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Bad Publicity: The Diminished Right of Privacy in the Age of Social Media

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Bad Publicity: The Diminished Right of Privacy in the Age of Social Media

Kirby Shilling*

The "public disclosure of private facts" tort involves determining if and when publication of truthful, albeit embarrassing, facts warrant liability. Such liability inherently runs into First Amendment concerns. This Note analyzes the background of this tort, its status, and its application in different jurisdictions. Scholarship and jurisprudence have traditionally balanced the right to privacy with First Amendment guarantees by looking at different factors, including whether the disclosed information is properly described as "private" and whether it is newsworthy or a matter of legitimate public interest. However, the line between "public" and "private" has become increasingly blurred with new technology and social media. Additionally, determining what is "newsworthy" is especially difficult in a society obsessed with celebrities, gossip, and entertainment. The approaches used to dictate the actionability of the public disclosure of private facts tort are inconsistent, and thus require courts to determine which types of speech ought to be afforded more or less constitutional protection on a case-by-case basis. This Note discusses these issues and how they are exacerbated in the twenty-first century. It then proposes a statute-based, bright-line approach to protect privacy with minimal intrusion on the press while simultaneously providing more notice and guidance.

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INTRODUCTION

Over Easter weekend in April 2021, echoes of a "breaking news" story vibrated across the internet. "Kardashian Team Working Hard to Remove Unwanted Khloé Photo": an old picture taken at a private family gathering featuring the youngest Kardashian sister clad in a bikini was leaked on Instagram without her consent.[1]

While one may ask why this was even considered news, the intrigue surrounding the story could hardly be said to have come as a surprise. Driven by a culture obsessed with celebrities and publicity, paparazzi constantly inundate news platforms with pictures, leaked videos, and scandals.[2] From never-ending thirst for the latest celebrity gossip to incessant postings of every detail of individuals' lives on social media, these practices have shaped an entire generation.[3] There has been a shift, or perhaps a broadening, of what constitutes "the public interest"—which often stands in opposition to the right of privacy.[4]

As Facebook CEO Mark Zuckerberg controversially but accurately stated in 2010:

> People have really gotten comfortable not only sharing more information and different kinds, but more

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1 *See* Francesca Bacardi, *Kardashian Team Working Hard to Remove Unwanted Khloé Photo*, PAGE SIX (Apr. 5, 2021, 2:33 PM), https://pagesix.com/2021/04/05/kardashian-team-working-hard-to-remove-unwanted-khloe-photo/ [https://perma.cc/WU3H-9K6V].

2 *See* Lawrence M. Friedman, *The One-Way Mirror: Law, Privacy, and the Media*, 82 WASH. U. L.Q. 319, 324 (2004).

3 *See id.*; Camrin L. Crisci, *All the World Is Not a Stage: Finding a Right to Privacy in Existing and Proposed Legislation*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 207, 208–09 (2003).

4 *See* Scott. J. Shackelford, *Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures*, 49 AM. BUS. L.J. 125, 138–39 (2012).

> openly and with more people . . . that social norm is just something that has evolved over time.[5]

Technological changes have transformed social behaviors—the ways in which individuals in modern society conduct themselves and perceive each other.[6] However, this should not mean that individuals are no longer entitled to *some* degree of privacy. This Note advocates for the legislature to develop privacy law in accordance with modern society's complexities.

The determination of whether disclosed private material is worthy of First Amendment protection remains imprecise.[7] This Note describes the efficacy (or lack thereof) of the public disclosure of private facts ("PDPF") tort in the era of internet and social media and explores potential solutions best suited for modern life. Part I provides a background on the tort's development and its general formulation. Part II examines the issues created by the tort as it currently stands and problems that arise from the various approaches utilized by different jurisdictions to determine how to balance private rights with First Amendment protections. Finally, Part III proposes a two-part solution. First, it argues that statutes should be used to prevent more egregious invasions of privacy in a way that is consistent with constitutional jurisprudence. Second, for that which remains of the tort, this Note offers more concrete, bright-line guidance for courts to balance privacy and free speech.

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[5] Alannah Sneyd, *Is Privacy No Longer a Social Norm for Digital Natives?*, MEDIUM (May 2, 2018), https://medium.com/@alannahsneyd/is-privacy-no-longer-a-social-norm-for-digital-natives-db62029ce4d9#:~:text='People%20have%20really%20gotten%20comfortable,'&text=Mark%20Zuckerberg%2C%20the%20founder%20and,back%20in%20San%20Fransisco%2C%202010 [https://perma.cc/D2ET-ZFYW].

[6] *See* Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J.L. & HUMANS. 171, 190–91 (2010); Christina M. Gagnier, *On Privacy: Liberty in the Digital Revolution*, 11 J. HIGH TECH. L. 229, 270–72 (2011).

[7] *See* Erwin Chemerinsky, *Protecting Truthful Speech: Narrowing the Tort of Public Disclosure of Private Facts*, 11 CHAP. L. REV. 423, 426–30 (2008).

I. PROTECTING ONE'S "RIGHT TO BE LET ALONE"

A. Background of the Right of Privacy

Roused by the political, social, and economic changes of the late nineteenth century, the right to privacy was first recognized in Samuel Warren and Louis Brandeis' seminal 1890 *Harvard Law Review* article, "The Right to Privacy."[8] As the newspaper industry boomed, technology developed, and the press became increasingly intrusive, Warren and Brandeis saw a need for corresponding legal development.[9] Their article recognized the right to privacy, illustrating it as a natural right each individual has "against the world."[10]

Over time, common law in the United States has come to embrace the right to privacy.[11] A few years after the article's publication, the Georgia Supreme Court validated this right in *Pavesich v. New England Life Insurance Co*.[12] Scholarship also increasingly endorsed the right. Following the First Restatement of Torts' publication,[13] in 1960, William Prosser classified four torts that may create a cause of action for an invasion of the right to privacy: (1) unreasonable intrusion upon another's seclusion; (2) appropriation of another's name or likeness; (3) public disclosure of private facts; and (4) publicity that unreasonably places another in a false light.[14]

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8 *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). *See also* Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L. J. 967, 970 (2003); Peter Gielniak, *Tipping the Scales: Courts Struggle to Strike a Balance Between the Public Disclosure of Private Facts Tort and the First Amendment*, 39 SANTA CLARA L. REV. 1217, 1221 (1999); Kendall Jackson, Note, *I Spy: Addressing the Privacy Implications of Live Streaming Technology and the Current Inadequacies of the Law*, 41 COLUM. J.L. & ARTS 125, 135 (2017); Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 794 (2009); Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 8 (2007).

9 *See* Warren & Brandeis, *supra* note 8, at 195–96.

10 *See id*. at 196.

11 *See* Scott Shorr, *Personal Information Contracts: How to Protect Privacy Without Violating the First Amendment*, 80 CORNELL L. REV. 1756, 1783 (1995); Eli A. Meltz, Note, *No Harm, No Foul? "Attempted" Invasion of Privacy and the Tort of Intrusion Upon Seclusion*, 83 FORDHAM L. REV. 3431, 3436–37 (2015).

12 50 S.E. 68, 70 (Ga. 1905) (stating that "a right of privacy is derived from natural law" and "is embraced within the absolute rights of personal security and personal liberty").

13 RESTATEMENT (FIRST) OF TORTS § 867 (AM. L. INST. 1939).

14 William L. Prosser, *Privacy*, *48 CALIF. L. REV. 383, 389* (1960).

These torts are recognized today by the current Restatement and by a majority of states.[15]

The right to privacy, however, is not absolute.[16] Because claims for certain torts (e.g., appropriation of another's name or likeness, public disclosure of private facts, and false light) involve speech, the protection of one's right to privacy is often muddied by First Amendment protections.[17] One such protection is the First Amendment's purpose to maintain an informed citizenry capable of self-governance.[18] Early political minds emphasized the importance of free speech's role in strengthening democracy. For instance, in John Stuart Mill's work, *On Liberty*, Mills theorized that the suppression of speech "rob[s] the human race . . . of the opportunity [to] exchang[e] error for truth."[19] Further, as Justice Holmes articulated in his famous *Abrams v. United States* dissent:

> [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment . . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the

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15 *See* Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1906 (2010).

16 *See* Warren & Brandeis, *supra* note 8, at 214. Warren and Brandeis discuss several possible constitutional limitations on the right to privacy, including: "[t]he right to privacy does not prohibit any publication of matter which is of public or general interest." *Id.* at 218. Additionally, "[t]he right to privacy ceases upon the publication of the facts by the individual, or with his consent." *Id.*

17 *See* Melville B. Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 957–58 (1968).

18 *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24, 26 (1948).

19 JOHN STUART MILL, ON LIBERTY 16 (Elizabeth Rapaport ed., Hackett Publ'g 1978) (1859).

> law that an immediate check is required to save the country.[20]

Another First Amendment protection is freedom of the press.[21] Historically, the press was understood to play a vital role in enabling informed self-governance and establishing a "check" on governmental institutions.[22] As noted above, the First Amendment's protections of both free speech and the press pose substantial obstacles for citizens exercising their privacy rights.[23] Accordingly, cases concerning the right to privacy necessarily weigh such individual privacy interests against constitutional considerations.[24]

In a separate, yet related, vein of law,[25] the Supreme Court addressed free speech and press concerns by placing constitutional restrictions on liability for defamatory speech.[26] In *New York Times Co. v. Sullivan*, the Court declined to impose liability for publication of false or defamatory statements about public officials absent a showing of "actual malice."[27] The Court went on to define "actual malice" as "knowledge that the statement was false or with reckless disregard of whether it was false or not."[28] The Court adopted this rule to comport with the guarantees of the First Amendment.[29]

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[20] 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[21] U.S. CONST. amend. I. *See also* Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2302 (2014).

[22] Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975) ("The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches."); *see also* Grosjean v. Am. Press Co., 297 U.S. 233, 248–49 (1936).

[23] *See* Nimmer *supra* note 17.

[24] Gill v. Hearst Publ'g Co., 253 P.2d 441, 443 (Cal. 1953). *See also* Forsher v. Bugliosi, 608 P.2d 716, 728 (Cal. 1980).

[25] Comment, *Privacy, Defamation, and the First Amendment: The Implications of Time, Inc. v. Hill*, 67 COLUM. L. REV. 926, 926 (1967) ("The conceptual basis for the right of privacy is distinct from that of defamation; protection is sought not for reputation as such, but rather for feelings and sensibilities.").

[26] *See id.*; *see also* J. Skelly Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630, 633 (1968).

[27] 376 U.S. 254, 279–80 (1964).

[28] *Id.*

[29] *Id.* ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'"). Note that the

But how might courts impose liability where the published statement is one of truthful information, as opposed to libelous? Since the actual malice standard turns in part on the falsity of a statement, the *Sullivan* test would not apply.[30] Indeed, in *Time, Inc. v. Hill*, the Court explicitly stated that the actual malice test is appropriate only in the context of defamation or libel.[31] As such, there have been limited opportunities to define and refine the tort of publication of private facts.[32] While preceding cases have provided narrow guidance, the Court has nonetheless aired on the side of protecting the press.[33] As Erwin Chemerinsky, legal scholar and dean of Berkeley Law,[34] points out, there are major First Amendment concerns in proscribing the disclosure of truthful speech.[35]

For example, in *Smith v. Daily Mail*, the Supreme Court held that the public disclosure of lawfully obtained, truthful information pertaining to a matter of public interest cannot be punished "absent a need to further a state interest of the highest order."[36] Moreover,

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Sullivan test was later extended to public figures as well. *See generally* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967).

30 *See* Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1207 (1976).

31 385 U.S. 374, 390 (1967).

32 Dianna M. Worley, *Shulman v. Group W Productions Invasion of Privacy by Publication of Private Facts—Where Does California Draw the Line Between Newsworthy Information and Morbid Curiosity?*, 27 W. ST. U. L. REV. 535, 539 (1999–2000).

33 *See, e.g.*, Chassen Palmer, *Celebrity Privacy: How France Solves Privacy Problems Celebrities Face in the United States*, 50 CAL. W. INT'L L.J. 245, 248 (2019).

34 *Erwin Chemerinsky*, BERKELEY LAW, https://www.law.berkeley.edu/our-faculty/faculty-profiles/erwin-chemerinsky/#tab_profile [https://perma.cc/8DWP-7LFK].

35 Chemerinsky, *supra* note 7, at 424. "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." *Id.* at 425.

36 443 U.S. 97, 103 (1979); *see also id.* at 102 ("[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards."); Fla. Star v. B.J.F., 491 U.S. 524, 524–25 (1989) (applying the same rationale to invalidate a state statute that prohibited the publication of a rape victim's name as applied to a defendant who obtained such information legally); Bartnicki v. Vopper, 532 U.S. 514, 527–28 (2001) (another media-friendly case in which the Court struck down a content-neutral wiretapping statute as applied to the facts of the case: where the media defendant had not participated in the interception and where the information disclosed was of public significance). Note, however, that the Supreme Court has explicitly held that the press may be subject to laws of general applicability. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 664 (1991); *see also* Branzburg v. Hayes, 408 U.S. 665, 682, 684 (1972).

the Court has sought to prevent the chilling effect caused by penalizing the press for publishing truthful information. By stating that such an approach would be unduly burdensome on the media and would likely serve to suppress its voice,[37] the Court has long championed its "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."[38] The Court is therefore hesitant to hold the press liable absent extreme circumstances.

Nevertheless, the Supreme Court has made clear that the press is not always privileged in its disclosure of truthful statements.[39] Indeed, the Court seems to have left this question open,[40] and has yet to fully articulate the extent of protection afforded under the PDPF tort, as opposed to defamatory speech.[41]

Accordingly, there is great inconsistency among jurisdictions regarding how to define and weigh these competing interests.[42] Such uncertainty is even more glaring in the current climate because, as many scholars recognize, the right to privacy is further complicated in the context of the internet and social media platforms.[43]

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[37] *Fla. Star*, 491 U.S. at 535–36 (stating that such a prohibition "would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication."); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) ("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.").

[38] *Bartnicki*, 532 U.S. at 516.

[39] *See Fla. Star*, 491 U.S. at 530 ("[A]lthough our decisions have without exception upheld the press' right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context."); *id.* at 541 ("Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected."). *See also* Near v. State of Minnesota *ex rel.* Olson, 283 U.S. 697, 708 (1931) ("Liberty of speech and of the press is also not an absolute right, and the state may punish its abuse.").

[40] *See Fla. Star*, 491 U.S. at 541.

[41] *See* Abril, *supra* note 8, at 9.

