THE PUBLIC DISCLOSURE OF PRIVATE FACTS: THERE IS LIFE AFTER *FLORIDA STAR*

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I. INTRODUCTION

For most of the twentieth century, the law of torts provided an effective remedy for unnewsworthy disclosures of private and intimate facts deemed highly offensive to a reasonable person. Propelled into existence by a famous law review article,[1] the tort of invasion of privacy gained a judicial foothold in the early 1900s and found black-letter legitimacy with its incorporation into the original *Restatement of Torts* in 1939.[2] The *Restatement (Second) of Torts*

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1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (discussing common law evolution of right to privacy as combining elements of the law of property and contracts).

2. *See* RESTATEMENT OF TORTS § 867 (1939).

further refined the contours of the tort of invasion of privacy.[3] Today, forty-one states allow an action for damages for what has become known as the public disclosure of private facts.[4] Recovery is not permitted, however, for the disclosure of private facts that are newsworthy or of legitimate public concern.[5] Courts endeavored for years to reconcile and balance the competing values represented by an individual's right to privacy and the public's right to know.[6]

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3. *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977) (discussing torts arising from publicity given to private life).

4. *See* Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 432 n.37 (1996) (noting North Dakota, South Dakota, Utah and Wyoming have suggested that they might recognize a private facts cause of action in related cases and Virginia, Minnesota, Nebraska, New York and North Carolina "have expressly rejected an invasion of privacy action for the public disclosure of private facts").

5. RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977).

6. *See, e.g.*, Gilbert v. Med. Econ., Co., 665 F.2d 305, 307-08 (10th Cir. 1981) (holding publication of a physician's photograph, name, and mental health medical history was privileged under the First Amendment); Virgil v. Time, Inc., 527 F.2d 1122, 1128-29 (9th Cir. 1975) (holding First Amendment privilege did not allow publication of plaintiff's statements because the plaintiff withdrew his consent for the statements to be published); Jenkins v. Dell Publ'g Co., 251 F.2d 447, 451-52 (3d Cir. 1958) (holding plaintiff could not recover for publication of an article that factually depicted the death of her husband); Sidis v. F-R Publ'g Corp., 113 F.2d 806, 809-10 (2d Cir. 1940) (holding publication of an article and cartoon depicting the plaintiff was privileged under the First Amendment); Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 37-44 (Cal. 1971) (holding a jury could reasonably find that a story portraying the plaintiff as a criminal was not newsworthy); Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 299-301 (Iowa 1979) (holding a newspaper story detailing that the plaintiff had been involuntarily sterilized was not actionable because the information contained in the article was otherwise accessible to the public); Rawlins v. Hutchison Publ'g Co., 543 P.2d 988, 993-96 (Kan. 1975) (holding a person's waiver of the right of privacy as to public facts cannot be withdrawn); Kelley v. Post Publ'g Co., 98 N.E.2d 286, 287-88 (Mass. 1951) (holding publication of a picture of plaintiff's deceased daughter was not an invasion of privacy); Winstead v. Sweeney, 517 N.W.2d 874, 876-78 (Mich. Ct. App. 1994) (upholding the decision that the issue of newsworthiness is properly decided by a jury); Meetze v. Associated Press, 95 S.E.2d 606, 609-10 (S.C. 1956) (holding the law does not recognize a right of privacy in connection with inherently public matters).

How this tension and conflict between these two fundamental values should be approached or resolved also spawned an encyclopedic array of scholarly articles and hypotheses. *See, e.g.*, Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 91-95 (1974) (noting, while one's privacy is important, free expression is not only an aspect of liberty, it is "a necessary attribute of the informed consent basic to democratic government"); Thomas I. Emerson, *The Right of Privacy and Freedom of Press*, 14 HARV. C.R.-C.L. L. REV. 329, 341-44 (1979) (discussing the balance between the social interests in the public's need for information and the social and individual interests in the right to privacy); Marc A. Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107, 127-37 (1963) (discussing the tension between an individual's right to privacy and society's need for information in the context of the debate over whether to release the name of rape victims); Ruth Gavison, *Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech*, 43 S.C.L. REV. 437, 456-69 (1992) (arguing that

They employed a plethora of balancing criteria designed to compare the relative worth of an individual's right to be free from unseemly and offensive publicity in a given situation with a party's right to inform the public on matters of legitimate public interest.[7] These criteria include the extent to which the plaintiff has voluntarily entered the arena of public debate and interest;[8] the social value of the publicity;[9] the extent of the intrusion into private affairs;[10] the plaintiff's reasonable expectation of privacy;[11] the extent to which the information is already publicly known;[12] the necessity of identifying the plaintiff;[13] the

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identifying the conflicting interests of free speech and personal privacy leads to a more adequate resolution of conflicts between them); Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1268-69 (1976) (recognizing a jury's role in determining community standards of unconscionable disclosure of private facts must be coupled with the danger that a jury may exercise that power to penalize speech); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 839-56 (1985) (discussing the difficulty juries encounter when attempting to balance a party's behavior against community morals to determine damages in a privacy action); Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 333-39 (1966) (examining a series of court decisions that narrowly limit the possibility of success of a privacy tort claim due to importance placed upon newsworthiness); Louis Nizer, *The Right of Privacy: A Half Century's Development*, 39 MICH. L. REV. 526, 528-29 (1941) (recognizing the inherent conflict between the right to privacy and the public's right to information); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 998-1008 (1989) (examining the continuing struggle "between the insistent demands of public accountability and the expressive claims of communal life"); Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 703-44 (1996) (advocating a new test that satisfies both an individual's privacy interest and a defendant's constitutional right to disclose information under the First Amendment); Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?* 64 IOWA L. REV. 185, 210-32 (1979) (finding an adequate balance between privacy and newsworthiness in the "morbid and sensational" test created by the Ninth Circuit); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren And Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 341-65 (1983) (discussing the tests for determining what is private information and the defense of newsworthiness available in a private-facts tort suit); John A. Jurata, Jr., Note, *The Tort that Refuses to Go Away: The Subtle Re-Emergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 532-44 (1999) (advocating a standard that balances newsworthiness and burden of proof in a private-fact tort suit).

7. *See* Kapellas v. Kofman, 459 P.2d 912, 922 (Cal. 1969).

8. *Id.*

9. *Id.*

10. *Id.*

11. *See* Huskey v. Nat'l Broad. Co., 632 F. Supp. 1282, 1291-92 (N.D. Ill. 1986) (holding prisoners have a legitimate expectation of privacy from television cameras although they have no expectation of privacy in their cells).

12. *See* Gill v. Hearst Publ'g Co., 253 P.2d 441, 444 (Cal. 1953) ("There can be no privacy in that which is already public." (quoting Melvin v. Reid, 112 Cal. App. 295, 296 (1931))).

13. *See* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1233 (7th Cir. 1993) (recognizing the importance of personal identification in historical writings); *see also* Virgil v. Time, Inc., 527

relevance of the private facts to the theme or purpose of the disclosure;[14] the lapse of time, if any, between the occurrence of an event and its disclosure;[15] and whether the publicity is so offensive as to shock the community's notions of decency.[16]

The major constitutional theme that permeates this dialectical process, at least from the standpoint of the speaker or publisher, is that information that should be disclosed to the public will be suppressed because of fear of tort liability and the costs attendant thereto.[17] Freedom of speech and press is thereby chilled, the argument goes, and the public's right to receive information "to enable [the public] to cope with the exigencies of their period" is deleteriously affected.[18] Applying the various balancing criteria, most courts broadly construed the concept of newsworthiness and were loathe to second-guess a defendant's judgment on what constituted news. Accordingly, the prospect of

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F.2d 1122, 1131 (9th Cir. 1975) (finding limitations on the disclosure of private facts about persons engaging in public activities); Barber v. Time, Inc., 159 S.W.2d 291, 295 (Mo. 1942) (advocating that the right of privacy is paramount to obtaining medical treatment).

14. *See* Ross v. Midwest Communications, Inc., 870 F.2d 271, 273 (5th Cir. 1989); *see also* Gilbert v. Med. Econ. Co., 665 F.2d 305, 308-09 (10th Cir. 1981) (holding Gilbert's photograph, name, and psychiatric and marital problems were substantially relevant to the newsworthy topic of inadequate policing of medical personnel); Nobles v. Cartwright, 659 N.E.2d 1064, 1077 (Ind. Ct. App. 1995) (holding an extramarital affair was substantially related to the public interest topic of sexual harassment).

15. *See* Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 40-43 (Cal. 1971) (noting that "identification of the [a]ctor in reports of long past crimes usually serves little independent public purpose").

16. *See* Virgil v. Time, Inc., 527 F.2d 1122, 1129-30 (9th Cir. 1975) (adopting the standard of community decency); *see also* Sidis v. F-R Publ'g Corp., 113 F.2d 806, 809 (2d Cir. 1940) ("Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency."); Diaz v. Oakland Tribune Co., 188 Cal. Rptr. 762, 772 (Ct. App. 1983) ("Whether a publication is or is not newsworthy depends upon contemporary community mores and standards of decency."); Green v. Chi. Tribune Co., 675 N.E.2d 249, 256 (Ill. App. Ct. 1996) ("'In determining what is a matter of legitimate public interest, account is taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of community mores.'" (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. n (1977))).

17. *See* Fla. Star v. B.J.F., 491 U.S. 524, 535-36 (1989) (noting this fear of liability may result in "self-censorship" on the part of the press "overdeterrence"); *see also* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) (noting a high potential of liability may result in "timidity and self-censorship"); Kelley v. Post Publ'g Co., 98 N.E.2d 286, 287 (Mass. 1951) (discussing that publishers would not be able to adequately disseminate newsworthy information if the potential for liability was ever-present); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 474-75 (Tex. 1995) (noting that forcing news organizations to sift through every piece of information for potential liability would be imposing "a task which foreseeably could cause critical information of legitimate public interest to be withheld until it becomes untimely and worthless to an informed public").

18. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)).

timidity and self-censorship by speakers and publishers was eliminated or reduced.[19] As a result, most public disclosure actions were dismissed before trial on defendants' dispositive motions.[20] There still was a measure of vitality, however, to the public disclosure tort as confirmed by the *Restatement (Second) of Torts*' adoption in 1977 of a functional test for determining newsworthiness.[21] According to the *Restatement (Second) of Torts*, impermissible publicity—nothing more than "a morbid and sensational prying into private lives for its own sake," as defined by community standards of decency—does not warrant any protection.[22]

The United States Supreme Court brought whatever vitality the public disclosure tort had into question in *Florida Star v. B.J.F.*[23] Emphasizing First Amendment concerns of press timidity, fear of self-censorship, and the need for breathing space, the Court promulgated a test usually reserved for gauging the validity of governmental regulatory schemes.[24] The Court held if the media publishes truthful information that it has lawfully obtained, punishment may only be imposed if it is "narrowly tailored to a state interest of the highest order."[25] This holding is significant, if not revolutionary, in two respects. First, the manner in which information is obtained, as opposed to whether it is of public interest, is now the cornerstone of the tort.[26] Second, a plaintiff must now assume the role of a private attorney general, arguing that the means sanctioned by the state—a tort action for damages—are narrowly tailored on the facts of the case to achieve an interest of the highest order, namely, the right to be free from highly offensive publicity.[27]

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19. *See* Zimmerman, *supra* note 6, at 353 (discussing cases that defer to the judgment of the press and noting, "The press, after all, has a better mechanism for testing newsworthiness than do the courts").

20. *See* Gilbert v. Med. Econ. Co., 665 F.2d 305, 309 (10th Cir. 1981) (affirming the trial court's grant of summary judgment for the publishing company); Jenkins v. Dell Publ'g Co., 251 F.2d at 452 (affirming the trial court's grant of summary judgment for the publishing company); Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 304 (Iowa 1979) (affirming the grant of summary judgment for the newspaper and its reporter); Jones v. Herald Post Co., 18 S.W.2d 972, 973 (Ky. 1929) (affirming the trial court's demurrer).

21. RESTATEMENT (SECOND) OF TORTS § 652D (a), (b) (1977).

22. *Id.* § 652D cmt. h.

23. Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989).

24. *Id.* at 541; *see* David A. Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71, 89-91 (1990) (discussing the Court's use of a balancing process that is highly situational in deciding First Amendment cases (citing Fla. Star v. B.J.F., 491 U.S. at 541)).

25. Fla. Star v. B.J.F., 491 U.S. at 541.

26. *See* Desnick v. ABC, Inc., 44 F.3d 1345, 1351 (7th Cir. 1995) (focusing on the way in which the defendant news organization obtained the information).

27. Anderson, *supra* note 24, at 94.

Florida Star was wrongly decided.[28] A strict scrutiny test designed to judge the constitutionality of a state tort action is not the proper constitutional vehicle with which to adjudicate whether an individual's privacy has been invaded by a highly offensive disclosure. Moreover, the emphasis on how intimate information is obtained as opposed to what the information discloses, unnecessarily exalts freedom from self-censorship over the interests of privacy. Further evidence that this approach is constitutionally misguided is the irony that newsworthiness, heretofore a complete bar to recovery, has been theoretically relegated by the Court to a qualified status, defeasible upon proof that a suit for damages is the least intrusive way to satisfy what the Court concedes is an interest of the highest order—privacy.[29]

However, reports of the demise of the public disclosure action have been exaggerated.[30] *Florida Star* is limited in scope; it applies only to those private facts that already have been placed in the public domain by the government.[31] It cannot be extended, by any form of constitutional logic or reasoning, to disclosures of offensive and unnewsworthy matters by private sources. Even the Court concedes as much.[32] In last term's *Bartnicki v. Vopper*[33] decision, the Court opted not to apply the "narrowly tailored means" aspect of the strict scrutiny test to a statutory privacy disclosure case.[34] Instead, it simply determined, like courts have done since the advent of the tort, whether the particular disclosure was of legitimate public interest.[35] This Article proposes that the actionability of private information that either is obtained unlawfully or obtained from nongovernmental sources should not be analyzed under *Florida Star* but under the standard contained in section 652D of the *Restatement (Second) of Torts*.[36] This standard provides a definite warning of potential liability that is sufficient to avoid a chilling effect on the part of the media in publishing the news of the day. This warning is manifested in the decency limitation on news, drawing the line at the point which publicity becomes morbid

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28. *Id.* at 91-97; Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1222-24 (1990).

29. Fla. Star v. B.J.F., 491 U.S. at 533.

30. *See id.* at 550 (White, J., dissenting) (stating that the Court obliterated the tort of publication of private facts); Edelman, *supra* note 28, at 1199 (condemning the Court for ending the privacy action tort); Lorelei Van Wey, Note, *Private Facts Tort: The End is Here*, 52 OHIO ST. L. J. 299, 300, 312 (1991) (discussing what little remains of private fact tort actions).

31. *See* Mintz, *supra* note 4, at 456-57 (noting lawfully obtained information is limited to the public domain).

32. Bartnicki v. Vopper, 121 S. Ct. 1753, 1760 (2001).

33. Bartnicki v. Vopper, 121 S. Ct. 1753 (2001).

34. *Id.* at 1764-65.

35. *Id.* at 1764.

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

and sensational prying for its own sake.[37] When coupled with a narrow range of actionable private facts and independent appellate review, this standard effectively diminishes any real impact the twin scourges of timidity and self-censorship have on publishing news. This Article also proposes that the *Florida Star* test does not pertain to actions brought against non-media defendants. Conditional privileges akin to those used in defamation law better balance the competing interests when the publicity is not disclosed to a mass audience.

The Article is divided into four parts. First, the common law principles of the public disclosure tort and its constitutional developments prior to 1989 are examined. Second, the opinions of *Florida Star* are discussed. A critical analysis of the majority's holding and rationale then follows. Finally, a proposal for a principled coexistence of privacy and free speech in a post-*Florida Star* world is presented.

II. THE PUBLIC DISCLOSURE ACTION

Before the Supreme Court's decision in *Florida Star*, the elements of the public disclosure tort were well settled.[38] Most jurisdictions had adopted the *Restatement (Second) of Torts* formulation that one who gives publicity concerning the private life of another is subject to liability if the matter published is highly offensive to a reasonable person and is not of legitimate concern to the public.[39] Although many courts scrutinize separately the four elements of the tort action—publicity, private facts, offensiveness, and newsworthiness—the private facts and offensiveness elements are best understood if analyzed together.[40]

A. *Publicity*

Courts are divided on the scope of the publicity element.[41] The majority follows the *Restatement (Second) of Torts*' comments and requires that the

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37. *Id.*

38. *See* Zimmerman, *supra* note 6, at 299 (noting the *Restatement (Second) of Torts* "is widely relied upon" although the elements "vary somewhat from jurisdiction to jurisdiction").

39. *See* Zimmerman, *supra* note 6, at 299 (stating that most jurisdictions follow the elements of private facts tort noted in the *Restatement (Second) of Torts*); *see also* RESTATEMENT (SECOND) OF TORTS § 652D cmts. b, d (1977) ("When . . . intimate details of [an individual's] life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of [the individual's] privacy, unless the matter is one of legitimate public interest.").

40. *See* Post, *supra* note 6, at 983 (stating that the inquiry into what is "highly offensive" is "virtually identical to that which underlies the 'private facts' requirement").

41. *Id.* at 987 ("Perhaps because the purpose of the publicity requirement is unclear, courts have been uncertain about whether to follow the Restatement by enforcing a strict publicity

information at issue be communicated "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."[42] Unlike the tort of defamation, in which the publication of a false and defamatory statement communicated to one person is sufficient to establish culpability,[43] the *Restatement* approach contemplates that a large number of persons must be aware of the intimate and embarrassing information before an actionable claim of invasion of privacy exists.[44] Communication of facts concerning another person's private life to a single person or even to a small group of persons, does not meet the *Restatement*'s definition of publicity.[45] Obviously, any mass media disclosure would meet the *Restatement* test.[46] Disclosures by non-media defendants, in contrast, do not constitute publicity unless they reach a large audience or a large number of persons.[47] "Large" is not defined, but *Restatement* authors cited two common law examples that give some measure of concreteness to the concept.[48] The first example involves a defendant who penned an unflattering portrait of a plaintiff in a letter sent to one thousand individuals.[49] The second example deals with a creditor who posted in the window of his retail establishment the fact that the plaintiff owed him money.[50] These cases illustrate the *Restatement*'s distinction between public and private communications: a communication must reach, or be sure to reach, the public to be actionable.[51]

A minority of courts, however, reject the *Restatement* approach and hold the publicity requirement may be satisfied by proof that the plaintiff has a special relationship with the public to whom the information is disclosed.[52] The public,

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requirement. Although the common law is still evolving, two distinct approaches can be identified.").

42. *See* Post, *supra* note 6, at 988-89; *see also* RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (explaining the parameters of the publicity element).

43. *See* RESTATEMENT (SECOND) OF TORTS § 577 cmt. b ("It is enough that [the defamatory matter] is communicated to a single individual other than the one defamed.").

44. *Id.* § 652D cmt. a.

45. *Id.*

46. *See id.*

47. *Id.*

48. *Id.*

49. *See id.* illus. 3 (discussing Kerby v. Hal Roach Studios, 127 P.2d 577 (Cal. 1942), as an example of what constitutes a large number of persons).

50. *See id.* illus. 2 (discussing Brents v. Morgan, 299 S.W. 967 (Ky. 1927), as an example of what constitutes a large audience).

51. *Id.* cmt. a.

