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## Small Hope Floats: How the Lower Courts Have Sunk the Right of Privacy

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# SMALL HOPE FLOATS?: HOW THE LOWER COURTS HAVE SUNK THE RIGHT OF PRIVACY

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## I. INTRODUCTION

In the early 1990s, a well-known and well-connected drug dealer was approached by a joint federal, state and local law enforcement task force operating through the Drug Enforcement Agency (“DEA”).<sup>1</sup> Through his work as a confidential informant with the New York Drug Enforcement Task Force (“Task Force”), Paul Lir Alexander helped this unit become one of the most successful drug task forces in the United States.<sup>2</sup> He worked very closely with undercover agents, Bernard B. Kerik and Jerry Speziale, to break up an international drug cartel.<sup>3</sup> In exchange for his help, Mr. Alexander received a portion of the money the Task Force had confiscated.<sup>4</sup> Although he was a confidential informant, Mr. Alexander became a close friend and confidant of the two undercover agents.<sup>5</sup>

His involvement, however, was conditioned on the fact that these undercover agents would keep his identity a secret.<sup>6</sup> Mr. Alexander, as well as Mr. Kerik and Mr. Speziale, knew what happened to people who betrayed a major Colombia drug cartel.<sup>7</sup> All three of the close friends knew that any unsuccessful busts must be blamed on someone other than Mr. Alexander or Mr. Alexander would quickly face repercussions by the dangerous Colombian drug lords.<sup>8</sup> In particular, Mr. Kerik explains:

Jerry’s problem was that if Paul remained on the hook for the lost shipment [767 kilos in August 1991], the Colombians would simply kill him. Jerry needed to shift the blame away from Paul. To do this, [Mr. Kerik and Mr. Speziale] fooled the

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<sup>1</sup> See BERNARD B. KERIK, *THE LOST SON* 201 (HaperCollins 2001).

<sup>2</sup> *Id.* at 208.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 227.

<sup>5</sup> *Id.*

<sup>6</sup> See Brief of Appellant at 4, *Alexander v. HarperCollins Publishers, Inc.*, 132 F. Appx. 250 (11th Cir. 2005) (No. 04-12801).

<sup>7</sup> KERIK, *supra* note 1, at 203, 208.

<sup>8</sup> *Id.*

Colombian drug lords by placing a fake story about the bust in a New York newspaper. The article blamed the bust on the local contacts claiming that they were caught because the van used had expired plates.<sup>9</sup>

In another section, Mr. Kerik explained in more explicit detail the danger of dealing with the drug lords as a confidential informant.

Paul was on the phone with two Colombian drug brokers ... the guys he'd worked with seven months earlier on the previous deal, the 767 kilos that we'd seized and then covered up with a phony newspaper story. ... Then Paul heard a loud noise and the phone went dead. ... It had taken seven months for the cartel to decide, but eventually blame had been assigned – this time squarely on the shoulders of the two brokers. ... With the cartels, someone is always held responsible.<sup>10</sup>

Although Mr. Alexander was working hard for the Task Force,<sup>11</sup> he also was double dealing by using another alias to bring in loads of cocaine through Miami.<sup>12</sup> Mr. Alexander was eventually apprehended by the Miami DEA for attempting to smuggle 1,700 kilograms of cocaine into Miami, hidden in the generators and transformers of his airplane.<sup>13</sup> Mr. Kerik and Mr. Speziale felt extremely betrayed by Mr. Alexander's double-dealing, especially since the Miami DEA originally thought that the two agents were part of Mr. Alexander's other schemes.<sup>14</sup>

After leaving the Task Force, Mr. Kerik eventually became the New York City Police Commissioner and held this position during the September 11 terrorism attack.<sup>15</sup> After this tragedy, he wrote his memoirs, including previously unknown details<sup>16</sup> about Mr. Alexander and his involvement with the Task

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 207-08.

<sup>11</sup> *Id.* at 229. In fact, Mr. Kerik had said, "Paul has made us stars in the drug world of law enforcement." *Id.*

<sup>12</sup> *See Id.* at 226-29. Specifically, Mr. Kerik explains, "For every load he did with us, Paul was doing two or three loads behind our backs." *Id.*

<sup>13</sup> *See Id.* at 228.

<sup>14</sup> *See Id.* at 229. Mr. Kerik states:

[W]e hadn't known about any of his side dealing. When Paul confirmed that we were in the dark, the Miami DEA finally dropped its investigation of us. We were relieved, but we were sad too. At his trial, Paul was found guilty and sentenced to twenty-two years in prison. I never saw him again.

<sup>15</sup> *See Id.* at 241.

<sup>16</sup> *See Id.* at 200-29; *see also* Brief of Appellant, *supra* note 6, at 5-13. In particular, the Appellant's Brief explains that the following previously publicly unknown details about Mr. Alexander's life were released: Mr. Alexander's name tied to the Task Force, Mr. Alexander's location in

Force.<sup>17</sup> Mr. Kerik, in breaking Mr. Alexander's confidence, released details about Mr. Alexander's physical description,<sup>18</sup> an entire list of his aliases,<sup>19</sup> and detailed descriptions of how he helped the Task Force become one of the most successful units in the United States.<sup>20</sup> Although the book focused on Mr. Kerik's life and experiences, he used his book to "out" Mr. Alexander to the Colombian drug cartels, putting his life and that of his family in danger of retaliation.<sup>21</sup> In response to the publication of Mr. Kerik's book, Mr. Alexander filed a *pro se* complaint in the U.S. District Court for the Southern District of Georgia claiming common law negligence and public disclosure of private-facts.<sup>22</sup> However, this case was quickly dismissed by the district court, which held that Mr. Kerik's disclosures of Mr. Alexander's private information were protected by the First Amendment.<sup>23</sup> The U.S. Court of Appeals for the Eleventh Circuit rendered a decision on Mr. Alexander's appeal by simply affirming the lower court's decision.<sup>24</sup> The Eleventh Circuit did not address, in its opinion, any of Mr. Alexander's privacy tort claims argued within his brief.<sup>25</sup>

Mr. Alexander's case represents a broad category of cases where private citizens, in an effort to protect their own privacy, seek civil remedies for public disclosure of private-facts. Like Mr. Alexander, these private individuals have had their confidences and privacy violated by mass publication of intimate details of their lives. Although these plaintiffs feel that a civil remedy should be available to protect their privacy interests, most disclosure of private-fact actions are blocked by absolutism approaches adopted by trial and appellate courts which allow the First Amendment protections to bar the plaintiff's privacy interests.<sup>26</sup> These courts fail to balance First Amendment rights of free press with

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1991, Mr. Alexander's physical description, information about Mr. Alexander's wife, Mr. Alexander's knowledge of the Colombian drug cartel, all of Mr. Alexander's aliases, and Mr. Alexander's current whereabouts.

<sup>17</sup> Brief of Appellant, *supra* note 6, at 5.

<sup>18</sup> KERIK, *supra* note 1, at 201-02.

<sup>19</sup> *See Id.* at 229.

<sup>20</sup> *See Id.* at 200-29.

<sup>21</sup> Brief of Appellant, *supra* note 6, at 3.

<sup>22</sup> *See Alexander v. News Corp.*, No. CV203-158, 2004 U.S. Dist. LEXIS 27990, at \*2-3 (S.D. Ga. Mar. 19, 2004).

<sup>23</sup> *See infra* Section II. After filing suit against Mr. Kerik, Mr. Alexander also filed suit against Gerald Speziale, who also wrote a book detailing his experiences as an undercover agent on the Task Force. Mr. Speziale's book was entitled WITHOUT A BADGE: UNDERCOVER IN THE WORLD'S DEADLIEST CRIMINAL ORGANIZATION. The U.S. District Court for the Southern District of Georgia also dismissed this case based on the reasons within *Alexander v. News Corp.* *See Alexander v. AOL Time Warner, Inc.*, No. CV203-114, 2004 U.S. Dist. LEXIS 11870, at \*8-9 (S.D. Ga. June 18, 2004).

<sup>24</sup> *See Alexander v. HaperCollins Publishers, Inc.*, 132 F. Appx. 250, 251 (11th Cir. 2005).

<sup>25</sup> *See Id.*

<sup>26</sup> *See* U.S. CONST. amend. I.

an individual's privacy interest.<sup>27</sup> Although the U.S. Supreme Court has had numerous opportunities to prohibit the public disclosure of private-facts as a legitimate tort claim,<sup>28</sup> it has refused to extend the First Amendment doctrine as an insurmountable obstacle to invasion of privacy claims.<sup>29</sup> Therefore, the Supreme Court has left a small hope for plaintiffs who seek some retribution from the media for the publication of their own private and embarrassing facts.

However, even with the Supreme Court's refusal to close the door on a legitimate tort claim for the publication of private-facts, only one U.S. Court of Appeals has upheld a plaintiff's claim for damages on this tort theory.<sup>30</sup> Instead, most of these courts have continuously held that these claims are barred by the First Amendment.<sup>31</sup> In examining the plaintiffs' abilities to bring a successful claim, many of the circuit courts have focused on whether the material published is of a "legitimate public interest."<sup>32</sup> In almost every single circuit court case concerning a private-fact tort, the circuit courts have determined that the plaintiff's private and embarrassing information published was of a legitimate public interest.<sup>33</sup> Therefore, these court decisions have led several commentators to reason that the public disclosure of private-facts tort is not a legitimate cause of action.<sup>34</sup>

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<sup>27</sup> See *infra* Section III.

<sup>28</sup> These potential causes of action are often referred to as private-fact torts.

<sup>29</sup> See generally *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding that there is no cause of action for invasion of privacy from a newspaper publishing the name of a rape victim, but leaves open whether there may be a valid cause of action for publication of private-facts in the future); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (holding that West Virginia statute was unconstitutional because it prohibited a newspaper from publishing the name of any youth offender even though the reporters obtained the student's name from interviewing witnesses); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that there is no cause of action for invasion of privacy grounded upon the publication of the name of a deceased rape victim, which was obtained by a television station from official court records open to the public, but refusing to determine that there is no case where the publication of the private-facts may be a viable cause of action).

<sup>30</sup> See generally *Cinel v. Connick*, 15 F.3d 1338 (5th Cir. 1994), *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993), *Ross v. Midwest Commc'ns, Inc.*, 870 F.2d 271 (5th Cir. 1989); *Gilbert v. Medical Econ. Co.*, 665 F.2d 305 (10th Cir. 1981); *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980) (per curiam); *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977).

<sup>31</sup> See *supra* note 30.

<sup>32</sup> See *Id.*

<sup>33</sup> *Supra* note 30; for examples of state courts who follow this reasoning, see generally *Anonson v. Donahue*, 857 S.W.2d 700 (Tex. App. 1993); *Pasadena Star-News v. Superior Ct.*, 203 Cal. App. 3d 131 (1988); *Anderson v. Fisher Broad. Co., Inc.* 712 P.2d 803 (Or. 1986); *Freihofer v. Hearst Corp.*, 480 N.E.2d 349 (N.Y. 1985); *Howard v. Des Monies Register and Tribune Co.*, 283 N.W.2d 289, 300 (Iowa 1979); *McNutt v. New Mexico State Tribune Co.*, 538 P.2d 804 (N.M. Ct. App. 1975); *Bremmer v. Journal-Tribune Pub. Co.*, 76 N.W.2d 769 (Iowa 1956).

<sup>34</sup> See Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 57 (1974); Geoff Dendy, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 164 (1997); Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 334 (1979); Theodore L.

This note will examine the small hope left behind by the Supreme Court for plaintiffs who wish to bring claims for the publication of private-facts. It will also explain how the lower courts have been willing to placate the importance of preserving privacy interests, but are unwilling to enforce the tort – the public disclosure of private-facts – created to protect these important privacy interests. As this note will explain, the courts should not look at the tension between the private-fact tort and the First Amendment right to free speech and press with an absolutism stance. This absolutism stance means that the courts tend to feel that they must make a choice between the First Amendment and privacy issues. To many courts, there is nothing in between these concepts – no middle ground.

