

Notes

Trafficking in Stolen Information: A “Hierarchy of Rights” Approach to the Private Facts Tort

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The private facts tort is a mess. It has disappointed those who hoped it would enhance individual privacy while it has exceeded all estimations of its chilling effect on speech. Because the newsworthiness criterion of the tort requires courts to assess the social value of speech, judges and juries often disagree as to whether certain speech merits First Amendment protection. Reports of criminal activity are generally considered newsworthy, but sometimes they are not. Disclosures of a sexual nature are generally not considered newsworthy, but sometimes they are. The results vary within and across jurisdictions and depend primarily on the intuition of the particular judge or jury who controls the outcome of the case. This lack of principled adjudication leaves the publisher without clear guidance as to what it may publish or broadcast without fear of legal reprisal and deprives individuals of any settled expectation of privacy.

Unfortunately, recognizing these inconsistencies is like noticing a flat tire on a car with a rusted-out engine. When the courts reached an interpretive crossroads where they had to choose between the social view and a rights-based approach to the First Amendment, they took a wrong turn—they chose the social view. On this view, the primary purpose of speech is to further democratic values by fostering rich public debate; speech is an instrument to achieve the democratic purpose of creating a more informed citizenry.¹ Consequently, the courts devised the “newsworthiness criterion” of the private

1. For further discussion of the social view, see ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 62–63 (1975); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971); Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405 (1986); Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 *SUP. CT. REV.* 191.

facts tort to gauge the speaker's First Amendment interest based on her contribution to public debate. If the contested speech is "newsworthy," a court will invoke the First Amendment to protect the speaker. If the court decides that it is not, the speaker is denied First Amendment protection and must stand trial for her speech. The newsworthiness criterion thus represents a triumph for the social view of the First Amendment—and the mess that results from the current private facts tort reveals why this approach is flawed.

But there is another approach to the First Amendment. Unlike the utilitarian orientation of the social view, the rights-based approach to the First Amendment holds that the fundamental purpose of speech is self-expression, which enhances individual autonomy. In other words, the value of speech is intrinsic, not instrumental.² One manifestation of the rights-based theory is what I term the "hierarchy of rights" approach. Using this approach, a court would rank rights based on their relative importance to individuals and their propensity to cause individual harm. A higher-order right trumps every right below it. The scope of protected First Amendment activity is defined by determining whether there is a legally enforceable, higher-order right to trump speech.³ By ranking rights, courts will never have to perform ad hoc valuations of an individual's speech. Consequently, dissident speakers will not be stymied by jury biases against their speech, and the mainstream media will not be in doubt as to whether, in the eyes of a court, their speech enhances public debate.

Under this approach, the right to speech ends where the right to privacy begins.⁴ Privacy is ranked above speech for two reasons. First, unlike the benefits of speech, the benefits of privacy are purely individual; second, speech

2. For further discussion of the rights-based view of the First Amendment, see RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 43–65 (1992); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 785–89 (2d ed. 1988); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 61–63 (1974).

3. The hierarchy-of-rights approach is an amalgam of several techniques used by theorists in other contexts. The notion of serially ranking liberties is derived from John Rawls's *A Theory of Justice*. JOHN RAWLS, *A THEORY OF JUSTICE* 60–65 (1971). The concept of requiring the government to permit all speech that does not interfere with the rights of others originates in John Stuart Mill's advocacy of the proposition that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others," JOHN STUART MILL, *ON LIBERTY* 13 (Currin V. Shields ed., Liberal Arts Press 1956) (1859), and in Joel Feinberg's description of such harm as a violation of one's moral right, or as an "undefensible invasion of another's interest," JOEL FEINBERG, *HARM TO OTHERS* 111, 112 (1984). Lastly, the idea of defining speech in relation to privacy, and protecting privacy where the two rights conflict, stems from Thomas Emerson's discussion of harmonizing privacy and speech. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 549, 562 (1970).

4. See Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 359 (1979). Emerson writes:

In strict theory the reconciliation [between privacy and speech] should be accomplished through development of a careful definition of privacy, and material falling within that carefully defined sphere would then be afforded full protection. This approach would seem to follow from the very nature of the right to privacy—protection for the individual against all forms of collective pressure.

Id.

has a greater propensity than privacy to harm other individuals.⁵ This legally enforceable right of privacy is defined by the conduct of the individual rather than the content of his speech because the rights-based approach demands that we focus on the individuals involved in the dispute, not social canons of decency. The court must restrict speech if, but only if, the speech was precipitated by a privacy violation such as physical invasion of privacy, breach of fiduciary duty, or breach of a duty of confidentiality. So, too, must it restrict the speech of the publisher who “trafficks” in this “stolen information.” Such a method-focused approach to the private facts tort returns control over privacy and speech to the individuals who exercise these rights and limits liability to those instances where there is a specific and identifiable privacy violation.⁶

The four parts of this Note describe this shift and the reasons for it in greater detail. Part I describes the basic structure of the private facts tort and its newsworthiness criterion. Part II discusses the contradictory reasoning employed by the courts in their newsworthiness analyses and the inconsistent protection of speech and privacy that results. Part III examines the Supreme Court’s response to this confusion, and finds that the Court has shied away from the content-sensitive newsworthiness analysis and has moved toward an approach emphasizing the method by which the information was obtained. Following the Supreme Court’s lead, Part IV completes the shift away from the social view of the First Amendment and uses a hierarchy-of-rights approach to design a method-focused private facts tort that holds a publisher or broadcaster liable for disclosure of private facts if (1) it, or one of its sources, obtained information by improper means such as physical invasion of privacy, breach of fiduciary duty, or breach of a duty of confidentiality, and (2) the defendant had actual knowledge or reason to believe that the information was obtained improperly. This proposed tort obviates the need for a newsworthiness criterion, thereby restoring coherence and integrity to a tort on the verge of collapsing under the weight of the First Amendment.⁷

5. For a further discussion of why I prioritize privacy over speech, see *infra* Subsection IV.A.2.

6. There are often radical differences between the outcomes obtained by the method-focused approach and by the current law of the private facts tort. For instance, if a newspaper reporter broke into Newt Gingrich’s office and found him having sex on his desk with a woman who was not his wife, *cf. Gingrich Cheated on First Wife, Story Says*, SACRAMENTO BEE, Aug. 10, 1995, at A8 (reporting allegations that Newt Gingrich had sex with campaign volunteer on his office desk), the publisher could be held liable under the proposed method-focused private facts tort for publishing such information because it was obtained by impermissible means. No such liability could attach under the current private facts tort because the court would, in all likelihood, find that such information is newsworthy. For a further discussion of the different outcomes obtained by the two approaches, see *infra* Section IV.B.

7. Some commentators claim that the Supreme Court has already nullified the private facts tort. See Jacqueline R. Rolfs, Note, *The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107; Marta Goldman Stanton, Comment, *Florida Star v. B.J.F.: The Wrongful Obliteration of the Tort of Invasion of Privacy Through the Publication of Private Facts*, 18 HASTINGS CONST. L.Q. 391 (1991); Lorelei Van Wey, Note, *Private Facts Tort: The End Is Here*, 52 OHIO ST. L.J. 299 (1991).

I. THE PRIVATE FACTS TORT AND ITS NEWSWORTHINESS CRITERION

A. *The Basic Structure of the Private Facts Tort*

Since its conception by Warren and Brandeis in *The Right to Privacy*⁸ and its codification in the *Restatement of Torts*,⁹ the private facts tort has become enmeshed in a complex and confusing body of law. Like defamation law, the private facts tort is a judge-made, state cause of action subject to federal constitutional limitations. As a result, it “resembles a creature fashioned by committee, or worse yet, one fashioned by several independent committees working in separate rooms in different eras with different blueprints—some building up and others chiseling down.”¹⁰

To state a cause of action for intentional disclosure of true private facts under current law, the plaintiff must show that the defendant (1) made public (2) private facts about the plaintiff that are (3) highly offensive to a reasonable person and (4) are not of legitimate concern to the public.¹¹ Courts usually concentrate on the first and fourth of these elements because they have been most affected by constitutionally mandated exceptions. The “public records” exception holds that a state may not hold a speaker liable for publishing true private facts obtained from public records,¹² and the “newsworthiness” exception confers on the press an absolute privilege to publish truthful information about matters of public interest that is lawfully obtained.¹³ As a result, two distinct lines of private facts cases have emerged.¹⁴ This Note

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

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

10. Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 293 (1994) (describing defamation law).

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

12. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (holding unconstitutional under First Amendment the imposition of civil liability for publication of name of deceased rape victim obtained from official court records). The Court later extended this “public records” privilege to encompass all information that has already been made public. *See Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989).

13. *See Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) (invalidating penal statute prohibiting publication of name of child who was subject of criminal proceedings).

Some courts have also established a third constitutional privilege based on the status of the person who is the subject of the publication. *See, e.g., Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980) (recognizing constitutional privilege to publish information relating to public figures). Unlike in defamation law, however, the public figure privilege has not played a large role in private facts law because public figures are rarely involved in private facts cases.

14. Cases involving public records form one such category. *See, e.g., Lusby v. Cincinnati Monthly Publishing Co.*, No. 89-3854, 1990 WL 75242, at *2-3 (6th Cir. June 6, 1990) (dismissing private facts claim where details of plaintiff’s six marriages and financial affairs were all in public records of divorces and bankruptcy); *Florida v. Johnson*, 22 Media L. Rep. (BNA) 1058 (Fla. Palm Beach County Ct. 1993) (finding plaintiff’s arrest for solicitation of sexual activity was part of public police record); *Doe v. Edward A. Sherman Publishing Co.*, 593 A.2d 457 (R.I. 1991) (finding names of persons granted divorce were obtained from public family court records). For cases where the focus of the inquiry is on whether the information was public in some other sense, see *Times Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556 (Ct. App. 1988) (holding that identity of plaintiff as murder witness and victim’s roommate not yet public even though there were press reports that body was found by roommate and police had questioned plaintiff in public places), *cert. dismissed sub nom. Times Mirror Co. v. Doe*, 489 U.S. 1094 (1989); *Porter v.*

focuses exclusively on the newsworthiness cases¹⁵ to reveal more clearly the deep roots of the newsworthiness criterion in the social view of the First Amendment.

B. *The Newsworthiness Criterion and the Social View of the First Amendment*

The social view of the First Amendment focuses on the utility of the First Amendment for society at large. Its adherents claim that the First Amendment exists to protect democratic values.¹⁶ Speech ought to be protected to promote rich public debate, leading to an informed citizenry capable of casting intelligent ballots.¹⁷ Accordingly, the strength of a speaker's First Amendment interest is measured by the content of her speech—if the contested speech meaningfully contributes to public debate, courts will be more inclined to invoke the First Amendment to protect the speaker-defendant.¹⁸ Under the social view, the benefits of speech are measured by content and are felt by the entire community.

