ARTICLE

Compensatory Damages for Newsgatherer Torts: Toward a Workable Standard

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In this article the authors focus on whether damages caused by publishing information that is tortiously acquired may be recovered on the theory that such damages are the proximate result of the antecedent newsgatherer tort. After concluding that the two cases which have directly addressed this issue both failed to supply a workable standard, the authors offer a compensatory damages formula which will better balance needed press protection and individual privacy and property rights.

Investigative reporting has evolved in recent years into a leading component of the "new journalism."[1] On both the national and local levels, investigative reporters have actively and successfully exposed crime and governmental corruption.[2] The most visible

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[1] "New journalism" refers to the recent trend of "activist" journalism, through which reporters attempt to use the communications media to influence society directly. *See* L. Downie, The New Muckrakers (1976). *See generally* M. Johnson, The New Journalism (1971); The Reporter as Artist: A Look at the New Journalism Controversy (R. Weber ed. 1974).

[2] *See* L. Downie, *supra* note 1, at 232 & 258; President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 208 (1967). The Commission recommended that all newspa-

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example of these successes is the Woodward and Bernstein Watergate probe. Today, almost every major newspaper has at least one full-time investigative reporter.[3] The press has thus found a modern means of performing its ancient function as a "watchdog" of government.

Unfortunately, tort law has lagged behind this rapid evolution. Various decisions involving alleged newsgatherer torts[4] have not dealt adequately with the unique and intractable problems such cases raise. These decisions have sparked considerable controversy in the legal community.[5] Numerous commentators have argued that existing law will inhibit much investigative reporting[6] and prevent disclosure of information that society has both a right and a need to know.[7]

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pers in major metropolitan areas "designate a highly competent reporter for full-time work and writing concerning organized criminal activities, the corruption caused by it, and governmental efforts to control it." *Id.* This recommendation was based on a finding that:

> [i]n some parts of the country revelations in local newspapers have stimulated governmental action and political reform. Especially in smaller communities, the independence of the press may be the public's only hope of finding out about organized crime. Public officials concerned about organized crime are encouraged to act when comprehensive newspaper reporting has alerted and enlisted community support.

Id.

[3] *See* L. DOWNIE, *supra* note 1, at 232-58.

[4] As used in this article, "newsgatherer torts" refers to trespasses or intrusions committed by reporters while gathering news.

[5] Newsgatherer tort liability was discussed recently at a conference of journalists and attorneys titled "The Media and the Law," held in Santa Barbara, California, in February 1977, and at a meeting of the American Bar Association Subcommittee on Freedom of Speech and Press held in Chicago on August 8, 1977.

[6] *See* Hill, *Defamation and Privacy under the First Amendment*, 76 COLUM. L. REV. 1205, 1277 (1976); Abrams, *The Press, Privacy, and the Constitution*, N.Y. Times, Aug. 21, 1977, § 6 (Magazine), at 11. *See also* M. FRANKLIN, CASES AND MATERIALS ON MASS MEDIA LAW 87-107 (1977).

[7] The mass media and its partisans frequently group the principles that protect the gathering and dissemination of information under the rubric "the public's right to know." *See generally* E. FRANCIS-WILLIAMS, THE RIGHT TO KNOW, THE RISE OF THE WORLD PRESS (1969).

Justice Douglas posited the public's right to know certain information as the rationale behind the first amendment in his dissent in Branzburg v. Hayes, 408 U.S. 665, 721 (1972):

> The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a

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The controversy is largely a product of a mushrooming clash between two sets of interests traditionally cherished and accorded special protections in our legal system: the rights to personal privacy and enjoyment of property on one hand, and freedom of the press and the public's right to know on the other. The courts have yet to achieve an appropriate accommodation of these interests. The sparse, inchoate rules that have surfaced seek primarily to nurture individual rights and too often ignore the pivotal role that the press plays in modern society. Carried to their logical extremes, these rules would deny protection to the press in circumstances where it is manifestly desirable.

This clash between individual rights and protection of the press is particularly evident in the nascent rules governing computation of compensatory damages for newsgatherer torts. Indeed, it may even be premature to suggest that any general rules exist, since the two cases[8] which have dealt with this issue arrived at opposite conclusions, and the lack of analysis in both significantly undercuts their value as precedent. In one, *Dietemann v. Time, Inc.*,[9] the court held that a plaintiff could recover damages which result from subsequent publication of information obtained by a reporter's tortious intrusion.[10] In the other, *Costlow v. Cusimano*,[11] the court held that a plaintiff could not recover such damages where the defendant obtained the information by trespassing on the plaintiff's property.[12] Because they expose the media to substantially different levels of liability, these two cases warrant a closer look at the compensatory damages issue.

Part I of this article reviews the two most common bases for newsgatherer tort liability—intrusion and trespass—and examines the *Dietemann* and *Costlow* decisions in detail. Part II catalogues the failings of both cases in addressing the compensatory

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> favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people, to paraphrase Alexander Meiklejohn. Knowledge is essential to informed decisions.

[8] The Kansas Court of Appeals in Belluomo v. Kake TV & Radio, Inc., 3 Kan. App. 2d 461, 596 P.2d 832 (1979) addressed the issue briefly, but only in dicta. *See* note 82 *infra*.

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

[10] *Id.* at 250.

[11] 34 A.D.2d 196, 311 N.Y.S.2d 92 (1970).

[12] *Id.* at 201, 311 N.Y.S.2d at 97.

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damages issue and demonstrates the need for a rule which falls between the extremes they posit. In Part III, the article proposes a compensatory damages rule which will provide needed press protections without unduly truncating individual privacy and property rights.

I. Tort Liability While Gathering News: Bases of Liability and Computation of Compensatory Damages

A. *Theories of Liability*

Although the first amendment's prohibition against prior restraint[13] has been held to encompass those torts which include publication as a requisite element,[14] there is much confusion

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[13] *See, e.g.,* New York Times Co. v. United States, 403 U.S. 713 (1971); Lovell v. City of Griffin, 303 U.S. 444 (1938); Near v. Minnesota, 283 U.S. 697 (1931).

[14] New York Times Co. v. Sullivan, 376 U.S. 254 (1964), brought much of the law of defamation within the ambit of first and fourteenth amendment protection. In that case, the Court interpreted the first amendment as prohibiting states from enforcing libel judgments in favor of public officials without proof that the defendant acted with "actual malice," that is, with knowledge of the statement's falsity or reckless disregard of its truth. *Id.* at 279-80.

In Time, Inc. v. Hill, 385 U.S. 374 (1967), the Court extended the *New York Times* standard to encompass "false light" invasion of privacy actions in which publication is a requisite element. *See* note 18 *infra*. The Court held that in giving publicity to a "newsworthy" event (i.e., an event of "public interest"), a publisher is privileged under the first amendment to make false statements of fact in good faith, and may be held liable only if the statements are known to be false, or made in reckless disregard of the truth.

The extent to which the Court's decision in *Hill* encompasses other invasion of privacy actions which include publication as a requisite element is unclear. According to the Note to Institute immediately following Restatement (Second) of Torts § 652F (Tent. Draft No. 13, 1967): "The decision may have other possible implications as to this Section, particularly as to what are matters of legitimate public interest. Other privacy sections, such as [public disclosure of private facts], may possibly become involved, although the Reporter finds nothing in the decision to suggest it."

However, after referring in Comment a to the Supreme Court's decision in *Hill,* Comment b to § 652F states:

> The result is that the right of privacy, as stated in [the sections on public disclosure of private facts and "false light" invasion of privacy], is not complete and unlimited, but is subject to the privilege of the press, or of other disseminators of information, to publish matters in which the public has a legitimate interest.

It is also unclear whether the constitutional protection accorded to publicizing certain matters encompasses only those which concern a "public figure" or

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over the extent to which it protects prepublication events such as newsgathering. The single rule to have crystallized is that the first amendment does not provide the press immunity from liability for torts committed while seeking information.[15] These in-

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"public official," or if it encompasses all "newsworthy" matters or matters of "legitimate concern to the public." Although *Hill* held that the first amendment privilege to make false statements in good faith extended to giving publicity to all "matters," of public interest 385 U.S. at 387-88, the Preliminary Note To Institute in the RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 21, 1975) preceeding § 652A states: "This position has been thrown in some doubt by the decision in Gertz v. Robert Welch, Inc., (1974) 418 U.S. 323, holding that negligence is required and is sufficient in a defamation action brought by a *private person.*" (emphasis added).

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the Court held that there can be no cause of action for disclosing the name of a rape victim when the name was a matter of public record in an indictment and trial. However, the Court did not decide whether there can be a cause of action for publishing matters which are not of legitimate concern to the public. *Id.* at 491. Although the decision in *Cox Broadcasting* is arguably limited to "truthfully publishing information released to the public in official records," *id.* at 496, at least one Circuit Court of Appeals has held that the first and fourteenth amendments preclude liability for truthful disclosure of all matters that are "of legitimate concern to the public." Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), *cert. denied,* 425 U.S. 998 (1976). For further discussion of matters which, at common law, have been held to be of "public interest," *see* note 44 *infra.*

[15] This rule proceeds from the principle that the first amendment does not grant the press immunity from the application of "general law." Branzburg v. Hayes, 408 U.S. 665, 683 (1972) (quoting Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937) "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." 408 U.S. at 684. In *Branzburg,* the Court held that news reporters have no first amendment right to refuse to disclose information to grand juries. Although noting that "news gathering is not without its First Amendment protections," *id.* at 707, the Court did not elaborate on the nature of this limited first amendment protection, other than to suggest that it would protect newsgatherers against governmental harassment. *Id.* at 707-08. The Court did say, however, that the first amendment does not immunize newsgatherers from tort or criminal liability. *Id.* at 691-92. Indeed, the Court stated that an argument in favor of such immunity would be "frivolous." *Id.* at 691.

