The Hidden First Amendment Values of Privacy

Sean M. Scott
THE HIDDEN FIRST AMENDMENT VALUES OF PRIVACY

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Abstract: The private facts tort protects the privacy of individuals by punishing the publication of private information. The First Amendment protects the press when it publishes information in which the public has a legitimate interest. The right to keep information private and the right to publish information sometimes conflict. The First Amendment is often the victor in these conflicts; courts are concerned that the private facts tort threatens First Amendment values. This Article challenges the argument that punishing a media defendant for publishing truthful information will threaten unduly First Amendment values. The Article argues instead that the private facts tort promotes, not undermines, First Amendment values. The Article suggests a reallocation of the burdens of proof in private facts tort cases and demonstrates that this reallocation will revitalize the tort while not threatening First Amendment interests.

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In a society in which multiple, often conflicting role performances are demanded of each individual, the original etymological meaning of the word "person"—mask—has taken on new meaning. Men fear exposure not only to those closest to them; much of the outrage underlying the asserted right to privacy is a reaction to exposure to persons known only through business or other secondary relationships. The claim is not so much one of total secrecy as it is of the right to define one's circle of intimacy—to choose who shall see beneath the quotidian mask. Loss of control over which "face" one puts on may result in literal loss of self-identity, and is humiliating beneath the gaze of those whose curiosity treats a human being as an object.¹

I. INTRODUCTION

On November 8, 1995, retired general Colin Powell held a news conference during which he announced that he would not run for the Presidency of the United States in 1996.² Prior to that conference, The Philadelphia Inquirer and Newsweek both published stories stating that Alma Powell, Colin Powell's wife, was taking medication for depression.³ When asked about the stories, General Powell was not critical of the press.⁴ However, an editorial that appeared in The New York Times was more critical of the publication of the information. The author wrote:

The story [about Mrs. Powell] . . . was not news, not pertinent and not our business.

Mrs. Powell was not considering running for office. Her medical history does not belong to the public unless she chooses to announce it.

If the editors' rationalization was that his wife's problem might influence Mr. Powell's decision, it would be a story only if she

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were refusing to take medication that helps her give sensible advice to her husband.

Finally—for emphasis—it is an invasion of privacy. The press has to do that every day. But ... journalists that regard their role as responsible ... have the moral and journalistic right to violate privacy only when necessary to make a significant news point ... .

This editorial and the disclosure of information about Alma Powell raise anew the tension between the protection of private information and the freedom of the press protected by the First Amendment. The disclosure and publicizing of private information can form the basis of a tort cause of action for invasion of privacy. When a cause of action based on this "private facts" tort is brought, courts are sometimes faced with the issue of how best to balance the right of privacy against the First Amendment. Although courts at one time seemed receptive to the private facts tort, it has been eroded steadily under the onslaught of First Amendment jurisprudence. The Supreme Court's most recent balancing of these two interests has resulted in a substantial undermining of the private facts tort.

7. The private facts tort has been identified by Prosser as one of four torts that come under the invasion of privacy umbrella. Prosser's four distinct torts are: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing facts about the plaintiff [the private facts tort]; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. William L. Prosser, Privacy, 48 Cal. L. Rev. 383, 389 (1960).
9. For a detailed history of the development of the law of privacy see Pember, supra note 8.
In preempting the private facts tort, courts are concerned about protecting First Amendment values. The conflict between these two rights is often construed as the individual's right to be let alone versus the public's need for information. This construction of the conflict is too simple. The conflict that arises between the right of privacy and the First Amendment freedom of the press may not be one of the individual against society. The private facts tort does protect an individual's interest in personhood or human dignity, it also promotes some of the same values protected by the First Amendment. Thus, allowing the private facts tort to preempt the right of freedom of the press will not always result in the undermining of First Amendment values—it may even promote them.

Current approaches to resolving the conflict between the private facts tort and the First Amendment fail to appreciate the First Amendment values of privacy. This article investigates whether changing the elements of the plaintiff's prima facie case for the private facts tort, combined with a change in the doctrine of newsworthiness, might cause courts to consider more seriously the interests protected by privacy without undermining the First Amendment.

Specifically, this article proposes a model in which the burden of proving newsworthiness in an action based on the private facts tort would shift from the plaintiff to the defendant. Thus, a plaintiff would not have to prove that the information disclosed lacked legitimate public interest. Instead, the media defendant seeking First Amendment protection would have the burden of proving the newsworthiness of the information disclosed. Additionally, a nexus requirement would be added to the newsworthiness test. This requirement would demand that the defendant establish that the information disclosed substantially related to a matter of legitimate public interest. The defendant also would be required to show that the information was obtained lawfully. Finally, a plaintiff could rebut the showing of newsworthiness by establishing that the restriction on publicizing the information was necessary to further a compelling state interest.

11. These values include truth, autonomy and self-governance.
14. That the private facts tort promotes the same values as does the First Amendment is the focus of the discussion in part III of this Article, infra.
Part II of this article reviews existing methods used by courts to balance the protection of private information against the freedom of the press. Part III investigates the impact the proposed approach would have on First Amendment values. Finally, part IV applies this proposed approach to the disclosure of confidential medical information (using Mrs. Powell's situation as an example).

II. THE EXISTING APPROACHES TO BALANCING THE RIGHT TO INFORMATIONAL PRIVACY AGAINST FIRST AMENDMENT VALUES

A. Development of the Private Facts Tort

Samuel Warren and Louis Brandeis are generally recognized as the fathers of the tort of invasion of privacy. In a 1890 Harvard Law Review article, the two articulated the need for a remedy against an overzealous and unrestrained press. The authors argued that man has a "right to be let alone." This "right to be let alone" went beyond the scope of defamation. The right to privacy was included in this right to be let alone. This right included the right to be free of the disclosure of true private information, where disclosure would cause unwarranted damage to a person,-inflicting needless mental and emotional distress. According to the authors, certain facts about a person's "private life, habits, acts, and relations" belonged to the individual and the publication of those facts should be actionable.

Initially the judiciary was reluctant to recognize the privacy cause of action. However, in the landmark case of Pavesich v. New England Life Ins. Co., the Georgia Supreme Court adopted a type of privacy tort. Pavesich involved the common law right to privacy for the commercial exploitation of a person's name to advertise a commercial product. It was not until 1927, in the case of Brents v. Morgan, that a court recognized a cause of action for invasion of privacy based on the dissemination of

19. Id. at 216.
21. 50 S.E. 68 (Ga. 1905).
22. 299 S.W. 967 (Ky. Ct. App. 1927).
private information. Gradually, the common law grew to recognize the tort of invasion of privacy and in 1934, the *First Restatement of Torts* included it as a harm to be remedied under the common law of torts.²³

Several states soon went beyond the common law and enacted statutes securing a right to privacy.²⁴ Other states have gone further and added a right to privacy to their state constitutions.²⁵ Today, thirty-five states recognize the private facts tort, either through common law or by statute.²⁶ The *Second Restatement of Torts* sets forth the most common elements of the tort: (1) public disclosure; (2) of private facts; (3) concerning a matter which would be highly offensive to a reasonable person; and (4) which is not of legitimate concern to the public.²⁷

1. Public Disclosure

As provided in the *Second Restatement of Torts*, "[P]ublicity ... means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."²⁸ Disclosure by the mass media satisfies the requirement of publicity.

²³. The *First Restatement of Torts*, section 867, provided that, "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." *Restatement (First) of Torts* § 867 (1934). The *Second Restatement of Torts*, section 652D provides that, "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Restatement (Second) of Torts* § 652D (1977).


²⁶. Libel Defense Resource Center, *supra* note 8 (citing and discussing each state's law).


2. **Private Facts**

There is no definitive test for "private facts." At the very least, information published must not be a matter of public record or open to public inspection. For instance, no liability has been found for publicizing criminal arrests, criminal convictions, or bankruptcy. Similarly, there is generally no liability for publicizing matters that were in plain view or occurred in a public place as these matters are not considered private. Thus, no liability was found for publicizing an arrest made in a public place, using a photograph taken during a combat mission in Vietnam, or depicting plaintiff at a public athletic event. On the other hand, information concerning sexual matters or procreation generally has been held to be private.

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29. The issue has arisen as to whether facts are no longer private when the plaintiff has disclosed the information to a limited number of people, such as family members or close friends. Generally, courts have found that the information remains private when such a limited disclosure is made. Virgil v. Time, Inc., 527 F.2d 1122, 1127 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976); Times Mirror, 244 Cal. Rptr. at 561; Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762 (Ct. App. 1983); Vassiliades v. Garfinckel's, 492 A.2d 580 (D.C. 1985); Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491 (Ga. Ct. App. 1994); Y.G., 795 S.W.2d 488; Hall v. Post, 372 S.E.2d 711 (N.C. 1987); But see Faloon v. Hustler Magazine, Inc., 607 F. Supp. 1341 (N.D. Tex. 1985), aff'd, 799 F.2d 1000 (5th Cir. 1986), cert. denied, 479 U.S. 1088 (1987).


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3. *Offensive Disclosure*

As with the definition of "private facts" the issue of what constitutes offensive facts depends upon the facts and circumstances of each case. The plaintiff must establish that a "reasonable person would feel justifiably and seriously aggrieved by widespread disclosure." However, the tort is not designed to protect the disclosure of all information that by its nature is private; as Prosser himself stated, "The law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive about such publicity."

4. *Matter of Legitimate Public Concern*

This final element, that the matter disclosed not be one of legitimate public concern, relates to the "newsworthiness" of the disclosed facts. Any information that is likely to garner public attention may be deemed newsworthy. This requirement will be discussed in greater detail in part II.B.2.

**B. Constitutional Defenses to the Private Facts Tort**

When an individual accuses a member of the mass media of invading her privacy by disclosing private information about her, the mass media defendant often responds by arguing that the disclosure is protected by the First Amendment. Hence, the claims of an individual against public

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39. Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 Iowa L. Rev. 185, 193 (1979); see Samuel v. Curtis Publishing Co., 122 F. Supp. 327, 328-29 (N.D. Cal. 1954); Daily Times Democrat v. Graham, 162 So. 2d 474 (Ala. 1964); Davis v. Gen. Fin. & Thrift Corp., 57 S.E.2d 225 (Ga. Ct. App. 1950); Williams v. KCMO Broadcasting Div., 472 S.W.2d 1 (Mo. Ct. App. 1971); Meetze v. Associated Press, 95 S.E.2d 606, 610 (S.C. 1956); Cason v. Baskin, 20 So. 2d 243 (Fla. 1944); This element does not require that the information publicized reach the level of repulsiveness or horror:

Even people who have nothing rationally to be ashamed of can be mortified by the publication of intimate details of their life. Most people in no wise deformed or disfigured would nevertheless be deeply upset if nude photographs of themselves were published in a newspaper or book. They feel the same way about photographs of their sexual activities, however, "normal," or about a narrative of those activities, or about having their medical records publicized. Although it is well known that every human being defecates, no adult human being in our society wants a newspaper to show a picture of him defecating.


40. Prosser, *supra* note 7, at 397; see also Gill v. Hearst Publishing Co., 253 P.2d 441, 444 (Cal. 1953); Davis, 57 S.E.2d at 227.
disclosure of private information are met with the society's interest in freedom of the press.\textsuperscript{41}

Current approaches to balancing the values protected by the private facts tort against the First Amendment include the "lawfully obtained" doctrine and the "newsworthiness" doctrine. Although newsworthiness is a common law doctrine, the judiciary has treated the doctrine as though it is of constitutional magnitude.\textsuperscript{42} It is designed to protect First Amendment values. Neither of these approaches consistently and adequately protects the privacy interests at stake.

1. The Lawfully Obtained Doctrine

Four cases have come before the Supreme Court in which plaintiffs have claimed the violation of their rights to avoid disclosure of assertedly confidential information by the press.\textsuperscript{43} The Court has held in each case that the First Amendment preempts the plaintiff's right of recovery. It was not until its decision in Smith v. Daily Mail Publishing Co.\textsuperscript{44} that the Court articulated a principle for balancing informational privacy interests against the First Amendment. This principle is known as the "lawfully

\textsuperscript{41} The Missouri Court of Appeals stated:

This complex, important case ... requires us to decide the precise issue of resolving the delicate balance between a married couple's right to their privacy ... and the freedom of the electronic news media to report and make public the events surrounding the modern medical "miracle" of the extraordinary process in vitro fertilization. The issue is certainly not easily resolved for the cherished freedoms embodied in the American ideal of privacy of the individual and the freedom of the news media necessarily conflict.


\textsuperscript{42} Ross v. Midwest Communications, Inc., 870 F.2d 271, 272–73 (5th Cir.), cert. denied, 493 U.S. 935 (1989); Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975) ("[W]e are satisfied that this provision [newsworthiness] is one of constitutional dimension delimiting the scope of the tort and that the extent of the privilege thus is controlled by federal rather than state law."); cert. denied, 425 U.S. 998 (1976); Wasser v. San Diego Union, 236 Cal. Rptr. 772, 775 (Ct. App. 1987).

