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NOTES

A REMEDY FOR ABORTION SEEKERS UNDER THE INVASION OF PRIVACY TORT*

INTRODUCTION

The United States Supreme Court articulated the right to an abortion as a fundamental constitutional privacy right in *Roe v. Wade*.¹ The Court stated, “[t]his right of privacy, whether it be found in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”² The Court thus defined the constitutional privacy right encompassing abortion as a woman’s right to be free from governmental interference in reproductive choice.

In exercising this right, some abortion clinic clients, or “abortion seekers,” have been photographed by anti-abortion protestors in the vicinity of clinics. Anti-abortion protestors have posted some of those photographs on the Internet. One such protestor, Neal Horsley, maintains a website on which he posts the names of abortion providers and clinic workers.³ Recently, he expanded his Internet publication to include photographs and videotape footage of abortion clinic clients.⁴ The footage is organized by geographic area, so that, for example, someone from New York can locate in one click of the

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¹ 410 U.S. 113 (1973).

² *Id.* at 153.

³ Horsley’s main website is <http://www.christiangallery.com>.

⁴ See Kimberly Hula, *U. Missouri: Controversial Anti-Abortion Web Site Adds Video*, U-WIRE, Aug. 21, 2001; see also Julia Duin, *Culture, et Cetera*, WASH. TIMES, Aug. 22, 2001, at A2.

mouse all the images of women seeking abortions at New York clinics.⁵ In interviews, Horsley stated that publishing the photographs and videotapes “expose[s] the reality of legalized abortion to the American people, show[s] people up close exactly what’s going on in the thing we call legalized abortion. . . . What we [anti-abortion protestors] do have access to [are] the . . . images of the people who are going in and out of these baby butcher shops.”⁶ Horsley’s stated purpose in publicizing images of abortion clinic clients is to dissuade women from obtaining abortions.⁷

This Note argues that abortion clinic clients who are targets of certain protest conduct, such as being photographed or videotaped, have a remedy under the invasion of privacy tort. The principle of a general right to privacy arising under tort law originated in Samuel D. Warren and Louis D. Brandeis’s decisive *Harvard Law Review* article, *The Right to Privacy*.⁸ In particular, this Note argues that abortion seekers may recover under the branches of the privacy tort entitled public disclosure of private facts and intrusion upon seclusion as described by Dean Prosser in his article *Privacy*⁹ and subsequently adopted by the Restatement (Second) of Torts.¹⁰ Alleging that the activity of anti-abortion protestors invades an abortion seeker’s privacy is significant because the claim describes an abortion as a private matter. Privacy can be experienced as non-disclosure of information or physical seclusion, forms of inaccessibility to others. This Note asserts that privacy possesses a positive value insofar as it promotes autonomy. It follows that formulating a civil remedy for abortion seekers under the invasion of privacy tort defends reproductive autonomy. Although common law and constitutional privacy are not to be equated in the abortion

⁵ See Yochi J. Dreazen, *In the Shadows: Photos of Women Who Get Abortions Go Up on Internet*, WALL ST. J., May 28, 2002, at A1. See also Robyn Blumner, ‘Abortioncams’ Well Within the Law, MILWAUKEE J. SENTINEL, Sept. 11, 2001, at 13A.

⁶ Alan Colmes, *One-on-One with Neal Horsley*, FOX NEWS: HANNITY & COLMES, June 4, 2001; see also Dennis B. Roddy, *Fugitive’s Threats Stir the Prayerful Abortion Clinics on Alert, As is His Family After Counterthreats on the Internet*, PITTSBURGH POST-GAZETTE, June 24, 2001, at A1.

⁷ See Carol Anne Douglas & Clare-Marie Myers, *Anti-Women’s Lives Website Gets Worse*, OFF OUR BACKS, July 1, 2001, at 3.

⁸ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter Warren & Brandeis].

⁹ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

¹⁰ RESTATEMENT (SECOND) OF TORTS § 652A (1977) [hereinafter RESTATEMENT].

context, aspects of the protection given to personal privacy in abortion rights cases are illustrative in advocating for abortion seekers' right to common law privacy.

Part I of this Note first explores the history of the invasion of privacy tort. It then defines privacy in terms of autonomy and discusses informational and physical inaccessibility as conditions of personal privacy. Additionally, Part I analyzes constitutional privacy jurisprudence concerning abortion rights and concludes that notions of personal privacy and autonomy under constitutional law are useful to this discussion of common law privacy. Part II outlines the public disclosure cause of action and relies on analogies to medical and sexual privacy in order to conceptualize abortion as a private fact. Furthermore, this Part addresses the First Amendment implications of the tort action and concludes that the identity of an abortion clinic client and the fact of her abortion are non-newsworthy. Part III analyzes the potential intrusion upon seclusion tort action in the context of abortion. Moreover, this Part advocates for abortion seekers' right to public privacy in the vicinity of family planning clinics. Finally, this Note concludes by recommending that the legal community recognize remedies for abortion seekers under the public disclosure and intrusion upon seclusion torts, invoking the common law right to privacy in order to promote reproductive self-determination.

I. DEVELOPMENT AND DEFINITION OF THE INVASION OF PRIVACY TORT

A remedy for abortion clinic clients under the invasion of privacy tort is significant in light of the unique, social qualities of tort law. "Tort law is specifically intended to allow individual citizens not only to have a remedy for wrongs endured and harms suffered but also to influence the way in which individuals in the broader community interact with each other and in society."¹¹ With respect to common law privacy rights, the potential effect of tort law on social relationships is evident. One scholar notes, the common law tort of invasion of privacy "safeguards rules of civility" by creating a "ritual

¹¹ Kathy Seward Northern, *Procreative Torts: Enhancing the Common-Law Protection for Reproductive Autonomy*, 1998 U. ILL. L. REV. 489, 545 (advocating for protection of women's reproductive autonomy by adopting a patient-centered standard under "procreative torts" such as wrongful birth and wrongful abortion).

idiom” which, in giving an individual the “ability to choose respect or intimacy, is deeply empowering for his sense of himself as an independent or autonomous person.”¹² The expression of the way in which respectful personal distance advances the right to individuality and autonomy within the language of privacy underscores a meaningful function of the common law right to privacy.

The notion of a common law right to privacy was introduced formally in Warren and Brandeis’s seminal article, *The Right to Privacy*.¹³ Their article purportedly responded to the encroachment of journalistic innovations on private life and criticized the press for “overstepping in every direction the obvious bounds of propriety and of decency.”¹⁴ Specifically, the authors noted that “[r]ecent inventions and business methods” such as “[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”¹⁵

The authors described the right to privacy as the “right to be let alone”¹⁶ Warren and Brandeis espoused a “general right to privacy”¹⁷ for which they found support in existing legal doctrine:

If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering,

¹² Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 959, 973 (1989).

¹³ Warren & Brandeis, *supra* note 8.

¹⁴ *Id.* at 196.

¹⁵ *Id.* at 195. This description, in effect, characterizes the growth of “yellow journalism” to which the authors were said to have responded. See Prosser, *supra* note 9, at 383. But see James H. Barron, *Warren and Brandeis, The Right to Privacy*, 13 SUFFOLK U. L. REV. 875, 907 (1979) (discrediting the claimed roots of Warren and Brandeis’s article and suggesting that “the origin of the . . . article lies to a great extent in the hypersensitivity of the patrician lawyer-merchant [Warren] and the verbal facility and ideological ambivalence of his friend and former law partner [Brandeis]”). Specifically, Barron suggests that Warren’s hypersensitivity was a response to the press coverage of his private family affairs. *Id.* at 902.

¹⁶ Warren & Brandeis, *supra* note 8, at 195 (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)); see also *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (regarding wire tapping of individuals’ phones, stating that the framers of the United States Constitution granted individuals “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men”).

¹⁷ Warren & Brandeis, *supra* note 8, at 198.

caused by an act wrongful in itself, is recognized as a basis for compensation.¹⁸

The authors also described the right to privacy as "spiritual." They thus distinguished it from "the wrongs and correlative rights recognized by the law of slander and libel [which] are in their nature material rather than spiritual" in that the injury to reputation materially affects one's interactions with others.¹⁹ Warren and Brandeis asserted that the general right to privacy with which their article was concerned underlay the common law principles of intellectual and artistic property. In this area, "[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."²⁰ Thus, the authors advocated for self-determination in conducting and protecting one's private affairs. They concluded by asking rhetorically, "[shall] the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?"²¹ Notwithstanding Warren and Brandeis's enthusiastic advocacy, a long period of indecision in the legal community followed publication of the article as to the significance and scope of common law privacy.

The modern definition of the tort can be understood through its later interpretation in legal scholarship. In *Privacy*,²² Dean Prosser reviewed the tort's development in judicial opinions issued in the seventy years since its inception in Warren and Brandeis's journal article. He asserted that the privacy tort represented invasions into four discrete interests which were linked only by a shared name and their common view toward redressing interference with the plaintiff's right "to be let alone."²³ Prosser labeled the four types of invasions:

¹⁸ *Id.* at 213.

¹⁹ *Id.* at 197; see also Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1002 (1964) (positing that Warren and Brandeis's right to privacy implicated "a spiritual interest" in one's "individuality or freedom").

²⁰ Warren & Brandeis, *supra* note 8, at 198. Bloustein points out that Warren and Brandeis distinguished the right to privacy from the right to intellectual and artistic property in that a pecuniary value underlies the property interest. Consequently, intellectual and artistic property is an illustration of the right to privacy only to the extent that one has the right to control its publication. Bloustein, *supra* note 19, at 969-70.

²¹ Warren & Brandeis, *supra* note 8, at 220.

²² Prosser, *supra* note 9.

²³ *Id.* at 389 (citation omitted).

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.²⁴

The Restatement (Second) of Torts then encoded these four torts.²⁵ In particular, this Note discusses the public disclosure and intrusion upon seclusion torts.²⁶

A. *A Legal Conception of Personal and Decisional Privacy*

The conception of common law privacy has been the subject of much debate and uncertainty.²⁷ Notwithstanding a lack of scholarly consensus, this Note constructs a particular conception of the common law right to privacy involving information about and access to abortion seekers. In this Note, privacy is identified as an independent value and defined in terms of autonomy. A functionalist argument reveals that limiting the accessibility of abortion seekers to anti-abortion protestors protects women's privacy. Furthermore, rendering unlawful the disclosure and scrutiny of an individual's abortion under the invasion of privacy tort promotes reproductive autonomy.

²⁴ *Id.*

²⁵ RESTATEMENT, *supra* note 10, § 652A. The Restatement also represents the limitations on the public disclosure tort cause of action which Warren and Brandeis outlined, for example, that disclosure of a matter of public interest is not tortious. Warren & Brandeis, *supra* note 8, at 214-19.

²⁶ See RESTATEMENT, *supra* note 10, §§ 652B & 652D. The other two torts are inapplicable to the situation in which an anti-abortion protestor photographs women who are seeking abortions and publicizes those images in order to deter women from obtaining abortions.

²⁷ Bloustein contends that Dean Prosser erroneously characterizes privacy in relation to societal interests in "mental tranquility, reputation, and intangible forms of property" instead of describing privacy as an independent value. Bloustein, *supra* note 19, at 966. Moreover, Bloustein proffers a definition of common law invasion of privacy in terms of dignitary interest: "The injury is to our individuality, to our dignity as individuals" *Id.* at 1003; accord Stanley Ingber, *Rethinking Tangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 819 (1985) (arguing "social recognition of an interest in human dignity" inheres in the conception of the privacy tort).

The conception of privacy described here relies primarily on the models developed by Ruth Gavison²⁸ and Anita Allen.²⁹ Gavison importantly defines privacy as limited accessibility of others to an individual.³⁰ She enumerates three forms of accessibility as “the extent to which we are known to others [information-gathering], the extent to which others have physical access to us, and the extent to which we are the subject of others’ attention.”³¹ Allen similarly employs a

²⁸ Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980).