This view differs greatly from its leading competitor, the rights-based approach, which postulates that the primary purpose of the First Amendment is to protect the individual speaker from restriction of her speech by others. Free speech is necessary, not for the public's edification, but to foster self-actualization by permitting the individual to express her thoughts and beliefs.¹⁹ The principal beneficiary of the First Amendment is the particular speaker, who is permitted to thrive as an individual.

Channel 7, 17 Media L. Rep. (BNA) 1898 (Mich. Cir. Ct. 1990) (holding that male employee's description on television of plaintiff sexually harassing him was not private fact because plaintiff had already told people of their relationship).

Newsworthiness cases make up the other category. *See, e.g.,* Cape Publications Inc. v. Bridges, 423 So. 2d 426 (Fla. Dist. Ct. App. 1982) (dismissing private facts claim because photo of half-nude woman escaping imprisonment by armed estranged husband is sufficiently newsworthy); Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289 (Iowa 1979) (finding report of plaintiff's sterilization newsworthy), *cert. denied*, 445 U.S. 904 (1980).

There is also a line of "hybrid cases" in which both the public records and newsworthiness inquiries are involved. *See, e.g.,* Tucker v. News Publishing Co., 397 S.E.2d 499 (Ga. Ct. App. 1990) (dismissing privacy claim because details of violent attack of high school victim came from public court records and were matters of public interest); Honig v. Nashville Banner Publishing Co., 10 Media L. Rep. (BNA) 2139 (Tenn. Ct. App. 1984) (finding reports of "hex" placed on someone's sex life to have been drawn from public records and newsworthy).

15. I limit my discussion of the current private facts tort to the newsworthiness cases for two reasons. First, the newsworthiness criterion is the source of most of the confusion involving the private facts tort. *See infra* Part II. Accordingly, the most effective way to reform the private facts tort is to correct the failings of the newsworthiness inquiry. Second, the analysis employed by the courts in the public records cases resembles the rights-based approach proposed in this Note. Thus, rather than revealing the flaws in the current private facts tort, the public records cases can be used to affirm the method-focused private facts tort.

16. *See, e.g.,* Fiss, *supra* note 1, at 1409–10.

17. *See id.* at 1410.

18. *See* MEIKLEJOHN, *supra* note 1, at 18–19, 22–27.

19. *See* Richards, *supra* note 2, at 62.

In choosing between these approaches, the Supreme Court and lower courts have embraced the social view of the First Amendment in their analyses of private facts cases, and the lower courts have designed a newsworthiness criterion to advance this goal. For instance, in *Cox Broadcasting Corp. v. Cohn*,²⁰ the Supreme Court displayed its allegiance to the social view when it declared:

Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. . . .

. . . .
 . . . The freedom of the press to publish . . . appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.²¹

The Court later affirmed its commitment to the social view in *Smith v. Daily Mail Publishing Co.*,²² when it proclaimed: "Historically, we have viewed freedom of speech and of the press as indispensable to a free society and its government."²³ Thus, at the level of First Amendment theory, if not in its actual practice,²⁴ the Supreme Court has championed the social view in its private facts decisions.²⁵

And the lower courts have even more wholeheartedly embraced the social view in their analyses of the private facts tort. At the theoretical level, for instance, the California Supreme Court announced in *Briscoe v. Reader's Digest Ass'n*:²⁶ "The central purpose of the First Amendment 'is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.'"²⁷ Similarly, in *Virgil v. Time, Inc.*,²⁸ the Ninth Circuit eschewed a rights-based approach in favor of the social view when it asserted: "It is because the public has a right to know that the press has a function to inquire and to inform."²⁹ Instead of regarding speech as intrinsically valuable to the speaker, the court interpreted it as important only insofar as it increases

20. 420 U.S. 469 (1975).

21. *Id.* at 492, 495.

22. 443 U.S. 97 (1979).

23. *Id.* at 106 (Rehnquist, J., concurring).

24. As I will argue in Part III, the Supreme Court strays from the social view when it employs a method-focused, rather than a content-based, analysis in its private facts decisions.

25. Thus, while the rights-based approach to the private facts tort advocated in this Note represents a radical break from the content-sensitive analysis employed by the lower courts, its method-focused orientation is consistent with the approach employed by the Supreme Court. For further discussion of this issue, see *infra* text accompanying notes 158–59.

26. 483 P.2d 34 (Cal. 1971).

27. *Id.* at 37 (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 75 (1960)).

28. 527 F.2d 1122 (9th Cir. 1975).

29. *Id.* at 1128.

social utility.³⁰ In the court's words, "[T]he foremost First Amendment concern is the interest of the public"³¹ As a result of this social orientation, the lower courts have designed the newsworthiness criterion to gauge the speaker's First Amendment interests in private facts cases.

II. APPLICATION OF THE NEWSWORTHINESS CRITERION

While the goal of the newsworthiness criterion—to protect speech that enriches public debate—is clearly defined, its application is not. The lower courts cannot agree on how the newsworthiness inquiry ought to be performed, nor can they agree on how to deal with factors other than speech. Even more troubling, however, is that even if the courts could reach consensus on these technical issues, they would still disagree over the best means to advance the democratic purpose of the First Amendment. One court could hold that disclosure of one's sexual identity is newsworthy because this information influences the public impression of gays, while another court could reply that such disclosure is not newsworthy because information so personal as sexual identity should not be of concern to the public. The problem is that either of these contradictory conclusions is consistent with the social view; this approach grants courts broad discretion and therefore allows for inconsistent results, stripping the First Amendment of its ability to provide uniform protection of speech.³² This is the social view's greatest flaw. But before I confront this deep-seated defect, I will first describe the procedural differences in the lower courts' approaches to newsworthiness.

A. Procedural Differences

Not only do the lower courts employ inconsistent reasoning in performing the newsworthiness analysis, but they use different procedures as well. Some states consider newsworthiness a matter of law to be decided by the court,³³ while others regard it as a matter of fact to be decided by the jury.³⁴ In allocating burdens of proof, many states require the plaintiff to show as an element of the tort that the information is not newsworthy,³⁵ whereas others

30. *See id.* ("The press, then, cannot be said to have any right to give information greater than the extent to which the public is entitled to have information.")

31. *Id.* at 1128 n.9 (citing *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973)).

32. Speech is chilled because the media cannot know in advance whether they may be held liable for their publications, and speech rights for dissident speakers are jeopardized because judicial biases against such speakers are not constrained by consistent application of bright-line rules. *See infra* text accompanying notes 102–04.

33. *See, e.g., Cinel v. Connick*, 15 F.3d 1338, 1345–46 (5th Cir. 1994) (Louisiana); *Barber v. Time, Inc.*, 159 S.W.2d 291, 295 (Mo. 1942).

34. *See, e.g., Virgil v. Time, Inc.*, 527 F.2d 1122, 1130 (9th Cir. 1975) (California).

35. *See, e.g., Cinel*, 15 F.3d at 1345 (Louisiana); *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 768 (Ct. App. 1983).

consider newsworthiness an affirmative defense.³⁶ These procedural differences exacerbate the inconsistent newsworthiness determinations made by the lower courts.

Also, the lower courts employ three different methods of performing the substantive newsworthiness analysis. The first approach focuses exclusively on newsworthiness, and treats this inquiry as an "either-or" proposition: Either the speech at issue is newsworthy and protected by the First Amendment, or it is not newsworthy and not protected by the First Amendment.³⁷ The second approach to newsworthiness adds another variable to the analysis: the privacy of the individual who is the subject of speech. This "narrow balancing" approach weighs the privacy interest of the individual against our collective interest in speech.³⁸ Finally, the third approach to newsworthiness expands the scope of the inquiry to include various social interests in addition to speech and privacy. Under this approach, as under the narrow balancing approach, the court assesses the speech interest in terms of its contribution to public debate, that is, its newsworthiness. It then determines the importance of the countervailing interest in privacy. Moreover, the court considers any other relevant social interests such as rehabilitating criminals,³⁹ protecting the identity of witnesses,⁴⁰ and maintaining the safety of victims.⁴¹ It places these interests on the scale alongside privacy and against speech. The court will grant the speaker First Amendment protection only if it finds that the

36. See, e.g., *Vassiliades v. Garfinckel's*, 492 A.2d 580, 588–89 (D.C. 1985).

37. For instance, in *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980) (per curiam), the Fifth Circuit affirmed the district court's grant of summary judgment against a plaintiff who was seeking damages for disclosure of information about her home life and marriage to a civil rights leader who was the subject of a book published by the defendant. *Id.* at 396–97. After finding the speech newsworthy, the court held that, all other considerations aside, the media had an absolute liberty to publish the information because of "the privilege [of the press] to publish or broadcast news or other matters of public interest." *Id.* at 397; see also *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 301 (Iowa 1979) ("[I]nvasion of privacy for a truthful disclosure is actionable only if the publicity is not newsworthy.").

38. The Georgia Court of Appeals employed this approach in *Macon Telegraph Publishing Co. v. Tatum*, 430 S.E.2d 18 (Ga. Ct. App. 1993), when it held that publication of a rape victim's name is not protected by the First Amendment because the privacy interest of the rape victim outweighs the negligible contribution of this speech to public debate. *Id.* at 22; see *id.* ("The legally protected right to privacy is limited by the rights of speech and of the press, and the two sets of rights must be balanced so that neither is allowed to destroy the other."); see also *Daily Times Democrat v. Graham*, 162 So. 2d 474, 476 (Ala. 1964) ("There is a fertile medium in this field of torts for the production of conflicts between the right of the individual to be let alone, and the right of the public to know . . ."). Similarly, in *Taylor v. K.T.V.B., Inc.*, 525 P.2d 984, 987 (Idaho 1974), the court stated:

The present case requires us to weigh the delicate interests involved—the right of the public to be given prompt, accurate, full and detailed information about the conduct of police officers and those they are arresting, and the right of persons to be spared from the disclosure of embarrassing, albeit true, private facts about their lives.

39. See *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 40–41 (Cal. 1971).

40. See *Capra v. Thoroughbred Racing Ass'n of North America*, 787 F.2d 463, 464–65 (9th Cir. 1986).

41. See *Times Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556, 559–60 (Ct. App. 1988); see also *Hyde v. City of Columbia*, 637 S.W.2d 251, 267–69 (Mo. Ct. App. 1982) (finding that abduction victim's right to personal security outweighed right of press to publish her name and address because this information was of trivial concern to public), *cert. denied*, 459 U.S. 1226 (1983).

speech is sufficiently newsworthy to supplant both the privacy interest and the social interests.⁴²

With all of these approaches, however, the most important inquiry is whether the speech is newsworthy. No matter what procedural constraints the courts adopt or what interests they consider other than speech, the bottom line is that courts will offer the speaker First Amendment protection only if they find that her speech reaches a threshold level of newsworthiness. The most important component of courts' First Amendment inquiries in private facts cases is, therefore, the substantive analysis of newsworthiness. As will be seen in the next section, this is where the current tort breaks down.

