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Baby Jane Doe: Stating a Cause of Action Against the Officious Intermeddler

By MICHAEL VITIELLO*

The birth of a seriously ill newborn presents parents and health care providers with an array of difficult choices. The parents, full of anticipation and excitement, "may be reeling emotionally from the shock of having a seriously ill child instead of the normal, healthy infant they had imagined."¹ Recent technological advances make it possible to sustain hopelessly ill patients for prolonged periods of time,² but the effectiveness of such treatment may require the parents to make quick decisions based on uncertain predictions about the infant's prognosis.³ The decision whether to treat can raise troubling moral and ethical dilemmas, especially in cases involving severe malformations or disabilities that would prevent a "normal" life if the infant were to survive.⁴

Hard decisions concerning the infant's treatment traditionally have been made after consultation between the infant's physician and parents.⁵ Recently, some health care providers have begun to rely on internal ethics committees⁶ or other professionals, including religious counselors and

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1. PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 216 (1983) [hereinafter cited as PRESIDENT'S COMMISSION].

2. *Id.* at 197-98; see also Singer & Kuhse, *The Future of Baby Jane Doe*, N.Y. REV. BOOKS, Mar. 1, 1984, at 18-19 (citing Surgeon General C. Everett Koop's statement that an infant born without an intestine can be sustained for up to 18 months).

3. See PRESIDENT'S COMMISSION, *supra* note 1, at 198-99.

4. R. WEIR, SELECTIVE NONTREATMENT OF HANDICAPPED NEWBORNS 177-84 (1984) (discussing various positions taken by ethicists).

5. See, e.g., Duff & Campbell, *Moral and Ethical Dilemmas in the Special-Care Nursery*, 289 NEW ENG. J. MED. 890, 892-94 (1973) (urging doctors to consult with parents in decision-making process).

6. PRESIDENT'S COMMISSION, *supra* note 1, at 161-62; see also *In re Quinlan*, 70 N.J. 10, 49-51, 355 A.2d 647, 668-69, cert. denied, 429 U.S. 922 (1976) (endorsing use of hospital ethics committees). For a discussion of ethics committees elsewhere in this symposium, see Shapiro & Barthel, *Infant Care Review Committees: An Effective Approach to the Baby Doe*

social workers, to assist the primary decision-makers.⁷

The addition of ethics committees or other consultants to the decision-making procedure has helped to ensure that the ultimate treatment decision is an informed one.⁸ But at least since the widely criticized 1982 Indiana *Infant Doe* case,⁹ this type of procedure has been under attack. Right-to-life groups have labeled such cases infanticide.¹⁰ Partially in response to those groups, the Reagan administration attempted unsuccessfully to use section 504 of the Rehabilitation Act of 1973¹¹ to support

Dilemma?, 37 HASTINGS L.J. 827 (1986); Smith, *Disabled Newborns and the Federal Child Abuse Amendments: Tenuous Protection*, 37 HASTINGS L.J. 765 (1986).

7. PRESIDENT'S COMMISSION, *supra* note 1, at 452 (listing composition of various ethics committees); see also Weber v. Stony Brook Hosp., 95 A.D.2d 587, 588, 467 N.Y.S.2d 685, 686, *aff'd per curiam*, 60 N.Y.2d 208, 456 N.E.2d 1186, 469 N.Y.S.2d 63, *cert. denied*, 464 U.S. 1026 (1983) (Baby Jane Doe's parents consulted with various professionals before refusing to consent to surgery).

8. See PRESIDENT'S COMMISSION, *supra* note 1, at 162-65 (discussing appropriate function of hospital ethics committees).

9. *In re Infant Doe*, No. GU 8204-004A (Monroe County Cir. Ct., Ind. Apr. 12, 1982), *cert. denied sub nom.*, *Infant Doe v. Bloomington Hosp.*, 464 U.S. 961 (1983). In this case, "parents elected to forgo treatment of their newborn child who had Down's syndrome, tracheoesophageal atresia, and possibly additional anomalies." PRESIDENT'S COMMISSION, *supra* note 1, at 224 n.92. The facts of the *Infant Doe* case are unclear because the record was sealed. *Id.* It does appear that there was an extensive review of the facts of the case by a guardian ad litem appointed to represent the infant and by a six-person task force assigned to review the decision. These parties apparently concurred in the decision not to seek court-ordered treatment. See Smith, *Life and Death Decisions in the Nursery: Standards and Procedures for Withholding Lifesaving Treatment from Infants*, 27 N.Y.L. SCH. L. REV. 1125, 1136 n.41 (1982). The *Infant Doe* case inspired efforts on the part of the federal government to intercede in such cases. See Vitiello, *The Baby Jane Doe Litigation and Section 504: An Exercise in Raw Executive Power*, 17 CONN. L. REV. 95, 98-102 (1984) (discussing Reagan administration's response to the *Infant Doe* case). For a criticism of that decision, see, for example, J. ROBERTSON, *THE RIGHTS OF THE CRITICALLY ILL: THE BASIC A.C.L.U. GUIDE TO THE RIGHTS OF CRITICALLY ILL AND DYING PATIENTS* 88 (1983); Reagan, *Abortion and the Conscience of the Nation*, 9 HUM. LIFE REV. 7, 9-10 (1983).

10. See, e.g., AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND, SUMMARY ANALYSIS OF FINAL "BABY DOE" RULES WITH RECOMMENDATIONS FOR ACTION 10 (1984); see also Brooks, *Ethical Dilemmas in the Treatment of Critically Ill Newborns*, 1 J. CONTEMP. HEALTH L. & POL'Y 133 (1985) (decisions allowing infant death rest on faulty data and faulty reasoning).

11. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (West 1982)). In the government's petition for a writ of certiorari in *Bowen v. American Hosp. Ass'n*, 106 S. Ct. 2101 (1986), the government offered the following explanation of how the regulations proposed by HHS on July 5, 1983 (Nondiscrimination on the Basis of Handicap, 48 Fed. Reg. 9630 (1983) (codified at 45 C.F.R. pt. 84)) would apply section 504 to cases involving seriously ill newborns:

The regulations explain the basic applicability of Section 504 in this setting through interpretive guidelines, which establish four basic principles: (1) health care providers receiving federal financial assistance "may not, solely on the basis of present or anticipated physical or mental impairments of an infant, withhold treatment or nourishment from the infant who, in spite of such impairments, will medically benefit from

federal intervention in such cases.¹² More recently, Congress amended the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978 ("Act") to encompass cases involving denial of medically appropriate treatment to seriously ill newborns.¹³ The amendments make the failure to provide life-sustaining treatment to a disabled infant a form of child neglect.¹⁴ Unlike the government's attempted use of section 504, the amendments leave the enforcement of such cases to state child protective agencies.¹⁵

These legislative and regulatory measures provide mechanisms through which the state can oversee the propriety of nontreatment decisions. Although the degree of popular support for these efforts is not clear, at least they have placed the issue in the public forum where healthy debate may produce a consensus on how such decisions should be made and the extent to which society is willing to subsidize the cost of raising a severely disabled person.¹⁶ Far more controversial are actions

the treatment or nourishment"; (2) treatment that is futile or will do no more than temporarily prolong the act of dying of a terminally ill infant is not considered treatment that will medically benefit the infant for purposes of Section 504; (3) reasonable medical judgments in selecting among alternative courses of treatment will be respected; and (4) where a parent withholds consent to treatment that is medically indicated, the hospital may not, solely on the basis of the infant's handicap, decline to report the matter to the appropriate child protective agency or to see judicial review.

12. See *Bowen v. American Hosp. Ass'n*, 106 S. Ct. 2101 (1986); *United States v. University Hosp.*, 575 F. Supp. 607 (E.D.N.Y. 1983), *aff'd*, 729 F.2d 144, 146 (2d Cir. 1984) (holding that section 504 does not authorize the government to compel hospital to release infant's medical records to determine whether discrimination on the basis of handicap was taking place). For a critical appraisal of the government's position in the *University Hospital* case, see Vitello, *supra* note 9, at 98-121.

13. Child Abuse Amendments of 1984, Pub. L. No. 98-457, 98 Stat. 1749 (1984) (codified at 42 U.S.C.A. §§ 5102-5106, 5111-5113, 5115 (West Supp. 1985)). The implementing regulations are contained in the Child Abuse and Neglect Prevention and Treatment Program, 45 C.F.R. § 1340 (1985). For a critical appraisal of that act and the regulations promulgated thereunder, see Smith, *supra* note 6.

14. Child Abuse Amendments of 1984, Pub. L. No. 98-457, 98 Stat. 1749, 1752 (codified at 42 U.S.C.A. § 5102 (West Supp. 1985)).

15. *Id.*

16. See J. LYON, *PLAYING GOD IN THE NURSERY* 286-93 (1985) (discussing debate surrounding expenditure for seriously ill newborns). It is ironic that cases like *Baby Jane Doe's* have been seen as right-to-life cases. Properly construed, the infant's self-appointed advocate is claiming a right to impose a lifetime of expensive treatment. See *id.* at 285. It is important to recognize the hidden claim on behalf of the infant. In many cases, the parents will be unable to afford adequate treatment. The issue to be clarified is whether proponents of a right to treatment are contending that the infant has a right to treatment paid by government. The United States Supreme Court has rejected such a right when made on constitutional grounds. See *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding withdrawal of funding for abortions from federal medical benefits programs); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding no constitutional right requires state or federal government to subsidize non-therapeutic abortions).

by more confrontational right-to-life advocates who find such legislatively mandated procedures inadequate and instead try to compel treatment for some dying patients. The Baby Jane Doe case, *Weber v. Stony Brook Hospital*,¹⁷ is illustrative. Baby Jane Doe was born with a series of physical anomalies,¹⁸ including spina bifida¹⁹ and hydrocephalus.²⁰ After extensive consultation, the infant's parents rejected surgery that might have prolonged the infant's life, but that could not improve her prospects for a sapient existence.²¹ An anonymous tip alerted the Department of Health and Human Services ("HHS") to Baby Jane Doe's plight.²² HHS filed a complaint with the Child Protection Services ("CPS"), the New York State agency responsible for investigating cases of child neglect and abuse. The agency found the complaint groundless.²³ Dissatisfied with the finding, a member of the hospital staff contacted A. Lawrence Washburn, Jr., a right-to-life attorney.²⁴ Washburn, though in no way related to the infant, made repeated unsuccessful efforts to secure a judicial order compelling treatment.²⁵

Washburn's conduct provoked sharp criticism. Even the New York Court of Appeals upholding the parents' decision in the Baby Jane Doe case characterized Washburn's²⁶ conduct as "unusual, and sometimes offensive."²⁷ Numerous editorials representing a wide array of political opinion expressed consternation at the plight of Baby Jane Doe's fam-

17. 60 N.Y.2d 208, 456 N.E.2d 1186, 469 N.Y.S.2d 63, *aff'g per curiam* 95 A.D.2d 587, 467 N.Y.S.2d 685, *cert. denied*, 464 U.S. 1026 (1983).

18. *Id.* Transcript of Oct. 19-20, 1983 Hearing Before Justice Melvyn Tanenbaum, Supreme Court of New York, Suffolk County 22-28, 45.

19. Myelomeningocele (spina bifida) involves a saccular enlargement that includes the spinal cord or nerves in the sac formation and protrudes through the vertebral column. See Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 STAN. L. REV. 213, 214 n.7 (1975) (citing J. WARKANY, CONGENITAL MALFORMATIONS 272 (1971)).

20. "Hydrocephaly is characterized by an increase of free fluid in the cranial cavity which results in a marked enlargement of the head." Robertson, *supra* note 19, at 213 n.4 (citing J. WARKANY, *supra* note 19, at 217).

21. *United States v. University Hosp.*, 729 F.2d 144, 146 (2d Cir. 1984).

22. *Id.* at 147.

23. *Id.* at 146.

24. J. LYON, *supra* note 16, at 46. The informant has never been identified, but presumably the identity of the informant could be ascertained through proper discovery in an action against Washburn. Cf. *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972) (rejecting news reporter's privilege to withhold from grand jury identity of confidential source suspected of criminal activity).

25. The New York Court of Appeals relied on this fact in its decision. See *Weber v. Stony Brook Hosp.*, 60 N.Y.2d 208, 456 N.E.2d 1186, 469 N.Y.S.2d 63, *cert. denied*, 464 U.S. 1026 (1983). See *infra* notes 60-80 & accompanying text.

26. The court did not refer specifically to Washburn by name, but accounts of the case make clear that the court had Washburn in mind. See, e.g., J. LYON, *supra* note 16, at 50.

27. *Weber*, 60 N.Y.2d at 209, 456 N.E.2d at 1187, 469 N.Y.S.2d at 64.

ily.²⁸ Much of the criticism was directed toward the Reagan administration's efforts to intervene.²⁹ Commentators also argued, however, that Washburn's actions as a self-appointed intervenor—or, what might be called an officious intermeddler—interfered with the parents' role as the appropriate decision-makers.³⁰ That indictment is persuasive,³¹ but it too easily assumes that such intervention violates recognized privacy rights apparently premised on broad parental autonomy rights over family matters.³²

The scope of parental autonomy should not be overstated. Although once deemed almost absolute,³³ the state may rightfully override parental autonomy in child-rearing in bona fide instances of neglect and abuse.³⁴ The state has a strong interest in the full reporting of cases of abuse and neglect to appropriate agencies. Neglect laws enable the state to fulfill its role as *parens patriae*, that is, its interest in protecting those unable to protect themselves. As a result, many abuse statutes provide informants anonymity or immunity in order to protect them from fear of reprisals.³⁵ Those statutes reflect a balance of competing interests. They allow state investigation of suspected child abuse, but respect parental autonomy because trained agency personnel conduct the investigation and must follow statutorily prescribed procedures, allowing the state to investigate abuse without bringing formal, public proceedings.

Not satisfied with these procedures, some right-to-life advocates have gone further and intruded upon the decision-making process in cases in which they disagree with the course of treatment chosen by

28. See, e.g., Cohen, *Baby Jane*, Washington Post, Nov. 29, 1983, at B1, col. 1; Kilpatrick, *Crucial Question Forgotten*, New Orleans Times Picayune, Nov. 15, 1983, at A9, col. 1; Goodman, *A Visit from an Intrusive Uncle*, Washington Post, Nov. 12, 1983, at A19, col. 1; *Cruelty and Baby Jane*, New York Times, Nov. 1, 1983, at A26, col. 1; *Big Brother Doe*, Wall Street Journal, Oct. 31, 1983, at 24, col. 1.

29. See, e.g., *Big Brother Doe*, *supra* note 28.

30. See, e.g., Cohen, *supra* note 28.

31. This author shares the same concern. See Vitiello, *supra* note 9.

32. See, e.g., Cohen, *supra* note 28; *Big Brother Doe*, *supra* note 28.

33. See Bopp & Balch, *The Child Abuse Amendments of 1984 and their Implementing Regulations: A Summary*, 1 ISSUES L. & MED. 91, 92 (1985) (discussing nineteenth-century view that privacy of the family was sacred); see also Smith, *supra* note 6 at 771-73.

34. See Smith, *supra* note 6, at 776-80 (state has interest sufficiently compelling to override parental autonomy rights); see also *infra* notes 226-30 & accompanying text.

35. See, e.g., CONN. GEN. STAT. ANN. §§ 17-38(a) to -38(c) (West Supp. 1985) (immunity); IND. CODE ANN. § 31-6-11-7 (Burns Supp. 1985) (immunity); TENN. CODE ANN. § 37-1-409 (Supp. 1985) (anonymity); see also NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD PROTECTION: A GUIDE FOR STATE LEGISLATION § 3 (1983), reprinted in PRESIDENT'S COMMISSION, *supra* note 1, at 478 (anonymity).

health care professionals and the patient's family.³⁶ Such intervention upsets the balance between autonomy rights and limited state intervention. Instead of a discreet professional agency proceeding, Washburn, for example, attempted to force discovery of Baby Jane Doe's medical records for examination by a medical expert closely identified with the right-to-life cause.³⁷ Unlike confidential agency proceedings,³⁸ litigation had the foreseeable, and apparently intended,³⁹ consequence of exposing all of the details of the Baby Jane Doe case to public scrutiny, even though the parents' decision turned out to be defensible. That conduct impaired two separate interests of the infant's parents—their ability to make decisions on behalf of the infant, an autonomy right, and their interest in being free from unwanted public attention, a privacy right.