[42] *See* Gloria Franke, *The Right of Publicity vs. the First Amendment: Will One Test Ever Capture the Starring Role?*, 79 S. CAL. L. REV. 945, 946 (2006).

[43] *See* Abril, *supra* note 8, at 5; Paul Gewritz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 140 (2001).

B. Public Disclosure of Private Facts

The Restatement's version of the PDPF tort has been widely relied upon by the majority of states.[44] In order to bring such a claim, a plaintiff must show four elements: (1) lack of newsworthiness; (2) public nature of the disclosure; (3) offensiveness of the disclosure; and (4) private nature of the information disclosed.[45] Courts vary in their approaches to these factors, with some jurisdictions utilizing different balancing tests.[46] This Section discusses each element of the tort in turn.

1. Lack of Newsworthiness

It has been argued that the most significant factor in determining the actionability of public disclosure of private information is whether the material at issue is "newsworthy."[47] Disclosure of private facts is considered newsworthy if it involves a matter of legitimate public concern.[48]

As explained above, because the public disclosure tort necessarily involves communication, such claims inevitably run into First Amendment problems.[49] The newsworthiness element seeks to

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[44] *See* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 299 (1983); *see* Richards & Solove, *supra* note 15, at 1906.

[45] RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977); RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 24:5 (3d ed. 1996).

[46] *See generally* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:77 (2d ed. 2021); see *infra* Part II for issues presented by some of these balancing tests. *See also* Patrick J. McNulty, *The Public Disclosure of Private Facts: There Is Life After Florida Star*, 50 DRAKE L. REV. 93, 94–96 (2001); C. Calhoun Walters, *A Remedy for Online Exposure: Recognizing the Public-Disclosure Tort in North Carolina*, 37 CAMPBELL L. REV. 419, 438–44 (2015); Karcher, *supra* note 8, at 795.

[47] *See, e.g.*, Joseph Elford, *Trafficking in Stolen Information: A "Hierarchy of Rights" Approach to the Private Facts Tort*, 105 YALE L.J. 727, 735 (1995); Lauren Gelman, *Privacy, Free Speech, and "Blurry-Edged" Social Networks*, 50 B.C. L. REV. 1315, 1336 (2009).

[48] RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (AM. L. INST. 1977); MCCARTHY & SCHECHTER, *supra* note 46.

[49] Merrit Jones, *First Amendment Protection for Newsgathering: Applying the Actual Malice Standard to Recovery of Damages for Intrusion*, 27 HASTINGS CONST. L.Q. 539, 551–52 (2000); Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 211 (1998); Fla. Star v. B.J.F., 491 U.S. 524, 524 (1989).

balance individuals' privacy rights against the First Amendment's freedom of speech and press guarantees.[50] Thus, courts typically give more weight to First Amendment protection where information implicates the public interest.[51]

For example, the press is free to publish truthful communications among the Trump administration regarding the January 6, 2021 Capital Riot.[52] This is because the official conduct of a political figure or candidate is indisputably a matter of public interest.[53] Following this logic, the Supreme Court has held that the truthful disclosure of such information cannot be penalized.[54] Because a high level of protection is afforded to such speech, public officials are afforded an extremely limited privacy right.[55] However, drawing this line becomes less clear outside the context of bureaucrats in their official roles as to information regarding their official duties.[56] This ambiguity illustrates where much of the difficulty surrounding the PDPF tort lies, which this Note will later explore.[57]

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[50] *See* Worley, *supra* note 32, at 551.

[51] *See* Roth v. United States, 354 U.S. 476, 484 (1957); Kimberly A. Dietel, *Shadow on the Spotlight: The Right to Newsgather Versus the Right to Privacy*, 33 SUFFOLK U. L. REV. 131, 140–41 (1999); Shackelford, *supra* note 4, at 136.

[52] *See, e.g.*, Nomaan Merchant, *Federal Judge Refuses Donald Trump's Request to Block Jan. 6 Records*, BOSTON.COM (Nov. 9, 2021), https://www.boston.com/news/politics/2021/11/09/federal-judge-refuses-donald-trumps-request-to-block-jan-6-records/ [https://perma.cc/4DCR-CSHB].

[53] Beauharnais v. Illinois, 343 U.S. 250, 263 n.18 (1952) ("[P]ublic men, are . . . public property."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268 (1964). Early theorists emphasized the necessity of adequately scrutinizing public officials in preserving our democracy. For instance, John Locke said that government cannot exist without the informed consent of the governed. *See, e.g.*, Rebecca Green, *Candidate Privacy*, 95 WASH. L. REV. 205, 213 (2020).

[54] Garrison v. Louisiana, 379 U.S. 64, 74 (1964); *see also* Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 839 (1978) (holding that the operation of a state entity is a "matter of public interest, necessarily engaging the attention of the news media." The publication in question "clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect.").

[55] *See, e.g.*, Shackelford, *supra* note 4, at 141–45; Shlomit Yanisky-Ravid & Ben Zion Lahav, *Public Interest vs. Private Lives—Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model*, 19 U. PA. J. CONST. L. 975, 994–95 (2017). Note that there may be a potential exception in cases where disclosure poses a threat to public safety. *See generally* N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

[56] *See generally* Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139 (2001); Yanisky-Ravid & Lahav, *supra* note 55.

[57] *See infra* Part II.

2. Public Nature of the Disclosure

The second element, public nature of the disclosure, requires the disclosure be sufficiently widespread—generally to more than one person.[58] Most courts require a broader release than that of defamation claims, which can be any communication of the libelous statement to a person other than the plaintiff.[59]

3. Offensiveness of Disclosure

The next element requires the defendant's disclosure be considered highly offensive to a reasonable person.[60] It is widely acknowledged that complete privacy is not feasible for any individual, and "anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part."[61] Accordingly, intrusion upon one's right to privacy can warrant liability only if it would be objectively upsetting to the *reasonable* person.[62]

In this context, the Court determines reasonableness by considering the "customs of the time and place, . . . the occupation of the plaintiff, . . . [and] the habits of his neighbors and fellow citizens."[63] As this Note will discuss, courts vary considerably in how they approach this inquiry.[64] For instance, some courts find offensiveness

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[58] RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (AM. L. INST. 1977); MCCARTHY & SCHECHTER, *supra* note 46, § 5:82. But note that a minority of courts have found a disclosure to be public where it has been made to a small number of people with a "special relationship" to the plaintiff. 62A AM. JUR. 2D *Privacy* § 84 (2021).

[59] RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (AM. L. INST. 1977); MCCARTHY & SCHECHTER, *supra* note 46, § 5:82.

[60] RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. L. INST. 1977).

[61] *Id.* § 652D cmt. c. *See also* Hill v. Nat'l Collegiate Athletic Assn., 865 P.2d 633, 655 (Cal. 1994); Pawlaczyk v. Besser Credit Union, No. 14-cv-10983, 2014 WL 5425576, at *5 (E.D. Mich. Oct. 22, 2014); Budik v. Howard Univ. Hosp., 986 F. Supp. 2d 1, 12 (D.D.C. 2013); Sandler v. Calcagni, 565 F. Supp. 2d 184, 197–98 (D. Me. 2008).

[62] DAN B. DOBBS ET AL., THE LAW OF TORTS § 581 (2d ed. 2011); RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

[63] RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (AM. L. INST. 1977).

[64] *See infra* Part II.A.2.i. *See also* Diane L. Zimmerman, *Real People in Fiction: Cautionary Words About Troublesome Old Torts Poured into New Jugs*, 51 BROOK. L. REV. 355, 375 (1985); Abril, *supra* note 8, at 21 ("Lacking a consistent and contextual framework for analyzing privacy, judges are forced to make an unorganized and highly normative qualitative leap to determine whether such things as a mastectomy, plastic surgery, a person's romantic life, and sexual orientation are . . . highly offensive if disclosed. These questions are virtually impossible to definitively resolve in a single

satisfied where the means by which an individual acquired information was particularly egregious,[65] or where the privacy interests of children are at issue.[66]

4. Private Nature of the Disclosed Information

Lastly, a valid claim requires the disclosed facts be properly categorized as private.[67] Courts look to material that has been disclosed and only impose liability where the information is, in fact, private.[68] The Restatement indicates that each individual has aspects of his or her life that are kept to himself or herself and, "at most" may be revealed to a select few family members or close friends; these matters are not exposed publicly and are therefore deemed private.[69] It is worth noting the overlap between the private and the offensiveness factors.[70] The less private a fact is, the less offense a reasonable person would take by its publication.[71] While courts tend to be

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decision, as they are highly dependent on historical moment, class, culture, education, and other moving sociological targets.").

65 *Cf.* Palmer, *supra* note 33, at 255–63.

66 *See* Samantha Barbas, *Saving Privacy from History*, 61 DEPAUL L. REV. 973, 1018 (2012) ("Similarly, courts were more likely to find publicity offensive or not newsworthy when it involved children, who were presumed incapable of assuming the risk of public exposure and more likely to be harmed by it." (citing Leverton v. Curtis Publ'g Co., 192 F.2d 974 (3d Cir. 1951))); *see generally* Metzger v. Dell Publ'g Co., 136 N.Y.S.2d 888 (Sup. Ct. 1955).

67 RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. L. INST. 1977).

68 *See, e.g.*, *id.* § 652D cmt. c; Frédéric Gilles Sourgens, *The Privacy Principle*, 42 YALE J. INT'L L. 345, 395 (2017).

69 RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. L. INST. 1977).

70 *Id.* ("When these intimate details of his life are spread before the public gaze in a manner *highly* offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.") (emphasis added); Alvarado v. KOB-TV, LLC, 493 F.3d 1210, 121 (10th Cir. 2007); Budik v. Howard Univ. Hosp., 986 F. Supp. 2d 1, 11–12 (D.D.C. 2013); Gutierrez v. Schwander, No. CIV 06-0937, 2008 WL 11451420, at *12 (D.N.M. July 7, 2008); Mirfasihi v. Fleet Mortg. Corp., No. 01 C 722, 2007 WL 2066503, at *5 (N.D. Ill. July 17, 2007), *aff'd*, 551 F.3d 682 (7th Cir. 2008).

71 *See, e.g.*, Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993) (noting that "offensiveness and newsworthiness . . . are related"); Doe v. Methodist Hosp., 690 N.E.2d 681, 692 (Ind. 1997) ("In our 'been there, done that' age of talk shows, tabloids, and twelve-step programs, public disclosures of private facts are far less likely to cause shock, offense, or emotional distress than at the time Warren and Brandeis wrote their famous article."). *See also* Comment, *Libel and Privacy Actions*, 81 HARV. L. REV. 160, 165 (1967).

inconsistent in this determination,[72] information pertaining to things such as family issues, personal health information, and intimate communications are generally held private.[73] Additionally, nonconsensual depictions of sexual activity and nudity are often found to constitute private material.[74]

One cannot expect privacy for appearances made and activities conducted in public.[75] Nor can one expect liability "for giving further publicity to what the plaintiff himself leaves open to the public eye."[76] This is true even where information may not otherwise be sufficiently newsworthy[77] or where publication might reasonably offend a plaintiff.[78] Courts have found that appearing in a public setting is tantamount to assuming a risk of publicity, as "an essential incident of life in a society which places a primary value on freedom of speech and of press."[79]

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[72] *See infra* notes 151–63 and accompanying text; *see also* Anderson v. Fisher Broad. Cos., 712 P.2d 803 (Or. 1986).

[73] RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. L. INST. 1977). Note that courts have made the determination as to whether a matter is "private" in different, often clashing, ways. *See generally* Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425 (1996) (discussing the vagueness and broadness of the term "privacy"); *see also infra* Part II.A.2.ii.

[74] Howell v. Trib. Ent. Co., 106 F.3d 215, 220 (7th Cir. 1997); Cape Publ'n, Inc. v. Bridges, 423 So. 2d 426, 427–28 (Fla. Dist. Ct. App. 1982); McCabe v. Vill. Voice, Inc., 550 F. Supp. 525, 527, 530 (E.D. Pa. 1982); Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964). *See also* G. Michael Harvey, Comment, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2410–11 (1992).

[75] DAVID A. ELDER, PRIVACY TORTS § 3:5 (2020) ("By contrast, plaintiff may forego any protection for matter subjectively deemed private where he or she publicizes the matter, directly or indirectly, to the public at large or makes such generally known—even within a limited arena.").

[76] RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. L. INST. 1977).

[77] Kapellas v. Kofman, 459 P.2d 912, 922 (Cal. 1969).

[78] Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975).

[79] *Time, Inc. v. Hill,* 385 U.S. 374, 388 (1967); *see also* Neff v. Time, Inc., 406 F. Supp. 858, 861 (W.D. Pa. 1976); McNamara v. Freedom Newspapers, Inc., 802 S.W.2d 901, 904 (Tex. App. 1991); *see also* Prosser, *supra* note 14, at 391–92 ("On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see.").

Further, there is no cause of action for disclosing facts that were already part of the public record.[80] In *Cox Broadcasting Co. v. Cohn*, the Supreme Court held the First Amendment bars liability for the press where a disclosed fact is a matter of public record.[81] The Court opined that, generally, one's interest in privacy is weak where factual material at issue is already public.[82] Therefore, the majority held that the government could not proscribe the truthful publication of a rape victim's name obtained from publicly accessible records.[83]

5. Other Considerations

As previously discussed, courts differ in their approaches to determine the actionability of public disclosures of private facts.[84] Many jurisdictions have considered additional conditions as part of the analysis.[85]

a) Reasonable Expectation of Privacy

Several courts focus significantly on the extent to which a plaintiff could have reasonably expected privacy in the particular circumstance.[86] These courts often make such a determination contextually by considering factors such as customs, practices, and physical

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[80] SMOLLA, *supra* note 45, § 24:5; RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. L. INST. 1977) ("[T]here is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye."). *See also Cox Broad. Corp*., 420 U.S. at 494; Fla. Star v. B.J.F., 491 U.S. 524, 532 (1989); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979).

[81] 420 U.S. at 494.

[82] *See id*. at 494–95.

[83] *See id*. at 491; *see also Fla. Star*, 491 U.S. at 535 (holding that "punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act.").

[84] *See supra* notes 42–43. *See also infra* Part II.A.

[85] *See, e.g.*, Roger L. Armstrong & Mark S. Lee, *Documentaries, Docudramas and Dramatic License: Crossing the Legal Minefield*, 8 SW. J. L. & TRADE AMS. 21, 27–28 (2001).

