

The Remains of Privacy's Disclosure Tort: an Exploration of the Private Domain

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THE REMAINS OF PRIVACY'S DISCLOSURE TORT: AN EXPLORATION OF THE PRIVATE DOMAIN

JONATHAN B. MINTZ*

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INTRODUCTION

Whether with dire warning, hand-wringing lament, or righteous affirmation, one third of the Supreme Court and most of privacy academia have pronounced dead the more than century-old tort of public disclosure of private facts.¹ Current jurisprudence makes clear, they say, that the First Amendment cannot withstand the imposition of tort liability for disclosing true, albeit private, facts. One professor has posited, however, that despite the undeniable jurisprudential and theoretical carnage, there are viable remains to the disclosure tort.² I agree, and in this Article I seek to explore them.

Privacy jurisprudence is marked by a tremendous amount of confusion. Theorists and jurists alike approach almost every aspect of privacy from legitimate and searching perspectives that nonetheless often bear no apparent relation to those of others engaging in the same putative inquiry. At a fundamental level, these discourses diverge in the nature of privacy as a concept as well as in the incarnations of privacy in the law. Theoretical and jurisprudential discourse on the tort of public disclosure of private facts also diverges, to the point where the Supreme Court's disclosure tort opinions bear mystifying relation to the elements of the tort itself.³

The first part of this Article therefore begins by surveying and categorizing the various theoretical approaches to the concept of privacy. From there, I set out the disparate views on the legal incarnations of the concept of privacy. This part concludes with an analytical compendium of the elements that constitute privacy's disclosure tort.

The second part of this Article reviews the Supreme Court's near-devastating treatment of the disclosure tort, highlighting the Court's refusal thus far to allow privacy protection for almost any private fact. This part concludes by identifying the "private domain": the viable remains wherein, consistent with the First Amendment, private facts can be protected from disclosure through tort incentives.

1. See discussion *infra* notes 183-184 and accompanying text.

2. Clifford J. Shapiro, *The First Amendment and the Private Domain* 3 (Apr. 16, 1993) (unpublished manuscript, on file with the author).

3. See discussion *infra* part II.A.1-3.

In the final part of this Article, I begin the dialogue by defining what remains of the private domain, and how courts can protect private facts within a "zone of fair intimate disclosure" consistent with the Supreme Court's privacy jurisprudence.

I. COMMON-LAW AND STATUTORY DIMENSIONS OF THE TORT

A. *The Concept of Privacy*

The law has struggled in its effort to protect the right of privacy for more than a century, principally because no one is quite sure what privacy means.⁴ The famous,⁵ and infamous,⁶ seminal article by Samuel Warren and Louis Brandeis colloquially defined privacy in 1890 as "the right to be let alone."⁷ Despite a widespread devotion to this formulation,⁸ the concept is so vague and so broad⁹ that it probably does more jurisprudential and philosophical harm than good.

4. See, e.g., James H. Barron, *Warren and Brandeis, The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890); *Demystifying a Landmark Citation*, 13 *SUFFOLK U. L. REV.* 875, 922 (1979) ("One of the enduring ironies of the Warren-Brandeis legacy is that the principal thrust of the article, their articulation of a legal basis for protecting individuals from press invasions into their personal affairs, is perhaps the least-developed area of the entire body of privacy law."); Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 *HARV. C.R.-C.L. L. REV.* 329, 340 (1979) ("If the evolution of a privacy right is to be successful, however, we must keep in mind that it is a theory of privacy that we are searching for.")

5. See, e.g., William L. Prosser, *Privacy*, 48 *CAL. L. REV.* 383, 383 (1960) ("It has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law."); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487 (1975) (describing the Warren and Brandeis piece as "the root article" of privacy).

6. See, e.g., Barron, *supra* note 4, at 907 ("The unromantic reality appears to be that the origin of the Warren-Brandeis article lies to a great extent in the hypersensitivity of the patrician lawyer-merchant and the verbal facility and ideological ambivalence of his friend and former law partner."); Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 *TEX. L. REV.* 611, 612 (1968) (questioning the impact of "that unique law review article which launched a tort"); Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 *LAW & CONTEMP. PROBS.* 326, 328 (1966) (noting the 'pettiness' of the privacy tort); Diane L. Zimmerman, *Requiem for a Heavyweight: A Fairwell to Warren and Brandeis's Privacy Tort*, 68 *CORNELL L. REV.* 291, 292 (1983) ("Depending upon the biases of the viewer, the article's effect could be said to exemplify the power, the impotence, or even the perniciousness of legal scholarship.")

7. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193, 193 (1890). But see Ruth Gavison, *Privacy and the Limits of Law*, 89 *YALE L.J.* 421, 437 & n.48 (1980) (asserting that the right "to be let alone" was first advanced in THOMAS M. COOLEY, *LAW OF TORTS* 29 (2d ed. 1888)).

8. See, e.g., *Metter v. Los Angeles Examiner*, 95 P.2d 491, 494 (Cal. Ct. App. 1939) (citing the definitional language of the Warren and Brandeis article); Ken Gormley, *One Hundred Years of Privacy*, 1992 *WIS. L. REV.* 1335, 1336 (same); Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 *CATH. U. L. REV.* 703, 703 (1990) (same); Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 *IOWA L. REV.* 185, 188-89 (1979)

At the risk of vastly oversimplifying a dense theoretical field, I think it is essential to begin by classifying what I see as the major conceptual approaches to privacy.¹⁰

Instead of defining its essence, most courts and legal scholars discuss a person's privacy only in terms of controlling the public's access to it. The Supreme Court has referred to privacy as the right to withhold information.¹¹ Professor Richard Parker remarked that "privacy is control over when and by whom the various parts of us can be sensed by others."¹² Similarly, Professor Alan Westin noted that "[p]rivacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."¹³ And Professor Emile Karafiol wrote that privacy "refers to the right of the individual to exclude society from his private life."¹⁴

Scholars who have attempted to define the essence of privacy have achieved little more specificity. Warren and Brandeis explained that each individual possesses a right to determine "to what extent his thoughts, sentiments, and emotions shall be communicated to others."¹⁵ Professor Paul Bender defines privacy as "the freedom to be one's self."¹⁶

Seemingly more utilitarian inquiries have concentrated on the functions that privacy serves. Professor Westin suggested that these functions were:

- (1) protection of personal autonomy—being free from manipulation or domination by others;
- (2) permitting emotional release—relief from the pressure of playing social roles;
- (3) opportunity for self-evaluation—a chance to integrate one's experience into a meaningful pattern and exert

(same); Marianne E. Lebeuf, Note, *A Media Defendant Is Not Necessarily Required to 'Unscramble the Egg' in Order to Avoid Disclosure of Embarrassing or Fictitious Private Facts in a Story of Public Interest*, 63 U. DET. L. REV. 821, 824 (1986) (same).

9. See, e.g., Gavison, *supra* note 7, at 438 (asserting that this articulation is overbroad because the "right to be let alone" theoretically could include the right not to pay taxes or be drafted).

10. For more thorough accumulations of these theoretical approaches, see James R. Beattie, Jr., Note, *Privacy in the First Amendment: Private Facts and the Zone of Deliberation*, 44 VAND. L. REV. 899, 910-21 (1991), and Emerson, *supra* note 4, at 329.

11. *Whalen v. Roe*, 429 U.S. 589, 600 (1977) (holding that a patient-identification requirement is a reasonable exercise of a state's police powers).

12. Richard Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 281 (1974) (emphasis omitted).

13. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1970).

14. Emile Karafiol, *The Right to Privacy and the Sidis Case*, 12 GA. L. REV. 513, 525 (1978).

15. Warren & Brandeis, *supra* note 7, at 198 (citation omitted).

16. Paul Bender, *Privacies of Life*, HARPER'S MAGAZINE, Apr. 1974, at 36.

one's individuality on events; and (4) allowance of limited and protected communication—permitting one to share confidences and to set the boundaries of mental distance.¹⁷

Professor Tom Gerety similarly posited three functions that privacy serves: “[a]utonomy, identity, and intimacy.”¹⁸

Other commentators have merely defined privacy as the opposite of nonprivacy. Professor Milton Konvitz referred to privacy as “a sphere of space that has not been dedicated to public use or control.”¹⁹ Similarly, Professor Harry Kalven views privacy as a non-delimiting “residual” interest: “what is left after the state or society has made its demand.”²⁰

In addition to these various conceptual inquiries, courts and legislatures have offered their own practical manifestations of privacy in the law, evidencing a similar ambiguity and ambivalence.

B. *Legal Categorizations of Privacy*

Defining the legal aspects of privacy has commanded a tremendous amount of ink for over one hundred years.²¹ Scholars and judges generally have paid homage to two macro-categories of the law that supposedly encompass a person's “privacy”: (1) federal constitutional autonomy from governmental intrusions into private decisions and (2) state tort recompense for nongovernmental intrusions into one's “personality.”²² Unfortunately, this popular dichotomy is quite misleading. This part of the Article seeks to classify more accurately the various bases of privacy.²³

17. Emerson, *supra* note 4, at 339 (citing WESTIN, *supra* note 13, at 32-39).

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

19. Milton Konvitz, *Privacy and the Law*, 31 LAW & CONTEMP. PROBS. 272, 279-80 (1966).

20. Kalven, *supra* note 6, at 327.

21. Professor Edward Bloustein stated over 20 years ago that it seemed “invidious to suggest bibliographic sources” regarding the “extensive scholarly literature” on privacy. Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 51 & n.39 (1974). I gratefully and wholeheartedly eschew such invidiousness.

22. See, e.g., *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989) (holding that disclosure of rapsheet constitutes invasion of privacy); *infra* notes 212-219; Warren & Brandeis, *supra* note 7, at 207.

23. Some scholars and philosophers assert that privacy's legal incarnations actually are based on a unitary interest, making any categorization insignificant. See, e.g., Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1000-01 (1964). Bloustein argues that privacy represents but one interest: the freedom from intrusion of public scrutiny. *Id.* at 1000. This unitary interest is reflected in “the tort cases, the criminal cases involving the rule of exclusion under the fourth amendment, criminal statutes prohibiting peeping toms, wiretapping, eavesdropping, the possession of wiretapping and eavesdropping equipment, and criminal statutes or administrative regula-

To begin, several zones of privacy protection stem from the federal Constitution. First, as noted, the Constitution protects some forms of private decision-making autonomy, such as abortion rights,²⁴ information regarding the use of contraceptives,²⁵ and private possession of obscene materials.²⁶ Second, the Constitution protects privacy interests through the Fourth Amendment²⁷ proscription of unreasonable governmental searches and seizures.²⁸ Third, the Supreme Court has found a right of privacy from the protections offered in the "penumbras emanating from the first eight amendments, the ninth amendment, and the concept of ordered liberty guaranteed by the due process clauses of the fifth and fourteenth amendments."²⁹

tions prohibiting the disclosure of confidential information obtained by government agencies." *Id.* at 1000-01; *see also* Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 483 (1968) (arguing that despite significant differentiating features, "privacy . . . is control over knowledge about oneself"); Gavison, *supra* note 7, at 428, 434 (contending that "privacy is a limitation of others' access to an individual" and that the independent elements of "secrecy, anonymity, and solitude are all part of the same notion of accessibility"); Schuyler M. Moore, *The Right to Be Left Alone: Integration of the Four Publication-Based Tort Actions*, 14 *LOYOLA L.A. ENT. L.J.* 405, 424-25 (1994) (advocating integration of the four publication-based privacy torts). *But see, e.g.*, Gormley, *supra* note 8, at 1339 (arguing that legal privacy consists of four or five separate and distinct species of legal rights, which are nonetheless historically and inevitably interrelated); Louis Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 *COLUM. L. REV.* 693, 708-10 (1972) (discussing the problems inherent in a unitary concept of privacy).

These views tend to focus upon the overarching theoretical role of autonomy that privacy affords individuals as they seek to coexist with society. *See, e.g.*, Bloustein, *supra*, at 1002-03; Emerson, *supra* note 4, at 337; Gavison, *supra* note 7, at 428-36; Hyman Gross, *The Concept of Privacy*, 42 *N.Y.U. L. REV.* 34, 35 (1967) (contending that development of a legally protected privacy interest requires recognition of the particular condition of human life); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 *CAL. L. REV.* 957, 968 (1989) (stating that the structure of the privacy tort is oriented toward safeguarding rules of civility); Symposium, *The Right to Privacy One Hundred Years Later*, 41 *CASE W. RES. L. REV.* 643, *passim* (1991) (examining the development of privacy rights during the past century).

24. *Roe v. Wade*, 410 U.S. 113 (1973).

25. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

26. *Stanley v. Georgia*, 394 U.S. 557 (1969).

27. U.S. CONST. amend. IV. The Fourth Amendment provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." *Id.* The Fourth Amendment was made applicable to state governments through the Due Process Clause of the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961). The Fourteenth Amendment states in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

28. *See* Project, *Government Information and the Rights of Citizens*, 73 *MICH. L. REV.* 971, 1283-84 (1975) [hereinafter Project] ("Except for the third amendment's ban on the quartering of soldiers in any house without the owner's consent in times of peace—a very narrow prohibition—the fourth amendment comes closer to mentioning a right of privacy than any other provision of the Constitution.").

29. *Id.* at 1282-83 (citations omitted).

The federal government also provides some noteworthy statutory protection of privacy.³⁰ For example, the Freedom of Information Act (FOIA) amendments of 1974 specifically exempt from disclosure government-held "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."³¹ In addition, FOIA prohibits the disclosure of information that would "constitute an unwarranted invasion of personal privacy."³² The Privacy Act amendment to FOIA³³ was enacted to limit the federal government's right to collect private information about its citizens, by imposing collection and maintenance safeguards, as well as some consent-premised dissemination standards.³⁴

The second half of the popular and flawed privacy dichotomy is state tort privacy protection. This category is, in fact, almost universally seen as encompassing not one but four distinct³⁵ interests repre-

30. See generally J. Thomas McCarthy, *The Rights of Publicity and Privacy* §§ 5.9[D][1]-[2] (Release #12, 1994).

31. Freedom of Information Act, 5 U.S.C. § 552(b)(6) (1978); see also Romualdo P. Eclavea, Annotation, *Construction and Application of Provision of Freedom of Information Act (5 U.S.C.S. § 552(b)(6)) Exempting From Disclosure Personnel and Medical Files*, 16 A.L.R. FED. 516 (1973).