As a solution, this note will suggest a two-part scheme for courts to adopt so that they can properly move away from their absolutism stance. First, the courts should adopt a new tort – breach of confidence. The breach of confidence tort will give a remedy to people who have had private information about themselves published by a person who has entered into some kind of confidential relationship with the plaintiff. Second, the courts should adopt another system to help protect people when their private information is published by someone with whom they did not have a confidential relationship. This new scheme advances a “pyramid” balancing test to help courts better determine when there is a legitimate public interest. This pyramid test gives much more weight to privacy issues than other court decisions that have attempted to balance privacy interests against the First Amendment. This test will force the courts to not look at the issue in terms of absolutism, but to come to a middle ground where the principal ideals behind privacy rights and the First Amendment can both exist.

More specifically, Part II of this note will briefly look at the district court’s opinion in Mr. Alexander’s case to show an example of how many courts look at “legitimate public interest.” Part III will examine the historical tension between invasion of privacy and the First Amendment. Part IV will discuss where the U.S. Supreme Court has left private-fact plaintiffs. Part V will examine the newsworthiness defense, balancing test options, and breach of confidence as a new tort. Finally, Part VI will explain how the courts can use the “pyramid” scheme to determine when information is of a “legitimate public interest.” It will also discuss why courts should adopt a breach of confidence tort.

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Glasser, *Resolving the Press-Privacy Conflict: Approaches to the Newsworthiness Defense*, 4 COMM. & L. 23, 31 (1982); Diane L. Zimmerman, *Requiem For A Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 353 (1983).

## II. *ALEXANDER V. NEWS CORPORATIONS*: AN EXAMPLE OF HOW THE LOWER COURTS FAIL TO PROTECT PLAINTIFFS FROM THE PUBLICATION OF THEIR OWN PRIVATE-FACTS

When Mr. Alexander realized that Mr. Kerik had written a memoir disclosing information about his private life, including the time he had spent as a confidential informant with the New York Drug Enforcement Task Force, Mr. Alexander filed a *pro se* complaint from his prison cell seeking damages.<sup>35</sup> Mr. Alexander, whose life was now endangered, wanted Mr. Kerik to pay for what Mr. Alexander thought was the unnecessary disclosure of information concerning his private life.<sup>36</sup> However, the U.S. District Court for the Southern District of Georgia reasoned that Mr. Alexander's claim was barred by the First Amendment right of the free speech and press.<sup>37</sup>

The district court construed two claims from Mr. Alexander's *pro se* complaint – invasion of privacy and negligent disclosure of private-facts.<sup>38</sup> Although the district court acknowledged that the defendant's First Amendment rights to free speech and free press are not absolute, the court held that subjecting the defendant to civil liability for the publication of private-facts about Mr. Alexander's activities would violate fundamental First Amendment rights.<sup>39</sup> In drawing this conclusion, the court examined both claims and determined that Mr. Alexander's criminal activities were of a "legitimate public interest."<sup>40</sup> Therefore, the court reasoned that, per the First Amendment, a matter of legitimate public interest cannot be the basis for an invasion of privacy claim.<sup>41</sup>

### A. *First Attempt: Invasion of Privacy*

To recover under a theory of invasion of privacy in Georgia, the court stated that Mr. Alexander must show "(1) the public disclosure of private-facts; (2) the facts disclosed must be private, secluded and secret facts; and (3) the matter made public must be offensive and objectionable to a reasonable man of

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<sup>35</sup> Brief of Appellant, *supra* note 6, at 3.

<sup>36</sup> *Id.* at 3-5.

<sup>37</sup> *Alexander v. News Corp.*, No. CV203-158, 2004 U.S. Dist. LEXIS 27990, at \*9-10 (S.D. Ga. Mar. 19, 2004).

<sup>38</sup> *Id.* at \*1-2.

<sup>39</sup> *Id.* at \*8-9.

<sup>40</sup> *Id.* at \*8-10.

<sup>41</sup> In making its decision, the court made no reference to *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). This case allowed a plaintiff to recover damages "under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality" even though the newspaper claimed such a suit violated its First Amendment rights. *Id.* at 665. Although there was no contract signed between Mr. Kerik and Mr. Alexander, it is possible that Mr. Alexander could have a cause of action under this claim. However, as a *pro se* plaintiff, Mr. Alexander probably did not plead such a claim and therefore, the court was unable to address this issue. *Cohen v. Cowles Media Co.* is discussed in detail in Section V(C)(2).



ordinary sensibilities under the circumstances.”<sup>42</sup> However, assuming that Mr. Alexander could have met these elements, his case was still barred by the First Amendment because “[w]here an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one’s legal right of privacy.”<sup>43</sup> The court reasoned that “the details of Alexander’s involvement in these investigations and drug busts are logically related to this discussion of important law enforcement efforts.”<sup>44</sup> Because Mr. Alexander’s drug activities and his involvement as a DEA informant concerned a matter of public interest, the court held that Mr. Alexander failed to state a cognizable claim in light of the defendants’ First Amendment rights of free speech and press.<sup>45</sup>

### B. *Second Attempt: Negligent Disclosure*

In addition to rejecting Mr. Alexander’s invasion of privacy claim, the court reasoned that Mr. Alexander’s negligent disclosure claim was barred by the First Amendment.<sup>46</sup> The court reasoned that “the First Amendment prohibits a court from imposing liability on the truthful publication of matters of public concern.”<sup>47</sup> Because Mr. Alexander did not allege that any of the information published about him was false, the court held that his negligent disclosure claim was also barred by the First Amendment.<sup>48</sup>

### C. *Simply Another Court Refusing to Act on the Small Hope*

In Mr. Alexander’s case, the court held that defendant-publisher and defendant-author disclosed information that was of a legitimate public interest.<sup>49</sup> As with many of the cases involving the publication of private-facts,<sup>50</sup> the district court did not outright reject a private-fact tort as a cause of action.<sup>51</sup> Instead, the court held that the plaintiff, Mr. Alexander, failed to overcome the First Amendment barrier by proving that the information was not of a public concern.<sup>52</sup> Even though this court did not reject a private-fact tort as a cause of

<sup>42</sup> Alexander v. News Corp., 2004 U.S. Dist. LEXIS 27990, at \*8 (citing Pierson v. News Group Publ’ns, Inc., 549 F. Supp. 635, 641 (S.D. Ga. 1982)).

<sup>43</sup> *Id.* at \*9 (citing Cox Broadcasting Corp. v. Lowe, 328 S.E.2d 384, 386 (Ga. App. 1985)).

<sup>44</sup> *Id.* at \*10.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at \*11.

<sup>47</sup> *Id.* (citing Bartnicki v. Vopper, 532 U.S. 514, 534 (2001)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at \*10.

<sup>50</sup> See *supra* note 30.

<sup>51</sup> See Alexander v. News Corp., No. CV203-158, 2004 U.S. Dist. LEXIS 27990, at \*8-11 (S.D. Ga. Mar. 19, 2004).

<sup>52</sup> *Id.*

action, it did severely limit the ability of any plaintiff to successfully sue for the release of any private information. Similar to many other lower court decisions, this district court limited the plaintiff's ability to succeed to only cases that involve some unidentified extreme situation where private-facts were disclosed to the public.<sup>53</sup> Based on this court's decision, that situation must be more extreme than exposing a plaintiff to potentially life-threatening danger from the publication of his private information.

### III. WHAT IS THE PROBLEM?: A BRIEF EXAMINATION OF THE TENSION BETWEEN THE FIRST AMENDMENT AND THE RIGHT OF PRIVACY

The First Amendment contains important and fundamental constitutional rights that have allowed the American citizenship to be more informed about our government, our society, our culture, and ourselves as a nation.<sup>54</sup> Underlying the First Amendment right of free speech and press are "society's needs for maximum flow of information and opinion and the individual's right to fulfillment."<sup>55</sup> Having this important right of expression allows our society to engage in a marketplace of ideas, where citizens can freely exchange ideas and thoughts.<sup>56</sup> The First Amendment also has played an important aspect in the development of today's media. Few limitations on the First Amendment have allowed our media to explore interesting and important stories that are of a legitimate public interests. For example, without the protections of the First Amendment, the *New York Times* would not have been able to publish their articles on the Pentagon Papers.<sup>57</sup> Or, more broadly, without the protections of the First Amendment, media outlets could not critique the activities of our government without facing criminal punishment.<sup>58</sup>

However, the First Amendment does have some limitations to the expansive protection of free speech and press.<sup>59</sup> There are certain limited classes of speech which may be prevented or punished by a state consistent with the principles of the First Amendment. These categories are: (1) obscene speech;<sup>60</sup>

<sup>53</sup> See *supra* note 30.

<sup>54</sup> See DWIGHT L. TEETER, JR. & BILL LOVING, *LAW OF MASS COMMUNICATIONS*, 1 (10th ed. 2001).

<sup>55</sup> *Id.* at 5.

<sup>56</sup> *Id.* at 7.

<sup>57</sup> See *New York Times Co. v. U.S.*, 418 U.S. 683 (1974) (holding that the government could not impose prior restraint upon the newspaper to stop them from publishing the Pentagon Papers).

<sup>58</sup> See TEETER & LOVING, *supra* note 54, at 28.

<sup>59</sup> See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977) (publishing likeness without consent); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (clear and present danger test); *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (defamation); *Roth v. U.S.*, 354 U.S. 476, 483 (1957) (obscenity); *Chaplinsky v. N.H.*, 315 U.S. 568, 571-72 (1942) (fighting words doctrine).

<sup>60</sup> See, e.g., *Miller v. California*, 413 U.S. 15, 34-35 (1973).

(2) defamation;<sup>61</sup> (3) speech or writing used as an integral part of conduct in violation of a valid criminal statute;<sup>62</sup> and, (4) speech which is directed to incite or produce imminent lawless action.<sup>63</sup>

In addition to these staples of the First Amendment, the right of privacy has also become an important part of First Amendment dogma. The right of privacy is the “right to be let alone.”<sup>64</sup> It can be more broadly stated as “the right to be free from the unwarranted appropriation or exploitation of one’s personality, the publicizing of one’s private affairs with which the public has no legitimate concern, or the wrongful intrusion into one’s private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.”<sup>65</sup> This right of privacy is recognized as both a common-law tort action<sup>66</sup> and as a constitutional right.<sup>67</sup> Even though both the First Amendment and the right of privacy have constitutional significance, these rights tend to clash with each other.<sup>68</sup> And, most times, the courts give the First Amendment more deference than the right of privacy.<sup>69</sup>

But, in today’s world, the right of privacy should be given more important credence. “Increasingly, it is more difficult for individuals to keep information about themselves from indiscriminate use by government agencies, from snooping businesses, or from predatory criminals who steal credit cards numbers and infest the Internet.”<sup>70</sup> Individuals have a constant fear of identity theft, others overhearing their private cellular telephone conversations, and still others reading private e-mails containing personal information about their lives. Due to the Internet and telecommunications industry, any individual’s private information concerning embarrassing facts about their lives can fall easily into another’s hands and this person may wish to publish these private facts. This situation exhibits the tension between the right of privacy and the freedom of the press, especially arising from the unauthorized publication of true but embarrassing facts.<sup>71</sup> In order to thoroughly examine this tension, it is important to look at the beginning of the right of privacy and the birth of lawsuits surrounding the publication of the private-facts.

<sup>61</sup> See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>62</sup> See, e.g., *Giboney v. Empire Storage Co.*, 336 U.S. 490, 498 (1949).

<sup>63</sup> See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969).

<sup>64</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

<sup>65</sup> 62A AM. JUR. 2D *Privacy* § 1 (2005).

<sup>66</sup> See *Id.* at § 8.

<sup>67</sup> See *Griswold v. Conn.*, 381 U.S. 479 (1965).

<sup>68</sup> See Glasser *supra* note 34, at 23.

<sup>69</sup> See *infra* Section V.

<sup>70</sup> *Supra* TEETER & LOVING, *supra* note 54, at 335.

<sup>71</sup> See Glasser *supra* note 34, at 23.