Baby Jane Doe is not likely to be an isolated instance. Right-to-life groups increasingly have begun to focus on medical treatment decisions.⁴⁰ Moreover, as persuasively argued by Professor Smith elsewhere in this symposium, recent amendments to the federal child abuse and neglect law have fallen short of the hopes of many advocates of aggressive treatment for seriously ill newborns.⁴¹ Predictably, there will be more instances of intermeddling by zealous members of the right-to-life movement because they will be frustrated by the failure to force treatment in cases like Baby Jane Doe's. Elsewhere, some members of the

36. See, e.g., *Spring v. Geriatric Auth.*, 475 N.E.2d 727 (Mass. 1985) (right-to-life members made unauthorized visits to senile patient to determine whether he wanted kidney dialysis continued); see also J. LYON, *supra* note 16, at 41-45 (citing cases of abuse of the "Baby Doe hot-line").

37. See *60 Minutes: Baby Jane Doe's Parents*, Transcript of televised interview of A. Lawrence Washburn, at 3 (CBS broadcast, Mar. 11, 1984; used herein by permission of CBS. CBS reserves all rights.) ("Our expert is Dr. McGlone [sic] of Children's Hospital in Chicago and by the reason of the size of Baby Jane Doe's head . . . he predicts normal intelligence.") [hereinafter cited as *60 Minutes*]. Dr. David McLone of Chicago's Children's Memorial Hospital "is the leader of a crusade to treat all babies born with myelomeningocele." J. LYON, *supra* note 16, at 186.

38. Many statutes provide specifically that the proceedings shall be confidential. See, e.g., FLA. STAT. ANN. § 415.51 (West Supp. 1985); LA. REV. STAT. ANN. § 40:1299.36.3 (West Supp. 1985); ME. REV. STAT. ANN. tit. 22, § 4008 (Supp. 1985); MICH. COMP. LAWS ANN. § 722.627 (West Supp. 1985); N.Y. FAM. CT. ACT art. 10, § 1043 (McKinney Supp. 1981). Interestingly, some states provide for criminal and civil sanctions against a party who reveals confidential information. See, e.g., ME. REV. STAT. ANN. tit. 22, § 4008(4) (West Supp. 1985) (criminal sanctions); MICH. COMP. LAWS ANN. § 722.633 (West Supp. 1985) (civil and criminal sanctions). This Article argues that a civil remedy should be available against anyone who reveals confidential information, even absent legislative action. These statutes, however, demonstrate that public policy favors privacy rights.

39. See *60 Minutes*, *supra* note 37, at 2 ("I entered this [case] because I . . . do not wish to consent or to remain silent while an innocent human life is taken in America.").

40. See *infra* notes 86-105 & accompanying text.

41. Smith, *supra* note 6, at 818-19.

right-to-life movement have resorted to self-help or civil disobedience to prevent abortions when they have been frustrated by the refusal of courts and legislatures to heed their cause.⁴²

Such conduct seriously threatens privacy rights. Although parents in cases like Baby Jane Doe's do not have an absolute right to unfettered decision-making, they ought to be protected from interference beyond those measures the state finds reasonably necessary to protect the infant's interests. This Article examines whether the law provides a remedy for the victims of efforts by strangers to compel treatment for seriously ill newborns⁴³ and discusses the extent to which an action for invasion of privacy may provide that relief.

The Article first reviews the Baby Jane Doe case to illustrate the facts that may give rise to an action for an invasion of privacy against officious intermeddlers.⁴⁴ The Article then argues that an infant's privacy action would fail, primarily because of the infant's lack of awareness of the defendants' conduct, but also because of policy considerations that have prevented courts from finding a right of action in "wrongful life" cases.⁴⁵ Finally, the Article argues that the concept of privacy is sufficiently flexible to encompass a distinct action by the parents despite the absence of precise precedent for it.⁴⁶ Such an action is particularly appropriate in light of parents' constitutionally protected autonomy rights in matters affecting the family.⁴⁷

The Baby Jane Doe Litigation

Baby Jane Doe was born on October 11, 1983, at St. Charles Hospital in Port Jefferson, New York.⁴⁸ She suffered from "multiple serious disorders, including myelomeningocele (commonly known as spina bifida), a failure of the normal closure of the bones and the coverings of the spinal cord, microcephaly, a small head circumference, bespeaking increased pressure in the cranial cavity, and hydrocephalus, a condition

42. C. PAIGE, *THE RIGHT TO LIFERS* 75-79, 218-20 (1983) (describing efforts of right-to-life advocates to disrupt abortion clinics, including bombings of abortion clinics and kidnapping of clinic owners).

43. This Article deals specifically with cases in which strangers attempt to compel treatment for seriously ill minors. But a similar analysis would apply when outsiders try to intrude upon the right of family members to make a decision on behalf of the incompetent patient. See *infra* notes 86-88 & accompanying text. A parallel privacy analysis might also apply in cases in which right-to-life members attempt to persuade a woman not to have an abortion.

44. See *infra* notes 48-84 & accompanying text.

45. See *infra* notes 132-91 & accompanying text.

46. See *infra* notes 235-346 & accompanying text.

47. See *infra* notes 203-33 & accompanying text.

48. J. LYON, *supra* note 16, at 45-46.

in which fluid fails to drain from the cranial areas.”⁴⁹ The infant also suffered from “bilateral upper extremity spasticity, a prolapsed rectum, a malformed brain stem, and additional problems indicating severe malformation of her nervous system.”⁵⁰

The infant’s parents consented to her transfer to Stony Brook University Hospital for possible corrective surgery.⁵¹ There, after consultation with health care professionals and counselors,⁵² the parents refused to consent to surgery to close the infant’s spine, an operation that could increase her life span, but that could not remedy the underlying anomalies.⁵³

There has been heated debate over the extent of Baby Jane Doe’s paralysis, retardation, and probable future pain and suffering.⁵⁴ At least one attending physician believed that surgery might significantly prolong Baby Jane Doe’s life, but that her prospects for a normal life were bleak.⁵⁵ In his view, even with surgery she would be bedridden, would have to be fed by hand or by an artificial feeding device, would be subject to bladder infections caused by incontinence that eventually would lead to kidney failure, and would lack the ability to interact meaningfully with her environment. Although not as pessimistic in his prognosis, the hospital’s chief neurologist believed that the infant’s microcephaly indicated brain malfunction.⁵⁶

After the infant’s parents refused to consent to surgery, a member of the hospital staff nonetheless contacted A. Lawrence Washburn, Jr., about the case.⁵⁷ Published reports do not reveal how Washburn came to the attention of the disgruntled staff member or what position the staff

49. See *Weber v. Stony Brook Hosp.*, 95 A.D.2d 587, 588, 467 N.Y.S.2d 685, 686, *aff’d per curiam*, 60 N.Y.2d 208, 456 N.E.2d 1186, 1188, 469 N.Y.S.2d 63, 65, *cert. denied*, 464 U.S. 1026 (1983).

50. Brief for the State of New York at 3-4, *United States v. University Hosp.*, 729 F.2d 144 (2d Cir. 1984).

51. *Weber*, 95 A.D.2d at 588, 467 N.Y.S.2d at 686.

52. *Id.*

53. Record at 48, 138.

54. See Hentoff, *Troublemaking Babies and Pious Liberals*, reprinted in 10 HUM. LIFE REV. 91, 93-94 (1984). Hentoff asserts that one neurologist’s “view of Baby Jane Doe’s future was decidedly bleak. On the other hand, . . . [the] chief of neurological surgery at the same hospital, who had treated some 350 spina bifida children, was in favor of surgery.” *Id.* at 93. Hentoff misleads his reader. The chief neurosurgeon also testified that the infant’s future would be poor. Record at 141-42, 174-76. A very different view of the infant’s condition was reported elsewhere. See, e.g., articles cited *supra* note 28.

55. Record at 32, 45-47.

56. *Id.* at 141-42, 174-76.

57. J. LYON, *supra* note 16, at 46.

member held at the hospital.⁵⁸ Washburn, however, has a reputation for his zeal in bringing lawsuits on behalf of fetuses and disabled infants.⁵⁹ Washburn filed an action in the New York Supreme Court to compel surgery,⁶⁰ and the court appointed William E. Weber, a local attorney, as guardian ad litem to replace Washburn.⁶¹

Shortly after Washburn commenced state court proceedings, an unidentified person contacted the Department of Health and Human Services ("HHS") about the infant. HHS filed a complaint with the Child Protective Services ("CPS"), a state agency with jurisdiction over child abuse cases. After an investigation, CPS found no neglect.⁶² The state court, however, held an evidentiary hearing, and ordered that the infant undergo surgery.⁶³ On the same day, in *Weber v. Stony Brook Hospital*,⁶⁴ a judge of the appellate division of the supreme court reversed that order and dismissed the proceeding.⁶⁵

The appellate division observed that the proceeding was properly entertained by the trial court on the ground that apart from any statutory authority, "a court of equity has both the power and responsibility to care for and protect all those persons who, by virtue of some legal disability, are unable to protect themselves."⁶⁶ On the merits, however, the appellate division rejected the trial court's findings that Baby Jane Doe had been denied adequate medical care or that her parents' refusal to consent to surgery placed her in imminent danger.⁶⁷ The court noted that the only medical experts who testified agreed that the parents' choice of medical treatment in lieu of surgery was "well within accepted medical standards and that there was no medical reason to disturb the parents' decision."⁶⁸

58. See, e.g., *id.* at 46-55; see also *United States v. University Hosp.*, 729 F.2d 144 (2d Cir. 1984).

59. J. LYON, *supra* note 16, at 46.

60. See *United States v. University Hosp.*, 729 F.2d 144, 146 (2d Cir. 1984) (describing procedural history of case).

61. Record at 5.

62. *United States v. University Hosp.*, 729 F.2d 144, 147 (2d Cir. 1984). HHS subsequently requested Baby Jane Doe's medical records from the hospital, pursuant to its regulations under section 504 of the Rehabilitation Act of 1973. After the hospital refused, HHS brought suit to compel the hospital to produce the documents. The district court entered summary judgment in favor of the hospital and the second circuit affirmed. *Id.*

63. *Id.* at 238.

64. 95 A.D.2d 587, 467 N.Y.S.2d 685, *aff'd per curiam*, 60 N.Y.2d 208, 456 N.E.2d 1186, 469 N.Y.S.2d 63, *cert denied*, 464 U.S. 1026 (1983).

65. *Id.* at 589, 467 N.Y.S.2d at 687.

66. *Id.* at 588, 467 N.Y.S.2d at 686 (citation omitted).

67. *Id.* at 589, 467 N.Y.S.2d at 687.

68. *Id.*

The court of appeals affirmed the dismissal ordered by the appellate division.⁶⁹ The court held that the trial court abused its discretion by permitting the procedure to go forward and stated that it should have granted a "broadly grounded motion" to dismiss the proceedings.⁷⁰ Ostensibly, the court's decision was based upon procedural grounds, relying on the express legislative design of family court procedures to help protect children from injury or mistreatment.⁷¹ The Family Court Act specified that such child neglect proceedings may be brought only by a child protective agency or by "a person on the court's direction."⁷² The Baby Jane Doe action, in contrast, was brought "at the behest of a person who had no disclosed relationship with the child, her parents, her family, or those treating her illnesses."⁷³ The court saw no reason to deviate from the statutory procedures.⁷⁴

In addition, the per curiam opinion implied that Washburn had violated rights of the parents. For example, it found "unusual, and sometimes offensive, activities and proceedings of those who have sought . . . to displace parental responsibility for and management of [the infant's] medical care."⁷⁵ The court expressed concern that Washburn had "catapult[ed] [himself] into the very heart of a family circle, there to challenge *the most private and most precious responsibility vested in the parents for the care and nurture of their children.*"⁷⁶ The court also cited the legislature's efforts to balance the parents' rights as primary decision-makers on behalf of their child with those of an abused infant, as reflected in the Family Court Act. In effect, by limiting the parties who may initiate abuse proceedings, the legislature gave recognition to the family's right to be free from unwarranted intervention.⁷⁷

The court of appeals did not articulate a specific theory upon which the parents might sue an intermeddler. But *Weber* certainly implies that legally protected interests had been violated without justification:

Confronted with the anguish of the birth of a child with severe physical disorders, these parents, in consequence of judicial procedure for which there is no precedent or authority, have been subjected in this last two weeks to litigation through all three levels of our State's court

69. *Weber*, 60 N.Y.2d at 213, 456 N.E.2d at 1188, 469 N.Y.S.2d at 65.

70. *Id.* at 209, 456 N.E.2d at 1187, 469 N.Y.S.2d at 64.

71. *Id.* (citing Family Court Act § 1011, N.Y. JUD. LAW § 1011 (McKinney 1983)).

72. *Weber*, 60 N.Y.2d at 209, 456 N.E.2d at 1187, 469 N.Y.S.2d at 64 (citing Family Court Act § 1032, N.Y. JUD. LAW § 1034 (McKinney 1983)).

73. *Weber*, 60 N.Y.2d at 210, 456 N.E.2d at 1188, 469 N.Y.S.2d at 65.

74. *Id.*

75. *Id.* at 209, 456 N.E.2d at 1187, 469 N.Y.S.2d at 64.

76. *Id.* at 210, 456 N.E.2d at 1188, 469 N.Y.S.2d at 65 (emphasis added).

77. *Id.* at 209, 456 N.E.2d at 1187-88, 469 N.Y.S.2d at 64-65.

system. We find no justification for resort to or entertainment of these proceedings.⁷⁸

After being rebuffed by state courts, Washburn filed a class action in the federal district court in Albany, New York.⁷⁹ The court dismissed the action and fined Washburn \$500 for bringing a frivolous suit.⁸⁰

Despite considerable expense and emotional harm to the infant's parents,⁸¹ the parents ultimately were vindicated by the courts. They voluntarily agreed to surgical implantation of a shunt to relieve pressure from the infant's hydrocephalic condition.⁸² The opening in the infant's spine closed without surgery, reducing some of the risk of imminent death from infection.⁸³ Baby Jane Doe's parents finally were able to bring her home.⁸⁴ After unwanted national attention, the family has vanished from the public eye.

The Baby Jane Doe litigation might not warrant extensive comment had it been an isolated incident. Examples of officious intermeddling or self-help—instances in which individuals act outside of established legal channels to press their right-to-life views—are becoming more common. Washburn himself apparently had a history of bringing similar actions on behalf of fetuses and seriously ill minors.⁸⁵ Elsewhere, members of a New England right-to-life group who were dissatisfied with a court order permitting a senile patient, Earle Spring, to be withdrawn from kidney dialysis treatments sought to intercede in the matter.⁸⁶ Several members of the medical staff of the nursing center where Spring resided published a letter expressing their opposition to the order in a local newspaper.⁸⁷ Some staff members also cooperated with a nurse and physician who had no involvement with the center or the patient, but who interviewed Spring and then prepared affidavits that were used to support a motion to intervene in the ongoing termination-of-treatment proceedings.⁸⁸

78. *Id.* at 210, 456 N.E.2d at 1188, 469 N.Y.S.2d at 65.

79. *See Saving Baby Jane from Her Saviors*, N.Y. Times, Jan. 24, 1984, at 24A, col. 1.

80. *See Suit by Lawyer over Baby Jane Doe is Thrown Out*, N.Y. Times, Jan. 21, 1984, § 1, at 24, col. 6.