32. 5 U.S.C. § 552(b)(7)(C); see also James O. Pearson, Jr., Annotation, *What Constitutes "Unwarranted Invasion of Personal Privacy" for Purposes of Law Enforcement Investigatory Records Exemption of Freedom of Information Act*, 52 A.L.R. FED. 181 (1981). While FOIA does not create private rights of action for those wishing to protect their privacy, FOIA request refusals have been litigated on privacy grounds, with government bodies asserting exemptions based upon common-law tort liability. See, e.g., *Swickard v. Wayne County Medical Examiner*, 475 N.W.2d 304, 314 (Mich. 1991) (finding that FOIA request for autopsy medical report was not an "invasion of privacy"); *Detroit Free Press, Inc. v. Oakland County Sheriff*, 418 N.W.2d 124, 130 (Mich. Ct. App. 1987) (holding that booking photographs are not protected from disclosure under Michigan's Freedom of Information Act as information of a personal nature).

33. Privacy Act of 1974, Pub. L. No. 93-579, § 3, 88 Stat. 1897 (1974) (codified at 5 U.S.C. § 552(a) (1988)).

34. McCarthy, *supra* note 30, § 5.9[D][2]. For more detailed FOIA and Privacy Act information, see JUSTIN D. FRANKLIN & ROBERT F. BOUGHARD, *GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS* (2d ed. 1986).

35. Despite Prosser's assertion that the four branches of common law privacy represent distinct interests, he acknowledges that the intrusion and disclosure branches both "require the invasion of something secret, secluded or private pertaining to the plaintiff." Prosser, *supra* note 5, at 407.

I also want to distinguish here between the interests protected by defamation and those protected by the privacy torts. "[I]n defamation cases, where the issue is truth or falsity, the marketplace of ideas furnishes a forum in which the battle can be fought. In privacy cases, resort to the marketplace simply accentuates the injury." Emerson, *supra* note 4, at 333; see also Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 958, 961 (1968) (distinguishing between the interests protected by privacy and defamation). Of course, defamation addresses false statements, truth being an absolute defense. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 116, at 839 (5th ed. 1984),

sented by four individual torts: (1) intrusion upon a person's seclusion or solitude, or into one's private affairs; (2) public disclosure of private facts about a person; (3) publicity that places a person in a false light in the public eye; and (4) appropriation, for the advantage of another, of a person's name or likeness.³⁶

Most states recognize an invasion of privacy action for the public disclosure of private facts through their common law,³⁷ but they also

whereas the disclosure tort applies only to true statements, *id.* § 117, at 856. *But see* Gavison, *supra* note 7, at 431-32 (suggesting that false information theoretically could be the subject of the disclosure tort, given the intrusion and reputation interests impinged by publicity of true or false statements of private fact).

The distinctions between the two torts are significant, yet there are some notable similarities. For example, the newsworthiness doctrine occasionally is referred to as the "fair comment" exception, *see, e.g.*, Lebeuf, *supra* note 8, at 826, likely because of its conceptual similarity to the "fair comment" exception to defamation. Samuel Sooper, Comment, *The First Amendment Privilege and Public Disclosure of Private Facts*, 25 CATH. U. L. REV. 271, 276 (1976). In addition, the *Restatement* notes that the absolute and conditional privileges in the defamation context (consent, for example, or for testimony during a judicial proceeding) also apply in the privacy context. RESTATEMENT (SECOND) OF TORTS §§ 652F-652G (1977).

36. Prosser, *supra* note 5, at 389.

37. Forty-one states and the District of Columbia recognize an invasion of privacy action for the public disclosure of private facts. *Doe v. Roe*, 638 So. 2d 826 (Ala. 1994); *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989); *Rutledge v. Phoenix Newspapers, Inc.*, 715 P.2d 1243 (Ariz. Ct. App. 1986); *Dunlap v. McCarty*, 678 S.W.2d 361 (Ark. 1984); *Hill v. National Collegiate Athletic Ass'n*, 865 P.2d 633 (Cal. 1994); *Lindemuth v. Jefferson County Sch. Dist.*, 765 P.2d 1057 (Colo. Ct. App. 1988); *Goodrich v. Waterbury Republican-Am., Inc.*, 448 A.2d 1317 (Conn. 1982); *Barker v. Huang*, 610 A.2d 1341 (Del. 1992); *Wolf v. Regardie*, 553 A.2d 1213 (D.C. 1989); *Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374 (Fla.), *appeal dismissed*, 493 U.S. 929 (1989); *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491 (Ga. Ct. App. 1994); *Mehau v. Reed*, 869 P.2d 1320 (Haw. 1994); *Baker v. Burlington N., Inc.*, 587 P.2d 829 (Idaho 1978); *Beverly v. Reinert*, 606 N.E.2d 621 (Ill. App. Ct. 1993); *Doe v. Methodist Hosp.*, 639 N.E.2d 683 (Ind. Ct. App. 1994); *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980); *Werner v. Klierer*, 710 P.2d 1250 (Kan. 1985); *Wheeler v. P. Sorensen Mfg. Co.*, 415 S.W.2d 582 (Ky. Ct. App. 1967); *Jaubert v. Crowley Post-Signal, Inc.*, 375 So. 2d 1386 (La. 1979); *Loe v. Town of Thomaston*, 600 A.2d 1090 (Me. 1991); *Arroyo v. Rosen*, 648 A.2d 1074 (Md. Ct. Spec. App. 1994); *Bratt v. International Business Mach. Corp.*, 467 N.E.2d 126 (Mass. 1984); *Beaumont v. Brown*, 257 N.W.2d 522 (Mich. 1977); *Young v. Jackson*, 572 So. 2d 378 (Miss. 1990); *Childs v. Williams*, 825 S.W.2d 4 (Mo. Ct. App. 1992); *State Bd. of Dentistry v. Kandarian*, 886 P.2d 954 (Mont. 1995); *Montesano v. Donrey Media Group*, 668 P.2d 1081 (Nev. 1983); *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964); *Gallo v. Princeton Univ.*, 656 A.2d 1267 (N.J. Super. Ct. App. Div.), *cert. denied*, 663 A.2d 1359 (N.J. 1995); *Moore v. Sun Publishing Corp.*, 881 P.2d 735 (N.M. Ct. App.), *cert. denied*, 882 P.2d 21 (N.M. 1994); *Hobbs v. Lopez*, 645 N.E.2d 1261 (Ohio Ct. App. 1994); *Guinn v. Church of Christ*, 775 P.2d 766 (Okla. 1989); *Anderson v. Fisher Broadcasting Co.*, 712 P.2d 803 (Or. 1986); *Marks v. Bell Tel. Co.*, 331 A.2d 424 (Pa. 1975); *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 278 S.E.2d 607 (S.C. 1981); *Dunn v. Moto Photo, Inc.*, 828 S.W.2d 747 (Tenn. Ct. App. 1991); *Star-Telegram, Inc. v. Doe*, No. D-4578, 1995 Tex. LEXIS 90 (June 8, 1995); *Lemnah v. American Breeders Serv., Inc.*, 482 A.2d 700 (Vt. 1984); *Hearst Corp. v. Hoppe*, 580 P.2d 246 (Wash. 1978); *Crump v. Beckley*

address privacy concerns in constitutional and statutory contexts. For example, four states statutorily recognize an individual invasion of privacy action for the disclosure of private facts,³⁸ ten states have a constitutional right to privacy,³⁹ and thirty states have rape shield statutes that prohibit the disclosure of identifying information concerning victims of sexual crimes.⁴⁰ In addition, forty-one states restrict the disclo-

Newspaper, Inc., 320 S.E.2d 70 (W. Va. 1984); *Hillman v. Columbia County*, 474 N.W.2d 913 (Wis. Ct. App. 1991), *review granted*, 482 N.W.2d 105 (Wis. 1992).

Four states have suggested in related cases that they might recognize a private facts cause of action. *Tehven v. Job Serv. N.D.*, 488 N.W.2d 48 (N.D. 1992); *Ward v. Shope*, 286 N.W.2d 806 (S.D. 1979); *Cox v. Hatch*, 761 P.2d 556 (Utah 1988); *Houghton v. Francell*, 870 P.2d 1050 (Wyo. 1994).

Five states have expressly rejected an invasion of privacy action for the public disclosure of private facts. *Evans v. Sturgill*, 430 F. Supp. 1209 (W.D. Va. 1977); *Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402 (Minn. Ct. App. 1995); *Brunson v. Ranks Army Store*, 73 N.W.2d 803 (Neb. 1955); *Howell v. New York Post Co.*, 612 N.E.2d 699 (N.Y. 1993); *Hall v. Post*, 372 S.E.2d 711 (N.C. 1988).

38. MASS. GEN. LAWS ANN. ch. 214, § 1B (West 1986); R.I. GEN. LAWS § 9-1-28.1 (1985); WASH. REV. CODE ANN. § 42.17.255 (West 1991); WIS. STAT. ANN. § 895.50(2)(b) (West 1983).

39. ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; ILL. CONST. art. I, §§ 6, 12; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

40. ALASKA STAT. §§ 12.61.110-150 (Supp. 1994); ARIZ. REV. STAT. ANN. § 13-4434 (Supp. 1994); CAL. EVID. CODE § 352.1 (West Supp. 1995); CONN. GEN. STAT. ANN. §§ 54-86d to -86e (West 1958); FLA. STAT. ANN. § 119.07(3)(y) (West Supp. 1995); GA. CODE ANN. § 16-6-23 (1992); IDAHO CODE § 9-340(35) (Supp. 1995); IND. CODE ANN. §§ 35-37-4-12, -6-9 (Burns 1994); LA. REV. STAT. ANN. § 44:3 (West Supp. 1995); ME. REV. STAT. ANN. tit. 30-A, § 288 (West Supp. 1994); MD. CODE ANN., CTS. & JUD. PROC. § 9-501 (1994); MASS. GEN. LAWS ANN. ch. 41, § 97D (West 1994); MICH. COMP. LAWS ANN. § 780.758 (West Supp. 1995); MINN. STAT. ANN. § 13.82 (West 1988 & Supp. 1995); MO. ANN. STAT. § 595.037 (Vernon 1995); NEB. REV. STAT. § 81-1842 (1994); NEV. REV. STAT. ANN. § 200.3771-3772 (Michie Supp. 1993) ("A victim of a sexual assault may choose a pseudonym to be used instead of victim's name . . ."); N.J. STAT. ANN. § 2A:82-46 (West 1994); N.M. STAT. ANN. § 31-24-5 (Michie 1994); N.Y. CIV. RIGHTS LAW § 50-b (McKinney 1995); OKLA. STAT. ANN. tit. 22, § 984.2 (West Supp. 1995); OR. REV. STAT. § 135.970 (1990); PA. CONS. STAT. ANN. tit. 42, § 5988 (Supp. 1995); S.C. CODE ANN. § 16-3-730 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. §§ 22-22-40, 23A-6-22.1 (1992 & Supp. 1995); TEX. CODE CRIM. PROC. ANN. arts. 56.09, 57.02 (West Supp. 1995) (allowing a sexual assault victim to use a pseudonym instead of her real name in all public records); UTAH CODE ANN. § 77-38-6 (1995); VA. CODE ANN. § 19.2-11.2 (Michie 1995); WYO. STAT. § 6-2-310 (1988 & Supp. 1995).

In addition, 16 states protect rape victims from public disclosure of statements made in confidence to sexual assault counselors. ALASKA STAT. §§ 9.25.400, 12.45.049 (1994); CAL. EVID. CODE § 1035.4 (West Supp. 1995); CONN. GEN. STAT. ANN. § 52-146K (West 1995); FLA. STAT. ANN. § 90.5035 (West Supp. 1995); HAW. REV. STAT. § 626-1, Rule 505.5 (Supp. 1994); IOWA CODE ANN. § 236A.1 (West 1994); ME. REV. STAT. ANN. tit. 16, § 53-A (West Supp. 1994); MASS. GEN. LAWS ANN. ch. 233, § 20J (West 1986 & Supp. 1995); MINN. STAT. ANN. § 595.02(j) (West Supp. 1995); N.H. REV. STAT. ANN. § 173-C:2 (1994); N.J. STAT. ANN. § 2A:84A-22.15 (West 1994); N.M. STAT. ANN. § 31-25-3 (Michie 1994); N.Y. CIV. PRAC. L. & R. 4510 (McKinney Supp. 1995); TEX. HEALTH & SAFETY CODE ANN. § 44.008 (West 1992); UTAH CODE ANN. § 78-3C-4 (1992 & Supp. 1994); VT. STAT. ANN. tit. 12, § 1614 (Supp. 1995).

sure of identifying information regarding an individual's Human Immuno-Deficiency Virus (HIV) or Acquired Immune Deficiency Syndrome (AIDS) status,⁴¹ sixteen states statutorily prohibit the disclosure of identifying information relating to abortion patients,⁴² and thirty states have statutes that protect some information about minors from public disclosure.⁴³ Furthermore, thirty states forbid the disclo-

41. ALA. CODE § 22-11A-54 (Supp. 1994); ARIZ. REV. STAT. ANN. §§ 36-664, -668 (1992); ARK. CODE ANN. § 20-15-904 (Michie 1991); CAL. HEALTH & SAFETY CODE §§ 199.20-.21 (West 1990); COLO. REV. STAT. ANN. § 25-4-1404 (West Supp. 1994); CONN. GEN. STAT. ANN. §§ 19a-583, -590 (West Supp. 1995); DEL. CODE ANN. tit. 16, §§ 1206A, 1207A (Supp. 1994); FLA. STAT. ANN. § 381.004 (West Supp. 1995); GA. CODE ANN. § 24-9-40.1 (Supp. 1994); HAW. REV. STAT. §§ 325-101 to -102 (Supp. 1994); IDAHO CODE § 39-610 (1993); ILL. ANN. STAT. ch. 410, para. 305/9 (Smith-Hurd 1993); IND. CODE ANN. § 16-41-8-1 (West Supp. 1994); IOWA CODE ANN. §§ 141.10, .23 (West 1989 & Supp. 1995); KY. REV. STAT. ANN. § 214.625(5)(c) (Michie/Bobbs-Merrill Supp. 1994); LA. REV. STAT. ANN. §§ 37:1747, 40:1300.14 (West 1992 & Supp. 1995); ME. REV. STAT. ANN. tit. 5, § 19203 (West Supp. 1994); MD. CODE ANN., HEALTH-GEN. §§ 18-207, -336 (1994); MASS. GEN. LAWS ANN. ch. 111, § 70F (West Supp. 1995); MICH. COMP. LAWS ANN. § 333.5133 (West Supp. 1995); MINN. STAT. ANN. §§ 144.768, .769 (West Supp. 1995); MO. ANN. STAT. § 191.656 (Vernon 1983 & Supp. 1995); MONT. CODE ANN. § 50-16-1009 (1993); NEB. REV. STAT. § 71-503.01 (1990); N.H. REV. STAT. ANN. § 141-F:8 (1955 & Supp. 1994); N.J. STAT. ANN. § 26:5C-7 (West Supp. 1995); N.M. STAT. ANN. § 24-2B-6 (Michie 1994); N.Y. PUB. HEALTH LAW § 2782 (McKinney 1993); N.C. GEN. STAT. § 130A-143 (1992); N.D. CENT. CODE § 23-07.505 (1991 & Supp. 1995); OHIO REV. CODE ANN. § 3701.243 (Baldwin 1994); OKLA. STAT. ANN. tit. 63, § 502.2 (West Supp. 1995); OR. REV. STAT. § 433.075 (1992); R.I. GEN. LAWS §§ 23-6-17, -18 (1989 & Supp. 1994); S.C. CODE ANN. § 44-29-135 (Law. Co-op. 1976 & Supp. 1994); TEX. HEALTH & SAFETY CODE ANN. § 81.103 (West 1991); UTAH CODE ANN. § 26-25a-101 (1995); VT. STAT. ANN. tit. 12, § 1705 (Supp. 1995); VA. CODE ANN. § 32.1-36.1 (Michie Supp. 1995); WASH. REV. CODE ANN. § 70.24.105 (West 1992 & Supp. 1995); WIS. STAT. ANN. § 252.15 (West Supp. 1994); WYO. STAT. § 35-4-133 (1994).