[86] *See* Hill v. Nat'l Collegiate Athletic Ass'n., 865 P.2d 633, 655 (Cal. 1994)*; see also Aisenson v. Am. Broad. Co.,* 220 Cal. App. 3d 146, 162 (1990) ("One factor relevant to whether an intrusion is 'highly offensive to a reasonable person' is the extent to which the person whose privacy is at issue voluntarily entered into the public sphere."); Jackson, *supra* note 8, at 146 ("[P]ublic disclosure of private facts claims can also turn on an individual's reasonable expectation of privacy."); *see also* Shulman v. Grp. W. Prods, Inc., 955 P.2d 469, 490 (Cal. 1998); Moreno v. Hanford Sentinel, Inc., 172 Cal. App. 4th 1125, 1129 (2009).

settings, which are then weighed against the countervailing public interest in disclosure.[87] Several jurisdictions, including California, look at the extent to which a plaintiff "consent[ed] voluntarily to activities impacting privacy interests."[88] When placed within the context of the Restatement's four factors,[89] such conduct may weigh against finding the disclosure highly offensive to the reasonable person and render such information public or newsworthy (and thus "fair game" for a defendant to disclose).[90] For example, political candidates and public officials generally receive very little privacy protections.[91] In these cases, it is easier to find that newsworthiness outweighs privacy rights, which officials largely relinquish by assuming public office.[92] The expectation of privacy is inherently diminished when one voluntarily runs for a political position.[93] At least to some degree, this may also extend to facts ordinarily regarded as private.[94]

Other public figures, such as celebrities, are often found to possess limited privacy rights because they willfully engage in public activities and assume public roles, rendering them matters of public

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87 Lutes v. Kawasaki Motors Corp., No. 3:10CV1549, 2014 WL 5420205, at *2 (D. Conn. Oct. 22, 2014) (quoting Puerto v. Superior Ct., 158 Cal. App. 4th 1242, 1250–51 (2008)); *see also* Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 936–38 (2005).

88 *Nat'l Collegiate Athletic Ass'n*., 865 P.2d at 655. *See id.* at 648 ("[T]he plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant."). *See also Shulman*, 955 P.2d at 482 (citing Kapellas v. Kofman, 459 P.2d 912, 922 (Cal. 1969)); Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 132 (1983).

89 *See supra* Part I.B.

90 *See, e.g.*, Clay Calvert, *Panel III: The Future of the Press and Privacy*, 19 COMM. L. & POL'Y 119, 120–23 (2014).

91 *See supra* notes 52–55; *see also* MCCARTHY & SCHECHTER, *supra* note 46, § 4:24; *Kapellas*, 459 P.2d at 922–23; Green, *supra* note 53, at 224.

92 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974).

93 *Kapellas*, 459 P.2d at 923. *See also* MCCARTHY & SCHECHTER, *supra* note 46, § 4:24 ("[O]ne who enters the political arena gives up privacy as the price of admission.").

94 *See* Susan M. Gilles, *Public Plaintiffs and Private Facts: Should the "Public Figure" Doctrine Be Transplanted Into Privacy Law?*, 83 NEB. L. REV. 1204, 1213 (2005) (citing RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977)). *See also infra* Part II.B.2.iii.

interest.[95] *Peckham v. Boston Herald, Inc.* involved a plaintiff who was a father, prominent real estate professional, and recognized civil rights leader. He sued a local newspaper for disclosing information about his sexual relationship with his employee, her resulting pregnancy, and his subsequent termination of their relationship and of her employment.[96] The Massachusetts court found the information sufficiently newsworthy given the public interest in the plaintiff's role in the community.[97] In a similar California case, a court held that "public figures have to some extent lost the right of privacy, and it is proper to go further in dealing with their lives and public activities than with those of entirely private persons."[98] Even if such information might not otherwise be sufficiently newsworthy, it is not actionable where the information cannot be deemed private.[99]

b) Logical Nexus

Some courts also require that a "logical nexus" exists between the specific content of the disclosure and the more general matter of public interest.[100] Such inquiries look to whether the disclosed fact

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95 *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (AM. L. INST. 1977). *See also infra* Part II.B.2.iii.

96 719 N.E.2d 888, 893–94 (Mass. App. Ct. 1999).

97 *Id*.

98 Carlisle v. Fawcett Publ'ns, Inc., 201 Cal. App. 2d 733, 747 (1962) ("A person may, by his own activities or by the force of circumstances, become a public personage and thereby relinquish a part of his right of privacy to the extent that the public has a legitimate interest in his doings, affairs, or character." (quoting Werner v. Times-Mirror Co., 193 Cal. App. 2d 111, 117 (1961)) (internal quotations omitted)).

99 *See, e.g.*, *id.* at 747–48; Creel v. I.C.E. & Assocs., Inc., 771 N.E.2d 1276, 1281 (Ind. Ct. App. 2002) (finding that plaintiffs had no reasonable expectation of privacy in attending a public church service); Coulter v. Bank of Am., 28 Cal. App. 4th 923, 929–30 (1994) (finding that an individual who had a private conversation, in private offices with no one else present, had a reasonable expectation of privacy); Gill v. Hearst Publ'g Co., 253 P.2d 441, 444 (Cal. 1953) (finding that plaintiffs had no reasonable expectation of privacy where they "had voluntarily exposed themselves to public gaze in a pose open to the view of any persons who might then be at or near their place of business.").

100 *See, e.g.*, Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980); Gilbert v. Med. Econ. Co., 665 F.2d 305, 308–09 (10th Cir. 1981); Nobles v. Cartwright, 659 N.E.2d 1064, 1076 (Ind. Ct. App. 1995); Romaine v. Kallinger, 537 A.2d 284, 294 (N.J. 1988).

is sufficiently connected to the newsworthy topic.[101] Where the link is slight or nonexistent, liability may be warranted.[102]

II. ISSUES IN DELINEATING THE PDPF TORT

Courts struggle to balance First Amendment guarantees with the right to privacy.[103] This is especially true in 2022, as modern society presents new challenges and complexities.[104] Jurisdictions vary in their approaches to the PDPF tort.[105] In this Part, Section A discusses inconsistencies among different jurisdictions' approaches; not only do many of these approaches present problems, but the Supreme Court's failure to clarify the tort has fostered general uncertainty, creating a major impediment for privacy law. Section B illustrates that the PDPF tort and courts' applications of different standards are outdated in the modern world, particularly in the context of social media, thus "fail[ing] to capture the complex and nuanced ways that we understand and experience privacy in real life."[106]

A. Inconsistent Judicial Decisions and Approaches

The lack of clarity in the PDPF tort is well-illustrated in the context of public officials. As discussed above, the privacy rights of political figures and candidates are negligible, at least in the scope of their official capacities.[107] Case law makes this abundantly clear, and these cases are consistently resolved in favor of the public's interest in such disclosures.[108] In this arena, the First Amendment generally bars the PDPF tort claim.

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101 *See* Doe v. Gangland Prods., Inc., 730 F.3d 946, 959 (9th Cir. 2013); Broidy Cap. Mgmt., LLC v. Muzin, No. 19-CV-0150, 2020 WL 1536350, at *18 (D.D.C. 2020).

102 *See, e.g.*, *Muzin*, 2020 WL 1536350, at *18.

103 *See* Gielniak, *supra* note 8, at 1246.

104 *Id*. at 1250.

105 *See* Karcher, *supra* note 8, at 795; *see also* Debra A. Spungin, *First in Write: Press Rights Prevail Over Privacy Interests in Bartnicki v. Vopper*, 27 NOVA L. REV. 387, 394 (2002); Strahilevitz, *supra* note 87, at 988.

106 Barbas, *supra* note 66, at 975.

107 *See supra* notes 52–56, 91–94.

108 *See* ELDER, *supra* note 75, § 3:16 ("The cases have uniformly also held that comments by or actions of a public official or officer in his or her official capacity or relating to fitness for office are matters of considerable public interest 'no matter how serious the invasion of privacy.'" (quoting Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 44 n.5 (Cal. 1971))).

However, trickier issues arise in cases involving a public official's private facts outside the scope of his or her political role. Some courts impose liability for the disclosure of a political figure's information even where the published material has "little if any connection" to official duties or fitness for office.[109] In other jurisdictions, however, the distinction between official acts of a political figure and that individual's private conduct is more blurred.[110] These courts broadly interpret journalistic privilege in the context of political figures and public officials so as to not prevent public access to information that *may* be relevant.[111]

Similar difficulties arise in disclosures involving public figures. While speech dealing with self-governance is generally afforded the greatest degree of First Amendment protection, other types of speech are also safeguarded.[112] For instance, entertainment news

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[109] *Id.*; *see generally* Kapellas v. Kofman, 459 P.2d 912, 922–23 (Cal. 1969).

[110] *See* Jeffrey Abramson, *Full Court Press: Drawing in Media Defenses for Libel and Privacy Cases*, 96 OR. L. REV. 19, 21, 24 (2017).

[111] *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 77 (1964) ("But, in measuring the extent of a candidate's profert of character, it should always be remembered that the people have good authority for believing that grapes do not grow on thorns, nor figs on thistles." (internal quotations omitted)); Huskey v. Nat'l Broad. Co., 632 F. Supp. 1282, 1291 (N.D. Ill. 1986) ("Those who deal with the public must be held to a high standard of business ethics, so the public may perhaps be entitled to rummage around in such people's past business dealings to see if anything is amiss."). This (latter) approach reflects the argument that judges should not be in the business of deciding which information citizens have the right to know in exercising self-governance, as reflected in the deferential approach discussed below. *See* David H. Pollack, *Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of "Outing,"* 46 U. MIA. L. REV. 711, 739 (1992); Hilary E. Ware, *Celebrity Privacy Rights and Free Speech: Recalibrating Tort Remedies for "Outed" Celebrities*, 32 HARV. C.R.-C.L. L. REV. 449, 451 (1997) (discussing the relevance of a politician's sexual orientation on voters' choice. They argue that information, like a public official's sexual orientation, will impact the kinds of policy decisions he or she may make, and is thus privileged as a newsworthy matter of public interest). *See also* Abramson, *supra* note 110, at 49–50 (discussing how information such as a public official's sexual fidelity may be relevant to that official's moral character, which is relevant to voters).

[112] *See, e.g.*, Gill v. Hearst Publ'g Co., 253 P.2d 441, 444 (Cal. 1953) ("However, the constitutional guaranties of freedom of expression apply with equal force to the publication whether it be a news report or an entertainment feature."); Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

and gossip can still function to promote First Amendment values.[113] The constitutional protections extend to any ideas having "even the slightest redeeming social importance."[114] Indeed, the Restatement explicitly states that newsworthiness is not limited to current events, but also "extends to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published."[115] Thus, privacy protections for these figures turn largely on the extent to which a disclosure is legitimately newsworthy or of public interest.

Case law generally interprets the newsworthiness privilege quite broadly.[116] But, courts are inconsistent and unpredictable in their approaches to balancing newsworthiness, or First Amendment values, with privacy interests.[117]

1. Procedural Inconsistencies

Many jurisdictions maintain that newsworthiness is a determination for the courts.[118] Accordingly, these courts generally defer to the media[119] by relying on editorial judgments[120] and journalistic

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113 Winters v. New York, 333 U.S. 507, 510 (1948); *see also* Hannegan v. Esquire, Inc., 327 U.S. 146, 157–58 (1946).

114 *Roth*, 354 U.S. at 484.

115 RESTATEMENT (SECOND) OF TORTS § 652D cmt. j (AM. L. INST. 1977).

116 Palmer, *supra* note 33, at 253.

117 Erin C. Carroll, *Making News: Balancing Newsworthiness and Privacy in the Age of Algorithms*, 106 GEO. L.J. 69, 75 (2017); *see also* Worley, *supra* note 32, at 539.

118 *See* Rosanova v. Playboy Enter., Inc., 411 F. Supp. 440, 444 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978); Rosenblatt v. Baer, 383 U.S. 75, 87–88 (1966); Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1045 (S.D.N.Y. 1975); Cinel v. Connick, 15 F.3d 1338, 1345–46 (5th Cir. 1994).

119 MCCARTHY & SCHECHTER, *supra* note 46, § 5:77; *see* Anderson v. Suiters, 499 F.3d 1228, 1237 (10th Cir. 2007); Lowe v. Hearst Commc'ns, Inc., 487 F.3d 246, 250–51 (5th Cir. 2007); *see generally* Time, Inc. v. Hill, 385 U.S. 374 (1967); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104–06 (1979); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (all demonstrating that the judiciary has traditionally afforded significant deference to the press).

120 *Cox Broad. Corp.*, 420 U.S. at 496 (1975). *See also* Jenkins v. Dell Publ'g Co., 251 F.2d 447, 450 (3d Cir. 1958) ("[T]he interest of the public in the free dissemination of the truth and unimpeded access to news is so broad, so difficult to define and so dangerous to circumscribe that courts have been reluctant to make such factually accurate public

professional responsibilities and ethics.[121] For instance, in *Shulman v. Group W. Productions, Inc.*, a California court found it unconstitutional for courts to act as "superior editors of the press."[122] The court was unwilling to allow interests and opinions of judges and jurors to determine whether a disclosure was "newsworthy," and thus constitutionally protected speech.[123] Moreover, in these courts, the trend is for media defendants to prevail on summary judgment or demurrer.[124] Even where a jury might otherwise play a role, the issue of newsworthiness is often dismissed or decided on summary judgment.[125]

On the other hand, many other courts take an active role by engaging various balancing tests to determine newsworthiness in a more normative sense.[126] In doing so, these jurisdictions have varied approaches.[127] For example, in *Virgil v. Time, Inc.*, the Ninth Circuit held that the newsworthiness inquiry is for the jury, so long as "there is room for differing views as to the state of community mores or the manner in which it would operate upon the facts in question."[128]

Other courts classify the matter as one of law to be determined by the court.[129] As this Note will discuss, constitutional problems,

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disclosures tortious, except where the lack of any meritorious public interest in the disclosure is very clear and its offensiveness to ordinary sensibilities is equally clear.").

[121] Rory Bahadur, *Newsworthiness as an Internet-Era Mitigant of Implicit Bias*, 88 UMKC L. REV. 1, 12 (2019); *see also* MCCARTHY & SCHECHTER, *supra* note 46, § 8:43 ("[M]ost judges have adopted a laissez faire attitude and 'simply accept the press's judgment about what is and is not newsworthy.'").

[122] 955 P.2d 469, 488 (Cal. 1998). *See generally* Taus v. Loftus, 40 Cal. 4th 683 (2007).

[123] *Shulman*, 955 P.2d at 485.

