The Tort that Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*

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I. INTRODUCTION

Like a damaged ship that refuses to sink or a tenacious heavyweight fighter who refuses to lie down for the count, Samuel Warren's and Louis Brandeis' invasion of privacy tort[1] refuses to slip into submission. The tort has not only survived repeated assaults by commentators and First Amendment enthusiasts, but recent case law suggests it may be on the verge of a significant comeback.[2]

The common law tort of "public disclosure of private facts"[3] has led an exciting life since introduced by Warren and Brandeis over a century ago.[4] In their famous law review article, *The Right to Privacy*, the authors warned that the press, a big business enterprise, was invading the privacy of citizens through the use of "instantaneous photographs" and "numerous mechanical devices."[5] Although the courts did not

1. For a detailed discussion of Warren's and Brandeis' proposed tort, see *infra* notes 15-19 and accompanying text.
2. *See infra* Part IV.
3. Hereinafter the private facts tort.
4. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
5. *Id.* at 195.

immediately recognize the proposed right to privacy, by the mid-twentieth century some version of an individual's "right to be let alone"[6] was recognized by a majority of American jurisdictions.[7] As noted by one state supreme court, "[a]cceptance of the right to privacy has grown with the increasing capability of the mass media and electronic devices with their capacity to destroy an individual's anonymity, intrude upon his most intimate activities, and expose his most personal characteristics to public gaze."[8] The American Law Institute followed the emerging trend of case law by recognizing the private facts tort in the Restatement (Second) of Torts.[9]

However, the private facts tort has not received universal acceptance. Due to the potential liability of media defendants, the tort has come under intense attack on constitutional grounds.[10] Critics argue the tort undermines First Amendment protection for freedom of expression.[11] As a result of this constitutional conflict, many courts have been reluctant to hold defendants liable for the public disclosure of private facts, leading to "rare, unpredictable awards of damages."[12] Constitutional concerns have been so great that many recent authors have declared the private facts tort null and void.[13]

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6. *Id.*

7. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 386-88 (1960) (declaring that the private facts tort had been adopted in 27 jurisdictions, probably would be adopted in seven additional jurisdictions, and was recognized in some form by four state statutes).

8. Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 37 (Cal. 1971).

9. *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977). The Restatement recognizes four forms of the invasion of privacy tort: "unreasonable intrusion upon the seclusion of another"; "appropriation of another's name or likeness"; "public disclosure of private facts"; and "publicity which unreasonably places another in a false light before the public." *Id.* §§ 652B-652E.

10. *See, e.g.*, Geoff Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 148 (1996-97) (stating that much criticism accompanies the private facts tort due to censorship concerns).

11. *See* Hall v. Post, 372 S.E.2d 711, 717 (N.C. 1988) (describing the private facts tort as "constitutionally suspect" based on the Supreme Court's recognition of a potential conflict with the First Amendment).

12. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 362-64 (1983) (concluding that the private facts tort should be abolished due to its ineffectiveness).

13. *See id.* at 351. *See also* Phillip E. DeLaTorre, *Resurrecting a Sunken Ship: An Analysis of Current Judicial Attitudes Toward Public Disclosure Claims*, 38 SW. L.J. 1151, 1184 (1985) (calling the private facts tort a "phantom tort"); Joseph Elford, Note, *Trafficking in Stolen Information: A "Hierarchy of Rights" Approach to the Private Facts Tort*, 105 YALE L.J. 727, 729 (1995) (proposing that the private facts tort is "on the verge of collapsing under the weight of the First Amendment"); Lorelei Van Wey,

Rather than simply arguing the merits or shortfalls of the tort, this Comment focuses instead on the subtle reemergence of the private facts tort in factual scenarios Warren and Brandeis most likely could not foresee one hundred years ago. Part II of the Comment briefly describes the development of the private facts tort. Part III examines the inevitable conflict between the private facts tort and the First Amendment, and common law attempts to reconcile that conflict through variations of the "newsworthiness" defense.[14] Part IV focuses on the resurrection of the private facts tort in recent case law, due to judicial limitation of the newsworthiness defense. Finally, after examining the problems associated with the fragmented case law, Part V proposes a new standard for determining newsworthiness—a standard that considers the social use of the information, the extent of prying into private lives for the information, and most importantly, the private or public status of the victim.

II. DEVELOPMENT OF THE PRIVATE FACTS TORT

It is suspected that the private facts tort is the result of excessive and overbearing newspaper coverage of a late nineteenth century private Boston socialite wedding.[15] After the *Saturday Evening Gazette* and other Boston newspapers "invaded" the wedding of attorney Samuel D. Warren's daughter, he teamed up with his friend and future Supreme Court Justice Louis D. Brandeis[16] to compose one of the most influential law review articles in American history.[17] In the article, the authors passionately argued that the resulting pain and distress from media invasions of privacy far exceeded the injuries from any physical tort.[18]

Note, *Private Facts Tort: The End Is Here*, 52 OHIO ST. L.J. 299, 300 (1991) (claiming that the Supreme Court's decision in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), rendered the private facts tort extinct).

14. For a detailed discussion of the newsworthiness defense, see *infra* Part III.B.

15. *See* Prosser, *supra* note 7, at 383.

16. Louis D. Brandeis served on the United States Supreme Court from 1916 to 1939. *See* LEWIS J. PAPER, BRANDEIS 238-39, 391 (1983).

17. *See* Prosser, *supra* note 7, at 383.

18. Warren and Brandeis further stated:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery.... [T]he details of sexual relations are spread broadcast in the daily papers.... The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Therefore, they proposed a common law tort for invasion of the right to privacy. Under their proposed tort, the media would be liable for the written publication of truthful private matter, provided the publication was not of public interest, privileged, or consented to by the injured party.[19]

Although the Warren and Brandeis article had little immediate legal impact, it began a debate over the right to privacy that continues today. In the early twentieth century, this debate slowly moved into the annals of case law. One of the earliest cases to validate the private facts tort was *Melvin v. Reid*.[20] In *Melvin*, the California Court of Appeals upheld a reformed prostitute's lawsuit against a film producer who used her maiden name in a film depicting the true facts of her "former" life, including that she had stood trial and was acquitted for murder.[21] After recognizing that "[a] reading of most of the decisions in jurisdictions recognizing this right leaves the mind impressed with the lack of uniformity in the reasoning employed by the various jurists supporting it,"[22] the court summarized the "better reasoned" general principles behind the right to privacy.[23] In finding for the plaintiff, the court

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Warren & Brandeis, *supra* note 4, at 196.

19. *See id.* at 214-18. The private facts tort has been best described as an extension of defamation, except that the private facts tort punishes the publication of *truthful* non-newsworthy matter that is damaging to a person's reputation. *See* Prosser, *supra* note 7, at 398.

20. 297 P. 91 (Cal. Dist. Ct. App. 1931).

21. *See id.* at 91.

22. *Id.*

23. The court defined the right to privacy as follows:

(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

proclaimed that rehabilitated members of society earned the opportunity to continue along a path of seclusion, reasoning that throwing their lives back into shame was contrary to the objectives of society.[24]

Another important, but inconsistent, decision in the emerging case law was *Sidis v. F-R Publishing*,[25] a matter involving a former child prodigy.[26] The plaintiff in that case, who graduated from Harvard at the age of sixteen but failed to succeed in the "real" world, was not allowed to bury his past after *The New Yorker* published an unflattering "Where Are They Now?" article about him years later.[27] The court declared that the public's interest in Sidis prevailed over his right to privacy.[28] However, the court did not go so far as to declare newsworthiness an absolute defense.[29] By not addressing the outer limit of the defense, the justices commenced a debate on the extent of the newsworthiness defense that remains to be resolved.

Two decades later, perhaps the second most influential law review article on the right to privacy was published. In *Privacy*, Dean William L. Prosser attempted to solidify the emerging tort of invasion of privacy.[30] He divided the tort of invasion of privacy into four separate torts, one of which was the private facts tort.[31] As did Warren and Brandeis, Prosser likened the private facts tort to an extension of defamation, except that the publication was truthful.[32] In order for a plaintiff to recover under the proposed tort, the disclosure had to be public, the facts had to be private, and the matter must have been highly offensive to a reasonable person.[33]

However, Prosser also proposed bounds to the tort. In addition to other limitations,[34] Prosser, like Warren and Brandeis, recognized the privilege of publishing newsworthy events.[35] The privilege was not

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profit.
Id. at 92-93.

24. *See id.* at 93.
25. 113 F.2d 806 (2d Cir. 1940).
26. *See id.* at 807.
27. *See id.* at 807-08.
28. *See id.* at 809.
29. *See id.*
30. *See generally* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) (advocating the formal recognition of four torts that had arisen from the common law tort of invasion of privacy).
31. *See id.* at 389.
32. *See id.* at 398; Warren & Brandeis, *supra* note 4, at 219.
33. *See id.* at 393-97.
34. For example, public figures had less of a right to privacy than did the average citizen. *See id.* at 411. Additionally, consent served as an absolute defense. *See id.* at 419.
35. *See id.* at 412; *see also* Warren & Brandeis, *supra* note 4, at 214 ("The right to privacy does not prohibit any publication of matter which is of public or general

limited to current news, but "extend[ed] also to information or education, or even entertainment and amusement, by books, articles, pictures, films and broadcasts concerning interesting phases of human activity in general, and the reproduction of the public scene as in newsreels and travelogues."[36] Included in this newsworthy category were people who had not sought publicity, but rather lost their right to privacy through involuntary involvement with a matter of newsworthiness.[37] In determining whether an individual fell into this newsworthy category, Prosser required that there be "some logical connection between the plaintiff and the matter of public interest."[38]

Prosser's influence was not limited to academic debate, as he served as the original draftsman of the Restatement (Second) of Torts.[39] However, prior to publication of the Restatement, a prominent decision emerged from the California Supreme Court. In *Briscoe v. Reader's Digest Ass'n*,[40] a reformed truck hijacker sued the popular magazine after his name and the details of his former hijacking were used in an article.[41] The article made no mention of the fact that the hijacking had occurred eleven years prior or that plaintiff had abandoned his past life of crime.[42] Although the court acknowledged the facts of the past crime were newsworthy, it followed the *Melvin* rationale by holding that identifying plaintiff's name was not newsworthy because it served minimal independent public purpose.[43] However, the court also suggested that some events and individuals might be so prominent that they would never fade from public interest.[44]

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interest.").

36. *Id.* at 413.

37. *See id.*

38. *Id.* at 414. Whether known or unknown to Prosser, this "logical connection" relationship would have a profound impact on future case law. *See infra* Part III.B.5.

39. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 1223 (6th ed. 1995).

40. 483 P.2d 34 (Cal. 1971).

41. *See id.* at 35-36.

42. *See id.* at 36.

43. *See id.* at 40. Since *Melvin* and *Briscoe* both dealt with cases of reformed criminals, a strong argument can be made that the judges were using the private facts tort as an incentive for reforming criminals.

44. The *Briscoe* court stated:

> There may be times, of course, when an event involving private citizens may be so unique as to capture the imagination of all. In such cases—e.g., the behavior of the passengers on the sinking *Titanic*, the heroism of Nathan Hale, the horror of the Saint Valentine's Day Massacre—purely private individuals may by an accident of history lose their privacy regarding that incident for all

A few years later, the Restatement (Second) of Torts solidified the private facts tort as one of the four invasion of privacy torts.[45] The Restatement text establishes liability for the publication of the private life of another, provided the publicized matter is highly offensive to a reasonable person and is not a matter of legitimate public concern.[46] To assist in determining whether a matter is of legitimate public concern, the Restatement offers as examples such traditional events as details of "homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, [and] a rare disease," as well as less traditional events such as "the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report . . . concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal."[47] However, the Restatement draws the line "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."[48] If the volumes of case law are any indication, determination of where that line is drawn is still in dispute today.[49]

The private facts tort is recognized as common law in thirty-nine states and the District of Columbia.[50] The most recent jurisdiction to

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> time. There need be no 'reattraction' of the public eye because the public interest never wavered. An individual whose name is fixed in the public's memory, such as that of the political assassin, never becomes an anonymous member of the community again. But in each case it is for the trier of fact to determine whether the individual's infamy is such that he has never left the public arena; we cannot do so as a matter of law.

Id. at 40.

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

46. *See id.*

47. *Id.* § 652D cmt. g.

48. *Id.* § 652D cmt. h.

49. For a detailed discussion of the confusion in current case law, see *infra* Part III.B.

50. *See* Vassiliades v. Garfinckel's, 492 A.2d 580, 587 (D.C. 1985); Johnston v. Fuller, 706 So. 2d 700, 701 (Ala. 1997); Smith v. Suratt, 7 Alaska 416, 423-26 (D. Alaska 1926) (recognizing the tort but finding photographs complained of to be a matter of public interest); Godbehere v. Phoenix Newspapers, Inc., 783 P.2d 781, 784 (Ariz. 1989); Milam v. Bank of Cabot, 937 S.W.2d 653, 657 (Ark. 1997); Shulman v. Group W Prods., Inc., 955 P.2d 469, 478 (Cal. 1998); Ozer v. Borquez, 940 P.2d 371, 377 (Colo. 1997); Department of Children & Families v. Freedom of Info. Comm'n, 710 A.2d 1378, 1381 (Conn. App. Ct. 1998); Barker v. Huang, 610 A.2d 1341, 1349 (Del. 1992); Doe v. Univision Television Group, Inc., 717 So. 2d 63, 64 (Fla. Dist. Ct. App. 1998); Multimedia WMAZ v. Kubach, 443 S.E.2d 491, 493 (Ga. Ct. App. 1994); State of Haw. Org. of Police Officers (SHOPO) v. Society of Prof'l Journalists-Univ. of Haw. Chapter, 927 P.2d 386, 406 (Haw. 1996); Baker v. Burlington N., Inc., 587 P.2d 829, 832 (Idaho 1978); Green v. Chicago Tribune Co., 675 N.E.2d 249, 252 (Ill. App. Ct. 1996); Howard

recognize the tort is Minnesota, which overturned previous case law in 1998.[51] Additionally, two states have suggested they would entertain the private facts tort in the proper factual scenario.[52] The tort has also been codified in three states not previously recognizing a common law right,[53] bringing the total to forty-five jurisdictions that recognize or would recognize the private facts tort. Most of the courts follow the elements outlined in the Restatement, requiring a public disclosure of private facts which are both highly offensive to a reasonable person and not of legitimate public concern.[54]

However, as will be discussed in Part III, there is no universal

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v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 291 (Iowa 1979); Werner v. Kliewer, 710 P.2d 1250, 1256 (Kan. 1985); Pearce v. Courier-Journal, 683 S.W.2d 633, 637 (Ky. Ct. App. 1985); Roshto v. Hebert, 439 So. 2d 428, 430 (La. 1983); Nelson v. Maine Times, 373 A.2d 1221, 1223 (Me. 1977); Lawrence v. A.S. Abell Co., 475 A.2d 448, 450-51 (Md. 1984); Winstead v. Sweeney, 517 N.W.2d 874, 875-76 (Mich. Ct. App. 1994); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998); Young v. Jackson, 572 So. 2d 378, 381-82 (Miss. 1990); Y.G. v. Jewish Hosp., 795 S.W.2d 488, 498 (Mo. Ct. App. 1990); State Bd. of Dentistry v. Kandarian, 886 P.2d 954, 957 (Mont. 1994); Montesano v. Donrey Media Group, 668 P.2d 1081, 1084 (Nev. 1983); Romaine v. Kallinger, 537 A.2d 284, 291-92 (N.J. 1988); McNutt v. New Mexico State Tribune Co., 538 P.2d 804, 807-08 (N.M. Ct. App. 1975); Bertsch v. Communications Workers of Am., Local 4302, 655 N.E.2d 243, 247 (Ohio Ct. App. 1995); Guinn v. Church of Christ, 775 P.2d 766, 781-82 (Okla. 1989); Flowers v. Bank of Am. Nat'l Trust & Sav. Ass'n, 679 P.2d 1385, 1389 (Or. Ct. App. 1984); Culver v. Port Allegany Reporter Argus, 598 A.2d 54, 56 (Pa. Super. Ct. 1991); Swinton Creek Nursery v. Edisto Farm Credit, ACA, 483 S.E.2d 789, 793-94 (S.C. Ct. App. 1997); Montgomery Ward v. Shope, 286 N.W.2d 806, 808 n.1 (S.D. 1979); Major v. Charter Lakeside Hosp., Inc., 1990 WL 125538, at *5 (Tenn. Ct. App. Aug 31, 1990); Hogan v. Hearst Corp., 945 S.W.2d 246, 250 (Tex. App. 1997); Stien v. Marriott Ownership Resorts, Inc., 944 P.2d 374, 380 (Utah Ct. App. 1997); Lemnah v. American Breeders Serv., Inc., 482 A.2d 700, 703-04 & n.1 (Vt. 1984) (applying RESTATEMENT (SECOND) OF TORTS § 652D (1977) to the facts of the case without addressing the more general issue of what constituted the elements of the invasion of privacy tort in Vermont); Reid v. Pierce County, 961 P.2d 333, 339 (Wash. 1998); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 85 (W. Va. 1984).