B. *Substantive Disagreements*

The newsworthiness analysis creates several problems for the current private facts tort that cannot be solved by anything short of a complete overhaul. For one, the newsworthiness analysis chills speech because it compels judges and juries to engage in ad hoc, fact-specific inquiries where they often disagree about whether speech enhances public debate even when they face almost identical sets of facts. The results cannot be made uniform because judges and jurors will always disagree over the best means to advance the democratic purpose of the First Amendment. Although some courts have attempted to harmonize their decisions by setting forth factors to guide the newsworthiness analysis, this analysis remains inherently unpredictable because the social view allows for different, and often contradictory, reasoning on how these factors should be employed. This inconsistent reasoning leads to incoherent results: Privacy is sometimes overprotected at the expense of speech, and, other times, speech is overprotected at the expense of privacy.

1. *Inconsistent Reasoning*

Due to the lower courts' allegiance to the social view of the First Amendment, they have analyzed newsworthiness based on the content of speech along with a host of other considerations. For instance, some judges and juries consider the identity of the speaker because particular speakers more frequently comment on political issues than do others;⁴³ other courts consider

42. For examples of cases where courts used this "open-ended balancing approach," see *Capra*, 787 F.2d at 465 (finding that disclosure of names in federal witness protection program was not protected by First Amendment because "program possesses some social values that weigh against unlimited free speech under the general balancing test of *Virgil* and subsequent cases"); *Briscoe*, 483 P.2d at 43 ("[T]he interests at stake here are not merely those of publication and privacy alone, for the state has a compelling interest in the efficacy of penal systems in rehabilitating criminals and returning them as productive and law-abiding citizens to the society whence they came.").

43. For example, a speech made by a candidate for public office is much more likely to include political matters than is a commercial produced by a car manufacturer.

the amount of time that elapses between the event and its publication because current events are more likely than old news to attract a widespread audience. But when push comes to shove, the social view dictates that the content of speech be the courts' primary concern because certain types of speech, regardless of who says it or how long ago it was said, contribute more to public debate.⁴⁴

Although some courts have adopted a broad general rule favoring speech on criminal matters, including details about the victim,⁴⁵ other courts have disregarded this rule and have found such speech to be unnewsworthy. For instance, in *Macon Telegraph Publishing Co. v. Tatum*,⁴⁶ the Georgia Court of Appeals held that the First Amendment did not protect a newspaper that published the name and address of a sexual assault victim.⁴⁷ Without elaborating on its reasoning, the court stated that "[b]y passing the Georgia Rape Shield Statute, . . . the Georgia Legislature has stated as a matter of public policy that, where the crime involved is rape, sexual assault or attempted sexual assault, the legitimate public interest in the identity of the victim does *not* outweigh the victim's privacy interest."⁴⁸ This is a noteworthy result because it conflicts with the principle set forth in *Morgan ex rel. Chambon v. Celender*⁴⁹ and *Briscoe v. Reader's Digest Ass'n*⁵⁰ that the First Amendment protects publication of victim data because such information helps the public gain a fuller understanding of the criminal justice system.⁵¹

44. For instance, reports about criminal activity are generally newsworthy because "[t]he circumstances under which crimes occur, the techniques used by those outside the law, the tragedy that may befall the victims—these are vital bits of information for people coping with the exigencies of modern life." *Briscoe*, 483 P.2d at 39; *see also* *Anonsen v. Donahue*, 857 S.W.2d 700, 704 (Tex. Ct. App. 1993) ("[W]e have no doubt that, as a matter of law, the crimes of incest and rape, the victimization of innocent people whose lives are touched by those crimes, and the importance of fostering understanding and healing of those victims, are matters of legitimate public concern."). Implicit in the reasoning of these cases is the recognition that the criminal justice system is one of the most important political institutions in a democratic society.

By contrast, reports of individual medical circumstances are generally not newsworthy because naming an impaired individual does not increase the stock of medical information available to the public. *See, e.g., Barber v. Time, Inc.*, 159 S.W.2d 291, 295 (Mo. 1942). Nor are accounts of sexual activity newsworthy because details of one's sexuality are so unique to the individual that their publication does not enlighten the public. *See, e.g., Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 773 (Ct. App. 1983).

45. *See, e.g., Morgan ex rel. Chambon v. Celender*, 780 F. Supp. 307, 310 (W.D. Pa. 1992).

46. 430 S.E.2d 18 (Ga. Ct. App. 1993).

47. *Id.* at 22.

48. *Id.*

49. 780 F. Supp. 307 (W.D. Pa. 1992).

50. 483 P.2d 34 (Cal. 1971).

51. *See Morgan*, 780 F. Supp. at 310; *Briscoe*, 483 P.2d at 39; *see also* *Cape Publications, Inc. v. Bridges*, 423 So. 2d 426, 427–28 (Fla. Dist. Ct. App. 1982) (holding that publication of photograph of plaintiff, clad only in dish towel after being rescued by police from her estranged husband who had been holding her hostage, did not constitute invasion of privacy because abduction was newsworthy story); *Doe v. H & C Communications Inc.*, 21 Media L. Rep. (BNA) 1639, 1640 (Fla. Cir. Ct. 1993) (holding that television station's broadcast of interview with plaintiff, who was victim of sexual assault at Walt Disney World, was protected by First Amendment because sexual assault is clearly matter of public interest); *Tucker v. News Publishing Co.*, 397 S.E.2d 499, 501 (Ga. Ct. App. 1990) (finding that information about

Similar inconsistencies exist in the context of speech on sexual identity. For example, the California Court of Appeal in *Sipple v. Chronicle Publishing Co.*⁵² refused to hold the publisher liable for disclosing the plaintiff's homosexual orientation in an article describing his actions to thwart the attempted assassination of President Ford.⁵³ The court reached this conclusion because the publications "were prompted by legitimate political considerations, i.e., to dispel the false public opinion that gays were timid, weak and unheroic figures and to raise the equally important political question whether the President of the United States entertained a discriminatory attitude or bias against a minority group such as homosexuals."⁵⁴ This reasoning, however, conflicts with *Diaz v. Oakland Tribune, Inc.*,⁵⁵ where the same court had concluded that the transsexual identity of a woman running for student body president was not newsworthy because this information had no bearing on the candidate's fitness for office.⁵⁶ If it had used an analysis like the one it later used in *Sipple*, the *Diaz* court would have concluded that reports of Diaz's sexual identity dispelled the myth that transsexuals are dysfunctional individuals who are unable to be leaders in their communities. These cases thus demonstrate that different judges can employ the social view to reach opposite conclusions in their newsworthiness analyses.⁵⁷

The lower courts are even more deeply divided over reports of individual medical circumstances. Not only have some courts found that such reports are newsworthy, but at least one court has suggested that the social view requires that this type of speech be given heightened protection. In *Howard v. Des Moines Register & Tribune Co.*,⁵⁸ the Iowa Supreme Court held that disclosure of the plaintiff's involuntary sterilization was newsworthy as a matter of law.⁵⁹ The court reasoned: "In the sense of serving an appropriate news function, the disclosure contributed constructively to the impact of the article. It offered a personalized frame of reference to which the reader could relate, fostering perception and understanding. Moreover, it lent specificity and credibility to the report."⁶⁰ This "personalization" argument, however,

students' violent attack on fellow student was matter of legitimate public interest); *Sanchez v. Affiliated Publications Inc.*, 22 Media L. Rep. (BNA) 1188, 1189 (Mass. Super. Ct. 1993) (dismissing private facts claim against newspaper for describing rape of 14-year-old girl because story was "an accurate account of the commission of a serious crime which [is] a matter of legitimate public interest").

52. 201 Cal. Rptr. 665 (Ct. App. 1984).

53. *Id.* at 671.

54. *Id.* at 670.

55. 188 Cal. Rptr. 762 (Ct. App. 1983).

56. *Id.* at 773.

57. See also *Honig v. Nashville Banner Publishing Co.*, 10 Media L. Rep. (BNA) 2139, 2140 (Tenn. Ct. App. 1984) (holding that statements drawn from public record of lawsuit surrounding woman's placing hex on lover's sex life are newsworthy).

58. 283 N.W.2d 289 (Iowa 1979). Although *Howard* is also a public records case, it contains an extensive discussion of newsworthiness. See *id.* at 300-03.

59. *Id.* at 303.

60. *Id.*

contrasts sharply with the reasoning in *Barber v. Time, Inc.*⁶¹ and *Vassiliades v. Garfinckel's*,⁶² where courts concluded that the First Amendment does not protect speech identifying an impaired individual because these courts did not consider such speech to communicate any medical information to the public.⁶³ In fact, the *Howard* court employed exactly the opposite analysis as did the court in *Barber*. Whereas the *Barber* court decided that pictures of those with medical infirmities have little social value because they only serve to attract the viewer's interest,⁶⁴ the *Howard* court reasoned that "the disclosure served as an effective means of accomplishing the intended news function. It had positive communicative value in *attracting the reader's attention* to the article's subject matter and in supporting expression of the underlying theme."⁶⁵ Thus, not only do the lower courts disagree over which factors to consider, but they also disagree about how to employ them. The resulting uncertainty is troubling to the media because they cannot publish or broadcast private facts about individuals without some fear of legal reprisal. As a consequence, many broadcasters and publishers may censor themselves to avoid legal exposure.⁶⁶

2. *Inconsistent Results*

Such inconsistent thinking also leads to incompatible results regarding the courts' protection of privacy and speech. Due to the extreme discretion accorded judges and juries in the newsworthiness analysis and their inconsistent reasoning under the social view, some courts will stretch the First Amendment to protect speech at the expense of privacy, whereas other courts zealously protect privacy with little regard for speech. When compared, these irreconcilable outcomes illustrate that the current private facts case law is more a product of the whim of individual judges and juries than the result of coherent First Amendment thought.

61. 159 S.W.2d 291 (Mo. 1942).

62. 492 A.2d 580 (D.C. 1985) (holding plastic surgeon liable for invasion of privacy for using photographs of plaintiff's cosmetic surgery).

63. *Vassiliades*, 492 A.2d at 589-90; *Barber*, 159 S.W.2d at 295; see *supra* note 44.

64. See *Barber*, 159 S.W.2d at 295.

65. *Howard*, 283 N.W.2d at 303 (emphasis added).

66. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989) (expressing concern that self-censorship would result from statute that punished media for publishing certain truthful information). Moreover, the media cannot reduce their exposure to liability by taking certain steps to establish an affirmative defense. With the current approach to private facts, the media are unsure whether they will prevail on a newsworthiness defense until the court reaches its final verdict because the newsworthiness determination relies almost completely on the subjective decisionmaking of the judge or jury in the case. By contrast, if the court were to employ a method-focused analysis, so that the conduct of the media rather than the content of their speech constituted their defense, the media could be confident that they would not be held liable for a publication or broadcast if they took appropriate action to satisfy the requirements of the defense. For further discussion of this issue, see *infra* text accompanying note 153.