[124] *See* Geoff Dendy, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 152 (1997).

[125] *See* Worley, *supra* note 32, at 565–68 (2000).

[126] *See* Thomas E. Kadri & Kate Klonick, *Facebook v. Sullivan: Public Figures and Newsworthiness in Online Speech*, 93 S. CAL. L. REV. 37, 75 (2019); McNulty, *supra* note 46, at 94–96.

[127] *See, e.g.*, Gill v. Hearst Publ'g Co., 253 P.2d 441, 443 (Cal. 1952). This Note will discuss substantive inconsistencies in courts' approaches. *See infra* Part II.A.2.

[128] 527 F.2d 1122, 1130 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). *See also* Gilbert v. Med. Econ. Co., 665 F.2d 305, 309 (10th Cir. 1981).

[129] *See generally, e.g.*, Lowe v. Hearst Commc'ns, Inc., 414 F. Supp. 2d 669 (W.D. Tex. 2006), *aff'd*, 487 F.3d 246 (5th Cir. 2007); *see also, e.g.*, Ross v. Midwest Commc'ns, Inc., 870 F.2d 271, 271 (5th Cir. 1989); *Gilbert*, 665 F.2d at 309; Howard v. Des Moines Reg.

including those implicating due process and equal protection rights, arise where certain publications are privileged while similar publications are actionable.[130]

2. Substantive Inconsistencies

While most jurisdictions favor press over privacy, no U.S. court has found the journalist's privilege to be absolute.[131] Scholars argue that courts today are less hesitant to challenge the professional decisions of the press.[132] They conclude that this results from "growing anxiety about the loss of personal privacy in contemporary society" and "declining public respect for journalism."[133]

Courts utilize variations of the Restatement's balancing test, which weighs newsworthiness against other elements of the tort, including whether the nature of the disclosure was private or highly offensive.[134] Although such approaches offer flexibility, they are not applied uniformly and are often questioned due to their unpredictability.[135]

a) Offensiveness

It is not easy to define what conduct is highly offensive to a reasonable person. It is unclear when a publication crosses the threshold from legitimate into actionable prying.[136] Moreover, degrees of offensiveness are open to individual interpretations and varies

& Trib. Co., 283 N.W.2d 289, 298 (Iowa 1979); Doe v. Berkeley Publishers, 329 S.C. 412, 413 (1998).

130 *See* Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722, 734 (1963) ("If that which is immune when published for one purpose is held actionable when published for another, the courts and legislatures may run afoul of constitutional requirements of due process or equal protection.").

131 Fla. Star v. B.J.F., 491 U.S. 524, 530, 541 (1989); Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991).

132 Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1083 (2009).

133 *Id*.

134 *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. c, h (AM. L. INST. 1977). *See also* Kadri & Klonick, *supra* note 126, at 50; ELDER, *supra* note 75, § 3:18.

135 Lidsky, *supra* note 49, at 235.

136 *See infra* note 141. *See also* Gielniak, *supra* note 8, at 1257–58; Worley, *supra* note 32.

across people, communities, and eras.[137] Material that is offensive to individuals in South Williamsburg's Hasidic Jewish community is not necessarily offensive to hipsters living in Bushwick—groups who only live a few blocks away from each other within the same jurisdiction.[138]

Courts inevitably decide the offensiveness element in a subjective way. This creates chaotic precedential guidance and uncertainty for future defendants.[139] In some cases, courts find disclosure substantially offensive to warrant liability under the PDPF tort.[140] A court may, for instance, impose liability where disclosure goes beyond the newsworthy element "to the degree of morbidity or sensationalism."[141] Similarly, in *Hill v. National Collegiate Athletic Association*, a California court looked to the gravity of the invasion of privacy with respect to its "nature, scope, and actual or potential impact," to determine whether the invasion at issue sufficiently represented a "breach of the social norms underlying the privacy right."[142]

In *Toffoloni v. LFP Publishing Group, LLC*, the Eleventh Circuit held a magazine liable for publishing private, nude photographs of Nancy Benoit, a professional wrestler who was murdered.[143] The court held that, although Benoit was a public figure and her murder was a matter of legitimate public concern, the photographs themselves did not qualify for the newsworthiness exception because

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137 1 RAYMOND T. NIMMER, INFORMATION LAW § 8:29 (1996).

138 *See, e.g.*, Crisci, *supra* note 3, at 242 ("One problem present in both the Restatement privacy torts and the new California tort is that they rely on society to set the standards for determining what is reasonable and offensive. While reasonableness and offensiveness are normative concepts that are best defined by society, these conceptions constantly change and leave the courts with even less ability to act.").

139 *See, e.g.*, Harvey, *supra* note 74, at 2407–08.

140 *See infra* notes 141–50.

141 Virgil v. Sports Illustrated, 424 F. Supp. 1286, 1289 (S.D. Cal. 1976); *see also* Gill v. Hearst Publ'g Co., 253 P.2d 441, 444 (Cal. 1953) ("It is only where the intrusion has gone beyond the limits of decency that liability accrues.").

142 865 P.2d 633, 655 (Cal. 1994).

143 572 F.3d 1201, 1204 (11th Cir. 2009).

they went further than necessary.[144] Courts are generally swayed when the disclosure's subject matter is particularly egregious.[145]

On the other hand, in *Gawker Media, LLC v. Bollea*, celebrity wrestler and reality television star Terry Bollea—also known as Hulk Hogan—was featured in a sex tape released to the public by Gawker, an online media company.[146] Bollea filed suit against Gawker in federal court, seeking to enjoin Gawker from further circulating the video.[147] However, the court dismissed his request, finding the sex tape material newsworthy.[148] Further, the court held that Bollea did not sufficiently show that granting such an injunction would not constitute an unconstitutional prior restraint under the First Amendment.[149] Unfortunately, the reality is that courts lack a consistent approach to analyze a disclosure's offensiveness.[150]

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144 *Id.* (holding that the photographs "needlessly expose[d] aspects of the plaintiff's private life to the public.") ("Indeed, people are nude every day, and the news media does not typically find the occurrence worth reporting."); *see also* Michaels v. Internet Ent. Grp., Inc., 5 F. Supp. 2d 823, 840–42 (C.D. Cal. 1998); Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th 856, 856 (2010) (holding that "[d]ecedent's family members had a sufficient privacy interest in accident scene photographs of decedent's corpse to maintain action for invasion of privacy based on the public disclosure of private facts against California Highway Patrol (CHP) officers who allegedly disseminated the photographs via e-mail, where officers allegedly disseminated the gruesome images out of sheer morbidity or gossip, as opposed to any official law enforcement purpose or genuine public interest."). Note that the majority rule limits the public disclosure tort to living claimants. However, the Supreme Court, as well as lower courts, have recognized the privacy interest of relatives in photos of a decedent, finding liability for particularly egregious disclosures. *See* Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 168–69 (2004) (quoting Schuyler v. Curtis, 147 N.Y. 434, 447 (1895); For personal nature of the privacy action, see ELDER, *supra* note 75, § 1:13. *See also* Sheets v. Salt Lake Cnty., 45 F.3d 1383, 1388 (10th Cir. 1995); *Catsouras*, 181 Cal. App. 4th at 908; Reid v. Pierce Cnty., 136 Wash. 2d 195, 961 P.2d 333 (1998).

145 *See, e.g.*, *infra* note 157.

146 129 So. 3d 1196, 1202 (Fla. Dist. Ct. App. 2014).

147 *Id.*

148 *Id.* at 1200–01 ("Mr. Bollea openly discussed an affair he had while married to Linda Bollea in his published autobiography and otherwise discussed his family, marriage, and sex life through various media outlets."). Note that Bollea then proceeded to voluntarily dismiss the suit, and filed in Florida state court, where a jury would ultimately hold for him. *See* Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051, 2074–76 (2018).

149 *Gawker*, 129 So. 3d at 1198.

150 *See id.* at 1201 ("However, the mere fact that the publication contains arguably inappropriate and otherwise sexually explicit content does not remove it from the realm of

b) Private Nature of Facts Disclosed

As discussed above, the Restatement also requires disclosed facts to be of a private nature.[151] However, subjectivity presents a problem here too. Courts necessarily approach this inquiry contextually, on a case-by-case basis.[152] In *Snyder v. Phelps*, the Supreme Court held that "deciding whether speech is of public or private concern requires us to examine the content, form, and context of that speech, as revealed by the whole record."[153]

But as expected, courts do not interpret this element uniformly.[154] They are unpredictable in determining when privacy interests outweigh newsworthy values. This is largely because the public-private distinction depends on the circumstances of each case, and courts are forced to make these determinations without sufficient guidance or clarity in the law.[155] While privacy rights are consistently recognized in spaces, such as the home and communications through letters and the telephone,[156] courts struggle to identify what constitutes public material.[157] In addition, some courts

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legitimate public interest"). *Compare id.*, *with* Michaels v. Internet Ent. Grp., Inc., 5 F. Supp. 2d 823, 839–40 (C.D. Cal. 1998) (finding that, although "[n]ewsworthiness is defined broadly to include not only matters of public policy, but any matter of public concern, including the . . . romantic involvements of famous people," the privilege is not absolute. "Where the publicity is so offensive as to constitute a morbid and sensational prying into private lives for its own sake, it serves no legitimate public interest and is not deserving of protection.").

151 *See supra* Part I.B.4.

152 Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 192 (1979).

153 562 U.S. 443, 453 (2011) (internal quotations omitted).

154 *See* Strahilevitz, *supra* note 87, at 931–35.

155 Abril, *supra* note 8, at 46–47.

156 Sourgens, *supra* note 68, at 395.

157 Cefalu v. Globe Newspaper Co., 391 N.E.2d 935, 939 (1979) ("The appearance of a person in a public place necessarily involves doffing the cloak of privacy which the law protects."). *But see* Daily Times Democrat v. Graham, 276 Ala. 380, 383, 162 So. 2d 474, 478 (1964) (making an exception for the disclosure of one "who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at the moment to be part of a public scene."); Espinoza v. Hewlett-Packard Co., C.A. No. 6000-VCP, 2011 WL 941464, at *7 (Del. Ch. 2011) ("Information that is already public is not private. To be a private fact, however, information does not need to be absolutely secret. Rather, the focus is on whether the claimant had an objectively

deny privacy protection if the plaintiff did not keep the information completely secret.[158] Others do not require absolute secrecy.[159] Notably, such inconsistency is especially problematic in the digital era.[160]

This unpredictability provides inadequate notice to individuals regarding how to protect certain information.[161] Critics express concern that lack of consistency and clarity among jurisdictions will have a chilling effect on true speech.[162] This is particularly concerning when communications are published on the internet and reach across jurisdictional lines.[163]

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reasonable expectation of privacy as to the information at issue."). *See also* Strahilevitz, *supra* note 87, at 920–21.

158 *See* Nader v. Gen. Motors Corp., 255 N.E.2d 765, 770 (N.Y. 1970); Smith v. Maryland, 442 U.S. 735, 742 (1979); *see also* Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123,182 (2007).

159 Sanders v. Am. Broad. Cos., 978 P.2d 67, 71 (Cal. 1999); Moreno v. Hanford Sentinel, Inc., 172 Cal. App. 4th 1125, 1130 (2009); M.G. v. Time Warner, Inc., 89 Cal. App. 4th 623, 632 (2001).

160 *See infra* Part II.B.2.ii.

161 *See, e.g.*, Harvey, *supra* note 74, at 2427–29; Jeffrey Grossman, *First Amendment Implications of Tort Liability for News-Gathering*, 1996 ANN. SURV. AM. L. 583, 601 (1996); David Libardoni, *Prisoners of Fame: How an Expanded Use of Intrusion Upon Psychological Seclusion Can Protect the Privacy of Former Public Figures*, 36 B.C. INT'L & COMP. L. REV. 1455, 1487 (2013).

162 Gilles, *supra* note 94, at 1237. *See also* Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1098 (1999) ("The cultural mood is to retrench privacy and restrain the press."); Gilbert v. Med. Econ. Co., 665 F.2d 305, 310 n.1 (10th Cir. 1981) (citing Guam Federation of Teachers, Local 1581 v. Ysrael, 492 F.2d 438, 441 (9th Cir. 1974) ("Requiring defendants to undergo a trial in this case would unnecessarily chill the exercise of their first amendment right to publish newsworthy information."); Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 487 (1998); Diversified Mgmt., Inc. v. Denver Post, Inc., 653 P.2d 1103, 1107 (Colo. 1982) ("Just as too easy a finding of liability on the part of a newspaper has a chilling effect on its expression, too easy a finding that someone has become a public figure by virtue of responding to unfavorable publicity can have a chilling effect on the expression of a private figure.").

163 *See* Ashley Messenger, *Rethinking the Right of Publicity in the Context of Social Media*, 24 WIDENER L. REV. 259, 282 (2018); *see also* Rehberg v. Paulk, 611 F.3d 828, 844 (11th Cir. 2010), *aff'd*, 566 U.S. 356 (2012) ("The Supreme Court's more-recent precedent shows a marked lack of clarity in what privacy expectations as to content of electronic communications are reasonable.").

B. Outdated Approaches to the PDPF Tort

Fast-growing societal and technological innovations served as major catalysts of Warren and Brandeis' right to privacy argument.[164] However, the nature of today's society tests this right in ways unforeseeable in 1890.[165] As critics point out, the PDPF tort has failed to adapt to today's changing technologies and norms.[166] In light of societal transformations, some of the approaches that courts have taken with respect to the tort present further issues.

Today's press takes a different form from that which catalyzed Brandeis and Warren's article, exacerbating these problems. There has been a shift in how the general public consumes news. In 1996, only about twelve percent of U.S. citizens used the internet for news.[167] Although 2008 marked the first time more U.S. adults consumed news online rather than print,[168] only forty percent cited internet use.[169] Today, an astonishing eighty-six percent of U.S. adults report consuming news from a digital device "often" or "sometimes," while only thirty-two percent consume news from print sources "sometimes."[170] In addition, about fifty-three percent of U.S. adults obtain news from social media sites "often" or "sometimes."[171]

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164 Warren & Brandeis, *supra* note 8, at 195–96.

165 *See, e.g.*, Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703, 719 (1990).

166 *See, e.g.*, Patricia Sánchez Abril, *"A Simple, Human Measure of Privacy": Public Disclosure of Private Facts in the World of Tiger Woods*, 10 CONN. PUB. INT. L.J. 385, 390, 394 (2011); Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1808–09 (2010); Skinner-Thompson, *supra* note 148, at 2065–67.