52. *See, e.g.*, McSurely v. McClellan, 753 F.2d 88, 112 (D.C. Cir. 1985) (distinguishing the court's interpretation of the Restatement approach by maintaining that the publicity requirement may be satisfied by proof of a special relationship between the plaintiff and the public); Hill v. MCI WorldCom Communications, Inc., 141 F. Supp. 2d 1205, 1213 (S.D. Iowa 2001) (stating that the

as defined by this minority rule, includes such small groups as "fellow employees, club members, church members, family, or neighbors."[53] The rationale for this rule is that a disclosure of private, intimate facts to these limited numbers of people may be more devastating to the plaintiff than a disclosure to the general public.[54] Thus, an employer's disclosure of a coworker's mastectomy,[55] revelations to a husband of another's love letters to his wife before their marriage,[56] and information critical of a civilian's job performance sent to the United States Reserve Personnel Center,[57] have been found to satisfy the publicity requirement. Although these courts claim they are being flexible in the application of the *Restatement*'s publicity requirement,[58] they are in fact ignoring it, focusing not on the amount or extent of publicity, but instead on whether the disclosure is unnecessary or unreasonable.[59] Because the defendants' conduct in this type of case is often egregious, recovery has been permitted.[60] The consequence of this minority rule is that the publicity element is effectively merged into the larger question of whether there has been a highly offensive disclosure of private fact.[61] These twin elements are discussed in the next section.

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publicity requirement may be satisfied if there is a confidential relationship between the plaintiff and the public); Miller v. Motorola, Inc., 560 N.E.2d 900, 903 (Ill. App. Ct. 1990) (adopting satisfaction of the public disclosure requirement by proof of a special relationship with the public); Bradley v. Bd. of Educ., 565 N.W.2d 650, 658 (Mich. 1997) (overruled on other grounds) (holding an analysis under the common law is necessary); Beaumont v. Brown, 257 N.W.2d 522, 531 (Mich. 1977) (overruled on other grounds) (stating that it may be a serious interference if involving a specific subset of the public).

53. Beaumont v. Brown, 257 N.W.2d at 531.

54. Miller v. Motorola, Inc., 560 N.E.2d at 903.

55. *Id.* at 902-03.

56. McSurely v. McClellan, 753 F.2d 88, 113 (D.C. Cir. 1985).

57. Beaumont v. Brown, 257 N.W.2d at 531-32.

58. *See* McSurely v. McClellan, 753 F.2d at 112 ("Kentucky has adopted the Restatement's articulation of privacy tort principles but has continued to emphasize the need for flexibility in the application of theory to conduct."); Miller v. Motorola, Inc., 560 N.E.2d at 903 (recognizing the need for flexibility to permit recovery for egregious conduct); Beaumont v. Brown, 257 N.W.2d at 531 (finding the requirement to be restrictive and ambiguous such that a more liberal interpretation of the general public should be used).

59. *See* Post, *supra* note 6, at 988 (stating that the minority rule renders the publicity requirement superfluous).

60. *See* McSurely v. McClellan, 753 F.2d at 112-13 (stating that egregious conduct has been found actionable).

61. Post, *supra* note 6, at 988.

B. *Offensive Disclosure of Private Facts*

Only publicity that discloses private facts and is highly offensive to a reasonable person is actionable.[62] In delineating the boundaries of these twin elements, courts have largely used a definitional approach.[63] Private facts are often defined by what they are not—facts already in the public domain.[64] For example, publicity about the plaintiff's life which is a matter of public record such as a date of birth, fact of marriage, military record, or pleading filed in a lawsuit is not a private fact as a matter of law and is not actionable.[65] This principle is not restricted to traditional public records.[66] A letter written by a concerned citizen to the governor detailing abuses in a county care facility was deemed to be a public record under a public records statute.[67] The letter disclosed that the plaintiff, along with two other women, was sterilized against her will in a county care facility.[68] With no consideration for the real-world privacy of a letter filed away and forgotten with thousands of others in a governor's file, a plurality of the court reasoned that once the governor received the letter, it belonged to the state within the meaning of the statute and was a public record.[69] This rationale ignores the obvious fact that "[t]he wider dissemination caused by the defendant is more relevant" to whether a privacy invasion has occurred "than whether the information is technically public."[70]

This public records exception to private facts was given constitutional validity by the United States Supreme Court in 1975 in *Cox Broadcasting Corp. v. Cohn*.[71] In that case, the father of a deceased rape victim sued a broadcasting company because its reporter disclosed his daughter's identity during a report of the trial of the alleged rapist.[72] The reporter obtained the name of the victim

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62. RESTATEMENT (SECOND) OF TORTS § 652D (1977).
63. Post, *supra* note 6, at 988.
64. *Id.* at 981.
65. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b.
66. *Id.*
67. Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 300 (Iowa 1979) (plurality opinion).
68. *Id.* at 296.
69. *Id.* at 300.
70. Edelman, *supra* note 28, at 1202 n.53; *see* Ingber, *supra* note 6 at 848-49 ("Only the extremely callous can be oblivious to the real-world differences in privacy invasion between the disclosure of a personal fact in a dusty public record hidden somewhere in the bowels of a county courthouse and a similar disclosure disseminated through the mass technology of the modern press.").
71. Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).
72. *Id.* at 474.

from the criminal indictment.[73] The Court held a state may not constitutionally impose sanctions for the accurate publication of a rape victim's name obtained from the official court records when the records are maintained in connection with a criminal prosecution and are open to public inspection.[74] This is because, according to the Court, judicial proceedings are an essential part of the operation of government, and the media has a great responsibility to report fully and accurately such operations to keep the citizenry informed.[75] The state, by placing the identity of the rape victim in official court records, is presumed to have concluded that the public interest was thereby being served.[76] To avoid media self-censorship and timidity in reporting accurate facts, the Court refused to adopt a rule that would except public records which contain offensive private facts from protection.[77] The *Cox Broadcasting* holding is absolute: public records open to public inspection cannot serve as the basis for a public disclosure privacy action.[78] It does not make any difference whether the information is easily accessible or already publicized, such as from an open court file, or is relatively inaccessible or not widely known, such as from information gleaned from documents contained in the storage bowels of some courthouse basement.[79] From a defendant's perspective, this hard and fast rule of no liability certainly fosters predictability of result and certainty of expectation.[80] The media knows it can publish, without exception, information from open public records. The result in *Cox Broadcasting* is driven by two interrelated practical considerations: enhancement of breathing space for the press and avoidance of self-censorship.[81] As will be discussed, these two considerations were the bedrock on which the Court in *Florida Star* took privacy tort law in a new direction.[82]

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73. *Id.* at 472.

74. *Id.* at 495. The Georgia Supreme Court had upheld the state statute under which Cox was liable as constitutional. *See* Cox Broad. Corp. v. Cohn, 200 S.E.2d 127 (Ga. 1973).

75. Cox Broad. Corp. v. Cohn, 420 U.S. at 493.

76. *Id.* at 495.

77. *See id.* at 495-96 (holding freedom of press is of critical importance to inform the citizens).

78. *Id.* at 496.

79. *See* Ingber, *supra* note 6, at 848-49 (proclaiming the media immune from liability for truthfully reporting on official court records and most likely other public records as well).

80. *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-44 (1974) (noting such results and expectations are achieved in defamation by the general application of a fault standard).

81. *See* Cox Broad. Corp. v. Cohn, 420 U.S. at 495-96 ("[F]reedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.").

82. *See infra* Part IV.A (discussing *Florida Star* and the power of the media to publish truthful public information without fear of liability, thus avoiding the problems of self-censorship).

Similar to the immunity given to dissemination of information in open public records is the protection given to the publicity of activities the plaintiff leaves open to public scrutiny.[83] A newspaper's publication of a photograph of a couple kissing at a sidewalk café does not amount to an invasion of a private fact.[84] Nor does newsreel footage depicting people on a public street which happens to show a man with a rip in the seat of his trousers constitute an actionable private fact.[85] In short, there is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public.[86]

The prohibition against public records and public facts as a predicate for recovery is not the only limitation on the private facts element of the tort; only those details of one's private life that are intimate or highly personal are actionable.[87] To some extent, the concept of intimacy is another definitional limitation on what constitutes private facts.[88] But it is much more than that. It gives meaning and substance to the offensiveness element of the tort in that only the most serious transgressions of privacy are deemed worthy of remedy.[89] Indeed, offensiveness can be seen as defining the tortious interference itself, for only revelations of that which is highly offensive can bring about the injury of mental anguish or distress that tort law will compensate.[90] Conversely, the law is not for the protection of the hypersensitive.[91] Anyone who is not a hermit must expect and endure the ordinary incidents of community life.[92] Such events as

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83. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) ("[T]here is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye.").

84. *Id.* § 652D illus. 5 (discussing the publicity of activities principle as illustrated in Gill v. Hearst Publ'g. Co., 253 P.2d 441 (Cal. 1953)).

85. *Id.* § 652D illus. 4 (discussing the publicity of activities principle as illustrated in Humiston v. Universal Film Mfg. Co., 178 N.Y.S. 752 (1919)); *see* McNamara v. Freedom Newspapers, Inc., 802 S.W.2d 901, 905 (Tex. App. 1991) (deeming a photograph depicting a male high school soccer player's genitalia taken while chasing the ball and published in conjunction with an article on the game to be protected). *But see* Daily Times Democrat v. Graham, 162 So. 2d 474, 478 (Ala. 1964) (finding a picture of the plaintiff with her dress blown above her waist as she left the county fair fun house was not protected because her expected public status changed under circumstances beyond her control).

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

87. *See id.* (noting examples in which intimate or highly personal details of one's private life are actionable).

88. *See id.* (referring to examples of intimate matters that constitute private facts).

89. Post, *supra* note 6, at 983-84.

90. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (observing that the cause of action arises only when the publicity given to them is such that reasonable persons would feel justified in feeling seriously aggrieved by it).

91. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 117, at 857 (5th ed. 1984).

92. *Id.*

returning home from a visit, going camping in the woods, or throwing a party for friends are simply not the kinds of disclosures of which an ordinary person takes offense.[93]

The zone of privacy represented by intimate personal facts,[94] however, goes beyond mere content or subject-matter limitations of the private facts and offensiveness elements.[95] It attempts to approximate, if not represent, a common everyday understanding of which private facts ought to be protected.[96] What ought to be protected, of course, is ultimately a normative judgment based on the customs and mores of society.[97] In *Vassiliades v. Garfinckel's, Brooks Bros.*,[98] the trial court held as a matter of law photographs of plaintiff taken before and after cosmetic surgery which were then used at a department store promotion and shown on television, were not offensive because their content was not uncomplimentary or unsavory.[99] The appellate court reversed, intimating that, content or subject matter alone was not the issue.[100] Rather, the relevant inquiry was whether the publicity given to plaintiff's surgery would offend a person of ordinary sensibilities.[101] The appellate court's holding highlights a critical distinction often overlooked in the public disclosure tort.[102] It is not whether the content of the publicity is highly offensive to a reasonable person, but whether the disclosure of private intimate facts, under all the attendant circumstances as viewed through the prism of the mores and customs of the times, offends the sensibilities of a reasonable person.[103] In addition to a person's medical status or condition,[104] courts have looked to the customs and mores of the community to provide privacy protection for disclosures of sexual activities and sexually related matters,[105] intimate photographs,[106] personal letters,[107] financial status and condition,[108] and certain domestic situations.[109]

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93. *Id.*
94. *See* Post, *supra* note 6, at 980.
95. *Id.* at 981.
96. *Id.* at 984.
97. *Id.*; *see* RESTATEMENT (SECOND) OF TORTS § 652D cmt. c.
98. Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580 (D.C. 1985).
99. *Id.* at 588.
100. *Id.*
101. *Id.*
102. *See id.*
103. *See* Post, *supra* note 6, at 983-84.
104. *See* Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580, 589-90 (discussing the publication of before and after photos of plaintiff's plastic surgery); *see also* Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d 488, 501 (Mo. Ct. App. 1990) (discussing the filming of plaintiffs at a gathering of participants of in vitro fertilization).
105. *See* Michaels v. Internet Entm't Group, Inc., 5 F. Supp. 2d 823, 841 (C.D. Cal. 1998) (discussing the privacy rights of two famous people when a video tape depicting them having

Not all highly offensive disclosures or private facts, however, are afforded protection.[110] Indeed, most are justified. Whether justification exists, particularly with respect to a media defendant, is another way of asking if the disclosure is newsworthy or of legitimate public concern. Although it has a considerable normative overlap with the element of offensiveness,[111] the concept of newsworthiness, or more precisely, the lack thereof, has been traditionally viewed as a separate element of the tort and has spawned a considerable body of precedent.

C. *Legitimate Public Concern*

First suggested by Warren and Brandeis in their seminal law review article,[112] the concept of newsworthiness or legitimate public concern has been applied universally by the courts to limit the right of privacy in order to protect

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sex was involuntarily distributed); Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 772 (Ct. App. 1983) (discussing the publication of the fact that the plaintiff is a transsexual).

106. *See* York v. Story, 324 F.2d 450, 455 (9th Cir. 1963) (discussing the taking of pictures of plaintiff in indecent positions); Daily Times Democrat v. Graham, 162 So. 2d 474, 478 (Ala. 1964) (discussing a newspaper's publication of photograph of plaintiff with her skirt blown up around her waist); Myers v. U.S. Camera Publ'g Corp., 167 N.Y.S. 2d 771, 774 (City Ct. 1957) (discussing a professional model's suit against a publisher for publishing nude pictures of her without her consent).

107. *See* McSurely v. McClellan, 753 F.2d 88, 111 (D.C. Cir. 1985) (discussing seizure and use of private documents as a constitutional rights violation).

108. *See* Mason v. Williams Disc. Ctr., Inc., 639 S.W.2d 836, 838 (Mo. Ct. App. 1982) (discussing the actionability of a publicly-posted list of customers from whom the store would no longer accept checks); Trammel v. Citizens News Co., 148 S.W.2d 708, 709-10 (Ky. Ct. App. 1941) (holding petitioner stated a cause of action in tort against respondent for publishing petitioner's debt). One of the first cases to uphold the right to sue for unreasonable publicity of private facts was *Brents v. Morgan*, 299 S.W. 967, 971 (Ky. Ct. App. 1927). The defendant posted a sign, five feet by eight feet, in the window of his garage which announced to the world, or at least those who passed by, that Dr. Morgan, the local veterinarian, would not pay off his debt of $49.67 for work performed on his vehicle. *Id.* at 968. This case illustrates the importance of the context of the disclosure. If Brents had disclosed the debt to his banker or accountant or those with an interest in his financial condition, Dr. Morgan may have had difficulty establishing that such a disclosure was highly offensive to a reasonable person. *Id.*; *see* Post, *supra* note 6, at 980.

109. *See* Baugh v. CBS, Inc., 828 F. Supp. 745, 755 (N.D. Cal. 1993)(discussing a suit for broadcasting a crisis intervention team's visit to the plaintiffs' home to investigate an incident of domestic abuse).

110. *See* Post, *supra* note 6, at 983-84 (stating the law will not regulate every transgression).

111. *See* Restatement (Second) of Torts § 625D (1977) (stating a person who gives publicity concerning the private life of another is liable for invasion of privacy if the matter is highly offensive *and* is not of legitimate public concern).

112. Warren & Brandeis, *supra* note 1, at 214.

the public's right to be informed on matters of public interest.[113] To a considerable extent, the media, in accordance with the mores of the community, dictates what is of interest.[114] "[C]rimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of [every] nature, . . . rare disease[s], . . . and many other similar matters of genuine, even if more or less deplorable, popular appeal," are routinely published and broadcast.[115] The public is not limited, however, to information about the event that arouses public interest. It reasonably extends to facts about individuals or even their families that would otherwise be purely private.[116] For example, the sexual orientation of Oliver Sipple, who foiled an assassination attempt on President Gerald Ford in San Francisco in 1975, was found to be a matter of legitimate interest to the public.[117]

The public's right to receive news is nearly all encompassing. It extends to publicity about public figures who invite public attention by their activities, those who are involuntarily placed in the public eye such as crime victims, information as hard news, and information as entertainment.[118] All are subject to the general right of the press "to satisfy the curiosity of the public as to their leaders, heroes, villains, and victims."[119] The Third Circuit Court of Appeals made a statement over forty years ago which is equally true today:

> For present purposes news need be defined as comprehending no more than relatively current events such as in common experience are likely to be of public interest. . . . A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. Still others are entertained by news which has an incongruous or ironic aspect. . . . Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account. In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a

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113. *See* Zimmerman, *supra* note 6, at 300 n.34.
114. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977).
115. *Id.*
116. *Id.* § 652D cmt. h.
117. *See* Sipple v. Chronicle Publ'g. Co., 201 Cal. Rptr. 665, 670 (Ct. App. 1984) (discussing newspaper articles commenting on plaintiff's sexual orientation).
118. KEETON ET AL., *supra* note 91, § 117, at 859-62.
119. RESTATEMENT OF TORTS § 867 cmt. c (1939).

> distinction between news for information and news for entertainment in determining the extent to which publication is privileged.[120]

An interrelated reason why courts deferred to the media's determination of news is the fear that the media will censor themselves in order to avoid imposition of liability.[121] Concerns about media self-censorship, in turn, raise obvious constitutional issues about freedom of speech and press. For these reasons—the courts wanting neither to be in the news business nor to create a climate of press self-censorship—plaintiffs in disclosure actions against the media found it extremely difficult to recover.[122]

Notwithstanding the deference courts have given the media on the determination of news, some courts have indicated that the media may cross the line if they reveal facts so shocking as to go beyond the limits of decency.[123] As expressed by the Second Circuit Court of Appeals in 1940: "Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency."[124] In 1977, the *Restatement (Second) of Torts* adopted a decency limitation on news.[125] Recognizing that what is a matter of legitimate public interest is ultimately a matter of community mores, the authors of the *Restatement* concluded that publicity is not newsworthy and crosses the line when it "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."[126]

Some of the factors mentioned at the outset of this Article bear particular relevance to the application of this decency standard.[127] Is the identity of the

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120. Jenkins v. Dell Publ'g Co., 251 F.2d 447, 451 (3d Cir. 1958) (footnotes omitted).

121. *See, e.g.*, Ross v. Midwest Communications, Inc., 870 F.2d 271, 275 (5th Cir. 1989) ("Exuberant judicial blue-penciling after-the-fact would blunt the quills of even the most honorable journalist.").

122. Woito & McNulty, *supra* note 6, at 195; *see infra* notes 492-551 and accompanying text.

123. Sidis v. F-R Publ'g Corp., 113 F.2d 806, 809 (2d Cir. 1940); *see also* Barbieri v. News-Journal Co., 189 A.2d 773, 777 (Del. 1963) (indicating that the press had a right to publish unless publication violated "ordinary notions of decency"); Schnabel v. Meredith, 107 A.2d 860, 863 (Pa. 1954) (stating that only publications "beyond the limits of decency" would give rise to liability); Meetze v. Associated Press, 95 S.E.2d 606, 609 (S.C. 1956) (suggesting that publication is unwarranted when it "outrage[s] the community's notion of decency").

124. Sidis v. F-R Publ'g Corp., 113 F.2d at 809.

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

126. *Id.* § 652D cmt. h.