42. FLA. STAT. ANN. § 390.002 (West 1993); ILL. ANN. STAT. ch. 720, para. 510/10 (Smith-Hurd 1993); LA. REV. STAT. ANN. § 40:1299.35.10 (West 1992); ME. REV. STAT. ANN. tit. 22, § 1596 (West 1992); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); MICH. COMP. LAWS ANN. § 333.17015 (West Supp. 1995); MO. ANN. STAT. § 188.055 (Vernon 1983); MONT. CODE ANN. § 50-20-110 (1993); NEB. REV. STAT. § 28-343 (1989); N.D. CENT. CODE § 14-02.1-03.3 (1991); OHIO REV. CODE ANN. § 2307.46 (Baldwin 1994); OKLA. STAT. ANN. tit. 63, § 1-738 (West 1984); PA. CONS. STAT. ANN. tit. 18, § 3214 (1983 & Supp. 1995); TENN. CODE ANN. § 39-15-203 (1991); TEX. HEALTH & SAFETY CODE ANN. § 245.011 (West 1992); WASH. REV. CODE ANN. § 9.02.100 (West Supp. 1995).

43. ALA. CODE § 12-15-100 (1975 & Supp. 1994); ALASKA STAT. §§ 47.10.093, .17.040 (1990 & Supp. 1994); ARIZ. REV. STAT. ANN. § 8-546.07 (Supp. 1994); ARK. CODE ANN. § 9-27-309 (Michie 1993); COLO. REV. STAT. ANN. § 13-8-124 (West 1989) (stating that only minors' initials may appear on court records, not names); FLA. STAT. ANN. § 39.045 (West 1992); GA. CODE ANN. § 15-11-58 (Supp. 1995) (requiring court order before records concerning minors are opened for public inspection); HAW. REV. STAT. § 846D-4 (1994); ILL. ANN. STAT. ch. 705, para. 405/1-8 (Smith-Hurd Supp. 1995); IND. CODE ANN. § 36-6-8-1 (West Supp. 1994); IOWA CODE ANN. § 910A.13 (West 1994) (prohibiting release to the public of the identity of a child crime victim); KY. REV. STAT. ANN. § 610.320 (Baldwin 1995); MD. CODE ANN., CRTS. & JUD. PROC. § 3-828 (1994); MONT. CODE ANN. §§ 41-5-601, 52-2-203 (1993); N.J. STAT. ANN. § 2A:4A-60 (West Supp. 1995); N.Y. CRIM. PROC. LAW § 720.15 (McKinney 1995); N.C. GEN. STAT. § 7A-675 (1989 & Supp. 1994); N.D. CENT. CODE § 27-20-52 (1991 & Supp. 1995); OHIO REV. CODE ANN. § 5139.05 (Baldwin 1994);

sure of identifying information concerning those with mental illnesses,⁴⁴ and four states have other general privacy protection statutes.⁴⁵ In addition, all states have various forms of data protection statutes⁴⁶ analogous to the FOIA and Privacy Act provisions discussed above.⁴⁷

Finally, confusion exists about whether the "personality" interference generally associated with state tort law also has a federal constitutional component. Dean Prosser suggested that the privacy protection first articulated in *Criswold v. Connecticut*⁴⁸ "embraces . . . the interests protected by the common law action."⁴⁹ The Supreme

OKLA. STAT. ANN. tit. 10, § 1125.1 (West Supp. 1995); OR. REV. STAT. § 179.045 (1991); R.I. GEN. LAWS § 11-37-8.5 (1994) (making court records that identify child victims of sexual assault confidential and closed to the public); R.I. GEN. LAWS § 38-2-2 (1990 & Supp. 1994); S.D. CODIFIED LAWS ANN. § 23A-6-22.1 (Supp. 1995) (allowing minor victims of rape to have name suppressed in court records); TENN. CODE ANN. § 37-1-153 (1991 & Supp. 1994); VT. STAT. ANN. tit. 33, § 5523 (1991); VA. CODE ANN. § 16.1-309 (Michie Supp. 1995) (prohibiting disclosure of identifying information concerning minors associated with criminal proceedings); WASH. REV. CODE ANN. § 10.52.100 (West Supp. 1995) (enjoining disclosure of the identity of minor victims of sexual assault); W. VA. CODE § 49-7-1 (1995); WIS. STAT. ANN. § 48.396 (West 1987 & Supp. 1994); WYO. STAT. § 14-3-106 (1994).

44. ALA. CODE § 22-50-62 (1975); ARK. CODE ANN. § 20-46-104 (Michie 1991); COLO. REV. STAT. ANN. § 27-10-120 (West 1990); CONN. GEN. STAT. ANN. § 17a-451 (West 1958); GA. CODE ANN. § 37-3-166 (Supp. 1994); HAW. REV. STAT. § 334E-2 (1991) (stating that patients shall have the right to "privacy, respect, and personal dignity"); ILL. ANN. STAT., ch. 740, para. 110/3 (Smith-Hurd 1993); IND. CODE ANN. § 16-39-2-3 (Burns 1993); IOWA CODE ANN. §§ 228.2, 229.25 (West 1994); KAN. PROB. CODE ANN. § 59-2931 (Vernon Supp. 1995); ME. REV. STAT. ANN. tit. 34-B, § 5605(15) (West 1994); MASS. GEN. LAWS ANN. ch. 19, § 16 (West 1994); MICH. COMP. LAWS ANN. § 330.1746 (West 1992); MINN. STAT. ANN. § 144.335 (West 1989 & Supp. 1995); MISS. CODE ANN. § 41-21-97 (1972); MO. ANN. STAT. § 630.140 (Vernon 1988 & Supp. 1995); NEV. REV. STAT. ANN. § 433A.360 (Michie 1991 & Supp. 1993); N.J. STAT. ANN. § 30:4-24.3 (West Supp. 1995); N.M. STAT. ANN. § 43-1-19 (Michie 1993); N.C. GEN. STAT. § 122C-207 (1986); N.D. CENT. CODE § 25-03.1-43 (1995); OHIO REV. CODE ANN. § 5123.89 (Baldwin 1994); OKLA. STAT. ANN. tit. 43A, § 5-401 (West 1990 & Supp. 1995); PA. STAT. ANN. tit. 50, § 7111 (Supp. 1995); R.I. GEN. LAWS § 40.1-5-5 (1990); S.D. CODIFIED LAWS ANN. § 27A-12-25 (1992); TENN. CODE ANN. § 33-3-104 (1989 & Supp. 1994); UTAH CODE ANN. § 62A-12-247 (1993); WASH. REV. CODE ANN. § 71.05.390 (West 1992 & Supp. 1995); W. VA. CODE § 27-3-1 (1992).

45. ARK. CODE ANN. § 12-12-213 (Michie 1987) (prohibiting general "invasion[s] of privacy"); CONN. GEN. STAT. ANN. § 1-19(b) (West Supp. 1995) (excluding from the public record "personnel or medical files . . . the disclosure of which would constitute an invasion of privacy"); LA. REV. STAT. ANN. § 46:1806 (West Supp. 1995) (classifying law enforcement investigative reports confidential and not open to public inspection); MONT. CODE ANN. § 53-9-107 (1993) (prohibiting the release of certain law enforcement records where disclosure would constitute an unreasonable invasion of privacy).

46. See Bruce D. Goldstein, *Confidentiality and Dissemination of Personal Information: An Examination of State Laws Governing Data Protection*, 41 EMORY L.J. 1185, *passim* (1992).

47. See *supra* notes 30-34 and accompanying text.

48. 381 U.S. 479, 485-86 (1965) (affirming "right of privacy" for married couples seeking information about contraceptives).

49. KEETON ET AL., *supra* note 35, § 117, at 866; see also Soopper, *supra* note 35, at 290.

Court reached a similar conclusion in *Whalen v. Roe*,⁵⁰ noting that the right of privacy extends to both “the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions.”⁵¹

While certainly less convenient than the popular dichotomy identified at the beginning of this section, these legal categorizations of privacy should help clarify the many privacy incarnations that have developed in American jurisprudence. In this Article, I will explore only the embattled⁵² tort of public disclosure of private facts.

C. *The Contours of the Tort of Public Disclosure of Private Facts*

State definitions of the public disclosure privacy tort⁵³ generally parallel the *Restatement (Second) of Torts*. Section 652D states:

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

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.⁵⁴

These elements serve as the skeleton for the tort’s litigation. Their jurisprudential flaws and ambiguities have greatly hampered the tort’s effectiveness for plaintiffs. This part will set out the basic contours of the disclosure tort’s elements, highlighting their troubled jurisprudence.

50. 429 U.S. 589 (1977) (upholding statutory scheme for maintaining computerized records of dangerous prescription drugs and the names of patients who use them).

51. *Id.* at 599. The Third Circuit reaffirmed *Whalen’s* articulation in 1991, noting however that the protection extended only to “information a person reasonably expected to remain private.” *Scheetz v. Morning Call, Inc.*, 946 F.2d 202, 206-07 (3d Cir. 1991) (deciding that information in police report filed by plaintiff does not qualify as information reasonably anticipated to be private), *cert. denied*, 502 U.S. 1095 (1992).

52. While Dean Prosser noted almost 55 years ago that “no other tort has received such an outpouring of comment in advocacy of its existence [as the tort of public disclosure of private facts],” WILLIAM L. PROSSER, *PROSSER ON TORTS* § 107, at 1051 (1941), *cited in* Kalven, *supra* note 6, at 326, others have been quite clear about their antipathy. *See, e.g.*, Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 463 (1978) (“Privacy, however lofty its pedigree, is the *least* important tort for a civilized society.”); Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 408 (1978) (noting that privacy is mainly spoken of in terms of controlling reputation and that “[w]e have no right, by controlling the information that is known about us, to manipulate the opinions that other people hold of us”); Zimmerman, *supra* note 6, at 362 (concluding that not even the preservation of a “small corner” of the tort is “worth the risks”).

53. *See supra* notes 37-38 and accompanying text.

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

1. *Publicity*.—Unlike defamation, which simply requires publication to a third party,⁵⁵ the disclosure tort requires publicity.⁵⁶ The difference between the two terms is both theoretical and significant, although practically it is only one of degree. The first Comment to section 652D of the *Restatement* makes clear the tort's numerical emphasis, requiring "that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."⁵⁷

Generally, even an audience of a small group fails to satisfy most states' publicity requirements.⁵⁸ However, a small minority of courts rejects this numerical approach, relying instead upon the nature of the particular audience's relationship to the plaintiff.⁵⁹

The rationale behind the majority rule's numerical publicity requirement appears to be that one's privacy in the disclosure context exists only in opposition to the knowledge of society.⁶⁰ Thus, when a

55. KEETON ET AL., *supra* note 35, § 113, at 797 ("[T]he defamation [must] be communicated to someone other than the person defamed.").

56. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

57. *Id.*

58. *See, e.g.*, Porten v. University of San Francisco, 134 Cal. Rptr. 839, 841 (Ct. App. 1976) (determining that the state Scholarship and Loan Commission was an insufficient audience); Schwartz v. Thiele, 51 Cal. Rptr. 767, 771 (Ct. App. 1966) (deciding that a mental health "peace officer" was insufficient); Werner v. Kliever, 710 P.2d 1250, 1256 (Kan. 1985) (finding it doubtful that a judge, attorneys, and court services officers make up a sufficient audience); Childs v. Williams, 825 S.W.2d 4, 9 (Mo. Ct. App. 1992) (stating that disclosure to plaintiff's supervisors and "others with a legitimate and direct interest in [plaintiff's] employment" was insufficient publicity); Eddy v. Brown, 715 P.2d 74, 78 (Okla. 1986) (finding that a limited number of coworkers was insufficient); Rycroft v. Gaddy, 314 S.E.2d 39, 43 (S.C. Ct. App. 1984) (deciding that a single opponent in separate litigation was insufficient). *But see, e.g.*, McCsurely v. McClellan, 753 F.2d 88, 113 (D.C. Cir. 1985) (determining that disclosure to one person satisfies publicity requirement), *cert. denied*, 474 U.S. 1005 (1985); Harris v. Easton Publishing Co., 483 A.2d 1377, 1385-86 (Pa. Super. Ct. 1984) (finding that an audience of 17 individuals was sufficient publicity as matter of law).

