INVASION OF PRIVACY TORT: DOES THE DEFERENCE GIVEN TO THE PRESS IGNORE THE FAMILY?

INTRODUCTION

An individual's right to privacy, or "the right to be let alone,"[1] is at a constant struggle with the media's ability to freely disseminate information for public discourse.[2] In the context of the dissemination of private facts, the media has had free reign to circulate any information they choose.[3] Presently, the only viable avenue for an individual, public-figure, or celebrity to attain redress for the harms caused by the media's circulation of private facts is a tort action pursuant to the *Restatement (Second) of Torts section 652D: Publicity Given to Private Life*.[4] State criminal statutes or court orders making the dissemination of certain private facts illegal have generally been struck down by the Supreme Court.[5] The possible remedies provided by a tort action arising from the publicity given to private life are rarely realized when applied to the dissemination of private facts of individuals, public-figures, or celebrities: The general failure of courts to allow recovery by private individuals or by those in the public spot-light is due in part to

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[1] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

[2] *See id.* Even in 1890, Warren and Brandeis, in a *Harvard Law Review* article, noted that commentators of the time believed that the law should provide a remedy for the invasion of privacy rights by the media:

> 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.

Id.

[3] *See* Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 446 (1996) (citing Dianne L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 293 (1983) and declaring that plaintiffs rarely achieve success in cases brought pursuant to the dissemination of private facts because "plaintiffs' privacy rights rarely prevail over the public's interests, rendering the limitation on the scope of the public interest essentially theoretical . . . .").

[4] RESTATEMENT (SECOND) OF TORTS § 652D (1977). The text of this section, entitled the "Publicity Given to Private Life," states that:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
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> (a) would be highly offensive to a reasonable person, and
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> (b) is not of legitimate concern to the public.

Id. The torts of defamation, false light, and intentional infliction of emotional distress are beyond the scope of this Note.

[5] *See* discussion *infra* Part I.C.

the deference given by the courts to the media to decide what is information fit to print.[6] The Supreme Court has refused to declare that no factual situation involving the dissemination of private facts will be denied recourse.[7] However, the Court grants First Amendment protection to the media if the dissemination comports with a notion that the information is newsworthy or of a legitimate public interest.[8] Although this standard seems reasonable, the deference given to the media on this issue has made the possibility of any remedy for the dissemination of private facts nearly impossible.[9]

This Note argues that an individual, celebrity, or public-figure's interests in protecting the privacy rights of not only themselves, but their families, outweighs the media's First Amendment right to free speech, as that right should only be considered absolute in the context of providing the public with the information they require for effective self governance.[10] First, this Note will explore the tension between First Amendment rights and the invasion of an individual's privacy caused by the publication of private facts. The second part of this Note argues that by changing the present weight granted to the "newsworthy" or public significance portion of an invasion of privacy action, an individual, celebrity, or public figure may achieve redress after taking into account the harm that the publication of private facts has on the individual, celebrity, or public figure's family. Finally, using the intense media coverage of both Princess Diana and President William Jefferson Clinton, this Note will attempt to show that the press can no longer

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[6] *See* discussion *infra* Parts II, III.

[7] *See e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (denying recovery to the father of a rape victim who sued a news agency which broadcast the victim's name in a news report); The Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) ("We hold only that where a newspaper publishes truthful information which has been lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."). The *Cox* case was limited to its facts as the Court would not declare whether a state could ever establish protection for an individual's privacy, free from "publicity in the press." *See Cox*, 420 U.S. at 491.

[8] *See Cox*, 420 U.S. at 492-97 (holding that information which is contained in public court records is to be freely disseminated as the function of the press in such a situation is to ensure that citizen are subject to fair trials, and further stating that to punish the press for the dissemination of a rape victim's name to the public when the name was obtained from a public court proceeding would lead to self-censorship by the press).

[9] *See Florida Star*, 491 U.S. at 550-51 (White, J., dissenting) (declaring that it is doubtful if any "'private fact'" would be protected from publication if the Court is willing to protect a newspaper that publishes the name, telephone number and address of a rape victim).

[10] *See* Texas v. Johnson, 491 U.S. 397, 411 (1989) (holding that at the core of the First Amendment is the ability to express dissatisfaction with the country's policies); *see also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 29 (1971) (propounding the view that political speech is all the First Amendment should protect).

be given the ultimate authority when deciding what is newsworthy information in a court of law.

I. The Struggle Between Free Speech and the Invasion of Privacy Caused By the Public Disclosure of Private Facts

A. *The Development of the Right to Privacy in the United States*

The genesis of recognizing privacy as an individual's fundamental right stems from the 1890 law review article written by Samuel D. Warren and Louis D. Brandeis, entitled *The Right to Privacy*.[11] Warren and Brandeis proposed that in order to combat a press believed to be out of control,[12] laws already existing which protected privacy in other situations should be extended because "the more general rules are furnished by the legal analogies already developed in the laws of slander and libel, and in the law of literary and artistic property."[13] They maintained that a right to control the publicity of one's private affairs would be an extension of these existing principles.[14] Furthermore, Warren and Brandeis foresaw the possibility that such a distinction would be difficult to apply to factual situations.[15]

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[11] *See* Warren & Brandeis, *supra* note 1, at 195.

[12] The Authors discussed that the role of the press was ever increasingly the voice of gossip and intrusion upon the individual's private affairs. *See id.* at 196. The public's desire to be informed of individuals' private lives had been fed by the press as "the supply creates the demand." *See id.* Warren and Brandeis further claimed that gossip, or an individual's private facts, crowded the mediums through which people attained their information and thereby made them believe it was information of importance, while ignoring or crowding out those things which were less sensational but of greater importance: "Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things." *Id.*

[13] *Id.* at 214.

