Notes

Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts To Protect Abortion Patients and Staff

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I. INTRODUCTION

When Lori Driver, an anti-abortion activist, learned that Lisa Smith[1] was scheduled to have an abortion the following day, Driver looked up Smith's telephone number and left her two telephone messages. Smith did not return Driver's calls, so Driver stepped up her efforts, going to Smith's house and leaving anti-abortion literature and a plastic model of a fetus on her doorstep. The next morning, the day of Smith's scheduled abortion, Driver left a message on her answering machine, asking her parents to call about a medical emergency involving their daughter. When Smith arrived at the clinic for her appointment, a protestor called out to her by name and accused her of murdering her baby. An unknown caller left a message for Smith at the clinic that Smith's parents knew about her plan and were distraught. Meanwhile, a clinic representative called Driver's number pretending to be Smith's father returning her message, and the person at the other end informed him that Smith had gone in for an abortion.[2]

1. For the purposes of this Note, "Lisa Smith" is used to denote the anonymous patient.

2. Robbinsdale Clinic v. Pro-Life Action Ministries, 515 N.W.2d 88, 90, 94-95 (Minn. Ct. App. 1994) (Lansing, J., dissenting). It is interesting to note that significant details—such as the message left for Smith by someone masquerading as her parents and the public yelling of her full name—were left out of the majority opinion's description of the facts but were included in the dissent's.

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This example has become all too ordinary. (Incidentally, a divided court denied relief to Smith.) Having lost the legal battle to criminalize abortion,[3] anti-abortion protestors have shifted to a strategy of extralegal deterrence through various techniques of shaming, harassment, and obstruction. Protestors publicize the names of patients[4] and, in at least one case, their medical records.[5] They film patients entering and leaving clinics, and post the images on the Internet.[6] They record license plates in clinic parking lots; track down drivers' names and addresses; visit patients' homes; and send letters to them and their families, friends, boyfriends, and husbands.[7] Protestors even pose as abortion providers, taking down personal information from callers and using that information to contact family members and urge them to intervene.[8]

Abortion doctors are also targets of intentional exposure. Protestors picket outside doctors' homes, photograph them, videotape them, and observe them through binoculars.[9] They leaflet cars with the names and addresses of clinic staff.[10] They post doctors' names, addresses, phone numbers, and license plate numbers, as well as video footage of clinic entrances, on the Internet.[11] Intent on going further, they have been planning, and may already have begun, to broadcast clinic footage on public access television.[12]

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3. *See* Roe v. Wade, 410 U.S. 113, 153, 163 (1973) (holding that "the Fourteenth Amendment's concept of personal liberty . . . encompass[es] a woman's decision whether or not to terminate her pregnancy" and consequently that states cannot intervene to protect the interests of the fetus before it becomes viable).

4. *See* Doe v. Mills, 536 N.W.2d 824 (Mich. Ct. App. 1995) (describing how defendants obtained information about two women scheduled to undergo abortions and, on the day of their appointment, stood at the entrance to the clinic parking lot holding up signs displaying these women's names).

5. Stephanie Simon, *Privacy at Stake in New Antiabortion Strategy Debate: A Woman Injured During a Procedure in Illinois Finds Her Medical Data Posted on a Web Site*, L.A. TIMES, July 6, 2001, at A18 (describing how one woman, who suffered complications resulting from an abortion, discovered that her photograph and medical records had been posted on the Internet).

6. Yochi J. Dreazen, *In the Shadows: Photos of Women Who Get Abortions Go Up on Internet*, WALL ST. J., May 28, 2002, at A1.

7. Steve McVicker, *Poison Pen: Bryan Anti-Abortionists Use the Mail—and the Law—To Escalate Their Attacks on Clinic Workers*, HOUSTON PRESS, Mar. 23, 2000, *at* http://www.houstonpress.com/issues/2000-03-23/news.html/1/index.html.

8. *See* Bonacci v. Save Our Unborn Lives, Inc., 11 Pa. D. & C.3d 259 (C.P. Phila. County 1979).

9. *See* Valenzuela v. Aquino, 853 S.W.2d 512, 521 (Tex. 1993).

10. Bella English, *Career of Choice: Dianne Luby Braves Threats and Political Storms as CEO of Planned Parenthood in Massachusetts*, BOSTON GLOBE, June 26, 2001, at E1.

11. *See* The Nuremberg Files, *at* http://www.christiangallery.com/atrocity/index.html (last visited Nov. 14, 2002).

12. *See* Robyn Blumner, *Abortioncam May Be Disheartening but It's Legally Sound*, ST. PETERSBURG TIMES, Sept. 9, 2001, at 1D (reporting that Neal Horsley, creator of The Nuremberg Files website, had sent out an e-mail request for supporters to air abortion-clinic footage on local public access stations).

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What all these activities—to which this Note refers as "abortion outing"—have in common is that they destroy the privacy and anonymity[13] on which the practice of abortion fundamentally depends. Patients need anonymity to be safe from community retaliation and free from the unwanted influence of friends, family members, and acquaintances. Doctors need privacy to be safe from harassment or violence by community members who oppose what they do. Abortion opponents have rightly guessed that reducing anonymity deters abortion, and their guess is paying off. Fewer and fewer doctors are practicing abortion, to the point where abortion is no longer accessible in much of the country,[14] and prospective patients have been driven away from clinics by the threat of publicity.[15]

Because *Roe*'s constitutional right to privacy only protects women against state actors, abortion-rights advocates have fought at the federal and state levels for statutory and judicial protections against protestors. At the federal level, for example, they have helped pass the Freedom of Access to Clinic Entrances Act of 1995 (FACE),[16] which criminalizes the use of, among other things, force or threats to prevent women from entering clinics, and the Drivers' Privacy Protection Act of 1994,[17] which makes it more difficult for anti-abortion activists, among others, to obtain personal information based on names and license plates. At the state and local levels, they have secured laws,[18] ordinances,[19] and injunctions[20] restricting protests outside clinic entrances and doctors' homes.

13. This Note generally uses privacy and anonymity interchangeably, even though technically it uses "anonymity" to denote a particular type of the more general concept of "privacy," because anonymity is so central to the abortion issue. Specifically, anonymity describes the condition of being free from individualized identification or recognition. Although it is distinct from other forms of privacy such as reserve, mental repose, autonomy, or seclusion, it is closely connected to these forms for reasons that, if not clear at the outset, should become clear in the course of this Note.

14. As of 1996, eighty-six percent of all U.S. counties had no identified abortion provider, and thirty-two percent of women of reproductive age lived in these counties. Press Release, The Alan Guttmacher Institute, Abortion Providers Decreased 14% Between 1992 and 1996 (1998), *at* http://www.guttmacher.org/pubs/archives/newsrelease3006.html.

15. *See The O'Reilly Factor: Unresolved Problem* (FOX News television broadcast, Aug. 3, 2001) (interview with anti-abortion activist Neal Horsley).

16. Pub. L. No. 103-259, 108 Stat. 694 (codified as amended at 18 U.S.C. § 248 (2002)).

17. Pub. L. No. 103-322, 108 Stat. 2099 (codified as amended at 18 U.S.C. §§ 2721-2725). Although a general privacy protection measure, this Act was specifically advanced as a means of protecting the privacy of abortion clinic staff and patients. *See, e.g.*, 138 CONG. REC. 7105 (1992) (statement of Rep. Moran).

18. *See, e.g.*, CAL. CIV. CODE § 3427 (West 1996) (duplicating FACE's protections and providing that, in litigation arising under this provision, courts shall "take all steps reasonably necessary to safeguard the individual privacy and prevent harassment of a health care patient, licensed health practitioner, or employee, client, or customer of a health care facility who is a party or witness in the proceeding, including granting protective orders"); COLO. REV. STAT. § 18-9-122(3) (1998) (making it unlawful to engage in certain acts of advocacy within 100 feet of a health care facility's entrance without the consent of the targeted audience).

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So far, however, advocates have largely overlooked common-law privacy rights as a possible source of protection. This may be a serious mistake. Two common-law torts, in particular, are well suited to the specific harm of abortion outing: the intrusion tort, which covers wrongful intrusions into a person's physical seclusion or personal affairs, and the publication tort, which covers wrongful publication of private facts. These torts are expressively valuable in that they focus on the individuals being harmed rather than on their general class, and empower these individuals to seek change directly through the courts rather than waiting to be protected by their legislators. The torts are also practical in that they actually compensate victims of past violations. They are easier to pursue than legislation, which requires tremendous momentum to overcome the burden of inertia, opposition from interest groups, and competition from other legislative priorities. They carry a lower burden of proof than criminal statutes such as FACE and may apply to a wider range of conduct.[21] Moreover, given the Supreme Court's division over questions related to abortion privacy and its growing resistance to federal law that does not fall neatly within Congress's Commerce Clause powers,[22] the states may now be the more promising arena for protecting abortion-related privacy.

This Note examines the possibility of using common-law privacy rights to cover gaps left by other forms of legal protection. Part II sorts out the various privacy interests at stake in the debate over abortion outing and takes stock of the conflicting interests of anti-abortion protestors, which courts must also weigh. Part III develops an account of which privacy interests might be protected through the common law. It will be clear from this account that, in its current form, the common law fails to match many

19. *See* Frisby v. Schultz, 487 U.S. 474, 476-77, 498 (1988) (describing how the town board of Brookfield, Wisconsin, passed an antipicketing ordinance in response to disruptive protests outside a local doctor's house).

20. *See, e.g.*, Northeast Women's Ctr., Inc. v. McMonagle, 939 F.2d 57 (3d Cir. 1991); N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989); Miss. Women's Med. Clinic v. McMillan, 866 F.2d 788 (5th Cir. 1989); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 859 F.2d 681 (9th Cir. 1988); Planned Parenthood Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617 (N.D. Cal. 1991); NOW v. Operation Rescue, 747 F. Supp. 760 (D.D.C. 1990).

