HOT PURSUIT: THE MEDIA'S LIABILITY FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS THROUGH NEWSGATHERING♦

INTRODUCTION

His last words conceded docility: "I'm not gonna hurt anyone." Facing an armed SWAT team–and the gravity of his actions–former District Attorney Louis Conradt shot himself and died. Police officers from nearby precincts exited the scene and packed up from a day's business done. One mugged to the cameras: "That'll make good TV."[1] Unlike fictitious television drama, where detectives use their zealous passion for "justice" to circumvent the legal system, the carefully crafted story of Conradt's demise was not scripted. However, it was directed.

There is no doubt that Dateline NBC's *To Catch a Predator*

[1] Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 386-87 (S.D.N.Y. 2008).

("*Predator*"), an investigative news series that uses sting operations to arrest (and publicly chastise) sexual predators of children,[2] was responsible for the factual events leading up to Conradt's fatal hour.[3] Along with watchdog group Perverted Justice, *Predator* facilitated Conradt's illicit online conversations with the decoy "child," and planned to have Conradt arrive at the decoy home and ultimately be arrested for his attempt to assault a minor. This was well within the bounds of the show's usual practice.[4] The real problem arose when Conradt never showed, tempting *Predator* to find him instead.

With numerous police cars and an armed SWAT team in tow, *Predator's* production crew arrived outside Conradt's home to videotape the execution of a search warrant large enough for prime time. Viewers needed to know about the former District Attorney, criminal prosecutor, and attempted child predator. Regardless of escaping liability from the sting itself, Conradt–a public servant and community leader–was about to be exposed as having an affixation with young boys. Instead of facing the cameras, he killed himself.[5]

One could assign blame to many people for Conradt's death. Local officials should indeed be criticized for sacrificing procedure to receive their fifteen seconds of fame. But in addition to the responsibility of state and local officials, maybe *Predator's* threat of theatrical public exposure fostered Conradt's extreme emotional distress. Maybe it was not only the fear of legal ramifications that distressed him, but also the humiliation of *how* he would be exposed, that pushed Conradt to his breaking point. When his family brought legal action on his behalf against the network, the Southern District of New York recognized the validity of his fatal mindset.[6]

Recently, courts have begun acknowledging claims of inten-

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[2] *See* Dateline NBC: To Catch a Predator with Chris Hansen, http://www.msnbc.msn.com/id/10912603 (last visited Sept. 25, 2009).

[3] By referring to NBC as "responsible," this Note does not insinuate legal responsibility. It refers to NBC's purposeful choice to initiate the investigation in Murphy, Texas, and to obtain warrants against Conradt.

[4] *See Conradt*, 536 F. Supp. 2d at 384 (describing *Predator's* process for producing the show).

[5] *Conradt*, 536 F. Supp. 2d at 383.

[6] In applying Texas' usage of the Restatement (Second) of Torts § 46, the court in *Conradt* noted that extreme and outrageous conduct may arise out of abuse of power by an actor, which gives him subconscious authority over the distraught person. *Conradt*, 536 F. Supp. 2d at 395. The court then acknowledged that reasonable minds could disagree on plaintiff's assertion that "what happened . . . was neither news nor law enforcement, but a blurring of the two with a tragic consequence–to avoid public humiliation, an otherwise law-abiding man was shamed into committing suicide. . . ." *Id.* at 397. For more illustrations of the court recognizing media-induced humiliation as extreme emotional distress, see *infra* Part III (A).

tional infliction of emotional distress ("IIED") against the media,[7] a shift that could place serious checks on the newsgathering techniques of investigatory journalists. Unlike its historical role, viewed as little more than a procedural "gap-filler" in litigation, the tort of IIED could potentially transform into a form of civic duty for journalists to avoid causing extreme emotional distress in its subjects. And unlike the dissemination of news itself, whether printed or broadcast, the *gathering* of this news may resound in conduct, not speech, making the veil of First Amendment protection more difficult to hide behind.

The reason behind this trend may be the changing times. As the Internet makes information more easily accessible than ever before, journalists are given more tools to surpass their traditional role in society and actually become the investigators themselves.[8] If these newsgathering techniques reach the "extreme and outrageous" standard for IIED, the result may be a novel cause of action for plaintiffs, and a new liability that taps into the deep pockets of major media outlets.

This Note will investigate the media's developing liability for intentional infliction of emotional distress onto its subjects, arising from "extreme and outrageous" newsgathering techniques. Part I will recall the historical background of IIED, and address the competing Constitutional provisions that safeguard journalists and hold them accountable. Part II will discuss how the Internet transformed journalism's role and the consequences of publication. Part III will go into the details and public response from the *Conradt* case, where the court recognized that NBC's newsgathering could have been "extreme and outrageous" enough to sustain claims of IIED. Finally, Part IV will urge that despite media contentions that IIED claims are a litigious, procedural strategy to circumvent both constitutional hurdles and other state tort laws, the courts are taking a productive step by sustaining IIED claims as a check on media's tenacious newsgathering techniques, which become more invasive as our technology advances. Yet, to limit ambiguity and avoid unconstitutional silencing of the media, these IIED claims should be narrowly tailored for newsgathering, conduct-based situations, where journalists surpass their role as disseminators of information.

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[7] *See infra* Part III (A).

[8] *See, e.g.*, Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. RICH. L. REV. 1185, 1208-09 (2000) (discussing how technological advancements in recording devices evolve the journalist's role as newsgatherer). For more examples of how technology changes newsgathering, see *infra* Part II.

I. HISTORICAL BACKGROUND

A. *Asserting a Claim for Intentional Infliction of Emotional Distress*

A claim for IIED seeks to recover from an "intentional and unprivileged invasion of the [injured's] mental and emotional tranquility."[9] Before discussing IIED in the context of claims brought against the media, it is important to present the traditional four elements needed for recovery, which "are rigorous, and difficult to satisfy."[10] In order to successfully recover under IIED, most courts require the following: 1) the defendant acted intentionally or recklessly, 2) the defendant's conduct was extreme and outrageous, 3) the defendant's actions were the actual cause of the emotional distress, and 4) the injured party's emotional distress was severe.[11]

These stringent requirements place substantial checks on how far IIED can reach. While at common law, "intending" a consequence merely requires the actor to know it is substantially certain to occur,[12] the "extreme and outrageous conduct" requirement puts many actions resulting in emotional distress outside the scope of IIED.[13] Generally, extreme and outrageous conduct is that which goes "beyond all bounds of decency and [is] considered intolerable in a civilized community."[14] Some jurisdictions recognize that a special authoritative relationship, where the actor has actual or perceived power over another, will more likely result in a conclusion of extreme or outrageous conduct.[15] Other factors often used to determine whether the actor's conduct was extreme and outrageous include the actor's motivation, the duration of the

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[9] Carolyn McKinney Garrett, *Cause of Action for Intentional Infliction of Emotional Distress*, *in* 7 CAUSES OF ACTION 663, § 3 (Thomson Reuters 2008).

[10] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, 60-61 (5th ed. 1984).

[11] *See* Conboy v. AT&T Corp., 241 F.3d 242, 258 (2d Cir. 2001); Benningfield v. City of Houston, 157 F.3d 369, 379 (5th Cir. 1998); Newcombe v. Adolf Coors Co., 157 F.3d 686, 696 (9th Cir. 1998). *See also* RESTATEMENT (THIRD) OF TORTS, § 45 (2008) (defining Intentional (Or Reckless) Infliction of Emotional Distress) ("An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional disturbance to another is subject to liability for that emotional disturbance . . . .") (emphasis omitted).

[12] RESTATEMENT (THIRD) OF TORTS § 1(B) (2008).

[13] The common law recognizes that liability for IIED must be limited (by requiring extreme or outrageous conduct) to promote the freedom of socially productive conduct: "Individuals participating in society must be prepared to suffer emotional trauma . . . without legal recourse." RESTATEMENT (THIRD) OF TORTS § 45 cmt. c (2008).

[14] Lopez v. City of Chicago, 464 F.3d 711, 720 (7th Cir. 2006) (alteration in original) (quoting Honaker v. Smith, 256 F.3d 477, 490 (7th Cir. 2001)).