The dissenters in *Branzburg* dwelt extensively on society's right to know and the press' role in modern society as the provider of needed information. Justice Douglas characterized the majority's decision as a "clog upon newsgathering" that would hinder fulfillment of the public's right to know. *Id.* at 724 (dissenting opinion). Although he focused mainly on the needs of a democratic system of government, Justice Douglas did recognize implicitly the nexus between gathering news and publishing it:

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clude intrusion, one of the newest torts in existence, and trespass, one of the oldest. Unfortunately, the few cases which have discussed newsgatherer tort liability have uniformly failed to explain important elements of their holdings and provide few guidelines for reporters to assess the legal consequences of their investigative conduct. Nonetheless, an understanding of how courts have applied the law on intrusion and trespass to newsgathering activities must precede the development of workable standards to apply in this area.

1. Intrusion

The tort of intrusion is defined as an intentional invasion of the seclusion or solitude of another that would be highly offensive to a reasonable person.[16] The aspect of the plaintiff's life

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> The people who govern are often far removed from the cabals that threaten the regime; the people are often remote from the sources of truth even though they live in the city where the forces that would undermine society operate. *The function of the press is to explore and investigate events,* inform the people what is going on, and expose the harmful as well as the good influences at work.

Id. at 722 (emphasis added).

Justice Stewart, with whom Justices Marshall and Brennan concurred, maintained that the right to publish news must necessarily include the right to obtain news, and thus vigorously argued for the application of full first amendment protection to newsgathering activities:

> A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. . . .
>
> No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised.

Id. at 727 & 728 (dissenting opinion).

Other courts that have considered the issue, both before and after the decision in *Branzburg,* have similarly rejected any form of constitutional immunity for torts committed while gathering news. *See, e.g.,* Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973); Dietemann v. Time, Inc., 449 F.2d 245, 249-50 (9th Cir. 1971). In addition, subsequent Supreme Court cases have reaffirmed the doctrine that the first amendment does not confer a right of access on the media that is not available to the general public. *See, e.g.,* Saxbe v. Washington Post, 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

[16] RESTATEMENT (SECOND) OF TORTS, § 652B (1977); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 807 (4th ed. 1971).

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upon which the defendant intrudes must be, and must be entitled to be, private.[17] The intrusion is complete upon the invasion of seclusion; in contrast to the three other invasion of privacy torts,[18] publication is not an essential element of the cause of action.[19]

While courts have found intrusions in a variety of factual circumstances,[20] the first case to discuss imposing liability on a

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[17] W. PROSSER, *supra* note 16, at 808.

[18] The other forms of the tort of invasion of privacy are appropriation of one's likeness, *see* RESTATEMENT (SECOND) OF TORTS § 652C (1977), publicity placing another in a false light in the public eye, (see *id.* § 652E), and public disclosure of private facts, (see *id.* § 652D). Publication is an essential element of each of these. *Id.* § 652; W. PROSSER, *supra* note 16, at 814.

The right to privacy, defined as the "right to be left alone," has received increasing protection under tort law since it was first proposed in an 1890 law review article written by Louis Brandeis and Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Forty-six jurisdictions presently recognize a cause of action in tort for invasion of privacy. W. PROSSER, *supra* note 16, at 804. The right has been rejected in Nebraska, Brunson v. Ranks Army Stores, 161 Neb. 519, 73 N.W.2d 803 (1955), Rhode Island, Henry v. Cherry & Webb, 30 R.I. 13, 73 A. 97 (1909), Texas, Milner v. Red River Valley Pub. Co., 243 S.W.2d 227 (Tex. 1952), and Wisconsin, Schaefer v. State Bar, 77 Wis. 2d 120, 252 N.W.2d 343 (1977).

[19] RESTATEMENT (SECOND) OF TORTS § 652B Comment b (1977); *see* Fowler v. Southern Bell Tel. & Tel. Co., 343 F.2d 150, 155-56 (5th Cir. 1965).

[20] *See, e.g.*, Zimmermann v. Wilson, 81 F.2d 847 (3d Cir. 1936) (unauthorized prying into plaintiff's bank account); Harms v. Miami Daily News, Inc., 127 So. 2d 715 (Fla. Dist. Ct. App. 1961) (persistent and unwanted telephone calls); Pinkerton National Detective Agency, Inc. v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119 (1963) (overzealous shadowing).

The cases have shown considerable solicitude toward protecting the sanctity of the home. *See, e.g.*, Thompson v. City of Jacksonville, 130 So. 2d 105 (Fla. Dist. Ct. App. 1961) (search without warrant); Souder v. Pendleton Detectives, Inc., 88 So. 2d 716 (La. Ct. of App. 1956) (snooping through windows); Welsh v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952) (landlord moving in on tenant). In fact, the emphasis on the sanctity of the home is so great that one court had held that any intrusion, to be actionable, must be analogous to an invasion of a home. American Credit Corp. v. United States Casualty Co., 49 F.R.D. 314 (N.D. Ga. 1969). Another found an actionable intrusion in an entry into the plaintiff's home even though he was not present at the time. Ford Motor Co. v. Williams, 108 Ga. App. 21, 132 S.E.2d 206 (1963).

The sanctity of other quarters has also been protected. Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905 (1924) (stateroom on steamboat); Newcomb Hotel Co. v. Corbett, 27 Ga. App. 365, 108 S.E. 309 (1921) (hotel room).

The cases have also condemned the use of electronic eavesdropping devices. *See, e.g.*, Briscoe v. Readers Digest Ass'n, 4 Cal. 3d 529, 533, 483 P.2d 34, 37, 93 Cal. Rptr. 866, 869 (1971) (decrying "the increasing capability of . . . elec-

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news media defendant for intrusion was not until 1969, in *Pearson v. Dodd*,[21] which extended the right of privacy in the District in Columbia to include protection against intrusion.[22] Senator Thomas Dodd had sued columnists Drew Pearson and Jack Anderson for publishing information from documents which

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tronic devices with their capacity to destroy an individual's anonymity, intrude upon his most intimate activities, and expose his most personal characteristics to public gaze."); Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931) (wiretapping); Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1958) (hidden microphones). *See generally* Kent, *Wiretapping: Morality and Legality,* 2 HOUS. L. REV. 285 (1965); Sullivan, *Wiretapping and Eavesdropping: A Review of the Current Law,* 18 HASTINGS L. REV. 59 (1966); Comment, *Eavesdropping in New York: 1968 Legislation,* 20 SYRACUSE L. REV. 601 (1969); Comment, *Wiretapping and Eavesdropping: A Case Analysis,* 36 TENN. L. REV. 362 (1969). Indeed, courts have found intrusions in the use of electronic devices even though no one listens, Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964) (bugging a marital bedroom), or though the information obtained is not disclosed to others. Fowler v. Southern Bell Tel. & Tel. Co., 343 F.2d 150 (5th Cir. 1965).

Concern about private use of eavesdropping equipment led to the enactment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Pub. L. No. 90-351, § 802, 82 Stat. 212 (codified at 18 U.S.C. §§ 2510-2520 (1976)). This statute essentially proscribes all private electronic eavesdropping. The sanction for violating it is a fine not to exceed $10,000 or up to five years imprisonment, or both. 18 U.S.C. § 2511(1) (1976). An aggrieved party may also seek relief of $100-a-day liquidated damages, punitive damages and litigation costs. Id. § 2520. Although the statute contains many "latent ambiguities," United States v. Carroll, 337 F. Supp. 1260, 1261 (D.D.C. 1971), the possibility of incurring these stiff penalties will deter much electronic eavesdropping, and thus supplement tort law.

Courts have tolerated certain intrusions without imposing liability where the intrusion served a valuable social interest. *See* Annot. 13 A.L.R.3d 1025 (1967). For example, courts have allowed insurance companies much leeway in investigating the validity of claims in personal injury suits because of the "public interest in exposing fraudulent claims." Tucker v. American Employers' Ins. Co., 171 So. 2d 437, 438 (Fla. Dist. Ct. App. 1965). As noted by one court: "[T]here is much social utility to be gained from these investigations. It is in the best interest of society that valid claims be ascertained and fabricated claims be exposed." Forster v. Manchester, 410 Pa. 192, 197, 189 A.2d 147, 150 (1963). If the investigation exceeds "reasonable" limits, however, there will be liability for intrusive conduct. *See* Schultz v. Frankfort Marine Accident & Plate Glass Ins. Co., 151 Wis. 537, 139 N.W. 386 (1913) (investigation included physical investigation of plaintiff's home, threats, insults, eavesdropping, and communications with plaintiff's employer).

[21] 410 F.2d 701 (D.C. Cir.), *cert. denied,* 395 U.S. 947 (1969).

[22] Pearson v. Dodd, 410 F.2d 701, 704 (D.C. Cir.), *cert. denied,* 395 U.S. 947 (1969).

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they knew were removed by former employees of Dodd from his office and copied without the Senator's permission. The documents revealed financial misdeeds by Dodd and eventually led to his censure by the Senate.[23] The court held for the defendants, however, on the theory that mere publication of material obtained by another's intrusion does not render the publisher liable.[24] To impose liability, noted the court, would imply that anyone who listens to an eavesdropper is liable for the eavesdropper's intrusion.[25] The court was reluctant to establish such a sweeping precedent.[26]

Pearson was relied upon extensively in *Dietemann v. Time, Inc.*,[27] the leading case on newsgatherer torts.[28] The Ninth Circuit panel in *Dietemann* held that California would expand the right of privacy to encompass intrusion.[29] Two reporters had gained access to a charlatan's home by a ruse and used hidden cameras and transmitters to record his attempts to cure one of the reporters of breast cancer by waving a magic wand.[30] This incident led to the charlatan's arrest and conviction, as well as

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[23] Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

[24] Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

[25] Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969). An interesting aspect of the *Pearson* decision is that the court did not discuss the possibility that the employees of Dodd who ransacked his files might have been bound to Pearson and Anderson prior to the intrusion under agency principles. *Cf.* Cantrell v. Forest City Publishing Co., 419 U.S. 245, 254 (1974) (even if publication of a story by a newspaper is not an independent tort, the newspaper is still liable for all damages proximately occasioned by the tortious invasion of privacy by its employee under respondeat superior). The leader of the intruders later wrote that they had a "working relationship" with Pearson's staff even before obtaining copies of the documents. J. BOYD, ABOVE THE LAW, 115 (1968); *see* L. DOWNIE, *supra* note 1, at 143: "[Jack] Anderson immediately won Boyd's (the intruders' leader) confidence and convinced him to carry thousands of documents from Dodd's files to Anderson's home, where he and Boyd went over them night after night, weekend after weekend, for nearly a year. . . ."