21. FACE applies only to force, threats of force, or physical obstruction. 18 U.S.C. § 248(a)(1)-(2).

22. *Compare, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000) (upholding the constitutionality of a state law protecting the right of abortion seekers to limit their contact with anti-abortion protestors), *with* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding state provisions requiring doctors to inform abortion seekers of available materials that describe the effects of an abortion on the fetus). *See also infra* notes 146-152 and accompanying text (discussing the *Hill* decision). For an example of the Court's recent turn toward a narrower reading of Congress's power under the Commerce Clause, see United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress did not have authority under the Commerce Clause to enact 42 U.S.C. § 13,981 (1994), part of the Violence Against Women Act of 1994, which provided a federal civil remedy for victims of gender-motivated violence).

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of our intuitions about privacy, or, at best, is inconsistent. Part IV addresses constitutional limits and considerations. Part V concludes.

II. THEORIZING THE HARM

This Part lays out the normative background to the legal controversy over abortion outing by considering how abortion outing is harmful, why abortion providers and patients value their privacy in the first place, and finally, what interests are served by abortion outing.

A. *The Value of Privacy to Abortion Seekers and Providers*

The outing tactics described earlier are harmful in several legally distinct ways. To begin with, abortion staff and patients experience being filmed or otherwise exposed as an invasion of their personal space, as a form of harassment, as embarrassing or dangerous public exposure, or even as a veiled threat.[23] In one sense, this experience may affect patients more deeply because they are in the midst of what may be, for them, an emotionally or ethically difficult decision; in another sense, it falls harder on abortion providers, who must face a more sustained campaign of exposure and harassment. Once anti-abortion protestors have collected personal information, they disseminate it in ways that are independently harmful to the individuals exposed—by displaying signs or by broadcasting information on cable television or the Internet. Put differently, the behavior at issue involves two moments of communication that implicate different privacy interests: In one, a message is being sent to the clinic patient or employee; in the other, a message is being sent to the outside world and to other anti-abortion protestors (and, indirectly, to the unwilling subject as well).

Moreover, depending on their relationship to the abortion procedure, different individuals have different reasons for valuing their informational privacy. An abortion patient may fear that her decision will be revealed to people she knows—her parents, her partner, or others. The consequences of such a revelation might be severe; one eighteen-year-old, for example, was thrown out of her parents' home and forced to drop out of college after an anti-abortion protestor informed her parents that she had visited the clinic.[24] The interest in keeping such information from one's intimates is validated, if only symbolically, by the Court's abortion jurisprudence, which

23. *See infra* text accompanying notes 24, 64-65.

24. Brief Amici Curiae of the American Civil Liberties Union et al. at app. E, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 766 (1986) (No. 84-495) [hereinafter ACLU Brief].

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recognizes that, in many cases, women will only be able to choose abortion if they can conceal that choice from others.[25] Patients may also have complicated feelings about their decision and, for that reason, may dread the emotional effects of a personal confrontation with anti-abortion strangers. Abortion providers have somewhat different fears; they fear that information about their activities will reach hostile strangers—militants who will harass them and their families and who might well cause them injury.[26] This interest is, of course, causally connected with the issue of women's choice: Without abortion providers, the right to choose abortion becomes imaginary. At least one court has taken note of this reality, holding that state laws that facilitate harassment of abortion providers—by providing the public with information about where clinics are located, with which organizations they are associated, and how many abortions they perform annually—violate their patients' decisional privacy rights.[27]

B. *The Interests Potentially Served by Abortion Outings*

Of course, before a court can take any steps against abortion outing, it must consider the interests at stake on the other side.[28] Activist Neal Horsley has identified two main benefits of outing: deterrence and publicity. Taking video footage of clinic entrances, among other acts, embarrasses and possibly deters prospective patients and allows the world to see what an abortion clinic looks like and what kinds of people are

25. *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 766 (1986) ("A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly."), *overruled on other grounds by Casey*, 505 U.S. 833; *see also infra* text accompanying notes 120-124.

26. *See* Planned Parenthood v. Superior Court, 99 Cal. Rptr. 2d 627, 638-39 (Ct. App. 2000) (considering whether to grant a discovery order for the release of clinic staff's personal information, and anticipating the likely harm arising from such an order); *see also* Dudley Clendinen, *The Abortion Conflict: What It Does to One Doctor*, N.Y. TIMES, Aug. 11, 1985, § 6 (Magazine), at 18 (describing an Oregon clinic that faced firebombs and death threats to staff and patients, including one incident in which an anti-abortion militant drove up to the doctor's house, revved up a chainsaw, and threatened to kill him and his family); Linda Greenhouse, *Doctor Spurns Euphemism in Pursuing Abortion Rights*, N.Y. TIMES, Apr. 8, 2000, at A7 (describing the harassment that Dr. Leroy Carhart and his staff have faced for performing abortions, including arson and vandalism attacks on their homes); Warren M. Hern, *Free Speech That Threatens My Life*, N.Y. TIMES, Mar. 31, 2001, at A15 (providing a first-hand account of the harassment and violence some abortion providers face from anti-abortion protestors, including shots fired into Hern's clinic waiting room, and describing how his professional and private lives have become a fortress of drawn binds, steel fences, and bulletproof windows).

27. Am. Coll. of Obstetricians & Gynecologists v. Thornburgh, 613 F. Supp. 656, 669 (E.D. Pa. 1985); *see also* Valenzuela v. Aquino, 853 S.W.2d 512, 524-25 (Tex. 1993) (Spector, J., dissenting) (noting that when protestors harass doctors they effectively reduce or eliminate patients' decisional privacy rights).

28. *See* Richard A. Epstein, *Deconstructing Privacy: And Putting It Back Together Again*, *in* THE RIGHT TO PRIVACY 1, 11-12 (Ellen Frarben Paul et al. eds., 2000) (arguing for a "balance of conveniences" test to determine the extent to which we should protect privacy).

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associated with it.[29] A third obvious benefit, the satisfaction individuals derive from freely expressing their views, is discussed in Section IV.B.

1. *Deterrence*

The first benefit, deterrence, is of questionable legitimacy. To begin with, protestors have less invasive—though perhaps less effective—means of deterring patients: They can plead with patients, hand them written information, etc. Even if cameras act as an especially effective deterrent, this is because they arouse fear—either of retaliation or of disapproval.

Insofar as cameras carry a threat of retaliation, they are clearly not a legitimate means of persuasion; to conclude otherwise would be to sanction vigilante justice. The threat of disapproval is less clear. Some theorists have argued that gossip is socially valuable because, among other things, it allows communities to preserve and enforce social norms.[30] But while this kind of argument may justify gossip that enforces commonly held norms—such as norms against cheating, cruelty, and certain forms of dishonesty—abortion outing enforces a highly controversial minority norm: the norm that a fetus, once conceived, must be preserved. And because the power of disapproval does not depend entirely on sharing the perspective of the disapproving person—young people are especially sensitive to the emotional content of disapproval—abortion outing does something more, and more insidious, than simply prevent deviousness and hypocrisy.

Moreover, because of the climate of violence surrounding clinics, the threat of disapproval is often indistinguishable from the threat of retaliation.[31] Protestors cannot be unaware of this fact; to the contrary, the evidence suggests that they exploit it.[32] One anti-abortion protestor tellingly explained that "[p]eople are ashamed to be there. They don't want to be there. By shining a light on people that are hiding, sometimes you can

29. In taking stock of the interests of the anti-abortion camp, this Note does not pretend to speak from a neutral perspective on the issue of abortion. On the contrary, this Note proceeds on the assumption that abortion is a private act, at least before viability, and that reproductive choice is an important interest. The interests of anti-abortion protestors are considered here to acknowledge the complexity of the issue, to engage a wider audience, and to suggest how courts might balance the interests of the parties before them in a privacy action.

30. *See, e.g.*, Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 332-33 (1983) (arguing that the privacy tort should be eliminated); *see also* Richard A. Posner, *The John A. Sibley Lecture: The Right of Privacy*, 12 GA. L. REV. 393, 395-96 (1978) (arguing that disclosing personal information about others is valuable because it reduces hypocrisy and allows people to make more accurate judgments about each other).

31. *See, e.g.*, Clendinen, *supra* note 25.

32. Abortion outing aimed at clinic staff is more overtly geared toward inspiring fear of retaliation. *See* Planned Parenthood v. Am. Coalition of Life Activists, 290 F.3d 1058, 1065-66 (9th Cir. 2002) (providing statements from the militant anti-abortion community expressing triumph at having made abortion doctors fear for their lives).

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frighten them into—or sober them into not doing the thing that makes them ashamed."[33] This comment suggests that, on some level, protestors understand that, insofar as their outing activities succeed, they succeed as much by inspiring fear as by inspiring shame. Of course, for abortion protestors, the value of deterrence, however unpleasant the means, is infinite: Each abortion deterred is a life saved. But courts can no more embrace this perspective than they can embrace the perspective of abortion seekers who, because the decision they have made is deeply personal, would prefer not to encounter protestors at all.[34]

2. *Publicity*

The second benefit cited by anti-abortion activists, publicity, is arguably more weighty; after all, abortion is a public controversy, and the public has a right to information about it. It is doubtful, however, that people learn anything about abortion by watching footage from a camera trained on a clinic entrance or by being handed a flier with a doctor's address and home phone number. They may learn something about the individual patients and staff members whose personal information is thus transmitted, but this is precisely the sort of information that courts have protected in other legal contexts.[35] Courts have made it clear that while the social practice of abortion is a public issue, the individual act of abortion is a private affair.[36] Thus, courts should conclude that any interest protestors have in publishing patients' and providers' personal information does not carry significant legal weight.