51. *See* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998). In justifying their decision, the court wrote, "[t]oday we join the majority of jurisdictions and recognize the tort of invasion of privacy. The right to privacy is an integral part of our humanity . . . [t]he heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close." *Id.*

52. *See* Hamberger v. Eastman, 206 A.2d 239, 240-41 (N.H. 1964) (discussing the private facts tort in an intrusion action); Hougum v. Valley Mem'l Homes, 574 N.W.2d 812, 816 n.1 (N.D. 1998) (hinting that they might recognize the private facts tort had the plaintiff included it as a cause of action).

53. *See* MASS. GEN. LAWS ANN. ch. 214, § 1B (West 1989); R.I. GEN. LAWS § 9-1-28.1 (1997); WIS. STAT. ANN. § 895.50 (West 1997).

54. *See, e.g.*, cases cited *supra* note 50.

standard for determining what is of legitimate public concern, as many different tests exist for evaluating newsworthiness.[55] Therefore, it is impossible to understand the tort without grappling with the vague term of newsworthiness and its potential First Amendment conflict.

III. CONFLICT WITH FREEDOM OF SPEECH: THE BEGINNING OF THE END

A. *The Supreme Court's Limited Treatment of the Private Facts Newsworthiness Defense*

Even before the private facts tort was recognized by the Restatement (Second) of Torts, it had been challenged on constitutional grounds.[56] As with any cause of action that might restrict speech, it was inevitable that the private facts tort would clash with the First Amendment. However, despite claims to the contrary,[57] no real winner has emerged from the several private facts bouts entertained by the Supreme Court. To the contrary, the Supreme Court's limited handling of the First Amendment conflict has made the private facts tort "a mess."[58]

The first constitutional challenge addressed by the Supreme Court was in *Cox Broadcasting Corp. v. Cohn*,[59] a case involving the television identification of the name of a brutally murdered rape victim.[60] In *Cox*, the victim's father sued the owner of a television station, claiming that the newscast violated a Georgia statute making the broadcast of a rape victim's identity a misdemeanor. The television station responded that since the rape victim's name was taken from court indictments involving the alleged murderers, it was constitutionally protected under the First and Fourteenth Amendments. The Georgia Supreme Court rejected the media station's arguments, holding that the plaintiff had a right to trial under common law invasion of privacy.[61]

In *Cox*, the Supreme Court overturned the decision of the Georgia Supreme Court.[62] In his opinion, Justice White acknowledged the need

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55. *See infra* Part III.B.
56. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (declaring a Georgia statute punishing the publication of a rape victim's publicly available identity unconstitutional on First Amendment grounds).
57. *See, e.g.*, Van Wey, *supra* note 13, at 300 (claiming that the Supreme Court's decision in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), rendered the private facts tort extinct).
58. Elford, *supra* note 13, at 727.
59. 420 U.S. 469 (1975).
60. *See id.* at 471-74.
61. *See id.* at 474-75.
62. *See id.* at 476.

for the right to privacy but noted that the private facts tort "most directly confront[s] the constitutional freedoms of speech and press."[63] However, his decision was far from sweeping. In finding for the television station, the court carefully and repeatedly limited the decision to the narrow issue of whether a state may punish the accurate publication of a rape victim's identity obtained from judicial documents that are open to public inspection.[64] Additionally, it expressly declined to address the broader question of whether the publication of truthful information could ever be punished.[65]

A careful analysis of the *Cox* decision quickly reveals that, due to its limited holding, it does not provide any practical guidelines for determining when a matter is newsworthy. In fact, by declaring only that liability cannot be attached to the disclosure of information from judicial documents of public record, the case simply reaffirms the private facts tort element that the disclosure must contain private, instead of public, facts.[66] In other words, since the matter was already public,

63. *Id.* at 489.

64. Justice White wrote:

> Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection. We are convinced that the State may not do so.

Id. at 491. The court repeatedly stressed the limitations of its holding throughout the decision. "[T]he First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." *Id.* at 495. "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Id.* at 496.

65. In discussing this issue, the court wrote:

> Appellants have contended that whether they derived the information in question from public records or instead through their own investigation, the First and Fourteenth Amendments bar any sanctions from being imposed by the State because of the publication. Because appellants have prevailed on more limited grounds, we need not address this broader challenge to the validity of . . . Georgia's right of action for public disclosure.

Id. at 497 n.27.

66. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977). "There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public. Thus there is no liability for . . . matters of public record." *Id.* The *Cox* decision is also consistent with Warren's and Brandeis' original

the question of newsworthiness was irrelevant, because plaintiff failed to state a cause of action for disclosure of *private* facts.[67] Therefore, the question of what constituted newsworthiness was postponed until another day.

The most recent Supreme Court opinion touching upon the private facts question is *Florida Star v. B.J.F.*,[68] which some have declared to severely undercut the private facts tort.[69] In *Florida Star*, a newspaper published the name of a rape victim after receiving the information from a police department press release.[70] Following publication, the plaintiff's mother received threatening phone calls from an individual threatening to rape the plaintiff again, causing the plaintiff to change her address and phone number, and to seek mental health counseling. As a result, the plaintiff filed a negligence per se lawsuit against the newspaper and the police department under a Florida statute banning the publication of the names of sexual offense victims.[71] In its appeal to the Supreme Court, the newspaper asserted that the case was identical to the situation in *Cox*; the newspaper also alleged that previous Supreme Court decisions suggested a broad rule that the press could never be liable for publishing truthful information.[72]

In another narrow ruling limited to the facts at hand, the Supreme Court invoked the First Amendment to reach a finding of no liability for the newspaper.[73] Similar to previous cases, the Court emphasized that it was "relying on limited principles that sweep no more broadly than the appropriate context of the instant case."[74] Although the Court provided three reasons justifying its decision, the case was primarily decided on the basis that the State could not punish the media for disclosing information which came from the State itself.[75] If the media were

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article, which declared that court publications should be privileged. *See* Warren & Brandeis, *supra* note 4, at 216.

67. Justice White stated, "[a]ppellee has not contended that the name was obtained in an improper fashion or that it was not on an official court document open to public inspection." *Cox*, 420 U.S. at 496.

68. 491 U.S. 524 (1989).

69. *See id.* at 550-52 (White, J., Rehnquist, C.J., O'Connor, J., dissenting). *See also* Van Wey, *supra* note 13, at 312 (concluding that the *Florida Star* decision may signal the end for the private facts tort).

70. *See Florida Star*, 491 U.S. at 527.

71. *See id.* at 526-28.

72. *See id.* at 531.

73. *See id.* at 532.

74. *Id.* at 533.

75. *See id.* at 538. The other two reasons were not closely related to the question of newsworthiness. First, the Court criticized the broad reach of the Florida statute because, unlike the Restatement (Second) of Torts, there was no requirement that the disclosed information be highly offensive to a reasonable person. Second, the statute appeared to hold mass media to a higher standard than small distributors of information.

required to evaluate government-provided news releases to determine the potential newsworthiness of that information, self-censorship would surely result.[76] The court also reasoned that because the government released the information, that action implied that it was proper and expected to be further disseminated.[77]

However, despite some scholarly opinion to the contrary,[78] *Florida Star* can hardly be seen as the final blow to the private facts tort. Although the Court found for the defendant newspaper, it expressly rejected the newspaper's broad claim that the press could never be held liable for publishing the truth.[79] Further, in specifically rejecting the request for a broad ruling protecting the publication of all truthful information, Justice Marshall stated that "[o]ur cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatory."[80] Additionally, the court did not rule out that there might be factual situations warranting punishing the media for publishing the identity of a rape victim.[81]

In view of the narrowness of the holding, it is difficult to extract a coherent message from the *Florida Star* decision. To further complicate matters, Justice White, the author of the Court's decision in *Cox*, dissented with the majority on several grounds.[82] However, it appears

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See id. at 539-41.

76. *See id.* at 538.

77. *See id.* However, the decision glossed over two important facts. Not only did the newspaper violate its own internal policy by revealing the name of rape victims, the room containing the police report contained signs clearly stating that the identities of rape victims were not a matter of public record and were not allowed to be published. *See id.* at 546 (White, J., Rehnquist, C.J., O'Connor, J., dissenting).

78. *See id.* at 550-52 (White, J., Rehnquist, C.J., O'Connor, J., dissenting). *See also* Van Wey, *supra* note 13, at 312 (concluding that the *Florida Star* decision may signal the end for the private facts tort).

79. *See Florida Star*, 491 U.S. at 532. The court "conclude[d] that imposing damages on appellant for publishing B.J.F.'s name violates the First Amendment, although not for . . . the reasons appellant urges." *Id.*

80. *Id.*

81. Justice Marshall wrote:

> Our holding today is limited. 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.

Id. at 541.

82. Justice White argued that, unlike *Cox*, the information was not already part of the public record. In addition, according to White, the decision promoted irresponsible

that the case expands the definition of newsworthiness by denying liability in situations where the information is provided by the government. But, beyond that specific context, the Court made no attempt to provide a standard for lower courts to use in defining newsworthiness consistent with the First Amendment. By passing over such an opportunity, the Court opened the door for subsequent years of inconsistent case law.

B. *Picking Up Where* Florida Star *Left Off: Attempts by Courts to Deal with Questions Unresolved by the Supreme Court*

In the absence of a broad Supreme Court ruling on the conflict between the private facts tort and the First Amendment, the state and lower federal courts have been left to themselves to distinguish between legitimate publicity and unwarranted invasions of privacy. As a result, five different major tests have emerged to determine if the disclosed private facts merit the newsworthiness defense.[83]

1. Restatement Approach

Given the predominance of the Restatement (Second) of Torts in the acceptance of the private facts tort, it is appropriate to begin with an evaluation of the Restatement's newsworthiness test. Not surprisingly, the Restatement contains the most commonly relied-upon newsworthiness test.[84] However, the American Law Institute's approach to determining whether private facts are of legitimate public concern might also be the most complicated newsworthiness test.[85] The Restatement relies upon the public's customs and conventions, which are heavily weighted towards community mores.[86] This standard, first

journalism, which may be worse than limiting freedom of the press. Finally, the decision leaves victims of inadvertently released information without legal recourse. *See id.* at 542-53 (White, J., Rehnquist, C.J., O'Connor, J., dissenting). However, the third argument seems to ignore that victims in such circumstances have legal recourse against the organization releasing the information to the press. *See* Doe v. City of New York, 15 F.3d 264 (2d Cir. 1994) (allowing plaintiff to sue *the city* for disclosing his HIV status in a news release).

83. *See* Dendy, *supra* note 10, at 157-64. Dendy concluded that court jurisdictions have developed five separate tests for evaluating newsworthiness, falling along a continuum between absolute immunity from liability and absolute censorship. His tests, which are discussed in detail in this section (but in different order), include: complete rejection of the private facts tort; the "Leave It to the Press Model;" the *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975) and Restatement approach; the Nexus test; and the California approach. *See* Dendy, *supra* note 10, at 157-64.

84. *See* Dendy, *supra* note 10, at 160-61.

85. *See id.*

86. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

adopted by the Ninth Circuit Court of Appeals in *Virgil v. Time, Inc.*,[87] denies liability when the private facts revealed are of legitimate public concern.[88] However, when the publicity exceeds the community's sense of decency, it no longer can be claimed to be of legitimate public concern.[89] Put another way, if a reasonable person would find the disclosed facts so indecent as to exceed the promulgation of information to which the community is entitled, then that disclosure is not of legitimate public concern.

This approach attempts to balance an individual's right to privacy while maintaining freedom of the press. The *Virgil* court believed that judicial scrutiny of the Restatement's community mores test was capable of protecting privacy rights consistent with the First Amendment.[90] However, this approach has also been criticized by commentators as unworkable, mainly due to its reliance on a subjective determination of what private facts disclosures violate community mores.[91] Yet despite the persuasive arguments of critics, the Restatement's approach has received favorable consideration in subsequent decisions outside the Ninth Circuit, particularly in recent years.[92]

2. *Refusal to Recognize the Private Facts Tort*

A handful of jurisdictions contrast the Restatement's newsworthiness approach by expressly rejecting the private facts tort.[93] Thus, any true

87. 527 F.2d 1122 (9th Cir. 1975); Dendy, *supra* note 10, at 160-61.

88. *See Virgil* at 1129; RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

89. *See Virgil* at 1129; RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

90. *See Virgil* at 1130; *see also* Dendy, *supra* note 10, at 164-66 (advocating that the Restatement's decency limitation on newsworthiness protects privacy consistent with other Supreme Court limitations on expression, such as obscenity).

91. *See* Zimmerman, *supra* note 12, at 359-62. Professor Zimmerman argues that courts may be unable to develop a general consensus as to what private facts will exceed the Restatement's definition of newsworthiness, leading to unpredictable verdicts.

> When we weigh the continued chilling effect of potential litigation and unpredictable liability against the benefits of allowing courts to retain the option of remedying some rare, genuinely offensive bits of publicity, we must question whether the preservation of even a small corner of the Warren-Brandeis tort is worth the risks. This observer answers in the negative.

Id. at 362.

92. *See* Ozer v. Borquez, 940 P.2d 371, 378 (Colo. 1997) (quoting RESTATEMENT (SECOND) OF TORTS § 652 D cmt. h (1977)); Green v. Chicago Tribune Co., 675 N.E.2d 249, 256 (Ill. App. Ct. 1996) (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977)); Winstead v. Sweeney, 517 N.W.2d 874, 877 (Mich. Ct. App. 1994) (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977)).

93. Four jurisdictions have rejected the tort. *See* Doe v. Methodist Hosp., 690

disclosure of private facts is immune from liability. One of the jurisdictions justified this position by relying on the Supreme Court's statement in *Cox* that private facts tort liability for true but non-newsworthy facts directly challenges freedom of the press.[94]

This approach places constitutionally protected freedom of speech and press above an individual's right to privacy. By refusing to recognize the tort, it also implies that all true facts, no matter how private, are of legitimate public concern. However, only two jurisdictions since *Cox* have adopted this approach.[95] Even Judge Posner was not willing to go this far in *Haynes v. Alfred A. Knopf, Inc.*,[96] a case that was critical of the private facts tort.[97] Although that case found for the defendant, Judge Posner acknowledged that the private facts tort survived the Supreme Court's decisions in *Cox* and *Florida Star*.[98] Therefore, the overwhelming majority of jurisdictions that have not employed this approach must believe that the private facts tort can co-exist with the First Amendment.

N.E.2d 681, 682 (Ind. 1997); Howell v. N.Y. Post Co., Inc., 612 N.E. 2d 699, 702 (N.Y. 1993); Brunson v. Ranks Army Store, 73 N.W.2d 803 (Neb. 1955) *superseded by statute on other grounds by* NEB. REV. STAT. § 20-201 (1997) (codifying the intrusion, false light and commercial appropriation torts but not the private facts tort); Hall v. Post, 372 S.E.2d 711, 717 (N.C. 1988). Additionally, the Fourth Circuit Court of Appeals has held, in the absence of Virginia Supreme Court guidance, that no right of privacy exists beyond a limited commercial appropriation statute. *See* Brown v. American Broad. Co., Inc., 704 F.2d 1296 (4th Cir. 1983).

94. *See Hall*, 372 S.E.2d at 717.

95. The jurisdictions are Indiana and North Carolina. *See Methodist*, 690 N.E. 2d at 685; *Hall*, 372 S.E.2d at 717. However, even *Hall* may not be as critical of the private facts concept as it initially appears. In justifying its refusal to recognize the tort, the Supreme Court of North Carolina also claimed that the private facts tort overlapped with the tort of intentional infliction of emotional distress.

> [I]n almost every instance in which a North Carolina plaintiff could establish a claim under the private facts tort, the same plaintiff could more easily establish a claim for intentional infliction of emotional distress. Since plaintiffs will only be entitled to recover once, if at all, it would seem the recognition of the private facts tort by this [c]ourt would deliver nothing of any real value.

Hall, 372 S.E.2d at 716-17. Thus, the *Hall* decision is far from a complete rejection of invasion of privacy. If potential private facts victims are able to pursue redress in North Carolina under intentional infliction of emotional distress, then the private facts tort is recognized in spirit if not by name.

96. 8 F.3d 1222 (7th Cir. 1993).

97. *See id.* at 1231 (criticizing past private facts cases with victorious plaintiffs as being out of step with the proper balance between privacy and First Amendment rights).

98. Justice Posner wrote:

> We do not think the Court was being coy in *Cox* or *Florida Star* in declining to declare the tort of publicizing intensely personal facts totally defunct.

Id. at 1232.