[15] *See id.* at 721 ("The more control which a defendant has over the [injured], the more likely that defendant's conduct will be deemed outrageous, particularly when the alleged conduct involves either a veiled or explicit threat to exercise such authority or power to [the injured's] detriment." (quoting McGrath v. Fahey, 533 N.E.2d 806, 809 (Ill. 1988))). *See also* Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J. 109, 141 (2003).

conduct, and "whether the other person was especially vulnerable and the actor knew of the vulnerability."[16] By requiring this deeper inquiry into the circumstances surrounding the defendant's conduct, the courts establish a significant safeguard against punishing merely negligent action.

In addition to jumping hurdles placed by the "extreme and outrageous" conduct requirement, plaintiffs claiming IIED must also prove that their emotional distress was sufficiently "severe."[17] Hurt feelings alone will not suffice. Courts often rely on the Second Restatement's language to express the necessary extent of harm required: "The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it."[18] This objective standard implies that the severity of the plaintiff's emotional distress must actually be justified.[19] That being said, the common law affords unusually vulnerable plaintiffs special consideration for their unique sensitivities, but only if the actor causing the harm had prior knowledge of the plaintiff's condition.[20] When evaluating the reasonability of the plaintiff's severe emotional distress, courts often look to factors like the intensity and the duration of the disturbance.[21] The more severe the emotional distress, often demonstrated by the accompaniment of physical harm, the greater chance the plaintiff has for a hefty reward of damages.[22]

Despite its rigid "severity" requirement, IIED has received criticism for its amorphous use in the courtroom. Restricted only by the "extreme and outrageous" limitation, IIED can stem from a wide range of conduct spanning many disciplines—from employ-

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[16] RESTATEMENT (THIRD) OF TORTS § 45 cmt. c (2008).

[17] *See id.* at cmt. a., cmt. f ("The court . . . plays a more substantial screening role on the questions of extreme and outrageous conduct and the severity of the harm.").

[18] *Id.* at cmt. f (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1977)).

[19] The Third Restatement explains why severity is required:

> Complete emotional tranquility is seldom attainable in this world, and some degree of emotional disturbance, even significant disturbance, is part of the price of living in a complex and interactive society. Requiring proof that the emotional disturbance is severe . . . provides some assurance that the harm is genuine.

Id. at cmt. i. For examples of modern courts endorsing objectivity, see Drejza v. Vaccaro, 650 A.2d 1308 (D.C. 1994); *see also* Bundren v. Superior Court, 193 Cal. Rptr. 671 (Ct. App. 1983).

[20] *See* RESTATEMENT (THIRD) OF TORTS § 45 cmt. i. (2008); *see* Cavico, *supra* note 15, at 141 (recognizing the common law's prior "knowledge" requirement, but also noting that some jurisdictions not requiring prior knowledge still take the defendant's recognition of that unique emotional vulnerability into account when deciding whether the defendant's conduct was extreme and outrageous).

[21] RESTATEMENT (THIRD) OF TORTS § 45 cmt. i (2008).

[22] *See generally* Russell Fraker, Note, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 987 (2008).

ment law[23] to media law.[24] IIED's flexibility can be troublesome for both courts and possible defendants.[25] At trial, judges may be able to sift through the hazy requirements with their own expertise in legal reasoning, but juries often have more difficulty. Critics are concerned that the essence of the tort itself, sounding in reprehensible behavior, could cause jurors to be "improperly influenced by antipathy toward, and consequent prejudice against, the defendant."[26] Stated plainly, critics worry that plaintiffs use IIED as a catch-all claim,[27] and confused juries are so jaded by the immoral nature of the conduct that they are automatically inclined to award damages.[28] General concerns with IIED become further complicated when media defendants are involved.[29]

B. *The First Amendment and Distaste for Emotional Damage*

A brief overview of legal issues facing the media can serve as a backdrop to this problem. Courts have had opportunities to assess the press's civil liability under many "neutral laws of general application," which do not target the press specifically, but apply generally to anyone engaging in the requisite prohibited conduct.[30] As a relevant example, the tort of intrusion is a claim

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[23] *See, e.g.*, Gantt v. Security, USA, Inc., 356 F.3d 547 (4th Cir. 2004) (employee who was kidnapped from her workplace and raped may sue her employer for intentional infliction of emotional distress).

[24] *See* Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380 (S.D.N.Y. 2008), *infra* Part III.

[25] "[B]road application of this tort poses concerns that it could interfere with the exercise of legal rights; deter socially useful conduct that nevertheless causes emotional harm; impinge on free speech; or target conduct that is 'different' rather than particularly reprehensible." RESTATEMENT (THIRD) OF TORTS § 45 cmt. f (2008).

[26] *Id.*

[27] The Restatement (Third) of Torts sums up the concern about IIED becoming too amorphous of a cause of action:

> [T]here is the reality that, because of the breadth of the conduct and the type of harm addressed, a claim for intentional infliction, regardless of its merit, can readily be added when the real gravamen of the case is a different tort, such as invasion of privacy . . . [or] defamation . . . . Accordingly, courts must play a more substantial screening role than usual . . . as a balance to the open-ended nature of this claim and the wide range of behavior to which it might plausibly apply.

Id. at cmt. f.

[28] Such concerns must be considered within the broader picture of the jury's essential role in tort law, as most doctrines are created with the ease of jury decision making in mind. David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 764-75 (2004). Compare this concern with general First Amendment jurisprudence, discussed in detail below, which limits the jury's role under the principle that laymen are not best suited to interpret the Constitution. *See id.*

[29] *See infra* note 41.

[30] C. THOMAS DIENES, LEE LEVINE & ROBERT C. LIND, NEWSGATHERING AND THE LAW 670 (3d ed. 2005). The authors give these examples of media liability under "neutral laws of general application":

> [F]or trespass when journalist enter ostensibly private property in search of news; for intrusion when it is alleged that the press has violated a plaintiff's reasonable expectation of privacy; for fraud and misrepresentation when reporters assume false identities or otherwise misrepresent their purposes to gain access to

commonly brought against media defendants when their intrusion on a person's privacy "would be highly offensive to a reasonable person."[31] To analyze the level of "offensiveness" for this action, courts consider the intentions motivating the media defendant's conduct.[32] Intrusion and trespass claims are often used to recover in situations where reporters use false identities to gain access to places where they are not likely welcome, usually while they are toting hidden cameras and recording devices.[33] Challenging newsgathering-related conduct in these situations seems fairly feasible. But note the operative word "conduct." Courts have been willing to hold media defendants liable in situations where their *conduct* is being challenged–not the *content* of the information being gathered.[34]

It is not always easy to distinguish conduct from content.[35] The lines often blur when actions are conducted to convey a particular message, or expression, to others.[36] How a court chooses to characterize a defendant's actions, as either speech or conduct, plays a pivotal role in determining the defendant's liability.[37] If the actions are considered speech (or expression), the First Amendment guarantees of freedom of speech will protect the defendant from liability.[38] If considered conduct-based, the defendant will not be able to shield its actions behind a Constitutional barrier.[39]

When it comes to gathering information from places off-limits to the general public, the First Amendment does not usually protect a journalist's right to find and collect information.[40] This

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information. . . .

Id.

[31] RESTATEMENT (SECOND) OF TORTS § 652 cmt. b (1977).

[32] If a journalist is in pursuit of a socially or politically important story, courts may not find the conduct offensive enough to hold the media defendant liable for intrusion. *See* Shulman v. Group W Prod., Inc., 955 P.2d 469, 495 (Cal. 1998); *see also* DIENES, ET AL., *supra* note 30, at 681.

[33] *See DIENES ET AL., supra* note 30, at 671.

[34] *See id.*

[35] *See* JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 41 (2006) ("One of the threshold problems in First Amendment law is to define what constitutes *speech* or *press*.").

[36] A modern example of the "symbolic speech" issue is flag burning. The Supreme Court in *Texas v. Johnson* declared that flag burning is such expressive, overtly political conduct that it warrants First Amendment protection. 491 U.S. 397 (1989); *see also* ZELEZNY, *supra* note 35, at 41.

