

## Protecting Truthful Speech: Narrowing the Tort of Public Disclosure of Private Facts

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### INTRODUCTION

“The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery.”<sup>1</sup> Although most would say that this statement describes the press today, it was written almost one hundred and twenty years ago by Samuel Warren and Louis Brandeis. They did not live during a time in which the news racks of every grocery store were stocked with countless magazines, each filled with the latest details and rumors of celebrities’ lives. But they were still concerned with the effects of the press on privacy.

Their tremendously influential article led to the development of tort liability for invasion of privacy.<sup>2</sup> One aspect of this tort is the cause of action for public disclosure of private facts. There is no doubt that this tort is motivated by the best intentions. We all have information that we want to shield from the world. But, from a First Amendment perspective, holding the media liable for public disclosure of private facts is deeply troubling. Most simply put, it allows liability for truthful speech. Rarely does the First Amendment allow criminal or civil liability for truthful expression.

I make three points in this article. First, liability for the tort of public disclosure of private facts is objectionable under the First Amendment. Second, the Supreme Court’s decisions in this area fail to adequately safeguard freedom of speech. Third, liability for public disclosure of private facts should be allowed only where there is a substantial threat to safety. In other words, loss of privacy, by itself, should not be actionable. There must also be a likelihood that release of the information risks harm to someone’s safety.

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<sup>1</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

<sup>2</sup> Don Corbett, *Virtual Espionage: Spyware and the Common Law Privacy Torts*, 36 U. BALT. L. REV. 1, 13 (2006).

## I. PUBLIC DISCLOSURE OF PRIVATE FACTS AND THE FIRST AMENDMENT

The Restatement (Second) of Torts describes the requirements for a cause of action for public disclosure of private facts. It provides:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.<sup>3</sup>

The common law cases involve a variety of situations in which the press reveals personal information about an individual. A few examples give a sense of how this tort is used. In *Diaz v. Oakland Tribune, Inc.*, a newspaper was held liable for revealing that a student leader was a transsexual and had a sex change operation.<sup>4</sup> In *Melvin v. Reid*, another early case about public disclosure of private facts, the plaintiff successfully sued when the press revealed that she previously had been a prostitute who had been prosecuted, but acquitted for murder.<sup>5</sup>

From a First Amendment perspective, liability for public disclosure of private facts is very troubling. First, unlike defamation, which creates liability for false speech, the tort of public disclosure of private facts inherently creates liability for truthful speech. Rarely does the First Amendment allow the law to make the value choice that ignorance is better than knowledge.

To be sure, there are a few instances when the Supreme Court has allowed liability for truthful speech. For example, truthful speech that seriously risks national security might be stopped and punished. In *Near v. Minnesota*, the Court recognized that a prior restraint on publication might be appropriate in a situation where publication of information might seriously endanger national security.<sup>6</sup> Additionally, in *New York Times v. United States*, the Court found that there was an insufficient basis for an injunction to halt the publication of the Pentagon Papers, but a majority of the Justices recognized that there can be criminal liability for publishing information harmful to national security.<sup>7</sup>

The Supreme Court has also allowed liability for truthful speech in the context of the right of publicity. In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court held that a television station could be held liable for broadcasting the entirety of a circus act by a "human cannonball."<sup>8</sup> The

<sup>3</sup> RESTATEMENT (SECOND) OF TORTS § 652D (1977).

<sup>4</sup> 188 Cal. Rptr. 762 (Ct. App. 1983).

<sup>5</sup> 297 P. 91 (Cal. Ct. App. 1931).

<sup>6</sup> 283 U.S. 697 (1933). The Court opined that during war time prior restraint would be appropriate to prevent "publication of the sailing dates of transports or the number and location of troops." *Id.* at 716.

<sup>7</sup> 403 U.S. 713 (1971).

<sup>8</sup> 433 U.S. 562 (1977).

Court concluded that the actions of the press deprived Zacchini of his livelihood by giving the public for free that which they otherwise would have had to pay to see.