81. *See 60 Minutes*, *supra* note 37, at 4, 6.

82. *See Baby Jane Doe Has Surgery to Remove Water from the Brain*, N.Y. Times, Apr. 7, 1984, § 1, at 28, col. 3.

83. J. LYON, *supra* note 16, at 55.

84. *Id.*

85. *Id.* at 46.

86. *See Spring v. Geriatric Auth.*, 475 N.E.2d 727 (Mass. 1985); *see also In re Spring*, 380 Mass. 629, 405 N.E.2d 115 (1980) (court order allowing withdrawal of senile patient from life-sustaining kidney dialysis).

87. *See Spring v. Geriatric Auth.*, 475 N.E.2d 727, 729 (Mass. 1985) (action by senile patient's widow for, *inter alia*, invasion of patient's right of privacy).

88. *Id.*

Many right-to-life groups feel outraged by cases like those of Baby Jane Doe and Earle Spring, which they perceive as a facet of the right-to-die movement.⁸⁹ For example, the President of the Human Life Alliance of Minnesota has characterized proponents of the living will as "death peddlers [who] have created a climate of confusion, anxiety and disgust."⁹⁰ Another group was dismayed by the rules promulgated by HHS in response to the *Infant Doe* case, interpreting them as a retreat from aggressive advocacy.⁹¹ This group, the Americans United for Life Legal Defense Fund, found that "the prominent role assigned by the final rule, at the option of each hospital, to Infant Care Review Committees is a major defeat."⁹² It argued that physicians "harbor outdated views about the potential of people with disabilities" and, therefore, that the fact that hospital review committees play a primary role in assuring equal treatment for defective newborns "sets the fox to watch the chicken coop."⁹³ Anonymous tips about suspected abuse have become more frequent, encouraged by the *Infant Doe* hot-line.⁹⁴

In 1984, Congress again attempted to deal with withdrawal of treatment from impaired newborns through amendments to the Child Abuse Prevention and Treatment Act.⁹⁵ In order to qualify for assistance under the Act, a state must have procedures "in place for the purpose of responding to the reporting of medical neglect (including instances of withholding of medically indicated treatment from disabled infants with life-

89. See, e.g., Barry, *The Ethics of Providing Life-Sustaining Nutrition and Fluids to Incompetent Patients*, J. FAM. & CULTURE, Summer 1985, at 23; Meilaender, *On Removing Food and Water: Against the Stream*, HASTINGS CENTER REP., Dec. 1984, at 11; Siegler & Weisbard, *Against the Emerging Stream: Should Fluids and Nutritional Support Be Discontinued?*, 145 ARCHIVES INTERNAL MED. 129 (1985); see also Letter from National Doctors for Life submitted to Nat'l Conference of Commissioners on Uniform State Laws (opposing uniform "living wills" statute), July 19, 1985.

90. Senander, *The Right-to-Die Movement Ignores Essential Right to Live*, Minneapolis Star & Tribune, Apr. 21, 1985, at A25, Col. 1.

91. Nondiscrimination on the Basis of Handicap, 49 Fed. Reg. 1622 (1984) (codified at 45 C.F.R. § 84.55 (1985)). For discussion of these regulations, see Smith, *supra* note 6, at 800-04; Smith, *Quality of Life, Sanctity of Creation: Palliative or Apotheosis?*, 63 NEB. L. REV. 709, 717-20 (1984).

92. AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND, *supra* note 10, at 15.

93. *Id.*

94. J. LYON, *supra* note 16, at 41-45. In the regulations to section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (1982)), HHS established a 24-hour toll-free telephone line to report suspected cases of noncompliance with the regulations. A call would activate an HHS investigation. See also 49 Fed. Reg. 1622 (1984) (codified at 45 C.F.R. § 84.55 (1985)).

95. Child Abuse Amendments of 1984, Pub. L. No. 98-457, 98 Stat. 1749 (1984) (codified at 42 U.S.C.A. §§ 5101-5106, 5111-5113, 5115 (West Supp. 1985)).

threatening conditions).⁹⁶ The amendments were the result of political compromise.⁹⁷ But, as argued by Professor Smith elsewhere in this symposium, the amendments do not compel a change in state substantive law under which those cases arose.⁹⁸

James Bopp, Jr., who, as general counsel to the National Right to Life Committee,⁹⁹ had an active role in promulgating the 1984 amendments, has acknowledged some of the shortcomings of the Act.¹⁰⁰ His response to concern about weak enforcement by state agencies is to exhort more private actions like those brought by Washburn:

It is absolutely essential that individual attorneys who represent the interests of people with disabilities, be thoroughly familiar with the enforcement mechanisms established by the Act and regulations and prepared both to monitor their employment with the sensitivity of watchdogs *while bringing independent legal actions whenever possible.*¹⁰¹

As Bopp indicates, such private actions are not authorized by the Act.¹⁰² Thus, if his exhortation is followed, there will be more Baby Jane Doe cases.

Furthermore, because the amendments do not change state law, there will undoubtedly be more instances in which life-sustaining treatment will be denied seriously ill newborns. That would seem to follow from the fact that many seriously ill newborns are allowed to die under the current laws of many states—hence the pressure to federalize such cases in the first place.¹⁰³ How such cases come to the attention of right-to-life groups is not always documented.¹⁰⁴ But at least in some instances of withdrawal of treatment, medical personnel with right-to-life sympathies or affiliation have contacted those groups.¹⁰⁵ Undoubtedly, those informants believed that their duty of confidentiality is outweighed in cases of denial of treatment, which they view as a form of murder.¹⁰⁶

96. 42 U.S.C.A. § 5103(b)(2)(K) (West Supp. 1985).

97. Bopp & Balch, *supra* note 33; Smith, *supra* note 6, at 797.

98. Smith, *supra* note 6, at 814.

99. Bopp & Balch, *supra* note 33, at 91 n.*.

100. *Id.* at 119-22, 130.

101. *Id.* at 120.

102. *Id.* at 130.

103. See Smith, *supra* note 6.

104. See, e.g., J. LYON, *supra* note 16, at 46 (unidentified member of hospital staff contacted Washburn).

105. See, e.g., Spring v. Geriatric Auth., 475 N.E.2d 727, 729 (Mass. 1985) (disgruntled staff members wrote to local newspaper, protesting court order withdrawing treatment from senile patient).

106. See, e.g., AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND, *supra* note 10, at 10 ("The most blatant—and universally condemned infanticide episode occurred in Bloomington, Indiana in April 1982."); 60 Minutes, *supra* note 37, at 2 (Washburn states that he refuses

Recent history is replete with instances in which zealous members of right-to-life groups have violated the law in the name of morality.¹⁰⁷ Such conduct has ranged from indisputably criminal acts, like kidnapping and bombing, to conduct like Washburn's in the Baby Jane Doe case and other milder forms of protest.¹⁰⁸ This conduct probably resulted in part from frustration within the right-to-life movement stemming from the movement's failure to elicit what it would consider effective anti-abortion legislation from Congress.¹⁰⁹ If this causal connection between frustration in the legal arena and stepped-up self-help measures is true,¹¹⁰ it is likely that there will be more cases like Baby Jane Doe's in the future. Faced with that prospect, it is important to determine whether the law recognizes an action for invasion of privacy to provide a remedy against such intermeddling.

Privacy Actions on Behalf of the Impaired Infant

A Brief History

Virtually all discussions of invasion of privacy begin with at least a passing reference to the 1890 *Harvard Law Review* article by Samuel D. Warren and Louis D. Brandeis.¹¹¹ Warren and Brandeis "reviewed a number of cases in which relief had been afforded on the basis of defamation, invasion of some property right, or breach of confidence or an implied contract, and concluded that they were in reality based upon a broader principle which was entitled to separate recognition."¹¹²

The significance of the article by Warren and Brandeis has been debated extensively.¹¹³ As observed by one commentator, "the article's ef-

to remain silent as long as innocent human life is being taken in America.); Senander, *supra* note 90, at col. 1 (characterizing right-to-life advocates as "death peddlers").

107. See C. PAIGE, *supra* note 42, at 75-76 (documenting disruptive conduct and unsuccessful trial defense of right-to-life members assertedly grounded in obedience to higher moral law); *id.* at 218-20 (recounting criminal conduct against abortion clinic operators and abortion clinics).

108. *Id.* at 75 (harassment of women attempting to procure an abortion); see *supra* note 42.

109. *Id.* at 221-40 (analyzing failures of right-to-life groups to get legislation passed by Congress).

110. *Id.*

111. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); see, e.g., Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291, 292 (1983).

112. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 849 (5th ed. 1984) (footnotes omitted).

113. See, e.g., Barron, *Warren and Brandeis, The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); *Demystifying a Landmark Citation*, 13 SUFFOLK U.L. REV. 875 (1979); Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitu-*

fect could be said to exemplify the power, the impotence, or even the perniciousness of legal scholarship."¹¹⁴ During the past ninety-five years a right of action based on privacy has been all but universally recognized.¹¹⁵ But as another commentator has pointed out, the concept of privacy has not developed primarily along the lines envisioned by Warren and Brandeis, who "intended primarily to lay down legal principles to protect an individual's right of privacy against contemporary practitioners of late nineteenth-century yellow journalism."¹¹⁶ Development of that aspect of privacy has been retarded because of conflict with the first amendment's protection of a free press.¹¹⁷

Dean Prosser probably has had a more enduring effect on the privacy tort than did Warren and Brandeis.¹¹⁸ In a 1960 law review article, Prosser reviewed "something over three hundred [privacy] cases in the books" to identify systematically "what interests [we are] protecting, and against what conduct."¹¹⁹ He concluded that the case law revealed "four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . 'to be let alone.'"¹²⁰

Prosser's treatment of privacy has had a significant impact on the development of the right of action. Since 1960, most privacy decisions have discussed and usually adopted his approach.¹²¹ Prosser's view has been adopted by the second *Restatement of Torts*.¹²² Section 652A of the

tional as Well?, 46 TEX. L. REV. 611 (1968); Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980); Zimmerman, *supra* note 111.

114. Zimmerman, *supra* note 111, at 292.

115. See W. PROSSER & W. KEETON, *supra* note 112, at 855; Zimmerman, *supra* note 111, at 365-67 (appendix listing status of the right of action in all jurisdictions). Not all jurisdictions adopt the privacy right of action in RESTATEMENT form.

116. Barron, *supra* note 113, at 877.

117. *Id.* at 880; see Zimmerman, *supra* note 111, at 306-20.

118. Dean Prosser called the Warren and Brandeis article "the outstanding example of the influence of legal periodicals upon the American law." Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383 (1960). Other writers have identified Prosser's article as a watershed in the development of the privacy tort. See, e.g., Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331-33 (1966).

119. Prosser, *supra* note 118, at 388.

120. *Id.* at 389 (quoting T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)).

121. See, e.g., Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289 (Iowa 1979) (en banc); Klipa v. Board of Educ., 54 Md. App. 644, 460 A.2d 601 (1983); Bisbee v. John C. Conover Agency, Inc., 186 N.J. Super. 335, 452 A.2d 689 (1982); Nagy v. Bell Tel. Co., 292 Pa. Super. 24, 436 A.2d 701 (1981); Wolfe v. Arroyo, 543 S.W.2d 11 (Tex. Ct. App. 1976); Jeffers v. City of Seattle, 23 Wash. App. 301, 597 P.2d 899 (1979).

122. Barron, *supra* note 113, at 878-79.

Restatement provides:

- (2) The right of privacy is invaded by
 - (a) unreasonable intrusion upon the seclusion of another . . . or
 - (b) appropriation of the other's name or likeness . . . or
 - (c) unreasonable publicity given to the other's private life . . . or
 - (d) publicity that unreasonably places the other in a false light before the public¹²³

The *Restatement* also followed Prosser's description of the parameters of those actions.¹²⁴

Rigid adherence to Prosser's analysis, however, is inappropriate. It is hornbook law that "[t]he law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy."¹²⁵ Among the numerous articles written on the subject, there is extensive debate about the nature of the privacy right,¹²⁶ but general agreement that it is an evolving concept.¹²⁷ Indeed, Warren and Brandeis urged the evolution of the law of privacy in their seminal article.¹²⁸ Further, in his 1960 article Prosser recorded the development of the right of action, but did not endorse those parameters as binding or find them universally accepted.¹²⁹ Finally, even the *Restatement*, which was so influenced by Prosser's views, suggests that the outlines of the right of action are not fixed.¹³⁰

123. RESTATEMENT (SECOND) OF TORTS § 652A(2) (1977).

124. Compare *id.* § 652B (intrusion on seclusion or solitude) with Prosser, *supra* note 118, at 389-92 (intrusion on seclusion or solitude); compare RESTATEMENT (SECOND) OF TORTS § 652C (1977) (appropriation of name or likeness) with Prosser, *supra* note 118, at 401-07 (appropriation of name or likeness).

125. W. PROSSER & W. KEETON, *supra* note 112, at 4.

126. Compare Davis, *What Do We Mean by "Right to Privacy"?*, 4 S.D.L. REV. 1 (1959) (privacy interest derives from other more meaningful and explicit causes of action) with Kalven, *supra* note 118, at 333-35 (failure to identify social values underlying privacy cases disables courts from formulating appropriate remedies and defenses); compare Posner, *Privacy, Secrecy, and Reputation*, 28 BUFFALO L. REV. 1 (1979) (privacy entitled to recognition only when information it protects has economic value to society) with Gavison, *supra* note 113, at 422-24 (defending privacy as useful, distinct, and coherent concept) and Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977) (when properly defined and limited, privacy is legally viable and necessary).

127. Critics often argue that courts should abandon the existing privacy analysis. See, e.g., Kalven, *supra* note 118, at 326-28. Advocates are quick to concede that "[p]rivacy is a legal wall badly in need of mending." Gerety, *supra* note 126, at 233.

128. Warren & Brandeis, *supra* note 111, at 195-97.

129. Prosser, *supra* note 118, at 389, 422-23.

130. See, e.g., RESTATEMENT (SECOND) OF TORTS § 652A comment c (1977), which states:

Other forms may still appear, particularly since some courts, and in particular the

Subsequent sections of this Article discuss the extent to which Baby Jane Doe, her family, and others like them might state a right of action against potential defendants within the *Restatement* framework.¹³¹ Also urged is the minor extension of the right of action to afford the parents a remedy for the substantial intrusion on their interest in family autonomy.

Baby Jane Doe and the *Restatement*

Stating a cause of action on behalf of either the infant or her parents runs into several common problems. For example, in either case, the prospective plaintiff may have difficulty establishing an intrusion into her solitude or seclusion for purposes of section 652B¹³² or proving the publicity required under section 652D.¹³³ This Article argues below that the right of action is sufficiently elastic to encompass the parents' right to family autonomy.¹³⁴ This section of the Article, however, reviews problems unique to a cause of action on behalf of the infant. It concludes that the right of privacy would have to evolve too far, too quickly to provide a basis for a right of action on her behalf.

Section 652B of the second *Restatement* may be violated by the intentional intrusion "upon the solitude or seclusion of another or his private affairs or concerns."¹³⁵ Unlike other subspecies of the action, section 652B does not require publication of information about the plaintiff.¹³⁶ But the interference must be substantial¹³⁷ and "of a kind that would be highly offensive to the ordinary reasonable man."¹³⁸

Obvious examples of an actionable privacy tort include actual physical intrusions.¹³⁹ But the right of action is not so limited. For example,

Supreme Court of the United States, have spoken in very broad general terms of a somewhat undefined "right of privacy" as a ground for various constitutional decisions involving indeterminate civil and personal rights. . . . Nothing in this Chapter is intended to exclude the possibility of future developments in the tort law of privacy.

131. This Article does not consider the second *Restatement of Torts* § 652C (appropriation) and § 652E (false light). RESTATEMENT (SECOND) OF TORTS §§ 652C, 652E (1977). Those sections are almost certainly inapplicable.