[37] *See* ZELEZNY, *supra* note 35, at 41 ("Implicit in the language of the First Amendment is that a distinction is to be made between expression and pure conduct, or action.").

[38] *See* U.S. CONST. amend. I: "Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ."

[39] Zelezny gives the example that journalists have a constitutional right to criticize public officials, but no constitutional right to throw rocks through the windows at city hall. ZELEZNY, *supra* note 35, at 40-41.

[40] *See* Michael Roffe, *Journalist Access*, FIRST AMENDMENT CENTER, http://www.firstamendmentcenter.org/press/topic.aspx?topic=journalist_access (last visited Sept. 25, 2009) (explaining that when a proceeding, area, or residence is not open to

holds true even when that information is directly linked to future expression (like publication).[41] But in most situations, once the information is lawfully acquired, its publication is fair game as expression.[42] Feeling falsely justified by Constitutional protections, journalists may push further and further to get the perfect quote or nab the big story. They sometimes forget about their legal responsibilities as ordinary citizens—not to interfere with the emotional or physical tranquility of others. Such laws of general application, like IIED, do not afford journalists any special treatment, except the possibility of some First Amendment safeguarding.[43] From this general overview alone, one can see the sensitive issues that arise when claims are brought against media defendants for IIED.

Historically, plaintiffs have not had much success using emotional distress as a way to recover against media defendants. Beginning in 1964, the Supreme Court viewed the First Amendment as limiting the scope of how much liability state tort law might impose for communicative conduct.[44] In the landmark case *New York Times v. Sullivan*, the Court demonstrated "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[45] Thus, when complaints of emotional distress from published works began appearing as additional claims in defamation cases, the Court was unwilling to acquiesce.[46]

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the general public, the press has no constitutional right to enter); *see also* Cohen v. Cowles Media, 501 U.S. 663 (1991) (holding that the First Amendment does not exempt the media from neutral laws of general application); *see also* ZELEZNY, *supra* note 35, at 42 ("[T]he First Amendment only in limited circumstances guarantees that the doors to information be open in the first place.").

[41] "Freedom [of the press] has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering." Dietemann v. Time, 449 F.2d 245, 249 (9th Cir. 1971). *See* Kathleen Kirby, Freedom of Information: Law and the Newsgathering Process, RTNDA: THE ASS'N OF ELECTRONIC JOURNALISTS, http://www.rtnda.org/pages/media_items/law-and-the-newsgathering-process186.php (last visited Sept. 25, 2009) ("The degree of constitutional protection accorded newsgathering is held to be distinct from and lower than that given dissemination, even though we conceive of the former as a prerequisite to the latter."); *see also* ZELEZNY, *supra* note 35, at 42; *see generally* Pell v. Procunier, 417 U.S. 817 (1974) (holding that the press does not have a constitutional right of access greater than that of the general public).

[42] *See* ZELEZNY, *supra* note 35, at 42.

[43] In *Cohen v. Cowles Media*, Justice Souter's dissenting opinion asserted that even "general laws" may "entail effects on the content of speech." Thus, in order to be constitutionally applied to the media, these general laws must be weighted for their governmental interest, versus the constitutional interest in question. *See* DIENES ET AL., *supra* note 30, at 683 (citing Cohen v. Cowles Media, 501 U.S. 663, 678 (1991) (Souter, J., dissenting)).

[44] *See* N.Y. Times v. Sullivan, 376 U.S. 254 (holding that the publication of statements about public figures, whether true or false, are protected by the First Amendment from defamation suits, so long as there was no "actual malice" present). *New York Times* and other early First Amendment cases, however, dealt with emotional distress and other tortious claims caused by the published information itself, not by the way in which the information was gathered. *See generally* Anderson, *supra* note 28, at 767.

[45] *N.Y. Times*, 376 U.S. at 270.

[46] Cases of mental distress against the media were not abundant; however in the early

In *Hustler v. Falwell*,[47] the Supreme Court made strides to curtail the advancement of emotional distress claims against the media.[48] The action arose from the November 1983 publication of *Hustler* magazine, which featured a parody advertisement that involved minister Jerry Falwell.[49] Falwell sued for libel, invasion of privacy, and intentional infliction of emotional distress. While losing on the first two claims, a jury awarded him $200,000 for the IIED claim.[50] The Supreme Court wholeheartedly disagreed, unanimously deciding that the *New York Times'* heightened standard of "actual malice" must also apply to emotional distress claims.[51] Chief Justice Rehnquist rejected Falwell's argument (and the Court of Appeals' belief) that a media defendant's intent to cause injury through extreme emotional distress, and the state's interest in protecting individuals from such injury, far outweighs the constitutional need to protect such outrageous, injurious speech.[52] Rather, the Court felt that, related to defamation, "an 'outrageousness' standard runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience."[53] The result in *Hustler* proved just how far the Court was willing to allow the Constitution to trump torts resounding in speech-based liability.

Resulting from the Supreme Court's stance against defamation claims, it became evident that plaintiffs were trying to shift their complaints towards other tort theories that would avoid the First Amendment shield at all costs.[54] In the 1980s and 1990s, courts saw an influx of claims for intentional infliction of emotional distress, and it became evident that plaintiffs were using

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1980s, scholars were projecting that an emotional distress tort could evolve as a more all-encompassing option to replace claims for defamation and invasion of privacy. Scholars purported this possibility because of the increasing difficulty to recover for defamation. *See* ZELEZNY, *supra* note 35, at 188-89; *see also* Anderson, *supra* note 28, at 776.

[47] 485 U.S. 46 (1988).

[48] ZELEZNY, *supra* note 35, at 189.

[49] The parody, entitled "Jerry Falwell Talks about His First Time," was based off a Campari liqueur advertisement. Using the format of the real Campari ads, *Hustler*'s editors created a mock interview with Falwell, describing his "first time" as a drunken sexual encounter with his mother in an outhouse. *See Hustler*, 485 U.S. at 48; *see also* ZELEZNY, *supra* note 35, at 189.

[50] *See Hustler*, 485 U.S. at 50 (detailing the holding of the lower courts, including the Fourth Circuit's rejection of the idea that the *New York Times'* "actual malice" standard must be present for public figures to recover for emotional distress).

[51] *Hustler*, 485 U.S. at 57. This heightened "actual malice" standard for public figures holds media defendants liable for defamatory statements made "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *Id.* at 52 (citing *N.Y. Times*, 386 U.S. at 279-80).

[52] "[W]hile such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures." *Id.* at 53.

[53] *Id.* at 55.

[54] *See* Anderson, *supra* note 28, at 777.

IIED as a litigation strategy, or as a contingent alternative if all else failed.[55] This procedural tactic, which sometimes led to frivolous claims and often led to overzealous advocacy, surely left a bad taste in the mouths of legal scholars and judges alike.[56] At the time, it was apparent that judges would have no problem—in light of the counterveiling First Amendment—denying all sympathy to those emotionally injured by media defendants.[57]

C. *The Media's Liability for Its Newsgathering Conduct*

Despite journalists' ever-so-paraded First Amendment right, the courts could not entirely ignore the damage some plaintiffs endured when subjected to outrageous newsgathering techniques. It comes naturally that liability for pursuit of newsgathering could be illustrated through a tort-like intrusion, which includes a requirement of "highly offensive" conduct—a standard not quite as high as "outrageous" for IIED, but still an elevated standard.[58] For example, when analyzing intrusion claims against the media for newsgathering conduct, the California Supreme Court considered

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[55] *See id.* (verifying the historical timing of increased IIED claims); *see also* Fraker, *supra* note 22, at 996 ("The inherently imprecise nature of 'outrageousness' encourages the widely held conclusion that IIED is a gap-filler designed to capture behavior that a court finds troublesome, but which slips through the cracks between the well-defined, traditional tort categories."). Under the subsection entitled "Tort of Last Resort," Fraker explains how IIED was historically utilized not just to avoid Constitutional barriers, but also to provide alternatives to state-imposed barriers (such as expired statutes of limitations for other claims within the lawsuit). *See* Fraker, *supra* note 22, at 998 (explaining this alternative use of IIED through Dickens v. Puryear, 276 S.E.2d 325 (N.C. 1981)).