33. *Q&A with Zain Verjee* (CNN television broadcast, Aug. 30, 2002). The speaker is David Leach, who hosts a local cable program and, at the time of the interview, was planning to broadcast footage of women entering abortion clinics.

34. Indeed, for state courts to take a strong pro-life stance toward abortion outing would risk running afoul of the Supreme Court's recognition of reproductive choice as a constitutionally protected interest. *See infra* Section IV.A.

35. *See* Doe v. Mills, 536 N.W.2d 824, 830 (Mich. Ct. App. 1995) (holding that patients' identities are not a matter of legitimate public interest); *see also infra* Section IV.A. Tellingly, the federal courts have given states more leeway to abridge speech in the interest of protecting patient privacy than they have given them to do the reverse. *Compare* Hill v. Colorado, 530 U.S. 703 (2000) (upholding a statute limiting the extent to which protestors can approach unwilling individuals outside health care facilities), *with* Am. Coll. of Obstetricians & Gynecologists v. Thornburgh, 613 F. Supp. 656 (E.D. Pa. 1985) (striking down Pennsylvania abortion recordkeeping requirements and rejecting the state's argument that it could compel clinics to provide statistical information to further the First Amendment interests of anti-abortion protestors).

36. Of course, anti-abortion protestors reject this distinction because they believe abortion is an act that concerns two persons, not one. On their view, abortion can no more be a private act than assault or murder. Although abortion opponents are entitled to view the fetus as a person, the legal system has rejected this view. *See* Roe v. Wade, 410 U.S. 113, 158 (1973) (holding that fetuses are not "persons" so as to be protected under the Fourteenth Amendment). Consistency therefore requires that the system characterize decisions about abortion as wholly personal (at least until the fetus becomes viable).

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Abortion outing, then, is an imperfect means of furthering some interests and may further only too well other interests that are not legitimate from the perspective of a pluralist society. On the other side of the scale are the significant interests of abortion providers and patients in retaining private space in which to make ethically important, legally protected decisions, and in avoiding exposure to unwelcome displays of hostility and condemnation. There is also a second set of interests to weigh: society's interests in promoting freedom of expression and action. These are discussed in Part IV, which addresses constitutional considerations.

Having conceptualized the harm caused by abortion outing, I now turn to the proposed legal remedy for this harm: the common-law privacy torts.

III. THE PRIVACY TORTS

Two privacy torts promise some possibility of relief: "intrusion upon seclusion" and "publication of private facts."[37]

A. *Intrusion upon Seclusion*

1. *Background*

The privacy tort most likely to address the harmful manner in which abortion protestors collect images of patients and staff is the "intrusion upon seclusion" tort, although it is practically untested in this context.[38] In describing the parameters of this tort, the *Restatement (Second) of Torts*

37. *See* RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D (1977) [hereinafter RESTATEMENT]. "Intrusion upon Seclusion" is the section heading for *Restatement* § 652B; although the "publication of private facts" tort is entitled "Publicity Given to Private Life" in the *Restatement*, this Note uses the simpler term found in many judicial opinions. *See, e.g.*, Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 232 (Minn. 1998). The torts are recognized in many if not most states, but estimates vary. *Compare* Angela Christina Couch, Note, *Wanted: Privacy Protection for Doctors Who Perform Abortions*, 4 AM. U. J. GENDER, SOC. POL'Y & L. 361, 376 n.99, 389 n.185 (1996) (estimating that 24 states recognize the intrusion tort and 34 states recognize the publication tort), *with* Andrew Jay McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 998-99 & nn.41-42 (1995) (estimating that at least 34 states recognize both torts).

For a very good summary of the history and doctrinal elements of the privacy torts, see Rachel Braunstein, Note, *A Remedy for Abortion Seekers Under the Invasion of Privacy Tort*, 68 BROOK. L. REV. 309 (2002). Ms. Braunstein and I were co-interns at Planned Parenthood in summer 2001, and we both independently researched the possible relevance of the privacy torts to protecting clinic privacy.

38. *See* Pro-Choice Network v. Project Rescue W.N.Y., 799 F. Supp. 1417, 1437-39 (W.D.N.Y. 1992) (commenting on the lack of precedent "dealing with the taking of photographs or videotapes of patients entering abortion or family planning clinics," and skirting the issue itself).

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states: "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."[39]

Unlike the other privacy torts, this tort does not require publication of personal facts. Rather, it focuses the judicial inquiry on whether a defendant has seriously invaded a plaintiff's personal space, either mental or physical. The intrusion tort seems particularly suited to abortion outing that targets abortion patients because protestors often use surveillance precisely as a means of intruding on patients' solitude.

2. *Barriers to Applying the Intrusion Tort to Abortion Outing*

The greatest obstacle to using the intrusion tort to redress forms of abortion outing is that courts generally have held that surveillance in public places cannot constitute an "intrusion upon seclusion."[40] Indeed, the commentary to the *Restatement* observes that "while [a person] is walking on the public highway," there can be no "liability for observing him or even taking his photograph."[41] The other classic authority on tort law, *Prosser and Keeton on Torts*, likewise reasons that the act of photographing someone in public without their consent "amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see."[42] Since clinics generally open onto a public street, it might seem indisputable that clinic entrances are not protected zones of privacy for patients or staff.

On a practical level, of course, the *Restatement* limitation is problematic.[43] People do not tend to think of themselves as entirely accessible to the public at large just because they happen to be outside their homes. Rather, various public settings are culturally associated with various degrees of privacy, depending on the "limitation of attention paid, various social rules, the dispersion of information over space and time, and the

39. RESTATEMENT, *supra* note 37, § 652B.

40. *See, e.g.*, Nader v. Gen. Motors Corp., 255 N.E.2d 765, 769 (N.Y. 1970) (noting that "there can be no invasion of privacy where the information sought is open to public view"); Swerdlick v. Koch, 721 A.2d 849 (R.I. 1998); *see also* Furman v. Sheppard, 744 A.2d 583, 587 (Md. Ct. Spec. App. 2000) (holding that surveillance of someone while "in open view of the public" could not constitute intrusion upon seclusion). In *Furman*, however, the court noted that the plaintiff had already sacrificed some expectation of privacy by initiating a personal injury suit, and that all the plaintiff was observed doing was sailing on his yacht, hardly a fact one would guard jealously. *Id.* at 587-88.

41. RESTATEMENT, *supra* note 37, § 652B cmt. c.

42. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 856 (5th ed. 1984).

43. For an extended argument for expanding the privacy torts to protect some degree of privacy in public, see McClurg, *supra* note 37.

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ephemeral nature of our use of public space."[44] Crowds afford a sort of anonymity, where the individual "knows that he is being observed" but "does not expect to be personally identified and held to the full rules of behavior and role that would operate if he were known to those observing him."[45] This anonymity offers a "sense of relaxation and freedom"[46] that people value and in fact seek out. For individuals who live in close quarters, public spaces may provide the sole opportunity for privacy. And, as Professor Anita Allen has pointed out, many public spaces—for example, parks—are valued precisely as a means of seclusion and freedom from sustained observation.[47] Of course, that we have an intuitive concept of public privacy does not make it necessary, worthwhile, or even administratively feasible for the law to protect a "right" to public privacy. But courts should at least recognize that public privacy is a coherent and deeply felt concept, rather than neatly defining it out of existence.

3. *Three Ways To Overcome the General Rule Against Public Privacy*

In fact, courts *have* carved out some scattered exceptions to the general rule against public privacy, exceptions that might be expanded to cover certain abortion-outing scenarios. The following Subsections draw upon existing case law to present three possible exceptions to the rule: the subject matter exception, the exception for especially offensive intrusions, and the exception for intrusions into intimate relationships.

a. *Subject Matter Exception*

To begin with, even the commentary to the *Restatement* admits that when an individual ventures into the public space, he nonetheless conceals certain aspects of himself, "such as his underwear or lack of it," and these aspects are covered by the intrusion tort.[48] This exception, although narrow, at least establishes that people do not altogether waive their privacy just by leaving their homes.

Even more telling is the following example of an actionable intrusion from the *Restatement* commentary: "A publishes, without B's consent, a picture of B nursing her child."[49] This example is surprising because it does not depend on B nursing in a private place, or on B inadvertently revealing

44. Elizabeth Paton-Simpson, *Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places*, 50 U. TORONTO L.J. 305, 321 (2000).

45. Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1021 (1966).

46. *Id.*

47. ANITA L. ALLEN, UNEASY ACCESS 124-25 (1988).

48. RESTATEMENT, *supra* note 37, § 652B cmt. c.

49. *Id.* § 652D illus. 10.

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her breast. The *Restatement* simply presumes that, however publicly or even flagrantly done, breastfeeding is a private activity. Granted, this exception stems from societal notions about bodily modesty, especially for women, and has a paternalistic ring. Nonetheless, by focusing on the activity itself, rather than on its location or visibility, this exception opens up the possibility of protecting certain inherently private activities, such as abortion, especially when they are exposed to the public by necessity rather than by choice.

At least one court has recognized a subject matter exception to the rule against public privacy in considering an intrusion claim.[50] In *Russell v. American Real Estate Corp.*, a Texas appellate court considered whether former tenants of a foreclosed house had a privacy right against the disturbance of certain belongings that they had temporarily left locked in their former home.[51] The court found that they did have such a right, rejecting the defendant's contention that they lost their right the moment they lost tenancy of the house. The court reasoned that whether or not the plaintiffs lived in the house was irrelevant, as "[t]he invasion of privacy tort is not limited to intrusions into the home but more generally covers matters involving 'another's solitude, seclusion, or private affairs or concerns.'"[52] What mattered to the court was not whether the house "belonged" to plaintiffs in some legal sense but that the defendant had broken the plaintiffs' lock and disturbed their personal belongings. Under such a theory of the intrusion tort, clinic patients might be able to argue that, although they had to pass through a public space to reach the clinic, their errand was obviously private in nature, and their body language conveyed an interest in avoiding the public.[53]

Another possible variant of the subject matter exception would focus on the mental state of the victim at the time of the intrusion. Women entering the clinic may be unable to disguise their apprehension or ambivalence; women leaving may be in physical or emotional pain.[54] Abortion outing

50. This exception is akin to that regularly recognized in the context of the publication tort. *See infra* Section III.B.