The Court has also indicated that there can be liability for truthful speech in the case of advertising for illegal activity.<sup>9</sup> Although there have not been Supreme Court cases about this, in *Braun v. Soldier of Fortune Magazine, Inc.*, the United States Court of Appeals for the Eleventh Circuit allowed liability for an advertisement for a contract killer.<sup>10</sup>

But the reality is that there are very few cases in American history where the Supreme Court in any context has allowed liability for truthful speech. The First Amendment is based on the strong premise that knowledge is better than ignorance, and liability for truthful speech is inconsistent with that axiom.

Second, the need to define what is of legitimate public interest raises troubling First Amendment issues. As explained above, liability under the tort of public disclosure of private facts requires a showing that the matter “is not of legitimate concern to the public.”<sup>11</sup> But how is a court to decide this?<sup>12</sup> There are two possible approaches, neither of which is satisfying. A court could decide “legitimate concern” to the public by focusing on what people are actually interested in learning about. But defining “legitimate public interest” in terms of the public’s *actual* interest eviscerates the tort of public disclosure of private facts. By definition, the media will report only that which is of interest to its readers and viewers. The media can always show that there is some segment of the public that is interested in whatever it is that they are communicating. In fact, the more personal the information, especially about celebrities, the more likely it is that there is interest in knowing about it.

The alternative is for the judge to decide what the public interest *should* be. In other words, a matter is of legitimate public interest, only if the court—in its enlightened knowledge of what is best—decides what the public should want to know. It appears that the Supreme Court used this approach in *Bartnicki v. Vopper*, in rejecting liability for a radio station and a talk show host for broadcasting the tape of an illegally intercepted and

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<sup>9</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563–64 (1980) (describing the First Amendment standard for when commercial speech can be regulated, including that there is no First Amendment protection for advertising of illegal activity).

<sup>10</sup> 968 F.2d 1110 (11th Cir. 1992); see also *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997) (allowing liability against the publisher of the book, *Hit Man: A Technical Manual for Independent Contractors*), *cert. denied*, 523 U.S. 1074 (1998).

<sup>11</sup> RESTATEMENT (SECOND) OF TORTS § 652D (1977).

<sup>12</sup> There is also uncertainty as to how a court is to decide what would be offensive to the reasonable person. From a First Amendment perspective, this is troubling, because the First Amendment often protects “offensive” speech. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (upholding the protection of hate speech); *Cohen v. California*, 403 U.S. 15 (1971) (noting that speech cannot be punished because of its offensiveness).

recorded conversation between two teachers' union officials.<sup>13</sup> The Court stressed that there was a public interest in hearing the conversation because it concerned labor management negotiations involving the schools.

But what the public should be interested in learning about is highly subjective. The First Amendment usually presumes that it is for the marketplace of ideas to decide this, not a government official or a judge. What is the basis for allowing a judge to decide whether the public has a legitimate interest in the details of a celebrity's private life or a conversation between teachers' union officials?

To be sure, the tort of public disclosure of private facts is not the only area where the Court has invoked the concept of "legitimate public interest."<sup>14</sup> But asking a court to make this determination is inherently at odds with the freedom of speech protected by the First Amendment. There is no way for a court to decide this without either totally deferring to the media (and effectively eliminating the tort) or substituting its own judgment (and putting itself in a role that is inimical to freedom of speech).

## II. THE SUPREME COURT'S DECISIONS FAIL TO SOLVE THE FIRST AMENDMENT PROBLEM WITH LIABILITY FOR PUBLIC DISCLOSURE OF PRIVATE FACTS

Thus far, there have been two sets of Supreme Court cases dealing with possible media liability for public disclosure of private facts. One set of cases involved state laws prohibiting disclosing a rape victim's identity without her consent.

In *Cox Broadcasting Corp. v. Cohn*, the issue before the Supreme Court was whether, consistent with the First and Fourteenth Amendments, a state could create "a cause of action for damages for invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the prosecution of the crime."<sup>15</sup> The Court held that a state could not.<sup>16</sup>

Mr. Cohn was the father of a deceased seventeen-year-old rape victim.<sup>17</sup> A reporter covering the trial learned the name of the victim from an examination of the indictments which were made available for the reporter's inspection in the courtroom.<sup>18</sup> The reporter subsequently disclosed the victim's name to the public.<sup>19</sup> It was not in dispute that the indictment was

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<sup>13</sup> 532 U.S. 514 (2001).