3. *"Leave-it-to-the-Press Model"*

An ostensibly less extreme approach to defining newsworthiness is an approach that Professor Diane Zimmerman has labeled the "leave-it-to-the press model."[99] This approach (theoretically) recognizes the private facts tort, but defers the definition of newsworthiness to the press, not to the courts.[100] As a result, anything printed by the media is by definition newsworthy.[101] Today, this discretionary approach is only recognized in one jurisdiction.[102]

The primary advocate of this approach believes the press is better suited than the legal system to define what constitutes a matter of legitimate public concern.[103] Professor Zimmerman argues that market forces will regulate what the media provides the public, and that "audience and advertiser response is more likely to restrain publishers . . . than the uncertain threat of an award of damages."[104] She further stated that any attempt beyond market regulation would only amount to an artificial judicially biased judgment on what type of information the public desires.[105]

However, this argument may be fundamentally flawed in its assumption that the media will give the audience *only* what it wants. Today's media must cater not only to the American audience, but also to corporate advertisers and a much larger global audience. Thus, the news Americans see is influenced by the mores of commercial sponsors and by the viewing desires of other countries.[106] The result of these influences may be an emphasis on inexpensive and sensational stories

99. Zimmerman, *supra* note 12, at 353; Dendy, *supra* note 10, at 159.
100. *See* Zimmerman, *supra* note 12, at 353-54.
101. *See id.* at 353.
102. *See* Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 302 (Iowa 1979); *cf.* Dendy, *supra* note 10, at 159 n.86. At the time of Dendy's Note, Minnesota may have also followed the "leave-it-to-the-press" approach, but the Minnesota Supreme Court overturned previous case law in 1998 by allowing a private facts case to proceed forward. *See* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 234-35 (Minn. 1998). Although the case was not against a media defendant, nothing in the court's opinion suggested they would follow the "leave-it-to-the-press" approach in evaluating newsworthiness. *See Lake*, 582 N.W.2d at 233-35.
103. *See* Zimmerman, *supra* note 12, at 353.
104. *Id.* at 354.
105. *See id.*
106. For a detailed discussion on the "externalities" which affect media coverage of current events, see C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997).

that are tantalizing to broad audiences.[107] Unfortunately, many of today's television talk shows and print tabloids clearly support the theory that self-regulation does not prevent the disclosure of highly offensive "private facts" of marginal to no public interest.[108] For example, the circular "leave-it-to-the-press" argument provides shows such as *Jerry Springer*[109] free rein to explore any intrusive and titillating topic that will grab sensational ratings, regardless of its apparent intrusiveness upon privacy.[110] Therefore, although the "leave-it-to-the-press" model honors the private facts tort in theory, in reality, its absolute deference to the media renders the private facts tort meaningless against media defendants.[111]

4. The (now defunct?) California Three-Prong Approach

A different and unique approach to defining newsworthiness has emerged out of California common law. In *Kapellas v. Koffman*,[112] the California Supreme Court promulgated its own test for evaluating newsworthiness.[113] In that case, the children of a candidate for public office brought suit against a newspaper when it revealed in an editorial that they had been arrested for juvenile offenses.[114] In finding for the newspaper defendant, the court set forth a three-prong test that considered 1) the social use of the published facts; 2) the extent of the

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107. *See id.* at 357-58 (declaring that the importance of market ratings forces contemporary journalists to focus on inexpensive and tantalizing stories as opposed to expensive traditional journalism).

108. Perhaps the failure of the "leave-it-to-the-press" model to regulate the disclosure of non-newsworthy private facts has led to the recent judicial backlash against media defendants in cases where it appears the media stepped over the line. *See infra* Part IV.C.

109. The *Jerry Springer* show is a controversial daytime television talk show that routinely explores what are arguably highly offensive issues of little legitimate public concern. Samples of show topics for a one week period include *Attack of the Ex-Lovers, Viewers Battle the Klan, I Have Another Lover*, and *I Have a Wild Sex Job*. *See* David Bauder, *Jerry Springer Promises to Tone Things Down*, THE ASSOCIATED PRESS, Apr. 3, 1998.

110. The problem with shows such as *Jerry Springer* is not that the guests are revealing intimate personal facts about themselves, but that they reveal embarrassing personal facts *about their close relatives and friends in the process*, without their consent. For a detailed discussion of how the private facts tort can be used against tabloid television, see *infra* Part IV.E.3. *See also* Robin Famoso, Note, *Ambush TV: Holding Talk Shows Liable for the Public Disclosure of Private Facts*, 29 RUTGERS L.J. 579 (1998); Eduardo W. Gonzales, Comment, *"Get That Camera Out of My Face!" An Examination of the Viability of Suing "Tabloid Television" for Invasion of Privacy,"* 51 U. MIAMI L. REV 935 (1997).

111. *See* Dendy, *supra* note 10, at 160.

112. 459 P.2d 912 (Cal. 1969).

113. *See id.* at 922.

114. *See id.* at 914-15.

article's encroachment into seemingly private affairs; and, 3) the extent to which the victim consented to a position of public fame.[115] Additionally, in *Briscoe v. Reader's Digest Ass'n*,[116] the California Supreme Court added an additional "decency" limitation, meaning that one could be liable even for publication of newsworthy private facts if the publisher acted "with reckless disregard for the fact that reasonable men would find the invasion highly offensive."[117]

Like the Restatement, the California approach attempts to balance privacy interests with the First Amendment. The California Supreme Court in all subsequent private facts cases has cited the *Kapellas* three-prong balancing test with approval.[118] However, although the court still cited *Kapellas* favorably in its most recent private facts decision,[119] the court's reconciliation of the test with the "logical nexus" approach may render the three-prong test extinct.[120]

5. *The "Logical Nexus" Approach*

If case law is any guide, the fastest growing approach to defining newsworthiness is the "logical nexus" approach.[121] This approach, first developed in *Campbell v. Seabury Press*,[122] invokes the newsworthiness defense when there is a logical relationship between the plaintiff and a matter of legitimate public concern.[123] In *Campbell*, the former sister-in-law of a civil rights leader sued the author and publisher of an autobiography that disclosed embarrassing private facts about her previous marriage.[124] In finding for the defendant, the Fifth Circuit held that since the facts of the plaintiff's marriage impacted the autobiography's author, the revealed facts "ha[d] the requisite logical

115. *See id.* at 922.
116. 483 P.2d 34 (Cal. 1971).
117. *Id.* at 44.
118. *See* Shulman v. Group W Prods., Inc., 955 P.2d 469, 482 (Cal. 1998); Forsher v. Bugliosi, 608 P.2d 716, 726 (Cal. 1980); *Briscoe*, 483 P. 2d at 43.
119. *See* Shulman v. Group W Prods., Inc., 955 P. 2d 469, 482 (Cal. 1998).
120. *See id.* at 502 (Brown & Baxter, JJ., concurring and dissenting). For a more detailed discussion of the challenges created by the *Shulman* decision, see *infra* notes 305-323 and accompanying text.
121. *See* Dendy, *supra* note 10, at 162. The "logical nexus" concept has been called by several names. These include "substantial relevance," "substantially related," and facts "germane" to story. *See Shulman*, 955 P.2d at 484-85.
122. 614 F.2d 395 (5th Cir. 1980).
123. *See id.* at 397.
124. *See id.* at 396.

nexus to fall within the ambit of constitutional protection."[125]

Since the *Campbell* decision, at least six other jurisdictions have adopted the "logical nexus" approach to defining newsworthiness.[126] Like the Restatement and *Kapellas* tests, the "logical nexus" approach attempts to balance an individual's privacy interests with the First Amendment. Supporters of the approach believe that it meets the Restatement's goal "that legitimate public interest does not include 'a morbid and sensational prying into private lives for its own sake.'"[127] However, critics of this approach advocate that since most people are involved with some activity of concern, their entire lives could become subject to public view.[128]

C. Scholarly Response to the Courts' Approaches to Newsworthiness

As expected, legal scholars have varying views on the current state of the private facts tort. However, the prevailing view of recent literature is that the newsworthiness defense is "so overpowering as virtually to swallow the tort."[129] Likewise, no less that seven law review articles in

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125. *Id.* at 397.

126. *See* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1233 (7th Cir. 1993) (holding that details of plaintiff's marriage that appeared in a social history novel were "germane" to a story of legitimate public interest); Gilbert v. Medical Econ. Co., 665 F.2d 305, 309 (10th Cir. 1981) (holding that physician's identity, photograph, and marital and psychiatric problems were "substantially relevant" to the newsworthy topic of medical malpractice); Vassiliades v. Garfinckel's, 492 A.2d 580, 590 (D.C. 1985) (holding that no "logical nexus" existed between plaintiff's plastic surgery pictures and her doctor's promotional program) (citation omitted); Shulman v. Group W Prods., 955 P.2d 469, 488 (Cal. 1998) (holding that a broadcast video and its accompanying audio feed depicting an automobile accident victim's non-graphic, injured and disoriented state were "substantially relevant" to a news special on emergency care workers); Ozer v. Borquez, 940 P.2d 371, 378 (Colo. 1997) (requiring "substantial relevance" to a matter of legitimate public concern) (quoting *Gilbert*, 665 F.2d at 308); Ayash v. Dana Farber Cancer Inst., No. CIV.A. 96-0565-E, 1997 WL 438769, at *6 (Mass. Super. July 9, 1997) (holding that newspaper article discussing hospital's internal investigation against physician after a patient died from a drug overdose was "closely related" to matter of public concern). Additionally, four years prior to the *Campbell* decision, the United States District Court for the Southern District of California advocated a similar test to the "logical nexus" approach. *See* Virgil v. Sports Illustrated, 424 F. Supp. 1286, 1289 n.2 (S.D. Cal. 1976) (holding that body surfer's radical habits were "at least arguably close[ly] relat[ed]" to a legitimate journalistic article on bodysurfing).

127. *Shulman*, 955 P.2d at 485 (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977)).

128. *See, e.g.*, Winstead v. Sweeney, 517 N.W.2d 874, 878 (Mich. Ct. App. 1994).

> Most persons are connected with some activity . . . as to which the public can be said as a matter of law to have a legitimate interest or curiosity. To hold as a matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view.

Id. (quoting Virgil v. Time, Inc., 527 F.2d 1122, 1131 (9th Cir. 1975).

129. Zimmerman, *supra* note 12, at 351 (quoting Harry Kalven, Jr., *Privacy in Tort*

the last fifteen years have declared the tort to be ineffective or on the verge of collapse.[130]

Indeed, it can be argued that the broad reach applied to the newsworthiness defense has greatly exceeded the defense's theoretical scope.[131] Despite the five different tests used in evaluating newsworthiness, plaintiffs rarely succeeded under the private facts tort.[132] Justices were quick to point out their reluctance in editing the press.[133] First Amendment advocates were also quick to endorse such a broad approach to prevent judicial editing of the press.[134] By contrast, supporters of the private facts tort proposed limiting the scope of the newsworthiness defense.[135]

However, what is absent from the scholarly commentary is the recognition of a quiet judicial movement in progress. While the commentators are busy arguing the merits and shortfalls of the private facts tort and announcing its demise, there have been a growing number of cases finding for plaintiffs in recent years.[136] In fact, as will be discussed in Part IV, the Warren and Brandeis tort may not only have

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130. *See* C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 380 (1997) (declaring the private facts tort as having "little if any actual bite"); DeLaTorre, *supra* note 13, at 1184 (calling the private facts tort a "phantom tort"); Jeanne M. Hauch, *Protecting Private Facts in France: The Warren & Brandeis Tort Is Alive and Well and Flourishing in Paris*, 68 TUL. L. REV. 1219, 1221 (1994) (stating that the private facts tort is "languishing on the vine" in the United States); Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL L. REV. 173, 198 (1998) (declaring that the private facts tort "is not a viable weapon against media intrusions"); Dendy, *supra* note 10, at 148 (calling the tort "effectively impotent"); Elford, *supra* note 13, at 729 (proposing that the private facts tort is "on the verge of collapsing under the weight of the First Amendment"); Van Wey, *supra* note 13, at 300 (claiming that the Supreme Court's decision in *Florida Star* rendered the private facts tort extinct).

131. *See* Dendy, *supra* note 10, at 163 (advocating that the newsworthiness defense has grown beyond a simple judicial check on the tort's breadth to become an insurmountable hurdle because of censorship fears).

132. A pre-1983 survey of state law found less than eighteen cases where plaintiffs either received an award for damages or survived a motion for summary judgment or dismissal. *See* Zimmerman, *supra* note 12, at 293 n.5.

133. *See, e.g.*, Gilbert v. Medical Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981) (declaring that the press required breathing space to "properly exercise effective editorial judgment").

134. *See* Zimmerman, *supra* note 12, at 354.

135. *See* Elford, *supra* note 13, at 743-50 (recommending abolishing the newsworthiness defense and replacing it with a rights-based approach).

136. *See* discussion *infra* Part IV.

found a path around the newsworthiness hurdle, but is actually subtly flourishing in courtrooms across America.

IV. THE RESURRECTION OF THE TORT: LIMITING THE DEFINITION OF NEWSWORTHINESS

In the first ninety years after the Warren and Brandeis article, plaintiffs were rarely successful in bringing private facts claims.[137] As discussed previously, pro-defendant decisions in cases such as *Florida Star* were generally thought to foreshadow the end of the private facts tort.[138] To the contrary, in the last five and one-half years, plaintiffs have been more successful than ever before in bringing a private facts claim.[139] This section will examine these cases in detail and will suggest some rationales for the subtle reemergence of the private facts tort.

A. Protecting Confidential Medical Information

One of the most effective applications of the private facts tort in recent years has been remedying the unauthorized disclosure of confidential medical information. Victorious plaintiffs in these cases have successfully used the tort to recover damages following the disclosure of Human Immunodeficiency Virus (HIV) infection,[140] graphic autopsy pictures,[141] plastic surgery,[142] Hepatitis C condition,[143] and other private medical information.[144] Defendants in these cases include traditional media and government defendants, as well as non-traditional private facts defendants such as employers, universities and medical laboratories.

In *Multimedia WMAZ v. Kubach*,[145] a patient with Acquired Immune Deficiency Syndrome (AIDS) sued a television station after his

137. *See supra* note 132.

138. *See* Van Wey, *supra* note 13, at 300 (claiming that the Supreme Court's decision in *Florida Star* rendered the private facts tort extinct).

139. In a survey of case law since 1993, this author discovered at least twenty-one cases where plaintiffs were awarded damages or survived a motion for summary judgment or dismissal, including one in 1999 and 10 in 1998. *See* cases cited *infra* Part IV.A-D.

140. *See* Doe v. High-Tech Inst., Inc., 972 P.2d 1060 (Colo. Ct. App. 1998); Multimedia WMAZ v. Kubach, 443 S.E.2d 491 (Ga. Ct. App. 1994).

141. *See* Reid v. Pierce County, 961 P.2d 333 (Wash. 1998).

142. *See* Conway v. Cook County, No. 98 C 5324, 1999 WL 14497 (N.D. Ill. Jan. 8, 1999); Doe v. Univision Television Group, Inc., 717 So. 2d 63 (Fla. Dist. Ct. App. 1998).

143. *See* Marino v. Arandell Corp., 1 F. Supp. 2d 947 (E.D. Wis. 1998).

144. *See* Blackwell v. Harris Chem. N. Am., Inc., 11 F. Supp. 2d 1302 (D. Kan. 1998).

145. 443 S.E.2d 491 (Ga. Ct. App. 1994).

identifiable image was mistakenly broadcast for seven seconds during a broadcast on AIDS.[146] The AIDS patient had previously consented to participate in the television show provided his identity would be concealed. The television station argued on appeal that the inadvertent disclosure was immune from liability because it occurred during a show that had legitimate public interest. The court did not agree and upheld the plaintiff's jury verdict on the basis that the identities of AIDS victims are not of legitimate public concern.[147]

In a similar case, *Doe v. High-Tech Institute, Inc.*,[148] a student filed suit against her college and a drug test laboratory after the positive results of a non-consented HIV test were sent to the Colorado Department of Health and other third parties.[149] The plaintiff settled out of court with the laboratory, but the college was found liable under the private facts tort.[150] Although the case was appealed, the private facts liability was not contested.[151]

Confidential medical information liability has extended beyond HIV infection. In *Reid v. Pierce County*,[152] four different families sued the county medical examiner's office in separate actions after it was discovered that office employees obtained and displayed graphic autopsy pictures of the families' dead relatives at cocktail parties, school classes and in personal scrapbooks.[153] Prior to consolidation of the cases, each of the cases had been dismissed in lower courts.[154] The Washington

146. *See id.* at 493.

147. *See id.* at 494-95. In justifying why the revelation was not newsworthy, the court relied upon a related state statute restricting the disclosure of persons being treated for AIDS. Since the state criminally punished the unauthorized disclosure of such information, the court logically concluded that the identities of AIDS victims were not of legitimate public interest. *See id.*

148. 972 P.2d 1060 (Colo. Ct. App. 1998).

149. *See id.* at 1064.

150. *See id.*

151. The issue on appeal was whether plaintiff's recovery under the private facts tort precluded a second claim for intrusion upon seclusion. *See id.*

Although not a common law private facts case, *Doe v. City of New York*, 15 F.3d 264 (2d Cir. 1994), sheds additional light on the newsworthiness defense in HIV cases. In *Doe*, an HIV infected person brought a civil rights suit against the City of New York Commission on Human Rights after the details of a settlement agreement on his previous discrimination complaint were revealed in a public press release. In finding for the plaintiff, the court determined that the disclosure of the confidential settlement was a violation of the plaintiff's privacy under a New York privacy statute. *See id.* at 264-68.

152. 961 P.2d 333 (Wash. 1998).

153. *See id.* at 335-36.