[56] In describing one of the reasons why courts and critics are so reluctant to advocate for the expansion of IIED recovery, Fraker uses the term "entrepreneurship." He explains:

> The tort's lack of clear substantive boundaries presents an open invitation to plaintiffs' attorneys to file frivolous IIED claims. As most cases turn on evidence of emotional distress and the moral indignation of the fact-finder, the disposition of borderline cases would be unpredictable. This uncertainty could produce an escalating cycle wherein a certain class of defendants would be motivated to settle to avoid expending time, money, and reputation on a public trial, and plaintiffs' lawyers would find an increasing incentive to continue seeking IIED clients—potentially leading to the birth of a cottage industry akin to ambulance-chasing.

Fraker, *supra* note 22, at 1003.

[57] For an example of just how far the Fourth Circuit was willing to extend the First Amendment reach over laws of general applicability, see Food Lion, Inc. v. Capital Cities/ABC, 194 F.3d 505 (4th Cir. 1999). Relying on *Hustler* for its decision, the court failed to notice the critical distinction between tortious *publication* and tortious *acquisition of information* that later led to publication. The court viewed the plaintiff as trying to circumvent First Amendment libel laws, instead of viewing the plaintiff as trying to seek recovery from an ordinary trespasser (media-associated or not). One could say the *Food Lion* decision surely contradicts the Supreme Court's representations in *Cohen*. *See* David A. Elder, *The Rights and Responsibilities of Media Defendants*, PRIVACY TORTS (2008); *see Cohen,* 501 U.S. 663 (1993) (holding that media defendants can be liable for its violation of laws of general applicability).

[58] The Restatement (Second) of Torts defines "intrusion upon seclusion" as follows: "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." § 652B (2008).

the reasonableness of the investigatory methods used, alongside the circumstances of each case.[59] The state high courts were beginning to notice, and question, how invasive some newsgathering techniques had become. But would the Supreme Court ever call out members of media, let alone, hold them responsible?

Beginning in the early 1990s, television shows like *Cops* brought camera crews alongside actual policemen, filming inside the private homes of criminals and victims alike.[60] Bringing the drama of high-speed car chases, drug dealings, and even domestic disputes, all together in one program proved to be a pioneering, instant hit (the show has been on the air for more than twenty years).[61] Viewers got what they could not see anywhere else: real-life criminals being arrested and brought to justice. The *Cops* formula was a clear moneymaker for the networks, and many followed suit with similar ideas, further entangling the media and entertainment worlds with law enforcement.[62] Some would venture to say that journalists and other media players wanted to "play cop," themselves.

Though not imposing liability, the Supreme Court commented on the propriety of the media's presence during law enforcement actions on May 24, 1999, in *Wilson v. Layne*[63] and *Hanlon v. Berger*.[64] In these twin opinions, the Court provided strong implications of an evolving view of the media's actual purpose in America. In *Wilson*, the police officers extended several justifica-

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[59] *See, e.g.*, Shulman v. Group W Prod., Inc., 955 P.2d 469 (Cal. 1998) (rejecting contention that the First Amendment is a viable defense for intrusion). The *Shulman* court noted that the pursuit of a story does not justify an otherwise offensive intrusion. The court held that reporting techniques, such as questioning, were reasonable; on the other hand, trespassing into a home or tapping a personal telephone was not. *See id.* at 494; *see also* DIENES ET AL., *supra* note 30, at 681.

[60] *See Cops*, www.cops.com (last visited Sept. 25, 2009).

[61] *See id.*

[62] CBS's *Street Stories* was a show that followed this same premise. Both the show itself and its producer were actually brought to court in *Ayeni v. Mottola*, allegedly for violating Ms. Ayeni's Fourth Amendment right against unreasonable searches and seizures. District Judge Weinstein denied the media defendants' motions to dismiss, deciding they were not entitled to qualified immunity. Like most deep-pocketed media defendants, as seen *infra* Part III (A), CBS settled out of court for an undisclosed amount. *See* Ayeni v. Mottola, 848 F. Supp. 362 (E.D.N.Y. 1994) (affirmed on appeal, but later challenged for other premises); *see also* Elsa Y. Ransom, *No Place For "Law Enforcement Theatricals": The Outlawing of Police/Media Home Invasions in* Ayeni v. Mottola, 16 LOY. L.A. ENT. L.J. 325, 330 (1995).

[63] 526 U.S. 603 (1999) (holding that police violate the Fourth Amendment when they bring members of the media or other third parties into a home during the execution of a warrant, unless the presence of those third parties was in aid of the execution of the warrant).

[64] 526 U.S. 808 (1999). *Hanlon* is often viewed as a companion case to *Wilson*, as they were purposely decided on the same day. Here, the Court held that having CNN reporters accompany law enforcement to the Bergers' home for a warrant execution violated their Fourth Amendment right. Note that in both cases, however, the Court allowed qualified immunity for the officers, because the relevant law was not well established at the time of the searches. *See id.*; *see Wilson*, 526 U.S. at 605-06.

tions for having *Washington Post* reporters and photographers present to "aid" their warrant execution. First, that media ride-alongs furthered the objective of law enforcement. The Court immediately rejected the argument, stressing that if "generalized" objectives were enough to trump the Fourth Amendment, our Constitution would be severely "watered down."[65] Second, the officers argued that the journalists served the purpose of "publicizing the government's efforts to combat crime, and [facilitating] accurate reporting on law enforcement activities."[66] The Court did acknowledge the resonance of the First Amendment here, as "the importance of the 'press' in informing the general public about the administration of criminal justice;" however, it stated that good "public relations for the police" was clearly not a justifiable excuse for violating one's rights.[67] Lastly, the police tried to argue that the reporters' presence aided in the warrant execution by acting almost as "police for the police," minimizing police abuses and protecting the suspects. But the Court would not allow it, drawing a sharp distinction between an installed police video camera, which served the purpose of police "quality control," and the Wilson's situation, where reporters from the *Post* were present solely for the purpose of gathering their own story.[68]

By denying these justifications, the Court took a critical stance against the First Amendment chants that so often allowed members of the media to conduct themselves however they pleased. Neither the *Washington Post* in *Wilson* nor CNN in *Berger* was held financially accountable for their actions (the lawsuits were directed at the government actors). However, the Court's stance resonated as a shifting of the minds: that a man's home is his castle, and although freedom of the press exists, that man, as a private citizen, still has some right to be free *from* the press.[69]

On first glance, the complicated relationship between the unpopular IIED, members of the media, and the First Amend-

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[65] 526 U.S. at 612.
[66] *Id.*
[67] Responding to this argument, the Court also said, "the need for accurate reporting on police issues in general bears no direct relation to the constitutional justification for the police intrusion into a home in order to execute a felony arrest warrant." *Id.* at 613.
[68] *Id.*
[69] At the time the decisions were made, Arthur B. Spitzer, acting director of the American Civil Liberties Union of the National Capital Area, said:

> Law enforcement officials can no longer have any doubt that their conduct must be guided by the Bill of Rights and not by the demands of infotainment . . . law enforcement agencies do not have carte blanche to expose a person's privacy to the whole world via the news media just because a person is suspected of a crime.