Note that many of the preceding cases rejecting disclosures to small groups as sufficient for publicity purposes could be viewed as cases involving privileged communications, rather than insufficient publicity, although none of those courts explicitly so ruled. As in defamation actions, judicial proceedings tend to involve communications absolutely or conditionally privileged from privacy liability. RESTATEMENT (SECOND) OF TORTS §§ 652F-652G (1977).

59. *See, e.g.*, Miller v. Motorola, Inc., 560 N.E.2d 900, 903 (Ill. App. Ct. 1990) (deciding that fellow employees constituted a sufficient audience for publicity requirement given "plaintiff has a special relationship with the 'public' to whom the information is disclosed"); Beaumont v. Brown, 257 N.W.2d 522, 531 (Mich. 1977) (determining that the publicity requirement was met where particular public was small group, but one "whose knowledge of the private facts would be embarrassing to the plaintiff").

60. Professor Emile Karafiol defined privacy as "the right of the individual to exclude society from his private life." Karafiol, *supra* note 14, at 525.

plaintiff cannot assert that "society" or "the public" has gained access to a private fact, courts conclude that the interests protected by the disclosure tort are unaffected.⁶¹

This hair-splitting rationale seems plainly flawed. It facilitates the conservation of judicial resources far more than the dignity interests deemed worthy of protection by tort law. The difference in the injury to a person's dignity between five persons' and fifty persons' access to a private fact is merely one of degree, not of nature. A person loses some sense of privacy the moment a second person divulges a private fact to a third person, particularly when the third person is a member of the same community as the first person. Thus, the degree of publicity, and the corresponding degree of injury to a person's dignity, is a factor better addressed in damage calculations than in summary judgments or motions to dismiss.⁶²

This numerical emphasis is also widely responsible for the prominence of the most troublesome aspect of the disclosure tort: the First Amendment complications inherent in the tort's intersection with the rights of a free press.⁶³ The press is by far the most common disclosure tort defendant given its almost singular ability to disclose facts beyond the publicity element's numerical threshold.⁶⁴ It is also the class of defendants that tends to give the Supreme Court the greatest pause in the free speech arena.

2. *Highly Offensive Matter Concerning Another's Private Life.*—This element focuses on the nature and location of the fact or facts divulged. A disclosure tort violation occurs only if the facts divulged are private by nature and the information was not already public.⁶⁵ The *Restatement* defines facts that are "private by nature" as those whose publicity would make "a reasonable person . . . feel justified in feeling seriously aggrieved."⁶⁶

61. See *supra* notes 56-58 and accompanying text.

62. Moore, *supra* note 23, at 414.

63. See *infra* notes 95-182 and accompanying text.

64. Barbara Moretti, Note, *Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation*, 11 CARDOZO ARTS & ENT. L.J. 857, 869 (1993). Another reason that fewer suits are generated against nonmedia defendants is that the risks a plaintiff takes in worsening a privacy loss by suing often are greater when the disclosure was only made to a smaller audience. *Id.* For a discussion of court-afforded opportunities for a plaintiff to use pseudonyms or initials rather than their names in court records, see *infra* notes 126-129 and accompanying text.

65. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

66. *Id.* cmt. c. Of course, the identity of the plaintiff in the disclosure must be apparent to enough of the audience to satisfy the publicity requirement. See, e.g., *Harris v. Easton Publishing Co.*, 483 A.2d 1377, 1384-85 (Pa. Super. Ct. 1984); see *supra* note 58 and accompanying text.

Whether a fact is private by nature—that is, whether a reasonable person would feel seriously aggrieved by its disclosure—is the subject of some disagreement. The *Restatement's* approach is the most popular and cogent. Comment c to section 652D offers this general explanation:

Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part. . . . It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises.⁶⁷

The *Restatement's* generality has spawned even vaguer, value-based definitions of what is private by nature. Courts and commentators have suggested that a fact is private by nature if disclosure of the information is “offensive,”⁶⁸ or if its publication “shocks the conscience”⁶⁹ or would “outrage the community’s notions of decency,”⁷⁰ or if the fact is “exploitative” rather than “informative or cultural.”⁷¹

Courts applying these standards generally have recognized only nudity,⁷² sex,⁷³ and health⁷⁴ as categories of facts that are private by nature. The case law interpreting this element betrays the confusion and ambivalence we all seem to bring to the table when seeking to understand what facts are private. If the definition of what is private resides somewhere within a sense of personal intimacy, to oversimplify for the moment, then the limited categorical approach taken by the courts vastly underprotects the interest. We all surely seek, reason-

67. RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977).

68. See, e.g., *Gill v. Hearst Publishing Co.*, 253 P.2d 441 (Cal. 1953) (finding no tortious conduct in publication of a magazine photograph of married couple seated in affectionate pose at their place of business, a confectionery and ice cream concession in an open market); see also KEETON ET AL., *supra* note 35, § 117, at 857.

69. See Zimmerman, *supra* note 6, at 358-62.

70. See Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1263 (1976).

71. See Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1596, 1608, 1622 (1979).

72. See, e.g., *Gallon v. Hustler Magazine, Inc.*, 732 F. Supp. 322, 325 (N.D.N.Y. 1990).

73. See, e.g., *Boyles v. Kerr*, 806 S.W.2d 255, 261 (Tex. Ct. App. 1991).

74. See, e.g., *Vassiliades v. Garfinckel's, Inc.*, 492 A.2d 580, 587-88 (D.C. 1985) (plaintiff's cosmetic surgery); *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 903 (Ill. App. Ct. 1990) (plaintiff's mastectomy); *Young v. Jackson*, 572 So. 2d 378, 382 (Miss. 1990) (plaintiff's hysterectomy); *Barber v. Time, Inc.*, 159 S.W.2d 291, 295 (Mo. 1942) (photograph of plaintiff in hospital for treatment of eating disorder); *Hillman v. Columbia County*, 474 N.W.2d 913, 923 (Wis. Ct. App. 1991) (plaintiff's HIV-positive status).

ably, to keep far more facts from the public than those related to our bodies.⁷⁵

The second focus in defining what is private by nature is the location (or source) of the fact before disclosure. Publicizing facts that already appear in some zone of the public does not give rise to liability under the disclosure tort, even if the facts are "private by nature."⁷⁶ Thus, any facts found in public records,⁷⁷ on public streets,⁷⁸ in public places of business,⁷⁹ inside a public hotel,⁸⁰ at school sporting events,⁸¹ or facts that either are public knowledge⁸² or have already been publicized,⁸³ are not actionably private, regardless of their nature. Courts sometimes speak of these scenarios as involving the plaintiff's waiver or consent, generally on an implied basis.⁸⁴

75. For example, details of one's drinking, adultery, unemployment, and irresponsible parenting would seem to qualify as intimate details of plaintiff's life, despite the contrary holding in *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1233-34 (7th Cir. 1993) (holding that book revealing plaintiff's drinking, unstable employment, and other irresponsible behavior did not violate plaintiff's right of privacy).

76. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) ("[T]here is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, . . . [and] there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye.").

77. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 472-73 (1975) (allowing publication of rape victim's name taken from open criminal indictment records); *Florida Star v. B.J.F.*, 491 U.S. 524, 527 (1989) (refusing to enjoin disclosure of rape victim's name available in sheriff department's pressroom report).

78. See, e.g., *Forster v. Manchester*, 189 A.2d 147, 150 (Pa. 1963) (permitting insurance company to conduct undercover investigation via surveillance film of activities conducted in public).

79. See, e.g., *Gill v. Hearst Publishing Co.*, 253 P.2d 441, 444 (Cal. 1953); see *supra* note 68.

80. See, e.g., *Jacova v. Southern Radio and Television Co.*, 83 So. 2d 34, 36 (Fla. 1955) (permitting publication of photograph of police questioning plaintiff during gambling raid outside of hotel cigar store).

81. See, e.g., *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901, 903 (Tex. Ct. App. 1991) (finding that publicized photograph of high school soccer player's exposed genitalia while running on field was not tortious). But see, e.g., *Daily Times Democrat v. Graham*, 162 So. 2d 474, 478 (Ala. 1964) (ruling that disclosure of picture of plaintiff as her dress blew up outside fun house at county fair was actionably private despite public locale).

82. See, e.g., *Trout v. Umatilla County Sch. Dist.* 712 P.2d 814, 817-18 (Or. Ct. App. 1985) (determining that plaintiff's consumption of alcoholic beverages before automobile accident was public knowledge before disclosure in school board meeting).

83. See, e.g., *Heath v. Playboy Enters., Inc.*, 732 F. Supp. 1145, 1149 (S.D. Fla. 1990) (finding for defendant because information about paternity lawsuit already appeared in 27 published magazine and newspapers and was discussed by plaintiff on local and national radio and television programs).

84. See, e.g., *KEETON ET AL.*, *supra* note 35, § 117, at 817; *Moore*, *supra* note 23, at 417; see also *Gill v. Hearst Publishing Co.*, 253 P.2d 441, 444 (Cal. 1953) (holding that voluntary action in public place results in waiver of privacy right on that issue); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 793 (Ct. App. 1993) (*dicta*) (same).

The rationale for the focus on location is compelling, but also flawed. The basic idea is that, once facts have appeared in public, privacy interests fade to the point of not being protectable at all.⁸⁵ While of course it is true that privacy interests fade when the public already has access to information, it is clearly wrong to say that those privacy interests therefore cease to exist and are not worthy of protection. The "fading" of a privacy interest attendant to a fact's prior public appearance should, instead, raise only a question of degree.

The courts' analytical flaw here is most notable given that, in this context, "public" only means the condition of being "in public," not the numerical standard courts require in the publicity element.⁸⁶ Thus, defendants may disclose a private fact about a plaintiff to two persons without invading that plaintiff's privacy at all, but plaintiffs who expose the same fact to the same two persons "in public" have destroyed their privacy interest in that fact entirely.⁸⁷

What is perhaps most confusing about this element is its tremendous overlap with the final element of the disclosure tort: the matter disclosed is not actionable if it is of legitimate concern to the public. The nature and location inquiry, which seeks to determine whether the matter disclosed was "highly offensive," often bleeds into the next element's analysis of whether the matter disclosed is of legitimate public concern.⁸⁸

3. *Not of Legitimate Concern to the Public.*—Facts of "legitimate public concern" or "newsworthy"⁸⁹ facts, even if legally private, may be disclosed without any liability under this tort.⁹⁰ Regardless of whether a plaintiff must affirmatively prove that facts disclosed were not newsworthy,⁹¹ or whether defendants can be said to enjoy a privilege⁹² or a

85. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975); see *supra* note 77.

86. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

87. With these concerns in mind, Professor Thomas Emerson has suggested that this element would be better served by recognizing a "zone of privacy" that identifies certain topics of intimacy whose disclosure automatically merits prima facie privacy liability. Emerson, *supra* note 4, at 343; see also Zimmerman, *supra* note 6, at 348-50.

88. For example, one court defined "highly offensive" using the "not of legitimate public concern" element's standard of a "morbid and sensational prying into private lives for its own sake." *Diaz v. Oakland Tribune Co.*, 188 Cal. Rptr. 762, 767 (Ct. App. 1983); see *infra* text accompanying note 90.

89. This element also is referred to occasionally as the "fair comment" exception. See, e.g., Lebeuf, *supra* note 8, at 826. This reference is based upon the "fair comment" exception to defamation. See Soopper, *supra* note 35, at 276.

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

91. One commentator has pointed out: "Apparently, newsworthiness is not 'an issue or privilege which must be urged defensively but an element which must be negated by the plaintiff when meeting her burden of proof.'" Theodore L. Glasser, *Resolving the Press-*

defense,⁹³ many have declared that the broad scope of the newsworthiness doctrine has "decimate[d] the tort."⁹⁴

It is at this juncture that the First Amendment guarantees of free speech and free press are, and always have been, accounted for in the litigation of the disclosure tort.⁹⁵ Once a fact is deemed newsworthy, First Amendment interests in speaking the truth about it are held universally to override the attendant incursion into the plaintiff's privacy rights, which generally are not viewed as possessing constitutional roots. As Professor Theodore Glasser noted:

Whatever protection might exist from invasion of privacy by the press is . . . a matter of common law or statutory law, not Constitutional law. But since any law that restricts or inhibits free expression is likely to come in conflict with the Constitution, particularly the First Amendment, the conflict between privacy and freedom of the press is typically a lopsided conflict between common law and Constitutional law.⁹⁶

Moreover, the tremendous level of protection afforded defendants by this doctrine is greatly enhanced by the relatively amorphous, and thus far-reaching, definitions of "in the public interest," "newsworthy," and "news." In fact, the prevailing sentiment in the *Restatement*⁹⁷ and among privacy scholars⁹⁸ essentially is that whatever the

Privacy Conflict: Approaches to the Newsworthiness Defense, 4 COMM. & L. 23, 31 (1982) (quoting *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 300 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980)).

92. See, e.g., *KEETON ET AL.*, *supra* note 35, § 117, at 859; *Bichler v. Union Bank & Trust Co.*, 745 F.2d 1006, 1010-11 (6th Cir. 1984) (holding that a qualified privilege applies to invasion of privacy claims).

93. See, e.g., *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 273 (5th Cir. 1989) (finding that documentary broadcast about rape victim was newsworthy); *Galella v. Onassis*, 353 F. Supp. 196, 224 (S.D.N.Y. 1972) (holding that, under a balancing test, photographer's conduct was not protected by First Amendment); *Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla.) (deciding that publication of lawfully obtained information about child abuse case was not invasion of privacy), *appeal dismissed*, 493 U.S. 929 (1989).

94. *Kalven*, *supra* note 6, at 336; see also *Florida Star v. B.J.F.*, 491 U.S. 524, 550-51 (1989) (White, J., dissenting) ("I doubt that there remain any 'private facts' which persons may assume will not be published . . .").

95. See generally, e.g., *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 74 (Ga. 1905) (advocating a balancing test between privacy and the First Amendment such that "neither can be lawfully sued for the other's destruction"); *Warren & Brandeis*, *supra* note 7, at 214-20.

96. Glasser, *supra* note 91, at 27.

97. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977) ("To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term ['news'].").

98. See, e.g., *Kalven*, *supra* note 6, at 336 ("[T]here is force to the simple contention that whatever is in the news media is by definition newsworthy, that the press must in the

press decides to publish is, by definition, "news" for purposes of this tort.

