WANTED: PRIVACY PROTECTION FOR DOCTORS WHO PERFORM ABORTIONS

ANGELA CHRISTINA COUCH*

INTRODUCTION

Since 1993, abortion-related violence has been increasingly in the news.¹ Patients, abortion protesters, and pro-choice groups all have been affected, but the doctors who perform abortions have most recently been the target of much of the anti-abortion violence.² In an effort to make abortions unavailable, many pro-life groups have resorted to exposure campaigns aimed at disclosing to the general public the names of doctors who perform abortions.³ Fearing such exposure will cost them their lives, many doctors are taking radical

* Emory University School of Law, Candidate for Juris Doctor, May 1996. The Author would like to thank Dean Howard O. Hunter, Karen Ann Ballotta, Barbara Rochelle, and Karyn Hudson for their guidance in writing this Comment. The Author is also indebted to the following individuals for their tremendous editing efforts: Regan M. Greene Sandra Bernstein, Crystal S. Deese, Marcella R. Eckels, Troy W. Garris, Zahra S. Karinshak, and Amy Schaner Stanley. The Author is eternally grateful to Khoi Nguyen for his dedication, patience, and understanding.

1. Morning Edition (NPR radio broadcast, Feb. 3, 1995) (1995 WL 2957329). “The statistics are only too familiar; five murders at clinics in less than two years, 400 death threats in 1994 alone. In the last dozen years, according to the Bureau of Alcohol Tobacco and Firearms, there have been 37 bombings in 33 states, 123 cases of arson, 1,500 cases of assault, stalking, sabotage, and burglary, and some $13 million in property damage.” Id.

2. See William Booth, Abortion Battle Fatigue; Slain Physician’s Replacement Vents Fears, Frustration, WASH. POST, May 7, 1993, at A3 (recounting the concerns and precautions that physicians take due to increased harassment by pro-life activists and the shooting death of Dr. David Gunn in Pensacola, Florida in March of 1993 by Michael Griffin); Lynne Bumpus-Hooper, Abortion Providers Seek More Protection, ORLANDO SENTINEL, Oct. 19, 1993, at B1 (discussing the effects of anti-abortion protestor tactics, which include protesting at clinics and doctors’ homes and making intimidation and fear an everyday aspect of doctors’ lives). One doctor was quoted as saying “I don’t believe as a physician I should have to wear a bullet-proof vest . . . .” Id. See also Weekend Edition-Saturday (NPR radio broadcast, Jan. 21, 1995) (1995 WL 2880299) (discussing the American Coalition of Life Activists’ (ACLA) creation of a list of doctors, “abortionists,” the group plans to expose by using wanted posters and harassment techniques).

3. See Timothy Egan, The Roots of Terror—A Special Report, N.Y. TIMES, June 18, 1995, at 1:1 (describing the ACLA’s compilation of a list of doctors they called the “deadly dozen” and targeted for exposure and harassment). See also infra Section I (summarizing pro-life groups’ new exposure techniques).
safety precautions like constantly wearing bullet-proof vests. Some doctors, however, have abandoned their medical practice or simply left the field because they do not want to subject their families to a barrage of harassment, threats, and the very real possibility of violence. Unfortunately, state and federal criminal penalties offer little in terms of deterring the violence and harassment against doctors.

This article suggests that an effective preventative measure against the harassment of doctors is the vigorous pursuit of civil actions focused on one or more of the various privacy torts. Depending on the type of harassment, doctors could bring suit against their harassers based upon the intrusion upon seclusion tort, the false light tort, and/or the public disclosure of private facts tort. This article briefly

4. See Morning Edition (NPR radio broadcast, Aug. 11, 1994) (1994 WL 8690168) (interviewing a targeted doctor who wears a military helmet and bullet-proof vest to work and would only consent to a telephone interview due to safety concerns); Sara Rimer, Abortion Clinics Seek Doctors but Find Few, N.Y. TIMES, Mar. 31, 1993, at A14 (citing a director of a women's health clinic who ordered bullet-proof vests for all of the doctors at her clinics due to the increase in hate mail, death threats, and wanted posters).

5. See, e.g., ABC World News Tonight: American Agenda Targeting Doctors Who Do Abortions (ABC television broadcast, Mar. 28, 1995) (noting that exposure campaigns have the greatest effect on doctors who perform abortions as only a small portion of their practice by forcing them to stop performing abortions and leave town); Abortionist Shooting Spurs Another to Quit, LIFE ADVOC., Nov. 1994 at 28 (recounting the experiences of a doctor who is a self-proclaimed "thrill-seeker" but quit performing abortions saying he would rather die sky-diving); Booth, supra, note 2, at A3 ("Fewer physicians are willing to endure what they call constant harassment and threats by an increasingly sophisticated anti-abortion movement."); The MacNeil/Lehrer NewsHour: Abortion Battles (PBS television broadcast, June 5, 1995) (linking the ACLA's exposure campaign against 12 Oregon doctors to an Oregon Health Department report that the number of abortion providers in Oregon has dropped from 59 to 48 since 1992).

6. See Special Hearing on Violence at Women's Health Clinics Before the Subcomm. on Labor, Health and Human Servs. and Educ. and Related Agencies of the Comm. on Appropriations, 104th Cong., 1st Sess. (1995) (statement of Katherine Spillar, National Coordinator Feminist Majority Foundation) (testifying that despite the efforts of state and federal law enforcement, in the first seven months of 1994, 52% of clinics surveyed experienced "one or more types of violence, including death threats, stalkings, bombings, invasions, arsons, and blockades"). See also infra Section II (discussing how current laws offer doctors little help).

7. See W. PAGE KEETON, DAN B. DOBB, ROBERT E. KEETON, DAVID G. OWEN, PROSSER & KEETON ON THE LAW OF TORTS, § 117, at 854 (5th ed. 1984) [hereinafter PROSSER & KEETON] (explaining that the primary elements of the intrusion upon seclusion tort are an unreasonable and intentional intrusion, physical or otherwise, into the solitude or seclusion of another's personal or private affairs).

8. See id. at 863 (defining the false light tort as an intentional invasion of privacy that violates a person's right to be "let alone" with a highly offensive form of publicity that would be objectionable to a reasonable person).

9. See id. at 856 (noting that even though the information may be true, an action lies for highly objectionable public disclosure of private information that would offend a reasonable person. However, merely including a fact in a public record does not automatically make it a public concern.). There is another type of privacy tort that deals with likeness for financial reasons or appropriation, but that tort would not be implicated in this type of situation because the exposure tactics of the anti-abortion protestors are generally not for personal financial gain. See id. at 851 (noting that the courts first recognized the appropriation form of invasion of privacy,
discusses the first two torts, but focuses primarily on a doctor’s potential use of the public disclosure of private facts tort to sue individuals and groups participating in exposure campaigns. Section I presents how abortion opponents target doctors and describes the various methods of current exposure campaigns. Section II examines why many within the anti-abortion movement are targeting doctors for harassment and analyzes how the Freedom of Access to Clinic Entrances Act (FACE)\(^\text{10}\) has failed to offer adequate protection for doctors.\(^\text{11}\) Finally, Section III explores the potential legal remedies behind the privacy torts. This article concludes that although some of the information about doctors used in exposure campaigns are matters of public record, doctors should be afforded the protection of the privacy torts to ensure the availability of abortion and preserve reproductive freedom. By protecting doctors’ safety and privacy we can protect the basic privacy rights of all citizens.

I: HOW ARE ABORTION OPPONENTS TARGETING DOCTORS—WHAT IS THEIR NEW STRATEGY?

Although numerous books and articles set forth new plans to target doctors who perform abortions,\(^\text{12}\) this article briefly describes the tactics addressed in three major pro-life works:\(^\text{13}\) *Abortion Buster’s*

---

1. A tort which involves the appropriation of the name or likeness of the plaintiff for the defendant’s own advantage or benefit.


11. Peter Eisler, *Abortion Providers Say New Law Does Not Protect Them*, GANNETT NEWS SERV., Sept. 22, 1994 (quoting the Director of the Ladies Center of Pensacola, a health clinic which provides abortion services and employed Dr. John Britton, as stating that six weeks prior to Paul Hill’s shooting of Dr. Britton and his escort, James Barrett, she tried, unsuccessfully, to get local and federal law enforcement officials to enforce FACE against Paul Hill for his disruptive behavior).


13. These three texts were chosen because they provide the basic strategies currently being used by pro-life activists involved in exposure campaigns.
Manual, Operation Rescue’s “No Place To Hide How-To” Packet, and Firestorm.

A. Abortion Buster’s Manual

The Abortion Buster’s Manual offers a work-book style primer targeting areas where pro-life activists can “find the greatest amount of dirt in the shortest time” in order to effectively “kill [doctors’] businesses.” In eleven chapters, the author uncovers the mysteries of public records in order to aid pro-life advocates in discovering doctors’ identities, malpractice records, criminal records, information on clinics and health standards violations, owners of clinics, names of women who have died while undergoing abortions under the care of specific doctors, and other information about

---

15. Operation Rescue of California, Operation No Place To Hide How-To Packet (June 1, 1992) [hereinafter “OR’s No Place to Hide”] (informally published by Operation Rescue of California, on file with the author). See also Egan, supra note 3, at 1:1 (describing the formation of the American Coalition of Life Activists (ACLA) after Operation Rescue was fatally divided between supporters of violence against abortion providers as justifiable homicide and those who condemned the violence). The founding members of ACLA are former Operation Rescue leaders who “refuse to condemn violence” and whose stated goal is “to find those abortionists who are hiding out from public scrutiny and expose them.” Egan, supra note 3, at 1:1. ACLA, however, has been careful to avoid advertising its tactics and goals except in various pro-life magazines including LIFE ADVOCATE which is published by Andrew Burnett, an ACLA leader. Egan, supra note 3, at 1:1. However, the actions of ACLA mirror those encouraged in the Operation Rescue Packet. Thus, the description of ACLA’s tactics and the Operation Rescue packet will be combined.
17. Sherlock, supra note 14, at i (combining his own experiences with those of others in his group in investigating public records to create a book that “any pro-lifer in any state can use”).
18. Sherlock, supra note 14, at 3-1 (explaining that methods of discovering doctors’ identities range from a simple phone call to an “abortion mill” to more covert methods like tracing a doctor’s license plate through a state’s motor vehicle department).
19. Sherlock, supra note 14, at 4-1 (summarizing the civil court filing system and how to track down information about any and all malpractice suits against a doctor in order to use his “past against him” and “scare some women away from his operating tables”).
20. Sherlock, supra note 14, at 5-1 (discussing the intricacies of the criminal court system and how to research a doctor’s local criminal record because “[If your local abortionist has no scruples about killing babies . . . what makes you think he’s an otherwise law-abiding citizen?”).
21. Sherlock, supra note 14, at 6-1 (explaining that “dirt on your local abortionist” can be found through clinic and doctor monitoring agencies if “the abortion mill you are interested in calls itself a clinic” and through the county public health department if “the abortionist works at a hospital”).
22. Sherlock, supra note 14, at 7-1 (discussing methods of discovering who owns or operates the building, clinic, or hospital housing “the abortion mill” so that the pro-lifer can then look into the owner’s criminal and tax records and possibly use the information to convince the landlord to evict the clinic).
23. Sherlock, supra note 14, at 8-1 (noting that information linking a doctor to the death of a patient can be the most damaging. Sherlock explains the procedures for getting copies of coroner’s reports and how to decipher the medical jargon to determine if a death was due to a mistake made by the doctor performing the abortion).
doctors (including home addresses and telephone numbers, insurance carriers' names, etc.). The last section of the book instructs pro-life activists on how to fully exploit the information they have found by circulating it to patients, insurance companies, health agencies, the media, and the general public.

One method of distribution involves writing an "exposé flyer" describing lawsuits against the targeted doctor and deaths or injuries which may have occurred at the clinic where the doctor works. The author encourages his readers to post the flyers around clinics, to give them to patients as they enter the clinics, and to distribute them to local newspapers, officials, and the doctor's insurance carrier.

B. Operation No Place to Hide

Operation Rescue of California introduced the idea of a "no place to hide" campaign in early 1992. Since then, however, Operation Rescue's leadership has split over the 1993 murder of Dr. David Gunn in Pensacola, Florida and the 1994 murder of Dr. John B. Britton and his escort, Lieutenant Colonel James H. Barrett. To those who viewed the killings of abortion doctors as a logical extension of

24. Sherlock, supra note 14, at 9-1 (discussing the additional sources of information that can help in the search for "dirt" such as voter registration, clinic literature, and newspaper files).

25. Sherlock, supra note 14, at 10-1 (noting that spreading the "dirt" found on an "abortionist" is the "most important job of a muckraker" to "permanently damage [the doctor's] reputation." Sherlock explains how to write reports to various government agencies, other doctors, and insurance companies. He describes how to attract the news media, and he suggests that letters to elected officials and hospitals are also helpful tools in distributing information about the doctor.).

26. Sherlock, supra note 14, at 10-2 to 10-3 (explaining that the lawsuit need not be successful, the fact that the doctor was sued is enough and for it to be noted on the flyer); see also Sherlock, supra note 9, at A-1 to A-5 (analyzing a sample flyer and its assembly).

27. Sherlock, supra note 14, at 10-3 (explaining the potential for lawsuits based on libel, slander, or defamation, Sherlock instructs his readers to have proof for every sentence on the flyer because the "truth is always your best defense." He also suggests that the flyer use words like "allegedly," "apparently" and "claimed" to qualify statements that might be difficult to prove, but still "let the reader draw the proper conclusion"); see also Sherlock, supra note 14, at A-3 to A-4 (analyzing each individual passage in the model flyer, Sherlock supports his assertions with case names, but does not say who prevailed on the merits. Interestingly, many of the suits against the doctors are brought by the same people who distribute the flyers.); see generally, Barbara Rochelle, Praying for Plaintiffs, FRONT LINES RESEARCH, 10 (1995) (exploring anti-abortion groups' use of abortion malpractice claims as "propaganda to intimidate abortion providers and insurers").

28. Sherlock, supra note 14, at 10-6 to 10-11 (emphasizing that getting the "dirt" to the "right people" can convince even those not opposed to abortion "to shun, boycott or attack your local abortionist" and "put him out of business").

29. OR's No Place to Hide, supra note 15.

30. See Egan, supra note 3, at 1:1 (discussing how the transfer of killing abortion providers from an abstract notion to a concrete practice drove a wedge between the anti-abortion militants and the pro-life activists. Operation Rescue was also weakened by legislation and court rulings making it a crime to block access to clinics).
Operation Rescue’s rhetoric, the statements by nationally recognized Operation Rescue leaders like Flip Benham condemning the violence seemed hypocritical, and thus, in the summer of 1994, the two sides split into smaller groups. One of the groups supporting justifiable homicide was the American Coalition of Life Activists (ACLA).

In the summer of 1994, ACLA began its campaign entitled “No Place to Hide.” The spokesperson of ACLA explained that the goal of the organization is “to find those abortionists who are hiding out... and expose them... bringing every facet of [a doctor’s life] to public scrutiny—his family, his suppliers, his office workers, his bank, vacation plans, you name it...” This exposure campaign seeks to inform the community of the targeted doctors’ identities, their home addresses and phone numbers, their license numbers, places the doctors frequent, and any criminal or civil suits that have been brought against the doctors.