154. *See id.*

Supreme Court overturned the previous dismissals, holding that the display of intimate autopsy photographs was "sufficiently egregious" to proceed to trial.[155] The court also expressly overruled a previous appellate court decision that erroneously claimed Washington did not recognize the private facts tort.[156]

In *Doe v. Univision Television Group, Inc.*,[157] a patient who underwent a poorly performed plastic surgery sued the defendant television station, after it inadvertently broadcast her picture in a news program on the dangers of undergoing low cost plastic surgery overseas.[158] As in the factual scenario in *Multimedia*, the plaintiff agreed to be interviewed provided her identity and voice would be disguised.[159] However, the special effects failed, causing her identity to be immediately recognizable to family and friends.[160] Once again, although the court agreed that the subject of poorly performed plastic surgery in foreign countries was a matter of public interest, it held that the plaintiff's identity was not.[161]

A second plastic surgery case involving a slightly different factual situation is *Conway v. Cook County*.[162] In that case, a police department employee sued the county, the department, and several individual officers after her department director disclosed that she had undergone breast augmentation surgery to other employees.[163] The surgery details, as well as other private personal information, were revealed after the plaintiff refused to continue her three-year romantic relationship with the director.[164] Although the trial court dismissed the suit against the county, the department, and two of the individual officers, the judge ruled that plaintiff's private facts case against her former director could proceed to trial.[165]

In another decision involving a former employee, *Marino v. Arandell*

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155. *See id.* at 342.
156. *See id.* at 339. Prior to the decision, there had been a dispute among Washington appellate courts as to whether the Washington Supreme Court recognized the private facts tort. *Compare* Caspary v. State, No. 36689-1-I, 1997 WL 103688, at *9 (Wash. Ct. App. Mar. 10, 1997) (discussing previous Washington Supreme Court approval of the private facts tort), *with* Doe v. Group Health Coop., Inc., 932 P.2d 178, 183 (Wash. Ct. App. 1997) (holding that Washington did not recognize the tort), *overruled by Reid*, 961 P.2d at 339 (Wash. 1998).
157. 717 So. 2d 63 (Fla. Dist. Ct. App. 1998).
158. *See id.* at 64.
159. *See id.*
160. *See id.*
161. *See id.* at 65.
162. No. 98 C 5324, 1999 WL 14497 (N.D. Ill. Jan. 8, 1999).
163. *See id.* at *1-2.
164. *See id.* at *1.
165. *See id.* at *9-10.

Corp.,[166] the plaintiff alleged that his employer illegally inquired into and subsequently disclosed details of his chronic Hepatitis C disability to other co-workers.[167] The corporate defendant did not deny the allegations, but rather argued that the plaintiff's private facts statutory claim was barred due to a state workers' compensation statute.[168] The trial court did not agree to such a broad reading of the workers' compensation statute's exclusivity, and ruled that the plaintiff's private facts claim could proceed forward.[169]

In a factually similar case, *Blackwell v. Harris Chemical North America, Inc.*,[170] a former manager sued her corporate employer after details of her personal medical information were disclosed to other employees.[171] The defendant requested that the trial court dismiss the complaint for failure to state a claim.[172] However, the trial court denied the request, ruling that the alleged release of confidential medical information by an employer to other employees sufficiently met the necessary elements of the private facts tort.[173]

B. Defending "Protected Classes"

A second application of the private facts tort in recent years has been the safeguarding of plaintiffs belonging to politically sensitive protected classes. Plaintiffs in these cases have successfully used the tort to address sensitive and emotionally charged issues such as homosexuality,[174] identification of women undergoing abortions,[175] and sexual harassment.[176] Defendants in the cases once again include non-traditional private facts defendants such as employers and religious groups.

In *Ozer v. Borquez*,[177] a homosexual attorney sued his employer law firm for public disclosure of private facts after a partner of the firm

166. 1 F. Supp. 2d 947 (E.D. Wis. 1998).
167. *See id.* at 948.
168. *See id.*
169. *See id.* at 957.
170. 11 F. Supp. 2d 1302 (D. Kan. 1998).
171. *See id.* at 1305.
172. *See id.* at 1304.
173. *See id.* at 1309-10.
174. *See* Ozer v. Borquez, 940 P.2d 371 (Colo. 1997); Greenwood v. Taft, 663 N.E.2d 1030 (Ohio Ct. App. 1995).
175. *See* Doe v. Mills, 536 N.W.2d 824 (Mich. Ct. App. 1995).
176. *See* Pucci v. USAIR, 940 F. Supp. 305 (M.D. Fla. 1996).
177. 940 P.2d 371 (Colo. 1997).

revealed the plaintiff's sexual orientation and possible HIV infection to other employees.[178] Relying on the Restatement and the reasoning in *Multimedia*, the lower appellate court concluded that the attorney's sexual conduct and possible HIV infection clearly were not of legitimate public concern.[179] Although the Colorado Supreme Court overturned the case on an erroneous jury instruction dealing with the public disclosure requirement of the tort, it did not criticize the appellate court's determination on lack of newsworthiness.[180]

A second recent case involving the disclosure of homosexuality is *Greenwood v. Taft*,[181] which also involved an attorney suing his former employer.[182] In that case, the attorney alleged that his employer circulated private information concerning his male partner to others who had no legitimate reason to receive the information.[183] The lower court dismissed the case for failure to state a viable claim.[184] However the appellate court, without proceeding into a newsworthiness discussion, reversed and remanded the case on the basis that the plaintiff had asserted enough facts to proceed to trial under the private facts tort.[185]

The recent case law safeguarding "protected classes" also reaches beyond sexual orientation. In *Doe v. Mills*,[186] two women brought a private facts action against abortion protesters who had carried signs with the plaintiffs' names, urging the women not to undergo their scheduled abortions at a clinic.[187] In finding for the plaintiffs the court conceded that the topic of abortion is of legitimate public concern.[188] However, in drawing an analogy to private medical information, the court concluded that while the general topic of abortion was of public concern, plaintiffs' identities were not.[189]

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178. *See id.* at 374.

179. *See* Borquez v. Ozer, 923 P.2d 166, 172-73 (Colo. App. 1995), *rev'd on other grounds*, Ozer v. Borquez, 940 P.2d 371 (Colo. 1997).

180. *See Ozer*, 940 P.2d at 378-80.

181. 663 N.E.2d 1030 (Ohio Ct. App. 1995).

182. *See id.* at 1031.

183. *See id.* The private information in dispute was the attorney's listing of his partner as a beneficiary on his company insurance and pension benefits forms. *See id.* at 1034.

184. *See id.* at 1031.

185. *See id.* at 1035-36.

186. 536 N.W.2d 824 (Mich. Ct. App. 1995).

187. *See id.* at 827.

188. *See id.* at 830.

189. *See id.* In discussing the interrelation between a topic of public interest and individual identities, the court said:

> The fact that [persons] engage in an activity in which the public can be said to have a general interest does not render every aspect of their lives subject to public disclosure. Most persons are connected with some activity . . . as to which the public can be said as a matter of law to have a legitimate interest or curiosity. To hold as a matter of law that private facts as to such persons are

In another employer case involving alleged sexual harassment, *Pucci v. USAIR*,[190] a former employee alleged private facts liability as part of a multi-suit claim against the airline.[191] Defendants requested the trial court to dismiss the private facts and other complaints for failure to state a viable claim.[192] Although the court did not include an in-depth discussion of the harassed employee's private facts cause of action, it upheld the private facts claim even though it dismissed several of her other claims.[193]

C. Reining in Sensational Media Defendants

A third application of the private facts tort in recent years has been in the successful crusade against media defendants concerning news programs of suspect merit.[194] Victorious plaintiffs in these cases have used the private facts tort against news programs that arguably crossed the line from reporting news to "a morbid and sensational prying into private lives for its own sake."[195] Defendants in these cases include newspapers,[196] television stations[197] and an Internet subscription service provider of adult entertainment.[198]

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also within the area of legitimate public interest could indirectly expose everyone's private life to public view.

Id. at 830 (quoting Winstead v. Sweeney, 517 N.W.2d 874, 878 (Mich. Ct. App. 1994)).

190. 940 F. Supp. 305 (M.D. Fla. 1996).

191. *See id.* at 307.

192. *See id.* at 306.

193. *See id.* at 310.

194. This category is not mutually exclusive of the previous confidential medical information or protected classes categories. However, it is a separate category in that it focuses on the status of the defendant instead of the plaintiff. In fact, cases involving confidential medical information or protected class plaintiffs *and* sensational media defendants are likely to find a more sympathetic judge or jury than any of the categories by itself.

195. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

196. *See* Hood v. National Enquirer, Inc., No. B082611 (Cal. Ct. App. 1995) (visited Apr. 12, 1999) <http://www.stanford.edu/group/law/library/how/b082611.htm> (unpublished decision); Green v. Chicago Tribune Co., 675 N.E.2d 249 (Ill. App. Ct. 1996); Winstead v. Sweeney, 517 N.W.2d 874 (Mich. Ct. App. 1994).

197. *See* Veilleux v. National Broad. Co., Inc., 8 F. Supp. 2d 23 (D. Me. 1998); Baugh v. CBS, Inc., 828 F. Supp. 745 (N.D. Cal. 1993).

198. *See* Michaels v. Internet Entertainment Group, Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998).

1. *Recent Victorious Newspaper Cases*

In *Winstead v. Sweeney*,[199] a woman sued a newspaper after it printed a story, discussing her previous mate-swapping experiences, as part of an overall piece on unique sexual practices.[200] The story included the fact that she participated in a surrogate parenting trio and was unable to have children due to previous abortions.[201] The information for the piece was provided by her former husband in response to an advertisement run by the paper.[202] The newspaper was granted summary judgment in the lower court, on the basis that the article was newsworthy as a matter of law.[203] On appeal, the appellate court stated that although the subject of unique love relationships was of public concern, it was a question of fact whether the particular facts revealed about the plaintiff were of legitimate public interest.[204]

In reaching its decision, the court relied upon both the Restatement's definition of newsworthiness and the "logical nexus" approach.[205] The *Winstead* court also rejected the newspaper's argument that since the information was obtained lawfully, the First Amendment absolved it of any liability.[206] By holding the defendant newspaper liable, the decision implicitly undermines claims regarding the broadness of the Supreme Court's decision in *Florida Star*.[207]

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199. 517 N.W.2d 874 (Mich. Ct. App. 1994).

200. *See id.* at 875.

201. *See id.* Although the article only referred to the parties by their first names, plaintiff alleged that her family, friends and employer recognized her as the woman in the article. *See id.*

202. *See id.*

203. *See id.*

204. *See id.* at 877-78. In denying the assertion that newsworthiness was always a matter of law, the court declared that "in certain rare cases, it is necessary to defer to the fact-finding process to gain a result that is fair and representative of the attitudes of the community." *Id.* at 877.

205. *See id.* at 876-79. Also, the court favorably cited California case law's three-prong test as an additional guide. *See id.* at 879 n.3.

206. The court wrote:

> Just because plaintiff's former husband took it upon himself to reveal the private facts to defendants, it does not follow that defendants thereby automatically are absolved from liability for printing that information. If such were the case, a media defendant could publish any material it wished as long as it received the consent of the one communicating the information. In truth, there are clear exceptions to the First Amendment freedom of the press that limit the right for policy reasons (i.e., obscenity, fighting words, defamatory information). In a case such as this, defendant's privilege is limited to that which is determined to be newsworthy.

Id. at 880 (citation omitted).

207. By holding the newspaper liable, the court's decision implicitly reaffirmed the limited scope of the *Florida Star* holding, as well as the Supreme Court's rejection of an absolute privilege for the publication of lawfully obtained truthful information. Although the *Winstead* court did not discuss *Florida Star* in its decision, a finding of

Shortly after the *Winstead* decision, tabloid journalism suffered a blow at the hands of the California Court of Appeal. In *Hood v. National Enquirer, Inc.*,[208] the illegitimate son of celebrity Eddie Murphy[209] and the child's mother sued the supermarket tabloid *The National Enquirer* following an article that not only revealed the plaintiffs by name, but also provided the details of financial support they were receiving.[210] Although the private facts claim was dismissed in the lower court, the appellate court reversed and allowed the lawsuit to proceed.[211] The court reasoned that although the general details of the plaintiffs' association with Eddie Murphy may have been newsworthy, details of their personal finances were not newsworthy as a matter of law.[212] Both the California

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liability in *Winstead* is consistent with *Florida Star* because of two substantial differences in their factual situations. First, the information received in *Florida Star* was received from the government, whereas the information in *Winstead* was received from a private citizen. Thus, *Winstead* was not a situation where the State was attempting to punish information it had previously provided to the media. *See supra* notes 68-82 and accompanying text. The second substantive difference is that in *Winstead*, the Detroit News ran an *advertisement* to solicit the information it later tried to declare as newsworthy. *See Winstead*, 517 N.W.2d at 875. By running an advertisement for the information, a strong argument can be made that the newspaper was actively trying to *create* news, rather than passively reporting on it.

208. No. B082611 (Cal. Ct. App. 1995) (visited Apr. 12, 1999) <http://www.stanford.edu/group/law/ library/how/b082611.htm> (unpublished decision).

209. Eddie Murphy is a popular movie actor and comedian. *See id.* at 2.

210. *See id.* at 2-4. The plaintiffs sued the newspaper under several causes of action, including public disclosure of private facts. The specific facts revealed in the article included:

> "And he made the boy a millionaire!"; "And when Tamara found a four-bedroom, three-bath home in Woodlands Hills, Calif., it was purchased on March 13, 1992, in Christian's name. The 2,583 square-foot home has a three-car garage, a concrete driveway, a slate tile roof as well as yards in the front and back."; "Eddie also told her to start looking for a house and he would buy it for her and Christian."; "Eddie gives her a generous allowance every month and she's living like a queen. She did over $60,000 of remodeling in her house and bought a new Range Rover that costs about $40,000."; "Eddie started paying her $2,000-a-month support and he paid for the birth of Christian."; "He also set up a million-dollar trust fund for Christian and bought the boy and Tamara a $376,000 house, . . ."; "He did it by setting up a special trust for Christian, said a source."; "He paid for the birth and has supported his love child and the boy's mom for the last two years."; and "She believed Eddie was just being nice to her so she wouldn't make a big deal about his new son to the press." The photograph of the house and the car was captioned, "'Eddie paid for $376,000 home and Tamara's $40,000 Range Rover, insiders say.'"

Id. at 4 n.2.

211. *See id.* at 18-19.

212. The court stated, "[w]e cannot say as a matter of law that the qualified loss of privacy resulting from plaintiffs' association with Mr. Murphy, a celebrity, rendered

Supreme Court and the U.S. Supreme Court denied the *Enquirer's* petition for writ of certiorari.[213]

Another recent case that is critical of editorial judgment is *Green v. Chicago Tribune Co.*[214] In *Green*, a woman sued the defendant newspaper after it published a picture of her dead son, including her private and intimate statements to him in a hospital room after his death, as part of an article on Chicago's homicide rate.[215] The newspaper had obtained the statements and picture by entering the private hospital room and "eavesdropping" on the plaintiff's conversation with her dead child.[216] In evaluating the newsworthiness of the statements, the Illinois Appellate Court, in a manner similar to the *Winstead* court, focused on the specific photographs and statements, not the general topic of gang warfare.[217]

After focusing on the specific picture and statements, the court held that reasonable minds could differ over whether the picture and statements were newsworthy and allowed plaintiff's case to go to trial.[218] In doing so, it rejected the newspaper's argument that the information was privileged because it fulfilled the public's curiosity in a newsworthy event.[219] This decision is even more daring than *Winstead*, because it

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their personal financial affairs newsworthy.... While the fact of that support may be newsworthy, the financial details may not." *Id.* at 18.

213. *See* 516 U.S. 1009 (1995); *'Enquirer' Must Defend Privacy Suit in Eddie Murphy Case*, USA TODAY (May 28, 1996) <http://www.usatoday.com/news/court/nscot003.htm>.

214. 675 N.E.2d 249 (Ill. App. Ct. 1996).

215. *See id.* at 251.

216. After the boy died on the operating table, the hospital staff moved his body to a private hospital room, where the following statements by his mother, which appeared in the article, were made:

> "I love you, Calvin. I have been telling you for the longest time about this street thing." "I love you, sweetheart. That is my baby. The Lord has taken him, and I don't have to worry about him anymore. I accept it." "They took him out of this troubled world. The boy has been troubled for a long time. Let the Lord have him."

Id.

217. The court stated:

> The Tribune argues the subject of the ... article was the death toll from guns and gang warfare, which, like the subject of drug use, is of legitimate public concern. In our view, however, the relevant inquiry is whether *the photograph of plaintiff's dead son and her statements to him* are of legitimate public concern.

Id. at 255.

218. *See id.* at 256.

219. In rebuking the argument, the court relied on the Restatement:

> [t]he extent of the authority to make public private facts is not... unlimited.... 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 community mores. The line is to be drawn when the publicity ceases to be the giving of information to

addressed a newspaper's reporting of the effects of crime, rather than the softer, more titillating subject of unique love relationships.