Clearly, the job of defining "news"—especially for purposes of imposing liability when the press discloses a truthful fact—is about as close to transgressing the First Amendment line as a court could ever come.⁹⁹ This dangerous proximity has led some scholars to advocate the "let-the-press-decide" approach¹⁰⁰ that has so dominated this tort's litigation.¹⁰¹

However, if a privacy interest regarding true facts exists to the point that it is worth protecting,¹⁰² courts cannot possibly allow the press, the largest class of defendants under this tort, to establish the terms of virtual immunity from liability. Such an abdication mocks this privacy interest, regardless of whether one's right to maintain some facts as private sounds in the Constitution,¹⁰³ or only in tort.

If "news" continues to be defined in the eye of the press, or even more broadly as, for example, items that contain an "'indefinable quality of interest, which attracts public attention,'"¹⁰⁴ then Professor Kalven¹⁰⁵ and others¹⁰⁶ are right about the nonviability of the tort by

nature of things be the final arbiter of newsworthiness. The cases admittedly do not go quite this far, but they go far enough to decimate the tort."); Woito & McNulty, *supra* note 8, at 195-96 ("Courts rarely even attempt to define news. . . . Similarly, attempts to distinguish between news as information and news as entertainment have met with failure.").

99. One privacy scholar labeled the distinction between information that is newsworthy and information that is "too offensive" for publication as "a Sisyphean determination." G. Michael Harvey, Comment, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2394 n.44 (1992). This gives rise to the concern expressed most notably by the Supreme Court regarding the chilling effect on the press if hampered by potential disclosure tort liability. See discussion *infra* note 151 and accompanying text.

100. See, e.g., Zimmerman, *supra* note 6, at 353 (recommending that courts resolve any interpretive doubts and err on the side of the press).

101. See, e.g., Jenkins v. Dell Publishing Co., 251 F.2d 447, 451-52 (3d Cir.) ("[I]t is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment . . ."), *cert. denied*, 357 U.S. 921 (1958); Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957, 960-61 (D. Minn. 1948) ("[I]f the news item constitutes legitimate news, the picture seems entirely appropriate to the news."); Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 302-03 (Iowa 1979) ("In determining whether an item is newsworthy, courts cannot impose their own views . . ."), *cert. denied*, 445 U.S. 904 (1980).

102. But see *supra* note 6 for those who would object to this premise.

103. See discussion *supra* notes 48-51 and accompanying text.

104. Sweenek v. Pathe News, Inc., 16 F. Supp. 746, 747 (E.D.N.Y. 1936) (quoting Associated Press v. International News Serv., 245 F. 244, 248 (2d Cir. 1917), *aff'd*, 238 U.S. 215 (1918)).

105. See discussion *supra* note 6 and accompanying text.

106. See, e.g., Jeffrey C. Martin, Note, *First Amendment Limitations on Public Disclosure Actions*, 45 U. CHI. L. REV. 180, 209 (1977); Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722, 725 (1963) [hereinafter *Normative-Descriptive Confusion*].

operation of its own terms. After all, every subject or fact can be said to contain some public aspect or interest.¹⁰⁷ For example in *Sipple v. Chronicle Publishing Co.*,¹⁰⁸ a California appellate court ruled that the homosexuality of the plaintiff, who gained national publicity after moving a would-be assassin's arm before she could fire a gun at President Ford,¹⁰⁹ was newsworthy¹¹⁰ because, in part, it could "dispel the false public opinion that gays were timid, weak and unheroic figures."¹¹¹

The central issue in defining what is "newsworthy"—albeit a question rarely asked and even more rarely answered—is whether the information is "of public interest" or "in the public interest."¹¹² Put another way: "Is the term 'newsworthy' a descriptive predicate, intended to refer to the fact that there is widespread public interest? Or is it a value predicate, intended to indicate that the publication in question is a meritorious contribution and that the public's interest is praiseworthy?"¹¹³

If a fact is merely of public interest because of "a morbid and sensational prying into private lives for its own sake," then the *Restatement* urges that "[t]he line is to be drawn."¹¹⁴ Even if a court were to

107. Martin, *supra* note 106, at 209.

108. 201 Cal. Rptr. 665 (Ct. App. 1984); see also John P. Elwood, Note, *Outing, Privacy, and the First Amendment*, 102 YALE L.J. 747, 774 (1992).

109. *Sipple*, 201 Cal. Rptr. at 666.

110. The court ruled that the privacy claim failed on the additional ground that the fact of plaintiff's sexual orientation was not "private" given the knowledge of "hundreds of people" and plaintiff's own willingness to "frankly admit that he was gay" if anyone were to ask him. *Id.* at 669.

111. *Id.* at 670. The court also based its newsworthiness determination upon the raising of "the equally important political question whether the President of the United States entertained a discriminatory attitude or bias against . . . homosexuals" because he "refrained from expressing normal gratitude to an individual who perhaps had saved his life." *Id.* at 670 & n.2. While this second link between plaintiff's homosexuality and the public interest seems to me legitimate, the separate "homosexuals can be heroes, too" rationale is surely attenuated.

For privacy articles devoted to the subissue of disclosing a plaintiff's homosexual orientation (also known as "outing"), see Elwood, *supra* note 108; Jon E. Grant, Note, "Outing" and Freedom of the Press: *Sexual Orientation's Challenge to the Supreme Court's Categorical Jurisprudence*, 77 CORNELL L. REV. 103 (1992); Moretti, *supra* note 64; David H. Pollack, Comment, *Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of "Outing"*, 46 U. MIAMI L. REV. 711 (1992); Ronald F. Wick, Note, *Out of the Closet and Into the Headlines: "Outing" and the Private Facts Tort*, 80 GEO. L.J. 413 (1991).

112. Glasser, *supra* note 91, at 32 (citations omitted); see also Everette E. Dennis, *The Press and the Public Interest: A Definitional Dilemma*, 23 DEPAUL L. REV. 937, 939 (1974) (citation omitted) (describing the public interest as "a conceptual muddle").

113. *Normative-Descriptive Confusion*, *supra* note 106, at 725.

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

search for such a line, it is obviously and empirically¹¹⁵ obscure. Several scholars also question the legitimacy of this *Restatement* standard, suggesting either that gossip performs useful public functions in our society¹¹⁶ or that one person's freedom to gossip outweighs another's desire to avoid being its object.¹¹⁷

The *Restatement* approaches the public interest issue using defamation litigation terms, primarily employing a "status of the plaintiff" rubric that speaks of voluntary and involuntary public figures.¹¹⁸ A voluntary public figure gains that status "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."¹¹⁹ Involuntary public figures are "[t]hose who commit crime or are accused of it," and "those who are the victims of crime or are so unfortunate as to be present when it is committed, as well as those who are the victims of catastrophes or accidents or are involved in judicial proceedings or other events that attract public attention."¹²⁰

For both voluntary and involuntary public figures, the *Restatement* suggests that the public interest includes not only those facts that gave rise to or are associated with their public figure status, but also "to some reasonable extent . . . information as to matters that would otherwise be private."¹²¹ However, as noted earlier, the *Restatement* does acknowledge some limits on this broad sweep of the public interest:

115. See, e.g., *Ramsey v. Georgia Gazette Publishing Co.*, 297 S.E.2d 94, 96 (Ga. Ct. App. 1982) (finding that the public has legitimate interest in private affairs of professionals).

116. See, e.g., *Zimmerman*, *supra* note 6, at 327-41 (arguing that gossip serves as an instrument of social control and "helps mark out social groupings and establish community ties"). But see *Warren & Brandeis*, *supra* note 7, at 196 (contending that gossip causes social harm where people need increasing privacy in growing society).

117. See *Posner*, *supra* note 52, at 408.

118. The First Amendment requires the plaintiff in a defamation action against a media defendant to prove reckless disregard ("actual malice") of the statements' falsity if the plaintiff is a public official or public figure, or if the matter is "of public concern." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 337 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

119. RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (1977).

120. *Id.* cmt. f; see, e.g., *Time Inc. v. Hill*, 385 U.S. 374, 394-95 (1967) (applying public figure standard to crime victims in appropriation privacy context). Note that the *Restatement* also includes as involuntary public figures a public figure's family members or "even others who have been closely associated with him." RESTATEMENT (SECOND) OF TORTS § 652D cmt. i (1977).

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

There may be some intimate details of [the plaintiff's] life, such as sexual relations, which even the [plaintiff] is entitled to keep to herself. In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.¹²²

This notion of line drawing sometimes is litigated in terms of "decency,"¹²³ and sometimes as a balancing of interests.¹²⁴ Whichever the articulation, plaintiffs' privacy rights rarely prevail over the public's interests,¹²⁵ rendering the limitation on the scope of the public interest essentially theoretical and leaving plaintiffs with rare success.

Even plaintiffs' calls for compromises for privacy's sake are rarely enforced by the courts in the context of newsworthy facts.¹²⁶ Plaintiffs

122. *Id.*

123. *See, e.g.,* *Virgil v. Time, Inc.*, 527 F.2d 1122, 1130 (9th Cir. 1975) (using community mores standard rather than media self-definition although on remand publication found not offensive), *cert. denied*, 425 U.S. 998; *see also* *Woitto & McNulty*, *supra* note 8, at 198-99.

124. The *Restatement* suggests the following approach:

The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure. Some reasonable proportion is also to be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given.

RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977); *see also* *Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969) (employing a balancing approach for determining newsworthiness that includes "the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety").

125. *Zimmerman*, *supra* note 6, at 293 n.5 (finding only 18 cases as of 1983 where "plaintiff was either awarded damages or found to have stated a cause of action sufficient to withstand a motion for summary judgment or a motion to dismiss"); *see also* *Florida Star v. B.J.F.*, 491 U.S. 524, 551 (1989) (White, J., dissenting) (faulting majority for "according too little weight" to privacy side of equation).

126. For example, even privacy's attendant safety issues are often considered irrelevant when determining the scope of how much identifying information is newsworthy. *See, e.g.,* *McNutt v. New Mexico Star Tribune Co.*, 538 P.2d 804, 808 (N.M. Ct. App. 1975) (determining that publication of names and addresses of police officers who shot and killed gang members was not invasion of privacy, regardless of subsequent anonymous threats to plaintiffs). *But see* *Hyde v. City of Columbia*, 637 S.W.2d 251, 263 (Mo. Ct. App. 1982) (deciding that, in a negligent publication context, safety was determinative when defendant published an escaped abduction victim's name and address while the assailant was still at large and unaware of her whereabouts), *cert. denied*, 459 U.S. 1226 (1983).

often argue that substituting initials or pseudonyms for their names in defendants' news articles still would satisfy the public interest.¹²⁷ Historically, these arguments have failed for two reasons. First, defendants have successfully countered that "the impact and credibility" of an article is greatly enhanced by the use of identifying information such as names and even addresses.¹²⁸ Second, courts have noted their fear that requiring "the media to sort through an inventory of facts, to deliberate, and to catalogue each of them according to their individual and cumulative impact under all circumstances, would impose an impossible task."¹²⁹ Plaintiffs also have argued unsuccessfully that the passage of time between when the plaintiff achieved public figure status and when the defendant made the current disclosure should negate the alleged newsworthiness.¹³⁰

127. See, e.g., *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981) (finding that publication of plaintiff's name obviates any impression that the problems discussed are hypothetical); *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 303 (Iowa 1979) ("[T]he specificity of the report would strengthen the accuracy of the public perception of the merits of the controversy."), *cert. denied*, 445 U.S. 904 (1980).

128. Both commentators and courts have explained the importance of personally identifying individuals:

Disclosure of identity in connection with a newsworthy report, as the Tenth Circuit Court of Appeals has noted, strengthens 'the impact and credibility' of an article and obviates 'any impression that the problems . . . are remote or hypothetical' So a [legal] distinction between the use of a name and the report of a newsworthy event has not gained wide acceptance.

George E. Stevens, Names, Newsworthiness, and the Right to Privacy, 13 COMM. & L. 61, 62 (1991) (quoting *Gilbert*, 665 F.2d at 308); see also *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 274 (5th Cir.) (using victim's first name and photograph of her residence provided "a personalized frame of reference that fosters perception and understanding Communicating that this particular victim was a real person with roots in the community [was] of unique importance to the credibility and persuasive force of the story."), *cert. denied*, 110 S. Ct. 326 (1989); *Howard*, 283 N.W.2d at 303 (same).

129. *Star Telegram, Inc. v. Doe*, No. D-4578, 1995 Tex. LEXIS 90, at *11 (June 8, 1995).

130. The general rule regarding the newsworthiness of past celebrities is that they retain their newsworthy or public figure status. See, e.g., RESTATEMENT (SECOND) OF TORTS § 652D cmt. k (1977); *McCarthy*, *supra* note 30, § 5.9[A][3], at 5-79 n.14; *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 809 (2d Cir.) ("[T]he misfortunes and frailties of . . . 'public figures' are subjects of considerable interest and discussion"), *cert. denied*, 311 U.S. 711 (1940).

One exception appears to exist when the plaintiff's past celebrity status was as a criminal, and plaintiff has since been rehabilitated in the eyes of the court. RESTATEMENT (SECOND) OF TORTS § 652D cmt. k (1977); *McCarthy*, *supra* note 30, § 5.9[A][3], at 5-80 n.16; *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971) (stating that former criminal may prevail in privacy suit despite past newsworthiness so long as he can prove rehabilitation); *Melvin v. Reid*, 297 P. 91, 93 (Cal. App. 1931) (finding that reformed prostitute has privacy action for later publication of her name and criminal history). *Contra Barbieri v. News-Journal Co.*, 189 A.2d 773, 776 (Del. 1963) (rejecting *Melvin* approach explicitly and noting that courts should not concern themselves with notions of decency and good taste in privacy litigation). But see *Normative-Descriptive Confusion*, *supra* note 106, at 729-30, in which the author suggests that *Melvin* was really about the value or social utility of the disclosed private information, not decency as suggested in *Barbieri*. The author cites as

The above-noted complications inherent in defining and litigating the elements of this privacy tort are obviously significant and have left little protection for plaintiffs. For those plaintiffs who can establish a prima facie case under the disclosure tort, an even greater obstacle stands in the way of actual recovery. Once a plaintiff succeeds in establishing the elements of the tort, the Supreme Court employs a nearly insurmountable approach to the inescapable conflict¹³¹ between a plaintiff's tort interest in preventing,¹³² or receiving recompense for, the disclosure of private facts, and a defendant's First Amendment right to free speech¹³³ particularly when speaking the truth.¹³⁴

II. THE VIABILITY OF THE TORT

A. *The Supreme Court's Disclosure Tort Jurisprudence*

When addressing recovery under the disclosure tort, the Supreme Court consistently has ruled against the protection of plaintiffs' privacy interests in favor of defendants' free speech interests. Moreover, with each successive opinion, the Court has narrowed even the tort's theoretical scope of protection.¹³⁵ After the Court's opinion in *Florida Star v. B.J.F.*,¹³⁶ most scholars of this branch of privacy have declared the disclosure tort all but dead.¹³⁷ Before exploring the na-

support *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939), in which the court had held that the victim's privacy was invaded by a clearly *not* indecent radio dramatization of him being robbed. *Normative-Descriptive Confusion*, *supra* note 106, at 730.

131. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489 (1975) ("Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press.").

132. The Supreme Court has rejected the characterization of statutory proscriptions on printing sensitive information as prior restraints. See, e.g., *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978).

133. The First Amendment interest at stake in the disclosure tort sometimes is called "free press" rather than "free speech." Gormley, *supra* note 8, at 1386-87; see also *Cox Broadcasting*, 420 U.S. at 491; Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195 (1990). Of course, there is no requirement that the defendant in a disclosure action be a member of the press, although the publicity element tends to make this inevitable. See *supra* text accompanying note 64. But see *Doe v. Methodist Hosp.*, 639 N.E.2d 683 (Ind. Ct. App. 1994) (allowing plaintiff to proceed with disclosure tort action against hospital and its employees).

134. See *supra* note 35 and accompanying text for a brief discussion of false speech's role in defamation actions and the disclosure tort.

135. See discussion *infra* part II.

136. 491 U.S. 524 (1989); see *infra* notes 165-182 and accompanying text.

137. See, e.g., Edelman, *supra* note 133, at 1199 (condemning the Court for its gradual erosion of the right of privacy); Jacqueline R. Rolfs, Note, *The Florida Star v. B.J.F.: The*

ture of any remains, this part of the Article begins by briefly summarizing the Supreme Court's major cases in this field.

1. *Cox Broadcasting Corp. v. Cohn*.—The Court's first foray into the tort's clash with the First Amendment came in 1975 with *Cox Broadcasting Corp. v. Cohn*.¹³⁸ The Court ruled unconstitutional the conviction¹³⁹ of a reporter under a Georgia statute making the publication of a rape victim's name a misdemeanor offense.¹⁴⁰ Despite noting that the interests of both privacy and a free press were "plainly rooted in the traditions and significant concerns of our society,"¹⁴¹ the Court declared that a State may not "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."¹⁴²

The presence of the rape victim's name—"truthful information"¹⁴³—in "official court records open to public inspection"¹⁴⁴ was the gravamen of the Court's analysis. The Court noted that such information was "in the public domain."¹⁴⁵ According to the majority, the privacy interest had therefore faded,¹⁴⁶ a conclusion that was espe-

Beginning of the End for the Tort of Public Disclosure, 1990 Wis. L. REV. 1107, 1124-27 (concluding that *Florida Star* renders the tort ineffective in protecting privacy interests); see also *infra* note 184.

138. 420 U.S. 469 (1975).

139. The Court expressly declined to address the constitutionality of the tort right of action or the statute in question, confining its ruling to the case before it. *Id.* at 497 n.27.

140. *Id.* at 471-72, 491. The Georgia law provides in relevant part:

It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of [f] any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

GA. CODE ANN. § 26-9901 (Michie 1972) (recodified as GA. CODE ANN. § 16-6-23 (1992)).

141. *Cox Broadcasting*, 420 U.S. at 491.

142. *Id.*

143. *Id.* at 495.

144. *Id.*

145. *Id.*

146. *Id.* at 494. While to some extent this is true,

[i]t is disingenuous to suggest that all facts on the public record are public facts, in the sense that they are known to a substantial number of people . . . Few citizens bother to investigate the general public record, and empirical studies have found that public access to information in the public record is often severely restricted by bureaucratic inertia.

cially "compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press."¹⁴⁷

The Court also ruled that the commission of a crime and related information was newsworthy "and consequently . . . within the responsibility of the press to report."¹⁴⁸ In this vein, the Court explicitly presumed that the government had made its own determination of public interest because it had chosen to make the information publicly available.¹⁴⁹ The Court also cited what would become its recurring concern:¹⁵⁰ that a contrary rule "would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public."¹⁵¹

2. *Smith v. Daily Mail Publishing Co.*—The Court took the next major step¹⁵² in its disclosure tort jurisprudence in *Smith v. Daily Mail Publishing Co.*¹⁵³ In *Daily Mail*, the Court disallowed statutory misdemeanor punishment of two reporters who published, without written approval from the juvenile court, the name of a youth charged as a juvenile offender.¹⁵⁴ Despite its assertion that "there is no issue here of privacy,"¹⁵⁵ the Court's opinion nonetheless centered on the free press ramifications of prohibiting disclosure of private truthful information.¹⁵⁶

Martin, *supra* note 106, at 190 & n.50; *see also* Shapiro, *supra* note 2, at 13.

147. *Cox Broadcasting*, 420 U.S. at 495.

148. *Id.* at 492.

149. *Id.* at 495. The Court added that "[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." *Id.* at 496.

150. *See infra* text accompanying note 174.

151. *Cox Broadcasting*, 420 U.S. at 496.

152. Two years after *Cox*, the Court reaffirmed the "public domain" approach, ruling in a per curiam opinion that where press members were present, without objection, at public hearings with full knowledge and permission by the presiding judge, the state could not then constitutionally prohibit them from publishing information obtained there. *Oklahoma Publishing Co. v. Oklahoma County Dist. Court*, 430 U.S. 308, 311-12 (1977) (upholding denial of injunction sought to prohibit publication of name and photograph of minor involved in juvenile proceeding).

One year later, the Court ruled that newspapers could not be subjected to criminal sanctions for divulging information regarding proceedings before a state judicial review commission, even when the State of Virginia had, by constitution and statute, declared such proceedings confidential. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978). The Court expressly avoided the privacy implications of this ruling. *Id.* at 840.

153. 443 U.S. 97 (1979).

154. *Id.* at 105-06.

155. *Id.* at 105.

156. *Id.* at 104. One decade later, *Florida Star v. B.J.F.* would make the privacy ramifications of *Daily Mail* even more explicit. *See discussion infra* note 169 and accompanying text; *see also* Shapiro, *supra* note 2, at 13 (suggesting that *Florida Star's* use of *Cox Broadcasting's*

The *Daily Mail* Court concentrated on the "routine reporting techniques"¹⁵⁷ by which the reporters ascertained the truthful information.¹⁵⁸ While the majority declared that issues of the public domain were not directly controlling,¹⁵⁹ the Court stated that the concept nonetheless suggested "strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."¹⁶⁰ Applying this standard, the Court found the State's interest in rehabilitating juvenile offenders¹⁶¹ insufficient¹⁶² and the attendant statutory scheme ineffective.¹⁶³

3. *Florida Star v. B.J.F.*—Clearly the most significant and most recent¹⁶⁴ Supreme Court guidance on the privacy interest embodied

"lawfully obtained" standard in the privacy context was erroneous and failed to distinguish between information already available to the public at time of dissemination and information not then publicly available).

157. *Daily Mail*, 443 U.S. at 103. "[R]eporters for both papers obtained the name of the alleged assailant simply by asking various witnesses, the police, and an assistant prosecuting attorney who were at the school." *Id.* at 99.

158. *Id.* at 103.

159. This discussion incorporated not only the *Cox Broadcasting* rubric, but also the "publicly revealed" approach of *Oklahoma Publishing*. *Id.*

160. *Id.*

161. *Id.* at 104.

162. *Id.* at 104-05. But see then-Justice Rehnquist's concurrence, in which he stated:

Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public [A] prohibition against publication of the names of youthful offenders represents only a minimal interference with freedom of the press It is difficult to understand how publication of the youth's name is in any way necessary to performance of the press' 'watchdog' role West Virginia law . . . permits the juvenile court judge to allow publication [whenever a judge determines deleterious effects on a youth are absent].

Id. at 108-09 (Rehnquist, J., concurring). Justice Rehnquist agreed with the majority, however, that the statute, by limiting its applicability to newspapers, was ineffective and thus unconstitutional. *Id.* at 110.

163. *Id.* at 104-05 ("The magnitude for the State's interest in this statute is not sufficient Moreover, the . . . statute does not restrict the electronic media or any form of publication, except 'newspapers.' . . . Thus, even assuming the statute served a state interest of the highest order, it does not accomplish its stated purpose.").

164. The Court ruled a few weeks prior to *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), that a Freedom of Information Act (FOIA) request for a Federal Bureau of Investigation (FBI) "rap sheet" was properly rejected on federal statutory privacy grounds. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 751, 762-63 (1989) (referring to FOIA's "personal privacy" exception to disclosure requirements at 5 U.S.C. § 552(b)(7)(C) (1982)); see *infra* notes 212-221 and accompanying text. The Court rejected the respondent's assertion that criminal conviction records constituted information found in the public domain and ruled that the FBI *compilation* was not public. *Reporters*

in the disclosure tort came in *Florida Star v. B.J.F.* in 1989.¹⁶⁵ In *Florida Star*, the Court ruled unconstitutional the imposition of civil damages on the defendant for publishing the name of a sexual offense victim.¹⁶⁶ Despite the State's erroneous release¹⁶⁷ of such truthful information in B.J.F.'s¹⁶⁸ case, the Court focused on the fact that the information nonetheless came to exist in the public domain, as in *Cox Broadcasting*, and that it had been lawfully obtained by the newspaper, as in *Daily Mail*.¹⁶⁹

The opinion presented an array of reasons for finding civil privacy¹⁷⁰ liability unconstitutional. Aside from its truthful nature¹⁷¹ and

Comm., 489 U.S. at 762-63. The Court seemed to distinguish privacy interests in federally computerized information from other privacy interests. *Id.* at 766. The Court noted that the Privacy Act was passed largely out of concern over "the impact of computer data banks on individual privacy." *Id.* (citation omitted). Perhaps it is this distinction that accounts for *Reporters Committee's* obscurity in both *Florida Star's* majority opinion and privacy's disclosure tort scholarship.

More recently, in a marginally related context, the Court held that a statute prohibiting grand jury witnesses from ever disclosing their own testimony, even after their jury term had ended, violated the First Amendment. *Butterworth v. Smith*, 494 U.S. 624, 635-36 (1990).

The Court has also concluded that the First Amendment does not prohibit a plaintiff from recovering promissory estoppel damages against a newspaper for breach of a confidentiality agreement with the informant/plaintiff, ruling that no *Daily Mail*-type issues were implicated by the application of general laws to the press. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668-69 (1991).

165. 491 U.S. 524 (1989).

166. *Id.* at 532 (ruling on the enforcement of FLA. STAT. ANN. § 794.03 (West 1987)).

167. The sheriff's department "prepared a report on the incident which identified B.J.F. by her full name. The Department then placed the report in its pressroom. The Department does not restrict access either to the pressroom or to the reports made available therein." *Id.* at 527. The Court noted that the government's failure to safeguard the information made subsequent burdens on the press to safeguard it even less palatable. *Id.* at 534, 535, 538. There were, the Court noted, "far more limited means of guarding against dissemination." *Id.* at 538. The dissent countered that the State had attempted to prevent public documentation, *id.* at 544 (White, J., dissenting), but that "unfortunately . . . mistakes happen." *Id.* at 547. In addition, other signals admittedly apparent to the reporter made clear that the state did not consider the dissemination lawful. *Id.*

Adding to plaintiff's undoubted frustration, the Court noted that "[i]n printing B.J.F.'s full name, the Florida Star violated its [own] internal policy of not publishing the names of sexual offense victims." *Id.* at 528.

168. Ironically, the Court deferred to the victim's privacy interests in choosing to refer to her by her initials. *Id.* at 527 n.2. It had not been so gracious in *Cox Broadcasting v. Cohn*, 420 U.S. 469, 473 n.2 (1975).

169. *Florida Star*, 491 U.S. at 541. The dissent objected to the use of the *Daily Mail* standard, noting that "the rights of those accused of crimes and those who are their victims must differ with respect to privacy concerns. . . . [The latter] must be infinitely more substantial." *Id.* at 545 (White, J., dissenting).

170. Technically, the civil action was for negligent violation of the statute. *Id.* at 528.

171. *Id.* at 536.

the lawful method of its receipt,¹⁷² the Court also noted that the rape victim's identity was clearly a matter of public significance.¹⁷³ The Court again stressed its concern with the "timidity and self-censorship" that may result from punishing the media for publishing truthful information.¹⁷⁴ Moreover, the majority objected to the "broad sweep" of the statute's negligence per se standard¹⁷⁵ and the "facial underinclusiveness" of the statute's application to instruments of mass communication only.¹⁷⁶

The *Florida Star* Court emphasized the chilling effect and "onerous obligation" on the press if it were faced with privacy liability,¹⁷⁷ but the Court did not find either B.J.F.'s interest in privacy or the state's interest in encouraging the reporting of crime to be "a state interest of the highest order."¹⁷⁸ While noting that the state's purported interests could "in a proper case . . . be so overwhelmingly necessary,"¹⁷⁹ the Court presumably set a higher standard than the circumstances in B.J.F.'s case.¹⁸⁰ In *Florida Star*, the rape victim's "mother had received several threatening phone calls from a man

172. *Id.*

173. *Id.*

174. *Id.* at 535.

175. *Id.* at 539. The dissent countered that the negligence per se standard did not mean that

defendants will be held liable without a showing of negligence, but rather, that the standard of care has been set by the legislature, instead of the courts [T]he legislature—reflecting popular sentiment—has determined that disclosure of the fact that a person was raped is categorically a revelation that reasonable people find offensive.

Id. at 548 (White, J., dissenting).

