Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort

Diane L. Zimmerman

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REQUIEM FOR A HEAVYWEIGHT: A FAREWELL TO WARREN AND BRANDEIS’S PRIVACY TORT

Diane L. Zimmerman†

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INTRODUCTION

In 1890, Samuel Warren and Louis Brandeis stirred the American legal community with a ringing call to arms to protect the hapless citizenry against the truthful exposure of their personal affairs on the pages of the "yellow press." Warren and Brandeis dubbed the protection they proposed a "right to privacy," and described it as the right "to be let alone." Their advocacy of this new tort created a minor revolution in the development of the common law.

Nonetheless, even after ninety years, the real impact of that revolution on legislatures and courts is hard to evaluate. Depending upon the biases of the viewer, the article's effect could be said to exemplify the power, the impotence, or even the perniciousness of legal scholarship. Those who assert that the impact of the article demonstrates the power of scholarship point out that the Warren-Brandeis argument led most states in this country to recognize a right to recover in tort for the wrongful public exposure of private information, as well as for a wide

2 Id. at 193, 195 (quoting T. COOLEY, LAW OF TORTS 29 (2d ed. 1888)).
3 It is not always clear whether a state recognizes a cause of action for publication of private facts. Although some state courts have entertained actions for publication of private facts, they have decided against the plaintiff without expressly ruling on whether a plaintiff
range of other invasions of privacy.4

The impotence argument contends, however, that despite the ever-increasing number of claims under the Warren-Brandeis theory, plaintiffs rarely win. One frustrated judge exclaimed in an impassioned dissent that if a right to be protected against the publication of truthful information indeed existed within his state, his colleagues should honor it "by more than lip service."5

Finally, one can argue that the Warren-Brandeis contribution has actually had a pernicious influence on modern tort law because it created a cause of action that, however formulated, cannot coexist with constitutional protections for freedom of speech and press.

The constitutional dilemma posed by the Warren-Brandeis tort inevitably implicates the companion problem of the failure of this branch of law to protect plaintiffs. The confusion that has attended the effort to create a firm legal contour for the tort6 merely reflects the inherent difficulty under the first amendment of treating truthful speech as tortious. The Warren-Brandeis tort posits a legal power to control the flow of information about one's self to other people—the right to govern authoritatively both the nature of personal information exposed to public view and the conditions under which others may discuss those personal facts. Yet even the most enthusiastic advocates of a right to privacy, including Warren and Brandeis, recognized that any absolute protection of such an interest would intolerably hamper human discourse.7

From the outset, advocates of privacy have thus faced a dual, and sometimes internally inconsistent, task. On the one hand, they needed to develop a philosophical basis to support the right through an exploration of why a civilized and humane society should recognize and protect an interest in controlling public discussion of personal information. On
the other hand, they had to protect free speech by creating numerous
defenses and narrowing the scope of the privacy tort, so that much per-
sonal information could circulate without penalty.

The challenge of harmonizing privacy with free speech has at-
tracted many outstanding scholars of tort and constitutional law.\(^8\) The
moral force of the privacy argument has compelled most commentators
to attempt to entrench the private-facts tort firmly in modern law. They
have stated the case in favor of the Warren-Brandeis right of pri-
vacy eloquently and forcefully. In their attempt to justify the tort, how-
ever, they have often underplayed its serious constitutional problems
and have overlooked the fact that genuine social values are served by
encouraging a free exchange of personal information. This article seeks
not to restate what has already been argued so well in favor of the pri-
vate-facts tort, but, by presenting the opposite view, to encourage a re-
evaluation of the prevailing doctrine. Is it possible that the seemingly
elegant vessel that Warren and Brandeis set afloat some nine decades
ago is in fact a leaky ship which should at long last be scuttled?

I

THE NATURE OF THE RIGHT TO BE FREE OF TRUE BUT
EMBARRASSING PUBLICITY

Since Warren and Brandeis first expounded the view that a right to
privacy deserves the protection of the law, the nature of the right has
expanded significantly. Lawyers and philosophers have generated a
vast literature on the subject without being able to agree upon some
core of values or interests common to each of the cases in which the
“right to privacy” has been applied.\(^9\) A part of the difficulty is that the

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\(^8\) E.g., Bloustein, Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty
and Unconstitutional as Well?, 46 Tex. L. Rev. 611 (1968); Franklin, A Constitutional Problem in
Privacy Protection: Legal Inhibitions on Reporting of Fact, 16 Stan. L. Rev. 107 (1963); Pound, The
Fourteenth Amendment and the Right of Privacy, 13 W. Res. L. Rev. 34 (1961); Prosser, Privacy, 48

\(^9\) One commentator recently stated that “[t]he long search for a ‘definition’ of ‘privacy’
has produced a continuing debate that is often sterile and, ultimately, futile.” Wacks, The
Poverty of “Privacy,” 96 Law Q. Rev. 73, 75 (1980). Since the original Warren-Brandeis effort
to define privacy, numerous writers have tried to define the term. Prosser divided the right of
privacy into at least four distinct interests. See Prosser, supra note 8, at 389; see also Restate-
ment (Second) of Torts § 652A (adopting Prosser’s formulation). In contrast, Bloustein
argued that a unitary interest in the preservation of human dignity underlies all privacy law.
See Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L.
Rev. 962 (1964). See generally A. Westin, Privacy and Freedom 7 (1967) (criticized in
Lusky, Invasion of Privacy: A Clarification of Concepts, 72 Colum. L. Rev. 693, 695-700 (1972));
Gavison, Privacy and the Limits of the Law, 89 Yale L.J. 421 (1980); Konvitz, Privacy and the Law:
A Philosophical Prelude, 31 Law & Contemp. Probs. 272, 279-80 (1966); Shils, Privacy: Its
of the variable meanings of privacy over time and across cultures is found in Velecky, The
Concept of Privacy, in Privacy 13-34 (J. Young ed. 1978). Perhaps the best summation of
the problem of defining privacy is contained in one witty remark: “[P]rivacy, like an elephant,
phrase today is a catch-all, attached to a broad range of interests which often have little or nothing to do with the tort originally envisioned by Warren and Brandeis. This article, therefore, begins with a retrospective look at the development of privacy law. Perhaps, sorting out the major legal interests that conglomereate under the general heading of a "right to privacy," will bring the private-facts tort—the sole concern of this study—into sharper focus.

A. The Original Warren-Brandeis Formulation

In the original Warren-Brandeis formulation, the phrase "right to privacy" referred to a right not to have information about one's personal life exposed to the general public by the press— the private-facts branch of tort law. The authors never specifically defined the kinds of information that they believed the law should protect. Their primary standard appears to have been the personal tastes and preferences of the individual plaintiff, and they therefore did not require that the actionable information be especially intimate, or particularly offensive by objective standards. They seemed instead to believe that the details of one's personal life "belonged" in some sense to the individual and could not be "used" by others without permission.

The circumstances that are said to have inspired the article may demonstrate the types of information, and the breadth of the right, that the authors wanted to protect. Proper Bostonians of the 1890s regarded the appearance of their names in the newspapers as a disgrace. Much speculation exists that anger over news accounts of the social life of War...
ren and his wife led Warren to solicit Brandeis to coauthor the law review article. In 1890, two newspapers carried items in their gossip columns describing in rather restrained tones a wedding breakfast held by the Warrens for a cousin and her new husband. This sort of nonintimate coverage may have been what induced the authors to lament: "To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle."

B. The Expansion of the Right to Privacy

After the article appeared, courts and legislatures began to apply the label "right to privacy" expansively to situations that bore little resemblance to those encompassed in the vague Warren-Brandeis formulation. By 1960, Dean Prosser found that he could identify, in addition to cases clearly in the Warren-Brandeis mold, at least three other distinct torts commonly labeled invasions of privacy. One of them, the tort of intrusion, is the easiest to analogize to the private-facts tort because it occurs when a defendant breaches a plaintiff's commonly respected expectation of seclusion. Most people anticipate that no one will open their personal mail without permission. Similarly, individuals expect that others will not spy on what they do behind the closed doors of their home. A defendant who steams open another's letters or "bugs" another's bedroom violates normal expectations about what will not be exposed to public view, and therefore invades another's privacy as that term is commonly understood.

The other two categories recognized by tort law touch less closely on the interest in privacy as an expectation of seclusion. "False-light" privacy cases involve publicized misinformation that creates a false impression about an individual's life or behavior. The information need not be degrading or intimate; it could, in fact, present the plaintiff more favorably than reality warrants. The gravamen of the "false-light" of-
fense is that publication of misinformation injures the plaintiff's dignity. Prosser's final tort law category treats appropriation of a name or likeness for commercial purposes as an invasion of privacy, although this tort does not involve an interest in seclusion or protection of intimate information. The misappropriation tort protects one's property right in the economic benefit derived from the commercial exploitation of one's face or name.22

Courts have also applied the term "right to privacy" to cases that limit the actions of creditors in the collection of debts23 and to cases that protect against misuse of information in data banks.24 All these fact patterns have one common element: they revolve around obtaining or exchanging data about another person without that person's consent.

The Supreme Court has also adopted the "right to privacy" term,
using it in the constitutional context to describe certain protections of personal autonomy against governmental interference. For example, the Court has repeatedly referred to the fourth amendment right to be free of warrantless searches as a right to privacy.\(^{25}\) The claims of individuals to be free of governmental constraints in choosing whether to use birth control\(^{26}\) or to seek abortions during the early stages of pregnancy are similarly grounded in a constitutional "right to privacy."\(^{27}\)

Although the constitutional privacy cases may address expectations of seclusion and protect very intimate and personal areas of life, just as the Warren-Brandeis tort does, the existence and the contours of the constitutional right to privacy reveal little about whether and when a corollary interest should be protected against invasion in ordinary tort law.\(^{28}\) Whereas the Constitution insulates individuals from governmental intrusion in their private lives, it does not dictate rights between private citizens.\(^{29}\) Although we may be tempted to accord individuals the same

\(^{25}\) See, e.g., Mapp v. Ohio, 367 U.S. 643, 655-57 (1961); see also L. Tribe, American Constitutional Law 967 (1978) ("The fourth amendment more than any other explicit constitutional provision reflects the existence of [some right to privacy and personhood].").


\(^{28}\) The case law rarely discusses the distinction between the constitutional right to privacy and the common law right, although courts occasionally mention it in passing. See, e.g., Birnbaum v. United States, 588 F.2d 319, 326 n.14, 327 n.17 (2d Cir. 1978) (suggesting a distinction between common law and constitutional privacy claims); Drake v. Covington County Bd. of Educ., 371 F. Supp. 974, 980 (M.D. Ala. 1974) (Johnson, C.J., concurring) ("[T]he Warren-Brandeis right of privacy . . . is a creature of state law and is not constitutionally based."); Mimms v. Philadelphia Newspapers, Inc., 352 F. Supp. 862, 865 n.5 (E.D. Pa. 1972) (distinguishing the right to be free from unwanted publicity from constitutional privacy cases).

In Paul v. Davis, 424 U.S. 693, 713 (1976), the Supreme Court suggested that the constitutional right to privacy is limited to cases involving abuse of government power by "unreasonable" searches or in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." Thus, courts may not extend the constitutional right to privacy to encompass unwanted publicity by public officials, even when the plaintiff proves damage to reputation. But see id. at 735 n.18 (Brennan, J., dissenting) ("A host of . . . courts, relying on both privacy notions and the presumption of innocence, have [held] that there are substantive limits on the power of the government to disseminate unresolved arrest records. . . ."); Time, Inc. v. Hill, 385 U.S. 374, 413-15 (1967) (Fortas, J., dissenting) (suggesting that right to privacy is a "basic right" of constitutional dimension, whether the defendant is a private party or a government official); W. PROSSER, supra note 4, at 816 (suggesting some undefined relationship between constitutional right to privacy and tort law in privacy area).

\(^{29}\) In Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the Supreme Court distinguished the constitutional rights to privacy from similar common law rights when it recognized a cause of action for damages against defendants for an unlawful search of plaintiff's home:

Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. . . . An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his
protection from their neighbor's prying as the Constitution provides against governmental invasions, such an equation conflicts both with the historical distinction between constitutional and common law and with the first amendment rights of our neighbors.

The broad range of situations covered by the term "right to privacy" may seem to add luster to the concept, and association with constitutionally protected interests may add an authoritative ring to the phrase; yet as a descriptive or analytic term, "right to privacy" is virtually meaningless. Little that has been said about privacy in its vague, general sense, or that has been said about specific categories of privacy cases adequately confronts the basic tension the original Warren-Brandeis private-facts tort creates between constitutional and social values. Conversely, discussion of the private-facts tort does not necessarily implicate the viability or constitutionality of other "privacy" rights.\(^{30}\)

C. The Elements of the Private-Facts Tort

The elements of the private-facts tort vary somewhat from jurisdiction to jurisdiction. The formulation of the Restatement (Second) of Torts, however, is widely relied upon by the courts and provides a useful general summary of the law.\(^{31}\) The Restatement requires the plaintiff in a private-facts case to show that the information was private\(^{32}\) and that

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\(^{30}\) This article will not address the separate problem of publication of tortiously obtained private information. The press's procurement of information by trespass, intrusion through eavesdropping, or other forms of surreptitious surveillance constitutes a potential source of liability. Whether the publication of information thus obtained should provide a separate ground for liability is complex and beyond the scope of this article.

A related and more difficult problem is the treatment of cases in which a publisher receives private information with reason to know that it has been obtained by the tortious acts of third persons. Although cases have not focused clearly on the distinction between intrusion and publication, some courts permit publication of information, even where unlawfully obtained. \textit{See}, e.g., Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir. 1969) ("[I]n analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate."). \textit{But see} Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971) (publication may be taken into account in assessing damages for the intrusion itself). \textit{See generally} D. Gillmore & J. Barron, \textit{Mass Communication Law} 335-51 (3d ed. 1979); Rubin, \textit{Reporters Keep Out}, 1979 \textit{COLUM. JOURNALISM REV.} 47 (discussing problems faced by journalists).

\(^{31}\) \textit{See Restatement (Second) of Torts} § 652D (1977).

\(^{32}\) \textit{See id.} comment b. The Restatement Second defines private information as that which the ordinary person would find highly personal and the disclosure of which would offend a person of ordinary sensibilities. Thus the Restatement Second, by establishing an objective, reasonable person standard, limits the tort to a range of communications narrower than did either Warren and Brandeis or some of the state courts. \textit{See supra} notes 11-16 and accompanying text. Although courts generally purport to use an objective, reasonable person standard, their decisions cast doubt on whether they have actually done so. In Cason v. Baskin, 155
the defendant disseminated the information widely. The defendant may defeat the action by showing that the public has a legitimate interest in the disclosed facts.

Even a casual glance at the elements of the tort and at the "newsworthiness" defense reveals several immediate legal difficulties. First, the widespread-publicity element of the cause of action targets the mass media for liability; except for highly unusual fact situations, individual nonmedia defendants will rarely satisfy the requirement. This element of the cause of action comports entirely with the original Warren-Brandeis theory, which was explicitly designed to protect against the indis-

Fla. 198, 20 So. 2d 243 (1944), the Florida Supreme Court ruled that a reasonable person could find that the defendant had invaded the plaintiff's privacy even though, "considered as a whole, [the book] portrays the plaintiff as a fine and attractive personality." Id. at 207, 20 So. 2d at 247. The Cason court noted that although many people would enjoy publicity, to some "it is extremely distasteful, disturbing and painful." Id. at 205, 20 So. 2d at 246; cf. Jeppson v. United Television, Inc., 580 P.2d 1087, 1089-90 (Utah 1978) (Crockett, J., dissenting) (plaintiff's right to privacy not invaded, in dissent's view, by television show, "Dialing for Dollars," because reasonable person with listed phone number would not be offended by courteous call offering prize); see also Karafiol, The Right to Privacy and the Sidis Case, 12 GA. L. REV. 513, 525 (1978) (urging courts to consider injury to plaintiff's feelings and not merely offensiveness to the "reasonable person" when assessing private-facts tort cases).

33 See RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977).

34 Id. comment d. Because courts soon recognized that broad tort liability for truthful speech could pose serious first amendment problems, they felt constrained to treat disclosures as immunized or privileged if they were newsworthy. All jurisdictions that recognize the private-facts tort have adopted the newsworthiness defense. See, e.g., Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905) (first case to adopt a common law right to privacy). In its opinion, the court cautioned:

The right of privacy is unquestionably limited by the right to speak and print. It may be said that to give liberty of speech and of the press such wide scope as has been indicated would impose a very serious limitation upon the right of privacy; but if it does, it is due to the fact that the law considers that the welfare of the public is better subserved by maintaining the liberty of speech and of the press than by allowing an individual to assert his right of privacy in such a way as to interfere with the free expression of one's sentiments and the publication of every matter in which the public may be legitimately interested.

Id. at 204, 50 S.E. at 74.

35 When it is confined to a small group, or communicated to other individuals over a long period of time, most jurisdictions exempt private, person-to-person gossip from liability.

A nonmedia defendant who spread the offensive information to a wide audience has occasionally satisfied the mass-publicity requirement. See, e.g., Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (5th Cir. 1962) (creditor stripped plaintiff's car of tires in employer's parking lot causing plaintiff to become butt of coworker's jokes and derision); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927) (auto repair shop owner posted billboard-size notice of plaintiff's failure to pay bill in window on main street of town); Lambert v. Dow Chem. Co., 215 So. 2d 673 (La. Ct. App. 1968) (company's showing photographs of injured employee undergoing surgery to other plant employees at safety meeting constituted widespread publicity); Biederman's of Springfield, Inc. v. Wright, 322 S.W.2d 892 (Mo. 1959) (bill collector repeatedly and loudly demanded payment in front of customers in restaurant where plaintiff worked).
cretions of the press, not those of the drawing room. Yet, the existence of the mass-publication requirement immediately taints the tort because it suggests that in this area the press has significantly less freedom of speech than does a private individual. The Supreme Court has often said that the press has no more rights than individual speakers; but it has never held that the press enjoys less protection than individuals under the first amendment or that its special role as mass communicator can subject it to special burdens.

Second, both the elements of the tort and the newsworthiness defense have remained so conceptually vague that they offer little guidance to the judges and jurors who must decide private-facts cases. What sorts of information should be deemed personal or private? The failure of the Restatement to fix clear boundaries illustrates the dilemma. It ultimately retreats into such vagaries as "common decency" and a reasonable person's perception of the line between what the public is entitled to know and what is merely a "morbid and sensational prying into private lives for its own sake." Other areas of tort law are, of course, rife with equally vague standards, and frequently draw lines between tortious and nontortious conduct based on the actions and per-

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36 Recent inventions and business methods call attention to the next step which must be taken for the protection of the person . . . . Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life . . . . For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. Warren & Brandeis, supra note 1, at 195 (footnotes omitted). The authors voiced concern with the behavior of the press, which was "overstepping in every direction the obvious bounds of propriety and of decency." Id. at 196.


38 Although dictum in Branzburg intimiated that the media was more restricted than individuals in their coverage of criminal trials, the Court elsewhere rejected the suggestion that the media's freedom of speech is more restricted than that enjoyed by the general public. See Pell v. Procunier, 417 U.S. 817, 833-34 (1974); accord Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 594 n.21 (1976) (Brennan, J., concurring).

39 Commentators have discussed the ambiguity of the private-facts tort and many have attempted to offer solutions that would more specifically define its contours. See, e.g., Emerson, The Right of Privacy and Freedom of the Press, 14 HARV. C.R.-C.L. L. REV. 329 (1979); Hill, Defamation and Privacy Under the First Amendment, 76 COLUM. L. REV. 1205, 1255-69 (1976) (attempting to clarify the decisions interpreting the tort); Wright, Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach, 46 TEX. L. REV. 630 (1968); Comment, First Amendment Limitations on Public Disclosure Actions, 45 U. CHI. L. REV. 180 (1977). But cf. Kalven, supra note 6 (arguing against expansion of the tort).