\textsuperscript{43} Florida Star v. B.J.F., 491 U.S. 524 (1989); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). In addition to the four cases discussed, another case is worth mentioning here. In Time, Inc. v. Hill, 385 U.S. 374 (1967), the plaintiff claimed invasion of privacy based on the false light tort. The tort of invasion of privacy through the disclosure of private facts was not at issue; however, the Court indicated in a footnote that there might be tort liability for unwarranted publicity of the truth. In note 7 of its opinion, the Court stated that "[r]evelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notion of decency." Id. at 383 n.7 (quoting Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), cert. denied, 311 U.S. 711 (1940)).

\textsuperscript{44} 443 U.S. 97 (1979).
obtained doctrine.” This doctrine is emerging as the principle the Court will apply to balance the protection of private information against the freedom of the press. This doctrine provides that publicizing private information is constitutionally protected if three factors are met: (1) the information publicized was lawfully obtained; (2) the information concerns a matter of public significance; and (3) the imposition of liability does not serve a compelling state interest.  

The first case decided by the Court in this area was *Cox Broadcasting Corp. v. Cohn.* 46 *Cox* involved a constitutional challenge to a Georgia statute that made it a misdemeanor to publish or broadcast the name or identity of any rape victim. 47 A television reporter obtained the name of a rape and murder victim from official court records open to the public. 48 The reporter identified the deceased by name while reporting on the trial of the accused rapists. 49 When the father of the deceased sued for violation of the Georgia statute, the defendants raised the First and Fourteenth Amendments as their defense. 50 The Supreme Court found that “[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.” 51 The Court held that the First and Fourteenth Amendments barred the State of Georgia from penalizing the defendants for the broadcast. 52

Two years after *Cox* came *Oklahoma Publishing Co. v. District Court.* 53 At issue in *Oklahoma Publishing* was the constitutionality of a pretrial order entered by the District Court of Oklahoma County enjoining members of the news media from publishing the name or picture of a minor child involved in a juvenile proceeding. 54 The child in question was charged with second-degree murder. 55 Members of the news media were present at the detention hearing, and were present with

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46. 420 U.S. 469.
47. Id. at 472.
48. Id.
49. Id. at 474.
50. Id.
51. Id. at 496.
52. Id. at 497. For a critique of this decision see Alfred Hill, *Defamation and Privacy Under the First Amendment,* 76 Colum. L. Rev. 1205, 1264–68 (1976).
54. Id. at 310.
55. Id. at 309.
the full knowledge of the judge. The court did not at any time object to the presence of the news media.

The Supreme Court held that the trial court's order violated the First and Fourteenth Amendments. It reasoned that pursuant to Cox, the court could not prohibit the dissemination of information obtained at court proceedings that were open to the public. Here, as in Cox, the name of the juvenile was "publicly revealed in connection with the prosecution of the crime" and thus "was placed in the public domain."

Two years after the Oklahoma Publishing decision, the Court decided Smith v. Daily Mail Publishing. Smith involved a constitutional challenge to a West Virginia statute that made it a crime for a newspaper to publish, without prior approval of the juvenile court, the name of a youth charged as a juvenile offender. The newspaper published the name of a juvenile charged with murder and information it had obtained from witnesses, the police, and an assistant prosecuting attorney present at the scene.

The Court reversed the conviction of the newspaper for violating the statute, holding that the statute violated the First Amendment. In reaching this decision, the Court articulated for the first time a First Amendment principle to use in balancing the rights of informational privacy and the First Amendment. The Court stated that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." The interest in protecting the identity of a juvenile offender did not satisfy this standard.

56. Id. at 311.
57. Id.
58. Id. at 311-12.
59. Id. at 311.
60. Id. (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 471 (1975)).
61. Id.
63. Id. at 99.
64. Id.
65. Id. at 105-06.
66. Id. at 100.
67. Id. at 103.
68. Id. at 104.
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*Florida Star v. B.J.F.*[^69^] is the most recent case in which the Supreme Court has been called on to balance the interests of privacy against the First Amendment. The Court employed the lawfully obtained doctrine articulated in *Smith* to invalidate a Florida statute prohibiting the disclosure of the name of a rape victim.[^70^] B.J.F. was raped at knifepoint in Jacksonville, Florida.[^71^] She reported the rape to the sheriff's office, which prepared a report.[^72^] The sheriff's department inadvertently included B.J.F.'s name in the report and placed the report in its pressroom.[^73^] A reporter for the *Florida Star* newspaper obtained the victim's name from the police report and the newspaper published the report including B.J.F.'s full name.[^74^]

B.J.F. sued the sheriff's department and the newspaper, alleging that the disclosure violated a Florida statute that prohibited the publication by the mass media of the name of any sexual offense victims.[^75^] The Florida courts agreed with B.J.F. and imposed civil damages on the newspaper.[^76^] The Supreme Court reversed, holding that such an imposition of damages for publishing the name of a rape victim violated the First Amendment when the information was lawfully obtained from a police report.[^77^]

Soon after the *Florida Star* case legal commentators suggested that the Court's decision foreclosed the possibility of privacy interests ever outweighing the First Amendment.[^78^] Indeed, Justice White in dissent stated that the Court had accepted Florida Star's "invitation . . . to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts. . . . Even if the Court's opinion does not say as much today, such obliteration will follow inevitably from the Court's conclusion here."[^79^] Despite Justice White's

[^70^]: Id. at 541.
[^71^]: Id. at 527.
[^72^]: Id.
[^73^]: Id.
[^74^]: Id.
[^76^]: *Florida Star*, 491 U.S. at 528.
[^77^]: Id. at 541.
[^79^]: *Florida Star*, 491 U.S. at 550 (White, J., dissenting) (citations omitted).
dire prediction, the Court itself stated in \textit{Florida Star} that it declined to hold that privacy interests must always fall in the face of a First Amendment challenge.\textsuperscript{80} Seven years have passed since \textit{Florida Star} was decided, and the fate of the private facts tort remains unclear.\textsuperscript{81}

The lawfully obtained doctrine generally has been found to apply when the information publicized is already a matter of public record, part of an official document, or in some other way has been made public.\textsuperscript{82} When courts have been confronted with a direct conflict between the common law private facts tort and the First Amendment, and the information has not been made public, some courts have continued to use the newsworthiness doctrine to resolve the conflict rather than the lawfully obtained doctrine.\textsuperscript{83} These courts do not consider whether the information was obtained lawfully or whether the state law restriction is necessary to further a compelling state interest. Other courts have adopted the lawfully obtained doctrine to resolve the conflict.\textsuperscript{84}

In \textit{Macon Telegraph Publishing Co. v. Tatum},\textsuperscript{85} the Georgia Supreme Court held that the plaintiff was not entitled to recover damages from a newspaper for an invasion of privacy based on its publication of her

\textsuperscript{80} See \textit{id.} at 532.

\textsuperscript{81} The statute under which the plaintiff in \textit{Florida Star} brought suit has been held unconstitutional by the Florida Supreme Court. \textit{State v. Globe Communications Corp.}, 648 So. 2d 110 (Fla. 1994).

\textsuperscript{82} See \textit{Haynes v. Alfred A. Knopf, Inc.}, 8 F.3d 1222, 1231–32 (7th Cir. 1993). The \textit{Haynes} court stated:

\begin{quote}
We do not think the Court was being coy in \textit{Cox} or \textit{Florida Star} in declining to declare the tort of publicizing intensely personal facts totally defunct. (Indeed, the author of \textit{Cox} dissented in \textit{Florida Star}. The publication of facts in a public record or other official document, such as the police report in the \textit{Florida Star}, is not to be equated to publishing a photo of a couple making love or of a person undergoing some intimate medical procedure; we even doubt that it would make a difference in such a case if the photograph had been printed in a government document . . . .
\end{quote}


\textsuperscript{85} 436 S.E.2d 655.
name in connection with a sexual assault.\textsuperscript{86} Plaintiff based her claim against the newspaper on violation of the private facts tort. The plaintiff had shot and killed an attacker as he attempted to rape her. The police who investigated the shooting disclosed the plaintiff’s name to reporters for the defendant newspaper, but admonished them not to publish it.\textsuperscript{87} Defendant published her name and the street where she lived despite the admonition.\textsuperscript{88}

In deciding the case, the court found that the decision in \textit{Florida Star} was not controlling. The plaintiff did not base her cause of action on the common law tort and the state had imposed liability on the media defendant based on a negligence per se standard.\textsuperscript{89} The court also construed the holding in \textit{Florida Star} quite narrowly: “The U.S. Supreme Court has held that the First Amendment prohibits imposing damages on a newspaper that publishes the name of a rape victim obtained from a police report.”\textsuperscript{90} Though it did not find the decision controlling, the Georgia court adopted the lawfully obtained test applied in \textit{Florida Star} and disallowed plaintiff’s recovery.\textsuperscript{91}

The court in \textit{Doe v. Star Telegram}\textsuperscript{92} also adopted the \textit{Florida Star} test. The plaintiff in Star Telegram had been raped.\textsuperscript{93} She reported the rape to the police, who prepared and filed a report of the assault.\textsuperscript{94} A reporter for the defendant newspaper obtained a copy of the report and the newspaper subsequently published two separate articles about the rape.\textsuperscript{95} Although the newspaper did not publish the plaintiff’s name, the articles did include a substantial amount of personal information about the plaintiff.\textsuperscript{96} The plaintiff sued claiming invasion of privacy. The trial court granted the defendant’s motion for summary judgment. The Texas Court of Appeals reversed and remanded the case for trial.\textsuperscript{97} On remand the appellate court found that the appropriate test to determine the

\textsuperscript{86} Id. at 657.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} 864 S.W.2d 790 (Tex. Ct. App. 1993), rev’d on other grounds, 915 S.W.2d 471 (Tex. 1995).
\textsuperscript{93} Id. at 791.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id. at 792–93.
defendant's liability was the *Florida Star* test.\(^9\) The majority found that *Florida Star* was controlling because it "involved a conflict between truthful reporting and state-protected privacy interests, the exact issue presented here."\(^9\) The concurring opinion would have decided the case under the newsworthiness doctrine.\(^10\)

Despite the inclination of courts to construe *Florida Star* narrowly\(^10\) and limit its application to information that was already public, it is impossible to ignore that *Florida Star* drastically undermines the tort of public disclosure.\(^10\) It does so in two primary ways: First, it prohibits restrictions on the publication of information that was lawfully obtained; second, it requires a showing that restricting publication is "overwhelmingly necessary" to advance the state's interest.\(^10\) The Court essentially has increased the plaintiff's burden in privacy cases. Not only must the plaintiff show that the information published is not newsworthy, the plaintiff must also show that the restriction on publication satisfies a compelling state interest.

A further concern is whether the lawfully obtained element of the *Florida Star* test will swallow the remaining two elements. The Court in *Florida Star* identified three factors to be used to determine if the disclosure is privileged by the First Amendment.\(^10\) The Court spent much of its opinion discussing whether the information had been obtained lawfully. In its concluding paragraph the Court stated in

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\(^9\) *Id.* at 792.

\(^9\) *Id.*

\(^10\) *Id.* at 793 (Hicks, J., concurring). It is not clear from the concurrence whether consideration would have been given to the issues of whether the information was lawfully obtained and whether the restriction served a compelling state interest. The concurring judge does state, "While I concur with the majority as to the result, I would offer a different analysis." *Id.* The concurrence then goes on to suggest that there was an issue of fact as to whether the information disclosed was a matter of legitimate public concern. *Id.*


\(^10\) Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993). The court stated:

Yet despite the limited scope of the holdings of *Cox* and *Florida Star*, the implications of those decisions for the branch of the right of privacy that limits the publication of private facts are profound, even for a case such as this in which, unlike *Melvin v. Reid*, the primary source of the allegedly humiliating personal facts is not a public record.

*Id.*

\(^10\) *Rolfs*, *supra* note 78, at 1115–17.