²⁹ ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988) [hereinafter *UNEASY ACCESS*]. This Note diverges from Gavison and Allen’s threshold evaluations of privacy as neutral. Allen asserts that “privacy is a descriptive, neutral concept denoting conditions that are neither always desirable and praiseworthy, nor always undesirable and unpraiseworthy.” *Id.* at 3. Similarly, Gavison argues that “[i]n order to see which aspects of privacy are desirable and thus merit protection as a value, however, we must begin our inquiry in a nonpreemptive way by starting with a concept that does not make desirability . . . part of the notion of privacy.” Gavison, *supra* note 28, at 425. Conversely, this Note asserts that privacy is desirable and appropriately invoked in the context of abortion. This is indeed a departure from Gavison’s conclusion that “prohibitions of such conduct as abortion” which are “sometimes said to constitute invasions of privacy will be seen not to involve losses of privacy per se under this concept.” *Id.* at 436. Gavison disagrees with the broad invocation of privacy doctrine in diverse claims because of the implication that privacy is not distinctively defined as inaccessibility of the individual. *Id.* at 437. Moreover, she counters the assertion of privacy values, or the “right to be let alone,” in claims of state interference with abortion, which is more properly phrased as a demand “for state interference in the form of legal protection against other individuals . . .” *Id.* at 438. With respect to Gavison’s challenge, this Note argues that privacy, understood as inaccessibility of the individual abortion seeker, promotes, and can be understood in terms of, reproductive autonomy. Privacy here is both attractive and apposite.

³⁰ Gavison, *supra* note 28, at 448. Jeffrey Rosen imports an “accessibility” definition to his analysis of constitutional privacy jurisprudence:

[B]y focusing on an amorphous vision of privacy that is really a misnomer for the freedom to make intimate decisions about reproduction, the Supreme Court has neglected a more focused vision of privacy that has to do with our *ability to control the conditions under which we make different aspects of ourselves accessible to others.*

JEFFREY ROSEN, *THE UNWANTED GAZE* 15 (2000) (emphasis added).

³¹ Gavison, *supra* note 28, at 423; accord Ingber, *supra* note 27, at 840 (“The ‘right to privacy’ . . . consists of the right to determine for oneself the extent to which one will share with others one’s thoughts, one’s feelings, and the facts of one’s personal life.”). For purposes of this Note, Gavison’s concepts of physical inaccessibility and freedom from others’ attention will be treated together. See *infra* Part III. In an old case, *Pasevich v. New England Life Insurance Co.*, the court recognized the relationship between privacy and anonymity which it defined in terms of personal liberty:

Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters, and of publicity as to others. . . . Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him this liberty. . . . The right to withdraw from the public gaze at such times as a person may see fit . . . is also embraced within the right of personal liberty.

"restricted-access definition" of privacy according to which "privacy denotes a degree of inaccessibility of persons, their mental states, and information about them to the senses and surveillance devices of others."³² The restricted-access approach presents two beneficial, paradigmatic forms of personal privacy, informational and physical privacy.

Privacy can also be defined in relation to liberty. A functionalist argument elucidates this relationship. Gavison's functionalist theory is "structured around the ways in which privacy functions to promote goals"³³ For example, she argues that privacy "functions to promote liberty of action, removing the unpleasant consequences of certain actions and thus increasing the liberty to perform them."³⁴ Liberty of action can be understood as autonomy.³⁵ Autonomy enables individuals to act and think free of "harsh sanctions"³⁶ imposed by the public. Privacy promotes autonomy by "permit[ting] individuals to do what they would not do without it for fear of an unpleasant or hostile reaction from others."³⁷ In this way, the idiom and rules of privacy can modify or enforce social norms.³⁸ Reproductive autonomy is the goal of privacy which is central to this discussion.

Similarly, Allen emphasizes the relationship between privacy and autonomy. She distinguishes privacy in restricted-access, paradigmatic forms of non-disclosure and seclusion

50 S.E. 68, 70 (Ga. 1905). See *infra* text accompanying notes 176-84.

³² UNEASY ACCESS, *supra* note 29, at 34.

³³ Gavison, *supra* note 28, at 446 n.79.

³⁴ *Id.* at 448; accord Bloustein, *supra* note 19, at 1002 (recognizing that a social goal of "individuality or freedom" is embodied in the conception of privacy).

³⁵ Gavison, *supra* note 28, at 448.

³⁶ *Id.* at 450.

³⁷ *Id.* at 451; see also Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions into Public Places*, 73 N.C. L. REV. 989, 1033 (1995) (arguing that when our privacy is intact, "we are free to go about our business even in public with little concern for relinquishing personal information about ourselves to others"). McClurg elaborates on this by way of a hypothetical situation:

The moment the Watcher began focusing attention on Joe, a substantial loss of privacy occurred. . . . Whereas he formerly was free to 'be himself' in public, secure in the knowledge that he was conveying information about himself only in a metaphysical sense, *Joe must now act in light of the awareness that this information is being conveyed to another. . . . He must now confront the choice of either allowing the Watcher to acquire this information or modifying his conduct.*

Id. at 1034 (emphasis added); accord Bloustein, *supra* note 19, at 1002-03 (explaining that tortious conduct is "an interference with the right of the individual to do what he will"). See discussion *infra* Part III.B.

³⁸ See Post, *supra* note 12.

from decisional privacy. Decisional privacy is conceptually akin to liberty and "refers to freedom from coercive governmental or, by extension, other outside interference with decisionmaking."³⁹ Accordingly, decisional privacy is a proxy for autonomy.⁴⁰ Despite Allen's argument that personal privacy and decisional privacy are distinct,⁴¹ she does acknowledge the relationship between the two interests, particularly with respect to women's freedom.⁴²

Allen positions the relationship between personal and decisional privacy in the context of women's lives⁴³ and

³⁹ UNEASY ACCESS, *supra* note 29, at 34. The conception of privacy adopted here as constituted by both personal and decisional privacy is a departure from some historical notions of privacy. The traditional invasion of privacy plaintiff may recover damages for mental suffering. See *Rothstein v. Montefiore Home*, 689 N.E.2d 108 (Ohio 1996) (stating that in order to recover, the plaintiff must establish cognizable harm done to plaintiff which results in shame or humiliation); see also *De May v. Roberts*, 9 N.W. 146, 149 (Mich. 1881) ("[T]he wrong thus done entitles the injured party to recover the damages . . . from shame and mortification . . ."). Notwithstanding that privacy may protect one from social stigma, and fear of social stigma may thwart individual autonomy, this Note is predominantly concerned with autonomy as a goal of privacy.

⁴⁰ See James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1 (1995) (finding the so-called "unenumerated" right to privacy in the language of the Constitution and in judicial opinions of the Supreme Court concerning namely reproductive rights, and describing privacy rights as a constitutional guarantee of deliberative autonomy).

⁴¹ UNEASY ACCESS, *supra* note 29, at 98-99 ("Liberty is conceptually distinct from privacy. . . . The concept of decisional privacy has closer conceptual affinities to liberty than to paradigmatic senses of privacy.").

⁴² *Id.* at 33. The argument in this Note conflicts with Allen's argument that decisional privacy to abort secures paradigmatic forms of privacy for women. See *infra* text accompanying notes 48-51.

⁴³ UNEASY ACCESS, *supra* note 29, at 53 (explaining that women's privacy may promote social equality). Interestingly, the typical invasion of privacy tort plaintiff is a woman. See *Melvin v. Reid*, 297 P. 91 (Cal. Ct. App. 1931) (a woman sued for disclosure of her former life as prostitute); *De May v. Roberts*, 9 N.W. 146 (Mich. 1881) (a woman sued under intrusion upon seclusion for intrusion by defendant into her home where she gave birth to a child); *C'Debaca v. Virginia*, No. 2754-97-4, 1999 WL 1129851 (Va. Ct. App. 1999) (plaintiff alleged that defendant videotaped up her skirt). Indeed, Dean Prosser invoked gender in his discussion of the privacy tort's inception: "All this is a most marvelous tree to grow from the wedding of the daughter of Mr. Samuel D. Warren. One is tempted to surmise that she must have been a very beautiful girl." Prosser, *supra* note 9, at 423. Anita Allen argues persuasively that "[w]omen lose privacy because others perceive that no significant negative sanctions or significant risks are associated with intrusion. The absence of risk relates closely to women's being perceived as inferiors." UNEASY ACCESS, *supra* note 29, at 143; see also Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175, 1178 (2000) [hereinafter Allen, *Cyberspace*] (asserting that "women in cyberspace do not enjoy the same level and types of desirable privacy that men do. Women face special privacy problems in cyberspace because there, too, they are perceived as inferiors, ancillaries, and safe targets and held more accountable for their private conduct. In short, the complex gendered social norms of accessibility and inaccessibility found in the real world are also found in the cyberworld.").

specifically their exercise of reproductive choice. Issues of women's reproductive autonomy concern the two exemplary forms of personal privacy, non-disclosure or informational privacy and seclusion or physical inaccessibility. Allen aptly argues that reproductive autonomy implicates conditions of informational privacy. She asserts that informational privacy in the form of "[s]ecrecy and confidentiality about procurement of . . . abortion"⁴⁴ safeguards decisional privacy.⁴⁵ Allen's discussion of the impact that informational privacy regarding abortion may have on decisional privacy in the contexts of spousal consent and minors' rights to contraception and birth control information⁴⁶ is relevant to this analysis of tort law, notwithstanding its focus on constitutional law. This relationship highlighted between personal and decisional privacy suggests that an invasion of privacy tort suit that redresses disclosure of a woman's abortion asserts informational privacy as a condition of decisional privacy or reproductive autonomy.⁴⁷

The other form of personal privacy that secures women's reproductive autonomy is seclusion, defined as "the inaccessibility of the physical person"⁴⁸ Allen explains that, in the context of motherhood, seclusion implies freedom from children's infringement on mothers' privacy in the home.⁴⁹ Thus, Allen suggests abortion "can be utilized to assure that children are not born who would constitute an obstacle to the attainment of privacy."⁵⁰ In this way, Allen argues that the liberty to obtain an abortion (of which decisional privacy is one aspect) implicates seclusion, a form of personal privacy. However, Allen's conclusion that decisional privacy secures

⁴⁴ UNEASY ACCESS, *supra* note 29, at 110.

⁴⁵ *Id.* at 92 (citing *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 765 (1986), as exemplary of the intersection of paradigmatic privacy—specifically non-disclosure—and reproductive choice). See *infra* text accompanying notes 76-84.

⁴⁶ UNEASY ACCESS, *supra* note 29, at 110-13.

⁴⁷ See *infra* Part II. See also *Whalen v. Roe*, 429 U.S. 589, 598-604 (1977) (recognizing the potential adverse effect of the New York statute requiring identification to the Department of Health of patients using certain prescription drugs on patients' "interest in independence in making certain kinds of important decisions," but declining to hold that statute violates plaintiffs' constitutional right to privacy).

⁴⁸ UNEASY ACCESS, *supra* note 29, at 83.

⁴⁹ *Id.* at 87 ("Sharing a life with a child has a psychological dimension that may undermine a woman's effort to create privacy and freedom by delegating childcare responsibilities.").

⁵⁰ *Id.* at 86.

seclusion is incongruous with this discussion. Where Allen advances abortion as a means to personal privacy, this Note proposes personal privacy as a means to abortion.⁵¹ Thus, although Allen's definition of seclusion as "the inaccessibility of the physical person" is useful, her positioning of seclusion as a consequence of free reproductive choice is not.

As argued above, one of the functions of privacy is to promote women's self-determination or autonomy. Accordingly, privacy may be a condition of empowerment.⁵² This Note advocates for affording women who seek abortions a civil remedy under the invasion of privacy tort; the remedy empowers those who invoke it.⁵³ A woman who sues under the invasion of privacy tort for wrongful public disclosure of her abortion, for example, defines what is private by describing her injury.⁵⁴ Similarly, an intrusion upon seclusion plaintiff

⁵¹ See *infra* Part III.

⁵² See Rosa Ehrenreich, *Privacy and Power*, 89 GEO. L.J. 2047 (2001) (arguing that violations of privacy could be more fully understood by describing them in terms of power. In this way, the particularly serious injuries to the personal privacy of disempowered sociopolitical groups, such as women, are revealed). The concept of power as underlying diverse "privacy" violations aids Ehrenreich in reconciling the distinct notions of informational (non-disclosure) and corporeal privacy ("notions of intimacy, the body, sexuality") represented in JEFFREY ROSEN, *THE UNWANTED GAZE* (2000). *Id.* at 2049-50. See cases cited *supra* note 43 in which plaintiffs are predominantly women. Privacy violations and the Internet have particular significance for women with respect to power. See Allen, *Cyberspace*, *supra* note 43, at 1184 ("To talk about women and privacy in cyberspace requires revisiting traditional feminist concerns about objectification, subordination, violence, and isolation."). Moreover, violations can be challenged by affirming women's reproductive rights through invoking the concept of privacy. *But see* CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 184, 192-93 (1989) (arguing that, in the context of abortion, privacy disempowers women by reinforcing sexual inequality along the public-private divide and has been used to justify state inaction with respect to public funding of abortions).