[26] Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

[27] 449 F.2d 245 (9th Cir. 1971).

[28] *See generally* Hill, *supra* note 6; Abrams, *supra* note 6; FRANKLIN, *supra* note 6.

[29] Dietemann v. Time, Inc., 449 F.2d 245, 248 (9th Cir. 1971).

[30] *Id.* at 246.

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to an article in *Life*.[31] In imposing liability, the court emphasized that even a quack has the right to expect seclusion in his "den,"[32] and dwelt on the intrusive nature of electronic surveillance equipment.[33]

Four of the factual circumstances in *Dietemann* could easily arise again in a suit against an investigative reporter. First, the reporters gained the victim's confidence by false statements of their identity. Second, the alleged intrusion took place in the victim's home. Third, the reporters were investigating the plaintiff's commission of a crime. Fourth, the reporters used hidden microphones and cameras to transmit and record the conversation.[34] Unfortunately, instead of discussing these factors thoroughly and stating precisely what constituted the intrusion, the *Dietemann* court merely referred to all of them in holding that an intrusion had occurred.[35] The court thus failed to provide future courts and legal analysts with a tangible framework for determining when a newsgatherer may take unconventional investigative steps without invoking the sanctions of tort law.

As the separate opinion in *Dietemann* pointed out, the majority erred by not discussing related fourth amendment doctrines,[36] most of which cut against the plaintiff's right of privacy.[37] The court's failure to analyze the intrusion sufficiently

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[31] *Id.* at 245-46

[32] Plaintiff's den was a sphere from which he could reasonably expect to exclude eavesdropping newsmen. He invited two of defendant's employees to the den. One who invites another to his home . . . 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. A different rule could have a most pernicious effect upon the dignity of man and it would surely lead to guarded conversations and conduct where candor is most valued, e.g., in the case of doctors and lawyers.

Id. at 249.

[33] *Id.* at 248-49.

[34] However, this fourth circumstance is less likely to occur because of the Omnibus Crime Control and Safe Streets Act. *See* note 20 *supra*.

[35] Dietemann v. Time, Inc., 449 F.2d 245, 248-49 (9th Cir. 1971).

[36] *Id.* at 250 (Carter, J., concurring and dissenting). Although there is no direct nexus between fourth amendment rights and privacy rights protected by tort law, they are analogous. Both are rooted in the same basic concept, a general right of privacy. *See* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

[37] In Hoffa v. United States, 385 U.S. 293 (1966), the Supreme Court held

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makes the decision difficult to reconcile with those cases which hold that a "reasonable" amount of intrusion is permissible if it serves a valid social objective.[38] In short, an editor or attorney who must decide whether or not to authorize a reporter's act will receive very little guidance from *Dietemann* in determining if the proposed act will be tortious.

Another intrusion case decided against the press is *Galella v. Onassis.*[39] In that case Jackie Onassis sought an injunction

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that a criminal defendant's misplaced confidence is insufficient to invalidate evidence obtained thereby under the fourth amendment, even though the confidence was obtained by deceit. The Court explicitly refused to protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.* at 302. This principle arguably offsets much of the criticism that the *Dietemann* court directed at the defendants for gaining entry by "subterfuge." Dietemann v. Time, Inc., 449 F.2d 245, 247 (9th Cir. 1971).

In addition, the Court has held that a home loses its protected character when the owner converts it into a headquarters for public activity, as Dietemann apparently did by using his home as his "doctor's" office. In Lewis v. United States, 385 U.S. 206 (1966), the Court stated: "[W]hen . . . the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street." *Id.* at 211.

In a factual situation reminiscent of *Dietemann,* the court in Jack v. United States, 387 F.2d 471 (9th Cir. 1967), *cert. denied,* 392 U.S. 934 (1968), held that evidence which was transmitted by a concealed device from the defendant's home was admissible because the defendant had converted his home into a "place of business." In Katz v. United States, 389 U.S. 347 (1967), the Court extended the fourth amendment to include protection against electronic surveillance, but also stated that what "a person knowingly exposes to the public, even in his own home. . ., is not a subject of Fourth Amendment protection." *Id.* at 351. Justice Harlan, concurring, wrote: "Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities or statements that he exposes to the 'plain view' of outsiders are not 'protected.' " *Id.* at 361. Nevertheless, the *Dietemann* court ignored these principles and protected the plaintiff's right of sanctuary in his "den," even though the entire incident took place within "the office portion of plaintiff's home." Dietemann v. Time, Inc., 449 F.2d 245, 247 (9th Cir. 1971).

[38] *See* note 20 *supra. Dietemann* also appears to be at odds with a later case, United States v. Phillips, 540 F.2d 319 (8th Cir.), *cert. denied,* 429 U.S. 1000 (1976), which held that people have no right of privacy in their statements, and therefore cannot maintain a tort action for invasions of privacy even if the statements are recorded by surreptitious devices.

[39] 487 F.2d 986 (2d Cir. 1973).

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against Ron Galella,[40] a photographer who specialized in obtaining candid photographs of celebrities.[41] Galella had attempted to photograph Mrs. Onassis and her children in a variety of unconventional and annoying ways.[42] The court enjoined Galella from continuing much of this activity in the future, noting that his "action went far beyond the reasonable bounds of news gathering."[43]

Although the courts have long recognized a privilege to publicize matters of public interest,[44] *Galella* is the only newsgatherer

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[40] Galella instituted the suit when he filed a complaint against Onassis and three Secret Service agents who were guarding her and members of her family for false arrest, malicious prosecution and interference with trade. Onassis counterclaimed for injunctive relief. Galella's claims were dismissed on a motion for summary judgment, which was affirmed on appeal. *Id.* at 991 & 993.

[41] "Galella fancies himself as a 'paparazzo' (literally a kind of annoying insect, perhaps roughly equivalent to the English 'gadfly'). Paparazzi make themselves as visible to the public and obnoxious to their photographic subjects as possible to aid in the advertisement and wide sale of their works." *Id.* at 991-92.

[42] Some examples of Galella's conduct brought out at trial are illustrative. Galella took pictures of John Kennedy riding his bicycle in Central Park across the way from his home. He jumped out into the boy's path, causing the [Secret Service] agents concern for John's safety . . . . Galella on other occasions interrupted Caroline at tennis, and invaded the childrens' private schools. At one time he came uncomfortably close in a power boat to Mrs. Onassis swimming. He often jumped and postured around while taking pictures of her party, notably at a theater opening, but also on numerous other occasions. He followed a practice of bribing apartment house, restaurant and nightclub doormen as well as romancing a family servant to keep him advised of the movements of the family. *Id.* at 992.

[43] *Id.* at 995.

[44] For a detailed discussion of the privilege to give publicity to matters of public interest, see W. PROSSER, *supra* note 16, 819-33; RESTATEMENT (SECOND) OF TORTS § 652F (Tent. Draft No. 13, 1967).

The privilege "was held to arise out of the desire and right of the public to know what is going on in the world, and the freedom of the press and other agencies of information to tell it." W. PROSSER, *supra* note 16, at 824. Matters of "public interest" include crimes, *see, e.g.,* Elmhurst v. Pearson, 153 F.2d 467 (D.C. Cir. 1946), suicides, *see, e.g.,* Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (2d Dist. 1939), divorces, *see, e.g.,* Aquino v. Bulletin Co. 190 Pa. Super. Ct. 528, 154 A.2d 422 (1959), the birth of a child to a twelve-year-old girl, *see* Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956), and "many other similar matters of genuine, if more or less deplorable, popular appeal." W. PROSSER, *supra* note 16, at 825.

The privilege centers, to a large extent, on the nature of the person being publicized. *See* Note, *Public Figures, Private Figures and Public Interest*, 30

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case which has explicitly suggested that the "newsworthiness" of information has a bearing on whether the means used to obtain it are tortious.[45] While noting that tort law places a high priority on the right to privacy, the *Galella* court stated that courts must also consider "countervailing social needs."[46] It concluded that in certain cases an otherwise wrongful act is warranted and hence does not constitute an actionable intrusion. It found liability because the "public interest" in Onassis's daily activities was *"de minimis"*[47] when compared with Galella's methods, which the court found to be "obtrusive and intruding," "unwarranted" and "unreasonable."[48]

Although not explicitly as in *Galella*, the court in *Pearson v. Dodd*[49] arguably considered the nature of the plaintiff and the information obtained in concluding that the defendants had not committed an intrusion.[50] In dicta, the court recognized policies supporting the disclosure of governmental corruption by noting that certain agency principles permit people to expose the wrongdoing of superiors,[51] and that the Code of Ethics for Gov-

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STAN. L. REV. 157 (1977). Information concerning such people as war heroes, *see, e.g.*, Stryker v. Republic Pictures Corp., 108 Cal. App. 2d 191, 238 P.2d 670 (2d Dist. 1951), inventors, *see, e.g.*, Corliss v. E.W. Walker Co., 64 F. 280 (D. Mass. 1894), ordinary soldiers, *see, e.g.*, Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E.2d 306 (1949), and even the Grand Exalted Ruler of a fraternal lodge, *see* Wilson v. Brown, 189 Misc. 79, 73 N.Y.S.2d 587 (1947), has been held to come within the privilege. Prosser notes that the privilege "includes, in short, anyone who has arrived at a position where public attention is focused upon him as a person." W. PROSSER, *supra* note 16, at 824. It embraces an individual "who had not sought publicity, but indeed, as in the case of any accused criminal, had tried to avoid it." *Id.* at 825. Such individuals become public figures temporarily and "they are subject to the public interest and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains, and victims." RESTATEMENT (SECOND) OF TORTS, § 652D, Comment f (1977).

Originally, this privilege was purely of common-law dimensions. But recent Supreme Court decisions have, at least in part, made the privilege a constitutional requirement. *See* note 14 *supra*.

[45] Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

[50] *See* notes 21-26 and accompanying text *supra*.