132. See *infra* notes 135-48, 235-60 & accompanying text.

133. See *infra* notes 187-91, 299-345 & accompanying text.

134. See *infra* notes 193-348 & accompanying text.

135. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

136. See *id.* § 652E comment a ("The form of invasion of privacy covered by [§ 652B] does not depend upon any publicity given to the person whose interest is invaded or to his affairs.").

137. *Id.* § 652B comment d.

138. *Id.*; see also W. PROSSER & W. KEETON, *supra* note 112, at 855.

139. See, e.g., *Young v. Western & A.R. Co.*, 39 Ga. App. 761, 148 S.E. 414 (1929) (warrantless search).

defendants have been found liable for electronic eavesdropping¹⁴⁰ and wiretapping,¹⁴¹ for securing information about another's finances,¹⁴² and for making harassing telephone calls.¹⁴³ Importantly, cases have recognized the right of action when a plaintiff's illness instigates the tortious conduct.¹⁴⁴ For example, the *Restatement* cites the example of a woman, "sick in a hospital with a rare disease that arouses curiosity," whose privacy is invaded when a news reporter takes her photograph over her objection.¹⁴⁵

It may be difficult to prove an invasion in a case like Baby Jane Doe's: the health care professional who reveals the confidential information may have been given permission to collect the information and the party receiving the information may be unsuccessful in his suit to compel unwanted treatment.¹⁴⁶ Even on the assumption that this obstacle can be overcome, a seriously ill newborn is unaware of the intrusion. Although not expressly made an essential element, awareness of the defendant's intrusion, even if not contemporaneous,¹⁴⁷ would seem to be implicit in the decided cases.¹⁴⁸

The most serious question is whether damages for an increased life span are compensable. Courts have recognized the right of seriously ill

140. See, e.g., *Roach v. Harper*, 143 W. Va. 869, 877, 105 S.E.2d 564, 568 (1958); see also *RESTATEMENT (SECOND) OF TORTS* § 652B comment b, illustration 3 (1977).

141. See, e.g., *Hamberger v. Eastman*, 106 N.H. 107, 112, 206 A.2d 239, 242 (1964).

142. See, e.g., *Zimmermann v. Wilson*, 81 F.2d 847 (3d Cir. 1936).

143. *RESTATEMENT (SECOND) OF TORTS* § 652B comment b, illustration 5 (1977); see also *Harms v. Miami Daily News*, 127 So. 2d 715, 717 (Fla. 1961).

144. See *Estate of Berthiaume v. Pratt*, 365 A.2d 792 (Me. 1976) (physician photographed patient against his wishes); see also *Spring v. Geriatric Auth.*, 475 N.E.2d 727, 734-35 n.9 (Mass. 1985) (whether there was an invasion of privacy by an unauthorized intrusion into a senile patient's room was a matter properly decided by the jury) (dicta); *RESTATEMENT (SECOND) OF TORTS* § 652B comment b, illustration 1 (1977).

145. *RESTATEMENT (SECOND) OF TORTS* § 652B comment b, illustration 1 (1977).

146. See *infra* notes 239-60 & accompanying text. Arguably, Washburn attempted to intrude by compelling inappropriate treatment. No treatment was ordered. Thus, Washburn might attempt to argue that, at most, his attempt to invade Baby Doe's privacy was unsuccessful and therefore not actionable. See, e.g., *Gretencord v. Ford Motor Co.*, 538 F. Supp. 331, 333 (D. Kan. 1982) (no invasion of privacy when employee refuses to submit to search ordered by employer and no search takes place).

147. Cf. *Zimmermann v. Wilson*, 81 F.2d 847 (3d Cir. 1936) (improper inquiry into private affairs was actionable without contemporaneous knowledge of invasion).

148. See *Froelich v. Werbin*, 219 Kan. 461, 464-65, 548 P.2d 482, 485 (1976) (no invasion of privacy when no physical intrusion into secluded place and plaintiff had no contemporaneous knowledge of taking of personal property) (alternative holding); cf. *RESTATEMENT (SECOND) OF TORTS* § 42 (1977) (awareness of confinement essential to cause of action for false imprisonment). Arguably, false imprisonment and invasion of privacy are similar torts in that plaintiff's awareness is essential to the injury.

minors to be withdrawn from life support systems.¹⁴⁹ For example, in a case concerning treatment of a mentally retarded adult suffering from leukemia, the Massachusetts Supreme Judicial Court found a constitutional right to privacy that encompasses a right to die.¹⁵⁰ It then extended that right to incompetent patients by allowing a surrogate to decide whether treatment is appropriate.¹⁵¹ Because it is similarly impossible to determine an infant's views of artificial life-support systems, the Massachusetts court has equated the substituted judgment test, under which a surrogate attempts to reach the decision that the incapacitated person would make if able to choose,¹⁵² with the best interest test in such cases.¹⁵³ The court has held that it may be in the best interest of a seriously impaired infant to be withdrawn from a life-support system and to be allowed to die.¹⁵⁴

Massachusetts is not alone in recognizing that an incompetent patient has a right to die under compelling circumstances.¹⁵⁵ For example, when continued existence is sufficiently burdensome, an unconscious incompetent patient may be withdrawn from a respirator,¹⁵⁶ and a senile patient may be denied nutrition provided by means of an artificial feeding device.¹⁵⁷ But the parties in those cases sought only injunctive or declaratory relief; the cases are silent on whether violation of a patient's right

149. See, e.g., *In re Guardianship of Barry*, 445 So. 2d 365, 371 (Fla. Dist. Ct. App. 1984); *In re P.V.W.*, 424 So. 2d 1015, 1020 (La. 1982); *Custody of a Minor*, 385 Mass. 697, 708-13, 434 N.E.2d 601, 607-10 (1982).

150. *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 739, 370 N.E.2d 417, 426 (1977).

151. *Id.* at 739-40, 370 N.E.2d at 433.

152. PRESIDENT'S COMMISSION, *supra* note 1, at 132.

153. *Custody of a Minor*, 385 Mass. 697, 716, 434 N.E.2d 601, 609 (1982). The President's Commission defines the best interests test as follows:

[T]he best interests standard does not rest on the value of self-determination but solely on the protection of the patients' welfare.

In assessing whether a procedure or course of medical treatment would be in the patient's best interests, the surrogate must take into account such factors as the relief of suffering, the preservation or restoration of functioning, and the quality as well as the extent of life sustained. An accurate assessment will encompass consideration of the satisfaction of present desires, the opportunities for future satisfactions, and the possibility of developing or regaining the capacity for self-determination.

PRESIDENT'S COMMISSION, *supra* note 1, at 134-36 (footnotes omitted).

154. *Custody of a Minor*, 385 Mass. 697, 716, 434 N.E.2d 601, 609 (1982).

155. See, e.g., *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985) (84-year-old bedridden woman with serious and irreversible physical and mental impairments and limited life expectancy); *In re Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983) (69-year-old comatose patient, suffering irreversible brain damage and having no chance of resuming meaningful existence).

156. See, e.g., *In re Guardianship of Barry*, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984).

157. See, e.g., *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985).

to die would support an action for damages.¹⁵⁸ Courts are unlikely to allow such an action. The damages sought are virtually identical to those almost universally rejected in suits characterized as "wrongful life" cases.¹⁵⁹

Recent medical developments have made possible prenatal or early pregnancy screening for genetic defects.¹⁶⁰ In the past twenty years, there have been a number of cases brought by parents of a seriously defective newborn against their physicians for failing to give them proper genetic counseling.¹⁶¹

Gleitman v. Cosgrove,¹⁶² the first such case, was decided in 1967. In *Gleitman*, an infant and his parents sued two physicians, specialists in obstetrics and gynecology. The basis of their complaint was that the infant's mother contracted German measles during her pregnancy and that, despite repeated inquiries, the defendants told her that the illness would have no effect on her child. In fact, the child was born with serious birth defects.¹⁶³ The plaintiff-mother alleged that, had she been properly informed, she might have aborted the fetus.¹⁶⁴ The plaintiffs contended that "but for the negligence of defendants, [the infant] would not have been born to suffer with an impaired body."¹⁶⁵

The court rejected both the parents' and infant's claims. In rejecting the infant's claim, the court found damages to be incalculable:

158. See, e.g., *In re Guardianship of Barry*, 445 So. 2d 365, 367 (Fla. Dist. Ct. App. 1984) (petition for court order authorizing withdrawal of life support); *Custody of a Minor*, 385 Mass. 697, 699, 434 N.E.2d 601, 602 (1982) (same); *In re Hier*, 18 Mass. App. Ct. 200, 464 N.E.2d 959 (1984) (order sought to appoint guardian to consent to administration of anti-psychotic drugs to incompetent patient).

159. The Prosser & Keeton hornbook notes:

The last couple of decades have witnessed the rapid development of tort claims concerning a variety of issues that arise when the tortfeasor's act or omission results in the birth of an unwanted child. . . . These actions are now generally referred to as "wrongful birth" claims, when brought by the parents for their own damages, and "wrongful life" claims, when brought by or on behalf of the child for the harm of being born deformed.

W. PROSSER & W. KEETON, *supra* note 112, at 370.

160. See Fraser, *Introduction: The Development of Genetic Counseling*, in *GENETIC COUNSELING: FACTS, VALUES, AND NORMS* (A. Capron ed. 1979).

161. See, e.g., *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (suit based on physician's failure to advise 37-year-old mother who had already given birth to one deformed child of amniocentesis); *Karlsons v. Guerinot*, 57 A.D.2d 73, 394 N.Y.S.2d 933, 938 (1977) (same); see also *Johnson v. Yeshiva Univ.*, 42 N.Y.2d 818, 820, 364 N.E.2d 1340, 1341, 396 N.Y.S.2d 647, 648 (1977) (suit based on physician's failure to advise parents of amniocentesis, a procedure which could have revealed the child's deformity).

162. 49 N.J. 22, 227 A.2d 689 (1967).

163. *Id.* at 25, 227 A.2d at 690.

164. *Id.* at 26, 227 A.2d at 691.

165. *Id.* at 28, 227 A.2d at 691.

The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself.¹⁶⁶

In rejecting the parents' claim, the calculation of damages was not the problem. Instead, the court found that the infant's intangible right to life outweighed any loss to the parents.¹⁶⁷

As a result of the United States Supreme Court's later decision in *Roe v. Wade*,¹⁶⁸ however, courts have begun to recognize a right of action on behalf of the parents in similar cases.¹⁶⁹ Once *Roe v. Wade* undercut the public policy argument against abortion,¹⁷⁰ denial of recovery amounted to unjust immunity from liability for the tortfeasng practitioner.¹⁷¹ Some courts have allowed recovery only for the parents' pecuniary losses attendant to the birth of an unwanted child.¹⁷² Other courts have gone beyond that limited recovery, rejecting the idea that the birth of an infant is necessarily a benefit, and have allowed damages for emotional distress caused by the birth of the infant.¹⁷³ Indeed, the New Jersey Supreme Court reversed a portion of its *Gleitman* holding in *Berman v. Allan*,¹⁷⁴ allowing the parents to recover for emotional distress. Two years later, it extended recovery to include pecuniary damages.¹⁷⁵

Despite, or perhaps because of,¹⁷⁶ recognition of an action on behalf

166. *Id.*

167. *Id.* at 31, 227 A.2d at 693.

168. 410 U.S. 113 (1973).

169. See, e.g., *Robak v. United States*, 658 F.2d 471, 474 (7th Cir. 1981); *Becker v. Schwartz*, 46 N.Y.2d 401, 412-15, 386 N.E.2d 807, 813-15, 413 N.Y.S.2d 895, 901-03 (1978); *Speck v. Finegold*, 497 Pa. 77, 83-86, 439 A.2d 110, 113-15 (1981); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 465-72, 656 A.2d 483, 488 (1983). The New Jersey Supreme Court overruled the *Gleitman* denial of a wrongful birth action. *Berman v. Allan*, 80 N.J. 421, 431-32, 404 A.2d 8, 14 (1979).

170. See *Gleitman*, 49 N.J. at 30, 227 A.2d at 693 ("substantial policy reasons prevent this Court from allowing tort damages for the denial of the opportunity to [procure an abortion].").

171. *Berman v. Allan*, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979); see also Comment, *Wrongful Life: The Right Not to be Born*, 54 TUL. L. REV. 480, 488-92 (1980) (discussing tort duties of physician in such cases).

172. See, e.g., *Robak v. United States*, 658 F.2d 471, 478-79 (7th Cir. 1981); *Becker v. Schwartz*, 46 N.Y.2d 401, 412-13, 386 N.E.2d 807, 813, 413 N.Y.S.2d 895, 901 (1978).

173. See, e.g., *Speck v. Finegold*, 497 Pa. 77, 88-89, 439 A.2d 110, 116-17 (1981); *Naccash v. Burger*, 223 Va. 406, 415-16, 290 S.E.2d 825, 830-31 (1982); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 477, 656 P.2d 483, 494 (1983). As observed by the New Jersey Supreme Court, "There is no joy in watching a child suffer and die from cystic fibrosis." *Schroeder v. Perkel*, 87 N.J. 53, 69, 432 A.2d 834, 842 (1981).

174. 80 N.J. 421, 431-32, 404 A.2d 8, 14 (1979).

175. *Schroeder v. Perkel*, 87 N.J. 53, 67-69, 432 A.2d 834, 841-42 (1981).

176. Recognition of a parent's cause of action has the salutary effect of deterring careless

of an infant's parents, there has been no similar trend towards allowing the infant a cause of action for wrongful life, no matter how impaired that life is. In the most recent addition of Prosser's hornbook, the editors summarized the law through 1983:

With the exception of three lower court decisions subsequently nullified by the high courts of New York and California, and a close call in Pennsylvania, all jurisdictions that have ruled on the issue now follow *Gleitman* in denying the child a wrongful life cause of action for general damages for the suffering of being born in an impaired condition.¹⁷⁷

Courts, however, have begun to recognize a limited right of action for wrongful life.¹⁷⁸ *Procanik v. Cillo*,¹⁷⁹ like *Gleitman*, was decided by the New Jersey Supreme Court and involved an infant born with congenital rubella syndrome. The infant sued in his own right because "he has suffered because of his parents' impaired capacity to cope with his problems," and seeks damages for his pain and suffering and for his 'impaired childhood.'¹⁸⁰

The court recognized that "a child or his parents may recover special damages for extraordinary medical expenses incurred during infancy, and that the infant may recover those expenses during his majority."¹⁸¹ But the court adhered to its view "that the infant's claim for pain and suffering and for a diminished childhood presents insurmountable problems."¹⁸² It again refused to weigh the value of a defective existence against the value of nonexistence because of the speculative nature of the damages.¹⁸³

Cases like Baby Jane Doe's present an analogous problem. Even if a court were to find that the staff member's presence or Washburn's inter-

conduct by physicians. At the same time, it allows courts to avoid the hard damage questions that the court found troubling in *Gleitman*. See *supra* notes 166-67 & accompanying text.

177. W. PROSSER & W. KEETON, *supra* note 112, at 371. All but two of the cited cases denied a right of action on behalf of the child in its entirety. Two cited cases denied general damages but recognized an action limited to the extraordinary costs caused by the child's defective condition. *Turpin v. Sortini*, 31 Cal. 3d 220, 229, 237, 643 P.2d 954, 959, 964, 182 Cal. Rptr. 337, 342, 347 (1982); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 479-80, 656 P.2d 483, 495 (1983).

178. *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Azzolino v. Dingfelder*, 71 N.C. App. 289, 322 S.E.2d 567 (1984), *petition for appeal granted*, 313 N.C. 327, 327 S.E.2d 887 (1985); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 479-80, 656 P.2d 483, 495 (1983).

179. 97 N.J. 339, 478 A.2d 755 (1984).