2. *Recent Victorious Television Cases*

Printed news is not the only media area to feel the impact of the private facts tort. In *Baugh v. CBS, Inc.*,[220] a domestic violence victim sued a television station after she was included in a newsmagazine broadcast on victim assistance programs.[221] Immediately following a domestic violence dispute involving the police, a news crew accompanying the victim assistance team filmed the plaintiff.[222] The plaintiff was unaware that the camera crew was part of a local news magazine filming for a special on victim assistance programs.[223] In that case, the television station argued that the broadcast was privileged because it concerned a matter of legitimate public interest.[224] Once again the court did not agree; although domestic violence in general was of legitimate public concern, the court was not convinced that plaintiff's personal involvement in domestic violence was newsworthy as a matter of law.[225]

A more complicated and potentially far-reaching decision was made in *Veillux v. NBC*,[226] a case involving the popular television newsmagazine *Dateline*.[227] In *Veillux*, a cross-country truck driver sued National

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> 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.

Id. at 256 (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977)).

220. 828 F. Supp. 745 (N.D. Cal. 1993).

221. *See id.* at 750-52.

222. *See id.* at 750.

223. *See id.* at 751.

224. *See id.* at 755.

225. *See id.*

226. 8 F. Supp. 2d 23 (D. Me. 1998).

227. *See id.* at 29. This case was not the first time *Dateline* found itself in legal difficulty for questionable news practices. In 1993, General Motors sued *Dateline* for defamation after *Dateline* broadcast GM pickup truck crash tests that had been secretly rigged with remote operated explosives. The lawsuit prompted the resignation of the president of NBC news, three senior producers, numerous reporters, and an on air apology and retraction by *Dateline* co-anchors. *See* Thomas D. Yannucci, *Debunking "The Big Chill"—Why Defamation Suits by Corporations are Consistent with the First Amendment*, 39 ST. LOUIS. U. L.J. 1187, 1188-1200 (1995). In 1992, a company specializing in overseas rescues of American children also sued *Dateline* for defamation. The lawsuit followed a segment entitled *Rambo Goes to Reykjavik*, and portrayed the plaintiffs as money wasting vigilantes of questionable ability. NBC's 1994 motions to

Broadcasting Company (NBC) for revealing that he had failed a drug test in a segment on trucking and highway safety.[228] The trucker had agreed to be accompanied by *Dateline* reporters on a cross-country trip, on the premise that the interview would be used to portray a positive image of the trucking industry.[229] However, the final broadcast claimed that during the trip plaintiff had falsified his logs, exceeded federal driving hour limitations, and lied to federal inspectors.[230] It also included interviews with an organization hostile to the trucking industry, and most importantly, revealed that plaintiff had failed a drug test prior to the trip.[231] In addition to other claims, the trucker asserted a private facts claim for revealing the drug test results on national television.[232]

Consistent with other recent cases involving private facts claims, the U.S. District Court of Maine held as a matter of law that the disclosure of the failed drug test was not a matter of legitimate public concern.[233] In distinguishing between the general topic of drug use among truck drivers and the identity of a specific, otherwise unknown, trucker who failed a drug test, the court stated, "[c]ontrary to [d]efendants' claim, working in a private, albeit heavily regulated, industry such as interstate trucking does not render one's life 'public' [and] thus open to increased scrutiny by the press."[234] By allowing the trucker's case to go to trial, the court

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dismiss the lawsuit were denied, but NBC eventually prevailed on summary judgment in 1997. *See* Corporate Training Unlimited, Inc. v. NBC, 981 F. Supp. 112 (E.D.N.Y. 1997); Corporate Training Unlimited, Inc. v. NBC, 868 F. Supp. 501 (E.D.N.Y. 1994).

228. *See Veilleux*, 8 F. Supp. 2d at 30.

229. *Dateline* decided to do the piece following a tragic accident where a fatigued truck driver killed four teenagers. When *Dateline* attempted to find a trucker to interview for the story, his employer recommended plaintiff. *See id.* at 29. However, prior to the interview, plaintiff and *Dateline* apparently settled on several ground rules to be followed. The program was to show the positive side of the trucking industry, plaintiff would not violate federally mandated driving hour limits for *Dateline*, and the Parents Against Tired Truckers (PATT) would not be involved with the show. *See id.* In fact, plaintiff threatened to terminate the entire project when the producer stated that *Dateline* wanted to show the driver "falsifying his logbook and evading inspection stations." *Id.* at 30. After the plaintiff's adamant objections, the producer withdrew the request, agreeing to do the segment along plaintiff's wishes. *See id.*

230. *See Veilleux*, 8 F. Supp. 2d at 30.

231. *See id.* The program concluded by stating "American highways are a trucker's killing field." *Id.*

232. *See id.* at 36-37. Apparently, plaintiff provided the information that he had tested positive for drugs *only* after being assured that it would be kept "off the record." *See id.* at 39.

233. *See id.* at 38.

234. *Id.* at 38. In reaching its decision, the court relied on the Ninth Circuit's distinction in *Virgil* that the public's interest about some general activity does not automatically extend to the private facts of people engaged in that activity.

> Defendants have presented no evidence that [the driver] ever drove under the influence of drugs or that he was an unsafe driver. They can point to no legitimate reason why the public should be informed that this particular driver tested positive for drug use. Were the [c]ourt to hold . . . that private behavior

implied that the imposition of liability for disclosing truthful information does not necessarily violate the First Amendment.[235]

3. *First Internet Case*

Even the emerging, high-speed transmission arena of the Internet is unable to escape the recent reappearance of the private facts tort. In *Michaels v. Internet Entertainment Group, Inc.*,[236] a well-known celebrity, Bret Michaels,[237] sued an Internet adult video distributor to prevent the Internet distribution of a pornographic video depicting him having sex with well-known actress Pamela Anderson Lee.[238] In addition to other claims, the plaintiff contended that distributing the video via the Internet would constitute a public disclosure of private facts.[239] The adult entertainment defendant argued that the sex acts were newsworthy

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> of a truck driver constitutes a matter of legitimate public concern simply because such behavior may in theory affect his or her performance on the road, it would seriously impair the right of privacy and open the door to further intrusion into the lives of private individuals whenever their behavior carries with it merely the potential to harm others.

Id.

235. In a related factual scenario, a Sacramento radio station and other media defendants recently settled out of court with a plaintiff after her private telephone conversation with her sister was broadcast nationwide as part of a radio stunt. *See* Cathleen Ferraro, *Radio Station to Air Apology, Make Donation to Women's Group*, SACRAMENTO BEE, Oct. 10, 1998, at B3, *available in* 1998 WL 8845224. The plaintiff and her sister were playing an on-air game that included a question about her sexual practices. *See id.* After the plaintiff refused to answer the question, the plaintiff alleged that the radio hosts told her and her sister they would "be right back" and placed the women on hold. *Id.* While on hold, the two sisters disclosed the answer to the sexual question to each other, which was simultaneously recorded and broadcast nationwide without their knowledge. *See id.* Although the defendants did not admit to any liability, the radio station aired two public apologies, paid a financial award to the plaintiff, donated an undisclosed amount of money to a Sacramento women's organization, and publicly "promise[d] that the 'Don and Mike Show' will 'not broadcast any conversations in violation of applicable law.'" *Id.*

236. 5 F. Supp. 2d 823 (C.D. Cal. 1998).

237. Bret Michaels is the popular lead singer for the rock and roll band "Poison." *See id.* at 828.

238. *See id.* at 828. Pamela Anderson Lee is best known as a former Playboy model and the former star of the popular television series "Baywatch." *See* Martha Frankel, *Very Important Pamela: Star of "VIP,"* COSMOPOLITAN, Oct. 1, 1998, at 264. The videotape in question was previously recorded by the plaintiffs and provided to the defendant by an associate of Michaels who had received a copy of the tape as a gift. *See Michaels*, 5 F. Supp. 2d at 832.

239. *See id.* at 839.

due to Lee's sex symbol reputation and Michael's status as a rock star.[240]

The court, in the first Internet case dealing with the private facts tort,[241] rejected the adult entertainment distributor's claim that the pornographic tape was newsworthy.[242] Applying the California three-prong test, the court stated that the social value of the videotape was minimal, the depth of intrusion was significant, and the plaintiffs had acceded to their fame.[243] Balancing these factors, the court concluded that because "[t]he first two factors weigh heavily against a finding of newsworthiness .... [P]laintiffs have demonstrated a likelihood of success in meeting their burden to show that the contents of the [t]ape are not covered by the newsworthiness privilege."[244] The court's decision, which was likely influenced by the concept of decency, may have far-reaching implications for the future of the Internet.[245]

D. Other Recent Cases

Four additional decisions that do not fall into any discrete categories warrant mention. In *Lake v. Wal-Mart Stores, Inc.*,[246] two young female customers sued a photo lab under all four invasion of privacy torts after employees allegedly circulated a picture of the two women showering naked together.[247] Apparently, the undeveloped picture was unknowingly contained in a roll of film the women gave Wal-Mart to be developed.[248] Two lower courts dismissed the plaintiffs' claims because Minnesota had not previously recognized any of the common law

240. *See id.* at 840. Additionally, the defendant argued that since Lee had previously appeared nude in magazines and pictures, the video of her having sex did not include private facts. *See id.* However, the court distinguished between the two in finding that "[t]he fact that she has performed a role involving sex does not, however, make her real sex life open to the public." *Id.*

241. A U.S. District Court in Michigan recently dismissed the second Internet case dealing with the private facts tort. In *Jessup-Morgan v. America Online, Inc.*, 20 F. Supp. 2d 1105 (E.D. Mich. 1998), the plaintiff sued America Online (AOL), an Internet service provider, after AOL disclosed her as the owner of a specific e-mail account in response to a civil subpoena. *See id.* at 1107. A third party had subpoenaed the information after a harassing and allegedly injurious e-mail was posted to an Internet electronic billboard under the plaintiff's e-mail account. *See id.* at 1106-07. The court, after determining that Virginia law should govern the claim, dismissed plaintiff's case on the basis that Virginia did not recognize the private facts tort. *See id.* at 1109.

242. *See Michaels*, 5 F. Supp. 2d at 842.

243. *See id.* at 841-42.

244. *Id.* at 842.

245. For a detailed discussion of privacy concerns with the Internet, see *infra* Part IV.E.4.

246. 582 N.W.2d 231 (Minn. 1998).

247. *See id.* at 232-33.

248. *See id.*

invasion of privacy torts.[249] However, the Minnesota Supreme Court reversed the lower court decisions by recognizing three of the four invasion of privacy torts, including the private facts tort.[250] Without discussing the merits of the claim further, the court stated that naked pictures generally warranted privacy protection, and remanded the case for further proceedings.[251]

In a similar lawsuit, *G.J.D. v. Johnson*,[252] a woman and her children brought a private facts action against the estate of the mother's former boyfriend.[253] The plaintiffs alleged that the decedent disseminated sexually explicit nude pictures of the mother at a county fair, the children's school bus stop, local high school football games, family mailboxes, and other public gatherings involving family and friends.[254] The woman had ended an abusive relationship with the decedent shortly before the pictures had begun appearing.[255] The trial court returned a verdict for the plaintiffs and awarded compensatory and punitive damages.[256] The Pennsylvania Superior Court refused to overturn the jury verdict on appeal,[257] and the Pennsylvania Supreme Court upheld the award of punitive damages due to the outrageous nature of the decedent's conduct.[258]

In another landmark private facts case, *Smith v. Calvary Christian Church*,[259] a parishioner sued his former church and pastor after the

249. *See id.* at 233.

250. *See id.* at 235. The court stated, "Today we join the majority of jurisdictions and recognize the tort of invasion of privacy. The right to privacy is an integral part of our humanity . . . ." *Id.*

251. *See id.*

252. 669 A.2d 378 (Pa. Super. Ct. 1995), *aff'd on other grounds*, 713 A.2d 1127 (Pa. 1998).

253. *See G.J.D.*, 669 A.2d at 379. The former boyfriend's estate was substituted for the defendant after he committed suicide prior to the trial. *See id.* at 380.

254. *See id.* at 380. The decedent took the pictures of the plaintiff during their five-year physically abusive relationship. *See id.* at 379-80. One of the pictures was a naked photograph of the woman; the second picture showed her "performing oral sex on an unidentifiable male." *Id.* at 380. Additionally, the pictures were captioned, "Suck lollipops for money, [plaintiff's name], [plaintiff's phone number], New Bloomfield, PA." *Id.*

255. *See id.* at 379.

256. *See id.* at 380.

257. *See id.* at 380 n.1.

258. *See* G.J.D. v. Johnson, 713 A.2d 1127, 1131 (Pa. 1998). The only issue on appeal to the Pennsylvania Supreme Court was the question of punitive damages, not the decedent's culpability or the award of compensatory damages. *See id.* at 1128.

259. 592 N.W.2d 713 (Mich. Ct. App. 1999).

pastor disclosed details of a private confession given ten-years earlier.[260] During a church service attended by the plaintiff, his wife, his family and other friends, the pastor announced to the entire congregation that the plaintiff had previously engaged in extra-marital sex with prostitutes.[261] The trial court granted the defendant's summary judgment motion on the basis that the disclosure should be governed by religious doctrine, not civil doctrine.[262] However, the appellate court reversed and remanded, holding that the plaintiff sufficiently pled that the disclosure was not of legitimate public concern to the congregation.[263]

In yet another private facts decision, *Hoskins v. Howard*,[264] plaintiffs sued a sheriff's deputy and his wife for eavesdropping, and later disclosing, details of a cordless telephone conversation intercepted with a borrowed police scanner.[265] Details of the illegally recorded conversation, which concerned an alleged murder plot, were subsequently disclosed during a local radio station broadcast.[266] The defendants argued that there could be no expectation to privacy concerning cordless phone conversations.[267] The trial court agreed and granted the defendant's motion for summary judgment.[268] However, the appellate court disagreed, holding that the privacy expectation for cordless phone conversations was a genuine issue of material fact for the jury to decide.[269]

E. Reasons for the Apparent Shift Toward Limiting the Newsworthiness Defense, and Predicted Future Private Facts Conflicts

The recent case law clearly illustrates an emerging trend of successful plaintiffs in private facts suits. The more difficult question, however, is why plaintiffs have been successful in recent years, especially in view of past Supreme Court treatment of the tort. In light of the large number of very recent cases and society's increased concerns over privacy interests, it would be disingenuous to just brush these cases off as anomalies.[270]

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260. *See id.* at 715.
261. *See id.*
262. *See id.* at 716.
263. *See id.* at 721-22.
264. 971 P.2d 1135 (Idaho 1998).
265. *See id.* at 1136-37.
266. *See id.* at 1137. The local county sheriff's department, due to the recording's illegally obtained nature and inadmissibility at trial, did not act upon the conversation. *See id.*
267. *See id.* at 1140.
268. *See id.* at 1141-42.
269. *See id.* at 1142.
270. For example, an August 18, 1998, telephone public opinion poll declared that 69% of the American public believed that the United States President's affair with a

This section provides an analysis of the shifting judicial attitude towards newsworthiness.

1. Judicial Willingness to Protect Confidential Medical Information and Defend Protected Classes

As previously discussed, one possible justification for the recent trend is a judicial willingness to protect confidential medical information and defend certain politically sensitive protected class plaintiffs.[271] Several courts dealing with such plaintiffs recently have selectively applied portions of the Restatement and previous case law in reaching their decisions. For example, in *Multimedia*, the court, in protecting the confidentiality of AIDS victims, failed to discuss the Restatement's inclusion of rare diseases as newsworthy events.[272]

Additionally, although the Restatement includes the birth of a child to a young minor as an example of a newsworthy item, the court in *Doe v. Mills* held that the identity of a minor undergoing the controversial procedure of abortion was not newsworthy.[273] In another example, despite declaring a domestic violence incident newsworthy, the court in *Baugh* spared the victim's claim on the basis that *her involvement* was not newsworthy as a matter of law, without elaborating on the

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White House intern, although highly trumpeted by the news media, was a private matter. *See "I Mislead People,"* TIME, Aug. 31, 1998, at 31. Six months later, following the public revelation of thong underwear, a semen-stained dress and cigar sex toys, and after a partisan House impeachment and Senate acquittal, the Clinton scandal was credited for raising society's awareness of invasion of privacy issues. *See* Kenneth T. Walsh, *The Price of Victory*, U.S. NEWS & WORLD REP., Feb. 22, 1999, at 29-30.

271. *See supra* Part IV.A-B.

272. *See* Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491 (Ga. Ct. App. 1994). AIDS, however, *is* classified as a rare disease by the National Organization for Rare Disorders (NORD). *See NORD—Rare Disease Database* (visited May 26, 1999) <http://www.rarediseases.org/lof/lof.html>. *Compare* Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 495 (Ga. Ct. App. 1994) (classifying the identities of AIDS victims as not newsworthy) *with* RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977) (including rare diseases as an example of newsworthy items). *But cf.* Lee v. Calhoun, 948 F.2d 1162 (10th Cir. 1991) (holding that a doctor's statement to the media that his patient had AIDS was sufficiently related to a medical malpractice lawsuit of legitimate public concern, because the doctor claimed that his incorrect diagnosis of the patient was affected by the fact the patient didn't tell him that he had AIDS).

273. *Compare* RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977) (declaring the "birth of a child to a twelve-year-old girl" a newsworthy event) *with* Doe v. Mills, 536 N.W.2d 824 (Mich. Ct. App. 1995) (concluding that an abortion was not a newsworthy event without discussing the plaintiff's minor status).

distinction between a person's involvement and the incident itself.[274] While the selective application of law is not a new legal phenomenon, its application in private facts cases is an emerging trend.