[51] Pearson v. Dodd, 410 F.2d 701, 705 n.19 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969). The court quoted from the RESTATEMENT (SECOND) OF AGENCY § 395, Comment f (1958), which provides:

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ernment Service compels federal employees to "expose corruption wherever discovered."[52]

To some extent, even *Dietemann v. Time, Inc.*[53] paid heed to the nature of the plaintiff and the information obtained. The court considered the plaintiff a harmless man, noting that he was a "disabled veteran with little education" who did not advertise or charge for his services.[54] It concluded that there was no "legitimate interest of the public" in knowing of the plaintiff's activities.[55] Perhaps the court would have found no intrusion had the plaintiff been a Mafia chieftain rather than a simple faith healer.

In sum, the newsgatherer intrusion cases suggest that courts are more likely to find an intrusion where the public's interest in the information concerning the plaintiff is not great. In contrast to cases involving invasion of privacy by publication,[56] however, this consideration has usually been mentioned only obliquely or in passing. Courts have not articulated it clearly enough to have much precedential value, nor specifically enough to convey to the news media the shifting boundaries that they must observe in the future.

2. Trespass

Another tort that reporters have committed while gathering news is trespass, which is defined as any unauthorized entry onto another's premises.[57] Trespass is based on the policy that people "should be free from willful injury and damage both

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> An agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest of himself or of a third person. Thus, if the confidential information is to the effect that the principal is committing or is about to commit a crime, the agent is under no duty to reveal it. . . .

[52] Pearson v. Dodd, 410 F.2d 701 n.19 (D.C. Cir.), *cert. denied,* 395 U.S. 947 (1969) (quoting from the CODE OF ETHICS FOR GOVERNMENT SERVICE, HOUSE Doc. No. 103, 86th Cong., 1st Sess. (1958)).

[53] 449 F.2d 245 (9th Cir. 1971).

[54] *Id.* at 245, 247.

[55] *Id.* at 250.

[56] *See* cases cited in notes 18 & 44 *supra.*

[57] *See, e.g.,* Bradford v. Clifton, 379 S.W.2d 249, 250 (Ky. 1964); Williams v. J.B. Levert Land Co., 162 So. 2d 53, 58 (La. Ct. of App. 1964); Allstate Fire Ins. Co. v. Singler, 14 Ohio St. 2d 27, 29, 236 N.E.2d 79, 81 (1968); Schronk v. Gilliam, 380 S.W.2d 743, 746 (Tex. Civ. App. 1964).

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great and small to their property."[58] It protects an individual's interest in exclusive possession of property and compensates him for damages to that interest.[59]

Four recent cases have examined alleged trespasses committed by members of the press. In *Florida Publishing Co. v. Fletcher,*[60] a newspaper photographer entered a burned-out home at the request of fire department officials investigating the possibility of arson. While inside, the photographer took a picture of the remains.[61] The Florida Supreme Court found no actionable trespass because the entry was made with the implied consent of custom.[62] Relying on *Fletcher,* the trial judge in *Green Valley*

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[58] State v. Kern, 258 Iowa 939, 940, 140 N.W.2d 920, 921 (1966). The action of trespass is also based on the notion that "a man's home is his castle":

> In these days of summit conferences, mass picketing, astronomical measurement in light years, the billions of ergs released by nuclear fission, mobs of juvenile delinquents, and the national passion for anonymity, it is serendipity to once again behold the reemergence of the individual rampant under time honored circumstances. It might be well for all to note once again at this point that a man's home is his castle . . . .

Hutchinson v. Rosetti, 24 Misc. 2d 949, 952, 205 N.Y.S.2d 526, 530 (1960).

[59] *See, e.g.,* Pentagon Enterprises v. Southwestern Bell Tel. Co., 540 S.W.2d 447 (Tex. Civ. App. 1976). *See generally* W. PROSSER, *supra* note 16, at 63.

[60] 340 So. 2d 914 (Fla.), *cert. denied,* 431 U.S. 930 (1977).

[61] *Id.* at 916.

[62] *Id.* at 917-18.

That the plaintiff consented to an act is a defense to any intentional tort. W. PROSSER, *supra* note 16, at § 18. In theory, consent is not an affirmative defense but instead negates the existence of a tort. *See* Christopherson v. Bare, 11 Q.B. 473, 116 Eng. Rep. 554 (1848). By consenting to an intrusion, a person relinquishes the right to keep the subject of the intrusion private. *See generally* Forster v. Manchester, 410 Pa. 192, 189 A.2d 147 (1963). Consent to a trespass means that the entry was authorized. Williams v. General Elec. Credit Corp., 159 Cal. App. 2d 527, 323 P.2d 1046 (2d Dist. 1958). The defense of consent fails if the consent is exceeded. W. PROSSER, *supra* note 16, at 103; Wheelock v. Noonan, 108 N.Y. 179, 15 N.E. 67 (1888).

Consent may be actual, arising directly from the words or conduct of a party; it may also be implied. *See* W. PROSSER, *supra* note 16, at 101. Implied consent may arise from the plaintiff's actions, as when a person without objection holds up an arm to be vaccinated. O'Brien v. Cunard S.S. Co., 154 Mass. 272, 28 N.E. 266 (1891). It may also arise from custom. W. PROSSER, *supra* note 16, at 102. *See* Vendrell v. School Dist. No. 26C, 233 Or. 1, 373 P.2d 406 (1962); Ogden v. Rabinowitz, 294 R.I. 86, 134 A.2d 416 (1957). To be valid, any custom must be reasonable and in accordance with public policy. *See, e.g.,* Threadgill v. Peabody Coal Co., 34 Colo. App. 203, 526 P.2d 676 (1974); Wilty v. Jefferson Parish Democratic Exec. Comm., 245 La. 145, 157 So. 2d 718 (1963).

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School, Inc. v. Cowles Broadcasting Co.[63] found implied consent for the entry of a television camera crew accompanying a police raid into a school for delinquent minors.[64] In *Le Mistral, Inc. v. Columbia Broadcasting System,*[65] CBS was found liable for trespass when its camera crew entered plaintiff's restaurant "with

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One shortcoming of the Florida Supreme Court's decision in *Fletcher* was its failure to identify what the particular custom was. In upholding the trial court's decision that a photographer was privileged to enter a burned-out home at the request of fire department authorities and take photographs, the court merely stated that there was implied consent "under the circumstances present here." Florida Publishing Co. v. Fletcher, 340 So. 2d 914, 918 (Fla.), *cert. denied,* 431 U.S. 930 (1977).

There are a number of possible customs to which the court might have been referring: reporters gathering news; reporters accompanying officials into buildings and taking pictures, etc. By not specifying the salient custom, *Fletcher* failed to provide guidance to courts, publishers or attorneys who may need to determine if a particular act falls within a legally recognized custom.

[63] 327 So. 2d 810 (Fla. App.), *cert. denied,* 340 So. 2d 1154 (Fla. 1976), *summary judgment for defendant granted,* No. 73-572-01 (7th Cir., Volusia County, Aug. 12, 1977).

[64] *Green Valley School* provides an excellent illustration of the consequences of the *Fletcher* court's failure to delineate the precise contours of its holding. The media conduct in *Green Valley School* was far more outrageous than in Fletcher; several affidavits in *Green Valley School* stated that the television crew not only accompanied a police raid of the school, but actually helped the police "mess up" the building. Green Valley School, Inc. v. Cowles Broadcasting Co., 327 So. 2d 810, 815 (Fla. App.), *cert. denied,* 340 So. 2d 1154 (Fla. 1976). The camera crew then filmed the disorder and subsequently broadcast the film as portraying the true condition of the school. 327 So. 2d at 815. Nevertheless, relying on *Fletcher,* the trial judge found that the television crew had acted with the implied consent of custom and granted summary judgment to the defendant. Green Valley School, Inc. v. Cowles Broadcasting Sys., No. 73-572-01, 2 (7th Cir., Volusia County, Aug. 12, 1977). The court apparently found a custom permitting entry into a building by a news reporter accompanying public officials. *Id.*

This holding clearly ignored the principles that the defense of custom fails if the specific consent is exceeded, *see* note 62 *supra,* and that the custom must be reasonable, Green Valley School, Inc. v. Cowles Broadcasting Sys., No. 73-572-01, 2 (7th Cir., Volusia County, Aug. 12, 1977). If the affidavits in *Green Valley School* were true, as the court was obliged to treat them for purposes of the summary judgment motion, *see* Jones v. Crews, 204 So. 2d 24, 25 (Fla. App. 1967); Carter v. Parker, 183 So. 2d 3, 4 (Fla. App. 1966), the consent allowing entry was exceeded when the television crews disrupted the rooms. Moreover, the reasonableness of the television crew's conduct clearly raised a question of fact. Yet the court disregarded these issues and, as in *Fletcher,* found a "custom" without articulating what that custom was.

[65] 61 A.D.2d 491, 402 N.Y.S.2d 815 (1978).

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cameras rolling"[66] in a "noisy and obtrusive manner"[67] after learning that the restaurant had been cited for several health code violations. Finally, in *Belluomo v. Kake T.V. & Radio, Inc.*,[68] the defendant televised a film of its reporters accompanying a health inspector on a visit to the plaintiffs' restaurant. The Kansas Court of Appeals affirmed a jury verdict for the defendant, concluding that the trial judge had correctly submitted the issue of fraudulently induced consent to the jury.[69]

Because intrusion cases have emphasized protection of the home,[70] much overlap exists between trespass and intrusion. Indeed, the court in *Fletcher* treated the torts identically.[71] This similarity of treatment probably occurs because the same act could easily constitute both torts.[72]

B. Computation Of Compensatory Damages

The damage measurements used to compensate the victims of intrusions and trespasses are functionally identical. The basic rule is that the victim of either tort may recover any loss that "proximately" resulted from the tort.[73] In intrusion cases, this

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[66] *Id.* at 493, 402 N.Y.S.2d at 816 n.1.

[67] *Id.*

[68] 3 Kan. App. 2d 461, 596 P.2d 832 (1979).

[69] *Id.* at 472, 596 P.2d at 840.

[70] *See* note 20 *supra.*

[71] Florida Publishing Co. v. Fletcher, 340 So. 2d 914, 918 (Fla.), *cert. denied,* 431 U.S. 930 (1977).