180. *Id.* at 344, 478 A.2d at 758.

181. *Id.* at 352, 478 A.2d at 762.

182. *Id.* at 353, 478 A.2d at 763.

183. *Id.* at 354, 478 A.2d at 763.

vention amounted to an intrusion,¹⁸⁴ it is difficult to find a compensable injury. The intended effect of those who might intervene on the infant's behalf is to prolong the infant's life.¹⁸⁵ Although the infant might argue that prolonging her life might be more burdensome to her than allowing her to die,¹⁸⁶ the damages caused by increasing her life span are analogous to those universally rejected in the wrongful life cases in the sense that both plaintiffs are alleging that they would be better off if they did not exist.

A claim under *Restatement* section 652D would seem to do no better. According to the *Restatement*, a person violates the privacy of another if she "gives publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that . . . would be highly offensive to a reasonable person, and . . . is not of legitimate concern to the public."¹⁸⁷

As with section 652B, the infant's action under section 652D would fail for lack of cognizable injury.¹⁸⁸ Prosser identified the interest protected by this subspecies of the tort as follows:

The interest protected is that of reputation, with the same overtones of mental distress that are present in libel and slander. It is in reality an extension of defamation, into the field of publications that do not fall within the narrow limits of the old torts, with the elimination of the defense of truth.¹⁸⁹

As Prosser and Keeton have noted, "When one's reputation is impaired, this affects one's relations with others, including business, social, religious, and family."¹⁹⁰ Testimony in the Baby Jane Doe case indicated that she would never achieve meaningful interaction with her environment.¹⁹¹ Thus, defamation damages seem singularly inappropriate in a case in which the plaintiff will never be aware of harm to her reputation because she is not even aware of having a reputation.

Despite public belief that Baby Jane Doe's interests were harmed by officious intermeddling by strangers, it is unlikely that a cause of action for invasion of privacy on her behalf could be brought. Denial of such

184. *But see supra* notes 140-46 & accompanying text.

185. *See Record* at 48.

186. *Id.*

187. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

188. The publicity requirement and the public concern element pose some difficulty for the infant, as they would for the parents. But a court otherwise moved to afford a remedy for violation of an identifiable legal interest may overcome those barriers with some support in the case law. *See infra* notes 299-337 & accompanying text.

189. Prosser, *supra* note 118, at 398.

190. W. PROSSER & W. KEETON, *supra* note 112, at 843.

191. *Record* at 46-47.

an action, however, does not justify intervention by outsiders. It merely disregards the infant as the injured party. Rather, the infant's parents are the appropriate plaintiffs in suits against intermeddlers.

Invasion of the Parents' Privacy

There are several reasons why the parents should be able to state a cause of action against both medical personnel who publicize confidential information and the stranger who attempts to override the parents' decision by unauthorized¹⁹² conduct.¹⁹³ First, parents have a constitutionally-based interest in family autonomy.¹⁹⁴ Absent governmental action, of course, that is not sufficient to state a cause of action,¹⁹⁵ but it does illustrate the fundamental importance of the parents' asserted interest. Second, although no appellate court has applied or rejected an action against an intermeddler like Washburn based on sections 652B and 652D, a review of the relevant case law suggests that the parameters of the tort are unsettled.¹⁹⁶ Rigid adherence to some of the elements of the tort does present obstacles for the parents as plaintiffs. In light of the fundamental interest asserted and the relative infancy of the action, however, courts should extend the right of action to encompass such suits. Third, because there is no adequate justification for the conduct of intermeddlers, extension of this privacy tort is especially warranted to avoid allowing an injury to the plaintiff to go unremedied.

As indicated above, parental autonomy rights are not, and should not be, absolute.¹⁹⁷ The law must test whether those rights conflict with

192. Unauthorized conduct refers to unprivileged conduct. In contrast, reporting the parents' decision to withhold treatment to a state agency is authorized by state law and is justified as a balance between the potentially competing interests of the parents and the child.

193. A similar analysis may apply in other instances in which right-to-life members attempt to harass a pregnant woman into changing her decision to have an abortion, a practice of some right-to-life advocates. See C. PAIGE, *supra* note 42, at 75. The injury would be to the woman's exercise of her right to make a choice free from intrusion by strangers. Other actions, such as intentional infliction of emotional distress, also may be applicable. See RESTATEMENT (SECOND) OF TORTS § 46 (1965).

194. See *infra* notes 217-26 & accompanying text.

195. See, e.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (federal cause of action implied when federal agents violated plaintiff's fourth amendment rights); 42 U.S.C. § 1983 (1982) (right of action against defendant acting under color of state law for violation of person's constitutional rights).

196. See, e.g., Zimmerman, *supra* note 112, at 293 (arguing that confusion exists as to contours of tort); see also RESTATEMENT (SECOND) OF TORTS § 652A comment c (1977) (other forms of invasion of privacy may still appear). Not only may forms of invasion increase, but within recognized forms of the action specific elements are subject to debate or expansion. See, e.g., *id.*, § 652D comment a (uncertain whether courts will make actionable disclosure not equivalent to giving of publicity to a private matter).

197. See *supra* notes 33-35 & accompanying text.

the interests of the infant or the state¹⁹⁸ through the established procedures for reporting suspected instances of abuse.¹⁹⁹ Consequently, after the appropriate state agency finds the complaint groundless, unauthorized suits by strangers, no matter how nobly motivated, should be tortious because the suitor cannot claim that the child's or state's interest justifies further interference with the parents' right to autonomy. While our litigious society is hesitant to punish a suitor,²⁰⁰ there is no absolute privilege to bring a lawsuit. Thus, courts have recognized rights of action²⁰¹ or sanctions²⁰² when filing the lawsuit caused the plaintiff's injury.

Constitutional Privacy

Despite almost universal recognition of a right of privacy,²⁰³ the parameters of the tort and its relationship to constitutionally protected privacy continue to generate extensive scholarly debate.²⁰⁴ The United States Supreme Court,²⁰⁵ Congress,²⁰⁶ and state courts²⁰⁷ have all recognized privacy as a distinct interest worthy of legal protection. At the same time, as observed by Professor Gavison, much of the scholarly liter-

198. See Smith, *supra* note 6, at 776-79.

199. See, e.g., CONN. GEN. STAT. ANN. §§ 17-38a to -38c (West Supp. 1985) (duty to report; immunity); IND. CODE ANN. § 31-6-11-3 (Burns 1980) (duty to report); *id.* § 31-6-11-7 (Burns Supp. 1985) (qualified immunity); N.Y. DOM. REL. LAW § 419 (McKinney Supp. 1986); TENN. CODE ANN. § 37-1-403 (Supp. 1985) (duty to report); *id.* § 37-1-409 (confidentiality).

200. See, e.g., Limerick v. Greenwald, 749 F.2d 97, 101 (1st Cir. 1984) (The court observed that "[d]espite exploding caseloads we have been very reluctant to enter sanctions for frivolous or vexatious appeals because we do not wish to chill the right to appeal.").

201. See, e.g., Lamos v. Bazer, Inc., 270 Or. 256, 527 P.2d 376 (1974) (malicious prosecution); Garland v. Wilson, 289 Pa. 272, 137 A. 266 (1927) (abuse of process).

202. See, e.g., Tatum v. Regents of the Univ. of Neb., 462 U.S. 1117 (1983) (damages awarded for frivolous appeal pursuant to SUP. CT. R. 49.2); Hagerty v. Succession of Clement, 749 F.2d 217 (5th Cir. 1984), *cert. denied*, 106 S. Ct. 333 (1985) (court imposed sanctions for bringing frivolous appeal pursuant to 28 U.S.C. § 1927 (1982)). Section 1927 provides "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs."

203. W. PROSSER & W. KEETON, *supra* note 112, at 851; see also Zimmerman, *supra* note 111, at 365-67 app. (status of cause of action for all American jurisdictions).

204. See *supra* notes 126-30 & accompanying text.

205. See, e.g., Roe v. Wade, 410 U.S. 113, 152-56 (1973) (upholding woman's right to privacy to procure an abortion); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) (upholding married couple's right to privacy to obtain contraceptive).

206. See, e.g., Privacy Act of 1974, 5 U.S.C. § 552a (1982).

207. See, e.g., Horne v. Patton, 291 Ala. 701, 287 So. 2d 824 (1973); Estate of Berthiaume v. Pratt, 365 A.2d 792 (Me. 1976); Alberts v. Devine, 479 N.E.2d 113, 119-21 (Mass.), *cert. denied*, 106 S. Ct. 546 (1985) (remedy provided for doctor's breach of patient's confidences and for inducement of breach by third party). See generally RESTATEMENT (SECOND) OF TORTS §§ 652A-652D (1977) (principles of invasion of privacy).

ature on privacy suggests that when we examine cases finding a right to privacy, "we always find that some other interest has been involved."²⁰⁸ Those commentators argue that when no other separate interest is involved, "privacy itself is never protected."²⁰⁹

Professor Gavison has argued in favor of a distinct and coherent theory of privacy and is critical of those commentators who reduce privacy to other legally recognized interests.²¹⁰ She has argued that Prosser's analysis of privacy was "reductionist"²¹¹ and that "[s]ome cases, frequently discussed in privacy terms, cannot be included under [the four *Restatement*] categories without straining them and weakening their power of description and guidance."²¹² According to Gavison, one failure of Prosser's analysis is that it is uncertain whether it "accommodate[s] the constitutional right to privacy decisions because [it] does not have a category for noninterference."²¹³

Absent governmental action, a constitutional right to privacy is not implicated in a case like *Baby Jane Doe's*.²¹⁴ Thus the federal civil action for deprivation of rights, section 1983,²¹⁵ and cases creating constitu-

208. Gavison, *supra* note 113, at 422. See, e.g., Davis, *supra* note 126, at 7-8 (defamation and invasion of privacy protect hurt feelings); *id.* at 9-10 (privacy action protects only interests now protected by recently expanded property interests like property rights in collection of news); *id.* at 12 (intrusion upon one's seclusion is a form of trespass).

209. *Id.* According to Professor Gavison, "[t]he concept of privacy as a concern for limited accessibility enables us to identify when losses of privacy occur." *Id.* at 423. She asserts that "the reasons for which we claim privacy in different situations are similar [, that is,] the promotion of liberty, autonomy, selfhood, and human relations, and furthering the existence of a free society." *Id.* Because of the similarity of those reasons, Gavison contends that "the legal system should make an explicit commitment to privacy as a value that should be considered in reaching legal results." *Id.* at 424.

210. *Id.* at 422.

211. *Id.* at 460 n.118.

212. *Id.*

213. *Id.*

214. The constitutional privacy issue might arise if a state or federal authority attempted to compel treatment in violation of a patient's constitutionally protected right to privacy. For a fuller argument on this point, see Vitiello, *supra* note 9, at 154-59 (arguing that infants have a constitutional right to be treated consistent with their best interests, which may dictate withdrawal of treatment).

Particularly in light of the thesis of this Article, it is interesting to note that Brandeis was instrumental in bringing a right to privacy into constitutional adjudication, just as he was in urging it as a right of action under state tort law. For example, in his dissent in *Olmstead v. United States*, 277 U.S. 438 (1928) (wiretapping), Justice Brandeis advocated a broad reading of the fourth amendment to protect privacy. *Id.* at 476-78 (Brandeis, J., dissenting). There was, he argued, a "right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Id.* at 478.

215. 42 U.S.C. § 1983 (1982) (creating right of action against defendant acting under color of state law for deprivation of a person's rights secured by federal law).

tional torts²¹⁶ are inapplicable. The case law governing family autonomy demonstrates, however, that there is a recognized interest of the parents in making decisions on behalf of their infants.

Although the Supreme Court's privacy analysis in its various contexts is not entirely consistent,²¹⁷ it has regularly protected matters relating to family autonomy. For example, in *Meyer v. Nebraska*²¹⁸ the Court, based on the parents' liberty to make educational decisions,²¹⁹ rejected a state's efforts to make illegal the teaching of a language other than English. Early cases like *Meyer* and *Pierce v. Society of Sisters*,²²⁰ which relied on *Meyer* in upholding parental liberty rights to direct the upbringing of their children, reflect the then-fashionable substantive due process analysis²²¹ rather than a right to privacy analysis. Nonetheless, they do show judicial deference to parental rights regarding family matters.²²²

More recent cases involving marriage,²²³ contraception,²²⁴ and abortion²²⁵ support the idea that family autonomy is at the core of the right to privacy cases. The Court has held that the right to privacy embraces "personal decisions relating to marriage . . . procreation . . . contraception . . . family relationships . . . and child rearing and education."²²⁶

Parental autonomy is not absolute. The Supreme Court refused long ago to allow parents "to make martyrs of their children,"²²⁷ and

216. See, e.g., *Davis v. Passman*, 442 U.S. 228 (1979) (damage remedy implied under due process clause of the fifth amendment); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (damage remedy implied under fourth amendment).

217. Compare *Griswold v. Connecticut*, 381 U.S. 479 (1965) (limiting states' right to regulate married couples' sexual conduct) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (limiting states' right to regulate unmarried individuals' heterosexual conduct) with *Bowers v. Hardwick*, 54 U.S.L.W. 4919 (U.S. June 30, 1986) (No. 85-140) (upholding states' right to criminalize homosexual conduct).

218. 262 U.S. 390 (1923).

219. *Id.* at 400.

220. 268 U.S. 510 (1925).

221. See J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK OF CONSTITUTIONAL LAW* 735 (2d ed. 1983); see also PRESIDENT'S COMMISSION, *supra* note 1, at 131.

222. More recently, the Supreme Court characterized *Meyer* and *Pierce* as privacy cases in *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977).

223. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry without court order); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (indigent's right to obtain divorce); *Loving v. Virginia*, 388 U.S. 1 (1967) (limitations on interracial marriage).

224. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

225. See, e.g., *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding Utah statute requiring notice to parents of minor child's decision to have an abortion). But see *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (spouse cannot veto wife's decision to abort her fetus).

226. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (quoting *Roe v. Wade*, 410 U.S. 113, 152-53 (1973)).

227. See *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("Parents may be free to be-

thus has held that parental autonomy does not allow a guardian to encourage a child to work in violation of child labor laws.²²⁸ Similarly, the Supreme Court limited parental autonomy rights when it held that parents cannot refuse consent to compulsory vaccinations, even when their objections are religiously based.²²⁹ Consistent with such authority curtailing parental autonomy, courts have intervened in cases in which parents have denied their children life-saving medical treatment.²³⁰ It is clear that the state as *parens patriae*²³¹ can compel *appropriate* medical treatment.

Some commentators who advocate aggressive treatment for seriously ill minors give short shrift to a right of parental decision-making in such cases.²³² Parental rights, however, have a proper place in the analysis of the treatment cases: parents should be the appropriate decision-makers, absent a compelling state interest in preventing child abuse or neglect.²³³ When the state compels treatment, it does so under its historic *parens patriae* function. In contrast, an intermeddler who seeks to overturn a parental nontreatment decision is a self-appointed champion

come martyrs themselves. But it does not follow that they are free . . . to make martyrs of their children . . .").

228. *Id.* at 170-71.

229. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

230. *See, e.g., Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968); *Mannis v. State*, 240 Ark. 42, 398 S.W.2d 206, *cert. denied*, 384 U.S. 972 (1966); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 874 (1952); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962); *see also Annot.*, 30 A.L.R.2d 1138 (1953).

231. "*Parens patriae* jurisdiction is a right of sovereignty and imposes a duty on the sovereignty to protect the public interest and . . . such persons with disabilities who have no rightful protector. . . . [It] extends to the personal liberty of persons who are under a disability whether by reason of infancy, incompetency, habitual drunkenness, imbecility, etc."

Johnson v. State, 18 N.J. 422, 430, 114 A.2d 1, 5 (1955).