127. *See supra* text accompanying notes 7-13.

plaintiff necessary to the story?[128] Is there a sufficient nexus or logical relationship between the disclosure of certain private facts about the plaintiff and the general subject matter of the story?[129] In the case of a former public figure who has resumed a private and unexciting life, has a sufficient amount of time elapsed from the event that made the plaintiff a public figure to militate against further publicity?[130] Even the employment of these factors in applying a decency limitation led to only a small number of successful tort actions.[131] Then came the 1989 Supreme Court's *Florida Star* decision that turned constitutional analysis of the public disclosure tort upside down.[132]

III. THE *FLORIDA STAR* DECISION

In 1983 it was a misdemeanor in Florida for the media to publish or broadcast the name of a victim of a sexual offense.[133] It was also the internal policy of *The Florida Star*, a weekly newspaper which serves Jacksonville, not to print the identities of sexual assault victims.[134] In its October 29, 1983 edition,

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128. *See, e.g.*, Virgil v. Time, Inc., 527 F.2d 1122, 1131 (9th Cir. 1975) (addressing "whether the identity of [the defendant] as the one to whom such facts apply is a matter in which the public has a legitimate interest"); Anonsen v. Donahue, 857 S.W.2d 700, 704-06 (Tex. App. 1993) ("We do not believe that the issue of newsworthiness of the parties' identities, whether a question of law or a question of fact, is relevant to the ultimate inquiry before us . . . .").

129. *See, e.g.*, Cinel v. Connick, 15 F.3d 1338, 1346 (5th Cir. 1994) (holding claimant's privacy was not invaded because information was substantially related to news story of public importance); Ross v. Midwest Communications, Inc., 870 F.2d 271, 274 (5th Cir. 1989) (noting a logical nexus must exist between private information and "a matter of legitimate public concern"); Gilbert v. Med. Econ. Co., 665 F.2d 305, 308-09 (10th Cir. 1981) ("[T]o properly balance freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest.").

130. *See, e.g.*, Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 43 (Cal. 1971) ("[A] jury could certainly find that Mr. Briscoe had once again become an anonymous member of the community.").

131. *See* Scott, *supra* note 6, at 700.

132. Fla. Star v. B.J.F., 491 U.S. 524 (1989).

133. FLA. STAT. ch. 794.03 (1987). The statute in its entirety provides:

> No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Id. This statute was amended in 1991, 1994, and 1996. 1991 Fla. Laws 91-224; 1994 Fla. Laws 94-88; 1996 Fla. Laws 96-406. It is currently available at FLA. STAT. ch. 794.03 (2000).

134. Fla. Star v. B.J.F., 491 U.S. at 528.

The Florida Star printed the full name of a rape and robbery victim.[135] The victim, whose initials are B.J.F., reported an assault to the local sheriff's department.[136] The sheriff's department prepared an incident report and placed it in its newsroom.[137] A reporter-trainee for the newspaper copied the report verbatim on a form supplied by the department.[138] From this form, another *Florida Star* reporter prepared a one paragraph article about the crime, including the full name of the victim.[139]

B.J.F. heard about the article from acquaintances and fellow workers.[140] Her resulting emotional distress was magnified when her mother received telephone calls from a man who stated he had raped her.[141] She sought police protection, changed her phone number and residence, and obtained mental health counseling.[142] About one year after the assault and publication of the story, B.J.F. sued *The Florida Star* for negligent violation of the Florida statute.[143] The trial judge directed a verdict for B.J.F. and against the newspaper on liability.[144] The jury awarded her $75,000 in compensatory damages and $25,000 in punitive damages.[145] The punitive award was predicated on a finding that the newspaper acted with a reckless indifference to the rights of others.[146]

The verdict did not stand, however.[147] In a six to three decision, the United States Supreme Court articulated a new constitutional principle for the public disclosure privacy tort.[148] It held state officials may not constitutionally punish a newspaper's publication of truthful information about a matter of public significance which has been lawfully obtained, absent a need to further a state interest of the highest order.[149] After finding that the publicity given to B.J.F.'s rape was newsworthy and that the newspaper had lawfully obtained the information from a report made available in a public newsroom,[150] the Court

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135. *Id.* at 527.
136 *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 528.
141. *Id.*
142. *Id.*
143. *Id.*
144 *Id.*
145. *Id.*
146. *Id.*
147. Fla. Star v. B.J.F., 491 U.S. at 524, *rev'g* Fla. Star v. B.J.F., 499 So. 2d 883 (Fla. Dist. Ct. App. 1986).
148. *Id.*
149. *Id.* at 533.
150. *Id.* at 536-37.

concluded that B.J.F. had not carried her burden of establishing a need which was narrowly tailored to fulfill a state interest of the highest order.[151] The major significance of the Court's opinion is whether the privacy disclosure tort action can ever be used as a weapon to punish true speech.[152] Although the Court does not rule out the possibility of a case where civil monetary sanctions against the media may be so overwhelmingly necessary as to further privacy interests, the chances of that happening, based on the Court's analysis, are unlikely.[153] The engine driving this tort action to oblivion is the same engine that revolutionized the tort of defamation—the fear that the press will be timid and censor itself in reporting the news of the day.[154] Although the Court was able to reduce the fear and reality of self-censorship in defamation by creating a fault standard geared to the defendant's awareness of the falsity of the statement,[155] there exists no such middle ground in privacy. Unlike defamation where the publication must be false to be actionable,[156] truth itself is actionable in a privacy disclosure tort.[157]

The Court sent several signals that it may be time to sing a requiem for this heavyweight of torts.[158] First, the Court explicitly held whether a story is of public significance is determined by its general subject matter, not by any considerations of whether the plaintiff's identity is of public interest.[159] Because the article of B.J.F.'s assault pertained to the commission and investigation of a violent crime which had been reported to authorities, it was "of paramount public

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151. *Id.* at 541.

152. *Id.* at 537.

153. *See id.*

154. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974) (stating that a publisher may be held liable in damages for a defamatory error, which is judicially deemed "unrelated to an issue of public or general interest," even if the publisher took all reasonable precautions in order to ensure the accuracy of its statements); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) ("A rule compelling the critic of official conduct to guaranty the truth of all his factual assertions . . . leads to a comparable 'self-censorship.'").

155. *See* Gertz v. Robert Welch, Inc., 418 U.S. at 343 (holding states are free to define the standard of liability for defamatory falsehoods injurious to private individuals as long as liability is not imposed without fault); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (extending the New York Times rule requiring actual malice to public figures); N.Y. Times Co. v. Sullivan, 376 U.S. at 279-80 (holding the First Amendment requires public figures and officials to prove the defendant published a defamatory statement with knowledge of its falsity or with reckless disregard for whether it was true or false).

156. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777-78 (1986) (holding plaintiff must prove the falsity of defamatory statements subject to First Amendment scrutiny); KEETON ET AL., *supra* note 41, § 113, at 804 (noting that at common law, falsity was presumed).

157. RESTATEMENT (SECOND) OF TORTS § 652D special note (1977).

158. Zimmerman, *supra* note 6, at 291.

159. Fla. Star v. B.J.F., 491 U.S. at 536-37.

import."[160] The Court made no attempt to justify whether the newspaper's identification of B.J.F. contributed to the public significance of the story.[161]

Second, the Court insulated the media from liability for privacy invasions when it lawfully obtains the information from the government.[162] The sins of the government in disclosing the identity of B.J.F. in a report placed in a public newsroom cannot be constitutionally foisted on the press when it discloses her identity.[163] Once the government places highly sensitive information in the public domain, even if such dissemination violates the law, the press may publish this information with impunity.[164] Otherwise, self-censorship would result.[165]

Third, the Court felt application of this statute in a civil setting was unconstitutionally broad.[166] The statute's categorical prohibition against the disclosure of a victim's identity did not take into account, in the Court's view, such case-by-case potentialities that the victim's name may already be known throughout the community, or that it may already be a matter of public concern through victim fabrication or otherwise.[167] That these potentialities were not present in B.J.F.'s case made no difference to the Court.[168]

Another clear example of the Court's antipathy to the privacy disclosure tort is its dictum that scienter or fault is a constitutionally compelled element of proof.[169] Analogizing to defamation, the Court labeled as perverse the fact that true speech gets less protection under the Florida statute than does defamatory speech which at a constitutional minimum, requires a showing of negligence.[170] Of course, the Court failed to note the obvious distinction between the two torts; in defamation, a defendant's fault pertains to the objectively verifiable standard of falsity, whereas in privacy disclosure actions, falsity is irrelevant.[171]

Finally, the Court believed the Florida statute was facially underinclusive.[172] It only sanctioned disclosures that appear in instruments of mass communication.[173] The Court held the First Amendment requires an

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160. *Id.*
161. *Id.*
162. *Id.* at 536, 538.
163. *Id.*
164. *Id.*
165. *Id.* at 538-39.
166. *Id.* at 539.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. KEETON ET AL., *supra* note 91, §§ 111, 117, at 773, 856.
172. Fla. Star v. B.J.F., 491 U.S. at 540.
173. *Id.*

evenhanded application in regulation of true speech.[174] The small-time disseminator engaged in backyard gossip as well as the media giant equally bear the impact of a state's attempt to protect privacy interests.[175] This is because a disclosure of a victim's identity to a small circle of people—friends and acquaintances—may have consequences as devastating as an exposure of the victim's name to the public at large.[176] If a state wants to enact legislation to further an interest of the highest order through means of prohibiting some speech, it must be totally inclusive.[177] Because Florida's statute singled out the media, it failed to completely accomplish its stated purpose of safeguarding the identity of sexual assault victims.[178]

Justice White dissented.[179] He questioned the constitutional wisdom of insulating the press from liability because the government mistakenly releases sensitive and protected information.[180] Although he did not discount the Court's historical concern with media self-censorship, Justice White clearly rejected its relevance to the facts of this case.[181] *The Florida Star*, after all, knew about the statute.[182] The crime incident report that contained B.J.F.'s name was posted in a room that contained signs making it clear that the names of rape victims were not matters of public record and were not to be published.[183] *The Florida Star* reporter admitted she understood that she was not legally allowed to take down B.J.F.'s name and that she was not supposed to take the information from the

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174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 541.
178. *See id.* at 540-41; *see also supra* note 133. The Florida Supreme Court declared the statute facially unconstitutional in 1994, relying almost entirely on the Court's decision in *Florida Star*. State v. Global Communications Corp., 648 So. 2d 110, 112-14 (Fla. 1994). This prompted the Florida legislature to pass a new Crime Victim's Protection Act in 1995. Crime Victims Protection Act, ch. 95-207, §3, 1995 Fla. Sess. Law Serv. (West) (codified at FLA. STAT. ANN. § 92.56 (West Supp. 1999)). The statute provides that court records containing the name of a rape victim are confidential and exempt from public disclosure if the identity of the victim is not already known in the community and is not otherwise the subject of legitimate public concern, the victim has not voluntarily called public attention to the offense, and the disclosure of the victim's identity would be offensive to a reasonable person, cause emotional harm to the victim, make the victim unwilling to testify, or is otherwise inappropriate. FLA. STAT. ANN. § 92.56.
179. Fla. Star v. B.J.F., 491 U.S. at 542 (White, J., dissenting).
180. *Id.* at 546-47 (White, J., dissenting).
181. *See id.* at 547 (White, J., dissenting) (stating that the facts of *Florida Star* are a "far cry" from the facts of previous cases).
182. *See id.* at 546 (White, J., dissenting) (noting that the reporter knew the limits of what she could report).
183. *Id.* (White, J., dissenting).

police department.[184] Under these circumstances, Justice White opined, *The Florida Star* could not have concluded the government considered the disclosure of B.J.F.'s name lawful.[185] Moreover, the newspaper's internal policy prohibited disclosure.[186] The newspaper should have recognized the inadvertence of the disclosure and, as a matter of simple decency, refrained from publishing B.J.F.'s name.[187]

The majority's failure to acknowledge the Florida legislature's decision that disclosure of a rape victim's identity is categorically indecent and offensive also met with disapproval by Justice White.[188] In his view, the majority's concern that a victim's identity may already be known, or that she may have made it known pertains, not to whether the publicity is offensive, but to damages.[189] In any event, none of these mitigating factors were present to justify the reversal of B.J.F.'s verdict.[190] In addition, the majority's criticism of the statute's lack of a scienter requirement, to the extent it had any merit, was rendered moot by the jury's finding that *The Florida Star* acted with reckless indifference toward the rights of others.[191] Finally, Justice White believed the underinclusiveness of the Florida statute is not unconstitutional because another source of Florida law—the common law public disclosure tort—exacts the same monetary penalty from non-media defendants for private and offensive speech as the statute does from media defendants.[192]

Characterizing rape as the ultimate violation of self, short of homicide, Justice White would hold the media accountable for giving publicity to B.J.F.'s tragedy.[193] His prediction that the tort has been obliterated by the Court's

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184. *Id.* (White, J., dissenting).
185. *Id.* (White, J., dissenting).
186. *Id.* at 527-28.
187. *Id.* at 547 (White, J., dissenting).
188. *Id.* at 552-53 (White, J., dissenting).
189. *See id.* at 548-49 (White, J., dissenting) (stating that the Court's concerns "miss the mark").
190. *Id.* at 549 (White, J., dissenting).
191. *Id.* at 548 (White, J., dissenting).
192. *Id.* at 549-50 (White, J., dissenting).
193. *Id.* at 542, 547 (White, J., dissenting). Justice White believed it was ironic that the Court would deny relief to B.J.F. when three months earlier, it had exempted from disclosure under the Freedom of Information Act, a private citizen's "rap sheet." *Id.* at 552 (White, J., dissenting) (citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989)). The Court had just held that the privacy interest in the compilation of criminal data on a private citizen categorically outweighed any public interest in the disclosure of the data. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. at 780. The case is distinguishable from *Florida Star* as it involves the media's right to access certain information. *Id.* at 749. It does not involve the same variables that enter into the mix of constitutionally formulating

decision has not come to pass, however.[194] By examining the progeny of *Florida Star*, one can see there is some life to the tort. A more complete redemption may even be possible if it is recognized that there are some situations in which private facts are revealed where timidity and self-censorship are but a figment of the media's constitutional imagination.

IV. *FLORIDA STAR*: A CRITICAL ANALYSIS

The message of *Florida Star* is clear and unambiguous: timidity and fear of self-censorship by the press in reporting the news of the day is to be avoided at nearly all costs.[195] To implement this bedrock principle, the Supreme Court deviated from traditional content-based tests of news and chartered a new course based on how news is obtained.[196] The impact of this deviation on the public disclosure tort is equally clear. The tort is dead, at least when the private information can be said to exist in the public domain.[197] The media can now publish this information with no fear of sanctions, no matter how harmful, humiliating, or devastating the disclosure may be.[198] It is constitutionally irrelevant that private information is publicized in a manner which is highly offensive to a reasonable person or that the substance of the information has no redeeming social value.[199] True information derived from the public domain cannot be sanctioned; it reigns supreme at the top of the constitutional hierarchy.[200]

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a tort remedy for damages against the media for the public disclosure of truthful information already in its possession. *Cf.* Fla. Star v. B.J.F., 491 U.S. at 533.

194. *See id.* at 550 (White, J., dissenting) (stating that the obliteration of the tort is inevitable under this decision).

195. *See id.* at 541 (stating that punishment seldom will be imposed when a newspaper publishes truthful news).

196. *See id.* at 538 (discussing three independent reasons why imposing liability on *The Florida Star* was too precipitous, including the manner in which the information was obtained).

197. *See, e.g., id.* (holding the publisher of information to which the government gives public access should not be liable for damages, as the imposition of liability in such a case would not "be a narrowly tailored means of safeguarding anonymity").

198. *See id.* at 541 (holding the publication of truthful, lawfully obtained information may lead to liability "only when narrowly tailored to a state interest of the highest order"). The Court was careful to limit its holding. *Id.* at 532, 541 (reiterating that the holding does not provide automatic constitutional protection for truthful publications and that states may never protect individuals from "intrusion by the press" or punish the press for its publications).

199. *See id.* at 536-37 (determining liability depends on whether the truthful information was lawfully obtained and whether imposing liability furthers a state interest of the highest order).

200. *See* Edelman, *supra* note 28, at 1207 (stating "the media will always prevail" if the standard for determining liability remains lawful acquisition).

Contrary to the Court's proclamation that it is relying on a limited principle that "sweep[s] no more broadly" than of the case demands,[201] *Florida Star* amounts to judicial overkill.[202] Invoking the specter of strict liability for a tort which admittedly exacts a penalty for the publication of true speech,[203] the Court ignored nearly a century of privacy tort jurisprudence.[204] In its place, the Court immunized the gathering of news by the media unless the plaintiff could prove that the public disclosure tort action is the least intrusive way to protect the state's interest in privacy.[205] This does not represent the application of a limited principle, but manifests an approach that achieves, at least in part, the draconian goal advanced by *The Florida Star* before the Court: evisceration of the public disclosure tort.[206] The decision by the Court in *Florida Star* is neither appropriate nor mandated by the First Amendment.[207]

A. *Fault and Offensiveness*

Before addressing the constitutional wisdom of the Court's holding, it is important to understand why the Court charted such a revolutionary course. Why didn't the Court simply adopt a fault standard or require that offensiveness be adjudicated on a case-by-case basis? The Court hinted at both approaches as a means by which at least two of the constitutional infirmities with the statute could be corrected.[208] Yet, the Court did not see either option as playing a role in balancing the competing interests of privacy and free speech?[209]

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201. Fla. Star v. B.J.F., 491 U.S. at 533.

202. *See id.* at 550-51 (White, J., dissenting) (stating the Court's decision will "obliterate . . . the tort of the publication of private facts," leaving doubt whether any privacy concerns will avoid publication or broadcasting).

203. *See id.* at 539 ("[U]nder the *per se* theory of negligence adopted by the courts below, liability follows automatically from publication.").

204. *See,* discussion *supra* Part II.

205. *See* Fla. Star v. B.J.F., 491 U.S. at 541 ("We hold 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 . . . .").

206. *See id.* at 532 (refusing to hold broadly that truthful publication may never be punished consistent with the First Amendment).

207. *See id.* at 553 (White, J., dissenting) (stating that the Court "hit the bottom of the slippery slope" and there should be a way to protect the victim when there is no public interest in the information).

208. *See id.* at 538-40 (noting the imposition of damages could not be called narrowly tailored and discussing how individualized adjudication is indispensable when the state seeks to regulate the publication of information).

209. *See id.* at 541 (limiting the holding to allow punishment only when lawfully obtained information is narrowly tailored to "a state interest of the highest order").

Fault, of course, is the cornerstone of the Court's defamation jurisprudence.[210] Beginning with the landmark decision of *New York Times Co. v. Sullivan*[211] in 1964 and then *Gertz v. Robert Welch, Inc.*[212] ten years later, the Court has consistently maintained that the First Amendment requires public plaintiffs and private citizens involved in an issue of public concern to prove a defendant is at fault in failing to recognize the falsity of a defamatory charge before recovery is permitted.[213] Specifically, public officials, candidates for public office, and public figures must prove that a defendant knew or recklessly disregarded the falsity of a publication.[214] Private figures who are defamed within the context of a discussion of issues of public concern must prove, at a constitutional minimum, that a defendant does not have reasonable grounds for believing that the defamatory statement is true.[215] Absent the requisite proof of fault, false speech in these instances is constitutionally protected.[216] Some error and falsity has to be tolerated, the Court reasoned, in order to provide adequate "breathing space" for speakers and publishers on issues of public concern.[217] The lack of a fault standard under the Florida privacy statute met with disapproval by the Court in *Florida Star*.[218] In a remarkable piece of dictum, the Court declared that the absence of a fault requirement "engender[s] the perverse result that truthful publications" are less constitutionally protected than even the least protected of the defamatory falsehoods—those involving private figures.[219] Under no circumstances, the Court intimates, can true speech in a public disclosure case receive less constitutional protection than false speech in a defamation action involving private figures and public issues.[220] Why then did the Court not dispose of *Florida Star*'s appeal by adopting a fault standard for

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210. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (granting a new trial because the jury was allowed to impose liability without fault); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (requiring actual malice).

211. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

212. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

213. Gertz v. Robert Welch, Inc., 418 U.S. at 347; N.Y. Times Co. v. Sullivan, 376 U.S. at 279-80.

214. *See, e.g.*, Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-72 (1971) (holding candidates and public officials should be treated alike); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (holding public figures must demonstrate actual malice—N.Y. Times standard); N.Y. Times Co. v. Sullivan, 376 U.S. at 279-80 (requiring public officials to prove actual malice).

215. Gertz v. Robert Welch, Inc., 418 U.S. at 347.

216. N.Y. Times Co. v. Sullivan, 376 U.S. at 271.

217. *Id.* at 271-72.

218. *See* Fla. Star v. B.J.F., 491 U.S. 524, 526 (1989) (remarking that the elements of the Florida statute did not include a fault requirement).

219. *Id.* at 539.

220. *Id.*

public disclosure actions thereby putting true speech on equal or similar footing as false and defamatory speech? The short answer is that the Court never had any intention of employing a fault standard. The constitutional fault standard in defamation was created to relieve a defendant from the harsh rules of the common law when, if a defendant was unable to establish the truth of the alleged defamatory statement and privileges were otherwise inapplicable, liability resulted.[221] Prior to *New York Times*, a defendant's awareness of the falsity of the statement was irrelevant to what a plaintiff needed prove initially.[222] The fault standards of *New York Times* and *Gertz* alleviated this strict liability rule.[223] By focusing on the blameworthiness of a defendant's conduct with respect to the falsity of a defamatory charge and by requiring the plaintiff to prove it, "the Court utilized traditional tort principles that assessed liability on foreseeable risks."[224] Under this constitutional fault regime, a "defendant [could] avoid liability for defamatory falsehoods with adequate preparation and investigation."[225] Fault served as a unifying principle to promote certainty of expectation and predictability of result while at the same time reducing media timidity and fear of self-censorship.[226]

A fault standard cannot alleviate any harsh consequences of the public disclosure tort because offensiveness, not truth, is the gravamen of the tort.[227] The defendant knows the publicity is true; measuring conduct or attitude toward the same is a meaningless exercise. Offensiveness of the communicative act which amounts to a morbid and sensational prying into the private life of another for its own sake is the predicate for the imposition of liability. This standard envisages a defendant's intentional misconduct as unconscionable behavior.[228] It simply is not the type of conduct that can be evaluated and ultimately judged in terms of reasonableness or unreasonableness. Either it is justified or it is wrongful. Application of a fault concept to this standard would be tantamount to

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221. *See* DAN B. DOBBS, THE LAW OF TORTS § 417, at 1169 (1st ed. 2000) (stating the Supreme Court, in *New York Times*, recognized the First Amendment "imposed limits on the common law strict liability for defamation").

222. *See id.* ("The common law rules did not require a defamation plaintiff to prove fault, falsity, or actual damages.").

223. *Id.* at 1169-70.

224. Woito & McNulty, *supra* note 6, at 213.

225. *Id.*

226. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343, 347-48 (1974) (holding this approach provides a fairer result between the competing interests involved).

227. Woito & McNulty, *supra* note 6, at 212.

228. *See* Zimmerman, *supra* note 6, at 358 (defining unconscionable behavior as behavior that is so unwarranted that it offends society's notion of decency).

employing a "negligent outrageousness" test, a dissonant juxtaposition if ever there was one.

Moreover, the offensiveness standard does not provide an objective standard like falsity. Instead of scrutinizing a defendant's conduct based on an objectively verifiable standard—falsity, a factfinder in a disclosure action must evaluate the propriety of a defendant's conduct based on an interpretation of community mores.[229] In the final analysis, whether a defendant engages in "a morbid and sensational prying into [a] private [life] for its own sake" is a value judgment.[230] Common notions of decency provide the guidance for that judgment.[231] Neither additional investigation nor preparation will assist a defendant in anticipating whether a judge or jury will find if publicity was so unwarranted as to outrage the community's notions of decency.[232] Notwithstanding its finding that the Florida statute was constitutionally suspect due to lack of a fault standard, the Court implicitly understood that a fault standard based on offensiveness could not serve as a unifying principle to resolve the competing interests of free speech and privacy.[233]

Nor did the Court want anything to do with promulgating a constitutional rule concerning offensiveness.[234] This, of course, is precisely what the authors of the *Restatement (Second) of Torts* chose to do when they adopted the morbid and sensational prying decency limitation.[235] The offensiveness element of the tort most directly intersects with the newsworthiness concept and creates the constitutional friction inherent in the tort. The opportunity to resolve this constitutional conundrum on the basis of a decency limitation was certainly present in *Florida Star*; the Court had before it a plaintiff who experienced an "ultimate violation of self" and had done nothing to waive the private nature of her sexual assault.[236] It had before it a defendant-newspaper that not only violated a state statute but also disregarded its own internal policy against

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229. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977) (stating that factfinders must consider community customs and conventions).

230. *Id.*

231. *See id.* (indicating the line is drawn by what "a reasonable member of the public with decent standards" would think).

232. *See* Ingber, *supra* note 6, at 849-50 (noting a publisher can only guess how a judge or jury would apply the reasonable person standard because privacy is an ideological concept which does not lend itself to empirical testing).

233. Fla. Star v. B.J.F., 491 U.S. 524, 539 (1989).

234. *See id.* (limiting its holding to the Florida statute and refusing to articulate an appropriate fault standard that complies with the narrowly tailored requirement).

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

236. Fla. Star v. B.J.F., 491 U.S. at 542 (White, J., dissenting) (citation omitted).

disclosure.[237] In view of the highly significant interest the state had in protecting her privacy, what possible interest could the public have in B.J.F.'s identity?[238] The Court sidestepped this question by finding jurisprudential solace in the fact Florida courts interpreted the statute improperly as mandating an automatic finding of liability irrespective of the circumstances surrounding publication.[239] According to the Court, this per se theory of liability did not require case-by-case findings of offensiveness such that liability could be established even if the victim's identity already had been publicly disclosed.[240] This concern did not pertain to B.J.F.'s situation nor her suit against the newspaper. She did not, by any stretch of the imagination, voluntarily thrust herself before the public view. She did not, through any statement or deed, waive her right to redress. She did not fabricate her story. A reasonable person could find, as the jury did in assessing punitive damages, that the disclosure was highly offensive and that *The Florida Star* acted recklessly.[241] The Court's emphasis on the Florida legislature's lack of precision in not anticipating all the circumstances inherent in publicizing private facts is unnecessary to the constitutional disposition of facts presented for resolution.[242] Why could not the Court, like its common law brethren, simply have noted in dictum that if a rape victim's identity is already publicly known at the time of media disclosure, that such a disclosure is not actionable under the statute?[243] If the Court were truly serious about the necessity of case-by-case adjudication of the offensiveness element, why did it not discuss, review, and evaluate the adjudicative facts before it, rather than postulating hypothetical situations solely to void the statute?[244]

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237. *Id.* at 528.

238. *See id.* at 537 (raising, but not resolving, the question of the newspaper's interest in imparting the details of a violent crime investigation with the interest of the state in protecting the privacy and personal safety of victims of sexual offenses to encourage them to report the offenses).

239. *See id.* at 539 (noting the per se standard would lead to perverse results when the identity of the victim is already known in the community or the victim voluntarily disclosed the crime).

240. *Id.*

241. *Id.*

242. *See id.* at 539. The mere possibility of mitigating factors weighing against the Florida statute "do[es] not justify the Court's ruling against B.J.F. in this case" because the mitigating factors did not present themselves here. *Id.* at 548-49 (White, J., dissenting).

243. *See supra* text accompanying notes 80-83 (recognizing that a rule precluding liability for publishing publicly known information would foster predictability, enhance the press' breathing space, and avoid self-censorship).

244. *See* Fla. Star v. B.J.F., 491 U.S. at 524, 539 (hypothesizing that imposing civil liabilities would violate the First Amendment if the appellant had simply reproduced the news release of the police department).

The answer seems clear: just as the Court never intended fault to be used as a unifying principle to resolve the privacy versus free speech conflict,[245] it also never intended to employ the subjective standard of offensiveness as the constitutional cornerstone of the tort.[246] It is wishful thinking to suggest that but for the trial court's failure to permit particularized factfinding on the offensiveness element, the Court would have affirmed B.J.F.'s judgment. It is wishful because the Court apparently wanted to lay down a principle which would resolve once and for all the problems, perceived or real, of media timidity and self-censorship. The Court's solution of course, does not encompass any of the means or methods the common law utilized during the one hundred year life of the tort. Precedent restricting private and intimate facts and arguably offensive disclosures were ignored.[247] Tests promulgated to enhance the breadth of the newsworthiness privilege were not mentioned in the decision.[248] One can only conclude that the Court did not believe any of these prior attempts at striking an appropriate balance between privacy and free speech satisfied the First Amendment objectives of enhancement of breathing space and deterrence of self-censorship.

In fact, the Court manifested a complete dissatisfaction with conventional public disclosure tort doctrines by adopting a test that emphasizes how information is obtained as opposed to what is disclosed.[249] The apparent justification for such a drastic change in approach is the constitutional impracticability of formulating a content-based principle which can distinguish between protected and unprotected true speech. The Court must have thought it necessary, to employ a broader, more objectively verifiable test so that the defendant is on fair notice of what publicity of private facts is and is not permissible. How a speaker or publisher obtains private information is now the polestar of the public disclosure tort and no doubt will influence how a putative defendant approaches the decision to publish private, highly offensive information. Timidity and self-censorship are reduced, if not eliminated, because the speaker or publisher need not worry about being second-guessed on the content of the publicity, or the appropriateness of the communicative act.

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245. *See supra* text accompanying notes 205-228 (noting the court's intent was to relieve defendants of the harsh rules of the common law).

246. *See* Fla. Star v. B.J.F., 491 U.S. at 536-37 (inquiring only into "whether the newspaper lawfully obtained truthful information about a matter of public significance," and "whether imposing liability . . . serves a need to further a state interest of the highest order").

247. *See* discussion *supra* Part II.B.

248. *See* discussion *supra* Part II.C.

249. *See* Fla. Star v. B.J.F., 491 U.S. at 536. "Applied to the instant case, the *Daily Mail* principle clearly commands reversal. The first inquiry is whether the newspaper 'lawfully obgain[ed] truthful information about a matter of public significance.'" *Id.*

The lawful gathering of news now serves as the unifying principle between privacy and free speech in the public disclosure tort.[250] For the reasons expressed below, the public disclosure tort has been essentially "unified" out of existence, at least in those instances where information is obtained from the public domain. Such a step was neither wise nor constitutionally compelled.

B. *The Lawfully Obtained Test: A Constitutional Palliative*

Florida Star is subject to criticism on essentially three grounds: (1) the decision is not mandated by existing precedent; (2) the "lawfully obtained" test ignores any considerations or interests of privacy; and (3) the state action or strict scrutiny regime of liability is constitutionally meaningless. The First Amendment rights of the media could have been adequately protected by more conventional and traditional doctrines.

The Court in *Florida Star* adopted verbatim the test articulated in *Smith v. Daily Mail Publishing Co.*[251] This test declared unconstitutional a West Virginia statute that prohibits newspapers from publishing the name of any child charged as a juvenile offender without written approval of the juvenile court.[252] In *Daily Mail*, two newspapers were criminally indicted for publishing the name of a minor charged in a juvenile proceeding.[253] The juvenile had allegedly shot a fellow student to death at a local junior high school.[254] The newspapers obtained the name of the alleged juvenile assailant from witnesses, the police, and a local prosecutor.[255] In ruling on whether the newspapers could be subject to criminal penalties for publishing the juvenile's name, the Court held "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."[256] As the state could not satisfy this burden, the statute did not pass constitutional muster.[257] By specifically noting that an issue of privacy was not present, the Court appeared to

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250. *See* Scott, *supra* note 6, at 693 (noting the Court first articulated the "lawfully obtained doctrine," balancing "private information against the freedom of the press" by applying a three part test in *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979)).

251. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979); *see* Fla. Star v. B.J.F., 491 U.S. at 533.

252. Smith v. Daily Mail Publ'g Co., 443 U.S. at 98-99, 105.

253. *Id.* at 99-100.

254. *Id.* at 99.

255. *Id.*

256. *Id.* at 103.

257. *Id.* at 104-05.

limit this test's application to the criminal or regulatory context.[258] That did not turn out to be the case as *Florida Star* demonstrates.

In addition to the public interest in the dissemination of truth, the Court in *Florida Star* offered three reasons why the public disclosure tort action is subject to scrutiny under the *Daily Mail* test.[259] First, the government retains the means of restricting access to private information.[260] It can, for example, classify information and establish and enforce procedures for redacted release.[261] If these procedures are violated by government officials, the government can extend a damages remedy against itself to those aggrieved.[262] Such an action would be a less drastic means of punishing the dissemination of truthful information than a damages action against the media.[263] Second, the media justifiably can assume that if the government places information in the public domain, it has concluded that the public interest would be served by further dissemination. Otherwise, why make such information available?[264] Conversely, the interest of privacy is not served by punishing the media for disseminating information that already has been made public. Again, the remedy lies against the government official who authorizes the release of the information.[265] Finally, the media may be timid and censor itself if it cannot rely on the unqualified release of information by the government and its implied representation that further dissemination is lawful.[266] Just as the media need not sift through public records to weed out arguably offensive material,[267] it likewise need not undertake the onerous task of editing government releases and pronouncements to prune out material that may be otherwise actionable.[268]

These three considerations misconstrue the intent and purpose of the *Daily Mail* principle. It was never intended to provide talismanic cover for the media to take advantage of mistakes by a government functionary.[269] Rather, the intent

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258. *See id.* at 105 (stating "no issue . . . of privacy" arose , a statute was unconstitutional because it failed to meet the "asserted state interest").

259. Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989).

260. *Id.* at 534.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 535.

265. *Id.*

266. *See id.* at 535-36 (discussing the fear that punishment might cause media self-suppression to become excessive).

267. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) (noting the Court's reluctance to restrict media access to public records containing offensive material because such a restriction would make it difficult for the media to stay within the law).

268. Fla. Star v. B.J.F., 491 U.S. at 536.

269. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 105 (1979).

was quite explicit and limited: to curb the power of a state to punish criminally the truthful and mass publication of an alleged juvenile delinquent's identity lawfully obtained through conventional news gathering techniques.[270] The lawfully obtained aspect of the *Daily Mail* test must be viewed accordingly.[271] The real constitutional significance of *Daily Mail* is its expansion of media protection from liability for publishing information obtained from private sources.[272] In two prior cases, *Oklahoma Publishing Co. v. Oklahoma County District Court*[273] and *Cox Broadcasting Corp. v. Cohn*,[274] the Court held once government officials provide public access to truthful information they cannot constitutionally restrain its further dissemination.[275] In *Daily Mail*, the Court made it clear that the media's constitutional right to publish true information free from criminal culpability does not depend upon where it obtains the information.[276] Lawfully obtaining the identity of an assailant from witnesses and publicizing that information should be protected as much as if the information were obtained or made accessible by a government official.[277] In the words of the Court, "a free press cannot be made to rely solely upon the sufferance of government to supply it with information."[278] Seldom, the Court declared in *Daily Mail*, would a state be able to satisfy strict scrutiny under these circumstances and hold the media criminally responsible.[279] It is curiously ironic that the Court in *Florida Star* offers as a rationale for applying the *Daily Mail* principle to privacy one based upon a notion of detrimental reliance on governmental sources.[280] One looks in vain to find any mention in *Daily Mail* of how, if at all, the lawfully obtained test promotes or relates to governmental power to forestall or mitigate injury, to media reliance on the governmental

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270. *Id.*
271. *Id.*
272. *See id.* at 104-05.
273. Okla. Publ'g Co. v. Okla. County Dist. Court, 430 U.S. 308 (1977).
274. Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).
275. *See* Okla. Publ'g Co. v. Okla. County Dist. Ct., 430 U.S. at 310-12 (finding when the judge, prosecution, and defense counsel are aware the press is present at a hearing in which the juvenile defendant is present, the press has lawfully obtained identification information); Cox Broad. Corp. v. Cohn, 420 U.S. at 496 (making clear the press may not be prohibited from "truthfully publishing information released to the public in official court records").
276. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. at 103 (1979).
277. *See id.* at 103-04 (ruling the state may not punish publication of lawfully obtained information while noting Daily Mail Publishing Co. "relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant").
278. *Id.* at 104.
279. *See id.* at 102 ("Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards.").
280. Fla. Star v. B.J.F., 491 U.S. 524, 538-39 (1989).

release of sensitive information, or to the possible effects of self-censorship should that reliance not be honored. In short, the rationale the Court attributes to *Daily Mail* for application of its principle to privacy is revisionistic and misplaced.

Equally ironic and just as erroneous is the fact that the Court applied the lawfully—obtained test to the public disclosure tort action with no discussion or consideration of the interests of privacy. Surely, the caveat expressed by the Court in *Daily Mail*—it was not presented with an issue of privacy—would have mandated an exacting and discerning analysis of just why the lawfully obtained test was the proper constitutional vehicle to weigh the competing interests of privacy and free speech.[281] None was forthcoming, notwithstanding the obvious differences between a state's invocation of its criminal laws to protect society and an individual's right to civilly protect the "essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[282] The Court took no account of the devastation suffered by B.J.F. as a result of the publication of her identity while her assailant was still at large. Fellow workers and acquaintances told her about the article; her mother received threats from a man who said he would rape B.J.F. again.[283] As a result, B.J.F. changed her phone number and residence, sought police protection, and obtained mental health counseling.[284] The Court ignored these facts, and instead viewed her entitlement to self-dignity, worth, and sense of personal autonomy as something that could be eviscerated by the error of a low-level public employee.[285] This was true even though the state of Florida clearly had articulated a policy of privacy protection to which *The Florida Star* subscribed.[286] In view of its own policy, the newspaper could not justifiably claim that it interpreted the policeman's mistaken disclosure of B.J.F.'s identity as an affirmative authorization by the state to publish her name to the public at large. The only explanation for the result reached by the Court is that speech occupies a preordained place in the pantheon of the constitutional hierarchy.[287] Privacy, in contrast, is a "right" that can be waived or lost by the government on behalf of a

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281. Smith v. Daily Mail Publ'g Co., 443 U.S. at 105.

282. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

283. Fla. Star v. B.J.F., 491 U.S. at 528.

284. *Id.*

285. *See id.* at 538.

286. *See id.* (noting that the newspaper had an internal policy of prohibiting the publication of the names of sexual offense victims).

287. *See* Edelman, *supra* note 28, at 1204 (interpreting *Florida Star* as "elevating the speech interest without acknowledging countervailing privacy interests").

victim.[288] On the constitutional playing field, privacy simply cannot compete with speech.