40 RESTATEMENT (SECOND) OF TORTS § 652D comment h (1977).

41 Id.
ceptions of the so-called reasonable person.42 Ambiguous standards in a
tort that infringes upon first amendment interests, however, become in-
herently suspect. Clearly, the application of standards that depend on
local mores43 easily could lead to widely divergent outcomes in factually
similar cases among jurisdictions and even among different courts
within a single jurisdiction.44

Similar difficulties have plagued courts’ attempts to define the priv-
ilege of newsworthiness that excuses the publication of private and em-
barrassing information.45 Courts have, for example, clumsily grappled

42 See, e.g., W. Prosser, supra note 4, §§ 32-33 (the reasonable person test in the law of
negligence).

43 But cf. Miller v. California, 413 U.S. 15 (1973) (approving use of “contemporary com-
munity standards” to decide when sexually explicit material is “obscene” and can be prohib-
ited). Miller does not suggest, however, that the Court transfer its reliance on local mores to
other speech areas, such as tortious invasion of privacy. Arguably, the Court’s approach to
obscenity and the first amendment is sui generis, and constitutes a tentative compromise at
best. The Court’s willingness to proscribe obscene speech seems to derive in part from the
notion that obscene expression is entitled to no first amendment protection, and from the
relative ease with which obscene and nonobscene speech can be distinguished. Moreover, the
Court appears to believe that even borderline, nonobscene pornographic materials, although
constitutionally protected, are unimportant in a scheme of free speech protection and that
their regulation does no serious harm to constitutional values. See, e.g., Young v. American
Mini Theatres, 427 U.S. 50, 70 (1976) (Stevens, J.) (plurality opinion); see also infra note 269.
These arguments are difficult to apply to speech that invades privacy. Unlike obscenity
which is limited to explicit sexuality, “private” facts are harder to single out of the general
realm of expression because they involve a tremendous range of different kinds of informa-
tion. See infra notes 295-307 and accompanying text. In addition, the press publishes informa-
tion subject to privacy objections precisely because, in the opinion of the press, the
material is a traditional subject of public concern and debate. In contrast, the law has tradi-
tionally regarded society as better served when explicit sexual materials are suppressed ent-
tirely or, at least, contemplated only in the innermost recesses of the home. Hence, in the
realm of privacy, unlike in the area of pornography, public importance (i.e., “newsworthi-
ness”) is a major countervailing force to the demand for regulation. See infra notes 308-44 and
accompanying text. Nevertheless, some courts have expressly approved of the use of commun-
ity standards in deciding what is newsworthy, and have said that the determination should
be made by a jury. See, e.g., Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), cert. denied, 425

1948) (court denied plaintiff’s recovery for defendant’s reporting on custody hearing and
scandalous evidence because of wide diversity of opinion over what is “legitimate” to print)
married younger woman to spite her parents and about the ensuing divorce constitutes en-
tertainment, not news, and reasonable person might find story offensive); Compare also Howard
v. Des Moines Register Tribune Co., 283 N.W.2d 289, 303-04 (Iowa 1979), cert. denied, 445
U.S. 904 (1980) (publication of plaintiff’s name in news story about her involuntary steriliza-
tion not tortious invasion of privacy) with Barber v. Time, Inc., 348 Mo. 1199, 1206-07, 159
S.W.2d 291, 295 (1942) and Melvin v. Reid, 112 Cal. App. 285, 292, 297 P. 91, 93-94 (1931)
(publication of plaintiff’s name in movie about her unsavory early life unnecessary and tor-
tious invasion of privacy). See generally Ashdown, Media Reporting and Privacy Claims—Decline in
area established by “nebulous concepts of sociopolitical relevance and offensiveness”); Hill,
supra note 39, at 1269 (noting fear that application of standard of extreme offensiveness by
jury would invite jury to act as “censors”).

45 See infra notes 308-65 and accompanying text.
with whether the public status of the plaintiff is relevant to a finding of newsworthiness. They have struggled to distinguish between nonnewsworthy information and that which the public "legitimately" needs. Many courts, despairing of their ability to make such determinations in a principled way, have ultimately deferred to the media's judgment of what is and is not newsworthy. As a result, the privilege in some jurisdictions has had the practical effect of demolishing the tort.

Yet, despite the definitional and constitutional pitfalls that have plagued the Warren-Brandeis tort, virtually all jurisdictions that have ruled on the matter have found that, at least theoretically, a state may protect its citizens against public exposure of private facts.

D. The Supreme Court and the Private-Facts Tort

The Supreme Court has never explicitly ruled on whether the private-facts cause of action is a constitutionally permissible vehicle for the protection of privacy rights. In only one instance, Cox Broadcasting Corp. v. Cohn, has the Court ever decided a private-facts case. Cox

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46 See infra notes 285-89 and accompanying text.
47 See infra notes 308-65 and accompanying text.
48 Henry Kalven, observing the tendency of the newsworthiness defense to obliterate the private-facts tort, quipped "[the [privacy] mountain . . . has brought forth a pretty small mouse." Kalven, supra note 6, at 337.
49 Some states have refused to adopt the private-facts tort. See infra Appendix. Of these, the Nebraska Supreme Court has come closest to an expression of skepticism about the legal legitimacy of the tort:

We submit that if [a right to privacy] is deemed necessary or desirable, such right should be provided for by action of our Legislature and not by judicial legislation. . . . This is especially true in view of the nature of the right under discussion, under which right not even the truth of the allegations is a defense.


50 The Supreme Court has recognized a constitutional right to privacy, and has intimated that states may recognize rights to privacy not grounded in the Constitution. The Court, however, has not yet addressed the validity of the private-facts tort. See supra notes 25-29 and accompanying text. See also, e.g., Kovacs v. Cooper, 336 U.S. 77 (1949). In his plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971), Justice Brennan noted that libel law, which the Court has found reflects a valid state interest, protects privacy as well as reputation. See infra text accompanying 345-48.

51 420 U.S. 469 (1975). A Georgia statute made the publication of a rape victim's name a misdemeanor:

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

GA. CODE ANN. § 26-990 (1972), reprinted in Cox, 420 U.S. at 471 n.1. The victim's father claimed that under either the statute or the common law, his privacy was invaded by the publicity given to his dead daughter's identity. See 420 U.S. at 474.
involved the truthful publication of a rape victim’s name, and posed for the Court, in its words; the sort of case in which “claims of privacy most directly confront the constitutional freedoms of speech and press.” Because the material divulged in Cox was obtained from publicly available trial records, however, the Court avoided a resolution of the constitutional dilemma; instead, it immunized the press against liability for accurate reports about matters contained in the public record. The Court reasoned that when the government chooses to include information in public records, it cannot then impose tort liability if individuals or the press choose to further publicize that already public information. The Court, in creating this privilege, accorded no
weight to the probability that government bodies give little thought to privacy questions when placing information in public records. Nor did it deem relevant the fact that the public is rarely aware of most of the information contained in so-called public records.\(^5\) The privilege for truthful reports was absolute.

But the reach of the \(Cox\) holding is hard to measure. \(Cox\) rests in part on the notion that first amendment values of free speech and press are involved most intimately when the protected information concerns government operations.\(^5\) It is difficult, therefore, to determine whether \(Cox\) affects the constitutionality of a tort proscribing publication of truthful facts gleaned from sources other than public records. As the Court said: "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media."\(^5\) In contrast, information from sources other than public records does not necessarily involve the "administration of government." We should not assume, however, that \(Cox\) would not apply to such information. The Supreme Court has held that the first amendment protects speech generally, and not merely a narrowly defined category of political speech.\(^6\) Moreover, the Court's second justification for denying liability in \(Cox\)—the fear of a "chilling effect"—applies equally well to any information that is of use to the general public in debating and deciding issues of concern to the community. \(Cox\) reflects the Court's concern that the nebulous distinction between permitted and prohibited material would lead the media to suppress much important information rather than risk future liability.\(^6\) If this chilling-effect ra-

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\(^5\) The Court accepted without comment the proposition set out in comment c to § 652D of the Restatement (Second) of Torts, that information in "public records" is de facto public. \(420\) U.S. at 494.

\(^5\) \(420\) U.S. at 495.

\(^5\) \(Id\).

\(^6\) \(See\), e.g., Joseph Burstyn, Inc. v. Wilson, \(343\) U.S. 495, 501-02 (1952) (motion picture cannot be banned merely because it is sacrilegious); Winters v. New York, \(333\) U.S. 507, 510 (1948) (first amendment protects not merely informational communications or the exposition of ideas, but entertainment-oriented speech as well).

We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public.
tionale is central to the Court's reasoning in Cox, by extension, all truthful speech should enjoy absolute protection from tort liability.

Although the Court has yet to rule on the validity of the private-facts tort, there is much evidence to suggest that it will ultimately find that body of law an unconstitutional restraint on speech. The history of the first amendment neither supports nor justifies a system of tort liability for true speech. Indeed, case law in the closely related area of defamation strongly implies that the first amendment protects accurate speech. Furthermore, the policy justifications that underlie the private-facts tort embody a state interest not sufficiently compelling to justify the infringement of fundamental first amendment rights. Based on this evidence, Cox, properly read in the context of the Court's recent decisions, mandates constitutional protection for true statements.

II

THE HISTORY OF PROTECTING TRUTHFUL SPEECH

A. The Framers' Intent: A Study of Truth as a Defense to Defamation Preceding the Adoption of the First Amendment

The history of the common law of defamation provides a useful point of departure for analysis. Although not dispositive, that history may shed some light on the meaning of the first amendment and on the intent of its framers—to the extent that any such intent may be discerned—and provide some insight into the impropriety of treating truthful speech as tortious. The long tradition of allowing defamation actions that preceded the adoption of the Bill of Rights, coupled with the uniform acceptance of such causes of action by the original states, suggest that the framers could not have expected the first amendment to prohibit the punishment of false and injurious speech. Privacy, in con-

62 See infra notes 99-117.
63 See infra notes 118-28.
64 For examples of situations in which true speech may not always be protected see infra notes 98-117 and accompanying text & text accompanying notes 118-28.
66 Justice White, in his dissent in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), reviewed the history of defamation actions and concluded that the framers could not have intended to prevent all punishment for libelous and false speech:

The Court does not contend, and it could hardly do so, that those who wrote the First Amendment intended to prohibit the Federal Government, within its sphere of influence in the Territories and the District of Columbia, from providing the private citizen a peaceful remedy for damaging falsehood. At the time of the adoption of the First Amendment, many of the conse-
trast, was not a recognized interest at the time the Bill of Rights was adopted. 67 And nothing in the history of the common law suggests even a tacit acceptance on the part of the framers of civil liability for accurate but personally embarrassing speech. 68 England has never recognized the tort of invasion of privacy. 69 Even the precedents relied on by Warren and Brandeis in 1890 protected privacy interests only as an incident to the recognition of some other independent interest, such as a property right. 70

Indeed, despite some confusion in the sources, 71 English and early American law seemed affirmatively to protect truthful but discreditable speech, at least from civil liability. English sources, from the earliest up until the adoption of the common law by the United States, recognized truth as an absolute defense in tort actions for defamation. The defense was not technical; rather, it seems to have reflected the prevailing view that sound social policy precluded legal recognition of the harm caused by speaking the truth.

The gravamen of the offense in defamation actions from their earliest appearance, long predating the development of English common law, was harm to reputation through falsity. The Ninth Commandment to Moses on Sinai proscribed bearing false witness against one’s neighbor. 72 The Old Testament Book of Psalms, too, is replete with invectives against those who spread false tales. 73 Roman law offered both civil and criminal remedies against defamation, and in most cases seems to have treated truth as a complete defense to the charge. 74 Likewise,

sequences of libel law ... had developed ... [Ten] of the 14 States that had ratified the Constitution by 1792 had themselves provided constitutional guarantees for free expression, and 13 of the 14 nevertheless provided for the prosecution of libels. Prior to the Revolution the American Colonies had adopted the common law of libel.

Id. at 380-81 (White, J., dissenting) (footnote omitted).

67 Warren and Brandeis first advocated the right to privacy in 1890. See infra note 70 and accompanying text.


69 REPORT OF THE COMMITTEE ON PRIVACY, CMD. 5, NO. 5012, AT 25 (1972); SEE ALSO WACKS, supra note 9, AT 73-74.

70 Warren and Brandeis relied primarily on precedents in the area of common law copyright, a property doctrine reserving to the author or creator of written, artistic, or other original work the initial right to control when and if it should be exposed to the public. See Warren & Brandeis, supra note 1, at 198-205. They also looked to certain cases which involved implied contracts, see id. at 207-11, and to the law of trade secrets, see id. at 212.

71 See infra notes 86-96.

72 Exodus 20:16 (King James).

73 In Psalms 35:11 (King James) the author laments: “False witnesses did rise up; they laid to my charge things that I knew not.” (Emphasis in original); see also id. 35:20-21 (“For they speak not peace: but they devise deceitful matters against them that are quiet in the land. Yea, they opened their mouth wide against me, and said, Aha, aha, our eye hath seen it.”) (Emphasis in original); id. 5, 10, 14, 31, 34, 38, 52, 59 (King James).

74 The later phases of Roman law treated different kinds of defamation in different
early English cases punished the spreading of lies about others; but none, apparently, provided penalties for spreading accurate but unflattering truths. Ecclesiastical law remedied defamation by imposing on the defamer the penance of public admission of the baselessness of his or her statements. The church seems, thus, to have focused only on unfounded gossip and appears to have been unconcerned with preventing revelation of true character or behavior. By the time the common law courts began to wrest jurisdiction over defamation from the church courts in the sixteenth century, the availability of truth as a complete defense in civil actions was settled law.

By the time the first amendment was drafted, truth was not a defense in criminal defamation actions. History suggests, however, that it had been a defense until the early seventeenth century. Beginning in 1275, England enacted successive criminal statutes—Scandalum Magnatum—that prohibited defaming the lords and prelates of England. The statutes did not impose penalties for true statements, but.
were couched in terms of prohibitions against "false news, lyes, or other such false things."82

The Star Chamber initially tried violations of Scandalum Magnatum, but gradually extended its jurisdiction to include criminal charges against nonpolitical defamers as well.83 This extension of jurisdiction apparently occurred because the Chamber wanted to provide a way to avenge insults other than by the duels that had become so common during the reigns of Elizabeth I and James I.84

In 1606, the Star Chamber, in pursuit of its dual objectives of preserving the public peace and of ensuring political stability in the face of the increasing potency of the printing press, enunciated the novel rule that "[i]t is not material, whether the libel be true or false."85 The Star Chamber purported to rely for its new approach on Roman law, but, unlike the Roman courts, it applied the doctrine to all defamation cases before it, political or otherwise, and whether or not by an anonymous author.86

When Parliament terminated the Star Chamber in 1641 and transferred its jurisdiction over criminal defamation to the King's Bench, not surprisingly some initial confusion arose over the applicability of the defense of truth.87 The same court would now hear civil actions for damages, as well as criminal cases for seditious libel and libels likely to disturb the public peace. In which of these classes of cases was truth to be a defense, and in which not? Commentators of the era disagreed.88

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83 See Donnelly, supra note 75, at 116; Veeder, supra note 75, at 554-55. In addition to imposing criminal penalties for defamation, the Star Chamber occasionally awarded damages to the injured party. Id.; T. Plucknett, supra note 78, at 461.
84 See W. Holdsworth, supra note 79, at 210; Veeder, supra note 74, at 555.
86 In Roman law, anonymous charges against public officials were called libelli famosi. See supra note 74.
87 T. Plucknett, supra note 78, at 467.
88 Hudson, who was the first to distinguish between libel and slander actions based on the form of the communication (written or spoken) rather than on the court that tried them (libel in the Star Chamber and slander elsewhere), wrote that truth was always a defense to charges of criminal or civil slander, but never to libel. W. Hudson, supra note 86, at 104. Bacon adopted Hudson's view, but added with regard to libel that the "only favour truth affords in such a case is, that it may be shewn in mitigation of damages in an action. . . ." 5
In light of this history, it is difficult to maintain unequivocally that the framers of the first amendment presumed a body of common law in which true speech was absolutely immune from civil liability. To the extent that the drafters had any explicit concern with the role of truth in defamation, they would undoubtedly have been far more consciously concerned with the criminal law regulating seditious—that is, political—libel. During the years preceding the adoption of the Bill of Rights, and again when the Congress adopted the Alien and Sedition Acts in the early federal period, criminal defamation was a far more prominent issue than civil defamation. Public debate centered on whether truth was required as a defense in criminal actions, not on its propriety in civil defamation cases.

Nonetheless, one can fairly infer from what is known of the law of civil defamation around the time of the framing of the first amendment, that its drafters assumed accurate speech to be immune from civil liability. The research of historians suggests that American decisions prior to the drafting of the Bill of Rights supported the view of those commentators who argued that truth was an absolute defense.

Bacon's Abridgement 203 (7th ed. C. Dodd & H. Gwyllim eds. 1852). Blackstone believed that truth was a complete defense to all civil actions, whether for libel or slander:

But in the remedy by action on the case, which is to repair the party in damages for the injury done him, the defendant [in a libel action] may, as for words spoken, justify the truth of the facts, and show that the plaintiff has received no injury at all.


For a discussion of the importance of criminal libel, especially seditious or political libel, at the time of the drafting of the Bill of Rights, see generally Z. Chafee, Free Speech in the United States 16-29 (1941); L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960); Kelly, Criminal Libel and Free Speech, 6 U. Kan. L. Rev. 295 (1958).

According to one commentator, criminal libel attracted so much attention because "the criminal penalty became almost exclusively an instrument by which the government was enabled to stifle criticism." Kelly, supra note 89, at 303. For a discussion of Andrew Hamilton's defense of John Peter Zenger, who faced seditious libel charges in 1735, and its effects, see L. Levy, supra note 89, at 132-33, 202-03.

The debates surrounding the passage in 1792 of Fox's Libel Act, 32 Geo. 3, ch. 60 (1792), illustrate the concern with criminal rather than civil libel. The author of the act argued for a qualified defense of truth in cases of criminal libel and called the question one "much canvassed in the world." 29 Parl. Hist. Eng. 574-75 (1791).

In pre-revolutionary Massachusetts, for example, truth was a defense in all civil and criminal libel cases. See W. Nelson, Americanization of the Common Law 39, 40 & nn.48-49, 59, 93-95 (1975).

See id. (citing Whitney v. Herbert, Worcester Ct. of Common Pleas (May 1765); Green v. Stimpson, Middlesex Ct. of Common Pleas (Dec. 1760); Rex v. Flagg, Worcester Ct. of General Sessions (Aug. 1767); Rex v. Brittan, Bristol Ct. of General Sessions Files (May 1768)).
by the close of the eighteenth century, reported civil defamation cases in England assumed, almost without discussion, a defense of truth.\textsuperscript{95} Similarly, nineteenth-century American case law took the unanimous position that truth always had been a complete defense in civil defamation.\textsuperscript{96}

The historical evidence suggests that the framers of the first amendment would have viewed restraints imposed by tort law on accurate speech—to the extent that they considered the matter at all—as inappropriate, and that the embarrassment that might result from true revelations was not considered a legal or compensable wrong. Thus, our modern law, which assesses civil damages for true but embarrassing speech, cannot be justified on the ground that it was an acceptable basis for restriction of the press at the time of the adoption of the first amendment.\textsuperscript{97}

B. The Supreme Court's Protection of Truthful Speech in Modern Case Law

1. The Fault Standard in Defamation Cases Requires a Defense of Truth

Supreme Court decisions over the course of the twentieth century suggest that the Court shares the historical understanding that the first amendment protects truthful speech in all but the most extreme situations.\textsuperscript{98} As recently as 1979, Chief Justice Burger, after reviewing a wide


\textsuperscript{96} Commonwealth v. Snelling, 32 Mass. (15 Pick.) 337 (1834), was one of the earliest cases following the adoption of the Bill of Rights to discuss the issue of truth as a defense in civil cases. Chief Justice Shaw wrote:

\begin{quote}
In civil actions, and against a party coming into a court of justice on a claim for damages, it had long been held as a rule of the common law, that the truth of the facts imputed constituting the slanderous or libellous charge, might be pleaded by way of justification, and if proved, constituted a good bar to the action. In such case, of course, the motive and purpose were immaterial and could not be the subject of inquiry. The rule proceeded upon the principle, that whatever was the motive, if the charge against the individual suing was true, if he was in fact guilty of the crime or disgraceful conduct imputed to him, he had sustained no damage, for which he could claim redress in a court of justice.
\end{quote}

Id. at 341; see also Ogren v. Rockford Star Printing Co., 288 Ill. 405, 415-17, 123 N.E. 587, 591-92 (1919) (common law rule that truth is defense to libel changed by state constitution); Sullings v. Shakespeare, 46 Mich. 408, 411, 9 N.W. 451 (1881) (truth a defense to libel); Neilson v. Jensen, 56 Neb. 430, 433-34, 76 N.W. 866, 867 (1898) (common law rule that truth a defense to civil libel changed by state constitution); Hogan v. Wilmoth, 57 Va. (16 Gratt.) 38, 40 (1860); Moseley v. Moss, 47 Va. (6 Gratt.) 534, 538-39 (1850) (truth a complete defense to written and oral defamation).