[72] For example, the intrusion in *Dietemann* just as easily could have been held to be a trespass. Although the plaintiff consented to the defendants' entry onto his property, the defendants surely exceeded that consent by secretly recording the plaintiff's acts through hidden cameras and microphones. For further discussion of the notion that the defense of consent fails if the consent is exceeded, see note 62 *supra.*

[73] *See generally* W. PROSSER, *supra* note 16, at 236. Before a defendant is liable for damages, the defendant's act must have been a "cause in fact," "actual cause" or "but for" cause of the loss. That is, "[t]he defendant's conduct is not a cause of the event, if the event would have occurred without it." *Id.* at 239.

Determining whether an "actual" or "but for" cause is also a "proximate" or "legal" cause of damage is an obscure process that has long vexed scholars of tort law. *See id.* at §§ 41-44 for a detailed explanation of proximate cause rules and policies. In discussing the many ambiguities in this area of the law, Prosser notes:

> 'Proximate cause' cannot be reduced to absolute rules. No better statement ever has been made concerning the problem than that of

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includes damages to the plaintiff's privacy interest, "peace of mind," and any specifically provable or "special damage."[74] In practice, this is usually compensation for the plaintiff's "injured feelings and mental suffering" caused by the intrusion.[75] The primary recovery in a trespass case is for harm to the owner's interest in exclusive possession of his land.[76] The plaintiff may also recover any additional loss "proximately"[77] or "naturally and fairly"[78] caused by the trespass.[79] Because both trespass and intrusion are intentional torts, the same considerations apply to both in determining what is a "proximate" or compensable result of the defendant's conduct.[80]

The proximate cause aspect of intrusion and trespass takes an interesting twist in media cases if the defendant publishes or

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> Street: "It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. . . . The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other.

Id. at 249 (quoting 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 110 (1906)).

The establishment of proximate cause rules consists primarily of drawing lines based upon policy considerations. The desire to compensate an injured plaintiff fully often is overborne by competing policies. In Prosser's words:

> [Proximate cause] . . . is sometimes said to be a question of whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusion in terms of legal policy, so that this becomes essentially a question of whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred.

Id. at 244.

[74] RESTATEMENT (SECOND) OF TORTS § 652H (1977).

[75] *See* Munsell v. Ideal Food Stores, 208 Kan. 909, 924, 494 P.2d 1063, 1075 (1972).

[76] The law infers some damage from every trespass. *See, e.g.,* Maganini v. Coleman, 168 Conn. 362, 362 A.2d 882 (1975); Longenecker v. Zimmerman, 175 Kan. 719, 267 P.2d 543 (1954).

[77] *See, e.g.,* Fairview Farms, Inc. v. Reynolds, 176 F. Supp. 178 (D. Or. 1959); Hughett v. Caldwell County, 313 Ky. 85, 230 S.W.2d 92 (1950); Allstate Fire Ins. Co. v. Singler, 14 Ohio St. 2d 27, 236 N.E.2d 79 (1968).

[78] *See, e.g.,* Mackey v. Board of County Comm'rs, 185 Kan. 139, 341 P.2d 1050 (1959).

[79] This may include mental suffering. *See* Acacia, California, Ltd. v. Herbert, 54 Cal. 2d 328, 353 P.2d 294, 5 Cal. Rptr. 686 (1960); Herzog v. Grosso, 41 Cal. 2d 219, 259 P.2d 429 (1953).

[80] *See generally* W. Prosser, *supra* note 16, at §§ 41-44.

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broadcasts information obtained through the tort. If the publication addresses a matter of "public interest" and would have been privileged standing alone,[81] the plaintiff may nonetheless attempt to recover damages caused by the publication on the theory that they were a proximate result of the prior intrusion or trespass.

The two decisions[82] which have confronted this issue directly reached contrary conclusions. In *Costlow v. Cusimano,*[83] the defendant entered plaintiff's property and photographed plaintiff's two children who had suffocated in a refrigerator. The court refused to award the plaintiff damages for publication of the photographs on the basis of the trespass, stating that the publication was a separable act "more properly allocated under other categories of liability."[84] The court was obviously referring to the invasion of privacy by publication rules.[85] *Dietemann v. Time, Inc.*[86] reached the opposite result, concluding that a failure to award damages for the publication would undercompensate the plaintiff for the "real harm done to him."[87]

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[81] *See* note 44 *supra.*

[82] In Belluomo v. Kake TV & Radio, Inc., 3 Kan. App. 2d 461, 596 P.2d 832 (1979), the Kansas Court of Appeals addressed the issue in dicta. The court stated:

> We conclude and hold that a party is entitled to recover compensatory damages for injury resulting from publication of information acquired by tortious conduct. A qualification to this rule is that recovery is usually to be against the tortfeasor alone and not against a recipient of the wrongfully acquired information who publishes [citing Pearson v. Dodd, 410 F.2d 701 (D.C. Cir.) *cert. denied,* 395 U.S. 917 (1969) discussed in notes 21-26 and accompanying text *supra*].

3 Kan. App. 2d at 471, 596 P.2d at 842. The court went on, however, to hold that the trial judge had correctly submitted the issue of fraudulently induced consent to the jury, which found that the plaintiffs had actually consented to the reporters' alleged trespass. The court therefore affirmed the jury's verdict for the defendant. *See* notes 68-69 and accompanying text *supra.* Moreover, in support of its conclusion and purported holding on the compensatory damages issue, the court relied solely on language from Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), and supplied no new or additional analysis. 3 Kan. App. 2d at 471, 596 P.2d at 842.

[83] 34 A.D.2d 196, 311 N.Y.S.2d 92 (1970).

[84] *Id.* at 201, 311 N.Y.S.2d at 97.

[85] *See* note 18 *supra.*

[86] 449 F.2d 245 (9th Cir. 1971).

[87] *Id.* at 250. Interestingly, the *Dietemann* court did not award any damages for the actual intrusion. Rather, it merely affirmed the trial court's $1,000 ver-

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Whether or not a plaintiff should recover damages for publication of information tortiously obtained is perplexing issue. On one hand, a rule that denies plaintiffs a recovery might, in some instances, leave a plaintiff largely uncompensated for the primary injury caused by the intrusion or trespass.[88] Yet a rule which automatically awards plaintiffs such damages could stifle much investigative reporting and deprive the public of information which it has both a right and a need to know.[89] Unfortunately, neither *Dietemann* nor *Costlow* adequately explained the rationales behind their decisions. Neither cited to significant authority, and both relied on facile reasoning.

The basic substantive defect of both decisions is their failure to discuss with sufficient rigor the wisdom of applying the traditional concept of proximate cause to newsgatherer torts. Both skirted a searching analysis of the bearing of the public's right to know on the selection of a damage measure. The rationale in *Dietemann* consists solely of language asserting the need to compensate injured plaintiffs,[90] and a statement that constitutional privileges "developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication."[91] This ignores the *common law* principle that the public is entitled to information of "public interest."[92] And in *Costlow* the analysis is equally conclusory,

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dict, which was based solely upon the publication of the information acquired via the intrusion. Dietemann v. Time, Inc., 284 F. Supp 925 (C.D. Cal. 1968), *aff'd,* 449 F.2d 245 (9th Cir. 1971). Nor did the court discuss whether the plaintiff could recover any damages which he incurred from the criminal prosecution that resulted from the publication. *See* note 31 and accompanying text *supra.* The plaintiff's arrest was as much a result of the intrusion as was the publication of the *Life* article, yet the court never discussed whether he could be compensated for his attorney's fees in the criminal case, or any fine that he paid or any damages to his peace of mind caused by having a criminal record. *Cf.* Kerr v. City of Chicago, 424 F.2d 1134 (7th Cir.), *cert. denied,* 400 U.S. 833 (1970) (holding that recovery under 42 U.S.C. § 1983 (1976) for a civil rights violation which could foreseeably engender criminal prosecution may include counsel fees in the criminal case).

[88] For example, in *Dietemann,* absent an award of damages based upon the publication, the plaintiff would have gone uncompensated. *See* note 87 *supra.*

[89] *See* discussion in Part II, "THE INHIBITING EFFECT OF THE DIETEMANN DAMAGES RULE," *infra.*

[90] Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971).

[91] *Id.* at 249-50.

[92] *See* note 44 *supra.* Actually, the *Dietemann* court did not entirely ignore

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holding simply that courts should not resort to trespass and proximate cause rules to circumvent the privileges attending the publication of newsworthy material.[93]

II. The Inhibiting Effect of the *Dietemann* Damages Rule

The *Dietemann* compensatory damages measurement could easily curtail reportorial activities that would otherwise fulfill the public's right to know.[94] The timidity this encourages in re-

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the public's interest in being informed. In concluding its opinion, the court stated that "[a] rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him *without any countervailing benefit to the legitimate interest of the public in being informed.*" Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971) (emphasis added). The latter portion of the court's statement may or may not have been accurate as applied to the *Dietemann* case, but is incorrect when expressed as a general rule. *See* discussion in Part II, "The Inhibiting Effect of the *Dietemann* Damages Rule," *infra.*

[93] Costlow v. Cusimano, 34 A.D.2d 196, 495, 311 N.Y.S.2d 92, 97 (1970). The decision in *Costlow* is also questionable in that the court held the damages from publication not legally compensable because the harm caused by the publication "rose as a consequence of acts performed after the trespass." *Id.* While a distinction between the trespass and the later publication is certainly valid, *see* text accompanying notes 123-29 *infra,* the trespass was still a cause in fact of the publication. *See* note 73 *supra.*

[94] This argument assumes that there are instances in which a reporter's newsgathering activities constitute, or at least approach, a trespass or an intrusion, and that information available through either of these means would otherwise be unobtainable. Although the extent to which the *Dietemann* damages rule actually deters newsgathering activity that leads to "newsworthy" information is not susceptible of empirical analysis, this does not mean that no cause-effect relationship exists. In the first amendment context, the Supreme Court has frequently recognized that certain laws deter the exercise of constitutional rights and has struck them down without demanding definite proof of a cause-effect relationship. An excellent summary of Supreme Court decisions which relied on "common sense" to find a "rational connection between the cause (the governmental action [which, in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), was the imposition of tort liability]) and the effect [the deterrence or impairment of First Amendment activity]" is found in Justice Stewart's dissent in Branzburg v. Hayes, 408 U.S. 665, 733-36 (1972). Justice Stewart cited numerous cases for his proposition that the Court has never "demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist." *Id.* at 733-34. He therefore concluded that courts should not be reluctant to hold that laws will, in practice, restrict the exercise of first amendment rights:

> We must often proceed in a state of less than perfect knowledge, either because the facts are murky or the methodology used in ob-

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porters is exacerbated by the failure of courts to articulate fully what conduct will result in the imposition of liability on the press.[95] For example, suppose that a reporter realizes that the necessary methods for pursuing a story may expose him and his paper to possible tort liability, and therefore telephones his editor. In anything but the most clearly defined situation, it would be virtually impossible for the newspaper's counsel to assess quickly and accurately the risk of a lawsuit and the potential liability caused by the proposed investigative activities. Without a definite answer from their attorneys, many publishers would surely decide that "discretion is the better part of valor" and forbid the reporter from pursuing the story, even though the reporter's proposed methods might be lawful and lead to discovery of very important information.

