com/www/computers/webcams/fullstory.html> (last visited Jan. 18, 2002).

262. See *Quad-Cities Online Webcam FAQ*, Quad-Cities Online, at <http://www.qconline.com/webcam/webcamfaq.shtml> (last visited Jan. 18, 2002).

263. See generally John J. Fried, *Videoconferencing Requires Webcam, Software, Patience*, INQUIRER (Phila.), Sept. 30, 2001, at E3.

264. See Amy M. Intille, Note, *Video Surveillance and Privacy: Implications for Wearable Computing*, 32 SUFFOLK U. L. REV. 729, 758 (1999).

d. Whether the Subject Consented or Should Be Deemed to Have Consented to the Intrusion

The media should generally respect the subject's request to be left alone. The media should also leave individuals alone in places where they should legitimately be able to expect privacy, such as restaurants or hospital waiting rooms.

At times, the subject can be taken to have voluntarily assumed the risk of being photographed or videotaped, as when a person enters places known to be crawling with journalists, such as parades, concerts, and other major public events. The media, however, should still respect specific requests not to be photographed or filmed.

In limited cases, the media can still pursue a subject, despite protests, if warranted by legitimate public interests. This exception to consent would apply if the subject is a suspect emerging from the courthouse or caught red-handed committing a crime.

These four factors are not exhaustive. The courts should modify these factors or create new ones as they struggle to mediate the tension between the individual's right to solitude in public and the public's right to know. For example, one argument is that any dissemination of the allegedly offending material should be taken into account as one factor in favor of finding that the subject's solitude was violated.²⁶⁵

However, considering dissemination as a factor would confuse the tort of intrusion with the tort of publicizing embarrassing private facts.²⁶⁶ The tort of intrusion is completed by the mere observation or recordation of an individual's image.²⁶⁷ Thus, one would be guilty of intruding on a plaintiff's solitude by simply taking a picture of the plaintiff embracing another. Whether the picture is subsequently disseminated is irrelevant. The defendant has the *power* to disseminate it. The mere fact that the defendant now has the power to disseminate it and thereby disturb the plaintiff's anonymity by affecting the secrecy of the plaintiff is egregious enough.

If the proposal for the right of solitude in public is accepted, it will correspondingly affect the tort of publicizing true but embarrassing private facts. As presently drawn, the tort does not recognize a cause of action for

265. See Ng-Loy, *supra* note 28, at 308.

266. See generally Angela Christina Couch, *Wanted: Privacy Protection for Doctors Who Perform Abortions*, 4 AM. U. J. GENDER & L. 361, 389-91 (1996).

267. See *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1183 (7th Cir. 1993) (discussing surveillance cameras as an intrusion of privacy).

the publication of affairs that take place in public.²⁶⁸ However, if some of what takes place in public becomes recognized as private, the ambit of this tort will naturally expand.

IV. CONCLUSION

The above proposals entail a fundamental re-ordering of the right to solitude within the entertainment and media industries as known in the United States and Singapore. It would mean the virtual abolition of journalism through subterfuge and a substantial curtailment of the media's freedom in public. It may even mean that life would become more boring. However, society would become more gracious and dignified. The press would not run amok trying to gather stories. Individuals could go out in public, safe in the knowledge that they have not relinquished all claims to respect and dignity. If this is the price society must pay to be more civilized, the price is not too great.

268. *See* *Hartman v. Meredith Corp.*, 638 F. Supp. 1015, 1018 (D. Kan. 1986) (discussing how plaintiff cannot claim a violation of privacy because the broadcast occurred during plaintiff's public occupation).