⁵³ Catharine MacKinnon proposed a Minneapolis ordinance in 1983 which would make pornography a violation of women's civil rights and argued that this civil remedy was empowering for women. Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985). Specifically, MacKinnon argued that by adopting this civil rights remedy, "a legislature recognizes that pornography, as defined and made actionable, undermines sex equality" and thus "[w]e would have . . . recognition and institutional support for our equality." *Id.* at 62, 70. Similarly, affording abortion seekers a tort remedy would empower women by recognizing the primacy of their reproductive autonomy.

⁵⁴ Ehrenreich, *supra* note 52, at 2060 (stating that "those who have the power have the luxury of defining what is and what is not private . . ."). It is not adequate to expand common law privacy protection only as to physicians who claim privacy violation by disclosure of their personal information as abortion providers on the Internet. See Angela Christina Couch, *Wanted: Privacy Protection for Doctors Who Perform Abortions*, 4 AM. U. J. GENDER & L. 361 (1996); see also *Klebanoff v. McMonagle*, 552 A.2d 677 (Pa. Super. Ct. 1988) (enjoining anti-abortion protestors from picketing around the home of the abortion provider plaintiff as a violation of

vindicates her right to make a decision regarding an intensely personal matter such as abortion free from surveillance or scrutiny.

B. *The Link to Constitutional Reproductive Privacy*

Within constitutional jurisprudence, an individual's right to abortion is defined in terms of privacy. The constitutional right to reproductive privacy is enunciated in terms of autonomy, or freedom from governmental interference.⁵⁵ In this way, decisional privacy—or “nongovernmental decisionmaking”⁵⁶—is traditionally the conception of privacy associated with reproductive choice. However, the constitutional right to reproductive privacy implicates forms of privacy—informational, physical, decisional—that inhere in the common law right to privacy as enunciated in the invasion of privacy tort. The 1965 case *Griswold v. Connecticut* introduced the constitutional right to reproductive privacy.⁵⁷ In *Griswold*, the Court held that a Connecticut law prohibiting married couples' use of contraceptives violated the Fourteenth Amendment. In so holding, the Court located the underlying constitutional right “within the zone of privacy created by several fundamental constitutional guarantees” including the First, Third, Fourth, Fifth and Ninth Amendments.⁵⁸ This was the first designation of penumbral constitutional rights around reproductive choice. Later, *Roe v. Wade*⁵⁹ defined the right to abortion as a privacy right. Writing for the majority, Justice Blackmun explained, “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ . . . are included in this guarantee of personal privacy.”⁶⁰ Thus, the fundamental

residential privacy). One scholar has argued that the right to publicity should extend to protect non-celebrity abortion providers whose names are published on the Internet by anti-abortion protestors such as Neal Horsley. Jennifer L. Carpenter, *Internet Publication: The Case for An Expanded Right of Publicity for Non-Celebrities*, 6 VA. J.L. & TECH. 3 (2001).

⁵⁵ See *Roe v. Wade*, 410 U.S. 113 (1973).

⁵⁶ UNEASY ACCESS, *supra* note 29, at 97.

⁵⁷ 381 U.S. 479 (1965).

⁵⁸ *Id.* at 485.

⁵⁹ 410 U.S. 113 (1973).

⁶⁰ *Id.* at 152 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). However, Justice Blackmun also acknowledged that “some state regulation in areas protected by [the right to privacy] is appropriate” and that “[t]he privacy right involved, therefore, cannot be said to be absolute.” *Id.* at 154. The Court then ruled that before viability—the end of the first trimester of pregnancy—a woman is free to choose abortion without

right to choose abortion is defined in terms of reproductive liberty or autonomy.

Courts have considered aspects of the constitutional privacy right to abortion that are similar to features of the common law right to privacy. For example, in *Chico Feminist Women's Health Center v. Scully*,⁶¹ the California Court of Appeals considered the Center's request to amend a preliminary injunction against defendant anti-abortion protestors on behalf of clinic clients. Earlier in the litigation, a protestor observed Barbara Doe, a woman whom he knew, at the health clinic and revealed Barbara's intention to obtain an abortion to her sister. Barbara's sister called Barbara at the clinic and pleaded with her to forgo the abortion. The sister finally went to the clinic to further dissuade Barbara.⁶² Consequently, the Center sought to amend a preliminary injunctive order precluding defendant protestors from demonstrating on Saturdays during the hours when abortions were performed.⁶³ The trial court, however, did not grant this request and plaintiff appealed from the order.⁶⁴ Specifically, the Center sought to enjoin the demonstrators from entering any area around the clinic, including public streets and sidewalks, from which they could observe and identify abortion seekers visiting the clinic on Saturdays.⁶⁵ The plaintiff argued that protestors' recognition of clients invaded the clients' privacy⁶⁶ and chilled the privacy rights of women who were dissuaded from obtaining abortions due to the threat of identification.⁶⁷

The appellate court rejected the Center's request, finding that neither federal nor state constitutional privacy rights prevailed because the clinic clients had no reasonable expectation of anonymity or privacy in public areas

State interference. *Id.* at 163. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 873 (1992), Justice O'Connor, writing for the plurality, rejected "the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life."

⁶¹ 256 Cal. Rptr. 194 (Cal. Ct. App. 1989).

⁶² *Id.* at 197.

⁶³ *Id.* at 198. Abortions were only performed at the clinic on Saturdays.

⁶⁴ *Id.*

⁶⁵ *Id.* at 196.

⁶⁶ *Chico*, 256 Cal. Rptr. at 199 (plaintiff argued that the protestors' conduct violated clinic clients' right to constitutional privacy, and the court noted that the California Constitution even more broadly protected individuals' right to privacy against private persons).

⁶⁷ *Id.* at 196.

surrounding the Center.⁶⁸ Notwithstanding its ruling against the Center, the court's discussion of the federal constitutional privacy interest in abortion is significant:

The federal constitutional right of privacy has been construed as implicating "at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Thus, . . . "[i]t is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny"⁶⁹

The analysis in *Chico* demonstrates that within constitutional privacy doctrine personal privacy interests in non-disclosure and freedom from public scrutiny are associated with decisional privacy.⁷⁰

Similarly, in *Planned Parenthood of Central Missouri v. Danforth*⁷¹ and *Thornburgh v. American College of Obstetricians & Gynecologists*,⁷² the Supreme Court implicated the principle of personal privacy in its discussions of constitutional decisional privacy. In particular, the discussions of statutory reporting requirements in those cases address a form of public disclosure of abortion under constitutional law. In *Danforth*, the claimants challenged the constitutionality of a Missouri law which required physicians and health facilities to keep records of abortion seekers' "relevant maternal health and life data."⁷³ Local, state and national public health officers were permitted to examine the records despite their confidentiality. Claimants argued that these provisions, applicable to records made throughout a pregnancy, posed an unconstitutional

⁶⁸ *Id.* at 199-200. The court described a clinic client's privacy interest as an interest in anonymity. See discussion *supra* note 31 and *infra* note 176.

⁶⁹ *Chico*, 256 Cal. Rptr. at 199 (emphasis omitted) (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986)).

⁷⁰ See *supra* Part I.A.

⁷¹ 428 U.S. 52, 79 (1976).

⁷² 476 U.S. 747, 765 (1986), *overruled on other grounds by* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881 (1992). In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992), the Court overruled *Thornburgh* with respect to the determination that the informed consent requirements in that case violated the Constitution. It held that there is no constitutional violation where "the government requires . . . the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus" to the pregnant woman. *Id.*

⁷³ *Danforth*, 428 U.S. at 79.

"burden of regulation."⁷⁴ However, the Court held that the requirements were constitutional because they were "reasonably directed to the preservation of maternal health and properly respect[ed] a patient's confidentiality and privacy."⁷⁵

In *Thornburgh*, claimants challenged abortion reporting requirements mandated by a Pennsylvania law.⁷⁶ The law required physicians to report information regarding the woman's personal history, her method of payment for the abortion and the physician's bases for any medical conclusions.⁷⁷ Unlike the law at issue in *Danforth*, where permission to inspect the records was limited to health officials, the Pennsylvania law directed that the abortion records "be open to public inspection and copying."⁷⁸ Although a provision of the statute specified that the abortion records were not public records,⁷⁹ the Court suggested that these abortion records would be tantamount to public records because of their availability for public inspection. Foreshadowing its ruling on the issue, the Court stated, "[t]he decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity."⁸⁰ Therefore, the abortion choice must "be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties."⁸¹ The Court held that because the reporting provisions were not reasonably directed to any state interest in health or statistics, they violated women's constitutional right to privacy around abortion.⁸² Moreover, the Court cautioned that a statute requiring disclosure of information likely to identify a woman who seeks an abortion might deter that woman from obtaining and her physician from performing an abortion.⁸³ The *Thornburgh* ruling demonstrates that, like common law privacy, privacy in abortion rights cases may be framed in

⁷⁴ *Id.* at 79-80.

⁷⁵ *Id.* at 80.

⁷⁶ *Thornburgh*, 476 U.S. at 765.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 766.

⁸¹ *Thornburgh*, 476 U.S. at 766 (emphasis added) (quoting *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring) (discussing the veto power of parents and judges over minors' exercise of the right to abortion)).

⁸² *Id.* at 766.

⁸³ *Id.* at 766-67.

terms of non-disclosure, a form of personal privacy which may impact decisional privacy.⁸⁴

Although constitutional privacy jurisprudence is distinct from common law privacy doctrine,⁸⁵ there is a conceptual link between the two with respect to privacy protection of reproductive rights.⁸⁶ To the extent that it addresses paradigmatic forms of privacy, constitutional law may help determine what is private under the common law and thus what injuries result from an invasion of privacy.⁸⁷ Indeed, one

⁸⁴ UNEASY ACCESS, *supra* note 29, at 91, 111.

⁸⁵ See *McNally v. Pulitzer Publ'g Co.*, 532 F.2d 69, 76-77 (8th Cir. 1976) ("Thus far only the most intimate phases of personal life have been held to be constitutionally protected. . . . Applying this limited doctrine of constitutional privacy, the federal courts have generally rejected efforts by plaintiffs to *constitutionalize tortious invasions of privacy* involving less than the most intimate aspects of human affairs.") (emphasis added) (citing *Roe v. Wade*, 410 U.S. 113, 152-54 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965))). But see *York v. Story*, 324 F.2d 450 (9th Cir. 1963) (holding that the violation of plaintiff's right to privacy, pleaded as a civil rights violation, amounted to a violation of her Fourth Amendment rights when, after plaintiff survived a sexual assault, the police photographed plaintiff in the nude and later circulated the photos to other officers).

⁸⁶ In an analogous context, the Supreme Court analyzed the two legal doctrines in relation to one another. In *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990), the state of Missouri adopted the evidentiary standard "clear and convincing evidence" with regard to the proceeding governing life-sustaining medical treatment for Nancy Cruzan. The Court held that this evidentiary standard was consistent with the United States Constitution's Due Process requirements. Justice Rehnquist discussed, in dicta, the relationship between the common law doctrine of informed consent and the constitutional right to privacy. Although the Court inquired into a constitutional right to refuse medical treatment, it began its discussion with the common law "notion of bodily integrity [which] has been embodied in the requirement that informed consent is generally required for medical treatment" and cited several cases predicated on both the common law and constitutional privacy rights. *Id.* at 269, 271. The Court concluded that "the common-law doctrine of informed consent is viewed as generally encompassing the [constitutional] right of a competent individual to refuse medical treatment." *Id.* at 277.