[14] Through analogies to principles of the law of Copyright, Warren and Brandeis explored the notion that the right of an author to decide whether his works are to be published for viewing by the public creates an interest different than the author's right to profit from those works. *See id.* at 198-205. The interest in preventing publication of an author's works is most consistent with the "right of the individual to be let alone," while the author's right to profit from his works exists as a fictitious property right. *See id.*

[15] The difficulties foreseen by Warren and Brandeis are as follows:

> There are of course difficulties in applying such a rule, but they are inherent in the subject-matter, and are certainly no greater than those which exist in many other branches of the law . . . . The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will . . . . There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation. Matters which men of the first class may justly con-

Immediately following the publication of the article by Warren and Brandeis, few courts were willing to allow for a privacy based cause of action.[16] After nearly four decades, state courts began to acknowledge the right to privacy as a legitimate claim,[17] and the common law of the right to privacy continued to grow until it was officially recognized in the *Restatement (First) of Torts* in 1934.[18] Today, a majority of states recognize a tort action for the invasion of privacy caused by the public disclosure of private facts, and many states recognize such an action in both statutes and state constitutions.[19]

B. The Importance of Family as Interpreted by the Supreme Court in Cases Concerning Governmental Intrusion of a Citizen's Right to Privacy

Before further discussion of the right to privacy in the context of the dissemination of private facts as envisioned by Warren and Brandeis, a review of Supreme Court decisions concerning the right to privacy, as found within the penumbras of the Constitution, is useful for establishing the importance placed on family rights, and the effect that the invasion of privacy in this context has on the family. The Supreme Court in *Griswold v. Connecticut*[20] held

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> tend, concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow citizens . . .
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> . . . Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case,— a necessity which unfortunately renders such a doctrine not only more difficult of application, but also to a certain extent uncertain in its operation and easily rendered abortive. Besides, it is only the more flagrant breaches of decency and propriety that could in practice be reached, and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn.

Id. at 214-16 (citation omitted). The authors then discussed the effects that recognizing privacy rights would have on concerns of communication and the inadequacy of using truth or an absence of malice as defenses. *See id.* at 216-17.

[16] *See* Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 688 (1996) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 850 (5th ed. 1984)).

[17] *See id.* at 688-89 ("However in the landmark case of *Pavesich v. New England Life Insurance Co.*, the Georgia Supreme Court adopted a type of privacy tort . . . . It was not until 1927, in the case of *Brents v. Morgan* that a court recognized a cause of action for invasion of privacy based on the dissemination of private information." (citing Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905) and Brents v. Morgan 299 S.W. 967 (Ky. Ct. App. 1927)).

[18] *See id.* at 689 (citing RESTATEMENT (FIRST) OF TORTS §867 (1934)).

[19] *See generally* Mintz, *supra* note 2, at 432-35 & nn.37-47 (citing to a variety of cases, statutes, and state constitutions which recognize the invasion of privacy through the public disclosure of private facts, including rape shield laws and laws restricting the disclosure of individuals suffering from Human Immuno-Deficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)).

[20] 381 U.S. 479 (1965).

that the right to privacy is found within the penumbras of the Constitution.[21] The *Griswold* Court cited to an earlier Supreme Court decision, which declared that the right of an individual to be free from the invasion of privacy by the government applied "'to all invasions on the part of the government and its employes [sic] of the sanctity of a man's home and the privacies of life.'"[22] In *Roe v. Wade*,[23] the right to privacy, which extended to such issues as contraception, marriage, family relationships, procreation, and child rearing and education, was used by the Court to declare that a nearly complete ban on abortions in Texas was unconstitutional.[24] However, similar to the limits placed on an individual's right to privacy in the dissemination of private facts, the Court in *Roe* also declared that the right to privacy found within the penumbras of the Bill of Rights was not absolute.[25]

Following these landmark cases, the Supreme Court extended the right to privacy to include the right of members of a family to live together[26] and the right to marry.[27] The Court in *Moore v. City of East Cleveland*[28] admitted that the family may, in certain circum-

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[21] *See id.* at 481-84 (holding a Connecticut law forbidding the use of contraceptives unconstitutionally intrudes upon the right of married privacy, and finding a zone of privacy in the penumbras of the First, Second, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution).

[22] *Id.* at 484 & n.* (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)); *see also* Roe v. Wade, 410 U.S. 113, 152 (1973) (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969); Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); Palko v. Connecticut, 302 U.S. 319, 325 (1937); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); Meyer v. Nebraska, 262 U.S. 390 ,399 (1923); Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891) (all establishing that a right to privacy or a zone of privacy free from governmental intrusion was found within the penumbras of the constitution or bill of rights, and requiring that the right to privacy from governmental intrusion must be "fundamental" or "implicit in the concept of ordered liberty")).

[23] 410 U.S. 113 (1973).

[24] *See id.* at 152 (citing Eisenstadt v. Baird, 405 U.S. 438, 442 (1972) (White, J., concurring in result); Loving v. Virginia, 388 U.S. 1, 12 (1967); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942); Pierce v. Society of Sisters 268 U.S. 510 (1925)).

[25] The Court stated that "the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant." *Id.* at 155.

[26] *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (holding that an East Cleveland city housing ordinance, that restricted the use of a dwelling unit to those of a single family, was unconstitutional where the homeowner convicted of violating the ordinance failed to meet the definition placed on "single family" by the Cleveland ordinance because she was living with her son, grandson, and a second grandson, who was a cousin of the first grandson).

[27] *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (holding that the right to marry is fundamental and invalidating a Wisconsin law which would require a father, with children to support that were not in his custody, to obtain court approval before being allowed to marry).

[28] 431 U.S. 494 (1977).

stances, be regulated by the government, "[b]ut when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[29] Such strict scrutiny applied by the Court stems from the importance the Court places on the family: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[30] The Court, however, reached the limitation it had alluded to in *Roe*,[31] and stopped short of allowing a right to privacy action that challenged a law which made the act of sodomy illegal.[32] In *Bowers v. Hardwick*,[33] the Court refused to extend constitutional rights to homosexual activity because "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . ."[34] Furthermore, in refusing to extend privacy protection to homosexual conduct, the Court relied on the fact that homosexual activity had been made illegal by the thirteen colonies and subsequently by all fifty states.[35]

The Supreme Court's decisions in the *Griswold* line of cases shows the importance that the Court places on the privacy rights of the family.[36] These privacy rights are inherent in our system of government as the Court found them to be rights which were fundamental.[37] The deference given to family interests by the Court in the *Griswold* line of cases should be extended to the test applied to torts arising from publicity given to private life. Placing such importance on the family will achieve a more fair balance between an individual's right to privacy and the press' First Amendment rights.

Despite the expansion of the right to privacy to encompass issues such as a woman's right to choose and familial relationships, the right to privacy in the context originally described by Warren

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[29] *Moore*, 431 U.S. at 499 (citing Poe v. Ullman, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting)).

[30] *Id.* at 503 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

[31] *See supra* note 25 and accompanying text.

[32] *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

[33] 478 U.S. 186 (1986).

[34] *Id.* at 191.

[35] *See id.* at 192-94. Such treatment of homosexual activity as illegal prevented the courts from granting protection to homosexual activity on the grounds that it was "'deeply rooted in the nation's history and tradition'" or "'implicit in the concept of ordered liberty'" to deny protection. *See id.*

[36] *See supra* notes 19-29 and accompanying text.