Picketing is a crucial element in the campaign, both outside of the clinics and in front of the doctors’ homes. Marchers circulate pro-life literature and distribute copies of wanted signs, another important feature of the exposure campaign. ACLA also encourages its members to picket businesses such as restaurants, banks, and anywhere the

---

31. See Egan, supra note 3, at 1:1 (explaining that the circulation of Paul Hill’s Justifiable Homicide petition seems to have been the final straw in splitting Operation Rescue).
32. See American Political Network, Inc., Abortion Report, Kansas I: ACLA to Hold Regional Convention in Wichita, Mar. 28, 1995 (noting that many ACLA members signed Paul Hill’s justifiable homicide petition); Egan, supra note 3, at 1:1 (explaining the membership of ACLA as former Operation Rescue leaders who refuse to condemn the use of violence in their campaign).
33. American Coalition of Life Activists paid advertisement in LIFE ADVOCATE, July 1994 [hereinafter ACLA advertisement]. See generally Telephone Interview with Christy Henderson, Executive Director of Pro-Choice Mississippi (Oct. 8, 1994) (asserting that ACLA has no ties to Operation Rescue and has been vague about its precise methodology, but the “No Place to Hide” campaign is not new).
34. OR’s No Place to Hide, supra note 15, at 8-9.
35. OR’s No Place to Hide, supra note 15, at 1 (emphasizing that use of the media is also crucial; the “How to List” of running a “No Place to Hide” campaign suggests calling local radio, television, and newspaper reporters to let them know about the campaign and advocates picketing between 11:30 a.m. and 1:30 p.m. so that people can join in during their lunch hours). While marching in a circle, demonstrators hold signs of aborted fetuses, pictures of the doctors with words like “abortionist” or “murderer” below them, and phrases like “Dr. X kills babies every day.” OR’s No Place to Hide, supra note 15, at 6.
36. OR’s No Place to Hide, supra note 15, at 2-4 (explaining how to run a “Nowhere to Hide” campaign, the OR packet includes several examples of preferred posters and flyers. The posters are designed to mimic “Wanted” posters like those found in post offices. Both the flyers and the posters include estimates of the number of abortions the doctor has performed and one even intimates that women have died following an abortion by the doctor targeted in the flyer.). See infra Appendix B (describing a typical wanted poster).
doctor frequently may go.\textsuperscript{37} If the establishments are not picketed, then they are given copies of wanted signs.\textsuperscript{38}

\section*{C. \textit{Firestorm}}

Life Dynamics, a pro-life organization based in Texas, published \textit{Firestorm} in order to detail its new strategy for the pro-life movement: making abortion unavailable, not illegal.\textsuperscript{39} The book discloses various “guerrilla attacks,”\textsuperscript{40} two of which are aimed specifically at doctors who perform abortions.\textsuperscript{41}

“Guerrilla One” employs a direct mail post-card strategy in which the targeted doctor’s neighbors and colleagues are mailed post-cards similar in nature to the wanted signs used in the No Place to Hide campaign discussed above.\textsuperscript{42} The basic idea of this tactic is to decrease the number of doctors willing to perform abortions by stigmatizing and harassing them.\textsuperscript{43} In addition to targeting doctors on a personal level, Crutcher suggests alternative means of driving abortion providers out of business, including driving doctors’ insurance rates up with malpractice claims,\textsuperscript{44} lobbying for stricter

\begin{itemize}
\item \textsuperscript{37} See \textit{Morning Edition} (NPR radio broadcast, Aug. 11, 1994) (1994 WL 8690168) (discussing the ACLA’s practice of picketing doctors not only at clinics but also anywhere else the doctors go). The broadcast quoted Roy McMillan, an ACLA member, as saying “We want everyone in the state [of Mississippi] to know the face and the name of the abortionist.” \textit{Id.}
\item \textsuperscript{38} Interview with Christy Henderson, \textsuperscript{supra} note 33. \textit{See also Morning Edition} (Aug. 11, 1994), \textit{supra} note 4 (asserting that the goal of the ACLA’s exposure campaigns is to “make life so uncomfortable for doctors that they’ll quit performing abortions voluntarily.”).
\item \textsuperscript{39} Crutcher, \textsuperscript{supra} note 16, at 34-36 (surmising that one of the main reasons abortion is legal is due to “political inertia” and because “it happens 1.6 million times a year”).
\item \textsuperscript{40} Crutcher, \textsuperscript{supra} note 16, at 36 (citing \textit{WEBSTEr’S NEW COLLEGIATE DICrIONARY} 310 (9th ed. 1990)). Crutcher, president of Life Dynamics, calls his approach a “guerrilla strategy” and exhorts his followers to engage in “irregular warfare” as members of an “independent unit carrying out harassment and sabotage.” Crutcher, \textit{supra} note 16, at 36.
\item \textsuperscript{41} Crutcher, \textit{supra} note 16, at 37 (claiming that the “biggest fear” of the abortion industry is “running out of people who are willing to do abortions”).
\item \textsuperscript{42} See Crutcher, \textit{supra} note 16, at 41-42 (indicating that the post-cards should contain a picture of the doctor, his or her name, home address, and any information regarding malpractice suits that have been brought against him or her. Crutcher adds that these post-cards could also be distributed during “home pickets” in doctors’ neighborhoods.). \textit{See also} Carol Gentry, \textit{Anti-Abortion Cards Target Doctors}, \textit{ST. PETERSBURG TIMES}, Apr. 24, 1994, at B1 (citing Ann Baker of the National Center for the Pro-Choice Majority whose research indicates that 100,000 pieces of mail are sent out by Life Dynamics every month. The mail campaign is apparently not limited to abortion providers as doctors whose practices have no connection to gynecology or abortion have received postcards discouraging the support of abortions.).
\item \textsuperscript{43} Crutcher, \textit{supra} note 16, at 43 (contending that since the “vast majority” of doctors view “abortionists as society’s bottom feeders,” the stigma need only be reinforced to convince doctors to give up their abortion practices). \textit{See also} Gentry, \textit{supra} note 42, at B1 (according to the American Medical Association, in 1993 Life Dynamics obtained the AMA’s medical student mailing list and sent a copy of their abortion joke book “Bottom Feeder” to over 30,000 medical students. Medical authorities found the book “revolting.”).
\item \textsuperscript{44} Crutcher, \textit{supra} note 16, at 45 (focusing on doctors’ profit motive, and their need for malpractice insurance, Crutcher advocates pressuring insurance companies to raise their premiums through legislation, but also by filing more malpractice suits against doctors).
\end{itemize}
zoning regulations for clinics, and removing abortion practices from hospitals.

"Guerrilla Four" involves a secret manual containing training for "operatives" living near a targeted doctor and plans to infiltrate and dismantle the National Organization for Women (NOW) and Planned Parenthood. The handbook incorporates harassment and publicity techniques already developed by other pro-life organizations. Also contained in the manual is a plan to create negative publicity about the pro-choice community, particularly doctors, through an increase in malpractice claims and skeptical advertising.

**D. The Result of these New Strategies**

Having failed to make abortion illegal, anti-abortionists' current strategy is to make abortion unavailable. Exposure campaigns, in general, and wanted posters, in particular, are two key methods currently employed by pro-life activists attempting to achieve this goal. As an ACLA spokesperson explained in a statement to pro-life activists, "I think we can expect [the] net result [of ACLA's No Place to Hide campaign] over the next ten years to be the creation of

---

45. Crutcher, supra note 16, at 48-61 (suggesting that abortion clinics should suffer just as large companies do from burdensome regulatory legislation. Thus, pro-lifers should support and demand increased governmental regulation in areas such as fetal disposal, medical standards and patient residency requirements.).

46. Crutcher, supra note 16, at 77-78 (maintaining that as long as abortions are only performed in stand alone clinics, they will be easier to target than abortions performed in hospitals. Thus, pro-lifers must endeavor to make the option of taking in abortion practices as unappealing as possible to hospitals by attacking the hospital's public image.).

47. Crutcher, supra note 16, at 63-64 (asserting that if the pro-life movement can become a "constant thorn in the abortion industry's side" by creating dissension within the pro-choice community, Crutcher believes that the pro-life movement can put the pro-choice community on the defensive and possibly create a situation where they would destroy themselves).

48. Crutcher, supra note 16, at 39-40, 64. See supra notes 17-35 and accompanying text (discussing some of these techniques).


50. See Sandra G. Boodman, The Dearth of Abortion Doctors, WASH. POST, Apr. 20, 1993, at Z27 (quoting a field director of Operation Rescue saying that "We may not get laws changed or be able to change people's minds, ... [b]ut if there is no one willing to conduct abortions, there are no abortions."); see also infra Section II (describing why this new strategy has developed. For the remaining analysis in this article, a wanted poster will include exposé flyers and post-cards as described above); see also supra notes 26-28 and 42 and accompanying text (discussing exposé flyers and post-cards).

51. See Booth, supra note 2, at A3 (describing the fear generated by the wanted posters and quoting Dr. David Gunn's replacement as saying "It might make a good story . . . if I told you everything about me. But they'd put me on a wanted poster, and then they'd put a bullet in my head.").
This prophesy is not so farfetched as evidenced by the outcry of doctors against the violence and harassment targeted at them. "The results of this intimidation campaign are plain to see. Abortion may remain a legal option . . . but there will be so few providers that access will become limited and in some cases unavailable." Wanted posters and the violence that sometimes accompany them simply turn doctors away from performing abortions.

Such posters have been linked to at least two cases of anti-abortion violence against doctors. On different occasions, two Florida doctors were shot in front of the clinics where they performed abortions. Both doctors were the subjects of wanted posters that included their pictures, home addresses and telephone numbers, and

52. ACLA advertisement, supra note 39. See also Weekend Edition-Saturday (Jan. 21, 1995), supra note 2 (summarizing statements made by the ACLA that their goals include pressuring doctors to stop performing abortions and to create “abortion-free zones.”). See, e.g., Morning Edition (Aug. 11, 1994), supra note 4 (relaying pastor’s declaration that the church “will not picket with [ACLA] because we do not take the same position as they [do]”). This article does not assert that all pro-life groups are involved in the violence; many (if not most) fervently criticize violent behavior. Unfortunately, however, militant groups gain more exposure than peaceful protesters, and this often incites even more violence. See Anthony Flint, Some Say Law too Harsh on Abortion Foes, BOSTON GLOBE, Jan. 5, 1995, at 8 (responding to the abortion clinic killings by John Salvi in Brookline, Massachusetts on December 30, 1994, non-violent pro-life advocates argue that “When adherents see that their movement is being strangled by powerful government forces, however, the practical effect may provoke and anger the most radical extremists.”).


54. See American Political Network, Inc., Healthline, Abortion: Number of Ob/Gyns Performing Procedure Drops, Sept. 22, 1995 (citing a survey by the Kaiser Family Foundation which found that 21% of the Ob/Gyns surveyed who did not perform abortions cited community pressure as the reason); see also Implementation of the Freedom of Access to Clinic Entrances Act: Hearing Before the Subcomm. on Crime and Criminal Justice, House Comm. on the Judiciary, 103rd Cong., 2nd Sess. 58 (1994) (testimony of Dr. George Klopfer, Fort Wayne Women’s Health Organization) (relating the effects of the anti-abortion exposure campaign and the increasing violence on doctors. "The death threats come when you are surrounded by individuals who will openly tell you they are going to break your neck like a twig . . . it is this constant harassment . . . that takes its toll not only on the physicians, but the family, the clinic staff and . . . individuals that are affiliated with the clinics.")

55. See Mike Williams, Doctor Slain at Abortion Clinic in Florida, ATLANTA J. & CONST., March 11, 1993, at A1 (noting that Dr. David Gunn, killed in March of 1993 by abortion protestors Michael Griffin, was the subject of a wanted poster in the summer of 1992).

56. See Kathy Sawyer, Turning from “Weapon of the Spirit” to Shotgun, WASH. POST, Aug. 7, 1994, at A1 (discussing the shooting deaths of Dr. John Britton and his bodyguard, Lieutenant Colonel James H. Barrett, outside of the Ladies Center of Pensacola. Both men were shot in the head by shotgun blasts fired by abortion opponent Paul Hill. The two men died instantly.); id. (discussing the shooting death of Dr. David Gunn behind Pensacola Women’s Medical Services Clinic).
other personal information. This type of vehemence indicates that doctors who perform abortions need protection; they should be afforded the benefits of the privacy torts to stop the exposure campaigns, curb the violence, and, in turn, protect reproductive freedom.

II: WHY HAS THIS NEW TREND DEVELOPED?

With the Clinton administration’s pro-choice policies and the Supreme Court’s refusal to overturn Roe v. Wade, many pro-life activists “concede that their momentum has ground to a crawl,” and the “political [and] judicial sector[s of the pro-life movement] have been very badly hurt.”

Aside from the political difficulties arising from the election of a pro-choice president, the pro-life movement has also suffered several legal defeats in the past few years. First, in Planned Parenthood of S.E. Pa. v. Casey, the Supreme Court made clear that it would continue to recognize the basic constitutional right to an abortion. More recently, the Court decided that pro-life groups could be sued under the Federal Racketeering Act (RICO). Finally, in Madsen v. Women’s Health Ctr., Inc., the Court held that an injunction creating a buffer zone around an abortion clinic entrance and driveway was content neutral and did not violate the First Amendment.

57. See Williams, supra note 55, at A1 (noting that at an Operation Rescue Rally in the summer of 1992, wanted posters of Dr. Gunn were distributed listing his address and telephone number and encouraging protestors to harass his co-workers); CBS This Morning (CBS television broadcast, Nov. 1, 1994) (1994 WL 3530844) (interviewing Patricia Ireland of NOW about the shooting of Dr. Britton, "they [anti-abortion protestors] took his photograph, they traced his license plate, they put out wanted posters with his name, address and schedule. They... all but put a target on his back."). Dr. Britton was in fact Dr. Gunn’s replacement and after protestors discovered his name through his license plate number, LIFE ADVocate printed his name and address and stated that he was “responsible ‘for the deaths of thousands of babies.’” N.Y. Times News Service, supra note 12, at A9.

58. 410 U.S. 113 (1973); See Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2809 (1992) (holding that on the basis of stare decisis, the central rule of Roe v. Wade has not proven “unworkable” and thus there is no reason to overrule the decision).

59. Lynn Smith, Bowed, but Unbroken?, L.A. Times, Mar. 2, 1993, at E1 (discussing the effects of President Clinton’s pro-choice policies, which reversed the gag rule preventing discussion of abortion at federally funded clinics and the ban on fetal tissue research on the pro-life movement. Although “frustrated,” many groups also feel “reinvigorated by adversity and are regrouping.”).


61. See generally THE SUPREME COURT CONFRONTS ABORTION (Leon Friedman, ed. 1993) (analyzing the Casey decision and its aftermath).


63. 114 S. Ct. 2516, 2527 (1994) (finding that the 36 foot buffer zone prohibited “no more speech than necessary” to accomplish the state’s interest in protecting access to the clinic).
These cases reveal the Supreme Court's reluctance to overturn the fundamental holding of Roe v. Wade that a woman has a constitutional right to an abortion. Recognizing this, the pro-life movement has shifted its focus away from making abortion illegal and toward making abortion unavailable. Activists have concluded that the best way to accomplish this task is to target doctors. Unfortunately, some militant pro-life activists feel that violence is the only means left to accomplish this goal.

In response to the violence campaign, Congress passed the Freedom of Access to Clinic Entrances Act (FACE) in early 1994, and in May of 1994, President Clinton signed the bill into law. FACE essentially makes the blocking of clinic entrances a federal crime with a maximum sentence of one year for a first violation and three years for subsequent violations. Through the establishment

64. 410 U.S. 113, 153 (1973) (holding that a woman's decision to terminate her pregnancy is included in the Constitutional right of privacy).
65. See Booman, supra note 50, at 227 (attributing the shortage of Ob/Gyns who perform abortions to pro-life campaigns against individual doctors).
66. See Weekend Edition-Saturday (Jan. 21, 1995), supra note 2 (discussing the activities of various pro-life organizations on the 22nd anniversary of Roe v. Wade which included ACLAs announcement of 12 doctors that they plan to target in the upcoming year. David Crane, ACLAs Virginia Director explained that the 12 persons named would be fully exposed to encourage them to see what they do as the killing of little children); see also John Balzar, Abortion Foes Test the Limits; Is the Use of Even Deadly Force Justified?, L.A. TIMES, Sept. 30, 1993, at A1 (quoting a pro-life activist as saying, "The transcendent question being forced on the pro-life movement is . . . it would be right if your family was defended from murderers by someone using lethal force. Why not a fetus?"); see also supra Section I (discussing specific techniques aimed at getting doctors to stop performing abortions).
67. See Balzar, supra note 66, at A1 (discussing the increase in physical violence against abortion clinics and doctors in the 1980s and referring to a 1988 Alan Guttmacher Institute Study which documented an 11% decline in abortion providers over six years); Tamar Lewin, Death of a Doctor: The Moral Debate, N.Y. TIMES, July 30, 1994, at A1 (reviewing the debate within the pro-life movement over the morality of killing abortion doctors and quoting Don Treshman, Director of Rescue America, as saying "[a]s a result of the Clinton Administration's oppressive efforts to stop even peaceful pro-life activities, I fear there will be more bombings and shootings. Up to now, the killings have been on one side, with thirty million dead babies . . . . On the other side, there are two dead doctors. Maybe the balance is going to shift.").
68. 18 U.S.C.A. § 248(a) (West Supp. 1995). ("Whoever—by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . . shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c) . . . .")
69. See Laurence McQuillan, Clinton Signs Abortion Clinic Bill, Lawsuit Filed, REUTERS, May 26, 1994 (quoting President Clinton as saying "We simply cannot, we must not, continue to allow the . . . campaigns of intimidation of law-abiding citizens that has given rise to this law.").
of fines and civil remedies, FACE is designed to protect both patients and providers.

Although FACE appeared to be a substantial win for pro-choice activists, the statute, thus far, has proven inadequate at deterring the violence and threats. Only nine days after the bill's signing, protesters in Milwaukee barricaded themselves with chains, concrete, and iron inside and around two cars located outside of a local abortion clinic. Furthermore, hours before President Clinton signed the bill, the American Life League filed a complaint in response to FACE calling for declaratory judgment, preliminary and permanent injunctions, and class action certification in the U.S. District Court in Alexandria, Virginia. In addition, immediately after the signing of the bill, the American Center for Law and Justice and Operation Rescue filed an emergency stay in the U.S. District Court in the District of Columbia. Within a week of the bill's signing, at least six similar suits were also filed around the nation.