167 Amy Mitchell, *Key Findings on the Traits and Habits of the Modern News Consumer*, PEW RSCH. CTR. (July 7, 2016), http://www.pewresearch.org/fact-tank/2016/07/07/modern-news-consumer/ [https://perma.cc/N2DD-2YYP].

168 *Internet Overtakes Newspapers as News Outlet*, PEW RSCH. CTR. (Dec. 23, 2008), https://www.pewresearch.org/politics/2008/12/23/internet-overtakes-newspapers-as-news-outlet/ [https://perma.cc/372W-WYZE].

169 *Id.*

170 Elisa Shearer, *More Than Eight-in-Ten Americans Get News from Digital Devices*, PEW RSCH. CTR. (Jan. 12, 2021), https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/ [https://perma.cc/48RX-RS4W].

171 *Id.*; Elisa Shearer & Amy Mitchell, *News Use Across Social Media Platforms in 2020*, PEW RSCH. CTR. 1, 4 (Jan. 12, 2021), https://www.journalism.org/wp-content/

These figures are significant, because modern media is shaped not only by journalists, but also by technology platforms, software engineers, news consumers, and algorithms.[172] Technology platforms today are instrumental to the way the press functions.[173] Digital news sources, including these platforms, increasingly rely on algorithms to determine which information will reach readers.[174] These complex metrics are typically designed by engineers,[175] differ among sites, and are often kept secret.[176]

Platforms rely on algorithms to determine, among other things, the types of information in which people are interested, generally to increase user engagement[177] and social sharing.[178] Large news organizations study and analyze data showing "what news consumers are reading and watching, where, and for how long."[179] Studies confirm that journalists pursue content most likely to capture consumers' attention.[180] Therefore, it is beneficial for news sources to publish content corresponding with these algorithms.[181] If metrics indicate significant public interest in Khloé Kardashian, the platform should publish articles accordingly. Courts may therefore be

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uploads/sites/8/2021/01/PJ_2021.01.12_News-and-Social-Media_FINAL.pdf [https://perma.cc/CLG4-ELHV].

172 *See* Erin C. Carroll, *Platforms and the Fall of the Fourth Estate: Looking Beyond the First Amendment to Protect Watchdog Journalism*, 79 MD. L. REV. 529, 531–32 (2020).

173 *See id.* at 548; *see also* Ravi Somaiya, *How Facebook Is Changing the Way Its Users Consume Journalism*, N.Y. TIMES (Oct. 26, 2014), https://www.nytimes.com/2014/10/27/business/media/how-facebook-is-changing-the-way-its-users-consume-journalism.html?_r=0%20[https://nyti.ms/2jObE2x [https://perma.cc/4XXW-WREE] (discussing the significant role that Facebook plays in the media).

174 *See* Carroll, *supra* note 117, at 70–71.

175 *See id.*

176 *See id.* at 532–33.

177 *See* Sang Ah Kim, *Social Media Algorithms: Why You See What You See*, 2 GEO. L. TECH. REV. 147, 148 (2017) ("To keep users engaged for as long and as frequently as possible, social media platforms want to make their news feeds interesting and relatable to users. It becomes crucial to predict what individual users, or groups of users, may find interesting. User actions on the platform generate data indicating each user's preference.").

178 *See* Carroll, *supra* note 172, at 533.

179 *Id*.

180 *See id.* at 571; *see also* Barbas, *supra* note 6, at 208–09 ("A publisher, with the 'interest of the public in view,' would not publish any news if 'interest in the item has died out.'").

181 *See* Somaiya, *supra* note 173.

comfortable allowing algorithms to dictate the scope of newsworthiness.[182]

1. Deference to the Press

First, a deferential, press-protective approach[183] taken by some courts is poorly suited for modern news reporting practices and norms for sharing information. In fact, scholars have comprehensively criticized the press-protective approach for this very reason.[184]

Critics are increasingly concerned about the implications of deference to an algorithm-centric press.[185] Many worry this press model renders platforms and algorithms "the ultimate arbiter of newsworthiness."[186] In recent years, scholars have argued these new mechanisms eliminate "the gatekeeping function of the traditional press."[187] In effect, this deferential approach means that virtually anything can qualify as newsworthy.[188] This is especially true today as society is increasingly obsessed with celebrities.[189] Since the press is driven by this ever-expanding public interest, it is incentivized to publish more information on the private lives of celebrities.

Further, social media platforms provide outlets that allow anyone and everyone to take on a journalistic role through publishing

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182 *See generally* Carroll, *supra* note 117.

183 *See supra* notes 118–25 and accompanying text.

184 *See, e.g.*, Barbas, *supra* note 66, at 975; Abril, *supra* note 166, at 393 (noting the circularity of the approach, as newsworthiness "can be determined by the market's demand and curiosity regarding the subject at hand."); Carroll, *supra* note 117.

185 *See generally* AMY GAJDA, THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS (2015).

186 *See* Carroll, *supra* note 172, at 572–73.

187 Kadri & Klonick, *supra* note 126, at 76–77 ("[T]here are no editorial desks at Google News.").

188 *See id.* at 75.

189 *See* Abril, *supra* note 166, at 396. *See also* Palmer, *supra* note 33, at 252; Joshua Azriel, *California Paparazzi Activities Under the First Amendment: The Legal Limits to Their Day-to-Day Activities*, 20 J. INTERNET L. 3, 4–5 (2016); Nora Turriago, *The Dangerous American Obsession: Why Are We So Fascinated With Fame?*, HUFFPOST, https://www.huffpost.com/entry/the-dangerous-american-ob_b_8721632 [https://perma.cc/S9MC-D3PQ] (Dec. 4, 2016); *see generally* Lizbeth Lopez & Scott J. Sholder, *Anything for Selenas? A Right of Publicity Case Study*, 13 LANDSLIDE 53 (2020).

information.[190] In *Lovell v. City of Griffin*, the Supreme Court held that the "press" includes "every sort of publication which affords a vehicle of information and opinion."[191] Today, anyone can whip out an iPhone, take a picture of something they find interesting, and post it on Instagram.[192] Does this make every Instagram or Twitter user a member of the press and therefore worthy of deference?[193]

The modern processes of news publishing arguably reflect the public's interests in fairly accurate ways. Many sites and platforms are free and facilitate a broad marketplace of ideas; thus, these algorithms may better represent society's interests.[194] However, coupled with judicial practices of deferring to the editorial process (in determining newsworthiness), this may lead to an overly-expansive understanding of the newsworthiness privilege, potentially swallowing the PDPF tort altogether.[195] This is why many scholars argue that it is inappropriate to defer to the press for newsworthiness inquiries.[196]

2. Various Balancing Approaches

Still, there exist issues in allowing courts to dictate what constitutes "news."[197] Rather than yielding entirely to the media's determination of what may be newsworthy or of legitimate public interest, courts seek to safeguard privacy by considering other factors.[198]

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190 *See* Abramson, *supra* note 110, at 47–48.

191 303 U.S. 444, 452 (1938).

192 *See, e.g.*, Jordan L. Couch, *Deep Dive: Instagram*, 36 GPSOLO 82, 82–83 (2019).

193 *See* Carroll, *supra* note 172, at 556; *see also* DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 164 (Yale University Press 2007) ("Armed with cell phone cameras, everyday people can snap up images, becoming amateur paparazzi. Websites like Flickr allow people to post their photos and share them with the world. Some people are posting a daily stream of photos, obsessively documenting every aspect of their lives. Beyond pictures, people are posting videos on the Internet for the world to watch.").

194 *See generally* Carroll, *supra* note 117.

195 *See* Richard A. Epstein, *A Not Quite Contemporary View of Privacy*, 41 HARV. J.L. & PUB. POL'Y 95, 104 (2018); Chemerinsky, *supra* note 7, at 425–26.

196 *See* Bahadur, *supra* note 121, at 12; Carroll, *supra* note 117; Worley, *supra* note 32, at 539; Amy Gajda, *Sympathy for the Devil: Gawker, Thiel, and Newsworthiness*, 67 AM. U. L. REV. 529 (2017); Abramson, *supra* note 110. This Note will argue that the tort might be better served by adding to the calculus factors other than newsworthiness, such as consent and voluntariness. *See infra* Part III.

197 *See, e.g.*, *supra* Part II.A.

198 *See supra* Part I.B.5.

However, in addition to concerns of inconsistency and uncertainty in application,[199] these elements are poorly suited for the nuances of technology and social media, among other societal changes.[200]

a) Offensiveness

It is problematic to focus on the offensiveness element of the PDPF tort in the modern world. Scholars argue that public interest has expanded to include virtually everything, especially that concerning celebrities' lives.[201] Accordingly, inquiring into the offensiveness of disclosure based on "community mores"[202] is unhelpful in a society intrigued by nearly anything.[203]

Cybersecurity and privacy attorney Christina Gagnier,[204] observed that the online community stretches across the globe.[205] Therefore, it is difficult, if not impossible, for courts to make such an inquiry according to a "community" that encompasses the entire world.[206] The offensiveness inquiry is contextual, and its inherently inconsistent application does not adequately respond to contemporary norms.[207]

b) Private Nature of Facts Disclosed

Modern technology also triggered a shift in what is considered private, or what one might reasonably expect to be private. Patricia

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199 *See supra* Part II.A and accompanying text.

200 *See supra* Part II.B and accompanying text.

201 Gagnier, *supra* note 6, at 229.

202 RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (AM. L. INST. 1977).

203 *See* Gagnier, *supra* note 6.

204 *Christina M. Gagnier*, CARLTON FIELDS, https://www.carltonfields.com/team/g/christina-m-gagnier [https://perma.cc/Y99Q-842N].

205 *Id*. ("The online community is not sequestered or localized: it literally encompasses a worldwide network of websites and users."). *See also* Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273, 294 (1999) ("[A]s we become a nation, a community, of voyeurs, and more and more people watch reality TV shows and become accustomed to hidden-camera investigative news shows like PrimeTime Live, the community standards issue is rendered moot. If the community wants to watch, then that's the community value and norm."); Erica Goldberg, *Competing Free Speech Values in an Age of Protest*, 39 CARDOZO L. REV. 2163, 2178–79 (2018).

206 Abril, *supra* note 8.

207 *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (AM. L. INST. 1977). *See also* Abril, *supra* note 8, at 21.

Abril, a professor of law at the University of Miami,[208] noted that the traditional view of privacy, as a "function of location,"[209] does not translate well in cyberspace.[210]

The distinction between public and private is unclear, making it extremely difficult to know where one's privacy rights stand.[211] For example, information voluntarily displayed online can be widely circulated and easily deemed public.[212] Studies indicate that many users view online social networks as public fora.[213] Indeed, a survey of adult Facebook users found that the very reason many use the platform is "the ability to share with many people at once."[214]

Therefore, some courts are less willing to grant a privacy right in the context of the internet and social media, finding a less reasonable expectation of privacy when someone electively posts something online.[215] For example, in *Fawcett v. Altieri*, a New York court found the very purpose of social media platforms like Facebook and Twitter was to facilitate connections between individuals.[216] Further, the court found users' purpose when engaging these sites is "to disseminate [ ] information."[217] Quoting Judge Matthew Sciarrino's

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[208] Patricia Abril, U. MIAMI, https://people.miami.edu/profile/pabril@miami.edu#panelResearch [https://perma.cc/4Z57-3GPD].

[209] *See* Abril, *supra* note 8, at 17–18 (noting that "actions within a bedroom are more private than the same actions would be in the town square").

[210] *See id.* at 5–6.

[211] *Id*.

[212] MCCARTHY & SCHECHTER, *supra* note 46, § 5:79.

[213] Joshua M. Greenberg, *The Privacy-Proof Plaintiff: But First, Let Me Share Your #Selfie*, 23 J.L. & POL'Y 689, 694–95 (2015).

[214] *Id*. at 693–94, 725–26 ("Posting on social media is often considered an implied waiver of privacy rights.").

[215] Demi Marks, *The Internet Doesn't Forget: Redefining Privacy Through an American Right to Be Forgotten*, 23 UCLA ENT. L. REV. 41, 47 (2016).

[216] 38 Misc. 3d 1022, 1025 (N.Y. Sup. Ct. 2013). *See also* Reid v. Ingerman Smith LLP, No. CV 2012-0307, 2012 WL 6720752, at *2 (E.D.N.Y. Dec. 27, 2012) (finding that a plaintiff who had adjusted her privacy settings, so as to only allow her followers access to view her posts, still could not reasonably expect that all of her Facebook "friends" would keep her posts private); United States v. Charbonneau, 979 F. Supp. 1177, 1185 (S.D. Ohio 1997) (Court found that there was no reasonable expectation of privacy in email messages sent by an individual in private electronic chat rooms); Moreno v. Hanford Sentinel, Inc., 172 Cal. App. 4th 1125, 1127–28 (2009) ("The facts contained in the article were not private. Rather, once posted on myspace.com, this article was available to anyone with internet access.").

[217] *Fawcett*, 38 Misc. 3d at 1025.

opinion in a criminal case charging an "Occupy Wall Street" protestor, the *Fawcett* court held that "[i]f you post a tweet, just like you scream it out the window, there is no reasonable expectation of privacy."[218] However, some courts have held otherwise. For example, a New Jersey district court held a plaintiff had a reasonable expectation of privacy in her Facebook posts when she affirmatively took steps to manage her privacy settings.[219]

There are also difficult questions centering around the publicity one's social media page receives under Terms and Conditions agreements. Although many people do not bother to read these agreements,[220] accepting a platform's Terms and Conditions can constitute user consent to the site's manipulation of the user's personal information.[221] Such terms may be binding on users and permit platforms to retain and share user information.[222]

While certain studies indicate that some users post information with the understanding it becomes publicized,[223] this is not true for everyone.[224] For instance, some people post content on Instagram to

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[218] *Id.* (internal quotations omitted). *See also Reid*, 2012 WL 6720752, at *2 (finding that a plaintiff who had adjusted her privacy settings, so as to only allow her followers access to view her posts, still could not reasonably expect that all of her Facebook "friends" would keep her posts private); *Charbonneau*, 979 F. Supp. at 1185 (finding that there was no reasonable expectation of privacy in email messages sent by an individual in private electronic chat rooms); *Moreno*, 172 Cal. App. 4th at 1127–28 ("The facts contained in the article were not private. Rather, once posted on myspace.com, this article was available to anyone with internet access.").

[219] Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 872 F. Supp. 2d 369, 373–74 (D.N.J. 2012).