\textsuperscript{97} See infra notes 171-84 and accompanying text.

\textsuperscript{98} For a discussion of the history of truth as a defense to defamation, see supra notes 65-96 and accompanying text. The Supreme Court has recognized that some accurate communications could be so damaging to national or individual interests that a limited use of re-
range of the Court's first amendment opinions, concluded that "state action to punish the publication of truthful information can seldom satisfy constitutional standards."[99]

The most illuminating line of Supreme Court cases on the question of when, if ever, states may provide damage awards for truthful but embarrassing communications are the libel and false-light privacy cases beginning in the 1960s. Both lines of cases deal with tort law and involve interests roughly comparable to those at stake in the private-facts cases. In addition, these opinions are the first in which the Court deals directly with the theoretical implication of truth and falsity for the scope of constitutional protection of speech.

The Court's decisions in *New York Times Co. v. Sullivan* [100] and its progeny leave little doubt that truth should be considered a constitutionally mandated defense,[101] at least in the context of common law tort actions for harmful speech. The Court has declared the *Sullivan* line of cases to rest upon the premise that false speech can be regulated because it has no constitutional value.[102] In *Gertz v. Robert Welch, Inc.*,[103] the Court confirmed that proposition:

Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues . . . . They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight

strains on speech might be appropriate. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556-62 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam); *Near v. Minnesota*, 283 U.S. 697 (1931). Commentators, however, have identified certain kinds of accurate information that are more freely regulated, including obscene depictions of sexual intercourse, the publication of private letters, or the misappropriation of a performance or another commercially valuable personal attribute. See, e.g., *Lusky, Invasion of Privacy: A Clarification of Concepts*, 72 COLUM. L. REV. 693, 698 (1972); *Note, Tortsious Invasion of Privacy: Minnesota as a Model*, 4 WM. MITCHELL L. REV. 163, 215-16 (1978).


[100] 376 U.S. 254 (1964). The plaintiff in *Sullivan* was a Commissioner of the City of Montgomery, Ala., who complained that inaccuracies contained in an advertisement published by the New York Times defamed him, although nowhere in the advertisement was his name used.


[102] New York Times Co. v. Sullivan, 376 U.S. at 279 n.19 (1964). Professor Emerson has criticized on two grounds the Court's position that false or inaccurate speech is valueless. First, he claims that inaccurate statements often force others to "defend, justify and rethink their positions" T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 530-31 (1970). Second, he protests that by denying a class of speech first amendment protection on the merits, the Court applies an impermissible normative test. *Id.*

social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." 104

Because the Court finds false speech constitutionally valueless because it does not contribute to public debate or a search for truth, it follows logically that its opposite—accurate speech—must deserve substantial protection. The Court, therefore, would presumably regard state laws restricting free exchange of accurate speech with skepticism, if not outright disapproval.

Indeed, the Court has buttressed this inference by the justification it has used for narrowing the scope of common law libel 105 and false-light 106 tort liability. The Court has made clear that, in order for the first amendment to promote widespread circulation of ideas and truthful information, it must provide some "breathing space" for accurate speech by extending protection for some falsehoods. 107 A margin for cost-free error is needed, the Court claims, to avoid the evils of self-censorship of accurate information by the press and by individual speakers. 108 Unless some false speech is protected,

would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They [would] tend to make only statements which "steer far wider of the lawful zone." . . . The rule thus dampens the vigor and limits the variety of public debate. 109

The Court has therefore developed a series of fault standards to immunize a broad range of inaccurate communications from liability under tort law. The Court has concluded that, whether commenting unfavorably upon the actions of government and public figures 110 or

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104 Id. at 340 (citations omitted); see also Time, Inc. v. Hill, 385 U.S. 374, 390 (1967); Garrison v. Louisiana, 379 U.S. 64, 75 (1964).
106 See supra note 21.
108 376 U.S. at 278-79.
109 Id. at 279 (citations omitted).
110 Curtis Publishing Co. v. Butts and Associated Press v. Walker were decided in a single opinion. 388 U.S. 130 (1967). Butts involved a claim of libel by a football coach at a public university, while Walker concerned a libel action by a retired military officer. In Butts and
reporting on the lives of private citizens swept up in matters of public interest, speakers should not be deterred from free discussion simply because they could not prospectively guarantee the accuracy of everything they might say. Thus, the Court has imposed on false-light plaintiffs and defamed public figures or officials the burden of showing that the defendants knowingly lied or acted recklessly with regard to the truth or falsity of their statements.

The Court has given greater protection to private plaintiffs in defamation cases by removing the onerous requirement of demonstrating knowing or reckless falsehood, but it does require a private plaintiff to submit at least some proof of the defendant's fault. A majority of the Justices has nevertheless claimed that the Court has left open the question of whether the Constitution requires a defense of truth in libel suits brought by private, rather than public, persons. An examination of the Court's private defamation cases suggests otherwise.

In his Cox concurrence, Justice Powell argues that Gertz v. Robert Welch, Inc. can be explained only by assuming that truth is a mandatory defense to both public and private libel actions. In Gertz, an attorney whom the Court found to be a private figure, brought a defamation action. The Court in Gertz declared that the private-person defamation cases required a showing of fault by the defendant in publishing the challenged information. Justice Powell noted "that if the statements are true, the standard contemplated by Gertz cannot be satisfied."

Justice Powell's conclusion is supported by careful reading of Gertz. The Gertz Court held that false speech falls outside the ambit of protection of the first amendment. Moreover, throughout the opinion, the Gertz majority repeated that liability in defamation actions entails factual misstatements. The Court further voiced concern that a need "to guarantee the accuracy of . . . factual assertions may lead to intolerable

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self-censorship." Ultimately, the majority held that states should have greater latitude in protecting the reputation of private individuals than the strict "knowing-or-reckless" standard of *New York Times Co. v. Sullivan* allowed. The Court concluded, however, that even private plaintiffs should not be able to recover for defamation without both proof of fault and a showing that the subject matter of the alleged defamation was such that a reasonable publisher would recognize it as a "substantial danger to reputation." The Court ruled that a strict liability libel standard is unconstitutional.

By rejecting the knowing-or-reckless standard of *Sullivan*, yet still resting liability on fault, *Gertz* in effect equates fault with negligence. To fit an accurate statement within that standard, the plaintiff would have to show that the true but discreditable revelation had somehow been negligently made. The notion of "negligent truth" is difficult to grasp. Arguably, sufficient "fault" for constitutional purposes could be said to occur if the publisher of a true but libelous report negligently overlooks the likelihood that the accurate statement will harm the plaintiff's community standing. Such an approach, however, poses serious problems. It is difficult to imagine how, in all but the most unusual cases, the Court could articulate a standard that would differentiate negligent from nonnegligent publication of the truth in any case in

120 Id. at 340.
121 See id. at 347.
122 Id. at 348 (quoting Curtis Publishing Co. v. Butts 388 U.S. 130, 155 (1967)).
123 See id. at 347 n.10.
124 The Supreme Court seems to have decided that for libel to be actionable, the defendant must either have been negligent or aware that the statement was false. A defendant who honestly believes a statement to be true is not liable to the plaintiff, even if he made it with an intent to do harm. See supra notes 105-17 and accompanying text.
125 The court in *Taylor v. K.T.V.B.*, Inc., 96 Idaho 202, 525 P.2d 984 (1974), held that truth was insufficient as a defense under the federal constitutional standard set out in *Gertz*. In *Taylor*, the Idaho Supreme Court held that a television station that aired a short sequence of the plaintiff being arrested and emerging nude from his house could be held liable for invasion of privacy because it either knew that the plaintiff would be embarrassed and humiliated by the film, or at least acted "with reckless disregard as to whether that disclosure [would] result in such embarrassment or humiliation." Id. at 205-06, 525 P.2d at 988. Compare Note, First Amendment Limitations on Public Disclosure Actions, 45 U. CHI. L. REV. 180, 194-96 (1977) (criticizing the *Taylor* holding) with Note, Tortious Invasion of Privacy: Minnesota as a Model, 4 WM. MITCHELL L. REV. 163, 199-205 (1978) (recommending a negligence standard for private-facts cases). See also Swan, Publicity Invasions of Privacy: Constitutional and Doctrinal Difficulties with a Developing Tort, 58 OR. L. REV. 483 (1980) (advocating a knowing-or-reckless disregard standard).
126 The publication of an embarrassing truth could be found nonnegligent when harm results because of additional facts, extrinsic to the information reported, and not known to the defendant. For instance, a photograph of a couple holding hands could be damaging if one or both were married to other people, but its publication would not be negligent if the defendant could not have known that fact. Although such cases undoubtedly occur, the case reports suggest that they occur rarely, and, thus, such a standard would exempt only the occasional defendant from liability. The vast majority of privacy defendants would not be helped.
which a plaintiff could prove he or she was in fact injured by the statement. Thus, whenever the publication could be found on its face or in reality to diminish reputation or to cause embarrassment, a court would tend to find liability. If strict liability for defamatory statements is unconstitutional, this functional strict liability for true statements is a fortiori unconstitutional.

The concept of "negligent truth" creates an internal inconsistency with the premise of Gertz. Although the majority in Gertz was unwilling to require states to use the Sullivan standard for private-person libel actions, it was also unwilling to free the states to use any standard that they chose. Regardless of how strong the equities were on behalf of private persons, liability for nonnegligent falsehoods was too restrictive of free speech rights. Thus, the Court clearly contemplated that at least some people would suffer reputational injuries as a result of false information and have no redress in the courts.

To extract from Gertz, therefore, a standard that would both impose liability for accurate speech and do so in virtually any case where reputational and emotional injury could be predicted, would be to broaden rather than narrow the exposure of the media and individuals to liability. Such a reading would contradict the Court's obvious intent in Gertz. It would also fly in the face of the reasonably consistent common law history of truth as a full defense to civil damage claims for libel.

2. The Court's Disapproval of Subjective Standards in Restricting Speech

In deciding Gertz, the Court did not need to address one particular relevant wrinkle in the libel law of a handful of jurisdictions. Some states, by statute or constitution, permit libel recovery for true but injurious statements if they are published with an improper motive.

127 See supra text accompanying notes 107-12.
128 See supra notes 65-97 and accompanying text.
These provisions effectively proclaim that an intent to do harm can overcome the privilege for true statements. Only once, in Garrison v. Louisiana, a criminal defamation action, did the Court examine such a limitation. In Garrison, the Supreme Court reversed a criminal libel conviction against the District Attorney of Orleans Parish, Louisiana. The Court rejected an inquiry into the motives of the libeler, except to the extent that such inquiry was necessary to decide whether the statement at issue was intentionally or recklessly false. Although the Court expressly declined to rule that motive is never a permissible inquiry under the first amendment, it suggested that motive is irrelevant whenever the injurious speech involves matters of public interest:

Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, “it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded.”

The Court’s comments on inquiries into the legitimacy of a speaker’s motives, although pronounced in the context of a seditious libel prosecution, should apply equally to civil actions. Indeed, the sentiments expressed in Garrison seem consistent with the general tenor of the Supreme Court’s decisions in first amendment cases over the past half century, and make it unlikely that the Court will abandon the requirement that defamation be false solely because of the speaker’s subjective intent.

2d 286, 290, 253 N.E.2d 408, 410 (1969). The states that treat truth as a partial rather than a complete defense were influenced by a nineteenth-century American case and its aftermath. In 1803, the state of New York prosecuted Harry Croswell for seditious libel. People v. Croswell, 3 Johns. Cas. 337 (N.Y. 1804). At the time, New York followed the English rule that truthful speech was punishable as a crime if it cast government or its officials in a bad light. See supra notes 81-85 and accompanying text. Alexander Hamilton, who represented Croswell, argued—in lawyerly fashion—for a modification rather than an outright rejection of that well-entrenched doctrine. He suggested that true speech should be protected as long as it was spoken “with good motives, for justifiable ends.” Id. at 352. The New York court rejected Hamilton’s argument, but the legislature adopted it and his language in an 1805 statute. Levy, supra note 89, at 299. Other states then picked up the New York formulation and applied it in both their criminal and civil law. See also infra note 214.

130 379 U.S. 64 (1964).
131 See id. at 72-73 & 73 n.9.
132 Id. at 73 (quoting Noel, Defamation of Public Officers and Candidates, 49 COLUM. L. REV. 875, 893 (1949)).
133 The Court in Garrison stated: “Where criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations.” Id. at 67.
Over time and in a wide range of situations, the Court has shown increasing reluctance to permit restrictions on speech based on the subjective attitudes, beliefs, hopes, and inclinations of the speaker.\textsuperscript{134} The cardinal rule of first amendment jurisprudence is that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."\textsuperscript{135} Presumably, the first amendment would also bar the state from requiring orthodoxy in matters of emotion.

Indeed, the Court has exhibited concern that attitudes and beliefs should not be penalized. During and immediately following World War I, the Court permitted repression of speech simply because individuals believed in "antisocial" ideas and expressed those beliefs publicly in words.\textsuperscript{136} By 1969, however, the Court in \textit{Brandenburg v. Ohio}\textsuperscript{137} had moved to the opposite pole.\textsuperscript{138} The Court held that a state could no longer justify the suppression of speech merely because the speaker desired to achieve mean-spirited and vicious ends. The state must instead make the nearly impossible showing that an imminent likelihood exists that the speech will incite lawless action.\textsuperscript{139}

\textit{Cohen v. California}\textsuperscript{140} provides another example of the Court's reluctance to impose penalties because of the subjective thought processes of the speaker. The majority in \textit{Cohen} rejected the use of societal norms to determine whether speech is too rude or debasing of decent social intercourse to be protected.\textsuperscript{141} More importantly, the Court expressly stated that the first amendment protects not merely words themselves but the emotional matrix that underlies them and is so vital to the process of communication.\textsuperscript{142}

\textsuperscript{134} See generally Emerson, \textit{Toward a General Theory of the First Amendment}, 72 \textit{Yale L.J.} 877, 919-20 (1963) (discussing protection of the "freedom of belief" under the first amendment).


\textsuperscript{137} 395 U.S. 444 (1969) (per curiam).

\textsuperscript{138} See generally J. \textit{NOWAK}, R. \textit{ROTUNDA} \& J. \textit{YOUNG}, \textit{CONSTITUTIONAL LAW} 728-40 (1978) (discussing the Court's move from a bad-tendency test to a strict and narrow "clear and present danger" standard).

\textsuperscript{139} \textit{See} 395 U.S. at 447.

\textsuperscript{140} 403 U.S. 15 (1971).

\textsuperscript{141} \textit{See id.} at 24-25.

\textsuperscript{142} [W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive
Thus, a rule of law requiring a court or a jury to pass on the acceptability of a speaker's emotions or the worthiness of his purposes would contravene the principle underlying Barnette, Brandenburg, and Cohen. The Court has acknowledged that the purpose of the first amendment is to encourage free trade in the marketplace of ideas. A statement is neither more nor less provocative, neither more nor less significant, simply because the person who articulates it speaks in anger or in calm. Hence emotions or motives standing alone should not subject otherwise protectible speech to legal restrictions. Moreover, if the first amendment also protects individual autonomy, such a value is scarcely served by allowing the courts to favor certain emotional states or to require "socially acceptable" motives as predicates for the exercise of the fundamental right to speak. It thus seems unlikely that the Supreme Court, even in cases dealing with libels against private persons, would accept any dilution of the defense of truth, including one premised on an examination of the speaker's thoughts, feelings and beliefs.

The Supreme Court has suggested that libel law protects not merely a property interest in reputation, but a "certain privacy around [the plaintiff's] personality from unwarranted intrusion." If the Court recognizes truth as a full defense to libel, one may reasonably predict that it will continue to protect truthful speech that compromises only privacy interests. Because of the Court's lack of guidance in this area, however, it is necessary to examine the private-facts tort to see function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

143 See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting):

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.


145 The Illinois Supreme Court has already invalidated art. II, sec. 4 of the Illinois Constitution, which makes truth a defense to libel only if spoken with "good motives and for justifiable ends," as violating the first amendment of the federal constitution, at least as applied to persons involved in public issues. See Farnsworth v. Tribune Co., 43 Ill. 2d 286, 253 N.E.2d 408 (1969); cf. Koren v. Capital-Gazette Newspapers, Inc., 22 Md. App. 576, 581, 325 A.2d 140, 143 (1974) (interpreting Supreme Court cases as requiring truth to be an absolute defense in reporting newsworthy events).

whether considerations exist that justify either broad or narrow liability as an exception to the general rule that truth is immune from punishment.

III

COMPETING INTERESTS IN THE PRIVATE-FACTS TORT

In his Cox concurrence, Justice Powell distinguished between the interests underlying defamation and those underlying private-facts actions: "causes of action grounded in a State's desire to protect privacy generally implicate interests that are distinct from those protected by defamation."147 In so doing, he left open the possibility that those undefined privacy interests might be so substantial as to justify liability for true speech despite the Gertz rule. Justice Powell thus raises a critical question about the precise nature and weight of the asserted state interest in permitting a cause of action for truthful but embarrassing disclosures of private facts.

The Court in Smith v. Daily Mail Publishing Co.148 made it very clear that state action infringing on the fundamental rights of speech and the press must pass strict judicial scrutiny. The Court reviewed a West Virginia statute making it a criminal offense to publish the name of someone charged as a juvenile offender and concluded—at least as to matters of "public significance," "[I]f a newspaper lawfully obtains truthful information . . . then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."149

At present, few clues exist to determine what constitutes a "state interest of the highest order" in the privacy-tort area. The Court did not need to weigh interests in its libel decisions because it found that deliberate falsehoods were totally outside the purview of the first amendment, and that negligent falsehoods do not contribute anything important to the free marketplace of ideas.150 Since this speech was not protected, the Court did not need to decide if the interest in regulating it was a "state interest of the highest order." But even if the weight of the states' interest in providing redress for libel were an issue, the ancient common law history of protecting individuals from defamation provided the Court with a basis for finding the states' purpose sufficiently substantial.151 History provides no equivalent support for the

147 Cox, 420 U.S. at 500.
149 Id. at 103.
150 See supra notes 103-05 and accompanying text.
151 In Gertz, one can infer a historical basis from the Court's assumption without discussion that the historical interest in protecting the citizenry against defamation is sufficient to permit some content-based restrictions on speech. See 418 U.S. at 341. The majority's approving reference to a statement by Justice Marshall that "[s]tates should be 'essentially free
Warren-Brandeis notion of a protection for the right to privacy. That interest, therefore, will have to swing alone on the scales of justice without the heavy thumb of a thousand years of Anglo-American legal development to lend it bulk.

A. The Substantiality of the Interests Protected By the Privacy Tort

Smith, which was a type of privacy case, suggests that in the ultimate weighing, the private-facts interest may well be insufficient. The state argued that it had a compelling concern in protecting the anonymity of a child charged with a crime and should therefore be permitted to penalize the accurate publication of the juvenile offender’s identity. By prohibiting publication of the offender’s name, the state sought to encourage rehabilitation and to minimize the adverse social and economic consequences later in life resulting from the child’s early brush with the law. The Court agreed that the state’s concerns were important, but held that they did not approach the level of significance that would justify a limit on the first amendment rights to publish accurate information.

How, then, could a state convince the Court that the interest protected by the private-facts tort outweighs the constitutional interest in free speech? Presumably, it would need first to be able to articulate the reasons that justify creation of a legal remedy for unwanted revelations about the self, and that might be difficult to do.

The commentators are in considerable disagreement over how to describe the purposes of this tort. Dean Prosser, for example, suggested that the tort protects two interests: an interest in freedom from emo-

_152_ See supra notes 68-70 and accompanying text.
_153_ See id. at 104-05. In Smith, the defendant faced criminal penalties for publishing the material. See id. at 98-99. Conceivably the strictest standard for substantiality would be imposed before a state could use criminal law to penalize speech. The libel cases, however, suggest that civil penalties are as offensive under the Constitution as are criminal penalties. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964). Even if the State’s burden were less onerous when it limits speech by recognizing tort remedies, no reason exists to believe that the difference in standards would be extreme.
tional distress, and an interest in preventing reputational injury.\textsuperscript{156} Other commentators contend that the tort protects only against emotional harm, and ignore or deny the relevance of reputational injury to these privacy cases.\textsuperscript{157} Bloustein rejects both the reputational and emotional distress arguments, and responds that the tort, in preserving some "right to be let alone," really protects "individual dignity and integrity," and prevents the loss of "individual freedom and independence."\textsuperscript{158}

The factual situations which have generated law suits in this area of tort law give but small aid in choosing among these theories. Some cases clearly involve both reputational harm and the probable infliction of substantial amounts of mental distress; plaintiffs in those suits seek to recover to some extent for the damage to their standing in their communities.\textsuperscript{159} But other cases may involve only one, or none, of these elements.

