Resurrecting a Sunken Ship: An Analysis of Current Judicial Attitudes Toward Public Disclosure Claims

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THE tort of public disclosure of private fact1 was officially recognized by the American Law Institute in 1976 as one of the four types of invasion of privacy.2 The promulgation of section 652D of the Restatement (Second) of Torts came more than eighty years after Samuel Warren and Louis Brandeis first propounded the idea in their famous 1890 article.3 The ALI’s adoption of section 652D comportted with a trend in recognizing privacy interests and provided such additional impetus that all but a handful of states now recognize the public disclosure tort.4 Thus, liability ostensibly results from giving publicity to a matter that is private, highly offensive, and not of legitimate concern to the public. While courts have nominally acknowledged the existence of the tort, they have done little to give it practical effect.5 Courts have instead used a variety of theories in

1. The RESTATEMENT (SECOND) OF TORTS § 652D (1977) [hereinafter cited as RESTATEMENT] defines the tort of public disclosure of private fact as follows:

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

2. The four types of invasion of privacy are:
(a) unreasonable intrusion upon the seclusion of another;
(b) appropriation of the other’s name or likeness;
(c) unreasonable publicity given to the other’s private life; and
(d) publicity that unreasonably places the other in a false light before the public.

RESTATEMENT, supra note 1, § 652A(2).

5. The courts historically have been reluctant to acknowledge privacy claims. In early cases, courts felt compelled to use other theories when they wanted to rule in favor of plaintiffs.
deciding public disclosure cases, all with the net effect and seeming purpose of circumventing the public disclosure tort.

Some courts and writers have suggested that this development is inevitable, if not necessary. One court has asserted that "[t]here are some shocks, inconveniences and annoyances [sic] which members of society in the nature of things must absorb without the right of redress,"6 including occasional affronts to their seclusion. A recent article laments that "many of the most important aspects of human relationships are beyond the reach of the law and must work themselves out in the imprecise laboratory of manners and mores."7 That article characterizes public disclosure problems as "impervious to legal solution" and concludes that "it is probably time to admit defeat, give up the efforts at resuscitation, and lay the noble experiment in the instant creation of common law to a well-deserved rest."8

This Article digests and critically evaluates the various methods that courts have developed in deciding public disclosure cases. The conclusion is that the courts, while paying lip service to the public disclosure tort, allow recovery in only very limited circumstances, that they are unduly conservative in their handling of these cases, and that a better approach would be to employ a more general test that would supersede the theories currently used. This conclusion takes issue with the position that public disclosure problems are impervious to legal solution and asserts that the test proposed can create a sensible degree of protection from unreasonable publicity. Part I of the Article describes and analyzes the six categories that courts use in deciding these cases; Part II summarizes the current state of the law; Part III proposes a general test to replace the current categories; and Part IV offers some general conclusions.

I. THE SIX CATEGORIES CURRENTLY EMPLOYED

The subjects of disclosure in recent cases have covered a broad range, from the unfortunate display of an unzipped fly9 to merciless accounts of an unusual and embarrassing disease.10 Some cases have involved the identifica-

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8. Id. at 365.
tion of criminal victims, and others have concerned the perpetrator. The location of the publicized event might be a crowded stadium where a televised football game is taking place, the plaintiff's place of business, or the plaintiff's home or hospital room. The range of disclosable items is of course vast, but the courts appear to have settled upon the following six categories in which to assort the cases: (1) consent to the publicity, particularly as inferred from the plaintiff's location; (2) the offensiveness of the publicity; (3) the plaintiff's status as a public figure; (4) the newsworthiness of the disclosed matter; (5) prior publicity given to the matter, particularly its appearance on a public record; and (6) the extent to which the disclosure identifies the plaintiff.

A. Location and Consent

The principle that a tort victim relinquishes the ability to recover when he consents to the defendant's action is a familiar one. The plaintiff's consent to the disclosure of a private matter, whether express or implied, will defeat any claim that the defendant's disclosure caused an undue invasion of privacy. This result will occur even if the disclosure otherwise could be regarded as sensitive or embarrassing.

An obvious example of consent is a case in which the plaintiff voluntarily relates information to a news reporter or magazine writer. The presence or absence of express consent would not seem to be significant in such a case. With or without express consent, a court may find that the plaintiff implicitly consented to the resulting disclosure, similar to a tort plaintiff who knowingly allows himself to be vaccinated without objection. One who expressly consents to the disclosure cannot later claim that a tortious publication of a private fact was made. This analysis would also apply when the plaintiff himself has previously published the disclosed facts.

Most of the cases discussing consent do not involve an express agreement to the publication, however. Absent an express agreement, a court must determine whether the circumstances can support a finding of implied con-

15. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971).
21. See RESTATEMENT, supra note 1, § 652D comment b.
sent. The question often turns on the physical location of the plaintiff. In *Neff v. Time, Inc.*\(^2\) publication of a photograph of a football fan with his pants unzipped was held not to constitute an invasion of privacy, because by placing himself in a highly public area, the fan consented to all visual inspection. The plaintiff was one of a group of people who not only waived their privacy by their mere presence in a football stadium, but who actually initiated the idea of being photographed and actively encouraged the photographer to capture them on film. The plaintiff, therefore, waived his privacy by actively seeking publicity.\(^2\)

According to many courts, such an affirmative effort is not necessary to waive one's privacy. The *Neff* court held that privacy is waived when a person is present at a public event and can be seen by everyone in attendance.\(^4\) For example, an affectionate embrace between husband and wife, arguably a sensitive and private moment by most standards, properly becomes viewing material for millions of magazine subscribers if the embrace is photographed in a candy store open to the public. The incident becomes part of the public domain because it occurred in a public area and is, therefore, not a private matter.\(^5\)

In contrast, an incident of bizarre quackery, conducted to cure a lump in the patient's breast, was held to be protected from public disclosure.\(^6\) In that case the plaintiff was photographed with one of his hands on the patient's breast and the other waving a wand, while he was observing various gadgets. The patient and the photographer, both employees of the defendant, were part of a clandestine design to photograph the plaintiff for use in a national magazine. The patient feigned the lump in her breast, and the camera was hidden. Moreover, the whole event took place in the plaintiff's private den, not in a public place. The plaintiff, therefore, did not consent, either expressly or implicitly, to the subsequent publicity. The quack's antics are more private than the lovers' embrace because of the dispositive distinction between events that take place in a public shop and those that occur in a private den. Because five persons viewed an event in a candy store, millions across the country could also view it.\(^7\)

Protection from disclosure might also be afforded if the plaintiff was photographed in a hospital\(^8\) or mental institution.\(^9\) Such places cannot offer the seclusion of one's home and are necessarily public to a degree. The pres-

\(^3\) Id.
\(^4\) Id.
\(^5\) Id.
\(^7\) Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971).
ence of a patient is normally involuntary, however, because it is usually compelled by necessity. Voluntary exposure to the public eye is an essential element of a public presence, and most courts have been unwilling to find this element in a hospitalization.

This element of voluntariness would also seem to be lacking in cases in which the plaintiff, by virtue of fortuitously standing near the location of a notable and spontaneous event, becomes the subject of unwanted publicity. Courts, however, have shown little sympathy for the innocent bystander. An unoffending and unwary customer at a cigar shop, for example, found himself the victim of unwanted publicity when the police detained him as part of a gambling raid. Nevertheless, he was without remedy when the local television station showed his image to the local viewers as part of its coverage of the event.30 The defendant in that case did not identify the plaintiff as a gambler, the coverage was accurate, and the broadcast contained nothing unreasonably offensive. The fact that the plaintiff was in a public place was, however, much more detrimental to his case than any of these other facts.31

Courts have applied the same attitude to cases in which police erroneously arrested the plaintiff or named him as a criminal suspect.32 The report of such an occurrence can obviously cause devastating damage, yet courts treat these cases much as they do cases in which the plaintiff was only a bystander. While one might regard any police action as an item of legitimate public concern,33 or as an event already in the public domain,34 particularly fatal to the plaintiff’s case is that his arrest occurred in a public place.35 Like the innocent bystander, the erroneously accused in such a case can only blame fate for his being at the wrong place at the wrong time.36

Not all cases of innocent bystanders involve the commission of a crime. In a recent Massachusetts case the plaintiff claimed an invasion of privacy when a newspaper photo showed him apparently standing in line for unem-

31. Id. at 40.
36. Criminal victims do not fare much better. See, e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982); Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 584 P.2d 1310 (1978); Ayres v. Lee Enters., Inc., 277 Or. 527, 561 P.2d 998 (1977). These cases do not rely just on location, but on other, more substantive grounds to be discussed more fully later. See discussion of newsworthiness, infra text accompanying notes 121-60.
ployment benefits. He was waiting to translate for another person, rather than to collect benefits for himself. Such a case involves a daily, unspontaneous occurrence and arguably not one warranting special media attention, such as the commission of a crime. Nevertheless, the Massachusetts court affirmed a summary judgment for the defendant and aptly summarized the judicial attitude behind all of these cases by stating that a person loses privacy rights by appearing in a public place. In a California case involving news coverage of a suicide, the court also held for the defendant and did not rely on the nature of the act as much as on its location. Courts have applied the same theory to inanimate things, so that a person cannot object to photographs of the exterior of his home or to a filming of barrels of hazardous chemical waste placed by him in an open lot.