[220] Francesca Grea, *To Like or Not to Like:* Fraley v. Facebook*'s Impact on California's Right of Publicity Statute in the Age of the Internet*, 47 LOY. L.A. L. REV. 865, 880 (2014).

[221] 62A AM. JUR. 2D *Privacy* § 174 (2021) (citing Cain v. Redbox Automated Retail, LLC, 136 F. Supp. 3d 824 (E.D. Mich. 2015) (applying Illinois law)).

[222] Connie Davis Powell, *"You Already Have Zero Privacy. Get Over It!" Would Warren and Brandeis Argue for Privacy for Social Networking?*, 31 PACE L. REV. 146, 165 (2011). Such a waiver may, depending on the particular terms of the agreement, bar future invasion of privacy claims against the platform or website. *See* 62A AM. JUR. 2D *Privacy* § 174 (2021) (citing Smith v. Facebook, Inc., 262 F. Supp. 3d 943 (N.D. Cal. 2017)); Caitlyn Slater, *The Duet on the Internet: Balancing Sharing Information and Protecting the Right of Publicity on Social Media*, 46 AIPLA Q.J. 457, 510 (2018).

[223] *See supra* notes 212–14 and accompanying text.

[224] *See, e.g.*, Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image over the Internet*, 49 SANTA CLARA L. REV. 313, 342–43 (2009).

gain followers, while others maintain private accounts to connect with only select friends. Why should these two types of users be subject to the same limited right of privacy when their expectations thereof clearly differ?

c) Classifications of Plaintiffs

Another major inadequacy within the PDPF tort is the way many courts categorize the subjects of such publications. Courts distinguish two broad categories: "voluntary" and "involuntary" public figures.[225]

i. Voluntary Public Figures

The Restatement defines a "voluntary public figure" as "one [who] voluntarily places himself in the public eye 'by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment.'"[226] The scope to which a voluntary public figure waives his or her privacy rights is quite broad.[227] For example, in *Michaels v. Internet Entertainment Group, Inc.*, the court held that if a plaintiff voluntarily assumes publicity, public interest should prevail absent a particularly egregious privacy intrusion.[228] In such cases, First Amendment interests will often outweigh individual privacy protections.[229]

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225 *See* RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

226 *Id.* § 652D cmt. e. *See also* Darby Green, *Almost Famous Reality Television Participants as Limited-Purpose Public Figures*, 6 VAND. J. ENT. L. & PRAC. 94, 99 (2003).

227 Sidis v. F-R Publ'g Corp., 113 F.2d 806, 809 (2d Cir. 1940) ("Regrettably or not, the misfortunes and frailties of neighbors and 'public figures' are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day."). *See also* Price v. Chicago Mag., No. 86 C 8161, 1988 WL 61170, at *5 (N.D. Ill. 1988).

228 No. CV 98-0583, 1998 WL 882848, at *10 (C.D. Cal. 1998) ("Where the plaintiff is a voluntary public figure, the depth of intrusion standard must be applied with greater deference to the public interest in unfettered news reporting.").

229 *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 263 n.18 (1952); Sipple v. Chron. Publ'g Co., 154 Cal. App. 3d 1040, 1048 (1984); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 455 (1977) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)); Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974); Capra v. Thoroughbred Racing Ass'n of N. Am., 787 F.2d 463, 464–65 (9th Cir. 1986). *See also* Shackelford, *supra* note 4, at 144–47; Gary

Today, people increasingly document their lives via social media. Celebrities use various platforms to communicate with fans and garner more popularity and success.[230] But celebrities are not the only ones actively engaging in this way. Everyday people who might otherwise be considered private figures also have a substantial presence in these spaces.[231] Take Instagram's story-sharing feature as an example, which allows users to "share everyday moments" with their followers, or even with the public at large.[232]

Under current doctrine, "voluntary accession" into publicity may render a huge number of people—otherwise considered private figures—voluntary public figures. This includes individuals "tweeting" provocatively for specific causes, TikTok users creating trendy dance moves, and Instagram "influencers" posting content.[233] Current case law suggests that almost anyone could qualify as a voluntary public figure by doing something as commonplace as posting a picture or status on Facebook.[234] In some jurisdictions, the public nature of such persons outweighs any privacy rights.[235] In addition, according to the Restatement, the newsworthiness and public interest surrounding these figures is not limited to specific matters and information made public by the individual; they may extend to that

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Wax, *Popping Britney's Personal Safety Bubble: Why Proposed Anti-Paparazzi Ordinances in Los Angeles Cannot Withstand First Amendment Scrutiny*, 30 LOY. L.A. ENT. L. REV. 133, 160 (2009).

230 *See* Abril, *supra* note 166, at 396; Stacy A. Smith, *If Dr. Martin Luther King, Jr. Had a Twitter Account: A Look at Collective Action, Social Media, and Social Change*, 12 SEATTLE J. FOR SOC. JUST. 165, 171 (2013).

231 *See generally, e.g.*, Maureen T. DeSimone, *Insta-Famous: Challenges and Obstacles Facing Bloggers and Social Media Personalities in Defamation Cases*, 11 MOD. AM. 70 (2018).

232 *See Features*, INSTAGRAM, https://about.instagram.com/features [https://perma.cc/4TQJ-XGSA].

233 *See, e.g.*, Sasha G. Brown, *How Instagram Influencers Replaced the Modern Day Celebrity*, HUFFPOST (Dec. 21, 2018), https://www.huffingtonpost.co.uk/entry/how-instagram-influencers-have-replaced-the-modern_uk_5c1b5af3e4b0535a214bd02a [https://perma.cc/3U8F-ZX5X]; Ava Farshidi, *Evaluating the FTC Endorsement Guidelines Through the Career of a Fashion Blogger*, 9 HARV. J. SPORTS & ENT. L. 185, 186–87 (2018); Grace Greene, *Instagram Lookalikes and Celebrity Influencers: Rethinking the Right to Publicity in the Social Media Age*, 168 U. PA. L. REV. ONLINE 153, 158–64 (2020).

234 *See* Kadri & Klonick, *supra* note 126, at 85.

235 *See, e.g.*, *supra* notes 215–19.

which "would otherwise be private."[236] Accordingly, it seems that the more these individuals post, the more aspects of their person become "public" and thus fair game for purposes of disclosure.

ii. Involuntary Public Figures

The Restatement also discusses "involuntary public figures," defined as "individuals who have not sought publicity or consented to it but through their own conduct or otherwise have become a legitimate subject of public interest."[237] And, as is true for voluntary public figures, this interest may reasonably extend to information that would normally be considered private.[238] Indeed, case law in several jurisdictions has affirmed this stance.[239]

What about someone like J.D. Salinger, who purposefully left the public arena and renounced publicity?[240] Or, similarly, someone who posts a popular YouTube video, but retracts from the public eye shortly thereafter. Do they have any privacy rights?[241] Or are those

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236 RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (AM. L. INST. 1977).

237 *Id.* § 652D cmt. f.

238 *Id*.

239 *See, e.g.*, Leverton v. Curtis Pub. Co., 192 F.2d 974, 976–77 (3d Cir. 1951) (The court opined that the publication of a photograph of the victim of an automobile accident was newsworthy, and that privilege is not lost by a lapse of time) ("[O]ne who is the subject of a striking catastrophe is the object of legitimate public interest . . . The result is the same as where one does waive his right of privacy by voluntarily getting into the public eye."); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232–33 (7th Cir. 1993) ("People who do not desire the limelight and do not deliberately choose a way of life or course of conduct calculated to thrust them into it nevertheless have no legal right to extinguish it if the experiences that have befallen them are newsworthy, even if they would prefer that those experiences be kept private."); Huskey v. Nat'l Broad. Co., 632 F. Supp. 1282, 1286 (N.D. Ill. 1986) ("For that purpose it is irrelevant whether a person has earlier sought the public eye intentionally, for involuntary publicity is publicity nonetheless. Once given it banishes privacy pro tanto.").

240 *See J.D. Salinger*, ENCYC. BRITANNICA, https://www.britannica.com/biography/J-D-Salinger [https://perma.cc/T6TB-BSGQ] (Jan. 23, 2022).

241 *See, e.g.*, Abril, *supra* note 166, at 396 (describing Tiger Woods as "one of the world's most private public figures."); s*ee id.* at 386–88 (discussing the golfer's aversion to publicity by "demanding confidentiality agreements from those with whom he did business and suing if the agreements were breached . . . almost never appear[ing] on talk shows, reality shows, or any other forum of modern celebrity cultivation.") (noting also that, "[e]ven parodies were fiercely defended by the Woods camp."). When Woods was involved in a car accident in 2009, the press covered it extensively. Woods spoke out, rebuking the press for its invasion of the family's privacy, and declaring, "[N]o matter how

individuals' rights diminished due to *past* voluntary conduct? Does this mean that someone who becomes popular on Instagram for, say, a fitness account is forevermore a public figure with minimized privacy rights? What about someone involved in a matter of public interest that was published by a news or social media platform? At what point can a person reclaim his or her privacy?

Courts inconsistently determine whether public figures can restrict or abandon their public statuses.[242] However, the Restatement notes that matters of the past can be of public interest.[243] In addition, under the Restatement's treatment of involuntary public figures, someone who does not engage in social media activity, but is mentioned or featured in a posted picture or video, might nonetheless be subject to a restricted privacy right.[244]

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intense curiosity about public figures can be, there is an important and deep principle at stake which is the right to some simple, human measure of privacy." *Id.* at 386–88.

[242] A handful of courts have answered this question in the affirmative. *See, e.g.*, Melvin v. Reid, 112 Cal. App. 285, 297 (1931) (finding actionable the claim of a plaintiff whose criminal past had been publicized in a movie); Rome Sentinel Co. v. Boustedt, 43 Misc. 2d 598, 600 (N.Y. Sup. Ct. 1964) (finding that the newsworthiness of an involuntary public figure does not extend indefinitely) ("Even the ordinary citizen may be newsworthy under certain circumstances. Whether the event be a calamity or an honor, it may be one in which his neighbors have a legitimate interest. During this brief period and for a reasonable length of time thereafter, pictures, stories and comments may be made without his consent."). However, a number of cases take the opposite view. *See, e.g.*, Sidis v. F-R Publ'g Corp., 113 F.2d 806, 807 (2d Cir. 1940); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1231 (7th Cir. 1993); Jones v. New Haven Reg., Inc., 763 A.2d 1097, 1101–02 (Conn. Super. Ct. 2000); Bernstein v. Nat'l Broad. Co., 129 F. Supp. 817, 828–29 (D.D.C 1955), *aff'd*, 232 F.2d 369 (D.C. Cir. 1956); *Leverton*,192 F.2d at 977; Man v. Warner Bros. Inc., 317 F. Supp. 50, 53 (S.D.N.Y. 1970); Contemp. Mission, Inc. v. N.Y. Times Co., 665 F. Supp. 248, 265–66 (S.D.N.Y. 1987), *aff'd*, 842 F.2d 612 (2d Cir. 1988); Green, *supra* note 226, at 109.

[243] RESTATEMENT (SECOND) OF TORTS § 652D cmt. k (AM. L. INST. 1977) ("The fact that there has been a lapse of time, even of considerable length, since the event that has made the plaintiff a public figure, does not of itself defeat the authority to give him publicity or to renew publicity when it has formerly been given. Past events and activities may still be of legitimate interest to the public, and a narrative reviving recollection of what has happened even many years ago may be both interesting and valuable for purposes of information and education.") (noting also that such a lapse in time may be relevant in analyzing whether a given disclosure is private or highly offensive to the reasonable person, based on "community standards and mores."). *But see* Prosser, *supra* note 14, at 418.

[244] *See* Kadri & Klonick, *supra* note 126, at 85.

Further, live streaming and surveillance technologies present another set of issues. In *I Spy: Addressing the Privacy Implications of Live Streaming Technology and the Current Inadequacies of the Law*, Kendall Jackson discusses the difficulties live streaming presents for privacy.[245] She specifically raises the issue in the context of an individual being shown on another person's live stream.[246] Similarly, Josh Blackman, a scholar of constitutional law,[247] discusses a recent trend he calls "omniveillance," and defines as "a form of omnipresent and omniscient digital surveillance in public places that is broadcasted indiscriminately throughout the [i]nternet."[248] Such threats come from myriad sources—from a public street camera to a citizen's phone.[249] As in cases involving an unknowing individual becoming the subject of a viral video or appearing in another Facebook user's live stream, anyone can be pushed into the public arena without consent or awareness.[250]

At one time, people could prevent publicity by avoiding certain public situations; this is no longer necessarily true. Arguably, individuals cannot be said to have assumed a risk of publicity if they are not aware they are being recorded.[251] In a world where "the cameras are always rolling," one cannot circumvent the public eye.[252] Are these targets thus categorized as public figures, whether voluntary or involuntary? Under current doctrine: likely, yes.

iii. Overbreadth of the "Involuntary" and "Voluntary" Categories

In defamation and libel cases, courts classify plaintiffs as either: (1) general public figures; (2) limited-purpose public figures; (3) involuntary public figures; or (4) private figures.[253] A general public

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245 *See* Jackson, *supra* note 8, at 139–40.

246 *See id.* at 145.

247 *About Josh*, JOSH BLACKMAN, https://joshblackman.com/about-josh/ [https://perma.cc/XM7K-5MHL].

248 *See* Blackman, *supra* note 224, at 314.

249 *Id*. at 331–32.

250 *Id*. at 385–88 ("The victims of this unblinking eye are thrust into the limelight without any reason or cause. There is absolutely no voluntary or even involuntary ascension to fame.").

251 *Id*.

252 *Id*.

253 *See generally* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

figure is one that has "achieve[d] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts."[254] However, more common is the limited public figure, which refers to an individual who "voluntarily inject[ed] himself or is drawn into a particularly public controversy and thereby becomes a public figure *for a limited range of issues*."[255] In other words, the limited public figures' newsworthiness is limited to those areas in which individuals "volunteered to involve themselves," but maintain privacy in all other areas.[256] The Court also acknowledges the theoretical "involuntary public figure," but notes that its existence is "exceedingly rare."[257]

On the other hand, jurisdictions that classify public figures when deciding the actionability of a PDPF claim[258] tend to take a more sweeping approach.[259] Even where the distinctions are made, the two are treated largely the same for purposes of the PDPF tort.[260] Someone who becomes part of a matter of public interest, whether voluntary or involuntary, is subject to diminished privacy rights.[261]

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254 *Id.* at 351.