### A. *The History of the Right of Privacy: Brandeis and Warren's Idea*

The right of privacy was first developed in a now famous 1890 article by Samuel D. Warren and his law partner, Louis D. Brandeis.<sup>72</sup> The two lawyers wrote the article in a critical response to the current heyday of “yellow journalism” and the mass publicity given over the wedding of Warren’s daughter.<sup>73</sup> Throughout the article, the authors urged courts to enforce an obligation on the media to recognize a “right to be let alone.”<sup>74</sup> To make this jump, Warren and Brandeis observed protection of individual property as gradually being expanded to include protection of one’s self, reputation, and general well-being.<sup>75</sup>

Although Warren and Brandeis are credited with the creation of the right to privacy, Professor William L. Prosser gave the common-law tort more depth and meaning. Professor Prosser categorized the invasion of privacy tort into four specific areas: (1) intrusion upon a person’s solitude or seclusion; (2) appropriation of a person’s name or picture for another’s financial benefit; (3) public disclosure of private, embarrassing facts about a person; and (4) publicity that places a person in false light.<sup>76</sup> Over the next fifty years, most state legislatures<sup>77</sup> and the U.S. Congress<sup>78</sup> have adopted some version of Brandeis and Warren’s and Prosser’s right to privacy.

In addition to the common-law tort right of privacy, the U.S. Supreme Court began to speak of a “constitutional” right of privacy in the 1950s.<sup>79</sup> Although never mentioned in the Constitution, the right of privacy was officially given constitutional footing in 1965 with *Griswold v. Connecticut*.<sup>80</sup> Specifically, the Supreme Court recognized a constitutional right against governmental

<sup>72</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>73</sup> Christine Hart, Note, *Y.G. v. Jewish Hospital of St. Louis: Breathing Life into the “Disclosure of Private-facts” Tort*, 25 ST. LOUIS U. L.J. 931, 933 (1990-91).

<sup>74</sup> Warren & Brandeis, *supra* note 64, at 195.

<sup>75</sup> *Id.* at 195-98.

<sup>76</sup> William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

<sup>77</sup> See 62A AM. JUR. 2D *Privacy* § 11 (2005).

<sup>78</sup> See Fair Credit Reporting Act, 15 U.S.C. § 1681 (2000) (bars credit agencies from sharing credit information with anyone but authorized customers); Privacy Act of 1974, 5 U.S.C. § 552a (2000) (bars federal agencies from letting information they collect for one purpose be used for a different purpose); Right to Financial Privacy Act, 12 U.S.C. § 3401 (2000) (sets strict procedures when federal agencies want to look through customer records in banks); Video Privacy Protection Act, 18 U.S.C. § 2710 (2000) (prevents retailers from disclosing video-rental records without the customer’s consent or a court order also forbids the sale of the records); Computer Matching and Privacy Protection Act of 1988, 5 U.S.C. § 552a (2000) (regulates computer matching of federal data for verifying eligibility of federal benefits programs).

<sup>79</sup> Please note that there is a distinction between the common-law right of privacy under which a person can sue another person and the constitutional right of privacy under which a person can sue for unlawful governmental interference into a private matter.

<sup>80</sup> 381 U.S. 479 (1965).

inference within a person's zone of autonomy, establishing a right of privacy.<sup>81</sup> In describing this new right, Justice Goldberg stated "the right of privacy is a fundamental personal right, emanating from the totality of the constitutional scheme under which we live."<sup>82</sup> He also stated that such a "fundamental personal right" should not be barred by a rational basis standard. Justice Goldberg noted:

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."<sup>83</sup>

After *Griswold* the Court has continued to expand upon the right of privacy to include not only the interests protected by the common-law action, but also to protect the autonomy of the individual to make certain personal decisions. These areas include the right to be free of warrantless searches<sup>84</sup> and the right to make decisions regarding marriage, procreation, contraception, family relationships, child rearing, and education free of governmental interference.<sup>85</sup>

### B. *The Birth of the Tort for the Publication of Private-facts*

Although the constitutional privacy cases give a person an expectation of privacy from governmental interference, these cases do little to help reveal whether such a strong privacy right should also translate into common tort law.<sup>86</sup> As Professor Zimmerman explained, the constitutional right of privacy does not necessarily require that the same protection be applied to ordinary tort law.<sup>87</sup> "Although we may be tempted to accord individuals the same protection from their neighbor's prying as the Constitution provides against governmental invasions, such an equation conflicts both with the historical distinction between constitutional and common law and with the First Amendment rights of our neighbors."<sup>88</sup> However, an examination of a few early cases and the develop-

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<sup>81</sup> *Id.* at 484.

<sup>82</sup> *Id.* at 494 (Goldberg, J. concurring) (citing *Poe v. Ullman*, 367 U.S. 497, 521 (1961) (Douglas, J. dissenting)).

<sup>83</sup> *Id.* at 497 (Goldberg, J. concurring) (citing *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)).

<sup>84</sup> *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961).

<sup>85</sup> *See, e.g., Roe v. Wade*, 410 U.S. 113, 152-54 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Conn.*, 381 U.S. 479, 485-86 (1965).

<sup>86</sup> Zimmerman *supra* note 34, at 298.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 298-99.

ment of the Restatement (Second) of Torts on the public disclosure of private-facts show how a common-law right of privacy can be given a legitimate role in the balancing process between privacy and the First Amendment right to free speech and press.

### 1. The Restatement (Second) of Torts § 652D

In 1977, the American Law Institute recognized an opening for civil liability for the publication of private-facts. The Restatement addressed the hurdles that a plaintiff would have to overcome more clearly, specifically the “legitimate public interest” element. In developing a tort for the publication of private-facts, the Restatement explained:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that:

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public<sup>89</sup>

Furthermore, in the comments to this Restatement section, the drafters made clear that the focus of this tort is whether the publicized facts, private or not, are of a legitimate public interest.<sup>90</sup> The drafters stated that “[t]he common law has long recognized that the public has a proper interest in learning about many matters. When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.”<sup>91</sup> In particular, the drafters explained that the First Amendment right to free speech and press overrides a claim for publication of private-facts when the situations involve the coverage of “voluntary public figures,”<sup>92</sup> of some “involuntary public figures,”<sup>93</sup> of “all matters of the kind customarily regarded as news,”<sup>94</sup> and of information given to the public “for purposes of education, amusement or enlightenment, where the public may reasonably be expected to have a legitimate interest in what is published.”<sup>95</sup>

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<sup>89</sup> RESTATEMENT (SECOND) OF TORTS § 652D (1977).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*, cmt. d.

<sup>92</sup> *Id.*, cmt. c.

<sup>93</sup> *Id.*, cmt. d (extending the First Amendment privilege to those “who have sought publicity or consented to it, but through their own conduct or otherwise have ... become news”).

<sup>94</sup> *Id.*, cmt. e.

<sup>95</sup> *Id.*, cmt. h.

## 2. What is of a Legitimate Public Interest?: How Early Case Law Addressed the Tension Between the First Amendment and the Publication of Private-facts

Prior to the Supreme Court's take on the legitimacy of the tort of the publication of private-facts, a few early cases tackled the issue addressed in the Restatement (Second) of Torts – whether the publicized facts were of a legitimate public interest. Three major cases addressed the public disclosure of private-facts tort prior to the Supreme Court: <sup>96</sup> *Melvin v. Reid*,<sup>97</sup> *Sidis v. F-R Publishing Corp.*,<sup>98</sup> and *Briscoe v. Reader's Digest Ass'n, Inc.*<sup>99</sup> Though not exactly worded as such, each of these cases examined whether the material published was of a "legitimate public interest."<sup>100</sup> To determine the meaning of this elusive term, the courts performed a balancing test of sorts.<sup>101</sup> However, unlike more recent cases, these three cases gave much more weight and concern to the right of privacy.

In *Melvin v. Reid* the defendant made a motion picture entitled, "The Red Kimono."<sup>102</sup> This movie used the plaintiff's maiden name to depict her as a prostitute who had been involved in a sensational murder trial several years earlier.<sup>103</sup> When the picture was released, the plaintiff had ended her scandalous lifestyle and was married living a respectable, quiet life.<sup>104</sup> No one in the plaintiff's social circle knew about her past until the movie was released.<sup>105</sup> Due to the movie's release, the plaintiff claimed her friends "scorn[ed] and abandon[ed] her and [the movie] exposed her to obloquy, contempt, and ridicule, causing her grievous mental and physical suffering."<sup>106</sup>

The Fourth District Court of California, one of California's immediate appellate courts, upheld the plaintiff's invasion of privacy claim, based on the

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<sup>96</sup> Although these are the main cases concerning the early developments on the public disclosure of private-fact torts, there are two other cases that discuss this issue prior to the Supreme Court's ruling on this topic. See *Barber v. Time, Inc.*, 159 S.W.2d 291, 296 (Mo. 1942) (holding that the press enjoyed no privilege to publish intimate details and photos of a hospitalized person's unique disease) and *Daily Times Democrat v. Graham*, 162 So. 2d 474, 478 (Ala. 1964) (upholding a woman's invasion of privacy claim against a photo of her while her dress had been blown above her waist by a jet of air).

<sup>97</sup> 297 P. 91 (Cal. Ct. App. 1931).

<sup>98</sup> 113 F.2d 806 (2d Cir. 1940).

<sup>99</sup> 483 P.2d 34, 49 (Cal. 1971), *overruled in part by* *Gates v. Discovery Commc'ns, Inc.*, 34 Cal. 4th 679 (2004).

<sup>100</sup> See *Melvin*, 297 P. at 92; *Sidis*, 113 F.2d at 809; *Briscoe*, 483 P.2d at 39-41.

<sup>101</sup> See *supra* notes 97-100.

<sup>102</sup> *Melvin*, 297 P. at 91.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

Warren-Brandeis article and upon a provision of the California constitution that guaranteed the “inalienable rights” of “enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.”<sup>107</sup> After examining eight principles that helped the court balance the publisher’s First Amendment rights and the plaintiff’s privacy rights,<sup>108</sup> the court reasoned that there was no justification for using the actual name of the plaintiff.<sup>109</sup> In particular the court noted:

The use of appellant's true name in connection with the incidents of her former life in the plot and advertisements was unnecessary and indelicate and a willful and wanton disregard of that charity which should actuate us in our social intercourse and which should keep us from unnecessarily holding another up to the scorn and contempt of upright members of society.<sup>110</sup>

Although not specifically terming her tort claim as the illegal publication of private-facts, the court was willing to overcome First Amendment concerns in favor of the plaintiff’s right to not have her personal, private life disclosed to the general public.

Next, the U.S. Court of Appeals for the Second Circuit, in *Sidis v. F-R Publishing Corp.*, examined an early version of the public disclosure of private-facts tort and dismissed the claim in favor of the First Amendment.<sup>111</sup> But,

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<sup>107</sup> *Id.* at 93.

<sup>108</sup> *Id.* at 92-93. The eight principles that the court examined were:

1. The right of privacy was unknown to the ancient common law.
2. It is an incident of the person and not of property -- a tort for which a right of recovery is given in some jurisdictions.
3. It is a purely personal action and does not survive, but dies with the person.
4. It does not exist where the person has published the matter complained of, or consented thereto.
5. It does not exist where a person has become so prominent that by his very prominence he has dedicated his life to the public and thereby waived his right to privacy. There can be no privacy in that which is already public.
6. It does not exist in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit as in the case of a candidate for public office.
7. The right of privacy can only be violated by printings, writings, pictures or other permanent publications or reproductions, and not by word of mouth.
8. The right of action accrues when the publication is made for gain or profit. (This however is questioned in some cases.)

*Id.*

<sup>109</sup> *Id.* at 93.

<sup>110</sup> *Id.*

<sup>111</sup> 113 F.2d 806 (2d Cir. 1940).



unlike *Melvin*, this case involved a person considered a “public figure,” which often involves a higher deference to the First Amendment.<sup>112</sup> The *New Yorker Magazine* featured a brief biographical sketch about a child prodigy who, years before, had been previously known to the public, but now spent his life as a ministerial clerk in obscurity and seclusion.<sup>113</sup> The article contained true details about the plaintiff’s life, but was “merciless in its dissection of intimate details of its subject’s personal life.”<sup>114</sup>

The court dismissed the former child prodigy’s invasion of privacy claim based somewhat on a newsworthy defense.<sup>115</sup> In particular, the court reasoned that “the interest of the individual in privacy must inevitably conflict with the interest of the public in news.”<sup>116</sup> Because the plaintiff was a “public figure,” the court held in favor of the defendant-publisher.<sup>117</sup> However, the court, in this case, did acknowledge that there may be incidents were the newsworthiness of a matter would not constitute a complete defense for the media.<sup>118</sup> The court mentioned that the defense may not hold up where “[r]evelations may be so intimate and so unwarranted in view of the victim’s position as to outrage the community’s notions of decency.”<sup>119</sup> This notation by the court seemed to indicate that the court would be willing to allow a cause of action for the publication of private-facts if the plaintiff was not a public figure and if the details revealed would outrage the community. Although not specific, this dicta did leave some room for plaintiff to legitimately argue for privacy rights over the First Amendment when dealing with the publication of private-facts.

