The Right to Solitude in the United States and Singapore: A Call for a Fundamental Reordering

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

Disa Sim*

I. INTRODUCTION

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

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

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

rightfully theirs, bright lines have to be drawn and the door firmly shut in the faces of entertainment and media personnel. This is due in large part to the difficulty often encountered in attempting to distinguish between these sectors. For example, while the press may seek to inform and educate, it can entertain as well. Conversely, entertainment can inform and educate.

6. In this article, the words “entertainment,” “media,” and “press” are used interchangeably. This is because it is difficult to distinguish between these sectors. For example, while the press may seek to inform and educate, it can also entertain. Conversely, entertainment can inform and educate.

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


9. Lidsky, supra note 5, at 179.

10. Id. at 213–16.

11. See id. at 173.


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

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

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

A. The United States

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


\textsuperscript{16} See RESTATEMENT (SECOND) OF TORTS § 652B.


\textsuperscript{18} RESTATEMENT (SECOND) OF TORTS § 652B.

\textsuperscript{19} See id. at § 652B cmt. a.
wiretapping devices.\textsuperscript{20}

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

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

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

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

\textsuperscript{20} See id. at § 652B cmt. b, illus. 3.


\textsuperscript{22} ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967).


\textsuperscript{25} See id.; see also Gavison, supra note 23, at 442.
As a former British colony, Singapore has traditionally tracked England's legal position. Singapore does not recognize a general right of privacy, much less a right to solitude. Plaintiffs aggrieved by intrusions on their solitude are forced to resort to a patchwork of laws to vindicate their claims. Causes of action that have been used as proxies for claims of intrusion on solitude are the torts of nuisance, harassment, and trespass. This fragmentary protection of the right of solitude is undesirable:

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

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

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


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

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

Id. at 489.


31. Hickman v. Maisey, [1900] 1 Q.B. 752, 753 (Eng.). The defendant, a “racing tout,” was found guilty of trespass when he crossed onto the plaintiff’s property to observe and take notes of racehorse trials being held on the land. Id. at 754–55.
the facts of each case in the pigeon-hole of an existing tort and this process may not only involve strained constructions; often it may also leave a deserving plaintiff without a remedy.\textsuperscript{32}

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

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

\begin{itemize}
\item \textbf{34.} \textit{Id.} at 62.
\item \textbf{35.} \textit{Id.}
\item \textbf{36.} \textit{Id.}
\item \textbf{37.} \textit{Id.} at 64.
\item \textbf{38.} \textit{Id.}
\item \textbf{40.} \textit{Id.} at 68.
\item \textbf{41.} \textit{Id.} at 70.
\end{itemize}

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

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

\textbf{42.} See Ng-Loy, \textit{supra} note 28, at 307.

effective remedies for invasions of this right.\textsuperscript{44}

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

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

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

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


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

\textsuperscript{47} Id.

\textsuperscript{48} Id.

\textsuperscript{49} Id.

\textsuperscript{50} Dalton Camp, \textit{Singapore Must Have Flaws but Darned if I Can Find Any}, TORONTO STAR, Mar. 29, 1992, at B3.


\textsuperscript{53} Telling It Like It Is: What the Editors Say, STRAITS TIMES, March 24, 2001, at H15.
and re-enactments rather than "ride-alongs" or aggressive investigative journalism. As one commentator put it, "investigative journalism is not among the growth industries here, and there is less hard-nosed political reporting in the local media than would be found between the covers of Anne of Green Gables." The media's efforts at so-called "investigative journalism" are innocuous compared to the high stakes game played in America. Local journalists have gone only so far as to pose as potential customers of a radio-taxi operation to test the efficiency of public services. The most sensational instance of investigative journalism was in 1990 when The Straits Times sent two individuals to pose as a modern day "Mary" and "Joseph" to test the compassion of the major hotels in Singapore on Christmas Eve.