71. Id. (including for the first offense, a maximum fine of $10,000 or imprisonment for up to one year and for the second or subsequent offense, a maximum fine of $25,000 or imprisonment for up to three years. Exclusively non-violent violations have lesser fines and sentences. A bodily injury exception applies to both first and subsequent offenses in that the length of imprisonment is increased to a maximum of ten years. If death results, imprisonment can be for any term of years or for life. The civil remedies include temporary, preliminary, or permanent injunctions; compensatory and punitive damages; and reasonable legal costs, including attorneys' and expert witnesses' fees. A plaintiff has the option of recovering statutory damages in the amount of $5,000 per violation in lieu of actual damages. Furthermore, the U.S. Attorney General or state attorney general may also bring an action for injunctive relief and compensatory damages (to be awarded to the injured person). For first-time, non-violent physical obstructions, violators may also be fined up to $10,000 in civil penalties and $15,000 for subsequent non-violent obstructions.).

72. S. 636, 103rd Cong., 2d Sess. (1994), reprinted in 1994 U.S.C.C.A.N. 108 Stat. 694 ("[I]t is the purpose of this Act to protect and promote the public safety ... by establishing ... penalties and civil remedies for ... conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services.").

73. See Ruth Marcus, President Signs Clinic Access Law, WASH. POST, May 27, 1994, at A10 (citing statements by the American Civil Liberties Union that FACE was "a milestone in congressional protection for reproductive freedom" and that it protects "peaceful protest and free speech").

74. See Special Hearing on Violence at Women's Health Clinics, supra note 6, (asserting that in the first seven months of 1994, 67% of abortion clinics surveyed reported at least one incident of violence ranging from death threats to vandalism); see also Eisler, supra note 11 (recounting findings of the House Judiciary Subcommittee on Crime and Criminal Justice that the level of violence against clinic doctors did not decrease since the passage of FACE).

75. See Lyle Denniston, Six in Wisconsin Charged Under New Law on Abortion Clinics, BALT. SUN, June 7, 1994, at A9 (noting that this was the first criminal case pursued under FACE and that its constitutionality was already being challenged in five federal courts nationwide).

76. See American Life League Press Release, May 26, 1994 (asserting that FACE was a denial of free speech for pro-life believers and thus, unconstitutional).

77. See Joshua Project Press Release, May 26, 1994 (proclaiming FACE as violating of pro-life supporters' First Amendment rights).

78. See, e.g., American Political Network, Inc., Abortion Report, Spotlight Story Face II: Louisiana, Arizona Suits Challenge Constitutionality, (asserting violations of pro-life supporters civil rights and asking for an injunction blocking enforcement of FACE until the constitutionality is
While some courts have upheld the statute, at least one court has determined that FACE is unconstitutional.

As the cases demonstrate, there has been much debate surrounding the constitutionality of FACE. Professors Michael Stokes Paulsen and Michael W. McConnell argue that the statute [G]riminalizes speech that is intended to 'discourage abortion.' It applies to no other speech. Other protestors who commit acts of trespass or violence—animal rights activists, antinuclear protestors, opponents of racism or sexism—are not covered by the [act], even if their protests are equally violent. Congress has selected a single point of view—opposition to abortion—and subjected it to penalties applied to no other point of view.

settled).

79. See Cheffer v. Reno, 55 F.3d 1517, 1521-22 (11th Cir. 1995) (holding that FACE is within Congress' Commerce Clause powers, is content neutral and narrowly tailored and therefore does not violate the Tenth Amendment nor the First Amendment's freedom of expression or exercise clauses. The court also found that FACE did not substantially burden abortion protestors' religious beliefs); American Life League v. Reno, 47 F.3d 642, 652-53 (4th Cir.) (upholding FACE as a content neutral, narrowly tailored restriction on protected speech), cert. denied 116 S. Ct. 55 (1995).

Multiple District Courts have also upheld FACE as constitutional. See Riely v. Reno, 860 F. Supp. 1286, 1289 (D. Mo. 1995) (holding that FACE is constitutional in response to a facial challenge); U.S. v. White, 893 F. Supp. 1423, 1434 (C.D. Cal. 1995) (finding that the commercial ramifications of abortion clinic violence is a national issue beyond the scope of local authorities and upholding FACE's constitutionality); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1431 (S.D. Cal. 1994) (holding that FACE is a legitimate extension of Congress' Commerce Clause power that does not violate protestors' First or Fifth Amendment rights); U.S. v. Hill, 893 F. Supp. 1034, 1037 (N.D. Fla. 1994) (holding that FACE falls within Congress' Commerce Clause power); U.S. v. Lucero, 895 F. Supp. 1421, 1424 (D. Kan. 1995) (holding that FACE is constitutional despite challenges to Congress' Commerce Clause power and claims of First Amendment violations); Cook v. Reno, 859 F. Supp. 1008, 1011 (W.D. La. 1994) (concluding that FACE is a valid extension of legislative power that does not violate protestors' right to freedom of speech).

80. See U.S. v. Wilson, 880 F. Supp. 621, 630 (E.D. Wisc. 1995) (holding that Congress overstepped its Commerce Clause power because the regulation of clinic protestors outlined in FACE are not aimed at (1) an activity that undermines a national regulatory scheme; (2) a commercial activity affecting "the right to travel interstate" nor (3) an activity that "employs violent means to achieve an economic purpose.").

81. Professor McConnell is a William B. Graham Professor of Law at the University of Chicago Law School.

82. Michael Stokes Paulsen and Michael W. McConnell, The Doubtful Constitutionality of the Clinic Access Bill, 1 VA. J. SOC. POL'Y & L. 261 (1994) (arguing that FACE is unconstitutionally selective in its regulation of the anti-abortion movement and if allowed to stand will constitute a marked departure from the country's past tolerance of political activity in the name of civil rights).

83. Id. at 281-82 (alleging that the drafters of FACE were not "legislating neutrally" and that if the drafters were thinking generally about the effects of illegal protesting "they would broaden the statute to encompass all such instances of unlawful protest that interferes with the rights of others, irrespective of the object of the protest.").

84. Id. at 283 (noting that FACE does not provide for penalties in the case of violence by pro-choice activists against pro-life supporters).
Specifically, they note several problems with FACE: the penalties are excessive; ordinary protestors will be jailed unjustly, and the definitions are so indistinct that free speech rights of the entire pro-life movement will certainly be chilled.

Moreover, Paulsen and McConnell assert that FACE suffers from two main constitutional problems. First, the statute is unconstitutionally vague and overbroad. Second, the restrictions represent content-based punishment of civil disobedience and therefore violate the First Amendment.

Laurence Tribe, however, disagrees with Paulsen and McConnell and argues that FACE does not in fact single out speech or even expressive conduct driven by a specific ideology. Comparing FACE to Title VII, Tribe states that FACE does nothing more than "punish those engaged in violence and intimidation with the intent to prevent others from exercising their constitutional right to obtain or provide abortion services."

Whatever the constitutionality of FACE, one thing is clear; the statute has proven to be little more than a band-aid solution for anti-abortion violence and harassment of doctors. FACE will have little, if any, effect on the exposure techniques of pro-life groups, simply

85. Id. at 263 (noting that "peaceful sit-in" participants could end up in jail for one to three years).
86. Id. at 263 (noting that enforcement of FACE is not confined to violent or unlawful acts).
87. Paulsen and McConnell, supra note 82, at 263 (asserting that even "peaceful protestors will face the real prospect of legal harassment by their ideological opponents").
88. Paulsen and McConnell, supra note 82, at 265-66 (contending that the overbreadth is substantial enough to render FACE "unconstitutional on its face").
89. Paulsen and McConnell, supra note 82, at 265 (referring to R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) in which the Supreme Court held that a Minnesota ordinance was impermissibly content-based and thus facially invalid).
90. Laurence Tribe, The Constitutionality of the Freedom of Access to Clinic Entrances Act, 1 VA. J. SOC. POL'Y AND L. 291, 299-300 (1994) (arguing that FACE avoids any violation of the First Amendment and is a valid extension of Congressional power to ensure that women have access to their constitutional right to abortion).
91. Id. at 302 (noting that the holding in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) does not require Congress to be neutral in distinguishing between actions directed at preventing the exercise of the right to terminate a pregnancy and the exercise of other rights).
92. See Implementation of the Freedom of Access to Clinic Entrances Act, supra note 54, at 71 (testimony of Linda Taggert, Administrator of the Ladies Center in Pensacola, Florida) (explaining her futile attempts to get local or federal authorities to prosecute Paul Hill under FACE for his harassment of Dr. Britton only two months before Hill murdered the doctor and his escort, James Barrett. Hill was arrested and released on a noise violation just over a month before he killed Dr. Britton). See also Stephanie Simon, Abortion Foes Assail Violence, L.A. TIMES, Jan. 17, 1995 at B1 (noting that even professed non-violent pro-life groups blamed FACE for the escalation in violence by anti-abortion radicals. Joseph Forman, of the California Missionaries to the Preborn, says "Any time the government seeks to oppress public protest...you have a situation where there's no reasonable way a reasonable person can express himself.").
because the statute's main focus is the clinic and patients. Consequently, doctors who perform abortions cannot rely on FACE to provide adequate protection against pro-life harassment and intimidation.

III: WHAT CAN DOCTORS DO ABOUT THE EXPOSURE TECHNIQUES?

A. Introduction to the Privacy Torts

In 1890, Samuel D. Warren and Louis D. Brandeis wrote a Harvard Law Review article calling for an explicit new tort that would recognize protection for citizens from harm caused by the press when it exposed private concerns to the public; essentially they argued for the right to be let alone. In 1960, Dean Prosser synthesized the opinions and articles written in response to Warren and Brandeis and identified four distinct torts that evolved from them: appropriation of the plaintiff's likeness or name for defendant's financial gain, intrusion upon the plaintiff's seclusion or solitude, publicity which

93. See 18 U.S.C.A. § 248(a) (West. Supp. 1995) (focusing primarily on clinic access and not protection of doctors away from work, FACE requires specific intent to injure or intimidate a provider due to his or her involvement with abortion services).

94. Samuel D. Warren and Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 195 (1890) (arguing that "the sacred precincts of private and domestic life" were being invaded by the expanding capabilities of the press, Warren and Brandeis asserted that

[t]he press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery... The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Id. at 196. After the article was published, courts and scholars began to use the concept of privacy protection in a myriad of ways, many of which were completely different from the original use contemplated by Warren and Brandeis. See William L. Prosser, Privacy, 48 CALIF. L. REV. 383, 390 (1960) (noting that the principle of physical intrusion of privacy established by Warren and Brandeis was soon extended to wire tapping and spying in windows).

95. Prosser, supra note 94, at 401 (explaining that the main question for courts is whether there has been an appropriation of not only the plaintiff's name but also her identity for the defendant's advantage, and then whether the plaintiff herself has appropriated her identity for her own advantage).

Prosser's second tort of likeness for financial reasons will not be discussed here because, at least so far, it is irrelevant to the situation between pro-life activists and doctors. For a discussion of the tort see Annotation, Invasion of Privacy by Use of Plaintiff's Name or Likeness in Advertising, 29 A.L.R.3d 865, 901 (1969). See also RESTATEMENT (SECOND) OF TORTS § 652A (1977) (recognizing the common law tort of the invasion of privacy, and dividing it in the same manner as Prosser).

96. Prosser, supra note 94, at 389 (noting that while the idea of intrusion has progressed beyond basic physical intrusion, the intrusion must still be something "offensive or objectionable to a reasonable man" and involve an element of the plaintiff's life which she is
places the plaintiff in a false light before the public,\footnote{Prosser, supra note 94, at 398 (observing that the false light tort protects the plaintiff's reputation by providing a remedy when an utterance is falsely attributed to him or her or their likeness is used in a publication to which the plaintiff has no reasonable connection).} and public disclosure of embarrassing private facts.\footnote{See Prosser supra note 94 at 389 (remarking that "public disclosure of embarrassing private facts about the plaintiff" was the tort with which Warren and Brandeis were principally concerned. The disclosure must be public and the fact must be private and deemed offensive to a reasonable person.).} This section will review the basic elements of the latter three torts and then explain how doctors who perform abortions can use these torts to bring suit against pro-life activists participating in exposure campaigns.

\section*{B. Intrusion Upon Seclusion}

This intrusion tort deals with offensive impingement upon the plaintiff's person or private affairs.\footnote{Twenty-four states recognize the intrusion tort. See K-Mart Corp. v. Weston, 530 So.2d 736, 739 (Ala. 1988) (concluding that whether the defendant's employee's announcement of plaintiff's bad credit in front of other customers qualified as wrongful intrusion was a question of fact properly left to the jury); Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123,1138 (Alaska 1989) (asserting that employer drug testing of employees is not an unwarranted intrusion); People v. Brown, 151 Cal. Rptr. 749, 754 & n.4 (Cal. App. 1979) (noting that a visit by the police to the defendant's hospital room was not an intrusion because a nurse permitted entry, and the police intended to question the defendant, not search the room); Mashantucket Pequot Tribe v. State Dep't of Revenue Servs., Div. of Special Revenue, No. 101113, 1994 WL 469625 at *2 (Conn. Super. Aug. 18, 1994) (concluding that whether the defendant's contacting the plaintiff without her permission was an "intentional physical intrusion" that was "highly offensive to a reasonable person" was a question of fact for the jury); Beckett v. Trice, No. 92C-08-029, 1994 WL 710874 at *6 (Del. Super. Nov. 4, 1994), aff'd 660 A.2d 395 (Del. 1994) (asserting that a sexual relationship premised on false pretenses does not qualify as an intrusion because the plaintiff voluntarily accepted the defendant into her life); Williams v. City of Minneola, 575 So.2d 683, 689 n.5 (Fla. Dist. Ct. App. 1991) (noting that unreasonable intrusion upon seclusion is one of four categories of the tort of invasion of privacy); Jarrett v. Butts, 379 S.E.2d 583, 585 (Ga. Ct. App 1989) (finding that photographs taken by a teacher of a student during regular school hours, in the presence of other students, were not an intrusion); Miller v. Motorola, Inc., 560 N.E.2d 900, 904 (Ill. App. Ct. 1990) (holding that defendant's publication of private information voluntarily provided by the plaintiff did not qualify as an unauthorized intrusion); Stessman v. American Black Hawk Broadcasting Co., 415 N.W.2d 685, 687 (Iowa 1987) (finding that plaintiff was not precluded from claiming intrusion upon seclusion when she was filmed in a restaurant without her permission); Finlay v. Finlay, 856 P.2d 183, 189-90 (Kan. Ct. App. 1993) (finding that the smell from defendant's farm operation was not an unreasonable invasion qualifying as an invasion of privacy because there was no intrusion using physical or sensory means); Pemberton v. Bethlehem Steel Corp., 502 A.2d 1101, 1117 (Md. Ct. Spec. App.) (holding that a listening device attached to plaintiff's door by the defendant was an intrusion) cert. denied, 508 A.2d 483 (Md.) and cert. denied, 479 U.S. 984 (1986); Knight v. Fenoscoct Bay Medical Ctr., 420 A.2d 915, 918 (Me. 1980) (affirming that whether a third party's presence in the delivery room constitutes an intrusion is a question of fact); Duran v. Detroit News, Inc., 504 N.W.2d 715, 720 (Mich. Ct. App. 1993) (holding that obtaining information from the newspaper and plaintiff's guards did not constitute an intrusion); People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 867 P.2d 1121, 1132-33 (Nev. 1994) (finding that plaintiff's claim must fail because he had no expectation of privacy or seclusion); Rumbauskas v. Cantor, 649 A.2d 853, 857-58 (N.J. 1994) (holding that an action for intrusion on seclusion under the auspices of the privacy tort qualifies as a claim for "injury to the person" when conduct such as stalkings and violent threats are present); Gilmore v. Enogex,}
Abortions could use this tort to assert a claim against pro-life advocates who picket his or her home. To succeed, a doctor would first have to prove that the protest was an intentional intrusion, physical or otherwise, into his or her solitude or private affairs. Secondly, the doctor would have to prove that the picket was highly offensive to a reasonable person.

The intrusion upon seclusion tort was at issue in Valenzuela v. Aquino. In that case, a doctor and his family sued for injunctive relief and damages for invasion of privacy arising from the picketing...
of their home by abortion opponents. The majority acknowledged that the Texas Supreme Court had previously recognized the intrusion tort, but remanded because the jury had not resolved the factual disputes as to whether there was an intentional intrusion and whether the picketing was highly offensive to a reasonable person. The dissenting opinions, however, argued that these elements had been satisfied by the jury’s findings, and therefore the defendants had breached the Aquino’s privacy. The jury found that the picketing was focused or directed at the Aquino residence, and the trial court granted a permanent injunction prohibiting the defendants from engaging in any type of picketing within 400 feet of the Aquino’s property. The state court of appeals upheld the injunction, but the state supreme court reversed and remanded the case.

