CONFIDENTIALITY: A MEASURED RESPONSE TO THE FAILURE OF PRIVACY

G. MICHAEL HARVEY†

INTRODUCTION

In the course of a lifetime, an individual necessarily shares with others information that she would like to keep private. To name only a few such situations, an individual may discuss her sexual orientation or proclivities with a potential lover, seek advice from a friend concerning an abortion, or request a loan from a parent for psychotherapy. Similarly, an individual may engage in activities which she would like to keep private, but that require the presence of another person, such as consenting to a doctor disconnecting her irreversibly brain-damaged parent or child from life-support machines, or having an extramarital affair. In addition, sometimes individuals may find it necessary to reveal personal information to institutions. This information is thereafter memorialized in files or databases ranging from police reports indicating that the individual has been raped, to medical records reflecting her cosmetic surgery, to lists showing that she was a member of an AIDS patient therapy group.

The importance of sharing such information with others cannot be doubted. Sometimes the confider of the information has no choice in the matter. A rape victim, for example, has to give her name to the police. Similarly, it is difficult to keep your identity secret from a lover. In many other situations where the confider can choose not to divulge the information, it is important that she does share it. Discussing our fears, problems, and ideas with others is crucial for informed decision-making and self-discovery.

When an individual has disclosed such personal information to persons or institutions, she relies upon notions of trust and civility in social relations to ensure that it is not publicized. Unfortunately,

† B.A. 1989, Duke University; J.D. Candidate 1993, University of Pennsylvania. I would like to thank Professor Seth Kreimer for his inspiration and helpful advice on this Comment.

This Comment is dedicated to Katy Forsyth and my family for their much-needed support during law school. But most of all I dedicate this Comment, the most significant thing I have ever written, to my father, Gordon W. Harvey—the man who sat down with me one day when I was in the fourth grade and taught me how to write.

reliance on the goodwill of intimates and strangers may not be sufficient; confidants, whether they be friends or employees of institutions who have access to personal information, may give or sell the personal information to publications¹ or prove so negligent in their protection of the information that the media has easy access to it.²

In general, the more unusual or intimate the information, or the more prominent its subject, the more likely it is that the media will desire to publish it.³ For example, the private lives of political figures have increasingly been the targets of media scrutiny.⁴ The

¹ See Steven I. Katz, Comment, *Unauthorized Biographies and Other "Books of Revelations": A Celebrity's Legal Recourse to A Truthful Public Disclosure*, 36 UCLA L. REV. 815, 819 (1989) (asserting in the narrower context of public figures that reasons for revealing embarrassing confidences "range from the obvious commercial benefits of publishing the secrets of a celebrity's life, to a desire to offer a 'valentine' to a former employer, to an emotional need to 'tell the whole world what a bastard' the subject of the disclosure is") (footnotes omitted).

² See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989) (involving a rape victim whose identity was released to the press through the "inadvertent . . . inclusion by the [Police] Department of her full name in an incident report made available in a pressroom open to the public"); Karen Timmons, *Study Finds Credit Report Errors*, L.A. TIMES, Apr. 30, 1991, Valley Edition, at 9F (reporting on Consumers' Union study that found that 27% of the 400 million credit reports now on file for nearly 90% of Americans "indicated that third parties had gotten access to their reports without their permission"). One researcher of medical privacy claims that his

rule of thumb is that anything you tell anybody in a hospital is available to anybody who is interested enough to go and get it. . . . Previously your privacy was protected by the fact that your records . . . were unreadable, they were disorganized and they were hidden away somewhere in the basement. . . . Now it's a piece of cake. . . . The patients become a data base.

Karen Timmons, *When it Comes to Medical Privacy, Your File Could be an Open Book*, L.A. TIMES, Dec. 2, 1990, at A35, A38 (quoting Vincent Brannigan). The Washington Post detailed an FBI investigation of a national network of "information brokers . . . [who] were bribing . . . government employees to run computer checks on individuals for as little as \$50 a pop. Computer checks were being run 'on thousands of people.'" Michael Isikoff, *Theft of U.S. Data Seen as Growing Threat to Privacy*, WASH. POST, Dec. 28, 1991, at A1, A4. The article concluded that "'insider' information trading may be far more widespread than previously suspected. For the past several years, while the news media have focused on the threat posed by outside computer hackers, law enforcement officials have been making a growing number of cases against computer 'insiders' who sell data to ['outsiders']." *Id.*

³ See Katz, *supra* note 1, at 819 & n.19 (asserting that "intimate disclosures sell" and substantiating the claim that "'tell-all' unauthorized biographies have traditionally fared very well financially").

⁴ See David Lamb, *Into the Realm of Tabloids*, L.A. TIMES, Feb. 13, 1992, at A1, A17 ("What has happened . . . is that ratings and circulation—read that money—power the engine [of the media] and that politicians have become celebrities, making Hollywood and Washington, D.C., much closer in spirit than most people on Capitol Hill feel

alleged affair between Gennifer Flowers and Democratic presidential candidate Bill Clinton⁵ is just the latest and most dramatic illustration of a phenomenon that has been termed the "smoking bimbo,"⁶ that is, the media exposure of a politician's extramarital lovers.⁷ Non-political celebrities are also exposed to intensive

comfortable admitting."). Another commentator states:

A case can be made that with respect to presidential candidates or Presidents, the broader concern we have for "character" makes patterns of personal behavior relevant.

....

But far more often than not these days, the link that is made between private behavior and public performance is a tenuous one, used simply as an excuse to report rumors and salacious details, or no link is made at all, and we are left with what amounts to commercially driven invasions of privacy.

Norman J. Ornstein, *Sexpress*, ATLANTIC, Oct. 1991, at 24, 26.

⁵ Gennifer Flowers divulged in *Star* (a supermarket tabloid with a circulation of 3.5 million), that she had had a twelve-year extramarital affair with Bill Clinton, who was at that time the front-runner in the New Hampshire Democratic presidential primary. See Marion Collins, *My 12-year Affair with Bill Clinton*, *STAR*, Feb. 4, 1992, at 24; see also Bill Turque et al., *Northern Exposure*, *NEWSWEEK*, Feb. 17, 1992 at 20, 29 (discussing the compromising of Bill Clinton's electibility in light of tabloid allegations of his infidelity). It was believed that Flowers received somewhere between \$130,000 and \$175,000 for her story. See William A. Henry III, *Handling the Clinton Affair*, *TIME*, Feb. 10, 1992, at 28 (stating that Flowers' fee was "amply recouped [by *Star*] via an estimated \$800,000 that her well-hyped recollections earned at newsstands"). Following the success of *Star's* exclusive, "the cash-for-trash patrol went wild, with some tabloid reporters offering up to a half a million dollars to anyone with a story to tell." Eleanor Clift et al., *Character Questions*, *NEWSWEEK*, Feb. 10, 1992, at 26, 27.

The Clinton campaign was also plagued by a leak to ABC News of a 1969 letter in which then-Oxford student Clinton told a University of Arkansas ROTC Colonel that the Vietnam War was "illegitimate" and thanked the Colonel for "saving me from the draft." See *Clinton: Questions over Source of Leaked '69 Letter*, *THE HOTLINE*, Feb. 13, 1992, White House '92 section, available in LEXIS, Nexis Library, Hotline file. Clinton responded:

[ABC News anchorperson Ted] Koppel confirmed to me that it is his understanding that ABC received a letter from two different sources, both of whom got it from the Pentagon. . . . This kind of activity . . . leaking papers—is exactly what was wrong with this country twenty years ago. It represents a pattern of behavior by people desperate to stay in power, and willing to impugn the motives, the patriotism, and the lives of anyone who stands in their way. We've been down the road of dirty tricks before. . . . [President] Bush and the (GOP) will do anything it takes to win. That's what they did in 1988, and they'll do it again in 1992.

Id. Clinton finished second in the New Hampshire primary, eight percentage points behind the leader.

⁶ See Helen Fielding & Geordie Greig, *The Smoking Bimbo*, *SUNDAY TIMES*, Feb. 2, 1992, § 4, at 1.

⁷ Other recent examples of this phenomenon include the alleged affairs between

media scrutiny. Whether it is information concerning sexual orientation, proclivities, or failing health, personal facts about celebrities sells magazines⁸ and drives the editorial judgments of a growing portion of the media.⁹ Tantalizing us with an "insider's" look at the personal preferences and kinky lifestyles of public figures are: "Oprah," "Geraldo," "Donahue," "Hard Copy," "A Current Affair," and "Entertainment Tonight" on television; *People*, *Vanity Fair*, *Star*, and the *Enquirer* on the newsstands; and Kitty Kelley in the bookstores.¹⁰ The privacy of private individuals is also not shielded from the press. Unusual facts about private individuals—whether it be a rare health defect, a twelve-year old mother, or the identity of a rape victim—can also attract the media spotlight.¹¹

Although the age of "infotainment"¹² is obviously fueled by a measure of self-promotion on the part of personalities¹³ and

Virginia Senator Chuck Robb and Tai Collins in 1991, and between Democratic presidential candidate Gary Hart and Donna Rice in 1988. Falling in what could be called the "smoking gigolo" category, would be the affair between Nancy Reagan and Frank Sinatra alleged by Kitty Kelley in her unauthorized biography of the First Lady. See KITTY KELLEY, *NANCY REAGAN: THE UNAUTHORIZED BIOGRAPHY* 311-12 (1991).

⁸ As *People* magazine's managing editor, Landon Jones, put it:

[W]e've tapped into a universal interest—that people are interested in people. . . . It's so basic and fundamental that the appetite for it is enormous. I don't want to put down my sister publication, *Time*, at all. But suffice it to say that I think there are probably more people interested in personalities than in issues.

Lamb, *supra* note 4, at A16 (quoting Landon Jones).

⁹ See *id.* ("Pick up *Vanity Fair*, *Esquire* or a woman's magazine today: The face of a marketable celebrity on the cover is evidence of *People's* success. (*People's* Richard Dreyfuss cover bombed in street sales while Michael Landon was a blockbuster)."); see also Pat H. Broeske & John M. Wilson, *Outing Target Hollywood*, L.A. TIMES, July 22, 1990, Calendar sec., at 6 (reporting that "outing"—revealing the homosexuality of celebrities and public figures—has shifted from the tabloids into the mainstream press).

¹⁰ While details of personalities' sexual proclivities have been available to the public in some form since the 1950's, see Irwin O. Spiegel, *Public Celebrity v. Scandal Magazine—The Celebrity's Right to Privacy*, 30 S. CAL. L. REV. 280, 281-86 (1957), "tabloid journalism" seems to be on the rise. In 1991, *People* magazine passed *Time* as the nation's top advertising revenue producing magazine. See Lamb, *supra* note 4, at A1. *People*, with a circulation of 3.1 million and 28 million readers, is said to be the most profitable magazine in the world. See *id.*

¹¹ See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 527 (1989) (newspaper reveals name of rape victim); *Meetze v. Associated Press*, 95 S.E.2d 606, 609 (S.C. 1956) (newspaper exposes 12-year-old mother).

¹² See Lamb, *supra* note 4, at A16 (attributing the term to ABC's "Nightline" correspondent Jeff Greenfield).

¹³ Although readers may believe third-parties are providing the information, not

exhibitionism on the part of private individuals,¹⁴ it has also had its unwilling victims. The subjects of these often merciless press "feeding frenzies" have suffered embarrassment and humiliation as their private lives are exposed to the public,¹⁵ and the very process of political and social debate has been degraded.¹⁶ The response of the legal system to this problem has largely been one of acquiescence. In the interest of upholding the First Amendment's guarantee of freedom of the press,¹⁷ courts have extended to both public and private figures very limited protection from the media. The subjects of media exposés usually have only the "disclosure of private facts" branch of the "invasion of privacy" tort¹⁸ as a legal

uncommonly

celebrities themselves are sources for stories intended to advance their careers or their projects. . . . "Stars rarely admit it in public," said Enquirer articles editor Dianne Albright, "but in private they'll tell you: 'When I stop appearing in the National Enquirer I know my career is on the skids.' And when they start to slide, they'll pick up the phone and call us with a story idea."

Id. at A17.

¹⁴ See Alex S. Jones, *News Media Torn Two Ways in Debate on Privacy*, N.Y. TIMES, Apr. 30, 1992, at B15 (noting that the current debate on privacy is "taking place in an era of staggering exhibitionism, when individuals compete to reveal the most intimate and embarrassing aspects of their lives before an audience of millions on television shows like 'Oprah' and 'Sally Jessy Raphael.'").

¹⁵ See Jan Gehorsam, *Newspaper Criticized for Triggering Ashe's Revelation*, ATLANTA J. & CONST., Apr. 9, 1992, at A6 (commenting on the "ugly hysteria" that surrounded tennis star Arthur Ashe's "forced" public confession that he had the AIDS virus).

¹⁶ After the Clinton-Flowers disclosures, one disillusioned commentator lamented that

our current presidential selection process has been hijacked and distorted by a press run amok, losing all sense of judgement and perspective. The press—not the candidates, the parties, or the public—has set the agenda for our choice among presidential candidates as one that's focused not on prospects for governance, leadership, or issue direction, but on scandal or allegations of scandal, not just today but a quarter century ago or more.

Norman J. Ornstein, *Press Hijacking: Distorting The Way We Select Presidents*, ROLL CALL, Feb. 20, 1992, available in LEXIS, Nexis, ROLLCL file.

¹⁷ The First Amendment reads, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

¹⁸ In most jurisdictions, the invasion of privacy cause of action is divided into four separate torts: 1) unreasonable intrusion into the plaintiff's seclusion; 2) commercial appropriation of the plaintiff's name or likeness; 3) disclosure placing the plaintiff in a false light; and 4) disclosure of the plaintiff's private life. See RESTATEMENT (SECOND) OF TORTS § 652A (1977). This Comment will only be concerned with the fourth branch of the invasion of privacy cause of action, the "public disclosure of private facts" tort.

In the interest of brevity, the "public disclosure of private facts" tort will be referred to as the "private-facts tort," and plaintiffs who bring private-facts tort claims

remedy for the publication of truthful information.¹⁹ The *Restatement (Second) of Torts* formulates this cause of action as publicity given to private facts that "would be highly offensive to a reasonable person" and that are "not of legitimate concern to the public."²⁰ In practice courts have rarely found the publication of personal information concerning private figures to be "offensive" because they fear chilling freedom of the press.²¹ Public-figure plaintiffs have fared even more poorly in private-facts litigation because most courts believe that they have waived any right to privacy in the process of becoming celebrated personalities. Any public disclosure of facts concerning them is held to be of public concern and therefore nonactionable.²² The lack of a judicial remedy has been a rude awakening for private individuals,²³ and has left public figures despondent.²⁴

This Comment will argue that judicial reluctance to enforce the private-facts tort can be attributed to an inherent flaw in the private-facts tort itself, not in the interests it is trying to protect. By focusing liability on the point of publication²⁵—that is, on the media organizations who publicize the personal information—the tort was doomed from the start. The belief in a free and inquisitive press runs deep in this country. Though there has been a public

will be referred to as "private-facts plaintiffs."

¹⁹ The private-facts cause of action for the publication of truthful, albeit private, information should be distinguished from the defamation tort. Defamatory speech is *false* speech that injures the plaintiff's reputation or lowers the community's estimation of the individual. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 773-74 (5th ed. 1984) [hereinafter PROSSER & KEETON]. This Comment will only be concerned with private-facts torts and the disclosure of truthful information.

²⁰ RESTATEMENT (SECOND) OF TORTS, *supra* note 18, § 652D(a)-(b).

²¹ See *infra* notes 125-137 and accompanying text.

²² See *infra* notes 140-142 and accompanying text.

²³ In one particularly poignant case, Justice White wrote in dissent:

As a result [of a newspaper article identifying the plaintiff by name as a rape victim, the plaintiff] received harassing phone calls, required mental health counseling, was forced to move from her home, and was even threatened with being raped again. Yet today, the Court holds that a jury award of \$75,000 to compensate [her] for the harm she suffered due to the [newspaper's publication of her name] is at odds with the First Amendment.

Florida Star v. B.J.F., 491 U.S. 524, 542-43 (1989) (White, J., dissenting).

²⁴ See Katz, *supra* note 1, at 820 ("[T]he wide latitude generally granted to the media when the focus of the presentation is a public figure, in tandem with the very low recovery rate against the media under other circumstances, have persuaded celebrities to resign themselves to privacy-invading publicity exposing intimate facets of their personal lives.") (footnote omitted).

²⁵ See *infra* notes 108-111 and accompanying text.

outcry with each new media advance into the realm of the personal,²⁶ sanctioning newspapers for publishing truthful information and permitting juries to decide what is and is not newsworthy profoundly disturbs journalists, judges, and citizens alike.²⁷ Unfortunately, the ramifications of such reverence for the First Amendment are no less disconcerting: individuals whose privacy has been invaded by public disclosure of personal information have no viable legal remedy in American jurisprudence.

Lovers of privacy should not concede defeat at this juncture, however. For the law has thus far overlooked the other party who is essential to the public disclosure of personal information but for whom constitutional protection is tenuous in comparison to that of publishers²⁸—that is, the source of the information.²⁹ Sources are key players in the disclosure of personal information: “[t]o meet society’s appetite for celebrity revelations, . . . [a tabloid has] a network of several thousand tipsters worldwide—journalists, hairdressers, cameramen, limo drivers, producers, sometimes even stars. . . . Someone—for either the thrill of the chase or the pleasure of dollars—is always willing to tell.”³⁰ In all the examples discussed

²⁶ See, e.g., Douglas Todd, *Extra! Extra! It's Extramarital!*, THE VANCOUVER SUN, Feb. 15, 1992, at D15 (“The supermarket tabloid that paid to have Flowers claim a torrid 12-year affair with . . . Bill Clinton acted as outrageously unethically as a newspaper can, even for a rag that regularly reports on Elvis sightings and humans mating with inter-galactic aliens.”). A *Time* magazine poll following the Clinton-Flowers ordeal revealed that most Americans think journalists should stay out of political candidates’ personal lives. See Henry, *supra* note 5, at 28. According to 69% of the 1000 adults surveyed, information about private behavior, including extramarital affairs, should be kept from voters out of respect for the candidates’ privacy, even if there is hard proof of the information’s truth; only 25% said that such information should be revealed. See *id.* In addition, 82% thought the press pays too much attention to personal lives in general; only 3% said too little. See *id.* Nearly half blamed media discussion of personal lives for crowding out discussion of political issues. See *id.*

²⁷ See *infra* notes 112-117 and accompanying text.

²⁸ See Mortimer B. Zuckerman, *Money for Mischiefs*, U.S. NEWS & WORLD REP., Feb. 10, 1992, at 82 (concluding that Gennifer Flowers “is not a victim . . . [because she] and her patrons have victimized the press, the public and Bill Clinton”).

²⁹ It is assumed here that the information was disclosed to the media through a source other than the individual herself.

³⁰ Lamb, *supra* note 4, at A17; see also Broeske & Wilson, *supra* note 9, at 6 (stating that a weekly column in *Outweek* magazine would reveal the homosexuality of a celebrity if it was corroborated by “at least two independent sources that had [a sexual] experience with the person”) (quoting Michelangelo Signorile, features editor of *Outweek* magazine); Jones, *supra* note 14, at B19 (stating that editors of *USA Today* would not report that a prominent, retired sports celebrity had AIDS “without on-the-record sources”).

above, there was a disclosure of information between the individual and an intimate prior to publicity. The existence of this as yet ignored link in the chain of public disclosure of personal information opens up the possibility of attaching liability at the source of the information leak under a breach of confidence theory.³¹ In order to preserve the privacy interests left unprotected by the impotent private-facts tort, this Comment advocates interring the private-facts tort and adopting a new approach to overcoming the tension between privacy interests and the First Amendment: a legally enforceable duty of confidentiality that attaches whenever a person or institution intentionally or negligently engages in an unauthorized disclosure of inaccessible, personal information that she/it has explicitly and voluntarily agreed to hold in confidence, and this disclosure results in the publicity of that information.³²

Though England has recognized a similar breach of confidence doctrine³³ as the basis of privacy protection in that country,³⁴ American courts and commentators have rejected such an approach primarily because it would be redundant with the invasion of privacy tort,³⁵ it would present a myriad of practical³⁶ and constitutional

³¹ In an attempt to avoid conflicts between the rights of the press and the rights of individuals victimized by public disclosure of private facts, Congress and some state legislatures have moved to control leaks at their source. *See, e.g.*, 18 U.S.C. § 1905 (1989) (prohibiting knowing disclosure by federal employees of confidential information obtained in the course of their employment). In New York, sex-offense records naming victims must be kept confidential by public officers or employees. *See* N.Y. CIV. RIGHTS LAW § 50-b (Consol. Supp. 1991). This confidentiality statute was amended in 1991 to permit the victim to bring a civil action against public officials who leak the victim's name. *See id.* § 50-c.

³² This formulation of a breach of confidence tort will be referred to in this Comment as the "breach of confidence tort." The information-giver in the confidential relationship will be referred to as the "confider"; the information-receiver will be referred to as the "confidant."

³³ *See* *Coco v. A.N. Clark (Engineers) Ltd.*, 1969 R.P.D. & T.M. 41, 47-48 (Eng.) (delineating the elements of a legally enforceable confidence in England as follows: a confider must establish 1) that confidential information existed, 2) that it was disclosed in circumstances which imposed an obligation on the confidant to respect its confidentiality, and 3) that the confidant breached this obligation).

³⁴ *See* FRANCIS GURRY, *BREACH OF CONFIDENCE* 13 (1984) (stating that the English common law duty of confidentiality provides a "limited right to prevent violations of one's state of privacy").

³⁵ *See* Alan B. Vickery, Comment, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1460-61 (1982) ("The law of confidence should not intrude into the realm of family and personal relationships, even though damaging information is often revealed in the course of such relationships. . . . Privacy law with its 'highly offensive' threshold provides ample protection for personal relations.") (footnotes omitted).

³⁶ *See* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and*

difficulties,³⁷ and it would be under-protective of privacy interests.³⁸ This Comment will demonstrate that an enforceable duty of confidentiality can overcome all of these objections and provide a better balance of privacy and First Amendment interests than the existent private-facts tort.

While a full delineation of the scope and exceptions of the proposed tort must wait until Part III of this Comment, its critical aspects deserve note at this point so as to immediately alleviate the most pressing concerns raised by the breach of confidentiality concept. First, although the proposed tort establishes as a constitutional minimum that an "explicit" and "voluntary" "agreement" of confidentiality must exist between the parties, an oral agreement would be sufficient.³⁹

Second, the proposed tort is not intended to overly constrict the natural human propensity to gossip. Rather, its goal is to provide a remedy if there is a public disclosure of confidential information on a widespread basis. The "publicity" requirement will be the pivot on which the tension between these interests will be accommodated.⁴⁰

Third, the "personal" information requirement of the proposed tort would prevent it from being used by the government or other institutional bodies to strangle "whistleblowers."⁴¹

Brandeis's Privacy Tort, 68 CORNELL L. REV. 291, 337 (1983) ("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.") (footnote omitted); Katz, *supra* note 1, at 816 ("A breach of confidence may take many forms, only some of which are legally actionable. . . . [G]ossip in its simplest form, between individuals, cannot practically speaking be the basis of a cause of action by the person whose activities are the subject of the conversation.").

³⁷ See Vickery, *supra* note 35, at 1458 ("Attaching a legal duty to every confidence received with knowledge of its confidential nature demands too much. . . . It would not be consistent with the notion of a free society for the state to intrude so deeply into individual decisionmaking with respect to one's casual relationships absent a compelling reason . . ."). The proposed tort avoids rendering ordinary gossip actionable by recognizing only those breaches of confidence that lead to "publicity." See *supra* text accompanying note 32; *infra* notes 258-269 and accompanying text.

³⁸ See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 210-11 (1890) (rejecting the "narrower doctrine" of breach of confidence based on violation of a contract because "modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party").

³⁹ Although the proposed tort recognizes both oral and written agreements, a written agreement would improve the confider's evidentiary position in the event of a suit. See *infra* note 205 and accompanying text.

⁴⁰ See *infra* notes 258-269 and accompanying text.

⁴¹ See *infra* notes 241-244 and accompanying text.

Fourth, the tort would provide exemptions to the obligation of confidentiality if the confider's revelations concerned activities dangerous to the public health or safety or amounting to fraud or criminal conduct.⁴²

Fifth, the proposed breach of confidence tort would not be offensive to the confidant's First Amendment rights because she will have explicitly waived her right to disseminate the confidential information to the public through her agreement of confidentiality with the confider, and because the information bound by the obligation of confidentiality will necessarily be limited and clearly defined.⁴³

Sixth, the proposed breach of confidence tort would safeguard freedom of the press by focusing liability on the "sources" or "leakers" of information rather than on the point of publication, thereby permitting members of the media to print with impunity any information that they have lawfully obtained.⁴⁴ Because the scope of information that can be protected by a duty of confidentiality is narrow and well-delineated,⁴⁵ the press would continue to have access to a wide range of information and sources.⁴⁶

Seventh, while this Comment will substantiate the claim that a right to confidentiality is a narrower protection of privacy interests than a general right to privacy,⁴⁷ that narrowness is its strength. Because of its greater precision, the proposed tort avoids the practical and constitutional problems that have made courts reluctant to give any substance to the private-facts tort. It thus provides greater protection to privacy interests simply by virtue of being more likely to be enforced by the courts.

Finally, it should be noted that the proposed tort is a radically different approach to privacy protection than the private-facts tort in that it requires the potential confider to take affirmative steps

⁴² See *infra* notes 283-294 and accompanying text.

⁴³ For an exploration of the interface between the proposed tort and the confidant's First Amendment rights, see *infra* notes 298-348 and accompanying text.

⁴⁴ The proposed breach of confidence tort will thereby shield the press from liability for failure to distinguish "newsworthy" information from that "too offensive" for publication—a Sisyphean determination imposed by the current private-facts tort. The "newsworthiness" requirement's potential for chilling freedom of the press has been a primary reason for the current tort's demise. See *infra* notes 125-131 and accompanying text.