Finally, the California Supreme Court, in *Briscoe v. Reader’s Digest Association, Inc.*, addressed whether the passage of time could affect the plaintiff’s ability to recover for invasion of privacy.<sup>120</sup> The plaintiff in this case sued *Reader’s Digest* for invasion of privacy for publishing an article which disclosed his involvement in a truck hijacking eleven years prior.<sup>121</sup> Although the court recognized that the publicly-available reports on the hijacking were newsworthy and therefore can be published without punishment, it also reasoned that little public purpose was served by the publication of the plaintiff’s name in the story.<sup>122</sup> The court specifically reasoned that “[u]nless the individ-

<sup>112</sup> *Id.* at 809.

<sup>113</sup> *Id.* at 807.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 809. The newsworthiness defense is discussed in detail *infra* Section V(A).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* This case begins the community mores test adopted by the *Virgil* case mentioned below.

<sup>120</sup> 483 P.2d 34, 49 (Cal. 1971), *overruled in part by* *Gates v. Discovery Commc’ns, Inc.*, 34 Cal. 4th 679 (2004).

<sup>121</sup> *Id.* at 36.

<sup>122</sup> *Id.* at 40.

ual has reattracted the public eye to himself in some independent fashion, the only public ‘interest’ that would usually be served is that of curiosity.”<sup>123</sup> In addition, the court also reasoned that some balancing should be done between the First Amendment and the right of privacy. The court stated that “the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other.”<sup>124</sup>

In conclusion, prior to the Supreme Court’s discussion of the public disclosure of private-facts tort, a few lower courts and the American Law Institute struggled with the tension between the First Amendment right to free speech and free press and the rights of the individual to “be let alone.” In their struggle to deal with this tension, these early court cases and the Restatement advocated a balancing test to determine what is of a “legitimate public interest.” These early cases did not immediately dismiss the plaintiff’s claim to privacy in favor of an almost *per se* bar of the plaintiff’s claim by the First Amendment. Instead, each court took a closer examination of the plaintiff’s privacy rights to determine where the court should draw the line as to what information is of a legitimate public interest and what information should remain private.

#### IV. LEAVING A SMALL HOPE BEHIND: THE U.S. SUPREME COURT’S TAKE ON THE PUBLICATION OF PRIVATE-FACTS

The U.S. Supreme Court first left a hope that a plaintiff could successfully bring a cause of action for the publication of private-facts over a First Amendment defense with a footnote in *Time, Inc. v. Hill*.<sup>125</sup> *Time, Inc.* was a false light invasion of privacy case involving a story published in *Life* magazine about the opening of the play *The Desperate Hours*.<sup>126</sup> The play was based on the widely publicized incident in which the Hill family was held hostage in their own home by three escaped convicts.<sup>127</sup> The portrayal by the magazine was not entirely accurate, but it was not defamatory either.<sup>128</sup> The Supreme Court did hold that the magazine could be liable for “false reports of matters of public interest,” but only after the plaintiff has established actual malice.<sup>129</sup>

The Supreme Court was clear to limit its holding in *Time, Inc.* to cases involving false light claims. However, in a footnote, the court eluded to the

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 42.

<sup>125</sup> 385 U.S. 374, 383 n. 7 (1967).

<sup>126</sup> *Id.* at 377.

<sup>127</sup> *Id.*

<sup>128</sup> *See id.* at 395-96.

<sup>129</sup> *Id.* at 388.

possibility that a valid claim could exist for the truthful publication of private-facts.<sup>130</sup> This footnote stated:

This limitation to newsworthy persons and events does not of course foreclose an interpretation of the statute to allow damages where "revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency." This case presents no question whether truthful publication of such matter could be constitutionally proscribed.<sup>131</sup>

After the *Time, Inc.* case, the availability of a tort for truthful publication of private-facts was given closer examination in *Cox Broadcasting Corp. v. Cohn*,<sup>132</sup> *Smith v. Daily Mail Publishing Co.*,<sup>133</sup> and *Florida Star v. B.F.J.*<sup>134</sup>

A. *Cox Broadcasting v. Cohn: Allowing the Publication of Private-facts Received From Public Records*

The plaintiff in *Cox Broadcasting* was the father of a 17-year-old deceased rape victim who sued a television station claiming invasion of privacy.<sup>135</sup> The station had released his daughter's name in violation of a Georgia statute forbidding such publication.<sup>136</sup> The television reporter had discovered the victim's name while he was examining the indictments for the trial.<sup>137</sup> These indictments were public records available for inspection.<sup>138</sup> Neither party disputed that the information publicized was truthful.<sup>139</sup>

The Supreme Court made a narrow decision in this case, holding that the First Amendment bars a cause of action for invasion of privacy grounded upon publication of information obtained from official court records open to the public.<sup>140</sup> The Court specifically refused to address the broader question of "whether truthful publications may ever be subjected to civil or criminal liability consistent with the First Amendment."<sup>141</sup> However, the Supreme Court did note

<sup>130</sup> *Id.* at 383 n. 7.

<sup>131</sup> *Id.* at 383 (quoting *Sidias v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir. 1940)).

<sup>132</sup> 420 U.S. 469 (1975).

<sup>133</sup> 443 U.S. 97 (1979).

<sup>134</sup> 491 U.S. 524 (1989).

<sup>135</sup> *Cox Broad.*, 420 U.S. at 472-74.

<sup>136</sup> *Id.* at 472.

<sup>137</sup> *Id.* at 473-74.

<sup>138</sup> *Id.* at 472.

<sup>139</sup> *Id.* at 472-73.

<sup>140</sup> *Id.* at 491.

<sup>141</sup> *Id.*

that “there is a zone of privacy surrounding every individual within which the state may protect ... from intrusion by the press.”<sup>142</sup>

To determine what is considered a legitimate public interest in this specific case, the Court did engage in some balancing between the First Amendment and the right of privacy.<sup>143</sup> First, it recognized that “[t]he developing law surrounding the tort of invasion of privacy recognizes a privilege in the press to report the events of judicial proceedings.”<sup>144</sup> The Court, like previous lower court decisions, focused on whether the publication of this information is of a legitimate public interest to determine when privacy ends and First Amendment protection begins.<sup>145</sup> It reasoned that, in a broad sense, “[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.”<sup>146</sup>

Second, the Court recognized that even “[t]he Warren and Brandeis article, *supra*, noted that the proposed new right would be limited in the same manner as actions for libel and slander where such a publication was a privileged communication.”<sup>147</sup> Therefore, based on the fact that the information was already in the public domain through the court documents, the Court concluded that “the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record.”<sup>148</sup>

#### B. *Smith v. Daily-Mail Publishing Co.: Refusing a Cause of Action When Information Was Lawfully Obtained*

After *Cox Broadcasting* left open the question of whether private-fact torts are all together barred by the First Amendment, the Supreme Court in *Smith v. Daily-Mail Publishing Co.*<sup>149</sup> again refused the opportunity to settle this constitutional debate. In *Daily-Mail*, a West Virginia newspaper was punished for publicizing the name of a juvenile offender.<sup>150</sup> In West Virginia, the publication of such information was forbidden by statute without the permission

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<sup>142</sup> *Id.* at 487.

<sup>143</sup> *See id.* at 492-94.

<sup>144</sup> *Id.* at 493.

<sup>145</sup> *Id.* at 492.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 495. Basically, the Supreme Court used a balancing test of sorts when it concluded that the right of privacy was outweighed by First Amendment rights when the information published was obtained from public records.

<sup>149</sup> 443 U.S. 97 (1979).

<sup>150</sup> *Id.* at 99-100.

of the circuit court judge.<sup>151</sup> The newspaper reporter had obtained the name of a juvenile involved in a school shooting by interviewing other students, teachers and police officers.<sup>152</sup>

The court in *Daily-Mail* held that the statute was unconstitutional because a state cannot punish the press for publishing information that is truthful and was obtained lawfully.<sup>153</sup> The court also noted that “state action to punish the publication of truthful information can seldom satisfy constitutional standards.”<sup>154</sup> Although this case did not outright ban a cause of action for the publication of truthful facts, the Court severely limited its usefulness by strictly defining what is of a legitimate public interest.<sup>155</sup>

### C. The Florida Star v. B.J.F.: *The Supreme Court’s Last Word on the Publication of the Private-facts*

*The Florida Star v. B.J.F.*<sup>156</sup> is the most recent case where the Supreme Court could have squarely eliminated the publication of private-facts as unconstitutional. Instead, the court once again made a narrow holding and alluded to the fact that private-fact torts may be constitutional in some circumstances.<sup>157</sup> In this case, *The Florida Star* was sued for invasion of privacy because it published the name of a rape victim that it obtained from a publicly released police report.<sup>158</sup> In Florida the publication of rape victim’s names was illegal.<sup>159</sup>

In deciding this case, the Supreme Court recognized that they are faced with a constitutional question that causes a clash between the First Amendment and an individual’s privacy rights.<sup>160</sup> The court even noted that there may be times when the publication of a rape victim’s name may be subject to civil liability.<sup>161</sup> However, the court did not extend such a determination in this case. Instead, the court narrowly held that “where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when [there is a] narrowly tailored state interest of the highest order.”<sup>162</sup> No such interest was present in this case as the court was reluctant to

<sup>151</sup> *Id.* at 98-99.

<sup>152</sup> *Id.* at 99.

<sup>153</sup> *Id.* at 104.

<sup>154</sup> *Id.* at 102.

<sup>155</sup> *See id.* at 103.

<sup>156</sup> 491 U.S. 524 (1989).

<sup>157</sup> *Id.* at 541.

<sup>158</sup> *Id.* at 527-29.

<sup>159</sup> *Id.* at 528-29.

<sup>160</sup> *Id.* at 533.

<sup>161</sup> *Id.* at 537.

<sup>162</sup> *Id.* at 541.

punish a newspaper for publication of a fact that was publicly released to the press through a governmental agency.<sup>163</sup>

The court again, in a resemblance of some balancing between the First Amendment and an individual's right to privacy, mentioned in a footnote that privacy fades when information is publicly released.<sup>164</sup> Otherwise, the court believes, there would be mass self-censorship.<sup>165</sup> However, unlike the previous cases, the Supreme Court specifically stated that it was not willing to hold that "truthful publication may never be punished consistent with the First Amendment."<sup>166</sup> Even more specifically, the court said that it specifically limited its holding today.<sup>167</sup>

We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense.<sup>168</sup>

#### D. *So Where Did the Supreme Court Leave Us?*

*Cox Broadcasting*, *Daily-Mail*, and *Florida Star* all examined the possibility of civil liability for private-fact torts.<sup>169</sup> In each of these cases, the Supreme Court wrote a limited opinion based on the discreet facts presented in each situation and in each case, the Supreme Court refused to bar a cause of action for the publication of private, but truthful facts.<sup>170</sup> Therefore, these cases do leave a small hope for future plaintiffs who wish to bring a cause of action for the disclosure of private-facts. Because the court refused to prohibit the tort, it can be argued that the Supreme Court believes that there are situations in which a person's right to privacy can override of the First Amendment.

On the other hand, in each of these cases, the Court has also limited the ability of a plaintiff to succeed because the Court has refused to define or expand the disclosure of private-facts to give it a fighting chance against the importance of the First Amendment right to free press and speech. Therefore, many commentators have reasoned that these Supreme Court cases have in fact been the "death nail" for the disclosure of private-facts as a legitimate tort.<sup>171</sup>

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<sup>163</sup> *Id.* at 535.

<sup>164</sup> *Id.* at 532, n.7.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 532.

<sup>167</sup> *Id.* at 541.

<sup>168</sup> *Id.*

<sup>169</sup> *See supra* note 29.