The location of an event has developed as a major, if not conclusive, factor in determining liability for public disclosure of that event. The rationale for this result is sometimes expressed in terms of consent, without recognition that consent, to be an effective defense, must be informed consent. While one might argue that a person is always informed on the possibility of publicity once he leaves his home, most people are not conscious of this possibility and have not consented to it.

B. The Question of Offensiveness

The terms of Restatement section 652D state that liability for disclosure occurs only if the matter is "highly offensive to a reasonable person." As in other areas of tort law, protection is not available from the common annoyances of ordinary life. Public disclosure gives rise to a cause of action only

38. 391 N.E.2d at 939.
39. In reciting the facts, the court stated: "She went to a public edifice in the heart of a large city and there ended her life by plunging from such high building. It would be difficult to imagine a more public method of self-destruction." Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491, 496 (1939). The court also denied the surviving husband's claim on the basis that the right of privacy is a personal action that dies with the person. 95 P.2d at 495.
42. E.g., Gill v. Hearst Publishing Co., 40 Cal. 2d 244, 253 P.2d 441, 444 (1953).
43. W. PROSSER, supra note 17, at 105.
44. Judge Carter, dissenting in Gill v. Hearst Publishing Co., 40 Cal. 2d 244, 253 P.2d 441, 446 (1953), stated:
   In effect, the majority holding means that anything any one does outside of his own home is with consent to the publication thereof, because, under those circumstances he waives his right of privacy even though there is no news value in the event. If such were the case, the blameless exposure of a portion of the naked body of a man or woman in a public place as the result of inefficient buttons, hooks, or other clothes-holding devices could be freely photographed and widely published with complete immunity. There is no basis for the conclusion that the second a person leaves the portals of his home he consents to have his photograph taken under all circumstances thereafter.
45. RESTATEMENT, supra note 1, § 652D.
when the disclosure would affront a person of ordinary sensitivities. The hypersensitive plaintiff will not be indulged.\textsuperscript{47}

Even the most insensitive of persons, however, would want to protect certain areas of life from the prying eye, including family and personal matters, unpleasant or humiliating illnesses, and intimate letters.\textsuperscript{48} Many of the cases involve the exhibition of physical characteristics that one would normally regard as private. A clear example would be publications of nude photographs. One court has stated that nudity is a private fact giving rise to damages when shown beyond persons to whom consent is given.\textsuperscript{49} This statement would be particularly true when the subject of the photograph has visibly demonstrated his lack of consent. A Massachusetts case held that a filming of nude prison inmates, who were shown desperately trying to hide their genital areas with their hands, was a violation of their right of privacy.\textsuperscript{50} In that case the defendant argued that the public had a "right to know" of the conditions of such facilities, particularly those groups having a special interest in rehabilitation.\textsuperscript{51} The Massachusetts court disposed of that argument by holding that the indecency of the film outweighed any right to know.\textsuperscript{52}

Other courts have also had to deal with the task of reconciling the right to know with an individual's protection from public disclosure. In several of these cases the plaintiffs had undergone an emotionally painful experience because of some tragic event involving a family member, only to have their grief aggravated by the publication of a news account of the event. In \textit{Bremmer v. Journal-Tribune}\textsuperscript{53} the body of the plaintiffs' young son, who had been missing, was finally discovered in a mutilated and decomposed condition. In \textit{Waters v. Fleetwood}\textsuperscript{54} the body of the plaintiff's murdered daughter was recovered from a river; the body was partially decomposed and wrapped in chains. In \textit{Kelley v. Post Publishing Co.}\textsuperscript{55} the plaintiffs' daughter had been killed in a car accident. In each of the three cases a rather grisly photograph of the victim's body accompanied the news account. If anything would justify a reasonable person in feeling seriously aggrieved,\textsuperscript{56} such a photograph would be the thing, especially in combination with an article describing the event and identifying the victim. In all three cases, however, the court held

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  \item \textsuperscript{48} Van Buren v. Miller, 22 Wash. App. 836, 592 P.2d 671, 675 (1979).
  \item \textsuperscript{49} Myers v. U.S. Camera Publishing Corp., 167 N.Y.S.2d 771, 774 (1957); \textit{see also} York v. Story, 324 F.2d 450 (9th Cir. 1963) (defendant, a city policeman, held liable for circulating photographs of plaintiff in "indecent positions" taken when she was at the police station filing a complaint).
  \item \textsuperscript{51} For a more complete discussion of newsworthiness, see \textit{infra} notes 121-60 and accompanying text.
  \item \textsuperscript{52} 249 N.E.2d at 617.
  \item \textsuperscript{53} 247 Iowa 817, 76 N.W.2d 762 (1956).
  \item \textsuperscript{54} 212 Ga. 161, 91 S.E.2d 344 (1956).
  \item \textsuperscript{55} 327 Mass. 275, 98 N.E.2d 286 (1951).
  \item \textsuperscript{56} \textit{Restatement}, \textit{supra} note 1, § 652D comment c.
\end{itemize}
for the defendant, emphasizing the newsworthiness of the matter. This Article will more fully discuss the concept of newsworthiness later, but it is mentioned here to show that indecency alone does not necessarily make disclosure actionable.

Courts are more willing to protect against disclosure in cases involving a photograph or news account of a physical ailment, than in cases involving a mutilated corpse. Deformed parts of a person's body, even if normally visible to the public, will usually be held to be a private matter, not susceptible to public disclosure. Liability has resulted from the publication of photographs of a semiconscious patient suffering facial disfigurement as a result of coronary thrombosis; of a malformed child, born with the heart on the outside of the body; and of twins who were joined together from the shoulders down. Publication of the fact that a person eats incessantly because of a rare and embarrassing disease is also unreasonably offensive. The physical or medical information need not concern an involuntary or life-threatening condition to warrant protection from disclosure. A recent California case, for example, indicates that a sex change operation might be a private matter if a jury could find its publication to violate "contemporary community mores and standards of decency."

Courts have used a variety of terms to describe the applicable standard of offensiveness. Some courts say that the disclosure must not "outrage common... decency," or "outrage the community's notions of decency." Other courts require a disclosure that causes "shame or humiliation." The defendant might be liable if he exceeds the "bounds of propriety and reason" or if the disclosure contains "intimate details of a 'highly personal nature.'" An oft-cited case on this point is Virgil v. Time, Inc. The plaintiff in that case was a body surfer of some achievement who was interviewed by a reporter from a national sports magazine. During the interview, the plaintiff revealed several bizarre incidents that portrayed him as extraordinarily reckless and mentally unstable. Accounts of these incidents later

57. See infra text accompanying notes 121-60.
58. Another obstacle faced by the plaintiffs in these three cases is that they were not the subjects of public disclosure. The question of whether a person can recover for publicity given to another is discussed later. See infra notes 208-18 and accompanying text.
69. 527 F.2d 1122 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976).
70. The incidents included using his mouth as an ashtray, burning two holes in his wrist,
became part of an article appearing in the magazine. The court, quoting approvingly from the Restatement, referred to a “community mores” test and stated that the disclosed information is not a public matter when the publicity “ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake.”

The courts will inevitably apply an ethereal test to the most elusive element of a still-developing tort. This “mores” test, propounded by William Prosser in 1960, may truly explain some cases in which courts have declined to find sufficient offensiveness to warrant liability. The publication of a person's normal facial appearance offends no community's mores, and the disclosure of a person's business or occupation or the stating of a person's name does not outrage common decency. At the other extreme, publicizing the details of a physical ailment or deformity would normally offend most people. The application of a mores test at either extreme should produce little quibbling.

Use of the mores test, however, has been more troublesome in cases that fall between these extremes. In Bisbee v. John C. Conover Agency, Inc., for example, the court failed to explain why a newspaper article describing the plaintiffs’ house in certain detail was not unreasonably offensive. The court affirmed a summary judgment for the defendant, stating only that the plaintiff failed to establish that public knowledge of the facts was offensive. The court offered no guidelines on the degree or type of offensiveness necessary to state a cause of action. Similarly, in a case in which the defendant described a widow's feelings during the last days of her famous husband's life, during which he was mentally ill, the court summarily concluded that the report “may not be treated as an impermissible revelation or as otherwise offensive to any notion of decency.” Neither of these cases is instructive on why the plaintiff's allegations were insufficient.

The court in Mason v. Williams Discount Center offered at least one type of offense when a person was injured diving headfirst down a flight of stairs, injuring himself to gain unemployment benefits, and eating spiders and other insects.

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71. 527 F.2d at 1129 (citing RESTATEMENT (SECOND) OF TORTS § 652D comment f (Tent. Draft No. 21, 1975) (current version at RESTATEMENT, supra note 1, § 652D comment h)).


76. See supra text accompanying notes 59-61.


78. 452 A.2d at 692.

79. Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 244 N.E.2d 250, 258, 296 N.Y.S.2d 771, 782 (1968). As in Bisbee, the court affirmed a summary judgment for the defendant. The plaintiff in Random House had two additional reasons for denying the claim. First, the plaintiff was a public figure, and second, the report was sympathetic to the plaintiff and not offensive to any notion of decency. 244 N.E.2d at 257-58, 296 N.Y.S.2d at 781-82. For a discussion of liability for disclosures sympathetic to the plaintiff, see infra text accompanying notes 227-33.

80. 639 S.W.2d 836 (Mo. Ct. App. 1982).
of guideline. In a case in which defendant posted on his storefront window a
list of names of people who had written bad checks, the court viewed allega-
tions of resulting shame and humiliation as sufficient to state a cause of ac-
tion.\textsuperscript{81} This standard, of course, could never be dispositive. If the
defendant's disclosure associates the plaintiff with a drug overdose,\textsuperscript{82} an
arrest for hot-rod racing,\textsuperscript{83} or a gambling raid,\textsuperscript{84} the plaintiff certainly will
feel shame and humiliation, but he still will be left without a remedy.\textsuperscript{85}

In one of these cases, the court stated that the essence of the disclosure
tort was the unwarranted publication of intimate details of a person's private
life and rejected the plaintiff's claim, concluding that an arrest for hot-rod
racing was not an intimate detail of one's private life.\textsuperscript{86} Courts have ex-
pressed their concern about prying into intimate details in other ways. For
example, other courts have referred to "maudlin curiosity"\textsuperscript{87} or to the "mor-
bid and sensational prying into private lives for its own sake."\textsuperscript{88} The plain-
tiff suffers no exposure of intimate details when she is photographed, clad
only in a dish towel, while escaping from her estranged husband.\textsuperscript{89} Embarrass-
ing and awkward as the situation might be, the only intimate details
revealed would also be revealed by an ordinary bikini.\textsuperscript{90} Likewise, the utter-
ance of a racial slur might "outrage common decency" or "shock the con-
science," and it also might cause "shame and humiliation" to the victim, but
it does not constitute an invasion of privacy. The fact that a person is of a
racial or ethnic minority is a public matter, visible to anyone who cares to
observe, and not an intimate detail.\textsuperscript{91}

Little constructive dialogue has occurred on what constitutes an offensive
disclosure. Neither agreement nor disagreement has arisen on this issue.
Courts have acted quite independently and have offered a collage of ideas,
causing uneven results and providing little instruction to the bar and public.

\textbf{C. Public Figures, Voluntary and Involuntary}

In 1964 the Supreme Court of the United States began a constitutional
revolution in the law of defamation that has had some impact on cases in-

\textsuperscript{81} Id. at 838; see Brown v. Mullarkey, 632 S.W.2d 507, 509 (Mo. Ct. App. 1982).

\textsuperscript{82} Beresky v. Teschner, 64 Ill. App. 3d 848, 381 N.E.2d 979 (1979).


\textsuperscript{85} One basis for all three results was the newsworthiness of the matter disclosed. Cover-
stone v. Davies, 38 Cal. 2d 315, 239 P.2d 876, 880, cert. denied, 344 U.S. 840 (1952); Beresky

\textsuperscript{86} Coverstone v. Davies, 38 Cal. 2d 315, 239 P.2d 876, 880, cert. denied, 344 U.S. 840
(1952).

\textsuperscript{87} Gill v. Hearst Publishing Co., 40 Cal. 2d 224, 253 P.2d 441, 446 (1953) (Carter, J.,
dissenting in part).

\textsuperscript{88} Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975) (quoting RESTATEMENT
(SECOND) OF TORTS § 652D comment f (Tent. Draft No. 21, 1975) (current version at Re-
STATEMENT, supra note 1, § 652D comment h)), cert. denied, 425 U.S. 998 (1976).

\textsuperscript{89} Cape Publications, Inc. v. Bridges, 423 So. 2d 426 (Fla. App. 1982).

\textsuperscript{90} Id. at 427.

volving the public disclosure tort. Beginning with *New York Times Co. v. Sullivan* the Court attempted in a series of cases to reconcile the competing interests represented by the constitutional right of free speech and the common law right to be free from defamation. The result was a doctrine that required public officials and public figures, seeking to recover for defamation, to prove that the defendant published the defamatory statement with malice, either with knowledge that the statement was false or with reckless disregard for its truth or falsity.

Courts have also applied the public figure concept in public disclosure cases, although not in a way intended by the *New York Times v. Sullivan* line of cases. The stricter requirement of proving malice, rather than merely negligence or no-fault, relied upon the concept that discussion of public issues should be robust, wide-open, and uninhibited. A more relaxed standard allowing plaintiffs to recover for mere negligence or no-fault would be inhibitive and could create excessive self-censorship. A decade after *New York Times v. Sullivan* the Supreme Court described public figures as ones who have thrust themselves into the forefront, and the court asserted that instances involving truly involuntary public figures are extremely rare. Before and after this pronouncement, however, other courts rejected claims of public disclosure on the grounds that the plaintiff was a public figure, even though the particular facts did not involve the interest of first amendment values and even though falsity and knowledge of falsity were not issues. Courts in public disclosure cases have instead used the idea to support the conclusion that the disclosed item was not a private matter.

Most people would consider it appropriate to label a professional or college athlete as a public figure, and cases have held accordingly. The same

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97. *Id.* at 345.
99. A few courts have recognized the tension between the first amendment and the public disclosure tort. *E.g.*, Forsher v. Bugliosi, 26 Cal. 3d 792, 809, 608 P.2d 716, 725, 163 Cal. Rptr. 628, 637-38 (1980) ("In determining whether a cause of action has been stated, we must consider certain principles relating to the First Amendment, for the right to keep information private often clashes with the First Amendment right to disseminate information to the public."); Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 298 (Iowa 1979) (first amendment rights prevail in invasion of privacy action for accurate disclosure of information in public records). These courts attempt to resolve this tension not by use of the *Sullivan* doctrine, but by the concept of newsworthiness. *Forsher*, 26 Cal. 3d at 810, 608 P.2d at 726, 163 Cal. Rptr. at 638; *Howard*, 283 N.W.2d at 303 ("In addition to being unwise, it would infringe the first amendment for courts to allow recovery to persons offended by a publication of matters of legitimate public concern."). For a discussion of newsworthiness, see infra notes 121-60 and accompanying text. For a discussion of the relationship between the first amendment and the public disclosure tort, see articles cited infra note 250.
would also be true for a movie star or entertainer. Although it might go too far to say that such a person has "dedicated his life to the public," as one court asserts, an athlete or entertainer probably expects a certain amount of exposure of the facts of his life. While the status of such persons seems clear, courts in other cases have been less precise in using the public figure concept and seem to have merged this concept with the notion of newsworthiness.

In *Meetze v. Associated Press*, for example, the plaintiffs, a twenty- and twelve-year-old couple, gave birth to a son after being married for a year. The defendant newspaper publicized the event. The Supreme Court of South Carolina held that the youthful parents had by their own acts assumed the status of "public character" and had thereby lost to some extent the right of privacy that otherwise would be theirs. Perhaps the court was correct in saying that the event was an "occurrence of public or general interest," which in itself might be a proper basis for rejecting the plaintiffs' claim. In regarding the plaintiffs as public characters, however, the South Carolina court showed little thought in using that term and managed only to obscure the primary basis for its decision. A certain irony results since the plaintiffs were not truly public at all until the defendant's publication made them so.

The life of a public official is, without question, properly the subject of public disclosure. A police judge or a housing inspector will be hard-pressed to recover for such a disclosure, particularly when the disclosure describes misconduct in an area pertinent to his position. Courts generally regard police officers as public figures, at least to the extent that the disclosure involves their conduct while on duty. The same would be true for a prosecutor and for one who is running for a city council position. One court held similarly in a case involving a World War II marine sergeant

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104. 95 S.E.2d at 609.

105. For discussion of newsworthiness, see infra notes 121-60 and accompanying text.

106. See also Bereskey v. Teschner, 64 Ill. App. 3d 848, 381 N.E.2d 979, 984 (1978) (parents of teenager who had died from an apparent drug overdose were said to have been cast into the "public eye" and therefore were not entitled to relief for ensuing publicity).