In \textit{Virgil v. Time, Inc.},\textsuperscript{160} for example, the plaintiff—a daring body surfer whose escapades included eating spiders and extinguishing lit cigarettes in his mouth—more or less flaunted his odd behavior and used it to attract attention and to achieve prominence among his peers in the Newport Beach, California, area.\textsuperscript{161} Given the public nature of Virgil's behavior, it is difficult to imagine how an accurate written description of his antics could cause reputational harm in any classic sense. For the same reason, the published account seems unlikely to have caused him more than minimal emotional injury.

\textsuperscript{156} See Prosser, \textit{supra} note 8, at 398 ("The interest protected is that of reputation, with the same overtones of mental distress that are present in libel and slander.").


\textsuperscript{159} Such a case is Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931), which involved a revelation that a "respectable" married woman formerly had been a prostitute. Similarly, the privacy action brought by Oliver Sipple, whose heroic actions prevented the assassination of President Gerald Ford, sought remedy for the reputational injury that Sipple suffered by the revelation that he was a homosexual. See Sipple v. Des Moines Register & Tribune Co., 82 Cal. App. 3d 143, 147 Cal. Rptr. 59 (1978). Under the prevailing social mores, both of these exposures were of a sort that could cause these plaintiffs both acute mental anguish and concrete losses of jobs, friends, and family relationships.

\textsuperscript{160} 527 F.2d 1122 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976). The Ninth Circuit vacated the trial court's order denying summary judgment to defendants, and remanded. The trial court then granted summary judgment to Time, Inc., on the ground that the revelations in question were protected by the newsworthiness privilege. Virgil v. Sports Illustrated, 424 F. Supp. 1286 (S.D. Cal. 1976); see also infra notes 349-54 and accompanying text.

\textsuperscript{161} See 527 F.2d at 1124-25, 1124 n.1.
The famous case of *Sidis v. F-R Publishing Corp.*, whose plaintiff is viewed by some as one of the most sympathetic in the annals of privacy law, certainly cannot be explained in terms of reputational injury. In *Sidis*, a former child prodigy's adult life as a rather reclusive, eccentric, and undistinguished office clerk was described in a *New Yorker* magazine profile. The story revealed nothing to Sidis's discredit, and its effect was more likely to create sympathy for him than to reduce his stature among his associates and friends. On the other hand, Sidis, a highly vulnerable individual, genuinely seems to have been emotionally disturbed by the frank portrait of his life.

Finally, consider the plaintiff in *Cason v. Baskin*. After a lengthy legal battle, she won nominal damages for being portrayed in a book by Majorie Rawlings in a way that was frankly admiring and, to an outside observer, decidedly flattering.

These plaintiffs do not seem to share any single common injury. It would be difficult to tell with any assurance whether any or all of them lost their dignity or integrity through these publications. Reputational injury is probable in some cases and at best questionable in others; in some instances it is even hard to believe that the plaintiffs' feelings were hurt. What these plaintiffs do seem to have in common is a dislike of being talked about by the general public, and a willingness to use the courts to complain about it—ironically, even when the probable result is further publicity for the supposedly "private" facts at issue. That a dislike of publicity emerges as the surest common denominator of the private-facts cases is not surprising. After all, a dislike of publicity is exactly what impelled Warren and Brandeis to suggest the creation of the privacy right in the first place. When weighed against the social and constitutional costs of preventing such publicity, however, a legal

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162 113 F.2d 806 (2d Cir. 1940). Although the court sympathized with the plaintiff, it affirmed the lower court decision to dismiss on the ground that the details of Sidis's life were newsworthy.


164 Sidis was a mathematical genius who graduated from Harvard at 16, but subsequently suffered an emotional breakdown and retired into an undistinguished, seemingly lonely existence. 113 F.2d at 807.

165 159 Fla. 31, 30 So. 2d 635 (1947).

166 The case came before the Florida Supreme Court on two separate appeals. *See id.; Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944).

167 Zelma Cason was described in Ms. Rawlings's book, *Cross Creek*, as an irascible, occasionally profane, but brave, warm, and widely loved figure in her Florida county. The segment of the book describing Ms. Cason is reprinted at 155 Fla. 198, 202-05, 20 So. 2d 243, 245-46 (1944).

168 *See*, e.g., Emerson, *supra* note 39, at 348; Kalven, *supra* note 6, at 338-39. Kalven even suggests that such actions will rarely be brought by any except those with "shabby, unseemly grievances and an interest in exploitation." *Id.* at 338.

169 *See supra* notes 10-16 and accompanying text.
action to support such a distaste is not highly compelling. Even if one were to assume that each case involved at least emotional injury and damage to dignity and that many also involve reputational harm, it remains unclear whether preventing such harm is a social interest of sufficient magnitude to give the states a right to limit free speech.

1. The Problems Associated with Compensating Emotional Harm

Regardless of the source of the injury, a tort recovery based solely or largely on claimed psychological harm (within which I would include emotional distress and possibly injuries to dignity) hardly rests on firm legal ground. Traditionally, courts were extremely reluctant to compensate plaintiffs for emotional harms except as an adjunct to awards of damages for other injuries that the courts deemed more concrete and easier to value. Roscoe Pound once explained:

There are obvious difficulties of proof in such cases, so that false testimony as to mental suffering may be adduced easily and is very hard to detect. Hence this individual interest has to be balanced carefully with a social interest against the use of the law to further imposture. Today, sixty-five years after Pound wrote those words, the award of damages exclusively for emotional harm remains controversial in tort law. Many states now follow the Restatement (Second) of Torts and allow for recovery for the intentional infliction of emotional distress caused by a defendant's outrageous behavior. Nonetheless, sufficient problems of proof and valuation remain that lead courts and commentators alike to tread cautiously in further extending the right to recovery for emotional harms.

Such caution seems especially appropriate when speech is the sole

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170 In using these examples, and expressing a doubt about the significance of the shared interest that explains them, I do not mean to suggest that true disclosures are always harmless, or that none of these plaintiffs were injured. I am simply illustrating that the tort law they invoke does not rest on a well-defined and precise foundation.


172 Pound, supra note 157, at 359-60.

173 RESTATEMENT (SECOND) OF TORTS § 46 (1965).

174 The Restatement (Second) of Torts continues to limit recovery for emotional distress to those cases in which the injury is caused by outrageous, intentional behavior by the defendant or where it is an element of harm incurred by the invasion of some independent legal interest. Id. § 47 comments a, b; see also Note, Defamation, Privacy and the First Amendment, 1976 DUKE L.J. 1016, 1099.
source of the injury. In a libel action, *Time, Inc. v. Firestone*, the plaintiff, Mrs. Firestone, abandoned all claims for pecuniary damage to her reputation and sued only to recover for emotional distress. A jury found for the plaintiff, and the court awarded her $100,000. The libel at issue was an erroneous *Time* magazine report that a Florida court had granted Mr. Firestone a divorce, partly on grounds of adultery. The case received extensive publicity—contributed to by Mrs. Firestone's press conferences—and both sides did charge one another with adultery, a fact that was widely reported. Thus, it is difficult to understand how a brief, if accurate, report in *Time* magazine by itself could have inflicted such extreme emotional damage. The anomalous award prompted Justice Brennan to warn in his dissent that the allowance of such a recovery without proof of injury to reputation "is clearly to invite 'gratuitous awards of money damages far in excess of any actual injury' and jury punishment of 'unpopular opinion rather than [compensation to] individuals for injury sustained by the publication of a false fact.' "

Justice Brennan's concern is equally appropriate in private-fact cases because courts do not require proof of special damages, and thus provide little objective evidence against which to test the size of a jury award for mental distress. The risk that damages awarded for emotional distress may exceed the harm done is acceptable in some areas of tort law because the law wants to discourage the underlying behavior. When the alleged injury results from speech, however, the threat of un-

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176 See id. at 460.
177 See id. at 452.
178 *Id.* Not until the Florida Supreme Court reviewed the decree did it become clear that the legal ground for the divorce was "extreme cruelty." *Id.* at 459. The divorce court had relied on "lack of domestication of the parties," which was not a valid basis for granting the decree in Florida. *Id.* at 458-59.
179 *Id.* at 454-55 & n.3.
180 *Id.* at 450-51; *id.* at 484-85 (Marshall, J., dissenting). The Florida Supreme Court referred to the case as a "cause célèbre." *Id.* at 454.
181 *Id.* at 475 n.3 (Brennan, J., dissenting) (bracketed language in original) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974)).
182 See W. PROSSER, LAW OF TORTS 815 (4th ed. 1971). The Restatement Second says that, after *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), it is likely that recovery for invasion of privacy will be confined to compensation for "actual injury." RESTATEMENT (SECOND) OF TORTS § 652H comment c (1977). It suggests, however, that a plaintiff's bare testimony as to feelings of emotional distress alone could be sufficient to demonstrate "actual injury." *Id.*
183 A recent California case indicates the potential for large mental distress verdicts in private-fact cases. Plaintiff won $250,000 in compensatory damages (in addition to a $525,000 punitive award), largely for psychological harm. Her actual expenditures for therapy were $800. The lawsuit was brought by plaintiff, first woman president of her college's student body, because a columnist in the Oakland Tribune revealed that plaintiff had undergone a sex-change operation. Although the decision was reversed on appeal, the reviewing court specifically declined to find that the damages at trial were excessive. *Diaz v. Oakland Tribune, Inc.*, 9 MEDIA L. REP. (BNA) 1121 (Cal. App., Jan. 18, 1983).
controlled jury verdicts poses an entirely different problem. The Constitution seeks to encourage speech except in rare and especially egregious forms. As the Supreme Court has recognized, the risk of large, speculative damage awards chills desirable as well as undesirable speech, and does so as effectively as can the threat of a prison sentence or criminal fine.184

2. A Case for the Positive Value of Gossip

The privacy tort not only poses problems of definition and damages, but also rests upon a dubious assumption that society has a greater interest in protecting certain details of an individual’s life than in protecting the values on which our traditional constitutional preference for unrestricted speech depends. A closer examination raises serious doubts, however, as to whether our society in reality has ever placed so high a value on protecting an individual’s reputation, dignity or emotional security from the assaults of true disclosures.

The literature on privacy has emphasized the social and philosophical bases supporting the notion that law should protect against publication of private facts. What is “private” has been variously defined by courts and commentators, but in the aggregate includes a wide range of data about individuals’ character, personality, and social behavior. The privacy literature, however, has rarely acknowledged a contrary body of evidence, casting doubt on the preeminent value of privacy and suggesting that the communication of information about such personal matters may serve a useful and productive social function. To the extent that this expression has worth, arguments for its suppression need serious reconsideration.

History, religious doctrines, literature, and the social sciences are replete with examples that suggest our society is at least ambivalent about the weight to assign to interests in personal privacy when they compete with the value of truthfulness about the character and activities of our neighbors.185

Christianity, which has strongly influenced Anglo-American law, often seemed to value public exposure of an individual’s faults and weaknesses as a way to stimulate better behavior in others and to assure the personal salvation of the sinner.186 Hester Prynne becomes a powerful moral force in her New England community because, unlike her lover, Dimmesdale, she must acknowledge her sin publicly.187 The com-

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184 See New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964) (“The fear of damage awards under a [tort liability law] may be markedly more inhibiting [of free speech] than the fear of prosecution under a criminal statute.”).
186 See supra notes 72-73 and accompanying text.
community benefits as a result, because it can take the true measure of Hester, whereas it cannot do so of others, like Dimmesdale, who continue to be protected by undeserved good reputations.\textsuperscript{188}

In daily life, the equivocation between respecting privacy and preferring public knowledge becomes even more evident. Parents teach their children that “tattling” is wrong, yet the children grow up in a world in which courts, academic honor systems, and other social and legal institutions may require them for the good of the community to reveal what they know about the activities of their associates and neighbors.

The reasons behind such ambivalence are easily uncovered. Most of us have some personal traits or indiscretions that we would prefer to remain unknown. We may also believe, as a matter of ethics, religious training, or simple good manners, that it is wrong, unkind or vulgar to make certain revelations about others. Yet, we at least tacitly recognize that the cohesiveness and durability of any social organization depends upon the ability of its members to evaluate each other accurately and to use their observations to exert, modify, or develop social controls.\textsuperscript{189}

Two sources support this assertion. First, social scientists in this century have developed both an understanding of the constructive functions of gossip and a recognition of its universality in human communities. Second, history suggests that we have intuitively appreciated the benefits of free exchange of gossip for a long while and that our understanding of its value may well have been a major force in the extraordinary reluctance of the English common law to develop legal sanctions against truthful speech.

\textbf{a. Gossip from a Historical Perspective.} In northern Europe during the Dark Ages and the medieval period, the privilege of social participation in the upper strata of society depended not merely on birth or other formal indicia of status, but also upon notions of character or individual worth.\textsuperscript{190} Bad character alone could incapacitate a man from oath-tak-

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\item Posner says this about undeserved reputations and the privacy tort: [W]e have no right, by controlling the information that is known about us to manipulate the opinions that other people hold of us. Yet this control is the essence of what most students of the subject mean by privacy.

Posner, supra note 185, at 408.
\item Professor Chafee points out that another source of ambivalence about privacy versus exposure is the pleasure that many people derive from receiving publicity in the media: Times have changed since Brandeis wrote in 1890: Seeing how society dames and damsels sell their faces for cash in connection with cosmetics, cameras, and cars, one suspects that the right to publicity is more highly valued than any right to privacy. . . . So I recommend that respect for privacy be left to public opinion and the conscience of owners and editors.

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ing. Thus, he could not participate as either a plaintiff or a witness in a legal proceeding and, if accused of a serious crime, could not clear himself of the charge by his oath as might a man of unblemished reputation. Similarly, in a feudal society, in which social relations and the structure of government itself consisted of an interlocking pyramid of promises of loyalty and service from vassal to lord, the right to hold land necessarily depended upon the individual’s reputation for faithfulness.

Julius Goebel, in his study of the origins of English criminal law, traces the legal incapacitation of an infamous person to numerous sources, including Roman law, ecclesiastical law, and quite possibly independent sources of Germanic law. According to Goebel, the Romans recognized two grounds for depriving an infamous individual of the rights and privileges enjoyed by citizens in good standing. *Infamia juris* resulted from actions that contravened the law. *Infamia facti* occurred when the individual repeatedly engaged in legal but “morally reprehensible” activity. Goebel stresses that, in both Europe and England, the Roman concept of infamy achieved such importance in both secular and in church law that it ultimately became “basic to their schemes of law enforcement, and eventually to the whole structure of human relationships.” If Goebel accurately reconstructs the relationship between good name and social status, then it should be no surprise

nal law 250-51 (1976). See also W. Ault, Europe in the Middle Ages 228-29 (1946) (describing the personal bond of homage central to the feudal relationship); R. Brown, The Origins of Modern Europe: The Medieval Heritage of Western Civilization 119-22 (1973) (describing the special commendation that paralleled the feudal knight’s increase in status); C. Wood, The Age of Chivalry: Manners and Morals 1000-1450, at 52-54 (1970) (discussing the critical role of honor in feudal system).

191 J. Goebel, supra note 190, at 70.
192 See id. at 322.
193 See id. at 255-57.
194 See id. at 70-71 & nn.16-29.
195 The essence of the Roman idea was that for certain acts or because of a mode of life an individual subjected himself to the moral censure of a competent authority in the state, and that this entailed disqualification for certain rights both in public and private law. In some types of cases *infamia* attached to the mere making known before a magistrate of acts which would exclude from public office or honor, whereas in other cases and notably criminal proceedings the infamy attached upon magisterial sentence. In addition to these forms of *infamia* to which writers have given the name *infamia juris* . . . is the infamy of opinion which the legal texts indicate was based upon character or standing. This has been called *infamia facti*—factual infamy. The essence of this conception was that persistent indulgence in acts morally reprehensible but not themselves entailing infamy of law, would lead to disabilities because such indulgence affects a man’s character. The principle of application of factual infamy was the same both in public and private [Roman] law, and the disabilities such as the exclusion from office or honors, and the lessening of a man’s credibility as a witness were in some ways similar to those ensuing upon *infamia juris*.

J. Goebel, supra note 190, at 70 n.16 (citations omitted).
196 Id. at 73.
that from the earliest time, English law treated reputation as a highly valuable commodity. The creation of the civil defamation action might thus be seen not merely as a socially acceptable way for an injured party to vent his or her rage, but also as a means to protect an individual's capacity to act as a full member of society. The decision to recognize truth as a complete defense in defamation made equally good sense. In a society in which personal worth is the coin on which power and status are traded, a person who reveals the truth about another's character commits no wrong, but instead helps to preserve the foundations of the society. Thus, accurate tale-telling would be encouraged and acceptable behavior.

Historians' accounts of the structure of English society support the notion that gossip, although occasionally irksome, was on the whole perceived as having genuine social value. Stone maintains that during the period from 1500 to 1800, close observation by one's neighbors, servants, and members of the extended kinship group was an immutable fact of life for rich and poor alike. Living conditions and prevailing social mores led people to expect little privacy, even in the home. Even sexual intimacies were somewhat public events. Not surprisingly, prying, observing, and gossiping about the behavior of others were commonplace, and the ecclesiastical courts entertained an active trade in denunciations of misbehavior and sexual peccadillos. In addition to the controls exerted by the church, the secular authorities and neighbors themselves used devices from stocks to skimmingtons to chastise observed deviations from behavioral norms. A society so dependent on gossip as a form of social control understandably would be reluctant to

197 See, e.g., T. PLUCKNETT, supra note 78, at 484.
199 Id. at 253-57.
200 The common practice among the poor of the sharing of beds by two, three, or even four persons made even visual sexual privacy impossible. In Elizabethan Essex, court records quite incidentally turn up evidence of a man having intercourse with a girl while her sister was in the same bed and of a case in which the girl's mother was in the same bed. There was simply nowhere else to go, and there is every reason to suppose that this indifference to sexual privacy persisted well into the nineteenth century; in fact, until working-class housing began to be slightly less grossly overcrowded.

Id. at 256. Even among the rich, sexual privacy was scarce until the introduction of hallways and rooms set aside for sleeping in the late seventeenth and eighteenth centuries. Before then, rooms opened into one another and families used them for multiple functions so that sexual privacy was not secure even within the upper classes. Id. at 8, 253-54; see generally D. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 20-21 (1972).
201 L. STONE, supra note 198, at 93.
202 Id. at 144-45. Stone describes the skimmington as a form of public humiliation in which the malefactor was paraded around the town seated backwards on a donkey. Id. The "parade" could also proceed with another person or an effigy to represent the unfaithful or scolding spouse. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2133 (1976).
discourage truthful speech by making it a basis of liability in a defamation action.

The Star Chamber ultimately abolished truth as a defense to libel. The alteration in the law, however, arose from pragmatic political considerations, and not from a change of heart about the underlying morality of unpleasant truthfulness. The Chamber was trying to preserve political stability in a troubled time and to exert control over the potentially subversive and powerful printing presses. It also hoped to preserve the public peace by offering criminal punishment to avenge insults as a substitute for the duel. In fact, until almost the turn of the nineteenth century there was no hint that an individual who revealed another's misdeeds, misfortunes, and personal failures would generally have been perceived as guilty of wrongdoing.