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

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

54. Camp, supra note 50.
55. See, e.g., Faster Phone-Answering, but Cabs Still Scarce, STRAITS TIMES (Singapore), Mar. 24, 1996, 1996 WL 14665872 (reporting how nine reporters were assigned to investigate the difference between premium taxi service and regular taxi service).
57. Chua Lee Hoong, How Should the Press Be Positioned?, STRAITS TIMES (Singapore), Nov. 6, 1999, 1999 WL 8266330; Chua Mui Hoong, No Lackey or Adversary, the Media's a Partner, STRAITS TIMES (Singapore), Nov. 27, 1999, 1999 WL 8270461.
why it is desirable to adopt such a right.\textsuperscript{61} One aggrieved individual should not be denied compensation simply because the majority is fortunate enough not to experience violations of their privacy. The right to privacy, however, has been so long disregarded in Singapore that now, only recognition by the legislature would legitimize it.\textsuperscript{62} Should Singapore’s Parliament ever decide to take up the challenge, it can draw inspiration from the formulation in the American \textit{Restatement (Second) of Torts}.\textsuperscript{63}

\textbf{C. A Common Challenge}

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

\textsuperscript{61}. See discussion \textit{supra} Part II.A.

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

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

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

In my opinion that time has come in Singapore.

\textit{Id.}

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

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

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

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

III. CHALLENGES FOR THE TWENTY-FIRST CENTURY

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

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65. Singapore Press Holdings, supra note 64.
66. Kam, supra note 64.
In resolving these issues, the right to solitude must be balanced against the public’s right to know and the media’s First Amendment right to gather news. In Singapore, the media’s right to free speech under Article 14(1)(a) of the Singapore Constitution applies.

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

A. Investigative Journalism in the Name of Public Interest

1. Investigative Journalism: A Social and Legal Problem

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

72. Id. at 938.
73. SING. CONST. pt. IV art. 14(1)(a).
76. Id. at 784; see, e.g., McCall v. Courier-Journal and Louisville Times Co., 623 S.W.2d 882, 884 (Ky. 1981).
(1) surreptitious surveillance; (2) traditional trespass; and (3) "instances where consent to enter into a secluded setting for one purpose has been exceeded by the invitee."77

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

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

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

77. Kovner & Dorsen, supra note 75, at 783.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id.
84. Barnett, supra note 78, at 434.
85. Id. at 434–44.
87. Id.
88. Id.
89. Id. at 510–11.
date in order to mask the smell and sell it as fresh in the gourmet food
section."90

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

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

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

90. Id. at 511.
Steve Coz, When Tabloids Cross the Line, N.Y. TIMES, May 29, 1997, at A21; Howard Kurtz,
Gifford Tumbles into Tabloid Trap, WASH. POST, May 17, 1997, at H1.
92. Richard Cohen, Wired Eyes: How Tapes and Technology Freeze Our Times—and
Sometimes the Blood Itself, WASH. POST, Feb. 22, 1998, at W20; Howard Kurtz, Tabloid Rings
93. See Barnett, supra note 78, at 442.
94. See Branzburg v. Hayes, 408 U.S. 665, 691 (1972); Nicholson v. McClatchy
Newspapers, 223 Cal. Rptr. 58, 63 (Ct. App. 1986); Miller v. NBC, Inc., 232 Cal. Rptr. 668, 684–
85 (Ct. App. 1986).
95. 449 F.2d 245 (9th Cir. 1971).
96. See id. at 249.
97. Id. at 245 (quoting Dietemann v. Time, Inc., 284 F. Supp. 925, 926 (C.D. Cal. 1968)).
98. See id. at 246.
Dietemann’s solitude:

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

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

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

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

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

99. *Id.* at 249.
100. *Id.*
102. *Restatement (Second) of Torts* § 652B.
105. *Id.* at 128.
duties.”

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

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

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

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

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

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

106. Id. at 132.
107. See Barnett, supra note 78, at 449.
108. Id.
110. Id. at 1100-01. The least-intrusive means test “has the dual benefit of protecting the reasonable privacy concerns of the journalist’s subjects and providing the court with a judicially manageable standard for analyzing such cases.” Id. at 1101. The court must decide “(1) if the means chosen were in fact intrusive of the subjects’ privacy interest and (2) if any practical and less intrusive means existed.” Id. n.49.
a. The Trust in the Press Is Misplaced

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

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

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

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

115. Stewart, supra note 112.
118. Lidsky, supra note 5, at 180.
necessarily most important, story. Even when pursuing an important story, there are no guarantees that the press will not exaggerate, sensationalize, or distort the facts for maximum effect. There are some doubts, for example, as to the complete accuracy of the "PrimeTime Live" story on Food Lion.\textsuperscript{120} The tip-off came from the United Food & Commercial Workers International Union ("UFCW"),\textsuperscript{121} hardly an unbiased source. The UFCW had been waging an unsuccessful campaign to unionize Food Lion employees.\textsuperscript{122} It had leveled accusations of legal and regulatory violations against Food Lion.\textsuperscript{123} Further, the UFCW actively courted media attention to gain publicity for its charges.\textsuperscript{124}