⁸⁷ Interestingly, Stacy R. Horth-Neubert "advocates the incorporation of the Supreme Court's privacy law constitutional standards into this area as guiding principles for deciding whether to allow witnesses to prevent the broadcast of their own testimony in trials that are otherwise open to broadcast." *In the Hot Box and On the Tube: Witness' Interests in Televised Trials*, 66 FORDHAM L. REV. 165, 169 (1997). Specifically, Horth-Neubert offers the example, based on the facts of *Doe v. Mills*, 536 N.W.2d 824 (Mich. Ct. App. 1995), of a woman whose abortion has been disclosed publicly and is then subpoenaed to testify to the disclosure at trial. See *infra* text accompanying notes 100-16. Horth-Neubert argues that constitutional privacy jurisprudence around abortion could guide a state court in determining whether broadcasting the witness's testimony would be an invasion of her privacy under the Restatement. Horth-Neubert, *supra*, at 201-02. But see Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 298 (1983) ("Although the constitutional privacy cases [including abortion] may address expectations of seclusion and protect very intimate and personal areas of life, just as the Warren-Brandeis tort does, the existence and the contours of the constitutional right to privacy reveal little about whether and when a corollary interest should be protected against invasion in ordinary tort law.").

scholar made a similar argument with respect to the Fourth Amendment and the common law tort action against an individual who intrudes upon another's privacy.⁸⁸ Specifically, the argument has been made in the context of governmental intrusions upon individual privacy. Both governmental intrusion and private actor interference constitute a "similar wrong," namely "a threat to individual liberty,"⁸⁹ although the invasions differ in seriousness and type of remedies available.⁹⁰ Further support for this argument comes from a recent case, *Wilson v. Layne*,⁹¹ in which the Court held that "ride alongs," where media personnel (private persons) accompany police during execution of arrest warrants, violate homeowners' Fourth Amendment right to residential privacy.⁹² It follows that a private actor's invasion of an abortion seeker's privacy, like governmental infringement on a woman's right to privacy, threatens to thwart her reproductive autonomy.⁹³

In sum, the constitutional "right to be let alone" in the context of abortion, like common law privacy, may invoke personal privacy principles in terms of autonomy. These bodies of law similarly perceive information disclosure and intrusion upon physical seclusion as potentially injurious to individual privacy and invoke the concept of privacy to defend the intimacy of personal affairs. Applying the invasion of privacy tort to abortion positions privacy in relation to its critical goal of promoting reproductive autonomy.

⁸⁸ Bloustein, *supra* note 19, at 975.

⁸⁹ *Id.* at 975, 994 (comparing *De May v. Roberts*, 9 N.W. 146 (Mich. 1881) (regarding the alleged invasion of plaintiff's privacy where defendant entered her home without plaintiff's consent and viewed the birth of her child), with *Silverman v. United States*, 365 U.S. 505 (1961) (concerning the alleged violation of petitioners' privacy where police officers used electronic listening devices to overhear conversations in petitioners' home), and suggesting that even though the intrusions were respectively committed by a private person and a government entity, "the underlying wrong in both instances was the same; the act complained of was an affront to the individual's independence and freedom").

⁹⁰ With respect to differing remedies, Bloustein explains that the plaintiff in *De May* pursued a tort remedy against an individual for alleged invasion of privacy, whereas in *Silverman*, 365 U.S. 505, a government agent committed the alleged invasion of privacy and plaintiff sought the suppression of evidence obtained from the alleged intrusion. *Id.* at 994.

⁹¹ 526 U.S. 603 (1999).

⁹² *Id.* at 614.

⁹³ See discussion *supra* Part I.A. Note that *Wilson v. Layne* is not invoked here in order to advocate that courts find anti-abortion protest conduct violates women's constitutional right to privacy around abortion without some further connection between the protestor and state action, as in *Layne* where media personnel accompanied the police on the search of Wilson's home.

II. PUBLIC DISCLOSURE OF PRIVATE FACTS

The two branches of the invasion of privacy tort that would afford abortion seekers protection against anti-abortion protestors' conduct are public disclosure of private facts and intrusion upon seclusion. Public disclosure of private facts⁹⁴ is defined as follows: "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."⁹⁵ Warren and Brandeis recognized the significance of "injurious disclosures as to private matters"⁹⁶ in *The Right to Privacy*:

The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for such extension [of tort redress for mental suffering]; *the right to protect one's self from pen portraiture, from a discussion by the press of one's private affairs, would be a more important and far-reaching one.*⁹⁷

The authors advocated for the right to an "inviolable personality" against the perceived encroachment of the proliferating press⁹⁸ and its "pen portraiture." Indeed, Dean Prosser in *Privacy* opined that Warren and Brandeis were "primarily concerned" with this particular branch of the invasion of privacy tort.⁹⁹

There has been a single successful public disclosure tort lawsuit in the abortion context.¹⁰⁰ In *Doe v. Mills*,¹⁰¹ defendant protestors and a religious order discovered that plaintiffs Doe and Roe planned to obtain abortions at the Women's Advisory Center in Livonia, Michigan.¹⁰² The defendants received this information from a nonparty who found a document in a nearby dumpster indicating that the two women had scheduled

⁹⁴ Although the RESTATEMENT (SECOND) OF TORTS § 652D (1977) titles the tort "publicity given to private life," Prosser refers to it as "public disclosure of embarrassing private facts." Prosser, *supra* note 9, at 392. For purposes of this Note, the tort will be referred to as "public disclosure."

⁹⁵ RESTATEMENT, *supra* note 10, § 652D.

⁹⁶ Warren & Brandeis, *supra* note 8, at 204.

⁹⁷ *Id.* at 213 (emphasis added).

⁹⁸ *Id.* at 205.

⁹⁹ Prosser, *supra* note 9, at 392.

¹⁰⁰ See discussion *infra* pp. 332-33 regarding a pending lawsuit under the tort in the abortion context.

¹⁰¹ 536 N.W.2d 824 (Mich. Ct. App. 1995).

¹⁰² *Id.* at 827.

abortions at the clinic.¹⁰³ Defendants appeared at the clinic and displayed large signs which revealed plaintiffs' names and the fact that they planned to obtain abortions the next day.¹⁰⁴ The signs begging Doe and Roe not to "kill their babies"¹⁰⁵ were displayed to the public at the entrance to the clinic parking lot.¹⁰⁶ Defendants' stated aim was to dissuade Doe and Roe from going through with the abortions.¹⁰⁷ Plaintiffs sued for invasion of privacy under the public disclosure tort,¹⁰⁸ and were required to show: "(1) the disclosure of information, (2) that is highly offensive to a reasonable person, and (3) that is of no legitimate concern to the public."¹⁰⁹ The trial court granted defendants' motion for summary judgment and plaintiffs appealed.¹¹⁰ The court reasoned that the revelation of plaintiffs' identities and their planned abortions—facts that plaintiffs intended to keep "private, confidential, and free from any publicity"—was sufficiently objectively offensive to constitute a jury question.¹¹¹

In *Mills*, the court undertook a two-part analysis of whether the disclosed fact was of legitimate public concern.¹¹² The court first considered whether the fact disclosed was private. Analogizing abortion to sexual relations and medical treatment, both of which are regarded as private matters under

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Mills*, 536 N.W.2d at 828. Notably, the court rejected defendants' argument that, because the property around the clinic was public, displaying the signs there did not violate plaintiffs' right to privacy. *Id.* at 832. The court reasoned that plaintiffs were protected because the signs displayed information about abortion, a procedure which takes place in the private space of the clinic. *Id.* Furthermore, the mere fact that plaintiffs are visible to the public when entering and exiting the clinic does not defeat the action. *Id.* See discussion *infra* Part III.B regarding public privacy and the intrusion upon seclusion tort.

¹⁰⁷ *Mills*, 536 N.W.2d at 828-29.

¹⁰⁸ Plaintiffs additionally claimed under the intrusion upon seclusion tort. However, the court of appeals affirmed the trial court's dismissal of this claim based on plaintiffs' failure to allege that defendants *obtained* the information in an intrusive manner. Instead, under the intrusion upon seclusion claim, plaintiffs erroneously alleged that defendants tortiously *publicized* the fact of their abortions. *Id.* at 832. See *infra* Part III.A.

¹⁰⁹ *Mills*, 536 N.W.2d at 828 (citing *Winstead v. Sweeney*, 517 N.W.2d 874 (Mich. Ct. App. 1994)).

¹¹⁰ *Id.* at 827.

¹¹¹ *Id.* at 829.

¹¹² *Id.* at 829-30. Although the *Mills* court merged the analysis of whether the abortions were private with whether they were of legitimate public concern, many other courts analyze these as two discrete elements. See, e.g., *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998).

tort law,¹¹³ the court concluded that a reasonable person would consider abortion a private matter.¹¹⁴ The court then evaluated whether plaintiffs' abortions were of sufficiently legitimate public concern to override their privacy interest. It stated, "even though the abortion issue may be regarded as a matter of public interest, the plaintiffs' *identities* in this case were not matters of legitimate public concern, nor a matter of public record, but, instead, were purely private matters."¹¹⁵ The court found for the plaintiffs, reversing the decision of the court below that granted defendants' motion for summary judgment on this claim.¹¹⁶ *Mills* provides an excellent example of the common law remedy available to abortion seekers against protestors like Neal Horsley who seek to dissuade women from obtaining abortions by giving publicity to that private decision.

A. *An Analysis of Elements*

The elements of the public disclosure tort action, which vary in appellation by jurisdiction, illuminate the type of unlawful conduct targeted and the privacy interest vindicated by this branch of the privacy tort. In order to make out a *prima facie* case of invasion of privacy under the public disclosure tort, a plaintiff must generally establish: (1) that the publicity given to; (2) a private fact; (3) would be highly offensive to a reasonable person; and (4) that the fact disclosed was not of legitimate interest to the public.¹¹⁷

The first element of the public disclosure cause of action is that the defendant give "publicity" to the plaintiff's private facts.¹¹⁸ Publicity "means that the matter is 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."¹¹⁹ Certainly, where an anti-abortion protestor like Neal Horsley gives publicity to an individual's abortion on the Internet, a globally pervasive communication "network," it properly can be considered dissemination to "the public at large." The determination that a

¹¹³ *Mills*, 536 N.W.2d at 829-30. See *infra* text accompanying notes 126-54.

¹¹⁴ *Mills*, 536 N.W.2d at 830.

¹¹⁵ *Id.* (emphasis added). See discussion of plaintiff's identity in abortion cases *infra* text accompanying notes 176-84.

¹¹⁶ *Mills*, 536 N.W.2d at 832.

¹¹⁷ See, e.g., *Shulman*, 955 P.2d at 478.

¹¹⁸ RESTATEMENT, *supra* note 10, § 652D cmt. a.

¹¹⁹ *Id.*

matter was given sufficient publicity is generally a threshold conclusion.¹²⁰

In order to meet the second element of the public disclosure tort, the plaintiff must show that the matter disclosed "concern[s] the private, as distinguished from the public, life of the individual."¹²¹ One category of private facts is defined in terms of non-disclosure.¹²² Warren and Brandeis explained that although "there is no fixed formula" in determining what constitutes one's private life, "to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn."¹²³ The Restatement of Torts echoes this limitation: "matters of public record," or information that "the plaintiff himself leaves open to the public eye"¹²⁴ are not private. Another category of private facts includes highly intimate matters. For an individual, these are those "phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family

¹²⁰ Interestingly, in *C.L.D. v. Wal-Mart Stores, Inc.*, 79 F. Supp. 2d 1080 (D. Minn. 1999), where plaintiff claimed invasion of privacy based on the disclosure of her abortion to co-workers, the court ruled against plaintiff because she failed to allege sufficient publicity given to the fact of her abortion. The court did not reach the question of whether plaintiff's abortion was private and so declined to "address defendant's argument for dismissal on the ground that the information disclosed was not 'private'" *Id.* at 1085-86 n.3; *accord* Bonacci v. Save Our Unborn Lives, Inc., 11 Pa. D & C.3d 259 (Pa. Com. Pl. 1979).

¹²¹ RESTATEMENT, *supra* note 10, § 652D cmt. b. Some scholars argue that litigating a public disclosure tort is inherently "self-defeating" because recovery requires that the plaintiff, in effect, re-broadcast in court the "private" facts. Post, *supra* note 12, at 985-86. However, this Note emphasizes, as Post himself points out, that the tort litigation vindicates a right—for example, to autonomous reproductive choice—and so overrides any concern of re-broadcasting private facts. *Id.*; *accord* Bloustein, *supra* note 19, at 1003 ("[T]he legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered."). See *supra* notes 52-54 and accompanying text.

¹²² Dean Prosser also defines privacy as non-disclosure in discussing intrusion upon seclusion, for example, where there is no tort action if inspection of information is required by law and thus obtaining is legal. Prosser, *supra* note 9, at 391.

¹²³ Warren & Brandeis, *supra* note 8, at 215.