I will start with those courts that have been extremely protective of the right to privacy, even at the expense of speech. In *Daily Times Democrat v. Graham*,⁶⁷ the Alabama Supreme Court held that publication of a photograph showing the plaintiff with her dress blown up as she was leaving a fun house was an invasion of the plaintiff's privacy.⁶⁸ Because the court found that the picture was not newsworthy and that the plaintiff had not voluntarily assumed the embarrassing pose, it refused to protect the media-defendant despite the fact that the photograph was taken in a public place.⁶⁹ Similarly, in *Times Mirror Co. v. Superior Court*,⁷⁰ the California Court of Appeal held that the First Amendment did not, as a matter of law, protect a newspaper that printed the name of a witness who found a murder victim's body.⁷¹ The court decided that the plaintiff's privacy interests superseded the speech interests of the press even though the information was obtained through the routine reporting technique of interviewing the plaintiff's neighbors.⁷²

In sharp contrast to these decisions that enshrine privacy, some courts go to great lengths to protect speech. One example is *Cinel v. Connick*,⁷³ where local authorities seized homemade videotapes of a priest engaged in homosexual activity with two young parishioners. Copies of the videotapes were subsequently leaked to a local investigative reporter, who broadcast portions of them.⁷⁴ Although the material was improperly leaked from investigative files, the federal district court held that disclosure of the information did not violate the plaintiff-priest's right of privacy because the information reflected on the guilt or innocence of the priest and was, therefore, protected by the newsworthiness privilege.⁷⁵ Similarly, in *Morgan ex rel. Chambon v. Celender*,⁷⁶ another federal district court invoked the newsworthiness privilege to allow publication of information obtained by improper means. There, the defendant-newspaper relied on the victim's mother as a source to expose her child's sexual abuse at the hands of the town's former police chief.⁷⁷ The mother divulged the information only because the newspaper reporter promised that her statements were "off the record" and that no names would be used in connection with the article and accompanying photograph.⁷⁸ Nevertheless, the court decided that the newspaper had a right

67. 162 So. 2d 474 (Ala. 1964).

68. *Id.* at 478.

69. *Id.* at 477-78.

70. 244 Cal. Rptr. 556 (Ct. App. 1988).

71. *Id.* at 562.

72. *Id.* at 564.

73. 792 F. Supp. 492 (E.D. La. 1992), *aff'd*, 15 F.3d 1338 (5th Cir. 1994).

74. *Id.* at 494.

75. *See Cinel*, 15 F.3d at 1346 (construing district court decision in terms of newsworthiness).

76. 780 F. Supp. 307 (W.D. Pa. 1992).

77. *Id.* at 309.

78. *Id.*

to publish such items because it found that the prosecution of a former police chief charged with sexual abuse was newsworthy.⁷⁹

Together, these cases illustrate the incoherent state of the current private facts tort. Some courts have invoked the First Amendment to protect a television station that broadcast the private sexual activities of a priest⁸⁰ and a newspaper that identified a child victim of sexual assault,⁸¹ while other courts have allowed the press to incur civil liability for publishing a rather tame "Marilyn Monroe" photograph⁸² and for printing the name of a witness who found a dead body.⁸³ These expansive and narrow interpretations of the First Amendment are difficult, if not impossible, to reconcile. Thus, judges' and juries' inconsistent notions about what types of speech enrich public debate lead to inconsistent outcomes such that speech and privacy are not uniformly protected. Such unpredictability chills speech and inhibits one's ability to control what is private. If these effects are to be ameliorated and the law is to provide more than ad hoc justice, the courts must abandon the newsworthiness criterion of the private facts tort. The Supreme Court has already begun this process.

III. THE SUPREME COURT'S RESPONSE

Although the Supreme Court has never directly addressed the constitutionality of the private facts tort, it has carved out the instances where publication of true private facts is protected by the First Amendment.⁸⁴ Unlike the lower courts, the Supreme Court has adopted a method-focused analysis of the tort. The problem is that, simultaneously, the Court has stated its allegiance to the social view of the First Amendment. Due to this tension between practice and theory, the Court has adopted a jurisprudence that conflates content with method. But rather than mixing approaches, I argue that the Court should finish what it has started and abandon the social view of the

79. *Id.* at 310; *see also* Scheetz v. Morning Call, Inc., 747 F. Supp. 1515 (E.D. Pa. 1990) (upholding summary judgment for defendant-newspaper that published stories based on information contained in confidential police report); Doe v. H & C Communications, Inc., 21 Media L. Rep. (BNA) 1639 (Fla. Cir. Ct. 1993) (dismissing disclosure complaint for broadcast of interview with plaintiff who was victim of sexual assault at Walt Disney World because information was matter of public interest despite defendant's alleged assurance of anonymity); *In re* Osceola County Grand Jury Report, 18 Media L. Rep. (BNA) 1489 (Fla. Cir. Ct. 1990) (protecting newspaper's publication of information allegedly contained in expunged grand jury presentment because publication of allegations of police misconduct was newsworthy).

80. *See Cinel*, 15 F.3d at 1346.

81. *See Morgan*, 780 F. Supp. at 310.

82. *See Daily Times Democrat*, 162 So. 2d at 477-78.

83. *See Times Mirror Co.*, 244 Cal. Rptr. at 562.

84. *See Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding that publication of truthful information lawfully obtained may not be punished absent state interest of highest order); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (holding that newspaper may publish lawfully obtained name of juvenile defendant); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that television station may broadcast deceased rape victim's name obtained from public records).

First Amendment so that it can formulate a more principled, exclusively method-focused approach to the private facts tort.

The Court's general shift toward a method-focused analysis is closely linked to its gradual de-emphasis of the social view of the First Amendment in private facts cases. Although the Court in *Cox Broadcasting Corp. v. Cohn*⁸⁵ and *Smith v. Daily Mail Publishing Co.*⁸⁶ expressed its allegiance to the social view, it took a giant step toward a rights-based approach by implicitly dismantling the newsworthiness criterion. In *Cox*, the Court held that the First Amendment protects a newspaper that publishes a rape victim's name obtained from official court records.⁸⁷ Although the *Cox* Court based its holding on the newsworthy content of the speech,⁸⁸ it placed great stock in the method by which the information was obtained. The Court combined content with method when it found that information contained in public records (method) is newsworthy (content) because public records are inherently connected with governmental functions. As Justice White explained:

By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media.⁸⁹

The Court further undermined the social view when it set forth a bright-line, method-focused rule to replace the content-based analysis of the lower courts. It proclaimed: "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it."⁹⁰ Thus, the *Cox* Court held that, regardless of content, information obtained from public records is newsworthy and protected by the First Amendment.

In its next private facts case, the Court almost completely broke away from the social view of the First Amendment. In *Smith v. Daily Mail Publishing Co.*,⁹¹ the Court held that a West Virginia statute prohibiting the truthful publication of an alleged juvenile offender's name violated the First Amendment because the name was lawfully obtained by monitoring police band radio broadcasts and interviewing eyewitnesses.⁹² The Court never once

85. 420 U.S. 469 (1975).

86. 443 U.S. 97 (1979).

87. *Cox*, 420 U.S. at 496-97.

88. *Id.* at 495. The Court did not explicitly employ the newsworthiness privilege as an absolute defense. Instead, it held that "[i]n preserving [a democratic] form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." *Id.*

89. *Id.*

90. *Id.* at 496.

91. 443 U.S. 97 (1979).

92. *Id.* at 104.

mentioned the social purpose of the First Amendment. Further, instead of concerning itself with the content of the speech, the Court focused on the method by which the underlying information had been obtained. It stressed that “respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant.”⁹³ It then concluded: “If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here.”⁹⁴ In so doing, the Court entirely ignored the social view of the First Amendment and its content-based analysis.

Ten years later, in *Florida Star v. B.J.F.*,⁹⁵ the Supreme Court again employed its method-focused approach. There, the Court found that imposing liability on a newspaper that published the name of a rape victim obtained from a police report available in the police press room violated the First Amendment.⁹⁶ In applying *Daily Mail* to the facts of *Florida Star*, the Court found that the speech was protected by the First Amendment because the newspaper “lawfully obtained” the plaintiff’s name.⁹⁷ Although the Court also mentioned that “the news article concerned ‘a matter of public significance,’”⁹⁸ there are two reasons to believe that this content analysis was not necessary for the decision. First, the content analysis was incomplete—the Court only determined that “the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities.”⁹⁹ The Court did not analyze the newsworthiness of the victim’s identity, which for the lower court was the central issue of the case.¹⁰⁰ Second, the Court did not include any finding of newsworthiness in its ultimate holding:

We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability under [the Florida statute] to appellant under the facts of this case.¹⁰¹

93. *Id.* at 103.

94. *Id.* at 104.

95. 491 U.S. 524 (1989).

96. *Id.* at 532.

97. *Id.* at 536.

98. *Id.* (quoting *Daily Mail*, 443 U.S. at 103).

99. *Id.* at 536–37.

100. See *Florida Star v. B.J.F.*, 499 So. 2d 883, 884 (Fla. Dist. Ct. App. 1986), *rev'd*, 491 U.S. 524 (1989).

101. *Florida Star*, 491 U.S. at 541.

By failing to mention newsworthiness in its ultimate holding and instead focusing entirely on the method by which the information was obtained, the Supreme Court in *Florida Star* continued its shift away from the social view to a rights-based, method-focused analysis of private facts cases.

Taken together, *Cox, Daily Mail*, and *Florida Star* represent the Supreme Court's attempt to redesign the private facts tort by substituting a method-focused inquiry for the newsworthiness analysis. But before the Court can do this in a theoretically coherent manner, it must change its approach to the First Amendment. Accordingly, in the part that follows, I take this step for the Court by reconstructing the private facts tort from a rights-based perspective.

IV. THE RIGHTS-BASED APPROACH TO THE PRIVATE FACTS TORT

The Supreme Court is reluctant to abolish the longstanding, content-sensitive newsworthiness criterion outright because of its traditional adherence to the social view of the First Amendment. Nevertheless, by moving towards a method-focused analysis, the Court has implicitly supported a shift to a rights-based approach to the private facts tort. Using this as a starting point, I propose a new, rights-based approach to the private facts tort that inquires not into the content of speech, but rather into how the plaintiff originally lost control over the private information. After I explain why we need a general change in First Amendment interpretation to a hierarchy-of-rights model, I describe how this approach operates and why I prioritize privacy over speech. Then, I examine the right of privacy from a rights-based perspective and conclude that privacy must be defined by the conduct of the involved parties rather than by the content of their speech. Consequently, I identify three types of privacy violations in which personal information is taken from an individual without her consent. From these ingredients, I construct a method-focused private facts tort where a publisher or broadcaster may be held liable for public disclosure of private facts only if (1) it, or one of its sources, obtained the information by improper means such as physical invasion of privacy, breach of fiduciary duty, or breach of a duty of confidentiality, and (2) the defendant had actual knowledge or reason to believe that the information was improperly obtained.