Justice Gonzalez, dissenting, believed that as a matter of law, the Aquinos proved an invasion of their privacy. Because she believed the appeals court was correct in upholding the injunction, Justice Gonzalez’s opinion concentrated on the First Amendment aspects of limiting the defendants’ speech. Noting that peaceful picketing is one type of expressive conduct that merits constitutional protection, she pointed out that such behavior is not free from

104. Id. at 520-21 (Spector, J., dissenting). Dr. Aquino maintained an obstetrics and gynecological practice of which only a small part was devoted to providing abortions. Id. at 514. After nearly six years of regular picketing of Dr. Aquino’s place of business, anti-abortion protestors began picketing his residence. Id.

105. Id. at 519 (citing Billings v. Atkinson, 489 S.W.2d 858, 861 (1973) as holding that the tort of invasion of privacy is a “willful tort” constituting a legal injury for which damages are recoverable even without physical injury).

106. Id. at 512-13 (incorporating the RESTATEMENT’S definition of the tort of invasion of privacy into Texas law).

107. Valenzuela v. Acquino, 853 S.W.2d 512, 514 (Tex. 1993) (Gonzalez, J., dissenting); Id. at 519 (Gammage, J., dissenting); Id. at 522 (Spector, J., dissenting). Justice Dogget concurred in the judgment only. Id. at 514.

108. Id. at 515. The trial court also awarded $810,000 in damages. Id.

109. 853 S.W.2d at 515. The court of appeals, however, reversed the damages award. Id.

110. Id. (upholding the appellate court’s reversal of the damage award).

111. Id. at 514-15 (Gonzalez, J., dissenting) (finding that the record revealed that the picketing had a devastating effect on Dr. Aquinos’ family members, causing some to become physically ill).

112. Id. Justice Gonzalez would have held that the state had a “compelling interest in protecting the common law right of privacy of an individual and [could] therefore place reasonable restrictions on the picketers right of free expression.” Id. at 514 (citing Billings v. Atkinson, 489 S.W.2d 858, 860 (Tex. 1973) as holding that an invasion of privacy constitutes a recoverable injury).

all restrictions.114 Because the picketing at issue took place on a public sidewalk, a traditional public forum, the state could implement reasonable time, place, and manner restrictions only if the state demonstrated a compelling interest.115 Relying on the Frisby v. Schultz line of cases to support her conclusion,116 Justice Gonzalez found the injunction at issue in Valenzuela to be sufficiently narrowly tailored to protect the Aquino's privacy and therefore, the injunction was proper, and the majority's analysis was incorrect.117

On the other hand, Justice Spector's dissent focused on the intrusion upon seclusion tort.118 He explained that the first element of the tort, an intentional intrusion, was satisfied by the jury's finding that the picketing was focused on the Aquino's residence.119 He also concluded that the second element was satisfied because, as the U.S. Supreme Court explained, directed residential picketing is, by its nature, highly offensive to a reasonable person:

The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt . . . . The resident is figuratively, and

Texas Constitution is an independently viable document that the state can interpret to give more rights than those conferred by the Federal Constitution).

114. 853 S.W.2d at 516 (citing Frisby v. Schultz, 487 U.S. 474, 488 (1988) which upheld a ban on residential picketing that singled out individual residences. The Court found the ban served the significant governmental interest of protecting residential privacy and was narrowly tailored to achieve that goal.).


116. See, e.g., Klebanoff v. McMonagle, 552 A.2d 677, 682 (Pa. Super. Ct. 1989) (upholding an injunction against picketing in front of a residence because states may place standard time, place, and manner restrictions on speech); Northeast Women's Ctr., Inc. v. McMonagle, 939 F.2d 57, 63 (3d Cir. 1991) (upholding an injunction's 2500-foot buffer zone for sound equipment and bullhorns and modifying the injunction to place a 500-foot buffer zone on picketing in front of an abortion clinic). Cf. Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2526-27 (1994) (holding that an injunction creating a 35 foot buffer zone around an abortion clinic did not violate the First Amendment because the content-neutral injunction burdened no more speech than necessary and served a significant government interest). The Court also held that the restriction was not content based merely because it restricted only anti-abortion protestors' speech. Id. The injunction was imposed on this group because of its past violations of a court order. Id. at 2525. The Court also held that the proper test for evaluating the injunction's restriction on free speech should be more stringent than the usual time, place, and manner review of ordinances. Id. An injunction must be "no broader than necessary to achieve its goals." Id. at 2525.

117. Valenzuela v. Acquino, 853 S.W.2d 512, 519 (Tex. 1993) (Gonzalez, J., dissenting). Justice Gammage agreed with Justice Gonzalez but wrote separately because he disagreed with her opinion regarding damages. Id.

118. Id. at 522 (Spector, J., dissenting) (assuming that the record's reference to an intrusion upon seclusion referred to this tort as defined in THE RESTATEMENT (SECOND) OF TORTS § 652B).

119. Id. at 523 (Spector, J., dissenting) (finding evidence in the record that the picketers carried placards reading; "God Gives Life, Aquino Takes It Away," and "Nice House Dr. Eduardo, How Many Babies Paid the Price?").
perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing[,] is left with no ready means of avoiding the unwanted speech. Thus, the "evil" of targeted residential picketing, "the very presence of an unwelcome visitor at the home," is "created by the medium of expression itself."120

Spector concluded that because the Aquinos proved each element of the tort, they were properly granted the injunction to protect them from further invasions of privacy.121

Justice Spector's dissent then focused on balancing the Aquino's right to privacy against the defendants' right to free speech.122 He identified two types of privacy rights at issue in this case: first, there was the Aquino's right to preserve the sanctity of their home,123 and second, there was the broader issue of a woman's right to decide whether to have an abortion.124 Noting that the ability of women to make this decision had been severely constricted, Spector described how doctors who perform abortions were seen as a "weak link" in the supplying of abortion services and were therefore viewed as favorable targets for harassment.125 "[O]rganizations across the state and nation have used a strategy of harassment and intimidation to 'dissuade skilled clinicians from entering this field or [to] convince them to quit . . . . [C]ommunities must curb the harassment of

---

120. Id. (citing Frisby, 487 U.S. at 486-87) (internal citations omitted).
121. Id. at 524 (Spector, J., dissenting). The dissenting Justices were concerned with the deleterious effects that the picketing caused, the long span of time over which the picketing had been occurring, and the additional time needed for final resolution when the case was remanded. Id. at 522-24. The record indicated that the picketing occurred when Dr. Aquino was at work and his children were at home after school. Id. at 519-20. During the picketing, the children cried, locked themselves in their rooms, and the oldest child had to be temporarily placed in a psychiatric institution before being sent to live with an aunt in Paraguay. Id. at 521.
123. Id. (Spector, J., dissenting) (providing a brief history of Texas' treatment of this right and the state's view of the household as a sanctuary and citing Porter v. Southwestern Public Serv. Co., 489 S.W.2d 361, 365 (Tex. Civ. App. 1973) as holding that the sanctity of one's private land is powerful enough to prevent eminent domain powers from usurping the city's zoning ordinances); Texas State Employees Union v. Tex. Dept. of Mental Health & Mental Retardation, 746 S.W.2d 203, 205 (Tex. 1987) (interpreting the Texas Constitution to "guarantee the sanctity of the individual's home and person against unreasonable intrusion.").
124. 853 S.W.2d at 524 (Spector, J., dissenting) (stating that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (citing Roe v. Wade, 410 U.S. 113, 115 (1972)). See also Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2804 (1992) (reaffirming a woman's right to choose to have an abortion before fetal viability but replacing the strict trimester framework of Roe with an "undue burden" analysis).
125. Valenzuela v. Acquino, 853 S.W.2d 512, 525 (Tex. 1993) (citing David A. Grimes, Clinicians Who Provide Abortions: The Thinning Ranks, 80 OBSTETRICS & GYNECOLOGY, 719, 721 (1992) (noting a dramatic decrease in abortion practitioners and calling on communities to protect these providers)).
clinicians; otherwise . . . the legacy of Roe v. Wade may become an empty promise."

Since the privacy interests at stake in Valenzuela were so vital, Justice Spector concluded the appeals court was correct in upholding the injunction. He determined that the restriction of the defendants' right to engage in expressive conduct was valid because it allowed other types of picketing, and the injunction also protected the defendants' right to express their views through alternative channels.

In striking the injunction, however, the majority of the Valenzuela Court concluded that the Aquino's failed to request the elements of the intrusion upon seclusion tort be submitted to the jury.Nevertheless, the Valenzuela case demonstrates how a doctor may bring a viable cause of action for an intrusion upon seclusion in Texas or other jurisdictions, if the facts are similar and the plaintiff's counsel presents the arguments.

C. False Light

A second invasion of privacy cause of action concerns publicity that places the plaintiff in a false light in the public eye. The tort was
conceived to provide redress for the person who suffers indignity and embarrassment because a part of his or her life had been falsely publicized.\textsuperscript{133} According to the \textit{Restatement (Second) of Torts}, the false light tort is comprised of three separate elements: there must be a publication placing the plaintiff in a false light; the publication must be highly offensive to a reasonable person; and the author must have acted with knowledge of the falsity or with reckless disregard as to the falsity of the publicized matter.\textsuperscript{134}

---

\textsuperscript{133} See Godbehere v. Phoenix Newspapers, Inc., 783 P.2d 781, 788 (Ariz. 1989) (adopting the false light tort delineated in \textit{The Restatement (Second) of Torts} § 652E); Dodrill v. Arkansas Democrat-Gazette Co., 590 S.W.2d 840, 845 (Ark. 1980) (holding that the actual malice standard applies to a false light claim); Fellows v. Nat'l Enquirer, Inc., 721 P.2d 97, 99 (Cal. 1986) (holding that to successfully state a false light cause of action, the plaintiff must allege that s/he was placed in a false light that would be highly offensive to a reasonable person); Goodrich v. Waterbury Republican-American, 448 A.2d 1317, 1330 (Conn. 1982) (joining jurisdictions that recognize the false light claim under the actual malice standard); Baker v. Burlington Inc., 587 P.2d 829, 832 (Idaho 1978) (holding that a false light claim cannot be brought unless there is some public disclosure of falsity concerning the plaintiff); Lovgren v. Citizens Nat'l Bank of Princeton, 534 N.E.2d 987, 990 (Ill. 1989) (stating that Illinois requires a plaintiff to show that the person was placed in a false light before the public that would be highly offensive to a reasonable plaintiff); Wolf v. Regardie, 553 A.2d 1213, 1216-17 (D.C. 1989) (adopting the four invasion of privacy torts as described in \textit{The Restatement (Second) of Torts} § 652); Vineyard v. Larsen, 260 N.W.2d 816, 822 (Iowa 1978) (adopting the four invasion of privacy torts as discussed in \textit{The Restatement (Second) of Torts} § 652); Dotson v. McLaughlin, 531 P.2d 1, 6 (Kan. 1975) (adopting the four invasion of privacy torts described in \textit{The Restatement (Second) of Torts} § 652); Berthiaume v. Pratt, 365 A.2d 792, 795 (Me. 1976) (adopting the four invasion of privacy torts articulated in \textit{The Restatement (Second) of Torts} § 652); Lawrence v. A.S. Abell Co., 475 A.2d 448, 451 (Md. 1980) (adopting the four invasion of privacy torts articulated in \textit{The Restatement (Second) of Torts} § 652); Prescott v. Bay St. Louis Newspapers, Inc., 497 So.2d 77, 79 (Miss. 1986) (holding plaintiff could not claim a false light tort for a newspaper article reporting his arrest for driving while intoxicated); Schoneweis v. Dando, 435 N.W.2d 666, 670 (Neb. 1989) (stating that Nebraska recognizes the false light tort described in \textit{The Restatement (Second) of Torts} § 652E); Romaine v. Kallinger, 537 A.2d 284, 290 (N.J. 1988) (noting that while New Jersey recognizes the false light tort, the truth is a total defense to such a claim); McCormack v. Oklahoma Publishing Co., 613 P.2d 737, 739 (Okla. 1980) (adopting the false light tort described in \textit{The Restatement (Second) of Torts} § 652E); Neish v. Beaver Newspapers, Inc., 581 A.2d 619, 624 (Pa. Super. Ct. 1990) (holding that the publisher must have had knowledge or acted in reckless disregard for a plaintiff to prevail in a false light claim); Montgomery Ward v. Shope, 286 N.W.2d 806, 808 n.1 (S.D. 1979) (adopting the privacy torts described in \textit{The Restatement (Second) of Torts} § 652); Clarke v. Denton Publishing Co., 799 S.W.2d 329, 331 (Tex. App. 1990) (holding that Texas recognizes the false light tort claim); Eastwood v. Cascade Broadcasting Co., 722 P.2d 1295, 1297 (Wash. 1986) (adopting the false light tort described in \textit{The Restatement (Second) of Torts} § 652E); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 83 (W.Va. 1984) (adopting the false light tort articulated in \textit{The Restatement (Second) of Torts} § 652E).

\textsuperscript{134} See Prosser, supra note 94, at 398-400; Bryan R. Lasswell, Note, \textit{In Defense of False Light: Why False Light Must Remain a Viable Cause of Action}, 34 S. Tex. L. Rev. 149, 152 (1993) (arguing that the false light tort, while largely neglected, should be further explored before courts allow the claim to perish).
Although there is some overlap between the false light tort and defamation, the two actions are distinct.\textsuperscript{135} First, the false light tort need not be defamatory, and it can in fact be laudatory.\textsuperscript{136} Second, the interests protected by each tort are different.\textsuperscript{137} While defamation protects the plaintiff's reputation, false light secures the plaintiff's right to be left alone.\textsuperscript{138} Third, a false light claimant must show the falsity was widely publicized, whereas, a defamatory statement need only be published to a single person.\textsuperscript{139}

In fact, the U.S. Supreme Court has treated the two claims differently. In \textit{New York Times v. Sullivan}, the first of an important line of cases dealing with defamation, the Supreme Court introduced the "actual malice" standard for recovery of damages.\textsuperscript{140} The standard requires a plaintiff to show that the defendant acted with "knowledge that [the statement] was false or with reckless disregard of whether [the statement] was false or not."\textsuperscript{141} Since the \textit{New York Times} plaintiff was a public official, the Supreme Court did not address the question of whether a different standard would apply to a private plaintiff.\textsuperscript{142} In \textit{Gertz v. Robert Welch, Inc.}, the Court held that where the plaintiff was a private individual, states were free to establish any standard of liability, as long as they did not impose strict

\begin{thebibliography}{99}
\bibitem{135} Prosser, "supra note 94, at 400.
\bibitem{137} Prosser, "supra note 94, at 400. \textit{See generally Prosser, supra note 94, at 400-01} (noting that while plaintiffs may have valid claims for both torts, false light is a broader cause of action than defamation); RESTATEMENT (SECOND) OF TORTS § 652 (1977).
\bibitem{138} Lasswell, "supra note 133, at 152.
\bibitem{139} Lasswell, "supra note 133, at 154.
\bibitem{140} 376 U.S. 254, 283 (1964) (striking an Alabama state statute that allowed public officials to bring libel suits against critics without a showing of malice).
\bibitem{141} \textit{Id.} at 279-80 (noting a long line of state cases upholding a similar rule).
\bibitem{142} \textit{See} Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (extending the actual malice standard from public officials to public figures and holding that a football coach accused of accepting bribes is a public figure for libel purposes).
\end{thebibliography}
liability. Most states responded by establishing a negligence standard for defamation cases involving private individuals.

On the other hand, regarding the proper standard in a false light claim, the Supreme Court held in *Time v. Hill* that when the alleged falsehood is a matter of public concern, a plaintiff must prove that the defendant published the statement with knowledge of the falsity or in reckless disregard of the truth. The plaintiff, therefore, must meet the actual malice standard in order to recover for damages stemming from the false statements. Notably, *Time* was decided a few years before *Gertz*, and the Supreme Court has not had the opportunity to revisit *Time* to determine whether *Gertz* has any effect on the standard to be used in a false light claim. If *Gertz* did apply, a private plaintiff need only show the defendant acted negligently as to the falsity of the publicized matter. As it stands, however, a private plaintiff still must meet the actual malice standard, and thus has a more difficult time winning a false light claim as compared to a defamation claim.

A doctor who performs abortions could bring a false light cause of action against pro-life activists for statements contained in wanted posters. To succeed, a doctor would first have to show that the

---

143. 418 U.S. 323, 347-48 (1974) (recognizing a more equitable approach to the competing concerns of the state's interest in compensating victims and the free press' First Amendment interest). *Gertz* held that a private plaintiff could recover only restricted damages from a defendant. *Id.* at 350. If the plaintiff and the matter concerned are considered private, then actual and punitive damages can be recovered, absent a showing of actual malice. *Id.* at 347-48. See also *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 755 (1985) (holding that false statements about a contractor in a credit report did not involve public concerns requiring application of the actual malice standard).


145. 385 U.S. 374, 387-88 (1967) (involving a report by Time, Inc., the publisher of Life Magazine, that a Broadway play was based on actual experiences of a family's suffering at the hands of criminals). The family brought suit alleging that this portrayal violated their right to privacy as defined in N.Y. CIV. RIGHTS § 50-51 (McKinney 1976). 385 U.S. at 376. The Supreme Court set aside the lower court's judgment for the plaintiff holding that the defendant was entitled to a jury instruction on the "knowing or reckless falsity" standard. *Id.*

146. *Id.* at 398.