232. *See, e.g., Bopp, Protection of Disabled Newborns: Are There Constitutional Limitations?*, 1 ISSUES IN L. & MED. 173, 177-93 (1985); *Robertson, supra* note 19 at 255-59; *Smith, supra* note 6, at 776-79. In these commentators' view, as long as the infant suffers a life-threatening condition, the state interest is enough to outweigh parental rights. Reliance is usually placed on cases like those cited *supra* at note 230. This author has argued that it is inappropriate to accept mechanically precedent developed prior to the extraordinary recent developments in medical technology. *See Vitiello, supra* note 9, at 135-36.

233. In light of the state's interest, parents cannot object to an appropriate investigation by proper state agencies into whether child abuse is occurring. Neglect and abuse statutes exist in every state and create a duty to provide medical assistance for helpless minor children. *Robertson, supra* note 19, at 218, 222. Those statutes are obviously a proper exercise of states' *parens patriae* function. A finding of no abuse, for example, when the parental decision is reasonable, should prevent the state from ordering treatment. *Id.* at 235-37 (defense to neglect proceeding that care would be extraordinary).

of an infant's "right" to treatment and does not possess analogous authority to act on an infant's behalf.

In sum, parental autonomy is sufficiently fundamental to warrant constitutional protection.²³⁴ This fundamental right should be vindicated in state jurisprudence by the recognition of a privacy action on the parents' behalf.

Restatement Section 652B:²³⁵ Intrusion Upon Seclusion

To state a cause of action under section 652B, a plaintiff must prove that the defendant intentionally intruded upon his seclusion or private affairs.²³⁶ The intrusion must be highly offensive to the reasonable person.²³⁷ Furthermore, the invasion must be to the plaintiff's personal rights and cannot be asserted derivatively.²³⁸

Intentional Intrusion

Cases like Baby Jane Doe's appear most often to be initiated by a member of the medical staff of the hospital caring for the infant.²³⁹ In at least one case, people seeking to compel treatment made an unauthorized entry into the patient's room.²⁴⁰ That apparently did not occur in the Baby Jane Doe case.²⁴¹ If the hospital employee, turned informant, had permission to examine the patient, it is difficult to find a sufficient intrusion to justify a right of action on behalf of the infant based on information gathering. Further, the parents could not argue that examination of their infant gave them a right of action because courts have not allowed

234. Interestingly, the federal district court in *American Academy of Pediatrics v. Heckler*, 561 F. Supp. 395 (D.D.C. 1983), *aff'd sub nom.*, *Bowen v. American Hosp. Ass'n*, 106 S. Ct. 2101 (1986), noted that the original Infant Doe regulations promulgated under § 504 of the Rehabilitation Act might in some cases infringe upon parental rights. *Id.* 400, 403.

235. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

236. *Id.*

237. *Id.*

238. It is black letter law that even a close relative may not recover for the invasion of privacy of another person. *See, e.g.*, *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1093 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 783 (1985); *Coverstone v. Davies*, 38 Cal. 2d 315, 322-24, 239 P.2d 876, 880-81 (1952); *Nelson v. Times*, 373 A.2d 1221, 1225 (Me. 1977); *Lambert v. Garlo*, 484 N.E.2d 260, 263 (Ohio Ct. App. 1985). *But see Viscovo v. New Way Enters., Ltd.*, 60 Cal. App. 3d 582, 587-88, 130 Cal. Rptr. 86, 89 (1976) (plaintiff's privacy invaded along with invasion of her parents' privacy).

239. *See J. LYON, supra* note 16, at 46 (identifying person who contacted Washburn only as member of the hospital staff). In the *Spring* case, discussed *supra* notes 87-88 & accompanying text, members of the medical staff published their dissent in a local paper. *Spring v. Geriatric Auth.*, 475 N.E.2d 727, 729 (Mass. 1985).

240. *Spring v. Geriatric Auth.*, 475 N.E.2d 727, 729 (Mass. 1985).

241. J. LYON, *supra* note 16, at 46.

that right to be raised derivatively.²⁴²

Section 652B, however, is not limited to physical invasions of privacy. For example, it has been extended to cases involving eavesdropping²⁴³ and harassing phone calls.²⁴⁴ Section 652B is designed to protect the plaintiff's interest in "his private affairs or concerns."²⁴⁵ Tort law also protects intangible rights from unwarranted interference,²⁴⁶ even when that interference is other than physical invasion.²⁴⁷

Thus, it is critical to examine the nature both of the interference and of the right to be protected. The parents in a case like *Baby Jane Doe's* would assert their cause of action based upon their personal right to make decisions on behalf of their infant.²⁴⁸ That right is personal, not derivative.²⁴⁹ Once the nature of the right is clearly identified, it is easier to understand the alleged intrusion.

Defendants in the *Baby Jane Doe* case were motivated by a desire to compel treatment.²⁵⁰ They would not be able to defend against an invasion of privacy action by asserting that their interference should not be

242. See, e.g., *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1093 (5th Cir. 1984); *Coverstone v. Davies*, 38 Cal. 2d 315, 322-24, 239 P.2d 876, 880-81 (1952).

243. See, e.g., *Roach v. Harper*, 143 W. Va. 869, 876-77, 105 S.E.2d 564, 568 (1958) (landlord eavesdropping on tenant through listening device); see also RESTATEMENT (SECOND) OF TORTS § 652B comment b, illustration 3 (1977).

244. See, e.g., *Hames v. Miami Daily News*, 127 So. 2d 715 (Fla. Dist. Ct. App. 1961) (newspaper prompted harassing calls to plaintiff by publishing that she had sexy voice); see also RESTATEMENT (SECOND) OF TORTS § 652B comment b, illustration 5 (1977).

245. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

246. See, e.g., *Holcombe v. Whitaker*, 294 Ala. 430, 318 So. 2d 289 (1975) (jury question whether threat was sufficient to arouse an apprehension of harm); *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952) (adopting RESTATEMENT OF TORTS § 46 (1965), giving a right of action for intentional infliction of emotional distress); *W. PROSSER & W. KEETON*, *supra* note 112, at 43 (action for assault protects individual's interest in freedom from apprehension of harm).

247. See, e.g., *Harms v. Miami Daily News*, 127 So. 2d 715 (Fla. Dist. Ct. App. 1961) (jury question whether telephone calls were actionable); RESTATEMENT (SECOND) OF TORTS § 652B comment b, illustration 5 (1977) (harassing phone calls give right of action).

248. See *supra* notes 203-34 & accompanying text. In a related context, the President's Commission observed that "[t]he family deserves recognition as an important social unit that ought to be treated, within limits, as a responsible decision-maker in matters that intimately affect its members." PRESIDENT'S COMMISSION, *supra* note 1, at 128.

249. It is important to recognize that the parents would not be able to contend that the injury was an attempt to secure treatment for the infant. That claimed right would be derivative. Furthermore, Washburn was unsuccessful in those efforts. Thus, if that were the only claimed injury, the action might be dismissed because unsuccessful attempts to invade privacy are not actionable. See *Gretencord v. Ford Motor Co.*, 538 F. Supp. 331, 333 (D. Kan. 1982) (having prevented the act, plaintiff cannot sue for damage resulting from the act); *supra* note 146 & accompanying text.

250. See *60 Minutes*, *supra* note 37, at 2.

actionable because they failed to achieve that goal.²⁵¹ In order to achieve their goal, they had to alter or overrule the parents' decision to refuse treatment.²⁵² To accomplish this, both the hospital staff member and Washburn intentionally intruded upon the parents' right to make a decision on behalf of their newborn. Washburn brought law suits in state²⁵³ and federal court²⁵⁴ to coerce treatment. This tortious conduct was complete upon the interference, not upon a final decision by the parents or the court. Consequently, Baby Jane Doe's parents were directly impaired in their ability to make their decision free from unauthorized intervention. The interference was both psychological, as demonstrated by the parents' statements to the media,²⁵⁵ and physical, as evidenced by their need to appear in court to justify their decision.²⁵⁶

The staff member's intrusive conduct was less direct, but also actionable. Presumably, the staff member notified Washburn in the hope that Washburn would intervene by filing a suit to compel treatment.²⁵⁷ Thus, the staff member would be a joint tortfeasor with Washburn on the theory that he acted in concert with Washburn.²⁵⁸

Unlike Baby Jane Doe, her parents were acutely aware of the intrusion.²⁵⁹ A right of action that is flexible enough to protect "a lady of social prominence" from a photographer's repeated phone calls made to

251. See *Gretencord v. Ford Motor Co.*, 538 F. Supp. 331 (D. Kan. 1982) (unsuccessful attempts not actionable).

252. The defendants might have argued that they did not intend to invade the parents' seclusion and that they intended solely to compel treatment for the minor. But, as with other intentional torts, specific intent is not required. Instead, intent is shown when defendants know to a substantial certainty that harm would result. See, e.g., *Garratt v. Dailey*, 46 Wash. 2d 197, 201, 279 P.2d 1091, 1093 (1955). The Baby Jane Doe defendants could not have plausibly denied that they knew their conduct would interfere with the parents' choice of treatment.

253. *Weber v. Stony Brook Hosp.*, 95 A.D.2d 587, 467 N.Y.S.2d 685, *aff'd*, 60 N.Y.2d 208, 456 N.E.2d 1186, 469 N.Y.S.2d 63 (1983).

254. See *Saving Baby Jane From Her Saviors*, N.Y. Times, Jan. 24, 1984, at A24, col. 1.

255. *60 Minutes*, *supra* note 37, at 4 (statement of father that "[i]t was very, very frightening to hear that—that a total stranger could force us into a state supreme court to answer to our decision-making").

256. See J. LYON, *supra* note 16, at 48-49 (describing father's appearance in court, including his testimony "behind a screen, as if he were a Mafia informant").

257. That inference is much stronger if the staff member were also the person who contacted the state child protection service and was unsuccessful in getting that agency to proceed against the parents.

258. See, e.g., *Bierczinski v. Rogers*, 239 A.2d 218 (Del. 1968) (defendant who engaged in drag race acted in concert with other driver despite absence of express agreement); W. PROSSER & W. KEETON, *supra* note 112, at 322-23 (discussing joint liability of tortfeasors acting in concert).

259. See *60 Minutes*, *supra* note 37.

persuade her to be photographed²⁶⁰ should be broad enough to protect parents who are dragged into court to justify a difficult decision, constitutionally entrusted to them.

Offensiveness

To be actionable, the intrusion also must be "highly offensive to a reasonable person."²⁶¹ Whether the intrusion in the Baby Jane Doe case was offensive has generated considerable debate. *Village Voice* journalist Nat Hentoff, for example, portrayed Washburn's efforts in a favorable light:

[E]verybody gives Mr. Washburn a hard time, from editorial writers to [New York's] Court of Appeals to the Federal Judge in Albany who fined him \$500 for harassment because Washburn has brought so many court actions on behalf of this handicapped infant when he isn't even a member of the family, for God's sake. The nerve of this intruder—trying to preserve the infant's rights as a "person" under the Constitution by trying to get an independent advocate appointed for her so that she might have a chance to live longer and with a brighter mind than is likely under the conservative treatment chosen by her parents. A terrible man huh? Actually, he's become one of my heroes.²⁶²

Most editorial comment was to the contrary. Political commentators along a broad spectrum condemned efforts to compel treatment.²⁶³ The staid *Wall Street Journal's* position was representative of most of the media:

Our position is that, unlike Mr. Washburn and the federal busy bodies, we do not presume to know what is the "moral" decision in each of these tragedies [when denial of treatment leads to the death of a severely impaired infant]. Someone has to decide, which means that someone will make mistakes. . . . [W]e do not want the decision made by some bureaucrat or some coven of lawyers. The inevitable agony will be much less if these decisions, and any mistakes, are left to the families involved²⁶⁴

Another writer observed that "[s]elf-righteous private parties seeking to intervene should be given even less encouragement [than the government] to do so."²⁶⁵ Richard Cohen of the *Washington Post* was similarly critical of ideologues who attempted to compel treatment.²⁶⁶

The law, like the society it governs, finds intrusion offensive in simi-

260. See RESTATEMENT (SECOND) OF TORTS § 652B comment b, illustration 5 (1977).

261. *Id.* § 652B.

262. Hentoff, *supra* note 54, at 100.

263. See *supra* note 28.

264. *Big Brother Doe*, Wall Street J., October 31, 1983, at 24, col. 1.

265. Pike, *Reagan Should Honor His Pledge*, N.Y. Times, Nov. 18, 1983.

266. Cohen, *supra* note 28.

lar cases. There are numerous cases in which defendants have been found liable for misusing medical information about a person's health.²⁶⁷ For example, defendants have been found liable for taking unauthorized photographs of a patient, even though the photographs were sought for use in medical instruction;²⁶⁸ for writing a book including the plaintiff's psychological case study, including revelations of her intimate fantasies and biographical detail sufficient to identify her;²⁶⁹ and for inducing a physician to reveal the plaintiff's medical records.²⁷⁰ These cases demonstrate that courts view as reasonable an expectation that medical information will not be revealed without the patient's consent, and that failure to honor that confidence is sufficiently offensive to be actionable.

Other areas of the law demonstrate the special status afforded medical information. For example, medical records are exempted from disclosure under the Privacy Act of 1974.²⁷¹ Professional licensing statutes²⁷² and other state laws, such as those enacting a patient's bill of rights,²⁷³ require confidentiality by health care personnel concerning all of a patient's records and communications. Finally, the vast majority of states recognize an evidentiary privilege for physician-patient communication.²⁷⁴ Most states extend the privilege to all information obtained by

267. *See, e.g.,* *Hammonds v. Aetna Casualty & Sur. Co.*, 243 F. Supp. 793, 799 (N.D. Ohio 1965) (physician breaches duty to patient when he speaks to lawyer about patient's condition prior to patient suing for malpractice); *Horne v. Patton*, 291 Ala. 701, 709-10, 287 So. 2d 824, 830-31 (1973) (plurality opinion) (doctor revealed to employer plaintiff's nervous disorder).

268. *See, e.g.,* *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 262, 155 S.E. 194, 197 (1930); *Estate of Berthiaume v. Pratt*, 365 A.2d 792, 795-96 (Me. 1976).

269. *Doe v. Roe*, 93 Misc. 2d 201, 211-14, 400 N.Y.S.2d 668, 675-77 (N.Y. Sup. Ct. 1977); *see also* *Berry v. Moench*, 8 Utah 2d 191, 331 P.2d 814 (1958) (court remanded for determination whether psychiatrist abused conditional protection of third person privilege when he revealed information about plaintiff's psychiatric treatment to a family of a woman about to marry plaintiff).

270. *See, e.g.,* *Hammonds v. Aetna Casualty & Sur. Co.*, 243 F. Supp. 793, 803-04 (N.D. Ohio 1965).

271. 5 U.S.C. § 552a(b) (1982) (conditions of disclosure).

272. *See, e.g.,* Rules of Board of Regents, N.Y. ADMIN. CODE tit. VIII, § 29.1(b)(8) (1979) (unprofessional conduct includes "revealing of personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the patient. . .").

273. *See, e.g.,* MASS. GEN. LAWS ANN. ch. 111, § 70E (West Supp. 1985) (Patients' Rights Statute); MINN. STAT. ANN. § 144.651 (West Supp. 1985) (Patients' Bill of Rights).