109. In *Harnish* the plaintiff, who was a member of the local housing board, was not allowed to recover for disclosure of housing code violations in rental property that he owned. *Id.*


by finding that military personnel are public figures, at least partially.\textsuperscript{113}

Most of the public disclosure cases involving criminal activity have come out in favor of the publisher, but many of these cases have involved disclosure of some part of the conviction or post-sentencing procedure, such as a parole hearing\textsuperscript{114} or the trial itself.\textsuperscript{115} Other cases have involved a publication of the details of the criminal event.\textsuperscript{116} In view of the first amendment consideration of informing the public about criminal procedures, the fact that courts sometimes label the plaintiffs as public figures and reject their claim of tortious public disclosure is not surprising.\textsuperscript{117} Courts would be more accurate, however, to focus on the public nature of the event, rather than to stretch the public figure concept beyond sensible application. The result would be the same, but the basis for the result would be sounder.\textsuperscript{118}

The distinction between public and private figures often does, and in many cases should, decide the question of liability, but not in the way that some courts have used the distinction. The tort of public disclosure of private fact does not require a showing of a false statement; a true statement can be the basis for liability if the true statement constitutes a wrongful invasion.\textsuperscript{119} Scierner of falsehood, therefore, is necessarily an irrelevant item. Nevertheless, some courts in public disclosure cases have discussed the subject of sci-

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\item Stryker submits that a person running for public office necessarily surrenders more of his privacy than does a military figure; in the latter case, personal activities unrelated to the plaintiff's military career are not necessarily open to public gaze. 238 P.2d at 672. In a case involving a candidate for city council, on the other hand, another court stated that political candidates are subject to the "most thorough scrutiny," even if the result is exposure of the delinquent conduct of the candidate's children. Kapellas v. Kofman, 1 Cal. 3d 20, 36-37, 459 P.2d 912, 922-23, 81 Cal. Rptr. 360, 370-71 (1969). In the Kapellas court's view, in a self-governing society publishers should be given wide latitude in exploring the personal aspects of those who aspire to leadership positions. Id. In Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 188 Cal. Rptr. 762 (1983), a university student body president brought an invasion of privacy action against a newspaper for disclosing that she was a transsexual. Although the court regarded the plaintiff as a public figure, it refused to rule as a matter of law that her sexual identity was a public fact. Id. at 134-35, 188 Cal. Rptr. at 772-73. The court stated: "[T]he fact that she was the first woman student body president, in itself, [does not] warrant that her entire private life be open to public inspection." Id. at 135, 188 Cal. Rptr. at 773. See also Virgil v. Time, Inc., 527 F.2d 1122, 1131 (9th Cir. 1975) (public does not necessarily have an interest in private facts about public figures), cert. denied, 425 U.S. 998 (1976); Garner v. Triangle Publications, Inc., 97 F. Supp. 546, 549 (S.D.N.Y. 1951) (status as a public figure does not destroy one's right to privacy); Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir. 1940) (certain facts may be so intimate that their revelation may outrage notion of public decency), cert. denied, 311 U.S. 711 (1940).
\item Id. at 549.
\item E.g., in Frith v. Associated Press, 176 F. Supp. 671 (E.D.S.C. 1959), the photographs and identifications of two muggers were published after law enforcement officers released the identification and photographs at a press conference. The court granted summary judgment for the defendant news agency without mentioning the public figure concept. Instead, the court held for the defendant because the information was contained on public records and was a matter of public interest. Id. at 674. See infra notes 121-88 and accompanying text for a discussion of public interest and public records concepts.
\item See RESTATEMENT, supra note 1, § 652D.
\end{enumerate}
enter as if it were important to the disposition of the case.\textsuperscript{120}

Courts have applied the public figure concept quite loosely, often encompassing plaintiffs whose lives clearly were not public until the defendants' disclosures made them so. The concept has proved to be a convenient one for courts disposed to hold for defendants, but the cost has been the further undermining of the public disclosure tort and decisions based upon faulty premises.

\textbf{D. The Wide-Reaching Concept of Newsworthiness}

The text of section 652D states that a disclosure, to be actionable, must be of a matter that is "not of legitimate concern to the public."\textsuperscript{121} In the 1940 case of \textit{Sidis v. F-R Publishing Co.},\textsuperscript{122} a lower federal court, applying state law, recognized that an individual's interest in privacy inevitably conflicts with the public's interest in news and concluded that at some point the public's interest outweighs the individual's desire for privacy.\textsuperscript{123} Older public disclosure cases were of a similar attitude.\textsuperscript{124} Few, if any, of these cases discussed this subject in constitutional terms. This newsworthiness defense seemingly derived from the nature of the public disclosure tort itself, rather than from the first amendment.

In \textit{Time, Inc. v. Hill},\textsuperscript{125} a 1967 privacy case involving false light,\textsuperscript{126} the Supreme Court fused first amendment considerations and the newsworthiness concept. This fusion has caused little noticeable change, however, in the way that courts have acted in this area. Even before the first amendment was held to compel an allowance for newsworthiness, the courts were zealous guardians of the public's interest in news. The constitutional mandate has possibly caused the courts to become even more disposed to reject the victim's claim in favor of a newsworthy disclosure. A notable feature of

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  \item \textsuperscript{121} Restatement, supra note 1, § 652D.
  \item \textsuperscript{122} 113 F.2d 806 (2d Cir. 1940).
  \item \textsuperscript{123} Id. at 809.
  \item \textsuperscript{125} 385 U.S. 374 (1967).
  \item \textsuperscript{126} False light is defined by Restatement, supra note 1, § 652E:
    \begin{itemize}
      \item \textsuperscript{a} One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
      \begin{itemize}
        \item \textsuperscript{a} the false light in which the other was placed would be highly offensive to a reasonable person, and
        \item \textsuperscript{b} the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.
      \end{itemize}
    \end{itemize}
these cases is the range of items regarded by the courts to be newsworthy, especially in cases involving the occurrence of a crime.

The public has a legitimate concern in the reporting of crime, which serves a public necessity and goes beyond "a morbid and sensational prying into private lives for its own sake."127 At a base level, news of criminal activity could be important for individual self-preservation. At a more elevated level, such information is necessary in assessing the society in which one lives so as to be able to effect change, either by vote or by moral suasion. This comports with even the seemingly restrictive view of some that newsworthiness, and the absolute guarantee of first amendment freedom of speech, apply only to things that are important in making an intelligent voting decision.128 Additionally, one would clearly regard the concern in reporting crime as a "legitimate public concern" as section 652D and the courts use that term. The courts have acted accordingly, holding that one who has been convicted of a crime is in no position to claim an invasion of privacy when that fact is publicized.129

Courts have extended the newsworthiness defense beyond cases in which a convicted criminal is the subject of disclosure. The only public disclosure case from the United States Supreme Court concerned the victim of a crime.130 In that case the Court held unconstitutional a state statute making it a misdemeanor to broadcast a rape victim's name.131 The Court did not find a need to determine the existence of a public interest in such information; instead, it deferred to a presumed finding by the state legislature.132 State courts have acted similarly, holding that the newsworthiness of a criminal event applies to the identification of the victim.133 These cases do not offer much in the way of explanation, but instead seem only to assume that any person who participates, whether voluntarily or involuntarily, in a newsworthy event loses his right of privacy, at least to the extent of being able to conceal his identity.

128. See A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 94 (1948).
131. Id. at 496-97.
132. The court stated that "by placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." Id. at 495. For a discussion of public records, see infra notes 161-88 and accompanying text.
Courts have applied the newsworthiness defense in cases brought by participants in the criminal process other than the victim or the convicted. The defense would obviously apply to the prosecutor of a criminal action; not only is he a public official, but he is also an active and willing participant in a matter of considerable public interest.\(^{134}\) Courts have also extended this defense to include a lawyer who assisted the police in solving a murder.\(^{135}\) One court has also concluded that a woman’s attempted defense of her husband against a fatal stabbing constituted “an occurrence of public or general interest,” which justified her identification in a newspaper article describing the event.\(^{136}\)

The newsworthiness defense also applies against persons who were not directly involved in the occurrence or prosecution of the crime and who were mistakenly identified as participants. These persons, like victims and unlike enforcers and perpetrators, are not voluntary participants in the criminal event itself. Unlike victims, their involvement would be insignificant and transitory, but for the public disclosure. In a Florida case in which the police conducted a gambling raid on a cigar shop, an innocent bystander, present only to buy a newspaper, was mistakenly detained, but not arrested. A news broadcast showed him being detained. Despite his innocence and involuntariness, the Florida Supreme Court held against the plaintiff since he was an actor, although unwittingly, in an occurrence of public interest.\(^{137}\) In another case the plaintiff had been identified mistakenly as one who committed two serious crimes, although he was later cleared of suspicion. The defendant's article reported both the false accusation and the exoneration, and the entire episode was held to be “of news interest.”\(^{138}\) In a Missouri case the defendant was held not liable for its televised news account of an erroneous arrest in which the defendant specifically identified the arrestee.\(^{139}\) The court held that the defendant was not liable for the disclosure because actions by the police are of “proper public concern.”\(^{140}\)

In each of these cases the circumstance that linked the plaintiff’s name with the occurrence was fortuitous. The association was not due to a conscious and voluntary choice by the plaintiff, and the plaintiff was not a law enforcer. Had it not been for the defendant’s action in publicizing the event, the plaintiff’s association with the occurrence would happily have faded into unrecorded oblivion. The plaintiff instead underwent embarrassing and undeserved publicity. He was also forced to risk the unfair judgment of observers who feel that just as smoke indicates fire, so also does implication prove guilt.

The courts have been quite willing to extend the scope of newsworthiness

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140. 472 S.W.2d at 4.
far beyond the occurrence of crime. An article describing a physician’s malpractice is of legitimate public concern, as is the testimony from a divorce proceeding. The range of newsworthy items also includes the occurrence of a suicide, a death caused by a drug overdose, the suffocation of the plaintiff’s children in an abandoned refrigerator, and the removal of dead bodies from a burnt cottage. Newsworthiness also includes more positive subjects, such as a North Pole expedition and the life of a famous conductor. The fact that the plaintiff persuaded a woman not to jump off the Golden Gate Bridge is also newsworthy.