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

b. Qualified Immunity Cannot Be Properly Limited

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

\begin{thebibliography}{99}
\bibitem{121} Id.
\bibitem{122} Id.
\bibitem{123} Id.
\bibitem{124} Id.
\bibitem{125} Id. at 62.
\bibitem{126} Singer, \textit{supra} note 120, at 61.
\bibitem{127} Deborah Daniloff, Note, \textit{Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace}, 40 HASTINGS L.J. 687, 709–11 (1989) (discussing the courts’ unsuccessful attempts to define the boundaries of qualified immunity and to evenly apply such a standard in the context of employer defamation).
\bibitem{129} Shulman, 955 P.2d at 485.
\end{thebibliography}
This problem should not be solved by confining the definition of "public interest" to only a few, select issues. Any selection is bound to have an element of arbitrariness. What is important to one may be trivial to another. Professor Barnett has tried to solve this problem by limiting qualified immunity to only "illegal, fraudulent, or potentially harmful conduct." The phrase "potentially harmful conduct" is so elastic that it can be used to justify an expansion of the newsgathering privilege. It is not likely to operate as a sufficient constraint on undercover subterfuge given the reluctance of the judiciary to effectively legislate what is and should not be matters of legitimate concern.

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

c. Qualified Immunity Is Prone to Abuse

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

130. Barnett, supra note 78, at 449.
131. See id.
132. See id. at 443 (noting that the court in Dietemann "did not provide newsgatherers with an adequate conceptual framework to determine when they may 'take unconventional investigative steps without invoking the sanctions of tort law'") (quoting James E. King & Frederick T. Muto, Compensatory Damages for Newsgatherer Torts: Toward a Workable Standard, 14 U.C. DAVIS L. REV. 919, 928 (1981)).
133. Id. at 449.
Our society has chosen to protect an individual's sphere of privacy with various common laws and statutes, and our Constitution requires that the people's own surrogates, the police, obtain appropriate search warrants and subpoenas before they may investigate an incident. In light of this, the media should not then be permitted to substitute, with impunity, illegal investigative procedures for lawful ones under the guise of "newsgathering."\textsuperscript{135}

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

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

d. Better Means to Address Issues of Public Interest

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

\begin{itemize}
  \item \textsuperscript{135} Id. (citation omitted).
  \item \textsuperscript{136} BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM 180 (2001).
  \item \textsuperscript{137} Walsh, supra note 134, at 1144.
  \item \textsuperscript{138} See generally discussion supra Part III.A.2.a–b.
  \item \textsuperscript{139} Barnett, supra note 78, at 451.
  \item \textsuperscript{140} Miller, 232 Cal. Rptr. at 685.
\end{itemize}
Some argue that it is inadvisable to rely exclusively on the government to monitor and investigate wrongs:

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

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

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

e. Denying Qualified Immunity Does Not End Investigative Journalism

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

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141. See U.S. CONST. amend. IV–V.
There are often viable alternative ways of getting the story. "PrimeTime Live," for example, did not have to go undercover to get the Food Lion story. It spoke to over twenty witnesses who testified as to the store's unsanitary practices. Some of these were actually former employees. In such circumstances, hidden-camera footage is just a frill, a "cute gimmick that attracts a profitably large audience share and garners great ratings."

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

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

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

144. Dietemann, 449 F.2d at 249.
145. Lidsky, supra note 5, at 233 n.303.
146. Id.
147. Id.
149. See Litwin, supra note 109, at 1113-14.
150. Id. at 1118.
151. See id. at 1113-14.
152. See id.
153. Banisar & Davies, supra note 12, at 86.
155. 44 F.3d 1345 (7th Cir. 1995).
156. 194 F.3d 505 (4th Cir. 1999).
test the efficacy and integrity of public services is perfectly permissible.\textsuperscript{157} The case of \textit{Desnick} arose out of the “PrimeTime Live” exposé of medical malpractice committed by the Desnick Eye Center.\textsuperscript{158} The director of the eye center agreed to allow “PrimeTime Live” to interview his staff and patients as well as film the performance of cataract surgery after extracting a specific promise from the producer that he would take a serious look at ophthalmological services and not conduct “ambush” interviews or engage in “undercover” surveillance.\textsuperscript{159}