2. *Selection of Non-Media Defendants*

A second possible rationale for the recent success of the tort may be plaintiffs' skillful selection of non-media defendants. Taking a cue from the Supreme Court's wariness in finding against *media* defendants, plaintiffs are increasingly suing *non-media* defendants in private facts actions. For example, since the *Florida Star* decision, there have been at least sixty private facts decisions involving employers alone.[275] By

274. *See* Baugh v. CBS, Inc., 828 F. Supp. 745, 755 (N.D. Cal. 1993).

275. *See* Doe v. Hendersonville Hosp. Corp., No. 97-5853, 1999 WL 68767, at *1 (6th Cir. Jan. 15, 1999) (former sales engineer suing employer following disclosure of confidential medical information to other employees); Conway v. Cook County, No. 98 C 5324, 1999 WL 14497, at *1 (N.D. Ill. Jan. 8, 1999) (former employee suing employer following her manager's disclosure of her breast augmentation surgery to other employees); Blackwell v. Harris Chem. N. Am., Inc., 11 F. Supp. 2d 1302, 1305 (D. Kan. 1998) (chemical company employee suing former employer following disclosure of her illness to other employees); Chisholm v. Foothill Capital Corp., 3 F. Supp. 2d 925, 939-40 (N.D. Ill. 1998) (former executive suing financial services employer following disclosure of her extramarital affair to business client); Ferraro v. City of Long Branch, 714 A.2d 945, 947-51 (N.J. Super. Ct. App. Div. 1998) (former public works director suing city after mayor released copies of his medical report to the press); Marino v. Arandell Corp., 1 F. Supp. 2d 947, 948 (E.D. Wis. 1998) (employee suing employer following release of his Hepatitis C medical information to other co-workers); Wayne v. Genesis Med. Ctr., 140 F.3d 1145, 1147 (8th Cir. 1998) (ophthalmologist suing former hospital following disclosure of her past misconduct to a prospective employer); Martin v. Johnson, 975 P.2d 889, 891-92 (Okla. 1998) (teacher suing former school district for alleged private facts disclosure as part of multi-count lawsuit); Swanson v. Civil Air Patrol, 37 F. Supp. 2d 1312, 1330 (M.D. Ala. 1998) (former employee suing employer after disclosure of sleeping arrangements to other employees); Wilson v. Proctor & Gamble, No. C-970778, 1998 WL 769718, at *1-2, (Ohio Ct. App. Nov. 6, 1998) (technician suing employer following announcement of sexual harassment investigation results at a team meeting); Aguinaga v. Sanmina Corp., No. 3:97-CV-1026-G, 1998 WL 241260, at *5 (N.D. Tex. May 04, 1998) (employee suing former supervisor following threats to disclose sexually compromising pictures of employee); French v. United Parcel Serv., Inc., 2 F. Supp. 2d 128, 130-31 (D. Mass. 1998) (former UPS manager suing employer following pressure to disclose the details of a party-related accident involving other UPS employees at the manager's home); Tidman v. Salvation Army, No. 01-A-01-9708-CV00380, 1998 WL 391765, at *1 (Tenn. Ct. App. July 15, 1998) (former Salvation Army officers suing their superior officers following disclosure of extramarital affair); Gates v. City of Dallas, No. Civ.A.3:96-CV-2198-D, 1998 WL 133004, at *1 (N.D. Tex. Mar. 18, 1998) (police department employee suing city for private facts disclosure as part of multi-count lawsuit); Dancy v. Fina Oil & Chem. Co., 3 F. Supp. 2d 737, 738 (E.D. Tex. 1997) (refinery employees suing employer following publication of a list of employees with excessive work absences); Emberger v. Deluxe Check Printers, No. Civ. A. 96-7043, 1997 WL 677149, at *1-7 (E.D. Pa. Oct 30, 1997) (manager suing former employer following disclosure of alleged suicide note to therapist and other third parties); Morris v. Ameritech, No. 96 C 4398, 1997 WL 652345, at *1-2 (N.D. Ill. Oct. 14, 1997) (telephone company employee suing employer for publishing

information from alleged eavesdropping); Logan v. West Coast Benson Hotel, 981 F. Supp. 1301, 1321 (D. Or. 1997) (hotel employee suing employer following disclosure of her resume and other personal information to unauthorized personnel); Stien v. Marriott Ownership Resorts, Inc., 944 P.2d 374, 376-77 (Utah Ct. App. 1997) (hotel employee suing employer following the showing of embarrassing video at company Christmas party); Gross v. Taylor, No. Civ. A. 96-6514, 1997 WL 535872, at *6-7 (E.D. Pa. Aug. 5, 1997) (police officers suing police department following broadcast of their police car conversations via hidden microphone system); Ozer v. Borquez, 940 P.2d 371, 374 (Colo. 1997) (attorney suing law firm following disclosure of his homosexual status and possible HIV infection to other employees); Crockett v. Kaiser Found. Health Plan, Inc., No. B104407, 1997 WL 271104, at *9 (Cal. Ct. App. Mar. 18, 1997) (former employee suing employer after notice of impending sexual harassment investigation was published on company bulletin board); Caspary v. State, No. 36689-1-I, 1997 WL 103688, at *10 (Wash. Ct. App. Mar. 10, 1997), (corrections officer suing prison following disclosure that he was HIV infected to prison staff); Doe v. Group Health Coop., Inc., 932 P.2d 178, 179-81 (Wash. Ct. App. 1997) (health care provider employee suing employer following disclosure of his past mental health treatment in department training manual), *overruled by* Reid v. Pierce County, 961 P.2d 333, 339 (Wash. 1998); Minckler v. Exxon Corp., No. 05-95-01015-CV, 1997 WL 34021, at *1 (Tex. App. Jan. 30, 1997) (foreman suing employer following disclosure of drug test results); Rudas v. Nationwide Mut. Ins. Co., No. Civ. A. 96-5987, 1997 WL 11302, at *1 (E.D. Pa. Jan. 10, 1997) (insurance company attorney suing employer following disclosure of her past sexual harassment experiences to third party); Pucci v. USAir, 940 F. Supp. 305, 307 (M.D. Fla. 1996) (airline employee suing former employer for alleged private facts disclosure as part of a multi-count lawsuit); McNemar v. Disney Store, Inc., 91 F.3d 610, 622 (3d Cir. 1996) (store employee suing employer following disclosure of employee's AIDS disease to friend of employee); Lansing Ass'n of Sch. Adm'rs v. Lansing Sch. Dist. Bd. of Educ., 549 N.W.2d 15 (Mich. Ct. App. 1996) (school administrators suing school board to prevent disclosure of past performance evaluations); Roehrborn v. Lambert, 660 N.E.2d 180, 183 (Ill. App. Ct. 1995) (probation officer suing former employer following disclosure of failed psychological testing evaluations to training institute); Doe v. Southeastern Pa. Transp. Auth. (SEPTA), 72 F.3d 1133, 1138-39 (3d Cir. 1995) (public transportation employee suing employer following disclosure of his HIV related prescriptions in company report); Nobles v. Cartwright, 659 N.E.2d 1064, 1073 (Ind. App. 1995) (state lottery employee suing lottery commission following disclosure of employee's sexual harassment charges against lottery director); Patton v. United Parcel Serv., Inc., 910 F. Supp. 1250, 1276 (S.D. Tex. 1995) (UPS employee suing employer following disclosure of property mishandling incident); Porter v. Royal Oak, 542 N.W.2d 905, 907 (Mich. Ct. App. 1995) (former police officer suing city for disclosing details of disciplinary actions against him); Scarborough v. Brown Group, Inc., 935 F. Supp. 954, 964 (W.D. Tenn. 1995) (former employee suing employer following disclosure of adverse information to prospective new employer); Greenwood v. Taft, 663 N.E.2d 1030, 1031 (Ohio Ct. App. 1995) (attorney suing former law firm following disclosure of private information regarding his male partner to other members of firm); Keenan v. Allan, 889 F. Supp. 1320, 1392 (E.D. Wash. 1995) (court employee suing employer following disclosure of her previous grievances to newspaper editor); Blackthorne v. Posner, 883 F. Supp. 1443, 1456 (D. Or. 1995) (computer store manager suing employer following alleged disclosure of private medical and family information to third parties); Yeager v. Harrah's Club, Inc., 897 P.2d 1093, 1094 (Nev. 1995) (casino assistant manager suing former employer for private facts disclosure as part of a multi-count lawsuit); Gallo v. Princeton Univ., 656 A.2d 1267, 1276 (N.J. Super. Ct. App. Div.

pursuing non-media defendants, plaintiffs avoid the First Amendment conflict regarding judicial editing of the press. As discussed by one court, there is a difference between suing the press for reporting news, as in *Cox*, and suing an agency that chooses to make a private matter

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1995) (facilities official suing university following disclosure of misconduct investigation in university bulletin); Handler v. Arends, No. 0527732 S, 1995 WL 107328, at *1 (Conn. Super. 1995) (university professor suing former employer following disclosure of her tenure denial in departmental meeting); Seta v. Reading Rock, Inc., 654 N.E.2d 1061, 1063-1068 (Ohio Ct. App. 1995) (accountant suing employer following telephone disclosure of her drug-related termination to third party); Merlo v. United Way of Am., 43 F.3d 96, 103 (4th Cir. 1994) (former charity treasurer suing employer following disclosure of the potential misuse of funds in report to board of governors); Smith v. Arkansas La. Gas Co., 645 So. 2d 785, 790-91 (La. App. 1994) (former manager suing employer following disclosure of alleged sexual harassment to other company officials); Hawley v. Atlantic Cellular Tel. Corp., No. Civ. 93-362-P-H, 1994 WL 505029, at *3 (D. Me. Sep. 2, 1994) (telephone company account executive suing employer following disclosure of an improper transactions investigative report to third parties); Moore v. Sun Pub. Corp., 881 P.2d 735, 742 (N.M. Ct. App. 1994) (newspaper publisher suing former employer following disclosure of the reason for his termination to county law firms); Sedlak v. Lotto, No. CV 92 328128, 1994 WL 685000, at *3 (Conn. Super. Nov. 29, 1994) (shipping department employee suing employer following repeated verbal disclosures concerning her marriage, grooming and intelligence to other employees); Carriker v. American Postal Workers Union, No. 13900, 1993 WL 385807, at *18 (Ohio Ct. App. Sep. 30, 1993) (union secretary suing union following disclosure of details of her work agreement in letter to union membership); Battenfield v. Harvard Univ., No. 915089F, 1993 WL 818920, at *8 (Mass. Super. Aug. 31, 1993) (assistant director of university department suing university following disclosure of her salary, job description and thesis to third parties); Elliott v. Healthcare Corp., 629 A.2d 6, 9 (D.C. 1993) (hospital administrator suing former employer following disclosure of the reasons for his termination to unemployment compensation board); Hines v. Arkansas La. Gas Co., 613 So. 2d 646, 648-49 (La. App. 1993) (former supervisor suing employer following disclosure of alleged sexual harassment to other company officials); Kersey v. Dennison Mfg. Co., No. Civ. A. 89-2650-MA, 1992 WL 71390, at *6 (D. Mass. Feb. 21, 1992) (patent employee suing former employer following disclosure of substandard work assessment report to other employees); LePore v. Ramsey, No. 90-1469, 90-1471, 1991 WL 197376, at *1 (4th Cir. Oct. 7, 1991) (secretary suing employer following disclosure of "talking points" memo discussing her previous sexual harassment complaints); Swanson v. Village of Lake in the Hills, No. 87 C 20352, 1991 WL 293270, at *12-13 (N.D. Ill. Apr. 18, 1991) (police sergeant suing former employer following alleged disclosure of psychological examination to newspaper reporters); Harris v. Neff, No. 88-1650, 1991 WL 42294, at *5-6 (D. Kan. Mar. 25, 1991) (insurance company sales representative suing former employer following disclosure of her ongoing drug and alcohol abuse treatment to co-workers); Wilhite v. H.E. Butt Co., 812 S.W.2d 1, 6 (Tex. App. 1991) (discharged employee suing former employer following disclosure of facts surrounding his termination to other management personnel), *abrogated on other grounds by* Cain v. Hearst Corp., 878 S.W.2d 577, 579 (Tex. 1994); Young v. Jackson, 572 So.2d 378, 379-81 (Miss. 1990) (nuclear power plant worker suing employer following disclosure of her hysterectomy to other employees); Miller v. Motorola, Inc., 560 N.E.2d 900, 902 (Ill. App. Ct.1990) (employee suing employer following disclosure of mastectomy surgery to other workers); Roe v. Cradduck, 555 N.E.2d 1155, 1157 (Ill. App. Ct. 1990) (former day care employee suing employer following disclosure of the reason for her discharge to parents of day care students).

public.[276] Although the employment claims to date have been mostly unsuccessful, the private facts tort will likely emerge as a potent weapon in arenas such as employment law due to diminished First Amendment concerns.[277]

3. *Increase of Tabloid Journalism*

Thirdly, the cases may represent a judicial backlash against media defendants for abusing the wide discretion they had previously been given in private facts cases. The Restatement, "leave-it-to-the-press," California three-prong, and "logical nexus" approaches all provide the media leeway in determining newsworthiness.[278] As a result, liability for editorial indiscretion had been reserved only for extreme cases.[279]

However, alleged media invasions of privacy have advanced beyond the "intrusive" reporting of Warren's socialite wedding last century. The past decade's incredible expansion of media outlets such as cable television, talk radio, and the Internet has brought a fierce competition for ratings. This competition has further blurred the line between news and sensationalism—leading to an increase in extreme disclosures offending community mores.[280] As a result, recent lawsuits against the

276. *See* Doe v. City of New York, 15 F.3d 264, 268 (2d Cir. 1994).

277. In such cases, an employer can successfully avoid liability by proving that the facts were disclosed to persons with a legitimate concern for such information. *See, e.g.*, Doe v. Southeastern Pa. Transp. Auth. (SEPTA), 72 F.3d 1133, 1141-42 (3d Cir. 1995). However, this defense pales in comparison to the daunting First Amendment shield used by the press.

278. *See supra* Part III.B.

279. *See, e.g.*, Coplin v. Fairfield Pub. Access Television Comm., 111 F.3d 1395, 1404 (8th Cir. 1997).

280. An excellent example of the blurring between traditional news and sensationalism recently occurred on the popular television newsmagazine *60 Minutes*. During the final Sunday of the November 1998 sweeps month, *60 Minutes* aired a video of euthanasia advocate Dr. Jack Kevorkian administering a lethal injection to a 52-year-old man suffering from Amyotrophic Lateral Sclerosis (ALS), commonly referred as "Lou Gehrig's disease." *See* Don Aucoin, *Furor Grows over CBS Tape of Aided Death*, BOSTON GLOBE, Nov. 24, 1998, at A1. Several prominent journalism critics immediately criticized *60 Minutes* for "cross[ing] a dangerous line" for television journalism, and attempting to turn a tragic death into a "form of news entertainment." *Id.* The major criticism focused on the timing of the broadcast, which brought *60 Minutes* its highest television ratings of the season at a time when ratings were measured for advertising rates. *See* Carol Morello, *Kevorkian Aims for Showdown*[,] *Critics Blast Videotape as 'Stunt Death,'* USA TODAY, Nov. 24, 1998, at 3A. Even though *60 Minutes* defended the videotape as legitimate news regarding a difficult topic, the newsmagazine suffered "some of the harshest criticism ever leveled at the 30-year-old program." Howard Kurtz and Caryle Murphy, *For CBS, Ratings and Reproach; '60 Minutes' Broadcast Raises a*

media have been over stomach wrenching disclosures such as: mate-swapping, barren fertility resulting from multiple abortions, a mother's highly personal good-bye to her tragically killed son, confidential drug test results, a home video following a domestic violence incident, and even a video of a couple engaged in sexual intercourse.[281] Although the newsworthiness defense extends beyond just the reporting of current events to items dealing with entertainment, education and enlightenment, the above disclosures are arguably the type of highly offensive and titillating non-newsworthy disclosures which are "a morbid and sensational prying into private lives for its own sake."[282] Thus, judicial intervention is necessary to curb the media's flagrant abuse of its wide editorial privilege.[283]

4. *Concerns Regarding the Increasing Ability to Transmit Private Information Rapidly over the Internet*

The unprecedented, rapid dissemination of information over the Internet increases the likelihood of future disclosures of highly offensive, non-newsworthy private facts. This reality of life has not gone unnoticed, and provides a strong argument for reinvigorating application of the private facts tort. For example, one can hardly go a week without discovering a newspaper article or television segment regarding invasion of privacy concerns and the Internet.[284] This is most likely because the market checks and balances on the media's selection of newsworthy material are not present with the Internet. In many cases there are no editors, the source of the information is difficult to identify, and Web advertising is still in its infancy. As a result, the Internet is likely to emerge as the next litigation battleground for the private facts tort, once again calling for an analysis of the newsworthiness defense.

Perhaps the most commonly known Internet privacy issue is the

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Furor, WASH. POST, Nov. 26, 1998, at A1. The television broadcast was later used as evidence to convict Dr. Kevorkian of second-degree murder. *See Kevorkian Guilty of 2nd-Degree Murder*, SAN DIEGO UNION-TRIB., Mar. 27, 1999, at A1. Three weeks later the judge in the case sentenced Dr. Kevorkian to prison for 10 to 25 years. *See* Eric Slatter, *Kevorkian Is Sentenced to 10 to 25 Years*, L.A. TIMES, Apr. 14, 1999, at A1. Although the *60 Minutes* controversy was not a private facts issue, it clearly demonstrates the competing interests between traditional news, sensationalism, and ratings in today's fiercely competitive media market.