\(^10\) The factors are those identified by the Court in *Smith v. Daily Mail Publishing Co.*: (1) whether the information publicized was lawfully obtained; (2) whether the information concerns a matter of public significance; and (3) whether the imposition of liability serves a compelling state interest. 443 U.S. 97, 103–04 (1979).
summary fashion the test it had applied: "We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . ."105 This emphasis on the manner in which the information was obtained is some indication of the importance the Court placed on this element of the test. If courts allow the lawfully obtained element to swallow the other two elements of the Florida Star test106 then the forecasters were right; the tort of public disclosure will be eviscerated.107 It will not matter whether the information is private, and not a matter of public record. As long as the media defendant can establish that it received the information lawfully, then its publication will not violate the right to privacy.108

2. Newsworthiness

a. Scope

The Court in Florida Star seems to have subsumed the newsworthiness test into the lawfully obtained doctrine. Newsworthiness as a limitation on the private facts tort appears in the seminal article on privacy authored by Warren and Brandeis.109 The right to keep certain information private was not unlimited. The authors noted that the right of privacy would not prohibit "any publication of matter which is of public or general interest."110 This concept has evolved into the doctrine of newsworthiness. In its current formulation, the doctrine of newsworthiness encompasses two distinct concepts: (1) the press may make fair comment regarding public figures,111 and (2) the press may make fair comment on that which is of legitimate public interest.112 The scope of the doctrine is quite broad; as stated by the U.S. Supreme Court:

106. It is too early yet to determine whether this will be the case. There is not enough case law to discern a trend.
107. For a detailed analysis and critique of the lawfully obtained doctrine, see Edelman, supra note 78.
108. See Rolfs, supra note 78.
110. Id. at 214.
112. Virgil, 527 F.2d at 1129; Campbell v. Seabury Press, 614 F.2d 395 (5th Cir. 1980); Restatement (Second) of Torts § 652D cmt. c (1977); Woito & McNulty, supra note 39, at 194.
The risk of ... exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." ¹¹³

Courts exhibit great deference to the news media in determining what shall constitute newsworthiness.¹¹⁴ They are reluctant to restrict or define newsworthiness, deferring instead to the press.¹¹⁵ One commentator suggests that this reluctance is based on the unwillingness of the judiciary to define "news"¹¹⁶ and on the fear that "the press will become a self-censor in order to avoid imposition of liability and thereby be chilled in the exercise of its first amendment rights."¹¹⁷ Essentially, if an item has been printed it is deemed newsworthy by the courts.¹¹⁸ Thus, the media, rather than the court, becomes the ultimate arbiter of what is newsworthy. Given this amount of deference by the court, claims based on violation of the private facts tort almost always fall in the face of this defense.¹¹⁹ As this element of the Florida Star test has so little weight as


¹¹⁴. Courts often acknowledge this deference to the press. In Costlow v. Cusimano, 311 N.Y.S.2d 92 (App. Div. 1970), the court stated that the definition of newsworthiness is "necessarily circular because an action for invasion of privacy arises only after some publication has made the plaintiff a subject of public concern." Id. at 94. Similarly, the court in Anderson v. Fisher Broadcasting Co., 712 P.2d 803, 809 (Or. 1986), stated that "one reader's or viewer's 'news' is another's tedium or trivia." Id.; see also Heath v. Playboy Enter., Inc., 732 F. Supp. 1145, 1149 n.9 (S.D. Fla. 1990) ("[W]hat is newsworthy is primarily a function of the publisher, not the courts.").

¹¹⁵. See Woito & McNulty, supra note 39, at 195.


¹¹⁸. Woito & McNulty, supra note 39, at 197. See Kalven, supra note 8; Peter N. Swan, Publicity Invasion of Privacy: Constitutional and Doctrinal Difficulties with a Developing Tort, 58 Or. L. Rev. 483, 502 (1980); Zimmerman, supra note 8, at 343.

¹¹⁹. See Dorsey D. Ellis, Jr., Damages and the Privacy Tort: Sketching a "Legal Profile," 64 Iowa L. Rev. 1111, 1133–34 (1979); Hill, supra note 52, at 1255. As one court has stated:

[The 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 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.]

Jenkins, 251 F.2d at 450.

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currently construed, it is almost certain that the lawfully obtained element will become key.

b. Burden of Proof

There is a limited debate over which party in a private facts tort action should bear the burden of proving newsworthiness. Prosser placed the burden of newsworthiness on the defendant. The Second Restatement of Torts, however, places the burden on the plaintiff to show that the information is not of legitimate public concern. Many jurisdictions usually require that the plaintiff prove that the matter is not one of legitimate public concern. For instance, in Howard v. Des Moines Register & Tribune the court stated clearly that "it is necessary for the plaintiff to prove the lack of newsworthiness of the disclosure as well as its invasiveness. Newsworthiness is thus not an issue of privilege which must be urged defensively but an element which must be negated by the plaintiff in meeting her burden of proof." Similarly, California follows the Restatement and requires the plaintiff to establish that the information does not involve a matter of legitimate public concern. In Diaz v. Oakland Tribune, the California Court of Appeals reversed a trial court.
opinion that held that the defendant in a private facts suit had the burden of proving newsworthiness.\textsuperscript{126}

There are two problems with allocating the burden of disproving newsworthiness to the plaintiff. First, placing the burden of proof on the plaintiff essentially requires the plaintiff to show that the defendant has no First Amendment defense to the disclosure. This allocation of proof seems inconsistent with the general approach to claims of constitutional privilege. Generally, if a defendant claims that his actions are protected by constitutional privilege, the burden is his to establish that privilege or defense. It is not the plaintiff’s initial burden to establish that the law is constitutional or that the defendant’s actions are not constitutionally privileged. This is so in the areas of commercial speech and obscenity. If an action is brought against a defendant based on the violation of a state statute regulating commercial or obscene speech, it is the defendant’s burden to raise the First Amendment defense.\textsuperscript{127}

Second, requiring the plaintiff to establish the non-newsworthiness of the disclosure forces the plaintiff to make an argument based only on one First Amendment value. She must argue that nondisclosure does not violate the First Amendment value of making information available to the public. She is limited to arguing that nondisclosure will not harm the First Amendment. But what of her arguments that non-disclosure will promote First Amendment values? If the plaintiff is unable to show that the information is noneworthy, then she will never have the opportunity to argue that nondisclosure may promote other First Amendment values. She cannot show that nondisclosure may promote the search for truth, or self-governance or autonomy. This is especially true as often a plaintiff’s complaint is met with a motion to dismiss or a motion for summary judgment.\textsuperscript{128} Shifting the burden to the defendant at least grants the plaintiff an opportunity to make her case based on the promotion of a wide range of First Amendment values.

\textsuperscript{126} Id.; see Swan, \textit{supra} note 118, at 505.

\textsuperscript{127} If the plaintiff is seeking to enjoin the dissemination of allegedly obscene speech then it has the burden of proving that it is unprotected. Freedman v. Maryland, 380 U.S. 51, 38–59 (1965).

III. THE NEW TEST AND THE FIRST AMENDMENT

A. The Proposed Reformulation

The proposed reformulation is premised on judicial acceptance of the three prong test employed in Florida Star. First, the reformulation would require the defendant to prove that the information had been obtained lawfully. Second, it would shift the burden regarding the element of newsworthiness from the plaintiff to the defendant. Third, it would adopt two of the three factors used by California courts to determine newsworthiness and add another. The factors used by California courts in assessing newsworthiness are: (1) the social value of the facts published; (2) the depth of the article’s intrusion into ostensibly private affairs; and (3) the extent to which the party voluntarily acceded to position of public notoriety. The added factor would require the defendant to show that disclosure of all of the information, including the identification of the plaintiff, was related substantially to a matter of legitimate public concern. Finally, the plaintiff could counter the showing of newsworthiness by establishing that the private facts tort serves a compelling state interest.

Before discussing these elements in greater detail, reasons supporting the reformulation will be articulated. This reformulation is proposed for the following reasons: First, it accords with the general treatment of constitutional defenses because the defendant has to prove constitutional

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129. This is not a change from existing law. See Florida Star v. B.J.F., 491 U.S. 524 (1989).
130. The author recognizes that the value of newsworthiness as a balancing mechanism has been extensively questioned. See Thomas I. Emerson, The System of Freedom of Expression 553–554 (1970); Kalven, supra note 8; Zimmerman, supra note 8. However, it seems to be the test used by lower courts to resolve the conflict between the private facts tort and the First Amendment. Thus, as courts do not seem ready yet to abandon the doctrine, it seems useful to try to make the doctrine more responsive to the concerns expressed in this article. Also, the advantage of using newsworthiness is that it allows for a case-by-case determination of the issues rather than a blanket rule. This will allow for a careful balancing of the interests presented in each case, which is a way to ensure that the freedom of the press is not unnecessarily chilled.
132. The second factor would not be adopted because courts have given it very little weight. See Kapellas, 459 P.2d 912; Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762 (Ct. App. 1983).
133. Briscoe, 483 P.2d at 43; Kapellas, 459 P.2d at 922; Times Mirror, 244 Cal. Rptr. 556.
134. This nexus would be required regardless of plaintiff’s status as a public or private figure. See Diaz, 188 Cal. Rptr. 762. Contra Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980).
135. This is consistent with the approach adopted by the court in Florida Star v. B.J.F., 491 U.S. 524 (1989).
privilege, rather than the plaintiff having to prove lack of privilege. Second, this test will protect better the right to informational privacy because it begins with the presumption that once disclosure is shown to be tortious, the burden shifts to the defendant to justify its disclosure under the First Amendment. The presumption in favor of privacy is desirable because the interests at stake are critical to the maintenance of a healthy pluralistic liberal democracy. Third, it still allows for a case-by-case adjudication of the issues. By not establishing a categorical prohibition on publication, courts are free to consider the interests at stake based on each factual situation that arises. Finally, it adds weight to the second element of Florida Star test, which will help to protect against courts giving too much weight to the lawfully obtained prong of the test.

As to the "substantially related newsworthiness" factor, Prosser and Keeton note that when a public disclosure of private facts is made, there must be "some logical connection between the plaintiff and the matter of public interest." Some courts have adopted a similar requirement when a defendant is claiming that the matter published is of legitimate public concern. It is not enough to show that the general subject matter is one of legitimate public concern—a defendant would have to show that the specific information disclosed was substantially related to a matter of legitimate public interest. In Gilbert v. Medical Economics Co., the Tenth Circuit Court of Appeals concluded that:

Because each member of our society at some time engages in an activity that fairly could be characterized as a matter of legitimate public concern, to permit that activity to open the door to the exposure of any

136. The Court in Florida Star evidenced a serious concern about the creation of categorical prohibitions on the publication of truthful information: "We have previously noted the impermissibility of categorical prohibitions upon media access where important First Amendment interests are at stake. More individualized adjudication is no less indispensable where the State, seeking to safeguard the anonymity of crime victims, sets its face against publication of their names." Florida Star v. B.J.F., 491 U.S. 524, 539-40 (1989) (citation omitted).

137. Keeton, supra note 20, § 117, at 862.

138. Ross v. Midwest Communications, Inc., 870 F.2d 271 (5th Cir.), cert. denied, 493 U.S. 935 (1989); Gilbert v. Medical Economics Co., 665 F.2d 305 (10th Cir. 1981); Campbell, 614 F.2d at 397; Diaz, 188 Cal. Rptr. 762; Vassiliades v. Garfinckel's, 492 A.2d 580 (D.C. 1985); Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289 (Iowa 1979), cert. denied, 445 U.S. 904 (1980); see also Barrows v. Rozansky, 489 N.Y.S.2d 481, 485 (App. Div. 1985) ("[T]o be privileged such use must be legitimately related to the informational value of the publication and may not be a mere disguised commercialization of a person's personality."); Delan v. CBS, Inc., 458 N.Y.S.2d 608, 613 (App. Div. 1983) ("Of course, there must have existed a legitimate connection between the use of plaintiff's name and picture and the matter of public interest sought to be portrayed.").

139. 665 F.2d 305 (10th Cir. 1981).
truthful secret about that person would render meaningless the tort of public disclosure of private facts. The First Amendment does not require such a result. Therefore, to properly balance freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest.\footnote{140}

This limitation has been applied as well in connection with public figures. \textit{Diaz v. Oakland Tribune, Inc.}\footnote{141} involved the public disclosure by the defendant that plaintiff had undergone gender corrective surgery. At the time of the publication, plaintiff was the student body president at a community college.\footnote{142} The court had to decide whether her status as a transsexual was newsworthy per se.\footnote{143} In assessing whether her sexual status was within the scope of her waiver as a public figure, the court sought a connection between Diaz's fitness for office and her sexual status.\footnote{144} It found none.\footnote{145} The court found first that her transsexuality did not relate to her honesty or judgment.\footnote{146} Second, the court found that the fact that Diaz was the first woman student body president did not "warrant that her entire private life be open to public inspection."\footnote{147} The court emphasized that public persons waive their right to privacy as to matters which are connected with their public conduct.\footnote{148} Thus, there must be some nexus between the statements made and the public agenda.\footnote{149}

Even if the defendant were able to show newsworthiness, the plaintiff could argue that the protection of the information from publicity was necessary for the furtherance of a compelling state interest. The case law is still developing in this area so it is hard to state with any degree of certainty what interests are compelling. The appellee in \textit{Florida Star} argued that there were three compelling interests protected by the state statute at issue: "the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation if their names become known to their

140. \textit{Id.} at 308.
141. 188 Cal. Rptr. 762 (Ct. App. 1983).
142. \textit{Id.} at 773.
143. \textit{Id.} at 772.
144. \textit{Id.} at 773.
145. \textit{Id.}
146. \textit{Id.}
147. \textit{Id.}
148. \textit{Id.}
assailants; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure.”150 The Court acknowledged that the interests identified were highly significant.151 Despite this acknowledgment, the Court held that the statute at issue was not necessary to protect those interests.152 However, the Court was careful to limit its ruling: “We accordingly do not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance these interests as to satisfy the Daily Mail standard.”153 Thus, it appears that the interests specified in Florida Star are compelling interests.