Charles Fox was perhaps the first to raise doubts about the morality of the defense of truth. In the parliamentary debates that preceded the passage of the 1791 Libel Law in England, Fox argued against making truth a complete defense in criminal libel, claiming that it would be wrong to give legal protection to someone who reveals another's inescapable personal misfortunes or physical defects. Fox's argument is

203 See supra notes 83-96 and accompanying text.
204 Veeder, supra note 74, at 561-63. For descriptions of the political instability of the period, see generally G. CLARK, ENGLISH HISTORY, A SURVEY (1971); D. HUME, THE HISTORY OF ENGLAND FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688 (abr. ed. 1975); 5-7 THE POLITICAL HISTORY OF ENGLAND (W. Hunt & R. Poole eds. 1919).
205 Church and state alike shared the hope of preventing the spread of "pernicious" ideas by controlling or prohibiting the writing and distribution of books. The invention of the printing press made such control far more difficult and created the need for a more efficient and ruthless form of censorship. The Crown limited the privilege of printing to the so-called Stationer's Company and imposed rigorous penalties for unauthorized publications. Veeder, supra note 74, at 561-63; see also Kelly, supra note 89, at 300-01.
206 See supra note 84 and accompanying text.
207 Blackstone, for example, bluntly stated that a plaintiff could not collect damages in a civil suit for true statements because the plaintiff "has received no injury at all." W. BLACKSTONE, supra note 88, at *126. He added: [W]here there is no injury, the law gives no remedy. And this is agreeable to the reasoning of the civil law; . . . (it is not just and right that he who exposes the faults of a guilty person should be condemned on that account; for it is proper and expedient that the offences of the guilty should be known). Id. at *125.
208 29 PARL. HIST. ENG. 575 (1817).
209 Fox admitted that it would be an unusual case in which truth would not be a defense, but offered the following as an example: Suppose, for instance, a man had any personal defect or misfortune, any thing disagreeable about his body, or was unfortunate in any of his relations, and that any person went about exposing him on those accounts, for the purpose of malice, and that all these evils were day after day brought forward, to make a man's life unhappy to himself, and tending to hold him out as the object of undeserved contempt and ridicule to the world, which was too apt to consider individuals as contemptible for their misfortunes, rather than odious for their crimes and vices . . . .

Id.
perhaps the most sympathetic of those raised against the defense of truth, because it was designed to protect the innocent from injury.²¹⁰

Not until 1843, however, did anyone appear to argue seriously about the moral injustice of the defense of truth in civil case law. In 1843, Lord Campbell recommended that Parliament eliminate truth as an absolute defense in civil defamation cases.²¹¹ His concern was broader than Fox’s; he wanted to protect repentent wrongdoers as well as those innocents cursed by fate with unpleasant ailments or unsavory relatives. It was unjust, he argued, to allow defamers who dredged up the long-forgotten misdeeds of others to hide behind the defense of truth unless they could demonstrate that the public would benefit from their revelations.²¹² Although Parliament declined to follow Lord Campbell’s advice,²¹³ his plea helped trigger debate over the reasons for the defense, and helped set the stage for the Warren-Brandeis proposal that the civil courts recognize an interest in “privacy.”²¹⁴

Around the same time, Thomas Starkie abandoned Blackstone’s explanation that truth was a defense because accurate statements were a social good. Instead, Starkie argued that the sole basis for denying recovery to plaintiffs for truthful defamations was the plaintiff’s failure to come to court with “clean hands.”²¹⁵ Starkie’s argument was influential, but not everyone rushed to embrace the more neutral “clean-hands” theory as an explanation of the defense of truth. For example, Thomas Cooley, from whom Warren and Brandeis adopted the famous phrase “the right to be let alone,”²¹⁶ adhered to the traditional view:

The law has never conferred upon any one the right to be protected against the damaging effect of the truth concerning his character. If he has been enabled to put on a good outward appearance by cover-

²¹⁰ See 1 T. Starkie, supra note 74, at lxiiv-lxv n.g.
²¹³ Lord Campbell’s Act, 1843, 6 & 7 Vict., ch. 96.
²¹⁵ “It may, therefore, be more consistent to consider the plaintiff as having excluded himself from the protection of the law by his own misconduct, than to attribute the exemption to any merit appertaining to his adversary.” 1 T. Starkie, supra note 74, at 231-32. In Curtis Publishing Co. v. Butts, 388 U.S. 130, 151 (1967), Justice Harlan, writing for the plurality, explained that the defense of truth as originally contemplated was “more readily explained as a manifestation of judicial reluctance to enrich an undeserving plaintiff than by the supposition that the defendant was protected by the truth of the publication.”
²¹⁶ Warren & Brandeis, supra note 1, at 195 (quoting T. Cooley, A Treatise on the Law of Tort 29 (2d ed. 1888)).
ing himself with the mantle of hypocrisy, it is not illegal for public inquiry and contempt to tear this away. A dishonest man is not wronged when his good repute is destroyed by exposure.\(^{217}\)

Although nineteenth- and twentieth-century writers have expressed increasing skepticism about the preference for truth over privacy, and have exhibited increasing empathy for those whose acts are exposed by true statements,\(^{218}\) studies continue to show that a free exchange of personal information plays the same central role in maintaining the social cohesiveness of modern communities that it played in English towns 300 or more years ago.\(^{219}\)

**b. The Function and Persistence of Gossip in Contemporary Life.** Superficial differences, of course, do exist between contemporary practices and those of early England and America. Spying through keyholes and chinks in walls\(^{220}\) is now as unacceptable as maintaining dunking stools and public whippings. Our mobile and industrial society offers opportunities for anonymity unimagined by inhabitants of the small, cohesive towns and villages of rural England and early America.\(^{221}\) Yet, contem-

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\(^{217}\) T. COOLEY, supra note 216, at 32. Modern writers have made similar arguments, suggesting that the right to privacy in its private-facts guise is a kind of legally sanctioned misrepresentation. See Epstein, Privacy, Property Rights, and Misrepresentation, 12 GA. L. REV. 455, 469-74 (1978). See generally Posner, supra note 185.

\(^{218}\) One writer describes in the following way the changes in the circumstances of life that generated greater support for privacy:

The growth of literacy and increased education, and the gradual involvement of larger and larger sections of the adult population [during the late 19th century] in education and politics, extended the radius of attention. People did not cease to be interested in their neighbors; but they had to contend with the increased resistance of their neighbors to being known and with increased difficulties in knowing about them. Many more persons became interested in affairs more remote than the affairs of their neighbors. The intense desire to penetrate into the affairs of one’s neighbors was probably attenuated by the increased interestingness of the affairs of the larger world. This made for a greater ease in the maintenance of privacy.

Shils, supra note 9, at 290. A number of modern sociologists and anthropologists, however, would quarrel with Shils’s assumption that the enlargement of the world in which ordinary citizens became interested was accompanied by a diminished interest in the lives of their neighbors. See infra notes 219-23 and accompanying text.


\(^{220}\) Stone describes historically the extent of surreptitious surveillance by servants within the homes of middle and upper classes. See L. STONE, supra note 198, at 253-54.

\(^{221}\) See supra note 218; see also A. BLUMENTHAL, supra note 219, at 108 (proposing that one reason individuals in the American town he studied moved to larger cities was to escape the degree of observation and control exerted in a small town by increasing their anonymity).
porary communities still enjoy considerable knowledge about the private lives of individual members, and still use that knowledge to preserve and enforce social norms. This appears to be true across all social strata, in urban neighborhoods as well as in small towns and rural areas. To a large extent, the development of modern popular journalism paralleled the growth of less intimate communities. The press, therefore, when it provides information about the private lives of both famous and ordinary people, could be viewed merely as performing a traditional function that no longer can be accomplished by person-to-person gossip alone.

Moreover, gossip—the exchange of personal information about character, habits and lifestyles—does not merely serve as an instrument of social control. Students of the phenomenon claim that gossip, and the rules governing who participates and who is privy to what information about whom, helps mark out social groupings and establish community ties. By providing people with a way to learn about social

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222 A wide variety of commentators have made this point. See, e.g., J. West, supra note 219, at 99. West also describes a number of so-called gossip groups in the town that he studied, and quotes a citizen referring to one such group: "They drive sin into the timber." Id. at 105; see also A. Westin, supra note 9, at 20; Abrahams, supra note 219, at 296-97; Gluckman, supra note 219, at 308.

223 Gluckman suggests that the degree of interest in the lives of other social groups, royalty, film stars, and sports personalities that permeates modern western society points to a need for more intensive study of this phenomenon. See Gluckman, supra note 219, at 315.

224 Suttles describes the functions of gossip in an urban neighborhood as quite similar to those described by others in small towns. See G. Suttles, supra note 219, at 36-37.

225 Historian Daniel Boorstin claims that the urbanization of the United States really took place in the century following the Civil War. See D. Boorstin, The Americans: The Democratic Experience 247 (1973). The first census to distinguish between urban and rural dwellers was that of 1870. See id. at 267. During the post-Civil War period, the newspaper industry also underwent a dramatic expansion. From 1860 to 1889, the number of daily newspapers published in the United States increased from 387 to more than 1,500. Circulation also increased during that time more than a thousand-fold. D. Pember, supra note 14, at 10. In contrast, Pember reports that in 1790 only eight daily newspapers were published in the entire country. Id. at 5.

226 In an urbanized society, direct observation and back-fence discussion of the foibles, habits, and lifestyles of other members of the community are prevented by the anonymity produced by a large population, impersonal apartment houses, distant work places, and other factors. Because the need for information about the personal lives of others is a widespread and persistent phenomenon, media reporting emphasizing lifestyles and personalities helps to fill the vacuum. See McQuail, The Mass Media and Privacy, in Privacy 177-214 (J. Young ed. 1979); O'Brien, The Right of Privacy, 2 Colum. L. Rev. 437, 443 (1902); Posner, supra note 185, at 395-97. McQuail, a sociologist, notes the extent to which press activity which seems to conflict with norms of privacy and confidentiality may actually perform an essential function in a society which is increasingly impersonal and governed by experts and bureaucratic organizations. In brief, the media have an implicit obligation to serve the public interest, by protecting and enlarging a "sphere of the public" in matters of morality and belief as well as of information.

McQuail, supra, at 191.

227 According to Gluckman:

[W]hen we try to understand why it is that people in all places and at all
groups to which they do not belong, gossip increases intimacy and a sense of community among disparate individuals and groups. Gossip may also foster the development of relationships by giving two strangers the means to bridge a gap of silence when they are thrown together in a casual social situation.\textsuperscript{228}

Thus, from the perspective of the anthropologist and sociologist, gossip is a basic form of information exchange that teaches about other lifestyles and attitudes, and through which community values are changed or reinforced.\textsuperscript{229} This description is a far cry from that of Warren and Brandeis, which characterized gossip as a trivializing influence that destroys “robustness of thought and delicacy of feeling”\textsuperscript{230} and serves the interests primarily of the “prurient”\textsuperscript{231} and the “indolent.”\textsuperscript{232}

Gossip thus appears to be a normal and necessary part of life for all but the rare hermit among us. Perceived in this way, gossip contributes directly to the first amendment “marketplace of ideas,” and the comparative weight assigned to an interest in its limitation merits careful consideration.

The Supreme Court noted in \textit{Time, Inc. v. Hill} that “[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community.”\textsuperscript{233} The Court suggested that the primary cause of this risk of exposure was the founders’ initial decision to protect freedom of speech.\textsuperscript{234} That assertion is probably untrue. Rather, the risk is created whenever any group of people bands together into any sort of a community at all. Interest in the details of one another’s lives seems universal.\textsuperscript{235} Thus, common sense suggests that courts and legislatures should exercise caution before imposing legal sanctions against behavior that

\begin{itemize}
  \item times have been so interested in gossip and scandal about each other, we have also to look at those whom they exclude from joining in the gossiping or scandalizing. That is, the right to gossip about certain people is a privilege which is only extended to a person when he or she is accepted as a member of a group or set.
\end{itemize}


\textsuperscript{228} Paine contends that gossip is an important and sometimes the sole way that information can be obtained to facilitate relationships between disparate groups, such as “[p]atron-client, landlord-tenant, producer-consumer” or “members of opposing political parties.” Paine, \textit{supra} note 219, at 282; \textit{see also} Gluckman, \textit{supra} note 219, at 315 (gossip about sports and entertainment personalities provides a basis for personal interchanges between transitarily associated individuals).

\textsuperscript{229} \textit{See supra} note 218; \textit{see also} Posner, \textit{supra} note 185, at 395-96. Posner suggests that people need information about others to evaluate people correctly and to make personal choices about lifestyles or careers.

\textsuperscript{230} Warren & Brandeis, \textit{supra} note 1, at 196.

\textsuperscript{231} \textit{Id.}

\textsuperscript{232} \textit{Id.}

\textsuperscript{233} 385 U.S. 374, 388 (1967).

\textsuperscript{234} \textit{See id.}

\textsuperscript{235} Gluckman, \textit{supra} note 219, at 313.
we may occasionally deplore but in which we all participate. The comment of one anthropologist makes this point quite pungently:

"[I]f I suggest that gossip and scandal are socially virtuous and valuable, this does not mean I always approve of them. Indeed, in practice I find that when I am gossiping about my friends as well as my enemies I am deeply conscious of performing a social duty; but that when I hear they gossip viciously about me, I am rightfully filled with righteous indignation."

Perhaps, then, one reason that many private-facts cases seem at times so dangerously near the edge of triviality is that the tort law mistakes the fundamental importance of the evil that it is designed to prevent. Furthermore, the tort as broadly described by Warren and Brandeis established a norm for behavior that deviates substantially from ordinary practices and that people would be unlikely and (perhaps even unwise) to adopt. As a general rule, legal standards for behavior cannot vary too greatly from accepted community practices without cre-

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236 Id. at 315.
237 A wide variety of commentators are skeptical of the social importance of preventing the publication of private facts. The study of the British Committee on Privacy, chaired by the Rt. Hon. Kenneth Younger, concluded that although 83% of the population surveyed considered privacy to be highly important as a general matter, few viewed the press as a serious threat to privacy. See REPORT OF THE COMMITTEE ON PRIVACY, CMD. 5, No. 5012, at 25 (1972). A recent American survey reached similar results. When asked to compare the press to other institutions in the private sector, those polled regarded newspapers and television as the least imposing invader of privacy. Americans worry most about invasions by government and business; in the private sector, they were most concerned about insurance, finance and credit-card companies, and credit bureaus. LOUIS HARRIS & ASSOCs., INC., THE DIMENSIONS OF PRIVACY: A NATIONAL OPINION RESEARCH SURVEY OF ATTITUDES TOWARDS PRIVACY 3, 6 (1981). Don Pember, in reviewing the American experience with the private-facts tort, explains that most plaintiffs fail in such suits because judges believe that "the evil [Warren and Brandeis] sought to remedy was largely mythical." D. PEMBER, supra note 14, at 238. One of the most skeptical statements, however, comes from Professor Epstein: "Privacy, however lofty its pedigree, is the least important tort for a civilized society. Its late emergence testifies to its marginal role, not to its moral sophistication." Epstein, supra note 217, at 463; see also McQuail, supra note 226, at 178.
238 In Donahue v. Warner Bros. Pictures Distrib. Corp., 2 Utah 2d 256, 272 P.2d 177 (1954), the Utah Supreme Court declined to extend Utah's anti-misappropriation privacy statute, UTAH CODE ANN. § 76-9-405,-406 (1953), to any publication of private information in a medium operated for profit. The court stated:

The right of privacy, although of great value to individuals, does not contain the vital social implications for the whole of society that exist in the allowance of freedom of expression in motion pictures, showings of newsreels, biographies, historical plays and the like. Where the right of privacy of the individual is pitted against the general weal, we give some consideration to the precept that the best social policy is that which results in the greatest good to the greatest number, unless application of this principle cuts into inviolable rights of the individual.

2 Utah 2d at 264, 272 P.2d at 183; see also Bcaney, The Right to Privacy and American Law, 31 LAW & CONTEMP. PROBS. 253, 255-56 (1966).
ating a risk that the community will totally disregard the law.239

Certainly, positive law may on occasion inspire dramatic changes in ordinary behavior and notions of decency. The civil rights amendments to the Constitution,240 and the statutes that flowed from them,241 have probably influenced external interactions as well as deeply ingrained psychological attitudes about race. Laws abolishing slavery and reaffirming the ideal of human equality, however, proceed from impeccable sources in moral law and draw support from widely shared political ideals of personal worth and freedom in a democratic society.

One need not be a cynic about the private-facts tort to suspect that, notwithstanding the advocacy of that particular interest in privacy, an action for the hurt that flows from the exposure of embarrassing facts taps no such source of fundamental moral law.242 The private-facts tort merely relies on a vague consensus that we should not cause one another unnecessary pain, an agreement that we regularly temper by our tacit preference for the freedom to dissect one another’s lives and characters.243

239 Any standard by which the law can undertake to compel the people to regulate their conduct must be one generally and spontaneously accepted, so that their approving judgment shall accompany the endeavor to enforce conformity. It must not be one that a majority of the people do not habitually observe, because if the majority of the people are law breakers, it is obvious that only some extraneous power could ever enforce the law.


240 U.S. CONST. amends. XIII-XV.


242 See supra note 237. Negley maintains that the moral foundations of a right to privacy are unclear:

What has not been discussed . . . is why privacy is commonly considered a right or a value to be protected by the law. There is no historical consensus, in philosophy, politics, or law, that it is such a right. Few philosophers would argue that privacy is a “natural” right or that the intrinsic nature of privacy establishes it as a legal right.

Negley, Philosophical Views on the Value of Privacy, 31 LAW & CONTEMP. PROBS. 319, 319 (1966). Since Negley wrote his article, Bloustein has attempted to establish a philosophical foundation on which to rest the legal protection of privacy. See E. BLOUSTEIN, INDIVIDUAL AND GROUP PRIVACY (1978). He argues that the tort law of privacy was designed to protect the fundamental integrity of each person’s individuality. See id. at 41-42. See generally Fried, Privacy: Economics and Ethics; A Comment on Posner, 12 GA. L. REV. 423, 426-27 (1978) (expressing a view similar to Bloustein’s as to the interest protected by privacy law). Although highly influential, Bloustein’s position has not succeeded in eliminating serious questions about the value of and justification for the private-facts tort. Indeed, Bloustein admits that identifying a moral foundation for privacy does not necessarily tell us whether the law should enforce the right. See id. at 42-43.

243 Roscoe Pound and Patrick Devlin have discussed the limits of the law in enforcing moral claims. Pound cautioned against trying to make law “do the work of the home and of the church,” Pound, The Limits of Effective Legal Action, 3 A.B.A. J. 55, 56 (1917), and against attempting “to enforce over-high ethical standards and to make legal duties out of moral duties which are not sufficiently tangible to be made effective by legal means.” Id. at 61. He
The private-facts tort is thus both constitutionally and practically untenable. A serious effort to enforce a general right to be free of unwanted publicity about private facts would probably be as successful as the attempt to enforce temperance through the ill-fated eighteenth amendment, or the effort to use the law to prevent extramarital sexual intercourse.\(^\text{244}\)

B. The Mass-Communication Element: An Attempt to Avoid More of the Right to Privacy Than Society Can Afford

The practical problems of proscribing widespread, socially important behavior may explain, at least in part, why most courts limit the private-facts tort's scope by requiring mass or widespread communication as an element of the cause of action.\(^\text{245}\) Judges either tacitly or expressly recognize that they would create an impossible legal tangle if they subjected back-fence and front-parlor gossip to liability.\(^\text{246}\) Thus, suggested that when we make such attempts the law becomes ineffectual or unenforceable. See id. at 56. Devlin writes that we expect a gap between law and our moral ideals. In his view, law can only set the lower limit on acceptable behavior, and cannot, in and of itself, effectively create a society that lives up to the highest ideals of human behavior. P. DEVLIN, THE ENFORCEMENT OF MORALS 19-20 (1965). When commentators disagree about the morality of discussing one another's private lives, and when gossip is practiced as widely and for such a variety of reasons as it is in this society, positive law should probably accept ordinary practices as the lower limit of tolerable behavior. See also infra note 244.

\(^\text{244}\) See J. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (1969). Gusfield's observations about the efforts to control alcoholic beverages apply equally well to the effort to enforce the law against public exposure of private facts. Social deviance from the legal ideal regarding temperance was also widespread. Moreover, the temperance movement originated with an elite group, the New England Federalists, who wished to impose their moral standards on an increasingly diverse population over which the elite no longer exercised political control. Id. at 5. The origin of the private-facts tort is strikingly similar. See supra notes 10-16 and accompanying text; see also infra text accompanying notes 303-05.

Even when a significant correlation initially exists between moral perceptions and actual behavior, law based on morals can eventually become ineffectual. Many moral precepts change or dissipate over time, leaving behind a body of law that quickly becomes irrelevant, or worse, produces undesirable results. One such example is the so-called heart balm torts protecting against breaches of sexual fidelity, alienation of affection, and other assaults on family relations. Many jurisdictions no longer permit such actions. See generally REPORT OF COMMITTEE ON PRIVACY, CMD. 5, No. 5012 (1972) (regarding shifting notions of privacy); W. PROSSER, supra note 4, § 124, at 873-88 (4th ed. 1971); Brown, The Action for Alienation of Affections, 82 U. PA. L. REV. 472 (1934) (favoring retention of the action); P. DEVLIN, supra note 243, at 18 (contending moral standards do not shift, but that the extent to which society tolerates deviations from such standards varies from generation to generation); Feinsinger, Legislative Attack on "Heart Balm," 33 MICH. L. REV. 979 (1935) (favoring legislative correction of tort and contract remedies); Richards, Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution, 127 U. PA. L. REV. 1195, 1198, 1234 (1979) (suggesting that desynchronization between law and morals is most likely to occur when moral views "rest on mere social convention," rather than on something more fundamental).