51. 89 S.W.3d 204 (Tex. App. 2002).

52. *Id.* at 212 (quoting Valenzuela v. Aquino, 853 S.W.2d 512, 513 (Tex. 1993)).

53. This exception to the locational theory of privacy, based on the nature of the intrusion or the activity intruded upon, also appears in constitutional case law. In *Hill v. Colorado*, for example, the Supreme Court recognized that, even in public places, an individual can be captured as an audience, and that the state has a legitimate interest in protecting such captives. 530 U.S. 703, 716 (2000).

54. One obvious objection to this approach would be that it would only protect abortion seekers who were experiencing strong emotions as they entered and left the clinic. However, given that the intrusion tort by its very nature addresses emotional harm, it makes some sense to narrow its application to those abortion seekers most likely to be deeply harmed by outing—i.e., those who are somehow conflicted or embarrassed about their decision. For those seekers who most want to retain their informational privacy, the publication tort may be more appropriate. *See infra* Section III.B.

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disrupts the inwardness of these moments and exposes the patient's inner life to the public gaze. Such a theory would borrow from the subject matter theory found in publication tort cases.[55] It arguably appears in one nineteenth-century case, *De May v. Roberts*, in which the court found that a woman giving birth had a right to privacy derived from the "sacred[ness]" of the occasion.[56] In the more recent past, however, at least one court has rejected the mental state theory.[57]

b. *Exception for Especially Offensive Invasions*

Courts also have expanded the privacy tort to cover especially offensive methods of intrusion into public privacy. If abortion-outing plaintiffs can focus courts' attention on the method of intrusion, they can argue that the mix of intrusion and harassment is what distinguishes abortion outing from more trivial privacy violations. In *Nader v. General Motors Corp.*, for example, the New York Court of Appeals recognized a limited privacy right in public.[58] In that case, the court considered whether defendants committed actionable intrusion upon seclusion by putting Ralph Nader under surveillance in public. The court found that although "the mere observation of the plaintiff in a public place does not amount to an invasion of his privacy, . . . under certain circumstances, surveillance may be so 'overzealous' as to render it actionable."[59] The court's analysis implied that in assessing for overzealousness, courts (or juries, in most cases) must look at the plaintiff's behavior and determine whether she was acting discreetly or flagrantly.[60] Applied to the context of abortion outing, this approach would suggest that the court should examine the patient's behavior. If she clearly manifests her desire to be let alone, and not to be photographed or videotaped, then her entrance into the clinic is a private act deserving of protection, at least in the absence of countervailing considerations.

Judge Breitel's concurrence in *Nader* was even more expansive. Breitel distinguished between normal observation, which picks up a few arbitrary facts about a person, and surveillance. The latter, which consists of "extensive or exhaustive monitoring and cataloguing of acts normally disconnected and anonymous,"[61] is more intrusive because it affords a

55. *See infra* Subsection III.B.2. I am grateful to Professor Anita Allen for suggesting this argument.

56. 9 N.W. 146, 149 (Mich. 1881).

57. *See* Tellado v. Time-Life Books, Inc., 643 F. Supp. 904 (D.N.J. 1986) (refusing to recognize a privacy action for the publication of a photograph of the plaintiff's face in an expression of anguish, taken when he was a soldier in Vietnam).

58. 255 N.E.2d 765 (N.Y. 1970).

59. *Id.* at 771.

60. *Id.* at 770-71.

61. *Id.* at 772.

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much more complete, more intimate, picture of the individual than normal observation. While the reasonable person expects to be observed when appearing in public, she does not expect to be under surveillance, and therefore, Breitel argued, surveillance should be actionable in certain (unspecified) circumstances.

The *Nader* case is also useful because it vividly illustrates intrusiveness as a form of harassment. According to Nader, General Motors placed him under surveillance not just because it hoped to uncover embarrassing information about him but also, and perhaps even more so, because it wanted him to have the uncomfortable, unnerving, and even destabilizing feeling of being watched.[62] This added dimension may have contributed to the court's willingness to recognize Nader's claim.[63]

Abortion outing serves this same harassment purpose. Anti-abortion activists use video cameras specifically to scare women entering clinics, often "point[ing] the cameras directly into [their] faces."[64] Moreover, "[t]he use of video cameras by defendants often makes patients hysterical or severely upset, thereby causing a delay in their readiness for prompt medical attention."[65] Given that the intent, and the effects, of abortion outing are far more harmful than mere data collection, courts should conceive of it as fitting within the above-described exceptions to the general refusal to protect public privacy.

c. *Exception for Intrusions into Intimate Relationships*

Regardless of whether courts extend the intrusion tort to activities outside the clinic, they may agree to apply it in those cases where activists directly intrude into the family lives of patients by contacting their family members.[66] Take the facts of the case described in the Introduction to this Note.[67] Upon learning that the plaintiff was planning to have an abortion,

62. In addition to his invasion of privacy claim, Nader also claimed intentional infliction of severe emotional distress. *Id.* at 767.

63. In another line of cases, courts have recognized the harassment component of surveillance used in investigating personal injury and workers' compensation claims. There, courts have held that to avoid liability, parties must use unobtrusive surveillance techniques. *See, e.g.*, Pinkerton Nat'l Detective Agency, Inc. v. Stevens, 132 S.E.2d 119 (Ga. Ct. App. 1963) (finding an intrusion claim where the defendants had conducted surveillance in an unreasonably intrusive manner); McLain v. Boise Cascade Corp., 533 P.2d 343, 346 (Or. 1975) (finding no intrusion claim where the "plaintiff was not aware that he was being watched and filmed").

64. Pro-Choice Network v. Project Rescue W.N.Y., 799 F. Supp. 1417, 1426 (W.D.N.Y. 1992).

65. *Id.* at 1427.

66. This Note does not look at possible intrusion claims by doctors against protestors who picket outside their homes and harass their families. Such cases are more straightforward because they involve the well-recognized right to privacy in one's own home. For a brief discussion of intrusion claims by doctors, see Couch, *supra* note 37, at 376-81.

67. Robbinsdale Clinic v. Pro-Life Action Ministries, 515 N.W.2d 88 (Minn. Ct. App. 1994).

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the defendant, either alone or with an associate, called the plaintiff repeatedly, visited her home, tried to contact her parents, publicized her identity as she entered the clinic, and, finally, tried to convince her that her parents were calling the clinic to prevent her from going through with the abortion. The clinic filed a motion with the court to have the defendant found in contempt for violating an earlier injunction. A Minnesota appellate court found the injunction unconstitutional and, in passing, took up the question of whether the defendant had committed a privacy tort. She had not, the court concluded, largely because Minnesota did not recognize such torts, but also because the defendant's efforts to inform the plaintiff's parents of her abortion had been too targeted to constitute "publication."[68]

The incident described above is not isolated. As noted in the Introduction, anti-abortion activists regularly seek to undermine patients' privacy by contacting their parents, spouses, and boyfriends.[69] And although the plaintiffs did not make an intrusion claim in the above case, in some intuitive nonlegal sense the defendant clearly intruded, or attempted to intrude, upon Smith's family life. Similarly, efforts to contact patients' boyfriends or spouses are intrusions into intimate relationships. Surely, the choices people make about how to structure their most intimate relationships—what parts of themselves to share in these relationships, and when to share these parts, and what parts to hold back—are "private concerns" in the sense intended by the *Restatement*.[70]

While not explicitly supported by precedent, then, an intrusion claim arising out of efforts to inform family members about an abortion might succeed if the court responded to commonly held notions about the importance of family privacy.[71] Indeed, an analogous argument prevailed in *O'Neil v. Schuckardt*, in which the court considered an invasion-of-privacy claim against a fundamentalist Catholic sect that had persuaded the plaintiff's wife that their marriage was invalid and that she could not be alone with him.[72] The trial court instructed the jury that the common-law right to privacy "prevent[s] governmental (and private) interference in intimate personal relationships or activities" and frees the "individual to make fundamental choices involving himself, his family, and his relationships with others."[73] The appellate court affirmed this interpretation,

68. *Id.* at 92.

69. *See* McVicker, *supra* note 7.

70. *See supra* text accompanying note 39.

71. Courts have recognized "[a]n individual's right to privacy in an intimate relationship." John C. v. Martha A., 592 N.Y.S.2d 229, 232 (Civ. Ct. 1992). However, this right is conceived of as a right of families, or intimates, to hold themselves back from the outside world, not from each other. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that married couples have a due process right to use contraception); Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that unmarried couples have the same right).

72. 733 P.2d 693 (Idaho 1986).

73. *Id.* at 699.

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without any reference to precedent. Although the court may have been influenced by the alienation-of-affection aspect of the claim,[74] this jury instruction is striking for its recognition of "domestic privacy" as an individual rather than collective right.

The intrusion tort, then, could be made to fit various forms of abortion outing through any of the three theories suggested above. The purpose of the tort is especially well-suited to attacking a principal motive of abortion outers, which is to disrupt abortion seekers' mental states as they enter and leave the clinic. The following Section takes up a second privacy tort, the publication-of-private-facts tort, which addresses the ways in which anti-abortion protestors broadcast the images and data they have collected.