281. For a detailed discussion of these cases, see *supra* Part IV.C.

282. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977); *see id.* § 652D cmt j.

283. For a criticism of tabloid television, see Gonzales, *supra* note 110; Famoso, *supra* note 110.

284. *See, e.g.*, Ted Bridis, *Net Firms Told to Protect Privacy or Face Laws*, SAN DIEGO UNION-TRIB., June 24, 1998, at C2; *Peeping Toms Find Legal Way to Film*, SAN DIEGO UNION-TRIB., June 27, 1998, at A3; Jim Borgman, Cartoon, SAN DIEGO UNION-TRIB., July 25, 1998, at G6 (reprinted from CINCINNATI ENQUIRER).

dissemination of nude celebrity pictures over the World Wide Web.[285] Celebrities provide an immense marketing tool for cyberpornography; actresses' nude pictures can be quickly copied, disseminated, and placed on hundreds of cyberporn Web pages, where they serve as "teasers" for an industry that collected over $50 million in 1996 alone.[286] Hollywood, however, has begun to fight back, and the private facts tort is one tool available for that fight.[287] Use of the tort should be successful against Internet publishers provided the pictures have not previously been published.[288] Additionally, given the court's comments in *Michaels*, it is safe to say that the most pro-free speech definition of the newsworthiness defense will not apply.[289] In view of the current crusade against this issue,[290] and the predicted future growth of cyberporn on the Web, future private facts lawsuits over previously unpublished nude pictures are inevitable.

A related emerging issue is the dissemination of non-celebrity "peeping Tom" pictures on the Internet. Using hidden video cameras, participants in "cyber peeping" sneak pictures down the blouses and up the skirts of unsuspecting women in public places, then publish such pictures on Internet Web sites for profit.[291] Although the secret film

285. *See* Mitchell D. Kamarck, *Empowering Celebrities in Cyberspace: Stripping the Web of Nude Images*, 15 ENT. AND SPORTS LAW, Winter 1998, at 1.

286. *See id.*

287. *See id.* at 15. Other legal recourses include violation of copyright, misappropriation of another's name or likeness, and false light invasion of privacy (if the photograph is a fake). *See id.*

288. This is because once the pictures have been previously published, there no longer can be an expectation of privacy, as they are considered to be in the public domain. *Cf.* Ann-Margret v. High Soc'y Magazine, Inc., 498 F. Supp. 401, 405 (S.D.N.Y. 1980) (declaring that nude still photographs taken from a motion picture clip were not private facts).

289. *See supra* Part IV.C.3. However, a less clear question is whether naked pictures copied from a private website constitute public or private facts. Such an inquiry is beyond the scope of this Comment.

290. Actress Alyssa Milano and her family have actively attempted to remove celebrity nude pictures from the Internet. The actress' mother founded *CyberTrackers*, a company that searches the Internet for nude celebrity pictures, then threatens the owners of illicit Web pages with legal action if the pictures are not subsequently removed. The company has made good on its threats; in April of 1998 Alyssa Milano filed the first lawsuit involving the Internet dissemination of nude still photographs. *See* Greg Miller, *"Melrose Place" Star Hopes to Pull Plug on Sex Sites*, L.A. TIMES, Apr. 28, 1998, at D1. Milano was awarded a $238,000 default judgment in one lawsuit, and settled out of court for an undisclosed amount against two other Web sites. *See* Greg Miller, *Actress Prevails in Suits over Nude Photos on Web*, L.A. TIMES, Dec. 21, 1998, at C3.

291. *See* Bill Ainsworth, *Proposal Seeks End to "Cyber Peeping,"* SAN DIEGO UNION-TRIB., July 9, 1998, at A3.

taking is currently legal because it occurs in public,[292] the publication of such pictures on the Internet most likely falls within the domain of the private facts tort. However, as a practical matter, it would be extremely difficult, if not impossible, for plaintiffs to win in court for two reasons. First, it is unlikely that a woman would even know that she had been photographed and placed on the Web. Second, even if a woman suspected she had been photographed, the limited nature of the Internet pictures make determining or proving the victim's identity nearly impossible. But, in the rare event that a plaintiff could prove the posting of such pictures on the Internet, such a claim will most likely survive the newsworthiness defense.[293]

V. RECOMMENDATION FOR THE FUTURE OF THE TORT AND THE NEWSWORTHINESS DEFENSE

The current state of the private facts tort, especially the newsworthiness defense, is confused and incoherent. The varying definitions of newsworthiness that exist in different jurisdictions are a burden on both plaintiffs and defendants. Additionally, the harsh, pro-defendant definitions of newsworthiness promoted in the "refusal" and "leave-it-to-the-press" approaches undermine victim compensation, excuse tortuous activity, and serve no deterrent function against "sensational prying into private lives for its own sake."[294] Likewise, the vague and unpredictable definitions in the Restatement, California three-prong, and "logical nexus" approaches potentially deter the dissemination of legitimate newsworthy information, thus conflicting with the First Amendment.[295] Therefore, by approving a specific newsworthiness definition the Supreme Court can eliminate the First

292. Since the "oops" pictures are taken in public places such as Disneyland or the beach, there is no expectation of privacy and thus little criminal legal recourse available. *See Peeping Toms Find Legal Way to Film*, SAN DIEGO UNION-TRIB., June 27, 1998, at A3.

293. Due to the limited ability of the private facts tort to deter such actions, the California legislature recently turned "cyber peeping" into a crime. On August 26, 1999, California signed into law a bill that turned "cyber peeping" into a criminal misdemeanor. *See New Law Takes Aim at Video Voyeurism Legislation: Davis Signs a Bill that Makes It a Misdeameanor to Use a Hidden Camera to Look up Women's Skirts*, L.A. TIMES, Aug. 27, 1999, at A3. The legislation was prompted by an incident at Disneyland where a man was noticed taking hidden pictures down the blouses and up the skirts of women standing in concession lines and getting off rides. *See id.* The "cyber peeping" misdemeanor carries a penalty of a $1,000 fine and up to six months in jail. *See id.*

294. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977); *see supra* Part III.B.2-3.

295. *See supra* Part III.B.1 and Part III.B.4-5.

Amendment conflict, providing a uniform minimum newsworthiness standard to be adopted by state courts and legislatures.

A. Problems with Fragmented Case Law

As discussed in Part III, current case law treatment of newsworthiness is scattered and inconsistent.[296] For example, one recent court proclaimed that "it is clear that establishing viable doctrine in this area has not been an easy task,"[297] while another court has declared it "one of the . . . well-defined areas of privacy law."[298] Disclosures of facts that are newsworthy in one instance may be the basis for liability in another instance, even within the same jurisdiction or same court![299] These inconsistencies go beyond simply the five differing newsworthiness tests. For example, sometimes newsworthiness is a matter of law, sometimes it is a matter of fact, and sometimes it is both.[300] Sometimes newsworthiness is an absolute defense; sometimes it can be overridden due to the offensiveness of the disclosure.[301] Sometimes a person's identity can be separated from newsworthy facts; sometimes it can not.[302]

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296. *See supra* Part III.B.

297. Ayash v. Dana Farber Cancer Inst., No. CIV.A. 96-0565-E, 1997 WL 438769, at *4 (Mass. Super. Ct. July 9, 1997).

298. Shulman v. Group W Prods., Inc., 955 P.2d 469, 478 (Cal. 1998).

299. *Compare* Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 771-73 (Ct. App. 1983) (holding that disclosure of a controversial college student body president's transsexual status had little social utility and thus was not newsworthy), *with* Sipple v. Chronicle Publ'g Co., 201 Cal. Rptr. 665, 670 (Ct. App. 1984) (holding that the disclosure of a presidential life-saving hero's homosexual status was newsworthy because it dispelled the myth that gays were weak, timid and unheroic). For a more detailed discussion on the disparities between the two cases, see Elford, *supra* note 13, at 737.

300. *Compare* Cinel v. Connick, 15 F.3d 1338, 1345-46 (5th Cir. 1994) (stating newsworthiness is "a question of law for the court"), *with* Hawkins v. Multimedia, Inc., 344 S.E.2d 145, 146 (S.C. 1986) (declaring "[w]hether a fact is a matter of public interest is a question of fact to be decided by the jury"), *and* Winstead v. Sweeney, 517 N:W.2d 874, 877 (Mich. Ct. App. 1994) (stating that newsworthiness "is a mixed question of law and fact").

301. *Compare Ayash*, 1997 WL 438769, at *3 (calling newsworthiness "a complete defense"), *with* Vassiliades v. Garfinckel's, 492 A.2d 580, 589 (D.C. 1985) (declaring "[c]ertain private facts about a person should never be publicized, even if the facts concern matters which are, or relate to persons who are, of legitimate public interest").

302. *Compare* Doe v. Univision Television Group, Inc., 717 So. 2d 63, 65 (Fla. Dist. Ct. App. 1998) (stating that "while the topic of the broadcast was of legitimate public concern, the plaintiff's identity was not"), *with* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1233 (7th Cir. 1993). The court in *Haynes* rejected the plaintiff's argument that their names could have been changed in defendant's history book by saying,

Sometimes time impacts whether a disclosure is newsworthy; sometimes time is irrelevant.[303] Sometimes in determining newsworthiness the standard is whether the disclosure was necessary, while other times it is not.[304]

Perhaps the best example of the current confusion and misunderstanding regarding the newsworthiness defense is *Shulman v. Group W Productions*,[305] the most recent private facts case from the California Supreme Court. Ironically, the discussion section begins with the statement, "[t]he claim that a publication has given unwanted publicity to allegedly private aspects of a person's life is one of the more commonly litigated and *well-defined areas of privacy law*."[306] In actuality, the plurality decision is far from decisive or well defined, and, as a practical matter, leaves California private facts law in an incoherent state.[307]

In *Shulman*, two automobile accident victims sued television producers after video and audio of their rescue and emergency medical treatment were broadcast as part of a television documentary on emergency medical care.[308] The broadcast included extraction from the vehicle and the medical treatment administered to one of the victims, both on scene and inside a rescue helicopter.[309] The trapped automobile portion of the broadcast showed pictures of one of the victim's limbs and torso, and included audio of her first name, age, and her incoherent and unflattering statements while being extracted.[310] The helicopter

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> [b]ut the use of pseudonyms would not have gotten [defendants] off the legal hook. The details of [plaintiffs'] lives recounted in the book would identify them unmistakably to anyone who has known [them] .... [Defendant] would have had to change some, perhaps many, of the details. But then he would no longer have been writing history. He would have been writing fiction.

Id. at 1233.

303. *Compare* Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 40 (Cal. 1971) (holding that "identification of the *actor* in reports of long past crimes usually serves little independent political purpose"), *with Shulman*, 955 P.2d at 489 (rejecting the timeliness argument by stating, "[o]ne might argue that, while the contents of the broadcast were of legitimate interest ... identification of [plaintiff] as the accident victim [was] irrelevant ... in a broadcast that aired some months after the accident and had little or no value as 'hot' news.... We do not take that view.").

304. *Compare Vassiliades*, 492 A.2d at 589 (holding that in presenting an issue of public concern, "it was unnecessary for [defendant] to publicize [plaintiff's] photographs"), *with Shulman*, 955 P.2d at 488 (stating that "[t]he standard, however, is not necessity .... The courts do not, and constitutionally could not, sit as superior editors of the press.").

305. 955 P.2d 469 (Cal. 1998).

306. *Id.* at 478 (emphasis added).

307. The plurality decision includes a concurring opinion and two separate concurring/dissenting opinions. *See id.* at 498-504.

308. *See id.* at 475-76.

309. *See id.*

310. *See id.* The court's summary of the dialog exchange between the plaintiff and

portion of the broadcast showed video of the victim's face, covered by an oxygen mask, and included audio of her vital signs and lack of foot sensation.[311] Although not included in the broadcast, the tragic accident left the plaintiff a paraplegic.[312]

The trial court granted summary judgment for the television producers on the private facts claim, on the basis of newsworthiness.[313] The appellate court reversed in part, stating that the portion of the broadcast inside the helicopter was private, and that there were triable issues regarding the newsworthiness of the broadcast.[314] On appeal to the California Supreme Court, supporters of the defendant argued that the helicopter portion of the broadcast was protected by the First Amendment because it was "reasonably relate[d]" to a subject matter of legitimate public concern.[315] In contrast, counsel for the victims argued that showing the plaintiff's intimate personal medical facts and turmoil wasn't necessary to demonstrate the gravity of the accident and rescue.[316]

The court spent the majority of the private facts discussion section addressing the evolution of the private facts tort in detail. Regarding the

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emergency care workers follows:

> While [plaintiff] is still trapped under the car, [the rescue worker] asks [plaintiff's] age. [Plaintiff] responds, "I'm old." On further questioning, [plaintiff] reveals she is 47, and [rescue worker] observes that "it's all relative. You're not that old." During her extraction from the car, [plaintiff] asks at least twice if she is dreaming. At one point she asks [the rescue worker], who has told her she will be taken to the hospital in a helicopter: "Are you teasing?" At another point she says: "This is terrible. Am I dreaming?" She also asks what happened and where the rest of her family is, repeating the questions even after being told she was in an accident and the other family members are being cared for. While being loaded into the helicopter on a stretcher, [plaintiff] says: "I just want to die." [The rescue worker] reassures her that she is "going to do real well," but [plaintiff] repeats: "I just want to die. I don't want to go through this."

Id. at 476.

311. *See id.*

312. *See id.*

313. *See id.* at 477.

314. *See id.*

315. *See* Lee Levine, *Brief in Support of Respondents of Amici Curiae, the American Society of Newspaper Editors, Et. Al. in Shulman v. Group Productions., Inc., Court of Appeal, Los Angeles Superior Court, in* PRINT AND ELECTRONIC PUBLISHING: UNDERSTANDING THE LEGAL AND BUSINESS ISSUES FOR BOOKS AND MAGAZINES, at 863, 906 (PLI Pats., Copyrights, Trademarks, and Literary Property Course Handbook Series No. S058629, Apr. 1998).

316. *See Shulman*, 955 P.2d at 488. Additionally, the court considered the argument that the broadcast served little value as "hot" news because it aired several months after the actual accident. *See id.* at 489.

issue of newsworthiness, the court conceded that "[a]ll material that might attract readers or viewers is not, simply by virtue of its attractiveness, of *legitimate* public interest."[317] After citing favorably to *Melvin* and *Briscoe*, the court reviewed the application of the California three-prong approach in past cases.[318] However, the court then proceeded to endorse the recent application of the "logical nexus" approach in other jurisdictions.[319] Finally, using the "logical nexus" approach, the court rejected plaintiff's argument that the helicopter disclosures were neither necessary nor relevant to an issue of public concern.[320]

Shulman clearly demonstrates why the Supreme Court needs to define what constitutes newsworthiness. According to one critic, the court, "[a]fter paying lip service to [the previous California three-prong approach] . . . proceed[ed] to ignore their test for assessing newsworthiness."[321] Additionally, the court misapplied the "logical nexus" test, as reasonable minds could differ in evaluating whether plaintiff's name and personal medical information were substantially relevant to the general newsworthy topic of emergency medical care.[322] A second critic has argued that the plurality relied on both *Melvin* and *Briscoe* in justifying their decision, two cases which likely would not survive the Supreme Court's holding in *Cox* protecting items of public record from liability.[323] In short, *Shulman* has turned the newsworthiness defense in California into a mess—not because of its finding for the television producers, but rather because of the plurality's inconsistent and confusing application of precedent case law. As a result, after *Shulman* it is unclear what is and is not newsworthy in California, which potentially chills free speech. Therefore, the issue once again beckons Supreme Court attention.

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317. *Id.* at 483-84.
318. *See id.* at 481-83.
319. *See id.* at 484-85. For a discussion of the "logical nexus" approach, see *supra* Part III.B.5.
320. *See Shulman*, 955 P.2d at 488-89. Regarding plaintiff's necessity argument, the court responded by saying, "[t]he courts do not, and constitutionally could not, sit as superior editors of the press." *Id.* at 488. Likewise, the court rebuked the argument that plaintiff's identity served little purpose as "hot" news:

> We do not take that view. It is difficult to see how the subject broadcast could have been edited to avoid completely any possible identification without severely undercutting its legitimate descriptive and narrative impact. . . . In a video documentary of this type, however, the use of that degree of truthful detail would seem not only relevant, but essential to the narrative.

Id. at 489.
321. *Id.* at 502 (Brown & Baxter, JJ., concurring and dissenting).
322. *See id.* at 503 (Brown & Baxter, JJ., concurring and dissenting).
323. *See id.* at 500 (Kennard & Mosk, JJ., concurring).