[37] *See supra* notes 21, 29 and accompanying text.

and Brandeis has not met with much approval by the courts.[38] Furthermore, a viable method for litigating and defining the required elements for an action caused by the publication of private facts, as well as a fair balancing of free speech interests with the invasion of privacy, has eluded the bar, as evidenced by four Supreme Court decisions.[39]

C. *First Amendment Defenses to the Invasion of Privacy Caused by the Publication of Private Facts*

Actions brought before the Supreme Court involving the invasion of privacy through the release of private information have all been decided in favor of the media. This line of cases involved the release of information that was deemed private either court order or by state statute.[40]

The Supreme Court's first consideration of the invasion of privacy through the dissemination of private facts was in both *Cox Broadcasting Corp. v. Cohn*[41] and *Oklahoma Publishing Co. v. District Court*.[42] At issue in *Cox* was the publication of a rape victim's name

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[38] *See* Time, Inc. v. Hill, 385 U.S. 374, 383-84 (noting that modern jurisprudence has allowed the press to publish any truthful information they wish despite a person's privacy interests); Morgan v. Celender, 780 F. Supp. 307, 310 (W.D. Pa. 1992) (using a broad interpretation of the First Amendment and denying recovery as a matter of law to a mother and daughter whose names had been placed in an article concerning the daughter being sexually abused by her father, because the burden on the media would be contrary to the freedom of the press); Hall v. Post 372 S.E.2d 711, 716-17 (N.C. 1988) (refusing to recognize a private fact tort as actionable as it is constitutionally suspect and would overlap damages already attainable through the intentional infliction of emotional distress); *see also* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 294 (1983) (arguing that the failure of Warren and Brandeis's privacy tort in the courts is due to many inherent flaws and the right to privacy action should be retired as a failed experiment).

[39] *See infra* note 40. *See generally* Mintz, *supra* note 3, at 448 (discussing the "nearly insurmountable approach" taken by the Supreme Court in balancing the interests between First Amendment rights of free speech and the right of a plaintiff to recover for the publication of private facts).

[40] *See* The Florida Star v. B.J.F., 491 U.S. 524 (1989) (allowing B.J.F. to sue newspaper for damages under a Florida statute where a newspaper obtained the name of a rape victim from a police report which had been mistakenly released to the public); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) (publishing the name of a juvenile charged with a crime without obtaining permission from the juvenile court whether the name was obtained from interviews with eyewitnesses or the monitoring of police radios constituting a crime under a West Virginia statute); Oklahoma Publ'g Co. v. Dist. Court, 430 U.S. 308 (1977) (enjoining the Oklahoma Publishing Company from printing the name or photograph of a juvenile, pursuant to the trial court's order, even though the name was obtained through legal means and the picture was taken outside of the courthouse); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (suing the broadcasting corporation pursuant to a Georgia statute where a deceased rape victim's name was broadcast on television and the father of the victim brought the suit).

[41] 420 U.S. 469 (1975).

[42] 430 U.S. 308 (1977).

in a newspaper.[43] The Court held that the First and Fourteenth Amendments would not "allow exposing the press to liability for truthfully publishing information released to the public in official court records."[44] Information in the public domain caused the plaintiff's privacy interest to abate, requiring a holding in favor of the newspaper which was "especially 'compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press.'"[45]

The majority in *Cox* further held that the state interest in protecting the rights of a rape victim's privacy could be better achieved by the state keeping the victim's identity a matter of strict confidence.[46] Similar to the Court's analysis regarding information that has been released by the government, commentators believe this analysis should apply equally to invasion of privacy cases not involving a governmental release of truthful information.[47]

Following *Cox*, the Supreme Court addressed a similar situation in *Oklahoma Publishing Co. v. District Court*.[48] The Court in *Oklahoma Publishing* found for the media, despite an injunction issued by the state court which prevented the dissemination of the name of a juvenile.[49] The juvenile was being tried in a juvenile court proceeding when the name was obtained at a hearing attended by the press.[50] Following its holding in *Cox*, the Court held that because the information was obtained lawfully and was part of the public record, the press was protected under the First and Fourteenth Amendments and could publish the information they gathered.[51]

The Supreme Court next decided *Smith v. Daily Mail Publishing Co.*,[52] which provided a test attempting to balance the conflicting

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[43] *See Cox*, 420 U.S. at 471.

[44] *Cox*, 420 U.S. at 496.

[45] Mintz, *supra* note 2, at 449-450 (quoting *Cox*, 420 U.S. at 495).

[46] The Supreme Court justified this rule as a necessary measure to ensure that the press does not engage in self censorship which would arise if the press were forced to use their judgment as to whether information they were printing, which was lawfully obtained, would be offensive to the reasonable man as reviewed in a court of law. *See Cox*, 420 U.S. at 496.

[47] *See* Zimmerman, *supra* note 38, at 347 (describing this clandestine attempt to keep information from the press as "location analysis," stating that those using "location analysis" usually assert that information revealed in public by the individual can no longer be claimed as private, and therefore, finding this distinction to be logically troubling because what many persons believe to be a private setting, a small gathering of close friends or presence at a private club, may be considered public for the sake of determining whether the press was justified in disseminating private facts).

[48] 430 U.S. 308 (1976).

[49] *See id.*

[50] *See id.*

[51] *See id.* at 311-12.

[52] 443 U.S. 97 (1979).

rights of the press and those of the individual whose private information had been circulated to the public.[53] The formulation created by the Court in *Daily Mail* drew from earlier court decisions: "None of these opinions directly controls this case; however, all suggest strongly that if a newspaper *lawfully obtains truthful information* about a *matter of public significance* then state officials may not constitutionally punish publication of the information, absent a need to *further a state interest of the highest order.*"[54] Applying this test, known as the lawfully obtained doctrine, the Court denied to extend privacy protection to a juvenile offender whose name was published in an Oklahoma newspaper.[55] The Court found the newspaper's reporters' identification of the juvenile offender employed methods that were "routine."[56] After finding the information published was lawfully obtained the Court failed to address any real privacy interests of the juvenile and instead focused on the lack of a sufficient state interest in protecting the juvenile.[57]

A decade after the Supreme Court's decision in *Daily Mail,* the Court decided *The Florida Star v. B.J.F.*[58]. Similar to *Cox, The Florida Star* involved the publication of a rape victim's name by a Florida newspaper.[59] The victim's name, telephone number, and address were mistakenly placed into the report released by the police to the press room.[60] The newspaper released the story along with the victims name address and telephone number.[61] Despite the oversight made by the police, the actions of the newspaper were in clear violation of a Florida state statute, which made the publication of the name of a sexual offense victim punishable as a misdemeanor.[62]

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[53] *See id.*

[54] *Id.* at 103 (emphasis added). The Court also used this formulation in *The Florida Star v. B.J.F. See infra,* notes 57-60 and accompanying text.