The California court in Times Mirror Co. v. Superior Court154 held that the nondisclosure of a plaintiff’s name served a compelling state interest when a crime had been committed and the search for the perpetrator was ongoing.155 The plaintiff’s roommate had been murdered.156 The plaintiff had discovered her roommate’s body and had seen the murderer.157 The newspaper published an account of the murder and identified the plaintiff by name.158 The plaintiff then sued the publisher of the Los Angeles Times for invasion of privacy.159 In denying the defendant’s motion for summary judgment, the court held where there is a witness to a crime and the criminal has not yet been apprehended, “[t]he individual’s safety and the state’s interest in conducting a criminal investigation may take precedence over the public’s right to know the name of the individual.”160 It appears then that the state’s interest in an individual’s safety and the resolution of crimes are compelling state interests when the assailant is still at large.

151. Id.
152. Id.
153. Id. Under Daily Mail, the state has the burden of establishing that the imposition of sanctions is necessary to serve a compelling interest. Smith v. Daily Mail Publishing Co. 443 U.S. 97, 103–04 (1979).
155. Id. at 564.
156. Id. at 558.
157. Id.
158. Id.
159. Id.
160. Id. at 560; see also Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982), cert. denied, 459 U.S. 1226 (1983).
B. The Impact of Burden Shifting on the First Amendment

Under the proposed reformulation the disclosure of private information would be protected only if the defendant were able to prove that the specific information disclosed was obtained lawfully, newsworthy, and substantially related to a matter of legitimate public concern. The major objection to the proposed model is that it will unduly threaten First Amendment values. This fear is implicit in decisions about the disclosure tort, the fear that punishing a media defendant for publishing certain truthful information may lead to "timidity and self-censorship."\(^{62}\)

A review of each of the proposed changes and their relationship to "First Amendment values" will reveal that these changes will not unduly burden the First Amendment.\(^{63}\) This proposed reformulation should result in expansion of the privacy right. However, it will not threaten First Amendment values. While an individual's interest in privacy may be at stake, there are larger societal issues protected by privacy. These societal values may be the same values protected by the First Amendment. This section discusses the hidden First Amendment values of privacy and illustrates that protecting the right of privacy does not always undermine First Amendment values; indeed in some instances it promotes them.

1. Newsworthiness as Defendant's Burden

Shifting the burden of proving newsworthiness to the defendant may narrow the scope of protected First Amendment speech. There is a fear that if media defendants have to justify publicizing certain information, they may decide not to publish. This would chill some speech and create an undesirable amount of self-censorship. This argument assumes that disclosure always advances First Amendment values and that nondisclosure does not. This assumption breaks down under close

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161. This article does not address the issue of whether the question of newsworthiness should be one of law or fact. Shifting the burden of newsworthiness to the defendant should not have an impact on this issue.


163. This article will not discuss the effect of the lawfully obtained doctrine on the First Amendment. The Supreme Court already has imposed this burden on the defendant. Thus, the proposed reformulation does not alter the existing balance.
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ty. The nondisclosure of private information can promote First Amendment values as well as protecting individual privacy.

There are various competing theories of the First Amendment which attempt to answer the question of what expression should be granted protection and why. This article discusses three prominent First Amendment theories: (1) the search for truth theory; (2) the self-governance theory; and (3) the self-realization theory.  

a. Non-disclosure and the Search for Truth

The search for truth is the first value that may be threatened by placing the burden on the defendant to prove newsworthiness. The

164. The theories discussed here are clearly associated with freedom of speech. The issue arises whether these theories are equally applicable when discussing freedom of the press. Is the freedom of the press somehow distinct from the freedom of speech? If so, are there separate theories which justify the free press guarantee? Scholars have long wrestled with these issues. See David Lange, _The Speech and Press Clauses_, 23 UCLA L. Rev. 77 (1975); Melville B. Nimmer, _Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?_, 26 Hastig L. J. 639 (1975); Potter Stewart, "Or of the Press," 26 Hasting L.J. 631 (1975); William W. Van Alstyne, _Interpretations of the First Amendment_ (1984). The U.S. Supreme Court has resisted creating doctrinal differences between the press and other speakers. Thus, it generally has endeavored to neither advantage nor disadvantage the press vis-à-vis other speakers. See Rodney A. Smolla, _Snyder And Nim"er on Freedom of Speech: A Treatise on the First Amendment_ § 13.01[3] (1994). The exception to this general rule is the concept of "reporter's privilege." This privilege does not relate to the thesis of this article and thus, is irrelevant to the discussion. Generally, First Amendment theories and case law subsume the protection of press under the protection of speech. See Van Alstyne, _supra_, at 50–51. Supreme Court Justice Potter Stewart has argued that the press has a special institutional role to play: that it operates as a check on the three branches of government. Stewart, _supra_, at 634. Under this theory the protection extended the institutionalized press is designed to check the abuse of official power. Others have argued that the role played by the press is as agent for the public; that it is a conduit of information to the people. For an extensive discussion of this theory, its strengths and weaknesses, see Van Alstyne, _supra_, at 50–67. See also James J. Brovsnahan, _From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment_, 26 Hastig L.J. 777, 793 (1975). Assuming, arguendo, the validity of the concept of press as either a checking agent or as a conduit of information, it does not render the three theories discussed in this article inapplicable. Indeed the concept ties in well with both the marketplace and the self-governance theories of the First Amendment. See Nimmer, _supra_, at 653. In discussing the three theories of the First Amendment, then, the discussion includes both the guarantees of free speech and free press.

165. It is helpful to keep in mind that although the First Amendment safeguards the right to disseminate information, this right does not always take precedence over the right to privacy. The interests must be balanced against one another, with the outcome dependent upon the specific facts of individual cases. Chafee discusses the need for this kind of careful analysis of interests:

[T]here are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right. It must never be forgotten that the balancing cannot be properly done unless all the interests involved are adequately ascertained ....
search for truth is often identified as the most prominent principle justifying freedom of expression. This principle posits that freedom of expression is necessary because it leads to the discovery of truth. The open exchange of ideas, the freedom to challenge positions articulated, the freedom to criticize, all without fear of reprisal, encourages the emergence of truth.

Several influential American jurists have adopted the "marketplace of ideas" metaphor in interpreting the First Amendment, and have ensured its prominent place in First Amendment jurisprudence. Included are Holmes, Brandeis, Frankfurter, and Hand. Holmes's articulation of the justification is often cited:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not

Zechariah Chafee Jr., Free Speech in the United States 32 (1942) (citation omitted).

166. See Frederick Schauer, Free Speech: A Philosophical Enquiry 15 (1982).

167. Two philosophers are closely associated with this principle of freedom of expression: John Milton and John Stuart Mill. Milton argued persuasively for this principle of free expression:

[T]hough all the windes of doctrin[e] were let loose to play upon the earth, so Truth be in the field, we do injuriously by licen[s]ing and prohibiting to misdoubt her strength. Let her and Fals[e]hood grapple; whoever knew Truth put to the wors[e], in a free and open encounter?


Mill, in On Liberty, echoes the defense raised by Milton. Mill argues in his essay:

[T]he opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume their certainty is the same thing as absolute certainty . . . . There is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation. Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.


care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution.\(^6\)

The search for truth is served by limiting the number of restrictions on the press. However, that is not the only way the value can be served. The search for truth is served as well by people becoming informed on a given topic, and engaging in public discourse. Granting people privacy, recognizing that despite their entering into the public debate on an issue that they remain a private person to some degree, encourages people to come forward and engage in the debate.\(^7\)

Numerous articles have shown that the intense scrutiny to which the press subjects people has had a chilling effect on those who would seek public office.\(^8\) These articles indicate that people have declined to

\(^{169}\) Abrams, 250 U.S. at 630 (Holmes, J., dissenting). Holmes's articulation of the search for truth theory of the First Amendment is but one of many. Professor Frederick Schauer has extrapolated three common characteristics shared by the various articulations of this theory. First, this theory views freedom of speech as a means, a process for ascertaining truth, rather than an end. Schauer, \textit{supra} note 166, at 16. Second, the marketplace theory assumes that truth will prevail in the competition between it and falsehood. \textit{Id.} Third, the theory is skeptical about accepted beliefs and widely acknowledged truth. \textit{Id.}

\(^{170}\) Gavison states:

[I]t can be argued that respect for privacy will help a society attract talented individuals to public life. Persons interested in government service must consider the loss of virtually all claims and expectations of privacy in calculating the costs of running for public office. Respect for privacy might reduce those costs.

Gavison, \textit{supra} note 17, at 456.

\(^{171}\) On this point, Professor Robert Bellah argues that:

[T]here is also reason to consider whether the treatment of public figures by the media does not have a "chilling effect" on the decision of individuals to enter the public sphere because they fear what the relentless scrutiny may do to them. To the extent that such fear deters able people from public service, this is a cost that a democratic society can ill afford.

The Hidden First Amendment Values of Privacy

become involved in politics or have withdrawn from political life due to the intense media scrutiny of both their public and private lives. The same chilling effect may discourage others from speaking out on public issues.\(^{172}\)

We are better off as a nation if we can motivate the public to learn about issues and to engage in meaningful dialogue concerning them. This engagement promotes the search for truth, and encourages an informed rather than an ignorant public. If granting people privacy, meaning not publicizing information that a publisher is not certain is newsworthy, encourages this participation in public debate, then privacy promotes the First Amendment value of truth.

Professor Lee Bollinger explores this concept of the role of the press in stifling the public discussion. In his book *Images of a Free Press* he suggests that the U.S. Supreme Court’s unwillingness to place restrictions on the press, particularly in the areas of libel and privacy, has a negative impact on society in general.\(^{173}\) He argues that since the Court’s decision in *New York Times Co. v. Sullivan*,\(^{174}\) the central image of the press is that of governmental watchdog.\(^{175}\) Pursuant to this image, the government is prohibited by the First Amendment from punishing or censoring the press.\(^{176}\) The government cannot be trusted to regulate public debate, as its self-interest will lead it to impose undue restrictions on speech and on the press.\(^{177}\) The public, not the government, is the ultimate sovereign—unlimited debate is necessary for the public benefit.\(^{178}\) The press is the public’s representative “helping stand guard against the atavistic tendencies of the state and serving as a forum for public discussion.”\(^{179}\)

Bollinger takes issue with this principle of freedom of the press. One criticism of this principle is that it does not adequately value the social

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\(^{172}\) The blacklisting of members of the entertainment industry in the 1950s provides an example of what can happen if people are deprived of privacy concerning political beliefs. Due to the close scrutiny given individuals, and the invasions of privacy, the political activities of writers, directors and actors were seriously curtailed.


\(^{174}\) *Id.* at 2 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

\(^{175}\) *Id.* at 1.

\(^{176}\) *Id.*

\(^{177}\) *Id.* at 20.

\(^{178}\) *Id.*

\(^{179}\) *Id.*
interests at stake in a contest with the First Amendment.\textsuperscript{183} Bollinger uses the areas of libel and privacy as examples to support his argument that the Court undervalues the private costs of unrestricted press speech. The Court’s analyses in \textit{Florida Star} and \textit{Cox Broadcasting} offer examples of the Court’s undervaluing the privacy interests at stake in these two cases. In discussing the Court’s conclusion that the names of the rape victims were already made public, Bollinger argues:

[A] Court sensitive to the privacy costs involved surely would have noted that to a normal person there is a great difference between having a humiliating and embarrassing fact recorded in a transcript housed at the local courthouse and having it become the headline of the local newspaper or television station.\textsuperscript{181}

Bollinger also suggests that there are other concerns that the Court fails to consider.\textsuperscript{182} He posits that the Court has cast the harm done by an unfettered press as a private harm; only the person libeled or whose privacy has been breached is injured. Bollinger cautions that there is a larger social cost to be paid where the press is too unrestricted.\textsuperscript{183} Again using the examples of libel and privacy, he argues that to limit the discussion of interests to the individual interest at stake is “to ignore the relevance of other strong social concerns about the quality of public discussion.”\textsuperscript{184} He argues, as does this article, that one of the costs of an autonomous press is that “press freedom might, instead of enhancing public discussion and decision making, actually prove to be a threat to it—a threat to quality decision making, a threat to democracy, a threat to the very values the First Amendment (as defined by \textit{New York Times v. Sullivan} and its successors) is supposed to further.”\textsuperscript{185}

Bollinger contends that a free press may repress rather than enhance public discussion and decision making and “can exclude important points of view, operating as a bottleneck in the marketplace of ideas.”\textsuperscript{186} Without the law of defamation as a recourse, people would have to bear
the weight of libelous falsehoods. Some would not want to bear this burden, opting instead not to participate in public life.\textsuperscript{187} 

An analogous argument can be made as to privacy. One way in which the press represses rather than enhances public discussion is by discouraging people from expressing points of view, thus restraining public debate.\textsuperscript{188} As previously stated, a recent example of this discouragement is Colin Powell’s decision not to run for the United States presidency. One reason apparently supporting his decision not to run was that “Powell decided his family was more important to him than the presidency. Their privacy could not be ‘sacrificed’ to the rigors of the race.”\textsuperscript{189} Using privacy as a strong check on the power of the press may encourage participation in public affairs. If a publisher decides not to publicize information that is marginally newsworthy, the search for truth can be enhanced by that nondisclosure if it encourages rather than discourages public participation and the expression of opinions and ideas.