⁴⁵ For a delineation of the scope of the breach of confidence tort, see *infra* notes 204-240 and accompanying text.

⁴⁶ See *infra* notes 378-384 and accompanying text.

⁴⁷ See *infra* notes 223-226 and accompanying text.

(that is, to obtain an agreement of confidentiality from the confidant) in order for the obligation of confidentiality to attach. Therefore this tort would demand that individuals change the way in which they approach their own privacy protection. Instead of relying on members of the press to protect their privacy interests, individuals themselves would bear the burden of delineating what is and is not private.⁴⁸

The rest of this Comment will develop the above arguments. Part I will demonstrate that liability for breach of confidence has a basis in both British and American common law. Part II will chart the death of the private-facts tort and show that the tort's demise is due to the constitutional and definitional problems it presents, not to a deficiency in the privacy interests it was created to protect. Part III will formally introduce the proposed breach of confidence tort, defining its elements, scope, and exceptions. That section will also demonstrate how the tort effectively overcomes the definitional problems that eroded the effectiveness of the private-facts tort. Part IV will show that a breach of confidence cause of action, when properly construed, does not infringe upon freedom of the press or speech. The Comment concludes by suggesting that a breach of confidence cause of action would come as a welcomed measure of relief in a legal system where the First Amendment has rendered the protection provided by the more broad-based private-facts tort unattainable.

I. BREACH OF CONFIDENCE IN ENGLISH AND AMERICAN COMMON LAW

When one person shares information with another, and the confidant agrees not to divulge this information to third parties, an expectation of confidentiality arises. If this confidence is broken, the extent to which resulting harm can be legally redressed differs in English and American common law. In England, the action for breach of confidence is well-developed;⁴⁹ in the United States,

⁴⁸ Therefore, the observation that the proposed tort would have little application to current social interactions because explicit agreements of confidentiality are not usually exchanged before personal information is disclosed, though correct, misses the point. It is the author's belief that, if the proposed tort were adopted, individuals would begin to make such agreements in order to protect personal information they do not wish to have publicized. See *infra* note 215.

⁴⁹ For the elements of the English breach of confidence cause of action, see *supra* note 33.

however, the right to sue for broken confidences has been overshadowed by the private-facts tort. With the decline of the private-facts tort in the latter half of this century, however, the breach of confidence tort has experienced a recent reemergence in American common law. This section will briefly explore the historical precedent of the breach of confidence tort in British and American common law.

English jurisprudence, while never recognizing a general cause of action for invasion of privacy, has developed an extensive body of law delineating actionable breaches of confidence.⁵⁰ English courts first recognized breach of confidence as a cause of action in *Prince Albert v. Strange*,⁵¹ in which the court held that a printer's unauthorized distribution of a surreptitiously made catalogue of royal etchings entrusted to him by Prince Albert was "a breach of trust, confidence, or contract."⁵² Since *Prince Albert*, English courts have expanded the action to protect information as diverse as marital communications,⁵³ commercial and technical secrets,⁵⁴ and government communications;⁵⁵ and to encompass relationships as diverse as banker-customer,⁵⁶ attorney-client,⁵⁷ Cabinet Minister-Cabinet,⁵⁸ accountant-client,⁵⁹ photographer-subject,⁶⁰ and husband-wife.⁶¹ While some British commentators have called for the recognition of a general right to privacy in English common law,⁶² in 1981 the British Law Commission, an advisory body to

⁵⁰ See COMMITTEE ON PRIVACY, REPORT 9-12 (1972) (Eng.) (government committee report acknowledging that British common law does not recognize a general right to privacy and recommending an expansion of the breach of confidence doctrine to cover certain specific invasions of privacy).

⁵¹ 41 Eng. Rep. 1171 (Ch. 1849).

⁵² *Id.* at 1179.

⁵³ See *Duchess of Argyll v. Duke of Argyll*, [1965] 2 W.L.R. 789 (Eng. Ch. 1964).

⁵⁴ See *Saltman Eng'g Co. v. Campbell Eng'g Co.*, 65 R.P.D. & T.M. 203 (Eng. C.A. 1948).

⁵⁵ See *Attorney-General v. Jonathan Cape Ltd.*, 1976 Q.B. 752 (Eng. 1975).

⁵⁶ See *Tournier v. National & Provincial Union Bank of Eng.*, [1924] 1 K.B. 461 (Eng. C.A. 1923).

⁵⁷ See *Taylor v. Blacklow*, 132 Eng. Rep. 401 (C.P. 1836).

⁵⁸ See *Jonathan Cape Ltd.*, 1976 Q.B. at 771.

⁵⁹ See *Weld-Blundell v. Stephens*, [1919] 1 K.B. 520 (Eng. C.A.).

⁶⁰ See *Pollard v. Photographic Co.*, 40 Ch. D. 345 (Eng. 1888).

⁶¹ See *Duchess of Argyll v. Duke of Argyll*, [1965] 2 W.L.R. 789 (Eng. Ch. 1964).

⁶² For example:

For many years, various commentators have advocated that there should be a right of privacy: that people should be able to conduct their lives free from intrusive journalistic surveillance. With the increased availability of mechanical aids to facilitate observation, this argument has become

Parliament, instead recommended that the common law action for breach of confidence be reformulated into a statutory tort providing a single set of principles for all kinds of confidences.⁶³ Breach of confidence continues today as the chosen method of privacy protection in English common law.⁶⁴

The use of the breach of confidence cause of action to protect personal privacy⁶⁵ in American common law has taken a more circuitous route. One of the earliest American breach of confidence cases, decided in 1894, was *Corliss v. E.W. Walker Co.*⁶⁶ In that case, a Massachusetts court concluded that it was a "violation of confidence" for a photographer to make additional copies of a picture of a deceased inventor.⁶⁷ In contrast to England's experience, however, there was no explosive growth of the breach of

stronger. Although the law of confidence can prevent some of the worst excesses, alone it is insufficient. English law has reached a state where it could develop without undue difficulty to recognise an enforceable right of privacy. It is hoped that the law will do this

M.P. Thompson, *Breach of Confidence and the Protection of Privacy in English Law*, 6 J. MEDIA L. & PRAC. 5, 22 (1985) (footnote omitted).

⁶³ See THE LAW COMMISSION, LAW COM. NO. 110, BREACH OF CONFIDENCE ¶ 6.1-5 (1981) [hereinafter LAW COMMISSION REPORT]. The Law Commission's recommendation for a statutory tort has not yet been followed by Parliament. The common law cause of action continues to be enforced by the courts, however.

⁶⁴ See J. FLEMING, THE LAW OF TORTS 572 (7th ed. 1987).

⁶⁵ This Comment is concerned with the use of the breach of confidence tort to protect personal confidences as opposed to business or industry secrets. See *infra* notes 241-244 and accompanying text. It should be noted, however, that breach of confidence is a central element in the protection of unpublished literary works in common law copyright law. See, e.g., *Baker v. Libbie*, 97 N.E. 109, 112 (Mass. 1912) (stating that copyright protection of unpublished letters would exist where "a confidential relation exist[s] between the parties, out of which would arise an implied prohibition against any use of the letters, and a breach of such trust might be restrained in equity"); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 16.06, at 16-48 (1992) ("An idea offered and received in confidence if later disclosed by the idea recipient will give rise to a breach of confidence action.") (footnote omitted). In the protection of trade secrets area, see, e.g., ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 4.01-.03 (1991) (noting that the existence of a confidential relationship is the basis for trade secret protection). There are no cases imposing liability for disclosure of confidential *personal* information under these areas of the law, probably because, as one commentator put it, "trade secrets and literary works are essentially property and confidential personal information is not." Vickery, *supra* note 35, at 1457 n.155.

⁶⁶ 64 F. 280 (C.C.D. Mass. 1894).

⁶⁷ See *id.* at 281. The court held, however, in favor of the defendants—innocent third-party purchasers of the photographs—because they were not parties to the confidential relationship between the photographer and inventor and had no notice of wrongful conduct. See *id.* at 282.

confidence tort in American jurisprudence following its introduction in *Corliss*.

The paucity of breach of confidence cases was probably due to the rise of the private-facts tort following Samuel Warren and Louis Brandeis's seminal 1890 *Harvard Law Review* article, *The Right to Privacy*.⁶⁸ In arguing for an invasion of privacy tort, Warren and Brandeis rejected the breach of confidence approach as providing too limited a protection of privacy interests:

The *narrower doctrine* [of breach of trust or confidence] may have satisfied the demands of society at a time when the abuse to be guarded against could rarely have arisen without violating a contract or a special confidence; but now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a *broader foundation*. . . . [T]he doctrines of contract and trust are inadequate to support the required protection, and the law of tort must be resorted to. The right of property in its widest sense . . . embracing the right to an inviolate personality, affords alone the broad basis upon which the protection which the individual demands can be rested.

Thus, the courts, in searching for some principle upon which the publication of private letters could be enjoined, naturally came upon the ideas of a breach of confidence, and of an implied contract; but it required little consideration to discern that this doctrine could not afford all the protection required, since it would not support the court in granting a remedy against a stranger; and so the theory of property in the contents of letters was adopted.⁶⁹

Most jurisdictions accepted Warren and Brandeis's argument alleging the inherent superiority of the "broader" right to privacy

⁶⁸ Warren & Brandeis, *supra* note 38; see also Vickery, *supra* note 35, at 1455 (speculating that the breach of confidence tort fell out of favor because breaches of a personal nature "were handled by resort to the new right of privacy, the birth and explosive growth of which corresponds with the period of dormancy in breach of confidence"). In their article, Warren and Brandeis concluded that "existing law affords a principle which may be . . . invoked to protect the privacy of the individual from invasion." Warren & Brandeis, *supra* note 38, at 206.

⁶⁹ Warren & Brandeis, *supra* note 38, at 210-11 (footnote omitted) (emphasis added).

approach to privacy protection,⁷⁰ and the breach of confidence cause of action fell into a period of dormancy.⁷¹

In the past three decades, however, with the private-facts tort in decline,⁷² the breach of confidence cause of action has experienced something of a renaissance in American common law.⁷³ In recent years, courts have returned to the breach of confidence approach to enforce duties of confidentiality in relationships as diverse as physician-patient,⁷⁴ psychiatrist-patient,⁷⁵ school-student,⁷⁶ attorney-client,⁷⁷ priest-penitent,⁷⁸ banker-custom-

⁷⁰ See *infra* note 86 and accompanying text. An interesting legal anomaly exists between the English and American approaches to protection of informational privacy. American courts, which are obligated by the First Amendment to ensure the free flow of information, adopted Warren & Brandeis's "broader" (more protective) approach to privacy protection. English courts, which have no corresponding constitutional obligation, adopted the more limited breach of confidence approach. One would expect that the country with constitutional protection of free speech would have pursued the narrower breach of confidence approach more passionately.

⁷¹ In the period between *Corliss* in 1894 and the 1960s, one commentator found only six cases where breach of confidence of a personal nature was a potential factor. See Vickery, *supra* note 35, at 1454 n.146. Those cases are: *Bazemore v. Savannah Hosp.*, 155 S.E. 194 (Ga. 1930) (deciding on privacy grounds a case alleging breach of confidence when hospital attendant took picture of deformed child); *Douglas v. Stokes*, 149 S.W. 849 (Ky. 1912) (involving an implied contract suit by a father against a photographer who made extra copies of a picture of the father's deformed child, and although inconsistent with contract theory, awarding damages for emotional distress); *Simonsen v. Swenson*, 177 N.W. 831 (Neb. 1920) (finding implied action for disclosure of secrets in physician licensing statute but holding for doctor after finding a qualified privilege where necessary to prevent spread of disease); *Munzer v. Blaisdell*, 49 N.Y.S.2d 915 (N.Y. Sup. Ct. 1944) (holding that statute implied cause of action prohibiting mental institution from disclosing patient medical records), *aff'd mem.*, 58 N.Y.S.2d 359 (App. Div. 1945); *Clayman v. Bernstein*, 38 Pa. D. & C. 543 (C.P. Phila. County 1940) (holding that in taking picture of patient's disfigured face doctor breached both implied contract and confidence); *Smith v. Driscoll*, 162 P. 572 (Wash. 1917) (affirming that doctor who breaches a patient's confidence can be held liable, but holding that doctor involved was privileged to disclose such information in court proceeding if material and relevant).

⁷² See *infra* notes 85-187 and accompanying text.

⁷³ See generally Vickery, *supra* note 35, at 1428-34 (analyzing the re-emergence of the breach of confidence tort in professional relationships).

⁷⁴ See, e.g., *Humphers v. First Interstate Bank*, 696 P.2d 527, 534 (Or. 1985) (recognizing a cause of action by a patient against her physician for breach of confidentiality).

⁷⁵ See, e.g., *Doe v. Roe*, 400 N.Y.S.2d 668, 674 (App. Div. 1977) (finding that a physician's duty of confidentiality toward her patient "is particularly and necessarily" strong in a psychiatric relationship).

⁷⁶ See, e.g., *Blair v. Union Free Sch. Dist. No. 6*, 324 N.Y.S.2d 222, 227 (Dist. Ct. 1971) (characterizing a student's relationship with her school as "special or confidential").

⁷⁷ See, e.g., *Beal v. Mars Larsen Ranch Corp.*, 586 P.2d 1378, 1383 (Idaho 1978)

er,⁷⁹ and reporter-source.⁸⁰ The courts that have ventured into the breach of confidence area thus far have limited the scope of the tort to the disclosure of information divulged in relationships traditionally understood to be bound by a duty of confidentiality, that is professional and quasi-professional relationships.⁸¹

(recognizing in dictum that "[t]he relationship of client and attorney is one of trust").

⁷⁹ See, e.g., *Snyder v. Evangelical Orthodox Church*, 264 Cal. Rptr. 640, 647 (Ct. App. 1989) (holding that unless serving a religious purpose, clergy's disclosure of penitents' confidential communications could be actionable without violating the First Amendment).

⁷⁹ See, e.g., *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 290 (Idaho 1961) ("[I]t is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons . . . any information relating to the customer acquired through the keeping of his account.") (quoting 7 AM. JUR. *Banks* § 196 (1937)).

⁸⁰ See, e.g., *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2515 (1991) (holding that the First Amendment does not bar a news source from recovering damages against a newspaper for breaching a promise of confidentiality).

⁸¹ See, e.g., *Vassiliades v. Garfinckel's*, 492 A.2d 580, 591 (D.C. 1985) (stating that the tort arises from a "limited duty that attaches to 'nonpersonal relationships customarily understood to carry the obligation of confidence'" (quoting Vickery, *supra* note 35, at 1460 (emphasis omitted))). The obligations of confidentiality recognized in these cases are founded on the laws of agency and trusts. See RESTATEMENT (SECOND) OF AGENCY § 396 (1958) (stating that an agent "has a duty to the principal not to use or to disclose to third persons . . . in competition with the principal or to his injury . . . confidential matters given to him only for the principal's use"); RESTATEMENT OF RESTITUTION § 200 (1936) ("Where a fiduciary in violation of his duty to the beneficiary acquires property through the use of confidential information, he holds the property so acquired upon a constructive trust for the beneficiary.").

Because of potential problems with extending these areas of the law to personal relationships, see *supra* notes 35-38 and accompanying text, courts have required the existence of a fiduciary relationship before finding that an obligation of confidentiality attaches. States one commentator:

If the law recognized an inherent duty between friends always to act for the benefit of the other, betrayals of any magnitude would be actionable on the basis of there existing a personal relationship. For that reason, courts have generally required that fiduciary obligations exist between the parties before a relationship with legally binding duties will be recognized.

Katz, *supra* note 1, at 821-22 (footnotes omitted). The definition of a "fiduciary relationship" has, therefore, been limited. See RESTATEMENT OF RESTITUTION, *supra*, § 190 cmt. a (giving as examples of commonly recognized fiduciary relationships "the relation of trustee and beneficiary, guardian and ward, agent and principal, attorney and client").

Some courts have, however, been more flexible in defining fiduciary relationships. See, e.g., *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542, 547 (E.D. Mich. 1984) ("A fiduciary relationship arises not only from a formal principal-agent relationship, but also from informal relationships of trust and confidence."); cf. *Fraser v. Evans*, [1969] 1 Q.B. 349, 361 (Eng. C.A.) ("No person is permitted to divulge to the world information which he had received in confidence unless he has just cause

Recently, however, in *Florida Star v. B.J.F.*,⁸² the Supreme Court indicated its potential openness to an expansion of the concept of confidentiality to protect personal privacy in non-professional relationships.⁸³ Following the Court's lead, this Comment proposes a "limited" right to personal privacy (albeit not restricted to professional relationships) based on breach of confidence. As Part II will demonstrate, because the private-facts' "broader" approach to privacy protection overly infringes on the First Amendment, it has never fulfilled the great expectations of its creators.⁸⁴ As Parts III and IV will argue, breach of confidence, condemned by Warren and Brandeis to the backwater of American common law for seventy years, may yet prove to be the proverbial tortoise to their private-facts hare.

II. THE DEATH OF THE PRIVATE-FACTS TORT

Few articles have had as pronounced an effect on the legal community as Warren and Brandeis's *The Right to Privacy*.⁸⁵ In the century since they argued for the existence of common law privacy protection, most jurisdictions have recognized a cause of action in tort for public disclosure of private facts, as well as for a wide range of other invasions of privacy.⁸⁶ Remarkably, the broad acceptance

or excuse for doing so.").

⁸² 491 U.S. 524, 541 (1989).

⁸³ For a discussion of this proposition, see *infra* notes 174-179 and accompanying text. See also *Duchess of Argyll v. Duke of Argyll*, [1965] 2 W.L.R. 789 (Eng. Ch. 1964) (British court enforcing a duty of confidentiality between a husband and wife).

⁸⁴ As one commentator put it:

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 tort merely reflects the inherent difficulty under the first amendment of treating truthful speech as tortious.

Zimmerman, *supra* note 36, at 293 (footnote omitted).

⁸⁵ Warren & Brandeis, *supra* note 38. One commentator described the article as the "most influential law review article of all." Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966).

⁸⁶ See LIBEL DEFENSE RESOURCE CTR., 50-STATE SURVEY 1989: CURRENT DEVELOPMENTS IN MEDIA LIBEL AND INVASION OF PRIVACY LAW, 964-67 (Henry R. Kaufman ed., 1989) [hereinafter PRIVACY SURVEY] (state-by-state survey of important invasion of privacy cases). Forty-three jurisdictions have recognized a general invasion of privacy tort, while three have explicitly rejected it, and four have either no rulings or contradictory rulings on the issue. See *id.* The private-facts tort branch of the privacy tort which is the subject of this Comment, see *supra* note 18, has been specifically recognized in twenty-nine jurisdictions, while six have explicitly rejected it, and fifteen have no, or contradictory rulings on the issue. See PRIVACY SURVEY, *supra*, at 964-67.

of the private-facts tort has produced very few successful actions for plaintiffs; in a review of state case law, one commentator found fewer than eighteen cases in which the plaintiff either won an award or stated a cause of action sufficient to withstand a motion for summary judgment or a motion to dismiss.⁸⁷ The scarcity of successful private-facts tort actions has moved commentators to call it a "phantom tort,"⁸⁸ and "a pretty small mouse"⁸⁹ alive "only in the minds of academics."⁹⁰

This section will investigate the reasons for the impotence of the private-facts tort; a detailed understanding of its inadequacies is necessary in order to appreciate fully the strengths of the proposed breach of confidence approach. Before entering into a discussion of the private-facts case law, however, it will be helpful to briefly delineate the privacy interests that commentators have advanced as being protected by the tort.

A. *The Interests Protected by the Private-Facts Tort*

Neither courts nor commentators have ever reached a consensus either as to what "privacy" is or what interests it protects. These questions alone have spawned an immense amount of commentary⁹¹ that ultimately proves inconclusive.⁹²

⁸⁷ See Zimmerman, *supra* note 36, at 293 n.5; see also Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 457 (1980) (noting the "relative rarity of legal actions" in this area); Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1268 (1976) (referring to "the extraordinary scarcity of cases in which liability has been imposed on the media solely on the ground of an embarrassing disclosure"); Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CAL. L. REV. (forthcoming Oct. 1992) (manuscript at 66 n.92, on file with the author) ("Successful privacy cases have never been legion. And recent experience is, if anything, worse, both as to the frequency of successful claims and as to the analytical difficulties associated with rationalizing a favorable result.").

⁸⁸ Zimmerman, *supra* note 36, at 362.

⁸⁹ Kalven, *supra* note 85, at 337.

⁹⁰ Bezanson, *supra* note 87, at 65.

⁹¹ See, e.g., David L. Bazelon, *Probing Privacy*, 12 GONZ. L. REV. 587, 592 (1977); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1003 (1964); Gavison, *supra* note 87, at 423; Kalven, *supra* note 85, at 329 & n.22; Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 398, 408 (1978); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 396 (1960); Warren & Brandeis, *supra* note 38, at 211; Zimmerman, *supra* note 36, at 323.

⁹² See Raymond Wacks, *The Poverty of "Privacy,"* 96 LAW Q. REV. 73, 75 (1980) (arguing that "[t]he long search for a 'definition' of 'privacy' has produced a continuing debate that is often sterile and, ultimately, futile").

In general, commentators' valuation of the interests promoted by the tort reflect their opinion concerning the significance of the tort itself. Commentators arguing in favor of enforcement of the tort believe that privacy fosters interests of great importance and therefore must be protected. These commentators have asserted that privacy is essential to the preservation of "individuality and human dignity,"⁹³ "an inviolate personality,"⁹⁴ "rules of civility,"⁹⁵ or "liberty, autonomy, selfhood, . . . human relations, and furthering the existence of a free society."⁹⁶ Commentators less enamored of the private-facts tort have argued that privacy protects "largely mythical"⁹⁷ or "inconsequential"⁹⁸ interests, i.e. "reputation,"⁹⁹ "hypersensitivity,"¹⁰⁰ "dislike of publicity,"¹⁰¹ or a desire to defraud society through concealment,¹⁰² and therefore does not warrant legal recognition. It is beyond the scope of this Comment to reach a conclusion on the definition of privacy or on the value of the interests it is supposed to protect. Suffice it to say that the fundamental ambiguity on which the private-facts tort is based has contributed to its poor showing in clashes with the strong, constant, and ascertainable values of the First Amendment.¹⁰³

To say, however, that First Amendment interests outweigh privacy interests when they are placed in direct conflict, is not to say that privacy interests merit no protection. The sheer number of jurisdictions that have recognized the private-facts tort and other privacy-related causes of action¹⁰⁴ offers eloquent testimony to our society's belief that privacy is worth protecting.¹⁰⁵ As the next two sections further demonstrate, the failure of the Warren and Brandeis tort is not a consequence of the inadequacy of privacy

⁹³ Bloustein, *supra* note 91, at 1003. Professor Bazelon makes a similar argument. See Bazelon, *supra* note 91, at 592.

⁹⁴ Warren & Brandeis, *supra* note 38, at 211.

⁹⁵ Post, *supra* note 91, at 959.

⁹⁶ Gavison, *supra* note 87, at 423.

⁹⁷ Zimmerman, *supra* note 36, at 335 n.237 (quoting DON PEMBER, *PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT* 238 (1972)).

⁹⁸ Harvey L. Zuckman, *Invasion of Privacy—Some Communicative Torts Whose Time Has Gone*, 47 WASH. & LEE L. REV. 253, 261 (1990).

⁹⁹ Posner, *supra* note 91, at 408.

¹⁰⁰ Kalven, *supra* note 85, at 329 & n.22.

¹⁰¹ Zimmerman, *supra* note 36, at 323.

¹⁰² See *id.* at 324.

¹⁰³ See *infra* note 117 and accompanying text.

¹⁰⁴ See *supra* note 87 and accompanying text.

¹⁰⁵ The Supreme Court has also advocated the legal protection of privacy interests. See *infra* notes 174-179 and accompanying text.

interests, but rather of the definitional and constitutional infirmities of the tort created to protect them.

B. *The Lower Court Developments*¹⁰⁶

¹⁰⁶ An analysis of the private-facts tort is complicated by the fact that its enforcement is seemingly governed by two separate bodies of law: the lower court decisions and the Supreme Court decisions. Although the Supreme Court's holdings must be adopted by the lower courts where applicable, the Court has handed down only four private-facts decisions, the scope of which have arguably been limited. See *Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989) (limiting its decision to "hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability [in this case]"); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 105-06 (1979) (narrowing the issue to whether the state had the power to punish a newspaper for truthfully publishing the identity of an alleged juvenile delinquent where that information was lawfully obtained); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 310 (1977) (per curiam) (holding only that publication of information disseminated at an open juvenile detention hearing could not be punished); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (limiting its decision to "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection"). Consequently, it is difficult to determine the effect of the Court's holdings on the common law in general. See *Florida Star*, 491 U.S. at 530 n.5 (stating that in comparison to the Court's "long line of decisions" which have "well-mapped [the] area of defamatory falsehoods," the Court's private-facts cases "have not . . . exhaustively considered" the conflicts in that area, leaving it "somewhat uncharted" as a result); RESTATEMENT (SECOND) OF TORTS, *supra* note 18, § 652D Special Note on Relation of § 652D to the First Amendment to the Constitution (acknowledging that the Supreme Court's private-facts cases have been limited in scope and stating that therefore "[p]ending further elucidation by the Supreme Court, this Section has been drafted in accordance with the current state of the common law of privacy and the constitutional restrictions on that law that have been recognized as applying").

Thus, both the paucity of cases and their limited holdings make it difficult to assess the contemporary effectiveness of the private-facts tort by studying Supreme Court decisions alone. However, the decisions do make clear the Court's increasing rejection of the common law balancing of privacy and First Amendment interests in favor of a more absolutist approach catering to the interests of the press-defendant. See *infra* notes 144-173 and accompanying text. This move toward a more absolutist approach is better understood after an examination of the infirmities inherent in the lower court's formulation of the tort. See *infra* notes 107-143 and accompanying text.