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

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

Investigative journalists well known for ruthlessness promise to wear kid gloves. They break their promise, as any person of normal sophistication would expect. If that is “fraud,” it is the kind against which potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods. Desnick, needless to say, was no tyro, or child, or otherwise a member of a vulnerable group. He is a successful professional and entrepreneur. No legal remedies to protect him from what happened are required, or by Illinois provided.\textsuperscript{164}

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

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\textsuperscript{157} \textit{Desnick}, 44 F.3d at 1354; \textit{Food Lion}, 194 F.3d at 520.
\textsuperscript{158} \textit{Desnick}, 44 F.3d at 1349.
\textsuperscript{159} \textit{Id.} at 1348.
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.} at 1352.
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Desnick}, 44 F.3d at 1354.
\textsuperscript{165} \textit{Food Lion}, 194 F.3d at 510.
\end{flushleft}
Lion succeeded in its trespass claim. The court held that the reporters’ filming of Food Lion’s activities in non-public areas constituted a breach of loyalty—a wrong that far exceeded the scope of the consent that Food Lion had granted. The court distinguished Desnick on the basis that the eye center had been open to the public. In contrast, the reporters in Food Lion conducted their investigations in areas not open to the public.

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

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

B. The Right to Privacy in Public Places

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

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

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

166. Id. at 519.
167. Id. at 516.
168. Id. at 516–17.
169. Id. at 518.
170. Id.
171. See Desnick, 44 F.3d at 1351, 1353.
172. McClurg, supra note 70, at 991 n.2.
173. Id.
exacerbated this problem. An Internet search turns up hundreds of websites featuring webcams displaying live footage of everything from tourist destinations to school and office interiors.176 In an interesting development in Singapore, one local took photographs of young women in the shopping district without their consent and posted them on the Internet.177 One series of photographs showed a girl adjusting her bra strap while another displayed a girl squatting in a short skirt.178 The photographs were accompanied by "humorous, provocative or naughty captions" like "[g]reat bod!" and "[c]heck out that low neckline."179 The Internet service provider ultimately removed the website for violating its policies on privacy regarding vulgar and obscene material.180

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

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

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

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177. Click! Your Picture's Taken, supra note 175.
178. Id.
179. Id.
180. Foo Kim Leng, Offensive Website Removed, STRAITS TIMES (Singapore), Oct. 16, 1999, 1999 WL 8264977; Dawson, supra note 175.
181. Prosser, supra note 17, at 391–92 (citations omitted).
182. Id.
183. Lidsky, supra note 5, at 209.
184. 487 F.2d 986 (2d Cir. 1973).
Kennedy children while they were swimming, water skiing, and horseback riding.\textsuperscript{185} The court enjoined Galella from harassing or endangering Mrs. Onassis and her children.\textsuperscript{186} An example of an intrusion that is highly embarrassing can be found in \textit{Daily Times Democrat v. Graham}\textsuperscript{187} where the newspaper was held liable for photographing the plaintiff with her dress blown up above her waist by an air jet.\textsuperscript{188}

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

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

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

\begin{thebibliography}{199}
\bibitem{185} Id. at 994.
\bibitem{186} Id. at 998-99.
\bibitem{187} 162 So.2d 474 (Ala. 1964).
\bibitem{188} Id. at 476.
\bibitem{189} Kim, supra note 148, at 276-77.
\bibitem{190} Lidsky, supra note 5, at 183-84 (citations omitted). A law enacted in 1998 now authorizes triple damages, punitive damages, and the disgorgement of profits for trespassing (or for using image or sound enhancing technology as an alternative to trespassing) to record or observe “personal or familial activity” of a person who has a reasonable expectation of privacy. \textsc{Cal. Civ. Code} § 1708.8 (Supp. 2002).
\bibitem{191} 253 P.2d 441 (Cal. 1953).
\bibitem{192} Id. at 442.
\end{thebibliography}
particular public pose was assumed for "[t]here can be no privacy in that which is already public." The photograph of plaintiffs merely permitted other members of the public, who were not at plaintiffs' place of business at the time it was taken, to see them as they had voluntarily exhibited themselves. Consistent with their own voluntary assumption of this particular pose in a public place, plaintiffs' right to privacy as to this photographed incident ceased and it in effect became a part of the public domain, as to which they could not later rescind their waiver in an attempt to assert a right of privacy. In short, the photograph did not disclose anything which until then had been private, but rather only extended knowledge of the particular incident to a somewhat larger public than had actually witnessed it at the time of occurrence.\textsuperscript{193}

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

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

\textsuperscript{193} Id. at 444–45 (citations omitted).
\textsuperscript{194} See McClurg, supra note 70 at 1037–41.
\textsuperscript{195} See id. at 1039–40.
\textsuperscript{196} Id. at 1040.
\textsuperscript{197} Id. at 1039.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} McClurg, supra, note 70 at 1040.
\textsuperscript{201} Id. at 1040–41.
does not necessarily expect to be intensely scrutinized, photographed, and videotaped. Individuals in public should not be treated like animals in a zoo—to be pointed at, gawked at, and photographed at will.