\textbf{b. Self-Governance}

Self-governance is the second First Amendment value that is arguably threatened by requiring the defendant to prove newsworthiness. The concern is that shifting the burden of proof to defendant may discourage the publicizing of information that would be helpful to a self-governing people. This would impinge on the First Amendment value of self-governance.

The self-governance theory of the First Amendment is premised on the belief that free expression is necessary for the proper functioning of democracy.\textsuperscript{190} It holds that “the essential objective of the First

\begin{itemize}
  \item \textsuperscript{187} Id. at 36.
  \item \textsuperscript{188} See id. at 25, 35–36.
  \item \textsuperscript{189} \textit{Family or Country?}, The New Republic, Nov. 27, 1995, at 7, 7.
  \item \textsuperscript{190} Free expression is said to contribute to the proper functioning of a democracy in a number of ways:
    \begin{itemize}
      \item (2) It facilitates majority rule. Smolla, supra note 164, § 2.04[2][b].
      \item (4) It allows citizens access to information necessary to formulate opinions and make decisions. See Alexander Meiklejohn, \textit{Political Freedom: The Constitutional Powers of the People} 3-89 (1960).
    \end{itemize}
\end{itemize}
Amendment is to promote a rich and valuable public debate." This theory is most closely associated with Alexander Meiklejohn, its chief contemporary architect and advocate. Meiklejohn begins with the rejection of the marketplace of ideas metaphor. He substitutes a town meeting metaphor. The town meeting metaphor illustrates his primary assumption that the people in a democracy are sovereign. To govern effectively, citizens must be fully informed—they must have unlimited access to material relevant to the decisions they are required to make. Restrictions on the information available to the sovereign people would impede the deliberative process and thus lead to the malfunctioning of the democracy.

A principle that is related to the sovereignty of the people is that government officials are servants rather than rulers. It is their responsibility to respond to the demands of the people as sovereign. Thus, the right to speak and communicate is necessary to enable citizens to communicate their wishes to those officials. The self-governance theory taken to its extreme leads to the conclusion that only political speech is entitled to full First Amendment protection, or that political speech is at least entitled to more protection than nonpolitical speech.

(5) It protects the right of the minority to dissent from majority decisions, thus creating the appearance of fairness and encouraging stability. See Emerson, supra note 130; Smolla, supra note 164, § 2.04[2][e].


193. Meiklejohn, supra note 190, at 24. His metaphor has been the subject of criticism. See Post, supra note 191.

194. Meiklejohn, supra note 190, at 18–19. Meiklejohn is clearly not the originator of the idea of the people as sovereign theory; this theory was articulated early in this nation's history by James Madison who stated that "In the United States ... [t]he People, not the Government, possess the absolute sovereignty." James Madison, Report on the Resolutions (House of Delegates, Session of 1799–1800), in 6 The Writings of James Madison 386 (Gaillard Hunt ed., 1906).

195. Meiklejohn, supra note 190, at 26; Schauer, supra note 166, at 38.

196. Schauer, supra note 166, at 38.

197. Id. at 38–39.


199. See Sunstein, supra note 192, at 301.
As expressed by Professor Owen Fiss, the degree of protection that should be afforded speech should depend on whether it promotes a rich public debate:

On the whole does it [the contested speech] enrich public debate? Speech is protected when (and only when) it does, and precisely because it does, not because it is an exercise of autonomy. In fact, autonomy adds nothing and if need be, might have to be sacrificed, to make certain that public debate is sufficiently rich to permit true collective self-determination. 200

Whether political speech alone is entitled to First Amendment protection or is entitled to the highest degree of protection, both reflect the belief that political speech lies at the core of the First Amendment.

The theory that the First Amendment is designed fundamentally to protect democratic self-governance 201 has had a substantial impact on First Amendment jurisprudence. 202 The Court in New York Times v. Sullivan 203 underscored the relationship between democracy and freedom of speech and press. The Court ruled in New York Times that a public official could not bring an action for libel absent a showing of actual malice, which was defined as knowledge of or reckless disregard for the falsity of the statements at issue. 204 In reaching its decision the Court stated that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." 205 To further underscore the point the Court quoted from its earlier opinion in Stromberg v. California: 206

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity

200. Fiss, supra note 192, at 1411.
201. Sunstein, supra note 192, at 263.
203. 376 U.S. 254.
204. Id. at 280, 283.
205. Id. at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
essential to the security of the Republic, is a fundamental principle of our constitutional system. 207

In Dun & Bradstreet v. Greenmoss Builders, 208 the Court reaffirmed its position that speech which contributes to public discourse should be given heightened First Amendment protection. 209 The Court was faced with the question of whether a private plaintiff had to show actual malice to recover damages for libel when the defamatory statements did not involve an issue of public concern. 210 In holding that the plaintiff did not have to make such a showing the Court reasoned, "We have long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'" 211 The Court found that speech about a private individual that does not involve a matter of public concern is entitled to less First Amendment protection. 212 This is consistent with the theory that the essential objective of the First Amendment is to ensure robust public debate. 213

Yet protecting privacy by not disclosing private information also has political value. As noted by Professor Emerson, "a system of privacy is vital to the working of the democratic process." 214 Professor Edward Bloustein also discusses the political value of privacy:

The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual. 215

209. Id. at 758–59.
210. Id. at 761.
211. Id. at 758–59 (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978)).
212. Id. at 759.
213. While it has recognized the primacy of political speech, the Supreme Court has not gone so far as to hold that the First Amendment protects only political speech. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967); Thornhill v. Alabama, 310 U.S. 88, 102 (1940).
214. Emerson, supra note 130, at 546.
The Hidden First Amendment Values of Privacy

Studies support the comments of Professor Bloustein. The studies indicate that the threat of continued exposure to adverse public opinion curtails an individual’s willingness not only to voice dissenting or nonconformist opinions but also curtails the willingness to entertain such positions privately. To be healthy, a democratic, pluralistic society requires the participation of its members. Privacy encourages that participation, and enhances its quality, by allowing individuals the space within which to formulate their individual thoughts and opinions. The ability to formulate thoughts and opinions in private encourages independence of thought, unconventionality, and a willingness to reject conformity. Privacy allows people to question conventional wisdom and to seek their own answers. If people are allowed privacy they are more likely to make valuable contributions to the public debate by questioning the status quo, first privately, then publicly. We are committed to a society that encourages pluralism and independent judgment. We expect individuals to bring those independent judgments to bear in the political arena. Thus, privacy is necessary to actualize our vision of ourselves as a nation.

Bollinger’s argument concerning the need for a check on the press in order to promote the search for truth is equally applicable here. It is desirable for people to engage in public discourse not only because it aids in the search for truth, but also because it aids democracy by enriching the public debate. Shifting the burden of newsworthiness to the defendant may cause a publisher not to publish marginally newsworthy information. However, that decision not to publish may encourage people to contribute to the debate on matters of public concern, thus promoting democratic deliberation.

c. Autonomy: Self-Realization and Individuality

Autonomy is the third interest that might be threatened by shifting the burden of proof to the defendant. Again the concern is that the burden of proof may discourage publicizing information infringing on the First


217. See Emerson, supra note 130, at 546.

218. See Gavison, supra note 17, at 455–56.
Amendment value of autonomy. A number of First Amendment scholars have identified autonomy as a core First Amendment value. First Amendment theory based on this interest focuses on the relationship between the individual and the First Amendment. Unlike the prior two theories, this theory assumes that the First Amendment serves interests of individuals that are intrinsically, rather than instrumentally, valuable. Thus, it protects individual interests not because to do so will promote societal values, such as truth or the proper functioning of a democracy. Rather it protects those interests because they are inherently good. The individual interests protected by autonomy have been identified as self-realization and individuality.

1) Self-Realization

This theory posits that an underlying premise of the First Amendment is the assurance of individual self-realization. If a publisher decided not to publish marginally newsworthy information because of the concern that he could not meet the burden of proving newsworthiness, the argument is that this First Amendment value would be harmed because it would limit the self-realization of those who would receive the information.

Individual self-realization can encompass both the development of powers and abilities and the ability to make choices which result in the realization of individual goals. To be fully human, the minds of humans must be free. A fully realized human is inherently valuable. Schauer articulates the underlying concept as follows:

This conception ... is derived from ideas of personal growth, self-fulfillment, and development of the rational faculties. . . . If it is the power of reason that distinguishes man from other forms of animal life, then only by fully exploiting this power can one be said to enjoy a full life. Because the basis of this conception of the full life is complete use and development of the mind and thinking process,

220. Schauer, supra note 166, at 47.
221. Id. at 48.
222. For a fuller exposition of this theory, see Redish, supra 190.
223. Id. at 593.
224. See Emerson, supra note 130, at 546.
speech is said to be an integral component of self-fulfillment, the one being inseparable from the other. Free speech is thus said to be justified not because it provides a benefit to society, but because it is a primary good.\(^2^2^5\)

Under this theory, then, speech is protected because it is necessarily and inevitably tied to thought, reason, imagination and creativity.\(^2^2^6\) It protects that which makes us distinctly human.\(^2^2^7\) This theory of the First Amendment takes into account both the rights of the speaker and the listener. Both benefit from communication generated in the attempt to develop both rational and creative, emotional faculties.\(^2^2^8\)

There has been some judicial acceptance of the theory that the individual’s interests in self-expression is a First Amendment concern.\(^2^2^9\) In *Procunier v. Martinez,*\(^2^3^0\) the Court was faced with the issue whether regulations censoring the mail of prisoners violated the First Amendment. The Court invalidated the regulations, and Justice Marshall in concurrence argued eloquently that:

The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual’s worth and dignity. . . . [A] prisoner needs a medium for self-expression. It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit.\(^2^3^1\)

Sometimes this interest in autonomy is not addressed expressly; rather, the concept of autonomy underlies the Court’s opinions. For instance, in *West Virginia v. Barnette,*\(^2^3^2\) the Court was faced with the

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227. *See* Smolla, *supra* note 164, § 2.03[2][e].


230. 416 U.S. 396.

231. *Id.* at 427–28 (citation omitted) (Marshall, J., concurring).

issue whether a public school board could compel students to salute the American flag. In holding that such compulsion violated the First Amendment the Court stated "[w]e think the action of the local authorities in compelling the flag salute and pledge [of allegiance] transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." This language, while it never uses the words autonomy or self-fulfillment, evidences a concern for autonomy values.

2) Individuality

The argument for a free speech principle based on the protection of individuality suggests that the primary interest protected is individual autonomy. This theory is best articulated by Thomas Scanlon. Under this theory free speech is premised on the inviolability of the principle of individual choice. The individual is to be granted absolute sovereignty in the process of making choices. This concept of autonomy is described by Professor Richard Fallon as ascriptive autonomy. Ascriptive autonomy is based on the notion that individuals have the right to make self-regarding decisions; it "marks a moral right to personal sovereignty." To fully enjoy this sovereignty, the individual should be as fully informed as he desires to be. Thus, there should be no restrictions on his access to material necessary to exercise his autonomy and to make "intelligent choices." If placing the burden of newsworthiness on the defendant causes a publisher not to publish, this may negatively affect the autonomy of listeners by depriving them of information necessary to make intelligent choices. Scanlon’s concept of autonomy, that is, freedom from governmental interference, be it coercive, manipulative or

233. Id. at 624.
234. Id. at 642.
235. Schauer, supra note 166, at 67–72 (making arguments from diversity and dignity as justifying freedom of speech and acknowledging that autonomy agreement is one that is most persuasive).
237. Fallon, supra note 219, at 877.
238. Id. at 878.
239. Schauer, supra note 166, at 69.
distortive, has been defined as negative descriptive autonomy.\textsuperscript{240} As articulated by Schauer:

\begin{quote}
[N]o government has the authority to distort the individual’s ultimate choice by preventing him from hearing any argument solely because it is on one side of an issue rather than another. . . . Scanlon’s theory, therefore, is best characterized not as a right to speech, but rather as a right to receive information and, more importantly, a right to be free from governmental intrusion into the ultimate process of individual choice.\textsuperscript{241}
\end{quote}

Respect for individual choice and personal sovereignty is reflected in Supreme Court decisions.\textsuperscript{242} Justice Stewart, dissenting in \textit{Branzburg v. Hayes},\textsuperscript{243} recognized the relationship between the First Amendment and autonomy: “the press enhance[s] personal self-fulfillment by providing the people with the widest possible range of fact and opinion.”\textsuperscript{244} In \textit{Abood v. Detroit Board of Education},\textsuperscript{245} the Court stated that, “at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”\textsuperscript{246} These decisions indicate an acceptance on the part of some prominent jurists of autonomy as a First Amendment value.