B. *Publication-of-Private-Facts Tort*

1. *Background*

In contrast to the intrusion tort, the publication tort addresses harmful ways in which personal information, once acquired, is disseminated. As transcribed in the *Restatement*, it provides that "[o]ne who gives publicity to a matter concerning the private life of another is subject to liability . . . 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."[75] Much like the intrusion tort, this tort's application has been limited by the assumption that individuals necessarily sacrifice their privacy when they venture into public space. Just as the *Restatement* asserts that the intrusion tort does not protect individuals from unwelcome photography "while . . . walking on the public highway,"[76] it also states that the publication tort does not create "liability for giving further publicity to what the plaintiff himself leaves open to the public eye. . . . [H]e *normally* cannot complain when his photograph is taken while he is walking down the public street and is published in the defendant's newspaper."[77] Thus, with respect to efforts to capture and broadcast images of abortion staff, the same question arises in publicity actions as in intrusion actions.

2. *The Subject Matter Exception*

The publication tort is different from the intrusion tort in that, among other things, it includes a doctrinally developed "subject matter" alternative

74. The plaintiff made an alienation-of-affection claim, and the court took the opportunity to abolish that cause of action as anachronistic and unnecessary. *Id.* at 698.

75. RESTATEMENT, *supra* note 37, § 652D.

76. *Id.* § 652B cmt. c; *see also supra* text accompanying note 41.

77. *Id.* § 652D cmt. b (emphasis added).

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to the general locational theory of privacy that more explicitly allows for some degree of public privacy. In the oft-cited case of *Daily Times Democrat v. Graham*, for example, an Alabama court chivalrously extended privacy protection to a woman who had been photographed in public by a local newspaper just as her skirt was accidentally billowing up to reveal her nearly naked body from the waist down.[78] In bold common-law-making fashion, the court found that "[t]o hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at the moment to be part of a public scene would be illogical, wrong, and unjust."[79]

The subject matter theory of privacy has been criticized for its dependence on contingent notions of what facts or states are private;[80] a woman captured in Graham's pose today on a Manhattan street corner might not prevail in court. But such criticism misses the mark. Far from being an unattractive feature of privacy torts, this variability is an example of the common law's ability to track changing norms. In *Daily Times Democrat*, the local newspaper arguably knew it was taking a mortifying picture and therefore knowingly assumed a risk of liability. By contrast, a contemporary newspaper might not know how the picture would be received, and that uncertainty would rightly figure into the court's decision whether to impose liability. If abortion-outing victims can focus courts on the subject matter of the information being publicized, as opposed to its (public or private) location, they have a strong case for classifying that information as private. As evidence of social norms, plaintiffs can point both to constitutional case law on medical informational privacy[81] and to the abundance of recent federal legislation protecting the privacy of medical and other kinds of information.[82]

78. 162 So. 2d 474 (Ala. 1964).

79. *Id.* at 478.

80. *See, e.g.*, Zimmerman, *supra* note 30, at 349-50.

81. *See infra* text accompanying notes 129-131.

82. *See* Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191, § 264, 110 Stat. 1936, 2033 (establishing a timetable for enacting federal law protecting medical privacy); HIPAA Privacy Regulations, 45 C.F.R. § 160 (2002) (setting a floor preemption for medical privacy); 45 C.F.R. § 164 (establishing strict consent and transparency requirements for any information disclosures); *see also* Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 502, 113 Stat. 1338, 1437 (1999) (codified as amended at 18 U.S.C. §§ 6801-6810, 6821-6827 (2002)) (regulating financial information-sharing practices by financial institutions); Driver's Privacy Protection Act of 1994, Pub. L. No. 103-322, 108 Stat. 2099 (codified as amended at 18 U.S.C. §§ 2721-2725). Of course, local norms count as well, *see infra* text accompanying notes 98-102, and these might weigh against abortion privacy. In such a case, however, plaintiffs could still invoke the role of the courts as protectors of vulnerable minorities. *See infra* note 104 and accompanying text.

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a. *The Subject Matter Exception and Abortion Providers*

The publication tort's application to abortion outing aimed at *providers* is more straightforward. To deter and intimidate providers, anti-abortion protestors publicize providers' personal information, including their names, addresses, telephone numbers, and other details.[83] Courts are likely to consider this information in the context of widespread harassment of, and violence against, abortion providers. At least one court has already done so in settling a discovery dispute. In *Planned Parenthood Golden Gate v. Superior Court*, which involved claims and counterclaims between the clinic and protestors, the protestors moved to compel the disclosure of all abortion staff and volunteers who had seen or written a report about the protests, and prevailed at the trial level.[84] The appellate court reversed the discovery order, holding that the privacy interests of the nonparties outweighed the discovery value of this information, particularly in light of current abortion-outing practices and their effects. "The Nuremberg Files website," wrote Justice Haerle, "is specific evidence that Planned Parenthood's staff and volunteers could well face unique and very real threats not just to their privacy, but to their safety and well-being if personal information about them is disclosed."[85]

As *Golden Gate* suggests, in an admittedly different context, whether or not information is private should be considered in terms of the possible consequences of disclosure.[86] Thus, even when personal information—for example, names, addresses, and telephone numbers—is available through public records or the media, courts might still protect such information from disclosure for inflammatory purposes.[87] Anti-abortion protestors generally publicize abortion providers' personal information along with a general, heated condemnation of their activities.[88] Furthermore, they deliberately publicize this information to an audience likely to act on it in ways that are themselves tortious and possibly criminal.[89] Abortion providers, aware of

83. The Nuremberg Files website collects such additional information as providers' social security numbers and the names and birthdates of their spouses, children, and friends. *See* The Nuremberg Files, *supra* note 11. The Nuremberg Files website also states that this information will be shared with "local or national pro-life organizations." *Id.*

84. 99 Cal. Rptr. 2d 627 (Ct. App. 2000).

85. *Id.* at 639.

86. *See id.* at 638.

87. *See id.* at 642-43 (citing Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487 (1994) (holding that federal agencies could not disclose the home addresses of their employees to the employees' collective bargaining representatives, even if such information was available elsewhere)).

88. *See supra* note 11.

89. *See supra* note 26. For an account of an extended harassment campaign conducted outside one doctor's home, see Valenzuela v. Aquino, 853 S.W.2d 512, 514-15 (Tex. 1993) (Gonzalez, J., dissenting).

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this, make special efforts to protect their personal information.[90] All of these factors, combined with the public policy expressed by Congress's recent passage of the Drivers' Privacy Protection Act,[91] suggest that abortion providers would have an extremely strong claim against those publishing their personal information.

b. *The Subject Matter Exception and Abortion Seekers*

The wrongful publicity tort might also have some application to abortion outing aimed at patients—for example, picket signs bearing information about individual patients and video footage of patients' faces posted on the Internet and elsewhere.[92] As with abortion doctors, the severe consequences of abortion outing for abortion seekers[93] may, and should, influence courts as they assess whether the publicized information is private or public. Indeed, at least one court has recognized a publication claim by an abortion seeker (in the context of reversing summary judgment for the defendants in a strongly worded opinion). In *Doe v. Mills*, the defendants obtained information about two women scheduled to undergo abortions and, on the day of their appointments, stood at the entrance to the clinic parking lot holding up signs displaying their names.[94] Responding to the trial court's argument that the information publicized could not be private because abortion was the subject of intense public debate, the court held that the decision to have an abortion is a private fact because "abortion concerns matters of sexual relations and medical treatment, both of which are regarded as private matters."[95]

Mills's expansive conception of privacy is by no means universal. In *United States v. Vazquez*, by contrast, a federal district court in Connecticut refused to seal tapes obtained through discovery that depicted patients entering and leaving the clinic.[96] According to the court, the space just outside the clinic was not merely public, but *highly* public, because it was the site of constant conflict and advocacy. Consequently, no privacy right existed because "no one walking in this area could have a legitimate expectation of privacy."[97] This line of reasoning is troubling because it

90. *See* Couch, *supra* note 37, at 393 (describing how doctors keep their numbers unlisted, drive different cars to work, and even wear disguises to work).

91. *See supra* note 17.

92. *See supra* notes 5-9 and accompanying text.

93. *See* ACLU Brief, *supra* note 24.

94. 536 N.W.2d 824 (Mich. Ct. App. 1995). This case illustrates the lengths to which protestors will go to gather such information. Late at night, an associate of the defendants climbed into the clinic's dumpster, found a slip of paper with the information that the plaintiffs were scheduled to have abortions, and passed the information along to the defendants. *Id.* at 827.

95. *Id.* at 830.

96. 31 F. Supp. 2d 85 (D. Conn. 1998).

97. *Id.* at 91.

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suggests that the more anti-abortion protestors "publicize" a certain location (i.e., turn it into an active public forum), the less is the privacy to which patients are entitled. While it is inevitable that the "should" of privacy law be controlled to some extent by the "is" (that is, the law generally will protect only those spheres in which individuals expect privacy because they generally *have* privacy), it is dangerous to allow a small, activist social group to set the standards for society at large.

Another case to address the issue of public privacy takes a more complicated position, somewhere between the poles of *Mills* and *Vasquez*. In *Chico Feminist Women's Health Center v. Scully*, the plaintiffs tried to bar anti-abortion protestors from gathering at a clinic entrance;[98] they argued that the practice violated California's constitutional right to privacy[99] because the clinic was located in a small town and protestors were likely to recognize, and had in fact recognized, clinic patients. The court analyzed the problem using a "reasonable expectation of privacy"[100] standard and held that the very closeness of the community should have removed any expectation of privacy. "Having chosen to live in the environment of a small city," the court opined, "the residents of Chico cannot expect the courts, by way of injunctive relief, to guarantee them the kind of anonymity they might find in a 'large metropolitan community' such as New York City."[101]

The facts in *Chico* supported the court's holding. The trial court had already enjoined the defendants from *publicizing* information about who was seeking an abortion. What plaintiffs were appealing was the court's refusal to go further—to enjoin defendants from standing near the clinic entrance. The gist of the appellate court's reasonable expectation analysis was that courts cannot prevent protestors from seeing what anyone on the street can see. This rule seems relatively uncontroversial. More generally, the court's approach is interesting because it ties privacy rights to the norms, or "common habits,"[102] of a specific community.