The lawfully obtained test avoids a head-on collision between free speech and privacy by creating a detour for privacy which comes to an abrupt end if the media gathers news lawfully.[289] Such an approach is constitutionally unsatisfactory.[290] For example, does "lawfully" photographing a woman's skirt being blown over her head by air jets at a county fair and witnessed only by a few, justify the widespread dissemination of that picture in a newspaper?[291] Conversely, how does improperly acquired, newsworthy, and truthful information make the substance of that information any less newsworthy or the truth of the information any less valuable?[292] Why not declare that the truth can never be the subject of a civil penalty? Why not state forthrightly that a substantive bright-line test that distinguishes between information of legitimate public concern and information constituting a morbid and sensational prying for its own sake cannot be fashioned? That is, in effect, what the Court held for information erroneously placed in the public domain by the government.[293] The lawfully obtained standard is but a constitutional facade constructed by the Court to immunize speech from liability thereby avoiding a direct confrontation between true speech and privacy.[294] No balancing is required as true speech always triumphs.[295] In the words of one critic, the Justices comprising the majority in *Florida Star* are speech absolutists clothed in balancers' garments.[296] Ultimately, the Court transformed the lawfully obtained principle from a shield which avoids criminal culpability, to a sword which condones and legitimizes the

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288. *See* Fla. Star v. B.J.F., 491 U.S. at 536 (stating that "the fact that the department failed to fulfill its obligation" does not "make the newspaper's ensuing receipt of this information unlawful").

289. Edelmen, *supra* note 28, at 1204.

290. *Id.*

291. *See* Daily Times Democrat v. Graham, 162 So. 2d 474, 478 (Ala. 1964) ("[W]here the status the [plaintiff] expects to occupy is changed without his volition to a status embarrassing to an ordinary person of reasonable sensitivity, then he should not be deemed to have forfeited his right to be protected from an . . . intrusion of his right to privacy merely because misfortune overtakes him in a public place.").

292. Edelman, *supra* note 28, at 1206.

293. *See* Fla. Star v. B.J.F., 491 U.S. at 540-41 (refusing to adopt a bright-line test for information mistakenly placed in the public domain by the government and limiting its holding to the statute in question).

294. *See* Edelman, *supra* note 28, at 1206 ("[L]awfulness of acquisition is an inept measure of the competing interests of speech and privacy in the private-fact disclosure context.").

295. *Id.* at 1207.

296. *Id.* at 1223.

publication of all private information obtained from the government either lawfully, by error or mistake, or by any means short of breaking and entering.[297]

By using the lawfully obtained test to slay the dreaded dual nemeses of press timidity and fear of self-censorship, the Court set the stage for the obliteration of the public disclosure tort. This was further manifested by the Court's requirement that a plaintiff establish that the privacy tort action must be narrowly tailored to the achievement of a state interest of the highest order.[298] A plaintiff has little or no chance of satisfying this standard. This form of strict scrutiny is constitutional hermeneutics at its worst. The Court assumed that the *Daily Mail* test, heretofore reserved for scrutiny of a criminal statute or the legitimacy of direct governmental action, could be applied intelligibly to a scheme of common law tort liability.[299] This assumption is incorrect. Unlike a criminal statute, agency regulation, or specific governmental action that is fixed and ascertainable, tort liability is inchoate and fluid.[300] The content and scope of a state's tort liability regime must be discovered in the holdings, dicta, and implications of judicial decisions.[301] These decisions are by no means complete or clear due in part to the fact that tort law is, by its nature, constantly expanding or contracting as conditions of society change and as the perceptions of judges change.[302] Although *Florida Star* was about a statute, not a series of judicial decisions or the common law, the Court still managed to disagree on what regime of Florida privacy liability was at issue.[303] The majority limited its analysis to the statute[304] while the dissent argued that if a state action analysis were to be employed, it should be applied to the entirety of Florida privacy liability—both statutory and common law.[305] This fundamental disagreement on just what constitutes Florida law, illustrates how easily the lawfully obtained test can be manipulated to achieve a desired result. And that result, in most if not all cases, will be the invalidation of the state regime because of the heavy presumption of unconstitutionality the *Daily Mail* principle carries.[306] Any ambiguity,

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297. *See id.* at 1204 (finding that a media defendant can publish any private information that is not discovered by breaking and entering or by violating a criminal statute under *Florida Star*).
298. Fla. Star v. B.J.F., 491 U.S. at 541.
299. *See id.* at 536 (applying the *Daily Mail* principle).
300. Anderson, *supra* note 24, at 94.
301. *Id.*
302. *Id.*
303. Fla. Star v. B.J.F., 491 U.S. at 541, 550.
304. *Id.* at 541.
305. *Id.* at 549-50 (White, J., dissenting).
306. Anderson, *supra* note 24, at 95-96.

incompleteness, or lack of clarity with a state's liability framework eliminates any possibility of constitutional survival for the state rule of law.[307]

Because the test adopted by the Court in *Florida Star* focuses on how the state plan of liability measures up against First Amendment interests, it necessarily discounts the underlying merits of the controversy between the litigants. It forces the individual plaintiff to assume the role of a private attorney general and defend the state's interest in how it chooses to balance speech and privacy.[308] It restrains the plaintiff from arguing privacy interests, how they were invaded, why the defendant was wrong to publicize sensitive information, why the act of giving publicity was offensive, and why damages are warranted. If strict scrutiny were to be applied to the facts of B.J.F.'s case and not to the state scheme of liability, the result would have been different.[309] B.J.F.'s privacy interests were evident: her identity was not widely known before publication. Her identity was made public while her assailant was still at large. She was threatened with rape again. And she sought mental health counseling as a result of the emotional distress she suffered from the publication of her name.[310] Moreover, *The Florida Star*, as a matter of adjudicative fact, could not invoke the specter of self-censorship since its own internal policy was identical to the statutory prohibition of publication.[311] A finding of liability would only induce the newspaper to strictly enforce its policy.[312]

Even assuming the validity of the state action or strict scrutiny test, the Court's analysis of why the Florida statute is not narrowly tailored to the interest of privacy is circular, essentially irrefutable, and constitutionally meaningless. The major reason why the imposition of liability against *The Florida Star* was too precipitous a means of advancing the state interest of privacy, according to the Court, is because the newspaper lawfully obtained B.J.F.'s name.[313] The lawful manner of obtaining news is also the reason why strict scrutiny applies even in the first instance.[314] In essence, the Court has placed the lawfully obtained test on both sides of the strict scrutiny test, the invocation side and the resolution side. In stating why strict scrutiny should be invoked, the Court reasoned, "Where information is entrusted to the government, a less drastic

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307. *Id.* at 95.
308. *Id.* at 94.
309. *Id.* at 93.
310. Fla. Star v. B.J.F., 491 U.S. at 528.
311. Anderson, *supra* note 24, at 93.
312. *Id.*
313. Fla. Star v. B.J.F., 491 U.S. at 537-38.
314. *Id.* at 538-39.

means than punishing truthful publication almost always exists for guarding against the dissemination of private facts."[315]

In holding B.J.F. could not prove the statute was narrowly tailored to further a state interest of the highest order, the Court stated, "Where, as here, the government has failed to police itself in disseminating information, it is clear . . . that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity."[316] Because *The Florida Star* lawfully obtained her name, the court determined B.J.F. must satisfy a strict scrutiny test, a test she will never be able to satisfy because the newspaper lawfully obtained her name.[317] Obviously, a plaintiff in B.J.F.'s position can never escape the circularity of the analysis and thus is doomed to defeat.

Even for a plaintiff who could cut through this Gordian knot of lawfully obtained information, defeat would still be inevitable. This is because the Court indicated a plaintiff must also prove some measure of scienter for the tort action to be narrowly tailored to the achievement of the state interest of privacy.[318] But scienter, or fault, has no place in the public disclosure tort.[319] Yet, the Court states that it would be perverse if there were not such a requirement.[320] Thus, the narrowly tailored requirement of the *Daily Mail* principle, like the lawfully obtained aspect, is wholly inappropriate to gauge the constitutionality of the liability features of invasion of privacy. The individual plaintiff is captured in a vicious circle with no realistic chance of escaping in order to prove the elements of the test. The declaration by the Court in *Daily Mail* that state action to punish the publication of truth seldom can satisfy constitutional standards certainly remains true after *Florida Star*.[321]

V. THE FUTURE OF THE PUBLIC DISCLOSURE TORT

Florida Star seems to sound the death knell for the public disclosure tort. It is surprising and unfortunate that the Court refused even to discuss the traditional means by which courts attempted to balance the interests of speech and privacy. The constitutional foundation on which the holding of *Florida Star* is constructed—media reliance on lawfully obtained information—cannot

315. *Id.* at 534.
316. *Id.* at 538.
317. *Id.* at 541.
318. *See id.* at 539 (stating the lack of a scienter requirement leads to "perverse results:" truthful publications receive less protection from the First Amendment).
319. *See supra* accompanying text notes 163-79.
320. Fla. Star v. B.J.F., 491 U.S. at 539.
321. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979).

intelligently support the suppression of privacy interests in all contexts. These contexts include situations when the media obtains information from private or nongovernmental sources and when the disclosure is made to a small or limited audience. In the latter situation, the disclosure will almost always be made by a non-media defendant. The public disclosure tort can and should be allowed to exist and develop in these other contexts consistent with its one—hundred year judicial heritage. Before discussing these other contexts and the rules appurtenant to them, it is first necessary to establish that *Florida Star* does indeed apply to a limited set of circumstances.

A. *The Limitations of* Florida Star

The lawfully obtained test of *Florida Star* applies only to those private facts placed in the public domain by government officials.[322] The three-part rationale offered by the Court to justify expansion of the *Daily Mail* principle is predicated solely on the fact that the government furnishes information to the media.[323] As the Court made clear, the media requires protection for publishing private information it lawfully receives from government officials in order to enhance its breathing space and to avoid the scourge of self-censorship.[324] In the Court's view, the unqualified disclosure of private facts by a government official sends an unambiguous message to the media that the government not only considers the disclosure lawful, but also knows that further dissemination by the media will occur.[325] To deprive constitutional protection "to those who rely on the government's implied representations of the lawfulness of dissemination," would force the media to weed out arguably offensive material which in turn causes an intolerable state of self-suppression.[326]

Admittedly, there is a certain symmetry to the Court's reasoning in *Florida Star*.[327] The government cannot allow, through means of a public disclosure tort action, a plaintiff to recover damages against a media defendant if that defendant lawfully obtains the private information from the government in the first place.[328] Whatever private information the government places into the public stream of commerce cannot be used consistent with the First Amendment as the basis for a government-sanctioned tort action to punish those who publish that private

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322. *See* Fla. Star v. B.J.F., 491 U.S. at 541 (limiting its holding to truthful publication of lawfully obtained information when a government official provided the published information).
323. *See id.* at 533-37.
324. *Id.* at 535-36.
325. *Id.* at 538-39.
326. *Id.* at 535-36.
327. *See id.* at 533-34.
328. *Id.*

information.[329] In other words, once the private facts are out of the government's bag, the government is constitutionally powerless to provide recourse against those to whom it originally gave the information.[330]

The Court in *Florida Star* made no pretense of attempting to justify the application of the *Daily Mail* principle to situations other than those in which the government initially discloses the information, nor could it. A private citizen makes no representation, implied or otherwise, about the lawfulness of disclosing information to the media or about the public significance of the information. A media defendant would be hard—pressed to explain how the Damoclean sword of self-censorship would cut off its means of supplying information to the public if sensitive information obtained from private sources were not insulated from liability. For example, *The New York Times* (*Times*) could not legitimately argue that private citizen John Doe's release of sexually titillating information about another private citizen led it to believe that Mr. Doe considered the release lawful, the information publicly significant, thereby rendering further publicity appropriate. For the *Times* to argue that it relied on Mr. Doe's stamp of approval to justify further dissemination which, if not given credence by the courts, would lead it into a downward spiral of timidity and self-censorship would be laughable. In short, where the media's source of information is private, there is no justification, constitutional or otherwise, to apply the governmental imprimatur and detrimental reliance scheme of *Florida Star*.

B. *Private Sources*

A dozen years of privacy tort jurisprudence since *Florida Star* have confirmed the decision's limited impact. At least three courts—the Seventh Circuit,[331] the Eighth Circuit,[332] and a plurality of the California Supreme Court[333]—have explicitly held the lawfully obtained test of *Florida Star* applies only to those actionable private facts obtained from government officials or public sources. Many other courts have simply ignored the *Florida Star* decision regarding the dissemination of private, sensitive facts obtained from private

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329. *Id.*

330. *Id.*

331. *See* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993) (stating that publishing facts from a police report should not be equated with publishing a private photo of a couple making love).

332. *See* Coplin v. Fairfield Pub. Access Television Comm., 111 F.3d 1395, 1404 (8th Cir. 1997) (agreeing with *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d at 1232).

333. *See* Shulman v. Group W Prods., Inc., 955 P.2d 469, 480-81 (Cal. 1998) (plurality opinion) (limiting *Florida Star* to cases when the government provided the lawfully obtained information that was published).

sources.[334] And in a case decided in the 2000-2001 term, the United States Supreme Court did not apply the least restrictive means aspect of the strict scrutiny test to a statutory privacy disclosure case.[335] *Bartnicki v. Vopper*[336] involved the media disclosure of the contents of cellular phone conversations between union officials about the status of their collective bargaining negotiations with a public school district.[337] The media lawfully obtained a tape of the conversations although the conversations were originally intercepted and recorded unlawfully by another.[338] At one point in the conversations, one of the union officials said: "If [management representatives of the school district are] not gonna move for three percent, we're gonna have to go to their, their homes. . . . To blow off their front porches, we'll have to do some work on some of these guys."[339] Two radio stations played the tape, and local newspapers published the contents.[340] Bartnicki and his union cohort sued media representatives for damages and attorneys' fees under federal[341] and state[342] statutes that prohibit the intentional disclosure of contents of an electronic communication, including the

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334. *See* Cinel v. Connick, 15 F.3d 1338, 1345-46 (5th Cir. 1994) (failing to discuss *Florida Star* in determining if appellant's right to privacy was invaded); Michaels v. Internet Entm't Group, Inc., 5 F. Supp. 2d 823, 840-42 (C.D. Cal. 1998) (neglecting to mention *Florida Star* in determining if plaintiffs, though public sex symbols, had a right of privacy in videotape of them engaged in sexual relations); Reeves v. Fox Television Network, 983 F. Supp. 703, 709 (N.D. Ohio 1997) (ignoring *Florida Star* in finding that plaintiff had no right of privacy in videotape of police taking him away in handcuffs); Foretich v. Lifetime Cable, 777 F. Supp. 47, 49-50 (D.D.C. 1991) (determining without mention of *Florida Star* whether defendants violated plaintiffs right to privacy by broadcasting footage of plaintiff depicting alleged sexual abuse on dolls); Winstead v. Sweeney, 517 N.W.2d 874, 876-80 (Mich. Ct. App. 1994) (failing to apply *Florida Star* in determining if newspaper had invaded the privacy rights of the plaintiff by publishing private facts about her revealed to newspaper by her ex-husband); Doe v. Berkeley Publishers, 496 S.E.2d 636, 636-37 (S.C. 1998) (using non-*Florida Star* tests to determine if petitioner had invaded respondent's privacy by reporting that he was sexually assaulted while incarcerated); Anonsen v. Donahue, 857 S.W.2d 700, 703-06 (Tex. App. 1993) (failing to use *Florida Star* to determine if defendant had invaded plaintiff's privacy by airing a television show in which plaintiff's grandmother discussed how plaintiff was the result of an incestual relationship).

335. *See* Bartnicki v. Vopper, 121 S. Ct. 1753, 1762 (2001) (stating the Court will determine whether the interests of the state justify restrictions on speech).

336. Bartnicki v. Vopper, 121 S. Ct. 1753 (2001).

337. *Id.* at 1756-57.

338. *Id.* at 1760.

339. *Id.* at 1757.

340. *Id.*

341. *See* 18 U.S.C. § 2511(1)(c) (1994 & Supp. 1999) (providing civil and criminal recourse for intentional disclosure of the contents of an intercepted electronic communication).

342. *See* 18 PA. CONS. STAT. § 5725(a)(1)-(3) (2000) (providing civil remedies for direct or indirect interception, disclosure, use, or procuring the assistance of another person, of wire, electronic, or oral communications).

conversations at issue, that a person knows or has reason to know were illegally intercepted.[343] Recognizing that individual privacy is a constitutional interest of the highest order and mindful that the media lawfully obtained the taped recording, the Court, nevertheless, eschewed any analysis concerning whether the statutes were narrowly tailored to the vindication of the privacy interest.[344] Instead, the Court simply inquired into whether the public interest in the collective bargaining negotiations, another interest of the highest order, outweighed the privacy interest of the plaintiffs, concluding that it did.[345] This balancing approach, without the lawfully obtained or strict scrutiny baggage, is exactly what courts have used since accepting the scholarly thesis of Justices Warren and Brandeis.[346] The Court in *Bartnicki* invoked one of the established common law balancing criterion—voluntary participation in public affairs—in rejecting the privacy claim.[347] Whatever new constitutional ground was broken in *Florida Star* certainly does not appear to have any impact on how media disclosures of intimate, private information obtained from private sources are analyzed.[348]

Unless the Court was being coy in *Florida Star* in declining to declare the public disclosure tort totally defunct,[349] there exists a constitutional need to balance the competing demands of free speech and privacy when the source of the actionable information is private. Then and now, the common law has found a way to balance these competing interests. Endorsed in large part by the *Restatement (Second) of Torts*,[350] these common law principles, properly understood, do not unconstitutionally deter the media from publishing the news

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343. Bartnicki v. Vopper, 121 S. Ct. at 1757 & nn.2-3.

344. *Id.* at 1764-65.

345. *Id.*

346. *See supra* text accompanying notes 6-16. The Court in *Bartnicki* quoted Justices Warren and Brandeis for the proposition that the right to privacy does not extend to matters of public concern. Bartnicki v. Vopper, 121 S. Ct. at 1765.

347. Bartnicki v. Vopper, 121 S. Ct. at 1765.

348. Although there are obvious differences on how the privacy interests of the statutory tort in *Bartnicki* and the common law disclosure tort are triggered, the differences are constitutionally irrelevant. *Bartnicki* makes clear, at least when the source of the underlying publicity is nongovernmental, that the newsworthiness of the disclosure and nothing else will ultimately determine which of the two constitutional heavyweights—free speech or privacy—will prevail. *See id.* at 1765. As the Court stated, "[P]rivacy concerns give way when balanced against the interest in publishing matters of public importance." *Id.*

349. *See* Haynes v. Alfred A. Knopf, Inc., 8 F.3d at 1232 ("We do not think the Court was being coy in . . . *Florida Star* in declining to declare the tort of publicizing intensely personal facts defunct.").

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

of the day.[351] When combined with a rule that would require independent judicial review of constitutional facts found adverse to the media defendant, there is no reason why the *Restatement* formulation of the tort should not govern media disclosures of private information obtained from nongovernmental sources.

Courts have traditionally circumscribed the reach of the public disclosure tort by narrowly interpreting the scope of actionable private facts. This operates on two levels: (1) the location or source of the facts before disclosure, and (2) the subject matter of the activity.[352] With respect to the former, the disclosure of facts already in the public domain cannot give rise to liability, even if the facts are private by nature.[353] As discussed in Part I, facts found in public records or activities that occur in public are not actionable.[354] Concerning subject matter, protection has been traditionally accorded only to those intimate facts or activities which people tend to keep to themselves or, at most, reveal only to family or close personal friends.[355] Depictions of physical maladies and wounds, nudity and various states of undress, and sexual matters all have been found to be within a protected zone of privacy.[356] The *Restatement (Second) of Torts* likewise defined the scope of actionable privacy invasions on a narrow basis listing sexual relations, family quarrels, unpleasant and disgraceful illnesses and medical conditions, intimate personal letters, and details of one's home life as deserving of protection from widespread disclosure.[357] Judicial decisions issued

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351. *See id.* § 652D cmt. g ("Included within the scope of legitimate public concern are matters of the kind customarily regarded as 'news.'").