The notion that the First Amendment protects the right to receive information is clearly reflected in the Court’s decisions concerning commercial speech. In \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council},\textsuperscript{247} the Court declared invalid a Virginia statute that subjected pharmacists to license suspension or revocation if they advertised the price of prescription drugs. The Court reasoned that the First Amendment protected the free flow of information and that consumers had an established interest in receiving the information published by pharmacists: “As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not

\begin{footnotes}
\textsuperscript{240} Fallon, \textit{supra} note 219, at 875.
\textsuperscript{241} Schauer, \textit{supra} note 166, at 69.
\textsuperscript{243} 408 U.S. 665 (1972).
\textsuperscript{244} \textit{id.} (Stewart, J., dissenting).
\textsuperscript{245} 431 U.S. 209 (1977).
\textsuperscript{246} \textit{id.} at 234–35.
\textsuperscript{247} 425 U.S. 748 (1976).
\end{footnotes}
keener by far, than his interest in the day's most urgent political
debate.\textsuperscript{248} This interest in the listener's right to receive information is reflected in a number of other Supreme Court decisions.\textsuperscript{249}

3) Privacy and Autonomy

Autonomy, however, is not the exclusive province of the First Amendment. If a central concern is individual autonomy, the sovereign right to make choices, then this interest can be protected by privacy and perhaps harmed by too broad a reading of the First Amendment. As discussed above, one sense of autonomy includes personal sovereignty. It includes the right to make choices about one's life. A publisher's decision not to publish marginally newsworthy deeply private facts about an individual promotes that individual's autonomy. The disclosure of private facts may offend the principle of autonomy because it violates the individual's right to choose who shall be privy to such information. This violation of dignity occurs regardless of the public reaction to or interest in the information disclosed. It matters not whether the public is repulsed or sympathetic; the harm is that one's dignity has been affronted and his private life has been forcibly subjected to public scrutiny.\textsuperscript{250}

Privacy also advances self-realization, which is another aspect of autonomy. As discussed above, self-realization includes the development of all human faculties. It also includes the development of morals and values upon which opinions are based. While the First Amendment values and protects self-realization, privacy creates the conditions under which self-realization can occur:

\begin{quote}
[I]t is in privacy that we are able to develop the resources necessary to be morally autonomous, persons whose moral values are genuinely our own. Without the opportunity to develop moral values in our private lives, we would have little opportunity to go beyond the values embodied in the formal roles we play and in the expectations of those we relate to through them. Moreover, the likelihood is far greater that we would be unable to make judgments other than those required by the conventions of our positions. The capacity to develop a moral point of view which is
\end{quote}

\textsuperscript{248} Id. at 763.


\textsuperscript{250} Bloustein, \textit{supra} note 13, at 979.
authentically our own requires the opportunity for reflection, discussion and action, within the sphere of private life.\textsuperscript{251}

The point here is that the right to privacy and the First Amendment both serve the same interest in individual autonomy. In a sense, there is a symbiotic relationship between privacy and the First Amendment. With privacy, people are able to develop themselves. Part of that development includes the formation of values, morals and opinions. Often, this development occurs in response to information that the First Amendment makes available. Having formed opinions, people often desire to express themselves. The First Amendment then protects that expression. Because both are critical to autonomy, it is desirable to give proper weight to both.

2. \textit{Burden Shifting and Defamation}

The immediately preceding section demonstrates that shifting the burden of newsworthiness to the defendant does not unduly burden the First Amendment. Further, it contends that privacy can promote First Amendment values. However, in addition to concern about unduly burdening the First Amendment, there may be a concern that shifting the burden of proof as to newsworthiness to the defendant would be inconsistent with the allocation of burdens made under the law of defamation.\textsuperscript{252} Some courts have turned to the law of defamation to try to decide how to balance the rights of privacy against the First Amendment.\textsuperscript{253} In allocating the burden of proving newsworthiness to the plaintiff, the California court in \textit{Diaz v. Oakland Tribune} justified its decision by arguing that it was mirroring the allocations made in the law of defamation.\textsuperscript{254} This objection assumes that constitutional privileges as to privacy should be similar to those for defamation because the two torts both protect the individual interest in human dignity and personality.

The constitutional privileges in defamation are intricate; some might even call them convoluted.\textsuperscript{255} There appear to be four different categories

\begin{thebibliography}{9}
\bibitem{254} \textit{Diaz}, 188 Cal. Rptr. at 769–70.
\end{thebibliography}
of libel law. The level of First Amendment protection that will be granted libelous speech depends both on the status of the plaintiff and on whether the matter is one of public concern. The first category of libelous speech involves speech about public figures on matters of public concern. The standards applicable to this category of speech were determined by the Court in *New York Times Co. v. Sullivan.* Pursuant to *New York Times* and its progeny, public figures seeking to recover for defamation can only do so by overcoming the First Amendment privilege. To overcome the privilege, the public figure must show that the defendant spoke with actual malice, which is defined as knowledge of falsity or reckless disregard for the truth. The plaintiff must show actual malice as well to recover for punitive and presumed damages.

The second level of libelous speech involves public figures and matters not of public concern. It is not clear what the plaintiff's burden of proof is here or what standard of liability for damages would apply. The Court has not yet resolved this question.

The third category of libelous speech involves a private person and matters of public concern. The standard here evolves from the Court's decision in *Gertz v. Robert Welch, Inc.* In *Gertz* the Court held that a private person plaintiff in a defamation action did not have to show actual malice to recover. Instead, the Court held that with private individuals, the states were free to establish any standard of liability so long as they did not impose liability without fault. Actual malice was still necessary, however, to recover for punitive or presumed damages.

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256. These four categories are: (1) speech about public figures on matters of public concern; (2) speech involving public figures and matters not of legitimate public concern; (3) speech involving private persons and matters of public concern; and (4) speech involving private persons and matters not of legitimate public concern.


260. While in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), the Court moved away from considering the public nature of the speech, its subsequent decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985), indicates that a different test is applicable when the speech involves matters not of public concern.


262. *Id.* at 343–47.

263. *Id.* at 347.

264. *Id.* at 350–51.
The fourth category includes speech about a private person where the speech is on a matter not of public concern. In its most recent case on this issue, the U.S. Supreme Court held that with this category of speech, states may permit awards of presumed and punitive damages absent a showing of actual malice.\(^{265}\) It is not yet clear whether this category of libelous speech still requires the plaintiff to show some level fault pursuant to Gertz.\(^{266}\)

This recounting of constitutional privileges in the law of defamation reflects the complex state of the law. The complexity of the rules is just one several reasons why reliance on the law of defamation would be misplaced.\(^{267}\) First, the very complexity of the law threatens to have a chilling effect on speech. A publisher must wind his way through the various categories and guess into which category the speech falls. As argued by one commentator:

By making so unpredictable the legal consequences of speech, the Court has encouraged excessive self-censorship among some speakers, reckless mudslinging among others, and has raised the prospect of due process challenges by speakers unable to conform their conduct to law.\(^{268}\)

Applying the constitutional scheme for defamation to the area of privacy would create the same confusion and self-censorship that currently exists as to defamation. Rather than eliminate uncertainty, it would create it. While the newsworthiness test already may create some uncertainty, that uncertainty pales compared to the thicket surrounding the law of defamation. Second, the allocation of burdens made in the law of defamation is predicated on the values protected by the tort of defamation and by the First Amendment. The value protected by defamation is an individual's interest in her reputation. The First Amendment values protected can


\(^{266}\) This last development has led to the issue of whether newsworthiness remains a viable defense at all. The U.S. Supreme Court's decisions in Cox and Florida Star can be construed as a rejection of the newsworthiness test in favor of the lawfully obtained doctrine. However, state and lower federal courts are construing these cases narrowly and have not yet abandoned the newsworthiness test. The curtain has not yet fallen on the newsworthiness defense to privacy actions.

\(^{267}\) Several articles have been written that address this precise topic. For a more extensive discussion of this issue see Elbridge L. Adams, The Right of Privacy, and its Relation to the Law of Libel, 39 Am. L. Rev. 37 (1905); Melville B. Nimmer, The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied To Privacy, 56 Cal. L. Rev. 935 (1968); Woito, supra note 37, at 203–217.

\(^{268}\) The Supreme Court, 1984 Term—Leading Cases, 99 Harv. L. Rev. 120, 217 (1985).
include the search for truth, self-governance, and any number of other values. In essence, individual rights are being weighed against societal rights. With privacy, on the other hand, the interest protected is not merely the interest in one’s dignity, but rather the interests in the search for truth, autonomy and self-governance. Because the values being served by the plaintiff’s privacy action are First Amendment values rather than simply human dignity, it is inappropriate to adopt the defamation model.

Third, the law governing the private facts tort has never relied on the status of the plaintiff to alter the elements of the prima facie case.269 There is no precedent in the law of privacy, then, for imposing defamation’s plaintiff-speaker scheme onto privacy. Fourth, the newsworthiness doctrine already takes into account the status of the plaintiff;270 if the information revealed concerns a public figure, courts consistently find that the matter published is newsworthy.271 Indeed, one of the factors used in California to decide newsworthiness is the extent to which the individual voluntarily acceded to a position of public notoriety.272 Because the newsworthiness test already accounts for the status of the plaintiff there is again no need to adopt the defamation model.

Fifth, the rationale offered by Gertz for applying different fault standards based on the status of the plaintiff is inapplicable to the disclosure tort.273 Pursuant to the Court’s ruling in Gertz, private citizens are more deserving of protection than public figures because private citizens have less access to the media to rebut a defamatory falsehood.274 Accepting that public figures do indeed have easier access to the media, this access is meaningless in the privacy context. Defamation by definition involves falsity; thus the ability to rebut publicly the statement made is valuable because it cures some or all of the harm inflicted. The

269. See Restatement (First) of Torts § 867 (1934); Restatement (Second) of Torts § 652D.
270. See Woito & McNulty, supra note 39, at 210.
publication of the truth restores the victim's reputation, which is the interest harmed by defamation.

The disclosure of private information, however, is not analogous to defamation. The interest protected by privacy is not reputation. In the privacy context there is no curative or corrective speech. Unlimited media access will do nothing to cure the harm inflicted by the unwanted disclosure. Indeed, more publicity is precisely what the plaintiff does not want. Thus, the rationale underlying the defamation distinction is inapplicable to privacy.

Finally, there is an argument that because courts have applied the "actual malice" standard to claims of false light privacy, the defamation standard should be applied to the private facts tort as well. Application of the defamation standards to privacy began with the leading false light privacy case of *Time, Inc. v. Hill*. In *Time*, the plaintiff, James Hill, sued defendant based on the publication of an article in Life Magazine describing the opening of a Broadway play. The play was based on the actual kidnapping of the James Hill family by escaped convicts. The Life article implied that the play recreated the actual events of the kidnapping. In fact, it did not. The gist of plaintiff's complaint was that the information falsely reported involved matters of public interest, the plaintiff could not recover absent a showing that the defendant had published the information with knowledge of its falsity or with reckless disregard for the truth. Since *Time*, courts have applied the actual

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277. *Id.* at 377.
278. *Id.* at 376.
279. *Id.* at 378.
280. *Id.* at 377.
281. *Id.* at 387–88. The law of defamation has evolved since *Time, Inc. v. Hill* was decided. Specifically, the Supreme Court has decided *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (holding that private figures need only show that defendant was negligent as to truth or falsity of information published), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (holding that when speech concerns private person on matter not of public concern presumed and punitive damages may be awarded without showing of actual malice). Prior to *Gertz*, it was unclear whether private figures had to show actual malice or simple negligence. The question arises whether a private individual bringing a false-light privacy cause of action must still prove actual malice or whether the lesser standards adopted in *Gertz and Dun & Bradstreet* apply.

Courts take differing approaches to this question. For decisions applying the lesser standards see *Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984), *cert. denied*, 469 U.S. 883 (1984); *Wood v. Hustler*
malice defamation test to false-light privacy actions involving public figures. 282

Application of the defamation standards to the false light privacy tort, however, does not mean that they should be applied to the private facts tort. One argument against applying the malice standard to the private facts tort is that it is more appropriate to apply defamation standards to the false light privacy tort because both torts are based on falsity. 283 The two are more analogous than are the private facts tort and defamation. 284

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283. Section 652E of the Second Restatement of Torts defines the false light tort:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977).

The comment to this section states that “it is essential to the rule stated in this section that the matter published concerning the plaintiff is not true.” Restatement (Second) of Torts § 652E cmt. a (1977).