Finally, although it is argued in this Comment that the Court's most recent private-facts decision, *Florida Star*, *supra*, effectively eliminates any protection of privacy interests that the lower courts may have provided plaintiffs, see *infra* notes 153-173 and accompanying text, recent changes in the composition of the Court could result in a reversal of that holding and a return to the lower courts' balancing test. See *infra* note 173. In support of its proposed tort, this Comment will therefore attempt to show that neither the lower courts' nor the Supreme Court's formulation of the private-facts tort is an adequate remedy for private-facts plaintiffs.

Most jurisdictions that have recognized the private-facts cause of action have adopted the *Restatement's* formulation of the tort.¹⁰⁷ The *Restatement* requires private-facts plaintiffs to prove four elements: 1) publicity, given to 2) private facts, 3) that would be highly offensive to a reasonable person, and 4) that does not reveal information of legitimate public concern.¹⁰⁸

Even a cursory review of these elements reveals that the publicity prong necessarily targets the press for liability. Indeed, it is rare that a non-media defendant will be able to disclose private information to "so many persons that the matter must be regarded as substantially certain to become one of the public knowledge," as the publicity prong of the *Restatement's* test requires.¹⁰⁹ The rationale for this element of the tort is more practical than principled; as one commentator remarked, the element is really just judges' "tacit[] or express[]" recognition "that they would create an impossible legal tangle if they subjected back-fence and front-parlor gossip to liability."¹¹⁰

Although pragmatic, the publicity requirement assures that the great majority of private-facts cases are necessarily brought against

¹⁰⁷ See, e.g., *Heath v. Playboy Enters.*, 732 F. Supp. 1145, 1148 (S.D. Fla. 1990); *Vassiliades v. Garfinckel's*, 492 A.2d 580, 589 n.2 (D.C. 1985); *Roshto v. Hebert*, 439 So. 2d 428, 430 (La. 1983); *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101 (Md. Ct. Spec. App. 1980); *Y.G. & L.G. v. Jewish Hosp.*, 795 S.W.2d 488 (Mo. Ct. App. 1990); *Montesano v. Donrey Media Group*, 668 P.2d 1081 (Nev. 1983); *Strutner v. Dispatch Printing Co.*, 442 N.E.2d 129 (Ohio Ct. App. 1982). Not all jurisdictions adopt the *Restatement* formulation of the tort, but its application is wide enough to warrant its use as the basis of this analysis. See *Zimmerman*, *supra* note 36, at 299 (asserting that the *Restatement* formulation of the tort is "widely relied upon by the courts").

¹⁰⁸ See RESTATEMENT (SECOND) OF TORTS, *supra* note 18, § 652D.

¹⁰⁹ See *id.* at § 652D cmt. a. For cases in support of this proposition, see, e.g., *Vogel v. W.T. Grant Co.*, 327 A.2d 133, 137-38 (Pa. 1974) (holding that "notification of two or four third parties [concerning plaintiff's debt] is not sufficient to constitute publication"); *Nagy v. Bell Tel. Co.*, 436 A.2d 701, 703 (Pa. Super. Ct. 1981) (holding that telephone company's disclosure of plaintiff's telephone number to her estranged and abusive husband did not constitute publicity). There are, however, some cases in which non-media defendants have violated the publicity prong. See, e.g., *Vassiliades*, 492 A.2d at 586-90 (holding that plastic surgeon's circulation of "before" and "after" photos of plaintiff in department store presentation amounted to publicity); *Lambert v. Dow Chem. Co.*, 215 So. 2d 673, 675 (La. Ct. App. 1968) (holding that employer's inclusion of picture of plaintiff's mangled leg in company safety brochure was publicity); *Harris v. Easton Publishing Co.*, 483 A.2d 1377, 1385-86 (Pa. Super. Ct. 1984) (holding that communication of private information to a group of 17 individuals constituted publicity).

¹¹⁰ *Zimmerman*, *supra* note 36, at 337.

media defendants.¹¹¹ The requirement, therefore, fuels the underlying conflict between the private-facts tort and the First Amendment. As the Supreme Court has noted in assessing the private-facts tort: "[b]ecause *the gravamen* of the claimed injury is *the publication of information*, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent"¹¹² In its defamation decisions, the Supreme Court has demonstrated the importance in such "face-offs" of allowing a measure of "breathing room" for the press.¹¹³ Standards that fail to accurately forewarn the press of liability are unconstitutional in that overestimation of liability and litigation risk may unduly encourage press self-censorship.¹¹⁴ Members of the press "[would] tend to make only statements which 'steer far wider of the lawful zone'" than is necessary, thereby dampening the "vigor and limit[ing] the variety of public debate."¹¹⁵ The publicity element and the constitutional clash it invokes¹¹⁶ have made courts wary of broad

¹¹¹ See Bezanson, *supra* note 87, at 32 ("The privacy tort visits liability on the point of publication, a fact dictated by the legal requirement of 'publicity.' It is therefore no great surprise that the vast bulk of privacy actions concern news.") (footnote omitted). See *infra* notes 123 & 128 for exemplary cases.

¹¹² Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 489 (1975) (emphasis added).

¹¹³ See New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (justifying its actual malice rule in defamation cases lest the press "be deterred from voicing their criticism . . . because of doubt whether it can be proved in court or fear of the expense of having to do so"). Outside the Court, at least one commentator has also stated the view that

[a]ny satisfactory standard of liability must allow the press 'breathing space.' It must not force the press into self-censorship, or in any way force it to refrain from legitimate expression, by reason of uncertainty as to where the boundaries lie, fear of costly litigation, or a desire to avoid possible trouble.

Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 344 (1979).

¹¹⁴ See Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966) ("The threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself . . ."), *cert. denied*, 385 U.S. 1011 (1967).

¹¹⁵ New York Times Co., 376 U.S. at 279.

¹¹⁶ In a similar vein, Professor Zimmerman argues that the publicity requirement places the private-facts tort on questionable constitutional grounds in that it

[i]mmmediately 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 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.

interpretations of the tort that might unconstitutionally infringe upon the press's "breathing room."¹¹⁷

Unfortunately, even though there has been pressure on courts to discern clear lines between allowable and tortious speech, "the elements of the tort . . . have remained so conceptually vague that they offer little guidance to the judges and jurors who must decide private-facts cases."¹¹⁸ Even commentators who are partial to the tort admit the vagueness of its elements.¹¹⁹ The guidelines

Zimmerman, *supra* note 36, at 301.

¹¹⁷ See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (asserting in a private-facts case that a rule which would expose "the press to liability for truthfully publishing information released to the public in official court records" 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"); *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981) (stating that the *Restatement* "properly restricts liability for public disclosure of private facts to the extreme case, thereby providing the breathing space needed by the press to properly exercise effective editorial judgment"). Another court put it as follows:

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 this 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.

Pavesich v. New England Life Ins. Co., 50 S.E. 68, 74 (Ga. 1905). For a discussion of the related newsworthiness defense, see *infra* notes 125-131 and accompanying text.

¹¹⁸ Zimmerman, *supra* note 36, at 301.

¹¹⁹ For example, Professor Peter Edelman, an advocate of the private-facts tort, acknowledges that "line-drawing that would be necessary to . . . determine when a fact about a private person is not of legitimate interest to the public, is not at all simple." Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1233 (1990). Another advocate, Professor Stanley Ingber, admits that there is no "general agreement as to what constitutes an intimate issue." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 843 (1985). Similarly, Professor Robert C. Post concedes that the "common law is deeply confused and ambivalent" about the application of the tort's "legitimate public concern" element, see Post, *supra* note 91, at 1007, and concedes that the tort's "offensiveness" and "private facts" elements do not "depend upon a neutral or objective measure of when disclosures should be subject to legal liability" but on "social norms" that have a "socially determined variability." *Id.* at 986.

Critics of the private-facts tort of course have nothing complementary to say on this point. See, e.g., Kalven, *supra* note 85, at 326; Zimmerman, *supra* note 36, at 343 ("[Even] after all the years devoted to the task [of finding clear and precise demarcations between protected and unprotected speech in the private-facts area], no one has yet developed a set of satisfactory and uniformly applied definitional standards.").

provided in the *Restatement* for the tort's elements are singularly unrevealing: publicity is highly offensive when it is "of a kind highly offensive to the ordinary reasonable man";¹²⁰ legitimate public concern includes "news" that is defined by the "mores of the community"¹²¹ but is limited by "common decency."¹²² The difficulty of divining from these vague and subjective guidelines clear standards of "offensiveness," "news," or "the public interest" has resulted in inconsistent judgments,¹²³ and has left the press in a state of uncertainty:

[I]t is simply too much to ask of a journalist in even the best and most reasoned editorial process that the peculiar circumstances and sensitivities of the subject be assessed, and that these be balanced off against hopelessly ambiguous questions of . . . offensiveness in a community, and legitimacy of public interest.¹²⁴

¹²⁰ RESTATEMENT (SECOND) OF TORTS, *supra* note 18, § 652D cmt. c.

¹²¹ *Id.* at cmt. g.

¹²² *Id.* at cmt. h.

¹²³ *Compare* *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 809-10 (2d Cir.) (examining magazine's "merciless" exposé of intimate details about an individual who was a former mathematical prodigy and holding that there was nothing in the publication which was objectionable to the normal person), *cert. denied*, 311 U.S. 711 (1940) *with* *Melvin v. Reid*, 297 P. 91, 93-94 (Cal. Dist. Ct. App. 1931) (finding publication of the plaintiff's name in a film divulging her "past life" as a prostitute to be an unnecessary and tortious invasion of privacy). *Compare* *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 489 (N.Y. 1952) (holding that "one attending a public event such as a professional football game . . . may be [televised] as part of the general audience, but may not be picked out of a crowd alone, thrust upon the screen and unduly featured for public view") *with* *Cox Communications, Inc. v. Lowe*, 328 S.E.2d 384, 386-87 (Ga. Ct. App. 1985) (finding no liability for photographing a prisoner who is walking across a prison yard). *Compare* *Gill v. Hearst Publishing Co.*, 253 P.2d 441, 444 (Cal. 1953) (holding that husband and wife, by engaging in an affectionate pose in public view, had "waived their right of privacy so far as this particular public pose was assumed") *with* *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975) (holding that wild bodysurfer's bizarre behavior at public parties, including proclivity for putting out cigarettes on his body, was not public behavior), *cert. denied*, 425 U.S. 998 (1976). *Compare* *Rawlins v. Hutchison Publishing Co.*, 543 P.2d 988, 993-96 (Kan. 1975) (holding that lapse of time since criminal activity does not restore an individual's right to privacy concerning that activity) *with* *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 39-41 (Cal. 1971) (holding that lapse of time since criminal activity does restore right of privacy). *Compare* *McSurely v. McClellan*, 753 F.2d 88, 113 (D.C. Cir.), *cert. denied*, 474 U.S. 1005 (1985) (holding that disclosure to a husband of his wife's premarital love letters satisfied the "publicity" requirement) *with* *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101 (Md. Ct. Spec. App.), *cert. denied*, 479 U.S. 984 (1986) (holding that disclosure to wife of husband's extramarital affair did not satisfy the "publicity" requirement).

¹²⁴ *Bezanon*, *supra* note 87, at 67.

In acknowledgment of both the impossibility of drawing clear lines in this area and the very real possibility of chilling free speech if they do not, many courts have interpreted the "public interest" or "newsworthiness" element of the tort broadly,¹²⁵ thereby severely limiting the liability of the press.¹²⁶ The case law in this area suggests that courts avoid line-drawing as to what is and is not "news" and instead allow journalists' editorial decisions to define the scope of what is essentially a defense to liability. "[M]ost judges . . . simply accept the press's judgment about what is and is not newsworthy. . . . [T]he vast majority of cases seem to hold that what is printed is by definition of legitimate public interest."¹²⁷ Cases that have held for the press based on the perceived "newsworthiness" of some bit of information are legion.¹²⁸ "News," said one

¹²⁵ See RESTATEMENT (SECOND) OF TORTS, *supra* note 18, § 652D & cmt. g. Courts alternatively call this defense the "public interest defense," the "newsworthiness defense," or the "legitimate public concern" defense. See *id.*

¹²⁶ See *Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543, 544-45 (N.Y. 1966) ("[E]ver mindful that the written word or picture is involved [in private-facts cases], courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.").

¹²⁷ Zimmerman, *supra* note 36, at 353 (footnotes omitted). In support of this assertion, Zimmerman cites: *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 451-452 (3d Cir.), *cert. denied*, 357 U.S. 921 (1958); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957, 960-61 (D. Minn. 1948); *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 302 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980). Prosser & Keeton have also acknowledged this trend of deference to the press:

To a very great extent the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definition of news, as a glance at any morning newspaper will sufficiently indicate. It includes . . . matters of genuine, if more or less deplorable, popular appeal.

. . . .

. . . [T]he point being that if the press thought there was enough justification for publication of the truth as news then it always would be in the public interest not to subject the press to harassing lawsuits about the appropriateness of a discrete publication.

PROSSER & KEETON, *supra* note 19, § 117, at 860-61, 862. See also *Florida Star v. B.J.F.*, 491 U.S. 524, 553 (1989) (noting that "after a brief period early in this century where Brandeis' view was ascendant . . . the trend in 'modern' jurisprudence has been to eclipse an individual's right to maintain private any truthful information that the press wished to publish").

¹²⁸ See *Rozhon v. Triangle Publications, Inc.*, 230 F.2d 359, 361-62 (7th Cir. 1956) (holding death by narcotics newsworthy); *Elmhurst v. Pearson*, 153 F.2d 467, 468 (D.C. Cir. 1946) (holding sedition newsworthy); *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 807 (2d Cir.) (holding newsworthy unauthorized publication of "merciless" exposé of former child prodigy nearly 30 years later), *cert. denied*, 311 U.S. 711 (1940); *Frith v. Associated Press*, 176 F. Supp. 671 (E.D.S.C. 1959) (holding arrest

court, includes events and information which have "that indefinable quality of interest which attracts public attention."¹²⁹ The comprehensiveness of this interpretation is readily apparent. Any piece of information could be of interest to some section of the public. Even if a court were to adopt a narrower interpretation of the "newsworthiness" element, for example, that disclosure of the information must have some "beneficial" social value in order for it to be in the public interest, exposure of most private facts could still be exempted since, as one commentator put it, "[a]ll information is potentially useful in some way to the public in forming attitudes and values."¹³⁰ It is evident then, that while the common law's broad interpretation of the "newsworthiness" defense has provided the constitutionally required "breathing room" for the press, it has left private-facts plaintiffs without a remedy. As Professor Kalven remarked in 1966, the newsworthy defense is "so overpowering as virtually to swallow the tort."¹³¹

On the other hand, the cases where the courts *have held the press liable* for a private-facts invasion are limited in number¹³² and difficult to categorize. One commentator has advanced the thesis that the controlling principle underlying these decisions is that the disclosures are of such a "shocking" or "offensive" character that

newsworthy); *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665, 669-70 (Cal. Ct. App. 1984) (holding that publicity concerning the sexual orientation of the plaintiff, who had saved President Ford's life, was "newsworthy" and therefore not a violation of privacy); *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 771-73 (Cal. Ct. App. 1983) (asserting that jury must weigh the newsworthiness of the past sex-change operation of a local college president); *Hubbard v. Journal Publishing Co.*, 368 P.2d 147 (N.M. 1962) (holding identity of crime victim newsworthy); *Meetze v. Associated Press*, 95 S.E.2d 606, 609-10 (S.C. 1956) (holding 12-year old giving birth to a child newsworthy); *Barber v. Time, Inc.*, 159 S.W.2d 291 (Mo. 1942) (holding woman's rare eating disorder newsworthy); *Metter v. Los Angeles Examiner*, 95 P.2d 491, 495-96 (Cal. Dist. Ct. 1939) (holding suicide newsworthy); *Jones v. Herald Post Co.*, 18 S.W.2d 972, 973 (Ky. Ct. App. 1929) (holding homicide newsworthy); *supra* note 106. *See also* *Time, Inc. v. Hill*, 385 U.S. 374, 383-84 n.7 (1967) (listing 22 cases in which lower courts held that freedom of press outweighed privacy interests).

¹²⁹ *Sweeney v. Pathe News*, 16 F. Supp. 746, 747 (E.D.N.Y. 1936) (quoting *Associated Press v. International News Serv.*, 245 F. 244, 248 (2d Cir. 1917), *aff'd*, 248 U.S. 215 (1918)); *see also* *Meetze*, 95 S.E.2d at 610 (interpreting the "newsworthiness" requirement as including any information "which would naturally excite public interest"). For examples of information that has been considered "news" by the courts, *see supra* notes 123 & 128.

¹³⁰ Zimmerman, *supra* note 36, at 351.

¹³¹ Kalven, *supra* note 85, at 336; *see also* Zimmerman, *supra* note 36, at 351 ("[T]he process of defining 'newsworthy' information has practically destroyed the private-facts tort as a realistic source of a legal remedy.").

¹³² *See infra* notes 134-137 for exemplary cases.

they cannot be considered newsworthy.¹³³ Though a number of cases are consistent with this principle,¹³⁴ it is by no means comprehensive. For example, the press has been held liable for further publicizing information that was already quite public.¹³⁵ It is difficult to see how further disclosure of publicly known facts amounts to unconscionable behavior on the part of the press. The press has also been held liable for revelations of material that does not seem to rise to the "shocking" level required by the principle.¹³⁶ Finally, in some of the cases where the press has not been held liable, the disclosures were arguably "shocking to the conscience."¹³⁷ Therefore, it is unlikely that a general principle of unconscionability is—or would be if universally recognized by the courts—any less vague and subjective than the other elements of the tort.

The conclusion that lower court private-facts decisions do not reveal a coherent basis for the offensiveness exception to the

¹³³ See Hill, *supra* note 87, at 1258. Professor Hill derives this principle from the holding in *Sidis v. F-R Publishing Corp.*, in which the court stated that it would allow recovery in cases of "[r]evelations . . . [that are] so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency." *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940). Prosser and Keeton have tentatively endorsed this distinction. See PROSSER & KEETON, *supra* note 19, § 117, at 857 ("There is much to be said for Hill's approach . . .").

¹³⁴ Most of these cases deal with nudity. See, e.g., *McCabe v. Village Voice, Inc.*, 550 F. Supp. 525, 529-30 (E.D. Pa. 1982) (holding that publication of nude photograph of plaintiff without her consent was actionable); *Taylor v. K.T.V.B., Inc.*, 525 P.2d 984, 987-89 (Idaho 1974) (holding that broadcasting a nude man arrested in front of his house was actionable). Others cases deal with the publication of unusual medical conditions. See, e.g., *Barber v. Time, Inc.*, 159 S.W.2d 291, 296 (Mo. 1942) (holding that publication of woman's rare eating disorder without her consent was actionable).

¹³⁵ See *Daily Times Democrat v. Graham*, 162 So. 2d 474, 478 (Ala. 1964) (holding newspaper liable for printing picture of woman's dress flying up); *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 43 (Cal. 1971) (holding reports of previous criminal activities of plaintiff actionable).

¹³⁶ See, e.g., *Huskey v. NBC*, 632 F. Supp. 1282, 1289 (N.D. Ill. 1986) (holding that broadcasting a film of a prisoner with a distinctive tattoo was actionable).

¹³⁷ See, e.g., *Sidis*, 113 F.2d at 807 (holding unauthorized publication of "merciless" exposé of former child prodigy nearly 30 years later newsworthy). For a commentator who argues that *Sidis* was wrongly decided, see EDWARD J. BLOUSTEIN, *INDIVIDUAL AND GROUP PRIVACY* 95 (1978). For other cases with especially sympathetic plaintiffs, see *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665, 669 (Ct. App. 1984) (holding publishing of sexual orientation of plaintiff, who saved President Ford's life, to be no violation of privacy in that it was "newsworthy"); *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 771-73 (Ct. App. 1983) (directing the jury to weigh the newsworthiness of the past sex-change operation of a local college president).

newsworthiness defense is just as damaging to First Amendment interests as the broad newsworthiness defense is to privacy interests; no clear principle can be discerned by which journalists can predict when the courts will find an exception to the newsworthiness defense. The constitutional ramifications of this situation moved one commentator to advocate the complete rejection of the "offensiveness" exception:

When we weigh the continued chilling effect of potential litigation and unpredictable liability against the benefits of allowing courts to retain the option of remedying some rare, genuinely offensive bits of publicity, we must question whether the preservation of even a small corner of the Warren-Brandeis tort is worth the risks. This observer answers in the negative.¹³⁸

Beyond the constitutionality of the exception,¹³⁹ its subjectivity and vagueness also "chills" the privacy interests of private-facts plaintiffs. Uncertainty concerning where the next court will draw the line between privacy and freedom of speech dissuades private-facts plaintiffs from engaging in costly, albeit meritorious, litigation.

If the private-facts plaintiff is a public figure, courts are even less accommodating to her claims of invasion of privacy. Although the *Restatement* would allow public figures a small degree of privacy,¹⁴⁰ most jurisdictions deny public figures any chance of recovery under the private-facts tort, reasoning that such personalities "had sought publicity and consented to it, and so cannot complain of it; [and] that their personalities and their affairs [had] already . . . become public, and [could] no longer be regarded as their own private business"¹⁴¹ By the mere act of becoming a public figure, the individual thus waives her right to privacy. As Kitty Kelley asserted upon learning that Frank Sinatra had dropped his lawsuit trying to enjoin the publication of her unauthorized biography of his life: "The life of a public figure belongs to us, the average American citizen."¹⁴²

¹³⁸ Zimmerman, *supra* note 36, at 362 (footnote omitted).

¹³⁹ For a discussion of whether any of these common law exceptions to the newsworthiness defense would be allowed under the Supreme Court's formulation of the private-facts tort, see *infra* note 170.

¹⁴⁰ See RESTATEMENT (SECOND) OF TORTS, *supra* note 18, § 652D cmt. h ("There may be some intimate details of her life, such as sexual relations, which even the actress is entitled to keep to herself.").

¹⁴¹ PROSSER, *supra* note 91, at 411. See, e.g., *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980); *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Rosemont Enters. v. Random House, Inc.*, 294 N.Y.S.2d 122, 127 (Sup. Ct. 1968), *aff'd*, 301 N.Y.S.2d 948 (App. Div. 1969).

¹⁴² Katz, *supra* note 1, at 820 (quoting Connelly, *Kitty Kelley's Battle with Sinatra*,

In summary, it is evident that the lower courts' formulation of the private-facts tort does not effectively protect the privacy interests at stake. The tort's focus on media defendants and the inherently subjective nature of its elements have created a body of law that, through the newsworthiness defense, heavily favors First Amendment interests. In addition, the few points of light for private-facts plaintiffs—the cases that have found “offensiveness” exceptions to the newsworthy defense—do not lend themselves to coherent principles upon which either the press or potential plaintiffs can make reliable publication and litigation decisions. These constitutional and definitional difficulties have so gutted the common law formulation of the private-facts tort as to make its enforcement against media-defendants highly unlikely. Private-facts plaintiffs who are public figures have essentially no chance of success. Commentators who dismiss new torts designed to protect privacy interests because of their redundancy with the common law private-facts tort¹⁴³ have not fully considered the inadequate protection of privacy interests that the Warren and Brandeis tort has provided in practice.

C. *The Supreme Court Developments*

If the lower courts' approach to private-facts cases is heavily biased toward the press,¹⁴⁴ then the Supreme Court's test for restricting publication of truthful information positively capitulates to it. The Court's decisions have relied exclusively on First Amendment values, ignoring lower courts' attempts to balance these values with competing privacy interests.¹⁴⁵ While the Court has

N.Y. DAILY NEWS, Sept. 15, 1984, at C14); see also *Forsher v. Bugliosi*, 608 P.2d 716, 726 (Cal. 1980) (stating 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”) (quoting *Prosser*, *supra* note 91, at 418); cf. *Beauharnais v. Illinois*, 343 U.S. 250, 263 n.18 (1952) (stating that “public men, are, as it were, public property”). But see Gary McDowell, *Private Lives, Perverted Law*, LEGAL TIMES, June 10, 1991, at 22 (claiming that the one element of Warren and Brandeis's tort most worth recovering “is the idea that public status does not deny one a protected realm of privacy” and furthering asserting that “[b]y taking seriously the idea that even public figures and officials have a right to their privacy, we could restore appreciation for what privacy truly means”).

¹⁴³ See *supra* note 35 and accompanying text.

¹⁴⁴ See *supra* notes 125-131 and accompanying text.

¹⁴⁵ See *Edelman*, *supra* note 119, at 1218 (“The line of decisions from *Cox Broadcasting to Florida Star* is curiously ahistorical: no case acknowledges that state courts have struggled throughout the twentieth century to accommodate first-amendment values while developing common-law torts for invasions of privacy.”). See *supra* notes

decided only four private-facts cases,¹⁴⁶ its holdings have adopted increasingly inflexible positions that ultimately renders a plaintiff victory over the press implausible, if not impossible.¹⁴⁷

In the first of the Court's private-facts cases, *Cox Broadcasting Corp. v. Cohn*,¹⁴⁸ the Court held that the press could publish with impunity any "truthful information contained in official court records open to public inspection."¹⁴⁹ The Court's relatively inflexible standard was singularly motivated by concern for freedom of the press:

The conclusion [that a state may not impose sanctions on the publication of truthful information found in public records] is compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press. . . .

. . . 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. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.¹⁵⁰

The Court explicitly rejected the common law approach of ad hoc balancing of privacy and press interests: "[w]e 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

107-143 and accompanying text for a discussion of the common law developments in this area.

¹⁴⁶ See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (per curiam); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

¹⁴⁷ In all of its private-facts cases, the Court has held for the media-defendant. See *Florida Star*, 491 U.S. at 541 (holding that a newspaper's publication of a rape victim's name was not a tortious invasion of privacy if it was "lawfully obtained"); *Daily Mail*, 443 U.S. at 104 (holding that newspaper's publication of juvenile offender's name was not an invasion of privacy where the name was lawfully obtained from police radio and eyewitness interviews); *Oklahoma Publishing*, 430 U.S. at 311-12 (finding no invasion of privacy when newspapers published name and picture of juvenile delinquent obtained from a "closed" hearing but with full knowledge of judge, prosecutor, and defense counsel); *Cox Broadcasting*, 420 U.S. at 491 (holding that the state may not "impose sanctions on the accurate publication of the name of a rape victim obtained from public records").