147. *Time* was decided in 1967 and *Gertz* was decided in 1974.

148. *Cf. Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 249 (1974) (finding that the facts in *Cantrell* did not present the issue of whether the *Time* knowing falsity/reckless disregard for the truth standard applies to all false light cases). The trial judge in *Cantrell* instructed the jury that liability for publishing false information about the plaintiff's family could be imposed only if the jury found that the defendant published false information with a "knowing or reckless falseness." *Id.*

149. If *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985) applied, the plaintiff could recover more damages if the matter was considered a purely private one. The *Restatement (Second) of Torts* advocates the actual malice standard, regardless of the type of plaintiff or matter. *See Restatement (Second) of Torts* § 652D cmt. a (1977).

150. See *Lasswell*, supra note 133, at 137 (comparing false light and defamation claims).

151. *See supra* Section I (describing typical wanted posters).
posters were widely distributed, so the matter is regarded as substantially certain to become one of public knowledge.152 Secondly, the doctor would have to show that statements on the poster placed him or her in a false light that would be highly offensive to a reasonable person.153 Finally, if the alleged false statements on the posters are considered matters of public concern, according to Time, a doctor would have to show the pro-life activists acted with actual malice.154 On the other hand, if Gertz applies, the doctor would only have to show the activists acted negligently.155

In Van Duyn v. Smith, an Illinois appellate court applied the Time "actual malice" standard to a false light claim brought by the executive director of an abortion clinic.156 The director’s complaint alleged intentional infliction of emotional distress, libel, and invasion of privacy in the form of the false light tort.157 The court upheld her cause of action for the intentional infliction of emotional distress, but decided the libel and invasion of privacy actions were properly dismissed in the lower court.158

The defendant in Van Duyn had, on numerous occasions, requested that Van Duyn quit her position as executive director of the clinic;
followed Van Duyn in her car; interfered with her getting in and out of the local airport; picketed her residence and the clinic at which she worked; confronted her at her residence and at the clinic; and distributed a wanted poster in conjunction with a "Face the American Holocaust" poster to Van Duyn's friends, neighbors, and acquaintances near her home.\(^{159}\) The wanted poster included statements that Van Duyn was wanted for murder in violation of the Hippocratic Oath,\(^{160}\) participated in killing for profit, presided over 50,000 killings, and used as a weapon a "small round suction machine that tears the developing child limb from limb."\(^{161}\) The "Face the American Holocaust" poster contained pictures of aborted fetuses of about 5-7 months gestational age.\(^{162}\) Under each picture a "cause of death" was listed such as salt poisoning and total dismemberment.\(^{163}\) The poster also contained information describing the discovery of some 17,000 fetuses stored in a three-and-a-half ton container in California, but failed to link that information to Van Duyn.\(^{164}\)

Regarding Van Duyn's claim of false light, the court determined that *Time* was the applicable case because abortion was a matter of public concern.\(^{165}\) According to the court, therefore, a negligence standard was not proper in this cause of action; instead, Van Duyn was required to satisfy the *New York Times* actual malice standard.\(^{166}\) The court found the false light claim was properly dismissed because Van Duyn had not satisfied this standard; her complaint alleged only a cause of action in negligence.\(^{167}\)

---


160. *See* LUDWIG EDELSTEIN, ANCIENT MEDICINE 6 (Owesi Temkin & C. Lilian Temkin eds. & C. Lilian Temkin trans.) (The Johns Hopkins Paperback ed. 1987) (translating the Hippocratic Oath to read "I will neither give a deadly drug to anybody... [nor] give to a woman an abortive remedy").


162. *Id.* (finding that the posters resembled wanted posters used by the Federal Bureau of Investigation).

163. *Id.*

164. *Id.* at 1016 (noting that there was no cross-referencing within the poster linking Van Duyn to the fetuses).

165. *Id.* at 1016 (rejecting Van Duyn's argument that the *Gertz* standard should apply).

166. Van Duyn v. Smith, 527 N.E.2d 1005, 1016 (Ill. App. 1988). The court noted that the Supreme Court in *Gertz* specifically excluded the *Time* decision from its consideration, therefore, the negligence standard did not apply, even though the false light claim was between two private individuals. *Id.* *See supra* notes 140-44 and accompanying text (discussing New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and the application of the actual malice standard to a false light claim).

167. *Van Duyn*, 527 N.E.2d at 1016 (holding that an "actual malice" standard was not required to maintain a cause of action for intentional infliction of emotional distress and that the allegations were sufficient to state a cause of action on that basis). The court affirmed only the dismissal of the false light claim and reversed the lower court's other holdings, remanding.
The Van Duyn case demonstrates two important points. First, relying on the fact that Time v. Hill held that a private plaintiff must satisfy the actual malice standard when the alleged falsehood is a matter of public concern,\(^{168}\) the Van Duyn court held that abortion is a matter of public concern, therefore, Van Duyn was required to meet that standard in order to bring a successful claim.\(^{169}\) That may be true, but the alleged falsehoods in the wanted posters were not about abortion; they were about Van Duyn.\(^{170}\) The falsehoods at issue were statements implicating Van Duyn as a wanted person because she was a "killer" who violated the Hippocratic Oath.\(^{171}\) Furthermore, these statements, when read in conjunction with the "Face the American Holocaust" poster, in fact connected Van Duyn with the discovery of 17,000 fetuses in a large container in California. The Van Duyn court rejected the notion that the "Face the American Holocaust" poster implicated Van Duyn because the poster did not refer to her, contained no cross-referencing, and dealt with an event that occurred in Los Angeles.\(^{172}\) The fact that these two signs were posted together, however, means the public will see them at the same time. Overall, the Van Duyn court took a superficial glance at the situation and automatically viewed it as a pro-life/pro-choice debate about abortion instead of seeing the real issue: pro-life harassment of the executive director of a clinic where abortions were provided.\(^{173}\)

The Van Duyn court's analysis is important for a second reason. In order to maintain a successful false light claim, a doctor may be required to satisfy the actual malice standard; that is, she or he may have to prove that the pro-life activist responsible for the posters knew the statements were false or acted with reckless disregard of the truth.\(^{174}\) However, the proper standard for a false light cause of

---

for further findings. \textit{Id}.  
169. Van Duyn, 527 N.E.2d at 1016.  
170. \textit{Id.} at 1015 (noting that the wanted poster referred to Van Duyn's practice of abortion).  
171. \textit{Id.} at 1007 (pointing out that the defendant's posters claimed that Van Duyn also violated the Geneva Code).  
172. Van Duyn v. Smith, 527 N.E.2d 1005, 1015 (Ill. App. 1988) (noting that the poignant reference to the 1982 "Woodland Hills Find" of 17,000 aborted fetuses in a large storage container in Woodland Hills, California has been strategically used in an attempt to persuade the middle majority to join the anti-abortion leagues).  
173. \textit{Id.} at 1012.  
action should be a negligence standard as already applied by many states in defamation claims involving private plaintiffs.\textsuperscript{175}

As the \textit{Van Duyn} court noted, the Supreme Court excluded the \textit{Time} decision from its consideration in \textit{Gertz}, but that is because a false light claim was not before it.\textsuperscript{176} The exclusion in no way affirms that the \textit{Time} standard must apply to false light claims involving private plaintiffs.\textsuperscript{177} Just as Justice Powell was concerned that many deserving defamation plaintiffs would be unable to meet the exacting actual malice standard,\textsuperscript{178} so too are many deserving false light plaintiffs unable to meet the standard. There simply is no logic behind a lower standard for defamation; the reasoning in \textit{Gertz} applies just as well to a false light claim.

First, in \textit{Gertz}, the Supreme Court held that because private individuals characteristically have less effective opportunities for rebuttal than do public figures, they are more vulnerable to injury from defamation.\textsuperscript{179} It follows that private citizens are just as susceptible to injury from matters placing them in a false light. Furthermore, private plaintiffs making false light claims have no more voluntarily exposed themselves to injury than a private defamation plaintiff.\textsuperscript{180} Finally, no intelligible reason can be given to explain why the state's interest in compensating a violation of one's right to be left alone is any less important than the interest in compensating an injury to one's reputation.\textsuperscript{181} The false light claim is aimed at protecting the plaintiff's dignity.\textsuperscript{182} As one defender of the negligence standard explained:

While the private person's reputation may not be subject to as much harm by the publication of a falsehood as that of a public person, the damage to a private person's dignity can be subject to an exponentially greater harm because that person never sought the limelight in the first place. The sense of embarrassment is

\begin{itemize}
\item \textsuperscript{175} See infra notes 227-59 and accompanying text (discussing why doctors should be considered private plaintiffs and not public figures).
\item \textsuperscript{177} \textit{Id.} at 348.
\item \textsuperscript{178} \textit{Id.} at 349 (noting the need to balance the competing interests of the protection of individual privacy with the First Amendment).
\item \textsuperscript{179} \textit{Id.} at 344. The Court noted, however, that even a mere opportunity to rebut a falsehood rarely undoes the harm inflicted. \textit{Id.} at 334 n.9.
\item \textsuperscript{180} Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) (holding that this element weighed in the totality even more than the chance for rebuttal).
\item \textsuperscript{181} \textit{Id.} at 345.
\item \textsuperscript{182} Lasswell, supra note 133, at 175.
\end{itemize}
compounded by the fact that the plaintiff has been presented in a highly offensive manner.\textsuperscript{188} Because a false light claim is just as important as a defamation claim, private plaintiffs should be afforded a lower standard in order to properly remedy a violation of the right to be left alone. In \textit{Van Duyn v. Smith}, therefore, the Illinois court should not have affirmed the dismissal of the false light claim. As this case demonstrates, without the lower negligence standard, many deserving doctors will simply have no redress for the harm caused by pro-life publications of offensive material placing them in a false light.

Although such a lower negligence standard would be much easier for a doctor to satisfy, there are some avenues a doctor could pursue in order to meet the actual malice standard. One type of claim could center on the number of abortions a targeted doctor is said to have performed.\textsuperscript{184} Actual malice would be proven by evidence showing that the defendant made no effort to verify the number or demonstrating that the defendant purposefully exaggerated the numbers. A doctor could also focus on the "modus operandi" described in many wanted posters, if he or she could show the descriptions to be those of commonly known outdated procedures.

A false light claim could be a significant weapon for doctors in the battle against pro-life exposure. The elements are not impossible to meet, and good argument can be made that the actual malice standard should be lowered to a negligence one. If a doctor is in fact successful in maintaining a false light cause of action and damages are awarded, a pro-life activist may think twice before placing false statements on wanted posters portraying a certain doctor's name and photograph.

D. Public Disclosure of Private Facts

A third invasion of privacy action is the tort of public disclosure of private facts.\textsuperscript{185} This tort creates a cause of action for the offensive

\textsuperscript{183} Lasswell, \textit{supra} note 133, at 161.

\textsuperscript{184} For example, in \textit{Van Duyn}, the wanted poster stated that Van Duyn had "presided over 50,000 killings." 527 N.E.2d at 1007. It would be relatively easy to show that number false. Van Duyn could satisfy the actual malice standard by showing the author had acted in reckless disregard of the truth by not verifying the number or by exaggerating the number to an outrageous amount knowing the figures to be inaccurate.

\textsuperscript{185} Thirty-four jurisdictions recognize the private facts tort. See MASS. ANN. LAWS 214, § 1b (Law. Co-op. 1986 & Supp. 1995); R.I. GEN. LAWS § 9-1-28.1 (1985 & Supp. 1994); WIS. STAT. ANN. § 895.50 (West 1983 & Supp. 1994); Johnson v. Evening Star Newspaper Co., 344 F.2d 507, 508 (D.C. Cir. 1965) (per curiam) (holding that a newspaper's publication of plaintiff's name, address and other identifying information as part of an account that plaintiff has been cleared of criminal charges did not constitute an invasion of privacy); Boyd v. Thompson Newspaper
publicity of any truthful private information about the plaintiff.185

According to the RESTATEMENT (SECOND) OF TORTS, the private facts

---

tort is limited to publicity given to private matters that would be highly offensive to a reasonable person and to information that is not of legitimate concern to the public.\textsuperscript{187}

A doctor who performs abortions could use this tort to bring a claim against pro-life activists for the publicity given to his or her private life through the distribution of wanted posters.\textsuperscript{188} While a false light claim would focus on the poster's falsities, such as inflammatory language that describes the doctor as a "killer" or the fraudulent number of abortions she or he has performed, a private facts cause of action would concentrate on the truthful information highlighted in the poster. A doctor could bring a private facts claim if pro-life activists distributed wanted posters detailing information about unrelated charges against the doctor, such as any malpractice suits that may have been brought.\textsuperscript{189} Likewise, a doctor could bring a private facts claim if pro-life activists published personal information about the doctor, such as the fact the doctor performs abortions; his or her home address, phone number, and car tag number; and places the doctor frequently visits.

A pro-life activist would be subject to liability for invasion of the doctor's privacy if the information publicized would be highly offensive to a reasonable person and is not of legitimate concern to the public.\textsuperscript{190} In the case of a rap sheet type of wanted poster, the thrust of the message is that the doctor is a negligent physician because of the number of malpractice suits brought against him or her.\textsuperscript{191} These wanted posters may also depict the doctor as a lawbreaker by announcing any criminal charges that have been brought against him or her, such as criminal negligence or failure to keep proper drug records.\textsuperscript{192} A typical poster will detail any suit or

\textsuperscript{187} \textsc{Restatement (Second) of Torts} § 652D (1977). "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." \textit{Id.}

\textsuperscript{188} See infra Appendix B (describing a typical wanted poster).

\textsuperscript{189} See supra part I.B (describing the "No Place to Hide" campaign's use of wanted posters containing alleged malpractice claims).

\textsuperscript{190} See \textsc{Restatement (Second) of Torts} § 652D (1977) (stating that the information must be both highly offensive and of no legitimate concern to the public in order to constitute an invasion of privacy).

\textsuperscript{191} See \textsc{Sherlock, supra} note 14, at 4-1 to 4-10, 10-2 to 10-3 (instructing anti-abortion activists to publicize malpractice cases against abortion providers). See also Nancy Cleveland, \textit{Abortion Wars: Confronting Doctors; Many Buckle Under Pressure}, \textit{San Diego Union Trib.}, Feb. 6, 1993, at A1 (describing efforts by anti-abortion groups to publicize malpractice suits brought against doctors who perform abortions).

\textsuperscript{192} See \textsc{Sherlock, supra} note 14, at 5-1 to 5-8 (instructing anti-abortion activists to uncover the criminal records of doctors who perform abortions).
charge, even if the doctor was not found liable, if the charges were dropped, or if the case was settled.\textsuperscript{193}

Given the standard for invasion of privacy set forth in the \textsc{Restatement (Second) of Torts},\textsuperscript{194} the information made public in pro-life wanted posters seems to be exactly the type of public disclosure at which the private facts tort is aimed. It may be difficult, however, for a doctor to base a private facts claim on this type of information, because it may not satisfy all of the elements of a private facts tort. Although a typical wanted poster would likely be considered a public disclosure,\textsuperscript{195} a wanted poster may not be considered an invasion of privacy since, for reasons of consumer protection, the public arguably has a legitimate interest in the matters publicized. Therefore, the doctor's private facts claim would not satisfy subsection (b) of the \textsc{Restatement}'s invasion of privacy standard, which requires that the information be of no legitimate concern to the public.\textsuperscript{196}

On the other hand a doctor may argue that only successful malpractice claims and convictions of criminal activity are of real importance to the public. The fact that a doctor may have twenty malpractice claims pending against him or her has little significance, unless the doctor is found negligent or reckless. In fact, some pro-life activists have brought frivolous malpractice claims against doctors in order to injure their reputations, and then in turn,\textsuperscript{197} use the allegations as evidence that the doctor is a dangerous physician.\textsuperscript{198} Even if the material announced in a wanted poster is of "no legitimate interest" and, therefore, satisfies subsection (b) of the \textsc{Restatement}'s invasion of privacy standard, the poster may still not meet the

\textsuperscript{193} See infra Appendix B (describing the charges made in a typical wanted poster).

\textsuperscript{194} \textsc{Restatement (Second) of Torts} § 652D (1977) (providing that the information constituting invasion of privacy must be both highly offensive and of no legitimate concern to the public).

\textsuperscript{195} See \textit{id.} at cmt. a (defining publicity to mean a "matter \ldots made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Thus, the standard for what constitutes "publication" is relatively low. In at least some jurisdictions, a private communication between a few people is sufficient.).

A poster probably would be considered a "public disclosure," given pro-life efforts to distribute many flyers so that the community knows about the practices of abortion providers. See OR's No Place to Hide, \textit{supra} note 15. Wanted signs are often posted and distributed in and around a doctor's neighborhood including schools and shopping, while posters, listing a doctor's malpractice record, among other things, often are distributed to women and their families and friends as they enter and exit clinics where abortions are performed. ATLANTA PRO-CHOICE ACTION COMMITTEE, ENCOURAGEMENT AND PROMOTION OF MURDER BY ANTI-ABORTION ACTIVISTS 1 (1993) [hereinafter APAC].