Section 558 of the Second Restatement of Torts sets forth the elements of a cause of action for defamation:

To create liability for defamation there must be:

(a) a false and defamatory statement concerning another;

(b) an unprivileged publication to a third party;

(c) fault amounting at least to negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Restatement (Second) of Torts § 558 (1977).

284. The U.S. Supreme Court in Time, Inc. v. Hill, seemed to limit its application of the defamation standards to the false light tort: “... revelations were so intimate and so unwarranted in view of the victim’s position as to outrage the community’s notions of decency.” Time, 385 U.S. at 383 n.7 (quoting Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), cert. denied, 311 U.S. 711 (1940)).
The interests protected by the false light tort and defamation are similar; both protect the individual’s interest in her reputation. Unlike the false light tort, the private facts tort by definition involves the disclosure of true information. As argued above, the interest protected by the private facts tort differ from this interest in reputation. Because the private facts tort and the false-light tort redress different harms, the constitutional limits on false light privacy should not be imposed on the private facts tort.

Second, the Court in *Time, Inc. v. Hill* did not seem ready to extend the actual evidence standard to preclude recovery for the publication of truthful information where the disclosure involved “‘[r]evelations . . . so intimate and so unwarranted in view of the victim’s position as to outrage the community’s notions of decency’ . . . . This case presents no question whether truthful publication of such matter could be constitutionally proscribed.” To date, the Court has maintained this position that the First Amendment does not always protect truthful publication, and has declined to apply the defamation standards of liability to the publicizing of truthful information.

3. **The Nexus Requirement**

The foregoing sections addressed two major objections to shifting the burden of proving newsworthiness to the defendant. This section reviews the effect the substantially related factor might have on the First Amendment. As discussed above, the reformulated test would require that there be a substantial relationship between the specific information disclosed and a matter of legitimate public concern. The First Amendment privilege is not absolute. To require that the defendant show that there is a substantial relationship between the information

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285. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977) (“‘[T]he interest protected’ in permitting recovery for placing the plaintiff in a false light ‘is clearly that of reputation, with the same overtones of mental distress as in defamation.’”) (citation omitted).

286. An argument has been made that the defamation privileges should not apply to the private facts tort because they should not have been applied to false light privacy either. This argument rejects the position that the interests protected by defamation and false light privacy are the same. The argument holds that application of malice to the false light tort at all was wrong because it was premised on the illusion that the torts of defamation and false light are similar. For a full explication of this argument see Nimmer, *supra* note 267, at 962–67.

287. *Time*, 385 U.S. at 383 n.7 (quoting *Sidis*, 113 F.2d at 809).


disclosed and a matter of legitimate concern simply forces a reasonable fit between disclosure and a First Amendment value. If there is no relationship between the disclosure and a First Amendment value, then the information should not be protected by the First Amendment.

Without this limitation, any private information that the media discovers could be published. This would essentially eliminate the private facts tort. Such a result is not compelled by the First Amendment. The Supreme Court itself has stated that the First Amendment does not protect all truthful disclosures,290 thus indicating an intention not to eliminate the private facts tort. Indeed, there is no Supreme Court precedent that is directly controlling as all of the cases that have come before the Court have involved the disclosure of information that had been made public. It has not yet squarely faced the conflict between the First Amendment and private information that has not been made public. A majority of courts continue to believe that the private facts tort is viable,291 and decisions after Florida Star construe its holding narrowly.292 All of this indicates an intention not to eliminate the private facts tort, although it is clearly limited by the First Amendment privilege.

IV. THE REFORMULATED TEST AND THE DISCLOSURE OF MEDICAL INFORMATION

Thus far this article has reviewed existing approaches to balancing the protection of private information against the First Amendment. It has offered a reformulated approach to this balancing and addressed some possible objections to the revised approach. This section applies the test to the protection of private medical reformation. The reformulated test discussed in the preceding sections of this article proposes that: (1) the burden of proving newsworthiness should fall on the defendant, not the plaintiff claiming invasion of privacy; (2) the defendant must show that the information disclosed is substantially relevant to a matter of legitimate public concern; and (3) the plaintiff should be able to rebut the defendant’s newsworthiness argument by showing that the restriction—here, the private facts tort—is necessary for the furtherance of a compelling state interest. This section applies this test to the disclosure of

290. Id. at 524.
292. See discussion supra part II.B.1 and notes accompanying text.
deeply private medical information. Specifically, it uses as an illustration the disclosure that Alma Powell is taking medication for depression.  

A. Invasion of Privacy  

First, Mrs. Powell would need to show (1) the publicizing, (2) of private information, (3) which publicity would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.

1. Publicity  

As discussed above in part II, publicity requires dissemination of information to the public at large. The information must have been communicated to a substantial number of people. When a member of the mass media disseminates information, the publicity requirement is satisfied. Members of the media are “quintessential public disseminators.” In the case of Alma Powell, both Newsweek and the Philadelphia Inquirer carried the story about her medical condition. This broad dissemination of information would satisfy the publicity requirement.

2. Private Facts  

The next element a plaintiff such as Mrs. Powell would need to satisfy would be that the information disclosed was private. The information disclosed about Powell was confidential medical information. Medical information disclosed in confidence is quintessentially, inherently private. Several early cases recognizing the tort of invasion of privacy involved the unauthorized publicizing of medical information. In

293. See supra text accompanying notes 1-3.


295. Elder, supra note 33, § 3:3, at 154.

296. See supra notes 1-3 and accompanying text.

Barber v. Time, Inc.,\textsuperscript{298} the Missouri court was faced squarely with the issue whether defendant's publication of plaintiff's picture was protected by the First Amendment or impermissibly violated plaintiff's privacy. The plaintiff was suffering from a disease that caused her to eat excessively while simultaneously losing weight rapidly. Without the plaintiff's consent, the defendant magazine published an article naming plaintiff along with a photograph taken while she was in the hospital receiving treatment for her condition. In ruling in plaintiff's favor, the court argued:

Certainly if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition . . . without personal publicity.... Whatever the limits of the right of privacy may be, it seems clear that it must include the right to have information given to or gained by a physician in the treatment of an individual's personal ailment kept from publication which would state his name in connection therewith without such person's consent.\textsuperscript{299}

The court in its opinion recognized the First Amendment values at stake, but reasoned that the two interests could be accommodated. It stated that where the subject matter of the article was of legitimate public interest, the First Amendment would protect its publication. Short of that, the right of privacy was to prevail.\textsuperscript{300}

Barber has been followed by a number of jurisdictions.\textsuperscript{301} The court in the more recent case of Vassiliades v. Garfinckel's,\textsuperscript{302} relies heavily on Barber v. Time, Inc. The plaintiff in Vassiliades sued her physician and two department stores for invasion of privacy.\textsuperscript{303} The physician, a plastic surgeon, had used photographs of the plaintiff in a presentation about

\textsuperscript{298} 159 S.W.2d 291 (Mo. 1942).
\textsuperscript{299} Id. at 295.
\textsuperscript{300} The court was mindful of the potential abuse of its rights by the press:
[F]reedom of the press was not created merely for the benefit of the press, but because it is essential to the preservation of free government and progress of civilization . . . Therefore, the press, like individual citizens, must not abuse its constitutional rights or overlook its obligations to others.

\textit{Id.}

\textsuperscript{301} See, e.g., Vassiliades v. Garfinckel's, 492 A.2d 580 (D.C. 1985); Y.G. v. Jewish Hosp. 795 S.W.2d 488 (Mo. Ct. App. 1990). Some have questioned the reasoning and logic of the decision and consider it poor precedent. \textit{See} Pember, \textit{supra} note 9, at 132–34.
\textsuperscript{302} 492 A.2d 580.
\textsuperscript{303} \textit{Id.} at 584.
plastic surgery made at two department stores. Plaintiff asserted that she had not consented to such use by the surgeon, and sued for invasion of privacy. The court held that the surgeon had violated plaintiff's privacy by publicizing the photographs. The court regarded the publication of the photographs as the publication of private medical information. The court found that the right to privacy at the very least includes the right to keep private medical information.

In *Y.G. v. Jewish Hospital*, the plaintiffs alleged that defendants had violated their right to privacy by televising plaintiffs attending a hospital function commemorating the success of the hospital's in vitro fertilization (IVF) program. The plaintiffs had participated in the IVF program and were expecting triplets when they appeared on television. In agreeing that plaintiffs had stated a cause of action for invasion of privacy, the court found that the plaintiffs' participation in the program was a private matter. The court reasoned that IVF concerned matters of procreation, sexual relations and medical treatment, all of which are private matters. This court reaffirmed the general notion illustrated by *Barber* that medical information is a private, not a public matter.

The California courts have held clearly and specifically that the right of privacy guaranteed by the California constitution includes the right to keep private information pertaining to a person's medical history, treatment, or condition. In discussing the relationship between medical information and the right of privacy, the California courts have stated, "[a] person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." In a leading case on the issue of the constitutional protection of medical records, the California court

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304. *Id.*
305. *Id.*
306. *Id.* at 590.
307. *Id.* at 587.
309. *Id.* at 488.
310. *Id.* at 492.
311. *Id.* at 500.
313. *Gherardini*, 156 Cal. Rptr. at 60.
discusses the reasons we guard so closely the privacy of medical information:

The matters disclosed to the physician arise in most sensitive areas often difficult to reveal even to the doctor. Their unauthorized disclosure can provoke more than just simple humiliation in a fragile personality. . . . The individual’s right to privacy encompasses not only the state of his mind, but also his viscera, detailed complaints of physical ills, and their emotional overtones. The state of a person’s gastro-intestinal tract is as much entitled to privacy from unauthorized public or bureaucratic snooping as is that person’s bank account, the contents of his library or his membership in the NAACP. We conclude the specie of privacy here sought to be invaded [the unconsented to disclosure of patients medical records] falls squarely within the protected ambit [of the California constitutional right of privacy].

In Alma Powell’s situation, based on the existing precedent, she would have a strong argument that the fact that she was taking medication for depression constituted a private fact. It was information concerning medical treatment she was receiving. While the nature of the information disclosed about Mrs. Powell is private, it may have become public depending on the number of people who knew about her condition. Courts generally have held that disclosure to a limited number of people will not render private information public. However, General Powell stated during his press conference that he and his wife had told many people about Mrs. Powell’s condition. A court would have to decide whether the information had become public due to the number of people who knew of Mrs. Powell’s condition.

3. Offensive Nature of Information Disclosed

The final element which a plaintiff such as Mrs. Powell would have to establish is the disclosure was offensive to persons of ordinary sensibilities. The dissemination of certain medical information will satisfy this standard. Courts have found that the publication of the

314. Id. at 61.
316. The disclosure of some confidential medical information will not satisfy this element of the tort; for instance if one were to disclose the information shared with an internist concerning the symptoms associated with sinusitis, headache, stuffy nose, or earache, it is doubtful that such disclosure would be offensive.
following information was offensive: the unauthorized publication of a nude photograph of a person; the disclosure by an employer to fellow employees that plaintiff had had a mastectomy or hysterectomy; the showing of a surreptitiously made videotape of plaintiff engaged in sexual intercourse; and the disclosure that plaintiff has tested HIV positive. HIV-positive status, syphilis and other sexually transmitted diseases are medical facts which if disclosed might be offensive.

Alma Powell was being treated for depression. Depression is another kind of medical condition to which stigma is attached. Depression is a condition which people strive to keep secret or private. Disclosure that one is suffering from the condition can be not only offensive but humiliating. Mrs. Powell would have a credible case for arguing that the disclosure was offensive to a person of ordinary sensibilities.

B. Defendant's Burden of Proof

Once Mrs. Powell had made her prima facie case, the media defendants who publicized Powell's medical condition would have the burden of proving that the information disclosed was lawfully obtained and newsworthy. To determine newsworthiness under the reformulated test, consideration would be given to the following: (1) the social value of the facts published; (2) the extent to which the party voluntarily

322. Courts have recognized and acknowledged that stigma attaches to one who is identified as mentally ill. See Vitek v. Jones, 445 U.S. 480, 492 (1980) (citing Addington v. Texas, 441 U.S. 418, 425-26 (1979)); In re Roulet, 590 P.2d 1, 6-7 (Cal. Sup. Ct. 1979). In Roulet, the court noted:

In the ideal society, the mentally ill would be the subjects of understanding and compassion rather than ignorance and aversion. But that enlightened view, unfortunately, does not yet prevail. The stigma borne by the mentally ill has frequently been identified in the literature: "a former mental patient may suffer from the social opprobrium which attaches to treatment for mental illness and which have more severe consequences than do the formally imposed disabilities. Many people have an 'irrational fear of the mentally ill.' The former mentally ill person is likely to be treated with distrust and even loathing; he may be socially ostracized.... The legal and social consequences of commitment constitute the stigma of mental illness, a stigma that could be as socially debilitating as that of a criminal conviction.

Id. (citations omitted).
acceded to position of notoriety; and (3) the relationship between the information disclosed and a matter of legitimate public concern.