¹⁴⁸ 420 U.S. 469 (1975).

¹⁴⁹ *Id.* at 495.

¹⁵⁰ *Id.* at 495.

sensibilities of the supposed reasonable man.”¹⁵¹ Still, while the Court seemed unwilling to engage in any meaningful balancing of the privacy interests involved in its decision, its holding was limited in scope. The press was allowed free reign, but only with respect to public records.¹⁵²

In its most recent private-facts decision, the Court cast an even wider net to protect the publication of truthful information. In *Florida Star v. B.J.F.*,¹⁵³ the name of a rape victim, B.J.F., was mistakenly included in a police report and released to the press.¹⁵⁴ B.J.F.’s name was then printed in a newspaper in violation of a Florida statute prohibiting any person from publicizing the name of a sexual assault victim in an instrument of mass communication.¹⁵⁵ B.J.F. sued based on the statutory prohibition and Florida’s private-facts tort.¹⁵⁶ The Supreme Court held for the media-defendants and advanced the rule 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.”¹⁵⁷ The Court stated that this principle would ensure the “public interest . . . in the dissemination of truth”, acknowledge that “punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance [significant state interests],” prevent “timidity and self-censorship” within the media, and still leave open the possibility that states would safeguard significant privacy interests by controlling information at its source.¹⁵⁸

¹⁵¹ *Id.* at 496.

¹⁵² The trend toward a more inflexible position favoring First Amendment interests was continued in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (per curiam), in which the Court held that a state cannot “prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public,” regardless of the information’s offensiveness. *See id.* at 310. Again the Court indicated that First Amendment concerns were motivating its decision: “[an opposite] order [would] abridge[] the freedom of the press in violation of the First and Fourteenth Amendments.” *Id.* at 311-12.

¹⁵³ 491 U.S. 524 (1989).

¹⁵⁴ *See id.* at 527.

¹⁵⁵ *See id.* at 526.

¹⁵⁶ *See id.* at 528.

¹⁵⁷ *Id.* at 533 (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)). Note that the Florida statute in question did not make the newspaper’s acquisition of the name unlawful, just its publication of it. Therefore, the Court was able to find that the newspaper had obtained the information lawfully.

¹⁵⁸ *See id.* at 533-36.

Though the Court claimed that the "lawfully obtained" doctrine was a "limited First Amendment principle,"¹⁵⁹ it is in actuality an absolutist rule ensuring that the media will very rarely, if ever, be held liable for publishing truthful, albeit private, information.¹⁶⁰ The principle seems to leave open a limited possibility of liability for publication of lawfully obtained information—that is, where there is a showing of "a state interest of the highest order."¹⁶¹ Still, it is difficult to imagine a state interest more compelling than that presented by B.J.F.¹⁶²—namely the interest in protecting victims of sexual crimes from public scorn and repeat attacks.¹⁶³ While the majority admitted that preserving the privacy of rape victims was a "highly significant interest[]," it believed that the Florida statute's imposition of "liability for publication" in this case was too "precipitous a means" of achieving its goal.¹⁶⁴ The Court's very demanding analysis of the statute found it to be overly harsh, underinclusive, and unnecessary to achieving the State's interest in protecting the identities of rape victims.¹⁶⁵ The Court's adoption of what is essentially a strict scrutiny analysis¹⁶⁶ to examine the

¹⁵⁹ *Id.* at 533.

¹⁶⁰ *See id.* at 547 n.2 (White, J., dissenting) ("The Court's concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society. An absolutist view of the former leads to insensitivity as to the latter.").

¹⁶¹ *Id.* at 541.

¹⁶² *See* David A. Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71, 90 (1990) ("The Court insisted it was leaving open the possibility that publication of a rape victim's name might be actionable under some circumstances, but if *Florida Star* was not such a case, it is difficult to imagine a case that would be actionable."); Edelman, *supra* note 119, at 1223 ("B.J.F.'s case could hardly have been more compelling . . . [Considering the Court's rejection of her claim despite the facts of this case,] it is difficult to imagine a plaintiff that the Court would allow to recover.").

¹⁶³ After the report revealing B.J.F.'s name was published in the newspaper, her mother (while caring for B.J.F.'s children) received a phone call from a man saying he was B.J.F.'s rapist threatening to rape her again. Fearing for her safety, B.J.F. moved and obtained mental health counseling. *See Florida Star*, 491 U.S. at 528.

¹⁶⁴ *See id.* at 537.

¹⁶⁵ The Court's "means" analysis faulted the State's statute on three grounds. First, liability for truthful information was not the best means of protecting privacy in that the State could have pursued the less drastic remedy of stricter enforcement of confidentiality rules within its own departments. *See infra* note 196 and accompanying text. Second, the Court found that the statute's imposition of liability based on a negligence per se theory was unnecessarily harsh. *See Florida Star*, 491 U.S. at 539. Finally, the Court found the statute facially underinclusive in that it targeted mass communication of rape victims' names, but did not prohibit the "devastating" consequences of backyard gossips. *See id.* at 540.

¹⁶⁶ The Court's "lawfully obtained" approach is comparable to its strict scrutiny analysis of Equal Protection Clause cases and cases involving state attempts to control

publication of truthful, albeit private, information does not bode well for future private-facts plaintiffs. As Justice White wrote in dissent, the Court's analysis denies any meaningful weighing of the privacy interests at stake in private-facts cases, and essentially kills the private facts tort:

By holding that only "a state interest of the highest order" permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim's right to privacy is not among those state interests of the highest order, the Court accepts appellant's invitation . . . to obliterate . . . the tort of the publication of private facts. . . . Even if the Court's opinion does not say as much today, such obliteration will follow inevitably from the Court's conclusion here. If the First Amendment prohibits wholly private persons (such as B.J.F.) from recovering for the publication of the fact that she was raped, I doubt that there remain any "private facts" which persons may assume will not be published in the newspapers, or broadcast on television.¹⁶⁷

To the extent that the result under a strict scrutiny analysis is something of a foregone conclusion,¹⁶⁸ private-facts plaintiffs' success after *Florida Star* will turn on that decision's other criterion—whether the information was "lawfully obtained."¹⁶⁹ With "lawful-

the content of speech. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (explaining that when speech takes place in quintessential public forums and the state seeks to enforce a content-based exclusion, the state "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end"). The analysis is similar in that the Court engages in a very demanding examination of the ends and means of the state action.

¹⁶⁷ *Florida Star*, 491 U.S. at 550-51 (White, J., dissenting) (citations omitted); see also Sheldon W. Halpern, *Rethinking the Right of Privacy: Dignity, Decency, and the Law's Limitations*, 43 RUTGERS L. REV. 539, 558 (1991) ("Certainly, the refusal to recognize the privacy interest in so compelling a set of facts as was presented in *Florida Star* seems to leave little vitality in the tort of disclosure of private facts.") (quoting Anderson, *supra* note 162, at 90).

¹⁶⁸ See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979) (Chief Justice Burger, writing for the majority, concedes that "state action to punish the publication of truthful information seldom can satisfy constitutional standards."). The Court has, so far, always held that the publication of truthful information has overcome whatever other interest was at stake. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 834 (1978) (interest in judicial disciplinary proceeding confidentiality); *Bates v. State Bar*, 433 U.S. 350, 368-72 (1977) (interest in preserving lawyer professionalism); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 542 (1976) (interest in plaintiff's right to a fair trial); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 749-50 (1976) (interest in preserving pharmacists' professionalism); *Garrison v. Louisiana*, 379 U.S. 64, 76 (1964) (interest of public figure in reputation).

¹⁶⁹ See Edelman, *supra* note 119, at 1206 (arguing that the dispositive factor in the Court's test in *Florida Star* is the concept of "lawful acquisition").

ly obtained" as the new standard for the private-facts tort, however, the media-defendants will almost always win. "[T]he media defendant now can publish virtually any private information discovered through means that fall short of breaking and entering, or violating a specific statute making the receipt of such information criminal."¹⁷⁰

Following *Florida Star*, the resolution of private-facts cases no longer revolves around the offensiveness of the information that is published, but rather on the methods by which it was acquired.¹⁷¹ The Court's approach effectively frees members of the media from performing the difficult calculus demanded by the lower courts' balancing of "newsworthiness" and "offensiveness". Instead, they need only inquire whether the information was lawfully obtained. Though the *Florida Star* doctrine may provide the press with a large degree of "breathing room," it does not provide a pivot on which privacy interests are equitably balanced. As one commentator noted:

The technically lawful acquisition of information does not ensure that the material was already "public." Neither does the lawfulness of acquisition mandate an unrestricted right to publish private information. . . .

. . . Unlawfulness in acquisition should bear upon the lawfulness of publication only if the unlawful acquisition reveals the private nature of the information and suggests that the information deserves protection from publication based on its private or confidential status. Otherwise, the lawfulness of

¹⁷⁰ Edelman, *supra* note 119, at 1204. It is highly questionable whether any of the lower court cases recognizing exceptions to the newsworthiness defense, *see supra* notes 134-137, would have been decided the same way under the "lawfully obtained" doctrine. In none of these cases did the press violate any law concerning its receipt of the information. Thus, in future common law cases using the Court's constitutionally based "lawfully obtained" standard, it is unlikely that any exceptions to the newsworthiness defense will be recognized.

¹⁷¹ *See, e.g.,* Heath v. Playboy Enters., 732 F. Supp. 1145, 1149 (S.D. Fla. 1990) (no invasion of privacy when defendant published pictures legally purchased from commercial photographer); Cape Publications, Inc. v. Hitchner, 549 So. 2d 1374, 1378 (Fla. 1989) (no invasion of privacy when case file was legally obtained from prosecutor's secretary, who gave no caution as to confidentiality). Other lower courts, however, have not whole-heartedly adopted the "lawfully obtained" doctrine in their post-*Florida Star* decisions. *See, e.g.,* Scheetz v. Morning Call, Inc., 747 F. Supp. 1515, 1525-34 (E.D. Pa. 1990) (conducting both *Florida Star* "lawfully obtained" analysis and more explicit balancing of press and privacy interests); Y.G. & L.G. v. Jewish Hosp., 795 S.W.2d 488, 498-99 (Mo. Ct. App. 1990) (balancing "offensiveness" and "newsworthiness" of publication). Resolution of this lower court confusion (or feigned ignorance?) will have to await further Supreme Court consideration.

acquisition is an inept measure of the competing interests of speech and privacy in the private-fact disclosure context.¹⁷²

The unlawfully obtained doctrine is essentially an absolutist abdication to the First Amendment. As one commentator stated, the Court in *Florida Star* "decided that when the violation of privacy involves publication of private information about an individual, free speech wins; everything is newsworthy, and nothing is private."¹⁷³

Curiously, the Court has also made clear in its private-facts decisions its belief that the underlying privacy interests which the tort attempts to preserve merit legal protection. In *Cox Broadcasting Corp. v. Cohn*,¹⁷⁴ the first of the Court's private-facts cases, the majority opinion asserted that "powerful arguments can be made, and have been made, that however it may be ultimately defined, there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity."¹⁷⁵ The Court also quoted liberally from Warren and Brandeis' article advocating the recognition of legal protection of the right to privacy.¹⁷⁶ Later decisions further

¹⁷² Edelman, *supra* note 119, at 1204-06 (footnotes omitted).

¹⁷³ *Id.* at 1207. Had Justices Souter and Thomas replaced Justices Brennan and Marshall before *Florida Star*, the 5-4 holding may well have come out the other way, especially if it were a matter of first impression. *But see* Edelman, *supra* note 119, at 1211 ("Right wing libertarians are never great enthusiasts for privacy except in cases involving the protection of private property . . ."). However, even if Justice White's alternative analysis in the *Florida Star* dissent had obtained a majority's support, it would not have brought about a resurgence in successful private-facts suits: it still leaves much to be desired from the point of view of the private-facts plaintiff. White allows that the "right to privacy is not absolute," acknowledging that "sometimes" the public's right to know must "trump" the individual's privacy interest, and that striking the appropriate balance between these two interests is "difficult." *See Florida Star*, 491 U.S. at 551 (White, J., dissenting). He concludes, rather weakly, that the majority "accord[ed] too little weight to B.J.F.'s side of [the] equation, and too much on the other." *Id.* His solution is to "draw the line higher on the hillside: a spot high enough to protect B.J.F.'s desire for privacy and peace-of-mind in the wake of a horrible personal tragedy." *Id.* at 553. This method for deciding when an individual's privacy interest should dominate over free speech and the press is little more than a restatement of the vague "offensiveness" standard which has proven ineffective at protecting privacy interests in the lower courts. *See supra* notes 132-137 and accompanying text. The future for private-facts plaintiffs is not bright under either the majority's "lawfully obtained" doctrine or the dissent's approach.

¹⁷⁴ 420 U.S. 469 (1975).

¹⁷⁵ *Id.* at 487 (footnote omitted). Significantly, the Court cites Professor Bloustein's article for support of this proposition. *See id.* at 487 n.14; *see also* Bloustein, *supra* note 91, at 1003 (arguing that privacy is essential to "individuality and human dignity"). The Court, therefore, clearly sides with the advocates of the tort. *See also* Hill, *supra* note 87, at 1268 ("[T]he opinion of the Court in *Cox Broadcasting* abundantly reveals the receptivity of the Court to possible liability").

¹⁷⁶ *See Cox Broadcasting*, 420 U.S. at 487 n.16 ("Of the desirability—indeed of the

demonstrate the Court's respect for the privacy rights of private-facts plaintiffs by "relying on limited principles that sweep no more broadly than the appropriate context of the instant case."¹⁷⁷ Had the Court really not "[r]espect[ed] the fact that . . . privacy rights are . . . 'plainly rooted in the traditions and significant concerns of our society,'"¹⁷⁸ it would have held that the disclosure's truthfulness is always a defense for media-defendants in private-facts cases, a holding it has purposefully avoided.¹⁷⁹

After this review of the Supreme Court's private-facts decisions, the obvious question arises: why has the Court, which ostensibly believes that the privacy interests at stake are "sensitiv[e] and significan[t],"¹⁸⁰ never held for a private-facts plaintiff and instead adopted an increasingly inflexible approach which also denies future plaintiffs any meaningful chance of recovery? The answer is clear: when First Amendment interests and privacy interests conflict, the Supreme Court has tried to give the press adequate "breathing room" by rejecting ad hoc balancing and drawing lines that, because of their absolute clarity, do not chill First Amendment interests.¹⁸¹ This tendency has necessitated the rejection of lower

necessity—of some such protection [of the right of privacy], there can, it is believed, be no doubt.") (quoting Warren & Brandeis, *supra* note 38, at 196).

¹⁷⁷ *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989); *see also* *Smith v. Daily Mail*, 443 U.S. 97, 105-06 (1979) (narrowing the issue of the case to whether the state had the power to punish a newspaper for truthfully publishing the identity of an alleged juvenile delinquent, where that identity was lawfully obtained); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (limiting its decision to "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection").

¹⁷⁸ *Florida Star*, 491 U.S. at 533.

¹⁷⁹ *See, e.g., id.* at 533, 541 (refusing to hold "that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the state may protect the individual from intrusion by the press, or even that a state may never punish publication of the name of the victim of a sexual offense"); *Daily Mail*, 443 U.S. at 103 (leaving open the possibility that a state may punish the publication of lawfully obtained information when such punishment "furthers an interest of the highest order"); *Cox Broadcasting*, 420 U.S. at 491 (refusing to address "whether the State may ever define and protect an area of privacy free from unwanted publicity in the press"); *see also* *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967) (acknowledging in dictum the possibility that "truthful publication . . . could be constitutionally proscribed" in a false light privacy case if publication of the information would be unconscionable).

¹⁸⁰ *Florida Star*, 491 U.S. at 533.

¹⁸¹ *See id.* at 535 (advancing as a rationale for the "lawfully obtained" doctrine that "timidity and self-censorship" . . . may result from allowing the media to be punished for publishing certain truthful information."); *see also* *Zimmerman*, *supra* note 36, at

court attempts at balancing "newsworthiness" and "offensiveness" in favor of the more predictable absolutist standards such as the *Cox Broadcasting* "public records"¹⁸² doctrine and the *Florida Star* "lawfully obtained"¹⁸³ doctrine.¹⁸⁴

342-43 & n.270 ("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. The Court has developed the doctrines of vagueness and overbreadth to address this concern.") (citing *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974) (holding statute prohibiting "contemptuous" treatment of American flag void because it provided inadequate notice of forbidden conduct and invited selective enforcement)); *Coates v. Cincinnati*, 402 U.S. 611 (1971) (holding that vague statute violated First Amendment); *NAACP v. Button*, 371 U.S. 415, 433 (1963) (finding statute defining solicitation of business unconstitutionally vague and overbroad)). See generally Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968). Nimmer remarks:

[A]d hoc balancing by hypothesis means that there is no rule to be applied, but only interests to be weighed. In advance of a final adjudication by the highest court a given speaker has no standard by which he can measure whether his interest in speaking will be held of greater or lesser weight than the competing interest which opposes his speech. Without pretending that there can ever be complete certainty as to how a given rule will be applied in a new situation, if there is no rule at all then there is no certainty at all.

Id. at 939.

¹⁸² See *supra* note 150 and accompanying text.

¹⁸³ See *supra* note 157 and accompanying text.

¹⁸⁴ Remarking on another of the Court's absolutist holdings, the *Cox Broadcasting* "public records" principle, see *supra* note 150, Justice Brennan stated that "[c]rucial to [that] holding . . . was the determination that a 'reasonable man' standard for imposing liability for invasion of privacy interests" is too vague to offer the press adequate protection of their First Amendment interests. *Time, Inc. v. Firestone*, 424 U.S. 448, 474 (1976) (Brennan, J., dissenting). The Court in *Florida Star* was also moved by an aversion to vague standards imposing liability at the point of publication:

[An important] consideration is the 'timidity and self-censorship' which may result from allowing the media to be punished for publishing certain truthful information. . . . *Cox Broadcasting* noted this concern with over-deterrence in the context of information made public through official court records, but the fear of excessive media self-suppression is applicable as well to other information released, without qualification, by the government. A contrary rule, depriving protection to those who rely on the governments implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication.

Florida Star v. B.J.F., 491 U.S. 524, 535-36 (1989) (citations omitted). Professor Zimmerman, relying on the Court's libel decisions, see, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964), predicted the Court's rejection of the common-law approach to the private-facts tort six years before the *Florida Star* decision:

Implicit in the Court's approach is the belief that when placed in direct conflict, First Amendment interests weigh more heavily than the privacy interests underlying the private-facts tort. This is not to say, however, that the privacy interests themselves do not merit protection. Rather, the problem is that the private-facts tort, by targeting the press for liability,¹⁸⁵ directly conflicts with the First Amendment, and then depends on unconstitutionally vague standards to mediate this conflict.¹⁸⁶ Thus the private-facts tort's formulation is the source of its own impotence.¹⁸⁷ The dilemma presented by these conclusions is clear: how can privacy interests be protected without imposing liability at the point of publication and without employing vague standards that infringe First Amendment rights? The breach of confidence tort, advanced in the next section, offers a response to this challenge.

III. THE CONFIDENTIALITY TORT: ITS SCOPE AND EXCEPTIONS

Part II's review of American decisions recognizing the private-facts tort reveals a paradox:¹⁸⁸ courts acknowledge the importance of preserving privacy interests, but are unwilling to enforce the tort created to protect them.¹⁸⁹ For those who believe that privacy is of profound consequence to human development,¹⁹⁰ this paradox is no mere legal anomaly but a gross absurdity;¹⁹¹

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 [i.e., the private-facts tort,] that employs such a nebulous standard to distinguish between constitutionally protected and unprotected speech.

Zimmerman, *supra* note 36, at 351.

¹⁸⁵ See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489 (1975) ("Because the gravamen of the [private-facts tort] is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press."); see also *supra* notes 108-111 and accompanying text.

¹⁸⁶ See *supra* notes 112-117 and accompanying text. As one commentator put it, the Court's decision in *Florida Star* "was driven more by concern for free speech and press than by the perceived inadequacy of the privacy interest involved." Edelman, *supra* note 119, at 1212.

¹⁸⁷ See Bezanson, *supra* note 87, at 70-71 (arguing that the "fundamental problem lies with the [private-facts] tort, not with privacy" and further suggesting that "[t]his conclusion is not . . . a wholly bleak one, for it does not imply that privacy is not a value to be legally protected" or "an idea without real and enforceable content").

¹⁸⁸ See *supra* note 86.

¹⁸⁹ See *supra* notes 125-131 and accompanying text.

¹⁹⁰ See *supra* notes 93-96 and accompanying text.

¹⁹¹ See *Bremmer v. Journal-Tribune Publishing Co.*, 76 N.W.2d 762, 769 (Iowa

the Supreme Court's resolution of this inconsistency in favor of the press in *Florida Star v. B.J.F.*¹⁹² provides further cause for alarm.

Responding to the dilemma that the First Amendment has presented for the Warren-Brandeis tort, some commentators have advocated duties of confidentiality as an alternative pivot on which privacy and press interests can be accommodated.¹⁹³ For example, Professor Bezanson has recently suggested:

[W]hile the judgments of "private" information, "outrageous" conduct, and "legitimate" public interest can never be wholly escaped, and while their determination in an adjudicative setting is problematical, they can perhaps be more closely captured in [a cause of action] which takes the form, not of a tort action focused on publication, but of identified information placed presumptively in the control of the individual, with the focus of adjudication being shifted from open-ended issues of value to the more circumscribed questions of consent, waiver, and an obligation of confidentiality owed by one possessing such information.¹⁹⁴

Similarly, although some commentators have declared *Florida Star* the end of the line for privacy protection in America,¹⁹⁵ a close reading of the opinion reveals that the Supreme Court is open to controlling private information by holding sources of confidential information liable for breach of confidence:

To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the [unlawfully obtained] principle the publication of any information so acquired. To the extent sensitive information is in the government's custody, it has even greater power to . . . classify certain information,

1956) (Larson, C.J., dissenting) (noting with frustration that although the private-facts tort was recognized by the courts of the state, the majority was only willing to honor it with "lip service").

¹⁹² 491 U.S. 524 (1989).

¹⁹³ See Zimmerman, *supra* note 36, at 363-64 (stating that the "right[] of contractual confidentiality . . . merits considerably more thought as an alternative to the Warren-Brandeis tort than it has received thus far").

¹⁹⁴ Bezanson, *supra* note 87, at 71-72.

¹⁹⁵ See *Florida Star*, 491 U.S. at 550 (White, J., dissenting) (claiming that the case "obliterate[s] one of the most note-worthy legal inventions of the 20th-Century: the tort of the publication of private facts"); Edelman, *supra* note 119, at 1206 ("The Court in *Florida Star* made a choice. It decided that when the violation of privacy involves publication of private information about an individual, free speech wins; everything is newsworthy, and nothing is private."); Zuckman, *supra* note 98, at 265 (agreeing with Justice White's belief that *Florida Star* had effectively "obliterated" the private-facts tort).

establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. . . .

. . . .

. . . Once the government [i.e. the source] has placed such information in the public domain, "reliance must rest upon the judgment of those who decide what to publish or broadcast" and hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence.¹⁹⁶

In its recent decision in *Cohen v. Cowles Media Co.*,¹⁹⁷ the Court went even further and allowed journalists to be held liable, under a state's promissory estoppel law, for their breach of a promise of confidentiality given to a source.¹⁹⁸ Distinguishing its private-facts cases, the Court asserted in *Cohen* that:

[i]n those cases, the State itself defined the content of publications that would trigger liability [and the tort was therefore constitutionally suspect]. Here, by contrast, [the cause of action based on breach of confidence] simply requires those making promises to keep them. The parties themselves . . . determine the scope of their legal obligations and any restrictions which may be placed on the publication of truthful information are self-imposed.¹⁹⁹

¹⁹⁶ *Florida Star*, 491 U.S. at 534, 538 (emphasis added) (footnote omitted) (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1974)); see also *id.* at 544 (White, J., dissenting) ("*Cox Broadcasting* stands for the proposition that the State cannot make the press its first line of defense in withholding private information from the public—it cannot ask the press to secrete private facts that the State makes no effort to safeguard in the first place."); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 n.10 (1978) (declining to address the issue of whether a state could punish judicial review commission staff members who breached confidentiality and disclosed information to the press); *Cox Broadcasting Corp.*, 420 U.S. at 496 ("If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information.").

¹⁹⁷ 111 S. Ct. 2513 (1991).

¹⁹⁸ See *id.* at 2519.

¹⁹⁹ *Id.* Even some of the dissenters in *Cohen* were open to the idea of enforceable obligations of confidentiality, albeit not for purposes of protecting a political figure like the *Cohen* petitioner:

This is not to say that the breach of such a promise of confidentiality could never give rise to liability. One can conceive of situations in which the injured party is a private individual, whose identity is of less public concern than that of the petitioner; liability there might not be constitutionally prohibited.

Id. at 2523 (Souter, J., dissenting).

In the twilight of the private-facts tort, the Court seems to be suggesting and sanctioning a new approach to the protection of privacy interests: "self-imposing" duties of confidentiality.²⁰⁰

Following the Court's lead, this Comment advocates the interment of the common law private-facts tort,²⁰¹ and the adoption of a new approach to privacy protection, the proposed breach of confidence tort. The rest of this Comment will explore the possibility of protecting privacy through a breach of confidence tort. This section will set forth and analyze the elements and exceptions to the proposed tort. Consideration of its constitutional implications will be delayed until Part IV.

A. *The Elements of the Proposed Breach of Confidence Tort*

It is proposed that a legally enforceable duty of confidentiality should attach whenever a person or institution intentionally or negligently engages in an unauthorized disclosure of inaccessible, personal information that she/it has explicitly and voluntarily agreed to hold in confidence, and this disclosure results in the publicity of that information.²⁰² The proposed exceptions to the

²⁰⁰ For a further discussion of *Cohen*, see *infra* notes 321-347 and accompanying text.