[55] *See Daily Mail,* 430 U.S at 103.

[56] *See id.*

[57] The Court in *Daily Mail* subordinated West Virginia's interest of providing confidentiality for juvenile offenders to the press' rights under the First Amendment by relying on the reasoning in *Davis v. Alaska,* which "subordinated" Alaska's interest of preserving a juvenile's anonymity to a defendant's right of confrontation pursuant to the Sixth Amendment. *Id.* at 104 (citing Davis v. Alaska, 415 U.S. 308, 319 (1974)). The Court further held that the West Virginia statute was not sufficiently tailored to meet Constitutional analysis as it only focused on the print media and provided no punishment for electronic media. *Id.* at 104-105.

[58] 491 U.S. 524 (1989).

[59] *See id.*

[60] *See id.* at 547 (White, J., dissenting).

[61] *See id.* at 527.

[62] *See id.* at 526 (citing Fla Stat. Ann. § 794.03 (West 1976)). At trial the Florida court found the newspapers dissemination of B.J.F.'s name was "per se negligent based upon its violation of §794.03." *Id.* at 528-29. The Judge then instructed the jury to award B.J.F. punitive damages if they found the newspaper had "'acted with reckless indifference to the rights of others.'" *Id.* at 529 (citation omitted). Pursuant to the judges orders, the jury awarded $75,000 in compensatory damages and $25,000 in punitive damages. *Id.*

The Court relied on the three part test expounded in *Daily Mail* to balance B.J.F.'s right to privacy with the press' right to free speech: "'[I]f a newspaper *lawfully obtains truthful information* about a *matter of public significance* then state officials may not constitutionally punish publication of the information, absent a need to *further a state interest of the highest order*.'"[63] Following this analysis, the Court held that because the government provided the information and the Court did not want to take "the extreme step of punishing truthful speech," the court found for the newspaper.[64] The court denied redress, notwithstanding the powerful state interests of maintaining an individual's privacy, facilitating rape victims to come forward, and protecting the identity of a rape victim when the perpetrator has not yet been apprehended.[65] The Court's decision to deny B.J.F. redress was the result of the Court placing great emphasis on the manner in which the information was obtained.[66]

The Court also relied on the proposition stated in *Cox* that once the media has lawfully obtained information, particularly by governmental release of information into the public domain, "'reliance must rest upon the judgment of those who decide what to publish or broadcast.'"[67] Deferring to the judgment of the media effectively destroys the use of a newsworthy test in the publication of private fact cases by "subsum[ing] the newsworthiness test into the lawfully obtained doctrine."[68]

D. Justice White's Dissent in The Florida Star v. B.J.F. and the Need to Strike a Fair Balance Between the First Amendment and the Right to Privacy

Justice White initially attacked the majority's reliance on the *Daily Mail* proposition that once the government had allowed information to enter the public sphere it was unconstitutional to punish the media absent a furtherance of state interests of the highest order.[69] Justice White distinguished this "rule" taken from *Daily Mail* as it applied to the publication of information of an al-

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[63] *Id.* at 533 (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979) (emphasis added) (alteration in original)).

[64] *See id.* at 538.

[65] *See id.* at 537.

[66] *See* Scott, *supra* note 15, at 699 (discussing the *Florida Star* Court's application of the test proposed in *Daily Mail* to the publication of B.J.F.'s private facts).

[67] *The Florida Star*, 491 U.S. at 538 (quoting Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975)).

[68] Scott, *supra* note 15, at 699.

[69] *See The Florida Star*, 491 U.S. at 545 (White, J., dissenting); (citing Smith v. Daily Mail Publishing Co., 443 U.S. 97,103 (1970)).

leged criminal, not the invasion of a rape victim's privacy.[70] Justice White was unable to see the harm in simply asking the media to refrain from using the information mistakenly released to the press room.[71]

The dissent was also troubled by the majority's belief that the Florida statute provided both a per se negligence standard for recovery, and it was under inclusive by punishing only the mass communication of private facts.[72] The majority relied on the tort claim standard for the invasion of privacy, which required a decision as to whether the published information was offensive to a reasonable person under an ordinary negligence standard to be applied by a jury.[73] However, Justice White, gave courtesy to the State legislature's ability to decide whether the publication of a rape victim's name was categorically offensive to the reasonable person.[74]

Even more troubling to Justice White was the overall effect that this decision could have on future private fact dissemination cases.[75] Considering the enormous state interest in protecting the privacy of a rape victim, Justice White found it difficult to imagine what could ever trump the press' First Amendment free speech rights following this decision.[76]

The fears expressed by the dissent are justified. The ability for the media to rely on this line of cases provides them with a nearly impenetrable defense when publishing truthful private facts which would be offensive to a reasonable person.[77] It is difficult to imagine that a tort case between private parties could allow the victim of an invasion of privacy, through the dissemination of private facts, any hope of recourse.[78] This result creates an unfair balance be-

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[70] *See id.* at 545 (White, J., dissenting).

[71] *See id.* at 547 (White, J., dissenting).

[72] *See id.* at 548-50 (White, J., dissenting).

[73] The Court held that by finding negligence per se, liability would follow automatically from publishing despite the possibility that the information published is already known to the community. *See id.* at 539 (citing RESTATEMENT (SECOND) OF TORTS § 652D (1977)).

[74] *See id.* at 548-49 (White, J., dissenting).

[75] *See id.* at 550 (White, J., dissenting).

[76] Justice White declared that if a rape victim's privacy rights are not "a state interest of the highest order," the Court has effectively "obliterated . . . the tort of the publication of private facts." *Id.* at 550 (White, J., dissenting). The dissent further declared that denying redress to a woman whose rape was published likely destroys the possibility of recovering for the dissemination of any "'private fact'" which could be published by the media. *See id.* at 551 (White, J., dissenting).

[77] *See* Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1197-98 (1990) ("With . . . Florida Star v. B.J.F., . . . the Court virtually extinguished privacy plaintiff's chances of recovery for injuries caused by truthful speech that violates their interest in nondisclosure.").