The inhibiting effect of the *Dietemann* damages rule on legitimate newsgathering activities is aptly illustrated by three hypothetical situations. Professor Alfred Hill of the Columbia Law School has postulated a situation in which local police, prosecutors and government officials are in league with the Mafia.[96] A reporter investigates and obtains conclusive proof of the corruption through a trespass or an intrusion. The reporter's newspaper then publishes the information. Under the *Dietemann* damages formulation, the officials could recover any losses caused by the intrusion *and* the subsequent publication. Hill states that permitting the corrupt officials to recover at all would be "disorienting," and adds that any damages awarded should not include compensation for harm caused by publication.[97]

This is an excellent example of a situation in which tort law would work against the public's right to know. Assume that the newspaper received a reliable tip revealing the corruption in the local government. To publish the information without investi-

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> taining the facts is open to question. It is then that we must look to the Constitution for the values that inform our presumptions. And the importance to our society of the full flow of information to the public has buttressed this Court's historic presumption in favor of First Amendment values.

Id. at 736 n.19.

[95] *See* notes 35, 56 & 62-64 and accompanying text *supra*. For a general discussion of the need for predictability in legal decisions, *see* K. LLEWELLYN, THE COMMON LAW TRADITION (1960).

[96] Hill, *supra* note 6, at 1278.

[97] *Id.* at 1282.

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gating would not only be poor journalism,[98] but could subject the newspaper to liability for libel if the information proved false.[99] Because the officials involved would have an interest in thwarting the reporter if they were guilty, information corroborating the tip could be difficult to obtain. In such a situation, tort law should either allow the newsgatherer some leeway in investigative techniques[100] or else limit potential liability.

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[98] *See* L. Downie, *supra* note 1, at 146-47; E. Francis-Williams, *supra* note 7.

[99] A failure to verify information may constitute "actual malice" under the *New York Times* standard. *See* St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

[100] Interestingly, other than implied consent by custom, *see* notes 62-64 and accompanying text *supra*, the subject of privileges has received no mention in newsgatherer tort cases. Indeed, Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) is the only such case to have employed the type of ad hoc balancing process used to decide if a defendant's otherwise tortious behavior is privileged. *See* text accompanying notes 45-47 *supra*.

Despite the absence of specific precedent, there are a number of traditional tort defenses that courts could apply to negate newsgatherer tort liability when appropriate. Among these are mistake, defense of others, prevention of crime and necessity. Courts have applied these privileges to myriad factual situations because they represent the time-honored determination that people should be permitted, in certain instances, to take action which, although injurious to the plaintiff, on balance benefits society.

There are, however, certain conceptual dissimilarities between newsgathering activities which should be privileged and conduct engaged in by traditional privilege claimants. These include the type of defensive action taken, the intent motivating the conduct and the immediacy of the result obtained by such conduct. For example, the Restatement of Torts contains language suggesting that privileges such as defense of others and prevention of crime are available only in tort claims involving physical contact; it speaks of protecting the use of "force." *See* Restatement (Second) of Torts § 76 Comment b and §§ 140-43 (1965). However, numerous courts have held that "force" need not include actual physical violence. *See, e.g.*, Garrett v. American Fruit Growers, 135 Fla. 98, 186 So. 269 (1938); Victor v. Fairchild Motor Corp., 18 So. 2d 566 (La. App. 1944). Moreover, limiting the availability of a particular defense to torts involving physical contact is unfounded, since the basis for the privilege is the potential benefit to society, rather than the type of defensive action taken. *See* W. Prosser, *supra* note 16, at 98.

Nor should the fact that a newsgatherer's intent may be primarily to gather news, rather than to prevent harm or a crime, a sound basis for finding conduct unprivileged. As recognized by the drafters of the Restatement of Torts, unless solely to harass the plaintiff, the actor's motive is of no consequence provided his conduct was necessary to benefit society. *See* Restatement (Second) of Torts § 870 Comment i (Tent. Draft No. 22, 1976).

Finally, a distinction might be drawn between newsgatherer and traditional

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Failure to do either would probably cause the story to die, and the public's right to know would suffer accordingly.

A second hypothetical was raised at a recent conference of journalists and legal experts on mass media law.[101] The journalists were asked whether they would trespass onto a manufacturing company's property if doing so would enable them to photograph the company illegally dumping waste products into a river. The journalists unanimously responded that they would trespass in order to take pictures that would embarrass the company and force it to stop polluting. Under the *Dietemann* damages rule, however, the press could be held liable for any loss of business to the company caused by publication of the photographs.[102]

A third hypothetical is posed by imagining a situation which might have occurred during the Woodward and Bernstein Watergate investigation. Assume that one of them had committed a trespass for which President Nixon could maintain an action. If the *Washington Post* then published information obtained as a result of that trespass, should President Nixon have been able to recover damages based on the publication? Such damages could be substantial if they included the mental distress caused by having to resign the Presidency in disgrace.

These hypotheticals illustrate circumstances in which the victims of an intrusion or trespass should receive little, if any, compensation. In each situation, the press is performing a vital public service which tort law should not discourage. Yet by permitting recovery for the publication which exposed the wrongdoing, the *Dietemann* damages measurement could result in astronomical liability for the press and deter socially desirable

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torts based upon the immediacy of the result obtained, but such a distinction does not warrant holding unprivileged newsgatherer conduct which on balance benefits society. While a newsgatherer tort may prevent harm only indirectly when people react to the information published, it should still be privileged if necessary to prevent harm or a crime.

[101] *See* note 5 *supra*.

[102] For example, in Belluomo v. Kake TV & Radio, Inc., 3 Kan. App. 2d 461, 596 P.2d 832 (1979), the plaintiffs sought recovery for alleged business losses resulting from the defendant's televising a film of its reporters accompanying a health inspector on a visit to the plaintiffs' restaurant. Although holding that the reporters had entered the plaintiffs' premises with their consent, in dicta the court stated that had the defendant's conduct not been privileged, the plaintiffs' would be entitled to recover the losses in business which resulted from publication of the film. *See* note 82 *supra*.

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reporting in the future.[103] As one commentator noted, there exists a very real danger "that the more privacy cases are decided against the press, the more the press will be inhibited in gathering news; as a consequence, much important newsgathering may become all but impossible."[104]

The *Dietemann* damages rule might also reduce the "spectrum of available knowledge"[105] by forcing self-censorship of truthful and important articles. Suppose that a reporter did obtain proof of government corruption through an intrusion of trespass. The editor must then decide whether or not to print this information, which would clearly be of "public interest." Numerous legal principles which have evolved in defamation and privacy cases protect publication of this information.[106] Yet the newspaper would be reluctant to print the article, since publication could significantly increase the damages for the tort which led to its discovery. In such an instance, the *Dietemann* damages rule would clearly restrict the "full and free flow of information to the public"[107] and run afoul of the common law and constitutional policies which protect the dissemination of information concerning matters of "public interest."[108]

III. An Alternative Compensatory Damages Rule

This section proposes several refinements in the *Dietemann* damages measure that would advance the public's right to know and still protect legitimate privacy interests. The compensatory damages rule suggested stands somewhere between the two extremes of *Dietemann* and *Costlow*. If implemented, these refine-

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[103] Individuals "steer far wider of the unlawful zone," Speiser v. Randall, 357 U.S. 513, 526 (1958), when large damage awards are at stake, both because of the possibility of losing large sums of money and the possibility of expensive litigation encouraged by the liberal awards. Maheu v. Hughes Tool Co., 384 F. Supp. 166 (C.D. Cal. 1974), *modified*, 569 F.2d 459 (9th Cir. 1977). As noted by the court in *Maheu:* "Aside from the specter of unlimited recovery, these gratuitous awards invite lawsuits. Regardless of the merits or extent of actual injury, some plaintiffs may be willing to trigger expensive litigation when the jackpot of open-ended recovery looms in the background." 384 F. Supp. at 170.

[104] Abrams, *supra* note 6, at 12.

[105] The purpose of the first amendment is to expand the "spectrum of available knowledge." Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

[106] *See* notes 14 & 44 *supra*.

[107] Branzburg v. Hayes, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

[108] *See* notes 14 & 44 *supra*.

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ments would better balance needed press protections and individual privacy rights.

As discussed above, the *Dietemann* damages rule could severely constrict the gathering and disclosure of information which the public has a need to know. Courts could prevent this constriction and protect both the public and the press by following *Costlow* and excluding damages for subsequent publication as an element of damages for an intrusion or trespass. As the court there noted, publication is a separate act which should be separately compensable.[109] Liability for publication of tortiously obtained information could be determined under the invasion of privacy torts in which publication is an essential element.[110]

The manifest weakness of this approach, however, is the possibility of undercompensating deserving plaintiffs. Requiring plaintiffs to establish a separate cause of action for invasion of privacy by publication in order to recover damages that result from publishing information not of legitimate public concern[111] ignores the tortious means by which the information was acquired. Nor would it be fair to deny plaintiffs recovery of such damages, even if the information is of public interest, in in-

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[109] Costlow v. Cusimano, 34 App. Div. 2d 196, 201, 311 N.Y.S.2d 92, 97 (1970).

[110] *See* note 18 *supra*. As a practical matter, this would mean that the plaintiff would have to establish a cause of action for public disclosure of private facts or, if the published information was misleading, for "false light" invasion of privacy. Rarely, if ever, will information acquired by a newsgatherer through an intrusion or trespass which is subsequently published be of a type that would constitute an appropriation of the plaintiff's likeness.