The hierarchy-of-rights approach is superior to the social view for two basic reasons. First, the hierarchy-of-rights approach places speech rights of dissident speakers on more stable footing. Unlike the social view, which relies heavily on judicial intuition and community standards of socially acceptable speech,¹⁰² the hierarchy-of-rights approach concentrates on the objective

102. The influence of judicial biases and social norms will frequently operate to suppress the speech of unconventional speakers. Cf. *Rosenblatt v. Baer*, 383 U.S. 75, 88 n.15 (1966) (recognizing "the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers"). In the private facts context, for instance, courts would not likely be sympathetic to gay rights activists who

question of whether privacy rights were violated. This shift in focus secures speech rights for dissident speakers because it ensures that *all* speakers are judged according to the same rules of behavior rather than by notions of the acceptability of their speech. Second, the hierarchy-of-rights approach does not chill speech as much as the social view. Whereas the latter demands that courts engage in ad hoc decisionmaking, such that they will often disagree over whether speech enhances (or degrades) public debate, the former instructs courts to develop bright-line rules to demarcate the boundaries between rights.¹⁰³ This feature of the hierarchy-of-rights approach enhances individual liberty because it offers the media clear guidance as to what they may publish or broadcast without fear of legal reprisal.¹⁰⁴ Thus, not only does the hierarchy-of-rights approach provide greater security for those speakers who are most dependent on constitutional protection, but it enhances liberty for the mainstream media as well.

A. *Constructing the Method-Focused Private Facts Tort*

1. *How the Hierarchy-of-Rights Approach Operates*

On the hierarchy-of-rights approach to the First Amendment, an individual has a constitutionally protected right to free speech up to the point where she infringes on the higher-order rights of others.¹⁰⁵ Where the speaker does not violate the higher-order right of another, the court must invoke the First Amendment to protect the speaker no matter how trivial the speech may be.¹⁰⁶ Conversely, where the court finds that such a violation has occurred, the First Amendment *must* yield, and the court should hold the speaker liable for committing the rights violation.¹⁰⁷

When the court performs its First Amendment analysis to determine whether speech is constitutionally protected, it must reach one of two conclusions. Either (1) the speaker does not violate the higher-order right of

reveal the sexual orientation of notable celebrities. Cf. John P. Elwood, Note, *Outing, Privacy, and the First Amendment*, 102 YALE L.J. 747 (1992) (arguing that "outed" plaintiff ought to prevail in invasion of privacy action unless plaintiff's sexual orientation is relevant to public controversy).

103. The social view is much less amenable to such bright-line demarcation because it is very difficult to identify categories of speech that courts would agree are newsworthy in every case.

104. It is important to note that this rights-based appraisal of the benefits that accrue from reducing the chilling effect on speech is based on the enhanced ability of individual speakers to exercise their speech rights in an uninhibited manner, not on the increased social utility generated by such speech.

105. See EMERSON, *supra* note 3, at 554.

106. See *id.* at 548.

107. Of course, there are structural constraints that may prevent courts from so holding. Because the First Amendment only protects speech, not privacy, the rights-based approach instructs judges to invalidate the current private facts tort under the First Amendment and to adopt the proposed formulation of the tort to protect the common law right to privacy. However, where there is no such common law right or the state court refuses to adopt the proposed private facts tort, the Constitution does not compel them to do so. Cf. *Hall v. Post*, 372 S.E.2d 711, 717 (N.C. 1988) (holding that North Carolina does not recognize private facts tort at common law).

another and, therefore, must receive First Amendment protection for his speech, or (2) the speaker violates the higher-order right of another and, therefore, may not receive such protection. The first proposition compels the reform of the private facts tort because the current tort fails to protect speakers who do not engage in a rights violation. The second proposition compels the adoption of the method-focused private facts tort proposed in this Note because a court may refuse to protect the speaker only after it determines that he has violated the higher-order right of another. Since such higher-order rights invariably are recognized under the Constitution or at common law, such a determination by a court is tantamount to a finding that the plaintiff should prevail in a tort action against the speaker for a violation of his higher-order right. Accordingly, the courts must recognize a private facts tort that provides the harmed individual a remedy in such instances.

Of course, the difficulty of the hierarchy-of-rights approach lies in determining when speech violates the higher-order right of another. To make this determination in the private facts context, the court must engage in a two-step inquiry. First, it must determine whether to prioritize privacy over speech.¹⁰⁸ If it decides to do so, then the court must define the scope of the legally enforceable right of privacy so that it does not swallow up the right to speech.

2. *Prioritizing Privacy over Speech*

An absolute right to privacy or speech at the expense of the other is undesirable because there are some situations where privacy should be preferred to speech and others in which speech should be preferred to privacy. For example, the law favors privacy to prohibit leaks of attorney-client communications, but it prefers speech to allow for public disclosure of a criminal act. Therefore, when adopting a bright-line rule to prioritize one right over another, we must define the superior right in a clear and limited manner so that it does not unduly encroach upon the inferior right.

From an individual-rights perspective, privacy ought to receive greater protection than speech for two reasons. First, speech has a greater propensity than privacy to cause individual harm. Unlike the enjoyment of privacy—which entails freedom from an audience and is asserted by the person who is the subject of the right—the exercise of speech rights may harm an unwilling subject or listener. For example, a speaker may harm another by subjecting him to death threats or sexual harassment, or she may communicate information about him that he does not want exposed to the general public,

108. The rights-based approach only requires that a right be restricted when it interferes with a *higher-order* right of another. If the right that is asserted to curtail speech is not a higher-order right, then speech may not be restricted even if it interferes with this right.

such as reports about his sexuality,¹⁰⁹ alleged criminal activities,¹¹⁰ or victimization through sexual abuse.¹¹¹ Put in economic terms, the cost of privacy is spread throughout society—when one exercises the right of privacy, one excludes society as a whole from access to information—whereas the cost of speech is often borne by particular individuals. Because “the guiding principle [is] that the exercise of an individual right which injures another person would not be favored. . . . the right of privacy would prevail over freedom of expression.”¹¹²

Second, the primary concern of the rights-based approach is individual liberty, not the social good. Unlike the right to speech, which serves both individual and social interests, the benefits of privacy are entirely individual.¹¹³ Scholars characterize the right of privacy as protecting the individual’s interests in “[a]utonomy, identity, and intimacy,”¹¹⁴ permitting emotional release, and providing an opportunity for self-evaluation.¹¹⁵ Since these benefits redound completely to the individual, “[t]he rules safeguarding the right of privacy would block out the rules governing the system of free expression. . . .”¹¹⁶ Therefore, as these two lines of argument illustrate, the right of privacy ought to take priority over the right of speech from the rights-based perspective because privacy is more likely to augment individual liberty without harming individuals.¹¹⁷

But since the right to speech ends where the right to privacy begins under the proposed rights-based approach, the right to speech is vulnerable unless the right to privacy has clear limits.¹¹⁸ Thus, the next step of the hierarchy-of-

109. See, e.g., *Cinel v. Connick*, 792 F. Supp. 492 (E.D. La. 1992).

110. See, e.g., *In re Osceola County Grand Jury Report*, 18 Media L. Rep. (BNA) 1489 (Fla. Cir. Ct. 1990).

111. See, e.g., *Morgan ex rel. Chambon v. Celender*, 780 F. Supp. 307 (W.D. Pa. 1992).

112. Emerson, *supra* note 4, at 341.

113. See *id.* at 337 (“Essentially [the right of privacy] is designed to support the individual, to protect the core of individuality, in the relations of the individual to the collective society.”)

114. Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977).

115. See ALAN F. WESTIN, *PRIVACY AND FREEDOM* 32–39 (1967).

116. EMERSON, *supra* note 3, at 562; see also Emerson, *supra* note 4, at 341 (“[T]he individual right of privacy would plainly take precedence over the collective interest.”).

By contrast, one who holds the social view would prioritize speech over privacy for this very reason—speech, but not privacy, creates a social benefit by increasing the pool of information available to the public. See, e.g., *Daily Times Democrat v. Graham*, 162 So. 2d 474, 476 (Ala. 1964) (“The right of action for invasion of privacy has had to give way to the interest of the public to be informed”); *Cape Publications, Inc. v. Bridges*, 423 So. 2d 426, 427 (Fla. Dist. Ct. App. 1982) (“At some point the public interest in obtaining information becomes dominant over the individual’s right of privacy.”).

117. For cases not involving the private facts tort where the Court has favored privacy to speech, see *Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988) (upholding constitutionality of municipal ordinance banning residential picketing to serve interest of residential privacy); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“[I]n the privacy of the home, . . . the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”); *Rowan v. United States Post Office Dep’t*, 397 U.S. 728, 738 (1970) (“The asserted right of a mailer, we repeat, stops at the outer boundary of every person’s domain.”); *Kovacs v. Cooper*, 336 U.S. 77, 87–88 (1949) (finding that residential privacy is superior to speech in upholding ordinance banning loudspeakers on public streets).

118. While it may seem counterintuitive to focus on privacy when defining the First Amendment right to speech, the hierarchy-of-rights approach demands such an inquiry because rights are defined in relation

rights approach requires that we clearly define the right of privacy as it relates to the private facts tort.¹¹⁹

3. *Defining the Right of Privacy from a Rights-Based Perspective*

While it may seem ambitious to capture the right of privacy in a bright-line rule, the reflections of many scholars and judges simplify this task. With respect to the right of privacy protected by the private facts tort, there are essentially two schools of thought.¹²⁰ The first school defines privacy based on the content of the speech: The individual has a right to prevent certain information about herself from reaching public attention. The Ninth Circuit embraced this conception of privacy when it provided the following description of the private facts tort: “The offense with which we are here involved is not the intrusion by means of which information is obtained; it is the publicizing of that which is private in character.”¹²¹ In contrast to this content-sensitive characterization, the second school defines privacy based on the conduct of the subject whose privacy is at issue and the actions of the source who obtained the contested information: The individual has a right to privacy over that information that he has properly secured, and this right of privacy is violated when such information is obtained by illegitimate means. Professor Richard Parker advanced this “method-focused” construction of privacy when he

to other rights, not based on intrinsic qualities of the right itself. For a similar approach, see EMERSON, *supra* note 3, at 549 (“The problem of reconciling First Amendment rights and privacy rights, where they conflict, is . . . one of defining the constitutional boundaries of the privacy system.”). Of course, the difficulty lies in defining the scope of this actionable right to privacy. I attempt to do this in the next section.