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

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

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

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\(^{202}\) 955 P.2d 469 (Cal. 1998).
\(^{203}\) 978 P.2d 67 (Cal. 1999).
\(^{204}\) Shulman, 955 P.2d at 475.
\(^{205}\) Id.
\(^{206}\) Id. at 476.
\(^{207}\) Id. at 475.
\(^{208}\) Id. at 491.
\(^{209}\) Id.
\(^{210}\) Sanders, 978 P.2d at 69.
\(^{211}\) Id.
\(^{212}\) Id. at 71.
\(^{213}\) Id. at 72.
public.

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

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

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

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

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

\textsuperscript{215} 696 P.2d 637 (Cal. 1985).

\textsuperscript{216} Id. at 640–41.

\textsuperscript{217} [1998] 1 S.C.R. 591 (Can.).

\textsuperscript{218} See id. at 605.

\textsuperscript{219} See id. at 621 (quoting J. Ravanas, \textit{La Protection Des Personnes Contre la Realisation et la Publication de Leur Image} 388–89 (1978)).
shown to a larger audience.

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

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

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

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

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

221. McClurg, supra note 70, at 1043.
222. Gill, 253 P.2d at 445.
223. McClurg, supra note 70, at 1033.
224. See Gill, 253 P.2d at 445.
without knowing that they can and are being watched.

2. Reform: A Proposal for a Multi-factored Approach\textsuperscript{227}

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

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

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

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

\textsuperscript{227} The following proposal draws upon, and attempts to improve upon, McClurg's approach. See McClurg, supra note 70, at 1057–88.

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

\textsuperscript{229} See Johnson supra note 220.

\textsuperscript{230} See McClurg, supra note 70, at 1057.


\textsuperscript{232} RESTATEMENT (SECOND) OF TORTS § 652A.
a. The Legitimate Public Interest

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

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

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

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235. Id. at 49.
236. Id. at 48-49.
237. Id. at 51.
239. Id.
240. Id.
241. Id. at 924.
Third, the courts should require the media to treat even bona fide subjects of public interest with more sensitivity. "Grief reporting," for example, needs to be handled more circumspectly than it is now. The Boston Globe, for example, should have shown more restraint in its coverage of the EgyptAir crash in October 1999. Following the crash, it published a "photo gallery" on its website of the distraught and grieving relatives of the victims. This goes beyond the pale of reasonableness. Even in times of great public interest and concern, some individuals still deserve to retain their privacy. In such cases, the media should ask the intended subjects for their consent. It is impermissible otherwise to turn their grief into a public spectacle.

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

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

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

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


244. See id.


248. Id.


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

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

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

b. The Duration, Extent, and Means of Intrusion

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

\[251. \text{Capra v. Thoroughbred Racing Ass'n of N. Am., Inc., 787 F.2d 463, 464 (9th Cir. 1986).}
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\[252. \text{525 P.2d 984 (Idaho 1974).}
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\[253. \text{See contra id. at 988 (holding that the media are immune from liability for invasion of privacy even if embarrassing private facts are disclosed, unless it can be shown that the disclosure}
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\[254. \text{Id. at 985.}
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\[255. \text{Id.}
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\[256. \text{Contra id. at 988.}
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\[257. \text{Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 655 (Cal. 1994).}
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generally not be allowed to complain when captured only inadvertently, incidentally, or fleetingly.\textsuperscript{259}

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

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

c. The Defendant’s Motive

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

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

\textsuperscript{259} See generally \textit{Westin}, supra note 22, at 19–21 (discussing that an individual’s propensity to be curious about others is acceptable and is at times considered socially beneficial).


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

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

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

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

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

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

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

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265. See Ng-Loy, supra note 28, at 308.
267. See Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1183 (7th Cir. 1993) (discussing surveillance cameras as an intrusion of privacy).
the publication of affairs that take place in public. However, if some of what takes place in public becomes recognized as private, the ambit of this tort will naturally expand.

IV. CONCLUSION

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