274. *See, e.g.,* ALA. CODE § 34-26-2 (Supp. 1980) (psychiatrist-psychologist and patient privilege placed on same basis as attorney-client privilege); CAL. EVID. CODE §§ 990-1007 (West 1966 & Supp. 1983) (governing physician and psychotherapist-patient privilege); DEL. UNIFORM R. EVID. 503 (1980) (same); LA. REV. STAT. ANN. § 13:3734(B) (West Supp. 1985) (privileged communications between health-care provider and patient; applicable in civil cases); *id.* § 15:476 (West 1981) (physician-patient privilege applicable in criminal cases); N.J. STAT. ANN. §§ 2A:84A-22.1 to -22.9 (West 1976); *see also* C. McCORMICK, McCORMICK ON EVIDENCE 244 n.5 (3d ed. 1984) (noting that at least 40 states recognize the privilege).

the doctor through observation and examination, not merely to communications.²⁷⁵ That privilege is extended to include any person, such as a nurse, who is "present as a needed and customary participant in the consultation."²⁷⁶ Thus, the rules of evidence protect medical information from disclosure despite the resultant frustration to the strong policy of truth-finding at trial.²⁷⁷ The special treatment traditionally accorded medical information demonstrates its attendant high level of privacy and confidentiality; it follows, therefore, that its misuse is offensive to reasonable people.

Extent to Which Conduct is Privileged

In the foregoing analysis, one form of intrusion was the misuse of the court system to interfere with the parents' right to make decisions regarding their child.²⁷⁸ Right-to-life advocates have sometimes used other more direct means of persuasion.²⁷⁹ But insofar as the analysis has focused on litigation as tortious, it is necessary to address the extent to which such conduct may be privileged.

Ours is obviously a litigious society. Indeed, many of our rules of law facilitate litigation. For example, American jurisdictions generally do not require losing parties to pay opposing counsel's fees;²⁸⁰ indigent criminal defendants must be afforded counsel at trial²⁸¹ and on appeal;²⁸² indigents cannot be barred from the courthouse based on their inability to pay certain fees;²⁸³ and contingency fees are widely accepted as a ne-

275. C. MCCORMICK, *supra* note 274, at 248-49.

276. *Id.* at 250.

277. *Id.* at 249 (discussing the competing policy of "holding all privileges within reasonable bounds since they cut off access to sources of truth").

278. See *supra* notes 248-58 & accompanying text.

279. See, e.g., C. PAIGE, *supra* note 42, at 75 (right-to-life members entered abortion clinic to dissuade pregnant women from aborting their fetuses).

280. See *Guardian Trust Co. v. Kansas City S. Ry.*, 28 F.2d 233 (8th Cir. 1928) (discussing narrow circumstances in which equity may order payment of attorneys' fees). This rule has been modified by statute in some specific cases where, for example, the legislature wants to discourage litigation and to encourage settlement of claims. See, e.g., *West v. French*, 51 Or. App. 143, 150-51, 625 P.2d 144, 148 (1981); see also W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 552 (7th ed. 1981).

281. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (indigent's right to appointed counsel whenever accused is sentenced to serve a term of imprisonment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent defendants in state courts have same right to appointed counsel as defendants in federal courts).

282. See, e.g., *Douglas v. California*, 372 U.S. 353 (1963) (indigent's right to appointed counsel on an appeal).

283. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (indigent's right to obtain divorce requires waiver of filing fees); MASS. GEN. LAWS ANN. ch. 261, § 27.B (West 1980) (providing for waiver of court costs in specified cases upon proof of indigency); see also *Har-*

cessity to secure plaintiffs' rights in personal injury cases.²⁸⁴ Even when making actionable an improperly motivated law suit, the law has given the suitor "a large degree of freedom to make mistakes and misjudgments without being subjected to liability."²⁸⁵

However favored, the right to bring suit is not absolute. Tort law has long recognized a right of action for malicious prosecution²⁸⁶ and abuse of process.²⁸⁷ Frustrated with frivolous litigation, federal courts have increased use of sanctions against attorneys under Rule 11 of the Federal Rules of Civil Procedure.²⁸⁸ In 1983, Rule 11, which requires an attorney to sign pleadings and motions filed in federal court, was amended, most importantly, to ensure "the availability of an appropriate sanction even if the violation cannot be shown to have been wilful."²⁸⁹ Thus, suits improperly brought may be actionable.²⁹⁰

Suits brought by intermeddlers also should be actionable in a Baby Jane Doe context. Tort law is designed to protect legally identifiable interests. Here, the parents have a constitutionally protected right to make a decision on behalf of their infant. Admittedly, that right may yield to a sufficiently compelling interest of the state or the infant, but state legislatures strike that balance through procedures to investigate unlawful parental conduct. A state agency's determination to uphold the parents' treatment decision should be final and should not provide grounds for any additional interference with the parents' right to make that decision. The noble motives or deep-seated convictions of private suitors cannot act as counterweights to the parents' privacy rights. There is no reason to shield intermeddlers when they invade these rights through improper resort to the judicial process.

ington v. Tibbet, 143 Cal. 78, 76 P. 816 (1904); Sutor v. Wood, 76 Tex. 403, 13 S.W. 321 (1890).

284. See W. PROSSER, J. WADE & V. SCHWARTZ, *supra* note 280, at 552-53; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1982); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(c) (1983).

285. W. PROSSER & W. KEETON, *supra* note 112, at 871.

286. See, e.g., *Lamos v. Bazar, Inc.*, 270 Or. 256, 527 P.2d 376 (1974); RESTATEMENT (SECOND) OF TORTS § 653 (1977).

287. See, e.g., *Nienstadt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876 (1982); *Candy v. Maxwell*, 9 Misc. 2d 329, 169 N.Y.S.2d 547 (1957); *Garland v. Wilson*, 289 Pa. 272, 275, 137 A. 266, 267-68 (1927); RESTATEMENT (SECOND) OF TORTS § 682 (1977).

288. FED. R. CIV. P. 11; see also 28 U.S.C. § 1927 (1982) (allowing assessment of excess costs, expenses, and attorneys' fees caused by bringing of frivolous lawsuit).

289. FED. R. CIV. P. 11, comment a to 1983 Amendments. Some states also have adopted similar provisions. See, e.g., CAL. CIV. PROC. CODE § 128.5 (West 1982); FLA. CODE CIV. PROC. § 1-109 (West Supp. 1985) (making false verification of pleadings a crime).

290. See *supra* notes 248-58 & accompanying text.

Restatement Section 652D: Publicity Given to Private Life

In addition to an action for intrusion upon seclusion of the parents under section 652B, parents also may have a cause of action based on section 652D.²⁹¹ A plaintiff may state a cause of action under section 652D if the defendant "gives publicity to a matter concerning the [plaintiff's] private life . . . if the matter publicized is of a kind that . . . would be highly offensive to a reasonable person, and . . . is not of legitimate concern to the public."²⁹² The most substantial problem for plaintiffs in cases like Baby Jane Doe's will be the publicity requirement.

As with section 652B,²⁹³ plaintiffs will be able to establish that revelation of medical information is highly offensive within the meaning of section 652D. For example, the *Restatement* cites the following as an example of highly offensive conduct: *A* agrees to allow *B* to film *A*'s cesarian delivery for exhibition to medical students for educational purposes. *B* invades *A*'s privacy when he exhibits the film to the public.²⁹⁴

As discussed above,²⁹⁵ plaintiffs must allege revelation of facts about their own private lives; the action cannot be raised derivatively. Although that distinction has not always been followed carefully,²⁹⁶ it does not prevent the parents from asserting a personal right in the Baby Jane Doe context.²⁹⁷ To maintain a cause of action under section 652D, the parents would allege that facts about them were revealed suggesting that they had improperly withheld appropriate medical care, and in effect, suggesting that they were committing infanticide.²⁹⁸ It cannot be

291. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

292. *Id.*

293. *See supra* notes 261-77 & accompanying text.

294. RESTATEMENT (SECOND) OF TORTS § 652D comment c, illustration 11 (1977). Obviously, a litigant cannot recover when a defendant reveals facts that are a matter of public record, or that already have been revealed to the public. *Id.* comment b; *see also* Bisbee v. John C. Conover Agency, 186 N.J. Super. 335, 452 A.2d 689 (1982) (disseminated information of homebuyer was all public information). But few would assert that a hospitalized patient, although seen by hospital personnel, has not thereby given up her right to privacy. *See* RESTATEMENT (SECOND) OF TORTS § 652D comment b, illustration 7 (1977).

295. *See supra* notes 248-58 & accompanying text.

296. *See, e.g.,* Bazemore v. Savannah Hosp., 171 Ga. 257, 155 S.E. 194 (1930) (photograph of deceased infant created right of action on behalf of the parents).

297. As argued above, Baby Jane Doe's parents have autonomy rights at stake in making a decision on her behalf. Here, they also have personal privacy rights at stake. There may be cases, however, where family members may be able to assert privacy rights only derivatively. For example, facts revealed might concern a conscious, competent patient who refuses to accept life-saving treatment. Family members may feel aggrieved, but they would not have personal rights at stake—they are not the decision-makers and the revealed information is not about them.

298. Some members of the right-to-life movement have said that such cases are infanticide. *See, e.g.,* AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND, *supra* note 10, at 10; Rue,

contended seriously that facts about the parents' decision-making in such a case do not relate to their own private lives.

The publicity requirement can be readily proven in some cases in which the member of the hospital staff or an intermeddler like Washburn tries his case in the media.²⁹⁹ In other situations, however, in which an intermeddler makes no effort to involve the media, the publicity element is more difficult to establish.

Comments to section 652D make clear that "publicity," unlike "publication" for purposes of defamation, means that the matter is made public "by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."³⁰⁰ Many courts have applied that requirement strictly in order to deny a plaintiff a right of action.³⁰¹ For example, an incorrect report concerning a plaintiff's credit rating was not actionable in *Polin v. Dun & Bradstreet, Inc.*³⁰² because it was made to only seventeen of the defendant's subscribers who had agreed not to give the information to others.³⁰³ Because the data had not yet been made public, the court denied recovery,³⁰⁴ perhaps naively presuming that it would not be made public.

Courts are not uniform in their interpretation of the meaning of the publicity requirement. Although the *Restatement* found publicity required communication to the public at large,³⁰⁵ it recognized that "courts may decide to extend the coverage to simple disclosure."³⁰⁶ Several cases have followed that suggestion,³⁰⁷ leading one commentator to observe that there is now "considerable doubt about the necessity of a

Death by Design of Handicapped Newborns: The Family's Role & Response, 1 ISSUES IN L. & MED. 201, 204-08 (1985) (discussing "neonaticide").

299. See, e.g., 60 Minutes, *supra* note 37.

300. RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977).

301. See, e.g., *Tureen v. Equifax, Inc.*, 571 F.2d 411, 419 (8th Cir. 1978) (information was not sufficiently disseminated to public); *Barr v. Arco Chem. Corp.*, 529 F. Supp. 1277, 1280 (S.D. Tex. 1982) (no third party heard tape recording); *Beard v. Akzona, Inc.*, 517 F. Supp. 128, 132-33 (E.D. Tenn. 1981) (insufficient to communicate only to small group); *Brown v. Mullarkey*, 632 S.W.2d 507, 509-10 (Mo. Ct. App. 1982) (disclosure was only to attorneys); *Corcoran v. Southwestern Bell Tel. Co.*, 572 S.W.2d 212, 214-15 (Mo. Ct. App. 1978) (disclosure to ex-daughter-in-law was not public disclosure); *Nagy v. Bell Tel. Co.*, 292 Pa. Super. 24, 27-28, 436 A.2d 701, 703 (1981).

302. 768 F.2d 1204 (10th Cir. 1985).

303. *Id.* at 1206.

304. *Id.* at 1206-07.

305. RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977).

306. *Id.*

307. See, e.g., *Hammonds v. Aetna Casualty & Sur. Co.*, 243 F. Supp. 793 (N.D. Ohio 1965); *Horne v. Patton*, 291 Ala. 701, 287 So. 2d 824 (1973); *Alberts v. Devine*, 479 N.E.2d 113 (Mass. 1985); *Berry v. Moench*, 8 Utah 2d 191, 331 P.2d 814 (1958).

public disclosure."³⁰⁸ That judgment may be premature because many courts continue to apply that rule stringently.³⁰⁹

Many of the cases in which the publicity requirement has been lowered have involved breaches of the physician-patient privilege.³¹⁰ Some of those cases have allowed or implied that a right of action might be permitted against a third party who induced a breach of confidence.³¹¹ For example, in *Hammonds v. Aetna Casualty & Surety Co.*,³¹² the court overruled the defendant insurance company's motion to dismiss. It found that the complaint stated a right of action against the defendant for inducing plaintiff's doctor to reveal confidential information by telling the doctor that the plaintiff intended to name him as a defendant in a malpractice action.³¹³ The absence of wide publicity was not a bar to recovery because of the nature of the relationship involved in the breach of confidence.³¹⁴ The Massachusetts Supreme Judicial Court recently held that a disclosure of private facts about an employee within an intra-corporate setting is a sufficient publication, subject to a balancing test to determine whether the communications are privileged:

In determining whether an employee's privacy right . . . is violated by his physician's disclosure of personal medical data to his employer, we would consider the degree of intrusion on privacy and the public interest in preserving the confidentiality of a physician-patient relationship balanced against the employer's need for medical information.³¹⁵

The willingness of courts to lower the publicity requirement in physician-patient cases has led one commentator to argue that courts are moving towards a new right of action, breach of confidence.³¹⁶ Indeed, that commentator argued that such a right is not limited in the same way by the traditional defenses to the invasion of privacy.³¹⁷ Even if a court rejected a new right of action for breach of confidence, in a case like *Baby Jane Doe's* it may be willing to follow those courts that have allowed suit by lowering the publicity requirement when a physician revealed confi-

308. W. PROSSER & W. KEETON, *supra* note 112, at 857.

309. *See supra* note 301.

310. *See supra* note 307.

311. *See, e.g.*, *Alberts v. Devine*, 479 N.E. 2d 113, 121 (Mass. 1985); *Hammonds v. Aetna Casualty & Sur. Co.*, 243 F. Supp. 793 (N.D. Ohio 1965).

312. 243 F. Supp. 793 (N.D. Ohio 1965).

313. *Id.*

314. *Id.* at 797.

315. *Bratt v. International Business Mach. Corp.*, 467 N.E.2d 126, 137 (Mass. 1984).

316. Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1448-55 (1982). At least one court has been persuaded by this Note's argument. *See, e.g.*, *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 591 (D.C. 1985). *But see Humphers v. First Interstate Bank*, 298 Or. 706, 717-18, 696 P.2d 527, 533-34 (1985).

317. Note, *supra* note 316, at 1468.

dential information³¹⁸ because of the importance of the interests involved in confidential relationships.³¹⁹

Not all courts would agree to a lowering of the publicity requirement. For example, in *Mikel v. Abrams*³²⁰ a physician gave his patient's wife information regarding the patient's excessive intake of nicotine, caffeine, and alcohol that she used against the patient in a child custody suit. The court concluded that the single disclosure from doctor to patient's wife was insufficient to satisfy the publication requirement, despite an allegation that the doctor knew the information was likely to be disseminated in the custody suit.³²¹ *Mikel*, however, is readily distinguishable from cases like *Baby Jane Doe*'s. In a custody case, the court must apply a best interest test, making interests of the child paramount.³²² Obviously, when parents are opposed to one another, parental autonomy rights—the right of each parent to decide on behalf of the child—cannot control because the parents' inability to agree on custody has brought the case to court in the first place. In the problem discussed in this Article, a state agency already has investigated the claim of abuse. Thus, the private suitor's claim should not be entitled to the type of protection afforded in *Mikel v. Abrams*. The law should not protect an intermeddler's right to interfere when the state itself already has determined that no further interference with the parents' privacy is warranted.

In addition, the publicity requirement might be satisfied in a *Baby Jane Doe* case because the staff member and the intermeddler were aware that the attendant publicity almost certainly would follow commencement of their suit.³²³ That argument has some force, especially if it appears that the potential defendants might have been motivated by a desire to seek the publicity for the right-to-life cause. That is, a case like *Mikel* may be explained by the doctor's desire to further the interest of the child. Publicity would be an unwanted side-effect of the breach of confidentiality. No similar narrow construction of publicity is warranted if a plaintiff shows that the defendant actively desired the resulting publicity.