Chico's pragmatic approach is more protective than that adopted in *Vasquez* because it allows local majority, rather than assertive minority, norms to dictate. Thus, courts might provide greater privacy protections in less insular communities and might distinguish between degrees of publicity—as the *Chico* court distinguished between mere observation,

98. 256 Cal. Rptr. 194 (Ct. App. 1989).

99. CAL. CONST. art. 1, § 1.

100. *See* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (arguing that evidence obtained from wiretapping a conversation in a public telephone booth without judicial authorization was inadmissible in a criminal trial because the defendant had a "reasonable expectation of privacy" while talking on the phone).

101. *Chico Feminist Women's Health Ctr.*, 256 Cal. Rptr. at 200.

102. *Id.*

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which was allowable, and videotaping, which was not.[103] At the same time, *Chico* is troubling because it seems to imply that courts can *never* override the community's judgment about the degree of privacy to which the individual is entitled. As such, it ignores the judiciary's historic role as a guardian of individual rights against majority preferences.[104]

3. *What Constitutes "Publicity"?*

The three opinions contrasted in the previous Subsection address the issue of whether the information publicized is "private." Another issue that might arise in suits for abortion outing is whether the information has been "publicized." While anti-abortion protestors generally publicize information about abortion providers indiscriminately, they engage in a much more tailored outing of patients. Namely, anti-abortion protestors often contact family members and boyfriends, knowing that these people are most likely to intervene and prevent the abortion.[105] And at least one court has rejected a publicity claim, reasoning that disclosure cannot constitute wrongful "publicity" unless made to a large group of people or to the public at large.[106]

Although such a limitation might generally make sense as a way to avoid the administrative burden of adjudicating claims based on trivial disclosures, it seems arbitrary in the context of abortion outing. If anti-abortion protestors disclose personal information to the very people from whom patients most want this information kept, then the harm is as great as if they had broadcast the information to the world. This is not, in other words, a case of innocent gossip. To the contrary, the Supreme Court has recognized the significance of the privacy interest at stake by holding that states cannot disclose abortion-related information to families or would-be fathers.[107] Just as the *Golden Gate* court addressed the question of whether

103. At least one other court has made this distinction between a waiver of *absolute* privacy and a waiver of *any* privacy. The Ninth Circuit noted:

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

Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971).

104. For the related argument that privacy rules should be normative and not simply descriptive, see Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1142-43 (2002).

105. *See* McVicker, *supra* note 7.

106. Robbinsdale Clinic v. Pro-Life Action Ministries, 515 N.W.2d 88, 92 (Minn. Ct. App. 1994) (citing RESTATEMENT, *supra* note 37, § 652D cmt. a).

107. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

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certain information was "private" from the functionalist perspective of how harmful disclosure would be,[108] courts should likewise be made more attentive, in defining "publicity," to the actual or likely degree of harm given the particulars of each case.[109]

C. *Limitations*

Two possible defenses to a common-law privacy action for abortion outing have been addressed above,[110] and the First Amendment defense is discussed below in Part IV. Two other defenses, however, deserve mention: the "matter of public concern" defense and the public figure defense. While courts have generally been somewhat protective of the identity of abortion providers and patients, they have been less so with respect to doctors who receive state Medicaid funds to perform abortions, on the theory that the public has a right to know how its money is being spent.[111] This exception may be limited; one court expressed its reliance on the fact that Medicaid-funded abortions were less controversial, and less likely to expose doctors to hostility, because they were limited to cases of medical emergency.[112]

Likewise, while courts usually do not classify doctors as public figures, they may be willing to view some especially prominent abortion providers as public figures, especially if they hold, or are under consideration for, some public position.[113] Of course, even doctors who become public figures may be entitled to a minimum of privacy in jurisdictions that extend privacy rights to public figures. California, for example, prohibits surveillance of the private lives of public figures.[114]

Finally, even if the privacy torts were recognized as covering abortion outing, they would provide only a limited remedy. Most importantly, as ex post solutions, they could never completely compensate patients and staff for what may well be lasting, irreversible damage to their privacy. Also,

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108. *See* Planned Parenthood Golden Gate v. Superior Court, 99 Cal. Rptr. 2d 627 (Ct. App. 2000).

109. Of course, even if the court insists on rigid adherence to the numbers limitation, a publicity case could be made out against individual anti-abortion protestors who share abortion-related details with fellow protestors. But such facts would normally be harder to prove.

110. For a discussion of the argument that, because abortion is a public controversy, abortion-related information cannot be private, see *supra* Part II. For a discussion of the argument that abortion outing cannot violate privacy rights because it takes place in public, see *supra* Sections III.A, III.B.

111. *E.g.*, Family Life League v. Dep't of Pub. Aid, 493 N.E.2d 1054 (Ill. 1986); Kansas *ex rel.* Stephan v. Harder, 641 P.2d 366 (Kan. 1982).

112. *Family Life League*, 493 N.E.2d at 1058.

113. *See* Couch, *supra* note 37, at 396-99 (discussing the public figure defense).

114. CAL. CIV. CODE § 1708.8(b) (West 2001). Although the term "public figure" never appears in this provision, it was enacted specifically to protect public figures against harassment by the press. *See* Note, *Privacy, Technology, and the California "Anti-Paparazzi" Statute*, 112 HARV. L. REV. 1367, 1368 (1999) (discussing the circumstances giving rise to the provision).

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anti-abortion protestors are famously and gleefully judgment-proof, and private causes of action, unlike statutes, do not carry the possibility of alternative sanctions. They are best thought of, then, as a complement to, rather than a replacement for, ordinances, rulings, and injunctions that close off various avenues of discovery, limit how close protestors can come, and prevent them from filming or photographing the clinic entrance.

Because the privacy torts involve interests—privacy and speech—that are central to constitutional law, how these torts develop will depend in part on constitutional precedent. Part IV considers this precedent.

IV. CONSTITUTIONAL BACKDROP

In various ways, abortion outing and possible responses implicate state and federal constitutional privacy rights. This Part first considers the ways in which the Constitution might strengthen a privacy action against anti-abortion protestors and then considers the most obvious constitutional objection to such an action: the First Amendment.

A. *Constitutional Privacy Rights*

Of course, the Federal Constitution does not affirmatively obligate the states to protect individuals against third parties.[115] Moreover, privacy actions against private parties raise First Amendment concerns that are absent from the debate over governmental measures that affect privacy.[116] Nonetheless, state courts have, on occasion, assumed a positive obligation to protect federal constitutional rights and have construed these rights as being not just against the state but against the world.[117] Constitutional jurisprudence is also relevant as a reflection of common intuitions and community norms about privacy—albeit at the national level. And finally, when the Court extends constitutional protection to certain practices, it in some sense *validates* those practices and thereby provides an institutionally

115. The Civil Rights Cases, 109 U.S. 3 (1883).

116. *See* Zimmerman, *supra* note 30, at 298-99.

117. Take, for example, "wrongful birth" suits, or suits based on the theory that but for a defendant doctor's negligence, the plaintiff woman would have acquired information about a fetal disability and with this information would have decided to abort her child. Prior to *Roe v. Wade*, most courts refused to recognize a cause of action for wrongful birth. After *Roe*, the Seventh Circuit and courts in Connecticut, New Hampshire, New Jersey, and New York held that *Roe* compelled them to recognize the cause of action as an extension of a woman's constitutional right to choice. Robak v. United States, 658 F.2d 471, 476 (7th Cir. 1981); Ochs v. Borrelli, 445 A.2d 883, 885 (Conn. 1982); Smith v. Cote, 513 A.2d 341, 346 (N.H. 1986); Berman v. Allan, 404 A.2d 8, 14 (N.J. 1979); Becker v. Schwartz, 386 N.E.2d 807, 810-11, 815 (N.Y. 1978) (connecting the two implicitly in the majority opinion and explicitly in Judge Fuchsberg's concurrence).

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normative ground for the common law to protect them against interference by private parties.[118]

Most obviously, abortion outing effectively limits the federal right to decisional privacy recognized in *Roe v. Wade* as encompassing the right to decide whether or not to have an abortion. Post-*Roe* abortion jurisprudence has recognized that, to have meaningful decisional privacy, women need a certain amount of informational privacy.[119] In *Thornburgh v. American College of Obstetricians and Gynecologists*, for example, the Court struck down a law that, among other things, required physicians to complete a detailed report for each abortion they performed.[120] This requirement, the Court held, would unduly compromise patients' informational privacy, a necessary component of the decisional privacy right recognized in *Roe*. "The decision to terminate a pregnancy," wrote Justice Blackmun for the majority, "is an intensely private one that must be protected in a way that assures anonymity."[121]

Justice Stevens drew the connection even more clearly in his concurrence in *Bellotti v. Baird*: "It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny . . . ."[122] The express purpose of abortion outing, as directed against patients, is to "'reinforce the stigma attached with abortion'"[123] and to force patients to think of others "watching [them] do it"[124]—in other words, to deprive patients of the very privacy that, in many cases, makes it possible for them to choose abortion. As such, states have a strong interest in curtailing and punishing such activities. This interest should prompt the judiciary to be receptive to common-law privacy and privacy-related abortion-outing claims.[125] Abortion-staff outing also implicates the First

118. *See* Solove, *supra* note 104, at 1143 (arguing that the value of "privacy" in a certain context derives from the value of the practice in which it is embedded).

119. "Decisional privacy" is equivalent to autonomy. It is the ability to decide in private—that is, decide as individuals—how to behave. By contrast, "informational privacy," as used below, is a more literal sense of the word "privacy"—that is, the ability to protect personal facts about ourselves. The two forms, though obviously related, are conceptually distinct.

120. 476 U.S. 747 (1986), *overruled on other grounds by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

121. *Id.* at 766.