352. Mintz, *supra* note 4, at 439-40.

353. *Id.* at 440.

354. *See supra* text accompanying notes 60-83.

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

356. Gallon v. Hustler Magazine, Inc., 732 F. Supp. 322, 325 (N.D.N.Y. 1990) (nude photo); Daily Times Democrat v. Graham, 162 So. 2d 474, 476-77 (Ala. 1964) (rear photo of dress being blown up by burst of air); Lambert v. Dow Chem. Co., 215 So. 2d 673, 675 (La. Ct. App. 1968) (photo of wounded thigh); Commonwealth v. Wiseman, 249 N.E.2d 610, 615 (Mass. 1969) (photos "of mentally incompetent patients in the nude"); Barber v. Time, Inc., 159 S.W.2d 291, 295 (Mo. 1942) (photo with accompanying captions of "'Insatiable-Eater Barber' and 'She eats for ten'"); *In re* Lori M., 496 N.Y.S.2d 940, 942 (Fam. Ct. 1985) (sexual orientation).

357. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b; RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 128 (1992). According to Professor Smolla, the type of information that should be regarded as quintessentially intimate includes matters related to an individual's:

1. mental and emotional condition, including grief;
2. physical health;
3. love and sexual relationships, including sexual orientation;
4. decisions concerning procreation, including a decision to have an abortion;
5. family relationships;

since *Florida Star* further confirm the limited scope of actionable facts. A jury question has been held to exist on revelations of private facts pertaining to HIV positive status, sexual relations of public figures, sexual abuse of a minor, rape, abortion and unique love relationships, in vitro fertilization, domestic abuse, plastic surgery and resulting facial scarring, and a grieving mother's death bed conversation with her son.[358] These examples of actionable private facts are by no means exhaustive nor by no means a satisfactory approach, standing alone, of resolving the free speech versus privacy dilemma.[359] Nevertheless, the courts and *Restatement*, by limiting the actionability of private facts or activities only to the most intimate, effectively have put the media on notice of which disclosures may result in liability.[360]

This is not to say, however, that courts should treat the private intimate lives of public figures the same as private figures. As a matter of community mores, the zone of privacy for public figures is more limited than those who have not voluntarily sought the public spotlight.[361] In fact, current community mores dictate that there is very little privacy left for public figures.[362] The public craves and receives titillating gossip on even the most transient of celebrities. Tabloids and television talk shows compete vigorously to satisfy that craving by printing and broadcasting the most private facts, often in an offensive and revolting manner. The disclosure of the most intimate details of President William Jefferson Clinton's sexual relationship with Monica Lewinsky is the culmination of an ever-growing and, more importantly, accepted journalistic practice of

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6. victimization, including whether the individual has been a victim of violent or sexual assault;

7. intense and close-knit associational memberships and affiliations;

8. deep personal beliefs, such as religious convictions; and

9. personal financial matters.

Id.

358. Bloch v. Ribar, 156 F.3d 673, 685-86 (6th Cir. 1998) (rape); Michaels v. Internet Entm't Group, Inc., 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998) (sexual relations of public figures); Baugh v. CBS, Inc., 828 F. Supp. 745, 755 (N.D. Cal. 1993) (domestic abuse); Foretich v. Lifetime Cable, 777 F. Supp. 47, 50 (D.D.C. 1991) (sexual abuse of a minor); Doe v. Univision Television Group, Inc., 717 So. 2d 63, 65 (Fla. Dist. Ct. App. 1998) (plastic surgery); Green v. Chi. Tribune Co., 675 N.E.2d 249, 256 (Ill. App. Ct. 1996) (facial scarring); Winstead v. Sweeney, 517 N.W.2d 874, 876-78 (Mich. Ct. App. 1994) (abortion and unique love relationships); Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d 488, 501 (Mo. Ct. App. 1990) (in vitro fertilization); Hillman v. Columbia County, 474 N.W.2d 913, 920 (Wis. Ct. App. 1991) (HIV positive status).

359. Mintz, *supra* note 4, at 439-41.

360. *See* Emerson, *supra* note 6, at 343-44 (discussing important factors in formulating legal doctrine in privacy tort law).

361. SMOLLA, *supra* note 357, at 135.

362. *Id.*

reporting on the private lives of public figures.[363] Private citizens who find themselves thrust before the public eye are, however, another matter.[364] They have not assumed the risk of reduced privacy as public figures have as part of their bargain for fame and influence.[365] These citizens deserve society's preservation of core privacy values, values any decent society should maintain to further the interests of human dignity and autonomy.[366]

By limiting recovery to disclosures of only the most intimate kinds of facts and activities, courts have lessened, but not eliminated, media timidity and fear of self-censorship.[367] The element of offensiveness and, more importantly, the issue of what constitutes legitimate public concern are still the main battlegrounds on which the claim of media deterrence must be judicially fought.[368] The press has largely won this battle over the years as the tort action has evolved.[369] Generally, courts have considered whatever the mass media has published to be newsworthy.[370] This has been prompted by the difficulty courts have had in articulating concrete standards of newsworthiness and by their reluctance to substitute their own judgment for that of the media in determining what constitutes the news of the day.[371] As a result, plaintiffs in actions against newspapers and broadcasters have found it extremely difficult to recover.[372] In fact, the creation of a jury question has been relatively rare in the tort's one hundred years of existence; summary disposition has been the norm.[373] The decency standard of the *Restatement (Second) of Torts* is an appropriate and constitutional vehicle by which to judge the limits of legitimate public concern in the public disclosure action.[374] The *Restatement* standard, which draws upon the

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363. *See generally* CNN, *Investigating the President*, *at* http://www.cnn.com/ALLPOLITICS/1998/resources/lewinsky/ (accessed Nov. 9, 2001) (archiving various articles detailing President Clinton's sexual relationship with Monica Lewinsky).

364. SMOLLA, *supra* note 357, at 135.

365. *Id.*

366. *Id.* at 134-35.

367. *See supra* Part III (discussing fear of media timidity and self-censorship).

368. *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) (declining to implement a rule that would prohibit the publication of public records if they would be offensive to the reasonable man); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471 (Tex. 1995) (deciding tort action against newspaper by determining whether the published material in question consisted of matters of legitimate public concern).

369. Scott, *supra* note 6, at 700.

370. Zimmerman, *supra* note 6, at 353.

371. Woito & McNulty, *supra* note 6, at 196-97.

372. *Id.* at 197.

373. *See* Zimmerman, *supra* note 6, at 293 (citing Bremmer v. Journal-Tribune Publ'g Co., 76 N.W.2d 762, 769 (Iowa 1956) (Larson, C.J., dissenting)).

374. *See* Woito & McNulty, *supra* note 6, at 226-28 (arguing for a more functional approach to defining the press' First Amendment limits).

factfinder's perception of community mores, permits recovery on a showing that the publicity constitutes "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."[375]

From a First Amendment perspective, the public disclosure action is more analogous to the law of obscenity than it is to the defamation tort, its cousin in the dignitary tort realm.[376] Obscenity statutes empower states "to maintain a decent environment and society" by providing "that community standards of decency may be used in part to determine what is not constitutionally protected speech."[377] The standard for determining whether speech is obscene has been the same for over a quarter of a century:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ;
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[378]

These guidelines, adopted by the Court in *Miller v. California*,[379] put an end to the Court's procedure of summarily reversing, without opinion, any conviction relating to material that at least five justices, applying their own individual definitions of obscenity, found to be protected speech under the First Amendment.[380] The *Miller* guidelines provide a rule of reason in which only portrayal of hard-core sexual content or conduct for its own sake is subject to criminal culpability.[381]

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

376. *See* Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975) (holding a newsworthiness standard that takes into account community mores "does not offend the First Amendment").

377. Woito & McNulty, *supra* note 6, at 223.

378. Miller v. California, 413 U.S. 15, 24 (1973) (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).

379. Miller v. California, 413 U.S. 15 (1973).

380. *See* FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 40-45 (1976) (discussing the Court's approach to obscenity cases between 1957-1973).

381. *See* Miller v. California, 413 U.S. at 24 (setting forth the factors to be considered in determining whether speech is obscene).

Similarly, the morbid and sensational standard of the *Restatement* represents a constitutional rule of reason for the imposition of civil liability for invasion of privacy.[382] This standard, coupled with a narrow range of actionable private facts, conveys a sufficiently definite warning to the media as to what disclosures are improper.[383] Similar to obscenity in which arguably obscene matters are examined contextually to ascertain whether their dominant theme appeals to prurient interest, publicity in a disclosure action should also be viewed contextually to determine whether the disclosure of intimate facts is not of legitimate public concern.[384] If appropriate, such contextual factors as the timing of the publication, its purported justification, the conduct of the media, and the circumstances surrounding the acquisition of the information should be considered.[385] Under the *Restatement* standard it is difficult for plaintiffs to even generate a jury issue; only in extreme cases would a jury get to decide whether a media defendant is liable.[386] "Just as the *constitutional* protection accorded literary, artistic, scientific, and political speech should not differ from community to community, neither should the public's right to know depend on the sensibilities of particular communities."[387] Community notions of decency can be used only if the "high degree of offensiveness exemplified by the 'morbid and sensational' prying test" is manifested.[388]

Cases decided in the decade since *Florida Star* demonstrate that a decency limitation, properly applied, does not foster media timidity, self-censorship, or the fear thereof.[389] These cases can be roughly grouped into four categories, each highlighting a particular contextual factor: (1) media misconduct; (2) breach of pledge of nondisclosure; (3) failure to safeguard a known and recognized

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382. RESTATEMENT (SECOND) OF TORTS § 652D.

383. *See* Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975), *remanded to* 424 F. Supp. 1286 (S.D. Cal. 1976) (finding the "morbid and sensational" standard to be within the First Amendment and as providing enough discretion to the press for exercising editorial judgment); Diaz v. Oakland Tribune Co., 188 Cal. Rptr. 762, 771-72 (Ct. App. 1983) (analyzing a tort claim of improper public exposure using a three-part test limiting facts deemed newsworthy).

384. *See* Woito & McNulty, *supra* note 6, at 228; *see also* Huskey v. Nat'l Broad. Co., 632 F. Supp. 1282, 1289 (N.D. Ill. 1986) (noting the public disclosure tort is as much concerned with the context of information as with the information itself).

385. *See* Post, *supra* note 6, at 979-84.

386. *See, e.g.*, Virgil v. Time, Inc., 527 F.2d at 1129 (holding there was a jury question when the defendant published embarrassing private facts about the plaintiff after she withdrew consent).

387. Woito & McNulty, *supra* note 6, at 229.

388. *Id.*

389. *See* cases cited *infra* notes 390-92.

intimate fact; and (4) gratuitous identification of plaintiff or irrelevant disclosure of private facts.[390]

In *Green v. Chicago Tribune Co.*,[391] and *Baugh v. CBS, Inc.*,[392] members of the media allegedly misrepresented facts to the plaintiffs or otherwise engaged in wrongful conduct in pursuit of a story.[393] In *Green*, staffers from *The Chicago Tribune* photographed the bullet-ridden body of the plaintiff's son while he lay in a private hospital room awaiting the coroner.[394] Not only were the staffers in the room without permission, but they also prevented the mother from entering the room while they were photographing the corpse.[395] When the mother was finally allowed to enter the room, the *Tribune* employees listened to her grief-stricken goodbyes to her son and published them even though she had already refused the request of a *Tribune* reporter to make a statement about her son's death.[396]

In *Baugh*, a CBS film crew entered the plaintiff's home with a domestic abuse intervention team from the local district attorney's office.[397] Plaintiff-wife, just beaten by her husband, inquired about the camera.[398] One of the crew members responded that they were doing a segment on the victim-witness intervention program.[399] He said nothing about filming for CBS *Street Stories* or that the footage would be used commercially.[400] In fact, in response to the plaintiff's statement that she had no objection to the filming as long as she was not going to be on television, the crewmember responded, "Okay."[401]

In both of these cases, the media engaged in surreptitious and pretextual conduct presumably because they knew the plaintiffs would not consent to the public disclosure and pictorial representations of their private and intimate

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390. *See, e.g.* Baugh v. CBS, Inc., 828 F. Supp. 745, 751 (N.D. Cal. 1993) (media misconduct); Sipple v. Chronicle Publ'g Co., 201 Cal. Rptr. 665, 666 (Ct. App. 1984) (irrelevant disclosure of private facts); Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d 488, 492 (Mo. Ct. App. 1990) (breach of pledge of nondisclosure); Guinn v. Church of Christ, 775 P.2d 766, 769 (Okla. 1989) (failure to safeguard a known and recognized intimate fact).

391. Green v. Chi. Tribune Co., 675 N.E.2d 249 (Ill. Ct. App. 1996).

392. Baugh v. CBS, Inc., 828 F. Supp. 745 (N.D. Cal. 1993).

393. *See id.* at 751-52 (claiming defendant's camera crew misled the plaintiff as to why they were filming her in her home); Green v. Chi. Tribune Co., 675 N.E.2d at 251 (considering a suit against newspaper for photographing the plaintiff's dying son without permission).

394. Green v. Chi. Tribune Co., 675 N.E.2d at 251.

395. *Id.*

396. *Id.*

397. Baugh v. CBS, Inc., 828 F. Supp. at 750-51.

398. *Id.* at 751.

399. *Id.*

400. *Id.*

401. *Id.* at 752.

lives.[402] Courts in each case found a factual issue was generated on liability.[403] The potential imposition of liability in these cases hardly raises the specter of media timidity or fear of self-censorship. The publicized events occurred in settings traditionally accorded as much privacy protection as any—a home and a private hospital room,[404] where third parties generally have no right to be without consent.[405] The defendants in each case entered or stayed in these private domains under improper circumstances, then proceeded to photograph and publicize matters which any reasonable person would want to keep from the world—a mother's last words with her murdered minor son and an assault victim's first contact with law enforcement after calling 911.[406]

These two cases clearly illustrate a morbid and sensational prying into private lives for its own sake. Although both of these defendants can argue the issue of newsworthiness at trial, they cannot legitimately argue that a finding of liability would deter them from reporting the news of the day. Such an argument fails under *Florida Star*, even if it were applicable, because the avoidance of self-censorship in publicizing private and intimate facts is a valid First Amendment interest only if the media acts lawfully in obtaining news.[407] The shield of lawful newsgathering that the press can raise to conquer the demons of self-censorship and thereby immunize itself against the imposition of liability fails if they unlawfully gather that information.[408] In other words, the media cannot hide behind *Florida Star* if they obtain news improperly.[409] Accordingly, if the media

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402. *See supra* text accompanying notes 394-401.

403. Green v. Chi. Tribune Co., 675 N.E.2d 249, 256 (Ill. App. Ct. 1996); Baugh v. CBS, Inc., 828 F. Supp. at 755.

404. Green v. Chi. Tribune Co., 675 N.E.2d at 251; Baugh v. CBS, Inc., 828 F. Supp. at 750-51.

405. *See* Wilson v. Layne, 526 U.S. 603, 612-14 (1999) (holding media "ride-alongs" do not override the right of residential privacy at the core of the Fourth Amendment).

406. Green v. Chi. Tribune Co., 675 N.E.2d at 251; Baugh v. CBS, Inc., 828 F. Supp. at 750-51.

407. *See* Fla. Star v. B.J.F., 491 U.S. 524, 535, 541 (1989) ("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 . . . .").

408. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979) (holding the publisher of lawfully obtained truthful information about a matter of public significance cannot constitutionally be punished). *But see* Shulman v. Group W. Prod., Inc., 955 P.2d 469, 497 (Cal. 1998) (plurality opinion) ("[T]he state may not intrude into the proper sphere of the news media to dictate what they should publish and broadcast, but neither may the media play tyrant to the people by unlawfully spying on them in the name of newsgathering.").

409. *See* Shulman v. Group W. Prod., Inc., 955 P.2d at 481 (plurality opinion) (noting *Florida Star*'s limited holding neither enunciated a general test of newsworthiness that could be applied to other facts nor provided a theoretical basis for a general constitutional standard) (citing Woito & McNulty, *supra* note 6, at 199-202).

unlawfully obtains private and sensitive information from any source which, but for the media's improper acquisition and publication would have remained in the private domain, any potential liability should be analyzed under the *Restatement*.[410] If the lawfulness of the acquisition from a government source is disputed, then the jury should be given, as a threshold matter, a special interrogatory to resolve the factual dispute. If it finds the acquisition lawful, the jury will apply the *Florida Star* test. If it finds the media unlawfully obtained the material, the jury should be instructed according to the *Restatement* elements.[411]

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410. Newsgathering, in and of itself, may give rise to privacy tort liability if it amounts to an intrusion into private matters or conversations in a manner that is highly offensive to a reasonable person. *See* Shulman v. Group W. Prod., Inc., 955 P.2d at 494-96 (plurality opinion) (discussing an intrusion claim brought by injured victims of an automobile accident against television producers who, with the cooperation of air medics, recorded the victims' extraction from the car, conversations with medical personnel during the extraction, and care administered during the extraction and transport to the hospital).

In addition, unlawful or improper newsgathering may give rise to other tort liability for nonpublication damages. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 521-22 (4th Cir. 1999) (stating that the press was also liable for breach of duty of loyalty and trespass); Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 128-29 (1st Cir. 2000) (stating that plaintiff could recover for loss of customers resulting from improper newsgathering). In *Food Lion*, two ABC reporters submitted job applications to two Food Lion retail stores in an effort to discover and document unsanitary meat handling practices. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d at 510. The applications contained false identities, references, and local addresses. *Id.* Both reporters were hired, and in a week or two, recorded forty-five hours of concealed camera footage documenting their fellow employees' unsanitary handling of beef, fish, and poultry. *Id.* at 510-11. The Fourth Circuit Court of Appeals affirmed a judgment for nominal damages on theories of trespass and breach of duty of loyalty. *Id.* at 522.

The court in *Food Lion* and the plurality in *Shulman* rejected the media defendants' contention that state tort liability interferes with their ability to gather news and is unconstitutional. *Id.* at 521-22; Shulman v. Group W. Prod., Inc., 955 P.2d at 496-97 (plurality opinion). Rejecting this argument, the courts relied on *Cohen v. Cowles Media Co.*, which allowed a confidential source to sue newspaper publishers for promissory estoppel after they revealed his identity. Cohen v. Cowles Media Co., 501 U.S. 663, 672 (1991). Because promissory estoppel applies to all citizens and does not target the press, it does not offend the First Amendment simply because its enforcement has incidental effects on the press' ability to gather and report news. *Id.* at 669-70.