<sup>170</sup> *Id.*

<sup>171</sup> *See generally supra* note 34.

Or, at minimum, some commentators have reasoned that the Court has left little room for the plaintiff to successfully maneuver.<sup>172</sup> “[T]he Court noted only that plaintiffs could enforce their privacy rights if: (1) the state narrowly tailors its punishment to protect a state interest of the highest order, or (2) the defendant discloses truthful information that was obtained unlawfully.”<sup>173</sup>

However, regardless of whether the Supreme Court will in the future determine that the disclosure of private-facts tort is prohibited by the First Amendment, the Court has currently chosen not to do so leaving the tort a fighting chance of survival – its small hope. But, for this small hope to succeed the Supreme Court and the lower courts must begin to look at the tension between the First Amendment and the right of privacy not in terms of absolutism – where only one concept can prevail in each case – but in terms of rights that must be balanced against each other in a fair and proportionate way. These rights must be balanced in a way so that neither interest is overcome by the other and both rights’ principles and ideals remain viable. However, lower courts have yet to turn this Supreme Court precedent into a test that balances these two interests. Most of the lower courts have acknowledged a need to balance the interests, but instead the uniform rule is that whatever is published was of a legitimate public interest, further bringing the private-facts tort to its deathbed.<sup>174</sup>

#### V. THE NEWSWORTHINESS DEFENSE, BALANCING OPTIONS, AND THE BREACH OF CONFIDENCE TORT: HOW THE LOWER COURTS HAVE REACTED TO THE SMALL HOPE LEFT BY THE SUPREME COURT

Instead of defining the boundaries of the public disclosure of private-facts tort and developing an operational test that balances privacy interests and the First Amendment rights of free speech and press, most courts have adopted some version of the newsworthiness defense, which basically involves deferring to the judgment of the media to determine what is of a legitimate public interest.<sup>175</sup> A few select others have engaged some sort of balancing test between the First Amendment and the individual’s right of privacy.<sup>176</sup> Still yet, other courts have adopted a new tort entitled, breach of confidence.<sup>177</sup> This section will closely examine each of these “solutions” developed by the lower courts to grapple with the determination of what information constitutes a legitimate public interest.

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<sup>172</sup> Jonathan B. Mintz, *The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 455 (1996).

<sup>173</sup> *Id.*

<sup>174</sup> See *infra* Section V.

<sup>175</sup> See *supra* note 30.

<sup>176</sup> See *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128-30 (9th Cir. 1975); see also *Bartnicki v. Vopper*, 532 U.S. 514, 535-41 (2001) (Breyer, J. concurring).

<sup>177</sup> See *infra* Section V(C).

### A. *The Newsworthiness Defense: Power to the Press*

The newsworthiness defense can be separated into different categories or types.<sup>178</sup> The most common understanding of this defense, and that most used by the lower courts, is the “Leave it to the Press” model developed by Professor Diane Zimmerman in her 1982 article.<sup>179</sup> Under this definition of the newsworthiness defense, a court would still recognize the existence of a tort for the truthful publication of private-facts.<sup>180</sup> But, in determining what material is of a legitimate public interest, the court will merely defer to the judgment of the press.<sup>181</sup> Although the court would not directly prohibit the tort, no plaintiff could possibly succeed under this model because the media-defendant, itself, would always determine that the material published was of a legitimate public interest.<sup>182</sup>

Professor Zimmerman made several justifications for this model. In particular, she noted that the press often has a better mechanism for determining what is newsworthy than the courts, as the economic survival of the media outlet depends on its ability to produce a product that the general public will purchase.<sup>183</sup> In noting that social norms of acceptable behavior are “better communicated through the marketplace than through the courtroom,” Professor Zimmerman stated that “to argue that the press merely ‘pander’ to public taste at the lowest common denominator is to make a class-based judgment about the value of information that people seek.”<sup>184</sup> Such a judgment is not consistent with the First Amendment.<sup>185</sup> As noted *supra*, the newsworthiness defense has been the preferred method by the courts when addressing the disclosure of private-facts tort.

#### 1. The Preferred Method: How the Lower Courts Have Used the Newsworthiness Defense

The first major case to use a version of the newsworthiness defense was *Sidis v. F-R Publishing Corporation*.<sup>186</sup> As discussed *supra*, the U.S. Court of Appeals for the Second Circuit determined that the publication of information

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<sup>178</sup> See Zimmerman, *supra* note 34, at 350-62.

<sup>179</sup> See *id.* at 353-55; for similar definitions of the newsworthiness defense, see also Bloustein, *supra* note 34, at 54; Dendy, *supra* note 34, at 151; Emerson, *supra* note 34, at 334; Glasser, *supra* note 34, at 27.

<sup>180</sup> See Zimmerman, *supra* note 34, at 353; Dendy, *supra* note 34, at 151.

<sup>181</sup> See Zimmerman, *supra* note 34, at 353.

<sup>182</sup> See *id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 354.

<sup>185</sup> *Id.*

<sup>186</sup> 113 F.2d 806 (2d Cir. 1940).



concerning a recluse child prodigy was newsworthy and therefore of a legitimate public interest. After *Sidis*, and especially after *Cox Broadcasting*, many lower courts have followed this lead by creating an unstoppable newsworthiness defense for the press and publishers.<sup>187</sup> Three main examples of this are *Campbell v. The Seabury Press*,<sup>188</sup> *Gilbert v. Medical Economics Co.*,<sup>189</sup> and *Haynes v. Alfred A. Knopf, Inc.*<sup>190</sup>

After *Cox Broadcasting*, the U.S. Court of Appeals for the Fifth Circuit was the first lower court to adopt a type of the newsworthiness defense through *Campbell v. The Seabury Press*. The plaintiff in *Campbell* brought an action for libel and invasion of privacy against the author, who was her former brother-in-law, and publisher of the book *Brother to a Dragonfly*.<sup>191</sup> This book was an autobiography of the defendant's interaction with the plaintiff's ex-husband, a famous religious and civil rights leader.<sup>192</sup> The plaintiff claimed that portions of the book describing her marriage constituted an invasion of her right to privacy.<sup>193</sup>

The Fifth Circuit denied the plaintiff a civil remedy for the publication of her private life by holding that a logical nexus existed between the information disclosed about the plaintiff's marriage and the impact it had on the subject of the book; therefore, the information disclosed was newsworthy and of a legitimate public interest.<sup>194</sup> The court did not go through any lengthy analysis to prove that the nexus existed, but simply said that "a review of the record" supported it.<sup>195</sup> In addition, this court expanded the traditional definition of the newsworthiness defense by reasoning that "[t]his . . . privilege is not merely limited to the dissemination of news either in the sense of current events or commentary upon public affairs."<sup>196</sup> Instead, "the privilege extends to information concerning interesting phases of human activity and embraces all issues about which information is needed or appropriate so that individuals may cope with the exigencies of their period."<sup>197</sup>

The U.S. Court of Appeals for the Tenth Circuit in *Gilbert v. Medical Economics Co.* also adopted the newsworthiness defense after *Cox Broadcasting*.<sup>198</sup> This case ruled that the circumstances to defeat a defendant's First

<sup>187</sup> See *supra* note 30.

<sup>188</sup> 614 F.2d 395 (5th Cir. 1980) (per curiam).

<sup>189</sup> 665 F.2d 305 (10th Cir. 1981).

<sup>190</sup> 8 F.3d 1222 (7th Cir. 1993).

<sup>191</sup> *Campbell*, 614 F.2d at 396.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 397.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981).

Amendment privilege to publish truthful information are present in only very extreme cases.<sup>199</sup> The plaintiff in *Gilbert* sued because of an article published in the periodical *Medical Economics*.<sup>200</sup> The article dealt with two incidents of medical malpractice committed by the plaintiff.<sup>201</sup> In addition to describing these incidents, the article included information about the doctor's "history of psychiatric and related personal problems."<sup>202</sup> The court held that the plaintiff's suit was blocked by the First Amendment because the information published added credibility to the story and were linked in the article as to why the doctor committed the malpractice.<sup>203</sup> In coming to this conclusion, the court reasoned that the First Amendment privilege protects all things that are newsworthy which only excludes extreme cases where the "editor abuses his broad discretion."<sup>204</sup> No other direction or specific guidelines were given. Therefore, the Tenth Circuit expressly adopted the "leave it to the press" model.

Finally, the U.S. Court of Appeals for the Seventh Circuit in *Haynes v. Alfred A. Knopf, Inc.* also adopted a version of the newsworthiness defense.<sup>205</sup> The plaintiff in *Haynes* sued the author and publisher of the popular social history *The Promised Land: The Great Black Migration and How it Changed America*.<sup>206</sup> Throughout the book, the author specifically identified the plaintiff by name while discussing his previous marriage and sexual proclivity with the book's main character.<sup>207</sup> The court held that the invasion of privacy claim was barred by the First Amendment because the information published was of a legitimate public interest.<sup>208</sup> In coming to this conclusion, the court used a version of the newsworthiness defense by recognizing that the information published must be more newsworthy than "the thrill of penetrating the wall of privacy."<sup>209</sup> Although the court does not define the newsworthiness defense as liberally as the "leave to it the press" model, it does narrowly limit a potential plaintiff's ability to recover for the publication of truthful private-facts.

Although *Campbell*, *Gilbert*, and *Haynes* are three main examples of how the lower courts have treated the small hope left by the Supreme Court, several other courts have followed a similar pattern.<sup>210</sup> These lower courts have

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 306.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 308-09.

<sup>204</sup> *Id.* at 308.

<sup>205</sup> *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993).

<sup>206</sup> *Id.* at 1224.

<sup>207</sup> *Id.* at 1224-25.

<sup>208</sup> *Id.* at 1232.

<sup>209</sup> *Id.*

<sup>210</sup> See, e.g., *Partington v. Bugliosi*, 56 F.3d 1147, 1157 (9th Cir. 1995) (holding that a book written by a man acquitted of murder criticizing his attorney's trial tactics was not invasion of

consistently sided with the First Amendment, limiting private-fact torts to unknown and undetermined extreme cases.<sup>211</sup> Therefore, under the newsworthiness defense as interpreted by these courts, no plaintiff would be able to prevail for a private-fact tort unless the publication of the truthful information is so extreme as to override this defense. Furthermore, a majority of these courts have deemed anything that the media has published as automatically newsworthy and therefore, automatically of a legitimate public interest.<sup>212</sup>

## 2. Problems with the Newsworthiness Defense: Where are the Privacy Interests?

Although the newsworthiness defense has been adopted by many courts, it has undergone severe criticism by many commentators who believe that courts are too timid in defining the meaning of “legitimate public interest.”<sup>213</sup> In particular, these commentators discuss the endless bounds of the defense.<sup>214</sup> They note that the defense is extremely vague because it “fails to protect an individual’s interest in privacy not only because the plaintiff – as opposed to the press – must identify the limits to the newsworthiness privilege but because the terms used to define ‘newsworthiness’ are themselves vague and ambiguous.”<sup>215</sup> In addition, the nexus of the newsworthiness defense and the First Amendment has also been questioned because “‘newsworthiness defense seemingly derived from the nature of the public disclosure tort itself, rather than from the First Amendment.’”<sup>216</sup>

But, more importantly, as one commentator expressly explained, the use of the newsworthiness defense either “evades the issue or gives exclusive weight to First Amendment rights.”<sup>217</sup> Therefore, these courts refused to give the tension between the First Amendment and the right to privacy justice. Instead, they rely on an absolutism concept where the courts feel that they must

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privacy as the book was more opinion than fact); *Cinel v. Connick*, 15 F.3d 1338, 1346 (5th Cir. 1994) (holding that the release of the names and identities of two men depicted in a video engaging in homosexual activities with a priest did not involve an invasion of privacy); *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977) (reasoning that activities of the Rosenberg children, whose identity as such were known, as published in a book about their parents, former Nazi spies, are within the “orbit of public interest and scrutiny”); for state courts that follow this reasoning, see *supra* note 33.

<sup>211</sup> See *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993).

<sup>212</sup> See *supra* note 30.

<sup>213</sup> Bloustein, *supra* note 34, at 55-57; see also Dendy, *supra* note 34, at 163-64; Emerson, *supra* note 34, at 342; Glasser, *supra* note 34, at 31; c.f. Zimmerman, *supra* note 34, at 353.