B. The Supreme Court Should Declare a Minimum Standard for Defining Newsworthiness

As previously discussed, the Supreme Court needs to stop its limited case-by-case narrow analysis regarding newsworthiness in favor of a broad ruling establishing the bounds of the defense. The payoff for such a definition would be immense—it would provide the common law with a minimum standard for the newsworthiness defense, thus placing plaintiffs and defendants on firm ground in evaluating the private facts arena. The challenge for such a ruling, however, is in providing a general definition that withstands First Amendment scrutiny but won't "swallow up the tort" when applied to specific factual scenarios. A modified version of the California three-prong approach, which incorporates the "logical nexus" approach and certain defamation principles, can live up to such high standards.

1. Proposed Newsworthiness Standard

A minimum and predictable standard for determining newsworthiness could be established through a two-part balancing test. The proposed test would weigh the social use of the published facts against the associated prying into private information. However, similar to the different intent requirements in defamation law,[324] the burden of proof for establishing newsworthiness under the two-part test would vary based upon the status of the plaintiff. As explained below, such a balancing of newsworthiness and burden of proof placement would promote an open discussion of public affairs, provide the media an incentive to self-evaluate the newsworthiness of issues dealing with private individuals, and be consistent with current First Amendment law.

a. *Newsworthiness Test*

Regardless of who has the burden of proving newsworthiness or lack thereof,[325] the substantive test for determining whether a matter is newsworthy should be uniform. Additionally, it should be easy to

324. Due to First Amendment concerns, the Supreme Court has mandated differing proof requirements when suing media defendants for defamation. In defamation cases, the intent requirement of the tort varies based on the public or private status of the plaintiff. *See infra* notes 337-38.

325. *See infra* Part V.B.1.b.

comprehend, and liberal enough to reserve liability for extreme cases so as not to unduly inhibit free speech. The following proposed newsworthiness standard accomplishes that result by balancing the social use of the information against the intrusiveness of the prying.

(1) Are Facts of Social Use?

The first prong under the proposed newsworthiness test adopts the pre-*Shulman* California standard of whether the facts are of social use. However, the inquiry can not end there; without further definition, "social use" is a vague term that can be manipulated to meet the needs of the trier of fact. To avoid such vagueness, in determining whether the facts are of social use, there should be a requirement that they be "substantially related"[326] to a matter of legitimate public concern. Therefore, the first element of the proposed newsworthiness standard incorporates the "logical nexus" approach to determine the social use of the disclosed information.

As a result, as long as the matters are substantially related to a matter of legitimate public concern, they should be considered to be of social use. The standard recognizes the growing trend in case law and the advantages of the "logical nexus" approach.[327] By requiring a significant link between the facts and a matter of legitimate public interest, the substantially related test for determining social use meets the Restatement's goal that legitimate public interest does not include "a morbid and sensational prying into private lives for its own sake."[328] Recognizing, however, that this standard potentially places everyone's life into public view due to common associations with a matter of public interest,[329] the social use element must be balanced with a second element to preserve privacy interests.

(2) Extent of Prying into Private Lives for Information

The second element of the proposed newsworthiness test is the extent to which the facts represent a prying into someone's personal life. Although some elements of an individual's personal life may be newsworthy, it does not follow that every aspect of their life is newsworthy. Thus, to determine newsworthiness, it is necessary to balance the social use of the disclosed facts against the extent of the

326. "Substantially related" is a term of art to show a significant link between the facts and a matter of public concern. It should not be confused with constitutional law "intermediate scrutiny" analysis in equal protection clause cases.

327. *See supra* Part III.B.5.

328. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

329. *See supra* note 128 and accompanying text.

prying into a person's personal life.

The social use of information may be diminished due to the intrusiveness associated with obtaining or providing that information. For example, as *Michaels* clearly demonstrates, there is a significant difference between discussing the details of someone's sexual life, and showing graphic video of the same details.[330] Both pictures of sexual acts and words indicating a sexual relationship serve the same social entertainment use of providing the details of Hollywood relationships. However, most people would agree that sexually graphic pictures are far more intrusive than gossiping words. Therefore, one can easily infer that the additional factor of intrusiveness associated with the video of sexual acts diminishes the newsworthiness of that information. In other words, the more significant the prying, the higher the social use must be for it to be considered newsworthy.[331]

Balancing the extent of the prying against the social use of the disclosed information is a necessary check that preserves privacy while still protecting newsworthiness. It is only when the intrusiveness outweighs the social use that the information is not newsworthy. This standard protects dissemination of all non-intrusive information, and also protects information with social value that outweighs its intrusiveness.[332]

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330. *See supra* Part IV.C.3.

331. For example, the picture of a woman mourning the loss of her dead son in a hospital is most likely newsworthy. This is because the picture is of social use, since it is substantially related to an issue of legitimate public concern (gang warfare). Additionally, the intrusiveness is minor when balanced against the social use. However, if the mother's intimate statements to her dead son are added as a caption to the picture, the social use of the picture remains unchanged, but the intrusiveness has increased. In this case, the intrusiveness most likely outweighs the social use, and the resulting picture/caption is no longer newsworthy. Yet, in this and other scenarios, a jury should make the ultimate determination of the disclosure's newsworthiness.

332. For example, broadcasting the results of a drug test involving a truck driver most likely would not be newsworthy. Although the facts would be of social use (substantially related to highway safety), the intrusiveness of the facts (revealing the results of a private work-related drug test in an interview on national television) would likely outweigh their social use. However, such is not the case with an athlete failing a drug test during the sporting season. In this case, the social use of the information (substantially related to the issue of athletic authenticity) most likely outweighs the intrusiveness of the prying (athletes are aware of their public figure status and the interest surrounding athletic authenticity). Thus, the information is newsworthy despite the intrusiveness. Likewise, the results of a drug test involving a politician would also be newsworthy (the social use of an elected official's criminal misdeeds would outweigh the intrusiveness of the information). Yet, as in the above and other scenarios, a jury should make the ultimate determination of the disclosure's newsworthiness as a question

The proposed newsworthiness standard also provides a definite standard in distinguishing between a matter of public interest and the *identity* of a person involved in a matter of public interest. Past cases reveal an almost ad hoc determination of this question by the lower courts.[333] However, the proposed test deals with this question by balancing the social use of the information against the associated prying into a person's private life.[334] Simply stated, the greater the prying, the less likely a person's identity would be a matter of legitimate public concern.[335]

b. Burden of Proof—Public or Private Plaintiff?

(1) Voluntary Public Plaintiff

It is generally accepted that people who have voluntarily ascended to a position of fame have fewer privacy interests than an otherwise unknown private citizen.[336] Because of the prominent position of public persons in society, there is a strong First Amendment urge to shield reporting on such persons. In recognition of this, under the test proposed here, a voluntary public figure would be required to prove, as an element of the private facts tort, that the disclosed facts were not newsworthy.

The proof standard for a voluntary public plaintiff does not differ from the current status of private facts jurisprudence, and is similar to the Supreme Court's treatment of defamation cases.[337] There is a strong

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of fact.

333. *See supra* note 302 and accompanying text.

334. As with any balancing test, the proposed test is subject to criticism on the grounds of trying to weigh "apples against oranges." Nevertheless, due to the importance of the competing interests at stake, a balancing test may be the only way to protect both interests without either disregarding the right to privacy or unconstitutionally restricting free speech. Despite the lack of a common denominator, a reasonable juror is capable of determining when intrusiveness outweighs an item's social use. An additional protection in difficult cases is the burden of proof allocation between public and private plaintiffs. *See infra* Part V.B.1.b.

335. However, this simple example may not always be the case. Juries may, and should, tolerate a higher degree of prying when the information is of very important social use. Obviously, the most difficult cases will certainly arise when both the degree of prying *and* the social use of the information are great.

336. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (1977).

> One who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him.

Id.

337. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (requiring

desire for active, public debate concerning public figures in our society. By placing the burden of proof with respect to newsworthiness (or, more precisely, lack thereof) on public plaintiffs, the proposed test would grant the necessary breathing space for newsworthy reporting. Additionally, the risk of the disclosure of private, newsworthy facts is a risk assumed by becoming a voluntary public figure.

(2) Private or Involuntary Public Plaintiff

As in defamation cases, not all persons should be subject to the same level of media scrutiny.[338] Thus, under the proposed standard for newsworthiness, a private or involuntary public figure[339] would not be required to prove the lack of newsworthiness as an element of the private facts tort. But, in cases involving such private or involuntary public figures, newsworthiness would serve as an absolute defense. In other words, the burden of proof regarding newsworthiness would shift to the defendant in private or involuntary public plaintiff cases.[340]

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a showing of actual malice for a public plaintiff to recover from a media defendant); *see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (extending constitutional protection to statements regarding public figures as well).

338. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (allowing, in non-public plaintiff cases, a lesser standard of proof in proving defamation against media defendants); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760-62 (1985) (interpreting *Gertz* as applying to situations involving private plaintiffs and public issues).

339. For the proposed newsworthiness test, the distinction between an involuntary public figure and a private plaintiff differs from the Restatement. This is because the Restatement defines a private plaintiff as an involuntary public figure. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. f (1977) (describing involuntary public figures as individuals who, despite not seeking out publicity, have nonetheless become the legitimate subject of public interest due to their conduct or some other reason). However, technically the two are different. Under the proposed test, the private plaintiff becomes public simply by virtue of the publication *at issue*. On the other hand, the involuntary public figure previously became public as the result of some *other* unintended event or publication, and *had subsequently returned to a life of anonymity* (such as a crime or accident victim from many years prior, or even the subject of a previous private facts disclosure). Although the distinction between the two is not required by the proposed test (they share the same newsworthiness standard because neither person voluntarily ascended into a position of fame), the distinction is helpful to prevent involuntary public figures from becoming permanently labeled as public figures.

340. Because of the proposed differing burden of proof requirements depending upon the plaintiff's status, disputes would likely emerge over distinguishing between voluntary public figures and involuntary public figures. Unfortunately, current private facts common law does not shed much light on this issue. However, the Restatement does provide some guidance. Generally, a voluntary public figure intends and desires to be in the public eye. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (1977)

There are several reasons justifying a lesser burden of proof standard for previously private plaintiffs. First, a rich public debate on issues is not dependent upon disclosing private, non-newsworthy facts about private individuals. Second, involuntary public plaintiffs did not ask for any publicity or media scrutiny into their lives. Third, facts about private individuals are likely to be private, non-newsworthy facts. Fourth, since newsworthiness serves as a complete defense, the shifting of the burden of proof would still protect the reporting of newsworthy events.

The advantage of shifting the burden of proof for newsworthiness is that it will promote the very press self-evaluation of newsworthiness desired by some private facts critics.[341] Under this standard, the press would have the incentive to determine if private facts *concerning a private or involuntary public figure* were newsworthy prior to publishing the information. If the editors believed the information passed the newsworthiness test discussed above, they would not hesitate in publishing the information. However, if the editors questioned the newsworthiness of the facts about *previously private plaintiffs*, they would have the incentive to further determine the newsworthiness of the information prior to publication.[342]

2. *Constitutional Validity of the Proposed Newsworthiness Standard*

The proposed newsworthiness standard of balancing the social use of the disclosure against its intrusiveness is consistent with previous Supreme Court treatment of the private facts tort. For example, a person could not have a reasonable expectation of privacy regarding a matter contained in the public record. Therefore, consistent with *Cox*, the publication of an item of public record can not be considered an intrusive prying into someone's private life.[343] Additionally, as

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(describing actors, boxers and public officials as examples of voluntary public figures). In contrast, an involuntary public figure does not intend or desire to get publicity, but receives it nonetheless as an unintended result of his/her conduct or for some other reason. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. f (1977) (describing criminals, crime victims and accident victims as examples of involuntary public figures). For examples of public figure determination problems in defamation law, see *infra* note 347.

341. *See* Zimmerman, *supra* note 12, at 353 (advocating that the press is in the best position to evaluate the newsworthiness of a publication).

342. Thus, in a close case involving a public plaintiff, the presumption will be that the disclosed information was newsworthy. On the other hand, in a close case involving a private plaintiff, the presumption will be that the matter was not newsworthy. Once again, however, a showing of newsworthiness by the defendant would serve as an affirmative defense.

343. This is because the disclosure was already a matter of public record. *See supra*

supported by *Florida Star*, information provided to a media defendant by a government body does not result from the media's intrusive prying into private lives.[344]

Also, a brief look at past Supreme Court defamation cases demonstrates that the differing proof standards for public and private plaintiffs should withstand First Amendment scrutiny. In *New York Times Co. v. Sullivan*,[345] the Court held that a public official could not recover damages against the media for publication of false material without proving actual malice.[346] First Amendment limitations on the application of state libel laws were further extended to cover public figures more generally in *Curtis Publishing Co. v. Butts*.[347] Under the proposed private facts test, requiring a voluntarily public plaintiff to prove lack of newsworthiness is similar to the defamation requirement of proof of actual malice. In both situations, the plaintiff's case is more difficult to prove when the plaintiff is a voluntary public figure. Therefore, if a public plaintiff can prove lack of newsworthiness in a private facts case, finding the defendant civilly liable should not be unconstitutional.

Likewise, in *Gertz v. Robert Welch, Inc.*,[348] the Court held that a state could define the appropriate standard of liability against the media in defamation cases involving private plaintiffs, provided liability was not imposed without negligence.[349] Further, in *Dun & Bradstreet, Inc. v.*

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note 66 and accompanying text.

344. This is because there is no prying when the government provides the information to the media. *See supra* note 75 and accompanying text.

345. 376 U.S. 254 (1964).

346. *Id.* at 279-80. Malice is defined as making a false statement with the "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*

347. 388 U.S. 130, 155 (1967). The Court disagreed, however, if the extent of the public figure limitation should extend all the way to the *New York Times* "actual malice" standard. *See id.* at 162-63 (Warren, J., concurring). Additionally, courts have had problems in defining the outer margin of the public figure category. For example, "former public officials, professional athletes, entertainers, and celebrities of all sort" have been regarded as public figures, as well as a former actor and the sons of the convicted Rosenberg spies. EPSTEIN, *supra* note 39, at 1195. However, the Supreme Court has held that a prominent research scientist, the wife of a prominent wealthy businessman and a person accused of being a Soviet agent were not pubic figures. *See id.* Further, other cases have determined that "large insurance companies, professional football players, navy officers during the Vietnam War, Johnny Carson, local mobsters, belly dancers, Nobel Prize winners, and debt collection agencies under public investigation" were "limited basis" public figures. *Id.* at 1195-96.

348. 418 U.S. 323 (1974).

349. *See id.* at 347.

Greenmoss Builders, Inc.,[350] a divided Court held that a private plaintiff, suing a private defendant for defamation regarding a matter not of public concern, was not constitutionally required to prove negligence to recover damages.[351] Under the proposed private facts test, not requiring a previously private plaintiff to prove lack of newsworthiness is similar to lessening the actual malice standard for private plaintiffs in defamation cases.[352] In both situations, the plaintiff's case is easier to prove when the plaintiff is a private figure.[353] Additionally, because a showing of newsworthiness serves as an absolute defense, shifting the burden of proof regarding newsworthiness in private or involuntary public plaintiff situations should survive First Amendment scrutiny.

VI. CONCLUSION

The recent resurgence of the private facts tort demonstrates both a need and a judicial willingness to protect individuals from the unauthorized disclosure of intimate non-newsworthy facts. Warren's and Brandeis' prediction that "what is whispered in the closet shall be proclaimed from the house-tops"[354] has not only come true, but such private information can now be transmitted world-wide with the click of a mouse in a fraction of a second, leaving lives forever damaged in its wake. Although the common law has made noble attempts to limit such damaging disclosures, competing concerns over privacy and the First Amendment have led to a fragmented tort that is unpredictable in its application and potentially chilling to free speech.

By providing a comprehensive standard for determining newsworthiness, the Supreme Court can further individual privacy interests while eliminating the uncertainty of liability for disclosing private facts. A proposed newsworthiness standard that weighs the social use of the disclosed information against the extent of prying into personal

350. 472 U.S. 749 (1985).

351. *See id.* at 762.

352. A possible inconsistency in this analysis is the Supreme Court's holding in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). In that case, the Court held that a private plaintiff suing a public defendant regarding a matter of public concern must prove the falsity of the statement to recover for defamation. *See id.* at 768-69. However, since the truth of the disclosure is not at issue in private facts claims, *Hepps*' requirement for proving the falsity of the claim should have little influence on the proposed newsworthiness standard.

353. However, although current defamation law draws a distinction between private and public figures, the Supreme Court has not made a distinction between voluntary and involuntary public figures in defamation cases. But granting involuntary public figures the same protection as previously private figures should not be a concern since the disclosure is regarding a different issue than the event bringing them originally into the public eye, and because newsworthiness still serves as an absolute defense.

354. Warren & Brandeis, *supra* note 4, at 195.

information provides clear criteria for determining newsworthiness. Additionally, by shifting the burden of proof regarding newsworthiness to the defendant in private plaintiff cases, the proposed standard deters tabloid journalism while protecting genuinely newsworthy information.

Privacy and free speech are both values that are deeply rooted in American history and tradition. The strong roots of privacy are apparent in courtrooms across America, where the private facts tort is flourishing despite widespread First Amendment concerns. This Comment's proposed standard for newsworthiness, which relies on the best features of current privacy and defamation law, will preserve privacy values without deterring newsworthy speech. It is a standard that, if adopted by the Supreme Court, should quickly be embraced by the state courts in an effort to consistently apply the reemerging private facts tort.

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