411. Such a procedure is envisioned by *Times-Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556 (Ct. App. 1988). There, the plaintiff had discovered the dead nude body of her roommate upon her return to their apartment late one summer evening. *Id.* at 558. Upon this discovery, the plaintiff was confronted by a man in the room. *Id.* She fled the apartment and found a police officer to whom she reported the crime and described the man. *Id.* The police withheld her identity from the public for her protection and to further their investigation. *Id.* Nevertheless, her name appeared in next morning's *Los Angeles Times*. *Id.* Plaintiff sued for invasion of privacy. *Id.* The *Los Angeles Times* and its reporter argued, inter alia, that plaintiff could not constitutionally state a claim because the reporter lawfully had obtained the plaintiff's name from the coroner's office. *Id.* at 562. This was denied by the coroner's office. *Id.* Because a fact question existed on this issue,

If certainty of expectation and predictability of result are benchmarks by which public disclosure tort liability is measured, the media should now be on notice that the unlawful acquisition of private information from either public or private sources may result in civil liability under section 652D of the *Restatement (Second) of Torts*.[412]

Unlawful acquisition is not, however, the only contextual factor to which plaintiffs can look to hold media defendants accountable for disclosing private facts obtained from private sources.[413] A jury question on the lack of newsworthiness also exists, courts have held, when the media violates a pledge of nondisclosure.[414] But for these pledges, the individuals involved would never have consented to be interviewed or to cooperate with the publication of a story or profile.[415] Because the disclosures pertained to intimate and private matters—in vitro fertilization and depictions of facial surgery—courts held a viable claim was stated.[416]

Unsuccessful attempts at disguising the identity of subjects who are not aware of the story until publication may also result in liability where intimate

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summary judgment was denied the *Los Angeles Times* and its reporter; the case was remanded for trial. *Id.* at 565.

Another noteworthy feature of *Times-Mirror* was the court's rejection of the newspaper's argument that the plaintiff had not proven her privacy tort action furthered a state interest of the highest order. *Id.* at 563. The court held the interest of the state to protect witnesses and conduct criminal investigations, particularly when the criminal is still at large, was sufficient to overcome the *Los Angeles Times'* First Amendment right to publish plaintiff's name. *Id.* at 564; *see also* Capra v. Thoroughbred Racing Ass'n of N. Am., Inc., 787 F.2d 463, 465 (9th Cir. 1986) (holding disclosure of the true identity of a participant in the federal witness protection program created a fact issue under the California public disclosure tort). After *Florida Star*, however, this is of little comfort to a plaintiff like the witness in *Times-Mirror* if a jury were to accept the newspaper's evidence that it lawfully obtained her name. The circularity of the *Florida Star* lawfully—obtained standard defeats any chance of her satisfying the narrowly tailored part of the test. *See supra* text accompanying notes 239-45.

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

413. *See* Doe v. Univision Television Group, Inc., 717 So. 2d 63, 64-65 (Fla. Dist. Ct. App. 1998) (using violation of a pledge of nondisclosure as a factor for determining whether there was an invasion of privacy); Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d 488, 501-03 (Mo. Ct. App. 1990) (recognizing that limited disclosure of private actions does not constitute waiver of privacy right).

414. Doe v. Univision Television Group, Inc., 717 So. 2d at 64-65; Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d at 501.

415. Doe v. Univision Television Group, Inc., 717 So. 2d at 64; Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d at 501.

416. Doe v. Univision Television Group, Inc., 717 So. 2d at 64 (facial surgery); Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 494-95 (Ga. Ct. App. 1994) (holding inadvertent identification of plaintiff during a broadcast on AIDS was a cognizable claim); Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d at 501 (in vitro fertilization).

activities are detailed.[417] In *Winstead v. Sweeney*,[418] a newspaper ran an advertisement soliciting information on "unique love relationships" involving friends or family members of former mates.[419] Plaintiff's former husband responded to the solicitation and related details of his relationship with the plaintiff.[420] The newspaper published the ex-husband's story and included that the plaintiff underwent several abortions, engaged in partner swapping, and entered into a surrogate parenting relationship with her ex-husband and maid of honor because she was unable to bear children.[421] In the story, plaintiff was identified only by her first name, Denise.[422] There were no references to her age, address, location, or career.[423] Nevertheless, "plaintiff alleged that her husband, friends, family, and boss had not known about the events that were within the article, but upon reading the article immediately equated plaintiff with 'Denise.'"[424] Overruling the newspaper's dispositive motion, the court focused not on the general subject of the article—unique love relationships—but on specific facts about the plaintiff.[425] The court remanded the case with directions to the trial court to determine if reasonable minds could differ whether the information published about the plaintiff constituted a legitimate public interest or merely a morbid and sensational prying for its own sake.[426]

Again, the result of this case does not present a constitutional problem of media self-censorship.[427] By identifying the plaintiff only by her first name, the newspaper obviously recognized the potential for liability if a more complete identification had been made. The newspaper had to know that the specific details about plaintiff's unique love relationships were intimate and embarrassing. Why else restrict the information about her identity? The problem for the newspaper was that what little information it did disclose—the plaintiff's true first name—was more than enough for a few members of the public—the ones she cared about the most—to make the link.[428]

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417. Winstead v. Sweeney, 517 N.W.2d 874, 875 (Mich. Ct. App. 1994).
418. Winstead v. Sweeney, 517 N.W.2d 874 (Mich. Ct. App. 1994).
419. *Id.* at 875.
420. *Id.*
421. *Id.*
422. *Id*
423. *Id.*
424. *Id.*
425. *See id.* at 878 (noting "unique love relationships" is a newsworthy topic while also stating "courts that have struggled with this issue have made it a point to focus not only on the newsworthiness of the topic itself, but also upon the facts disclosed about the plaintiff").
426. *Id.*
427. *See id.* at 875 (noting the husband supplied the information in response to the newspaper's solicitation of information about unique love relationships).
428. *Id.*

The majority of public disclosure cases, however, are not so easy to resolve.[429] They do not involve media misconduct, breaches of pledges of nondisclosure, or situations where the media acknowledge the need for privacy protection.[430] Rather, they consist of allegations that the media gratuitously identified plaintiffs in an otherwise newsworthy story, photograph, or video, or that the media disclosed private facts that were irrelevant to the general purpose of the publicity.[431] In the latter situation, the plaintiff concedes the newsworthiness of the identification but contests the necessity of certain disclosures.[432] In either scenario, the allegation insists the disclosure of identifiable information about the plaintiff's private life adds nothing of substance or credibility to the publicity and is of no legitimate concern.[433] Most of these claims have been rejected as a matter of law.[434] But there have been occasions when courts have allowed juries to determine whether the media crossed the line. Older examples include a portrayal of a grotesque physical malady;[435] a film in which naked patients in a mental hospital were identifiable and in which force feedings, masturbation, and sadism were depicted;[436] a picture of a woman with her dress blown above her waist;[437] details of a woman's masculine characteristics;[438] a picture of unsightly wounds;[439] and a newspaper's

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429. Ross v. Midwest Communications, Inc., 870 F.2d 271, 274-75 (5th Cir. 1989).

430. *See, e.g., id.*

431. *Id.*

432. *See* Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 474-75 (Tex. 1995) (conceding the crime itself is of legitimate public concern but the factual details went beyond merely reporting the crime).

433. *See id.* (asserting that the public concern in some cases may only go to the general issue but not to the specific facts); Ross v. Midwest Communications, Inc., 870 F.2d at 274-75 (revealing victim's name and picture of her residence was not substantive to the documentary).

434. *See* Ross v. Midwest Communications, Inc., 870 F.2d at 274-75 (holding as a matter of law journalists should be allowed to report private information, even if victim is legitimately distressed); Gilbert v. Med. Econ. Co., 665 F.2d 305, 308-09 (10th Cir. 1981) (finding the controversial article to be privileged, therefore not subject to liability for publicly disclosing private facts); Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 299-301 (Iowa 1979) (holding the plaintiff did not negate the newsworthiness of the published information, therefore the defendant was entitled to summary judgment); Doe v. Berkeley Publishers, 496 S.E.2d 636, 637 (S.C. 1998) (holding if a person becomes an actor in an event of public interest, then publishing his connection with such event is not an invasion of privacy); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 474-75 (Tex. 1995) (finding summary judgment for newspaper was proper because it is unrealistic to require newspapers to avoid every circumstance in which a party may be subjected to unpleasant notoriety without an unwarranted effect on the media itself).

435. Barber v. Time, Inc., 159 S.W.2d 291, 295 (Mo. 1942).

436. Commonwealth v. Wiseman, 249 N.E.2d 610, 615 (Mass. 1969).

437. Daily Times Democrat v. Graham, 162 So. 2d 474, 476-77 (Ala. 1964).

438. Cason v. Baskin, 20 So. 2d 243, 245-47 (Fla. 1945).

439. Lambert v. Dow Chem. Co., 215 So. 2d 673, 675 (La. Ct. App. 1968).

identification of an individual who came upon her murdered roommate and saw the suspect at a time when the suspect was still at large.[440] Cases since *Florida Star* in which a jury issue has been generated involve a videotape of a couple engaging in sexual intercourse;[441] a videotape depiction of a seven-year-old using anatomically correct dolls to demonstrate how her father allegedly abused her;[442] the details of a victim's rape allegedly disclosed for purposes of retribution;[443] and a photographic representation of a forty-year-old statement accusing a man of homosexual activities.[444]

These types of cases strike at the core of constitutionally protected editorial decision making and discretion.[445] Utilizing community mores, juries are allowed to second-guess the appropriateness of the editorial decision to identify the plaintiff or publish certain private facts about the plaintiff in a story or picture of general newsworthy value.[446] The *Restatement* decency limitation provides sufficient warning or notice to the media in these types of cases so that timidity and fear of self-censorship do not reign supreme.

Nearly a century of judicial public disclosure decisions demonstrates that only a very narrow range of disclosures are even actionable.[447] Only the most private and sensitive facts have been held to be actionable, and any claim for protection is forfeited if a logical nexus or relevance exists between the complaining individual and the matter of legitimate public interest.[448] The logical nexus is lost when the identification of the plaintiff or disclosure of

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440. Times-Mirror Co. v. Superior Court, 244 Cal. Rptr. 556, 558 (Ct. App. 1988).

441. Michaels v. Internet Entm't Group, Inc., 5 F. Supp. 2d 823, 828 (C.D. Cal. 1998).

442. Foretich v. Lifetime Cable, 777 F. Supp. 47, 50 (D.D.C. 1991).

443. Bloch v. Ribar, 156 F.3d 673, 686 (6th Cir. 1998).

444. Uranga v. Federated Publ'ns, Inc., No. 27118, 2001 WL 693891, at *7 (Idaho June 21, 2001).

445. Nizer, *supra* note 6, at 691-92.

446. Woito & McNulty, *supra* note 6, at 198.

447. Zimmerman, *supra* note 6, at 292-93.

448. *See, e.g.*, Cinel v. Connick, 15 F.3d 1338, 1346 (5th Cir. 1994) (finding a substantial relationship between claimant's actions and matters of public concern); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1233 (7th Cir. 1993) (recognizing the necessity for reporting true facts in a historical work); Ross v. Midwest Communications, Inc., 870 F.2d 271, 274 (5th Cir. 1989) (establishing a logical nexus between a victim's name and a matter of legitimate public concern); Gilbert v. Med. Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981) (finding that publication of name and photograph strengthen the impact and credibility of a newsworthy topic); Shulman v. Group W Prod., Inc., 955 P.2d 469, 485 (Cal. 1998) (plurality opinion) (discussing the balancing of privacy interests with constitutional exercise of a free press in matters of legitimate public interest); Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580, 589-90 (D.C. 1985) (holding publication of the claimant's picture did not serve the public's interest); Peckham v. Boston Herald, Inc., 719 N.E.2d 888, 893-94 (Mass. App. Ct. 1999).

certain private facts about the plaintiff is made to fulfill the reader's or viewer's "voyeuristic thrill of penetrating the wall of privacy that surrounds" us all.[449]

Haynes v. Alfred A. Knopf, Inc.[450] serves as a convenient illustration of the concrete nature of the *Restatement* test.[451] Luther Haynes did not like what the author and publisher had to say about him in *The Promised Land: The Great Black Migration and How It Changed America*, a highly praised and best-selling book.[452] The book told the story of the migration undertaken by millions of blacks from impoverished rural areas to northern cities in the mid-twentieth century in search of a better life.[453] It chronicled the struggles of a few of these migrants, including Luther Haynes, a sharecropper from Mississippi.[454] Haynes had moved to Chicago to reconcile with his wife.[455] The effort failed but he met Ruby Daniels, a central figure in the book with whom he lived and fathered children.[456] It is with the particulars of this relationship that Haynes claims his privacy was invaded.[457] Haynes, the author reports, began to drink too much after meeting Daniels.[458] When he drank, he would get into "ferocious quarrels" with Ruby[459] On those payday Fridays he managed to make it home, Haynes would "saunter into the bedroom, a bottle in one hand and a cigarette in the other, in the mood for love."[460] On one such Friday, Ruby's last child was conceived.[461] The youngster was moody and had a speech impediment, afflictions Ruby blamed on Luther's alcohol-laden sperm.[462] Haynes eventually lost his decade-old job, began and lost several other jobs, and had an affair with a neighbor.[463] One of Ruby's sons, not Luther's, discovered the affair and tried to strangle Haynes.[464] Luther moved out; Ruby and he were soon divorced; he

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449. Haynes v. Alfred A. Knopf, Inc., 8 F.3d at 1232. Voyeuristic thrill is the pursuit of a prying observer, seeking the morbid and sensational. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2133 (2d ed. 1987). This is another way of saying there is no logical nexus between the offending disclosure and furthering the public's right to know.

450. Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993).

451. *Id.* at 1224.

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.* at 1226.

458. *Id.* at 1224.

459. *Id.*

460. *Id.* at 1224-25.

461. *Id.*

462. *Id.* at 1225.

463. *Id.*

464. *Id.*

married the neighbor and finally found steady employment as a parking lot attendant.[465] The book then took up Ruby's life without him.[466]

Haynes claimed the revelations about his drinking, unstable employment, adultery, and irresponsible and neglectful behavior toward his wife and children invaded his privacy.[467] Specifically, he argued that he should not have been identified or that the author should have used a pseudonym.[468] The Seventh Circuit disagreed and affirmed the district court's grant of summary judgment.[469] The appellate court addressed head-on the anonymity contentions of Haynes and analyzed the appropriateness of the disclosures by utilizing a decency standard.[470]

The court concluded that the disclosures were appropriate and noted the book has been praised as social history at its finest.[471] According to the court, the revelations about Haynes are intimate details not so much of his life as they are of his misconduct.[472] The author's portrayal of that misconduct fits within the thematic structure of the book, namely, "the transposition . . . of a sharecropper morality, characterized by a family structure 'matriarchal and elastic' . . . to the slums of the northern cities, and the interaction . . . of that morality with governmental programs [designed] to alleviate poverty."[473] "Reporting the true facts about real people" in the advancement of that theme "is necessary to 'obviate any impression that the problems raised in the [book] are remote or hypothetical.'"[474] If, as the court stated, the author "cannot tell the story of Ruby Daniels without waivers from every person who she thinks did her wrong," then this book could not be written.[475]

It is clear, however, that the social history that touched upon the less than glorious life of Luther Haynes is not unlimited.[476] What if the author detailed the sexual acts and conduct of Haynes and Daniels on those amorous Friday nights? What if the author laid out in excruciating detail the medical history of Haynes? Or what if intimate facts or other sexual escapades of Luther were spread out on the page? A reasonable person could conclude that such publicity was not

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465. *Id.* at 1225-26.
466. *See id.*
467. *Id.* at 1230.
468. *Id.* at 1233.
469. *Id.* at 1222, *aff'g* 1993 WL 68071, at *1 (N.D. Ill. Mar. 10, 1993).
470. *Id.* at 1232-35.
471. *Id.*
472. *Id.* at 1230.
473. *Id.* at 1232.
474. *Id.* at 1233 (quoting Gilbert v. Med. Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981)).
475. *Id.*
476. *Id.* at 1232-33.

substantially relevant or logically related to the story at hand and served only to humiliate and mortify, not to enlighten.

By way of further illustration, what if the media published a piece about how the use of illicit drugs on one college campus had changed over thirty years? As part of that story, it is disclosed that a current and prominent professor, who has not thrust himself into the public debate about drugs on campus, experimented with psychedelic drugs as a student in the 1960s. If the disclosure of this person's identity or the facts of his past drug use do not advance the credibility or authenticity of the story, why shouldn't a jury decide if there has been an invasion of privacy?

Or, assume the media, in the course of investigating allegations about the abuse of sick leave by public employees, obtains information from private sources or unlawfully obtains from public sources the fact that a particular employee is gay. The media further learns that this employee has missed a lot of work due to AIDS-like symptoms and publishes that fact. What possible justification is there for disclosing this specific information about one person to the public?[477] Finally, how about the case of *Sipple v. Chronicle Publishing Co.*[478] and the application of today's community mores? There, a newspaper "outed" Oliver Sipple in an article detailing how he foiled an assassination attempt on President Ford in San Francisco in 1975.[479] Sipple sued claiming he had been abandoned by his family who learned for the first time that he was gay from the article.[480] The court found the outing was newsworthy as a matter of law because it dispelled the notion that gays are timid, weak, and unheroic and because it raised the important political question of whether President Ford entertained a discriminatory bias toward gays by failing to express promptly his thanks to Sipple.[481] It would be ridiculous for the media to suggest today that it needs to out someone to demonstrate to the world that gays possess the same favorable human qualities as others. It would be equally incredulous for the media to justify an outing on the basis of its own speculation of the timing of presidential gratitude. All of these examples illustrate the extreme offensiveness required to satisfy the morbid and sensational prying standard of the

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477. *See, e.g.*, Diaz v. Oakland Tribune Co., 188 Cal. Rptr. 762, 772 (Ct. App. 1983) (allowing jury question on newsworthiness of the disclosure of plaintiff's status as a transsexual during her tenure as college student body president).

478. Sipple v. Chronicle Publ'g Co., 201 Cal. Rptr. 665 (Ct. App. 1984).

479. *Id.* at 666.

480. *Id.* at 667.

481. *Id.* at 670. The court also rejected Sipple's claim because the evidence showed his sexual orientation was in the public domain. *Id.* at 669.

Restatement.[482] More importantly, these examples constitute the type of disclosures a reasonable member of the media would understand to be wrongful.