119. Every right is defined by determining (a) what activity involves an exercise of that right (its beginnings) and (b) what activity exceeds the bounds of the right (its limits). For instance, some conduct is not considered speech, *see, e.g.*, *United States v. O’Brien*, 391 U.S. 367, 376 (1968), and some speech is not protected because it exceeds the boundaries of the First Amendment, *see, e.g.*, *Roth v. United States*, 354 U.S. 476, 485 (1957) (obscenity). Because it is beyond dispute that publication of private facts is a form of speech, the only disputed issue is whether it exceeds the limits of the right. To make this determination under the rights-based approach, we must determine where the right to privacy begins.

120. For positions outside either of these schools, see WESTIN, *supra* note 115, at 7 (defining privacy as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”); Milton R. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROBS. 272, 279–80 (1966) (offering spatial definition of privacy as a “claim that there is a sphere of space that has not been dedicated to public use or control”). In contrast to these positive constructions, other courts and scholars have characterized privacy as “the right to be let alone.” *See, e.g.*, *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 767 (Ct. App. 1983) (“The specific privacy right with which we are concerned is the right to be free from public disclosure of private embarrassing facts, in short, ‘the right to be let alone.’”); *Barber v. Time, Inc.*, 159 S.W.2d 291, 294 (Mo. 1942) (“The basis of the right of privacy is the right to be let alone.”); Warren & Brandeis, *supra* note 8, at 195, 205.

121. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1126 (9th Cir. 1975) (citation omitted); *see also* EMERSON, *supra* note 3, at 557 (defining privacy in private facts context as preventing “communication that touch[es] the inner core or intimacy” or that describes “personal and intimate details of one’s life”).

defined it as “control over when and by whom the various parts of us can be sensed by others.”¹²²

In choosing between these competing conceptions of privacy, three principles point us to the latter definition. First, the method-focused definition of privacy sets the bounds of the right based on individual behavior rather than on social judgments as to what information is “private.” Such a concentration on individuals rather than community values is more consistent with the rights-based approach. Second, unlike the content-sensitive definition of privacy, the method-focused construction does not evaluate speech by its content. As stated earlier, the hierarchy-of-rights approach differs from the social view in that it defines the contours of the First Amendment by focusing on rights other than speech.¹²³ If the court were to define the right to privacy in the private facts context by the content of speech, it would undermine this fundamental difference in these approaches. Finally, the method-focused approach to privacy presents a smaller threat to individual liberty than does the content-sensitive alternative. Because the courts can set out objective standards describing situations where information is obtained by impermissible means, a method-focused definition of privacy is likely to have a smaller chilling effect on speech than the inherently unpredictable content analysis.¹²⁴ Thus, the method-focused construction of privacy is more compatible with the rights-based perspective.

From here, we can formulate a new private facts tort based on the conduct of the parties who are involved in the alleged privacy violation. On the subject’s side of the equation, the court must focus on control and consent. The method-focused private facts tort must be designed so that the individual can keep his public image within his control unless he “consents,” through his actions, to release certain information about himself to the public. Specifically, an individual would have a legally enforceable right to privacy over personal information if (1) he takes precautions that are necessary to keep such information private, and (2) he does not consent to relinquish this right by unconditionally disclosing private information to others or by permitting others to gain access to the information.¹²⁵ The other side of the equation is that a source violates an individual’s right to privacy when he obtains information

122. Richard B. Parker, *A Definition of Privacy*, 27 *RUTGERS L. REV.* 275, 281 (1974) (emphasis omitted); see also *Briscoe v. Reader’s Digest Ass’n*, 483 P.2d 34, 37 (Cal. 1971) (defining right to privacy as “not so much one of total secrecy as it is of the right to define one’s circle of intimacy—to choose who shall see beneath the quotidian mask”) (emphasis omitted).

123. See *supra* text accompanying notes 105–07.

124. See *infra* Section IV.C.

125. For instance, a court may infer consent to waive the right of privacy when someone performs an activity in a public place. See *Gill v. Hearst Publishing Co.*, 253 P.2d 441, 444 (Cal. 1953) (privacy right waived by couple kissing in public marketplace); *RESTATEMENT (SECOND) OF TORTS* § 652D cmt. b (1977) (“Similarly, there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye.”).

about the subject without consent and through impermissible means. To draw the bright-line rules, we must identify such situations.

The Supreme Court has suggested that the line ought to be drawn using the criminal law. So long as information is "lawfully obtained," the state must assert an extremely important interest to override speech.¹²⁶ But privacy violations occur even when the criminal law is not violated. So that we do not neglect those individuals who suffer violations of their privacy by tortious, if not criminal, conduct, we ought to reconsider the scope of the legally enforceable right of privacy based on the conduct of the parties involved in the dispute.

A good starting place is the tort of invasion of privacy.¹²⁷ Where an individual has created a physical barrier to protect her private activities and a physical invasion exposes such information to others, the invader's conduct violates a legally enforceable right of privacy because the subject of the disclosure took the precautions necessary to create a right of privacy, and control over private information was taken from her without her consent. Similarly, from a rights-based perspective, an individual creates a legally enforceable right of privacy when she contracts with another party to reveal information to that party in exchange for an agreement that the party will not put the information to certain uses. The proposed private facts tort ought to provide redress when the second party breaches such an express duty of confidentiality.¹²⁸

Finally, there is a third category of cases in which the individual loses control over personal information without her consent. Under special circumstances, an individual has little choice in the decision to reveal personal information to others, such as when a rape victim must report her name to the police or when a doctor discovers a patient's physical infirmity. In many of these situations, a duty of confidentiality or fiduciary duty arises because the individual takes the steps necessary to retain a privacy right over the information by entrusting the proper authorities with that information only for the sake of a specific social, or other, benefit. It is a violation of that

126. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979).

127. Also known as "Intrusion upon Seclusion." See RESTATEMENT (SECOND) OF TORTS § 652B (1977).

128. For breaches of a duty of confidentiality, one commentator advocates interring the private facts tort and replacing it with "a legally enforceable duty of confidentiality [that] attach[es] whenever a person or institution intentionally or negligently engages in an unauthorized disclosure of inaccessible, personal information that she/it has explicitly and voluntarily agreed to hold in confidence, and this disclosure results in the publicity of that information." G. Michael Harvey, Comment, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2425 (1992). The rights-based approach is broader than this contractual approach because it includes situations in which the information was obtained by compulsion or force as well. Moreover, the proposed approach attaches liability to the publisher or broadcaster rather than just to the source of the leak. *Cf. id.* at 2390 (arguing that inherent flaw in private facts tort is that it focuses liability on point of publication).

individual's privacy if the confidant (or fiduciary) does not fulfill his obligation to protect the information against disclosure to outside sources.

Accordingly, the proposed private facts tort provides a remedy to the victim who suffers a disclosure due to a breach of a fiduciary or other duty arising from special circumstances, as well as from a breach of an express duty of confidentiality or a physical invasion of privacy. In other words, an individual is presumed to be able to maintain her own privacy without legal recourse unless control over information is taken from her by force (physical invasion), deceit (fiduciary duty and confidentiality), or compulsion (duty of confidentiality arising from special circumstances). When one of these transgressions occurs, the individual has taken the precautions necessary to create a legal right of privacy, but control over the private information has been taken without the individual's consent. These three forms of privacy violations set the bounds of the legal right of privacy for the method-focused private facts tort. This exclusive focus on the method by which the information was originally revealed makes the right of privacy commensurate with the actions of the individual in securing or sacrificing her right to privacy, and it places on trial the conduct of the media rather than the content of their speech.

4. *Constructing the Method-Focused Private Facts Tort*

All that is left now is to determine the scope of liability and iron out the procedural rules of the tort. In order to ensure a remedy for plaintiffs who have suffered a physical invasion of privacy, breach of a fiduciary duty, or breach of a duty of confidentiality, the method-focused private facts tort, in conjunction with other torts, makes all who are party to the privacy violation accountable for their actions. Using a theory that resembles the crime of trafficking in stolen goods, I argue that the publisher or broadcaster of the improperly obtained information should be accountable, in addition to the source of the leak.¹²⁹ Those who publish information obtained through crooked means are party to the invasion of the right to privacy, because they have "aided the thief" by creating the market for the stolen goods and therefore

129. In order to avoid overlap with other torts, however, the private facts tort only targets for liability the publisher of the information, not the source of the leak. Cf. *Hall v. Post*, 372 S.E.2d 711, 716 (N.C. 1988) (arguing that private facts tort overlaps with tort of intentional infliction of emotional distress). The plaintiff can obtain relief from the source of the leak by commencing an action for physical invasion of privacy, breach of fiduciary duty, or breach of a duty of confidentiality. For further discussion of these actions, see RESTATEMENT (SECOND) OF TORTS § 652B (1977) ("Intrusion Upon Seclusion"); M. Thomas Arnold, *Breach of Fiduciary Duty*, in ACCOUNTANTS' LIABILITY 1994, at 341 (PLI Litig. & Admin. Practice Course Handbook Series No. H-506, 1994); Harry M. Johnson, *Invasion of Privacy: Unscrambling the Omelet*, in LIBEL LITIGATION 1992, at 269 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. 338, 1992); Jean A. Mortland, *Remedies for Breach of Fiduciary Duty*, 15 EST. PLAN. 188 (1988); Harvey, *supra* note 128, at 2395-2401, 2422-70 (duty of confidentiality).

provided an outlet for the rights violation.¹³⁰ Like the trafficker in stolen goods who is held accountable for his role in violating property rights, the publisher of improperly obtained information ought to be held liable for its role in violating privacy rights.

But the media's liability must be limited so that their speech is not chilled. Thus, to ensure that a media-defendant is not penalized when it could not have known that the information was improperly obtained, it may defend against a private facts action by showing that it made a diligent inquiry into the method by which the information was obtained. This duty of diligent inquiry can be satisfied as a matter of law if the publisher gets confirmation from both the subject of the story and the original source of the leak that the information was obtained by legitimate means, and their explanations do not conflict.¹³¹ If the publisher satisfies this duty but does not discover that the information was impermissibly obtained, it is immune from liability even if the information was in fact obtained improperly.

The method-focused private facts tort also contains a built-in "whistleblower exception." Because the hierarchy-of-rights approach only protects individual rights, institutional actors do not necessarily have a legal right to privacy or to speech. Institutional actors deserve such legal rights only where individuals rely on the institutions for the exercise of their legal rights. For instance, the media must be afforded a right to speech so that individual journalists and broadcasters can use the media as a conduit by which to express themselves. Consequently, there is an institutional right to speech. Individuals do not, however, rely on institutions to safeguard their individual right of privacy. This right can be exercised fully even if there is no legal protection for the privacy of institutions. Accordingly, the proposed private facts tort would not apply to institutional plaintiffs such as corporations or government agencies.¹³² While a newspaper may be held liable for publishing

130. Cf. 76 C.J.S. *Receiving Stolen Goods* § 2 (1994) ("Statutes criminalizing the receipt of stolen goods . . . are directed at eliminating a market for stolen goods which the purchaser believes to have probably been stolen." (citing *Commonwealth v. Dellamano*, 469 N.E.2d 1254, 1257 (Mass. 1984))).