[111] If the information were of legitimate public concern, the plaintiff would be precluded from recovering for public disclosure of private facts. Section 652D of the RESTATEMENT (SECOND) OF TORTS (1977) provides that

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

The definition of "public disclosure" invasion was modified from the Restatement's formulation in 1967. At that time, the definition of the tort did not contain subsection (b), which was included in a separate section of the Restatement granting a privilege "to give publicity to matters of public interest." RESTATEMENT (SECOND) OF TORTS § 652F (Tent. Draft No. 13, 1967). The privilege to publicize matters of "public interest" is a traditional defense to "public disclosure" invasions, and today may even be constitutionally mandated. *See* notes 14 & 44 *supra*.

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stances where the defendant's tortious behavior was so egregious that, under ordinary principles of tort law, the plaintiff would be entitled to an award of punitive damages.[112] What is needed is a rule that falls between the *Costlow* and *Dietemann* extremes, but draws upon the strengths of both.

A. *Proximate Cause Analysis*

Neither the *Dietemann* nor the *Costlow* court scrutinized carefully the wisdom of adopting traditional proximate cause doctrines in the newsgathering situation. Although superficially the *Dietemann* measure appears to be consistent with these doctrines, an analysis of the various interests at stake demonstrates that the issues of compensation for the initial tort and compensation for the later publication should be treated separately.

1. Conventional Proximate Cause Rules

Both the intrusion in *Dietemann* and the trespass in *Costlow* were actual or "but for" causes of the subsequent publica-

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[112] Punitive damages, although controversial, *see, e.g.*, Duffy, *Punitive Damages: A Doctrine Which Should be Abolished*, in THE CASE AGAINST PUNITIVE DAMAGES 4 (Def. Research Inst. monograph 1969), are permitted in almost all jurisdictions. *See* W. PROSSER, *supra* note 16, at 11. Their purpose is to deter future tortious conduct by punishing the defendant. *See* Scott v. Donald, 165 U.S. 58, 86-89 (1896); Kirschbaum v. Lowrey, 165 Minn. 233, 206 N.W. 171 (1925). *See generally* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957). To obtain an award of punitive damages, the plaintiff must prove that the defendant acted with common law "malice." *See, e.g.*, Garland Coal & Mining Co. v. Few, 267 F.2d 785, 790 (10th Cir. 1959); Magagnos v. Brooklyn Heights R. R., 128 A.D. 182, 112 N.Y.S. 637 (1908); Parker v. Hoefer, 118 Vt. 1, 20, 100 A.2d 434, 446 (1953). The definition of "malice" varies somewhat among jurisdictions, but it is usually something akin to a "willful and wanton" infliction of harm. *See* Toole v. Richardson-Merrill, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1st Dist. 1967); Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954); W. PROSSER, *supra* note 16, at 10.

Many jurisdictions require that the amount of punitive damages awarded be reasonably related to the compensatory damages award. *See, e.g.*, Luke v. Mercantile Acceptance Corp., 111 Cal. App. 2d 431, 244 P.2d 764 (4th Dist. 1952); Mitchell v. Randal, 288 Pa. 518, 137 A. 171 (1927). In practice, this rule enables judges to overturn punitive damage awards which they feel are excessive. W. PROSSER, *supra* note 16, at 14.

For further discussion of when courts will permit punitive damages and of the standard in newsgatherer tort cases, *see* note 136 *infra*.

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tions.[113] As noted earlier, however, the step from actual cause to proximate cause is a complicated one.[114] The primary test of whether an act is the proximate cause of harm incurred is whether the consequences were foreseeable when the defendant acted.[115] Alternatively, some courts follow a "direct consequences" test, which holds the defendant liable for any consequences which flow directly from the effect of his acts upon existing or operating conditions and forces.[116]

A facile application of either of these tests would require newsgatherer defendants who publish information which they tortiously obtain to compensate plaintiffs for losses resulting from publication, as well as for losses caused by the antecedent tort itself. Committing a trespass or intrusion to gather information for a prospective article foreseeably will result in publication of that information, and publication would flow directly from the information-gathering activity. Moreover, many courts have indicated that those who commit intentional torts should be exposed to greater liability for the consequences of their acts than merely negligent tortfeasors.[117] These rules obviously buttress the *Dietemann* court's choice of a liberal damages measure.

2. The Manifold and Variable Character of Proximate Cause

Proximate cause rules rest, in the final analysis, upon policy considerations.[118] An eminent jurist has written that proximate cause "is not logic. It is practical politics."[119] Although the anal-

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[113] *See* note 73 *supra*.

[114] *Id.*

[115] *See* W. PROSSER, *supra* note 16, at § 42.

[116] *Id.* at 263-64.

[117] In determining how far the law will trace causation and afford a remedy, the facts as to the defendant's intent, his imputable knowledge, or his justifiable ignorance are often taken into account. The moral element is here the factor that has turned close cases one way or the other. *For an intended injury the law is astute to discover even very remote causation.*

Derosier v. New England Tel. & Tel. Co., 81 N.H. 451, 463-64, 130 A. 145, 152 (1925) (emphasis added). *See also* Seidel v. Greenberg, 108 N.J. Super. 248, 260 A.2d 863 (1969); Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability,* 81 U. PA. L. REV. 586, 592-96 (1933); Note, *The Tie That Binds: Liability of Intentional Tort-Feasors for Extended Consequences,* 14 STAN. L. REV. 362 (1962).

[118] *See* note 73 *supra*.

[119] Palsgraf v. Long Island R.R., 248 N.Y. 339, 351-52, 162 N.E. 99, 103

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ysis above lends support to the *Dietemann* result, not all of the principles and policies underlying conventional proximate cause rules do.

First, as Dean Prosser has noted, the notion that proximate cause should be found readily in intentional tort cases is "more of a general attitude and an unexpressed tendency than anything like a concrete rule."[120] This suggests that there may be instances where the proximate cause aspect of a intentional tort should be circumscribed when, as in the newsgatherer context, the conduct giving rise to liability is not wholly lacking in social utility. In addition, proximate cause rules were originally developed to assign responsibility for the consequences of an act which operates on existing conditions to set in progress a chain of events, as in the famous *Palsgraf*[121] or *Polemis*[122] cases. Where the antecedent act merely enables the defendant to perform a later and separate act, however, such as publishing information acquired earlier through tortious means, there may be circumstances which render the later act justifiable even though the earlier act was not. In such instances, liability for the later act should not hinge solely upon whether the initial act was tortious. Rather, given that the purpose of proximate cause is to determine where a loss ought to fall,[123] the two acts should be considered separately.

Distinct treatment of the initial tort and later publication is buttressed by the host of legal rules, grounded on both constitutional and common law precepts, which have been formulated to regulate invasion of privacy by publication.[124] The existence of these rules suggests, at a minimum, that the interests at stake at the time of publication may differ from those at stake when the published information is acquired. For example, although the tort of invasion of privacy by public disclosure of private facts protects people from undue publicity,[125] a defense to that tort is that the information disclosed is of "public interest."[126] The tort of invasion of privacy by intrusion, on the other hand, protects

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(1928) (Andrews, J., dissenting).

[120] W. PROSSER, *supra* note 16, at 263.

[121] Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[122] In re Polemis and Furness, Withy & Co., [1921] K.B. 560 (C.A.).

[123] *See* W. PROSSER, *supra* note 16, at 244-45.

[124] *See* notes 14 & 44 *supra*.

[125] *See* note 111 *supra*.

[126] *See* notes 14, 44 & 111 *supra*.

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an individual's right of seclusion,[127] as does trespass, indirectly, by safeguarding the right to exclusive possession of property.[128] But a claim that the information is of "public interest" will not negate an intrusion or trespass which led to its discovery. The rules which protect these interests differ because the interests themselves are distinct. Prior to an alleged intrusion or trespass, an individual's interest in seclusion must be weighed against another's interest in invading that seclusion. Once the alleged intrusion or trespass has occurred, however, the competing interests may be different, and a new balance must accordingly be struck. The individual now has an interest in not receiving publicity, whereas society may have an interest in knowing certain information about the individual. Yet by automatically treating publication as a proximate result of a prior intrusion or trespass and ignoring the policies which protect disclosure of matters of "public interest,"[129] the *Dietemann* damages measure undermines the legal principles specifically designed to regulate the publication situation.

B. *Proposed Compensatory Damages Standard*

The *Dietemann* court established its damage rule because it felt that such a rule was necessary to protect people against newsgatherer conduct which serves no "legitimate interest of the public in being informed."[130] Privacy interests can be protected, however, without collapsing the acts which lead to discovery of information into the act of publication itself. These acts should be analyzed separately, but not by simply relegating recovery for damages caused by publication exclusively to those invasion of privacy torts which include publication as an essential element.[131] Although the method used to acquire the information should not be the sole determinant of the damages for publication issue, it should not be wholly ignored either.[132]

The method used to acquire the information can be taken into account, and the appropriate balance between competing interests struck, by retaining the *Dietemann* damages rule in those

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[127] *See* notes 16-19 and accompanying text *supra*.
[128] *See* notes 57-59 and accompanying text *supra*.
[129] *See* notes 14 & 44 *supra*.
[130] Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971).
[131] *See* note 18 *supra*.
[132] *See* notes 110-11 and accompanying text *supra*.

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instances where the information published is not of "public interest." This standard should be applied in conjunction with a presumption that any matter which is unearthed through an intrusion or trespass is not of "public interest." The burden of proof would then shift to the defendant newsgatherer to show that information published is of "public interest."[133] As an additional safeguard of privacy interests, even if the defendant could make such a showing, the plaintiff could nonetheless recover damages for publication by showing that the defendant's conduct in acquiring the information was such that the plaintiff would be entitled to an award of punitive damages.[134] To do so, the plaintiff would have to demonstrate that the defendant acted with common law "malice."[135] Although this could conceivably include every intentional tort, courts have traditionally denied recovery of punitive damages unless the wrongful nature of the defendant's conduct was "aggravated."[136]

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[133] That the information published was of "public interest" would thus constitute a *conditional defense. See* text accompanying note 134 *infra.* Contrast this with the approach taken in the RESTATEMENT (SECOND) OF TORTS § 652D (1977) to "public disclosure" invasion of privacy, requiring the plaintiff to show, as a prerequisite to recovery, that the information published was "not of legitimate concern to the public." *See* note 111 *supra.* Placing the burden on the defendant to show that the information published was of "public interest," as the proposed compensatory damages rule does, accounts for the tortious means by which the information was acquired.