See Press Release, American Civil Liberties Union, High Courts Protect Privacy Rights in Media 'Ride-Alongs' with Police (May 24, 1999), *available at* http://www.commondreams.org/pressreleases/may99/052499e.htm.

ment do not seem to be any further resolved by comparisons to intrusion and unreasonable search cases. But in the 1990s, when the *Cops* trend of media "ride-alongs" gave journalists newfound access to essentially "play cop," the Court did not acquiesce. Rather, it recognized that members of the media could contribute to violations of the law by their newsgathering conduct. By adding an additional level of public exposure to an ordinary search warrant, the presence and actions of media members brought the level of unreasonableness past what the Constitution permits.[70] A decade later, as technology heightens the ramifications of public exposure, maybe the Court is poising to provide citizens with more protection from journalists—protecting not just the privacy of their personhood, but also the solicitude of their minds.[71]

II. MORE INFORMATION, MORE REPERCUSSIONS

Reporting has come a long way since the pencil and Steno pad, largely due to booming technological advances within the last decade. Downsizing the world's information to the size of a computer screen, the Internet is reshaping the way journalists gather, analyze, and disseminate news.[72] Just as our lives became simpler by "Google-ing" a new product for user reviews, or searching a prospective employee on Facebook, the Internet has given journalists a fast, cheap, and more efficient way to find out information about their subjects. But the laws governing our ever-expanding technology have not developed as quickly, nor have the courts addressed all of the complicated new legal issues affecting our world, which is getting smaller every day.[73] This section argues that the Internet affects the media in two ways: first, it eases journalist's newsgathering efforts, often allowing for an unprecedented depth of discovery; and second, it expands the scope and makes permanent the stories written about people, thus having a more profound, lasting effect on their reputations and livelihood.

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[70] *See Wilson*, 526 U.S. at 612. For another example of how the media was held liable, albeit nominally, for their newsgathering conduct, see Food Lion, Inc. v. Capital Cities/ABC, 194 F.3d 505 (4th Cir. 1999).

[71] Drawing a connection between privacy of personhood and intentional infliction of emotional distress is by no means far-fetched. In his 1960 publication, *Privacy*, William Prosser noted that both stem from a kind of mental injury. *See* Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 149 (2007).

[72] Justin Krypel, *A New Frontier or Merely a New Medium? An Analysis of the Ethics of Blawgs*, 14 MICH. TELECOMM. & TECH. L. REV. 457, 458 (2008); *see also* JOHN VERNON PAVLIK, JOURNALISM AND THE NEW MEDIA 63 (2001).

[73] For example, courts of various jurisdictions have had a difficult time applying traditional defamation law to Internet blogs. *See* Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1453-54 (2006).

A. *Are Journalists Becoming Detectives on Sharper Deadlines?*

Some believe that "what appears in newspapers and on television news is not the result of heroic journalistic diligence, but the product of routine information gathering and processing."[74] On the most basic level, the Internet as a research tool is now an indispensable asset for journalists, because it makes the information both cheaper and more accessible.[75] In a study of professional newspaper journalists, sixty-seven percent use Web sites for work-related purposes, and thirty-six percent of reporters go as far as to conduct their interviews via e-mail. Additionally, the most frequent Internet users in the newsroom are editors with five to ten years of experience, at large circulation daily newspapers (of 100,000 subscribers or more).[76] These findings indicate the importance of the Internet as a cost-effective way for journalists to reserve resources and remain in competition with their populating new media counterparts.[77] The Internet also makes information more attainable for journalists during their research. As explained in the study, "'[s]ince journalists must often let sources come to them, the news is weighted toward sources which are eager to provide information.' The Internet, through the many companies, governments, organizations and public citizens that post information online, has possibly become the most 'eager' . . . ."[78]

Besides the general ease on legwork that online research provides to journalists (and all of us), anonymity and lack of physical presence play an enormous role in why the Internet is so pivotal for members of the media trying to find their stories.[79] To

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[74] *See* Scott Reindary, Jensen Moore & Wayne Wanta, How Do Newspaper Journalists Use the Internet in Newsgathering? 5 (Nov. 1, 2007) (unpublished manuscript, *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/1/7/1/1/9/p171196_index.html).

[75] *See id.* The authors elaborate by noting:

> Historically, journalists had to 'beat the streets' for stories. . . . Reporters had to put in relentless man-hours pursuing stories through public discourse, sources and research for information to fill the news hole. . . . [T]he cheaper or more accessible the information, the more valuable it becomes to media organizations. For example, the less leg-work or fewer man-hours needed for a single story means that same journalist can create more stories for a newspaper outlet.

Id. at 3. (Citations omitted).

[76] *Id.* at 2.

[77] In the late 1990s, journalists and technology experts stressed how important it would be for old media to embrace new media, as a means of enabling journalists to break the news first. Along with the boom of the World Wide Web, twenty-four hour news stations like CNN were gaining their footing, and print journalists would need to utilize this new technology to stay afloat. *See* STUART ALLAN, JOURNALISM: CRITICAL ISSUES (2005).

[78] *Id.* at 4.

[79] Explaining why changes in technology pose interesting questions with journalist newsgathering, the *New Jersey Lawyer* magazine discusses the issue in the context of intrusion: "One of the difficult aspects of [intrusion] in a digital age is that the intrusions may fre-

make an everyday analogy, a woman may not want to date a potential suitor if she discovers that he manually searched the County Courthouse for her criminal history; nor would she be thrilled to know that he went undercover to spy on her at home. Yet, the same man is able to anonymously use the Internet, through search engines, social sites, and chat, to achieve the same result without deterring her.

Likewise, journalists can utilize the Internet to anonymously gather information on their unsuspecting subjects.[80] Search-tracking devices reveal what information people are using the Internet for, thus allowing "[i]ndividuals [to become] sources in stories simply by virtue of the Internet queries they typed into the search box."[81] This lack of actual privacy on the Internet, coupled with users' expectation of privacy, raises an interesting question of journalism ethics: "[s]hould journalists be comfortable with the amount of information they can gather on individuals completely without them knowing?"[82]

The increased ability of journalists to easily gather a depth of information speaks largely to the heightened authority the Internet provides them with.[83] Having the tools to discover more details—without the cooperation or approval of sources—allows journalists actually to become the detectives.[84] For "investigatory" news broadcasts, investigations are conducted on various issues that the producers believe in calling attention towards. Investigatory work often involves using the Internet (browsers and chat rooms), and hidden camera technology, to appear as anyone from an ordinary consumer, to a drug dealer, to even an underage child. In many instances, the police are not involved with these

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quently go undetected because they involve the use of technology that does not require the physical presence of the intruder to succeed." Scott Jon Shagin, *The Prosser Privacy Torts in a Digital Age*, N.J. LAW. 9, 10 (Spring 2008) (citing Adam J. Tutaj, *Intrusion on Seclusion: Bringing an "Otherwise" Valid Cause of Action into the 21st Century*, 82 MARQ. L. REV. 665 (1999)). In addition to using the Internet to achieve this "physically present" result, the article lists sensory-enhancement tools such as ultra-sensitive listening devices or voice-stress analysis technology as other examples of new, intrusive means explored by journalists to achieve more accurate information. *See id.*

[80] *See* Kendyl Salcito, *Online Journalism Ethics: Anonymity of Sources*, U. OF BRITISH COLUMBIA SCHOOL OF JOURNALISM (2005), *available at* http://www.journalismethics.ca/online_journalism_ethics/anonymity.htm.

[81] *Id.*

[82] *Id.*

[83] Coupling the Internet's function as a search tool with the Internet's utility of disseminating information faster, it becomes clear how the public relies on members of the media to help form their opinion on different issues. As Stuart Allan writes, "the features that make an event newsworthy are also those that have potential for moral panic development. . . . events that are unexpected, negative, momentous, personalized, and unambiguous are likely to contrast the abnormal with the normal and thus lead down the road of good and evil." ALLAN, *supra* note 77, at 185.

[84] For a coinciding argument about journalists' evolving role as investigators, see Tyler Graf, Op-Ed, *Vigilante Entrapment*, OREGON DAILY EMERALD, Apr. 3, 2007, *available at* http://media.www.dailyemerald.com/media/storage/paper859/news/2007/04/03/Commentary/Vigilante.Enrapment-2819693.shtml.

actions from the outset, and they become involved as ancillary "providers of justice," if you will, after the exposure of such news.[85] But even without the aid of law enforcement, members of the media are able to enhance their role as fact-finders and gain an enormous amount of authority in the public eye, which can surely be used as either a shield or a sword.