\(^\text{245}\) RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977).

the prevailing practice, which limits liability almost exclusively to the media, seems often to be more a pragmatic than a principled policy.

Warren and Brandeis originally may have envisioned a principled distinction between tortious and nontortious publication when they suggested the mass-communication element of the tort. They agreed that a plaintiff might possibly recover in the rare instance in which oral, limited communications of private information resulted in special damages. But they believed that the injury from private gossip would "ordinarily be . . . trifling," and hence not actionable. They wished primarily to protect an individual's right to what might be called selective anonymity—the principle that each of us should be able to control, with few exceptions, the circles within which details of our lives and characters are disseminated. Thus, they logically distinguished gossip among friends and acquaintances from the publication of the same information in a newspaper. This rationale for the mass-communication requirement of the tort no longer is accepted. Selective anonymity as a theory quickly proved too broad to reconcile with even conservative notions of free speech and press. The trend in the case law toward narrowing the definition of private information and expanding the privilege for press publications of newsworthy information clearly demonstrates that jurisdictions today reject selective anonymity as a legally protectible interest.

In modern times, Professor Bloustein has most cogently rejustified the mass-publicity requirement. He argues that the private-facts tort (as well as other kinds of privacy protections) is designed to afford legal protection to the individual's fundamental human dignity. That interest is damaged, says Bloustein, not when friends learn things that change their opinions of us, but when we are "made a public spectacle." The difference, in his view, is that private gossip has "a kind of human touch and softness," and its effect is moderated by the tendency of at least some listeners to "know and love or sympathize with the person talked about." In contrast, newsprint (and presumably


247 See Warren & Brandeis, supra note 1, at 217 & n.4.
248 See id. at 217.
249 See id. at 214-15.
250 See id. at 217 n.4.
251 See infra notes 268-373 and accompanying text.
252 See E. BLOUSTEIN, supra note 242, at 41-42. But see O'Brien, supra note 226, at 443 (suggesting that people are often gratified by publicity and public attention).
253 E. BLOUSTEIN, supra note 242, at 20.
254 Id. at 23.
255 Id.
telecasts) is "cold and impersonal" and not subject to the tempering influences that may create sympathy or at least tolerance among neighbors.\textsuperscript{256}

Several problems arise with this defense. First, although human dignity is an important value, it is hard to define, identify, and measure. Moreover, the existence of an arguably fundamental interest in dignity does not lead inexorably to the conclusion that the law can or should shield it from all possible assaults.\textsuperscript{257} Many important human values, such as loyalty to friends or the love of parents for their children, are either unprotected by law entirely or can be enforced by it only tangentially.

Second, the factual assumptions that underlie Bloustein's hypothesis about the difference between press coverage and back-fence gossip are questionable. It is not at all clear that the exposure of personal information to people who have no particular interest in the plaintiff's life is more damaging than circulation to those who do know the plaintiff and who have a personal stake in discovering whatever they can.\textsuperscript{258}

Most people are embarrassed and hurt by the exposure of private facts because such revelations may alter the way that others see them—not necessarily in the sense that it will cause classic reputational injury, but in the sense that it will create a deviance between the image that they want to project of themselves and the one that others will actually form.\textsuperscript{259} As a practical matter, the subjects of unwanted publicity are likely to be concerned primarily with how they are viewed by people who know them. The opinions of strangers are far less likely to matter

\textsuperscript{256} Id.

\textsuperscript{257} Bloustein agrees that identification of the values protected by privacy law does not necessarily mean that such law should exist. See id. at 42-43. Nevertheless, he advocates preserving the tort law in this area. See id. at 62, 83.

\textsuperscript{258} The Michigan Supreme Court, which has begun to erode the mass-publicity requirement, clearly disagrees with Bloustein's argument that widespread publicity is more harmful than local gossip:

Communication of embarrassing facts about an individual to a public not concerned with that individual and with whom the individual is not concerned obviously is not a "serious interference" with plaintiff's right to privacy . . . . An invasion of a plaintiff's right to privacy is important if it exposes private facts to a public whose knowledge of those facts would be embarrassing to the plaintiff. Such a public might be the general public, if the person were a public figure, or a particular public such as fellow employees, club members, church members, family, or neighbors, if the person were not a public figure.

Beaumont v. Brown, 401 Mich. 80, 104-05, 257 N.W.2d 522, 531 (1977). Sociological studies support Michigan's position. See, e.g., A. BLUMENTHAL, supra note 219, at 140, 144, 180-81. The subjects of gossip in a small town often escape hurt feelings because social convention protects them from learning in most cases what is being said. See A. VIDICH & J. BENSMAN, supra note 219, at 42-44. Failure to learn about gossip, however, does not mean that the subject of it has not been harmed.

\textsuperscript{259} See Gavison, supra note 9, at 423, 450-55.
intensely. An example used by Westin clearly illustrates this difference. He observes that individuals are often more open and honest about themselves with strangers than they are with friends or acquaintances. He suggests that a person is often able to elicit objective advice from the stranger, fully aware that the stranger "is able to exert no authority or restraint over the individual."

In addition, Bloustein's distinction between press coverage and back-fence gossip assumes without support that the tempering effects of human sympathy and mutual protectiveness are absent in the wider audience that receives its information from the media rather than from friends or neighbors. The ability to empathize with strangers and even with totally fictional characters is surely a major element in our appreciation of literature and largely explains our taste for so-called human interest stories in the press. Moreover, some appreciation for another's predicament may well limit what an individual will tell a reporter about another person, in much the same way that similar self-protective instincts may limit his willingness to indulge in personal gossip with friends. In fact, current public mores about what is and is not "fit to print" probably exert a more effective control over privacy violations by the press, which remains economically sensitive to the tastes of its audience, than over the private gossip mill. For instance, an Idaho television station, clearly worried about audience and sponsor reactions, fired an employee who allowed a few seconds of nudity to appear on an evening newscast.

In reality, the most important distinction between press coverage and gossip seems to be in its visibility to the victim. Although we may suspect that our friends secretly talk about us, we know exactly what has been said when information about us appears in the press. Thus, our feelings are less likely to be hurt by private gossip, even though our images may suffer every bit as much as they do from more public disclosures. The distinction between press coverage and gossip may be important to our subjective sense of well-being, but it appears to be a dubious basis for imposing liability only on mass communicators of public facts, especially in light of the serious infringement on the press and free

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260 See supra note 258.
261 A. Westin, supra note 9, at 31-32.
262 See infra notes 323-29 and accompanying text.
264 In a study of "Springdale," a community in upstate New York, researchers discovered that part of the social ethic of gossip was that "one [need] not confront the subject of gossip with what is said about him." This ethic enables surface cordiality to be maintained, even between enemies. A. Vidich & J. Bensman, supra note 219, at 44. But see A. Blumenthal, supra note 219, at 108, 129 (although the people in the community who were studied often did not know what was said about them, they were well aware that they were subjects of discussion in the community and often found that knowledge uncomfortable).
speech that such a limitation engenders.  

The mass-publicity requirement of the private-facts tort, therefore, probably exists solely to cut off an intolerably attractive invitation to the hypersensitive and litigious, and not in response to valid differences in the capacity of public versus private gossip to cause harm. If this is true, the mass-publicity requirement only throws into sharper relief the implausibility of the underlying rationale of the tort as a whole. If, in our social judgment, highly personal gossip is so damaging that it necessitates some protection by the state, then surely the identity and audience size of the gossipier should ordinarily be irrelevant to a finding of liability. If, on the other hand, we believe that gossip and its harms are, as a general matter, unsuitable for legal control, we should not single out the press for liability that we would not willingly impose on one another.

To summarize, a state can justify a content-based regulation of speech, such as the private-facts tort, only if it can demonstrate a clearly defined harm and a compelling interest in its prevention. But the nature of the harm done by publication of private facts has continued for almost a century to elude more than vague, subjective definition. Furthermore, because society has a powerful countervailing interest in exchanges of accurate information about the private lives and characters of its citizenry, a compelling case for a general right to suppress such exchanges is difficult to construct. Many decades ago, a commentator on the budding tort of invasion of privacy cautioned that publicity about our private affairs may be among the "impertinent and disagreeable things which one may suffer" but which do not "amount to legal injuries such as courts may redress." However uncomfortable that conclusion is, it may well have turned out to be right.

IV
THE POSSIBILITY THAT A NARROW RIGHT TO RECOVER FOR PUBLICATION OF PERSONAL FACTS COULD BE PRESERVED, CONSISTENT WITH CONSTITUTIONAL VALUES

Even those writers most sensitive to the constitutional thorniness of the private-facts tort have nonetheless insisted that it could be so shaped as to salvage a cause of action for those plaintiffs who suffer particularly painful publicity. For the sake of argument, let us assume that some particular facts are so intimate and revealing that their disclosure would probably cause most individuals serious distress and strain their relationships with others. Let us also assume that compensation of these individuals for that harm is a sufficiently substantial state interest to

265 See supra notes 36-38 and accompanying text.
266 See supra notes 147-52 and accompanying text.
267 O'Brien, supra note 226, at 439.
justify limitation of the defendant's right of free speech. At the same time, common sense and concern that free speech not be choked off at the roots require some limits on the extent to which communications can be made tortious. Courts and legislatures must therefore face the difficult process of delineating standards that permit recovery in serious cases, while not also encouraging costly litigation over injuries that are more trivial.268

This narrowed tort would have to be defined precisely and clearly enough that a publisher would have fair warning of the approximate location of the line between protected and unprotected revelations. Although the Supreme Court has consistently refused to rule that any speech—including accurate speech—is absolutely protected by the Constitution,269 the Court has also been equally insistent that the Constitution condemns vague regulation. The Court has stated repeatedly that vague proscriptions against speech may chill the willingness of individuals and the media to take part in those communicative activities that are clearly protected by the first amendment.270 The Court has developed

268 The British Committee on Privacy concluded that the delineation of a right to privacy would be so difficult and time-consuming, and so threatening to free speech, that it recommended against adoption of the tort in Great Britain. The Committee compared the issues in privacy to those in obscenity: "We already have some experience of the uncertainties which result . . . in obscenity cases, when courts of law are asked to make judgments on controversial matters, where statutory definitions are unsatisfactory, and social and moral opinion fluctuates rapidly." REPORT OF THE COMMITTEE ON PRIVACY, CMD. 5, NO. 5012, at 206 (1972).

269 The Supreme Court has permitted regulation of certain kinds of speech because, for one reason or another, they fall outside the ambit of first amendment speech. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (permitting state proscription of negligent and intentional lies about a private person); United States v. Roth, 354 U.S. 476, 485 (1957) (permitting state regulation of obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (permitting state regulation of fighting words likely to breach the peace). But see Brandenburg v. Ohio, 395 U.S. 444 (1969) (casting doubt on the continuing validity of the Court's reasoning in Chaplinsky). Of these, obscenity and perhaps fighting words could involve accurate communications. The Court has left open the possibility of prior restraints on true speech in a very narrow group of cases in which the communication at issue is a matter of profound concern to national security. See, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697, 715-16 (1931). The Court has also suggested the possible availability of a prior restraint when publication creates an unusual risk to an individual's constitutional right to a fair trial. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-70 (1976). Additionally the Court has hinted that criminal punishment could be appropriate for the reporting of certain kinds of accurate but harmful information, but has set a standard so high and narrow that the state must offer an extremely strong showing of harm in order to justify penalizing such speech. See Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). One of the few recent cases in which the Court permitted a penalty to be imposed for presumably accurate speech was Snepp v. United States, 444 U.S. 507 (1980). Snepp, however, involved a potential threat to national security, and the Court regarded Snepp not as a first amendment case, but as a contract case involving breach of a fiduciary duty. See id. at 510.

the doctrines of vagueness and overbreadth to address this concern.

Fear of a chilling effect has led the Court to protect even undesirable speech. In *Sullivan*, the Court immunized from tort liability some speech that, in its view, did not further first amendment interests because it wanted to prevent inhibition of speech that did contribute to the marketplace of ideas.\textsuperscript{271} Even when the Court decided to relax free speech protections in *Gertz* to facilitate private recovery for libel, it emphasized as one element in its decision that the content of the publication at issue gave clear warning of its potentially defamatory nature.\textsuperscript{272} Thus, the danger zone in *Gertz* was clearly enough marked to put the speaker on notice of a special duty to exercise reasonable care in checking factual assertions for accuracy.

The problem of finding clear and precise demarcations between protected and unprotected speech in the private-facts area actually occupied the attention of judges and scholars even before the Supreme Court began developing modern free speech law.\textsuperscript{273} No court has wanted to grant plaintiffs carte blanche to veto what could be said about them by mass communicators. Yet, after all the years devoted to the task, no one has yet developed a set of satisfactory and uniformly applied definitional standards.

Warren and Brandeis themselves conceded that their proposed tort was subject to some limitations and should not create a right to sue for any unauthorized publication. It is unclear whether they created these limitations to protect the free flow of information, to prevent the courts from sinking under an avalanche of litigation, or both.\textsuperscript{274} But, certainly,
courts have recognized the free speech implications of the private-facts tort from the time of its adoption.\textsuperscript{275}

Whatever their motive, Warren and Brandeis proposed a test that they believed would distinguish cases where liability was justified from those where it was not.\textsuperscript{276} To be actionable, a revelation would have to involve "private" information, and not the sort of information in which the public maintained a "legitimate" interest.\textsuperscript{277}

A. Private Information: The Various Tests

1. \textit{The Status of the Plaintiff as a Gauge of Private Information}

Warren and Brandeis deemed information private if it involved "the private life, habits, acts, and relations of an individual," or similar matters.\textsuperscript{278} Warren and Brandeis added, however, that some limited information that would otherwise fall into this prohibited category could be published without liability if it pertained to a person who was active in "public life." Information bearing on the person's fitness for a public role would be immune from liability even though it concerned the individual's "private" sphere of activities.\textsuperscript{279} Thus, Warren and Brandeis defined the difference between public and private information both as a function of the status of the individual, and of some public "need to know."\textsuperscript{2780} Although they do not necessarily define these elements as Warren and Brandeis did, the courts have adopted the "private information" and "public interest" criteria to reconcile tort law with conflicting free speech values.

Both criteria are eminently sensible in theory. If we wish to compensate people when they are hurt by the truth because the information is "personal," we must be able to distinguish what is personal from what is not. On the other hand, if the first amendment is intended to ensure that debate over public affairs is vigorous and free, it also makes sense to shield from liability that speech which contributes data to public debate.

The "newsworthiness" privilege,\textsuperscript{281} which protects information of legitimate public interest from liability, nicely tracks modern theories of

\textsuperscript{275} See supra note 273.
\textsuperscript{276} They also proposed that the tort be subject to the same rules of privilege that applied to defamation, see Warren & Brandeis, supra note 1, at 216-17, that oral publication normally not be actionable, see id. at 217, and that no liability be imposed when the plaintiff either published the information or consented to its publication, see id. at 218.
\textsuperscript{277} Id. at 214-16.
\textsuperscript{278} Id. at 216.
\textsuperscript{279} Id. According to Warren and Brandeis, a plaintiff was active in "public life" if he or she sought, was considered for, or occupied a public office. Plaintiffs in "public or quasi-public position[s]" were also active in "public life." Id.
\textsuperscript{280} Id. at 215.
\textsuperscript{281} See generally Restatement (Second) of Torts § 652D comments d, g (1977).
the first amendment. Ideally, the privilege could provide both a comfortable definition of the line between protected and unprotected speech and a way to avoid the need of resorting to a balancing of privacy against free speech values. On this point, Alexander Meiklejohn argued that the first amendment was designed not to protect speech as a general matter, but to protect speech that contributes to the ability of the citizens in a democracy to govern themselves. It would follow that purely private speech (that which is not of "legitimate public interest") does not contribute to the process of self-governance, and therefore is not protected by the first amendment. States could thus subject such speech to tort liability without implicating or conflicting with constitutional values.

The Supreme Court has lent credence to this analytic approach. The political speech theory was a source of the rationale for New York Times Co. v. Sullivan and is clearly reflected in case law developments since then. The problem with the use of the public-private speech distinction as a way to evade a conflict between the constitution and the private-facts tort arises not from the theory, but from the attempt to derive from it some workable definition of private, as opposed to public, speech.

Warren and Brandeis believed that the classifications of "private" and "newsworthy" (that is, "public") were merely different points on a single continuum. They defined information as public or private based as much on the identity of the individual discussed as on the subject matter under discussion. Although courts continue to talk about its importance in privacy cases, the status approach as a way to distinguish privileged from tortious speech has proved unproductive. The Warren-Brandeis limitation assumed no legitimate public need to know about the personal lives and characters of others unless the information related to the fitness of the individual for public office or positions of public

282 See Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245, 255.
283 376 U.S. 254, 269 (1964). The Court describes the first amendment as securing "freedom of expression upon public questions," and as designed "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Id. (quoting Roth v. United States, 354 U.S. 476, 484 (1957)). Justice Black, in a concurrence joined by Justice Douglas, cited Meiklejohn for the proposition that the first amendment confers a privilege of unfettered speech on public affairs. See 376 U.S. at 297 n.6 (Black, J., concurring).
284 See, e.g., Young v. American Mini Theatres, 427 U.S. 50, 61 (1976) ("[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance."); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975) ("The freedom of the press to publish [information from public records] 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."). See generally Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 HARV. L. REV. 1 (1965).
power.\textsuperscript{286} Tested under modern first amendment standards, however, this concept of public or political speech is far too narrow.

The Supreme Court has created a series of standards for libel which, very much like the distinction made by Warren and Brandeis, offer far greater protection to private than to public plaintiffs.\textsuperscript{287} The Court has clearly indicated, however, that at least where opinions, ideas, nondefamatory falsehoods, and accurate factual speech are involved, the status of the plaintiff is constitutionally irrelevant.\textsuperscript{288} To decide otherwise would be to narrow severely the scope of protected first amendment speech; the Court appropriately has shown little enthusiasm for excluding from protection the great bulk of information that informs the social, political, moral, and philosophical positions of individual citizens but that is not itself strictly political or "public" in nature.\textsuperscript{289} That reluctance is consistent with the Meiklejohn thesis. For example, the attitude of individual voters toward an administration's economic philosophy may be influenced by their knowledge of the latest government economic indicators and the President's policy speeches and lifestyle. But the voters might be equally affected by a newspaper story describing the impact of that economic philosophy on an ordinary automobile worker who has just collected his last unemployment check and is unable to support his children or meet mortgage payments.

Because the position of the person whose life is publicized provides no real means of distinguishing between speech which contributes to self-governance and that which does not, efforts to define what is private and what is newsworthy have, as a practical matter, turned from status considerations to a search for other relevant distinctions.\textsuperscript{290} In the process, privacy and newsworthiness have come to be treated as more in-

\textsuperscript{286} See supra note 279.

\textsuperscript{287} See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); supra notes 103-12 and accompanying text.

\textsuperscript{288} The Court has thus far failed to distinguish between public and private figures in false-light privacy cases. See, e.g., Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974); Time, Inc. v. Hill, 385 U.S. 374 (1967). Nor did the Court suggest that such a distinction is relevant in the only private-facts case it has decided, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). The distinction does not appear in other areas of first amendment law, either. The Court suggested in Cox that the relevant consideration is the public interest in the information itself. Id. at 495. Commentators have also criticized the use of the public-private figure distinction in common law privacy cases and have urged courts to consider only the degree of public interest in the information. See, e.g., Larremore, The Law of Privacy, 12 Colum. L. Rev. 693, 698-701 (1912) (calling distinction "abortive and futile"); Ragland, The Right of Privacy, 17 Ky. L.J. 85, 110-13 (1929).

\textsuperscript{289} See, e.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (motion pictures within scope of first amendment speech); Winters v. New York, 333 U.S. 507, 510 (1948) (fiction included in first amendment protection because "[w]hat is one man's amusement, teaches another's doctrine").

\textsuperscript{290} The public-private figure distinction has also been troublesome in the private-facts tort area because it suggests that all publications about public figures—however intimate—are newsworthy. The Restatement Second rejects this view, arguing instead that even the best
dependent concepts. Courts now typically decide first whether the information at issue is of a kind that is truly private or intimate, and then ask whether, nonetheless, it should be privileged because it is newsworthy.