\textsuperscript{196} \textsc{Restatement (Second) of Torts} § 652D(b) (1977).

\textsuperscript{197} Rochelle, \textit{supra} note 27, at 10 (describing attempts by anti-abortion groups to bring malpractice suits against doctors to prevent them from performing abortions).

\textsuperscript{198} Rochelle, \textit{supra} note 27, at 10.
requirements of a private facts tort. Although a reasonable person would be likely to find such information highly offensive, the facts disclosed may not be considered private facts because they are matters of public record. However, given the current climate surrounding the abortion debate, compelling arguments can be made to protect such information regarding doctors. Thus, a doctor may have a difficult time recovering when his or her private facts cause of action is focused on public information about civil claims or criminal charges against him or her.

However, a doctor has a greater opportunity at making a successful private facts claim if she or he focuses on the personal information publicized in the wanted poster such as his or her name and the identification of him or her as a doctor who performs abortions. A doctor who bases a private facts tort cause of action on the private details of his or her life will likely be more successful in proving his or her claim because the elements of the tort are easier to meet. Just as with the wanted posters which read like rap sheets, the publicity requirement would be plainly met. Moreover, since the focus of the claim would be personal material, a doctor would not be concerned with the question of whether the information is in fact private. Given the increase in violent incidents against doctors in recent years, most doctors fervently try to conceal their names and identities. Most doctors who perform abortions have unlisted phone numbers, many drive several different cars to the clinics where they work, and some even wear disguises when entering the clinic.

199. See, e.g., Sherlock, supra note 14, at Forward ("It took me quite a while to cut through the cobwebs, the fog and the red tape surrounding the public records, but once I did, I was pleasantly surprised ... "). The U.S. Supreme Court has held that where matters of public record are made public, such publicity does not constitute an invasion of privacy. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 493-95 (1975) ("There is no liability when the defendant merely gives further publicity to ... facts which are matters of public record ... .") (citation omitted).

200. See supra note 125 and accompanying text (claiming that the number of doctors who perform abortions is rapidly declining). See, e.g., Diane Hurth, Pensacola Haunted by History of Violence in Abortion Debate: Life and Death: Violence and the Anti-Abortion Movement, SUN-SENTINEL, July 23, 1995, at A1 (reporting that threats of violence against abortion providers have continued in Pensacola since Dr. Gunn's murder); Deborah Schoch, Frightened Physicians Staying of Florida Prompts Local Debate Over 'Wanted' Flyers Used by Abortion Foes, L.A. TIMES, Mar. 21, 1993, at B3 (describing targeted doctors fear of violence by abortion foes).

201. See infra appendix B (describing the contents of typical wanted posters).


203. See id. at cmt. a (defining publicity).

204. State Report-California: Bay Area Docs Fear, Harassment, Violence, American Political Network, Inc., Abortion Report, Mar. 24, 1993, available in Westlaw, APN-AB database [hereinafter "APN-AB State Report"] (quoting a Northern California abortion provider who claimed that doctors have been keeping lower profiles since Dr. Gunn was murdered).

205. APAC, supra note 195, at 3.
Therefore, any publicity given to a doctor's identity or the dissemination of any information revealing his or her name could easily be viewed as a disclosure of a private fact. The private facts tort is limited, however, to those matters that are highly offensive to the reasonable person and are of no legitimate concern to the public. A reasonable person may not find the publication of his or her name, address, telephone number, and occupation highly offensive. However, when such information is disclosed along with inflammatory information about the doctor, including unproven allegations described in gruesome language, a reasonable person may indeed be offended.

Finally, such private information would be of no legitimate concern to the public. The substance of the abortion debate is certainly of legitimate interest to the public and therefore deserves full publicity. However, private information about individual doctors performing the abortion procedure does not similarly merit such publicity. These physicians vigorously try to keep out of the public eye, and they do not openly involve themselves in the debate. Therefore, their private lives, especially details outside the medical duties as physicians, are of no legitimate concern to the general public.

Wanted posters publicizing doctors who perform abortions have yet to be the subject of an invasion of privacy suit. However, as National Bonding Agency v. Demeson demonstrates, at least one case involving a wanted poster and the private facts tort confirms that bringing such a suit can be successful. In National Bonding Agency v. Demeson, the Texas Court of Appeals held that the publication of a wanted poster constituted an actionable intentional invasion of the

---

207. See id. (listing the elements for the tort of invasion of privacy).
208. See, e.g., Peter Eisler, Videotape: Latest Weapon Against Clinic Violence, SALT LAKE TRIB., Aug. 21, 1994, at A15 (reporting that Planned Parenthood publicized a video in which anti-abortion leaders preach violence in order to underscore the threat posed by groups like Operation Rescue).
210. See APN-AB State Report, supra note 204 (describing efforts by abortion providers to avoid publicity).
211. See infra notes 315-16 and accompanying text (discussing why a doctor's private life is of no legitimate concern to the public).
right to privacy. Demeson, the plaintiff in the case, brought suit against a bonding agency for publicly disclosing private facts about her in a wanted poster. The poster in question contained a picture of Demeson, described her as a bond jumper, and referred to her sexual habits. A jury awarded Demeson damages and court costs for the invasion. National Bonding Agency appealed, claiming that Demeson stated no cause of action. The court disagreed and held that Demeson not only stated, but proved an intentional invasion of privacy claim, and the court affirmed the judgement and damages award.

Demeson is important because it recognized and awarded a plaintiff damages for the private facts tort in connection with a wanted poster. Unfortunately, however, the case sheds little light on the proper analysis of the private facts elements. Because the intrusion and false light claims were grouped with the private facts claim, the Demeson court reached its decision without addressing the elements of any of the torts.

Furthermore, the case did not discuss three defenses that are often asserted by defendants facing private facts claims. First, a defendant often argues that the plaintiff is a public figure and, therefore, that any publicity about the plaintiff is not actionable. Second, a defendant in a private facts suit often claims that the information publicized is newsworthy and that, therefore, the disclosure is not only acceptable, but necessary. Finally, closely related to this newsworthiness argument is a defense based on the First Amendment; that is, a defendant often claims that he or she has a constitutional right to

---

214. Id. at 750.
215. Id. She also brought intrusion upon seclusion and false light claims. Id. at 749 n.2. The court grouped all three of the privacy claims together addressing them as an allegation of intentional invasion of the right of privacy. Id.
216. 648 S.W.2d at 749 n.1 (describing the wanted poster at issue).
217. Id. (awarding the plaintiff $90,500 in actual damages and $75,000 in exemplary damages).
218. Id. at 749.
219. Id. (underscoring that Texas recognizes an enforceable right of privacy).
220. Id. at 750.
222. Id. at 749 (recognizing the existence of an invasion of privacy tort without elucidating a particular invasion of privacy standard).
223. Id. at 749-50 (consolidating the three invasion of privacy tort claims).
225. See, e.g., Forsher v. Bugliosi, 608 P.2d 716, 726 (Cal. 1980) (suggesting that newsworthiness is a defense to an invasion of privacy).
publicize this information.\footnote{226} Each of these three defenses will be analyzed in detail below.

1. Public Figure Defense

The Supreme Court has stated that "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures . . . "\footnote{227} Public figures generally have assumed roles of special prominence in the public's affairs and in the resolution of public questions.\footnote{228} There are two distinct categories of public figures: the all purpose public figure and the limited purpose public figure.\footnote{229} The all purpose class includes those who occupy positions of great persuasive power and influence,\footnote{229} while the limited purpose group includes those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."\footnote{231} Furthermore, it may be possible for someone to become a public figure involuntarily, but such instances "must be exceedingly rare."\footnote{232}

Applying this definition of "public figure," practicing medicine does not in itself make a doctor a public figure.\footnote{233} Doctors do, however, have many opportunities to become involved in the determination of controversial issues, making them subject to the possibility of being deemed a limited purpose public figure.\footnote{234} Cases involving doctors vary widely on the question of whether they are public figures.\footnote{235} Indeed, one media attorney declared that determining who is a public figure is, at best, "an inexact science."\footnote{235} Decisions differ based on jurisdiction, and the resolution is very fact-specific.\footnote{237}

\footnote{226} See, e.g., id. at 725 (recognizing that the right to privacy must often be subordinated to the First Amendment).
\footnote{227} Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (holding that a newspaper cannot claim a constitutional privilege against liability in a defamation suit where plaintiff was not a public figure).
\footnote{228} Id. at 345, 351.
\footnote{229} Id. at 351.
\footnote{230} Id. at 345.
\footnote{231} Id.
\footnote{232} Gertz, 418 U.S. at 345.
\footnote{233} See Harry Stonecipher & Don Sneed, A Survey of the Professional Person as Libel Plaintiff: A Reexamination of the Public Figure Doctrine, 46 ARK. L. REV. 303, 322 (1993) (analyzing whether doctors' medical duties render them public figures).
\footnote{234} Id.
\footnote{235} See id. ("[A] review of thirteen reported libel cases brought by doctors . . . indicates that six plaintiffs were found to be public figures, four were found not be public figures . . . and three others were stipulated to be private figures without further comment.").
\footnote{236} Id. at 304 n.10 (citing ROBERT SACK, SLANDER, LIBEL, AND RELATED PROBLEMS, 204 (1980)).
\footnote{237} Id. at 305.
For example, the Supreme Court of Alaska held that a practicing obstetrician who voluntarily pursued an appointment to the state medical board was a limited purpose public figure. After learning of the plaintiff's potential appointment, Alaska Right-to-Life published an article making several allegations about the doctor's abortion practices. Because the qualifications of the doctor as a potential appointee was subject to public attention and comment, she was deemed a limited purpose public figure. In another case, a doctor involved in a public controversy concerning the medical mistreatment of a patient was held not to be a limited purpose public figure, although he had voluntarily given a television interview. The court determined there was no evidence that the plaintiff had assumed a position of prominence in the publicity surrounding the alleged mistreatment, and the doctor had not invited public attention to himself in an effort to influence others.

As evidenced by these cases, it is difficult to determine whether a doctor is in fact a public figure. With the exception of the Surgeon General, it is highly unlikely a doctor will be held an all purpose public figure. In the case of most, if not all, doctors who perform abortions, it is easy to identify them as private individuals, given their vigorous attempts to remain unknown.

---

238. Moffatt v. Brown, 751 P.2d 939, 941 (Alaska 1988) (suggesting that the doctor's limited purpose was in her capacity as a potential appointee to the medical board which placed her in a position of public attention).
239. Id. at 940. The article called the doctor an "abortionist" and claimed that her "methods were so horrible as to cause a boycott by everyone employed" at the hospital in which she worked. Id.
240. Id. at 941. The plaintiff's libel action against the author of the article labeling her as "an abortionist was, therefore, dismissed." Id. at 946.
242. Id. at 169-70.
243. See Stonecipher & Sneed, supra note 233, at 306-07 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) which defined a public figure as a person with notorious achievements or who vigorously and successfully seeks the public's attention, and which defined an all purpose public figure as a person who occupies a position of "such persuasive power and influence that [she is] deemed [a] public figur[e] for all purposes"). The Surgeon General satisfies the definition of an all purpose public figure because she is nominated by the President of the United States to oversee issues of and promote public health concerns throughout the country. See Baby Doctors-in-Chief, LOS VEGAS REVIEW JOURNAL, Feb. 12, 1995, at C2 (describing the Surgeon General's "enormous" public role).
244. See, e.g., Stonecipher & Sneed, supra note 233, at 322 & nn. 122-23 (citing Renner v. Donsbach, 749 F. Supp. 987 (W.D. Mo. 1990) which held that, while the doctor was a public figure, this status only applied to a limited range of issues).
245. See APB-AB State Report, supra note 204, at *1 (reporting that doctors vigorously attempt to maintain their privacy).
246. See APB-AB State Report, supra note 204, at *4 (describing efforts by doctors to avoid publicity).
regarding their work at particular clinics. It would be difficult, therefore, to demonstrate that a doctor who attempts to conceal his or her identity is a limited purpose public figure, because she or he has not intentionally put him or herself at the forefront of a particular public controversy in order to influence the resolution of the issues involved.

On the other hand, pro-life activists could argue that doctors who perform abortions are at the heart of the abortion debate and that they are therefore limited purpose public figures. However, while these doctors might provide abortions, most of them try to avoid controversy, and generally do not participate in the open debate to try and motivate a settlement of the problems. Instead, many doctors who perform abortions do so to provide a much needed medical service, not to try to resolve the debate. Although some doctors may in fact be activists within the medical community, their activities may not be enough to cause them to be public figures.

Finally, doctors should not be deemed involuntary public figures. Pro-life activists try to publicize and expose doctors, but this should not be the "exceedingly rare" case where an individual unwillingly becomes a public figure. The Gertz Court reasoned that generally individuals become public figures voluntarily. Therefore, given doctors' efforts to remain unidentified, they should be protected.

If a doctor is deemed a public figure, it is not clear whether a private facts claim will be completely barred, or if the plaintiff will have to prove some form of the actual malice standard for the defendant.

247. APAC, supra note 195, at 3.
249. See APN-AB Florida Report, supra note 209 (underscoring efforts by abortion providers to remain out of the public eye).
250. See Booth supra note 2, at A3 (presenting the opinion of a doctor who refused to stop performing abortions in spite of the increase in terrorist activities against abortion providers).
251. See Georgia Society of Plastic Surgeons, Inc. v. Anderson, 363 S.E.2d 140, 142 (Ga. 1987) (holding that a doctor was not a public figure even though he was involved in a controversy about whether certain medical specialists should perform plastic surgery). The court reasoned that the debate was merely a private controversy within the medical profession and, therefore, the doctor was not a public figure. Id. Based on this holding, the fact that a doctor may be an activist only within the medical community and not within the general public may be an important factor in determining whether she or he is a public figure.
252. See Gertz, 418 U.S. at 345.
253. Id.
254. See APN-AB Florida Report, supra note 209, at *4 (explaining that abortion providers make vigorous efforts to remain anonymous).
255. See New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (striking down an Alabama rule that malice is presumed in libel actions brought by public officials against critics). The standard requires a plaintiff to show the defendant in a defamation case acted with knowledge that the statement was false or with reckless disregard of whether the statement was false. Id.
to be liable.\textsuperscript{256} Even if a doctor is required to prove the disclosure was done with malice, he or she can probably meet this burden. When discussing their exposure campaigns, many pro-life activists refer to driving a particular doctor out of business or making his or her life so unbearable that she or he quits performing abortions.\textsuperscript{257} Even if a doctor is deemed a public figure, she or he can demonstrate malice if anti-abortion activists try to intimidate him or her since such activity is aimed particularly at the doctor and is intended to cause some injury.\textsuperscript{258} However, given the fervent efforts by doctors who perform abortions to remain out of the public’s eye,\textsuperscript{259} they should not be considered public figures.

2. \textit{Newsworthy Defense}

Generally, a successful private facts plaintiff is able to show that the publication of the private information was of no legitimate concern to the public by demonstrating that the issue in question was not newsworthy.\textsuperscript{260} What constitutes “newsworthy” information is difficult to determine, as evidenced by the fact that most states have not adopted explicit definitions.\textsuperscript{261} Courts have taken different approaches to the determination of newsworthiness, including balancing of First Amendment rights with the privacy interests and designating certain types of information as “per se newsworthy,” while other subjects are considered private.\textsuperscript{262}

\textsuperscript{256} Compare \textit{Gilbert v. Medical Economics Co.}, 665 F.2d 305, 307-08 (10th Cir. 1981) (holding there is a privilege barring a private facts cause of action against a public figure absent “extreme cases”) with \textit{Kinsey v. Macur}, 107 Cal. App.3d 265, 273 (1980) (recognizing same privilege but alluding to the possibility of recovery upon a showing of actual malice).

\textsuperscript{257} \textit{See Morning Edition: Radical Anti-Abortion Movement Leaders Meet This Week} (NPR radio broadcast, Aug. 11, 1994) (1994 WL 8690168) (explaining that the strategy of the American Coalition of Life Activists is to intimidate doctors into quitting their practices of performing abortions).

\textsuperscript{258} \textit{See id.} (reporting that anti-abortion leaders intend to make the lives of abortion providers so unbearable that they will be driven out of business).

\textsuperscript{259} \textit{See APN-AB Florida Report, supra note 209, at n4} (noting the efforts made by abortion providers to avoid the public eye).

\textsuperscript{260} \textit{See, e.g., Forsher v. Rugliosi}, 608 P.2d 716, 726 (Cal. 1980) (applying the idea that newsworthy information is of legitimate concern to the public).

\textsuperscript{261} Diane L. Zimmerman, \textit{Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort}, 68 CORNELL L. REV. 291, 299-301 (1983) (noting that the concept of newsworthiness is inherently vague and that the \textit{RESTATEMENT’S} definition of the right to privacy offers little guidance to courts for determining what is newsworthy).