I. Social Value of Facts Published

In asking about the social value of the facts published, we are in a sense asking about First Amendment values. What values were served by the publicizing of Mrs. Powell’s medical condition? Arguments could be made that the disclosure served the values of self-governance and the search for truth.

a. Self-governance

The media defendant could argue that the publicity served the value of self-governance. The argument would be that Mrs. Powell is married to a man whom many thought was contemplating running for the office of President. Because Colin Powell was a potential candidate for public office, so the argument goes, the public needed the information about his wife to assess General Powell’s character and ability to serve. The defendant could argue further that the public needed information about Mrs. Powell because it needed to assess her character as well. Given the amount of influence that spouses of politicians may have, the information enabled citizens to better evaluate the Powells as the potential First Family. Eleanor Roosevelt, Nancy Reagan and Hillary Rodham Clinton all have played an important and influential role as First Lady. Additionally, it could be argued that publicizing the information increased public awareness of and public education about depression. It may have prompted people to seek advice about and treatment of the disease.

b. The Search for Truth

The media defendant might assert that the dissemination of information contributed to the robust exchange of ideas, thus aiding in the search for truth. As with the self-governance argument, the notion is that the information is valuable because it adds to the discourse about depression specifically and mental illness generally. The idea is that the more information that is contributed to the debate, the more likely it is that the truth about the topic will surface.

The topic at issue here is that of depression. The media defendant could argue that publicizing the information about Mrs. Powell helped
destigmatize mental illness and thus aided in uncovering the truth about it. This argument is based on the notion that publicizing the fact that an influential person has an illness which is stigmatized helps to eliminate the stigma. It helps to eliminate myths about the illness and those who suffer from it. Thus, the disclosure aided the search for truth. At least one court has been amenable to the destigmatization argument. In *Sipple v. Chronicle Publishing Co.* the plaintiff filed suit claiming invasion of privacy based on the defendant newspaper's disclosure that plaintiff was homosexual. Two days after the attempted assassination, the *San Francisco Chronicle* published an article concerning Sipple, in which it disclosed that he was a prominent member of the San Francisco gay community. In ruling against Sipple, the California court held that the facts disclosed were newsworthy and that their publication served "legitimate political considerations," including the destruction of stereotypes about homosexual men as being "timid, weak and unheroic." Arguably, the publicizing of Mrs. Powell's condition served to destigmatize the disease of depression.

2. **Voluntary Public Figure**

The third factor to consider when deciding whether information is newsworthy is the degree to which the person voluntarily acceded to a position of public notoriety. Mrs. Powell has not injected herself into the limelight. She kept a low profile when her husband was Chairman of the Joint Chiefs of Staff. She has not taken political positions; she has not come forward in any respect. Aside from her marriage to Colin Powell, she has maintained her private person status. The degree to which she has kept herself private would militate towards finding that the information published was not newsworthy.

3. **Nexus Requirement**

The reformulated approach would add a fourth consideration in assessing newsworthiness: whether the information disclosed is substantially related to a legitimate matter of public concern. If the

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323. 201 Cal. Rptr. 665 (Ct. App. 1984).
324. *Id.* at 667.
325. *Id.* at 666.
326. *Id.* at 670.
327. *Id.*
matter of public concern is construed as Colin Powell's potential candidacy, the question becomes whether Mrs. Powell's medical condition was substantially related to General Powell's candidacy. This situation is similar to the plaintiff's situation in Diaz. There, the issue was whether plaintiff's transsexuality was substantially related to her ability to serve as student body president of a college. The California court found that her transsexuality bore little, if any, relationship to her honesty, integrity or ability to serve.

Here, there is little connection between Mrs. Powell's condition and General Powell's fitness for office. First, assuming that the information was necessary for people to assess the character of a political candidate, it did not pertain to Colin Powell, the potential candidate. That his wife was taking medication for depression does not speak to Colin Powell's fitness for office, nor does it reflect on his governing abilities, his honesty, his integrity, or his judgment. As noted in the editorial quoted at the beginning of this article, the information might be relevant if Mrs. Powell were not taking medication which she needed to treat her condition. That was not the case. Moreover, General Powell was not yet a candidate when the disclosure was made. To say that there is a First Amendment interest in the private lines of potential candidates leads to the conclusion that there is a First Amendment interest in every citizen's life. Every citizen is a potential candidate for office. This result construes the First Amendment too broadly and unduly trammels the right to privacy.

C. Plaintiff's Rebuttal

Mrs. Powell could rebut the newsworthiness argument by showing that the private facts tort serves a compelling state interest. Mrs. Powell could argue that the tort promotes self-governance, autonomy and the search for truth. It is arguable that these interests are compelling as they are protected by the First Amendment. She would then have to show that the private facts tort is narrowly tailored to further those interests.

329. Id.
330. Rosenthal, supra note 5.
I. Compelling State Interests

a. Self-Governance

Mrs. Powell could show that protection of the information is needed to serve the compelling state interest in self-governance. Perhaps by the disclosure of Mrs. Powell’s condition some citizens learned that even well-situated people can suffer from depression. This can serve the goals of self-governance. But if the social value served by the story was to increase public awareness of the disease, the articles fell short of this goal. As the court stated in Diaz, “The tenor of the article was by no means an attempt to enlighten the public on a contemporary social issue… The social utility of the information must be viewed in context, and not based upon some arguably meritorious and unintended purpose.” Simply identifying a sufferer of a disease without providing supporting information about it does nothing to increase public awareness.

Moreover, even if the intention is to educate the public about a disease, it may not be necessary to violate the privacy of person suffering from the condition by identifying him. This point was made strongly in Barber v. Time, Inc., where the court stated that, “[i]t was not necessary to state plaintiff’s name in order to give medical information to the public as to the symptoms, nature, causes or results of her ailment.” A similar finding was made by the court in Lambert v. Dow Chemical Co., where the court found that while showing in safety lectures of photo of gaping wound in plaintiff’s leg was a legitimate use, there was no need to identify plaintiff by name.

331. Diaz, 188 Cal. Rptr, at 773.
332. 159 S.W.2d 291 (Mo. 1942).
333. Id. at 295.
Finally, if self-governance was the social value served by the disclosure, General Powell's comments concerning his decision not to run for office support the position that nondisclosure would better have served the goal of self-governance. General Powell implied that his decision not to run for office was based at least partially on his concern about the invasion of his family's privacy. The fear of an unrestricted press may have discouraged a viable person from running for office. General Powell arguably would have been a viable candidate for office. If elected, he would have been this nation's first African-American President. Our nation may have suffered a considerable loss when General Powell declined to run for office. This social value was undermined by the publicity, rather than enhanced.

b. Autonomy

Mrs. Powell could argue that protecting the information about her condition served the state interest in personal autonomy. Autonomy would allow her to choose whom would be privy to such personal information. The disclosure of private information about an individual violates that individual's right to autonomy. It removes from that individual the right to choose who shall have access to personal private information about herself and thus violates the principle of personal sovereignty.

c. Search for Truth

Mrs. Powell could argue that the private facts tort is necessary to further the state interest in truth. First, Mrs. Powell would argue that the search for truth is enhanced by confidentiality particularly when medical issues are involved. It is critical that people confide in their physicians completely and without reservation. If Mrs. Powell had known that her treatment for depression would become public information, she might not have sought treatment. Individuals need to confide not only for their own health, but for the health of the community. Eradication and treatment of disease is facilitated by conducting studies and experiments. Confidentiality encourages participation in such studies and experimental

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treatments. Many would not participate in these studies and experiments without the guaranty of privacy and confidentiality.\textsuperscript{337}

Second, Mrs. Powell could rebut the destigmatization argument. The destigmatization argument assumes that prejudice is born of ignorance. It assumes further that with more information about the subject of prejudice, truth will surface and the prejudice will be eliminated. These assumptions are questionable. Schauer offers a critique of the theory that truth will prevail over falsity, or that knowledge will prevail over ignorance.\textsuperscript{338} He argues that the theory is based on the assumption that people are rational and capable of objective reasoning.\textsuperscript{339} Thus, the destigmatization argument assumes that prejudice is rational. As history teaches, this is an insupportable assumption. To argue that truth will out over ignorance, it must be shown "either that true statements have some intrinsic property that allows their truth to be universally apparent, or that empirical evidence supports the belief that truth will prevail when matched against falsehood."\textsuperscript{340} Neither of these has been shown to be the case.

While the assumptions underlying the destigmatization argument are uncertain, the harm caused by the disclosure of private information is not. It is clear that that which was held private deliberately has become public, creating a loss of human dignity. The disclosure can engender feelings of humiliation and embarrassment. The harm done to the individual seems disproportionate to the tenuous good to the public that may result from the disclosure.

Finally, as argued above in connection with self-governance, because of the threat to his family's privacy we have lost the contributions to public discourse that Colin Powell may have made both as presidential candidate and president. We have suffered a loss because we are unable to hear his thoughts, ideas and opinions on issues that we face as a nation. The marketplace would have been better with these ideas.

\textsuperscript{337} See Farnsworth v. Proctor & Gamble Co., 758 F.2d 1545, 1546-47 (11th Cir. 1985) (affirming district court order denying defendant access to names and addresses of participants in medical study on Toxic Shock Syndrome).
\textsuperscript{338} Schauer, supra note 166, at 25-30.
\textsuperscript{339} Id. at 25-26.
\textsuperscript{340} Id. at 26.
2. Narrowly Tailored Restriction

After establishing that the private facts tort serves the compelling state interests of self-governance, autonomy and the search for truth, Mrs. Powell would have to establish that the tort was narrowly tailored to further those interests. The concern again is that the restriction must not unduly burden the First Amendment.

The private facts tort provides a civil damages remedy for the disclosure of deeply private facts. The issue becomes whether such a civil remedy is the least burdensome remedy available to a plaintiff. This article considers five alternative remedies to discern whether this is the least restrictive measure available: (1) criminal sanctions; (2) injunction; (3) retraction; (4) right of reply; and (5) governmental controls over the release of information.

Both criminal sanctions for the disclosure of deeply private facts and an injunction which would restrain the publication of the information would impose heavier burdens on the First Amendment than the existing civil remedy. Generally, criminal sanctions create more of a chilling effect than do civil sanctions. People are more concerned about being convicted of a crime, and risking a prison sentence than they are about having to pay a civil fine. The loss of liberty is a frightening prospect as is that of having a criminal record.

Prior restraints are more burdensome than civil penalties and are disfavored by courts.341 As the Supreme Court has stated, any "system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."342 Judicial disfavor of prior restraints is based on the fact that suppression occurs before the information is disseminated. The Supreme Court has indicated that punishment after publication is preferred to prior suppression:

[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.343

With an injunction, the court decides that the information will not be published. With the private facts tort, the decision to publish is left in the hands of the media defendant. The option for publishing remains. Thus, more speech will be published under the private facts tort than if the remedy were an injunction. Because an injunction would suppress speech prior to dissemination it would be more burdensome on the First Amendment than the civil damages remedy.

The harm that occurs when deeply private facts are disclosed cannot be remedied by either retraction or right of reply. These remedies are feasible when information disclosed is false. In this context, where the information disclosed is true, such remedies are meaningless. Once the true private information is publicized, a retraction is useless. Similarly, there is no reply to be made to the disclosure. The information is true. There is no record to set straight.

A final remedy is suggested by the Court in Florida Star.\textsuperscript{344} There, the state statute imposed civil sanctions on members of the mass media for printing, publishing or broadcasting the name of the victim of a sexual offense.\textsuperscript{345} The plaintiff’s name had been obtained from a police report which inadvertently had been placed in a pressroom accessible by the public.\textsuperscript{346} The Court held that the statute was not necessary to safeguard the compelling state interests identified.\textsuperscript{347} The Court suggested that there were more limited means of guarding against the release of the name of sexual assault victim where the government was responsible for the initial disclosure of information.\textsuperscript{348}

The Court’s rationale in Florida Star is inapplicable here. The information about Mrs. Powell was not released by a government actor. Thus, the possibility of tighter internal controls on the release of private information is not a viable option. None of the five alternatives would be less burdensome than the civil remedy provided by the private facts tort. Thus, in this case, the tort would seem necessary to serve the compelling state interests of self-governance, autonomy, and the search for truth.

\begin{footnotesize}
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  \item \textsuperscript{344} 491 U.S. 524.
  \item \textsuperscript{345} Florida Star v. B.J.F., 491 U.S. 524, 526 (1989).
  \item \textsuperscript{346} Id. at 528.
  \item \textsuperscript{347} Id. at 541.
  \item \textsuperscript{348} Id. at 538. The Court suggested that the police department should tighten its internal policies to prevent the inadvertent disclosure of the names of rape victims. Id.
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V. CONCLUSION

Allowing the right to privacy to preempt the First Amendment may not be as harmful to First Amendment values as has been suggested by some courts. Indeed, recognizing the privacy rights of individuals may promote, rather than undermine those values. Recognizing the privacy interests at stake allows us to retain our autonomy, our dignity and facilitates this experiment called democracy.