[78] *See* Morgan v. Celender, 780 F.Supp. 307, 310 (W.D. Pa 1992) (holding that the publication of a mother and daughter's names in an article concerning the daughter having been sexually abused by her father was protected by both the First Amendment and the

tween the press' ability to disseminate an individual's private facts and the same individual's ability to attain redress.[79]

The Supreme Court in *The Florida Star* line of cases has left what amounts to a token right to privacy claim. The Court declared that their holding in *The Florida Star* is limited in scope and does not destroy the zone of privacy protecting "the individual from intrusion by the press . . . ."[80] The reality of the Court's decisions is to effectively strip an individual of their right to protection from invasion by the press and give only "'lip service'" to the right to privacy.[81]

Regardless of whether it is a statutory right or a private tort claim, it is necessary to redefine the criteria that an individual's right to privacy is currently subjected to. A primary obstacle to a persons ability to recover is the deference given to the media to decide what is and is not newsworthy.[82] The Supreme Court in *The Florida Star* effectively disregarded this issue and focused on whether the newspaper lawfully obtained the information.[83] The Court stated the article contained information, notwithstanding the identity of the victim, which was of general public interest.[84] One can see that the dissemination of information concerning the rape of a woman to the community's readers was certainly a "newsworthy" matter. The use of B.J.F.'s name, however, is another issue entirely and the Supreme Court has ignored this issue by only ad-

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holding of *The Florida Star*). *See also* Mintz, *supra* note 2, at 454 (citing Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195 (1990); John P. Elwood, Note, *Outing, Privacy, and the First Amendment*, 102 YALE L.J. 747 (1992); G. Michael Harvey, Comment, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385 (1992); Jacqueline R. Rolfs, Note, *The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 107)).

[79] *See, e.g.*, Russell D. Workman, Comment, *Balancing the Right to Privacy and the First Amendment*, 29 HOUS. L. REV. 1059 (1992) (comparing the Supreme Court's treatment of privacy in the home and invasion of privacy caused by the dissemination of private facts). The Author concludes that the Court's reluctance to extend privacy rights to *The Florida Star* line of cases is at odds with the Court's extension of privacy rights in the anti-picketing line of cases, when the privacy rights of the former are greater than those of the latter and they are subject to similar tests. *See id.* at 1088-89.

[80] *The Florida Star*, 491 U.S. at 541 (limiting its holding to require that a state statute similar to the one at bar, must be narrowly tailored to exhibit a state interest of the highest order when the private facts released by the media were lawfully obtained).

[81] *See* Zimmerman, *supra* note 43, at 293 (citing Bremmer v. Journal-Tribune Publishing Co., 76 N.W.2d 762, 769 (1956) (Larson, C.J., dissenting).

[82] *See* Scott, *supra* note 15, at 700 (citing Costlow v. Casimano, 311 N.Y.S.2d 92 (Ap. Div. 1970); Anderson v. Fisher Broad. Co., 712 P.2d 803 (Or. 198); Heath v. Playboy Enter., Inc., 732 F.Supp. 1145 (S.D. Fla. 1990)).

[83] *See The Florida Star*, 491 U.S at 536-37. *See also supra* note 63 and accompanying text.

[84] *See The Florida Star*, 491 U.S. at 536-537.

dressing it in passing during its analysis of whether the information published by the press was of general public interest.[85]

The Supreme Court trivialized the importance of rape victims' rights to maintain their privacy. Perhaps the Court would be more apt to accept the weight of the victim's rights if they were to also consider the effects that the dissemination had on the privacy of the victim's family as well.[86]

The Court's decision to not honor a rape victim's rights to keep personal facts private, does not correspond with the Court's *Griswold* line of decisions.[87] The privacy interests of a rape victim and the effects dissemination of such information has on the victim's family[88] should also be considered significantly similar to a married couple's fundamental right to privacy in the bedroom[89] and a person's fundamental right to marry.[90] While the difference in law and facts between the right of privacy with respect to governmental intrusions and the right to privacy from the dissemination of private facts are great, the reliance placed on the "fundamental" interests of the family must be extended to the right to recover in a court proceeding for the dissemination of private facts which are not matters of significant public importance.

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[85] *See id. But see* Y.G. v. The Jewish Hospital of St. Louis, 795 S.W.2d 488, 500 (Mo. Ct. App. 1990) (reversing a summary judgment decree the court held that the in vitro fertilization event attended by the plaintiffs was a newsworthy event, however, the dissemination of information that the plaintiffs paticipated in the program was to be distinguished as a private matter not worthy of dissemination). Winstead v. Sweeney, 517 N.W.2d 874,878 (Mich. Ct. App. 1994) (reversing a summary judgment decree, the court made a distinction between an article topic that is newsworthy and the private facts of an individual revealed in an article).

[86] *See id.* at 547 n.2 (White, J., dissenting) (relying on a "simple standard of decency", Justice White requested that the press refrain from releasing not only the name but the address and telephone number of the victim. The footnote following this statement revealed that due to the dissemination of BJF's name, telephone number, and address, B.J.F.'s mother received at B.J.F.'s home a call threatening to rape B.J.F. again).

[87] *See supra* Part I.B.

[88] The effects of The Florida Star's dissemination of B.J.F.'s private facts marked not only the beginning of her ordeal but likely the ordeal that would be shared by the rest of her family:

> For B.J.F. . . . the violation she suffered at a rapist's knifepoint [sic] marked only the beginning of her ordeal. A week later, while her assailant was still at large, an account of the assault—identifying by name B.J.F. as the victim—was published by The Florida Star. As a result, B.J.F. received harassing phone calls, required mental health counseling, was forced to move from her home, and was even threatened with being raped again.

The Florida Star, 491 U.S. at 542-43 (White, J., dissenting). *See also* Paul Marcus & Tara L. Mcmahon, *Limiting Disclosure of Rape Victim's Identities*, 64 S. CAL. L. REV. 1019, 1031-32 (1991) (stating that the victim of a sexual assault has a great interest in keeping her identity private during the healing process).

[89] *See supra* note 25 and accompanying text.

[90] *See supra* notes 24, 26 and accompanying text.