2. Location Analysis as a Means of Defining Private Information

To distinguish private facts from "public" information about an individual, courts often look either to the location of the action or to the nature of the subject matter. Courts using the "location" analysis commonly state that information individuals reveal about themselves in public places is by definition not private. Therefore, reports of such revelations are not actionable merely because the press has further publicized the information.

Although the location argument is attractive, it fails as a rational principle of distinction. First, what is a public place? For example, suppose that a tort claim is based on the allegation that the press has unjustly revealed that the plaintiff is a cocaine user. If a reporter obtained that information by watching the plaintiff use the drug on a park bench or a public street corner, courts generally agree that the reporter invades no right of privacy by revealing what he or she has seen. But the plaintiff's use of the same drug in a private club, at a large house party before fifty guests, or even in an intimate gathering of a few friends, poses logical difficulties for the location test. In each case, the plaintiff acted in view of others. A reporter may be present, or one of the guests may describe the behavior to others including the reporter who writes of it. In some senses, all these scenarios involve public action on the plaintiff's part. It is not clear, however, which of these sites are "public" places. It is also not clear what weight that distinction should carry in imposing liability.

The exposure in private-facts tort cases almost always occurs because the plaintiff has not acted in seclusion, but has in some way publicized personal information to a select group of other people. The element of self-exposure, a kind of "assumption of the risk," clearly in-

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292 For examples of cases in which the plaintiff's reported behavior took place before large groups of people, but not necessarily in a "public place" as narrowly defined, see Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976) (plaintiff's bizarre behavior exhibited at parties); Rafferty v. Hartford Courant Co., 36 Conn. Supp. 239, 416 A.2d 1215 (1980) (plaintiffs held outdoor "unwedding" reception to celebrate divorce).
fluenced the Younger Committee in advising against creating a legal right to privacy in Great Britain. The Committee concluded that if an individual seriously wished to protect his or her privacy, such simple devices as “guarded speech about one’s personal affairs, care of personal papers, caution in disclosing information on request, confining private conduct to secluded places, and the use of curtains, shutters and frosted glass” were as likely to be effective as resort to a legal remedy.

3. The “Subject Matter” Test of Private Facts

To avoid the pitfalls of the location test, or sometimes to augment it, courts and commentators have also relied on a subject matter or “zone of privacy” test. Embarrassing events sometimes occur over which the individuals involved have little control, but which are undisputably “public” under the location test. Courts in these cases sometimes rule that the subject matter is private even though the locus is not. For example, a woman’s skirt was blown up around her waist as she stepped over an air vent as she emerged from a funhouse at a public fairground. The Alabama Supreme Court affirmed an award of several thousand dollars against the newspaper that ran a picture of the unfortunate woman on subject matter grounds, although it remains questionable how the newspaper invaded her privacy by further publicizing an event that was witnessed as it occurred by hundreds if not thousands of spectators.

Emerson supports a subject matter or “zone of privacy” test and argues that courts can remove some of the uncertainty surrounding the private-facts tort by identifying certain topics that are sufficiently intimate to establish in essence a prima facie case of liability. Emerson

293 Report of the Committee on Privacy, Cmd. 5, No. 5012 (1972). The Committee on Privacy is often referred to as the Younger Committee because its chairman was the Rt. Hon. Kenneth Younger.
294 Id. at 25; see also Lundsgaarde, Privacy: An Anthropological Perspective on the Right to Be Let Alone, 8 Hous. L. Rev. 858, 875 (1971) (questioning whether many invasions of privacy would be possible without “active collaboration” of people willing to disclose private facts); cf. A. Westin, supra note 9, at 53 (people are willing to disclose confidential information to public opinion pollsters when assured that their individual responses will remain confidential).
295 See, e.g., Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 76 N.W.2d 762 (1956) (suggesting that photograph of dead body presents no serious privacy problem but that showing body’s sex organs would be invasion of privacy).
297 The court conceded that the event had many eyewitnesses, and that because of its indisputably “public” location it would ordinarily be privileged. Nonetheless, the court decided to create an exception to that rule for publications that are “offensive to modesty or decency.” Id. at 383, 162 So. 2d at 477-78 (quoting Holcombe v. State, 5 Ga. App. 47, 62 S.E. 647 (1908)).
298 See Emerson, supra note 39, at 343-44; cf. Karafiol, supra note 32, at 529 (“[t]he controlling factor in overriding newsworthiness is not an invasion of privacy that is exceptionally injurious as measured by the sensitivity of the average person in the community but an inva-
considers as intimate "those activities, ideas or emotions which one does not share with others or shares only with those who are closest. This would include sexual relations, the performance of bodily functions, family relations, and the like." Other commentators have suggested additional categories.

Like the location and status approaches, the subject matter approach has difficulties. It may be impossible to identify in advance appropriate categories that encompass the wide variety of possible fact patterns that can occur. Publishers would still face some uncertainty as to which subjects or facts invade privacy, and some chilling of free speech would remain. Moreover, categorical prohibitions may not take adequate account of variations in what is perceived as "private." For example, not all family relationships—even those rarely discussed—are necessarily intimate. Most importantly, it may be difficult to ascertain at any point in time, and certainly for any significant span of time, which subject matters are so personal as to justify tort protection. Public consensus is difficult to forge, hard to measure, and subject to rapid shifts. Differences of opinion over which subjects are offensive can be found at any moment in history among different geographical regions, or levels of social, economic, or educational status.

Wright, Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach, 46 Tex. L. Rev. 630, 636 (1968) (private matters are those "affecting only one man or a group of men, but not so large a group as would constitute a community").

Professor Lusky would include other areas in which the individual should be given total control over information about himself or herself—what is said in the confessional or the psychiatrist's office, and what occurs in the voting booth and the jury room. See Lusky, Invasion of Privacy: A Clarification of Concepts, 72 Colum. L. Rev. 693, 709 (1972). In contrast, Professor Emerson hopes that delineation of zones of privacy will eliminate the chilling effect and lessen the self-censorship that he believes the current, vaguer standards produce. See Emerson, supra note 39, at 344.

For example, the fact that I intensely dislike a relative may be something that I would not object to having revealed because it would not embarrass me or otherwise be painful.


"Class, occupation, education, and status within various communities and organizations may significantly affect the way in which an individual thinks of himself as a 'private' individual and what he understands by 'the moral right to privacy.'" Velecky, The Concept of Privacy, in PRIVACY 25 (J. Young ed. 1978). For an interesting example of the differences in views of privacy according to social class, see A. Vidich & J. Bensman, supra note 219, at 407. The publication of the authors' study of a small town in upstate New York created serious controversy because the subjects claimed that their right to privacy had been invaded. The authors, commenting on the furor surrounding publication of their book, wrote:

There is an interesting parallel between the license taken by anthropologists and that taken by sociologists who have studied crime, minority groups, caste groups, factory workers, prostitutes, psychopathic personalities, hoboes, taxi-dancers, beggars, marginal workers, slum dwellers, and other voiceless, powerless, unrespected, and disreputable groups. Negative reaction to community and organizational research is only heard when results describe artic-
This tendency toward divergence of opinion emerges most clearly with regard to sexual conduct and the display of the human body. Because most commentators include these areas among those that raise the most serious privacy concerns,\textsuperscript{305} the existence of radically different standards is especially telling. In different parts of the country, a trip to the beach may reveal extremes of dress from modest bathing suits to partial or even total nudity. In the age of topless sunbathing, the bikini, which was still scandalous only a decade ago, has become reasonably conservative beachside attire.

In contrast, although we generally enjoy sexual intimacies in seclusion, our ancestors in Elizabethan England and colonial New England typically shared sleeping quarters and even beds, making sexual intercourse a somewhat public act.\textsuperscript{306} Just as the modern nude sunbather might be nonplussed by the thought of quasi-public sex, an Elizabethan undoubtedly would have been shocked by modern casualness about nudity.\textsuperscript{307}

Because a stable coalescence of opinion about what areas are genuinely private is unlikely, the zonal approach to defining “private” areas creates two risks. First, some plaintiffs could recover for revelations that the zonal approach defines as offensive, but that in fact did not especially offend the plaintiff or the court. Second, zones of privacy identified by legislation or judicial rule will tend to freeze into the legal system social values that may be idiosyncratic with the lawmakers, or that the public at large may widely share now but may abandon after a short while. In either case, information might be inhibited that would ultimately prove useful to the process of public debate and societal change.

B. The Newsworthiness Defense

If the attempt to define “private” information has proved difficult,
the process of defining "newsworthy" information has practically destroyed the private-facts tort as a realistic source of a legal remedy. More than a decade and a half ago, Harry Kalven noted that the newsworthiness privilege was "so overpowering as virtually to swallow the tort." All information is potentially useful in some way to the public in forming attitudes and values. Thus every communication is arguably privileged.

1. Attempts to Define Newsworthiness: The Political Speech Model

Because all information is arguably "newsworthy," the private-facts case law has been plagued by the same problem that has debilitating the Meiklejohn political-speech theory as a useful tool for rationalizing first amendment law. When Meiklejohn initially espoused the notion that the first amendment was designed to protect "political" speech as opposed to other kinds of speech, commentators criticized him for his substantially underinclusive definition. Does the first amendment leave unprotected most literature, art and learning not explicitly political in nature? Meiklejohn countered that speech relating to the process of self-governance need not be "about" politics. Meiklejohn claimed that people reach decisions based on many different kinds of information. "Political" speech, he said, is a very broad concept that includes "forms of thought and expression . . . from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express." Thus, he created a new problem: instead of excluding too much important speech from first amendment coverage, Meiklejohn's redrafted political-speech theory threatened to provide no limits at all to the array of speech within the amendment's coverage.

The Supreme Court's experience with the political-speech doctrine in libel law illustrates some of the difficulty in applying the equally broad newsworthiness standard, and suggests that the Court may be reluctant to approve a body of tort law that employs such a nebulous standard to distinguish between constitutionally protected and unprotected speech.

Beginning with its decision in New York Times Co. v. Sullivan, the Court held in a series of cases that to recover for libel, public officials and public figures must show that the defendant either knew that the speech was false or spoke in reckless disregard of its truth or falsity. In

308 See Kalven, supra note 6, at 336.
310 Meiklejohn, supra note 282, at 256; see also Chafee, supra note 309, at 900 ("[T]here are public aspects to practically every subject. The satisfactory operation of self-government requires the individual to develop fairness, sympathy, and understanding of other men, a comprehension of economic forces, and some basic purpose in life.").
Rosenbloom v. Metromedia, Inc., a divided Court ruled that the Sullivan knowing-or-reckless standard applied to private plaintiffs as well. Justice Brennan, in his plurality opinion, relied on the political-speech theory to justify Rosenbloom. He reasoned that because the first amendment protects all speech that promotes "self-governance," the Court must extend the maximum protection to any material "of public or general interest" without regard to the "prior anonymity or notoriety" of the subjects of the discussion.

Justices Marshall and Stewart dissented. They argued that the plurality opinion would require all libel victims to prove knowing-or-reckless falsity because they would never be able to convince a court that libelous communication was not "of 'public or general concern.'" Justice Marshall analogized the new "public or general interest" standard of Rosenbloom to the problematic newsworthiness element in privacy cases:

The authors of the most famous of all law review articles recommended that no protection be given to privacy interests when the publication dealt with a "matter which is of public or general interest." Yet cases dealing with this caveat raise serious questions whether it has substantially destroyed the right of privacy as Warren and Brandeis envisioned it.

Only three years later, the Court in Gertz v. Robert Welch, Inc. abandoned the Rosenbloom rule. The Court's opinion can be read as a tacit endorsement of Marshall's view that no plaintiff could escape the restrictive Sullivan standard if the public interest remained the relevant criterion. The Court thus abandoned the effort to distinguish libel cases.

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312 403 U.S. 29 (1971).
313 Three Justices (Justice Brennan, joined by Justices Blackmun and Burger) agreed that the knowing-or-reckless standard should apply to the reporting of all matters of public concern. See 403 U.S. at 50 ("[T]he vital needs of freedom of the press and freedom of speech persuade us that allowing private citizens to obtain damage judgments on the basis of a jury determination that a publisher probably failed to use reasonable care would not provide adequate 'breathing space' for these great freedoms."). Justices Black and White concurred for different reasons. Justice Black adopted the plurality opinion only because his more radical view that the media should incur no liability, even for knowing falsehoods, did not persuade the other members of the Court. See id. at 57 (Black, J., concurring). Justice White concurred because the publication at issue in Rosenbloom involved the actions of public servants, even though the actual plaintiff was a private person. See id. at 62 (White, J., concurring). Justices Harlan, Marshall, and Stewart dissented. See infra text accompanying notes 316-17. Justice Douglas did not participate in the decision.
314 403 U.S. at 41. Justice Brennan suggested that self-governance includes "[o]ur efforts to live and work together in a free society." Id.
315 Id. at 43. Justice Brennan feared that the possibility of an erroneous verdict for the plaintiff in a libel action would "create a strong impetus toward self-censorship, which the First Amendment cannot tolerate." Id. at 50.
316 Id. at 79.
317 Id. at 80.
based on the public interest in the subject matter and reverted to a focus on the status of the plaintiff.

In the course of the *Gertz* decision, Justice Powell made some additional observations about newsworthiness as a viable judicial touchstone for distinguishing protected from unprotected speech. His thoughts are especially telling when applied to private-facts litigation. Use of a newsworthiness test, he wrote,

would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not—to determine, in the words of Mr. Justice Marshall, "what information is relevant to self-government." . . . We doubt the wisdom of committing this task to the conscience of judges.\(^{319}\)

2. The Leave-it-to-the-Press Model

If the case law is any gauge, most judges share the Supreme Court's reluctance to engage in line drawing over newsworthiness and simply accept the press's judgment about what is and is not newsworthy.\(^{320}\) Although courts will occasionally find that a particular story is not privileged,\(^{321}\) the vast majority of cases seem to hold that what is printed is by definition of legitimate public interest.\(^{322}\)

Although one could describe such deference to editorial judgment as capitulation, deference to the judgment of the press may actually be the appropriate and principled response to the newsworthiness inquiry.\(^{323}\) The press, after all, has a better mechanism for testing newsworthiness than do the courts. The economic survival of publishers and broadcasters depends upon their ability to provide a product that the public will buy. Unlike judges and jurors, the press must develop a re-

\(^{319}\) *Id.* at 346.


\(^{321}\) See, e.g., Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964) (photograph of woman with skirt blown above waist not of legitimate news value); Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (jury could conclude that revelation of prior criminal acts not newsworthy); Annerino v. Dell Publishing Co., 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958) (use of photograph in connection with story about crime not legitimate news reporting); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942) (use of plaintiff's name not of legitimate public interest).

\(^{322}\) *See supra* note 320.

\(^{323}\) Zechariah Chafee, Jr. argued that editors and public opinion, rather than law, should decide which sorts of revelations ought not to be published. *See Z. CHAFEE, supra* note 189, at 138.
sponsiveness to what substantial segments of the population want (and perhaps even need) to know to cope with the society in which they live.³²⁴ To argue that the press merely "panders" to public taste at the lowest common denominator is to make a class-based judgment about the value of the information that people seek. The law cannot make such judgments consistent with the first amendment, and probably ought not to make them as a matter of policy.³²⁵

Social norms that govern acceptable behavior in the exchange of information are better communicated through the marketplace than through the courtroom. Audience and advertiser response is more likely to restrain publishers from certain kinds of communications than the uncertain threat of an award of damages.³²⁶ In one Idaho case, for example, a plaintiff recovered from a television station that aired a few seconds of footage showing him emerging from his house naked.³²⁷ The dissent disclosed that well before the lawsuit had begun, the station employee who had shown the clip had been fired. "Thus," noted the dissenting justice, "ended, probably for all time, the onset of X-rated television newscasts in the Boise Valley."³²⁸ Social mores rather than legal prohibitions also explain the reluctance of many journalists, even after the outcome of Cox Broadcasting Corp. v. Cohen, to name the victims of rape and sexual abuse in their stories.³²⁹ On the other hand, when

³²⁴ Posner argues that the increased journalistic attention to personal life and gossip is a function of audience demand, and not of some independent choice of editors. Posner argues that the consumers of the mass media want information about others to enable them to better judge the worth of others and make personal lifestyle choices. Posner, supra note 185, at 395-97.

³²⁵ Cf. Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957, 962 (D. Minn. 1948): That we have gone much further since [Warren and Brandeis's] time in attaching importance in the news to trivial things and sheer gossip . . . is undoubtedly true, but in proceedings of this kind the courts should not attempt to determine whether the Press is to blame or whether it is merely catering to the present mores of the people.

³²⁶ Blumenthal observed the influence of local response on publishers in his study of a small mining town in the American Rocky Mountains. He recounts the protest that arose when the local newspaper divulged the details of a relationship between a man and woman living in the community, and adds: "After all, it seems that the editor of the Mail was not far wrong when he said: 'If I printed the really interesting news in this town I would be run out of town.'" A. BLUMENTHAL, supra note 219, at 180. Blumenthal claims that the very existence of the Mail depended on its not offending the tastes of its readers. As a result, and in contrast to big-city newspapers, the editor of the Mail printed only "dry or semi-dry facts" that do "not pretend to offer serious competition to gossip insofar as the most interesting local news which he is free to print is concerned." Id. at 181.


³²⁸ 96 Idaho at 207, 525 P.2d at 989 (Shephard, C.J., dissenting).

³²⁹ See Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 584 P.2d 1310 (1978) (plaintiffs argued that newspaper not privileged to use name of juvenile sex-abuse victim because defendant newspaper followed general policy of not identifying these victims); see also The
changes in social mores begin to permit publication of previously taboo information, perhaps we should view the phenomenon as evidence that the public now values the information more highly than it weighs the privacy interest. In this instance, publication of the information may not represent a failure of the marketplace controls.

3. Passage of Time and the Erosion of Newsworthiness

Although we might not wish to leave the determination of newsworthiness to the unregulated judgment of publishers, the absence of any other sensible test may dictate a continuation of the practice. Courts’ efforts to devise a better standard have met with little success. Some courts have suggested that the passage of time erodes the newsworthiness of events. California stressed this factor in deciding two well-known cases in which the defendants revealed past criminal activities of the plaintiffs. The California courts, however, have recently shown great reluctance to continue to differentiate newsworthy from non-newsworthy publications along a time line. In *Forsher v. Bugliosi*, decided in 1980, the California Supreme Court distinguished the prior decisions on the basis that the earlier holdings applied only to cases that involved a reformed criminal who committed the crime a long time ago: “Our decision in *Briscoe* was an exception to the more general rule that ‘once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days.” The court further suggested that even the narrow exception for criminals and past crimes might now be unconstitutional under the Supreme Court’s holding in *Cox*.

It is difficult to imagine how the passage of time could constitute a serious consideration in determining newsworthiness. Such a standard

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*Right to Privacy*, *Newsweek*, Mar. 17, 1975, at 66. The article discusses *Cox*, and suggests that “[i]n general, whether by law or custom, the press usually withholds names of juveniles, rape victims and persons with sexual aberrations or venereal diseases—so long as the names in question are not critical to the story.” The article notes that, even in *Cox*, station officials conceded that disclosure of the victim’s name violated the station’s policy, and was “an accident in the newsroom.” *Id.; cf. Naming Names in San Antonio*, *Newsweek*, Mar. 2, 1981, at 83 (criticizing a small Texas monthly, the *El Pueblo*, for printing the names of several prominent San Antonio citizens who frequented a local prostitute after the principle San Antonio paper, *The San Antonio Light*, refused to publish those names). 333 This view of the newsworthiness standard is similar to the rationale behind abolishing actions for alienation of affection and related torts. Most jurisdictions eventually barred these actions on the ground that social mores provided a better framework for appropriate social control than did legal rules. See supra note 243.

would make the exploration of modern history a hazardous enterprise and endanger access to important information. The recollection and rethinking of past events often influences opinions on current issues. "Where-are-they-now" articles like that challenged in *Sidis v. F-R Publishing Corp.* not only satisfy the public's curiosity as to what became of once-famous people; they also may supply individuals with important insights into such matters as the problems of notoriety.

4. Naming Names as a Gauge of Liability

Courts have also occasionally relied on the defendant's use of the plaintiff's name or other identifying characteristics to distinguish news-worthy revelations from unnewsworthy. These courts concede that the facts themselves may be newsworthy, but argue that the public gains no additional "legitimate" knowledge by learning the identity of the party. *Cox* diminished the importance of this distinction when it held that if the name appears in a public record, its use in reporting is privileged. The distinction between names and facts when public records are not involved, however, continues to present serious, if subtle, problems.