[134] *See* note 112 *supra* and note 136 *infra.*

[135] *See* note 112 *supra.*

[136] "Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage." W. PROSSER, *supra* note 16, at 9. Thus, defendants acting under a good-faith mistake of law or fact lack the requisite "malice" to be liable for punitive damages in trespass actions. Illinois Cent. R.R. v. Hoskins, 80 Miss. 730, 32 So. 150 (1902); Scurlock Oil Co. v. Joffrion, 390 S.W.2d 526 (Tex. Civ. App. 1965); Wilson v. Texas Co., 237 S.W.2d 649 (Tex. Civ. App. 1951). The same is also true in intrusion cases. Estate of Berthiaume v. Pratt, 365 A.2d 792 (Me. 1976). However, to negate common-law "malice" and hence avoid liability for punitive damages, the defendant's good-faith mistake must also be "reasonable." Hall Oil Co. v. Barquin, 33 Wyo. 92, 237 P. 255 (1925); *cf.* Capital Elec. Power Ass'n v. Hinson, 230 Miss. 311, 92 So. 2d 867 (1957) (defense of mistake will not insulate a defendant who has acted in an "outrageous manner" from liability for punitive damages).

The cases involving punitive damages in the newsgathering context are few. The issue arose recently in Le Mistral, Inc. v. Columbia Broadcasting Sys., 61 A.D.2d 491, 402 N.Y.S.2d 815 (1978). In that case, the trial court found CBS liable for trespass when a camera crew entered plaintiff's restaurant "with

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The suggested alternative damage measurement does have a potential Achilles' heel. "Public interest" is an expansive and expandable concept.[137] For example, it would be absurd to let the

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cameras rolling" in a "noisy and obtrusive manner" after learning that the restaurant had been cited for several health code violations. *See* notes 65-67 and accompanying text *supra*. The jury returned a verdict against CBS for $1,200 compensatory damages and $250,000 punitive damages. 61 A.D.2d at 495, 402 N.Y.S.2d at 818. The trial judge vacated the jury's decision and directed a new trial solely on the issue of damages because he had not allowed CBS to present evidence of its motive. *Id.* at 495, 402 N.Y.S.2d at 817.

On appeal, the court reinstated the compensatory damages award, but remanded the case for a new trial on the issue of punitive damages. As noted by the court:

> " 'As a general rule, exemplary damages are recoverable in all actions *ex delicto* based upon tortious acts which involve ingredients of malice, fraud, oppression, insult, wanton or reckless disregard of the plaintiff's rights, or other circumstances of aggravation, as a punishment of the defendant and admonition to others. . . .' "

Id. (quoting 14 N.Y. Jur., Damages § 180).

The issue of punitive damages also arose in Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971). However, the trial court rejected the plaintiff's claim, Dietemann v. Time, Inc., 284 F. Supp. 925 (C.D. Cal. 1968), *aff'd*, 449 F.2d 245 (9th Cir. 1971), and its decision was not appealed. The court based its decision on the "unusual facts of this case," 284 F. Supp. at 932, noting that "[i]t cannot be overlooked that defendant's efforts were directed toward the elimination of quackery, an evil which has visited great harm upon a great number of gullible people." *Id.* at 932-33.

[137] In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court held that the first amendment protection afforded news media defendants against defamation suits brought by public figures or officials does not extend to such suits by private individuals even though the defamatory statements concern an issue of public or general interest, provided that liability is not imposed without fault. *Id.* at 347. In rejecting the "public interest" concept as the standard of first amendment protection, the Court stated:

> The extension of the New York Times test proposed by the Rosenbloom plurality . . . would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not . . . . We doubt the wisdom of committing this task to the conscience of judges.

Id. at 346 (citation omitted).

In his dissent, Justice Brennan addressed this concern as follows:

> I reject the argument that my *Rosenbloom* view improperly commits to judges the task of determining what is and what is not an issue of "general or public interest." I noted in *Rosenbloom* that performance of this task would not always be easy. . . . But surely the courts, the ultimate arbiters of all disputes concerning clashes of constitutional values, would only be performing one of their

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issue of "public interest" hinge upon whether the information was actually published as news, since the damages for publication issue presupposes publication. Nonetheless, the "public interest" concept has been employed as a defense to "public disclosure" invasion of privacy actions,[138] and there is nothing to suggest that the standard will not work equally well in connection with recovery of damages for publication of tortiously acquired information.[139] Moreover, as noted above, a showing by

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> traditional functions in undertaking this duty. Also the difficulty of this task has been substantially lessened by that "sizable body of cases . . . that have employed the concept of a matter of public concern to reach decisions in . . . cases dealing with an alleged libel of a private individual that employed a public interest standard. . . ."

Id. at 368-69 (Brennan, J., dissenting) (quoting from Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547, 1560 (1972) (footnote omitted)).

Similarly, the difficulty of the task of ascertaining when a publication addresses a matter of "public interest," which would be necessary in applying the proposed compensatory damages standard, has been "substantially lessened" by that "sizable body of cases" which have recognized a privilege to give publicity to matters of public interest in invasion of privacy cases. *See* note 44 *supra*. Moreover, the majority's decision in *Gertz* was based, in large part, upon the more limited opportunities of private individuals "to contradict the lie or correct the error and thereby minimize its adverse impact on reputation." 418 U.S. at 344. As noted by the majority, "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* This basis of distinction, however, is inapposite where, as in the situation where a media defendant publishes tortiously acquired information, the information published is truthful. In such cases, access to effective channels of communication is irrelevant, given that there is no falsehood to counteract.

[138] *See* notes 14 & 44 *supra*.

[139] The comments following RESTATEMENT (SECOND) OF TORTS § 652F (Tent. Draft No. 13, 1967) cast light on the nature of matter that is both included within and excluded from the "public interest" concept. Included within it are matters concerning "voluntary public figures," Comment c; "involuntary public figures" (those "who have not sought publicity or consented to it, but through their own conduct or otherwise have . . . become 'news' "), Comment d; "all matters of the kind customarily regarded as 'news,' " Comment e; and also "giving information to the public for purposes of education, amusement or enlightenment, where the public may reasonably be expected to have a legitimate interest in what is published," Comment h.

That the privilege to give publicity to matters of "public interest" is not unlimited is indicated by Comment f. That comment states:

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the defendant that the published information was of "public interest" would provide only a conditional defense. The plaintiff could still recover damages resulting from publication if the defendant's conduct in acquiring the information involved "malice, fraud, oppression, insult, wanton or reckless disregard of plaintiff's rights, or other circumstances of aggravation."[140]

In short, the proposed compensatory damages standard provides the flexibility needed to balance correctly individual privacy and property rights against the public's need to be informed and the press' role in fulfilling that need. Application of this standard in newsgatherer tort cases would preclude recovery of damages for publication in instances where it is manifestly unwarranted, as in the three hypotheticals discussed earlier.[141] Moreover, it would yield recovery of such damages in cases

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> In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.

An example of a publication that might be regarded as "morbid and sensational prying into private lives" is provided by Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942). In that case the plaintiff, a hospitalized woman, was photographed by a reporter while another reporter distracted her. The picture was subsequently published under the caption "Starving Glutton," and underneath the picture was printed: "Insatiable-Eater Barber" and "She eats for ten." The court affirmed the jury's award of $1,500 compensatory damages for invasion of privacy, holding that the trial judge had correctly submitted the case to the jury.

There is of course the danger that a jury might find some matter to be outside the scope of the "public interest" standard because of its distaste for a particular defendant. However, the risk that a standard based upon community mores will be used as a cloak to punish unpopular speakers or the views they expouse can be minimized by close judicial scrutiny. *See* Virgil v. Time, Inc., 527 F.2d 1122, 1130 n.13 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976) (first amendment protects a defendant from liability in a public disclosure privacy action if the information is of "legitimate concern to the public" and such a determination must be largely resolved by a jury subject to close judicial scrutiny).

[140] Le Mistral, Inc. v. Columbia Broadcasting Sys., 61 A.D.2d 491, 494, 402 N.Y.S.2d 815, 817 (1978), discussed in note 136 *supra*.

[141] *See* discussion in Part II, "THE INHIBITING EFFECT OF THE *Dietemann* DAMAGES RULE," *supra*.

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where the published information is of dubious value to the public, or where the defendant's conduct goes beyond that reasonably necessary merely to acquire the information. The suggested standard would thus protect people from newsgatherer conduct that serves no "legitimate interest of the public in being informed,"[142] while removing the potential chilling effect on investigative reporting caused by the *Dietemann* damages formulation.

CONCLUSION

Investigative reporters have become an indispensable link in this country's continually evolving chain of democratic traditions. Our recent past is replete with the accomplishments of this expanding group. But reporters at the movement's vanguard have already precipitated several skirmishes between the press and individual rights. Further skirmishes seem inevitable.

The judicial response to these developments has been confused and, by its nature, incremental rather than whole. Nowhere is this more apparent than in the conflicting results reached in the two cases which have addressed the issue of compensatory damages for harm caused by publishing tortiously acquired information. On one hand, a rule which automatically denies recovery of such damages may impose substantial hardship on deserving tort victims. Yet a rule which makes recovery of these damages hinge solely on whether the method used to obtain the information is tortious ignores both constitutional and common law principles designed to facilitate the dissemination of information that is of legitimate concern to the public. These extremes can be avoided by adopting a rule which denies recovery of damages for publishing information of public interest unless it is obtained in a manner which, under developed tort principles, would warrant an award of punitive damages. Such a rule would enable the press to perform its traditional role of keeping the public apprised of newsworthy events as well as provide adequate protection for individual privacy and property rights.

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[142] Dietemann v. Time, Inc. 449 F.2d 245, 250 (9th Cir. 1971); *see* note 130 and accompanying text *supra*.

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