It is true the *Restatement* test does not set forth a specific verbal formula.[483] The First Amendment does not require, however, exact precision of language in the formulation of tort liability standards.[484] "All that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[485] "When measured by common understandings and practices, and when combined with the skill of the media in ascertaining 'news,'" the morbid and sensational standard "conveys a sufficiently definite warning to avoid a chilling effect on the dissemination of protected speech."[486] In cases decided since *Florida Star*, in which a jury issue was found to exist in support of this proposition, could any reasonable member of the media not be on notice that releasing a video of a couple engaging in sexual intercourse might subject him to liability?[487] Or releasing a videotape of a seven-year-old disclosing how her father allegedly abused her?[488] Or disclosing play-by-play the details of a rape?[489] Granted some cases are easier to resolve than others, but difficulty of decision-making is no excuse for refusing legal remedies. Juries decide obscenity cases.[490] Juries decide defamation disputes.[491] In fact, the Supreme Court has empowered juries in defamation cases to award damages to private citizens and against the media on a strict liability basis if the defamatory statement is not of public concern.[492] So should juries, with a watchful eye provided by the court, be vested with the power to award damages in appropriate public disclosure tort cases.[493]

A question arises as to whether *Hustler Magazine, Inc. v. Falwell*,[494] decided one year before *Florida Star*, renders a tort standard based on a decency limitation unconstitutional. In *Hustler*, the Court rejected an argument that

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482. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. h. (1977).
483. *See id.* (mandating the standard draws upon the fact finder's perception of community mores).
484. Roth v. United States, 354 U.S. 476, 491 (1957).
485. Miller v. California, 413 U.S. 15, 27 n.10 (1973) (quoting Roth v. United States, 354 U.S. at 491).
486. Woito & McNulty, *supra* note 6, at 227.
487. *See* Michaels v. Internet Entm't Group, Inc., 5 F. Supp. 2d 823, 828, 842 (C.D. Cal. 1998).
488. *See* Foretich v. Lifetime Cable, 777 F. Supp. 47, 50 (D.D.C. 1991).
489. *See* Bloch v. Ribar, 156 F.3d 673, 686 (6th Cir. 1998).
490. *See* Alexander v. United States, 509 U.S. 544, 546 (1993).
491. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 752 (1985).
492. *Id.* at 761.
493. *See supra* text accompanying notes 486-89.
494. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

outrageousness could serve as a principled standard for distinguishing protected from unprotected speech.[495] Falwell, a well-known Christian fundamentalist, recovered a money judgment under the theory of intentional infliction of emotional distress for the defendant's publication of an advertisement parody depicting Falwell losing his virginity during a drunken incestuous rendezvous with his mother in an outhouse.[496] The Court held, "Outrageousness in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[497] An outrageousness standard runs afoul of the Court's "longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience."[498] Falwell's judgment was reversed.[499]

Although the *Restatement* standard similarly permits a jury's subjective view of community mores,[500] it is readily distinguishable from *Hustler*.[501] The tort of intentional infliction of emotional distress, unlike the public disclosure tort, has no built-in protections for the media: there is no analog to the judicial circumscription of the private facts element; no newsworthiness privilege; and no preliminary judicial determination of legitimate public concern.[502] Only proof of outrageousness as defined by state law is necessary for the imposition of liability.[503] Not only does the public disclosure tort action have the protections noted above,[504] the Supreme Court has recognized in another context that speech which is vulgar, offensive, and shocking may be regulated consistent with the First Amendment.[505]

To foster yet more First Amendment protection in the privacy area, independent judicial review of any factual finding adverse to the media, as in constitutional defamation cases, should be required.[506] This means that courts

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495. *Id.* at 55.
496. *Id.* at 47-49.
497. *Id.* at 55.
498. *Id.*
499. *Id.* at 57, *rev'g* Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986).
500. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) (stating that liability has been found when conduct has been outrageous as regarded an average member of the community).
501. Hustler Magazine, Inc. v. Falwell, 485 U.S. at 55.
502. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d.
503. *Id.*
504. *See id.* (discussing such protection).
505. *See* FCC v. Pacifica Found., 438 U.S. 726, 747-48 (1978) (holding content of a broadcast is not entitled to unlimited constitutional protection and, of all forms of communication, broadcasting has the most limited First Amendment protection).
506. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

need not apply traditional standards of review, and view the evidence in the light most favorable to the plaintiff or accept every legitimate inference that may be drawn in support of the verdict.[507] Instead, courts would be free to examine evidence independent of these traditional standards and draw their own conclusions about the strength of the evidence and the legitimacy of inferences.[508] Such freedom to independently review factual findings adverse to the media provides a buffer against any possible First Amendment interference by a jury.[509] The media possesses this kind of protection in obscenity and in defamation cases.[510] No reason exists why it should not also be employed in public disclosure cases.

There is indeed some vitality left to the public disclosure tort after *Florida Star*. The twin evils of media timidity and fear of self-censorship noted by the Court need not and should not swallow the tort whole where the source of the media disclosure is private in nature. The *Restatement* standard provides sufficient breathing space to the media, yet it allows citizens to pursue and enforce their privacy rights in appropriate circumstances.

A final situation in which *Florida Star* should not apply is when private facts are disclosed to a small, nonpublic audience. As discussed in the next section, this involves completely different constitutional variables and accordingly, a different constitutional approach and analysis.

C. *Limited Audience*

A speaker or writer who discloses private and offensive facts about a person to a small audience is not handicapped by the fears of self-censorship and potential civil liability that may exist if the same information were published to a large cross section of people.[511] This is because the speaker or writer knows exactly who the audience is and why he is communicating to it.[512] The speaker understands and appreciates the context in which the private information is disseminated and knows or should know whether the limited audience is

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507. *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989) (holding the reviewing court must consider the full record).

508. *Id.* at 690.

509. *See id.* at 688-89.

510. Jenkins v. Georgia, 418 U.S. 153, 160-61 (1974) (obscenity); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. at 686 (defamation).

511. *See* RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a (1977) (stating that it is not an invasion of the right of privacy to communicate private information to a limited group of people. Therefore, one could infer that in front of a limited audience, self-censorship is unnecesary).

512. *See id.*

interested or not in the publicity.[513] The defendant in these cases is not selling news or trying to market to a mass audience, satisfy the public's penchant for the offbeat and curious, or reach across the breadth and depth of society to inform, entertain, or influence.[514] Rather, such a defendant is communicating private and sensitive information to a few people or group of people because they are interested in its receipt or because they can take action on the information.[515] Because the audience is small and the purpose of the communication singular, the specter of self-censorship is not present. Thus, there is no constitutional need for an information-gathering test for limited audiences. Nor, as a practical matter, would such a test make sense. A speaker or writer addressing a small audience is not in the business of obtaining or gathering news for mass distribution in an effort to contribute to the marketplace for ideas and to make a profit. Friends, neighbors, creditors, and employers generally come by their information about the private lives of their cohorts in the ordinary and lawful course of everyday affairs. If immunity were granted to these people based on how they obtained the information, the public disclosure tort would indeed be dead. Not only can a content-based standard be used to determine whether a limited number of persons have a legitimate interest in publicity about the private life of an individual, it is eminently more practical and meaningful than a test based on information gathering. For example, if sensitive medical information is obtained from an employee's personnel file or under normal channels from the employee's physician and is then communicated by the employer to coemployees, the employer should easily recognize whether the coemployees have a legitimate interest in the receipt of the information. If they do not, the employer should be held accountable. If, on the other hand, the coemployees have such an interest, the employer should likewise recognize that he should only publicize that information which is reasonably necessary to satisfy or advance that interest.

If this sounds like the conditional privilege scheme of defamation law, it is.[516] In many respects, the conditional privileges of defamation law are equally applicable to the public disclosure tort, at least in a limited audience context. First, conditional privileges reflect a judicial policy that information should be communicated whenever reasonably necessary to protect or advance certain

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513. *Id.*

514. *See* Miller v. Motorola, Inc., 560 N.E.2d 900, 902 (Ill. App. Ct. 1990) (stating that defendant communicated sensitive medical information to a limited number of persons); Beaumont v. Brown, 257 N.W.2d 522, 522-23 (Mich. 1977) (stating that defendant communicated sensitive information in a privileged memo).

515. *Id.*

516. RESTATEMENT (SECOND) OF TORTS §§ 594-598.

legitimate interests or to facilitate the discharge of a legal or moral obligation.[517] Second, several of the same interests which conditional privileges are designed to protect in the defamation context—the interest of a third party,[518] the interest a publisher and recipient of communication share in common,[519] and, to a lesser extent, communications to those who can act in the public interest[520]—are equally applicable in evaluating the appropriateness of a disclosure alleged to be an invasion of privacy. Finally, the qualified immunity afforded conditionally privileged statements can be overcome by evidence that the defendant either published the information to an uninterested audience or published damaging and irrelevant information to an interested audience.[521] In defamation parlance, these are known as excessive publication and excessive statement respectively.[522]

There is a lot more, of course, to conditional privileges than what has been stated here. Their purpose is to mitigate the harsh effects of the strict liability features of the common law of defamation,[523] a body of law which, through the years, has been castigated in such terms as absurd and anomalous,[524] and irrational and hairsplitting.[525] The public disclosure tort has enough problems without the wholesale incorporation of legal principles from another tort action, particularly an action of which the central aim is to redress the publication of false and defamatory statements. But the application of certain conditional privileges to the public disclosure tort when there is a limited audience can give meaning and substance to the legitimate public concern element without sacrificing free speech interests. Specifically, this can be accomplished through a jury instruction that would allow a jury to determine legitimate public concern by

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517. *Id.* ch. 25, topic 3, special note, at 258.
518. *Id.* § 595.
519. *Id.* § 596.
520. *Id.* § 598.
521. *See id.* §§ 604, 605A. Section 604 states: "One who, upon an occasion giving rise to a conditional privilege for the publication of defamatory matter to a particular person or persons, knowingly publishes the matter to a person to whom its publication is not otherwise privileged, abuses the privilege." *Id.* § 604, at 292. Section 605A states: "One who upon an occasion giving rise to a conditional privilege publishes defamatory matter concerning another, abuses the privilege if he also publishes unprivileged defamatory matter." *Id.* § 605A, at 296.
522. *Id.* §§ 604, 605A. Section 605A of the *Restatement (Second) of Torts* is entitled: "Unprivileged Matter in Addition to Privileged Matter" and commonly referred to as "excessive statement. *See* Patrick J. McNulty, *The Law of Defamation: A Primer For the Iowa Practitioner*, 44 DRAKE L. REV. 639, 668 (1996).
523. DOBBS, *supra* note 221, § 413, at 1158.
524. Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 546 (1903).
525. SIR PERCY WINFIELD, WINFIELD ON TORT, § 72, at 287 (T. Ellis Lewis ed., 6th ed. 1954).

assessing the relative merits of the interests of third parties, any common interest the publisher and recipient share in common, and whether the privileges were exceeded. There would be no shifting burden of proof as in defamation;[526] the jury would merely be instructed on what specific interests are involved in a given case and under what circumstances those interests can be lost or abused.

As a practical matter, cases in which publicity is disseminated to a small or limited audience will usually involve a non-media defendant.[527] Although the Supreme Court has rejected a constitutional principle based on the status of the defendant for defamation purposes, that holding should not be controlling in the privacy context.[528] The constitutional rules of defamation, which pertain to damages and presumably to fault, apply only if the publication is of public concern.[529] The Court in *Florida Star* eschewed a content-based test for media defendants, opting instead for one based on whether the information was obtained or gathered lawfully.[530] Although the goal of the constitutionalization of defamation and privacy tort law is the same—the enhancement of breathing space and avoidance of self-censorship—the means the Court has chosen to achieve that end for these two torts are fundamentally different.[531] Because the means are different, the treatment accorded non-media defendants under

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526. *See* RESTATEMENT (SECOND) OF TORTS § 613 cmt. c (stating that when the plaintiff proves the language is defamatory on its face, the burden is on the defendant to come forward with evidence to make it doubtful that the recipient so understood it).

527. Although § 652G of the *Restatement (Second) of Torts* recognizes that conditional privileges apply to the disclosure of any matter that constitutes an invasion of privacy, they are, nevertheless, seldom invoked by the media. *See* RESTATEMENT (SECOND) OF TORTS § 652G. This is no doubt due to the traditional and ubiquitous use of the newsworthiness concept. There are rare occasions, however, in which media defendants in public disclosure actions invoke conditional privileges. *See, e.g.*, Howell v. Tribune Entm't Co., 106 F.3d 215 (7th Cir. 1997). In *Howell v. Tribune Entertainment Co.*, a sixteen-year-old pregnant girl sued the producers of a television talk show for comments her stepmother made about her moral fiber, or lack thereof, on the show. *Id.* at 219. The juvenile, her stepmother, and older stepsister were all on the show participating, before a live audience, in a roundtable discussion on the Cinderella-like relationship between stepparents and stepchildren. *See id.* at 218-19. The stepmother's comments were in response to her stepdaughter's diatribe about her own lack of moral fortitude. *Id.* The court held the stepmother's negative statements about her stepdaughter were conditionally privileged and the television producers could assert the same. *Id.* at 221. The court reasoned that a person whose character is assailed in front of millions can respond with facts bearing on the character of her assailant that might otherwise be off limits and that the producers can assert her privilege to avoid a one-sided view of the public quarrel. *Id.* at 220-21.

528. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 753, 773 (1985) (plurality opinion) (White, J., concurring).

529. *Id.* at 761 (plurality opinion).

530. *See* Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989).

531. *Compare* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (defamation), *with* Fla. Star v. B.J.F., 491 U.S. at 535-36 (invasion of privacy).

defamation law has no constitutional relevance on how such defendants should be treated under the public disclosure tort. For the reasons stated above, there is ample justification to treat non-media defendants differently than media defendants. The conditional privilege framework of defamation law provides guidance in balancing the competing concerns of privacy and freedom of speech where private offensive information is disseminated to a small audience. Since *Florida Star*, courts confronted with this issue have embraced the conditional privilege analogy in analyzing the actionability of non-media disclosures of private facts.[532]

In *Guinn v. Church of Christ*,[533] a former member of a religious congregation alleged that the elders of the congregation invaded her privacy by denouncing her as a fornicator to the congregation after she had withdrawn from the church.[534] The plaintiff acknowledged to the elders that she violated "the church's prohibition against fornication."[535] After this admission, the elders began to carry out a biblically-mandated disciplinary procedure which culminated with the elders reading aloud to the congregation the particular scripture that the plaintiff violated.[536] Before that was done, the plaintiff withdrew from the church and pleaded with the elders not to carry out the public airing of her transgressions.[537] The elders ignored her request and not only branded her as a fornicator before the congregation, which consisted of five percent of the townspeople, but also sent the information about the plaintiff's sins to four other affiliated local churches which likewise announced them during services.[538] The plaintiff sued the elders and her former church and obtained a

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532. *See* Young v. Jackson, 572 So. 2d 378, 383 (Miss. 1990) (finding under Mississippi law that when people establish a qualified privilege they are cloaked with a presumption of good faith); Greenwood v. Taft, 663 N.E.2d 1030, 1035 (Ohio Ct. App. 1995) (refusing to allow summary judgment because defendant had not shown privilege to disclose confidential information about plaintiff); Guinn v. Church of Christ, 775 P.2d 766, 784-85 (Okla. 1989) (finding conditional privilege did not extend beyond members or prospective members of the church); Zinda v. La. Pac. Corp., 440 N.W.2d 548, 556 (Wis. 1989) (following the conditional privilege doctrine and finding the employer had not abused its privilege); *see* RESTATEMENT (SECOND) OF TORTS §§ 652F, 652G (stating conditional privilege is applicable to any matter that is an invasion of privacy). Public disclosure actions against non-media defendants are certainly not uncommon. One student commentator notes that since *Florida Star* there have been at least sixty reported decisions involving public disclosure actions against employers. Jurata, *supra* note 6, at 526.

533. Guinn v. Church of Christ, 775 P.2d 766 (Okla. 1989).

534. *Id.* at 769.

535. *Id.* at 768.

536. *Id.* at 768-69.

537. *Id.* at 768.

538. *Id.* at 768-69.

verdict for compensatory damages of $205,000 and punitive damages of $185,000.[539]

The elders and the church appealed and argued, inter alia, that the disclosure about the plaintiff's private life was conditionally privileged because the elders and the congregation shared a common interest in the subject matter.[540] The court rejected their argument and held there was no common interest because the plaintiff was neither a present nor prospective member of the church at the time the information was disseminated.[541] There was no church-related disciplinary interest to be furthered because the plaintiff was no longer a member of the church.[542] Under these circumstances, no conditional privilege existed as a matter of law.[543]

Just the opposite result was reached in *Young v. Jackson*.[544] Certain coemployees of Young publicized her recent hysterectomy to other factory workers in an effort to allay their fears that her recent episode of unconsciousness and ill-health was caused by exposure to radiation at the job site.[545] Young sued contending the disclosure was inappropriate.[546] The court initially held the conditional privilege for defamation was applicable to privacy invasions.[547] The court then held the circumstances of the case created a conditional privilege.[548] The human fear associated with radiation exposure was such that defendants had a legal and moral duty to do what was necessary to alleviate the anxieties of the plaintiff's coworkers.[549] The court went an extra step and ruled that the plaintiff failed to prove, as a matter of law, that the defendants abused the privilege.[550] The plaintiff argued that it was not necessary for the defendants to state she had a hysterectomy; it was enough to say that her condition was not radiation-related.[551] Characterizing it as a matter of judgment and discretion, the court refused to judicially second-guess the full disclosure of Young's health situation

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539. *Id.* at 769.
540. *See id.* at 784 (citing RESTATEMENT (SECOND) OF TORTS § 596 cmt. e (1977)).
541. *Id.* at 785.
542. *See id.* at 784 ("Parishioner withdrew from the church . . . effectively revoking any consent upon which the Elders could have based a defense of 'absolute privilege' to share Parishioner's private life with the . . . congregation.").
543. *Id.*
544. Young v. Jackson, 572 So. 2d 378 (Miss. 1990).
545. *Id.* at 380-81.
546. *Id.* at 381.
547. *Id.* at 382-83.
548. *Id.* at 384.
549. *Id.*
550. *Id.* at 385.
551. *Id.* at 384.

to her coemployees.[552] The summary dismissal of Young's privacy claim was affirmed.[553]

Between these two extremes is the situation when a fact question is created on whether a conditional privilege is abused. This is illustrated by *Zinda v. Louisiana Pacific Corp.*,[554] a case in which the court also explicitly adopted the conditional privilege analogy for public disclosure torts.[555] In *Zinda*, the plaintiff was terminated from employment for falsification of his medical history on his employment application form.[556] This fact was made known to coemployees in a newsletter placed in the lunchroom.[557] "Employees were not restricted from taking the newsletter home," and in fact, they "regularly took the newsletter out of the workplace."[558] Plaintiff sued for defamation and invasion of privacy and obtained a $50,000 verdict on each claim.[559] The defendant-employers requested a jury instruction on conditional privilege, but it was not submitted to the jury.[560] The Supreme Court of Wisconsin believed this was reversible error because a common interest existed between the employer and employee as it concerned the comings and goings of other employees.[561] In the court's words, "employees have a legitimate interest in knowing the reasons a fellow employee was discharged," and "an employer has an interest in maintaining morale and quieting rumors which may disrupt business."[562] However, the court declined to hold the privilege either applied or was abused as a matter of law.[563] The court noted the employer "attempted to correlate the number of copies printed to the number of employees."[564] It was for the jury to decide whether the means utilized by the employer to publicize the reason for the plaintiff's termination were necessary to accomplish its aforementioned interests.[565]

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552. *Id.* at 384-85.
553. *Id.* at 385.
554. Zinda v. La. Pac. Corp.,440 N.W.2d 548 (Wis. 1989).
555. *Id.* at 556.
556. *Id.* at 550.
557. *Id.* at 550-51.
558. *Id.* at 551.
559. *Id.*
560. *Id.*
561. *Id.* at 556.
562. *Id.* at 553.
563. *Id.* at 556.
564. *Id.*
565. *Id.*

VI. CONCLUSION

Courts have been loathe, and rightly so, to second-guess the media's judgment on what constitutes news. With the adoption of the lawfully obtained or strict scrutiny test by the Supreme Court in *Florida Star*, not only has this second-guessing been eliminated, but the public disclosure tort has been effectively obliterated, at least for information obtained from the government. Absent the Court overturning *Florida Star*, a welcome but unlikely event, the residual vitality of the tort action is limited to situations when the media unlawfully obtains private facts, obtain private facts from nongovernmental sources, and when the disclosure is directed at a limited audience. The *Restatement* standard provides the best legal framework for judging the appropriateness of the tort action in these circumstances. It does so without sacrificing the fundamental First Amendment interests of enhancement of breathing space and deterrence of self-censorship and preserves the right to be free from offensive and unnewsworthy publicity.

As we progress through a new century and as life becomes more intense and complex and civilization more advanced, the *Restatement* standard provides a legally enforceable enclave, albeit small, to which modern man and woman can still retreat.[566]

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566. *See* Warren & Brandeis, *supra* note 1, at 196.