II. WHAT IS NEWSWORTHY?

A. The Media's Ability to Decide What Is Newsworthy

The media in the United States enjoys a great deal of freedom to disseminate information due to the protections provided it by the First Amendment.[91] Often, this freedom of dissemination is at the expense of an individual's seemingly private domain. Individuals may have an avenue of redress when their privacy right are invaded,[92] however, courts have rarely allowed a person's right to privacy to overcome the media's ironclad rights under the First Amendment.[93] When the individual is a public figure or celebrity, the chances of recovery become almost nonexistent.[94]

For many years, the Courts have given deference to the media's notion of what is and is not information of public significance.[95] The reluctance of the judiciary to exact a newsworthy standard on the press is precipitated by its resistance to define news[96] and "the fear that 'the press will become a self-censor in order to avoid imposition of liability and thereby be chilled in the exercise of its first amendment rights.'"[97] The deference given to the media must be reexamined. Presently the media does not have to take into account the possibility that their dissemination of injurious, salacious, or sensational private facts may cause grievous harm to the privacy rights of an individual and the individual's family.[98]

Arguably, the purpose of granting the press a right to free speech is to provide the populous with a medium by which it may increase its liberty through self-governance.[99] The dissemination of information relating to political issues allows the public to keep

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[91] *See* U.S. CONST. amend. I.

[92] See RESTATEMENT (SECOND) OF TORTS § 652D (1977); see also William L. Prosser, The Law of Torts § 117, at 809 (4th ed. 1971).

[93] *See* Zimmerman, *supra* note 43, at 293 n.5 (finding only 18 state cases "in which a plaintiff was either awarded damages or found to have stated a cause of action sufficient to withstand a motion for summary judgment or a motion to dismiss").

[94] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (increasing the standard for the defamation of public officials to "actual malice"); *see also* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (including public figure in the "actual malice" category).

[95] *See* Zimmerman, *supra* note 43, at 355.

[96] *See* Scott, *supra* note 15, at 700 (citing Linda M. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 195 (1979)).

[97] *Id.* (quoting Kelly v. Post Publishing Co., 98 N.E. 2d 286).

[98] *Cf.* Richard Turner, *Swept Away by the Swarm*, NEWSWEEK, Feb. 9, 1998, at 48, 49 ("The 'respectable' press has little but libel laws and competitive pride to keep it honest." Despite these self restraints, the author notes that standards have slipped as news sources continue to multiply).

[99] *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.

possible abuses by government officials in check, by promoting majority rule, allowing citizens the ability to participate in the decision-making process, providing citizens access to the information required to make valued judgments, and by providing the minority with an avenue of dissent.[100]

Author Frederick Schauer suggests that the theory of self-governance taken to its ultimate end proposes that the First Amendment is for the protection of political speech and speech of other kinds are not to be granted as powerful a protection.[101] Whether one agrees with this notion,[102] the theory that the press' role is to promote self-governance is a widely accepted principle which effects decisions made by the Supreme Court.[103]

Applying the idea that the First Amendment is primarily for the protection of politically charged speech to the newsworthy test, gives the privacy rights of individuals a strong boost. Should a court distinguish between speech that promotes a political end and speech that provides nothing more than gossip?[104] Making this distinction would enable a court to fashion a workable distinction between what are matters of public significance and what are not.

The Supreme Court in *Dun & Bradstreet v. Greenmoss Builders*[105] held that a private citizen in a defamation action need not show actual malice when the statements made were not of legitimate public concern.[106] Furthermore, the Court declared that the protection afforded by the First Amendment to speech that was not of a legitimate public interest, was not as powerful as that granted to information of legitimate public interest.[107] Recognition of this distinction by the Court in a defamation action should be expanded to actions for invasion of privacy caused by the publication

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[100] *See* Scott, *supra* note 15, at 714, (citing ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 3-89 (1960); Vincent Blasi, *The Checking Value of the First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; RODNEY A. SMOLLA, AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT §13.01[3] (1994); Martin H. Redish, *The Value of Free Speech*, 130 PA. L. REV. 591, 601-04 (1982)).

[101] *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY, 38-9 (1982).

[102] *See* Scott, *supra* note 15, at 714.

[103] *See id.* (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985); Press-Enter. Co. v. Superior Court, 464 U.S. 502, 518 (1984) (Stevens J., concurring); Buckley v. Valeo, 424, U.S. 1, 14 (1976); Red Lion Broad. Co. v. Fed. Communications Comm'n, 395 U.S. 367, 390 (1969); Mills v. Alabama, 384 U.S. 214, 218 (1966); New York Time Co. v. Sullivan, 376 U.S. 254 (1964); Roth v. United States, 354 U.S. 476, 484 (1957); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis J., concurring)).

[104] *See* Warren and Brandeis, *supra* note 1, at 196 (discussing gossip as an evil when widely disseminated and as an intrusion upon the "domestic circle"). *But see* Zimerman, *supra* note 43 at 326-337 (discussing the positive value of gossip as a way of establishing community ties and a way of changing community values).

[105] 472 U.S. 749 (1985).

[106] *See id.*

[107] *See id.* at 758-59 (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978)).

of private facts, even if the injured party is a public-figure or celebrity.

The Supreme Court's decision in *The Florida Star* shows that the limited restrictions placed on the First Amendment in the context of a defamation case have no bearing on the privacy interests of a rape victim in keeping her name from being published.[108] The result of the dissemination of B.J.F.'s name, telephone number, and address was the receipt of threatening phone calls, which threatened to rape her again and caused her harm substantial enough to seek psychotherapy and relocate with her two children.[109] This provides an excellent example of how publication of private facts can effect the fabric of a family already traumatized by an event they would like to forget.

Proponents of granting the media the strongest possible interpretation of the First Amendment argue that by allowing the courts to decide what information is newsworthy will lead to self-censorship.[110] Self-censorship by the media will, in turn, have a chilling effect on their ability to provide information to the public that encourages public discourse, not only on political issues, but the equally important discourse the public has on the changes needed in society as well.[111]

However, the interests of a person's right to privacy and ability to shield their family, friends, or acquaintances from the dissemination information they find most private, should not be sacrificed to allow the general public to talk about their private facts to resolve social issues.[112] The weight given to the press' free speech may often stifle a person with useful discourse to go to the forefront with their ideas and leadership.[113] The fear of having the press scrutinize his family life was a major factor that prevented General Collin Powell from deciding to run for the presidency, "'Powell decided his family was more important to him than the presidency. Their privacy could not be sacrificed to the rigors of the race.'"[114] Similarly Princess Diana had expressed her desire to retire from public-life for the sake of her children and the effect

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[108] *See* The Florida Star v. B.J.F., 491 U.S. 524 (1989).

[109] *See id.* at 542-43.

[110] *See id.* at 535-36 (discussing the Court's holding in Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975)).

[111] *See supra* notes 91-92 and accompanying text.

[112] Courts have on occasion recognized the importance of a persons privacy in specific contexts such as sexual matters or matters of procreation. *See* Y.G. v. The Jewish Hospital of St. Louis, 795 S.W.2d 488, 500 (Mo. Ct. App. 1990).