¹²⁴ RESTATEMENT, *supra* note 10, § 652D cmt. b. But see discussion of right to public privacy *infra* Part III.B. In the famous case *Melvin v. Reid*, 297 P. 91, 93 (Cal. Ct. App. 1931), the court held that, although the facts that plaintiff was formerly a prostitute and had been charged with murder appeared in the public record of her trial for that crime, the disclosure of such personal information in connection with plaintiff's true maiden name by defendant movie producer was actionable under the invasion of privacy tort. In so holding, the court relied on language from the California Constitution regarding a person's "inalienable rights" to justify its novel recognition of a common law right to privacy. *Id.*

or to close friends."¹²⁵ Traditionally, two such matters are medical information and sexuality. The unlawful disclosure of medical and sexual facts can be analogized to the disclosure of a woman's abortion.

Courts have long considered medical information, including medical treatment, medical history and medical records, private under the common law right to privacy. In an early case, *Barber v. Time*,¹²⁶ the court stated, "[c]ertainly if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition . . . without personal publicity."¹²⁷ Whether grounded in the tradition of confidentiality cloaking medical information¹²⁸ or general agreement as to its intimacy,¹²⁹ medical treatment is considered private and its disclosure is actionable under tort law where it results in embarrassment and harm to the plaintiff.¹³⁰ Moreover, medical history is protected under the common law right to privacy. The Court of Appeals for the Seventh Circuit stated, "[a] right to conceal one's medical history is readily derivable from the branch of the tort of invasion of privacy that protects people against the indiscriminate publicizing of intimate details of their personal lives."¹³¹ Finally, courts have held that disclosure of medical records is actionable under the public disclosure tort. For example, the Mississippi Court of Appeals held that where the plaintiff had not publicized his own medical records, defendant committed the tort of public disclosure of private facts by making the content of the records known to others.¹³²

Medical privacy can be extended by analogy to abortion in two ways. First, medical privacy can be applied to abortion itself as a medical procedure. The intersection of abortion with

¹²⁵ RESTATEMENT, *supra* note 10, § 652D cmt. b.

¹²⁶ 159 S.W.2d 291 (Mo. 1942).

¹²⁷ *Id.* at 295.

¹²⁸ *Id.* (noting that "the ethics of the medical profession require such matters to be kept confidential").

¹²⁹ RESTATEMENT, *supra* note 10, § 652D cmt. b (identifying "unpleasant or disgraceful or humiliating illnesses" as "intimate details" of one's life).

¹³⁰ *Mills*, 536 N.W.2d at 829; *accord Doe v. Univision Television Group, Inc.*, 717 So. 2d 63 (Fla. Dist. Ct. App. 1998) (defendant television station's disclosure of plaintiff's treatment for plastic surgery, her embarrassing scars, and its broadcast of her identity therewith violated plaintiff's right to privacy).

¹³¹ *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995).

¹³² *McCorkle v. McCorkle*, 811 So. 2d 258, 269 (Miss. Ct. App. 2001). There, the court described the medical records as private in nature because of their cloak of confidentiality. *Id.* at 267.

medical privacy is apparent in an Illinois lawsuit pending at the writing of this Note.¹³³ Plaintiff Jane Doe suffered a tear in her uterus as a result of an abortion procedure. As Doe was being loaded into a van for transport from the Hope Clinic where the abortion was performed to St. Elizabeth Hospital for further treatment, anti-abortion protestors Angela and Daniel Michael photographed her. The protestors later obtained the plaintiff's hospital records and published the records, along with the photograph and identifying information, on an anti-abortion website. Jane Doe and the Hope Clinic sued St. Elizabeth Medical Center, Angela Michael, Daniel Michael and other anti-abortion protestors, Stephen Wetzel, Verna Cepicky, Jerry Lieneke, Tim Berands and Reverend John Gamblin. In their complaint filed July 2, 2001, plaintiffs alleged, inter alia, intrusion upon seclusion and public disclosure of private facts. Specifically, the complaint alleged that "Defendants' procurement of the Plaintiff's said photograph and medical records constituted an intrusion into Plaintiff's private matters in that the Plaintiff's abortion procedure, . . . her medical history, details concerning her personal life . . . were all private facts of no legitimate concern."¹³⁴ With respect to the public disclosure cause of action, plaintiffs alleged that "[t]he unauthorized publication of the said photograph, the said medical records and the said private information was highly offensive and/or objectionable to both the Plaintiff and to any reasonable person"¹³⁵ On August 22, 2001, presiding Judge George Moran issued a preliminary injunction against defendants ordering them to "restrain[] from obtaining, distributing or publishing the medical records, medical data and photograph of Plaintiff Jane Doe."¹³⁶ Judge Moran's order characterizes the defendants' actions as invasive of Doe's medical privacy, rather than focusing exclusively on the intrusion into or disclosure of her abortion. There has been much media attention given to this case.¹³⁷

¹³³ The Hope Clinic for Women, Ltd. v. St. Elizabeth Med. Ctr., No. 2001-L-1090 (Ill. Cir. Ct. filed July 2, 2001).

¹³⁴ Complaint at 2-3, *Hope Clinic* (No. 2001-L-1090).

¹³⁵ *Id.* at 5.

¹³⁶ Preliminary Injunction at 4, *Hope Clinic* (No. 2001-L-1090).

¹³⁷ See, e.g., Steve Korris, *Judge Throws Cold Water on Abortion Protests*, CHI. TRIB., Feb. 6, 2002; *Judge Keeps Woman's Records Off Net*, AP ONLINE, Aug. 23, 2001; Stephanie Simon, *Privacy At Stake in New Antiabortion Strategy Debate*, L.A. TIMES, July 6, 2001, at A18.

Second, the analogy between medical privacy and privacy around abortion is appropriate because of the extreme intimacy of both medical information and abortion. To be sure, abortion has been described as a "matter[] of a sensitive and highly personal nature" in support of the non-disclosure of a plaintiff's identity in a suit challenging the constitutionality of a state abortion law.¹³⁸

Sexuality and sexual conduct are also considered private under tort law. According to the Restatement, "[s]exual relations, for example, are normally entirely private matters . . ."¹³⁹ Abortion and sexuality are marked by correlative high degrees of intimacy. At least one court has stated, "no aspects of life is [sic] more personal and private than those having to do with one's sexual organs and reproductive system."¹⁴⁰ Furthermore, several courts have held that the disclosure of another's sexual conduct is actionable under the public disclosure of private facts tort.¹⁴¹ That sexual matters are considered private bears on a similar description of abortion under the common law, illustrated by a class of invasion of privacy tort cases regarding "outing" or the public disclosure of an individual's homosexuality. The analysis of public disclosure claims in outing cases is traditional. Several courts held that where one's homosexuality is already a matter of public knowledge or record, further disclosure of that fact is not actionable.¹⁴² Indeed, under these circumstances, there would

¹³⁸ Doe v. Deschamps, 64 F.R.D. 652, 653 (D. Mont. 1974).

¹³⁹ RESTATEMENT, *supra* note 10, § 652D cmt. b. Warren and Brandeis condemned journalists who, "[t]o satisfy a prurient taste," publish information about individuals' sexual relations. Warren & Brandeis, *supra* note 8, at 196.

¹⁴⁰ Young v. Jackson, 572 So. 2d 378, 382 (Miss. 1990) (finding that defendants violated plaintiff's privacy by disclosing the private fact of her hysterectomy, but that the communication was protected by defendants' qualified privilege to warn other employees of health risks at the nuclear power plant). A less persuasive argument can be made that the Restatement's definition of sexual relations as private directly implicates reproductivity as a private fact because pregnancy itself (and childbirth) may result from sexual intercourse. *See generally* De May v. Roberts, 9 N.W. 146 (Mich. 1881).

¹⁴¹ *See* Cummings v. Walsh Constr. Co., 561 F. Supp. 872, 884 (S.D. Ga. 1983) (finding that plaintiff's sexual relationship with defendant was a private fact); Diaz v. Oakland Tribune, Inc. 188 Cal. Rptr. 762, 771 (Cal. Ct. App. 1983) (finding that transsexual plaintiff's sexual identity was a private matter under the public disclosure tort).

¹⁴² *See, e.g.,* Crumrine v. Harte-Hanks Television, Inc., 37 S.W.3d 124, 127 (Tex. App. 2001) (holding that where plaintiff's homosexuality was disclosed when he was a participant in a family law court proceeding and thus "public as a matter of law," re-disclosure by defendant television station was not actionable under tort law); Hogan v. Hearst Corp., 945 S.W.2d 246, 251 (Tex. App. 1997) (holding that defendant publisher's article regarding decedent's homosexual conduct as indicated in public

be no "private" fact to disclose. Without that bar on the action, at least one court found sexual orientation to be a private fact. In *Simpson v. Burrows*,¹⁴³ plaintiff was a restaurant owner in a rural town whose identity as a lesbian became the subject of letters sent to numerous individuals and local groups. Finding for the plaintiff with respect to her invasion of privacy tort claim, the court stated simply, "[p]laintiff's sexual orientation is a private fact."¹⁴⁴ Another court determined that a plaintiff's homosexuality was private according to the Restatement's identification of "sexual conduct" as a private matter.¹⁴⁵

Cases that consider outing under the public disclosure tort are particularly useful in the context of abortion because they draw on the connection between personal and decisional privacy. These cases show that disclosing another's homosexuality may result in the plaintiff being fired,¹⁴⁶ being forced to abandon a business¹⁴⁷ and even committing suicide.¹⁴⁸ These extreme consequences suggest that one might be compelled to act in such a way as to avoid the likelihood of another disclosing his or her sexual orientation. Thus, with sexual orientation, as with abortion, personal "privacy permits individuals to do what they would not do without it for fear of an unpleasant or hostile reaction from others."¹⁴⁹ Although disclosure may carry with it social stigma, the more egregious cost of disclosure is that it may impede one's liberty of action or restrict one's choices.¹⁵⁰ These "outing" cases show that disclosure may impact one's choice to be openly gay and are

record of arrest for indecent exposure was not an actionable disclosure under tort law); *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665, 669 (Cal. Ct. App. 1984) (holding that disclosure of plaintiff's homosexuality already publicized as a result of his political celebrity was not actionable under tort law).

¹⁴³ 90 F. Supp. 2d 1108 (D. Or. 2000).

¹⁴⁴ *Id.* at 1125.

¹⁴⁵ *Borquez v. Robert C. Ozer, P.C.*, 923 P.2d 166, 172 (Colo. Ct. App. 1995), *aff'd in part, rev'd in part*, 940 P.2d 371 (Colo. 1997). It seems that the court of appeals in *Borquez* found for plaintiff in part because his HIV-positive status was made public in addition to his sexual orientation. The court determined that plaintiff's ailment was private by relying on the Restatement characterization of stigmatized illnesses as private. *Id.* at 172-73.

¹⁴⁶ *Id.* A related case is *M.G. v. Time Warner, Inc.*, 107 Cal. Rptr. 2d 504 (Cal. Ct. App. 2001), in which defendant published a photograph depicting plaintiffs as members of a sports team with their coach who had pleaded guilty to child molestation. Plaintiffs alleged that homophobia compelled them to quit school or transfer. *Id.* at 511.

¹⁴⁷ *Simpson*, 90 F. Supp. 2d 1108.

¹⁴⁸ *Hogan v. Hearst Corp.*, 945 S.W.2d 246 (Tex. App. 1997).

¹⁴⁹ Gavison, *supra* note 28, at 451.

¹⁵⁰ See *supra* note 39.

analogous to potential public disclosure lawsuits in the abortion context which would assert that disclosure threatens to deter a woman from seeking an abortion.¹⁵¹ Like abortion seekers, individuals who bring suit regarding the unlawful disclosure of their homosexuality vindicate their right to make autonomous choices.

Extending the analogies of medical and sexual privacy suggests that abortion should be considered a private fact under the public disclosure of private facts tort. First, like medical information and sexual choices, an abortion is a highly personal experience. Abortion is intimate because it relates to pregnancy and reproductive choice.¹⁵² Second, with increasingly intense anti-abortion protest around clinics and the use of surreptitious surveillance technology, abortion seekers are unable to take evasive action against protestors. The generic suggestion that an individual who knows that she is under intrusive surveillance can protect her privacy "by applying social sanctions" such as confronting the intruder or fleeing is impracticable in this context.¹⁵³ A woman may not know that she is being surveilled, and if she does, she may flee the clinic and forgo the abortion. In effect, then, she has relinquished control of her reproductive choice to the protestors. Third, as a matter of public policy, the public disclosure tort may be invoked to protect certain classes of people—for example, women exercising reproductive choice and gays and lesbians—who suffer disclosure of especially personal facts that are politically charged.¹⁵⁴

In addition to meeting the requirements of publicity and privacy of the fact disclosed, the public disclosure plaintiff must satisfy a third element: that the publicity given to her private facts is "highly offensive to the ordinary reasonable" person

¹⁵¹ See discussion *supra* Part I.A.