176. *Id.* at 540. The dissent noted that the legislature's exclusion of "neighborhood gossips" was presumably based upon the lesser damage they could exact on a plaintiff's privacy and, more significantly, the alternate option provided to plaintiffs through the state's recognition of the common-law tort. *Id.* at 549-50 (White, J., dissenting).

177. *Id.* at 536.

178. *Id.* at 537 (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)). One author suggested that the Court failed to "accord any real significance to privacy interests" because none of the major cases explicitly involved the right of privacy. Rolfs, *supra* note 137, at 1124. Another author sought to explain the Court's judgments in favor of defendants by noting that, in each case, the information was already public. Grant, *supra* note 111, at 106.

179. *Florida Star*, 491 U.S. at 537.

180. As Justice White noted in his dissent,

[I]nvariably . . . [i]f the First Amendment prohibits wholly private persons (such as B.J.F.) from recovering for the publication of the fact that she was raped, I doubt that there remain any "private facts" which persons may assume will not be published in the newspapers or broadcast on television.

. . . .
Today, we hit the bottom of the slippery slope. . . . There is no public interest in publishing the names, addresses, and phone numbers of persons who are the

who stated that he would rape B.J.F. again; and these events had forced B.J.F. to change her phone number and residence, to seek police protection, and to obtain mental health counseling."¹⁸¹

Recognizing the apparent and overwhelming impact of its rulings on the disclosure tort, the Court attempted to limit its holding:

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. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability under section 794.03 to appellant under the facts of this case.¹⁸²

B. *The Search for Remains*

I do not now add my voice to those passing judgment on either the wisdom or the significance of *Cox Broadcasting* and its progeny. Despite the alarming words of Justice White in his *Florida Star* dissent that the majority had "obliterate[d] one of the most noteworthy legal inventions of the 20th century"¹⁸³—words that have been echoed by almost everyone writing in the field¹⁸⁴—I agree with Professor Clifford Shapiro¹⁸⁵ that some viable part of the disclosure tort survives *Florida Star*. I prefer instead to focus on the more useful identification of that

victims of crime—and no public interest in immunizing the press from liability in the rare cases where a State's efforts to protect a victim's privacy has failed.

Id. at 550-51, 553 (White, J., dissenting).

181. *Id.* at 528.

182. *Id.* at 541.

183. *Id.* at 550 (White, J., dissenting). Chief Justice Rehnquist and Justice O'Connor joined Justice White in this pronouncement.

184. See, e.g., Edelman, *supra* note 133, at 1197-98 ("With . . . *Florida Star v. B.J.F.*, . . . the Court virtually extinguished privacy plaintiffs' chances of recovery for injuries caused by truthful speech that violates their interest in nondisclosure."); Elwood, *supra* note 108, at 762 ("The right to privacy is in danger of becoming—and indeed may have already become—a right surviving only in dicta."); Harvey, *supra* note 99, at 2414 (The Court has "adopted increasingly inflexible positions that ultimately renders [sic] a plaintiff victory over the press implausible, if not impossible."); Rolfs, *supra* note 137, at 1124-27 (concluding that *Florida Star* renders the tort ineffective in protecting privacy interests).

185. Shapiro, *supra* note 2, at 3; see also Grant, *supra* note 111, at 135 (arguing that the Supreme Court privacy jurisprudence was limited to the public domain, leaving "open the possibility of recovery in cases of 'outing'").

part of the disclosure tort that survives *Florida Star*, given the powerful conceptual and jurisprudential limitations now firmly associated with this tort.

Clearly, *Florida Star* leaves little room in which plaintiffs can maneuver. Even in its effort to reassure privacy enthusiasts that the protectable interest survived, the Court noted only that plaintiffs could enforce their privacy rights if: (1) the state narrowly tailors its punishment to protect a state interest of the highest order, or (2) the defendant discloses truthful information that was obtained unlawfully.¹⁸⁶

Florida Star's "narrowly tailored punishment"¹⁸⁷ avenue can be of essentially no moment to the viability of disclosure tort privacy interests. As noted above,¹⁸⁸ *Florida Star* itself raised the presumptive level of such relief beyond realistic reach.¹⁸⁹ Similarly, the "unlawfully obtained" avenue of theoretical recovery suggested in *Florida Star* provides little help. Cases of unlawfully obtained information in the disclosure context are extremely rare.¹⁹⁰ More likely, cases in which defendants have obtained information unlawfully are addressed by criminal conversion codes or, perhaps, the intrusion branch of privacy torts. But whether through theft, intrusion, or disclosure, those rare disclosure punishments that arise under the "unlawfully obtained" window do more to discourage already unlawful predisclosure behavior than to affirm and protect privacy interests.

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

187. *Id.*

188. *Id.* See discussion *supra* notes 177-181 and accompanying text.

189. The few cases preceding *Florida Star* that upheld the plaintiff's right of privacy appear inconsistent with current Supreme Court jurisprudence. See, e.g., *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971) (allowing privacy suit for disclosure of plaintiff's publicly available criminal record); *Barber v. Time, Inc.*, 159 S.W.2d 291, 295 (Mo. 1942) (subjecting media defendant to privacy liability for disclosure of lawfully obtained photograph of hospitalized plaintiff).

Even post-*Florida Star* cases that have upheld the right of privacy appear at odds with the Court's current position. See, e.g., *In re Minor*, 595 N.E.2d 1052 (Ill. App. Ct. 1992) (upholding liability under state statute allowing restraint on disclosure of names of minor victims despite dissent's observation that the information had been publicly revealed).

190. I have only found two post-*Florida Star* cases that appear to give some credence to the "unlawfully obtained" standard as a viable avenue for privacy protection. See *ACLU v. Mississippi*, 911 F.2d 1066, 1072 (5th Cir. 1990) (holding that information gathered contrary to protective order may be enjoined without violating the First Amendment); *Marin Indep. Journal v. Municipal Court*, 12 Cal. App. 4th 1712, 1721-22 (Ct. App. 1993) (finding that seizure and restraint of the publication of media photographs "unlawfully obtained" in courtroom were actions consistent with the First Amendment).

Another opinion actually considered the "lawfully obtained" status of the information irrelevant, ruling instead that the public interest in the information justified its disclosure. *Morgan v. Celender*, 780 F. Supp. 307 (W.D. Pa. 1992).

However, I agree with Professor Shapiro's assessment that the Court's attention to the "lawfully obtained" standard is the key to at least theoretical disclosure tort viability.¹⁹¹ In each case, he notes, the defendants divulged information that they lawfully obtained from a location that the Court classifies as the "public domain."¹⁹²

The public domain component of each of the Court's disclosure decisions was clearly of crucial analytical importance. In *Cox Broadcasting Corp. v. Cohn*,¹⁹³ the Court stated repeatedly that the information was obtained from courthouse records that were open to public inspection,¹⁹⁴ and that the information had been placed "in the public domain on official court records."¹⁹⁵ Moreover, the *Cox Broadcasting* Court noted that because the disclosed information came from "public records generally available to the media," affirming liability against the defendant would then give rise to "timidity and self-censorship."¹⁹⁶

Similarly, the *Daily Mail*¹⁹⁷ opinion summarized the "lawfully obtained," "publicly revealed," and "public domain" discussions in *Cox Broadcasting*¹⁹⁸ immediately before declaring that those principles "suggest strongly" that publishing matters of public significance that were obtained lawfully could not be punished constitutionally.¹⁹⁹

Finally, *Florida Star's* references to "lawfully obtained" information were clearly limited to the public domain context.²⁰⁰ The Court reasoned that, because the information had been "furnished by the government,"²⁰¹ the First Amendment demanded that such provision alleviated subsequent disclosers of the responsibility of factoring in

191. Shapiro, *supra* note 2, at 23.

192. Some commentators see the prior presence of the disclosed facts in the public as negating a privacy interest entirely. See, e.g., Grant, *supra* note 111, at 106. In my view, the relevant distinction is not whether the information was private by nature or not, but whether the source of the information was the public domain or the private domain. See *infra* notes 204-207 and accompanying text.

193. 420 U.S. 469 (1975).

194. *Id.* at 491, 492, 495.

195. *Id.* at 495.

196. *Id.* at 496.

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

198. *Id.* at 103 (summarizing with approval *Oklahoma Publishing Co. v. Oklahoma County Dist. Ct.*, 430 U.S. 308, 311 (1977)). The Court specifically noted in *Landmark Communications* that the broader question regarding the constitutionality of liability for "the publication of truthful information withheld by law from the public domain . . . was not reached and indeed was explicitly reserved in *Cox*." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 840 (1978) (emphasis added).

199. *Daily Mail*, 443 U.S. at 104. In *Daily Mail*, the reporters acquired the information by questioning witnesses, police officers, and an assistant prosecuting attorney. *Id.* at 99.

200. *Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989).

201. *Id.* at 536.

privacy liability when judging "what to publish or broadcast."²⁰² Thus, when the Court referred to the ability to publish "truthful information . . . lawfully obtained,"²⁰³ it was in the context of the public domain.

It is this consistent public domain emphasis then that gives rise to the only real avenue left open by the Supreme Court. What *Florida Star* must mean, or arguably could mean, by the "zone of personal privacy within which the State may protect the individual from intrusion by the press"²⁰⁴ is information that resides outside of the public domain—in what Professor Shapiro calls "the private domain."²⁰⁵ After all, information not in the public domain certainly does not bear the imprint that the "government considered dissemination lawful,"²⁰⁶ nor has the privacy interest in that information necessarily "faded"²⁰⁷ beyond protectable levels.

That having been said, exploring the definition of the private domain—the disclosure tort's last real hope—is characteristically problematic.

III. DEFINING THE REMAINS: WHAT AND WHERE IS THE PRIVATE DOMAIN?

It is certainly tempting to characterize the private domain as the opposite of the public domain: declaring that what is not one domain is therefore the other. Perhaps it is almost as beguiling to distinguish the two domains using the residual existence terms put forward by Professor Kalven in defining what was private,²⁰⁸ with the private domain as that which remains after the public has claimed its own. Even if theoretically sound, neither approach is practically useful. If courts do not or cannot begin their process of identifying the domain at issue with any substantive sense as to the meaning of the private domain, they undoubtedly will place more weight on their empirically clearer and stronger sense of the public domain.

Also tempting is the approach that sees the search for a coherent view of the private domain as simply the search for the meaning of what types of information are private. Even though the concepts of what is private information and what is the private domain are interrelated, they must remain analytically distinct. In the imposing shadow

202. *Id.* at 538 (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975)).

203. *Id.* at 541.

204. *Id.*

205. Shapiro, *supra* note 2, at 3.

206. *Florida Star*, 491 U.S. at 538-39.

207. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975).

208. *See supra* note 20 and accompanying text.

of the Supreme Court's public domain disclosure tort jurisprudence, private information is likely to be protected only when it is taken from the private domain,²⁰⁹ not from the public domain.²¹⁰

My inquiry in this Article is therefore the characterization of the predisclosure source of the private information: in which domain did the information exist before it was disclosed? This inquiry becomes relevant only after a plaintiff has established a prima facie case of disclosure, when the court must decide whether disclosure liability can survive the First Amendment.

A. *Establishing the Justiciable Boundaries of the Private Domain: The Zone of Fair Intimate Disclosure*

Judicial articulations seem a responsible starting point for defining the private domain. Unfortunately, despite the weighty significance of the public domain articulations in the Supreme Court's disclosure tort opinions,²¹¹ I have found only one case in which the Court has offered any guidance in divining the private domain.

In *United States Department of Justice v. Reporters Committee for Freedom of the Press*,²¹² the Court upheld the denial of a Freedom of Information Act (FOIA) request for a Federal Bureau of Investigation (FBI) "rap sheet" on privacy grounds.²¹³ According to the Court, while the information contained in a rap sheet—criminal convictions—existed in the "public record," the FBI's compilation of such information did not.²¹⁴ The Court noted that, under FBI general policy, rap sheets were available and disseminated only on a limited basis.²¹⁵ As directed by FOIA guidelines, the Court balanced the subject's privacy interests in his rap sheet against the public's interest in open access to government records.²¹⁶ The Court's analysis relied on various federal statutes' legislative histories²¹⁷ and the sense that individuals had a substantial interest²¹⁸ in having their criminal histories forgotten.²¹⁹

This inquiry, insofar as it rejected public domain status, appears to suggest that the private domain (or at least "not the public do-

209. See discussion *supra* notes 204-207 and accompanying text.

210. See discussion *supra* note 169 and accompanying text.

211. See discussion *supra* notes 204-207 and accompanying text.

212. 489 U.S. 749 (1989).

213. *Id.* at 780; see also discussion *supra* note 164.

214. 489 U.S. at 753.

215. *Id.*

216. *Id.* at 762.

217. *Id.* at 762-69.

218. *Id.* at 771.

219. *Id.* at 769.

main”) is a function of both the information’s location and the strength of the privacy interest at stake. This suggestion is of very limited value, however, given that the Court explicitly engaged in a FOIA-mandated inquiry rather than one it had deemed appropriate to the disclosure tort.²²⁰ In fact, the Court viewed the two inquiries as so distinct that it failed even to mention *Reporters Committee* a few weeks later in *Florida Star’s* majority opinion.²²¹

I believe that this use of location as one private domain factor lies at the root of the domain confusion. This allegedly bright-line perspective is only helpful when the location facts are physical. For example, if a private fact exists in a sheriff department’s incident report available to the press, it is clearly located within the public domain;²²² if a private fact is written in a letter sent to a spouse through the mail, the domain presumably must be private.

But when a fact exists in a nonphysical form—for example when the fact’s source is oral—locational analysis is of no value in, and actually confuses, domain identification. If someone tells a group of people on a bus that she is planning to have an abortion, one is tempted to say that the private fact of seeking an abortion now resides in the public domain. If, however, that bus was chartered by a family reunion group, the answer could well be the opposite. In that instance, physical location is irrelevant. Similarly, if a person whispers abortion plans into a companion’s ear on a bus full of strangers, location again is irrelevant.

Similarly, the “strength of the privacy issue at stake” approach used in *Reporters Committee* offers little guidance in identifying the domain in which a private fact resides. While there may be varying degrees of strength among private issues, the only relevant threshold in that regard is at what point a fact can be considered private (or “highly offensive when publicized”²²³) under existing tort jurisprudence. Once a fact is adjudged private as a *prima facie* element of disclosure, the degree of privacy is only properly a matter of injury, not domain.