122. 443 U.S. 622, 655 (1979) (Stevens, J., concurring) (striking down a Massachusetts provision requiring parental notification before a minor could undergo an abortion). Three other Justices joined Justice Stevens's concurrence. *Id.* at 623.

123. McVicker, *supra* note 7 (quoting the website of Life Dynamics, a Texas anti-abortion organization).

124. *Hannity & Colmes: One-on-One with Neil Horsley* (FOX News television broadcast, June 4, 2001).

125. Many plaintiffs combine privacy claims with other, clearly related claims such as intentional infliction of emotional distress. *See, e.g.*, Vescovo v. New Way Enters., 130 Cal. Rptr. 86 (Ct. App. 1976); Doe v. Mills, 536 N.W.2d 824 (Mich. Ct. App. 1995). For a skeptical reception of the "position that a constitutional right to privacy exists where a woman seeking an abortion travels on a public street to enter an abortion clinic," see United States v. Vazquez, 31 F. Supp. 2d 85, 89 (D. Conn. 1998).

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Amendment freedom of association.[126] As the Court observed in *NAACP v. Alabama*, there is a "vital relationship between freedom to associate and privacy in one's associations."[127] At least one court has made this connection in the abortion context, holding that a discovery order mandating disclosure of names of clinic staff and volunteers would "implicate[] the rights of nonparties to freely and privately associate with Planned Parenthood."[128]

Abortion outing endangers a third constitutional right—the limited right to informational privacy recognized in *Whalen v. Roe*[129] and subsequent cases. Medical information, at issue in *Whalen*, is generally recognized as the sort of information that should be kept private whenever possible. That a woman was pregnant and had an abortion is, among other things, a medical fact. As such, it is constitutionally protected under *Whalen*. Thus, in *Planned Parenthood League of Massachusetts, Inc. v. Blake*, a state supreme court refused to allow defendants in a civil rights suit to depose those abortion patients on whose behalf Planned Parenthood had filed suit.[130] Citing *Whalen*, the court held that "[t]he constitutional right of privacy concerns a person's interest both in avoiding disclosure of personal matters and in independence in making certain kinds of important decisions."[131] Federal constitutional privacy jurisprudence, then, provides persuasive authority for affording strong common-law privacy protection to abortion patients.

State constitutional protections may be even more useful than federal ones. The California Constitution, for example, enumerates a specific privacy right,[132] one that has been held both to be broader than the federal right and to shield individuals against violations by third parties.[133] In *Chico Feminist Women's Health Center v. Scully*, a California appellate court found that the state's "right of privacy protects information about a citizen's participation in a medical procedure, including abortion."[134] Although, as described in Section III.B, the court went on to find that this right did not extend to protect patients' anonymity on the streets, the issues in that case were somewhat peculiar. The court might have responded differently had it

126. The Court has read the Fourteenth Amendment as incorporating this associational right against the states. *See* NAACP v. Alabama, 357 U.S. 449 (1958) (holding unconstitutional Alabama's effort to compel the NAACP to disclose its membership list).

127. *Id.* at 462.

128. Planned Parenthood v. Superior Court, 99 Cal. Rptr. 2d 627, 637 (Ct. App. 2000).

129. 429 U.S. 589 (1977) (upholding New York reporting requirements for some prescription drugs on the grounds that their design reflected due concern for patients' privacy rights).

130. 631 N.E.2d 985 (Mass. 1994).

131. *Id.* at 992 n.11.

132. CAL. CONST. art. I, § 1. The California Constitution has also been interpreted to allow for attorney's fees to be awarded against private defendants. Planned Parenthood v. Aakhus, 17 Cal. Rptr. 2d 510 (Ct. App. 1993).

133. *See* Chico Feminist Women's Health Ctr. v. Scully, 256 Cal. Rptr. 194 (Ct. App. 1989).

134. *Id.* at 199.

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been confronted with a claim based on publication of information. Four years later, in considering a claim against protestors primarily for trespassing on the clinic's private property but also for outing practices, the court held that "by photographing and videotaping respondent's clients, appellants actually did deny them their right to privacy under the California Constitution."[135]

The constitutional rights just described create a background against which privacy interests have meaning, legitimacy, and weight. They also provide a ready normative language for describing these qualities. The Constitution does not, however, directly obligate the states to take any affirmative actions. A more important caveat is that whatever actions state courts or legislatures do take are limited by the First Amendment.

B. *First Amendment Limits on Privacy Protection*

The First Amendment prohibits legislation "abridging the freedom of speech."[136] Abortion outing is speech in several senses: Intentional intrusions are a form of expressive conduct intended to convey anger, sorrow, or condemnation, and activists publicize personal information through verbal and written words. Moreover, the practice of abortion is a political issue of great public concern, and thus advocacy for and against abortion is undeniably part of the "robust democratic debate"[137] that the First Amendment was specifically intended to protect. Any attempt to curtail abortion outing, then, raises significant First Amendment issues. This Section first reviews relevant First Amendment doctrine, then turns to two recent applications in the abortion context, and finally concludes with some general observations about how First Amendment concerns should be approached in abortion-related cases.

The First Amendment has been interpreted as protecting written and spoken words more strongly than expressive conduct.[138] In both cases, the Amendment is broadly construed; no one has the right to be absolutely insulated from unwelcome speech. States, however, can place content-neutral time, place, and manner restrictions on speech to further legitimate state interests, and courts can fashion narrowly tailored injunctions to curtail "abusive conduct" and minimize the "emotional distress" caused by

135. *Aakhus*, 17 Cal. Rptr. 2d at 515.

136. U.S. CONST. amend. I.

137. Brown v. Hartlage, 456 U.S. 45, 62 (1982) (holding that state court nullification of election results based on an objectionable promise made by a candidate violated the First Amendment).

138. Texas v. Johnson, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.").

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speech.[139] Courts have also recognized that states have a legitimate interest in protecting unwilling, captive audiences.[140] In fashioning content-neutral restrictions, courts can consider which activities are "basically incompatible with the normal activity of a particular place at a particular time."[141] But they must leave open "ample alternative channels for communication of the information."[142] The test for content neutrality is not the practical effect of the restrictions but rather whether they serve some purpose unrelated to the content of the regulated speech.[143] Finally, some harmful speech can be prohibited outright if it intentionally threatens grave harm or "'prepar[es] a group for violent action and steel[s] it to such action,'" but not if it merely amounts to "'abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence.'"[144]

This body of precedent suggests that outing practices such as videotaping may be less protected than actual speech and therefore more vulnerable to a tort action for violation of privacy. In assessing a privacy tort action against the background of the First Amendment, courts may look to how abusive the conduct in question is and to whether abortion patients and providers made to run a gauntlet in front of a clinic can be called "captive" for First Amendment purposes.[145] They may ask whether the conduct is "incompatible" with the day-to-day operations of the clinic. They may consider the likelihood that awarding damages will unreasonably chill nontortious anti-abortion advocacy. Courts may also be willing to prohibit certain privacy violations, such as publication of personal information about abortion providers, if plaintiffs can show that these violations were designed to place them in imminent danger or to convey a direct threat of violence.

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139. *Chico Feminist Women's Health Ctr.*, 256 Cal. Rptr. at 203 (describing approvingly how the trial court had gone about fashioning its injunction). In general, though, appellate courts scrutinize injunctions more closely for constitutional defects than they do statutes or ordinances because there is a greater risk that injunctions will be issued selectively, based on impermissible factors. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764-65 (1994) (opining that because injunctions carry a greater risk of "discriminatory application" than does legislation, they are subject to "a somewhat more stringent application of general First Amendment principles," but nonetheless upholding the challenged injunction).

140. Frisby v. Schultz, 487 U.S. 474, 484-85 (1988) (upholding an ordinance prohibiting picketing outside private residences).

141. Grayned v. Rockford, 408 U.S. 104, 116 (1972) (holding that an anti-noise ordinance aimed at disturbances in the vicinity of classrooms in session did not violate the First Amendment).

142. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1982) (upholding the federal government's refusal to allow individuals to sleep on public land in a demonstration to call attention to the problem of homelessness).

143. *Id.*

144. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).

145. *See* Hill v. Colorado, 530 U.S. 703, 718 (2000) (concluding that abortion patients are sufficiently captive to justify some state protection).

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Given the scarcity of common-law actions against abortion outing, there is no developed First Amendment case law on the subject. Two recent cases, however, address closely related questions and are therefore noteworthy. In *Hill v. Colorado*, the Court upheld a state law that restricted how close protestors could come (without first obtaining consent) to patients entering and leaving medical facilities.[146] The Court recognized that Colorado had a legitimate interest in protecting its citizens' welfare, freedom of access to medical facilities, and interest in "be[ing] let alone."[147] It connected the state's interest to the individual's common-law right to privacy, both explicitly and by quoting the famous *Olmstead v. United States* dissent of Justice Brandeis, who first, as a theorist, persuaded courts to recognize privacy rights in their common-law jurisprudence and later, as a jurist, championed privacy in his constitutional jurisprudence.[148] The individual's right to be let alone, the majority held, "must be placed in the scales with the right of others to communicate."[149]

Equally important for present purposes, the *Hill* court eschewed the more abstract perspective often assumed in First Amendment jurisprudence and took a hard look at the reality behind the case: "Persons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions."[150] Finally, the Court was willing to accept the risk of chilling some harmless speech as the price of protecting other important interests.[151] *Hill* suggests that, despite possible First Amendment reservations, courts will be willing to countenance privacy actions in which significant, palpable harm is alleged.

Another recent decision that may influence the development of the privacy torts is the Ninth Circuit's en banc opinion in *Planned Parenthood v. American Coalition of Life Activists*, which upheld a jury verdict against anti-abortion protestors for, among other things, violating FACE.[152] The court agreed with the plaintiff physicians that the Nuremberg Files and other tactics aimed at harassing abortion doctors constituted "true threats" of force within the meaning of FACE and were, therefore, not protected

146. *Id.* at 735.