²⁰¹ It should be noted that an interment of the common law private-facts tort would have no effect on the Supreme Court's requirement that publishers of truthful information not be held liable unless that information was unlawfully obtained. What is meant to be interred is the common law approach set out in the *Restatement*, which requires the court to balance "offensiveness" and "newsworthiness." See *supra* notes 106-143 and accompanying text. The "lawfully obtained" doctrine, on the other hand, is a constitutional minimum, and cannot be abandoned. Since the proposed breach of confidence tort focuses liability on information's source rather than its publisher, it is unlikely to conflict with the Court's "lawfully obtained" standard.

²⁰² The specific formulation of the breach of confidence tort is obviously debatable; its suggested form merely reflects the author's attempt to balance the interests favoring enforcement of confidentiality against the countervailing interests of freedom of speech and press, concern for public safety, and consideration of the human propensity to gossip. While justifications will be advanced here for the proposed formulation of the tort, some of the choices made in defining its elements are, admittedly, arguable. Regardless of one's objections to the proposed tort's formulation, however, the underlying argument of this Comment—that the demise of the private-facts tort demands the exploration of new approaches to protecting privacy interests—still holds. The author advances the formulation of the tort with a desire less to set precise boundaries than to stir debate on the issue. See Vickery, *supra* note 35, at 1451 ("Explicit recognition of the new [breach of confidence] tort would have the . . . advantage of making possible open debate about the tort's proper scope."). Therefore, although some readers may object to certain elements of the proposed tort, they are encouraged not to "throw out the baby with the bath water."

duty of confidence created by this tort will be delineated in the next sub-section;²⁰³ this sub-section will explore the scope of the tort's *prima facie* case.

1. Scope of the Duty of Confidentiality

The proposed tort would only create a duty of confidentiality if the confider has indicated, either in writing or orally, a desire to exercise control over the disclosure of the information, and the confidant has "explicitly and voluntarily agreed to hold [the information] in confidence."²⁰⁴ This requirement could be satis-

²⁰³ See *infra* notes 270-294 and accompanying text.

²⁰⁴ See *supra* text accompanying note 202. Whether or not there is currently a requirement of "agreement" in British law is not clear from the cases. See LAW COMMISSION REPORT, *supra* note 63, ¶ 4.1-.5. The Law Commission Report, however, suggests the codification of such a requirement:

an obligation of confidence should come into existence where the recipient of the information has expressly given an undertaking to the giver of the information to keep confidential that information . . . or where such an undertaking is, in the absence of any indication to the contrary on the part of the recipient, to be inferred from the relationship between the giver and the recipient or from the latter's conduct.

Id. ¶ 6.14(i). The scope of the duty of confidence advocated by the Law Commission is, therefore, much broader than that suggested here. First, in British case law, a duty of confidentiality can be "inferred from the relationship between the giver and the recipient." *Id.* In general, duties of confidence arise irrespective of any "agreement" when "the circumstances of the relationship import it[,] which is a matter to be determined by the court in each case." *Id.* ¶ 4.2. This inference has created obligations of confidence, irrespective of the presence of a contract, in business and professional relationships. See *supra* notes 56-61 and accompanying text.

While the breach of confidence tort has seen a recent emergence in similar relationships in U.S. law, see *supra* notes 73-80 and accompanying text, the proposed tort would create a separate, more limited body of law protecting confidences disclosed in *any* relationship. To the extent that professional confidences could also be protected by a wider duty of confidence (i.e., one which does not require an "acceptance" of the obligation of confidentiality and would not require that the disclosure results in "publicity," see *infra* notes 205-240, 258-269 and accompanying text) justified by the societal interest in protecting the special benefits which inure from those relationships, it would not conflict with the proposed cause of action. For example, a doctor could be obligated by a duty of confidence arising out of either 1) a patient's request for confidentiality (accompanied by the doctor's acceptance) or 2) a general duty of confidentiality implicit in the relationship.

An extension of the "inferential duty of confidence" concept to all personal relationships would result in tremendous practical and constitutional difficulties, however. Practically speaking, asking courts to discern which private relationships are "special" enough to justify an inference of a duty of confidentiality would result in the same vague and subjective line-drawing that smothered the private-facts tort. As for constitutional problems, the Supreme Court has thus far held that enforceable duties of confidentiality may arise only when the confidant's waiver of her right to speak is

fied either by a written agreement of confidentiality or the confidant responding "yes" to the confider's question "will you hold what I am about to tell you in confidence?"²⁰⁵

The requirement that the potential confidant "accept" the potential confider's request of confidentiality²⁰⁶ would ensure the

"voluntary" and "explicit." See *infra* note 208 and accompanying text.

The proposed "agreement"-oriented approach, however, has neither of these problems: provided that the confidant agrees to hold the information in confidence, no "special," pre-existing relationship need exist for a duty of confidentiality to arise; moreover, an explicit agreement by the confidant is required. Unlike the "inferential duty" approach, under the proposed formulation of the tort complete strangers could be bound by a duty of confidence, its legal enforceability depending completely on the way the confidential information was divulged between the parties.

The proposed tort also rejects the British rule allowing a duty of confidentiality to be "inferred from the [confidant's]. . . conduct." See LAW COMMISSION REPORT, *supra* note 63, ¶ 6.14(i). Waiver of the important constitutional right at stake—the confidant's right to speak—should not be allowed without an explicit agreement. See *infra* note 305 and accompanying text; see also *Humphers v. First Interstate Bank*, 696 P.2d 527, 534 (Or. 1985) ("[A] legal duty not to speak, unless voluntarily assumed in entering the relationship, will not be imposed by courts or jurors in the name of custom or reasonable expectations."). The desire to provide potential tortfeasors with notice as to the boundaries of tortious conduct, see *infra* note 207 and accompanying text, would also be hampered by such an approach.

²⁰⁵ The exact language of each oral agreement will of course change. The important point is that in each case the potential confidant must affirm the confider's explicit request for confidentiality. Whether the agreement is oral or written will most likely depend on the degree of trust between the confider and confidant and the potential for public disclosure of the information. While written agreements of confidentiality between "friends" would be impractical and perhaps result in ill will, they may be useful in situations where the confidant is a stranger, or an institution (e.g., a government agency). In such a case, the benefits of a written agreement (e.g., improved evidentiary position in the event of publicity of the information), may outweigh the loss of trust and goodwill that a demand for a written agreement may invoke. It should also be noted that individuals at greater risk of public exposure, public figures, for example, may feel the need to have even intimate acquaintances sign an agreement of confidentiality. See *infra* note 240.

²⁰⁶ Since the proposed tort is based on an explicit contractual relationship, the question arises as to why it should be recognized as a tort. There are five main reasons why contract remedies alone would be inadequate. First, contractual relationships require consideration. It is difficult to imagine what the confidant is offering in consideration for the confidence revealed. But see *Katz, supra* note 1, at 844 n.147 ("Conceivably, friends could agree at the outset of their relationship that anything said in confidence between them would not be publicly disclosed. In that case, the mutual exchange of promises might, though will not necessarily, satisfy the requirement of consideration."). British common law overcomes this problem by permitting enforceable duties of confidence to arise without consideration. See *James Michael, Breach of Confidence*, 131 NEW L.J. 1201 (1981).

Second, since many confidentiality agreements will be oral, it is possible that they would be obstructed by the statute of frauds. In many states a statute of frauds provision works to make void any oral contract which cannot be performed within one year. See A. MUELLER ET AL., *CONTRACT LAW AND ITS APPLICATIONS* 224 (3d ed.

1983). Since a duty of confidence is an ongoing obligation that would often last longer than a year, they would probably need to be in writing if they were to be enforced in contract. The impracticality of demanding a written agreement for any duty of confidentiality to last beyond a year is apparent. *See supra* note 205.

Third, contract law is also deficient because damages for mental distress—the damages which would most typically result from breach of confidence—are as a rule not allowed. *See* RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (1981). Supposedly, courts will make an exception when “the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.” *Id.* In practice, however, this exception has been very narrowly construed (although its invocation with regard to leaky caskets is quite frequent). *See, e.g.,* *Hirst v. Elgin Metal Casket Co.*, 438 F. Supp. 906, 908 (D. Mont. 1977) (emotional damages awarded when undertaker’s “leakproof” casket leaked); *Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949) (emotional damages awarded when undertaker’s “watertight” vault leaked). Tort law, on the other hand, presents no such limitations. It would compensate the confider for any injuries sustained as a result of the confidant’s breach of duty of confidence, restricted only by the doctrine of “proximate cause.” *See* PROSSER & KEETON, *supra* note 19, at 612-23.

Fourth, courts have been sporadic in their enforcement of contractual duties in familial and social relationships. *See, e.g.,* *Balfour v. Balfour*, [1919] 2 K.B. 571, 579 (Eng. C.A.) (holding unenforceable a husband’s promise to his wife to provide a monthly allowance because “[i]n respect of [such] promises each house is a domain into which the King’s writ does not run, and to which his officers do not seek to be admitted”); *Mitzel v. Hauck*, 105 N.W.2d 378, 380 (S.D. 1960) (“To spell out a contract [for use of a car] from this hunting trip of these young men, an enjoyable pastime with his friends as plaintiff described it, ‘would transcend reality’ . . .”) (quoting *Scotvold v. Scotvold*, 298 N.W. 266, 272 (S.D. 1941)); *O’Reilly v. Mitchell*, 148 N.Y.S. 88 (Sup. Ct. 1914) (rejecting claim that a politician is contractually liable for not fulfilling campaign promises). To the extent that agreements of confidentiality would often be exchanged in the “social” or “familial” context, the proposed tort would not be redundant with contract law in that courts might not enforce the contract. Even if recognition of the tort resulted in some redundancy, overlap has previously been allowed in the common law for particularly egregious breaches. *See, e.g.,* *Crisci v. Security Ins. Co.*, 426 P.2d 173, 179 (Cal. 1967) (holding that insurance company’s refusal to settle was actionable in both tort and contract); *Chung v. Kaonohi Ctr. Co.*, 618 P.2d 283, 289 (Haw. 1980) (holding that shopping mall’s denial of lease to fast food restaurant sounded in both tort and contract); *see also* LAW COMMISSION REPORT, *supra* note 63, ¶ 6.128 (“[T]here seems to us to be no reason why [a tortious] obligation of confidence should not come into being even though the undertaking of confidence has contractual force. . . . [A]s elsewhere in the common law, [there would] be a co-existence of remedies in contract and tort.”).

Finally, the diverse privacy and First Amendment interests at stake in this area are probably best accommodated within a tort framework, where the multi-faceted elements upon which they should be balanced can be clearly defined. Relying solely on the fairly rigid contract principles of offer, acceptance, consideration, and breach would overly simplify the complex problems presented. In support of this point, one commentator noted that

liability [for breach of confidence] should be grounded in tort law. . . . [A] separate tort focused directly on the broken confidence should be recognized because it would address squarely the individual and societal interests at stake in a confidential relationship. With such a tort available, courts confronted with a compelling case of breach of confidence will not

fundamental goal of any tort: that the tortfeasor is given notice of the potential for tortious conduct.²⁰⁷ As one commentator put it: "[t]he contractual duty of confidentiality puts both parties on notice of the communications to be protected and the rights and responsibilities that the relationship creates."²⁰⁸ In addition, this provision would avoid placing the burden of confidentiality—fundamentally a waiver of the confidant's First Amendment right to speak²⁰⁹—on an involuntary confidant.²¹⁰ Since the obligation of confidentiality proposed here includes a general duty of care to protect the privacy of the confidential information,²¹¹ this point should not be underestimated. The tort requires the confidant not only not to disclose the information, but also to protect it from disclosure. The potential restriction on the confidant's activities

be left to manipulate haphazardly the remedies offered by theories of liability developed for other wrongs.

Vickery, *supra* note 35, at 1451.

²⁰⁷ See Bezanson, *supra* note 87, at 67 ("Tort liability must, if nothing else, be realistically premised on the conviction that the tortfeasor will be put on notice of the tortious conduct."). The related question of whether this "agreement" of confidentiality must precede the disclosure of the information by the confider is an interesting one. It would seem that an agreement of confidentiality made after the information is released would be equally as binding as one made prior to the release. The potential confidant in the former situation would not, however, be obligated to accept the duty at that time. A confider who waits to get such assurances, therefore, puts the confidentiality of the information at risk. This would seem an equitable result: the duty of confidentiality does not exist until the confidant has agreed to treat the information as confidential. Before such an agreement exists, however, the burden of confidentiality should rest only on the confider. See LAW COMMISSION REPORT, *supra* note 63, ¶ 6.13 ("We propose that the person who acquires information and undertakes to keep it confidential should be under an obligation to do so whether he gave the undertaking before or after or at the time when he acquired the information.").

²⁰⁸ Zimmerman, *supra* note 36, at 363. Professor Zimmerman makes this statement in a general discussion advocating the legal recognition of "special confidential relationships." See *id.* Though it is not entirely clear, Professor Zimmerman seems to be referring to professional or fiduciary relationships. See *id.* at 363-64 (discussing, but not explicitly limiting, the usefulness of "rights of contractual confidentiality . . . [i]n the context of private commercial and professional services"). Regardless of its context, however, the statement holds true for all explicit agreements of confidentiality, even those in private relations.

²⁰⁹ See *infra* notes 295-297 and accompanying text.

²¹⁰ The Supreme Court also agrees on this point. See *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) (rejecting a confidant's First Amendment defense to a confidentiality agreement, emphasizing that the agreement was "express" and "voluntary").

²¹¹ See *infra* notes 256-257 and accompanying text.

that such an obligation imposes should not be thrust upon an individual unwillingly.²¹²

The proposed tort would, therefore, protect information whose transfer has been localized into a small number of confidants²¹³ who have been explicitly obligated to a duty of confidentiality. Provided the other elements of the tort are satisfied, a confidant who breaches this duty by intentionally publicizing the information (or was negligent in allowing it to be publicized) will be liable to the confider for any injuries suffered from the publicity. For example, had the rape victim in *Florida Star v. B.J.F.*²¹⁴ obtained an agreement from the police department that her identity be kept confidential, she would have had a cause of action against it for negligently disclosing that information to the press.²¹⁵

Furthermore, because the proposed duty of confidentiality attaches only if an individual is bound by an explicit agreement, no obligation of confidentiality will attach to third parties who receive information subject to an obligation of confidence, but who have not explicitly assumed this obligation themselves. That is, an individual not a party to a confidential relationship could not be held liable for revealing information even if it is inherently private or she knows it is confidential.²¹⁶ Although British case law holds

²¹² The Law Commission agreed with this proviso, concluding that: provided the defendant would be liable if he had himself disclosed the information . . . he should be equally liable if the disclosure or use results from his negligence. The proviso is important so as to make clear that a person does not have a duty of reasonable care thrust upon him in respect of the handling of unsolicited information.

LAW COMMISSION REPORT, *supra* note 63, ¶ 6.57.

²¹³ For an exploration of proof problems presented by multiple sources, see *infra* note 234.

²¹⁴ 491 U.S. 524 (1989). For a more complete explanation of the facts of this case, see *supra* notes 154-156 and accompanying text.

²¹⁵ It is not clear from the facts in *Florida Star* whether the rape victim made any request of confidentiality from the State. In fact, she may have. The opinion's failure to discuss this point merely highlights the differences between the breach of confidence and invasion of privacy approaches to privacy protection. The proposed tort offers a remedy only to those individuals who have taken positive steps (i.e., entering into a confidentiality agreement) to protect their privacy. Failure to do so is dispositive. In invasion of privacy jurisprudence, however, the manner in which the information is divulged is not important. The Court's failure to discuss the circumstances under which the information was divulged is therefore not surprising.

It is, in any event, unrealistic to apply the proposed tort to the facts of privacy cases. After all, the facts may have been different if a breach of confidence cause of action were recognized in the plaintiff's jurisdiction. For example, had the proposed tort been available to the rape victim in *Florida Star*, she probably would have requested confidentiality.

²¹⁶ If, however, the third party has received the information as a result of a

third parties liable for revealing information that they know or should know is subject to an obligation of confidence,²¹⁷ this practice would not be constitutionally acceptable in this country. As will be demonstrated in Part IV, it is only through an explicit waiver that individuals relinquish their First Amendment rights to speak and publish truthful information.²¹⁸

This "third-party" exception to the proposed duty of confidentiality will essentially create a newsperson's privilege. Members of the press will be able to print with impunity any information which they have not agreed to keep confidential.²¹⁹ Although it could be argued that a reporter who knowingly makes a source reveal information bound by a duty of confidence has unlawfully acquired information, to hold a journalist liable depending upon her "knowledge" of the confidentiality of the information received from a source would have an impermissible chilling effect upon the publication of legitimate news.²²⁰ Just as the First Amendment

confidant's disclosure, and the third party publicizes the information, the confider may be able to hold the confidant liable for the disclosure. See *infra* notes 258-269 and accompanying text.

²¹⁷ See, e.g., *Duchess of Argyll v. Duke of Argyll*, [1965] 2 W.L.R. 789 (Eng. Ch. 1964) (holding that a newspaper which receives from a confidant information it knows to be confidential is liable to the confider). See generally LAW COMMISSION REPORT, *supra* note 63, ¶ 4.11-12 (reviewing British case law on this point).

The Supreme Court in *Florida Star* might also have been indicating its openness to this possibility when it asserted that "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its non-consensual acquisition." 491 U.S. at 534. This assertion could be interpreted to mean that if the information is derived from a private (rather than public) source, then the balance between press and privacy interests would be struck differently, that is, liability would be extended to the press if they acquired private information through "non-consensual acquisition." Because the Court did not give any indication of what it meant by "non-consensual acquisition" or "some circumstances," it is uncertain whether a source breaching a duty of confidentiality would fall within this "non-consensual acquisition" category. But see *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (holding that a newspaper could publish information about the proceedings of the state judicial review commission despite a criminal statute barring disclosure of such information).

²¹⁸ See *infra* notes 304-305 and accompanying text.

²¹⁹ The possibility that a member of the press could be held liable for breaching her own agreement of confidentiality with a confider was recently answered by the Supreme Court in *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991). In that case, the Court held that two journalists could be held liable for breach of a confidentiality agreement with a source. See *id.* at 2516. Calling the decision's detrimental effects on First Amendment rights "constitutionally insignificant," the Court held that the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law. See *id.* at 2519. See *infra* notes 321-347 and accompanying text for a discussion of this case.

²²⁰ See *Hill*, *supra* note 87, at 1279 ("A person supplying information to a

forbids burdening the press with determining the "newsworthiness" or "offensiveness"²²¹ of information, it would also prohibit requiring the press to determine whether information is subject to a duty of confidence.²²²

Still, one can argue that the scope of the duty of confidentiality defined by the proposed tort's "agreement" standard would result in only very limited protection of information that individuals would like to keep private; individuals may want to keep private a significant amount of information that would not lend itself to an agreement of confidentiality. For example, under the proposed tort it would not be possible to hold confidential embarrassing public activities that are witnessed by too many people for the individual to bind in confidence or by only one person that the individual does

newspaper may have obtained such information through a variety of [tortious] ways Yet it is unthinkable that a newspaper should incur liability solely because it has knowledge that the information is 'tainted' because so derived.").

The court in *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969), was also in accord on this point. In that case, the court refused to extend an invasion of privacy claim to members of the press who had received and published documents that they knew "had been removed without authorization." *Id.* at 705. The court asserted that a member of the press

approached by an eavesdropper with an offer to share in the information gathered through the eavesdropping would perhaps play the nobler part should he spurn the offer and shut his ears. However, it seems to us that at this point it would place too great a strain on human weakness to hold one liable in damage who merely succumbs to temptation and listens.

Id. The court would have been truer to the facts of the case had it extended its language to include not only "listening" but also "publishing" the information. Still, the court's point is clear: third-party liability for the press based on knowledge that the information was confidential is impermissible.

²²¹ See *supra* notes 125-131 and accompanying text.

²²² Imposing third-party liability on the press would also destroy the delicate "adversarial game" balance of the breach of confidence tort. See *infra* notes 385-392 and accompanying text for a discussion of this "adversarial game." As Professor Bickel remarked:

[A]s I conceive the contest established by the First Amendment, . . . the presumptive duty of the press is to publish, not to guard security or to be concerned with the morals of its sources. Those responsibilities rest chiefly elsewhere. Within self-disciplined limits and presumptively, the press is a morally neutral, even an unconcerned, agent as regards the provenance of newsworthy material that comes to hand; and within like limits and again presumptively, the press is not the judge or the definer of the national interest. It is, rather, one party to a contest. Its chief responsibility is to play its role in that contest, for it is the contest that serves the public interest, which is not wholly identified either with the interest of the government of the day, or of the press.

ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 81 (1975).

not know was a witness. Additionally, many individuals would forgo the protection offered by the tort simply because they do not wish to "contractualize" their private relations,²²³ thereby leaving all private information that they have shared with intimates exposed to the possibility of publicity. Finally, the tort's remedy is necessarily dependent on there being a human source of the information that can agree to the obligation of confidentiality. Therefore, the tort potentially would not cover printed information and computer data bases.²²⁴ Although these are only three of the possible limitations on the scope of the protection offered by the proposed tort,²²⁵ they cut a wide swath. Indeed, the proposed tort would provide only limited protection of information, much less than that of the private-facts tort, private facts being more numerous than confidential ones.²²⁶

The critique that the proposed tort's scope is confined, while obviously accurate, misses the point, however. A duty of confidentiality is essentially a duty not to speak. In light of the tort's potential infringement of First Amendment rights,²²⁷ it is the limit of the tort's obligation which is its strength. The requirement of "agreement" and the limitations it imposes on who and what can be bound by a duty of confidence is necessary in order to overcome these First Amendment concerns.²²⁸ Although the broader notion of

²²³ See *infra* notes 236-240 and accompanying text for a discussion of this issue.

²²⁴ There is, of course, the possibility that an individual could get an agreement of confidentiality from the "caretakers" of these information sources. However, the combination of the individual's ignorance of who has this information, the large number of data collection agencies that share it, and their probable resistance to confidentiality agreements with respect to information already in their possession, would probably make any attempt to control the dissemination of this information with the proposed tort futile.

²²⁵ For other limitations on the proposed tort's scope, see *infra* notes 378-384 and accompanying text.

²²⁶ Private facts, the information protected by the private-facts tort, encompass a very wide amount of information. The *Restatement* includes as examples: "[s]exual relations, . . . family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget." RESTATEMENT (SECOND) OF TORTS, *supra* note 18, § 652D cmt. b. Because these details of a person's life are "inherently" private they could potentially be protected by the private-facts tort; whether the proposed breach of confidence tort would protect them would depend on whether the information was divulged subject to an agreement of confidentiality.

²²⁷ For a detailed explanation of the First Amendment challenges to the proposed breach of confidence tort, see *infra* notes 295-392 and accompanying text.

²²⁸ For an exploration of the "agreement" requirement's interrelation with freedom of speech and press, see *infra* notes 298-348 and accompanying text.

privacy underlying the private-facts tort may *potentially* protect a wider scope of information, this statement ignores the fact that a right, no matter how broadly defined in theory, is worth nothing if it is not enforced.²²⁹ As one commentator remarked: "[if breach of confidentiality] succeeds in more closely safeguarding privacy by rules that might actually be enforced, it will fulfill a promise that the present [private-facts] . . . tort consistently disappoints."²³⁰

Beyond the constitutional justification for the tort's limited scope, the question arises as to why a society, which values privacy, should be satisfied with such limited privacy protection. The answer to this inquiry can be found in the notion of personal responsibility for private facts on which the proposed breach of confidence tort rests. While breach of confidence may be less protective of privacy interests, it produces a more rational result, in that it puts the burden of protecting those interests where it belongs—on the individual. As one commentator remarked, "[i]n order to preserve confidentiality, a person must take reasonable care to keep the information secret. If, for example, confidential documents are left unattended in a public place or a person blurts out information in public, he cannot insist on the recipient of that information keeping it to himself."²³¹ The breach of confidence tort will provide protection only to those who most value it—those who will 1) go to the pains of imposing the duty by entering into "agreements", 2) be discrete in the number of people to which this confidence is disclosed, and 3) avoid exposing intimate behavior to public view.²³² The proposed tort is very different from the private-facts tort, which burdens the media with the double duty of both determining what information is private and protecting it.²³³ To demand restraint when we have not shown any is too much to ask of a media responding to the desires of a naturally curious public. Placing the responsibility for keeping secrets on the individual and not on the shoulders of the press or the rest of society seems a more rational approach to privacy protection.

²²⁹ For an explanation of the impotency of the private-facts tort, see *supra* notes 106-72 and accompanying text.

²³⁰ Bezanson, *supra* note 87, at 8.

²³¹ Thompson, *supra* note 62, at 8 (footnotes omitted).

²³² See Henry P. Lundsgaarde, *Privacy: An Anthropological Perspective on the Right to Be Let Alone*, 8 HOUS. L. REV. 858, 875 (1971) (questioning whether as many invasions of privacy would be possible without the "active collaboration" of people willing to disclose private facts).

²³³ See *supra* notes 118-124 and accompanying text.

One could also object to basing the duty of confidentiality on the existence of an "agreement" because of the difficulty of proving the terms of what will often be a verbal contract.²³⁴ In response, it should first be asserted that while a scant amount of evidence as to the agreement between the parties will obviously be a factor that the courts will weigh in adjudicating breach of confidence claims, this is an objection that only goes to the problems of proof, not to the merits of having such a cause of action in the first place. Additionally, in comparison to the subjective, value laden *prima facie* case that confronts a private-facts plaintiff, the breach of confidence proof problems seem positively concrete. Debate over the more circumscribed questions of consent, intent, and conduct of the parties will most probably prove more objective and equitable than those encountered trying to prove "newsworthiness" and "offensiveness."²³⁵

A final possible objection to the scope of the duty of confidentiality imposed by the tort is that "contractualizing" private relationships—relationships which are supposed to be based on mutual trust and respect—is undesirable.²³⁶ A number of responses undercut this critique, however. First, although switching from the invasion of privacy to breach of confidence approach will admittedly require members of society to change how they go about protecting their

²³⁴ See Vickery, *supra* note 35, at 1460 (asserting that a general "confessor-confidant" approach to breach of confidence would raise a "potentially difficult evidentiary determination of whether a confidential relationship existed at all, whether the information was learned within it or independently, and whether or not there was consent").