Only rarely have the courts held against the public’s interest in the reporting of news. On some of these rare occasions, the courts seem not to have denied the potential public interest in the event disclosed, but instead to have found that other considerations, such as the shame and humiliation suffered by the plaintiff, outweighed the public’s interest. More often, courts have had little trouble in finding newsworthiness even in very sensitive items. A striking example of this comes from the 1979 Iowa case of Howard v. Des Moines Register & Tribune. The defendant in that case published a newspaper article describing improper treatment of patients by a public care facility. As one of its examples the article stated that the plaintiff, while a minor, had been sterilized as a precondition to being released from the institution. The court held the entire account, including the identification of the plaintiff by name and hometown, to be newsworthy and absolved the newspaper and its reporter of liability.

The Howard court not only failed to offer a precise test of newsworthiness, but seemed to decide the case in a cursory manner, with no test whatsoever in mind. The court did quote the comment to the Restatement stating that one limitation to newsworthiness is "common decency, having due regard to

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152. 283 N.W.2d 289 (Iowa 1979), cert. denied, 445 U.S. 904 (1980).
153. 283 N.W.2d at 303-04.
the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure."154 Perhaps this is the best that any court can offer as a general statement on the matter. Ultimately, however, the due regard for the freedom of the press became total capitulation to the discretion of the editor. After describing the defendant's article as investigative journalism, the court rather meekly concluded that this journalistic technique was permissible.155

Perhaps Professor Kalven was right in arguing that the newsworthiness concept was so overpowering that it could virtually swallow the public disclosure tort.156 As a practical matter, courts may simply consider whatever the press prints to be newsworthy just because the press prints it.157 Most courts have in fact acted in a pliant and deferential manner. One writer has asserted that courts are justified in doing so because the news media are economically motivated to publish only matters of interest to the public; therefore, editorial judgments concerning what the public wants to know are apt to be sound and legitimate.158

For whatever rationale, the courts are willing to allow publishers not only to meet public need, but to cater to public curiosity, without any attempt in the process to articulate a test to distinguish the two. Even the idlest of gossip is sometimes accorded the protection of newsworthiness.159 Courts must recognize that "[j]ust as war is too important to be left to generals so is the right to publish too important to be left solely to professional media sellers."160 Up to this point, however, many courts have allowed the generals to have a free rein.

E. Facts that are Already Public

In Cox Broadcasting Corp. v. Cohn,161 the Supreme Court's only public disclosure case, the Court held that the father of a deceased rape victim had no cause of action when a television broadcast revealed his daughter's name.162 The defendant's reporter had obtained the victim's name from indictment records made available at the court appearances of the six per-
sons charged with the crime. Relying upon a Georgia statute making the publishing or broadcasting of the name of a rape victim a misdemeanor, the victim's father brought suit and recovered a judgment based upon the statute. On appeal the Georgia Supreme Court held that the statute did not provide for a civil cause of action, but did hold that the plaintiff had a cause of action based upon the common law tort of public disclosure.

The United States Supreme Court reversed. In holding that the first and fourteenth amendments barred the plaintiff's recovery, the Court deferred to the state's decision to place the information on official court records. In doing so, said the Court, "the State must be presumed to have concluded that the public interest was thereby being served." The Court placed heavy emphasis upon the public's reliance on the media to report "the proceedings of government" and asserted that "official records and documents open to the public are the basic data of governmental operations." The Court failed to show, however, how revelation of the victim's name helped people to vote intelligently or to register opinions on government administration, or why such information would necessarily be of interest to people concerned with government administration. The Court ultimately deferred at two levels: to the state in its decision to make the information a matter of public record, and to the defendant in its decision to publicize it. On this latter point, the Court concluded that reliance must rest upon the judgment of the media.

The Court based its decision on constitutional considerations, but it need not have done so. The nature of the public disclosure tort itself would, in the view of many courts, have precluded recovery here simply because the information was obtained from public records. Comment b to Restatement section 652D states that no liability should result from information that is "already publicly known" and includes as an example facts that are "matters of public record." The Court itself suggested that the bare existence of a public document made the difference on the question of liability. The Court need not have assessed the information for its value in voting intelligently or in keeping tabs on government conduct; the only concern is whether the state has chosen to place the information on a public document.

Such is the attitude of almost all of the courts that have dealt with this

165. 420 U.S. at 497.
166. Id. at 492.
167. Id.
168. Id.
169. Id. at 491.
170. Id. at 495.
171. Id. at 496.
172. Id. at 497.
173. RESTATEMENT, supra note 1, § 652D comment b.
174. 420 U.S. at 496. The Court said that "[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." Id.
The involuntary nature of the plaintiff's involvement does not matter. The fact that a personal matter appears on a public document of some kind is sufficient to make the personal fact available for widespread circulation. The plaintiff's delinquency on tax payments or status as a drug patient is publishable if a public document already contains the fact. Even as sensitive a fact as an involuntary sterilization is fair game if it already appears on a public record. Courts have considered divorce, criminal, custody hearing, lawsuit, tax, and marriage and annulment records to be public records, with their contents available for public disclosure. One court has held a birth certificate, which performs little, if any, government-checking function, to be a proper basis for an Associated Press article regarding the birth of a child to twenty- and twelve-year-old parents. Only rarely have courts allowed recovery when the disclosure was of a matter contained in a public record.

The position that public records generally promote the government-checking process has substance. In the application of this position, however, an idea that should be based on sound public policy has become arbitrary and dispositive, encompassing all that a public record happens to contain, regardless of the content of the disclosed item. The courts apparently assume that the items disclosed, by virtue of being on a public record, are already known to the public. While it is true that such information is available to

188. See Moore, A Newspaper's Risks in Reporting "Facts" from Presumably Reliable Sources: A Study in the Practical Application of the Right to Privacy, 22 S.C.L. REV. 1, 13 (1970) (implying that if all relevant information is a matter of public record, fact that it is not known to readers is inconsequential).
the public, in most cases few people have actually reviewed the public record or discovered the particular information. The information, therefore, is a matter of public record, but is usually not a matter of public knowledge.

The information in some cases is arguably a matter of public knowledge, although not contained in a public record. The process in these cases is not as mechanical as in the public records cases. Determining whether some fact is a matter of public knowledge is not as clear-cut as determining whether a certain item appears on a public record. As in the public records cases, however, this determination is usually made in favor of defendants. In *Forsher v. Bugliosi*, for example, the association, in the defendant's book, of the plaintiff with the disappearance and murder of a person was held not to be the basis for a cause of action, partly because the plaintiff had previously been mentioned in two earlier newspaper articles regarding the occurrence. The embarrassment of being mistakenly identified as a criminal suspect is magnified when subsequent newspaper articles describe the mistake and the exoneration, but no liability results if the occurrence was already in the public domain. In a similar case involving a conviction and a Presidential pardon, the court emphasized that the criminal case had received considerable publicity, that newspaper files contained accounts of the entire episode, and that a radio play based on these events had been broadcast. A radio program based on a false report of the escape of a black panther was held not to be the basis for liability, despite plaintiff's arguments that the program revived psychological problems and the scorn and ridicule of friends. One basis for this position was that the incident was not drawn from the plaintiff's "private affairs or activities," but rather was a matter "known to the public."

Whether generally known to the public or known in the sense of being contained on a public record, the courts plainly have developed a clear view as to how these cases should be decided: if a "public document" contains the fact, or if the fact is otherwise already publicly known, no liability results from further dissemination of that fact. The initial exposure, however limited, justifies the subsequent publicity, however widespread.

189. 26 Cal. 3d 792, 608 P.2d 716, 163 Cal. Rptr. 628 (1980).
190. Id. at 812, 608 P.2d at 727, 163 Cal. Rptr. at 639-40.
194. 292 P.2d at 603; see also Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765, 770 (1970) (information from interviews with people who knew the plaintiff was not regarded as private to the plaintiff).
F. Identification of the Plaintiff

A given public disclosure would seem not to be actionable unless it in some way can be related to a particular person. A plaintiff should not be able to recover unless the disclosure reasonably identifies him, for only then can he justifiably argue that he has been harmed. In Meeropol v. Nizer the defendant was held not liable for publishing a book about the trial of the plaintiffs' natural parents in which he referred to the plaintiffs by their original names. Because the plaintiffs were currently known by the name of their adoptive parents, no identification of the plaintiffs and no invasion of privacy occurred. Other courts have also held for the publisher on the basis that the publication did not identify the plaintiff.