¹⁵² See *supra* note 140 and accompanying text.

¹⁵³ See Elizabeth Paton-Simpson, *Privacy and The Reasonable Paranoid: The Protection of Privacy in Public Places*, 50 U. TORONTO L.J. 305, 330 (2000) (arguing for a limited right to public privacy and suggesting that one writing in a diary in a public park who notices someone looking at the diary "can then confront the intruder or simply close the diary and walk away"). Paton-Simpson also acknowledges that the development of covert surveillance technology makes physical evasion a less tenable solution to intrusive scrutiny. *Id.*

¹⁵⁴ See John A. Jurata, Jr., *The Tort That Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 513-15 (1999). See *supra* text accompanying notes 52-54.

who would be "justified in feeling seriously aggrieved" ¹⁵⁵ Social stigma resulting from disclosure may be an indicia of offensiveness and is an added reason to protect certain private facts. ¹⁵⁶ As with medical privacy, privacy around sexual relations may protect the individual from social stigma. With respect to the revelation of the plaintiff's homosexuality in *Borquez v. Robert C. Ozer, P.C.*, the court stated, "the disclosure of this information would be highly objectionable to a reasonable person because a strong stigma still attaches to . . . homosexuality" ¹⁵⁷ Similarly, the plaintiff in *Greenwood v. Taft* ¹⁵⁸ alleged that the publicity given to his homosexuality violated his common law right to privacy. Although the court remanded the case for insufficiency of facts alleged, it suggested that "[i]f Greenwood had chosen to keep his sexual orientation private, and the firm's alleged disclosure 'outed' him, a reasonable person may well have been offended by this disclosure." ¹⁵⁹ Thus, disclosure is objectionable where it would shame or disgrace the average individual.

B. *First Amendment Implications of Disclosure Suits*

If a court determines that the matter disclosed is of legitimate public concern, an action for invasion of privacy is defeated. Whether the public has a legitimate interest in the disclosed matter is defined as a question of "newsworthiness" and thus implicates the First Amendment privilege of the

¹⁵⁵ RESTATEMENT, *supra* note 10, § 652D cmt. c. Another description of the offensiveness of the disclosure is as "deeply shocking to the average person subjected to such exposure." *Haynes v. Alfred Knopf, Inc.*, 8 F.3d 1222, 1235 (7th Cir. 1993). The lower court in *Sidis v. F-R Publishing Corp.* 34 F. Supp. 19, 25 (S.D.N.Y. 1938), adopted what is known as the "mores test": "that under our law one may speak and publish what he desires provided no offense against public morals . . . is committed . . ."

"Robert C. Post argues that the inquiry into the offensiveness of the disclosure is virtually identical to that which underlies the "private facts" requirement. Both focus broadly on the appropriateness of the communicative act in question, rather than narrowly on the specific content of that communication. The distinct contribution of the "offensiveness" requirement is primarily that it makes explicit the notion that the law will not regulate every inappropriate revelation, but only those which are "highly offensive."

Post, *supra* note 12, at 983-84; see also Warren & Brandeis, *supra* note 8, at 216.

¹⁵⁶ See Bloustein, *supra* note 19, at 978-79 (arguing that, although shame may result from public disclosure of one's private facts, the real injury is "that some aspect of [one's] life has been held up to public scrutiny at all").

¹⁵⁷ *Borquez v. Robert C. Ozer, P.C.*, 923 P.2d 166, 173 (Colo. Ct. App. 1995) *aff'd in part, rev'd in part*, 940 P.2d 371 (Colo. 1997).

¹⁵⁸ 663 N.E.2d 1030 (Ohio Ct. App. 1995).

¹⁵⁹ *Id.* at 1035.

press.¹⁶⁰ Information in these cases is typically disclosed to the public via the press or an arm of it. Concern about media activity encroaching on privacy rights is not new. Indeed, Warren and Brandeis addressed the conflict between the two interests in *The Right to Privacy*.¹⁶¹ In identifying the "exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice," the authors created the "public interest" limitation on the tort action.¹⁶² Courts have framed the question of newsworthiness for the jury by enumerating three factors: "[1] the social value of the published facts, [2] the extent of the intrusion into ostensibly private matters, and [3] the extent to which the party voluntarily assumed a position of public notoriety."¹⁶³ Even if the first three elements of the tort—publicity given to a private fact, the disclosure of which is objectively offensive—are satisfied, the tort action may be defeated if the disclosed fact is deemed to be of legitimate concern to the public.¹⁶⁴

Notwithstanding that a matter is intimate, it may be of legitimate public interest if it is contained in the public record or is connected with the identity of a public figure. Because access to information in the public record is unrestricted and thus the data is not private,¹⁶⁵ it is clear that whether the public interest in the disclosed subject matter is legitimate relates to, but is not coextensive with, the determination that a subject is private.¹⁶⁶ The Supreme Court has outlined the First

¹⁶⁰ The Restatement identifies this concern: "It seems clear that the common law restrictions on recovery for publicity given to a matter of proper public interest will now become a part of the constitutional law of freedom of the press and freedom of speech." RESTATEMENT, *supra* note 10, § 652D cmt. d. Scholars have been prolific in the area of anti-abortion protest and the First Amendment. See *infra* note 182.

¹⁶¹ Warren & Brandeis, *supra* note 8, at 214.

¹⁶² *Id.* Of this conflict, one scholar suggested "the value of privacy may constitute a counterforce of perhaps equal symbolic and societal influence to the value embodied in the first amendment." Ingber, *supra* note 27, at 843.

¹⁶³ *Times Mirror Co. v. Superior Ct.*, 244 Cal. Rptr. 556, 561 (Cal. Ct. App. 1988) (explaining that the question is one for the jury whether plaintiff's name, which defendant published because plaintiff discovered a rape/murder victim's body, was of legitimate public concern).

¹⁶⁴ See *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665, 668 (Cal. Ct. App. 1984).

¹⁶⁵ See *supra* text accompanying note 124.

¹⁶⁶ Additionally, the public interest analysis relates to whether the disclosure would be objectively highly offensive. The Restatement explains,

[w]hen the matter to which publicity is given is true, it is not enough that the publicity would be highly offensive to a reasonable person. The common law has long recognized that the public has a proper interest

Amendment implications of publicizing information obtained from public records. However, the Court has not yet described potential freedom of speech implications for the invasion of privacy tort with respect to publicizing a "private" fact. In *Cox Broadcasting Corp. v. Cohn*,¹⁶⁷ the plaintiff sued for invasion of privacy under the public disclosure tort where the defendant published the name of his daughter, a victim of rape and murder. Defendant obtained the name of the victim from court records.¹⁶⁸ The Court considered whether the Georgia statute which prohibited publicizing the name of a rape victim was consistent with the First Amendment privilege of the press. It held that where a judicial record is open to public inspection, the publication of truthful, lawfully obtained information therein is privileged under the First Amendment, notwithstanding that publication would be highly offensive to a reasonable person.¹⁶⁹ The Court did not analyze whether the common law privacy protection of the victim's identity in connection with an intimate matter such as rape might diminish the significance of First Amendment principles.¹⁷⁰ The fact that the information was part of the public record truncated the Court's analysis of common law privacy. Similarly, in *Florida Star v. B.J.F.*,¹⁷¹ a rape victim sued defendant newspaper for violating her right to privacy where defendant published her name, obtained from a police report. The Court focused its inquiry on whether the Florida statute making it unlawful to publish the name of a victim of a sexual

in learning about many matters. When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.

RESTATEMENT, *supra* note 10, § 652D cmt. d.

¹⁶⁷ 420 U.S. 469 (1975).

¹⁶⁸ *Id.* at 472.

¹⁶⁹ *Id.* at 491.

¹⁷⁰ Specifically, the Court stated:

Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.

Id.

¹⁷¹ 491 U.S. 524 (1989).

offense was constitutional under the First Amendment¹⁷² and limited its analysis to "principles that sweep no more broadly than the appropriate context of the instant case."¹⁷³ The Court held 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, and that no such interest is satisfactorily served by imposing liability" under the Florida statute.¹⁷⁴ Recognizing the press' broad privilege to publish information which is part of the public record, the Court declined to describe the First Amendment implications of publicity given to private facts under the privacy tort.¹⁷⁵

Where there is no threshold determination that the disclosed information is newsworthy, as with public records, courts have distinguished between disclosure of a plaintiff's identity and revelation of the subject matter to which the plaintiff's identity relates.¹⁷⁶ In one set of cases, where the plaintiff has assumed a public position, the plaintiff's identity may be considered newsworthy. Indeed, Prosser underscored this rationale in *Privacy* when he stated that, in addition to the press' privilege to give publicity to newsworthy topics of legitimate interest to the public, the press has license to publicize the identity of one who has voluntarily become a public figure.¹⁷⁷ Generally, giving publicity to the private facts of one who has assumed a public position is consistent with the right of privacy because the public figure's expectation of and accordant right to privacy are voluntarily diminished.¹⁷⁸

¹⁷² *Id.* at 530-41.

¹⁷³ *Id.* at 533.

¹⁷⁴ *Id.* at 541.

¹⁷⁵ Some scholars assert that the Court's ruling in *Florida Star* permanently rendered the tort an ineffective remedy for invasion of privacy. See Jacqueline R. Rolfs, *The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107. But see *Haynes v. Alfred Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993) (Judge Posner suggested that the Court was careful not to "declare the tort of publicizing intensely personal facts totally defunct.").

¹⁷⁶ The relationship of plaintiff's identity to the disclosure raises the issue of anonymity as another paradigmatic form of privacy in the abortion context. See Paton-Simpson, *supra* note 153, at 325-26; see also Gavison, *supra* note 28, at 428, 436. In this Note, anonymity is described as a condition of privacy that facilitates the exercise of autonomy in the abortion context. See discussion *supra* Part I.A.

¹⁷⁷ Prosser, *supra* note 9, at 410.

¹⁷⁸ *Id.* at 410-11. With respect to voluntary public figures, the Restatement explains:

So far as his public appearances and activities themselves are concerned, such an individual has . . . no right of privacy. . . . [T]he legitimate interest of the public in the individual may extend beyond

Moreover, where one's identity has involuntarily come to public attention, for example, through heroism or criminal activity, there may be no invasion of privacy due to the newsworthiness of the event.¹⁷⁹

In another substantial body of case law, a plaintiff's identity is deemed non-newsworthy. Here, press activity runs afoul of the right to privacy where it exposes the identity of an individual who intends to remain private with respect to a particularly intimate matter.¹⁸⁰ These matters may concern medical treatment or, significantly, reproductive issues such as fertility or abortion.¹⁸¹ The distinction between newsworthy facts and privacy of an individual's identity is important in the context of abortion. The permissible journalistic goal of protesting abortion can be attained without identifying a particular abortion seeker. As the abortion debate accrues

those matters which are themselves made public, and to some reasonable extent may include information as to matters that would otherwise be private.

RESTATEMENT, *supra* note 10, § 652D cmt. e. According to the excerpt from the Restatement above, it could be argued that the identity of a celebrity or other public figure who has had an abortion is newsworthy. However, this Note argues that even a public figure has a right to common law privacy which protects her abortion from disclosure by another given the extreme intimacy of abortion. Additionally, the risk of deterrence posed by disclosure supports an argument for extending the right to privacy to public figures. The Court's discussion in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 765 (1986), of the limitations on permissible disclosure of the identity of a woman seeking an abortion is applicable here. See *supra* text accompanying notes 76-84.

¹⁷⁹ RESTATEMENT, *supra* note 10, § 652D cmt. f.