<sup>14</sup> The Court has done so in the context of defamation as well, when the speech involves a private figure. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (holding that the media can be held liable for presumed or punitive damages without proof of actual malice when the plaintiff is a private figure and the speech does not involve a matter of public concern).

<sup>15</sup> 420 U.S. 469, 471 (1975).

<sup>16</sup> *Id.* at 496-97.

<sup>17</sup> *Id.* at 471.

<sup>18</sup> *Id.* at 472.

<sup>19</sup> *Id.* at 473-74.

a public record available for inspection.<sup>20</sup> The father sued the broadcasting company and the reporter for violating a Georgia law making it a misdemeanor to broadcast a rape victim's name.<sup>21</sup>

The Court ruled in favor of the media defendants, holding that a state could not, consistently with the First Amendment, impose sanctions on the accurate publication of a rape victim's name obtained from judicial records that are maintained in connection with a public prosecution and that themselves are open to public inspection.<sup>22</sup> In support of its conclusion, the Court made two points. First, the Court acknowledged the media's "[g]reat responsibility . . . to report fully and accurately the proceedings of government," and further noted that "official records and documents open to the public are the basic data of governmental operations."<sup>23</sup> Given the public's limited time and resources, it necessarily relies on the media for this information—information that it has a legitimate interest in receiving.<sup>24</sup> Further, "[w]ith respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."<sup>25</sup>

Second, the Court explained that prevailing privacy law recognizes that privacy interests "fade when the information involved already appears in public records."<sup>26</sup> Indeed, the fact that the state placed the information in the public domain on official court records leads to the presumption that the state concluded that the public interest was thereby being served. The Court was not willing to articulate a rule under which the media was prohibited from publishing information from public records, even if the information was reasonably offensive to the sensibilities. As the Court explained:

Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.<sup>27</sup>

The Court thus limited the ability to hold the media liable for publishing true information lawfully obtained from government records. The Court stated: "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those

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<sup>20</sup> *Id.* at 473.

<sup>21</sup> *Id.* at 474; *see also* GA. CODE ANN. § 16-6-23 (2007).

<sup>22</sup> *Cox Broad.*, 420 U.S. at 496–97.

<sup>23</sup> *Id.* at 491–92.

<sup>24</sup> *Id.* at 491.

<sup>25</sup> *Id.* at 492.

<sup>26</sup> *Id.* at 494–95.

<sup>27</sup> *Id.* at 496.

who decide what to publish or broadcast.”<sup>28</sup> The Court accordingly held that the Georgia statute was unconstitutional and that the media defendants were, thus, not subject to liability for their conduct under the state statute.<sup>29</sup>

The other Supreme Court case in this area is *Florida Star v. B.J.F.*<sup>30</sup> Florida had a law that made it unlawful to “print, publish, or broadcast. . . in any instrument of mass communication the name . . . of the victim of any sexual offense . . . .”<sup>31</sup> B.J.F., a rape victim, sued The Florida Star newspaper for violating this law when it published her name in its “Police Report” section, which described local criminal incidents under police investigation. The newspaper obtained the victim’s identity from a report produced by the police department and made available to the public.<sup>32</sup>

Citing *Cox Broadcasting*, among other cases, the newspaper urged that the award of damages against it under the Florida statute violated the First Amendment.<sup>33</sup> Notably, despite strong factual resemblance to *Cox Broadcasting*, the Court did not rely on that decision as precedent, particularly because that case involved information disseminated in *court* records made available to the public.<sup>34</sup> Here, in contrast, the information came from a “police report prepared and disseminated at a time at which not only had no adversarial criminal proceedings begun, but no suspect had been identified.”<sup>35</sup>

Despite this distinction, the Court still held in favor of the newspaper. “[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”<sup>36</sup> The Court found no such state interest. The Florida Star lawfully obtained the information, which was a matter of public significance, and its disclosure was truthful and accurate. Though the Court recognized that the interests in protecting the privacy and safety of sexual assault victims and in encouraging them to report offenses without fear of exposure are highly significant, it nevertheless held that “imposing liability for publication under the circumstances of this case is too precipitous a means of advancing those interests . . . .”<sup>37</sup> It was the police department, not the newspaper, that failed to comply with the Florida statute. The imposition of damages, therefore, could “hardly be said to be a narrowly tailored means of safeguarding anonymity.”<sup>38</sup> The Court noted that its hold-

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 496–97.