Conversely, use of the plaintiff's name would seem to be the basis for liability in some cases. A few writers have argued that the identification of the plaintiff is not essential to the public interest in most cases, that the disclosed facts need not be associated with particular individuals, and that liability should result when the disclosure identifies the plaintiff. Some courts have agreed, but most courts have found some way to avoid imposing liability. A leading example is Howard v. Des Moines Register & Tribune Co., in which the defendant published an article describing the abusive practices of a county home, which included the involuntary sterilization of the plaintiff. The plaintiff, while conceding the newsworthiness of the subject, argued that the disclosure of her identity was not justifiable. The court disagreed, saying that the identification contributed to the effectiveness of the report. The court admitted that the identification was not essential, but stated that the publishers could properly strengthen the force of their evidence by naming the participants in the story. In addition to lending credibility to the story, the disclosure of the plaintiff's identity served to attract the reader's attention to the story. The court gave very little, if any, consideration to the interests of the plaintiff. The court certainly did not balance the competing interests. The only test that the defendant had to

196. 560 F.2d at 1067-68.
197. Id.
199. See Swan, Publicity Invasion of Privacy: Constitutional and Doctrinal Difficulties with a Developing Tort, 58 OR. L. REV. 483, 499-500 (1980); Comment, supra note 158, at 210.
200. See infra notes 219-26 and accompanying text.
201. 283 N.W.2d 289 (Iowa 1979). See supra text accompanying notes 152-55 for newsworthiness aspects of this case.
202. 283 N.W.2d at 303.
203. Id.; see Bezanson, supra note 157, at 1097-98 (discussing Howard).
meet was whether the disclosure of the plaintiff's identity in some way aided the story.

Disclosure of identity is more reasonable in a story describing a perpetrator, rather than a victim. In *Gilbert v. Medical Economics Co.*, for example, the defendant published an article that concerned a doctor's acts of malpractice and identified the doctor by name. Identification arguably serves a useful purpose in such a case, because the readers can take warning about a particular doctor. The fact that the perpetrator's own acts precipitated the event in the first place may also influence the court's decision. When the court in *Gilbert* justified the identification, however, it did so on grounds that considered only its benefit to the defendant's story.

While these decisions appear to endorse more forceful journalism, they do not take into account the public's need for information, the exercise of first amendment freedoms, or the defendant's interest in remaining anonymous. A balance of these factors may weigh in favor of identification without liability, but those courts that are particularly concerned with freedom of the press appear unwilling to use the balancing approach. In any event, most courts addressing the issue have refused to impose liability for identifying the plaintiff.

Courts have also been unsympathetic to the claims of family members. The immediate victim is arguably not the only sufferer, because family members also bear some of the consequence of the defendant's publication. Embarrassing behavior may naturally be attributed to family members, particularly parents, and they arguably should be compensated for the vicarious suffering and embarrassment that they experience. Nevertheless, most courts have rejected such claims for vicarious damages. The Alabama Supreme Court considered this question in *Abernathy v. Thornton*, in which a mother sought to recover for the publication of photographs and articles concerning her murdered son. The court referred to this as a "relational" right of privacy, but ultimately rejected the idea in that case.

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204. 665 F.2d 305 (10th Cir. 1981).
205. *See also* Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 536, 483 P.2d 34, 39, 93 Cal. Rptr. 866, 871 (1971), in which the court reasoned the same way. It stated: "While such an identification may not presume guilt, it may legitimately put others on notice that the named individual is suspected of having committed a crime." *Id.*
206. The *Gilbert* court stated:
   With respect to the publication of plaintiff's photograph and name, we find that these truthful representations are substantially relevant to a newsworthy topic because they strengthen the impact and credibility of the article. They obviate any impression that the problems raised in the article are remote or hypothetical, thus providing an aura of immediacy and even urgency that might not exist had plaintiff's name and photograph been suppressed.
665 F.2d at 308.
209. 263 Ala. 496, 83 So. 2d 235 (1955).
210. The court stated that "the relational right must be subject to at least the same limitations as the ordinary right of privacy." 83 So. 2d at 237.
Since the murder of her son was a matter of legitimate public interest, no liability, either direct or vicarious, resulted from its publication.\textsuperscript{211} The court noted that the plaintiff herself was not mentioned in the article.\textsuperscript{212} The court did not address the question of whether the mother could recover in a case in which the son would have recovered.

Other cases have been more direct, holding that a relative cannot maintain an action for public disclosure unless that relative is personally implicated by the publicity.\textsuperscript{213} This would presumably be true even if the primary victim had a valid cause of action. One rationale for this restrictive view is the fear of not being able to limit liability.\textsuperscript{214} Another concern is that the harm suffered is too subjective and difficult to assess, thus opening the door for spurious claims.\textsuperscript{215} The upshot is that parents, siblings, and spouses generally may not recover vicariously for public disclosures of private facts. Exceptions to this have been rare and have involved cases in which the plaintiffs' badly deformed child was the subject of the disclosure.\textsuperscript{216} These cases have not carried much weight, however, and at least one of them was subsequently described as "an extreme case,"\textsuperscript{217} involving commercial use of photographs of the nude, deformed body of the plaintiffs' child.\textsuperscript{218}

In some cases courts have critically examined the need to identify the plaintiff and have found it lacking, ruling in favor of the plaintiff.\textsuperscript{219} The
courts have considered the effect that identification would have on rehabilitation from lives of crime. One of these courts concluded that identification served no public purpose in the administration of justice, such as soliciting witnesses; instead, identification served only to hamper the important process of rehabilitation by preventing the offender, after having paid the price for his misdeed, from reverting to an anonymous and inconspicuous station. \(^{220}\) Rehabilitation would be particularly undermined if many years have passed since the commission of the crime. All of society, as well as the offender himself, has an interest in allowing the rehabilitated person to leave his past behind. \(^{221}\) Many courts seem to say that a rehabilitated person has earned the right to forget and society has an interest in protecting that right. Although the events themselves are subject to exposure and publicity, the name of the one-time offender is not. \(^{222}\)

In a case in which the defendant published a story about the plaintiff's disease that caused her to eat incessantly, the court emphasized the lack of need to identify the plaintiff. \(^{223}\) The fact that the identification was not essential to the story was a strong factor in the court's decision. The plaintiff's name was simply not necessary to give the public medical information as to the symptoms, nature, causes, or results of her ailment. \(^{224}\) The defendant's argument that identification of the plaintiff would attract the interest of readers did not convince the court. \(^{225}\) This conclusion contrasts with the view of most courts, which find merit in anything that strengthens the credibility and impact of the article. \(^{226}\) Even if the disclosure does identify the plaintiff, courts have other means available to avoid imposing liability. Courts generally deny recovery in cases in which the disclosure was of a

\(^{220}\) Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 542, 483 P.2d 34, 43, 93 Cal. Rptr. 866, 875 (1971).


\(^{223}\) The court stated that the plaintiff's ailment may be a matter of public interest because it is unusual, but the identity of the person suffering from this ailment is not. Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291, 295 (1942).

\(^{224}\) 159 S.W.2d at 295.

\(^{225}\) See id.

\(^{226}\) Gilbert v. Medical Economics Co., 665 F.2d 305, 308 (10th Cir. 1981).
matter not adverse to the plaintiff.\textsuperscript{227} Under this rationale, no liability accrues if the disclosure describes a wife's heroic attempts to save her husband from a stabbing incident or if it describes her statements of intended revenge.\textsuperscript{228} A defendant is not liable when the disclosure details the plaintiff's successful efforts to dissuade a person from committing suicide.\textsuperscript{229} One court noted that such an account was not derogatory or negative, but instead was most laudatory.\textsuperscript{230} The same would apply to accounts that are neutral and simply contain no criticism of the plaintiff,\textsuperscript{231} and of accounts that are sympathetic.\textsuperscript{232} If the interest to be protected by the public disclosure tort is one's privacy, rather than one's reputation, it would seem irrelevant whether the disclosure was of a matter not adverse.\textsuperscript{233}

Another available defense is that not only has the disclosure not identified the plaintiff, but that no public disclosure has occurred. The \textit{Restatement} requires communication to the public at large before a public disclosure has been made.\textsuperscript{234} Disclosure of the details of a highly personal phone conversation, therefore, did not result in liability when the disclosure was to only five persons, all of whom were management employees of the defendant corporation.\textsuperscript{235} Publicity also does not occur when a consumer reporting firm provides information to its client, an insurance company, about plaintiff's insurance history to assist in assessing the validity of a current claim.\textsuperscript{236} Public disclosure also has not occurred when the disclosure is limited to the plaintiff's wife,\textsuperscript{237} to the plaintiff's employer and three relatives,\textsuperscript{238} to the estranged husband of plaintiff's sister,\textsuperscript{239} or to a couple of attorneys.\textsuperscript{240} Telling a plaintiff's employer of the plaintiff's failure to pay a debt is not a public


\textsuperscript{228} Jones v. Herald Post Co., 230 Ky. 227, 229, 18 S.W.2d 972, 973 (1929).


\textsuperscript{230} Id.


\textsuperscript{233} At least one court so noted, stating that "[i]t would seem that the right of privacy, distinct from defamation, might include the right not to have one's picture published under circumstances which are complimentary as well as those which are critical . . . ." Hull v. Curtis Publishing Co., 182 Pa. Super. 86, 125 A.2d 644, 650 (1956). That court also conceded, however, that liability is generally found only when the disclosure causes "outrage" or "mental suffering, shame or humiliation." Id. (quoting from Smith v. Doss, 251 Ala. 250, 37 So. 2d 118, 120 (1948)).

\textsuperscript{234} \textit{Restatement}, supra note 1, § 652D comment a. This requirement is to be contrasted with publication for purposes of defamation, "which includes any communication by the defendant to a third person." Id.


\textsuperscript{236} Tureen v. Equifax, Inc., 571 F.2d 411, 419 (8th Cir. 1978).