A similar proof problem will confront a confider who has disclosed the information in question to a number of different confidants and does not know which was the source of the publicity. On the other hand, the extent of this problem is within the confider's control. Since both the likelihood of breach and the difficulty of prosecuting a claim will increase as the number of confidants increase (because the more potential sources of the information there are, the more likely it is that the individual confidant will feel able to disclose the information without being caught, and the more difficult it will be for the confider to prove which confidant breached), the responsibility of limiting the potential for publicity and the difficulty of proving breach rests with the confider. Successful prosecution of the tort will depend on the confider treating with discretion the information she wants kept private.

²³⁵ See Bezanson, *supra* note 87, at 71-72 (stating that a breach of confidence cause of action would shift the focus of adjudication "from open-ended issues of value to the more circumscribed questions of consent, waiver, and an obligation of confidentiality owed by one possessing such information").

²³⁶ See Katz, *supra* note 1, at 844 ("People are naturally reluctant to transform relationships otherwise based on mutual respect and trust into contractual relationships . . .").

privacy, such a change is worthwhile in that the proposed breach of confidence tort will provide a measure of privacy protection where the current private-facts tort provides none. Second, to the extent that the fear underlying this complaint is that private "gossip" will become legally actionable, it is unfounded. The "publicity" requirement of the proposed tort would ensure that liability would not be imposed for discrete breaches of confidence that do not result in public knowledge.²³⁷ Third, despite the potentially uncomfortable imposition of a contract to protect one's secrets, similar unpleasant obstacles have been overcome in other areas of law—most notably, antenuptial agreements commonly used to protect property interests.²³⁸ Finally, although the imposition of a legally enforceable duty of confidentiality would result in some loss of trust between confider and confidant,²³⁹ recognition of the tort will not force such a sacrifice on anyone who does not want it. Potential confidants can decline the invitation to confidence and potential confiders can either not extend the invitation or extend it and not enforce it. Furthermore, some individuals' desire to keep information confidential may outweigh any countervailing deterioration in trust.²⁴⁰ Since weighing the interests at stake is inherently subjective, the determination should be left to the individual.

²³⁷ For additional discussion of the "publicity" requirement, see *infra* notes 258-269 and accompanying text.

²³⁸ See, e.g., *In re Marriage of Dawley*, 551 P.2d 323, 325 (Cal. 1976) (upholding an antenuptial agreement).

²³⁹ Note that British common law has held personal duties of confidence legally cognizable for over two decades, without any corresponding breakdown in personal relationships. See *Duchess of Argyll v. Duke of Argyll*, [1965] 2 W.L.R. 789, 797 (Eng. Ch. 1964) (holding that a duty of confidence is implicit in the marital relationship and thereby enjoining a wife from publishing her husband's secrets).

²⁴⁰ Two possibilities come to mind where the balance may be struck in favor of confidentiality. First, many individuals who reveal confidential information to government agencies or other institutions may want to take advantage of the tort because the sacrifice of trust will not be painful in such instances. In addition, public figures, who are more likely to be subject to invasions of privacy, may find it beneficial to bind their intimates regardless of the loss of trust that may occur. See Katz, *supra* note 1, at 844 ("While such precautionary contracts may prove to be offensive initially—and perhaps even throughout a relationship—a party wishing to safeguard his or her interests may have to sacrifice part of the goodwill of the relationship in order to do so.").

2. Inaccessible and Personal Information Requirements

The proposed tort stipulates that only "inaccessible, personal information" can be bound by the tort's obligation of confidentiality.²⁴¹ The "personal" information requirement is meant to distinguish the protection provided by the proposed tort from that provided by the settled law of trade secrets and copyright. The proposed tort is not meant to be an expansion of these areas of the law; the former protects information that is significant to an individual's identity or privacy, the latter protects business or institutional secrets.²⁴² The requirement also reflects the belief of the Court that corporations and institutions do not enjoy the same level of protection of privacy and speech that individuals do.²⁴³ The practical significance of the requirement is that corporations, the government, and other institutional bodies will not be able to use the tort to try and control the public disclosure of organizational secrets. No liability will attach to institutional whistleblowers,²⁴⁴ though it would allow an organization to bind in confidence a third party to whom the corporation discloses personal information. For example, a credit agency revealing an individual's credit history to a retailer may bind the retailer in confidence.

"Inaccessible" refers to any information that is confidential or not already within the public knowledge.²⁴⁵ Thus, on this ele-

²⁴¹ See *supra* text accompanying note 202.

²⁴² See *supra* note 65.

²⁴³ See *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986) (plurality opinion). In dissent, Justice Rehnquist asserted what is probably now the majority opinion:

[B]ecause the interest on which the constitutional protection of corporate speech rests is the societal interest in receiving information and ideas, the constitutional interest of a corporation in not permitting the presentation of other distinct views clearly identified as those of the speaker is de minimis This argument is bolstered by the fact that the two constitutional liberties most closely analogous to the right to refrain from speaking—the Fifth Amendment right to remain silent and the constitutional right of privacy—have been denied to corporations based on their corporate status.

Id. at 34 (Rehnquist, J., dissenting); see also *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777, 779 n.14 (1978) (asserting that "purely personal" guarantees . . . are unavailable to corporations and other organizations" and declining to hold that "corporations have the full measure of rights that individuals enjoy under the First Amendment").

²⁴⁴ These would include parties that reveal government misconduct, such as those that disclosed the Watergate and Iran-Contra scandals.

²⁴⁵ Present English breach of confidence law agrees on this point: it does not appear to provide protection against disclosure of information already in the public domain, at least in cases where the duty of confidentiality arises in equity (that is,

ment the tort shares a requirement that is similar to the private-facts tort's "private facts" requirement.²⁴⁶ The transfer of this element into the breach of confidence tort is a necessary response to First Amendment interests.²⁴⁷ Even if the confidant has waived his right to speak, the First Amendment would not acknowledge such a waiver if non-disclosure does not incur substantial benefit to the confider.²⁴⁸ If the information is widely known, the confidant holding this information in confidence would only marginally benefit the confider—little harm can flow from further disclosure of public information. Thus, the confidant in such a situation could breach the duty of confidence with impunity.

The difficulty of defining "inaccessibility," however, might make courts reluctant to enforce the proposed breach of confidence tort. The uncertainty inherent in this element, and the potential for

where the duty has been inferred from the relationship). See LAW COMMISSION REPORT, *supra* note 63, ¶ 4.15-20. In addition, the Law Commission has recommended that any codification of England's breach of confidence law should include a "public domain" exemption. See *id.* ¶ 6.74(i).

English common law, however, has held duties of confidence arising in contract to lie outside the "public domain" exemption. See *id.* ¶ 4.21 ("[T]here is no doubt that a contract can provide for information to be kept confidential . . . whether or not that information is in or comes into the public domain."). Still, as another commentator noted, "in practice, it is difficult to see how any meaning or effect could be given to such an obligation by the courts. The confider could not establish a right to damages for the confidant's use of something which was freely available to everyone." GURRY, *supra* note 34, at 65; cf. LAW COMMISSION REPORT, *supra* note 63, ¶ 6.74(i) ("To . . . enjoy[] the protection of . . . breach . . . of confidence, the information must be information which is not in the 'public domain.' . . . [I]nformation is in the public domain when, having regard to its nature and the circumstances of its disclosure, it is generally available to the public.").

²⁴⁶ See RESTATEMENT (SECOND) OF TORTS, *supra* note 18, § 652D cmt. b ("There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public.").

²⁴⁷ See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) ("[O]nce the truthful information [is] 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its dissemination.") (citing *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (per curiam)).

²⁴⁸ See *United States v. Marchetti*, 466 F.2d 1309, 1313, 1318 (4th Cir.) (stating in dictum that "the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees It precludes such restraints with respect to information which is unclassified or officially disclosed Information, though classified, may have been publicly disclosed. If it has been, [the defendant] should have as much right as anyone else to republish it"), *cert. denied*, 409 U.S. 1063 (1972); see also *Snepp v. United States*, 444 U.S. 507, 521 n.11 (1980) (per curiam) (Stevens, J., dissenting) (stating that "[i]t is noteworthy that the Court does not disagree with the Fourth Circuit's view in *Marchetti* . . . that a CIA employee [who has signed a confidentiality agreement] has a First Amendment right to publish unclassified information").

chilling the confidant's freedom of speech,²⁴⁹ could create an incentive for courts to contract the "inaccessibility" element to the point where it undermines the proposed breach of confidence tort, much like the "newsworthiness" defense has emasculated the private-facts tort.²⁵⁰ Determining when information has entered the public domain, however, constitutes a more objective inquiry than distinguishing between "newsworthiness" and "offensiveness." In time, quantifiable lines may be drawn around which both confider and confidant can order their actions, thereby minimizing the potential chilling effect on protected (i.e. in this case "accessible") speech. In addition, the situation presented by the breach of confidence tort is also conceptually different from that presented by the private-facts tort. A confider would presumably have some control over the information entering the public domain in the first place;²⁵¹ the private-facts plaintiff, on the other hand, has no such control over whether or not a fact is "newsworthy." The outcome of whether or not information is "accessible" is, therefore, at least partially in the hands of the confider.

In addition, the "inaccessibility" requirement presents the potential problem of a confidant using her knowledge of the confidences disclosed to her as a guide to public sources of the information, thereby justifying an exemption from her duty of confidentiality. British courts that have struggled with this "bad faith confidant" problem have developed a test of "inaccessibility" that pivots on whether the information can "only be reproduced at the cost of time, labour, and effort."²⁵² If adopted, this test would help distinguish between information that is easily accessible, and therefore privileged, and information which the confidant went searching for in an effort to create a privilege for herself.

²⁴⁹ See *infra* notes 298-348 and accompanying text.

²⁵⁰ See *supra* notes 125-131 and accompanying text.

²⁵¹ See *supra* notes 231-233 and accompanying text.

²⁵² GURRY, *supra* note 34, at 71. The Law Commission Report phrases the test as follows: "Information should not be treated as being in the public domain where it is only accessible to the public after a significant contribution of labour, skill or money has been made." LAW COMMISSION REPORT, *supra* note 63, ¶ 6.74(ii).

3. Unauthorized Injurious Disclosure and Duty of Care

The proposed tort requires the confidant's disclosure to be "unauthorized," "injurious," and made either "intentionally or negligently."²⁵³ The "unauthorized" requirement allows for the possibility that the confider may wish to waive the confidant's duty of confidentiality with regard to certain people and situations. By allowing such authorization, this element ensures that the confidant's waiver of her right to speak is no broader than necessary. Due to the necessity of clearly delineating the boundaries of tortious conduct, however, only an explicit exemption from confidentiality will qualify as a defense.²⁵⁴ If the confider does not make a careful delineation of her expectations regarding how the information can be used, the default should be in her favor: that is, *any* disclosure should be considered "unauthorized."

The requirement of "injurious" disclosure is also unproblematic. It fulfills the general requirement of tort law that detriment to the plaintiff, in this case the confider, be substantiated before a cause of action is established. In keeping with fundamental tort principles, the confidant would compensate the confider for *any* injuries that were sustained as a result of her breach of duty of confidence, restricted only by the doctrine of "proximate cause."²⁵⁵

The prohibition of a "negligent" breach would impose a duty of care concerning the information that the confidant agrees to hold in confidence. The confidant would have a duty not only not to publicize the information, but also to ensure that the information is protected from inadvertent disclosure. The necessity of this requirement is clear: if only intentional breaches of the duty of confidence were actionable, then it would be rather easy for a mischievous confidant to "accidentally" leave confidential information where the media could find it. Though English case law on this point is not clear,²⁵⁶ the Law Commission has suggested that a

²⁵³ See *supra* text accompanying note 202.

²⁵⁴ See GURRY, *supra* note 34, at 5 (saying with regard to the general rule of "disclosure" in English breach of confidence that "[t]his requirement is satisfied when it is shown that the confidant has made an unauthorized use of the information by using it for a purpose other than that for which it was imparted to him").

²⁵⁵ See PROSSER & KEETON, *supra* note 19, at 272-80.

²⁵⁶ See LAW COMMISSION REPORT, *supra* note 63, ¶ 4.14 (finding no clear answer in English common law to the question of "whether a person who is under a duty of confidence, but is not in any contractual relationship with the person to whom it is owed, can be liable for breach of confidence if the information to which the duty relates is disclosed or used owing to his negligence"). British law does hold the

duty of care be incorporated into any future codification of the breach of confidence cause of action.²⁵⁷

4. The "Publicity" Requirement

This discussion of the proposed tort ends with a delineation of potentially its most difficult element: the requirement that the "disclosure results in the publicity"²⁵⁸ of the information held in confidence.²⁵⁹ This requirement, in addition to the "agreement" requirement,²⁶⁰ is an attempt to accommodate the natural human propensity to gossip by exempting from liability isolated, discrete breaches of confidence. As one court stated, "[a] cause of action can not [sic] lie each time someone succumbs to the temptation to break a confidence and whisper a juicy rumor."²⁶¹ The rationale behind this distinction is perhaps more practical than princi-

confidant liable for negligent breach if she is bound by a *contractual* duty of confidence. See *Weld-Bundell v. Stephens*, 1920 App. Cas. 95 (appeal taken from Eng.) (holding accountant liable for breach of duty of confidence when he negligently left his confidential papers with a client).

²⁵⁷ See LAW COMMISSION REPORT, *supra* note 63, ¶ 6.59(i) (recommending that "a person who is under [a duty of confidence] . . . should also be under a duty to take reasonable care to ensure that unauthorized disclosure or use does not take place").

²⁵⁸ See *supra* text accompanying note 202. The *Restatement's* definition of "publicity" as the disclosure of the confidential information to "so many persons that the matter must be regarded as substantially certain to become one of the public knowledge," RESTATEMENT (SECOND) OF TORTS, *supra* note 18, § 652D cmt. a, would seem adequate here. Any disclosure in an instrument of mass media would fulfill the "publicity" requirement.

Though this element is one that the proposed tort shares with the private-facts tort, the "publicity" requirement in the breach of confidence tort does not focus liability on the press; it focuses liability on the confidant/source of the information. Its use in the proposed tort is not as constitutionally problematic in that it focuses liability on an individual who has waived her First Amendment rights. See *supra* notes 298-348 and accompanying text.

²⁵⁹ English common law does not attach any requirement of "publicity" to the disclosure of confidential information. Any disclosure, even to a single friend, is potentially actionable. Such a formulation of the tort is of course possible only in a country that does not have a First Amendment.

²⁶⁰ In addition to the publicity requirement, the "agreement" requirement, see *supra* notes 204-240 and accompanying text, would also alleviate the tort's conflict with First Amendment interests by distinguishing the class of confidential information from casual communications. Furthermore, it would put the confidant on notice of what information is and is not covered, alleviating any tendency to chill protected speech. See *supra* note 207 and accompanying text.

²⁶¹ *Blair v. Union Free Sch. Dist. No. 6*, 324 N.Y.S.2d 222, 228 (Dist. Ct. 1971); See also *Vickery*, *supra* note 35, at 1458 ("Human weakness . . . cannot in every case be remedied by bringing the force of the state's judicial machinery to bear upon the idle gossipier.").

pled;²⁶² subjecting "back-fence" gossip to liability would "create an impossible legal tangle."²⁶³ In addition, holding individuals liable for isolated, discrete breaches of confidence would constitute a very heavy, and potentially unconstitutional state intrusion into private affairs. The publicity requirement would ensure that the imposition of liability would be limited to only egregious breaches: disclosures that result in the confidential information becoming public knowledge. Admittedly, the line drawn here is not as fixed as that created by the other elements of the tort in that "publicity" is difficult to clearly define. The potential for constitutional and

²⁶² The line drawn by this requirement stands to leave some very sympathetic plaintiffs without a remedy. One can imagine situations where the greatest harm could result from the disclosure of a confidence to just one other person. See, e.g., *Nagy v. Bell Tel. Co.*, 436 A.2d 701 (Pa. Super. Ct. 1981) (private-facts case holding that telephone company's disclosure of plaintiff's telephone number to her estranged and abusive husband did not constitute publicity). In addition, as Professor Zimmerman puts it, "[i]t 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." Zimmerman, *supra* note 36, at 339.

Based on similar reasoning, the Michigan Supreme Court in *Beaumont v. Brown*, 257 N.W.2d 522 (Mich. 1977) advocated an erosion of the private-facts tort's "publicity" requirement:

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.

Id. at 531 (cited in Zimmerman, *supra* note 36, at 339 n.258). The fact that the information was disclosed in breach of confidence would also militate for the availability of a cause of action; unlike in the private-facts cases, in the breach of confidence situation the confidant is not only disclosing information that is presumptively private, but she is also breaching a confidence to do it.

Still, from the author's point of view, a rule which runs opposite to basic human nature and community mores and tries to control every discrete breach of confidence would seem as unlikely to be respected by society as the Eighteenth Amendment. See U.S. CONST. amend. XVIII, § 1 (prohibiting the "manufacture, sale, or transportation of intoxicating liquors within . . . the United States"), repealed by U.S. CONST. amend. XXI, § 1; see also BLOUSTEIN, *supra* note 137, at 20 (arguing for the private-facts publicity requirement by asserting that an individual's "human dignity," which the private-facts tort was created to protect, is not harmed when friends change their opinion of us, but only when we are "made a public spectacle"); *infra* note 373 (discussing the constitutionality of the "publicity" requirement).

²⁶³ Zimmerman, *supra* note 36, at 337.

practical difficulties if the tort did not have the publicity element,²⁶⁴ however, argues strongly in favor of its existence.

An important question needs to be raised at this point as to what the confidant's *mens rea* should be as to the "publicity" requirement for liability to attach: must the confidant intend that her disclosure results in publicity, or should liability incur regardless of her intent if the disclosure does indeed result in "publicity"? The line drawn here is probably the most difficult one the proposed tort presents. While requiring intent as to the publicity would seem to be the more constitutionally permissible approach,²⁶⁵ it would effectively obliterate the stricter requirement of negligence as to the disclosure itself.²⁶⁶ It would be difficult, indeed, for the confidant to both negligently disclose information and intend for it be publicized. Because the negligence standard as to the disclosure ensures the good faith of the confidant,²⁶⁷ denying the confidant scienter as to the publicity prong seems necessary.

It must be kept in mind, however, that the purpose of the tort is to reach an equitable accommodation of the privacy and First Amendment interests that are in conflict.²⁶⁸ The tort strives to accomplish this goal by subjecting the source, rather than the publisher of confidential information to liability. It is not attempting, however, to regulate isolated, private occasions of gossip. Therefore, to the extent that a confidant did not actually mean for her discrete disclosure to result in publicity of the confidential information, imposition of liability would not seem to satisfy the underlying aim of the tort, and would potentially chill personal relations that it does not mean to disturb. In addition, it does not seem equitable for the confidant to bear alone the burden that a friend to whom she has discretely disclosed the confidential information will publicize it when the confidant does not herself intend publicity of the information; given the natural human propensity to gossip, the confider must also be seen as assuming some of the risk that the confidant's isolated disclosure to an associate could result in unintended publication.

²⁶⁴ See *supra* notes 260-263 and accompanying text.

²⁶⁵ See *infra* notes 300-305 and accompanying text.

²⁶⁶ See *supra* notes 256-257 and accompanying text.

²⁶⁷ That is, it deters the confidant from "accidentally" leaving the confidential information where the media might "find" it. See *supra* notes 256-257 and accompanying text.

²⁶⁸ See *supra* notes 188-193 and accompanying text.

Therefore, in order to reach the goals of the tort and to avoid the problems inherent in an approach that would require intent as to the publicity element, negligence should also be the mens rea of the publicity requirement. The confider would have to show that the confidant was negligent in making the discrete disclosure which unintentionally resulted in publicity, that is, that it was negligent for the confidant to disclose the information to a person who she should have known would publicize the information. Although the adoption of negligence as the mens rea of the publicity element would necessarily increase the confidant's risk of liability, the confidant could insulate herself from this risk by requesting confidentiality from any individual to whom she discloses the confidential information. In such a case, the individual would become a secondary confidant and the original confidant a primary confidant/secondary confider. If the secondary confidant then publicized the information, the primary confidant/secondary confider could hold her liable for breach of confidence. Although, the primary confidant/secondary confider would not necessary be "off the hook" in that the original confider could potentially hold her liable for breach of confidence, the secondary duty of confidentiality would serve to deter any publicity of the information from the secondary confidant, thereby giving the primary confidant/secondary confider (who presumably did not intend her disclosure to result in publicity) a measure of security from the possibility of liability, and a potential remedy, if the information is in fact publicized by the secondary confidant.²⁶⁹

B. *Exceptions to the Duty of Confidentiality*

Some commentators have argued that too much secrecy in a society is undesirable.²⁷⁰ Admittedly, situations exist where the needs of society outweigh the confider's interest in confidentiality

²⁶⁹ In such an instance, a chain of potential liability would be forged between the primary confider, primary confidant/secondary confider and secondary confidant, with each party being liable to the confider to whom she promised confidentiality.

²⁷⁰ See SISSELA BOK, *SECRETS* 135 (1983) (asserting that the values protected by confidentiality are eroded by practices of secrecy); Katz, *supra* note 1, at 844 (confidentiality agreements between "public figures" and their associates would "serve to deny society creativity and knowledge that might otherwise inure to it"); see also Alan Donagan, *Justifying Legal Practice in the Adversary System*, in DAVID LUBAN, *THE GOOD LAWYER* 123, 144 (1983) (questioning whether confidentiality in the lawyer-client relationship preserves a client's "dignity"); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 608-09 (1985).

and will justify a breach of that duty. In addition, the demands of the First Amendment may restrict the imposition of liability. Privileges²⁷¹ based on societal interests other than freedom of expression will be explored briefly here; the possibility of exceptions based on the First Amendment will be dealt with in Part IV.²⁷²

It is beyond the scope of this paper to delineate fully the situations where public policy demands that the interest served by enforcing a confidence are outweighed by other more compelling societal interests. Some general comments need to be made, however. Most importantly, the British approach of allowing only a single "public interest" privilege to the duty of confidence that permits a court to balance the respective public interests in confidentiality and disclosure is inadequate for the proposed breach of confidence tort.²⁷³ The proposed tort's strength is that—in keeping with the Supreme Court's move towards a clear, line-

²⁷¹ In this context "privileged" is meant to denote information which, because of public policy and First Amendment interests, should not be subject to a duty of confidentiality.

²⁷² See *infra* notes 295-392 and accompanying text.

²⁷³ See, e.g., *Schering Chems. v. Falkman, Ltd.*, [1981] 2 W.L.R. 848, 864-65 (Eng. C.A.) (applying the balancing test and determining that the public interest outweighs the private interest); see also LAW COMMISSION REPORT, *supra* note 63, ¶ 6.84(i) (suggesting that "[i]nformation should only enjoy the protection of the action for breach of confidence if, after balancing the respective public interests in confidentiality on the one hand and in disclosure or use of the information on the other, the information is found to merit such protection").

This exception to the duty of confidentiality began in the 1856 British case *Gartside v. Outram*, 26 L.J. Ch. 113 (1856), in which the court asserted rather enigmatically that "[t]here is not confidence as to the disclosure of iniquity." *Id.* at 114. Since that time, courts have attempted to more clearly define the exception to the duty of confidentiality. See, e.g., *Beloff v. Pressdram*, [1973] R.P.C. 765 (Eng.). The *Beloff* court held that:

The defence . . . clearly covers . . . disclosure which . . . must be disclosure in the public interest of matters, carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity.

Id. at 783-84; see also *Initial Servs. Ltd. v. Putteril*, [1967] 3 W.L.R. 1032, 1037-39 (Eng.) (applying the exception to allow disclosure of an anti-competitive arrangement among laundries).

U.S. courts introducing the proposed tort could learn from the British example and attempt at the start to clarify the specific situations where the interest in disclosure outweighs the interest in confidentiality. Such limiting of the scope of the tort's exceptions would ensure that courts are not permitted to engage in ad hoc balancing of the interests involved—an approach that proved fatal to the private-facts tort. See *supra* notes 125-131 and accompanying text.

drawing approach to resolving the conflict between privacy and First Amendment interests²⁷⁴—it leads to relatively objective, clearly drawn lines around a limited amount of information that should not be disclosed for publication. To impose a broad “public interest” exception to liability would subject the tort to judicial ad hoc balancing that, as the private-facts cases demonstrated, would result in subjectivity, vagueness, and ultimately either chilling of or total capitulation to First Amendment interests.²⁷⁵ The privileges, like the elements of the tort, must therefore be as clearly drawn and circumscribed as is possible. More importantly, as one commentator has noted, the broad “public interest” privilege in British breach of confidence law is necessitated by the “potentially sweeping liability the English general duty of confidentiality would threaten absent [it].”²⁷⁶ Because, unlike its British counterpart, the proposed breach of confidence tort is already very limited in the scope of the duty it imposes,²⁷⁷ the information it protects,²⁷⁸ and its allowance for discrete disclosures,²⁷⁹ there is no similar need for a general exception to guard against overbreadth. The public interest has already been incorporated into the proposed tort’s elements; therefore, it does not need to overly influence the scope of its defenses. As one British commentator has remarked on England’s common law:

Breach of confidence provides a *limited* right to prevent losses of privacy in a legal system which does not recognize a general right to privacy. Why make this right subject to further restrictions? To date the law imposes, by way of defense, the limitation that a confidence will not be enforced where it relates to something *detrimental* to community interests. What is the justification for breaching confidences where not detriment, but some positive benefit, can be shown, and how is this justification to be measured? What is the measure of the values of information which justifies a breach of confidence?²⁸⁰

The introduction of a public interest exception to the proposed breach of confidence tort would result in vague and subjective

²⁷⁴ See *supra* notes 144-173 and accompanying text.

²⁷⁵ See *supra* notes 118-131 and accompanying text.

²⁷⁶ Vickery, *supra* note 35, at 1463. For an explanation of the broad scope of the British duty of confidence, see *supra* note 204.

²⁷⁷ See *supra* notes 204-240 and accompanying text.

²⁷⁸ See *supra* notes 241-252 and accompanying text.