131. When private facts are improperly obtained, the nature of the information usually puts the media on notice of this fact. For instance, information regarding the medical circumstances of patients or the identity of rape victims is generally obtained by improperly gaining access to medical or police records. Unless the defendant can demonstrate that it made a diligent inquiry to find out whether the information was obtained by improper means, it may be held liable under the public disclosure tort because it otherwise had constructive knowledge that it was trafficking in stolen information. For a further discussion of the duty of diligent inquiry as a matter of law, see *infra* text accompanying notes 153–55.

For discussion of a duty of diligent inquiry in the law on receiving stolen goods, see *People v. Rosenthal*, 90 N.E. 991, 993 (N.Y. 1910) (holding that legislature may declare junk dealer who purchases stolen property guilty of crime of receiving stolen goods, whether he actually knows such property to be stolen or not, provided he does not try to find out by making diligent inquiry). It should also be noted that the crime of receiving stolen property generally contains an additional element of fraudulent intent. See 66 AM. JUR. 2D *Receiving and Transporting Stolen Property* § 3 (1973). I have chosen to omit this element of intent because, in contrast to crimes, torts generally do not require inquiry into the intent of the defendant.

132. Cf. BICKEL, *supra* note 1, at 79–80 ("The government is entitled to keep things private and will attain as much privacy as it can get away with politically by guarding its privacy internally; but . . . [i]t

information about the personal life of a store owner, it could not be held liable for publishing information about the store.¹³³ Consequently, whistleblowers cannot be punished for their speech.

In sum, the method-focused private facts tort is composed of two elements, the second of which allows the defendant to insulate itself from liability as a matter of law: A publisher or broadcaster may be held liable for a private facts action if (1) it, or one of its sources, obtained information about an individual by improper means such as physical invasion of privacy, breach of fiduciary duty, or breach of a duty of confidentiality, and (2) the defendant had actual knowledge or reason to believe that the information was improperly obtained.¹³⁴ This knowledge requirement cannot be satisfied as a matter of law if the defendant gets confirmation from both the subject and the source that the information was obtained legitimately.

B. *Application of the Method-Focused Private Facts Tort*

In order to illustrate how the proposed method-focused private facts tort differs from the current model, I will apply it to some of the cases that I discussed in earlier parts. I will begin with cases in which the plaintiff would prevail under the proposed tort.

In *Florida Star v. B.J.F.*,¹³⁵ the Supreme Court held that imposing damages on a newspaper for publishing the name of a rape victim violated the newspaper's First Amendment rights because the information was "lawfully obtained."¹³⁶ A different conclusion would be reached under the method-focused private facts tort because the information was obtained improperly, even if not unlawfully. As both sides admitted, the contested information was not unconditionally released to the reporter—the incident report that inadvertently included the victim's name was posted in a room with signs making it clear that the identities of rape victims were not matters of public

is severely limited as to means, being restricted, by and large, to enforcing security at the source."). For a criticism of this approach to government privacy, see Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 901-04 (1986).

133. Similarly, the U.S. government could not sue the *New York Times* for publishing excerpts from a top secret study of the Vietnam War that was improperly obtained by a former Pentagon official because governmental privacy is not protected under the rights-based tort. *Cf. New York Times Co. v. United States*, 403 U.S. 713 (1971) (lifting injunction preventing newspaper from publishing Pentagon Papers).

134. A First Amendment case currently pending in the lower courts provides an example where the method-focused private facts tort might come into play. In an embarrassing moment for the law firm of Sullivan & Cromwell, one of its partners violated his fiduciary duty by disclosing to a reporter from *Business Week* magazine information obtained from sealed court documents. Patrick M. Reilly & Amy Stevens, *Sullivan & Cromwell Says a Partner Gave Court Papers to Business Week*, WALL ST. J., Sept. 28, 1995, at A2. Although the publisher claims that it should be permitted to publish its article containing the private facts because it lawfully obtained the sealed documents, *id.* at A12, an individual plaintiff whose privacy was violated would likely be entitled to relief under the proposed method-focused private facts tort because *Business Week* knew that the material was impermissibly obtained, *see id.*

135. 491 U.S. 524 (1989).

136. *Id.* at 536.

record and were not to be published.¹³⁷ Thus, the newspaper would be liable for disclosure of private facts under the method-focused approach based on either of two theories: (1) the police violated their duty of confidentiality to the rape victim by releasing her name to a third party, and the newspaper should have known it was trafficking in improperly obtained information,¹³⁸ or (2) the newspaper violated its duty of confidentiality by reporting information that it received under a condition of nonpublication. In contrast to the outcome in *Florida Star*, where the Court's method-focused analysis rigidly adhered to the "lawfully obtained" doctrine, the media-defendant would have been held liable under the proposed method-focused private facts tort because it should have known that the information was impermissibly revealed through a breach of confidentiality.

The proposed tort would yield a similar result if faced with the facts of *Morgan ex rel. Chambon v. Celender*.¹³⁹ In *Morgan*, a federal district court failed to protect the privacy of a plaintiff whose confidence was violated. The court held that the First Amendment protected the disclosure of facts about a child victim of sexual abuse, even though the victim's mother revealed the facts to the defendant only on the condition that these facts not be published.¹⁴⁰ The court reasoned that "anyone who desires to discuss matters of public concern with a reporter does so at his or her peril that the matter may be published."¹⁴¹ The opposite conclusion would be reached under the method-focused private facts tort because the reporter promised the mother that her statements were "off the record" and that no names would be used in connection with the photograph and article.¹⁴² The newspaper, therefore, would be liable for disclosure of the private facts because it breached an express duty of confidentiality.¹⁴³

In contrast to these cases, where the proposed rights-based tort would favor privacy over speech, the tort would protect speech in the following cases. In *Times Mirror Co. v. Superior Court*,¹⁴⁴ the California Court of Appeal held that a newspaper did not have an absolute First Amendment privilege to print the name of a witness who found a murder victim's body.¹⁴⁵ By contrast, the newspaper would prevail on the rights-based view because the

137. *Id.* at 546 (White, J., dissenting).

138. Since the newspaper received the information from the police, it ought to have known that the police violated their duty not to release the name of a rape victim.

139. 780 F. Supp. 307 (W.D. Pa. 1992).

140. *Id.* at 309-10.

141. *Id.* at 310.

142. *Id.* at 309.

143. See also *Doe v. H & C Communications Inc.*, 21 Media L. Rep. (BNA) 1639 (Fla. Cir. Ct. 1993) (dismissing complaint by plaintiff who participated in interview with defendant-broadcaster only upon assurances that she would be completely unidentifiable in broadcast).

144. 244 Cal. Rptr. 556 (Ct. App. 1988).

145. *Id.* at 560.

information was properly obtained through routine reporting techniques.¹⁴⁶ The plaintiff's case would not meet either element of the method-focused private facts tort. A similar result would be reached under the facts of *Daily Times Democrat v. Graham*,¹⁴⁷ where the Alabama Supreme Court held that publication of a picture showing the plaintiff with her dress blown up as she was leaving a fun house was an invasion of privacy even though the picture was taken in a public place. Notwithstanding the low-value content of the published information, the rights-based approach would protect the defendant-newspaper because the information was obtained by legitimate means. Unless the plaintiff's privacy is specifically violated by the defendant's sources, the plaintiff cannot recover under the proposed tort because there is no higher-order right to override the defendant's right to speech.

C. *Criticisms of the Method-Focused Private Facts Tort*

As the above discussion illustrates, the method-focused private facts tort is sometimes more protective and sometimes less protective of speech than the current model. It will therefore be criticized by some for being overprotective of speech and by others for being overprotective of privacy.

Because the method-focused private facts tort does not protect an individual's privacy when information is obtained by legitimate means, some may criticize it for failing to prevent the dissemination of facts, such as a rape victim's identity, that none of us would wish to be publicized. Although I admit that the method-focused private facts tort is limited in this respect, there must be clear limits placed on the right of privacy to ensure that speech is not substantially chilled. Also, there are practical reasons why the proposed tort promises to be very effective in securing a core right of privacy.¹⁴⁸ First, because the method-focused tort objectively describes the circumstances under which the plaintiff should prevail on her private facts claim rather than relying on the court's subjective determination of newsworthiness, the individual is better able to understand the scope of her right to privacy *ex ante* and, therefore, may exercise this right in a more effective manner. Second, because the method-focused private facts tort concentrates on the conduct of the media rather than the content of their speech, it promises to be more protective of privacy than the current tort, suits under which are almost always dismissed at summary judgment when members of the media assert the newsworthiness

146. *Id.* at 564 (noting that "routine reporting techniques" include interviewing neighbors of victim and obtaining information from coroner's office).

147. 162 So. 2d 474 (Ala. 1964).

148. For instance, the method-focused private facts tort ought to be very effective in protecting against disclosure of the identities of rape victims because the police have a fiduciary duty not to disclose these names to the media. Unless a rape victim reveals to friends or neighbors that she was raped, and does so without a promise of confidentiality, she will likely prevail in an action under the proposed tort for publication of her name because this information must have been improperly obtained from the police.

defense. Thus, by narrowing and more clearly defining the right to privacy, the rights-based tort should increase the likelihood that the courts will consistently protect this right.¹⁴⁹

Others may criticize the method-focused private facts tort for being underprotective of speech. Some will contend that imposing a duty of diligent inquiry on the media will chill speech because publishers are often under great pressure to check an avalanche of facts.¹⁵⁰ They will argue that due to the sheer number of facts contained in newspaper and magazine articles, it simply is not possible for these publications to inquire into the method by which the information was obtained in time to meet their deadlines. Rather than risk liability, many publishers will steer clear of stories containing private facts. Other critics will argue that the fact-specific nature of determining whether the publisher satisfied its duty of diligent inquiry will chill speech because such factual determinations cannot be made at summary judgment. Consequently, many publishers will prefer self-censorship to the potential cost of going to trial.

I would respond to the time pressure concern by noting the contrasts between defamatory and invasive stories. Unlike the truth inquiry in defamation actions, which involves checking numerous facts ranging from the accuracy of quotations to the truth of allegations in a given story,¹⁵¹ the source inquiry in private facts actions usually involves only one or a few personal facts about the individual. Moreover, these facts are almost always revealed by a single source. Thus, the duty of diligent inquiry is less likely to chill speech due to time pressure than is the truth inquiry in defamation suits because there are fewer facts to check and fewer sources to consult.¹⁵²

149. See Harvey, *supra* note 128, at 2394. Harvey notes:

[W]hile this Comment will substantiate the claim that a right to confidentiality is a narrower protection of privacy interests than a general right to privacy, that narrowness is its strength. Because of its greater precision, the proposed tort avoids the practical and constitutional problems that have made courts reluctant to give any substance to the private-facts tort. It thus provides greater protection to privacy interests simply by virtue of being more likely to be enforced by the courts.