Thus, publicity may pose a problem in stating a right of action

318. See, e.g., *Hammonds*, 243 F. Supp. 793; see also RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977) (courts may extend coverage to a simple disclosure).

319. See Note, *supra* note 316, at 1434.

320. 541 F. Supp. 591 (W.D. Mo. 1982), *aff'd mem.*, 716 F.2d 907 (8th Cir. 1983).

321. *Id.* at 597.

322. *In re Bachman v. Mejias*, 1 N.Y.2d 575, 581, 136 N.E.2d 866, 869, 154 N.Y.S.2d 903, 907 (1956).

323. See RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977) (elements met if publicity is substantially certain to follow disclosure).

against the staff member and intermeddler. A number of arguments are available, however, to overcome that obstacle. Depending on the circumstances, the defendants may have publicized the case apart from the lawsuit, thereby clearly meeting the publicity requirement.³²⁴ Furthermore, even absent wide publicity, a court may find that publicity is met with communication to a small group, especially in the light of the confidential relationship between the parties.³²⁵ The intermeddler also may be found liable if he induces or encourages the medical staff to breach their duty of confidence.³²⁶ Finally, in reliance on the terms of the *Restatement*, one might argue that the defendants knew to a substantial certainty that publicity would result from their conduct.³²⁷ Although there is some authority suggesting a contrary result,³²⁸ it may be possible to distinguish it by reference to the disparity in the social utility of the defendants' conduct.³²⁹

Finally, the *Restatement* recognizes a defense of newsworthiness.³³⁰ The long line of cases allowing recovery when medical facts have been revealed demonstrates that such information is not newsworthy without more.³³¹ As one court stated, "Certainly if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition (at least if it is not contagious or dangerous to others) without personal publicity."³³² The right to privacy in medical matters is grounded on a similar utilitarian policy, as is the doctor-patient privilege, and on the chilling effect that publicity would have on the free flow of information between the doctor and patient.³³³ A similar interest exists when the parents, not the patient, are the appropriate decision-makers. It would be inappropriate to

324. See *supra* note 299 & accompanying text.

325. See *supra* notes 310-16 & accompanying text. Allowing an action where the information is disseminated to a small group may be particularly appropriate when a confidential relationship exists because of the strong policy interests that led to the creation of such a relationship in the first place. That is, socially accepted confidential relationships should be protected as effectively as possible. Note, *supra* note 316, at 1434-36.

326. See *supra* note 311 & accompanying text.

327. See RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977) (elements met if publicity is substantially certain to follow).

328. See *supra* notes 320-21 & accompanying text.

329. See *supra* note 321 & accompanying text.

330. RESTATEMENT (SECOND) OF TORTS § 652D comment d (1977).

331. See *supra* notes 267-70.

332. *Barber v. Time, Inc.*, 348 Mo. 1199, 1206, 159 S.W.2d 291, 295 (1942).

333. *Id.* ("To enable a physician to treat his patient to advantage, it is often necessary that the patient communicate information which it would be embarrassing and harmful to have circulated generally throughout the community."); see also *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 588 (D.C. 1985) (citing *Barber v. Time, Inc.*, 348 Mo. 1199, 1206, 159 S.W.2d 291, 295 (1942)).

deter parents from seeking adequate medical care for their children by allowing free access to facts about patients' medical conditions.³³⁴ That is, people are less likely to secure adequate health care if they must fear that the physician will reveal intimate details about them. Thus, the defense ought to be narrowly construed in cases involving medical care.³³⁵

The second *Restatement* states that "when the subject matter of the publicity is of legitimate public concern, there is no invasion of privacy."³³⁶ The defense of legitimate public concern is restricted mainly to revelations by the broadcast and news media and is based on the freedom of the press guaranteed under the first amendment.³³⁷ There is still uncertainty whether the defense is available to nonmedia defendants.³³⁸

Even assuming that the defense were available, the medical and personal information revealed in the Baby Jane Doe case probably would not be newsworthy. Newsworthy information is not limited to facts concerning public figures. Private individuals may unwittingly become "news."³³⁹ Nevertheless, whether information is newsworthy is decided by giving "due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure."³⁴⁰ Such analysis does not lend itself to bright lines. Whether surgery to remove a growth on one's colon is newsworthy may depend on whether she is President of the United States or merely a private citizen.³⁴¹ Examples of private facts offered in the *Restatement* suggest that most facts about one's physical condition are entitled to protection from

334. In fact, there is strong evidence that, even though authorized by federal law, Infant Doe squads have caused disruption within hospitals, impairing effective treatment and producing consternation among parents and hospital staffs. Furthermore, the complaints that initiated the squads' investigations have generally been groundless. See J. LYON, *supra* note 14, at 41-45. Allowing suits by strangers increases the chilling effect on parents and physicians, who must make critical decisions in fear of a lawsuit despite the lack of merit of the suit. Infant Doe squads may be justified under *parens patriae*, but private lawsuits are not.

335. Insofar as parental autonomy rights are constitutionally based, a narrow construction is appropriate even though there are competing first amendment considerations.

336. RESTATEMENT (SECOND) OF TORTS § 652D comment d (1977).

337. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487-97 (1975).

338. See *Dun & Bradstreet v. Greenmoss Builders*, 105 S. Ct. 2939 (1985) (Court failed to achieve clear majority on extent to which first amendment defense is available to nonmedia defendants in defamation cases).

339. RESTATEMENT (SECOND) OF TORTS § 652D comment e (1977); see, e.g., *Jacova v. Southern Radio & Television Co.*, 83 So. 2d 34 (Fla. 1955); *Hubbard v. Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147 (1962).

340. RESTATEMENT (SECOND) OF TORTS § 652D comment h (1977).

341. See Note, *supra* note 316, at 1467 (discussing similar example as possible defense to tort of breach of confidence); see also Hoffman, *The President's Health and Privacy Issue*, Washington Post, Nat'l Weekly ed., Feb. 10, 1986, at 12.

public view.³⁴² One would seem to lose privacy by reference to who one is rather than by reference to what disease one has.³⁴³ Because of the psychological harm caused by revelation of medical information, courts have held that the individual's interests in privacy about medical conditions outweigh the public's right to know.³⁴⁴

The California Supreme Court has developed a useful three-part test to determine whether a particular event is newsworthy. To make this finding, the court must consider "(1) the social value of the facts published, (2) the depth of the news article's intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily acceded to a position of public notoriety."³⁴⁵

The California test depends on the circumstances of a given case.³⁴⁶ Concededly, there is some social value in information about care of newborns. But in the Baby Jane Doe case, the parents did not, in effect, consent to notoriety. Although they appeared on television,³⁴⁷ they did so months after Washburn had made them a subject of public scrutiny. As observed by the New York Court of Appeals, Washburn sought extensive intrusion into the case, by attempting to "catapult [himself] into the very heart of a family circle, there to challenge the most private and most precious responsibility vested in the parents for the care and nur-

342. See, e.g., RESTATEMENT (SECOND) OF TORTS § 652D comment b, illustration 7 (1977) (invasion of privacy to show photograph of deformed infant); *id.* comment c, illustration 10 (highly offensive to show picture of mother nursing her infant); *id.* comment e, illustration 11 (highly offensive to show film of cesarian section). But see *id.* comment f, illustration 15 (not invasion of privacy to publish report about 12-year-old who gives birth).

343. *Id.* comment f (listing instances of person involuntarily becoming news).

344. See, e.g., *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 580-89 (D.C. 1985); *Diaz v. Oakland Tribune*, 139 Cal. App. 3d 118, 133-35, 188 Cal. Rptr. 762, 772-73 (1983). Although not dispositive, New York state law permits the public to be excluded from abuse hearings pursuant to the Family Court Act. N.Y. FAM. CT. ACT § 1043 (McKinney 1983). According to commentary to that section, "the general public is routinely and automatically excluded from every hearing." *Id.* comment to § 1043. In this act, the New York legislature has effectively balanced public and private rights. See *Weber v. Stony Brook Hosp.*, 60 N.Y.2d 208, 209, 456 N.E.2d 1186, 1187, 469 N.Y.S.2d 63, 64 (1983) (Family Court Act was designed to balance interests of parents, infant, and the state).

345. *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 541, 483 P.2d 34, 43, 93 Cal. Rptr. 866, 875 (1971) (citing *Kapellas v. Kofman*, 1 Cal. 3d 20, 36, 459 P.2d 912, 922, 81 Cal. Rptr. 360, 370 (1969)).

346. For example, in *Briscoe* the court observed that several factors were relevant to whether a jury found revelation of private facts newsworthy, including whether the individual's identity in connection with incidents of his past life has significant social value and whether an individual has reverted to an unexciting life after the events that led to public attention initially. *Id.*; see also *Roshto v. Hebert*, 439 So. 2d 428 (La. 1983) (listing factors to be considered).

347. 60 Minutes, *supra* note 37.

ture of their children.”³⁴⁸ Thus, a court applying the California test for newsworthiness might appropriately weigh the relevant factors in favor of the parents.

Thus, though this Article concedes that a seriously ill newborn cannot state a cause of action against an intermeddler,³⁴⁹ it argues that her parents can do so. For purposes of section 652B, the parents must prove that a defendant intentionally intruded upon their seclusion or private affairs and that this type of intrusion is highly offensive to a reasonable person.³⁵⁰ Proving intent in a case like that of Baby Jane Doe will not be difficult. The intermeddler intends to change the course of medical treatment selected by the parents.³⁵¹ Courts recognize a state interest to inquire and sometimes to intervene in decisions made by parents on behalf of their children.³⁵² But absent a sufficient state interest, the parents’ decision is their private affair. Although not controlling, parental rights have constitutional roots, a fact that should inform a court considering the interest intruded upon. Finally, the parents must prove the offensive nature of the intrusion.³⁵³ This Article has cited other cases involving intrusion in the medical context³⁵⁴ and the public response to the Baby Jane Doe case³⁵⁵ to demonstrate that intermeddling in such cases is considered highly offensive. The advantage of pursuing an action under section 652B is the unavailability of a defense of newsworthiness.³⁵⁶ The parents also must show damages. For a case under section 652B, they would have to show harm suffered from the deprivation of their seclusion or freedom from intrusion in making a decision on behalf of their infant.³⁵⁷ Arguably, this would include legal fees necessitated by the intrusion: that is, those fees the parents incurred in order to retain their right to make a medical treatment choice on behalf of their infant.³⁵⁸ A second area of damages, potentially quite substantial, is mental distress that normally would result from such an intrusion.³⁵⁹

348. *Weber v. Stony Brook Hosp.*, 60 N.Y.2d 208, 213, 456 N.E.2d 1186, 1188, 469 N.Y.S.2d 63, 65 (1983).

349. *See supra* notes 132-91 & accompanying text.

350. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

351. As with the Baby Jane Doe case, the intermeddler may be quite willing to try his case in the public forum, making proof of intent quite simple. *See 60 Minutes, supra* note 37.

352. *See supra* notes 217-33 & accompanying text.

353. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

354. *See supra* notes 267-70 & accompanying text.

355. *See supra* note 28.

356. RESTATEMENT (SECOND) OF TORTS § 652B comment a (1977).

357. *Id.* § 652H(a) & (c).

358. These fees were quite substantial. *See 60 Minutes, supra* note 37, at 6.

359. RESTATEMENT (SECOND) OF TORTS § 652H(b) (1977). For some evidence of the parents’ emotional harm in the Baby Jane Doe case, *see 60 Minutes, supra* note 37.

Less certain is the availability of an action under section 652D. A plaintiff must show that a defendant "gives publicity to a matter concerning the [plaintiff's] private life . . . [and] the matter publicized is of a kind that . . . would be highly offensive to a reasonable person and . . . is not of legitimate concern to the public."³⁶⁰ It seems beyond cavil that revealing facts about parental decision-making gives publicity to a matter concerning the parents' private life.³⁶¹ As with section 652B, the plaintiff should show that such a revelation is highly offensive to reasonable people. Section 652D requires a showing that the information is not of legitimate concern to the public, and that has proven to be the most difficult issue under that section.³⁶² The balancing test developed to resolve the newsworthiness question arguably tilts in favor of the parents in a case like that of Baby Jane Doe.³⁶³ The damages received under section 652D also may be less substantial than an action under section 652B. Damages for mental distress would be equally available.³⁶⁴ The additional element of damages, harm to reputation,³⁶⁵ may be relatively meager.³⁶⁶

Conclusion

The Baby Jane Doe³⁶⁷ case has captured considerable attention and produced extensive commentary. Much of the commentary has been critical of private and governmental efforts to intervene.³⁶⁸ Implicit in the commentary was the assumption that privacy rights had been invaded. This Article has attempted to examine that assumption and to determine whether private conduct by an officious intermeddler is actionable in cases such as Baby Jane Doe's. Case law does not answer the question. The privacy action continues to evolve, however, and should provide a much-needed remedy.

Section 652B of the second *Restatement of Torts*³⁶⁹ protects an individual from interference with solitude or seclusion, not only to his person, but also to his private affairs. This Article contends that Baby Jane Doe's parents and others like them should have a legally protected inter-

360. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

361. Cf. *id.* comment b (citing family quarrels and many unpleasant illnesses as examples of private facts).

362. See *supra* notes 332-67 & accompanying text.

363. See *supra* notes 346-49 & accompanying text.

364. RESTATEMENT (SECOND) OF TORTS § 652H(b) (1977).

365. *Id.* § 652H(a).

366. This is especially true in light of much of the press being sympathetic to the parents. See *supra* note 28; 60 Minutes, *supra* note 37.

367. For a discussion of the case, see *supra* notes 48-84 & accompanying text.

368. See *supra* note 28.

369. RESTATEMENT (SECOND) OF TORTS § 652B comment a (1977).

est in making treatment decisions for their newborn. That interest is constitutionally protected against unwarranted governmental invasion. Although not controlling in an action against a private citizen, the constitutional authority for such a privacy right demonstrates that it is worthy of protection. Properly analyzed, a court could easily find that an intermeddler, such as the attorney Washburn in the Baby Jane Doe case, intentionally intruded on the parents' decision-making autonomy.

Section 652D of the second *Restatement*³⁷⁰ also provides authority for a right of action against intermeddlers like Washburn. He and his cohort within the hospital succeeded in giving publicity to a matter concerning the private lives of Baby Jane Doe's parents.³⁷¹ For a time, the nation was riveted on whether the parents would consent to surgery for their seriously ill newborn. Publicity was the foreseeable consequence of Washburn's efforts. Although the public was interested in those private facts, if the facts were improperly revealed the defendants may not necessarily be able to invoke a newsworthiness defense. On balance, that defense should be rejected in such a case.

This Article does not argue for a new right of action.³⁷² Instead, it analyzes the Baby Jane Doe case in light of established precedent and suggests that a court need not depart from the current law to recognize the parents' right of action against an intermeddler. Such a right of action is especially appropriate in a case like Baby Jane Doe's when the state has established procedures to balance and protect the interests of the infant against the interests of the parents. The law should not protect private interference into the parents' personal lives once the state has determined that the parents' treatment decision should be respected. As medical treatment decisions become more complex,³⁷³ we may see more instances in which an individual like Washburn will engage in his own brand of civil disobedience, spurred on by his personal moral vision.³⁷⁴ Such individuals may resort to personal harassment, as has occurred at abortion clinics,³⁷⁵ or to improper use of the court system. Whatever the

370. *Id.* § 652D.

371. *Id.*

372. *But see* Note, *supra* note 316 (arguing that courts are recognizing a cause of action for breach of confidentiality).

373. *See, e.g., In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985) (court established three separate tests to determine whether nutrition and hydration could be withdrawn from a senile patient); *see also* authority cited *supra* note 89 (critical of withdrawal of support in such cases).

374. *See supra* notes 85-110 & accompanying text.

375. *See* C. PAIGE, *supra* note 42, at 75-76.

form of invasion, tort law ought to redress such abuses and vindicate the rights of privacy and personal choice.