²⁷⁹ See *supra* notes 258-269 and accompanying text.

²⁸⁰ GURRY, *supra* note 34, at 477 (footnotes omitted).

determinations similar to those that ultimately smothered the private-facts tort.²⁸¹ A general public interest exception to the proposed breach of confidence tort would be the death of this tort as well.²⁸²

As an alternative approach, the relatively clear privileges developed by American courts in professional breach of confidence cases should act as defenses for the proposed tort.²⁸³ The analogy between the two bodies of law is appropriate in that the duties of confidence imposed in both are limited in their scope,²⁸⁴ both bodies of law, therefore, share the goal of circumscribing the exceptions to the duty of confidentiality.²⁸⁵ Commonly recognized categories of information that have been privileged in this area of the law have included intimations that reveal the individual is contemplating activities that would be: dangerous to the public health or safety,²⁸⁶ or amount to fraud²⁸⁷ or a crime.²⁸⁸ Also

²⁸¹ See *supra* notes 118-131 and accompanying text.

²⁸² The Supreme Court's decision in *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991), also stands for the proposition that a public interest exception to a duty of confidence should not be permitted. The case involved the enforcement of a confidentiality agreement between two journalists and an "active Republican" associated with a candidate in the 1982 Minnesota gubernatorial race. See *id.* at 2515. Despite the fact that the confider was a "political source involved in a political campaign," *id.* at 2520 (Blackmun, J., dissenting), and that the confider's identity could have "expanded the universe of information relevant to the choice faced by Minnesota voters in the State's . . . gubernatorial election," *id.* at 2522 (Blackmun, J., dissenting), the majority held that the journalists/confidants should be held to their promise, relying on the fact that the restriction of their First Amendment rights had been "self-imposed." *Id.* at 2519. There was no discussion in the Court's opinion of the significance of the public's interest in this information. See *infra* notes 321-347 and accompanying text for further discussion of this case.

²⁸³ See generally Vickery, *supra* note 35, at 1463-66 (describing the privileges that courts have recognized in cases of professional confidence).

²⁸⁴ Compare *supra* notes 223-226 and accompanying text and *infra* notes 379-384 and accompanying text with Vickery, *supra* note 35, at 1463 ("[T]he American duty of [professional & fiduciary] confidentiality is a limited one . . .").

²⁸⁵ See Vickery, *supra* note 35, at 1463 (stating that there "is no . . . need for a general exception to guard against overbreadth" in fiduciary/professional confidences because the scope of the duty is "limited").

²⁸⁶ See, e.g., *Simonsen v. Swenson*, 177 N.W. 831, 832 (Neb. 1920) (holding that "[n]o patient can expect that if his malady is found to be of a dangerously contagious nature, he can still require it to be kept secret"). Some jurisdictions have even ruled that professionals have a legal duty to reveal a confidence. See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 342-49 (Cal. 1976) (holding that where a patient threatens in confidence to kill a third party the doctor must reveal that threat).

²⁸⁷ See, e.g., *Hague v. Williams*, 181 A.2d 345, 348-49 (N.J. 1962) (invalidating the doctor/patient privilege when the patient's parents fraudulently applied for life insurance for their sick child).

²⁸⁸ See, e.g., *State v. McCray*, 551 P.2d 1376, 1378-81 (Wash. Ct. App. 1976)

privileged are revelations that are demanded by a court,²⁸⁹ and those that are necessary in order for the confidant to protect herself from liability.²⁹⁰ This list is not exhaustive, and it will be up to the courts to refine and develop these and other privileges, while

(holding that once a bad check is passed, the issuer loses her expectation of privacy). The question of whether a confidant who merely suspects the confider is involved in criminal activity should be justified in revealing confidential information exposing the potential crime, is more difficult. Though innocent confiders will suffer harm from such an exception, a "suspected crime" privilege should probably be permitted. Technically, it is the courts, not individual witnesses, that determine whether a crime has been committed; therefore, to justify a confidant's disclosure only if a crime is in fact being revealed may impute an unrealistic degree of knowledge to the confidant. *But see* *Suburban Trust Co. v. Waller*, 408 A.2d 758, 764 (Md. Ct. Spec. App. 1979) ("[A]bsent compulsion by law, a bank may not make any disclosure concerning a depositor's account without the express or implied consent of the depositor.").

²⁸⁹ All citizens have an obligation to respond to the subpoena of a court or grand jury to answer questions relevant to a legal investigation:

For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.

8 WIGMORE ON EVIDENCE § 2192, at 70 (McHoughton rev. 1961) (footnote omitted); *see also* *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created or expansively construed, for they are in derogation of the search for truth.").

Some jurisdictions have recognized an exception to this general evidentiary principle in the case of information divulged in the context of a confidential relationship. *See, e.g.*, *Blau v. United States*, 340 U.S. 332, 333 (1951) (husband-wife relationship); *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983) (psychotherapist-patient relationship); *United States v. Hodge & Zweigh*, 548 F.2d 1347, 1355 (9th Cir. 1977) (lawyer-client relationship); *Cimijotti v. Paulsen*, 219 F. Supp. 621, 626 (N.D. Iowa 1963) (priest-penitent relationship). Such evidentiary exceptions have recently been on the wane. *See* *Dennis Pfaff, Privilege: A Principle in Peril*, L.A. DAILY J., Mar. 18, 1991, at A1 (citing erosions in the attorney-client, doctor-patient, and clergy-penitent privileges). Instead, courts have increasingly demanded the disclosure of confidential information in trials. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972) (holding that news reporters must respond to grand jury subpoenas even though they might be required to reveal a confidential source).

²⁹⁰ According to one commentator, the scope of this privilege has been severely restricted by the courts: "A party may be permitted to breach a confidence to the extent necessary to defend himself against charges of incompetence, protect himself against fraud, or perhaps to collect fees, but strict limits have been imposed by some courts." Vickery, *supra* note 35, at 1465 (citing *Hammonds v. Aetna Casualty & Sur. Co.*, 243 F. Supp. 793, 804 (N.D. Ohio 1965), which held that a doctor is not privileged to disclose patient confidences until after the patient has expressly indicated an intention to sue).

keeping in mind the caveat that any privileges that are created should be limited in scope and clearly defined.²⁹¹

It should be noted that this list of privileges does not include an exception for public or political figures, and it is this Comment's position that it should not. Although such personalities have been denied an action based on invasion of privacy,²⁹² a confidant of a public figure who breaches a duty of confidentiality by publicizing confidential information has not only denied the public figure her privacy but also her expectancy of confidentiality. The two interests are conceptually different; a confider who has arranged for confidentiality with an intimate has not only expressed a desire for privacy, but has also now relied on an assurance of confidentiality.²⁹³ So, while the public figure may have waived her privacy interest in the process of becoming a public figure (though even this concession is arguable), her expectancy of confidentiality based on her bargain with the confidant remains intact. The concept of waiver of privacy should not be stretched to deny the public figure her right to make such bargains. As one commentator said, "[p]ublic figures, because of their relative lack of privacy, have at least as great, if not greater, need to be secure in their confidential relationships as private individuals."²⁹⁴

IV. THE CONSTITUTIONALITY OF THE BREACH OF CONFIDENCE TORT

When new causes of action potentially chill the exercise of First Amendment functions, courts can be expected to be cautious in their enforcement of them.²⁹⁵ Normally, requiring individuals to

²⁹¹ See *supra* notes 273-82 and accompanying text.

²⁹² See *supra* notes 140-42 and accompanying text.

²⁹³ See Vickery, *supra* note 35, at 1434 (stating that enforcing duties of confidentiality protects the confider's "general interest in the security of the confidential relationship and his corresponding expectation of secrecy [and] his specific interest in avoiding whatever injuries will result from circulation of the information").

²⁹⁴ *Id.* at 1444-45; see also Katz, *supra* note 1, at 820. Katz notes:

A review of the contemporary reported cases in which a public figure has alleged injury from an unauthorized biography demonstrates that many of the plaintiffs who have taken their claims to trial have not had very strong claims, and further, have fought doctrine that has long been settled in favor of the press. Thus the precedents in this area of the law may not provide adequate representative models for a plaintiff who shows that confidence is breached and whose intimate secrets are publicly disclosed.

Id.

²⁹⁵ See William W. Van Alstyne, *First Amendment Limitations on Recovery from the*

keep their promises does not implicate First Amendment concerns. An obligation of confidentiality, however, is a promise not to speak. Because freedom of speech interests are at stake, First Amendment principles dictate that some limitation must be imposed on the enforcement of the obligation.²⁹⁶ Additionally, as formulated here, the breach of confidence tort imposes what could be interpreted as an obligation not to speak to the media,²⁹⁷ thus implicating further possible constitutional conflicts with freedom of the press. This section will investigate the constitutional difficulties that the proposed tort presents and will demonstrate that neither the confidant's nor the press's First Amendment rights will present insurmountable obstacles to recognition of the tort.

A. Confidentiality and the Confidant's First Amendment Rights

Enforcement of the proposed breach of confidence tort raises the question whether a confidant can waive her First Amendment right to speak or publish information by agreeing to hold it in confidence. The question is a difficult one, in that it presents a conflict between freedom of speech and freedom of contract, both values basic to our society.²⁹⁸ Though some commentators have objected to the notion that freedom of speech or press can be voluntarily waived,²⁹⁹ the Supreme Court's First Amendment

Press—An Extended Comment on "The Anderson Solution," 25 WM. & MARY L. REV. 793, 817-19 (1984) (arguing that courts should be vigilant in applying heightened constitutional standards to new causes of action that threaten First Amendment values).

²⁹⁶ The First Amendment prohibits the State from limiting an individual's freedom of speech. The state action requirement is fulfilled by the confider's attempt to use the state's judicial machinery to sanction, even civilly, speech that breaches a confidential relationship. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (holding that a state rule of law imposing impermissible restriction on the federal constitutional freedoms of speech and press fulfills the "state action" requirement of the Fourteenth Amendment); Hill, *supra* note 87, at 1295 n.424 ("[A]ttempted suppression of . . . [confidential] information by resort to the courts would immediately pose a first amendment problem."); see also *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (holding that the state law imposition of the burden of proof in libel suits constitutes state action); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n.51 (1982) (holding that the state action requirement is met through the application of state law in a civil lawsuit).

²⁹⁷ See *supra* notes 258-69 and accompanying text.

²⁹⁸ See *Blount v. Smith*, 231 N.E.2d 301, 305 (Ohio 1967) ("The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint.").

²⁹⁹ See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 396 (1985) (rejecting the notion of waiver of First Amendment rights because "it rests on a mistaken analogy

decisions have made clear that the right to disclose truthful information can be restrained if the individual voluntarily agrees to waive her First Amendment rights. In the first of these cases, *Snepp v. United States*,³⁰⁰ the Supreme Court held that First Amendment rights could be waived. In *Snepp*, a former CIA employee who had signed an agreement not to disclose classified information without prepublication clearance published a book without the required review. The government brought suit in contract to enforce the agreement.³⁰¹ In holding for the government, the Court emphasized that a "trust relationship"³⁰² had been established between the agency and the defendant:

[The defendant's] employment with the CIA involved an extremely high degree of trust. In the opening sentence of the agreement that he signed, [the defendant] explicitly recognized that he was entering a trust relationship. The trust agreement specifically imposed the obligation not to publish any information relating to the Agency without submitting the information for clearance. . . . [By] publish[ing] his book about CIA activities on the basis of [his employment] background and exposure . . . [the defendant] deliberately and surreptitiously violated his obligation to submit all material for prepublication review.³⁰³

The defendant's freedom of speech defense³⁰⁴ was rejected by the Court because the defendant had "expressly," "voluntarily," and without "duress" obligated himself to submit any proposed publication to prior review.³⁰⁵ Waiver of the right to speak and publish information was, therefore, constitutionally permissible in this case where these requirements were met.

The Court, however, advanced another basis for its decision in *Snepp*—essentially a strict scrutiny balancing of the interests underlying the waiver of the employee's First Amendment rights:

Moreover, this Court's cases make clear that—even in the absence of an express agreement—the CIA could have acted to protect substantial

between a constitutional right and a piece of property"); Hill, *supra* note 87, at 1294 ("Whether on a theory of waiver of constitutional rights or some other theory, such uncritical enforcement of a contractual obligation of secrecy seems egregiously wrong.").

³⁰⁰ 444 U.S. 507 (1980) (per curiam).

³⁰¹ See *id.* at 508.

³⁰² *Id.* at 510.

³⁰³ *Id.* at 510-11.

³⁰⁴ See *id.* at 509 n.3 ("[The defendant] relies primarily on the claim that his agreement is unenforceable as a prior restraint on protected speech.").

³⁰⁵ See *id.*

government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment. The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service. The agreement that *Snepp* signed is a reasonable means for protecting this vital interest.³⁰⁶

Therefore, *Snepp* may stand not for the constitutional sanction of waiving First Amendment rights, but for the less remarkable proposition that freedom of speech is overwhelmed when national security is at stake.³⁰⁷ The difficulty that the latter proposition presents for the proposed breach of confidence tort is apparent: the waiver of First Amendment rights inherent in an agreement of confidentiality between private citizens will rarely be supported by interests rising to the level of national significance. Following the Supreme Court's recent decisions in *Rust v. Sullivan*³⁰⁸ and *Cohen*

³⁰⁶ *Id.* (emphasis added) (citations omitted).

³⁰⁷ But see *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975). In *Knopf*, the Fourth Circuit, faced with facts almost identical to those in *Snepp*, held for the government, resting its opinion solely on the defendant's waiver of his right to speak. The court enjoined the publication of a former CIA employee's book containing unauthorized and "confidential" disclosures. As part of the terms of his employment, the employee had signed a "secrecy agreement" barring the disclosure of classified information acquired during the course of his employment. The court held that "by his execution of the secrecy agreement and his entry into the confidential employment relationship, [the former employee] effectively relinquished his First Amendment rights" to disclose the information covered by the agreement. *Id.* at 1370. The opinion made no mention of the government's interest in controlling the secrecy of information that might be harmful to national security if disclosed. Rather, the defendant's waiver of his First Amendment rights was dispositive.

It should be noted that in *Knopf*, the employee's waiver of his right to speak justified a prior restraint of the confidential information. The Supreme Court has made clear that only the most compelling interests justify a prior restraint of even confidential information. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (per curiam) (Stuart, J., concurring) (noting that prior restraint requires a showing that the disclosure "will surely result in direct, immediate and irreparable damage to our Nation or its people"); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("Any prior restraint of expression . . . [has] a 'heavy presumption' against its constitutional validity."); *Carroll v. President of Princess Anne*, 393 U.S. 175, 181 (1968) (any prior restraint upon speech "suppresses the precise freedom which the First Amendment sought to protect against abridgment"). Since the Fourth Circuit based its decision in *Knopf* on the employee's waiver of his right to speak rather than on the possible consequences of disclosure, it evidently believed that the interest in protecting confidentiality agreements was itself quite compelling.

³⁰⁸ 111 S. Ct. 1759 (1991).

v. Cowles Media Co.,³⁰⁹ however, it is clear that strict scrutiny balancing does not constitute a condition precedent to waiver of freedom of speech.³¹⁰ In both decisions, the Court held that a waiver of First Amendment rights was constitutional without regard to the significance of the interests served by the waiver.

In *Rust*, a group of doctors and recipients of family planning funds under Title X of the Public Health Service Act³¹¹ brought suit challenging the constitutionality of regulations³¹² promulgated by the Secretary of Health and Human Services.³¹³ The regulations prohibited Title X fund supervisors from engaging in counseling concerning, referrals for, and activities advocating abortion as a method of family planning.³¹⁴ The petitioners claimed, inter alia, that the regulations abridged the free speech rights of the doctors who supervised Title X funds in that they were not permitted to discuss the option of abortion with grant recipients.³¹⁵ Employing *only* the doctrine of waiver, the Supreme Court upheld the regulation's suppression of the doctors' freedom of speech:

Individuals who are *voluntarily employed* for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral. The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project. . . . *The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.*³¹⁶

³⁰⁹ 111 S. Ct. 2513 (1991).

³¹⁰ See *infra* notes 319-20 & 335-40 and accompanying text.

³¹¹ See 42 U.S.C. §§ 300 to 300a-6 (1989).

³¹² See 42 C.F.R. § 59.2 (1989).

³¹³ See *Rust v. Sullivan*, 111 S. Ct. 1759, 1764-66 (1991).

³¹⁴ See *id.* at 1765.

³¹⁵ See *id.* at 1775.

³¹⁶ *Id.* (emphasis added). The Court also employed the concept of waiver to deny petitioners' claim that the regulations infringed on the First Amendment rights of privately funded speech. The petitioners argued that "since Title X requires that grant recipients contribute to the financing of Title X project through the use of matching funds and grant-related income, the regulation's restrictions on abortion counseling and advocacy penalize privately funded speech." *Id.* at 1775 n.5. In rejecting this challenge, the Court again invoked the principle of waiver.

We find this argument flawed for several reasons. First, Title X subsidies are just that, subsidies. The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline

Asserting that the interests underlying the Title X doctors' waiver need not be "compelling," the Court upheld regulations that restricted their right to speak *solely* because the restrictions were voluntarily consented to when the public funds were accepted.³¹⁷ The Court, therefore, clearly departed from the *Snepp* strict scrutiny balancing approach.³¹⁸ The Court, in fact, engaged in no balancing of the interests placed in conflict by the regulation—the doctors' waiver vitiated their claim of violation.³¹⁹ *Rust* thus stands for the

the subsidy. . . . By accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income. Potential grant recipients can choose between accepting Title X funds . . . or declining the subsidy and financing their own unsubsidized program. We have never held that the Government violates the First Amendment simply by offering that choice.

Id. (citation omitted) (emphasis added).

³¹⁷ The dissent in *Rust* also acknowledged the novelty of the majority's position that voluntary waiver alone, without any balancing of the interests at stake, was sufficient to overcome First Amendment rights:

Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds. Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech. . . . At the least, such conditions require courts to balance the speaker's interest in the message against those of government in preventing its dissemination.

Rust, 111 S. Ct. at 1780, 1783 (Blackmun, J., dissenting).

³¹⁸ See *supra* notes 306-07 and accompanying text.

³¹⁹ See *Rust*, 111 S. Ct. at 1784 (Blackmun, J., dissenting) (stating that the majority "fail[ed] to balance or even to consider the free speech interests claimed by Title X physicians against the Government's asserted interest in suppressing the speech"). A strong argument could be made that if the interests were balanced in this case, those supporting the doctrine of waiver would be found wanting. A doctor's interest in disclosing information concerning abortion is "clear and vital." *Id.* at 1783 (Blackmun, J., dissenting). According to the Council on Ethical and Judicial Affairs of the American Medical Association, "[t]he patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. . . . The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice." COUNCIL ON ETHICAL & JUDICIAL AFFAIRS OF THE AMA, CURRENT OPINIONS ¶ 8.08 (1989) (quoted in *Rust*, 111 S. Ct. at 1783 (Blackmun, J., dissenting)).

On the other hand, the government's stated interest in restricting the doctors' right to speak—"ensuring that federal funds are not spent for a purpose outside the scope of the program"—seems to fall short of that necessary to justify the suppression of information that is not only truthful, but that doctors are also ethically obligated to disclose. See *id.* at 1783-84 (Blackmun, J., dissenting) (arguing that the regulations are not narrowly tailored to meet the government's stated interest). Even in the face of strong interests compelling disclosure, the Court sanctioned the doctors' waiver

proposition that it is permissible, regardless of the significance of the First Amendment interests at stake, to condition the dispensing of government benefits on the fulfillment of requirements that limit freedom of speech when the individual affected has voluntarily waived her First Amendment rights.³²⁰

The Court again upheld a waiver of First Amendment rights without balancing the interests served (or inhibited) by the waiver in *Cohen v. Cowles Media Co.*³²¹ The Court's application of the waiver doctrine in *Cohen*, however, went beyond that presented by the facts in *Rust* in that the restriction of First Amendment rights was not a condition placed upon receipt of government largesse, but was the result of an agreement between private parties. The Court in *Cohen*, in fact, explicitly sanctioned the waiver of First Amendment rights in order to enforce an *agreement of confidentiality* between two private parties.

The plaintiff in *Cohen*, an "active Republican" associated with a candidate in the 1982 Minnesota gubernatorial race, gave two journalists information relating to an opposing candidate's arrest record³²² in exchange for a promise of confidentiality.³²³ The reporters later breached this obligation by identifying the plaintiff in their publications as the source of the information.³²⁴ As a result, the plaintiff lost his job³²⁵ and he sued the newspapers based on promissory estoppel for breach of the confidential agreement.³²⁶ The newspapers pleaded the First Amendment as a defense to the suit.³²⁷

of their right to speak. It is obvious then, that the Court is strongly committed to the constitutional sanctity of voluntary, informed consent. See *infra* notes 335-340 and accompanying text for a similar analysis of the Court's approach to the sufficiency of waiver in *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991).

³²⁰ The Court in *Rust* has thus employed the concept of waiver of constitutional rights to resolve one aspect of the general problem of constitutionally questionable conditions placed upon the receipt of government benefits. See Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984), for a general discussion of the constitutionality of conditioning government largesse on requirements that restrict constitutional rights.

³²¹ 111 S. Ct. 2513 (1991).

³²² The information related to the opposing candidate's convictions more than a decade earlier for unlawful assembly and petit theft. See *id.* at 2516.

³²³ See *id.*

³²⁴ See *id.*

³²⁵ See *id.*

³²⁶ Although the stated cause of action was promissory estoppel, the suit was the result (as the Court acknowledged) of a breach of an underlying duty of confidence. See *id.*; see also *infra* text accompanying note 328.

³²⁷ See *Cohen*, 111 S. Ct. at 2516.

According to the Supreme Court, the issue presented in *Cohen* was "whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information."³²⁸ The Court held for the plaintiff, asserting that "the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law."³²⁹ Relying on the "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news,"³³⁰ the Court determined that Minnesota state law (i.e. the doctrine of promissory estoppel) requiring journalists who "make . . . promises to keep them"³³¹ was a neutral law of general applicability whose enforcement against the press was not prohibited by the First Amendment.³³² The fact that enforcing such agreements might inhibit the media-confidants' First Amendment rights was, according to the Court, "no more than the incidental, and constitutionally insignificant, consequence" of the generally applicable law requiring "those who make certain kinds of promises to keep them."³³³

³²⁸ *Id.*

³²⁹ *Id.* at 2519.

³³⁰ *Id.* at 2518 (citing in support of this proposition: *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (holding that the press must obey copyright laws); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding that the press must respond to grand jury subpoenas); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (holding that the press must obey the Fair Labor Standards Act); *Associated Press v. United States*, 326 U.S. 1 (1945) (holding that the press must obey the antitrust laws); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (holding that the press must pay non-discriminatory taxes); and *Associated Press v. NLRB*, 301 U.S. 103 (1937) (holding that the press must obey the National Labor Relations Act)). After a review of this case law, the *Cohen* Court concluded that the press did not have any "special immunity from the application of general laws" and that "[a]ccordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.* at 2518.

³³¹ *Id.* at 2519.

³³² The Court explained:

There can be little doubt that the Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, in so far as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.

Id. at 2518-19.

³³³ *Id.* at 2519.

In addition, the Court's decision in *Cohen* rejected any balancing of First Amendment interests that may be infringed by confidentiality agreements because the burden on these rights is "self-imposed" by the confidant's voluntary promise of secrecy.³³⁴ Unlike its private-facts decisions, the Court asserted that the constitutionality of a confidentiality agreement does not require a strict scrutiny analysis because the parties to the agreement,³³⁵ not the State, restrict their own First Amendment rights:

In [*Florida Star v. B.J.F.*, 491 U.S. 524 (1989), and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979)], the State itself defined the content of publications that would trigger liability. Here, by contrast, Minnesota law simply requires those making promises to keep them. *The parties themselves, as in this case, determine the scope of their legal obligations and any restrictions which may be placed on the publication of truthful information are self-imposed.*³³⁶

Therefore, according to the Court, enforcing voluntary agreements in which a confidant has waived her First Amendment rights cannot be said to be "punish[ing]" [her] for publishing truthful information";³³⁷ an individual is not punished when she is held to a promise that she has knowingly and voluntarily made, even if the promise waives First Amendment rights. If the law permitting the waiver is generally applicable, i.e. not targeted at the press,³³⁸ any detriment to First Amendment interests that results from enforcing the individual's waiver is "incidental" and "constitutionally insignificant."³³⁹ It is, therefore, unnecessary to engage in strict scrutiny balancing of the interests underlying the waiver.³⁴⁰

Because the confider in *Cohen* was a political figure involved in a political debate³⁴¹ and the confidant was a member of the press, the case presents the quintessential constitutional test of private

³³⁴ See *id.* at 2522-23 (Souter, J., dissenting) (asserting that the "majority's position . . . dispense[s] with balancing because the burden on publication is . . . voluntary" and is characterized as an incidental result of a neutral law of general applicability).

³³⁵ See *supra* notes 306-07 and accompanying text.

³³⁶ *Cohen*, 111 S. Ct. at 2519 (emphasis added).

³³⁷ *Id.*

³³⁸ See *supra* text accompanying notes 330-32.

³³⁹ *Cohen*, 111 S. Ct. at 2519 (acknowledging that "maintain[ing] a cause of action for promissory estoppel will inhibit truthful reporting" but dismissing any accompanying infringement of First Amendment rights as "constitutionally insignificant").

³⁴⁰ See *id.* at 2518.