\textsuperscript{262} \textit{See Christine Hart, Note, Y.G. v. Jewish Hospital of St. Louis: Breathing Life into the “Disclosure of Private Facts” Tort, 35 ST. LOUIS U.L.J. 931, 943 (1991)} (explaining that in order to determine whether a topic is newsworthy some courts have focused exclusively on the press’ First Amendment rights; other courts have focused primarily on privacy rights; still others have used a balancing test; and others have carved out particular realms of information as \textit{per se} newsworthy).
The Supreme Court has not directly addressed the private facts tort; however, two decisions implicating the private tort suggest that the Court likely would follow a balancing approach to determine whether a topic is newsworthy. In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court faced a private facts situation, but rather than addressing the broader issue of whether truthful publications of private facts may ever subject the publisher to liability consistent with the First Amendment, the Court focused on the narrower issue of whether a state may impose sanctions for the accurate publication of a rape victim's name legally obtained from public records. The majority began its discussion by noting the important role the press plays in reporting the proceedings and administration of government. Regarding judicial proceedings, the Court discussed the significant function of the press in guaranteeing fairness of trials and "bring[ing] to bear the beneficial effects of public scrutiny upon the administration of justice." The Court concluded that because "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff which

263. Cf. *Time v. Hill*, 385 U.S. 374, 384 n.7 (1967) (recognizing the possibility of tort liability for the publication of the truth: "This limitation to newsworthy persons and events does not of course foreclose an interpretation of the statute to allow damages where 'Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency'" (citing *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir.), cert. denied, 311 U.S. 711 (1940)).

264. See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding that where a newspaper publishes truthful information lawfully gathered, damages may be awarded only when liability is narrowly tailored to further a state interest of the highest order); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that a state may not impose sanctions on the accurate publication of the name of a rape victim obtained from public records).


266. *Id.* at 491. The defendant broadcast corporation televised a report about how the plaintiff's daughter, the rape victim, did not survive the attack. *Id.* at 496. The broadcast used the victim's full name, in violation of a Georgia statute that made it a misdemeanor to report the names of rape victims. *Id.* The defendant's report was based on notes a reporter took during criminal proceedings against the rapist and from copies of the indictments the reported obtained during a recess in the hearing. *Id.* Plaintiff brought suit for, among other things, invasion of privacy in violation of the Georgia statute. *Id.*

267. *See id.* at 497-500 (Powell, J., concurring) (explaining how the Court's past treatment of defamation law differed from the view expressed by the majority). Justice Douglas also wrote a separate concurring opinion arguing that the Court should have taken a much broader approach in order to find that "there is no power on the part of government to suppress or penalize the publication . . . of 'any matter of sufficient general interest to prompt media coverage.'" 420 U.S. at 501, 501 n.8 (Douglas, J., concurring) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 357 n.6 (1974)). By allowing the First Amendment to be accommodated by individual state interests, Douglas believed that the majority had raised "a specter of liability which must inevitably induce self-censorship by the media, thereby inhibiting the rough-and-tumble discourse which the First Amendment so clearly protects." *Id.* at 501 n.8. Justice Rhenquist dissented on the grounds that the Court lacked jurisdiction because the decision below was not a final judgment or decree. *Id.* at 501-512 (Rhenquist, J., dissenting).

268. *Id.* at 491-492.

269. *Id.* at 492.
is already public," the dissemination of public record information is outside the realm of the private facts tort.270

Finally, the Court explained that, by definition, information in the public records are part of the public domain and serve the purpose of informing those who are interested in the administration of government.271 The Court refused to distinguish certain public record information as being non-publishable because it could potentially offend the sensibilities of a reasonable person.272 According to the Court, to make such a rule would put a difficult burden on authors to decide what is legally important enough to publish, would invite self-censorship, and would likely lead to the suppression of many newsworthy items.273

The Supreme Court was again faced with the publication of a rape victim's name in Florida Star v. B.J.F.274 The facts in this case were a bit different from those in Cohn. The published report using the victim's full name violated a state statute but, unlike Cohn, the report was based on a publicly released police report rather than judicial proceedings.275 Cohn was not controlling in the case because an essential basis for the Cohn decision was the press's important role in subjecting trials to public scrutiny and helping to guarantee their fairness.276 No such role was at issue in Florida Star because the rape victim was identified at a time when there were no proceedings at stake.277 The majority278 rested its opinion on the precedent set forth in Smith v. Daily Mail Publishing Co.:279 "[I]f a newspaper lawfully obtains truthful information about a matter of public

271. Id. at 491-92.
272. Id. at 496.
273. Id.
275. See id. at 527-28 (stating that the newspaper violated its own policy by publishing the name of a sexual offense victim). The reporter for the Star who copied the information from the report acknowledged at trial that there were signs posted in the room where he obtained the report noting the names of rape victims were not matters of public record and were not to be published. Id. at 546 (White, J., dissenting).
276. Id. at 532 (citing Cohn, 420 U.S. at 492-93).
278. See id. at 542 (Scalia, J., concurring) (stating that no damages could be imposed on the newspaper because the Florida statute was underinclusive: it did not prohibit dissemination of such private news by individuals). Justice Scalia concluded that subjecting only the media to the prohibition did not protect an "interest of the highest order," and therefore could not meet the constitutional standard required. Id. Justice White wrote a dissenting opinion in which Justices Rehnquist and O'Connor joined. Id. at 542-53 (White, J., dissenting). His opinion will be discussed at length below.
279. 443 U.S. 97, 103 (1979) (holding unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish the name of any youth charged as a juvenile offender without the juvenile court's written approval).
significance[,] then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."\textsuperscript{280} There was no question in \textit{Florida Star} that the reporter had lawfully obtained the information, and there was no issue as to the accuracy of the report.\textsuperscript{281} The question the Court was faced with, then, was whether prohibiting the publication of a rape victim’s name was furthering a “state interest of the highest order.”\textsuperscript{282} Given “the overarching ‘public interest, secured by the Constitution in the dissemination of truth,’”\textsuperscript{283} the Court ultimately concluded that the Florida statute did not reflect such a state interest.\textsuperscript{284}

The majority discussed three distinct reasons why the First Amendment principle articulated in \textit{Daily Mail}\textsuperscript{285} should be supported.\textsuperscript{286} First, the Court pointed out that under the \textit{Daily Mail} principle, governments retain ample means of safeguarding significant privacy interests by keeping such information from the public and imposing damages on those officials who, through mishandling, allow the release of such information.\textsuperscript{287} Second, the Court explained that punishing the press for publication of information that is already available to the public would not protect privacy interests.\textsuperscript{288} Finally, the Court expressed its concern about “‘timidity and self-censorship’ that might result from allowing the media to be punished for publishing certain truthful information.”\textsuperscript{289} Noting the \textit{Cohn} Court was concerned about the context of official court records, the Court

\textsuperscript{281} Id. at 536.
\textsuperscript{282} Id. (stating that this case is appropriately analyzed with reference to the \textit{Daily Mail} standard).
\textsuperscript{283} Id. at 433 (quoting Cohn, 420 U.S. at 491).
\textsuperscript{284} Id. at 541.
\textsuperscript{285} 491 U.S. at 533 (“[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information absent a need to further a state interest of the highest order.”) (quoting Smith v. Daily Mail, 443 U.S. 97, 103 (1979)). But see id. (White, J., dissenting) (questioning whether this principle is really nothing more than a hypothesis offered by the \textit{Daily Mail} Court). Given the fact that this “principle” was introduced “with the cautious qualifier that such a rule was ‘suggest[ed]’ by . . . prior cases, ‘[n]one of [which] . . . directly control[led]’ in \textit{Daily Mail},’” the majority “should not be so uncritically accept[ing] [of \textit{Daily Mail}] as constitutional dogma.” Id. at 545 (citing \textit{Daily Mail}, 443 U.S. at 103).
\textsuperscript{286} Id. at 534-36.
\textsuperscript{287} Id. at 534 (“Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.”)
\textsuperscript{289} Id.
stated that this self-censorship was also a legitimate concern for "other
information released, without qualification, by the government."290

Once it established that the Daily Mail principle was a legitimate
one, the majority applied the principle to the statute at hand.291
First, the Court pointed out that the government's distribution of the
release can only convey the message that publication of the informa-
tion is not only lawful, but expected.292 Next, the Court took
issue with the statute's negligence per se standard, calling for a
reasonable person standard characteristic of the common law private
facts tort.293 Finally, the Court addressed the underinclusiveness of
the statute, explaining that it did not apply to the "backyard gossip
who tells fifty people."294 The majority ended its discussion in a
similar manner with which it began; it recognized the holding as
being limited to the circumstances at hand.295 The Court explicitly
did not answer the broad question left unresolved by Cohn: whether
truthful publications of private facts can ever be subject to civil or
criminal liability consistent with the First Amendment.296 Rather,
the Court held "only that where a newspaper publishes truthful
information which it has lawfully obtained, punishment may lawfully
be imposed, if at all, only when narrowly tailored to a state interest of
the highest order."297 Because the Florida statute at issue did not
serve such an interest, it could not be upheld.298

290. Id. at 536. The dissent took issue with the majority's position that the information at
hand was in fact released without qualification given the statute and given the signs posted in
the room in which the information was made available. Id. at 546 (White, J., dissenting).
291. Id. at 536.
293. Id. at 539 (discussing how under the theory of negligence, liability automatically results
from publication and, unlike common law torts, there is no requirement that the disclosure
about an individual's personal life be highly offensive to a reasonable person). The dissent
pointed out that in this case, the jury found the Star had acted with reckless indifference, a
standard far higher than ordinary negligence, the standard urged. Id. at 548 (White, J.,
dissenting).
294. Id. at 540 (citing B.J.F.'s acknowledgment at oral argument and stating that the statute
does not protect against disclosure of information by means other than publication in an
"instrument of mass communication"). The dissent argued this problem was remedied by
Florida's recognition of the common law private facts tort, so that the gossip would be subject
to the same (or similar) liability as the Star. Id. at 550. (White, J., dissenting).
the recognition that its past decisions upholding the press' right to publish were resolved only
within each factual context. Id. at 530.
296. Id. (stating that the Court does not hold that truthful publication is automatically
protected by the Constitution or that there is no zone of personal privacy that the state can
protect from intrusion by the press).
297. Id. at 541.
298. Id. (holding that there is no state interest served by imposing liability).
Cohn and Florida Star are important cases because they offer insight on what type of material is considered public information and matters of public significance. However, it is important to recognize that both decisions were couched in issues arising from the freedom of the press since the defendants in both cases were newspapers. When a doctor pursues a private facts claim against a pro-life activist, freedom of the press is not at stake because private speech is at issue; therefore, Cohn and Florida Star do not preclude a doctor from bringing an invasion of privacy claim. This is especially lucid given the careful holdings in each case limiting the decisions to specific facts. Regarding a doctor's potential private facts claim, the importance of these cases lies in the Court's analysis of the newsworthy defense, chiefly in regards to information contained in public records.

The newsworthy defense will be an important factor to consider in a doctor's private fact cause of action, because it will be the most compelling argument against him or her. If the claim focuses on a rap sheet type of wanted poster, the defense may be effective at precluding the doctor's success. Malpractice suits and criminal charges are not private facts because they are matters of public record. Given the unquestioned statement in Cohn, which was reiterated in Florida Star, that matters of public record pose no threat to privacy interests because they are, by definition, part of the public domain, a doctor will have a difficult time persuading a

299. Cox Broadcasting, Corp. v. Cohn, 420 U.S. 469, 496 (1975) (holding that once the information is disclosed in public court documents open to public inspection, the press cannot be held liable for publishing it).

300. Florida Star v. B.J.F., 491 U.S. 524, 539 (1989) (stating it is not unlawful for a newspaper to print a rape victim's name when it is furnished by the government and when the matter is one of public concern).

301. See id. (limiting the Court's holding to the facts of the case and refusing to hold that all truthful publications are automatically protected under the Constitution); Cohn, 420 U.S. at 496-97 (holding that under the specific facts of the case, the state cannot impose liability under the First and Fourteenth Amendments).

302. See supra notes 265-75 and accompanying text (discussing the Cohn Court's contention of the importance of the press in disclosing public records to inform the public about the administration of government); supra notes 280-84 and accompanying text (addressing the Florida Star court's discussion of whether disclosure of truthful information already available to the public furthers a state interest).

303. See Sherlock, supra note 14, A-1 (indicating that with this type of wanted poster, the message is that the doctor is a negligent physician because of the number of malpractice suits brought against him or her).

304. See, e.g., Sherlock, supra note 14, at 2-3 (asserting that criminal case files and lawsuit files are public records which individuals have a right to view).

305. 420 U.S. 469, 495-96 (1975) (stating that once truthful information is in public documents, the press cannot be liable for publishing such information).

306. 491 U.S. 524, 535 (1989) (contending that privacy interests are not protected by imposing liability on the press for publication of information that is available to the public).
court that his or her information should somehow be treated differently. The burden is not an impossible one, however, given the limited scope of the holdings in *Cohn* and *Florida Star*.

Both *Cohn* and *Florida Star* explicitly left open the broad constitutional question of whether the media may ever be subject to civil liability for publishing the truth. Instead, both decisions focused on the facts at issue and clearly presented limited holdings. In *Cohn*, the basic foundation for the decision regarding the private facts tort was the important role the media played in accurately reporting the proceedings and administration of the government. The Court cited the need for such reporting so that citizens may vote intelligently. Especially important in *Cohn* was the fact that the information in question was properly gathered in a judicial proceeding. This fact was significant because of the media's role in ensuring the fairness of trials. Furthermore, the focus of *Cohn* was a criminal prosecution, and such a proceeding is "without question" an event of legitimate public concern.

However, none of these issues are implicated in a situation that involves doctors and pro-life activists. Successful malpractice suits are of concern to potential patients, but they are immaterial in helping citizens to vote intelligently and in insuring fair trials. Most wanted posters cite civil suits that have been decided or long settled; therefore, the adversarial proceedings deserving of public scrutiny are

---

307. *Cohn*, 420 U.S. at 491 (stating that the Court is addressing whether the state can impose sanctions for the truthful publication of information obtained in judicial records and not whether truthful publication can ever be subject to civil or criminal liability under the First and Fourteenth Amendments); *Florida Star*, 491 U.S. at 541 (asserting that this case does not hold all truthful publication is automatically constitutionally protected or that there is no zone of privacy that the state can protect from invasion by the press).

308. *Cohn*, 420 U.S. at 496-97 (asserting that under the specific circumstances of the case, liability will not be imposed); *Florida Star*, 491 U.S. at 532 (stating that the "sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.").

309. 420 U.S. at 491-92.

310. *Id.* at 492.

311. *Id.* at 472 (explaining that the information was learned from an examination of the indictments which were made available to reporters in the courtroom and were open to public inspection).

312. *Id.* at 492 (discussing how the reporting of government proceedings by the press helps guarantee the fairness of trials and brings the beneficial effects of public scrutiny on the administration of justice).

313. *Id.* The *Cohn* Court explicitly held the topics of commissions of crimes, prosecutions resulting from them, and judicial proceedings arising from those prosecutions to be "events of legitimate concern to the public," and that the private facts tort probably would never be successful against publications concerning these issues.
no longer at issue. Furthermore, the suits are civil suits, not criminal cases, and are not per se a matter of public concern. They are, however, relevant to the patients who are seeking an abortion and potentially may be under the doctor's care. The problem with the pro-life activists' publication of the suits is the use of inflammatory words and choice of uncommon instances where an injury has occurred. Furthermore, some of the suits may be based only on allegations filed by the pro-life activists themselves.

A doctor fighting a rap sheet will probably find it more difficult to convince a court that malpractice suits and similar charges are not newsworthy. However, if the claim focuses on the personal information contained in a wanted poster, such as a doctor's picture, name, address, and the like, then the arguments against the newsworthy defense are more compelling. First, a doctor's personal information is irrelevant to the administration of the government, voting intelligently, and fairness of trials. In addition, identifying doctors who perform abortions simply is not a legitimate concern of the public; it is the debate surrounding the issue of abortion that deserves publicity.

Moreover, it is unlikely that the Court had these wanted posters in mind when it made its decisions in Cohn and Florida Star. The Court in Florida Star stated that, by giving a news release, the government not only considered the dissemination of the information lawful, it expected the recipients to accurately report the information. Implicit in this assertion is the idea that the recipients would merely convert the release into a news story by "adding the linguistic connecting tissue necessary to transform the report's facts into full sentences." In the wanted posters and rap sheets, however, the authors do much more than fill in the blanks with nouns and verbs to form both subject and predicate. They add gruesome photographs and insert frenzied adjectives and adverbs to draw atten-

314. See generally Sherlock, supra note 14, at A-6 (discussing the various lawsuits filed against abortion providers).
315. See Rochelle supra note 27 (discussing how pro-life organizations want to file malpractice lawsuits against abortion providers but are having difficulty locating plaintiffs).
316. Florida Star v. B.J.F., 491 U.S. 524, 536-67 (1989) (alluding to this point, the Court stated: "[T]he news article concerned a matter of public significance . . . . That is, the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import . . . .") (emphasis added) (internal citations omitted).
317. Id. at 538-39.
318. Id. at 538-39.
319. See OR's No Place to Hide, supra note 15 (instructing pro-life supporters to make posters with pictures of aborted fetuses).
tion to a private, law-abiding doctor.\textsuperscript{320} Therefore, the details contained in the typical wanted poster should not be deemed newsworthy information.