A factual report that fails to name its sources or the persons it describes is properly subject to serious credibility problems. Consider, for example, the debate that erupted in 1981 over the practice of "disguising" subjects and quoting anonymous sources. A Pulitzer Prize was withdrawn from a Washington Post reporter when it was discovered that she made up, and not merely disguised, the characters in her story on juvenile drug addicts. At least one court has also given thorough consideration to whether use of name invades privacy. In *Howard v. Des Moines Register & Tribune Co.*, the Iowa Supreme Court ruled that a

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335 113 F.2d 806 (2d Cir. 1940).
336 The disputed article in *Sidis*, for example, provides helpful insights into the problems experienced by gifted children. See supra note 164.
338 One suggested way to avoid the public records problem is for the government to redact the name or use a pseudonym such as Jane or John Doe. See Comment, Poteet v. Roswell Daily Record, Inc.: Balancing First Amendment Free Press Rights Against a Juvenile Victim's Right to Privacy, 10 N.M. L. REV. 185, 192-93 (1980); see generally supra notes 50-57 and accompanying text.
340 283 N.W.2d 289 (Iowa 1979), cert. denied, 445 U.S. 904 (1980). Several other courts have been similarly unreceptive to treating the use of a name as an invasion of privacy. See, e.g., Barbieri v. News-Journal Co., 56 Del. 67, 70-71, 189 A.2d 773, 775 (1963); Poteet v.
newspaper was not liable for printing the name of a young woman who was involuntarily sterilized while confined in a county home. The court reasoned:

Assuming, as plaintiff agrees, the newspaper had a right to print an article which documented extrastatutory involuntary sterilizations at the Jasper County Home, the editors also had a right to buttress the force of their evidence by naming names. We do not say it was necessary for them to do so, but we are certain they had a right to treat the identity of victims of involuntary sterilizations as matters of legitimate public concern. . . . Moreover, at a time when it was important to separate fact from rumor, the specificity of the report would strengthen the accuracy of the public perception of the merits of the controversy. 341

The impossibility of determining whether the Iowa Supreme Court was right or wrong about the public's need to know the name of a woman sterilized while in the Jasper County Home is precisely why any decision other than one that defers to the judgment of the press is arguably wrong. 342

No one, including judges or juries, can determine with any certainty whether a particular piece of information is ever likely to influence the thoughts, impressions, and political decisions of individual citizens. The first amendment created a strong presumption against regulation precisely because the worth of any bit of speech is so hard to measure. Certainly the framers of the amendment foresaw that in creating a presumption against regulation they were creating a system in which abuses of speech were inevitable; the first amendment clearly prefers abuse to misjudgments about when such abuse has occurred. 343


341 283 N.W.2d at 303.
342 It may be futile to rely on the defendant's use of plaintiff's name to distinguish invasions of the plaintiff's right to privacy from nontortious publications. In several cases in which the defendant did not use the name at all, or only used a first name or a maiden name, the plaintiff argued that others could still clearly identify him or her from the other details in the article or work. See, e.g., Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931) (married women identified by maiden name); Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944) (plaintiff identified by first name only); Hubbard v. Journal Publishing Co., 69 N.M. 473, 368 P.2d 147 (1962) (young girl sexually assaulted by brother identifiable although name not used in newspaper article); see also A. VIDICH & J. BENSMAN, supra note 219, at 398-99. Vidich and Bensman relate that despite the fictitious names used in the study, the participants are clearly identifiable to anyone who knows the town. The researchers argue that if social obligations required them to alter facts other than the names to protect study participants' identities, such obligation would begin to undercut the scientific usefulness of their work. Id. at 429.
343 See New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); see also Beaney, supra note 238, at 257 (the law must protect the least exemplary speakers in order to preserve
Thus, the imperfect controls of contemporary mores and public opinion ultimately seem to be a less dangerous alternative than control of the press through a legal "newsworthiness" test, even in the hands of the most cautious judiciary.\footnote{344}

5. The Unconscionability Standard

Although they have acknowledged that such tests as "newsworthiness" and "private nature of the information" may remain vague and may threaten fragile first amendment values, some courts and commentators have nevertheless argued that the Constitution permits private-facts liability in a small class of cases.\footnote{345} These advocates would preserve a right of action when the revelations are so shocking, intimate and objectionable as to amount to unconscionable\footnote{346} behavior on the part of the publisher. They claim that limiting recovery to cases that "shock the conscience" would minimize the chill on protected speech and would still redress the most serious abuses of privacy.\footnote{347}

The Court of Appeals for the Second Circuit is usually credited with the original formulation of an unconscionability standard for private-facts cases. In \textit{Sidis v. F-R Publishing Co.},\footnote{348} the court expressed some doubt that newsworthiness would always be a defense in private-facts cases: "Revelations may be so intimate and so unwarranted . . . as to outrage the community's notions of decency."\footnote{349} Thus, the court implied, even a newsworthy story might be tortious.\footnote{350} In 1975, the Ninth Circuit in \textit{Virgil v. Time, Inc.},\footnote{351} essentially agreed with the \textit{Sidis} court's...
suggestion that newsworthy information could lose its constitutional protection if the revelations at issue were so sensational and shocking as to violate the community’s norms of human decency.  

Neither the revelations in *Sidis* nor those in *Virgil*, however, met the unconscionability standards set out by the two courts. Moreover, courts may not develop a general consensus about what sorts of cases would represent unconscionable publications. Commentators have argued, for example, that *Sidis* should have won. The court in *Sidis*, however, found that although the article was a “merciless” dissection of his life, the portrait that resulted was sympathetically drawn and “instructive.”

One illustration—drawn from a case that was not itself a private-facts action—should demonstrate why even the unconscionability standard will not (and should not) tame the newsworthiness privilege. In *Commonwealth v. Wiseman*, the state of Massachusetts, acting as *parens patriae* on behalf of the inmates of a Massachusetts correctional institution, sought an injunction against further showings of the film ““Titicut Follies.”” The footage was unquestionably shocking. The film showed identifiable naked patients futilely attempting to conceal their nudity; it depicted inmates who were incoherent and raving. It recorded some in the process of dying, and still others as they received treatments callously administered by staff psychiatrists. The reviewing court concluded that the movie constituted a “collective, indecent intrusion into the most private aspects of the lives of these unfortunate persons.”

But the evidence cited by the court demonstrates that many viewers deemed the conditions in the institution, and not the film, to be un-

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352 See id. at 1129-31. The Ninth Circuit adopted the position taken in the Restatement Second. See generally Restatement (Second) of Torts § 652D comment h (1977). The Restatement Second extends the newsworthiness privilege only to information that the public has a “legitimate” right to know, and imposes liability for revelations of great public interest if “the publicity . . . becomes a morbid and sensational prying into private lives for its own sake,” as tested by community mores. The *Virgil* court, in applying this test, would allow a jury in a close case to determine the boundary between legitimate and illegitimate public interest. See 527 F.2d at 1130-31; supra note 43.

353 See 113 F.2d at 809.


355 See E. BLOUSTEIN, supra note 163, at 95; KARAFIOL, supra note 32, at 523-29.

356 113 F.2d at 807.

357 356 Mass. 251, 249 N.E.2d 610, cert. denied, 398 U.S. 960 (1969). Although the court in *Wiseman* discussed the privacy issue at great length, it did not resolve it, preferring to issue the injunction based on a violation of a contract between the state and the filmmaker regarding the conditions under which permission to make the movie had been granted. Cf. *Cullen v. Grove Press, Inc.*, 276 F. Supp. 727 (S.D.N.Y. 1967) (refusing to grant injunction against “Titicut Follies” on ground that the film was protected by first amendment).

358 *Wiseman*, 356 Mass. at 254 n.2, 249 N.E.2d at 613 n.2.

359 Id. at 256 n.5, 249 N.E.2d at 614 n.5.

360 Id. at 258, 249 N.E.2d at 615.
The very brutality of the imagery gave the film its impact. One critic said that the movie’s “repulsive reality” forced the viewer “to contemplate our capacity for callousness. No one seeing this film can but believe that reform of the conditions it reports is urgent business.”

If this had been a tort action on behalf of the inmates, should a court have found the film unconscionable? Or was its communicative force on an issue of public interest so overwhelming that even the most degrading depictions of others’ lives could not overcome the constitutional privilege? The court itself noted that one reason the film crew was permitted in to make “Titicut Follies” was because prison officials could find no other ways to generate interest in reforming the Bridgewater facility; indeed, after the film was made, sizable additions were made to the institution’s staff. Furthermore, the court clearly believed that the communication was so important that, even in the face of a violation of a “quasi-fiduciary” duty by the filmmaker not to depict inmates who could not consent, the court could not justify a total ban on further showings. Today, the film is available to a wide spectrum of specialized viewers, from doctors and lawyers to members of “organizations dealing with the social problems of custodial care and mental infirmity.”

A review of the successful tort cases—in which the plaintiff has either prevailed or at least survived a motion for summary judgment—also fails to reveal either emerging application of an unconscionability standard, or, for that matter, a clear pattern of outrageous abuse by the media. Some of the “successful” tort cases involved publication of facts

361 See id. at 256 n.6, 249 N.E.2d at 614 n.6 (quoting testimony of former director of division of legal medicine of State Department of Mental Health).
362 Id. at 256 n.5, 259 N.E.2d at 614 n.5.
363 Id. at 260 & n.8, 249 N.E.2d at 616 & n.8.
364 Id. at 262, 249 N.E.2d at 618. The film continues to be distributed according to the terms of the modified injunction. A person wishing to obtain the film must complete a statement prior to its shipping that only persons in the categories designated by the court order will attend. After the screening, a second statement must be filed attesting that the conditions set out in the injunction were actually met. Interview with and letter from Karen A. Batting, Zipporah Films, Boston, Mass. (Dec. 15, 1981) (on file with author).
365 This point is well made by a commentator critical of the “unconscionability” test accepted in Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976):

Disclosure of information which shocks reasonable people is at times important speech. The test [of unconscionability] is unacceptable both because it allows the imposition of sanctions on speech of paramount constitutional importance and because a judge or jury determination of extreme offensiveness is quite unpredictable.

available from public records, and thus would not succeed today after Cox. Other cases challenged arguably offensive revelations, but could hardly be considered to "shock the conscience," because the reported events occurred in indisputably public settings. Still other cases involved sufficiently offensive behavior, but the unconscionability resulted from some factor unrelated to the nature of the material revealed.

For example, in Barber v. Time, Inc., the court conceded that the description of the patient's illness was not repulsive or unusually intimate. The plaintiff suffered from a metabolic disorder that allowed her to eat enormous quantities of food while continuing to lose weight. Rather, it was the manner in which the story was obtained that was offensive. A reporter and photographer apparently entered the plaintiff's hospital room uninvited and surreptitiously took her picture while she tried to object to any publicity about her illness. The problem was arguably not the disclosure of private facts, but the physical intrusion.

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366 See, e.g., Briscoe v. Reader's Digest Ass'n, Inc., 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (reports of previous criminal activities that were part of court records); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931) (same); Patterson v. Tribune Co., 146 So. 2d 623 (Fla. Dist. Ct. App. 1962) (report of a voluntary psychiatric commitment for drug addiction that was part of the public record).

367 See, e.g., Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964) (picture of plaintiff with dress blown above her waist at fairgrounds published in newspaper).

368 348 Mo. 1199, 159 S.W.2d 291 (1942).

369 The court agreed that Mrs. Barber's ailment was of general public interest. Nothing about the description itself was offensive or shocking. Id. at 1203-04, 1207, 159 S.W.2d at 293, 295.

370 Id. at 1208, 159 S.W.2d at 295-96.

371 Harms v. Miami Daily News, Inc., 127 So. 2d 715 (Fla. Dist. Ct. App.; 1961), presented a different kind of unconscionability problem. In Harms, a reporter wrote: "Wanna hear a sexy telephone voice? Call ________ and ask for Louise." Certainly there is nothing outrageous or intimate in either the statement that someone's voice is sexy or in the publication of her office telephone number. The problem was in the result: the plaintiff was inundated by "many hundreds of telephone calls by various and sundry persons." Id. at 716. Although there is room for debate about the extent to which the media should be liable for the foreseeable acts of third parties in response to broadcast and published materials, we are not likely to further the resolution of this complex problem by forcing the analysis into the private-facts tort mold.

In recent years, this problem has arisen with increasing frequency. Although no definitive approach has yet emerged, the courts seem reluctant to hold the press liable for the acts of third parties, even when the acts could be deemed "foreseeable." See, e.g., Olivia N. v. National Broadcasting Co., 74 Cal. App. 3d 383, 141 Cal. Rptr. 511, cert. denied, 435 U.S. 1000 (1978), dismissed on remand, 126 Cal. App. 3d 498, 178 Cal. Rptr. 888 (1981) (appellate court suggested, and on remand, trial court found, tort immunity where television program on rape of young girl not intended to advocate or incite lawless action); Walt Disney Prods., Inc. v. Shannon, 247 Ga. 402, 276 S.E.2d 580 (1981) (first amendment bars suit against defendant where child injured trying trick demonstrated on television program). But see Weirum v. RKO General, Inc., 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975) (radio station liable for automobile accident caused by teenage participants in promotional contest which had listeners driving around looking for location of disc jockey). See generally Note, Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis, 52 S. Cal. L. Rev. 529 (1979)
In summary, the “shock-the-conscience” standard, which seeks to preserve some small measure of protection for private facts from the broad reach of the first amendment, probably is unworkable. Because “unconscionability” is ultimately a subjective determination, open to many different interpretations, this theoretical narrowing of the tort is not, as a practical matter, likely to discourage many potential litigants from suing, or to prevent courts from continuing to arrive at conceptually irreconcilable results. When we weigh the continued chilling effect of potential litigation and unpredictable liability against the benefits of allowing courts to retain the option of remediating some rare, genuinely offensive bits of publicity, we must question whether the preservation of even a small corner of the Warren-Brandeis tort is worth the risks. This observer answers in the negative.

CONCLUSION

After ninety years of evolution, the common law private-facts tort has failed to become a usable and effective means of redress for plaintiffs. Nevertheless, it continues to spawn an ever-increasing amount of costly, time-consuming litigation and rare, unpredictable awards of damages. In addition, this “phantom tort” and the false hopes that it has generated may well have obscured analysis and impeded efforts to develop a more effective and carefully tailored body of privacy-protecting laws.

Many of the most troubling privacy questions today arise not from widespread publicizing of private information by the media, but from electronic eavesdropping, exchange of computerized information, and the development of data banks. Much of this information, which individuals supply as a necessary prerequisite to obtaining important benefits like credit, medical care, or insurance, can cause serious harm, even if circulated only to one or two unauthorized recipients. Privacy law might be more just and effective if it were to focus on identifying (pref-
erably by statute) those exchanges of information that warrant protection at their point of origin, rather than continuing its current, capricious course of imposing liability only if the material is ultimately disseminated to the public at large.

For example, thoughtful elaboration of privacy law involving intrusions on solitude is likely to promote greater protection of the individual's interest in being free of public scrutiny than is the vague and hard-to-apply law governing the publicity of private facts.  

More thought should also be given to increasing the use of legal sanctions for the violation of special confidential relationships, in order to give individuals greater control over the dissemination of personal information. The lawyer-client relationship provides a useful model. A client who hires an attorney expects the attorney to keep confidential all disclosures made by the client in the course of the professional relationship. Breach of this duty gives rise to an action for damages. The contractual duty of confidentiality puts both parties on notice of the communications to be protected and the rights and responsibilities that the relationship creates.

States have only intermittently recognized rights of contractual confidentiality in other relationships. Contractual or quasi-contractual...
tual notions of confidentiality, of course, can pose major constitutional
dilemmas of their own, particularly when the government is one of the
parties to the contract and the scope of the information to be controlled
is broad. In the context of private commercial and professional serv-
ices, however, a careful identification of particularly sensitive situations
in which personal information is exchanged, and an equally careful
delineation of the appropriate expectations regarding how that informa-
tion can be used, could significantly curtail abuses without seriously
hampering freedom of speech. At the very least, this possibility merits
considerably more thought as an alternative to the Warren-Brandeis
tort than it has received thus far.

In the final analysis, the Younger Commission may have been
right. Perhaps the best defense against the effects of public gossip is a
willingness to be more discreet in revealing personal information about
ourselves and in exposing our intimate behavior to public view. Because we live in an information-obsessed society, we often give out our
most private opinions and reveal our most private lives to others almost
reflexively. To some extent, the intense focus that we place on inti-
macy in social relationships is inevitably reflected in the practices and
editorial choices of the press. If the balance has really tipped too far and
redress is needed, it may be better to rely on the same processes of social
evolution that initially created our excessive taste for personal details,
rather than to leap into the breach with an enunciation of new legal
restraints. As centuries of experience have shown, many of the most

c.e.g., Horne v. Patton, 291 Ala. 701, 287 So. 2d 824 (1973) (doctor-patient relationship entails
duty of confidentiality, such that unauthorized disclosure of medical information to plaintiff's
employer gives rise to action for breach of confidence); Geisberger v. Willuhn, 72 Ill. App. 3d
435, 438, 390 N.E.2d 945, 947-48 (1979) (statutorily created right of privileged communic-
eation equated with contract theory protecting patient from unauthorized disclosure of personal
information); McDonald v. Clinger, 482 A.D.2d 482, 446 N.Y.S.2d 801 (1982) (recognizing
tort liability in addition to contractual liability for doctor's breach of duty of confidentiality);
contractual right of confidentiality exists between bank and its depositors).

Recent cases involving the enforcement of secrecy agreements against former federal
employees who later write about government policies and events to which they were privy
demonstrate this problem. See, e.g., Snepp v. United States, 444 U.S. 507 (1980) (per curiam)
imposing constructive trust on profits of unauthorized book recounting CIA activities in
South Vietnam); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.) (enjoining former
CIA employees from publishing information gained in the course of employment), cert. denied,

See supra notes 293-94 and accompanying text.

Some recent writers on privacy have lamented that self-invasion is growing
dangerously in American society, especially in people's responses to pub-
lic-opinion pollsters and behavioral researchers. What will happen to respect
for privacy, it is asked, when people blurt out their views, personal histories,
and intimate behavior so freely to such inquiring questioners, instead of say-
ing "It's none of your business"?

A. Westin, supra note 9, at 53 (footnote omitted).

See Beaney, supra note 238, at 271; cf. Ingham, Privacy and Psychology, in Privacy 35,
important aspects of human relationships are beyond the reach of the law and must work themselves out in the imprecise laboratory of manners and mores. Some human problems are impervious to legal solution because they involve social ideals that do not readily translate into intelligible legal theory; we cannot clearly identify and balance the relevant social and moral values; and we refuse to resolve some human problems by law because we are unwilling to bear the cost that legal solutions would impose. Perhaps the problem identified by Warren and Brandeis has been incapable of resolution in the courts because, after nearly a century of experience, it has proved woefully vulnerable on all three counts. If so, it is probably time to admit defeat, give up the efforts at resuscitation, and lay the noble experiment in the instant creation of common law to a well-deserved rest.

APPENDIX


385 See supra notes 147-70 and accompanying text.
386 See supra note 244 (criticism of so-called heart balm actions). Both Kalven and Emerson point out that private-facts tort actions conflict with first amendment values, and also damage the very interest they are designed to protect by increasing the amount of exposure already given to the allegedly intimate information. See Emerson, supra note 39, at 348; Kalven, supra note 6, at 338-39. Kalven suggests that, because privacy suits frequently involve this element of publicity, they often contain an element of “fraud and exploitation.” Id. at 338.
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Indiana, Montana, and Washington have entertained no actual or arguable private-facts cases, but suggest in related cases that they might permit such actions. See, e.g., Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E.2d 306 (1949); Welsh v. Roehm, 125 Mont. 517, 241 P.2d 816 (1952); Hearst Corp. v. Hoppe, 90 Wash. 2d 123, 580 P.2d 246 (1978).

Only four states have expressly rejected a private-facts action. E.g., Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955); NEB. REV. STAT. §§ 20-201 to -211, 25-840.01 (1979 & Supp. 1980) (adopting aspects of the privacy tort but excluding private-facts tort actions); Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902); Donahue v. Warner Bros. Pictures Distrib. Corp., 2 Utah 2d 256, 272 P.2d 177 (1954) (statutory right to privacy limited to commercial misappropriation); Evans v. Sturgill, 430 F. Supp. 1209 (W.D. Va. 1977) (statutory right to privacy limited to commercial misappropria-