³⁴¹ See *id.* at 2520 (Blackmun, J., dissenting) (calling the plaintiff a "political source involved in a political campaign") (quoting *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 205 (Minn. 1990), *rev'd*, 111 S. Ct. 2513 (1991)).

promises of confidentiality. The Court's rejection of a strict scrutiny analysis advanced in *Snepp* and its embrace of the belief that it is constitutionally permissible to waive First Amendment rights, should not be underestimated. While it is probably true that the confidant in most breach of confidence cases would not be a member of the press, this anomaly in *Cohen*, if anything, strengthens the case's precedential value in an argument advocating the establishment of a breach of confidence tort. If there are no constitutional infirmities when a journalist waives her right to disclose confidential information,³⁴² it is unlikely that there will be any constitutional impediments to a *non-media* confidant waiving her right to disclose confidential information.³⁴³

It should also be emphasized that the waiver of First Amendment rights in *Cohen* was allowed despite very significant interests compelling disclosure of the information. First, the Court's enforcement of the confidentiality agreement between confider and confidant in *Cohen* inhibited the reporting of truthful information regarding a political campaign, an area where the protection of First Amendment rights has traditionally been considered imperative.³⁴⁴ As the Minnesota Supreme Court asserted when deciding in favor of the journalists-confidants in the predecessor case to *Cohen*:

Of critical significance in this case . . . is the fact that the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign. The potentiality for civil damages for promises made in this context chills public debate In this context, and considering the nature of the

³⁴² See *infra* notes 349-54 and accompanying text for a discussion of the unique, constitutionally protected role that the press plays in American society.

³⁴³ In *Doe v. Roe*, 400 N.Y.S.2d 668 (Sup. Ct. 1977), a New York court held that waiver of First Amendment rights was possible as a result of an agreement of confidentiality between two "private" parties. In *Doe*, a former patient brought a breach of confidential relationship suit against her psychiatrist for publishing a book disclosing her thoughts, feelings, emotions, and fantasies. The court held that the patient's interest in confidentiality was important enough to overcome the doctor's First Amendment interests and to justify enforcing the agreement by preventing publication of the book. *Id.* at 675. The court also noted that the defendant's reliance on the Supreme Court's defamation cases "would appear to be misplaced. In none of them is a contractual duty to maintain confidence involved." *Id.*

³⁴⁴ See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.").

political story involved, it seems to us that the law best leaves the parties here to their trust in each other.³⁴⁵

The result in *Cohen* demonstrates that the Supreme Court obviously holds the sanctity of contract and confidentiality somewhat higher than the Minnesota Supreme Court. Similarly, it should be noted that the waiver of First Amendment rights in *Cohen* was allowed despite the detrimental effect that enforcement of such obligations may have on the press's news-gathering capabilities in general. As the majority admitted: "permitting [the confider] to maintain a cause of action [in this case] . . . will inhibit truthful reporting because news organizations will have legal incentives not to disclose a confidential source's identity even when that person's identity is itself newsworthy."³⁴⁶ On the other hand, the State's interest in maintaining confidentiality extends little farther than the confider's interest in his own privacy and his expectation that his agreements with others will be honored. Taken together, the interests underlying the facts of *Cohen* are actually the mirror opposite of those in *Snepp* in that, in the latter case national security interests compelled *concealment* of the confidential information; in *Cohen*, however, there were strong interests compelling *disclosure* of the confidential information.³⁴⁷ Nevertheless, in both cases, the Court enforced agreements of confidentiality and the waivers of First Amendment rights that formed their basis. Thus, the typical breach of confidence case will turn not on whether a waiver of First Amendment rights advances significant state interests, but on whether the waiver was explicit and voluntary.

In sum, based on the Court's holdings in *Snepp*, *Rust*, and *Cohen*, it is clear that the proposed breach of confidence tort would not unconstitutionally infringe the confidant's First Amendment rights. The proposed tort would meet the constitutional mandate by requiring that the confidentiality agreement be explicit and voluntarily, thereby ensuring that any waiver of First Amendment

³⁴⁵ *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 205 (Minn. 1990), *rev'd*, 111 S. Ct. 2513 (1991); *see also* *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2523 (Souter, J., dissenting) ("There can be no doubt that the fact of [the confider's] identity expanded the universe of information relevant to the choice faced by Minnesota voters in that State's 1982 gubernatorial election, the publication of which was thus of the sort quintessentially subject to strict First Amendment protection.").

³⁴⁶ *Cohen*, 111 S. Ct. at 2519.

³⁴⁷ There were also strong interests compelling disclosure of the restricted information in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). *See supra* note 319.

rights is left to the individual who will bear the burden of confidentiality—the confidant herself.³⁴⁸

That the proposed tort will effectively meet the First Amendment attacks that a confidant may use to challenge it is not only constitutionally permissible but also equitable. Enforcement of a confidant's waiver of her right to disseminate information that she has agreed to hold in confidence is well grounded in fundamental fairness. A confidant who freely makes an informed choice not to reveal confidential information should not be released from her agreement when it becomes inconvenient or when she stands to gain from the breach. To allow the confidant to benefit to the confider's detriment through disclosure of information that she possesses only because she has promised secrecy seems especially repulsive. The Supreme Court's embrace of the concept of waiver constitutes tacit acknowledgement that the First Amendment is not meant to protect such behavior.

B. Confidentiality and the Press's First Amendment Rights

If the proposed breach of confidence tort were enforced, a confidant would be deterred from publicizing confidential information. Consequently, a confidant would have less of an incentive to be a source of confidential information to the press. It is therefore possible that the press's First Amendment rights would be impermissibly inhibited by recognition of the proposed tort. This section will demonstrate that the breach of confidence approach to privacy

³⁴⁸ In addition, the other elements of the proposed tort guarantee that the scope of the obligation of confidence is narrowly tailored, thereby ensuring that the confidant's First Amendment rights are not inhibited to a greater extent than necessary. First, the "publicity" requirement ensures that the tort does not encompass discrete disclosures not amounting to publicity. *See supra* notes 258-269 and accompanying text. Second, the tort's "inaccessibility" requirement limits the confidentiality obligation to only that information not already in the public domain, thereby ensuring that the confidant's waiver is limited to information that could actually harm the confider if publicly exposed. The confidant will suffer little harm from the public disclosure of information which is already public knowledge, and such disclosures will therefore be privileged. *See supra* notes 241-52 and accompanying text. In addition, the tort's "unauthorized" requirement permits disclosures to which the confider has consented, thereby providing a possible avenue by which the confidant can restore her First Amendment rights. *See supra* notes 253-57 and accompanying text. Finally, the specific exceptions to the duty of confidence delineated in Part III, *see supra* notes 270-94 and accompanying text, will ensure that in certain extreme situations the confidant's waiver of her First Amendment rights can be ignored—for example, when necessary to protect herself or society from physical harm, fraud, or the perpetration of crime.

protection both would not unconstitutionally infringe freedom of the press and would actually provide a better balance between privacy and freedom of the press interests than the private-facts tort.

In its First Amendment cases, the Supreme Court has identified at least three different societal functions that the press fulfills: it is a conduit of individual expression, a vehicle for societal education and debate, and a check on government power.³⁴⁹ Fundamental to the fulfillment of all of these functions is access to information. If there is too much restraint on the flow of information, the press will be unable to satisfy its role within the constitutional scheme.³⁵⁰

The First Amendment states that "Congress shall make no law . . . abridging the freedom . . . of the press."³⁵¹ Although the Supreme Court has interpreted this amendment to mean that members of the press are protected in both their news-gathering³⁵² and publishing³⁵³ activities, it has extended greater First Amendment protection to publishing activities as they more directly implicate the core functions of the press, that is, the dissemination of information and ideas of public importance.³⁵⁴ When these

³⁴⁹ See Michael Dicke, Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553, 1558-59 (1989) (summarizing the constitutional bases for these three functions of the press).

³⁵⁰ See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-79 (1964).

³⁵¹ U.S. CONST. amend. I.

³⁵² See *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.").

³⁵³ See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (rejecting on First Amendment grounds a criminal conviction for publication of confidential information); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (denying prior restraint of expression).

³⁵⁴ See *First Nat'l Bank v. Bellotti*, 435 U.S. at 800 (Burger, C.J., concurring) ("[T]he Press Clause [of the First Amendment] focuses specifically on the liberty to disseminate expression broadly . . ."). Compare *New York Times Co.*, 403 U.S. at 730 (Stewart, J., concurring) (stating that there is no prior restraint of publication unless it "will surely result in direct, immediate, and irreparable damage to our Nation or its people") with *Branzburg*, 408 U.S. at 681, 707 (holding that there is no news gathering privilege allowing journalists to withhold their sources from grand juries).

constitutionally protected activities conflict with other legitimate interests, however, the Court has recognized the importance of conflicting fundamental values, and has not given the press absolute protection.³⁵⁵ In its decisions, the Court has stressed the importance of creating standards that both balance the interests at stake³⁵⁶ and give a measure of "breathing room" for the press.³⁵⁷ A vague, overbroad standard that does not give the press adequate forewarning of liability is unconstitutional because uncertainty as to the boundaries between protected and unprotected speech may result in press self-censorship of protected speech.³⁵⁸ Using these constitutional principles as guidelines, this subsection will demonstrate that the proposed tort creates an equitable and constitutional balance of press and privacy interests.³⁵⁹

For an overview of the constitutionally protected functions that the press serves, see Dicke, *supra* note 349, at 1558-59.

³⁵⁵ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974) (rejecting the suggestion of absolute protection for the media because it would totally sacrifice the countervailing values militating against defamation).

³⁵⁶ See *Konigsberg v. State Bar*, 366 U.S. 36 (1961). The *Konigsberg* Court held:

[State laws affecting the content of speech] have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. . . . Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved.

Id. at 51 (citations omitted); see also *Gertz*, 418 U.S. at 341 (balancing the interest in freedom of the press and the interest in avoiding defamation); *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) ("Where First Amendment rights are asserted to bar governmental interrogation resolution of the issues always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.").

³⁵⁷ See *supra* note 113 and accompanying text.

³⁵⁸ See *supra* notes 114-15 and accompanying text.

³⁵⁹ One commentator summarized the standards that would measure the constitutionality of any new "privacy tort" as follows:

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, 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. The Court has developed the doctrines of vagueness and overbreadth to address this concern.

First, by targeting the source of information for liability, rather than the publisher,³⁶⁰ the breach of confidence tort avoids the conflict between freedom of press and privacy interests that was a primary cause of the private-facts tort's demise.³⁶¹ With the interment of the private-facts tort and the recognition of the proposed breach of confidence cause of action, publishers would no longer be held liable for disclosures of embarrassing information.³⁶² In *Cohen v. Cowles Media Co.*,³⁶³ the Supreme Court acknowledged that an action based on breach of confidence is less

Zimmerman, *supra* note 36, at 342-43 (footnote omitted). The proposed breach of confidence tort overcomes these constitutional objections. See *infra* notes 360-392 and accompanying text.

³⁶⁰ Admittedly, the distinction between press and source is not crystal clear. The Supreme Court has implied that the Press Clause protects either persons or institutions performing press functions. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 781-84 (1985) (Brennan, J., dissenting). It has also suggested that "[a] reporter is no better than his source of information." *Branzburg v. Hayes*, 408 U.S. 665, 722 (1972) (Douglas, J., dissenting). Furthermore, the source may in fact be the reporter as, for example, in the case of an autobiographer. Thus, it is possible that the Court would view the source as a reporter of sorts, within the umbrella of freedom of the press protection. In any event, the bifurcation between press and source on which the proposed tort relies is not always obvious.

A number of responses can be made to this argument. First, the Court's decisions have demonstrated that the press's news gathering activities are not as constitutionally protected as its publishing activities. See *supra* notes 352-354 and accompanying text. To the extent then that the source falls within the news gathering category, she cannot expect the extreme protection that the Court gives to publication rights. See *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestricted right to gather information."). Additionally, the Court has indicated in a number of its decisions the potential constitutionality of directly suing those who leak information to the press. See *supra* notes 196-200 and accompanying text. Therefore, it can be inferred that the Court does not think that sources have any special privilege because of their involvement in the workings of the media. Finally, the distinction that this argument relies on is really only one of semantics. The Court has never distinguished between freedom of speech and freedom of the press in its opinions. See *Nimmer, supra* note 181, at 935. It has never indicated that the right to free speech should weigh any heavier than the right to a free press. Thus, to the extent that freedom of speech can be waived by a confidentiality agreement, see *supra* notes 304-305 and accompanying text, so can freedom of the press.

³⁶¹ See *supra* notes 112-31 and accompanying text.

³⁶² Two exceptions must be made to this statement. First, a publisher could be held liable under the proposed tort if she or a member of her organization agreed to hold information from a source in confidence. For a discussion of this possibility, see *supra* note 219. Second, the press could be held liable for publishing information that was not "lawfully obtained." See *supra* notes 157-165 and accompanying text and note 201.

³⁶³ 111 S. Ct. 2513 (1991). For a summary of the facts of this case, see *supra* notes 321-327 and accompanying text.

constitutionally problematic than one based on invasion of privacy.³⁶⁴ When addressing the First Amendment problems presented by two journalists who breached their promise of anonymity to a confider, the Court in *Cohen* distinguished its earlier private-facts holdings in *Florida Star v. B.J.F.*³⁶⁵ and *Smith v. Daily Mail Publishing Co.*³⁶⁶ by asserting that "[i]n those cases, the State itself defined the content of publications that would trigger liability."³⁶⁷ The contract cause of action based on breach of confidence at issue in *Cohen*,³⁶⁸ however, was less constitutionally suspect in that the State was not directly punishing the publication of information but "simply requir[ing] those making promises to keep them."³⁶⁹ It is the parties to the confidentiality agreement themselves who "determine the scope of their legal obligations and any restrictions which may be placed on the publication of truthful information are self-imposed."³⁷⁰ Consequently, in a jurisdiction recognizing the breach of confidence tort, journalists would not be subject to legal sanction based on the subjective, inconsistent judicial definitions of "newsworthiness" and "offensiveness."³⁷¹ Since sources bear the risk of liability, journalists could print with impunity any information which they had legally obtained.³⁷² Therefore, the enforce-

³⁶⁴ See *Cohen*, 111 S. Ct. at 2519.

³⁶⁵ 491 U.S. 524 (1989). For a discussion of this case, see *supra* notes 153-170 and accompanying text.

³⁶⁶ 443 U.S. 97 (1979).

³⁶⁷ *Cohen*, 111 S. Ct. at 2519.

³⁶⁸ While the stated cause of action in *Cohen* was promissory estoppel rather than breach of confidence, the use of this case as precedent is warranted here because the claim of estoppel was founded on a journalist's broken promise of confidentiality. See *id.* at 2516 ("The question before us is whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information.").

³⁶⁹ *Id.* at 2519.

³⁷⁰ *Id.*

³⁷¹ Of course, community mores (as expressed by demand for the media's product) and journalistic ethics would still act as restraints on what is published. Moreover, if the journalist agrees to hold information from a source in confidence, a breach of this obligation could result in liability under the proposed tort. See *supra* note 219.

³⁷² The scope of the press's liability under a breach of confidence tort would be no different from that of the "lawfully obtained" doctrine defined by the Supreme Court in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). See *supra* note 201. Under both torts the press would be allowed to print any information that was lawfully obtained. Had B.J.F. been able to take advantage of a breach of confidence tort, however, there would be one very important difference in the result of the case: where the "lawfully obtained" doctrine blocked B.J.F.'s private-facts remedy against the publisher of the

ment of the proposed cause of action would not have a chilling effect on journalists' editorial decisions like that which plagues journalists currently subject to the private-facts tort.³⁷³

It might be argued, however, that the breach of confidence tort would still "punish" the press in that journalists will have to pay more money for information from sources concerned about liability for breaching a confidence. The breach of confidence tort would, therefore, still place a burden on freedom of the press. While it is true that the proposed tort might make confidants demand higher remuneration before divulging confidences, the flaw in this argument is, as the Supreme Court asserted in *Cohen*,³⁷⁴ that it construes such payments as a punishment of the press rather than the necessary cost of publishing confidential information:

[C]ompensatory damages are not a form of punishment If the contract between the parties [obligating them to a duty of confidentiality] in this case had contained a liquidated damages provision, it would be perfectly clear that the payment to [the confider upon breach of that contract] would represent a cost of acquiring newsworthy material to be published at a profit, rather than a punishment imposed by the State. The payment of compensatory damages in this case is constitutionally indistinguishable from a generous bonus paid to a confidential news source.³⁷⁵

information, it would not have blocked a breach of confidence remedy against the source of the information.

³⁷³ The fact that the publisher of information will not be held liable under the proposed tort avoids the facial underinclusiveness of prohibitions sanctioning mass media publishers of truthful personal information but not other disseminators of the same information. In *Florida Star*, the Court rejected a statute that "prohibit[ed] the publication of identifying information only if this information appears in an 'instrument of mass communication'" because a State must not "punish[] truthful publication in the name of privacy . . . [unless] it . . . demonstrate[s] its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant." 491 U.S. at 540.

The proposed tort eludes underinclusiveness analysis in that it does not pivot liability on publication by or in the media, but on the broader notion of publicity in general. See *supra* notes 258-69 and accompanying notes. Liability attaches if confidential information is disclosed in the media or by any other means amounting to publicity. See *supra* note 109 for exemplary cases. Therefore, liability could very well attach to "the backyard gossip who tells 50 people" or the "smalltime disseminator," as required by the Court's reading of the underinclusiveness doctrine. See *Florida Star*, 491 U.S. at 540. In addition, the proposed tort might entirely skirt the underinclusiveness issues associated with "punishing truthful publication" simply because it does not sanction publishers. See *id.*

³⁷⁴ 111 S. Ct. 2513 (1991).

³⁷⁵ *Id.* at 2519.

The notion underlying the Court's decision in *Cohen* is clear: confidential information is a commodity, like any other, for which the press must pay.³⁷⁶ The fact that the confidential relationship in *Cohen* was between members of the press and their source, and therefore can be distinguished from the more typical breach of confidence case where the confidant will be a non-media related individual, only strengthens the argument in favor of the breach of confidence tort. In *Cohen*, the press, because they were parties to the confidential relationship, bore the burden of liability for the breach of confidence *directly*, and yet the Court held that this burden was not unconstitutional. Thus, in the more typical breach of confidence case that would impose the burden of liability on the press only *indirectly*—that is, by paying more money for confidential information from confidants—the Court would also not find a constitutional infirmity. Therefore, the monetary burdens that the proposed tort would impose on the press, albeit not insignificant, would not amount to an unconstitutional infringement on freedom of the press.³⁷⁷

³⁷⁶ Similarly, in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Court held:

The Constitution no more prevents a State from requiring [the media-defendant] to compensate petitioner for broadcasting his act on television than it would privilege [the media-defendant] to film and broadcast a copyrighted dramatic work without liability to the copyright owner

. . . .

No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.

Id. at 575-76 (quoting *Kalven*, *supra* note 85, at 331).

³⁷⁷ In addition, any indirect burden of liability imposed on the press by the proposed tort is alleviated by the fact that predicting whether the source will be held liable for her breach will be easier than predicting liability under the private-facts tort. See *supra* note 235 and accompanying text. As opposed to the private-facts tort, which forces editors to make publication decisions based on vague and subjective notions of "newsworthiness" and "offensiveness," the elements of the breach of confidence tort are more concrete. Therefore, calculation of a source's potential costs from disclosure would be more accurate. For example, the possibility of litigation could be determined based upon the number of people who have been bound to keep the information in confidence (the more confidants with which the confider shared the information, the less likely that the editor's source will be suspected of the disclosure and brought to court by the confider). See *supra* note 234. The outcome of litigation would be based on the circumscribed questions of whether there was an explicit agreement of confidentiality and whether the information disclosed was bound by this agreement. Thus, rejecting the debate over the vague, subjective scope of "newsworthiness" in favor of the objectivity of contract principles would produce a more predictable and efficient accounting of potential litigation costs. This would in

Another potential constitutional objection to the breach of confidence tort is that it will effectively deny the press access to a large amount of information—access that is necessary for the media to fulfill its role as disseminator of information and ideas of public importance.³⁷⁸ In fact, the proposed breach of confidence tort would provide only a limited amount of information protection, much less than that potentially protected by the private-facts tort. The privacy protection provided by the proposed tort would be limited in five major ways. First, because the confidentiality right granted by the proposed tort operates only against the confidant, the tort does not provide a cause of action if someone other than the confidant intercepts the confidential communication.³⁷⁹ Thus, if the press, or anyone else, gains knowledge of the confidential information from a source, the confider would not have a right of action against them. Second, the proposed tort only protects information that is transferred from confider to confidant.³⁸⁰ There are many other ways of communicating information that the tort would not give the confider the power to control. As one commentator put it, the tort protects “only confidential information *from* a person . . . not information *about* him or her.”³⁸¹ Information that is communicated about a person other than orally—for example, information acquired just from observing another person—would be difficult, if not impossible, to control. That is, because an individual often does not know what another person thinks, sees, or hears, she would not know to try and negotiate a commitment of confidentiality. Similarly, controlling information about an individual’s public behavior would also be burdensome, it being difficult for the individual to identify and bind everyone who witnesses the public behavior that she wishes to keep private. Third, the requirement of an explicit agreement between the confider and confidant will ensure that many intimates are not bound by a duty of confidence, because the potential confider has

turn ensure that the indirect burden borne by the press is an accurate reflection of the actual detriment imposed on the confider by the disclosure.

Finally, it should be noted that recognition of the breach of confidence tort would not necessarily mean that editors would pay more money “up-front” for confidential information from sources. It is possible that they would only pay the “normal” amount for the information, but would agree to pay a portion of the source’s litigation costs only if any litigation results from the disclosure.

³⁷⁸ See *supra* notes 349-54 and accompanying text.

³⁷⁹ See GURRY, *supra* note 34, at 14.

³⁸⁰ See *id.*

³⁸¹ Michael, *supra* note 206, at 1201.

an aversion to "contractualizing" her relationships and instead relies on trust.³⁸² These intimates, of course, can share the information they have gathered in the relationship with members of the press. Fourth, because the duty of confidentiality is essentially a link between the confider and confidant, when the confider dies this link, and its concomitant obligation of confidentiality, is extinguished.³⁸³ Therefore, eventually all bound information can be disclosed with impunity. Lastly, the press can pay a confidant enough money to offset her potential liability.³⁸⁴ So ultimately, information is available from any source—provided the press is willing to pay. Taken together, these gaps in the protection provided by the confidentiality tort would result in the press having many different avenues for obtaining information if they want it.

Finally, it could be argued that replacing the broader private-facts tort with the proposed breach of confidence tort would create an incentive for the press to "snoop." If members of the press are not concerned with protecting themselves from liability for the publication of personal information they will not be deterred from gathering and publishing "offensive" private facts.³⁸⁵ Though this critique is fair, it misses the point. The Court's decision in *Florida Star v. B.J.F.* has already given the press an incentive to snoop, in that after that decision the press is no longer bound by respect for an individual's right to privacy³⁸⁶ but only by the much narrower consideration of whether the information is "lawfully obtained."³⁸⁷ Although the breach of confidence tort would not substantially change the post-*Florida Star* orientation of the media to news-gathering, it would provide a much needed, albeit limited, countervailing protection of privacy interests. As Alexander Bickel

³⁸² See *supra* notes 236-40 and accompanying text.

³⁸³ See BRIAN C. REID, CONFIDENTIALITY AND THE LAW ¶ 13.17 (1986). However, the courts may choose to continue the duty of confidentiality even after the death of the confider out of a concern that publication might cause harm to the confider's survivors. See *id.*

³⁸⁴ It is true that this may limit the number of sources that the press can afford. Still, the Court has made clear that it views the press's paying more for confidential information not as an infringement of the freedom of the press, but as merely the necessary cost of publicizing sensitive information. See *supra* notes 374-377 and accompanying text.

³⁸⁵ It should be noted that if the proposed tort is adopted, the press will still be deterred from snooping by the "lawfully obtained" doctrine and by community mores as expressed through demand for their products.

³⁸⁶ See *supra* notes 159-170 and accompanying text.

³⁸⁷ This doctrine is easily overcome in that the press can always "arrange" for third-parties to purloin the information they desire.

commented on the resulting balance when sources of information rather than its publishers are held liable for confidential disclosures:

[T]he power to arrange security at the source, looked at in itself, is great, and if it were nowhere countervailed it would be quite frightening . . . since the law in no wise guarantees its prudent exercise or even effectively guards against its abuse. But there is countervailing power. The press, by which is meant anybody, not only the institutionalized print and electronic press, can be prevented from publishing only in extreme and quite dire circumstances. . . . It is a disorderly situation surely. But if we ordered it we would have to sacrifice one of two contending values—privacy or public discourse—which are ultimately irreconcilable.³⁸⁸

Admittedly the balance that the “adversary game”³⁸⁹ among confider, confidant/source, and press produced by the breach of confidence tort would be an uneasy one, but it would at least be a balance of the privacy and press interests at stake—an accomplishment which the private-facts tort cannot claim.³⁹⁰ Recognition of the proposed tort would, therefore, bring the clash between press and privacy more in line with the Supreme Court’s own expressed desire to both protect privacy interests³⁹¹ and balance the individual’s need for privacy with the societal need for disclosure.³⁹²

CONCLUSION

In the interest of providing a more equitable balance between the privacy and press interests involved, this Comment has advocated replacing the private-facts tort with a new tort based on breach of confidence. The proposed tort, by targeting sources rather than publishers of information, would effectively overcome the definitional and constitutional problems that led to the demise of the private-facts tort. Because the proposed tort is based on the circumscribed concept of confidentiality, rather than the more general notion of privacy, the privacy protection that it would provide would necessarily be limited. Still, the proposed breach of

³⁸⁸ BICKEL, *supra* note 222, at 80. Bickel is commenting here on the situation where the government is permitted to withhold information, not private citizens. His point is just as applicable, however, to the latter situation.

³⁸⁹ *See id.*

³⁹⁰ *See supra* notes 125-31, 159-70 and accompanying text.

³⁹¹ *See supra* notes 174-77 and accompanying text.

³⁹² *See supra* note 356 and accompanying text.

confidence tort would provide more privacy protection than exists now, more than ever existed under the Warren-Brandeis standard, and perhaps just as much as the First Amendment will allow. As one commentator has remarked, "[d]espite its limitations, the protection which the breach of confidence action does afford against violations of one's state of privacy provides a welcome measure of relief in a legal system which does not recognize a general right to privacy."³⁹³ The irony of this statement is that though it is a comment on English law, which has never recognized an individual's right to privacy, it is equally applicable to U.S. law, which has recognized this right only in theory.

³⁹³ GURRY, *supra* note 34, at 15.