255 *Id*. (emphasis added). *See also* Time, Inc. v. Firestone, 424 U.S. 448, 452–55 (1976); Wolston v. Reader's Dig. Ass'n, 443 U.S. 157, 166–67 (1979); Hutchinson v. Proxmire, 443 U.S. 111, 134–36 (1979).

256 Abramson, *supra* note 110, at 26–27.

257 *See Gertz*, 418 U.S. at 345; *see also* Matthew Lafferman, Comment, *Do Facebook and Twitter Make You a Public Figure?: How to Apply the* Gertz *Public Figure Doctrine to Social Media*, 29 SANTA CLARA COMPUT. & HIGH TECH. L.J. 199, 220 (2013) (noting that the doctrine of involuntary public figures is used "so sparingly that some courts and commentators have questioned its existence altogether.").

258 *See supra* Part I.B.5.i.

259 *See supra* notes 226–36 and accompanying text; *see generally* Crisci, *supra* note 3.

260 *See* Kadri & Klonick, *supra* note 126, at 52; *see also* RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (AM. L. INST. 1977) ("Permissible publicity to information concerning either voluntary or involuntary public figures is not limited to the particular events that arouse the interest of the public. That interest, once aroused by the event, may legitimately extend, to some reasonable degree, to further information concerning the individual and to facts about him, which are not public and which, in the case of one who had not become a public figure, would be regarded as an invasion of his purely private life.").

261 *See* Shackelford, *supra* note 4, at 144 ("In many instances even the most tangential relationship to a matter of public interest will convert a private person into a public figure, giving rise to what Justice Harlan said was 'a severe risk of irremediable harm to individuals involuntarily exposed to [publicity] and powerless to protect themselves against it.").

For both types of public figures, disclosure may include the event that first "arouses the public interest," but, where reasonable, may also extend to some publicity for facts about the person that would otherwise be private.[262]

Some courts attempt to circumvent the overbreadth issue introduced by the Restatement by employing a nexus approach.[263] In other words, courts may protect the privacy of an "otherwise private individual involved in events of public interest" by requiring that a relevant connection exists "between the complaining individual and the matter of legitimate public interest."[264]

However, there is valid concern that overbreadth would likely still result. Typically, the nexus element is applied generously, in favor of the media defendant.[265] Courts, scholars, and commentators have argued that it "sweeps too broadly, as most people are involved in some activity of public concern," which could accordingly privilege any piece of information under newsworthiness.[266] Some assert that such an approach would usher in "breathtaking boundarylessness"[267] due to the ease with which a defendant could argue that any disclosure of private material is relevant to a matter of public

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262 RESTATEMENT (SECOND) OF TORTS § 652D cmt. e, f (AM. L. INST. 1977).

263 *See supra* Part I.B.5.i and accompanying text.

264 Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 484 (1998) (citing Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980)).

265 2 RODNEY A. SMOLLA, LAW OF DEFAMATION § 10:51 (2d ed. 1999); *see also* Wilson v. Grant, 687 A.2d 1009, 1015 (N.J. Super. Ct. App. Div. 1996); Young v. City of S. Bend, No. 3:12-CV-475, 2013 WL 5913812, at *3 (N.D. Ind. Oct. 31, 2013).

266 *See* Jasmine E. McNealy, *The Emerging Conflict Between Newsworthiness and the Right to Be Forgotten*, 39 N. KY. L. REV. 119, 128 (2012) (noting that "the courts could find a logical nexus between a matter of public interest, or Virgil's status as a star surfer, and the information printed about Virgil's drug use, stair diving, and cigarette eating."); *see also* John A. Jurata, Jr., Comment, *The Tort That Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 508 (1999); Worley, *supra* note 32, at 569–70; Virgil v. Time, Inc., 527 F.2d 1122, 1131 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976) ("Most persons are connected with some activity, vocational or avocational, as to which the public can be said as matter of law to have a legitimate interest or curiosity. To hold as matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view. Limitations, then, remain to be imposed and at this point factual questions are presented respecting the state of community mores.").

267 ELDER, *supra* note 75, § 3:17.

concern.[268] This is especially true in the context of the internet and social media, where anyone can become "viral."

In effect, under current doctrine, virtually anyone can be deemed the subject of legitimate public interest. Thus, it will be extremely hard for individuals' privacy rights to outweigh press rights. The voluntary-involuntary approach is ill-suited for the nuances of public life, the internet, and social media. The current PDPF framework does not consistently nor predictably account for the complexities and variances created by modern norms and practices.

III. CALL TO REDEFINE THE PDPF TORT

The various standards and balancing tests utilized to determine the actionability of a PDPF claim are inconsistently applied, provide insufficient guidance, and poorly reflect modern societal norms. Many scholars recognize that this tort, as it currently stands, is incompatible with the current climate.[269]

The types of privacy harms PDPF was designed to protect are exacerbated in the internet context and by modern technology.[270] Once made public, information is easily distributed and accessed, and can linger indefinitely.[271] The harms caused by the nonconsensual publication of one's body parts, for example, are amplified today, as information can easily travel across the internet and become "viral."[272] It can also disseminate globally and become easily accessible by curious browsers.[273] Therefore, privacy surely warrants *some* degree of security.[274]

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[268] Gewirtz, *supra* note 56, at 174–75, 199 ("[S]ome relevance can always be found or created, and privacy will be only a matter of media grace and forbearance.").

[269] Abril, *supra* note 8, at 38.

[270] *See, e.g., supra* Part II.B.2.ii.

[271] *See* Blackman, *supra* note 224, at 334.

[272] *Id.* at 369.

[273] Walters, *supra* note 46, at 427; Jaime A. Madell, Note, *The Poster's Plight: Bringing the Public Disclosure Tort Online*, 66 N.Y.U. ANN. SURV. AM. L. 895, 904 (2011).

[274] *See* Maayan Y. Vodovis, *Look Over Your Figurative Shoulder: How to Save Individual Dignity and Privacy on the Internet*, 40 HOFSTRA L. REV. 811, 828 (2012) ("[C]riminals and tortfeasors get away with more, and victims who are unable to connect an individual to the offense are left without a remedy.").

How, then, is the law to protect privacy interests? The following Section proposes the Court should combine the use of specific, targeted statutes with bright-line criteria for what remains of the PDPF tort.

A. Narrowly Drawn Statutes

In *Florida Star*, the Supreme Court held the publication of truthful information lawfully obtained actionable "only when narrowly tailored to a state interest of the highest order."[275] In other words, restrictions on the press are constitutionally permitted only when necessary to further a legitimate governmental purpose or interest.[276] Therefore, the most egregious violations of individuals' privacy are best regulated by carefully and narrowly drafted statutes. This approach would target the most harmful intrusions, while simultaneously providing clear notice to potential defendants as to which information can be lawfully disclosed.[277]

Statutes specifically directed toward the media are indeed likely to raise constitutional issues.[278] But, under *Cohen v. Cowles Media Co.*, the press is still subject to *laws of general applicability*, even when such liability incidentally affects newsgathering and reporting abilities.[279] Such laws may effectively provide redress for several of the wrongs stemming from the PDPF tort.[280] To be constitutional,

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275 Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989).

276 Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 97 (1979).

277 *See* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1947 (2019) ("Not only does legislation have to give fair warning to potential perpetrators—defendants must have clear notice of the precise activity that is prohibited—but it must also not be so broad as to criminalize or impose civil penalties on innocuous behavior.").

278 City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994) ("Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech."); *see* Smolla, *supra* note 162, at 1097, 1110 ("To the extent that the intent and operation of these laws focus on the traditional paparazzi, they violate current First Amendment principles that prohibit singling out a certain class of speakers or a certain form of media for specially disfavorable treatment.").

279 501 U.S. 663, 669 (1991).

280 *See* Zimmerman, *supra* note 44, at 302–03, 362–63.

though, statutes must be "narrowly tailored to a state interest of the highest order."[281]

It is important to note the frequent inconsistencies in how courts understand and define privacy interests.[282] Courts interpret privacy and the harm caused by its misappropriation in different ways.[283] Warren and Brandeis's article focused on emotional harms resulting from invasions of one's right to privacy.[284] Both the Restatement and Prosser's approaches describe right to privacy violations as a harm to one's reputation.[285] Some courts echo this view,[286] while others express unease in hinging recovery solely on reputational harm.[287] Therefore, these privacy-protective statutes should track specific harms rooted in state interests that are legitimized by case law and legislation. For example, courts generally agree that the government has a legitimate interest in protecting minors and, as such, often provides children special protection, even when balanced against the constitutional rights of adults.[288] Accordingly, a carefully drafted statute proscribing public disclosure of information about minors is unlikely to run into First Amendment concerns.

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[281] Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989).

[282] Zimmerman, *supra* note 64, at 324, 341, 376; *see* Dendy, *supra* note 124, at 149–50; Zimmerman, *supra* note 44, at 341, 362 ("But the nature of the harm done by publication of private facts has continued . . . to elude more than vague, subjective definition.").

[283] *See* Dendy, supra note 124, at 149–50.

[284] *See* Warren & Brandeis, *supra* note 8, at 195–97.

[285] Prosser, *supra* note 14, at 398; RESTATEMENT (SECOND) OF TORTS § 652H cmt. a (AM. L. INST. 1977).

[286] *See, e.g.*, Pavesich v. New England Life Ins. Co., 50 S.E. 68, 74 (1905); Toffoloni v. LFP Publ'g Grp., LLC, 572 F.3d 1201, 1211 (11th Cir. 2009); Jenkins v. Dell Publ'g Co., 251 F.2d 447, 450 (3d Cir. 1958); Michaels v. Internet Ent. Grp., Inc., 5 F. Supp. 2d 823, 842 (C.D. Cal. 1998); Baugh v. CBS, Inc., 828 F. Supp. 745, 755 (N.D. Cal. 1993); Snakenberg v. Hartford Cas. Ins. Co., 299 S.C. 164, 169, 383 S.E.2d 2, 5 (Ct. App. 1989); Reid v. Pierce Cnty., 136 Wash. 2d 195, 212, 961 P.2d 333, 342 (1998).

[287] *See* Richards & Solove, *supra* note 15, at 1922.

[288] *See* New York v. Ferber, 458 U.S. 747, 764–65 (1982) (upholding as constitutional a statute that prohibited the sale or making of child pornography as applied to conduct outside the definition of obscenity); Ginsberg v. New York, 390 U.S. 629, 639–40 (1968) (finding that a sufficient state interest in regulating material that was obscene relative to children); Ashcroft v. Free Speech Coal., 535 U.S. 234, 234 (2002); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988); Globe Newspaper Co. v. Superior Court of Norfolk, 457 U.S. 596, 607 (1982); Packingham v. North Carolina, 137 S. Ct. 1730, 1739 (2017) (Alito, J., concurring). *See also* Julian Grant, *Victims, Offenders, and Other Children: A Right to Privacy?*, 19 AM. J. CRIM. L. 485, 486–87 (1992).

In addition, the judiciary often recognizes harms created by nonconsensual exposure of sexual activity or unclothed body parts as legitimate state interests.[289] Modern technology amplifies these injuries.[290] Although some courts have found disclosures of such material actionable, these discrepancies stem primarily from conflicting interpretations of the "newsworthiness" of such information.[291] A bright-line statute would resolve such inconsistency by eliminating the need to determine what is newsworthy. Further, such a law would avoid offending the Constitution because the statute would be rooted in and justified by a legitimate state interest. Therefore, the criminalization of nonconsensual disclosure of nudity or sexual activity may similarly be narrowly tailored, clearly defined, and

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289 *See, e.g.*, *Ex parte* Metzger, 610 S.W.3d 86, 104 (Tex. App. 2020); People v. Austin, 2019 IL 123910, ¶¶ 67–71, 155 N.E.3d 439, 461–62 (2019); Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 252 (1891); Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964); State v. Casillas, 952 N.W.2d 629, 642 (Minn. 2020) ("It is difficult to imagine something more private than images depicting an individual engaging in sexual conduct, or of a person's genitals, anus, or pubic area . . . .The harm largely speaks for itself."). *See also* Roth v. United States, 354 U.S. 476, 485 (1957) (holding that there is a compelling state interest in "order and morality," which can outweigh "utterances . . . [that] are of such slight social value as a step to truth."); Miller v. California, 413 U.S. 15, 23–24 (1973) (holding that obscenity, as defined according to a specific formulation, is an unprotected form of speech). Note that, while certain pornographic disclosures may lawfully be proscribed under *Miller*, the standard likely would not embrace all such disclosures, including those which pose a significant threat today. For instance, an "upskirt" picture probably cannot be said to "depict or describe" sexual activity. *See* Citron, *supra* note 277, at 1878; *see also* Sarah E. Driscoll, *Revenge Porn: Chivalry Prevails as Legislation Protects Damsels in Distress Over Freedom of Speech*, 21 ROGER WILLIAMS U. L. REV. 75, 88 (2016). Still, the Court has generally maintained that there is a legitimate state interest in "family life, community welfare, and the development of human personality," as well as in "the quality of life and the total community environment . . . and . . . the public safety itself." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58, 63 (1973).

290 Citron, *supra* note 166, at 1811, 1878; Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislators*, CYBER C.R. INITIATIVE (Mar. 30, 2015), https://www.cybercivilrights.org/wp-content/uploads/2015/04/Guide-for-Legislators-3.30.15.pdf [https://perma.cc/N9WX-Q3KR]. It is estimated that "revenge porn" is featured on as many as 10,000 websites, and is also circulated on social media platforms, and through texts and emails. *See Casillas*, 952 N.W.2d at 642; Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1260–61 (2017); Vodovis, *supra* note 274, at 828.

291 See *supra* Part II.A.

continually updated to not conflict with the Constitution.[292] As Chemerinsky wrote, "I can image a clear rule: no videos of people having sex should be made public unless all of the participants consent. I think the media will survive the restriction."[293]

Significantly, many harms can be prevented if the legislature enacts generally applicable statutes that target the *means of acquiring* private information sought to be disclosed, rather than its content.[294] While the Supreme Court's guidance by way of determining liability for the public disclosure of private information has been limited, it may still be instructive. In *Smith v. Daily Mail Publishing Co.*, the Court ruled that where the press *lawfully* obtains truthful information implicating public interest, it cannot be prohibited from publishing such information "absent a need to further a state interest of the highest order."[295]

This leaves open the possibility of banning the disclosure of information that has been *unlawfully* obtained. In *Dietemann v. Time, Inc.*, the Ninth Circuit confirmed that such a prohibition would not run contrary to the First Amendment.[296] Thus, privacy could be protected if the Court gives more weight to the acquisition of private

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[292] Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 386–90 (2014); Citron, *supra* note 277, at 1944–48; *see* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 804–05 (2011); United States v. Alvarez, 567 U.S. 709, 724 (2012); Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247, 277 (2015); Peter W. Cooper, *The Right to Be Virtually Clothed*, 91 WASH. L. REV. 817, 839 (2016).