B. *Sticks and Stones—A Lethal Blow to Reputation*

More relevant than its utility as an advanced fact-finding tool, the Internet serves as a permanent historical archive of newsworthy (and not-so-newsworthy) times—highlighting our moments of accolade and accomplishment, but also our moments of embarrassment and shame. Daniel Solove writes in his book, *The Future of Reputation*, how this Google Generation puts us at risk of acquiring "digital baggage."[86] Although the Internet is freedom enhancing, in regards to finding and posting information more quickly, there is a harsher reality to virtual reality.[87] The growing amount of personal information online can significantly affect our reputations, which are "essential component[s] to our freedom, for without the good opinion of our community, our freedom can become empty."[88] Our proliferating use of the Internet poses a potential threat of damaging reputations more permanently and vastly than ever before, which in turn, can have a significant effect on the emotional stability of those being publicly chastised.

A tragic symbol of this dilemma comes from South Korea, one of the world's most "wired" countries.[89] Choi Jin Sil, one of the nation's most popular television and film actresses, committed suicide in the fall of 2008, several years after her 2004 divorce from a celebrity baseball player made her a frequent favorite of

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[85] This is the essential model for NBC's *To Catch a Predator*, detailed *infra* Part III (A).

[86] *See* DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 9 (2007). Solove writes that as people spend more time online, the more personal details are at risk of being leaked, whether accidentally by the users themselves, or under the full-blown intentions of friends, family, or enemies. *See id.* at 9-10.

[87] Solove puts this in perspective:

> We will be forced to live with a detailed record beginning with childhood, that will stay with us for life wherever we go, searchable and accessible from anywhere in the world. This data can often be of dubious reliability; it can be false and defamatory; or it can be true but deeply humiliating or discrediting. We may find it increasingly difficult to have a fresh start, a second chance, or a clean slate. . . . This record will affect our ability to define our identities, to obtain jobs, to participate in public life, and more. Ironically, the unconstrained flow of information might impede our freedom.

Id. at 17.

[88] *Id.* at 30.

[89] *See* Choe Sang-Hun, *South Korea Links Web Slander to Celebrity Suicides*, INT'L HERALD TRIB., Oct. 12, 2008, *available at* http://www.iht.com/articles/2008/10/12/technology/kstar.php?page=1.

the tabloids.[90] After reading her memoirs and interviewing friends and family, officials concluded that Choi's suicide came as a result of severe depression, provoked by invasive Internet postings about her divorce and subsequent personal affairs, to which the public had no problem chiming in.[91] Choi's death was actually the third in a string of recent celebrity suicides, all which were provoked by malicious online commentary.[92] Officials quickly drew a link between South Korea's notoriety as being the most suicidal industrialized nation and one of the most Internet-savvy. The deaths spurred a huge debate between pro-regulation advocates—who argue that the Internet deserves its own regulation, because it causes quicker and vaster damage—and anti-regulation fighters, who see proposed restrictions as an attempt to chill anti-governmental speech.[93] While no legislative conclusion has been drawn in South Korea, it is clear that governments around the world are beginning to address the widespread effect that new technology can have on mental solicitude, and they are at least beginning to think about ways to regulate the problem.

The prevalence of blogs and social networking websites—both which feature user-controlled content—have added layers of complexity to this issue, posing questions about who are legally considered members of the media, and whether people should be held responsible for their hurtful online actions that are often conducted without repercussive thought.[94] Without addressing any First Amendment implications, it is still critical to recognize the interchange between people's opinions, the new channels for expressing those opinions, and the news.[95] Now, if a person is the subject of a newsworthy controversy, she must not only be subject to scrutiny from professional journalists, but she also must face the subsequent response of her fellow citizen critics face-to-face (or screen-to-screen). When she is suspected of deplorable conduct, the threat of being shunned from society could present a harsher

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[90] *See South Korean Actress Choi Jin Sil Found Dead in Apparent Suicide*, ASSOC. PRESS, Oct. 2, 2008, *available at* http://www.latimes.com/news/nationworld/world/la-fg-skoreaactress3-2008oct03,0,103737.story.

[91] *See* Sang-Hun, *supra* note 89. The Internet rumor mills focused on the suicide of Choi's good friend several months prior. They claimed that Choi provoked her friend into death by pressing him to repay a debt. *See id.*

[92] *Id.*

[93] *Id.* This hot debate in South Korea sounds similar to First Amendment freedom of speech arguments here in the United States, which cite to the right to criticize government as an important aspect of our democracy.

[94] In a subsection entitled "Journalists or Diarists," Solove writes that because anyone with a computer can disseminate information to the world, the Internet is "dissolving the boundaries between professional journalists and amateurs." SOLOVE, *supra* note 86, at 23.

[95] *See* ALLAN, *supra* note 77, at 106 (describing the emergence of participatory journalism, through media like text messaging and e-mail).

punishment than any court could sentence.[96]

Furthermore, the media immensely contributes to the permanency of online content, as many news sources retain online archives of their printed stories and television segments.[97] Such content, existing in digital infamy, could serve as a springboard for continuous public disapproval for years to come. Therefore, while reading the rest of this Note, it is important to consider the permanent threat that media exposure poses in the Google Generation, and how members of the media could potentially abuse this heightened authority—or power of enhanced societal influence—to gather information for their stories.

III. *CONRADT* AND AN OUTRAGEOUS MEDIA[98]

A. *Conradt v. NBC Universal, Inc.*

The facts of *Conradt v. NBC Universal, Inc.* parallel a television drama.[99] First, and most importantly, is some background on the parties involved. NBC produced a television news magazine called Dateline, which in 2004, began running an "investigative news series" called *To Catch a Predator*.[100] Working alongside Perverted Justice and local police, Dateline utilized decoys, posed as minor children, to chat with unsuspecting individuals online about meeting for sexual relations; then, the individuals were "lured" to various "sting houses" around the country.[101] Once at the house, the decoy (a young-appearing adult) would invite the individuals in. Within several minutes, host Chris Hansen—often armed with transcripts of online conversations—confronted them about their sexually explicit intentions. Eventually, the individuals

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[96] See *infra* Part III as an illustration of this argument.

[97] For example, Dateline NBC's *To Catch a Predator* posts video segments and photo slideshows from its old episodes online. Dateline NBC: To Catch a Predator with Chris Hansen, http://www.msnbc.msn.com/id/10912603/ (last visited Sept. 25, 2009). *See also* video archives at CNN.com, *available at* www.cnn.com (last visited Sept. 25, 2009); see print archives at NewYorkTimes.com, *available at* http://query.nytimes.com/search/sitesearch (including some articles dating back to 1851) (last visited Sept. 25, 2009).

[98] Before dredging into details of the case that inspired this Note, I would like to reiterate my intention to characterize this case from a legal perspective—not a personal one. By no means am I asking readers to feel sorry for Conradt, or sympathize with any illegal action he may have been contemplating in the days leading up to his suicide. Rather, I would ask readers to view the facts with a focus on the propriety of NBC's conduct leading up to the death of a man they should have known was mentally unsound. View this case in light of the progressive history of IIED, and the modern technology that makes it easier for us to discover more about others, and then shun them for what we learn.

[99] *See* Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 384 (S.D.N.Y. 2008) (noting that the some facts in the Statement of the Case are drawn directly from the February 20, 2007 episode of *To Catch a Predator* on NBC).

[100] *Id.*

[101] *Id.*

would attempt to leave the sting house, only to be arrested by local police, who were often pointing guns and yelling for them to "get on the ground." They were arrested, booked, and eventually arraigned. The entire ordeal—from the sting home to the station—would be caught on tape by NBC.[102] Needless to say, "Dateline [sought] 'to sensationalize and enhance the entertainment value' of the confrontations, and accordingly it encourage[s] the police officers 'to give a special intensity to any arrests, so as to enhance the camera effect.'"[103]

The sting in Murphy, Texas, took place about an hour from where Louis William Conradt lived.[104] Conradt was an assistant prosecutor and served five years as District Attorney of Kaufman County, Texas. He unsuccessfully attempted to run for district judge, and then became a defense attorney until he committed suicide at age 56.[105]

In November 2006, Conradt engaged in online communications with one of the decoys involved in the *To Catch a Predator* operation, but he never showed up at the sting house. NBC and the police knew of Conradt's high position in the legal community, as the Murphy police described Conradt to the cameras as a "chief felony prosecutor" in the neighboring county. Frustrated that Conradt did not bite, Chris Hansen asked police for a "'favor,' saying, 'if he won't come to us, we'll go to him.'" Hansen insisted that the police obtain search and arrest warrants for the former prosecutor, and they agreed, working through the night to make it happen.[106] The judges who signed off on these warrants later admitted that they had no idea NBC was involved in the request; and had they known, they never would have signed them.[107]

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[102] *Id.* The Court also notes the elaborate production required for *To Catch A Predator*:

> It is apparent that NBC commits substantial resources to the show. In [Conradt's] episode, for example: a large house was used; the police were "staked out" in a U-Haul truck parked on the adjacent property; there were shots taken from numerous angles, both inside and outside the house; there is equipment to allow night-time filming; there is equipment to monitor and record on-line chats and telephone conversations; in one shot, Hansen is standing in front of perhaps eight television monitors; and there are many individuals involved, including Perverted Justice personnel, actors, police officers, and NBC cast and crew.