147. *Id.* at 718 (internal quotation marks and citation omitted).

148. *Id.* at 716-17 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). For a fuller account of the connection between Brandeis's scholarship and the privacy torts, see Zimmerman, *supra* note 30, at 292-99.

149. *Hill*, 530 U.S. at 718 (citation omitted). *But see id.* at 750-54 (Scalia, J., dissenting) (rejecting the view that the state has a legitimate interest in protecting an individual's right to be let alone).

150. *Id.* at 729.

151. *Id.*

152. 290 F.3d 1058 (9th Cir. 2002) (en banc). For a description of FACE, see *supra* note 16 and accompanying text.

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under the First Amendment.[153] The court reversed a panel opinion by Judge Kozinski, which had held that the jury was not authorized to consider context in assessing whether challenged conduct amounted to a threat of violence and was only authorized to impose liability if the defendants had themselves directly threatened, or had explicitly "authorized" others, to commit violence.[154] The *Life Activists* en banc opinion is especially welcome for its recognition that context matters. Because context is very much in the minds of both anti-abortion protestors and abortion seekers and providers—indeed, context is what makes abortion outing so popular and so effective as a means of coercion—context likewise must inform a court's assessment of abortion outing, whether it is hearing constitutional challenges to speech restrictions or privacy tort claims. Unfortunately, *Life Activists* may not have settled the matter once and for all. The court was closely divided (6-5),[155] and the case is considered a likely candidate for a writ of certiorari from the Supreme Court.[156]

Free speech advocates often argue, and courts often assume, as did the Ninth Circuit panel, that most offensive and even harmful speech must be protected so as to avoid chilling other, desirable speech.[157] One critic of *Life Activists*, for example, argued that, while the defendants' activities may have reasonably and predictably provoked fear, "much vigorous political speech often does precisely that"[158]—as if no workable line could be drawn between speech that makes people reasonably fear for their lives and "vigorous political speech." But *any* time constitutional law requires a delicate balancing of competing interests, as does First Amendment jurisprudence, some lawful behavior will be chilled. When faced with a

153 *Am. Coalition of Life Activists*, 290 F.3d at 1085-86. The court read FACE's "threat of force" as coextensive with the "true threats" excluded from First Amendment protection. *Id.* at 1077.

154. Planned Parenthood v. Am. Coalition of Life Activists, 244 F.3d 1007, 1014, 1018 (9th Cir. 2001), *rev'd en banc*, 290 F.3d 1058 (9th Cir. 2002) (noting that to allow juries to consider the context of ambiguous statements, such as threats based on previous acts of violence by nondefendants, would impermissibly chill public debate). Judge Kozinski's opinion seemed to be based in part on a bizarre and somewhat frightening romanticism about past uses of violence to achieve lofty goals, from American independence to abolition. *Id.* at 1014. The en banc court rightly rejected Kozinski's implication that violence and intimidation are somehow constitutive of robust political debate. *Am. Coalition of Life Activists*, 290 F.3d at 1086.

155. 290 F.3d at 1058.

156. Travis Loop, *Laying Down Media Law: Free Speech and Public Access Punctuate the Docket*, PRESSTIME, Nov. 2002, at 33.

157. Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (holding that the First Amendment prohibits states from imposing sanctions for the publication of a rape victim's name, where the information was already on public record in connection with a public prosecution); Zimmerman, *supra* note 30.

158. Ronald K.L. Collins & Robert Corn-Revere, *Wanted! First Amendment Protection: Clamping Down on Anti-Abortion Web Site Risks Speech for Everyone*, LEGAL TIMES, June 3, 2002, at 75; *see also* Opinion, *Chilling Effect: Provocative, Even Repugnant Speech Doesn't Necessarily Constitute a Threat*, GAZETTE, June 4, 2002, Metro, at 6 (condemning the Ninth Circuit's ruling in *Life Activists*).

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regulation that inhibits protected speech, courts do not simply strike it down; they perform a painstaking balancing test to see if countervailing interests are sufficiently weighty to justify the harm.[159] The moral imperative to engage in this intellectually messy task of imperfect line drawing stems from the fact that, if courts abdicate this task, they allow, perhaps needlessly, activities that traumatize patients and endanger doctors' lives.

In the final analysis, the degree to which one tolerates limitations on speech depends on one's theory of why free speech is important. For those primarily motivated by distrust of state power, the First Amendment may be overridden, if at all, only in extreme situations. However, many theorists view the First Amendment more instrumentally—valuing it, for example, because it contributes to the free exchange of ideas, or promotes democracy or autonomy.[160] Because speech often impinges on the rights of others, an instrumental view of the First Amendment requires that those rights be considered as possible reasons for limiting the speech in question. The practice of abortion outing, for example, brings two types of freedom of expression into tension: the freedom to voice one's views through aggressive advocacy and intimidation, generally acknowledged to be protected by the First Amendment, and the freedom to express one's views in choices about how to live, which is often protected in privacy tort actions and constitutional privacy cases.

Many individuals engage in lawful activities that appear morally objectionable, and possibly even dangerous, to some segment of the population: marital infidelity, gun ownership, and enjoyment of hard-core pornography, to name a few. The question is to whom they should be accountable when they engage in such activities.[161] Virtually everyone agrees that some forms of private accountability are an important and necessary source of morality. For example, an unfaithful husband ought to be accountable to his family and to his friends, a minister who violates the tenets of her religion ought to be accountable to her congregation, and a lazy student ought to be accountable to her teachers and parents.

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159. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 729 (2000) (acknowledging that the law "will sometimes inhibit" harmless advocacy, but maintaining that such chilling was inevitable given the difficulty of drawing a line that adequately protects patients). Indeed, there is some evidence of an emerging national policy that medical privacy trumps freedom of speech per se. *See* Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191, § 164, 110 Stat. 1936, 2033 (protecting the privacy of medical records without including a free speech exception).

160. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561-62 (1980) (implying that one purpose of the First Amendment is to promote the availability of information); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) (arguing that freedom of speech promotes autonomy).

161. Accountability is used here to describe one's moral obligation to explain one's actions to others and, likewise, the right others have to express their disapproval of one's actions.

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But if we make private individuals universally accountable, as anti-abortion protestors do when they disseminate doctors' and patients' names and faces on the Internet, we arguably violate their moral autonomy. Unmoored from the libertarian, majoritarian limits of the state and from the context of personal relationships, universal accountability imposes a kind of super-Kantian imperative: Only commit those acts that you would not mind exposing to the endless scrutiny, judgment, and reaction of the entire world.[162] The results of this imperative, in the long run, would closely resemble the results of suppressing speech: greater moral convergence, followed by less moral debate, followed in turn by less independent reflection.[163]

The argument against universal accountability has particular force with respect to the practice of abortion because abortion is both an intimate and significant individual decision and a subject of heated moral and political controversy. For abortion to retain this essential former character, for it to even exist as a subject of debate, individual abortion seekers and providers must not be dragged into the eye of the controversy. "It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny," as Justice Stevens famously wrote,[164] because without privacy, one's choice is effectively made by others.

V. CONCLUSION

The common-law privacy rights, largely unnoticed by victims of abortion outing, may cover, or may evolve to cover, many outing techniques. In particular, this Note has considered two torts that seem, on their face, particularly promising: the intrusion-upon-seclusion tort, which covers particularly offensive invasions of personal space, and the publication-of-private-facts tort, which protects the privacy of sensitive information. The intrusion tort may be difficult to use because courts traditionally have limited it to intrusions occurring in private places. Likewise, attempts to apply the publication tort to abortion outing are likely

162. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 17 (H.J. Paton trans., Harper Torchbooks 1964) (1785) ("I ought never to act except in such a way *that I can also will that my maxim should become a universal law*.").

163. Edward Bloustein captured this point when he wrote:

> The man . . . whose every need, thought, desire, fancy or gratification is subject to public scrutiny . . . merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man.

Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1003 (1964); *see also* Westin, *supra* note 45, at 1022-24.

164. Bellotti v. Baird, 443 U.S. 622, 655 (1979) (Stevens, J., concurring). Justices Brennan, Marshall, and Blackmun joined Justice Stevens's concurrence.

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to raise questions about whether information gathered in public can ever be considered "private" and whether targeted disclosure to family members—a common abortion-outing tactic—constitutes "publication."

Plaintiffs might overcome these obstacles by drawing on analogous case law in which courts have stretched the intrusion and publication torts to provide some privacy protection to moments and information that are in some aspect public. In particular, courts might be persuaded to extend protection against abortion outing by focusing on the following factors: the medical and sexual aspects of abortion, which make it an inherently private act; the intention to shock and intimidate that often motivates abortion outing; the importance of family privacy, which abortion outing often disrupts; and the risk of violence to which abortion outing exposes both abortion seekers and abortion providers.

Plaintiffs can draw on constitutional considerations to further support their claims. Constitutional norms of decisional, associational, and informational privacy provide persuasive authority for a state interest in curtailing abortion outing. While the First Amendment protects abortion outing from outright elimination, it also allows for state actions that restrict abortion outing that is particularly intrusive and obstructive, provided they leave meaningful space for legitimate protest activities.

On a more theoretical level, the very principles so often cited to defend free speech—pluralism and dissent—also support strong privacy protections for abortion seekers and providers. If individuals are not permitted to make fundamental ethical decisions without subjecting themselves to universal scrutiny and retaliation from any disapproving minority, then their actions—and eventually, perhaps, their views—will homogenize in much the way they might without free speech. This is not, of course, an argument for any affirmative state obligations to prevent such a result, but it does imply that the courts should not, simply out of First Amendment concerns, abandon the privacy torts. On balance, we are a freer society for them.

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