[293] Erwin Chemerinsky, Opinion, *Privacy Versus Speech in the Hulk Hogan Sex Tape Trial*, L.A. TIMES (Mar. 14, 2016, 5:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-0314-chemerinsky-hulk-hogan-gawker-20160314-story.html [https://perma.cc/6HRV-YWT5]; *see* Snehal Desai, *Smile for the Camera: The Revenge Pornography Dilemma, California's Approach, and Its Constitutionality*, 42 HASTINGS CONST. L.Q. 443, 462 (2015) ("Through the Court's recognition of revenge pornography as a new category of unprotected speech, only media that fits the definition of 'revenge pornography' would be prohibited. Consensual pornography would still exist as protected speech, and those who want to access pornographic materials would still have the liberty to do so.").

[294] *See* Zimmerman, *supra* note 44, at 362–63.

[295] 443 U.S. 97, 103 (1979) (emphasis added).

[296] 449 F.2d 245, 250 (9th Cir. 1971) ("No interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired.").

information. Statutes could do much of this work in a bright-line way.

For instance, the Supreme Court has made clear that privacy protection in one's home is a significant state interest and outweighs an intruder's First Amendment interests.[297] Following this principle, many states have enacted statutes protecting residential privacy.[298] For example, the California Privacy Protection Act protects against intrusion and trespass, including that facilitated by technology.[299] This is a law of general applicability that is narrowly tailored to protect against privacy violations in one's home.[300]

In addition, federal law criminalizes nonconsensual interception of electronic communications where neither party has consented.[301] Most states have adopted a version of the statute.[302] New York and California have also adopted extensive harassment statutes "that eliminate the element of intent from stalking statutes as a prerequisite to obtaining an injunction against alarming, annoying, or harassing behavior."[303] The harms caused by these behaviors can be constitutionally protected by a statute that does not unduly restrict a defendant's First Amendment interests. This protects privacy without requiring courts to make subjective determinations about what information is private or public and which disclosures are highly offensive. Accordingly, statutes may protect against some of these harms—which have been deemed state interests—with less threat to free speech and the press.

B. What Remains of the PDPF Tort

Because many privacy harms can be proscribed statutorily, the PDPF tort itself should be constricted. This Section argues that what

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297 *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978); Frisby v. Schultz, 487 U.S. 474, 487 (1988).

298 *See* Meltz, *supra* note 11, at 3438.

299 CAL. CIV. CODE § 1708.7 (West 2015); CAL. CIV. CODE § 1708.8 (West 2016).

300 Erwin Chemerinsky, *Balancing the Rights of Privacy and the Press: A Reply to Professor Smolla*, 67 GEO. WASH. L. REV. 1152, 1155 (1999).

301 18 U.S.C. §§ 2510–2522; *see* Vodovis, *supra* note 274, at 843; Citron, *supra* note 277, at 1932 n.415.

302 *See* Citron, *supra* note 277, at 1932 n.415.

303 Jamie E. Nordhaus, *Celebrities' Rights to Privacy: How Far Should the Paparazzi Be Allowed to Go?*, 18 REV. LITIG. 285, 302–03 (1999).

remains of the tort should be circumscribed significantly, with clearer guidance to be applied uniformly across the judiciary. It advocates for an approach based less on muddy, malleable, and vague conceptions of "newsworthiness," and instead on concrete distinctions between private and public, voluntary and involuntary.

1. Bright Line Approaches to Identify "Types" of Public Figures

Courts must better distinguish between the different "types" of public figures. All voluntary figures should not be conflated and treated identically, as is often the case under current doctrine.[304] For example, Person A, who voluntarily posts a public video on how to cut one's bangs with kitchen shears, should not be subject to the same diminished privacy rights as someone like John Mayer, a celebrity known for his music as well as his strong presence on social media.[305] Further, John Mayer should not be subject to the same degree of publicity as a political figure like former Senator Chuck Schumer.[306] The degree to which someone has voluntarily assumed publicity should play a larger role in the inquiry than it currently does.

Now imagine Person B. She is a librarian. While at work, Person B is unknowingly recorded in a student's live stream video, which goes viral. The video itself could constitute a matter of public interest. Nevertheless, under current doctrine, the student who disclosed the video would unlikely face liability; Person B would likely be treated like Person A, John Mayer, and Senator Schumer. However, Person B's involuntary role in the "newsworthy" topic will automatically permit free dissemination of an embarrassing video of her, as if she electively circulated the video.

For privacy torts, the Restatement clarifies that involuntary public figures who are involved in matters of public concern have

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304 *See supra* Part II.B.2.iii.

305 *See, e.g.*, Brianna Morton, *That's It, John Mayer Officially Has One of the Best Celebrity Instagrams*, SUGGEST (Mar. 26, 2020), https://www.suggest.com/john-mayer-officially-best-celebrity-instagram/58140/ [https://perma.cc/C3G6-CREH].

306 *See About Chuck*, U.S. SENATE, https://www.schumer.senate.gov/about-chuck [https://perma.cc/8WPX-ZXRM].

minimal privacy rights, like voluntary public figures.[307] Defamation law describes this class of involuntary public figures but asserts that this classification is uncommon.[308] As this Note argues, however, technological advancements have created an expanded definition of involuntary public figures.[309]

One's expectation of privacy can also be reflected, at least in part, by the measures taken to preserve that privacy—including keeping private information limited to friends and family, safeguarding important records in private spaces, limiting elective publicity, and utilizing privacy settings online.[310] Social media platforms' privacy settings may provide a more bright-line way to classify individuals, according to their conduct and reasonable expectations of privacy.[311] This is more consistent with evolving customs and social norms.[312] A platform also might, for example, use explicit opt-in and opt-out notifications. This approach would clarify whether an individual has "voluntarily" acceded into publicity with respect to particular bits of information. Those who live aspects of their lives publicly can be properly presumed to have relinquished privacy expectations in those publicized areas. Finally, a clearer rule ought to be applied for children.[313] The presence of minors in public and on the internet, absent a showing of consent by their parents, should be actionable.[314]

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307 *See supra* Part II.B.2.iii.b.

308 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

309 *See supra* Part II.B.2.iii.b; *see also* Yanisky-Ravid & Lahav, *supra* note 55, at 997, 1011; Kadri & Klonick, *supra* note 126, at 81–82.

310 *See, e.g.*, Jackson, *supra* note 8, at 151 (stating that while social media users often over-share on the platforms, there is statistical reason to believe that "users still value their privacy and are using the provided methods of protecting it on social media sites.").

311 *See, e.g.*, Gagnier, *supra* note 6, at 278 ("This . . . allows users online to make the same decisions about their privacy that they make in real space. In the visceral world, people are aware when they are in a public place or when, and to whom, they are revealing information. The same type of protection should be afforded in virtual space. With proper notice, a user can be held to a standard where they 'knew or should have known' that their privacy was being compromised.").

312 Allyson W. Haynes, *Virtual Blinds: Finding Online Privacy in Offline Precedents*, 14 VAND. J. ENT. & TECH. L. 603, 629 (2012).

313 *See* Kadri & Klonick, *supra* note 126, at, 82–83.

314 *See generally* Shannon Sorensen, *Protecting Children's Right to Privacy in the Digital Age: Parents as Trustees of Children's Rights*, 36 CHILD.'S LEGAL RTS. J. 156 (2016); *see also* Adam Chrzan, *No-Fault Publicity: Trying to Slam the Door Shut on*

2. Scienter

Defamation law requires "actual malice" to impose liability for the publication of libelous statements about public officials and public figures.[315] The Court set out this standard to prevent chilled speech and to strike a balance between a plaintiff's reputational rights and the press's First Amendment rights.[316] However, there is no equivalent standard where disclosed information is truthful,[317] even though the *Florida Star* Court struck down a law proscribing public disclosure of private facts, in part due to lacking an element of scienter.[318]

The Restatement and most jurisdictions are silent as to a defendant's state of mind in the context of the PDPF tort. However, a small number of courts have considered scienter in such cases. For instance, in Colorado, the tort requires "the defendant [to] act[] *with reckless disregard* of the private nature of the fact or facts disclosed"[319] in addition to the four Restatement factors. Courts should consider the circumstances surrounding disclosure. Evidence that a defendant's outrageous conduct was clearly intended to harass or embarrass is relevant in the calculus.[320] Moreover, when users take

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Privacy—the Battle Between the Media and the Nonpublic Persons It Thrusts Into the Public Eye, 27 NOVA L. REV. 341, 342 (2002); Grant, *supra* note 288, at 496 (proposes a presumption of "un-newsworthiness" for child plaintiffs).

315 *See supra* notes 26–29.

316 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–82 (1964). *See* Hatchard v. Westinghouse Broad. Co., 532 A.2d 346, 349 (Pa. 1987) ("That rule struck a balance between First Amendment concerns and the 'strong and legitimate state interest in compensating private individuals for injury to reputation,' by requiring a lesser showing than actual malice in the case of a private individual and at the same time shielding the media from the rigors of strict liability."). Some have argued that this approach prevents overbreadth. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 896 (1970).

317 *See* Prosser, *supra* note 14, at 389.

318 491 U.S. 524, 539 (1989) (holding that lack of scienter requirement "endanger[s] the perverse result that truthful publications challenged pursuant to this cause of action are less protected by the First Amendment than even the least protected defamatory falsehoods.").

319 *See, e.g.*, *Robert C. Ozer, P.C. v. Borquez,* 940 P.2d 371, 377 (Colo. 1997) (emphasis added); Taylor v. K.T.V.B., Inc., 96 Idaho 202, 205–06 (1974); Templeton v. Fred W. Albrecht Grocery Co., 72 N.E.3d 699, ¶ 8 (Ohio Ct. App. 2017). *But see* Briscoe v. Reader's Dig. Ass'n, Inc., 483 P.2d 34, 44 (Cal. 1971), *overruled by* Gates v. Discovery Commc'ns, Inc., 101 P.3d 552 (Cal. 2004).

320 *See* Abril, *supra* note 8, at 35–36.

affirmative action to retain privacy by making their Instagram accounts only accessible to a handful of close friends, the subsequent disclosure of private information may put the burden on the defendant to disprove intent or recklessness. As Katheleen Guzman, legal scholar and Dean of the University of Oklahoma College of Law,[321] notes, "[a] defendant should enjoy less protection where bad motive impels the speech."[322] Adding an element of scienter is an important step in providing guidance to the courts and targeting more egregious invasions of privacy, where a victim's harm can be more properly inferred.

C. Pros and Cons

Everything in the modern world has the potential to become extremely publicized. As discussed, public interest has evolved in such a way that almost anything can qualify as "newsworthy."[323] The judiciary, as well as the legislature, must act accordingly and establish tests and standards to identify actionable PDPF claims.[324] In doing so, courts and legislatures must provide clear-cut guidance and preserve judicial economy by decreasing trivial and frivolous claims.[325]

For better or worse, there are circumstances in which the reasonable expectation of privacy has indisputably shrunk. For example, by posting something on Facebook without privacy filtration or simply existing in a public location, one assumes the risk of publicity. Diane Zimmerman writes:

> [B]ecause society has a powerful countervailing interest in exchanges of accurate information about the private lives and characters of its citizenry, a compelling case for a general right to suppress such exchanges is difficult to construct. Many decades ago, a commentator on the budding tort of invasion of privacy cautioned that publicity about our private

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321 Katheleen Guzman, UNIV. OKLA. COLL. L., https://www.law.ou.edu/directory/katheleen-guzman [https://perma.cc/CL57-3AYJ].

322 Katheleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 WASH. U. L.Q. 1531, 1596 (1995).

323 See *supra* Part II.B.1; Palmer, *supra* note 33, at 257–58, 269.

324 Zimmerman, *supra* note 44, at 342.

325 *Id.*

> affairs may be among the "impertinent and disagreeable things which one may suffer" but which do not "amount to legal injuries such as courts may redress." However uncomfortable that conclusion is, it may well have turned out to be right.[326]

But, this does not necessarily mean that individuals have no control over the way their personal information is publicized. By articulating guidelines in a formalistic way, people will know how to conform behavior to safeguard their privacy and actively engage in protectionary measures like updating privacy settings online to clearly indicate the scope of publicity one is willing to give certain material.

This proposed approach falls short in protecting disclosure of material that is less obviously offensive or egregious. However, this is the reality of today's world. It is difficult to constitutionally disallow someone from posting information obtained lawfully, such as in a public place. But, by providing palpable guidance, such as elements pertaining to privacy settings, consent, and scienter, courts can protect privacy in a predictable and consistent way while providing reliable rules to which individuals can shape their conduct.

CONCLUSION

> When everyone has a blog, a MySpace page or Facebook entry, everyone is a publisher. When everyone has a cell phone with a camera in it, everyone is a paparazzo. When everyone can upload video on YouTube, everyone is [a] filmmaker. When everyone is a publisher, paparazzo or filmmaker, everyone else is a public figure. We're all public figures now.[327]

More than a century after the origination of the concept of a right of privacy, the doctrine remains hazy. This indefiniteness is

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326 *Id.* at 341.

327 Abril, *supra* note 8, at 29 (quoting Thomas Friedman, Opinion, *The World Is Watching*, N.Y. TIMES (June 27, 2007), http://select.nytimes.com/2007/06/27/opinion/27friedman.html [https://perma.cc/2DTK-6W8L]).

compounded by technological advancements and their complete reshaping of our world. It is necessary to provide clarity for the sake of the press, who lack a guiding framework to help avoid liability, and for citizens, who remain unclear as to the scope of their privacy protections.

The concern is less about the Kardashians or John Mayers of the world, who have actively sought fame, but rather for everyday people who are unwittingly thrust into the public eye. An overhaul of the current legal infrastructure is necessary to adequately preserve privacy rights. The most flagrant invasions of privacy may properly be regulated through enactment of narrowly tailored statutes. The PDPF tort should be modified to differentiate between different types of plaintiffs and focus on the defendant's state of mind and conduct. To do so, courts should create bright-line rules distinguishing "public" from "private" based upon the plaintiff's affirmative actions. Such an approach would pose fewer threats to the press and free speech rights by targeting more egregious invasions of privacy. Simultaneously, this solution also provides individuals with guidance to protect their information, allowing them to align their conduct with modern expectations of privacy.