Id. at 384-85.

[103] The Complaint further stated, and NBC did not object, that NBC incentivized local police departments to participate by supplying new equipment, money, and other services of value. In return, the police provided NBC with confidential information, and sometimes allowed Chris Hansen to interview the arrestees even before detectives. *See id.* at 385.

[104] The Court noted that all charges were dropped against the twenty-six men lured to the sting home in Murphy, Texas. *Conradt*, 536 F. Supp. 2d at 385.

[105] *Id.*

[106] Complaint at 28, 31, Conradt v. NBC, Universal, Inc., 536 F. Supp. 2d 380 (S.D.N.Y. 2008) (No. 07 Civ. 6623 DC).

[107] *Id.* at 31-32. *See also Conradt*, 536 F. Supp. 2d at 386.

Approximately ten members of the *Predator* cast and crew, representatives from Perverted Justice, and many police officers from the Murphy and Terrell police departments, all arrived outside Conradt's home in Terrell, Texas. Police discussed their strategy for executing the warrants, mugging towards the *Predator* crew as the cameras rolled.[108]

A detective and two officers—one with a drawn gun—approached Conradt's home and knocked on the door. Nobody answered, but the police chief, conferring with Hansen in plain-view of the home, believed that Conradt was inside, so they called in a "tactical squad." A seven-man SWAT team arrived, armed with large rifles and visored helmets. There were more than a dozen officers present.[109] Members of the SWAT team opened a sliding glass door behind the house and entered, yelling "Terrell Police!" and "Search Warrant!" Conradt, coming from the end of a hallway, stepped into the room and said "'I'm not gonna hurt anyone.'" He shot himself with a handgun. Outside, a police officer told Hansen that Conradt had shot himself. Another reportedly told producers: "'That'll make good TV.'"[110]

NBC obtained an excessive amount of data pertaining to the incident, including photographs of the body, the gun, and an audiotape of Conradt's last words. They also have footage of his body being wheeled out on a gurney before being airlifted to the hospital.[111] When the episode aired on February 20, 2007, it featured much of the events stated. In an exclusive interview with the Murphy police chief, Hansen asked about the computers seized from Conradt's home. The police chief surmised, on national television, "'there's going to be something that's way worse than the chats or the pictures he had already sent.'"[112]

Conradt's sister filed the complaint against NBC on September 5, 2007, asserting nine different causes of action, including intentional infliction of emotional distress.[113] NBC moved to dismiss the claims, contendeding that the pleadings did not establish

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[108] Also, a sergeant who had known Conradt for twenty years was one of the officers present. *Conradt*, 536 F. Supp. 2d at 386.
[109] *Id.*
[110] *Id.* at 387; Mark Hamblett, *Lawsuit Proceeds Against NBC Over 'Dateline' Suicide*, N.Y.L.J., Feb. 27, 2008, *available at* http://www.law.com/jsp/article.jsp?id=1204066591649.
[111] *Conradt*, 536 F. Supp. 2d at 387.
[112] *Id.*
[113] On behalf of Louis Conradt's estate, she filed under Texas state law for intentional infliction of emotional distress, negligence, and unjust enrichment; under 42 U.S.C. § 1983, for violations of his civil rights; and under 18 U.S.C. § 1962 for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). She filed on her own behalf, under Texas law, for intentional intrusion upon the right to be left alone, intentional disclosure of private facts, IIED, and negligence. *Conradt*, 536 F. Supp. 2d at 387,

enough facts to state a claim for relief that is plausible.[114] However, Judge Chin, of the Southern District of New York, did not agree. While several of the claims were dismissed, the Court denied the motion pertaining to NBC's liability under a theory of IIED.[115]

The Court turned to the Restatement of Torts for some guidance on how to evaluate whether NBC's conduct could be considered "extreme and outrageous" enough to be held liable under IIED. Using the example of "a school principal who accuses a student of immoral conduct and threatens public disgrace," the Court noted that "extreme and outrageous" conduct could be more prevalent in situations where an authoritative relationship gives the actor more power over the victim.[116] The Court also turned to the Restatement to show that "extreme and outrageous" conduct may also arise from the actor's knowledge that "'the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity.'"[117]

Using these two clauses of the Restatement as guidance, the Court held that reasonable minds could disagree on whether NBC acted outrageously. Finding that the two circumstances above that could give rise to IIED were present, Judge Chin wrote, "NBC was in a position of power, both with its ability to disseminate information to the public and with its apparent influence over the police, and NBC knew or should have known that Conradt was peculiarly susceptible to emotional distress and suicide."[118]

But Judge Chin saved his real critique of NBC's actions to address its argument that the plaintiff was only asserting IIED as a procedural "gap-filler" (basically, that the IIED claim was a bogus, last-resort argument).[119] Although recognizing that IIED is traditionally reserved for "rare instances,"[120] Judge Chin wrote that Conradt's situation could very reasonably be one of those instances. He wrote that in considering whether NBC acted "outrageously," a jury could consider NBC's potential breaches of professional journalism standards.[121] Then, Judge Chin "turned the

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[114] *Id.* at 388: *see* Patane v. Clark, 508 F.3d 106, 111-12 (2d Cir. 2007) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).

[115] The Court also refused to dismiss the Fourth Amendment unreasonable search claim against NBC, citing cases such as *Hanlon v. Berger*, *supra* Part I (C), in its conclusion that "a reasonable jury could find that the intrusion on Conradt's privacy substantially outweighed the promotion of legitimate governmental interests." *Conradt*, 536 F. Supp. 2d at 390.

[116] *Id.* at 395-96 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1977)).

[117] *Id.* at 396.

[118] *Id.* at 397.

[119] *Id.* at 396.

[120] *Id.*

[121] The Complaint cited breached ethical standards such as: "Avoid . . . staged news

cameras" on NBC, for all to see:

> [A] reasonable jury could find that Dateline violated . . . these standards by failing to take steps to minimize the potential harm to Conradt, by pandering to lurid curiosity, by staging (or overly dramatizing) certain events, by paying Perverted Justice and providing equipment and other consideration to law enforcement, by failing to be judicious about publicizing allegations before the filing of charges, by advocating a cause rather than independently examining a problem, and *by manufacturing the news rather than merely reporting it. In light of the consequences here, an "average member of the community" could find that NBC abused its power—the power of the press enhanced by the involvement of law enforcement—in reckless disregard of Conradt's rights, in a manner that overstepped "all possible bounds of decency."*[122]

Instead of taking the case to trial, NBC chose settlement out of court for an undisclosed and assumingly large amount, presumably to avoid any negative attention.[123]

B. *Journalists, and Others, Speak Out*

While not setting any groundbreaking precedent (the case never made it to the appellate level), *Conradt* quickly gained much attention from journalists. The First Amendment Center warned that even though the case settled, *Conradt* should receive the attention of journalists everywhere: "As is clear from Chin's opinion . . . journalism (or at least some parts of it) is as much on trial as NBC."[124] The Gannett News Organization also warned journalists that the "[*Conradt*] decision is a reminder that the more intertwined a news organization's newsgathering efforts become with law enforcement activities, the greater the risk of exposure to litigation."[125]

NBC received its fair share of criticism for *Predator* in the aftermath. Some felt that "investigative journalism is a time-honored tradition. It is something else entirely when journalists act on behalf of law enforcement, for the purpose of reporting or

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events;" "Recognize that gathering and reporting information may cause harm or discomfort"; and "Be judicious about naming criminal suspects before the formal filing of charges." *Id.* at 397 (citing standards from the Society of Professional Journalists, http://www. spj. org/ aboutspj.asp; and the Radio-Television News Directors Association, http://www. rtnda. org/ pages/ about- rtnda.php).