3. First Amendment Defense

The First Amendment defense is closely tied to the newsworthy argument. The defendant is not asserting a constitutional right to publish everything about the plaintiff; rather, the argument is that the Constitution permits publicity about those subjects of public significance.\textsuperscript{321} However, on the other side of the argument is the plaintiff's right to privacy. The tension between the "right to be let alone"\textsuperscript{322} and the right to free speech is clearly seen in a private facts claim.\textsuperscript{323}

In circumstances where the Supreme Court has addressed the stress between the right to privacy and the right to free speech, it has upheld the publicity in favor of the First Amendment.\textsuperscript{324} However, it is critical to note that the Court has been careful to emphasize that each decision applied only to the discrete factual context.\textsuperscript{325} Therefore, one cannot make a blanket statement that the right to free speech will always outweigh the right to privacy.

\textsuperscript{320} See Sherlock, supra note 14, at A-1 (asserting that pro-life individuals who make flyers should use "short, active, and disgusting verbs and adjectives to get [the flyer's] message across").

\textsuperscript{321} See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-96 (1975) (discussing the clash between right to privacy claims and First Amendment rights. The Court held that under the First Amendment there is no liability for printing information that was available to the public and that was of public concern.).

\textsuperscript{322} Warren and Brandeis, supra note 94, at 194 (discussing how the press invades the sacred precinct of privacy and domestic life).

\textsuperscript{323} See Zimmerman, supra note 261, at 299-300 (discussing how the \textsc{Restatement (Second)} \textsc{of Torts}, which is heavily relied upon by the courts, requires the plaintiff in a private facts claim to demonstrate that the material is private and that the defendant disseminated the information widely. If the defendant can show that there is a legitimate public interest in the disclosure, he or she can defeat the claim.).

\textsuperscript{324} See Florida Star v. B.J.F., 491 U.S. 524, 532 (1989) (holding that imposing liability on a newspaper for publishing a rape victim's name violates the First Amendment); Smith v. Daily Publishing Co., 443 U.S. 97, 105-06 (1979) (holding that a statute which makes it illegal to publish alleged juvenile delinquent's names in violation of the First Amendment); Cox Broadcasting Corp. v. Cohn, 420 U.S. 496, 469 (1975) (holding that it is a violation of the First Amendment to impose liability on a broadcast company for disclosing a rape victim's identity).

\textsuperscript{325} See Florida Star, 491 U.S. at 524, 530 (contending that the Court's holding is limited to the specific facts of the case. The Court discusses that, although the Supreme Court has continuously upheld the press' right to publish over the right to privacy, it has emphasized in each case that it was "resolving this conflict only as it arose in a discrete factual context."; Smith \textit{v. Daily Mail Publishing}, 443 U.S. 97, 105-06 (stating that the Court's holding only applies to whether a newspaper can publish a juvenile delinquent's name which the newspaper lawfully obtained); Cohn, 420 U.S. at 496 (stating that according to the specific circumstances of the case, imposing liability would be a violation of the First Amendment).
There are few bright-line rules in this area, but at least one general principle can be gleaned from the Supreme Court cases: the publication of truthful information about a matter of legitimate public concern constitutionally may not be punished, absent a need to further a state interest of the highest order. This premise will be applied in a private facts claim only if one key element is not met; that is, the information in question is in fact a matter of public significance. As argued above, details of a doctor's life publicized on a wanted poster are not matters of interest to the general public. However, even if the information is a matter of public significance, a doctor may still be successful if he or she can prove that a state interest of the highest order is furthered.

Given the increasing amount of violence in the anti-abortion movement, especially the current trend targeting doctors, some courts may in fact recognize the state's interest in protecting a doctor's safety in order to ensure reproductive freedom. One major criticism of the private facts tort is that a fear of publicity should not be enough to restrict free speech. This argument is a superficial one, overlooking the important constitutional significance of privacy—both a doctor's right to be left alone and a woman's right to choose to have an abortion. Moreover, in this particular situation, a doctor's safety is at stake, not simply embarrassment or humiliation. The state has a significant interest in protecting its citizens and

326. See Florida Star, 491 U.S. at 541 (holding that, under the facts of the case, there is no state interest in imposing liability); Daily Mail Publishing Co., 443 U.S. at 104 (holding the state's interest is not sufficient to justify imposing liability).
328. See supra note 210 and accompanying text (discussing that the personal details of a doctor's life are of no interest to the general public).
329. See Daily Mail Publishing, Co., 443 U.S. at 105 (asserting that the publication of truthful information can be sanctioned even if the information is lawfully obtained and is of public significance, if there is "a need to further an interest of the highest order").
330. See supra notes 1-2 and accompanying text (discussing the increase in abortion-related violence since 1993).
331. See Zimmerman, supra note 261, at 337 (arguing that "[a] serious effort to enforce a general right to be free of unwanted publicity about private facts would probably be as successful as the attempt to enforce temperance through the ill-fated Eighteenth Amendment, or the effort to use the law to prevent extramarital sexual encounters.").
it should be respected through the protection of a doctor's right to privacy.

In dicta, the Court in *Florida Star* stated that there may be situations when truthful publication can be punished consistent with the First Amendment, noting "that the future may bring scenarios which prudence counsels our not resolving anticipatorily." In addition, the Court did not completely rule out the possibility that public information may still be restricted: "[there] is a limited set of cases . . . where, despite the accessibility of the public to certain information, a meaningful public interest is served by restricting its further release by other entities, like the press."

The Supreme Court has held that the First Amendment is not absolute. As the public interest in the information decreases, it can be argued that the First Amendment interest decreases, especially when balanced against a significant constitutional interest like the right to privacy. Just as "interests in privacy fade when the information involved already appears on the public record," the opposite should be true: interests in privacy expand when the matter in question is kept confidential. Because many doctors fervently try to keep their personal material undisclosed, the privacy interests involved increase to full constitutional proportions. As previously argued, there is little public interest in the doctor's personal information, so the interests in free speech are lessened. Therefore, when balanced against a pro-life activist's right to free speech, a doctor's privacy interests should prevail.

**CONCLUSION**

As of 1988, eighty-three percent of United States counties had no identified abortion provider. The basic cause behind the low numbers of doctors performing abortions is that more doctors are leaving the field than are entering it. Two grounds have been cited for this phenomenon. First, doctors are retiring faster than

---

334. *Id.* at 535 (citing *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)).
337. *See supra* note 210 and accompanying text (discussing that individual doctors' private lives are not matters of public concern).
younger doctors are being trained to perform the service, and secondly, doctors are prematurely leaving the field due to dissatisfaction. Besides the low pay and the poor conditions, one major reason behind the discontent is harassment. Threats of intimidation not only cause early abandonment of the practice, such tactics also discourage young medical graduates from joining the field.

Recently, the harassment of doctors has become more intense. Doctors are not only specifically targeted for intimidation, they are more frequently becoming the victims of violent acts resulting in injury and death. It is true that not all pro-life advocates condone this behavior, but the militant activists have created a climate of fear among doctors who perform abortions. In order to preserve these doctors' safety and the right of a woman to choose an abortion, this behavior should be stopped at the early stages of harassment. Typically, the intimidation of doctors begins with an exposure campaign, aimed at informing the community that a particular doctor performs abortions. The underlying theory behind this new

---

340. Grimes, supra note 125, at 720 (discussing how many of the older clinicians were motivated by their concern for patients who were killed by illegal abortion and explaining that younger clinicians who have not had similar experiences may lack the personal commitment of the older clinicians).
342. Grimes, supra note 125, at 721 (asserting that since the cost of abortion is fairly low and has not increased with inflation, performing abortions does not generate much income for clinicians).
343. Grimes, supra note 125, at 721 (discussing how abortion underutilizes the clinician's skills. The presence of abortion counselors and nurse practitioners, in addition to the rapid flow of patients in clinics, all have depersonalized "the abortion experience" for the clinician since communication with the patient may be very limited.).
344. Grimes, supra note 125, at 721 (stating that harassment of abortion providers has taken many different forms, ranging from picketing of doctors' homes and offices to death threats).
345. See, Grimes, supra note 125, at 721 (asserting that harassment can result in a clinician's loss of hospital privileges and close scrutiny by state licensing boards because of the nature of the abortion practice); Let Feds Use Their Power on Anti-Abortion Extremists, DAYTON DAILY NEWS, Aug. 18, 1994, at A14 (stating that fewer doctors are willing to endure the harassment and threats which often accompany the performing of abortions).
346. See Morning Edition, supra note 1 (discussing that fewer medical students are being trained to perform abortions).
347. See Bumpus-Hooper, supra note 2 (discussing violence against doctors who provide abortions).
348. See Morning Edition, supra note 1 (relating Helen Alvare's (of the National Council of Catholic Bishops) notion that the recent violence toward abortion clinics is not what the pro-life movement is truly about). Tim Poor, Abortion-Rights Supporters Want Action on Extremists, ST. LOUIS POST-DISPATCH, July 31, 1994, at A5 (quoting the National Right to Life Committee, Inc. as saying the killing of doctors who perform abortion is "deplorable and reprehensible . . . ").
349. See Morning Edition, supra note 1 (stating that because of the increase in violence against abortion clinics some doctors no longer will perform abortions).
350. See, e.g., Sherlock, supra note 14, at 10-6 to 10-15 (discussing the various ways to notify the community about doctors performing abortions).
trend is to make abortion unavailable by forcing doctors to stop providing abortion services. These exposure campaigns consist primarily of picketing the doctor's home and exposing him or her through publicity, usually in the form of some type of wanted poster. Contained in these signs are both truthful and false information, coupled with inflammatory language and gruesome photographs. As such, these posters are sometimes the beginnings of a violent pattern of behavior aimed at a particular doctor in an effort to force him or her out of the field. Often they cause enough hardship that a doctor simply can no longer endure the intimidation. Either way, the end result is the same: one less doctor to provide abortions. If a doctor could stop this harassment, perhaps the violence that sometimes follows would be curbed as well. Unfortunately, the current law offers little in the form of preventative measures; therefore, the law needs to recognize the necessity of privacy protection for these doctors.

Three potential claims have been analyzed in this Comment, all based on a broader assertion of invasion of privacy. Intrusion upon seclusion, false light, and the public disclosure of private facts are all viable claims that could be brought by a doctor against pro-life activists. At the heart of each of these claims is a tension between a fundamental right of the doctor to be left alone and the pro-life activist's right to free speech. In the past, the balance has tipped in favor of the First Amendment. However, given the potential gravity of the situation and the lack of other possible avenues in this area, a court should seriously consider the invasion of privacy torts as significant causes of action for doctors.

351. See e.g. Sherlock, supra note 14, at 10-6 (asserting that if the community knew about the doctors who perform abortion, they could put them out of business).

352. See, e.g., OR's No Place to Hide, supra note 15 (instructing pro-life supporters to contact the media, create flyers and posters, and picket the homes of doctors who perform abortions).

353. See infra, Appendices A and B (describing the tactics used to target doctors who perform abortions).

354. See Let Feds Use Their Power on Anti-Abortion Extremists, supra note 345, at A14 (stating that harassment and threats to doctors who perform abortions have caused fewer doctors to remain in the abortion practice).


356. See Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (holding that the facts of the case require the newspaper's First Amendment rights to outweigh a rape victim's privacy rights); Smith v. Daily Mail Publishing, Co., 443 U.S. 97, 104 (1979) (asserting that the state interest in protecting the anonymity of a juvenile offender is outweighed by the newspaper's First Amendment right to publish lawfully obtained information); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494-95 (1975) (stating that, in terms of the First and Fourteenth Amendments, privacy rights fade when information is already in the public record).
If the harassment continues, the medical field will continually be less capable of providing abortion services. The right to choose an abortion is a constitutional right,\textsuperscript{357} and it must be safeguarded properly. We must offer doctors some form of privacy protection, otherwise reproductive freedom will no longer be a reality, but merely a legal ideal.

**APPENDIX A—EXCERPTS FROM THE MODEL EXPOSE FLYER IN ABORTION BUSTER'S MANUAL**

In bold letters at the top are the words ARE YOU SAFE?\textsuperscript{358} The text begins with: “Serious injuries to female organs. Abortions done on non-pregnant women. Women so damaged they have not been able to have sex. WOMEN DYING OR NEARLY BLEEDING TO DEATH AFTER ABORTIONS. . . [This] is what women said happened to them when the doctors of [a clinic] operated on them in recent years!”\textsuperscript{359}

The next section of the flyer details gruesome allegations made against these doctors and describe stories of four women who died after undergoing abortions at this clinic.

A woman sued Dr. [X], saying she had to get two abortions—several weeks apart—to kill the same child . . . . Hospital [Z] was the last stop for a 16-year-old girl in 1984. Dr. [X] couldn’t get all of an aborted baby out of her womb on the first try, so he set her aside for several hours before trying again. She died in the operating room. The coroner’s autopsy report on her said her vagina contained ‘a collection of catgut sutures . . . .’ A woman checked into Hospital [Y] for an abortion just before Christmas in 1984; she didn’t come out alive. She kept bleeding after the abortion, so one of the doctors did a hysterectomy on her. This didn’t work; she went into shock and bled to death . . . .\textsuperscript{360}

The flyer ends with several questions aimed at making the reader think twice about abortions.\textsuperscript{361}

These items raise serious question about Dr. [X] and Hospital [Z]. WHY do Dr. [X] and his staff doctors get sued so often? WHY do they try to do abortions in five minutes or less? Don’t they care about women’s health? In fact, WHY should women risk going to

\textsuperscript{357} See Roe v. Wade, 410 U.S. 113 (1973) (holding that a statute prohibiting abortion except to save the mother's life is unconstitutional).

\textsuperscript{358} See Sherlock, supra note 14, at A-6. This flyer was printed as an example of how pro-life supporters target doctors who perform abortion.

\textsuperscript{359} Sherlock, supra note 14, at A-6.

\textsuperscript{360} Sherlock, supra note 14, at A-6.

\textsuperscript{361} Sherlock, supra note 14, at A-6.
ANY abortion clinic? Abortionists get BIG money for abortions. It is in their interests not to inform women the surgery involves risk, the children they are carrying are human beings who can feel pain, and there are alternatives. And all too often, the staffers at these high-volume abortion business RUSH women thru [sic] surgery. The results aren’t pretty. If you are pregnant and are considering abortion, ask yourself this question: Do Hospital [Z] staffers care about me, or do they care only about the money they will get from the abortion of my child?  

APPENDIX B—THE TYPICAL WANTED POSTER

Based on the approaches described in the Abortion Buster’s Manual, Operation No Place to Hide, Firestorm and the author’s personal experiences as a clinic escort, a typical wanted poster contains certain key information and language. Common phrases include “Dr. X kills seven-month old babies every day,” “Your neighbor is a killer for profit,” “WANTED: Dr. X for killing babies. Estimated to have killed 120,000 babies—nearly enough people to populate Huntington Beach,” “This man is extremely dangerous to unborn babies!!! Write him and ask him to stop killing innocent babies.”

REWARD of $5000 for information leading to the arrest and conviction of this killer. A baby killer lives in your neighborhood and participates in the American Holocaust everyday. Unfortunately there is no Oskar Schindler for the millions of inconvenient people being slaughtered. Please don’t look the other way.... You may be the next hero to save these people from extermination, and this man is wanted for crimes against humanity. He has butchered and dismembered thousands of little children for profit.

Along with these remarks are usually a picture of the doctor, his or her name, address, phone number, and places she or he frequents (such as restaurants and banks). Many posters also have pictures of aborted fetuses or decapitated children or other gruesome photographs with captions like “death by total dismemberment” or “this doctor believes in freedom of choice—the choice to mutilate babies.”

363. OR’s No Place to Hide, supra note 15. See, e.g., Van Duyn v. Smith, 527 N.E.2d 1005, 1007 (Ill. App. 1988) (discussing how the posters targeted at the plaintiff, an Executive Director of an abortion clinic, contained pictures of aborted fetuses).
364. OR’s No Place to Hide, supra note 15.
365. The above quotations from wanted posters are based on posters the author saw while volunteering as a clinic escort.
APPENDIX C—"JUSTIFIABLE HOMICIDE"

We, the undersigned, declare the justice of taking all godly action necessary to defend innocent human life including the use of force. We proclaim that whatever force is legitimate to defend the life of a born child is legitimate to defend the life of an unborn child. We assert that if Michael Griffin did in fact kill David Gunn, his use of lethal force was justifiable provided it was carried out for the purpose of defending the lives of unborn children. Therefore, he ought to be acquitted of the charges against him. 367

The document was written by Paul Hill and included the signatures of twenty-five activists as of early 1993. Since Paul Hill's conviction, several more individuals have signed the document. It is important to note that several activists who signed the document were pastors and priests, and at least one attorney has signed the document as well. 368

368. Id.