[113] *See* Scott, *supra* note 15, at 712-713 (citing Lee Bollinger, Images of a Free Press 36 (1991)).

[114] *Id.* at 713 (citing *Family on Country*, The New Republic, Nov. 27, 1995 at 7)).

the press' unrelenting scrutiny was having. "'My sons are always urging me to live abroad and to be less in the public eye.'"[115]

B. There Still May Be Hope

The Supreme Court has addressed the truthful dissemination of private facts in cases that dealt with either court orders or statutes which prevented the dissemination of an individual's private facts,[116] however, the Court has not addressed the issue of a private fact tort. State courts have had occasion to address tort actions brought pursuant to the invasion of privacy caused by the dissemination of private facts and provide some hope that this cause of action is not moot.

In *Y.G. v. Jewish Hospital of St. Louis*,[117] a St. Louis husband and wife, who had participated in an in vitro fertilization program at a hospital, attended a reception for the successful program.[118] The husband and wife denied to grant any express permission to be filmed by a news crew reporting on the success of the program.[119] Notwithstanding their refusal to be filmed, the plaintiffs were seen by friends and acquaintances after the report aired, which caused the plaintiffs to receive telephone calls, church admonishment, and ridicule at work.[120] The trial court dismissed the case for failure to state a claim.[121]

The Missouri Court of Appeals granted that in vitro fertilization was a matter of public interest, however, the court refused to ignore the plaintiff's right to privacy, as her identity was not necessarily a matter of pubic interest.[122] Remanding to the trial court for further proceedings, the court held the complaint stated a sufficient claim for relief and that "the issues of newsworthiness, and whether the television report relating to in vitro fertilization in general, and showing the appellants in particular offends the common decency of a reasonable person are questions to be ultimately determined by the jury."[123]

The decision in *Jewish Hospital* is evidence that a court does not have to rely completely on the media's definition of newswor-

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115 *Entertainment Briefs*, CHICAGO SUN-TIMES, July 15, 1997 at 23, *available in* WL 6359873.
116 *See* discussion *supra* Part I.C.
117 795 S.W.2d 488 (Mo. Ct. App. 1990).
118 *See id.* at 492.
119 *See id.*
120 *See id.* at 493.
121 *See id.*
122 *See id.* at 500.
123 *Id.* at 503.

thiness.[124] Relying on the jury to determine whether information disseminated to the public is newsworthy provides a plaintiff with a greater possibility to have her case decided through adjudication, not deference to the press.

The harm that will likely be caused to the family in this situation is difficult to measure. However the court acknowledged the plaintiff's were caused to suffer for their participation in a program which involved the inherently private issue of procreation, and by the fact the couple were forced to resort to in vitro fertilization, the wife's infertility.[125] Analogous to the situation faced by B.J.F.[126], Y.G. will now be forced to cope with the inviolably private issue of infertility in public. There can be no doubt that this will cause greater strain on a family already having to manage these issues in private.

The Court of Appeals in Michigan, similar to the decision in *Jewish Hospital*, reversed a grant of summary judgment and remanded the case of *Winstead v. Sweeney*[127] to decide the issue of whether the publication of plaintiff's facts were a matter of legitimate public interest.[128] Reporting on unique love relationships, the newspaper article revealed many personal and embarrassing facts about the plaintiff's private life.[129]

Acceding that the topic of the story was newsworthy, the court held that the trial court erred by not addressing whether the information revealed about the plaintiff was itself newsworthy.[130] The court found that despite a strong First Amendment defense for the publication of private facts, "it is of paramount importance to determine whether the information published is of legitimate public concern."[131]

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[124] *See id.*

[125] *See id.* at 493 (the plaintiff's complaint stated that defendants acts would bring a reasonable person humiliation).

[126] *See supra* note 83 and accompanying text.

[127] 517 N.W.2d 874 (Mich. Ct. App. 1994).

[128] *See id.* at 878.

[129] To illustrate that a reasonable person would find these published facts embarrassing, the court quoted from the relevant portions of the newspaper article:

> "I wanted children, but Denise couldn't have kids because she had several abortions before we got married. Then Denise got this bright idea that Linda could be our surrogate mother. Linda said she was willing to have a baby for us, but she couldn't give it up afterwards. She said the three of us could live together. It seemed possible—I mean we were already in the same house when Linda was still married, we used to swap partners once in a while. So we tried it for several months.

Id. at 878.

[130] *See id.*

[131] *Id.* at 876 (citing Time Inc. v. Hill 385 U.S. 374 (1967); Gilbert v. Medical Economics Co., 665 F.2d 305 (CA 10 1981); Fry v. Ionia Sentinel-Standard, 300 N.W.2d 687 (1980); PROSSER & KEETON, TORTS § 117 (5th ed. 1984)).

Both *Jewish Hospital* and *Winstead* give evidence that *The Florida Star* does not "obliterate one of the most noteworthy legal inventions of the 20th century: the tort of publication of private facts."[132] Yet, the influence of *The Florida Star* still pervades the judiciary and has led to a near destruction of the tort of publication of private facts.[133]

III. Reevaluation of the Press' Ability to Consider What Is Newsworthy Without Any Supervision By the Courts, in Light of Recent Events

A. *Taking the High Road to What Are Matters of Legitimate Public Interest*

Warren and Brandeis attempted to provide a definition which courts could apply to check the press' publication of private facts.[134] Admitting that such a definition was difficult in application,[135] Warren and Brandeis attempted to limit only the publication of an individual's private facts having no connection to the persons capacity as a public figure.[136] This definition was not to be "exhaustive," but was intended to act as a guide for "individual judgment and opinion."[137]

Notwithstanding Warren and Brandeis' attempt to create viable definitions of what are "legitimate matters of public investigation," the Supreme Court has been reluctant to demarcate between speech to be protected by the First Amendment and speech to be repressed.[138] Justice Powell in *Gertz v. Robert Welch, Inc.*[139] admonished any attempt to distinguish between protected and unprotected speech in the context of newsworthiness as "ad hoc" and

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[132] The Florida Star v. B.J.F., 491 U.S. 524, 550 (White, J., dissenting).

[133] *See* Haynes v. Alfred A. Knopf, 8 F.3d 1222 (7th Cir. 1993) (granting summary judgment, court held that author's revelation of a plaintiffs alcoholism, neglect of wife and children, and adultery were not intimate details of the husbands life); Morgan v.Celender, 780 F.Supp. 307 (W.D.Pa. 1992) (holding that the publication of the family's picture with their names in connection with a story concerning the father's sexual abuse of the daughter was newsworthy and could not be considered offensive to the reasonable person).