\textsuperscript{237} Mikel v. Abrams, 541 F. Supp. 591, 598 (W.D. Mo. 1982).


\textsuperscript{240} Brown v. Mullarkey, 632 S.W.2d 507, 510 (Mo. Ct. App. 1982).
disclosure, but placing the same information in a storefront window located on a well-travelled public street is. A disclosure is public if it is made in a newspaper, a magazine, a handbill distributed to a large number of persons, a radio broadcast, or an address to a large audience.

The defendant can be held liable only if he intends or permits a reasonably broad publication, although determining how broad the publication must be is not an easy task in all cases. One court stated that the audience need not be the general public, but rather can be a smaller segment of the general public if the publication is embarrassing to the plaintiff. Courts, however, have not widely accepted this position. Most courts have taken a more restrictive view, and the result is that the plaintiff, who may be most concerned about shielding information from finite groups closest to him, must nevertheless establish that the disclosure was to a less finite "public at large."

II. SUMMARY OF THE CURRENT STATUS

The above categories can be used to assess the present state of the law. Two of them offer relatively straightforward tests with results that are fairly predictable. The plaintiff's presence in a public setting or the appearance of the disclosed fact on a public record will usually result in a denial of recovery. All have developed as pro-defendant standards with the result that courts have allowed recovery in only very limited circumstances.

Three factors emerge from the categories as essential requirements for a successful public disclosure action: (1) the fact must be one not voluntarily disclosed; (2) it must not concern governmental authorities or the occurrence of crime; and (3) it must concern a matter that would be embarrassing or demeaning to a reasonable person. Under current judicial thinking the plaintiff must, as a minimum, establish these elements to recover for public disclosure of private fact. As will be seen, however, this does not guarantee recovery. Even in cases in which these factors are present, the courts have been conservative in their approach to public disclosure cases.

This conservatism can be justified on several grounds. Some of the cases undeniably represent bogus or frivolous claims. Another concern is that more liberal application may undermine freedom of speech as guaranteed by the first amendment. The premise of a public disclosure claim is that the disclosed information is true. Courts may justifiably be concerned about

243. RESTATEMENT, supra note 1, § 652D comment a.
246. See supra notes 22-44 and accompanying text.
247. See supra notes 161-88 and accompanying text.
249. See supra note 119 and accompanying text.
imposing liability for the dissemination of true information.\textsuperscript{250} Courts may also discount these claims as the inevitable price one pays for living in a give-and-take society.\textsuperscript{251}

Even in a give-and-take society, however, the individual should be allowed to keep certain matters concealed to himself. Such matters should be deemed public material only when he voluntarily allows them to become so. The notion of a voluntary exposure is the basis for many of the cases holding for defendants. The idea is directly applicable in some cases;\textsuperscript{252} in others, such as location cases, the courts infer voluntary exposure;\textsuperscript{253} while in yet other cases, courts use the notion in ways that seem dubious, such as in some of the public-figure cases.\textsuperscript{254}

Voluntariness also plays a large role in other cases in which the idea is scarcely, if at all, mentioned. The plaintiff's involuntary position might explain much of the outcome in cases in which the disclosure is found to be indecent.\textsuperscript{255} Perhaps this is why publishing photographs of a person suffering physical disfigurement is actionable;\textsuperscript{256} a person's disfigurement is usually not voluntarily acquired or disclosed.

Voluntariness might also explain the difference in outcome between \textit{Neff v. Time, Inc.}\textsuperscript{257} and \textit{Daily Times Democrat v. Graham}.\textsuperscript{258} These two cases were similar in the subject matter of the disclosure. In \textit{Neff} the disclosure was the unzipped fly of an inebriated sports fan's trousers; the plaintiff in \textit{Graham} was photographed while her skirt was unexpectedly raised by air jets in a carnival fun house. If the two courts had been faithful to the location analysis used by most courts, the results in both cases would have been for the defendants. While \textit{Neff} predictably held for the defendant, \textit{Graham} held for the plaintiff, acknowledging the location rule, but rejecting it as arbitrary and unfair.\textsuperscript{259}

The \textit{Graham} court apparently felt that location should at most be only a factor in determining voluntariness. But \textit{Graham} is an anomaly. Most

\begin{footnotes}
\item[250] See Bezanson, supra note 157, at 1079-80; Swan, supra note 199, at 508-09; Comment, supra note 158, at 181; Comment, \textit{An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases}, 124 U. Pa. L. Rev. 1385, 1407-08 (1976).
\item[252] See supra notes 19-21 and accompanying text.
\item[253] See supra notes 22-44 and accompanying text.
\item[256] See supra notes 59-61 and accompanying text.
\item[258] 276 Ala. 380, 162 So. 2d 474 (1964).
\item[259] 162 So. 2d at 478.
\end{footnotes}
courts have placed much heavier emphasis on the event’s location, and at least one of the opinions includes language that describes location as conclusive. These courts apparently disagree with the Graham court and believe that a person does indeed forfeit his right of privacy merely because he was temporarily part of a public setting. The essential attitude is arguably the same, however. Consent and voluntariness are the basic consideration, but whereas most courts see these in virtually any public appearance, the Graham court was more discerning.

The courts have consistently rejected plaintiffs’ claims in cases involving governmental activity. These cases most often arise in the context of the occurrence or prosecution of crime and in accounts involving political leaders. Courts regard seriously the need to oversee our governmental authorities, an interest important enough in our self-governing society to sweep aside the claims of many persons who are only indirectly involved, particularly in cases involving criminal matters. One who attempts to rescue a murder victim, for example, becomes the proper subject of publicity, as do criminal victims, the erroneously accused, and innocent bystanders. The procedures of the criminal process, such as parole or trial, are subject to publicity. The media have a free rein in reporting crime, including the right to identify nearly everyone involved and to publish matters that are certain to be distressing. Even a photograph of a mangled corpse, complete with identification, is proper in describing a murder. For a fact to be a private one, therefore, it must be unrelated to the occurrence of crime.

The fact must also be unrelated to persons who hold government positions, such as police judges, housing inspectors, police officers, and military officers. The license is a broad one, allowing publicity of all involved, either directly or indirectly. One court, for example, has allowed a description of a political candidate’s delinquent children. Whether couched in terms of public figure, newsworthiness, or consent, the cases indi-

262. See supra notes 114-18, 127-36, and accompanying texts.
265. See supra notes 130-33 and accompanying text.
266. See supra notes 138-40 and accompanying text.
268. See supra note 114 and accompanying text.
269. See supra note 115 and accompanying text.
270. See supra notes 127-40 and accompanying text. One possible exception is represented by cases in which substantial time has elapsed since the conviction. See supra note 221 and accompanying text.
274. See supra note 110 and cases cited therein.
cate a clear judicial willingness to allow publication of matters pertaining to the lives of government officials.\textsuperscript{277}

In the words of the Restatement, liability for a public disclosure will result only if the disclosed matter "would be highly offensive to a reasonable person."\textsuperscript{278} This is probably the most elusive element of the tort and is made more difficult to delineate by the infrequency with which courts have directly dealt with it. If the disclosed matter is of legitimate public concern, no liability results, even if the matter is otherwise highly offensive. Because so many cases have come out for the defendant based on the public interest, obviating the need to consider the meaning of "highly offensive," very little data are available from which to derive a definition. If the publicity concerns either government officials or criminal matters, the publisher will generally not be liable, despite the offensiveness of the publicity. The voluntariness of a public appearance also renders irrelevant the offensiveness of a disclosure.\textsuperscript{279}

Nonetheless, the publicity must be embarrassing and demeaning for liability to result. Virtually all of the few cases favoring plaintiffs have concerned a matter embarrassing or demeaning to the plaintiff, whether it be his nudity,\textsuperscript{280} deformed body,\textsuperscript{281} embarrassing disease,\textsuperscript{282} or debt status.\textsuperscript{283} No liability results from publicity that is favorable or complimentary, because such publicity normally would not be embarrassing or demeaning.\textsuperscript{284} Many cases decided for the defendant on the basis of newsworthiness could also have been decided on the basis that no demeaning or embarrassing exposure was made of the plaintiff.\textsuperscript{285}

The significance of these three factors can particularly be seen in the handful of cases holding for the plaintiff. All three factors are present in each of these cases, with the exception of the cases that involve rehabilitated
criminals, in which the passage of time is a key factor. These factors, however, can only be regarded as minimum requirements. Not all courts are persuaded by their significance; the factors are present in many cases in which courts nevertheless hold for defendants. Two particular examples are *Howard v. Des Moines Register & Tribune Co.* and *Meetze v. Associated Press.*

### III. A Briefly Stated Suggestion

If the goal of Warren and Brandeis was to create an effective remedy for unreasonably offensive publicity, their goal remains unaccomplished. From the Warren-Brandeis point of view, the public disclosure tort has thus far proven to be a failure. According to one writer's count, fewer than eighteen public disclosure cases have favored plaintiffs over the years. Many of the majority are affirmances of summary judgments for defendants, cases in which juries were not allowed to make their input. Many claims have surely been bogus or trivial, and others probably represent unsure efforts by plaintiffs' attorneys to explore an uncharted course. But the scarcity of holdings favoring plaintiffs also suggests a strong judicial distaste for claims of unjustified public disclosure and an indisposition to support such claims.