<sup>30</sup> 491 U.S. 524 (1989).

<sup>31</sup> FLA. STAT. ANN. § 794.03 (West 2007).

<sup>32</sup> *Florida Star*, 491 U.S. at 527.

<sup>33</sup> *Id.* at 530–32.

<sup>34</sup> *Id.* at 532.

<sup>35</sup> *Id.* at 532.

<sup>36</sup> *Id.* at 533 (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)) (brackets in original).

<sup>37</sup> *Id.* at 537.

<sup>38</sup> *Id.* at 538.

ing was limited:

We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability under [Florida Statute] § 794.03 to appellant under the facts of this case.<sup>39</sup>

*Cox Broadcasting* and *Florida Star* thus establish the proposition that the media cannot be held liable for the truthful reporting of information lawfully obtained from government records. The cases rest on the importance of the press being able to report without any fear of liability on what is in government records. A central function of the press is to check the government,<sup>40</sup> and this requires that the press be able to communicate anything it finds in government documents that is lawfully available without hesitation. This is consistent with other Supreme Court decisions holding that the media cannot be punished for revealing information that is learned in court proceedings.<sup>41</sup>

The other Supreme Court case concerning media liability for invasion of privacy is *Bartnicki v. Vopper*.<sup>42</sup> It is a crucial extension of *Cox Broadcasting* and *Florida Star* because it involved information that was not part of government records and that was not lawfully obtained.

The Pennsylvania State Education Association was a union that represented the teachers at the Wyoming Valley West High School in contentious collective-bargaining negotiations.<sup>43</sup> Gloria Bartnicki was the chief negotiator for the union and Anthony Kane was president. A phone call between Bartnicki and Kane was illegally intercepted and recorded. During the conversation, the two union officials discussed the timing of a proposed strike, difficulties created by public comment on the negotiations and the need for a dramatic response to the school board's intransigence.<sup>44</sup> Bartnicki and Kane believed that they were having a private conversation. At one point, Kane said, "[i]f they're not gonna move for three percent, we're gonna have to go to their, their homes. . . . To blow off their front porches, we'll have to do some work on some of those guys."<sup>45</sup>

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<sup>39</sup> *Id.* at 541.

<sup>40</sup> See, e.g., Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

<sup>41</sup> See, e.g., *Okla. Publ'g Co. v. Dist. Court*, 430 U.S. 308 (1977) (per curiam) (holding that the media could not be held liable for identifying a juvenile suspect after the judge had admitted the press and the public to a juvenile hearing).

<sup>42</sup> 532 U.S. 514 (2001).

<sup>43</sup> *Id.* at 518.

<sup>44</sup> *Id.* at 518–19.

<sup>45</sup> *Id.* at 519 (omission in original).

Frederick Vopper was a radio commentator who had been critical of the union in the past. Vopper played the tape of the intercepted phone conversation on his public affairs talk show. Bartnicki and Kane sued Vopper and others for violations of federal and state wiretapping laws.<sup>46</sup>

The Supreme Court balanced two competing interests, weighing the petitioners' right to privacy against the public's right to information concerning important public affairs.<sup>47</sup> Justice Stevens, writing for the majority, explained that holding respondents liable for invasion of privacy when the information was obtained from a private source would violate the First Amendment.<sup>48</sup> Vopper was not liable because he did not participate in the illegal interception and recording, and because the tape concerned a matter of public importance.<sup>49</sup>

In a concurring opinion, Justice Breyer cited a concern for public safety, referencing Kane's threat of physical harm. "Where publication of private information constitutes a wrongful act, the law recognizes a privilege allowing the reporting of threats to public safety."<sup>50</sup> Justice Breyer stressed that there was a threat of violence during the conversation: the threat to blow up the porches.<sup>51</sup>

Although I agree with the results in these three cases, they are very troubling. What is the public interest in knowing a rape victim's identity? Publicizing the names of rape victims might create a disincentive for victims to report a crime that is all too often unreported. It is hard to imagine any public interest in knowing the victim's name. If the focus is on the public's legitimate interest in knowledge, as the tort requires, there seems to be none. Likewise, what was the public's interest in hearing the private conversation of the two teachers' union officials in *Bartnicki*? Justice Breyer's focus on the hyperbole about blowing up a porch seems silly. There was no threat of violence in that tape; it was a figure of speech.