[122] *Id.* at 398 (emphasis added). (citation omitted)

[123] The settlement was announced on June 24, 2008. *See* Project on Government Oversight, Federal Contractor Misconduct Database, http://www.contractormisconduct.org/index.cfm/1,73,222,html?CaseID=967 (last visited Sept. 25, 2009).

[124] Douglas Lee, *NBC 'Predator' Lawsuit: Journalism on Trial*, FIRST AMENDMENT CENTER ONLINE, Mar. 4, 2008, http://www.firstamendmentcenter.org/commentary.aspx?id=19753.

[125] Barbara W. Wall, *Judge Refuses to Dismiss 'To Catch a Predator' Case*, LEGAL WATCH, Mar. 6, 2008, http://gannett.com/go/newswatch/2008/mar/nw0306-4.htm.

filming the resulting arrest."[126] These critics contend that NBC, along with Perverted Justice, were actually manufacturing the news themselves, as opposed to bringing any type of justice.

The general public's opinion, as a whole, was far different. Just in scanning the comments beneath online content about the *Conradt* case, one could see that America's "lay men" were scathing. On USAToday.com, ElGuapoLA posted: "Apparently he did have a gun and it was a good thing . . . Judgment: To the Plaintiff, for $1.00, to cover the price of the bullet." Sagicap wrote: "[*Predator*] is one of the most valuable shows on TV. So, the guy committed suicide . . . one less threat to our children out there."[127] Not bothering to grapple with the legal basis behind Judge Chin's decision, much of the public vehemently defended the show, its premise, and an "all is fair in justice" attitude behind capturing these men at all costs. Clearly, these people are the show's most dedicated viewers.

In the months following Judge Chin's opinion, a Florida court was given the chance to stand by those emotionally injured from outrageous media conduct, as well.[128] District Judge Terrell Hodges denied CNN's motion to dismiss IIED claims against the network, on behalf of Melinda Duckett and her grandparents, for her suicide following an aggressive news interview by journalist Nancy Grace.[129] While recognizing that the parties were just in the pleadings stage, the Court did give recognition to the argument that CNN producers very well may have been aware of Duckett's impaired mental state before the interview commenced, thus heightening their level of outrageousness.[130] The Court also refused to dismiss IIED claims on behalf of Duckett's grandparents, noting that "[w]hen dealing with survivors of a decedent, 'behavior which in other circumstances might be merely insulting, frivolous, or careless becomes indecent, outrageous and intoler-

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[126] Graf, *supra* note 84.

[127] *See* comments below Larry Neumeister, *Lawsuit Proceeds vs. NBC's 'Predator' by Family of Suicide Victim*, ASSOCIATED PRESS, Feb. 27, 2008, http://www.usatoday.com/life/television/news/2008-02-26-predator-lawsuit_N.htm.

[128] *See* Estate of Duckett, *ex rel.* Calvert v. Cable News Network LLLP, 2008 WL 2959753, at *1 (M.D. Fla. July 31, 2008).

[129] *See id.* The Complaint against CNN alleged that after Duckett's two-year-old son, T.D., went missing around September 7, 2006, Nancy Grace invited Duckett for an interview on the show, promising that it would assist in the safe return of her son; however, when actually questioned, Grace procured a series of aggressive accusations and verbal assaults, alleging that Duckett, in fact, murdered her son. Before the show aired the next evening, Duckett committed suicide. CNN still proceeded to air the interview several times. *Id.* at 1. *See also* Matthew Heller, *Judge Backs 'Ambush' Interview Case vs. CNN*, On Point: A New Take on Legal News, Aug. 5, 2008, http://www.onpointnews.com/NEWS/judge-backs-qambushq-interview-case-vs-cnn.html.

[130] *Duckett*, at *5-6.

able.'"[131] Although reluctant to display as much clear-cut criticism of the media defendants as in *Conradt*, the *Duckett* opinion was another sounding alarm for journalists to be careful how they gather information.

IV. WHERE TO GO FROM HERE

Weigh each word: intentional infliction of emotional distress. To knowingly or recklessly cause such intense mental suffering, so intense as to even claim a life, seems like a difficult thing for any person to accomplish. But is it really that difficult? People have different motivations for their actions. When an actor's conduct exceeds the bounds of community standards of decency, and reaches the threshold of "extreme and outrageous," they may not have "intended" the requisite result from their actions.

Members of the media, in their zealous quest to break a story, can often walk this "extreme and outrageous" line by pushing a little harder or digging a little deeper—whether for journalistic passion, blatant competition, or just a paycheck. While they may not have the malicious intent of some IIED defendants, it is their recklessness in the hot pursuit of news that becomes questionable, and which can ultimately hold them accountable. Therefore, state district courts are moving in the right direction of recognizing IIED cases against media defendants in the early stages of litigation.

To believe that IIED—in the context of cases like *Conradt* and *Duckett*—is a procedural "gap-filler" would be an outdated opinion. There was a time when print journalism reigned supreme, and controversial issues facing the media revolved around minutely "offensive" published content, contradicting the much stricter community standards of decades past.[132] But this *Hustler*-era view of IIED, as an overly litigious nuisance used to circumvent the First Amendment,[133] clearly does not control the way plaintiffs have recently used it. This is no longer about hurt feelings and offensive parodies; it is about dangerous newsgathering techniques that claim fragile lives.

As a journalist myself, I passionately believe in the First Amendment right of expression. But claiming IIED in this context has little to do with any Constitutional shield. The only issue remotely involving the dissemination of information (thus regarding the First Amendment) is that of the increasingly devastating affect that publication of outrageously gathered material has on its

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[131] *Id.* at 6 (citing Williams v. City of Minneola, 575 So. 2d 683, 691 (Fla. 5th Dist. Ct. App. 1991)).
[132] *See* Hustler v. Falwell, 485 U.S. 46 (1988).
[133] This view of IIED was discussed, *supra* Part I (B).

subjects, due to the Internet as an archival reminder of one's shameful moments.[134] I did not present this idea to argue that journalists should be held liable under IIED for the outrageously hurtful things they write, as alleged in *Hustler*. Rather, I posed the "effects of publication" issue to exhibit how the threat of public exposure, made permanent and widespread by the Internet, gives journalists more "authority" over their subjects.

Although IIED generally applies to all individuals the same way,[135] courts should assess media defendants' liability for outrageous newsgathering by taking special consideration of the aggrandized authority that journalists have acquired in recent years. This special consideration should be narrowly tailored into the determination of whether the conduct was "extreme and outrageous" enough, as part of the Restatement's suggestion for courts to provide extra solicitude when the actor has "authority" over the plaintiff in some way.[136] By viewing the journalist's powerful position in society within the "extreme and outrageous conduct" prong of the IIED test (a very high bar to surpass), opponents could not claim that any First Amendment rights were being violated, because the issue revolves around newsgathering *conduct* in the first place.

CONCLUSION

The requirements of IIED will remain difficult to satisfy, no matter how they are tweaked; but such a high bar was only set because people were reaching it. The deep pockets of our major media outlets—like NBC and CNN—allow them to freely access information, influence people, and settle up for their mistakes. One or two large settlements, furthermore, will not affect the success of revenue-generating programs like *Predator*. But maybe, if the courts use IIED to take a stand against media abuses of power through outrageous newsgathering techniques, these media defendants will have to start refining their techniques and handle their sources with more care. Maybe then, we can save theatrics for television drama, and reserve cries of "justice" for when they are due.

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[134] *See supra* Part II (B).
[135] *See supra* Part I (A).
[136] *See id.*

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to give a special thanks to the professors who have inspired my passion to write.