If ever a plaintiff could justifiably have been distressed by personal publicity, it was Robbin Howard in *Howard v. Des Moines Register & Tribune Co.* While confined to a county home, she was involuntary sterilized as a precondition to being released. For six years afterward she lived a normal life and established friendships with people who were unaware of the sterilization. This situation changed, however, when a Des Moines newspaper published an article describing questionable practices and patient abuse at the home. The article highlighted Howard's sterilization as an example and identified her by name. Howard's petition claimed that she incurred contempt and ridicule because of the publicity and suffered mental pain and anguish. The matter was involuntary, embarrassing, and demeaning to Howard, noncriminal, and only indirectly concerned with political figures. The trial court did not allow the jury to consider the case, granting the newspaper's motion for summary judgment. The Supreme Court of Iowa affirmed, employing some of the categories described in Part I of this Article as the basis for its decision. The court said that the entire episode, including the identification of the plaintiff, was a matter of public record and newsworthy. The plaintiff was left with no remedy.

The young couple in *Meetze v. Associated Press* also had their private

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286. See *supra* note 221 and accompanying text.
287. 283 N.W.2d 289 (Iowa 1979).
289. Zimmerman, *supra* note 4, at 293 n.5.
290. 283 N.W.2d 289 (Iowa 1979).
291. *Id.* at 299-303.
292. *Id.* at 299-300.
293. *Id.* at 302-03.
lives disturbed by a newspaper article. The article described the personal and intimate occasion of the birth of their son. Despite their consistent entreaties and precautions to limit publicity, the defendant published an article publicizing the birth and highlighting a fact that was certain to attract the readers' attention—the age of the mother, who was twelve years old when the child was born. As a result of the publication, the young mother allegedly became an object of scorn and ridicule and suffered "extreme embarrassment, humiliation, mental anguish, mental agony, wounded feelings and loss of privacy."295 As in Howard, the matter was noncriminal, nonpolitical, not voluntarily disclosed, and embarrassing and demeaning to the plaintiff. The trial court, however, sustained the defendant's demurrer, and the Supreme Court of South Carolina affirmed.296 The court relied principally on the same two grounds as did the Howard court: the newsworthiness of the birth297 and the fact that the information was contained in a public record.298

In its discussion of each of these two points, the Meetze court displayed a disregard for the privacy claim.299 In discussing newsworthiness the court remarked that the birth of a child to a twelve-year-old girl was rather unusual and gave as the primary rationale for its conclusion that the birth was a biological event that would naturally raise public interest.300 Under this view the question of privacy is removed from considerations of normative value or policy consideration and becomes subject to popular inquisitiveness. If enough people would be curious about the matter, then it is not private and no liability results from publicizing it. The court did not assess public need,301 nor did it consider whether the information was important to the government-checking process. In commenting on the public records idea, the court acknowledged that the article was published before the birth certificate was filed, but stated that this was of little significance, since a person has no claim of privacy in something that could not, by operation of law, remain private.302 To invoke the public records rule, therefore, the defendant need only argue that the matter will, in the future, appear on a public record.

If the Howard and Meetze decisions were isolated occurrences, they would be notable but not significant. These two cases, however, are representative of a general judicial distaste for privacy claims. Many courts have relied on artful and narrow device and theory to circumvent the public disclosure tort, often preventing juries from considering the question. If a public disclosure tort is to exist at all, this approach is unwarranted. If the courts are truly

295. 95 S.E.2d at 608.
296. Id. at 610-11.
297. Id. at 610.
298. Id.
299. Id.
300. Id.
301. Cf. Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474, 477 (1964). The court in Graham stated that the defendant's photographs of the plaintiff disclosed nothing about which the public had a right to be informed.
302. 95 S.E.2d at 610.
interested in protecting against unreasonable publicity, the approach is self-
defeating.

A better approach would be for the courts to consider a more general
question: whether the reasonable person would have expectations of privacy
in the matter publicized by the defendant. This general approach has long-
established parallels in other areas of tort law. To establish an assault, for
example, the plaintiff must show that he was reasonably apprehensive of a
physical contact. The entire field of negligence is unified by a single, gen-
eral inquiry, which asks whether the defendant acted as a reasonable person
under the circumstances.

A recent example of such an approach comes from a Connecticut trial
court. In *Rafferty v. Hartford Courant Co.* the plaintiffs, both recently
divorced, staged a bizarre "unwedding ceremony" to celebrate their di-
vorces. The defendant newspaper's reporter and photographer recorded the
event, and their story and photograph later appeared in the defendant's
newspaper. As a result the plaintiffs suffered "extreme mental anguish," and
one of them was forced to leave his job.

The court ultimately rejected the newspaper's motion for summary judg-
ment, saying that questions of fact existed as to the scope of the reporter's
invitation. The court made no reference to any of the traditional catego-
ries. The court instead said that questions existed as to the motive and
intent in the extension of the invitation to the reporter; the fair and honest,
but subjective, feelings of the reporter and his reactions to the invitation; and
the reactions of the witnesses to the ceremony itself. The issue had been
raised as to whether everyone in attendance had agreed that no one would
report the party, as alleged in the plaintiff's affidavit. All of these factors
approach a discussion of consent, but more accurately can be described as a
consideration of the reasonable expectations of all the persons involved: the
plaintiffs, the reporter, the photographer, and the guests. The plaintiffs al-
legedly intended their behavior to be viewed privately, and the jury's re-
sponsibility was to determine whether this expectation was reasonable and
justifiable. The court's opinion is in contrast to the cases discussed in Part I,
in which such considerations were seldom, if ever, raised.

The general test proposed need not be inconsistent with the ideas de-

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303. W. Prosser, supra note 17, § 10.
304. Id. § 32.
306. 416 A.2d at 1220.
307. The court could have emphasized the location of the event, which took place on an
open hillside, but in an area that was private and some distance from passers-by. Id. at 1216.
308. Id. at 1221.
309. Id. at 1220.
310. Id. at 1216.
311. See Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964). The
court in *Graham* stated:
One who is a part of a public scene may be lawfully photographed as an inciden-
tal part of that scene in his ordinary status. Where the status he expects to
occupy is changed without his volition to a status embarrassing to an ordinary
person of reasonable sensitivity, then he should not be deemed to have forfeited
scribed in Part I. A truly public figure, for example, probably has lower expectations of privacy and, therefore, would face a higher burden in recovering for unwanted publicity under the proposed test. Many of the cases described in Part I would reach the same result under a general test. The proposed test still has value, however. A unifying theme would promote consistency of results and allow courts and juries to base decisions on a firmer, more thoughtful, and less arbitrary foundation. A more general test would help to avoid questionable decisions such as Meetze and Howard, which resulted from uncritical loyalty to the established categories.

Courts currently dispose of many public disclosure cases by summary judgment, untouched by jury consideration. The importance of the jury would obviously be greater under a more flexible standard that considers reasonable expectations. A jury would be able, more so than a judge, to determine whether a reasonable person would have expectations of privacy in a certain matter. The jury’s discretion should, therefore, be accorded great weight, summary judgments should be rare, and appellate courts should reverse only in limited circumstances.

IV. CONCLUSION

The courts have developed a variety of methods to deal with public disclosure cases. Some of these have become hard-and-fast rules, and all have developed into pro-defendant standards. The result is that the tort of public disclosure has failed in its initial purpose of providing a remedy for unreasonable publicity. It has indeed become a phantom tort.

Our society continues to regard privacy as a valuable interest worth preserving. Protection from unwanted and unreasonable publicity remains a worthwhile goal achievable by legal doctrine. One writer has suggested otherwise, stating that “[p]erhaps the best defense against the effects of public gossip is a willingness to be more discreet in revealing personal information about ourselves and in exposing our intimate behaviour to public view.” She quoted the Younger Committee’s conclusions that “guarded speech about one’s personal affairs, care of personal papers, caution in disclosing information on request, confining private conduct to secluded places, and the use of curtains, shutters and frosted glass” are effective to protect privacy. She further suggested that the public disclosure tort is a “leaky ship which should at long last be scuttled.”

The Committee’s alternatives, however, only demonstrate the need for a

162 So. 2d at 478.
312. Zimmerman, supra note 4, at 362 (citing A. Westin, Privacy and Freedom 7, 346-50 (1967)).
313. Zimmerman, supra note 4, at 364.
314. REPORT OF THE COMMITTEE ON PRIVACY, CMD 5, No. 5012 (1972) [frequently referred to as the Younger Committee Report]. The British Government established the Younger Committee to study the need for privacy legislation.
315. Zimmerman, supra note 4, at 348.
316. Id. at 294.
legal measure. The solution is not to scuttle the public disclosure tort, but to resurrect it. Courts need not abandon the theories that have emerged over the years, but they should employ them more critically, perhaps as important considerations rather than as dispositive rules, all with a view to answering a basic and overarching question: whether the plaintiff had a reasonable expectation of privacy in the disclosed item. Such an approach would afford a fair and reasonable soundness to a much-needed legal remedy.