220. *Id.* at 762 n.13 (“The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy . . .”).

221. The decision in *Reporters Committee* was noted only in Justice White’s dissent, in which he suggested that rape victims’ privacy interests in nondisclosure of their identity must be as significant if not even more so than individuals’ privacy interests in their rap sheets. *Florida Star v. B.J.F.*, 491 U.S. 524, 552 (1989) (White, J., dissenting).

222. *Florida Star*, 491 U.S. at 538.

223. See discussion *supra* notes 65-71 and accompanying text.

The domain inquiry is instead a characterization of the source of the information, not the subject matter. The Court made this clear in *Florida Star*, where the determination of public domain was based upon the presence of the rape victim's name in a press-room report, regardless of the state's "highly significant" interest, inter alia, in the victim's privacy.²²⁴

The "disclosure on a bus" scenarios noted above highlight more appropriate factors in a domain inquiry: the conduct of the plaintiff in maintaining the confidentiality of a private fact, measured primarily by the degree of intimacy among those to whom the plaintiff discloses or otherwise gives access to the private fact.

Some lower courts engaging in a domain-like inquiry have focused on these factors. In *Times Mirror Co. v. Superior Court*,²²⁵ the California Court of Appeal addressed the impact of the plaintiff's disclosure of certain information on her privacy claim.²²⁶ Before the defendant newspaper disclosed the information, the plaintiff had revealed to "selected neighbors, friends, family members, and officials investigating the murder" how she had discovered a murder victim's body and confronted the murderer.²²⁷ The court ruled that the plaintiff had not "rendered otherwise private information public by cooperating in the criminal investigation and seeking solace from friends and relatives."²²⁸

The *Restatement* endorses the legitimacy of this perspective, suggesting that a plaintiff may, consistent with maintaining a matter's confidential status, reveal intimate matters to "family or to close personal friends."²²⁹ In *Virgil v. Time, Inc.*,²³⁰ the Ninth Circuit cited this comment with approval, going so far as to suggest that even knowingly telling something private to a member of the press did not necessarily "destroy the private character of the facts disclosed," although it could be viewed as consent to publish them.²³¹

Thus, when determining the domain in which a private fact resided before its disclosure, courts should employ, and to an extent

224. *Florida Star*, 491 U.S. at 537.

225. 244 Cal. Rptr. 556 (Ct. App. 1988), *cert. denied*, 489 U.S. 1094 (1989).

226. *Id.* at 560-61.

227. *Id.* at 561. The reporter for the disclosing newspaper obtained details of the discovery of the body and assailant identification from "an unknown person." *Id.* at 558.

228. *Id.* at 561.

229. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

230. 527 F.2d 1122, 1127 (9th Cir. 1975) (holding that plaintiff's voluntary disclosure of private facts to magazine writer was actionable where plaintiff withdrew consent prior to publication), *cert. denied*, 425 U.S. 998 (1976).

231. *Id.* at 1127.

have employed, what I would call a *zone of fair intimate disclosure* to set the bounds of the private domain. Borrowing from Fourth Amendment jurisprudential language,²³² I would define this zone as *those disclosures that a person might make consistent with a reasonable expectation of privacy*.

Some categories of human disclosees may seem easily justiciable under this rubric, such as family, friends, and clergy on one hand and strangers on the other. Nevertheless, in confirming or denying a fact's presence in a zone of fair intimate disclosure, courts may have to endure fact-intensive challenges to the level of intimacy actually existing between the plaintiffs and their disclosees. As time consuming and unpleasant as these inquiries occasionally could be, however, they are well within the fact-finding competence of our court system.²³³ Non-human disclosures, such as recording private information in various written forms, are even more easily litigated in terms of reasonable privacy expectations.

If there is to be any vestige of disclosure privacy, if there is any real substance to the Supreme Court's salutary insistence to that effect in *Florida Star*,²³⁴ then people must be able to transmit private information within a zone of fair intimate disclosure without losing their right to protect that information's private status. Those who would publicize information that only has been intimately disclosed would then have to be susceptible to liability in tort. Attendant burdens on even media defendants—including the need to investigate the origins of the private fact—would have to be tolerated by the First Amendment.

B. The Private Domain's Zone of Fair Intimate Disclosure and the Supreme Court

While the private domain, as defined through the zone of fair intimate disclosure, is all that makes sense from the perspective of preserving some remains of the disclosure tort given the Supreme Court's near-devastating disclosure liability decisions, it is nonetheless unlikely to survive the Court's review. Because private facts rarely travel from

232. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (defining an enclosed telephone booth as an area in which "a person has a constitutionally protected reasonable expectation of privacy"). For example, in the Fourth Amendment context, a person reasonably expects that letters and other sealed packages are private. *United States v. Jacobsen*, 466 U.S. 109, 114 (1984).

233. Even more unpleasant and fact-intensive inquiries into degrees of intimacy undoubtedly exist in marriage dissolution and child custody proceedings, for example.

234. *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989).

just one person to another, the Court is unlikely to find constitutionally palatable the investigative burden of tracing a private fact's path from its original source to the last discloser.

As *Florida Star* makes too clear, even a fact that the plaintiff has acted to keep within the private domain ultimately will be protected as private consistent with the First Amendment only if the last known source of the fact is also the private domain.²³⁵ As demonstrated by the *Florida Star* plaintiff's actions, private facts may exit the private domain into the unprotectable public domain despite the conduct of the plaintiff or even that of some subsequent recipients of that fact.²³⁶ Given the Court's ruling, only the predisclosure source of the information is allowably relevant under the First Amendment. Apparently, holding earlier links in the communicative chain relevant would impose an investigative burden that would impermissibly chill First Amendment speech under current jurisprudence.²³⁷

Thus, the Court likely would allow privacy liability only when the defendant acquired the information directly from the plaintiff's zone of fair intimate disclosure. Under these circumstances, the defendant would be on clear notice of the fact's domain status. But once the plaintiff discloses a fact to one recipient who then rediscloses it to another, and the fact ultimately winds its way to publication, the Supreme Court is likely to reject the relevance of the plaintiff's efforts to keep that fact private when determining the First Amendment ramifications of liability. Instead, *Florida Star* indicates that the Court will focus on the perspective of publicizers, who could face substantial investigative burdens that could inhibit their speech. The Court has made quite clear that privacy interests, regardless of plaintiffs' efforts to preserve their privacy, do not outweigh the imposition of such speech-chilling burdens upon the press.

The following scenarios suggest how the zone of fair intimate disclosure would work and where it is likely to conflict with the Supreme Court's First Amendment overlay.

1. *A Private Fact About Plaintiff Is Somehow Disclosed to the Government.*—These types of cases already have been litigated, although not in private domain terms. Regardless of a person's disclosure choices, the state and federal governments acquire many private facts, typically concerning accused criminals, convicted criminals, and victims of crime. Unless the government actually maintains restricted access to

235. *Id.* at 538.

236. *Id.*

237. *Id.* at 536.

such facts, the Supreme Court has made quite clear that, purely from a result-oriented perspective, the fact is deemed to exist in the public domain.²³⁸

2. *Plaintiff Discloses a Private Fact to a Disclosee and Defendant Lawfully Overhears the Disclosure.*—Here, the zone of fair intimate disclosure has two facets: disclosee and environment. If the disclosee does not qualify as the type of person with whom the plaintiff would have a reasonable expectation of privacy after disclosure, then the fact has, in result, exited to the public domain, and publicity by either the defendant or the disclosee is protected by the First Amendment.

But even if the disclosee qualifies as a person within the plaintiff's zone of fair intimate disclosure, the physical environment of the disclosure would also have to be a component in the inquiry. If the disclosure is made where persons not sufficiently intimate could lawfully overhear, then the fact would also have exited to the public domain, and the defendant overhearer could publicize freely.

The interesting wrinkle here is whether the disclosee could publicize the information if it were overheard by a third person. I think the answer has to be no. Even if the fact also existed in the public domain, the intimate disclosee's knowledge (the source of this would-be publicizer's information) stems directly from the private domain. The disclosee would have clear notice that the fact derived from the private domain. However, if the intimate disclosee *also* found the fact in the public domain, disclosure would then likely have to be protected by the First Amendment consistent with public domain source jurisprudence.

3. *Plaintiff Discloses, Consistent with Zone of Fair Intimate Disclosure, to Disclosee—Who Then Discloses.*—This category presents the greatest challenge to the viability of the private domain's zone of fair intimate disclosure. On the one hand, the plaintiff's disclosee has his or her *own* zone of fair intimate disclosure and will tend to make his or her own disclosures, even of private information given by the plaintiff. But once a disclosure subsequent to plaintiff's initial disclosure is made, several troubling scenarios arise.

The sense that a disclosee within a plaintiff's zone of fair intimate disclosure should not be able to destroy plaintiff's privacy is compelling but ultimately unhelpful. The Supreme Court will insist that the domain inquiry remain an inquiry into the defendant publicizer's

238. See discussion *supra* notes 168-169 and accompanying text.

source. If, for example, the disclosee tells the police that the plaintiff is a rape victim, the plaintiff's name may end up in a publicly accessible government location. At this point, the Supreme Court makes clear that this location virtually trumps all other interests, and the law protects the eventual publicizer, whose source of information is the public domain.²³⁹ To require the publicizer to trace the source to the plaintiff's initial disclosure likely would be so onerous as to impermissibly chill First Amendment speech under Supreme Court jurisprudence.

But what if the intimate disclosee discloses private facts about a plaintiff to a third person who is outside the private domain? Assuming that third person is not within plaintiff's zone of fair intimate disclosure, the question becomes even more complicated. The third person's knowledge may stem from disclosee's zone, but would that protection apply to facts disclosed regarding the plaintiff, who did not share an intimate zone with the third person at the time of disclosure?

A hypothetical would be helpful here. Walter is dating Anna, who discloses to him that she has a venereal disease. Walter clearly would be within Anna's zone of fair intimate disclosure. If he publicized that fact, Walter would be liable to her because he would be on easy notice of the private domain source of the information. But if Walter instead discloses this fact to his brother, Daniel, who is clearly within Walter's zone of fair intimate disclosure, and Daniel then chooses to publicize this fact, would any privacy rights be enforceable?

While Walter as a plaintiff could say that Daniel's source of information was the intimacy of Walter's private domain, Walter could *not* claim that his own privacy right was invaded because the only legally private fact in this hypothetical relates to Anna.²⁴⁰

Could Anna sue Daniel? Unfortunately, I suspect that the answer will be no. If she could, Daniel would be held tortiously responsible for not having ascertained that the fact he learned from Walter came from a private, not a public, domain. Again, if would-be publicizers were legally responsible for verifying the chain of disclosure of a private fact prior to their own source, the Supreme Court would likely rule that the burdens on their First Amendment rights were unconstitutional. While the chain of sources may be readily ascertainable in

239. See *supra* note 169 and accompanying text.

240. Modifying the hypothetical to add Walter's own contraction of the venereal disease from Anna alters this conclusion. If Walter discloses the fact of his disease and from whom he contracted it to Daniel and Daniel then publicizes this fact, Walter could successfully sue Daniel for his own invaded privacy interest. In that suit, Daniel's source of information was the private domain intimacy of his brother's disclosure.

some instances, that chain will be far more obscure in most cases. As most privacy cases demonstrate, very private facts can end up in the public domain. In Anna's suit against Daniel, therefore, Anna would have to prove that Daniel obtained the information from *her* private domain, because the First Amendment would not allow her to punish Daniel for taking the fact from someone else's private domain, regardless of how it got there.

Anna's only redress might be against Walter, but it would not be under the disclosure tort. Under existing tort law,²⁴¹ Walter did not "publicize" the private fact because he told only one person, specifically someone with whom he has an intimate relationship. Anna's avenue of redress against Walter could only come under the distinct emerging tort of "breach of confidence," which of late has received some attention from scholars dissatisfied with the protection offered by the disclosure tort.²⁴² That avenue of redress is beyond the scope of this Article.

My prediction regarding Anna's lack of a successful disclosure tort action against Daniel is disappointing. From a privacy perspective, requiring a publicizer to trace the origins of a private fact before publicizing seems a fair price to pay to preserve the significant interests embodied in the disclosure tort. Unfortunately, the Court's decisions culminating with *Florida Star* seem incontrovertible: requiring publicizers to search communication chains predating their own source—"sifting . . . to prune out material arguably unlawful for publication"—impermissibly chills free speech in the eyes of the Court.²⁴³

Moreover, even if a defendant publicizer *could* be constitutionally required to inquire down the source chain, it is unimaginable that the Court would allow publicizers to be held tortiously responsible in privacy if they received erroneous information that suggested the fact

241. See discussion *supra* notes 55-64 and accompanying text.

242. See, e.g., Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CAL. L. REV. 1133, 1135 (1992) (defining breach of confidence as "a concept of privacy based on the *individual's* control of information rather than on generalized *social* controls on information, and . . . an enforceable obligation of confidentiality for those possessing private information rather than . . . a duty visited on publishers"); Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 73 (1995) (suggesting that breach of confidence is the best hope in the face of a waning disclosure tort, but that it would likely still face insurmountable First Amendment objections); Harvey, *supra* note 99, at 2392 (arguing for attaching liability at the source of the leak under a breach of confidence theory); Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1450-51 (1982) (advocating the recognition of a distinct tort for broken confidences); Zimmerman, *supra* note 6, at 363 (suggesting the use of legal sanctions for violations of confidential relationships).

243. *Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989).

already had exited at some point into the public domain. This scenario is all the more reason why the Court is likely to focus on the publicizer's direct source of the information, rather than on the domain characterization of the original privacy holder's disclosures.

CONCLUSION

I believe that Professor Shapiro is correct in asserting that the private domain approach to disclosure tort constitutional jurisprudence is the tort's last hope. In addition, I believe the zone of fair intimate disclosure offers a justiciable definition of that domain. But my best guess is that the Court will honor the private domain only in limited circumstances. My exploration suggests that the Court would allow a defendant to be held tortiously responsible for publicizing a private fact only when the information is taken directly from the privacy holder's private domain.

Given the tremendous burdens standing in the way of protecting private facts from public disclosure, both in succeeding with a prima facie case and in surviving First Amendment scrutiny, perhaps the broader question worth considering next is what we, as a society, gain and what we lose when forced to rely primarily upon others' good will in respecting our privacy.