<sup>214</sup> See *supra* note 34.

<sup>215</sup> Glasser, *supra* note 34, at 31.

<sup>216</sup> Sharon Carton, *The Poet, the Biographer and the Shrink: Psychiatrist-Patient Confidentiality and the Anne Sexton Biography*, 10 U. MIAMI ENT. & SPORTS L. REV. 117, 133 (1993).

<sup>217</sup> Emerson, *supra* note 34, at 342.

choose between the First Amendment and the right of privacy. Because the newsworthiness defense puts too much power in the hands of the defendant-publisher, the courts should look for another solution to determine what is of a legitimate public interest that more fairly addresses all of the concerns instead of just one – the First Amendment.

*B. Professor Emerson's Balancing Test: A Fairer Examination of the Problem*

In an effort to find a solution to the tension between the First Amendment and privacy interests, Professor Thomas Emerson created a balancing test that the courts could use to address the issue. Although Professor Emerson, in developing his balancing solution, acknowledged that balancing tests are often vague and ineffective, he stated that “it may be possible to refine the balancing process by isolating specific types of interests, rejecting some claimed interests, giving special weight to others, utilizing presumptions, and otherwise laying the basis for a common law development of the issues.”<sup>218</sup> To make the balancing test more predictable, Professor Emerson placed more emphasis on the privacy side of the scales.<sup>219</sup> In particular, he stated that his balancing test “would give primary attention to a number of factors which derive ultimately from the functions performed by privacy and the expectations of privacy that prevail in contemporary society.”<sup>220</sup> These factors include: (1) emphasis on elements of intimacy to determine the zone of privacy,<sup>221</sup> (2) the non-protection of information from judicial or administrative procedures,<sup>222</sup> (3) the public status of the person claiming invasion of privacy,<sup>223</sup> and (4) allowing the “breathing space” for the press.<sup>224</sup>

After Professor Emerson developed his balancing test, which placed more weight on privacy rights, a few courts have come close to following a balancing test that does more than completely ignore privacy interests. In particular, *Virgil v. Times, Inc*<sup>225</sup> became the first case to set a definitive standard that courts could follow when determining whether the material published is of a

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 343.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 343-44. Professor Emerson specifically mentions sexual relations, bodily functions, and family relations as elements of intimacy.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* Specifically, Professor Emerson noted, under this factor, that “[i]t must not force the press into self-censorship, or in any way force it to refrain from legitimate expression, by reason of uncertainty as to where the boundaries lie, fear of costly litigation, or a desire to avoid possible trouble.”

<sup>225</sup> 527 F.2d 1122 (9th Cir. 1975).

“legitimate public interest.”<sup>226</sup> The plaintiff in *Virgil* sued for invasion of privacy after he willingly gave interviews to a Sports Illustrated reporter.<sup>227</sup> The plaintiff later revoked consent when he learned that the article would contain details about his somewhat erratic behavior.<sup>228</sup>

In determining that the plaintiff’s cause of action should go to the jury,<sup>229</sup> the U.S. Court of Appeals for the Ninth Circuit made several strong statements about the importance of privacy.<sup>230</sup> Before announcing a standard, the court recognized that merely discussing private-facts with another person does not mean that that person is free to make those facts public.<sup>231</sup> More importantly, the Ninth Circuit reasoned that the First Amendment does not protect the right to pry into an individual’s private life.<sup>232</sup> Thus, the court indirectly rejected the “leave it to the press” model of the newsworthiness defense.<sup>233</sup> Furthermore, the court recognized the need to protect privacy so that people can maintain an enjoyable quality of life<sup>234</sup> by developing a balancing test to determine what is the meaning of a legitimate public interest. The court stated that:

In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.<sup>235</sup>

Although the Ninth Circuit does not go as far as Professor Emerson in emphasizing privacy rights in its balancing test, this court does go further than most others by recognizing the importance of implementing a balancing test, as opposed to automatically determining that First Amendment rights prevail over privacy rights.<sup>236</sup> Instead, this court allows the community to determine what

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<sup>226</sup> See J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 507-08 (1985).

<sup>227</sup> *Virgil*, 527 F.2d at 1123-25.

<sup>228</sup> *Id.* at 1124.

<sup>229</sup> *Id.* at 1130.

<sup>230</sup> *Id.* at 1126-28.

<sup>231</sup> *Id.* at 1127.

<sup>232</sup> *Id.* at 1128.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 1129 (citing RESTATEMENT (SECOND) OF TORTS § 652D (1977)).

<sup>236</sup> *Id.*

information should be protected under the truthful publication of private-facts.<sup>237</sup> In particular, the court stated “[w]here competing values are involved, unless one competitor is to be sacrificed outright, those involved with the competition must accept that risks are inherent and the problem lies in attempting to minimize them to the extent that the conflict permits.”<sup>238</sup> In conclusion, the *Virgil* court actually added to the balancing test by including an additional factor – a determination by the community of what is of a legitimate public interest.<sup>239</sup> Finally, the *Virgil* court does not use an absolutism concept and attempts to come to a middle ground when confronted with a case that puts the First Amendment against the right of privacy.

Another relevant example of an appropriate balancing test between the First Amendment and privacy rights occurred at a higher level – Justice Breyer’s concurring opinion in *Bartnicki v. Vopper*.<sup>240</sup> The plaintiffs in *Bartnicki* sued because a local radio show played a tape-recorded conversation about a hotly contested issue involving the local teacher union.<sup>241</sup> The recorded conversation contained threats made by one local school board member against other members if they chose not vote the plaintiff’s way.<sup>242</sup> Although the conversation was illegally recorded, the radio outlet that played the conversation was unaware of this fact.<sup>243</sup>

The *Bartnicki* majority decided a very narrow issue, namely “[w]here the punished publisher of the information has obtained the information in question in a manner lawful in itself, but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect?”<sup>244</sup> Although the court recognized that there is an important interest in protecting an individual’s privacy,<sup>245</sup> it reasoned that privacy concerns give way when compared to publishing matters of public concern.<sup>246</sup> In the end, the majority held that a “stranger’s illegal conduct does not suffice to

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<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 1129-30.

<sup>239</sup> *Id.* at 1129.

<sup>240</sup> 532 U.S. 514, 535-41 (2001) (Breyer, J., concurring).

<sup>241</sup> *Id.* at 518-19. The issue involved collective bargaining negotiations between the Pennsylvania Student Education Association, on behalf of the teachers at Wyoming Valley West High School, and the local school board.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 519. Most likely, the station could have figured out that the conversation was illegally recorded. *Id.* at 525. But, the point in the case became that the media outlet came into the information lawfully. *Id.* at 528.

<sup>244</sup> *Id.* at 528 (quoting *Boehner v. McDermott*, 191 F.3d 463, 484-85 (Sentelle, J., dissenting), *overruled in part* by *Bartnicki v. Vopper*, 532 U.S. 514 (2001)).

<sup>245</sup> *Id.* at 533.

<sup>246</sup> *Id.* at 534.

remove the First Amendment shield from speech that involves a matter of public concern.”<sup>247</sup>

Although agreeing with the ultimate holding of the majority, Justice Breyer, in his concurring opinion, takes a different path to the same result. Breyer, in developing his own balancing test, stated that a strict scrutiny analysis is out-of-place when dealing with competing constitutional interests.<sup>248</sup> Breyer then compared the First Amendment rights and the privacy interest at issue in this case.<sup>249</sup> First, he explained that the Constitution demands that all laws aimed at protecting an individual’s privacy must be tailored to reconcile the tension between media and privacy interests.<sup>250</sup> Second, he noted that several factors cause the disclosure of the conversations to have a high level of public interest.<sup>251</sup> These factors include the fact that the conversation dealt with potential harm to others and that the conversations were limited to public figures that are subject to more public scrutiny than private citizens.<sup>252</sup> In the end, Breyer noted that some intrusions on privacy are more offensive than others and therefore deserve higher protection and balancing weight.<sup>253</sup> However, in this case, the privacy concerns were relatively low and the public interest was very high.<sup>254</sup>

Breyer’s concurring opinion clearly lays out the importance of balancing First Amendment and privacy rights. Instead of outright rejecting the privacy rights as unimportant, Breyer goes through a balancing test to determine which right outweighs the other.<sup>255</sup> Because this case involves the tension between privacy and the First Amendment, Breyer is able to do a fair balancing test – one that may be followed by the lower courts when addressing this issue.

In conclusion, although neither Breyer’s concurring opinion nor the *Virgil* court went as far as Professor Emerson in protecting privacy rights, these two decisions can serve as the foundation for courts that would want to do justice to the tension between First Amendment and privacy rights. Breyer’s concurrence in *Bartnicki* and the *Virgil* court give other courts guidelines that more fairly help to determine when disclosed information is of a legitimate public interest. Based on these cases, other courts could weigh the importance of privacy rights over First Amendment rights by focusing on factors such as the extent to which the published information dealt with a public figure, the impact of the publication on the private individual, the impact of the publication on the

<sup>247</sup> *Id.* at 535.

<sup>248</sup> *Id.* at 536.

<sup>249</sup> *Id.* at 537.

<sup>250</sup> *Id.* at 538.

<sup>251</sup> *Id.* at 539.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 540.

<sup>254</sup> *Id.* at 539-40.

<sup>255</sup> *Id.* at 538-40.

community, and the right of the community to legitimately know this information.<sup>256</sup>

### C. *An Emerging Possibility: Breach of Confidence*

According to one commentator, there are two common law mechanisms that are “designed to provide a remedy when personal information is disclosed – invasion of privacy and breach of confidence.”<sup>257</sup> Breach of confidence is a “legally enforceable duty of confidentiality if the confider has indicated, either in writing or orally, a desire to exercise control over the disclosure of the information, and the confidant has ‘explicitly and voluntarily agreed to hold [the information] in confidence.’”<sup>258</sup> Both of these remedies can trace their origin to the same old English case – *Prince Albert v. Strange*.<sup>259</sup> However, the American court system has used this starting point to develop invasion of privacy law while the English court system has used this case to develop a theory of recovery entitled breach of confidence.<sup>260</sup>

Over the past century and a half, English courts have further developed the breach of confidence as a tort theory of recovery.<sup>261</sup> In particular, the English court system has determined that breach of confidence can be a valid claim where: (1) the parties have a contract; (2) there was a pre-existing relationship between the parties; and (3) “the unilateral imposition of such a duty by the confider telling the confidant that the information is given ‘in confidence.’”<sup>262</sup> Even when there is no expressed or implied contract between the parties, the English courts have allowed a breach of confidence claim to continue where there was an employer/employee, lawyer/client, doctor/patient, or priest/penitent relationship. The English courts have also allowed the plaintiff to bring a successful breach of confidence claim “where a husband proposed to reveal his marital secrets; where a woman disclosed the revelations of a close friend; and, where a litigant revealed information produced during discovery in a civil case.”<sup>263</sup>

Although the American court system chose to pursue the invasion of privacy route to protect the publication of private-facts, many scholars have noted that this has been made unsuccessful by the lower courts’ interpretations.

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<sup>256</sup> For more development of this, see *infra*, Section VI.

<sup>257</sup> Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasion of Privacy*, 43 BUFFALO L. REV. 1, 4 (1995).

<sup>258</sup> G. Michael Harvey, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2425 (1992).

<sup>259</sup> 41 Eng. Rep. 1171 (1849).

<sup>260</sup> Gilles, *supra* note 257, at 4-5.

<sup>261</sup> See *id.* at 10-14.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 12-13.



Therefore, the breach of confidence tort has been seen by some to be a bright new light in the protection of a person's privacy.<sup>264</sup>

### 1. The Three Categories of American Breach of Confidence

Currently, American courts have allowed a breach of confidence cause of action to continue within three categories of recovery: (1) contract, (2) fiduciary duty, and (3) tort. First, under the contract theory for breach of confidence, "express written contracts, binding the signer to hold information confidential, have long been used in the commercial area, particularly by employers to prevent employees from revealing business secrets."<sup>265</sup> An example of this type of cause of action is *Snepp v. U.S.*<sup>266</sup> In that case, a former CIA agent wrote a book without submitting the manuscript to the agency beforehand.<sup>267</sup> The agent was required to do so through an employment contract he signed when joining the agency. When Snepp published his book, the government sued for breach of contract. The U.S. Supreme Court upheld the government's claim and reasoned that Snepp, the CIA agent, was bound by his contract agreement to not publish the book without submitting it for review by the agency first.<sup>268</sup> Therefore, the Court required the CIA agent to abide by his promise to keep secret the confidential information he learned while employed by the CIA because of his written employment contract.