At the very least, these cases do not provide a useful way of answering the central First Amendment problem posed by the tort of public disclosure of private facts: how is it to be determined when the public has a legitimate interest in information?

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 518.

<sup>48</sup> *Id.* at 535.

<sup>49</sup> *Id.* at 525.

<sup>50</sup> *Id.* at 539 (Breyer, J., concurring) (citing RESTATEMENT (SECOND) OF TORTS § 595, cmt. g (1977) (general privilege to report that "another intends to kill or rob or commit some other serious crime against a third person")).

<sup>51</sup> *Id.*



### III. A NEW APPROACH TO THE TORT OF PUBLIC DISCLOSURE OF PRIVATE FACTS

I propose that there be no liability for public disclosure of private facts, except where publication poses a substantial threat to safety. If revealing private information would put someone in physical danger, then there can be liability.

There have been cases where this has been exactly the reason why liability has been allowed. In *Times-Mirror v. Superior Court*, the Los Angeles Times published Jane Doe's name after she discovered her roommate's body and confronted the suspected murderer.<sup>52</sup> Jane's roommate had been raped, beaten, and strangled. Amy Chance of the Times investigated the story and learned of Jane's identity from the coroner's office. Chance told the Times that she knew the murder victim, having lived next door to her shortly before the murder. The Times assigned Chance to cover the story.<sup>53</sup> The investigating detective did not reveal Jane's identity but did tell Chance that the victim's roommate had provided a description of the murder suspect. The detective told Chance that he did not want the information to appear in the newspaper. The Times published a story the next morning identifying Jane, and revealing her true name, as the discoverer of the victim's body.<sup>54</sup> Jane Doe sued the Times and Chance for invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress.<sup>55</sup>

The issue before the California Court of Appeal was "whether the news media is privileged to print the name of a witness to a crime when doing so could subject that witness to an increased risk of harm."<sup>56</sup>

The court rejected the Times' arguments that its First Amendment right to disseminate information took precedence over Jane's right to privacy. The court concluded that, "where an individual observes and can identify a suspected murderer who is still at large, the First Amendment provides no absolute protection from liability from printing the witness's name."<sup>57</sup> Balancing the interest of the individual's safety and the state's interest in conducting a criminal investigation—especially when the criminal is still at large—against the public's right to know the name of the individual witness, the court held that the former interests could trump the latter interest. The court recognized that, even where the elements for a cause of action for invasion of privacy are met, publication of the information may be exempt from liability if it is "truthful and newsworthy."<sup>58</sup>

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<sup>52</sup> 244 Cal. Rptr. 556, 558 (Ct. App. 1988).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 559.

<sup>57</sup> *Id.* at 560.

<sup>58</sup> *Id.* at 561.

The court stated that although an account of the murder was newsworthy, the publication of Doe's name might not be and that this was an issue to be determined by a jury.<sup>59</sup> The court accordingly upheld the denial of summary judgment in favor of the plaintiff.<sup>60</sup>

Similarly, in *Hyde v. City of Columbia*,<sup>61</sup> the court allowed liability because of the threat to safety. Plaintiff Hyde sued the City of Columbia for the negligent disclosure of her name and address by the city police to news reporters, and the newspapers for the subsequent negligent publication of the information.<sup>62</sup> Hyde had been abducted and kidnapped by an unknown assailant, but escaped from his car. With the assailant still at large, Hyde reported the incident to police, who later, without Hyde's knowledge or consent, released her name and address to the media for publication. Subsequent to these publications, Hyde had several encounters with the assailant. For example, the plaintiff reported that the assailant drove up to her duplex to read her house number. The assailant later returned with a shotgun, the same shotgun he had used while abducting Hyde, but drove away.<sup>63</sup> Hyde also received phone calls purportedly from the assailant, in which he said, "I'm glad you're not dead yet, I have plans for you before you die[.]" and "I wanted to refresh your memory of who I am before I kill you tonight."<sup>64</sup> After this second phone call, which was received at Hyde's place of employment, the assailant appeared outside of Hyde's place of employment, pointed a shotgun at her, and conveyed to her the threat to kill her that night.<sup>65</sup>