¹⁸⁰ See *Doe v. Univision Television Group, Inc.*, 717 So. 2d 63, 65 (Fla. Dist. Ct. App. 1998) (holding that plaintiff who underwent plastic surgery and suffered embarrassing scarring as a result was unlawfully identified by defendant television station); *Winstead v. Sweeney*, 517 N.W.2d 874, 880 (Mich. Ct. App. 1994) (remanding the case for jury consideration of whether plaintiff's abortions are private and non-newsworthy to make out tort of public disclosure of private facts); *Y.G. v. Jewish Hosp.*, 795 S.W.2d 488 (Mo. Ct. App. 1990) (holding that plaintiffs' identities in connection with their participation in hospital in vitro fertilization program is not a matter of legitimate public interest). But see *Haynes v. Alfred Knopf, Inc.*, 8 F.3d 1222, 1233 (7th Cir. 1993) (stating that publishing the identities of plaintiffs in book about black migration was necessary in order for "the public . . . to evaluate the profound social and political questions that the book raises" and to lend concreteness to the problems described in the book); *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 489 (Cal. 1998) (holding that identifying characteristics of accident victim could not have been edited from broadcast and were dramatic and newsworthy); *Howard v. Des Moines Register*, 283 N.W.2d 289 (Iowa 1979) (holding that the identity of plaintiff who was involuntarily sterilized while a resident of an institution was newsworthy). *Howard* is distinguishable from the case in which a protestor, like Neal Horsley, discloses the fact of a particular woman's abortion. First, the court there found that the sterilization was part of the public record, and second, the identity of the plaintiff in *Howard* was useful in exposing "maladministration and patient abuses" at the institution. *Id.* at 300, 303.

¹⁸¹ See *Winstead*, 517 N.W.2d 874; *Y.G.*, 795 S.W.2d 488.

political attention and increasingly concerns the legal community¹⁸² and the public, the violation of women's privacy becomes more serious and the need to protect privacy intensifies. Moreover, with the availability of new surveillance equipment¹⁸³ and expansive channels of communication such as the Internet, the "degradation of personality by the public disclosure of private intimacies [will] become a legally significant reality"¹⁸⁴ in the context of abortion.

¹⁸² The legal community has given much attention to First Amendment issues surrounding the actions of anti-abortion protestors. In *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F. Supp. 2d 1130 (D. Or. 1999), abortion providers and abortion rights groups filed suit against anti-abortion protestors seeking to enjoin protestors from posting the names of providers on the Internet. The United States District Court of Oregon rejected the First Amendment defense of the anti-abortion protestors and held that the protestors engaged in illegal communication or "true threats" and were enjoined from further protest activity. *Id.* at 1154-55. The plaintiffs in that action were awarded a judgment of \$107 million. Roger Parloff, *Defending the Doctors*, AM. LAW. July, 1999, at 91. Then, in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001), the Court of Appeals for the Ninth Circuit vacated the award to plaintiffs, holding that defendant protestors' speech was protected under the First Amendment. The Court of Appeals for the Ninth Circuit then entered an order for rehearing of the case en banc. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 268 F.3d 908 (9th Cir. 2001). Recently, the court of appeals reheard the case and, affirming the order of the district court, held that the American Coalition of Life Activists' statements in the form of "wanted"-type posters and listings of the names of killed or wounded abortion providers on the Nuremberg Files website amounted to "true threats" to intimidate under the Freedom of Access to Clinic Entrances Act and therefore were not protected speech under the First Amendment. See *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1063 (9th Cir. 2002). The "true threats" doctrine under the First Amendment and its intersection with abortion and technology as raised by this case have interested many scholars. See Jason Schlosberg, *Judgment on "Nuremberg": An Analysis of Free Speech and Anti-Abortion Threats Made on the Internet*, 7 B.U. J. SCI. & TECH. L. 52 (2001); Steven G. Gey, *The Nuremberg Files and The First Amendment Value of Threats*, 78 TEX. L. REV. 541 (2000); Melanie C. Hagan, *The Freedom of Access to Clinic Entrances Act and the Nuremberg Files Web Site: Is The Site Properly Prohibited Or Protected Speech?*, 51 HASTINGS L.J. 411 (2000); Michael Vitiello, *The Nuremberg Files: Testing the Outer Limits of the First Amendment*, 61 OHIO ST. L.J. 1175 (2000); Clay Calvert & Robert D. Richards, *New Millennium, Same Old Speech: Technology Changes, But the First Amendment Issues Don't*, 79 B.U. L. REV. 959 (1999); Robert D. Richards & Clay Calvert, *The "True Threat" To Cyberspace: Shredding The First Amendment For Faceless Fears*, 7 COMM. LAW CONSP. 291 (1999); John Rothchild, *Menacing Speech and the First Amendment: A Functional Approach to Incitement That Threatens*, 8 TEX. J. WOMEN & L. 207 (1999).

¹⁸³ Anti-abortion protestors typically use still and video cameras to record images of abortion seekers and clinics and increasingly are implementing new ways to convey the images such as "live video broadcasts" on the Internet. See Hula, *supra* note 4.

¹⁸⁴ Bloustein, *supra* note 19, at 984.

III. INTRUSION UPON SECLUSION

In addition to the public disclosure tort, abortion seekers may also seek legal redress for the wrongful actions of anti-abortion protestors under the intrusion upon seclusion tort. Intrusion upon seclusion is defined as follows: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."¹⁸⁵ An actionable intrusion claim requires that the plaintiff show: (1) the defendant's intrusion; (2) into a place of seclusion or plaintiff's private affairs; and (3) that the intrusion would be highly offensive to a reasonable person.¹⁸⁶

There is one case in which the court considered the intrusion upon seclusion tort in the context of abortion.¹⁸⁷ In *United States v. Vazquez*,¹⁸⁸ plaintiffs, the United States and the State of Connecticut *parens patriae*, alleged that defendant, an anti-abortion protestor, violated the Freedom of Access to Clinic Entrances Act.¹⁸⁹ During discovery in the litigation, defendant produced videotape footage depicting clients entering an abortion clinic.¹⁹⁰ Pursuant to the plaintiffs' request, the trial judge issued an order temporarily sealing the videotapes and defendant appealed.¹⁹¹ Plaintiffs argued that certain tapes identifying clients as they entered the clinic should remain permanently under seal, preventing public disclosure in order to protect clients' privacy rights.¹⁹² On remand from the Court of Appeals for the Second Circuit, the district court balanced clinic clients' common law privacy rights¹⁹³ against the "strongest presumption of [public] access"

¹⁸⁵ RESTATEMENT, *supra* note 10, § 652B.

¹⁸⁶ See, e.g., *Swarthout v. Mut. Serv. Life Ins. Co.*, 632 N.W.2d 741, 744 (Minn. Ct. App. 2001) (regarding alleged privacy violation where, without plaintiff's authorization, life insurance company altered plaintiff's medical information release form in order to receive additional medical information about plaintiff).

¹⁸⁷ See discussion *supra* pp. 332-33 regarding a pending intrusion upon seclusion lawsuit in the abortion context.

¹⁸⁸ 31 F. Supp. 2d 85 (D. Conn. 1998).

¹⁸⁹ 18 U.S.C. § 248 (1994).

¹⁹⁰ *Vazquez*, 31 F. Supp. 2d at 87.

¹⁹¹ *Id.*

¹⁹² *Id.* at 88.

¹⁹³ The court also considered, but rejected, plaintiffs' argument that a clinic client has a constitutional right to privacy "which extends to her travel on a public street outside of an abortion clinic." *Id.* at 89.

to the videotapes.¹⁹⁴ Although it did not expressly name the interest as one in seclusion, the court approached plaintiffs' request in light of the principles underlying intrusion upon seclusion. The court held that because the clients were filmed in a public place, plaintiffs did not establish a countervailing common law right to privacy which would mandate the sealing of the tapes.¹⁹⁵ It reasoned:

[T]he video cameras captured images of potential patients walking on a public street as they entered and exited [the clinic]. Thus, any images filmed by the video camera could also be viewed by members of the general public who were standing or walking in the vicinity of the clinic. Moreover, the videos were made out in the open and during broad daylight.¹⁹⁶

Thus, the fact that the clinic clients could be publicly viewed with the naked eye defeated plaintiffs' argument for a right to privacy. *Vazquez* demonstrates the strength of a traditional limitation on the intrusion upon seclusion tort, the deficiency of a common law right to privacy where the alleged intrusion occurs in public.¹⁹⁷

Rather than addressing the intimacy of abortion as a basis for the right to common law privacy, *Vazquez* merely reiterates the limitation on privacy rights in public. However, an argument can be made for the common law right to public privacy in this context. Protestors' increasingly frequent use of surveillance techniques supports this contention.¹⁹⁸ Indeed, the *Vazquez* court suggested, in dicta, that utilizing "ruse or subterfuge" to record the images of clinic clients may constitute a violation of clients' common law right to privacy.¹⁹⁹ One ploy anti-abortion protestors used to capture the image of an abortion seeker rushing to the safety of a clinic was to shout anti-choice messages, causing the woman to turn in response to the disturbance, and then snap her picture. Other subterfuge includes mounting ladders to reach over fences that have been erected to block the view of clinic parking lots in order to

¹⁹⁴ *Id.* at 88. Specifically, the court explained that public access to the videotapes is presumed because it provides a check on the judiciary and a way for the public to evaluate state and federal entities that bring FACE claims. *Id.*

¹⁹⁵ *Vazquez*, 31 F. Supp. 2d at 91.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Horsley now utilizes video recording devices in addition to cameras. See Douglas & Myers, *supra* note 7, at 3.

¹⁹⁹ *Vazquez*, 31 F. Supp. 2d at 91.

photograph abortion seekers.²⁰⁰ Thus, although this Note advocates more fervently for remedying violations of abortion seekers' common law privacy under the public disclosure tort, it also supports a potential remedy under intrusion upon seclusion.

A. *An Analysis of Elements*

First, the intrusion upon seclusion tort requires the plaintiff to show that the defendant committed an intrusion. Unlike the public disclosure tort which focuses on publicity given to private facts, the intrusion upon seclusion action focuses on the means of intrusion.²⁰¹ It follows that the tort is complete at the moment of intrusion. The intrusion must be intentional, a requirement which is met where the defendant "does not believe that he has either the necessary personal permission or legal authority to do the intrusive act."²⁰² The actionable means of intrusion vary and may include physical invasion by the defendant²⁰³ or invasion "by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs"²⁰⁴ Generally, physical distance between individuals maintains a state of inaccessibility, a form of personal privacy.²⁰⁵ However, surveillance methods may be used to transcend physical distance and invade an individual's privacy by rendering that individual accessible to another.

²⁰⁰ Dreazen, *supra* note 5, at A1.

²⁰¹ RESTATEMENT, *supra* note 10, § 652B cmt. b; *accord* Bloustein, *supra* note 19, at 982 ("Physical intrusion upon a private life and publicity concerning intimate affairs are simply two different ways of affronting individuality and human dignity. The difference is only in the means used to threaten the protected interest.") (citing *De May v. Roberts*, 9 N.W. 146 (Mich. 1881), as exemplary of a case in which a single intimate affair, childbirth, could be the subject of both an intrusion upon seclusion and a public disclosure of private facts suit)).

²⁰² *O'Donnell v. United States*, 891 F.2d 1079 (3d Cir. 1989).

²⁰³ *See De May*, 9 N.W. at 147.

²⁰⁴ RESTATEMENT, *supra* note 10, § 652B cmt. b. Where the alleged intrusion is committed with the use of surveillance technology, courts have held that the defendant need not have actually viewed the plaintiff. *See Harkey v. Abate*, 346 N.W.2d 74 (Mich. App. 1983) (holding that plaintiff's privacy was violated where defendant "installed see-through panels in the ceiling of the [public] restroom which permitted surreptitious observation from above," notwithstanding plaintiff's lack of proof that the defendant actually viewed her and her daughter in the restroom).

²⁰⁵ UNEASY ACCESS, *supra* note 29, at 14.

Second, the tort requires that the defendant invade the plaintiff's "solitude" or "seclusion." The plaintiff's private affairs or intimate concerns may be secluded.²⁰⁶ Private affairs may include bank accounts, mail or personal documents.²⁰⁷ In addition, physical spaces commonly associated with privacy have been considered places of seclusion. Courts have ruled that a plaintiff's privacy is invaded where the defendant intrudes into her home,²⁰⁸ for example, the plaintiff's den²⁰⁹ or bedroom.²¹⁰ An exemplary case regarding interference with residential and personal privacy, *De May v. Roberts*,²¹¹ preceded Warren and Brandeis's prescient article. There, defendant physician De May allowed his friend, a non-physician, to enter plaintiff's home and witness the birth of her child without plaintiff's consent.²¹² The court found that the plaintiff possessed a legal right to the privacy of her home.²¹³ Given the emphasis on physical seclusion as an aspect of privacy, it follows that courts have held one does not have a reasonable expectation of privacy when in a public place.²¹⁴ The Restatement notes, "there is no liability for . . . observing [plaintiff] or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye."²¹⁵

²⁰⁶ RESTATEMENT, *supra* note 10, § 652B cmt. b.