Second, a fiduciary cause of action exists when the plaintiff can show that a fiduciary relationship existed between himself and the defendant. "Where such a relation exists, a fiduciary is under a duty to act for the benefit of the other party to the relation as to matters within the scope of the relation."<sup>269</sup> This cause of action can also be characterized as a duty of loyalty that includes a duty not to disclose information.<sup>270</sup> Under the area of fiduciary duty breach of confidence, there are two main types of cases: doctor-patient<sup>271</sup> and banker-depositor.<sup>272</sup>

An example of the fiduciary duty breach of confidence cause of action is *Peterson v. Idaho First National Bank*.<sup>273</sup> In this case, an officer of the plain-

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<sup>264</sup> See Gilles, *supra* note 257, at 9; Alan B. Vickery, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1456 (1982); Zimmerman, *supra* note 34, at 362-63.

<sup>265</sup> Gilles, *supra* note 257, at 15.

<sup>266</sup> 444 U.S. 507 (1980).

<sup>267</sup> *Id.* at 507-08.

<sup>268</sup> *Id.* at 516.

<sup>269</sup> Gilles, *supra* note 257, at 39.

<sup>270</sup> *Id.*

<sup>271</sup> See, e.g., *Berry v. Moench*, 331 P.2d 814, 817 (Utah 1958); *Doe v. Roe*, 400 N.Y.S.2d 668, 674 (Sup. Ct. 1977).

<sup>272</sup> See, e.g., *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 290 (Idaho 1961).

<sup>273</sup> 367 P.2d 284 (Idaho 1961).

tiff's employer had asked a bank manager to inform him of any problems the plaintiff had that may reflect badly upon the company.<sup>274</sup> The manager then wrote the employer, explaining that plaintiff's financial position was bad.<sup>275</sup> The Idaho Supreme Court examined the relationship between the banker and the plaintiff to determine if the plaintiff has a valid breach of confidence claim.<sup>276</sup> The court compared the plaintiff and the banker's relations to that of an agent and principal.<sup>277</sup> Then the court stated that "[u]nless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given to him by the principal . . . ."<sup>278</sup> Therefore, under this cause of action, courts have long used the theory to allow recovery when there is no specific contract, but where a fiduciary relationship exists.

Although contract and fiduciary breach of confidence causes of action have existed for many years within America, these two theories can be limiting to a plaintiff who wishes to recover for public disclosure of private-facts because the plaintiff must prove that an expressed or implied contract existed or that a fiduciary relationship existed. In addition, the injuries the plaintiff in a disclosure of private-fact case will suffer typically involve loss of income, loss of reputation, and mental distress and anguish.<sup>279</sup> However, in contract cases damages are limited to those that "'may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of breach of it."<sup>280</sup> Fiduciary duty cases can also limit damages. Typically, depending on the case, the plaintiff can enjoin the defendant from releasing the information and/or recover damages based on the profit the defendant received from the information.<sup>281</sup> Therefore, under this cause of action, damages are evaluated in terms of the gain to the defendant instead of the loss to the plaintiff.

Because of the limitation of damages and the difficulties in proving a breach of confidence case within the contract and fiduciary duty realm, several people have looked and encouraged the courts to adopt breach of confidence as a tort theory of liability. Commentators have described the tort as the disclosure of information learned in a confidential relationship.<sup>282</sup> By allowing a breach of confidence cause of action as a tort, the plaintiff could potentially recover for damages from emotional distress and loss of reputation. In addition, the tort

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<sup>274</sup> *Id.* at 286.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 289-90.

<sup>277</sup> *Id.* at 289.

<sup>278</sup> *Id.*

<sup>279</sup> Gilles, *supra* note 257, at 25.

<sup>280</sup> *Id.* at 26.

<sup>281</sup> *Id.* at 48-51.

<sup>282</sup> *Id.* at 52.

would include disclosures of information that did not directly involve a contract or a fiduciary relationship.

Two states have adopted a breach of confidence tort: California<sup>283</sup> and New York.<sup>284</sup> However, in both of these states, only the intermediate appellate levels have adopted the tort. Neither final appellate court has addressed the issue. In California, the breach of confidence tort is very similar to contractual relationship breach of confidence cases, where the plaintiff is required to prove an agreement of confidentiality as an essential element. In *Tele-Count Engineers, Inc. v. Pacific Telephone and Telegraph Company*<sup>285</sup> the plaintiff sued because the defendant had disclosed the plaintiff's trade secrets and other information to companies that were the plaintiff's competitors.<sup>286</sup> A California Court of Appeals held that the cause of action was legitimate because the plaintiff was able to rely on an implied obligation or contract between the parties.<sup>287</sup> The plaintiff had understood that the defendant would not disclose this information to others.<sup>288</sup>

Similarly, the New York courts have required that the parties have either a fiduciary relationship or that an implied contract existed.<sup>289</sup> In *MacDonald v. Clinger*, the plaintiff sued because the defendant, a psychiatrist, disclosed personal information about the plaintiff that was learned during the course of his treatment.<sup>290</sup> The New York Supreme Court, Appellate Division held that the plaintiff and defendant's relationship "gives rise to an implied covenant which, when breached, is actionable."<sup>291</sup> In addition, the court reasoned that "[i]f the plaintiff's recovery were limited to an action for breach of contract, however, he would generally be limited to economic loss flowing directly from the breach ... and would thus be precluded from recovering for mental distress, loss of his employment and the deterioration of his marriage."<sup>292</sup> Therefore, this court believed that "the relationship contemplates an additional duty springing from but extraneous to the contract and that the breach of such duty is actionable as a tort."<sup>293</sup>

In conclusion, although a breach of confidence tort would allow a plaintiff to collect different types of damages, the only two courts to adopt this tort

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<sup>283</sup> See *Tele-Count Eng'rs, Inc. v. Pac. Tel. & Tel. Co.*, 214 Cal. Rptr. 276 (Cal. Ct. App. 1990).

<sup>284</sup> See *MacDonald v. Clinger*, 446 N.Y.S.2d 801, 804 (N.Y. App. Div. 1982).

<sup>285</sup> See *Tele-Count Eng'rs, Inc. v. Pac. Tel. & Tel. Co.*, 214 Cal. Rptr. 276 (Cal. Ct. App. 1990).

<sup>286</sup> *Id.* at 277-78.

<sup>287</sup> *Id.* at 279-81.

<sup>288</sup> *Id.* at 277-78.

<sup>289</sup> See *MacDonald v. Clinger*, 446 N.Y.S.2d at 804.

<sup>290</sup> *Id.* at 802.

<sup>291</sup> *Id.* at 804.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

still require certain elements of contract and/or fiduciary law to be met before the plaintiff can recover.

## 2. But, What Are the Constitutional Issues?

Although strongly encouraged by several commentators,<sup>294</sup> the constitutionality of this new “development” is just as questionable as that of the truthful publication of private-facts tort.<sup>295</sup> Courts, as with the truthful publication of private-facts tort, are likely to challenge the tort’s ability to limit a publisher’s speech from the breach of confidence theories.<sup>296</sup> The guiding case on the constitutionality of breach of confidence is *Cohen v. Cowles Media Co.*<sup>297</sup>

The plaintiff in *Cohen* was promised anonymity in exchange for damaging information about a political candidate for the Lieutenant Governorship in Minnesota.<sup>298</sup> Each of these newspapers independently decided to break the promise made to Cohen by publishing Cohen’s name as part of the story.<sup>299</sup> Cohen sued the newspapers under the state’s common promissory estoppel doctrine.<sup>300</sup> The U.S. Supreme Court determined that Cohen’s suit was not barred by the First Amendment because promissory estoppel law is generally applicable and does not single out the media.<sup>301</sup> The Court distinguished Cohen’s case from the *Florida Star* line of cases by claiming that laws of general applicability, such as common promissory estoppel law, do not offend the First Amendment.<sup>302</sup> The court also noted that there was an important distinction between contract relationships such as this case and suing for information that is already put into the public domain.<sup>303</sup>

However, although the U.S. Supreme Court allows a breach of confidence cause of action to continue in *Cohen*, which involved a promissory estoppel theory of recovery, this case can be distinguished from the tort breach of confidence version. The biggest problem for this new tort is that some courts may also view it as targeting and singling out the media for punishment because, similar to the problems faced by the private-fact tort, one of the essential elements of the tort involves limiting information that will be disclosed to the public.<sup>304</sup> On the other hand, there are some advantages to breach of confi-

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<sup>294</sup> See Gilles, *supra* note 257, at 65-71.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> 501 U.S. 663 (1991).

<sup>298</sup> *Id.* at 665.

<sup>299</sup> *Id.* at 666.

<sup>300</sup> *Id.* at 666-67.

<sup>301</sup> *Id.* at 670.

<sup>302</sup> *Id.* at 669-70.

<sup>303</sup> *Id.* at 670-71.

<sup>304</sup> See Gilles, *supra* note 257, at 79.

dence. For example, as shown by *Cohen* and the New York and California cases, the courts could use the tort framed by contract and fiduciary issues to bypass any constitutional problems.<sup>305</sup> But, ultimately, these cases and the current breach of confidence law show that the plaintiffs and the courts are attempting to allow some privacy rights to continue by re-characterizing and squeezing what is essentially a private-fact tort claim into a different box in an attempt to avoid confrontation with the First Amendment. In reality the courts need to address this tension by properly balancing the privacy interests and the First Amendment and come to a middle ground where both principles can exist.

#### VI. THE SOLUTION: HOW COURTS SHOULD REACT TO THE SMALL HOPE LEFT BY THE SUPREME COURT

From *Cox Broadcasting* to *Florida Star*, the U.S. Supreme Court has left a small hope for plaintiffs who wish to recover for the truthful publication of private-facts.<sup>306</sup> This small hope is the Supreme Court's continuing refusal to outright bar the publication of private-facts as a legitimate tort. However, most lower courts have taken this small hope and sunk it by practically eliminating the private-fact tort through the newsworthiness defense.<sup>307</sup> By using the newsworthiness defense, the courts are cheating the plaintiffs because these courts are ignoring the importance of privacy rights in their decisions. Instead, these courts have latched onto an absolutism concept. This absolutism concept means that the courts tend to feel that they must make a choice between the First Amendment and privacy issues. To these courts, there is nothing in between these concepts – no middle ground. It is important for these courts to take a closer look at the tension between the First Amendment and privacy rights to determine an approach that would take both of these important rights into consideration. In order to appropriately address this tension, the courts should open the small hope left by the Supreme Court by adopting a “pyramid” scheme as a part of the balancing test to determine a legitimate public interest. Courts should also adopt some version of breach of confidence as a subset of invasion of privacy law.

First, it is important for courts to recognize the breach of confidence theories of liability as a subset of invasion of privacy causes of action. By adopting breach of confidence, this theory of recovery could help plaintiffs deal with more common revelations about their private lives. For example, under a breach of confidence claim, the plaintiff would be able to recover for disclosure of private information from a person who was engaged in a relationship with the plaintiff.<sup>308</sup> Although breach of confidence in its current form would help the

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<sup>305</sup> *Id.*

<sup>306</sup> *See supra* Section IV.

<sup>307</sup> *See supra* Section V(A).

<sup>308</sup> *See supra* Section III.

vast majority of plaintiffs, it is still important for the courts to finally address the tension between the First Amendment and privacy issues instead of simply re-categorizing the cause of action to avoid the ultimate issue. Professor Edward Bloustein, in an early article, began to recognize the importance of having two separate causes of action and of addressing the tension between these two important constitutional issues.