Id. (footnote omitted).

150. See *Newton v. NBC, Inc.*, 930 F.2d 662, 683 (9th Cir. 1990).

151. In defamation law, publishers are under no obligation to perform a truth inquiry when the plaintiff is a public figure. See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (holding that failure to investigate accuracy of information, standing alone, is not sufficient to demonstrate actual malice); *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968) (same). Nevertheless, most publishers conduct such an inquiry either to protect their reputation, see *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 901–02 n.5 (9th Cir. 1992), or to ensure against liability if the court finds that the subject of the story is not a public figure. This is due to the fact that, in some jurisdictions, failure to verify a story's accuracy is, by itself, sufficient to establish negligence. See *Kassel v. Gannett Co.*, 875 F.2d 935, 944 (1st Cir. 1989).

152. I must acknowledge that this response does not fully address the time pressure concern because there will be instances when the publisher is unable to reach the subject of the story before publication. In these instances, the publisher cannot satisfy its duty of diligent inquiry as a matter of law, and, as when the subject relates to the publisher that the information was obtained by illegitimate means, the burden would shift to the plaintiff to show that the publisher failed to take reasonable steps to dispel doubts about the legitimacy of the method by which the information was obtained.

The cost criticism, however, requires a more detailed response. Due to the great expense and uncertainty of jury trials, the chilling effect on speech created by the duty of diligent inquiry can best be contained by providing for standards whereby the publisher can satisfy its duty as a matter of law.¹⁵³ Under the proposed tort, a publisher of private facts can satisfy its duty of diligent inquiry as a matter of law by obtaining confirmation from the subject of the story and the original source of the disclosure that the information was obtained by legitimate means. If the subject and the source disagree as to whether the information was obtained by legitimate means,¹⁵⁴ the plaintiff must prove not only that the information was obtained by illegitimate means, but also that the publisher failed to take reasonable steps to dispel doubts about the means by which the information was obtained.¹⁵⁵ This proposed duty should not excessively burden the media because it largely overlaps with, and is easier to perform than, the truth inquiry in defamation actions. When the publisher contacts the source and the subject as part of its truth inquiry, it can also probe into the method by which the information was obtained. While the substance of this question differs from those regarding truthfulness, this difference ought to weigh in favor of the duty of diligent inquiry because it is more difficult to affirm that information is “true” than to ascertain how the information was obtained. Although the proposed tort will chill some speech due to disputes between the subject and the source as to whether the information was obtained by illegitimate means,¹⁵⁶ speech is likely to be

153. This speech-protective measure resembles defamation law, under which a publisher of potentially defamatory statements can immunize itself from liability as a matter of law by verifying the accuracy of its sources. *See, e.g.,* *Diesen v. Hessburg*, 455 N.W.2d 446, 453–54 (Minn. 1990). Because this defense as a matter of law is compelled by the First Amendment, states must adopt this defense as part of their private facts jurisprudence.

154. In almost all cases where there is disagreement, it is likely to be the subject rather than the source who will claim that the information was obtained by illegitimate means.

155. *Cf. Masson*, 960 F.2d at 900 (holding that actual malice in defamation actions could be shown when publisher has “obvious reasons to doubt the veracity” of author or facts in publications, but “failed to take reasonable steps to dispel those doubts”).

Of course, reducing publishers’ obligations under their duty of diligent inquiry makes it more difficult for plaintiffs to prevail in their actions under the proposed private facts tort. Thus, critics may argue that the proposed tort will not adequately protect privacy because sources can immunize publishers from tort suits, or at least cause a burden shift, by lying to them about information that was obtained by improper means.

But it is important to note that a publisher cannot satisfy its duty of diligent inquiry simply by obtaining “confirmation” from its *source* that the information was legitimately obtained. The publisher must also solicit the views of the *subject* as to how the information was obtained. This requirement of the defense as a matter of law under the proposed private facts tort provides the individual whose privacy is at stake with an opportunity to tell her side of the story. No matter what the source tells the publisher, the subject must only relate to the publisher that the information was obtained by illegitimate means to preserve her opportunity to show at trial that the newspaper had constructive knowledge that it was trafficking in stolen information. Because the subject is usually in the best position to monitor the contested information and she is the only party to claim that the information was obtained by impermissible means, the burden ought to fall on her to verify her claim. Thus, even where a source lies as to how he obtained information, a subject who is aware of a privacy violation ought to be able to obtain relief.

156. The most troublesome examples of such disputes would occur where the source claims that disclosure violated an express duty of confidentiality. These cases have a great potential to chill speech

enhanced when compared to the current private facts tort. This is because the media can take certain steps to insulate themselves from liability under the proposed tort rather than having to wait until the judge or jury reaches its final decision regarding newsworthiness.¹⁵⁷

On a practical level, some may criticize the method-focused private facts tort because it represents a significant departure from current law. Specifically, the rights-based tort conflicts with the *Restatement (Second) of Torts*'s definition of the private facts tort,¹⁵⁸ which has been adopted almost unanimously by the lower courts. In contrast to the *Restatement* view, which considers the content of speech in terms of the newsworthiness criterion, the proposed tort completely disregards the content analysis of newsworthiness in favor of a method-focused inquiry. I would respond that this shift is desirable because the rights-based approach more clearly defines the First Amendment rights of the media than does the impressionistic *Restatement* approach. Moreover, the rights-based approach is more consistent with the method-focused analysis of the Supreme Court. Although the Court has not yet stated that the media may be held liable for disclosure when information was

because they require adjudication of the factual issue of whether such a duty arose. Nevertheless, the proposed tort ought to be less chilling of speech than current law because the media usually obtain personal information by physical means, such as photography or an examination of written records, rather than by word of mouth. Moreover, the media can protect themselves in such situations by recording or videotaping the interviews, as they usually do already.

157. Some will recognize that another conflict arises between speech and privacy in cases in which a publisher obtains personal information about a plaintiff from a confidential source, and the plaintiff needs to discover the identity of this source in order to prove that the source violated her right of privacy. Once again, to resolve this conflict, I would employ the hierarchy-of-rights approach. Under this approach, the privacy of the confidential source would prevail. Although the plaintiff's right to privacy supersedes the publisher's right to speech in maintaining the confidentiality of its sources, it does not supersede the privacy right of the confidential source. The applicable principle is that we ought to favor the individual whose privacy we are certain to violate over the individual who merely alleges that he is a victim of a privacy violation. Because we will definitely invade the privacy of the confidential source if we compel him, or the publisher, to reveal his identity to the plaintiff, whereas it is questionable whether the source violated the plaintiff's privacy, the source's right of privacy ought to supersede that of the plaintiff. Accordingly, a publisher may refuse to disclose the identity of a confidential source when a plaintiff requests such information in discovery.

While this will make it more difficult for some plaintiffs to prevail on their private facts claims, there are several reasons why this should not cause us great alarm. For one, most private facts cases do not involve confidential sources. When there is an invasion of privacy or a breach of an express duty of confidentiality, the plaintiff usually knows who violated her right of privacy and therefore will not be hampered by a rule protecting the confidentiality of sources. Moreover, a plaintiff often will be able to prove to a jury that the publisher obtained information improperly even if she is unable to identify the source of the leak. For instance, a rape victim might show that the police disclosed her name to the newspaper and thereby violated their special duty of confidentiality. This is true even if she is unable to identify the particular officer who leaked the information. In such cases, the publisher might encourage the source to come forward and prove that he legitimately revealed the information, or it might describe the legitimate method by which it obtained the information without compromising the identity of its source. Alternatively, the publisher may present to the judge the identity of the source as well as evidence concerning the method by which the information was obtained for *in camera* review, thereby enabling the judge to decide as a matter of law that the information was not improperly obtained. The bottom line is that, so long as the plaintiff keeps track of whom she entrusts with private information, she will have an opportunity to prevail on her private facts claim even if she does not know the exact source of the leak.

158. See RESTATEMENT (SECOND) OF TORTS § 652D (1977).

improperly obtained, it has focused on the conduct of the press in obtaining information to determine the scope of the media's First Amendment privilege. The proposed private facts tort more closely resembles the Supreme Court's method-focused analysis than does the *Restatement's* content-sensitive analysis.

In fact, at least one lower court has discarded the newsworthiness criterion altogether in favor of an exclusively method-focused analysis. In *Anderson v. Fisher Broadcasting Cos.*,¹⁵⁹ the Oregon Supreme Court reversed a judgment for a plaintiff whose injury in an automobile accident was broadcast in advertisements for a special news report about a new system for dispatching emergency help.¹⁶⁰ In reaching its decision, the court conclusively rejected the social view of the First Amendment when it disavowed that the right to publish is measured by the "public's right to know."¹⁶¹ The court then proceeded to discard the newsworthiness criterion and its content-sensitive analysis. It held:

[I]n Oregon the truthful presentation of facts concerning a person, even facts that a reasonable person would wish to keep private and that are not 'newsworthy,' does not give rise to common-law tort liability . . . unless the manner or purpose of *defendant's conduct* is wrongful in some respect apart from causing the plaintiff's hurt feelings.¹⁶²

As with the proposed method-focused private facts tort, the Oregon Supreme Court focused exclusively on the conduct of the media rather than the content of the speech. Together with the United States Supreme Court's interpretation of the private facts tort, *Anderson* demonstrates that the method-focused private facts tort has some basis in the common law.

V. CONCLUSION

As the current private facts tort demonstrates, the social view of the First Amendment is starting to unravel. Speech is chilled because courts cannot agree on what information is newsworthy, and individual privacy is stymied because those who are subject to embarrassing disclosures cannot take definite steps to ensure that their innermost secrets are kept confidential. The result is a messy body of private facts case law that provides inadequate protection for both speech and privacy.

While the Supreme Court senses the weaknesses in the current tort, it refuses to confront the true culprit behind this confusion—the social view.

159. 712 P.2d 803 (Or. 1986) (en banc).

160. *Id.* at 804.

161. *Id.* at 805 n.2 ("[T]he right to publish is measured by the 'public's right to know,' is not, we think, an accurate statement of the First Amendment." (citation omitted)).

162. *Id.* at 814 (emphasis added).

Rather than question this widely accepted approach to the First Amendment, the Court has experimented with a method-focused approach to the private facts tort that is mostly alien to the content-driven social view it still embraces. The Court is trying to force a square peg through a round hole.

To rescue the private facts tort from constitutional invalidation, and harmonize the Supreme Court's theory and practice, I argue that the courts ought to abandon the social view in favor of a hierarchy-of-rights approach to the First Amendment. Under this model, the court must only determine if the plaintiff has suffered a violation of his right of privacy that justifies restriction of the media's speech. The media may publish without restriction unless they, or one of their sources, obtained the published information by improper means. This content-neutral First Amendment approach renders the newsworthiness criterion obsolete because it puts on trial the conduct of the media rather than the content of their speech.