²⁰⁷ *Id.*

²⁰⁸ Violations of residential privacy have been the subject of litigation concerning abortion providers' rights against anti-abortion protestors demonstrating outside their homes. *See supra* note 54.

²⁰⁹ *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971).

²¹⁰ RESTATEMENT, *supra* note 10, § 652B cmt. b, illus. 2.

²¹¹ 9 N.W. 146 (Mich. 1881).

²¹² *Id.*

²¹³ *Id.* at 149. *See infra* text accompanying note 218.

²¹⁴ *See Jackson v. Playboy Enter.*, 574 F. Supp. 10 (D. Ohio 1983) (holding that because plaintiffs were on a public street at the time the photograph about which they complained was taken, there was no invasion of privacy); *Wilkins v. Nat'l Broad. Co.*, 84 Cal. Rptr. 2d 329 (Cal. Ct. App. 1999) (holding that plaintiffs had no reasonable expectation of privacy on the patio of a public restaurant with others in the vicinity); *Cox v. Hatch*, 761 P.2d 556, 564 (Utah 1988) (holding that plaintiffs had no reasonable expectation of privacy where their photographs were taken with politician in "an open place" and "in the company of others").

²¹⁵ RESTATEMENT, *supra* note 10, § 652B cmt. c. This limitation on the tort action is described in Dean Prosser's *Privacy*:

On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record . . . of a public sight which any one present would be free to see.

Prosser, *supra* note 9, at 391-92 (citations omitted).

In addition to showing that the defendant intruded upon plaintiff's physical seclusion or private affairs, the plaintiff must establish that the intrusion would be "highly offensive to a reasonable person."²¹⁶ The Restatement describes this standard as connoting a "substantial"²¹⁷ intrusion. Case law indicates that the offensiveness of the intrusion is distinct from, but related to, the seclusion of the plaintiff's physical person or her private affairs. Where a plaintiff alleges a violation of particularly personal affairs, courts' reasoning suggests that this element prevails over the question of whether the plaintiff was located in a private or public space at the time of the alleged intrusion. For example, in *De May v. Roberts*, regarding the defendant's intrusion upon the birth of plaintiff's child, the court stated:

[I]t would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy. *To the plaintiff the occasion was a most sacred one* and no one had a right to intrude unless invited or because of some real and pressing necessity which it is not pretended existed in this case.²¹⁸

The court's characterization suggests that the real harm in the case was not that the plaintiff's home was invaded, but that there was an intrusion upon an intensely personal, private event. This emphasis is apparent with respect to intrusions on privacy in public places. In *Bennett v. Norban*,²¹⁹ an assistant manager of a shop who suspected the plaintiff of shoplifting impeded plaintiff's movement, touched her shoulder, directed her to remove her coat and searched her dress pockets for merchandise.²²⁰ The court reasoned that "the angry performance of defendant's agent was an unreasonable and serious interference with appellant's desire for anonymity and an intrusion beyond the limits of decency."²²¹ That the court found for the plaintiff despite her presence on a "public highway" during the alleged invasion suggests that the court gave greater weight to the offensiveness of the intrusion upon plaintiff's person.²²² Thus, courts have overlooked the

²¹⁶ See, e.g., *Swarthout v. Mut. Serv. Life Ins. Co.*, 632 N.W.2d 741, 744 (Minn. Ct. App. 2001).

²¹⁷ RESTATEMENT, *supra* note 10, § 652B cmt. d.

²¹⁸ *De May*, 9 N.W. at 148-49 (emphasis added).

²¹⁹ 151 A.2d 476 (Pa. 1959).

²²⁰ *Id.* at 477.

²²¹ *Id.* at 479.

²²² See *id.*

traditional "public place" limitation on this tort action in ruling against defendants who have committed particularly offensive intrusions upon plaintiffs' affairs.

B. *An Argument for Public Privacy*

Cases such as *Bennett v. Norban* illustrate the potential for an intrusion upon seclusion action to lie, notwithstanding that the alleged privacy violation occurred in a public place. This has important implications for abortion seekers who are surveilled on public property around a family planning clinic. Indeed, the Restatement issues a caveat to the limitation on actions for intrusion in public places: "Even in a public place, however, there may be some matters about the plaintiff . . . that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters."²²³ Andrew Jay McClurg advocates for recognizing an intrusion tort action where the public intrusion would be particularly offensive to a reasonable person.²²⁴ McClurg suggests privileging the "offensiveness" requirement above the fact of the plaintiff's physical location at the time of the alleged invasion.²²⁵ However, this modified inquiry is better understood as an emphasis on the intimacy of the plaintiff's affairs. Moving away from the limiting notion of the plaintiff's physical seclusion, McClurg emphasizes the Restatement definition of "seclusion" which includes "intrusions upon a person's 'private

²²³ RESTATEMENT, *supra* note 10, § 652B cmt. c. The Restatement adopted this language from the classic case of *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964), in which plaintiff prevailed on her intrusion upon seclusion claim against the newspaper that published a photograph of her which revealed her undergarments, despite the fact that she was in public at a fun-house when the photograph was taken.

²²⁴ McClurg, *supra* note 37.

²²⁵ McClurg suggests a test for applying allegations of public privacy violations to the intrusion upon seclusion tort. *Id.* at 1058. This test combines some elements of the public disclosure and intrusion upon seclusion branches. Although the relatedness of the two branches is apparent from the fact that plaintiffs frequently plead both causes of action in one case, this Note will utilize only McClurg's argument for public privacy under intrusion upon seclusion. *See also* Paton-Simpson, *supra* note 153, at 321 (arguing that, because the right to privacy is a matter of degree, individuals may have a reasonable expectation of privacy even in public). Notably, Paton-Simpson cites *United States v. Vazquez*, 31 F. Supp. 2d 85 (D. Conn. 1998), as an example of a case in which the right to public privacy would be appropriate. Paton-Simpson, *supra* note 153, at 313.

affairs or concerns.”²²⁶ He argues that this conception “is broad enough to include intrusions in public places.”²²⁷ By focusing the inquiry on private matters which a plaintiff secludes from the public, McClurg centralizes the plaintiff’s privacy interest. McClurg then defines a person’s private concern as her “ability to move about in a public place without being followed, photographed, or videotaped.”²²⁸ He offers the example of intrusion by an anti-abortion protestor upon an abortion seeker’s solitude by videotaping or photographing her in the clinic vicinity.²²⁹ He argues that “even brief observations may seriously invade a person’s private information preserve. . . . Though [a protestor’s intrusion] may be brief in duration, it obviously captures an extremely intimate fact about the person filmed: that she is getting or considering an abortion.”²³⁰ Although it concerned constitutional law, the court’s analysis of intrusion in *Pro-Choice Network v. Project Rescue*²³¹ is pertinent. There, the court considered whether private actors could be enjoined from videotaping abortion seekers in the clinic vicinity based on the women’s constitutional right to privacy. The court suggested, in dicta:

It is unavoidable that, in exercising her right to have an abortion, a woman must momentarily travel on a public sidewalk or street in order to get to the doctor’s office. However, this fact should not allow defendants to freely intrude upon a woman’s right to privacy. *What is particularly bothersome is that when the intruder is an individual rather than the government, the use of the photographs and videotapes is left to the sole discretion of the intruder with no concern for the well-being of the woman.*²³²

²²⁶ McClurg, *supra* note 37, at 1055 (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1977)).

²²⁷ *Id.* at 1055.

²²⁸ The emphasis on technology is significant: McClurg asserts that a possible distinction between actionable and non-actionable instances of intrusion lies in the use of camera and video recording devices versus the naked eye. *Id.* at 1041. The use of technology is particularly offensive in that it enables the intruder to form a permanent record of the plaintiff’s private affair. *Id.* at 1042; accord Paton-Simpson, *supra* note 153, at 321 (asserting that “[a] rogue factor that not only disrupts normal expectations of public privacy but also undermines the distinction between public and private places is the use of privacy-invasive technologies”).

²²⁹ McClurg, *supra* note 37, at 1033.

²³⁰ *Id.* (citing Chico Feminist Women’s Health Ctr. v. Scully, 256 Cal. Rptr. 194 (Cal. Ct. App. 1989), in which plaintiffs sued protestors for invasion of privacy under the California Constitution and invoked a right to public privacy).

²³¹ 799 F. Supp. 1417, 1438 (W.D.N.Y. 1992), *rev’d*, 67 F.3d 377 (2d Cir. 1995), *aff’d in part, rev’d in part*, 519 U.S. 357 (1997).

²³² *Id.* (emphasis added).

Although the court declined to enjoin defendants' use of cameras based on the lack of precedent,²³³ its pronouncement indicates the potential for abortion seekers' right to public privacy. This analysis of public privacy suggests that an abortion may be deemed a "private concern," although procurement requires a woman to traverse public space, and thus the abortion seeker should be protected from tortious intrusion by another.

Another approach indicates a shift toward recognizing privacy rights in public. According to this analysis, courts qualify the standard of reasonableness and endorse an expectation of privacy that is not complete. In *Sanders v. American Broadcasting Companies*,²³⁴ plaintiff employee claimed that a co-worker, by videotaping and recording workplace conversations, intruded upon his seclusion and thus invaded his privacy. The court analyzed the extent to which a person may reasonably expect privacy in the workplace:

[P]rivacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy: the fact the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law.²³⁵

Significantly, the court expanded the right of public privacy by stating that "mass media videotaping may constitute an intrusion even when the events and communications recorded were visible and audible to some limited set of observers at the time they occurred."²³⁶ An emphasis on technology has compelled courts to reconceive and expand the scope of actionable intrusions into individual privacy.

In sum, courts should afford an abortion seeker a remedy for intrusion upon the intimate affair of her abortion by protestors who scrutinize her activity at a reproductive health services clinic. The success of this action would likely depend

²³³ *Id.* at 1437.

²³⁴ 978 P.2d 67 (Cal. 1999).

²³⁵ *Id.* at 72.

²³⁶ *Id.* (citing *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998) (finding a triable issue of fact with respect to the reasonableness of an accident victim's expectation of privacy where a television producer recorded the victim's conversation with the rescue nurse, but the record was unclear as to whether the general public overheard the conversation)). See *supra* note 228 regarding intrusion and technology.

upon a recognition of a right to privacy in public. Courts should recognize this right to privacy in public where the intrusion concerns a particularly intimate affair such as abortion, the intrusion upon which would be objectively highly offensive.

CONCLUSION

This Note argues that abortion seekers have a common law right to privacy arising under the principles described by Warren and Brandeis in *The Right to Privacy*.²³⁷ A woman may vindicate her right to privacy in a lawsuit against anti-abortion protestors who have disclosed the fact of her abortion. A court's conclusion that an abortion is a private, intimate matter, like one's medical information and sexual orientation, should prevail over any First Amendment defense offered by the individual or entity who gives publicity to the abortion. Under the intrusion upon seclusion tort, an abortion seeker may also sue an anti-abortion protestor for invasion of privacy where the demonstrator has scrutinized or created a photographic record of her presence at an abortion clinic. Here, courts should recognize the countervailing offensiveness of the intrusion into a matter as personal as abortion to transcend the traditional "public forum" limitation on the tort action. Acknowledging this right is particularly important in light of the increasing inventiveness of surveillance technology which anti-abortion protestors use as a tentacular means of intrusion.

Recognizing a remedy for abortion seekers under the invasion of privacy tort will vindicate women's reproductive autonomy. This Note has adopted a functionalist theory of privacy and defined common law privacy in terms of autonomy. Non-disclosure and seclusion are forms of personal privacy that may promote reproductive autonomy. This is a familiar scheme within constitutional privacy jurisprudence involving abortion rights²³⁸ and is an incarnation of Warren and Brandeis's "right to be let alone."²³⁹ The common law remedies for which this Note advocates uniquely define and defend a woman's right to

²³⁷ Warren & Brandeis, *supra* note 8.

²³⁸ See, e.g., *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), *overruled on other grounds by* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

²³⁹ Warren & Brandeis, *supra* note 8, at 195.

personal privacy as against invasive anti-abortion protest activity and facilitate reproductive self-determination.

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