Where private information is wrongfully gained and subsequently communicated, the wrong is made out independently of the communication. Communication in such a case, whether to one person or many, is not of the essence of the wrong and only goes to enhance damages. This, then, is not an exception to the rule of mass communication at all. Where, however, a person chooses to give another information of a personal nature and the confidence is broken, publication is indeed a requisite of recovery and even limited publication is sufficient to support the action. But the wrong here is not the disclosure itself, but rather the disclosure in violation of a relationship of confidence.<sup>309</sup>

As Professor Bloustein alludes to, the release of truthful private information needs to be protected by two distinct causes of action. Breach of confidence alone would not be enough to protect individual privacy rights. For example, the breach of confidence would in theory provide a plaintiff with a cause of action if the plaintiff had some sort of fiduciary relationship with the defendant who disclosed the information. However, the same plaintiff would not have a cause of action under breach of confidence if the defendant, who she had no relationship with, stole her diary full of private, embarrassing facts about her, and published it. Therefore, it is important to address the ultimate problem when a plaintiff finds that their private information was disclosed to the public.

In order to address this tension and this problem, I believe that the court should adopt the “pyramid” scheme. By adopting a “pyramid” scheme as a part of the balancing test to determine what is of a legitimate public interest, the courts will be better able to draw that fine line between the First Amendment and privacy rights. To help explain this theory, first, imagine a multi-level pyramid. Using Mr. Alexander’s case as an example, imagine that the bottom level of the pyramid is general information about criminal proceedings and crimes. The second level consists of information about the war on drugs. The third level is information about multiple drug busts in New York City during which the police confiscated hundreds of kilos of drugs and millions of dollars. The fourth level is made up of the fact that the Task Force used confidential informants and undercover agents to help bring down several Colombian drug cartels. The fifth level is the identity of the main confidential informant – Paul

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<sup>309</sup> See Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 NYU L. REV. 962, 980.

Lir Alexander. The peak of the pyramid contains the specific details about Mr. Alexander's involvement in the drug busts and other private information identifying Mr. Alexander to the drug lords.

The next step for the court is to determine where to draw the line among these various levels of the pyramid as to what information is of a legitimate public interest and what information is not. When examining the very bottom level of the pyramid, and even the second and third levels, courts can still apply the newsworthiness defense as a method to determine what is of a legitimate public interest because those categories of information are easily considered material that should be shared with everyone in the marketplace of ideas.

Limiting the publication of such broad, general categories such as those contained within the first three levels of the pyramid would severely chill speech and the press as well as undermine the First Amendment and the major principles behind it. People have a right to know about criminal proceedings and crimes. People have a right to know about the war on drugs and even specific incidents of success within this war. Because such information contained in the first three levels is so important to our society's knowledge of significant events in their community, the newsworthiness defense is sufficient to satisfy the tension between the First Amendment and any privacy rights that may be enclosed within those levels.

However, it is when the courts begin to examine the fourth, fifth and sixth levels of the pyramid the newsworthiness defense no longer effectively works to address and confront the tension between the First Amendment and privacy rights. Instead, these levels contain significant privacy rights that must be taken into consideration when making a decision as to what information is of a legitimate public interest. To do so, the courts should adopt a balancing test similar to that suggested by Professor Emerson.<sup>310</sup> In developing the ideal balancing test, the courts should draw on some of the individual factors developed by various courts. These factors should include: (1) the identity of the person as a public figure,<sup>311</sup> (2) whether the information can be obtained from public records or information publicly released by government,<sup>312</sup> (3) the duration of time between disclosure and occurrence of the private information,<sup>313</sup> (4) whether the specific identity of the person served a greater interest than to promote gossip,<sup>314</sup> and (5) whether a reasonable person in the community would determine that the information is offensive in disclosure.<sup>315</sup> Other considera-

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<sup>310</sup> See Emerson, *supra* note 34, at 343.

<sup>311</sup> See *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir. 1940).

<sup>312</sup> See *The Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989); *Cox Broad. v. Cohn*, 420 U.S. 469, 491 (1975).

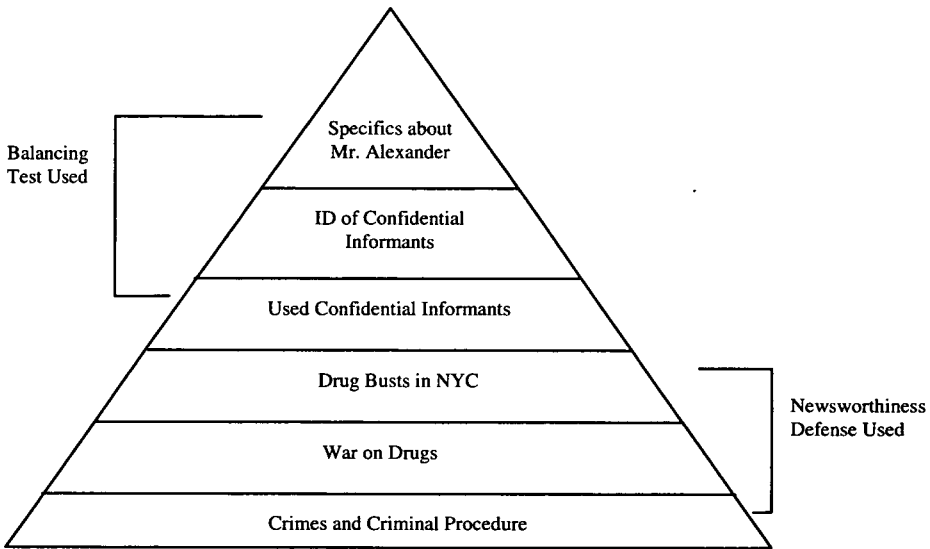
<sup>313</sup> See *Briscoe v. Reader's Digest Ass'n, Inc.*, 4 Cal. 3d 529, 537 (1971), *overruled in part by Gates v. Discovery Commc'ns, Inc.*, 34 Cal. 4th 679 (2004).

<sup>314</sup> See *Melvin v. Reid*, 112 Cal. App. 285, 291 (Cal. Dist. Ct. App. 1931).

<sup>315</sup> See *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975); RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977).

tions and factors can be added to this list over time.<sup>316</sup> When looking at these factors, the plaintiffs or defendants do not have to prove or disprove each of them. Instead, the courts must make their decision based on a totality of the circumstances.

### Diagram Describing the Pyramid Scheme



When doing the balancing for the fourth, fifth and sixth levels, the importance of the privacy issues increases as the court and the information disclosed moves towards the top of the pyramid or when the more private and privileged information has been disclosed. For example, again using Mr. Alexander’s case, the court would start balancing at the fourth level of the pyramid – the disclosure to the public that confidential informants were used. Generally, most courts would probably easily find that someone could disclose to the public that confidential informants were used in combating the war on drugs. Basically, the public has a right and need to know how some police business is conducted in our country and our communities. In addition, since the disclosure that confidential informants were used does not involve the release of specific details or identification of these informants, the disclosure of the information is unlikely to interfere with any major privacy concerns. However, balancing

<sup>316</sup> See Emerson, *supra* note 34, at 344.



should still be done at this level because there may be some circumstances where the disclosure would hurt privacy concerns. For example, this may occur when a police investigation may be harmed by the disclosure.<sup>317</sup>

When the court and the information reaches the fifth and sixth levels of the pyramid, the privacy interests involved may be intense and ideally, the question should go directly to the jury to determine if the information is of a legitimate public interest. But, if the court wants to balance, itself, at these levels to determine if the privacy interest claims are barred by the First Amendment, then the court needs to look at the above factors and legitimately consider the importance of the privacy interests involved while balancing. For example, in Mr. Alexander's case, the court should not bar privacy interest claims when the disclosed information reaches the fifth and sixth levels. First, Mr. Alexander was not a public figure and information concerning his specific involvement with the Task Force was never part of the public record before Mr. Kerik's book was published. Second, the time element is relevant because the information was disclosed to the public soon enough that it was relevant to the drug lords who lost millions and who would still be interested in revenge against Mr. Alexander and his family.

Third, and most importantly, no great public interest was served when Mr. Kerik disclosed Mr. Alexander's name and specific identifying details about his involvement with the Task Force. There was nothing added to his book or story by revealing this information and in the reverse, there would have been nothing taken away if Mr. Kerik had left Mr. Alexander's name out of his book or used a fake name when referring to Mr. Alexander. Mr. Kerik would have still been able to explain to the public about his life story and about his important work for the Task Force. The public, without the release of Mr. Alexander's name and identifying information, would still learn about the world of undercover agents and the war on drugs in New York City. Finally, the disclosed information could be viewed as offensive because it could lead to the death of Mr. Alexander and his family simply because he helped out the government.

Therefore, Mr. Alexander's claims should not have been barred by the First Amendment because, based on the totality of the circumstances, his privacy interests should have outweighed any First Amendment concerns. In particular, as noted above, there is minimal harm to the First Amendment principle because no greater good was served by including Mr. Alexander's name in Mr. Kerik's book. Mr. Kerik's ability to publish his book would not have been harmed or really even limited. He would still be able to express his opinions and tell his story about his role in the war on drugs even if Mr. Alexander's claim was successful.

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<sup>317</sup> See *U.S. v. De Los Santos*, 810 F.2d 1326, 1331 (5th Cir. 1987); *U.S. v. Doe*, 63 F.3d 121, 130 (2d Cir. 1995).

Although no balancing test is perfect, the pyramid scheme attempts to address the major criticisms of using such a balancing test. First, the greater use of this balancing test would give the test itself great predictability.<sup>318</sup> And, as with much of the law, when dealing with First Amendment and privacy issues, there can never be complete predictability on the outcome of a case. Second, because this balancing test is reserved only for specific levels of the pyramid, the pyramid scheme would not chill or cause a major limitation on speech. Most notably, the balancing test is mainly reserved for extreme cases when the tension between the First Amendment and privacy rights is too great to be settled by the newsworthiness defense. Because the courts, using this model, can continue to use the newsworthiness defense in cases involving general and common information, the press will have sufficient “breathing space.” In addition, there will be limited uncertainty because the pyramid scheme does not ask the media to limit disclosure on major aspects that concern the public’s interest. Instead, through the pyramid levels, in combination with a balancing test that acknowledges the importance of privacy interests, the scheme limits disclosures to minor and very specific information.

## VII. CONCLUSION

In conclusion, the Supreme Court has left a small hope concerning whether the publication of private-fact torts can be subject to civil liability under the First Amendment.<sup>319</sup> However, many lower courts have taken this opportunity to sink the small hope by severely limiting a plaintiff’s ability to state a cause of action that can escape the newsworthiness defense.<sup>320</sup> Because the publication of private-facts involves a complex tension between the First Amendment right to free speech and press and privacy rights, the courts need to take a new approach – one that would not ignore the importance of an individual’s privacy.<sup>321</sup> To best walk the fine line between the First Amendment and privacy rights, the courts should adopt the “pyramid” model balancing test, which helps courts to determine where to draw the line between what is of a legitimate public interest and what is not. Furthermore, in conducting this balancing test, the courts should consider several factors, including the identity of the person as a public figure;<sup>322</sup> the availability of the information through other public channels, such as public records;<sup>323</sup> the duration of time between disclo-

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<sup>318</sup> See Emerson, *supra* note 34, at 344.

<sup>319</sup> See U.S. CONST. amend. I.

<sup>320</sup> See *supra* Section V(A).

<sup>321</sup> See *supra* Section III.

<sup>322</sup> See *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir. 1980).

<sup>323</sup> See *The Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989); *Cox Broad. v. Cohn*, 420 U.S. 469, 491 (1975).

sure and occurrence of the private information;<sup>324</sup> the specific interest, not merely promoting gossip, served to the public by divulging the information;<sup>325</sup> and the determination, measured by a reasonable member of the community, that would find the information offensive in disclosure.<sup>326</sup> Finally, in order to protect an individual's privacy rights, the courts should also adopt breach of confidence as a tort cause of action because it will allow the plaintiff to seek tort damages when the defendant breached a contract or fiduciary duty to keep certain information confidential.

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<sup>324</sup> See *Briscoe v. Reader's Digest Ass'n, Inc.*, 4 Cal. 3d 529, 537 (1971), *overruled in part by* *Gates v. Discovery Commc'ns, Inc.*, 34 Cal. 4th 679 (2004).

<sup>325</sup> See *Melvin v. Reid*, 112 Cal. App. 285, 291 (Cal. Dist. Ct. App. 1931).

<sup>326</sup> See *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975); RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977).

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