[134] *See supra* text accompanying note 14.

[135] *See id.*

[136] *See* Warren and Brandeis, *supra* note 1, at 216. The Authors further state, "Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation." *Id.* (citation omitted).

[137] *Id.*

[138] *See* Zimmerman, *supra* note 43, at 351-53 (discussing a line of libel cases which have likely set aside Warren and Brandeis' notions of legitimate public concern) (citing New York Times v. Sullivan, 376 U.S. 254 (1964); Rosenbloom v. Metromedia, Inc., 312 U.S. 29 (1971); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)).

[139] 418 U.S. 323 (1974)

unwise.[140] The Court's decisions in *The Florida Star* line of cases provides further proof that the Court prefers giving the media complete deference to decide issues of newsworthiness.[141]

Commentators approve of the judiciaries' reliance on the press to decide what to publish. Professor Zimmerman bases her support of this reliance on a notion that the press is in the best position to provide its readers with what they need to "cope with the society in which they live."[142] Furthermore, Zimmerman claims that arguments based on a theory that the press' decisions of what to publish are predicated on a race to the bottom theory, hold no merit.[143] This claim may have been true at one time, however, recent episodes showing the press' lack of value judgment, leads to a different conclusion.[144]

B. Competency of the Press

Albeit the generally accepted notion of deferring judgment of what information is newsworthy to the press, the recent death of Princess Diana has created a great number of questions for and within the media.[145] After the tragic death of Princess Diana a public debate over the role of newspapers has led many British politicians to demand for a law that will protect people's privacy and the editors have been working together to create a new code of journalistic practice.[146] The recent scandal in the United States involving a sexual relationship between President Clinton and a White House intern, Monica Lewinsky, has also created a backlash to the media's handling of the situation, both within the press and by the public.[147]

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[140] *See id.* at 346 (opinion of Powell, J.); *see also* Zimmerman, *supra* note 43, at 351-53.

[141] *See* The Florida Star v. B.J.F., 491 U.S. 524, 538 (1989) ("'reliance must rest upon the judgment of those who decide what to publish or broadcast.'") (quoting Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975)).

[142] Zimmerman *supra* note 43, at 353-54 (citing Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978)).

[143] *See id.* at 354.

[144] *See* Janny Scott, *A Media Race Enters Waters Still Uncharted: In the Lewinsky Story Fears of a Siren Song*, N.Y. TIMES, Feb. 1, 1998, §1, at 19 ("There was a time when a handful of newspapers and networks acted as gatekeepers for the news. But that monopoly is long gone. Now everyone seems to compete with everyone.").

[145] *See generally* Paul Greenberg, *Will the Wisdom of Repugnance Prevail?*, TULSA WORLD, Sept. 10, 1997, at 14, *available in* 1997 WL 3649968; Roy Greenslade, *British Press Dips Its Toes in Ethical Waters—for Now Media: Are the Tabloids Really Sincere in Mending Their Ways or Just Ducking the Public Salvos?*, L.A. TIMES, Sept. 29, 1997, at B5, *available in* 1997 WL 13984667.

[146] *See* Greenslade, *supra* note 145, at B5.

[147] *See* Turner, *supra* note 93, at 48. *See also* Mark Jurkowitz, *Public Devours the Story but Sours on the Media's Zeal*, THE BOSTON GLOBE, Jan. 27, 1998, at A1, *available in* 1997 WL 9114320 (citing a CNN/Time poll which "[indicated that 60 percent of the respondents felt journalists were going too far in probing the president's sex life.").

What has prompted the media to begin looking at their standards and the methods by which they report current events? Journalist claim the speed of the information age has led to an "information free-for-all."[148] The speed in which news stories are presented to the public causes the media to compete and pander to a public trained to expect stories of crime and sex.[149] As a result of the mainstream media's increasing willingness to bend their own standards in order to compete with members of the tabloid media,[150] vitally important information, like politics, now "focuses as much on the distinguishing characteristics of the president's [sic] genitals as it does on NAFTA."[151]

The competitive nature of the media has created an alarming situation, which was prophesied by Warren and Brandeis.[152] Expressing their concern for not only those injured by the dissemination of private facts by the media, the authors state:

> In this [the media], as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated is potent for evil. . . . It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds out the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance.[153]

The mores of society may have changed greatly since 1890, however, this statement bears great relevance to the situation which the media presently faces.

The courts should follow the desires of both the public and segments of the press[154] and establish a "newsworthy test" that will allow for a more fair balance between the press' First Amendment rights and an individual's right to protect their private facts. Allowing the press to maintain course is unwise as they are controlled by the interests of commerce. Therefore, the press is incapable of assigning value to the privacy interests of both an individual's pri-

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148 *See* Janny Scott, *supra* note 137, at 19.
149 *See id.*
150 *See id.*
151 Mark Jurkowitz, *A Star-Struck Press: 'Respectable' Press Not Just Tabloids, Obsessed With Celebrities*, DALLAS MORNING NEWS, Oct. 12, 1997, at 1J, *available in* WL 11529099.
152 *See* Warren and Brandeis, *supra* note 1.
153 *Id.* at 196.
154 *See supra* notes 138-44 and accompanying text.

vate facts and their family interests. Furthermore, the fundamental rights of the family must be taken into consideration when deciding whether the interest in publishing truthful private facts is greater than the harm which could be caused to an individual or family.

The courts must take notice of the dangers facing the families of individuals who have found their private acts under siege by the media. The effect of the publication of private facts on Princess Diana's children, who have grown up accustomed to the invasion of their mother's privacy, may seem extraordinary.[155] However, the affects on B.J.F.'s mother, who received a phone call at her daughter's residence threatening to rape B.J.F. again, were likely as extraordinary as the reaction by a prince to his mother's invasion of privacy.[156]

CONCLUSION

The present course taken by the invasion of privacy tort is dangerously close to destruction. Future courts must take the reins away from the press and steer the invasion of privacy action down a more equitable path. Placing greater weight on the fundamental interests of family, harmed by the media's inability to recognize their interests, will allow the courts to achieve greater protection for both an individual and a family. Furthermore a reevaluation of the newsworthy doctrine will arrest the present destructive path the press is barreling down.

T. Michael Wickersham

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[155] *See Entertainment Briefs, supra* note 111, at 23 ("William gets very distressed and can get freaked out by all the attention.").

[156] *See* The Florida Star v. B.J.F., 491 U.S. 524, 547 n.2 (1989).