Defendants argued that they were not negligent because they had no duty to Hyde, that their conduct was protected by the First Amendment, and that the publication of Hyde's name and address were permissible under the Sunshine Law, which directs that public records shall be open to the public for inspection and duplication.<sup>66</sup>

The court explained that, because the media enjoyed no constitutional right to police records, the defendant-media's right to have Hyde's name and address depended on whether the information was a public record under the Sunshine Law.<sup>67</sup> The court disagreed with defendants and found that Hyde's name and address were not public record and, therefore, were not required to be disclosed under the Sunshine Law.<sup>68</sup> As the court explained:

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<sup>59</sup> *Id.* at

<sup>60</sup> *Id.* at 565.

<sup>61</sup> 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983).

<sup>62</sup> *Id.* at 253.

<sup>63</sup> *Id.* at 254 n.2.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 258.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

To construe the Sunshine Law to open *all* criminal investigation information to *anyone* with a request subserves [sic] neither the public safety policy of our state nor the personal security of a victim—but rather, courts constitutional violations of the right of privacy of a witness or other citizen unwittingly drawn into the criminal investigation process as well as the right of an accused to a fair trial. Such a construction leads to the absurdity (adroitly drawn by the defendants) that an assailant unknown as such to the authorities, from whom the victim has escaped, need simply walk into the police station, demand name and address or other personal information—without possibility of lawful refusal, so as to intimidate the victim as a witness or commit other injury.<sup>69</sup>

For the purposes of Restatement (Second) of Torts Section 652, subsection D, the court found that Hyde's name and address were of "trivial" public interest.<sup>70</sup> The disclosure, as the court characterized it, "served no essential criminal investigation role of the police, but rather was a foreseeable impediment to that function by the encouragement of an obstruction of justice by the assailant[,] and "was also a threat to the very *personal safety* of the victim."<sup>71</sup> The court found that the facts alleged gave rise to a duty by the police to foresee risk of injury to Hyde by the assailant. The court said:

[T]he name and address of an abduction witness who can identify an assailant still at large before arrest is a matter of such trivial public concern compared with the high probability of risk to the victim by their publication, that a news medium owes a duty in such circumstances to use reasonable care not to give likely occasion for a third party [assailant still at large] to do injury to the plaintiff by the publication.<sup>72</sup>

The court accordingly held that Hyde had stated a cause of action for which relief could be granted against the media defendants.<sup>73</sup>

There are significant advantages to limiting liability for public disclosure of private facts to situations in which there is a risk to safety from the publication of information. Most importantly, this avoids the need for courts to define what is a matter of legitimate interest to the public. It also minimizes the circumstances in which there will be liability for the reporting of truthful information. Liability would be restricted to the compelling circumstance in which safety was placed in danger by publication.

There is, admittedly, a cost to this approach: the public will receive less legal protection for privacy. Highly private information—about sexual activities, about medical conditions, about embarrassing moments—will be subject to publication without the possibility of liability. I do not underestimate this cost or the importance of privacy. Nor do I think that a standard can be formulated to allow for liability that is consistent with the First

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<sup>69</sup> *Id.* at 263 (emphasis in original).

<sup>70</sup> *Id.* at 269.

<sup>71</sup> *Id.* at 263 (emphasis added).

<sup>72</sup> *Id.* at 269.

<sup>73</sup> *Id.* at 273.

Amendment. Liability for publishing truthful information should be limited to where there is a truly compelling government interest.

#### CONCLUSION

I am always stunned by the number of magazines that focus entirely on gossip about celebrities. Because I have little interest in the latest details of the lives of Brad Pitt and Angelina Jolie, Britney Spears, or Paris Hilton, it is tempting to say that no one should care. But under the First Amendment, it is not for me—or any government official or judge—to decide what people should be interested in knowing.

My father always repeated the expression, “The problem with teaching children to think for themselves is that they do.” The problem with protecting freedom of press is that it may want to report things that we would rather keep private. But that is the inevitable cost of a free press. Liability for public disclosure of private facts should thus be limited to situations in which publication will endanger public safety.