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## Candidate Privacy

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# CANDIDATE PRIVACY

Rebecca Green\*

*Abstract:* In the United States, we have long accepted that candidates for public office who have voluntarily stepped into the public eye sacrifice claims to privacy. This refrain is rooted deep within the American enterprise, emanating from the Framers’ concept of the informed citizen as a bedrock of democracy. Voters must have full information about candidates to make their choices at the ballot box. Even as privacy rights for ordinary citizens have expanded, privacy theorists and courts continue to exempt candidates from privacy protections. This Article suggests that two disruptions warrant revisiting the privacy interests of candidates. The first is a changing information architecture brought on by the rise of the internet and digital media that drastically alters how information about candidates is collected and circulated. The second is a shift in who runs for office. As women and minorities—targets of the worst forms of harassment—increasingly throw their hats in the ring, this Article argues that competing democratic values should challenge previous assumptions about candidate privacy. Far from suggesting easy answers, this Article offers a framework for courts to weigh candidate privacy interests in a more nuanced way, drawing on vetting principles for aspirants to other positions of public trust. While there are good reasons candidates should have far less privacy than ordinary citizens, the reflexive denial of candidate privacy must have its limits if we care about nourishing our evolving democracy.

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## INTRODUCTION

After Gary Hart told a Miami Herald reporter during the 1988 presidential campaign season that he'd done nothing "immoral,"<sup>1</sup> and that he held himself "to a high standard of public and private conduct,"<sup>2</sup> the decades-old gentleman's agreement that the press would not report on the extramarital detours of candidates for president fell by the wayside.<sup>3</sup> The reporter who asked Hart about his affair explained that he did not intend to delve into the question for salacious reasons but did so only upon Hart's affirmative denial.<sup>4</sup> This reporter believed Hart had lied.<sup>5</sup> And, he decided, that a candidate's lie is information voters should know.<sup>6</sup>

This event unleashed a flurry of scholarship about the ethics of reporting on the personal lives of candidates for office.<sup>7</sup> Commentators

1. Paul Taylor, Letter to the Editor, *Asking Gary Hart the Question He Asked For*, N.Y. TIMES (May 22, 1987), <https://www.nytimes.com/1987/05/22/opinion/1-asking-gary-hart-the-question-he-asked-for-126787.html> [<https://perma.cc/YXK4-KW6L>].

2. *Id.*

3. Throughout this country's history, the press was full of real and made-up stories of politicians' peccadillos. For a colorful description of one example, see VIRGINIUS DABNEY, *THE JEFFERSON SCANDALS: A REBUTTAL* 8–10 (1981) (describing a reporter at the Richmond Recorder's efforts in 1802 to expose Thomas Jefferson's alleged affair with Betsey Walker). See generally Charles S. Clark, *Politicians and Privacy*, 2 CQ RESEARCHER 37 (1992). President Franklin D. Roosevelt's term in office is widely credited as having rewritten "the rules of engagement for the relationship between the press and the politicians they covered." LARRY J. SABATO, *FEEDING FRENZY* 29 (1991). As Sabato describes, "[t]he Rooseveltian rule of thumb for press coverage of politicians was simple, and it endured for forty years . . . : The private life of a public figure should stay private and undisclosed unless it seriously impinged on his or her public performance." *Id.* at 30. And even then, Sabato notes, reporters often still declined to report. *Id.*; see also Clark, *supra*, at 4 (describing the sea of change the Hart incident brought about: "[m]ainstream journalism reached the pinnacle of its pursuit of the adultery issue when it dug into the private life of Democratic presidential hopeful Gary Hart in May 1987. The coverage of Hart broke new ground . . .").

4. See Taylor, *supra* note 1.

5. See *id.* Subsequent reporting suggests the truth may have been more complicated. See James Fallows, *Was Gary Hart Set Up?*, THE ATLANTIC (Nov. 2018), <https://www.theatlantic.com/magazine/archive/2018/11/was-gary-hart-set-up/570802/> [<https://perma.cc/E5UW-K63X>] (describing how Lee Atwater may have set Gary Hart up for the fall).

6. See Taylor, *supra* note 1.

7. See, e.g., Sanford Levinson, *Public Lives and the Limits of Privacy*, 21 POL. SCI. & POL. 263 (1988) ("The very fact that public figures are by definition 'newsworthy' means that in fact they forego any legal protection against the publication of true facts about them, however embarrassing or offensive such publication might be."); see also Ralph G. Elliot, *The Private Lives of Public Servants:*

largely came to a consensus: candidates are fair game.<sup>8</sup> Today, the personal lives, medical histories, criminal records, financial dealings, and mountains of other personal information about candidates are regularly circulated during campaigns.<sup>9</sup> And that is as it should be if you believe that voters have the right to decide what information is relevant to their choices at the ballot box.

But the modern campaign environment suggests some reasons for pause. First, the gatekeeper role the press traditionally played in vetting candidates is gone.<sup>10</sup> In today's campaigns, any person (and even non-humans)<sup>11</sup> can access and share material about candidates, reaching millions of eyeballs. Second, even as the drive for more diverse representation expands,<sup>12</sup> disproportionate online and offline harassment of women and minority<sup>13</sup> candidates impacts whether such individuals seek office.<sup>14</sup>

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*What Is the Public Entitled to Know?*, 27 CONN. L. REV. 821, 826–27 (1995); Anita L. Allen, *Privacy and the Public Official: Talking About Sex as a Dilemma for Democracy*, 67 GEO. WASH. L. REV. 1165, 1170 (1999) (but noting that “the notion that public officials should be denied privacy does not follow from the premise that the public should trust and expect accountability of public officials.”). Bill Clinton’s scandals did their part to fan the scholarship flame soon after. *See, e.g.*, JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (2000), the first lines of which read, “[t]his book began as an effort to understand the constitutional, legal, and political drama that culminated in the impeachment and acquittal of President Bill Clinton.” *Id.* at 3.

8. *Id.*

9. Some information emanates from required disclosures at the state and federal level; other information comes via reporters and others. In many cases, candidates voluntarily disclose personal information to beat the press to it. In the 2020 Democratic primary, many candidates voluntarily disclosed their tax returns. Reid J. Epstein & Richard Rubin, *Democratic Presidential Candidates Release Tax Returns, Urge Others to Follow Suit*, WALL STREET J. (Mar. 29, 2019), <https://www.wsj.com/articles/democratic-presidential-candidates-release-tax-returns-urge-others-to-follow-suit-11553893002> (last visited Dec. 19, 2019).

10. *See infra* section II.A.

11. *See* Jonah E. Bromwich, *Bots of the Internet, Reveal Yourselves!*, N.Y. TIMES (July 16, 2018), <https://www.nytimes.com/2018/07/16/style/how-to-regulate-bots.html> (last visited Feb. 17, 2020) (discussing California legislation aimed at curbing distortions in political discourse caused by bots).

12. Multiple national and state-level groups are dedicated to increasing the number of and supporting minority and women candidates. *See, e.g.*, EMILY’S LIST, <https://www.emilyslist.org> [<https://perma.cc/6XMF-ZTRJ>] (pro-choice Democratic women); GET HER ELECTED, <https://www.getherelected.com> [<https://perma.cc/6EV3-ZEBQ>] (progressive women); VICTORY INSTITUTE, <https://victoryinstitute.org> [<https://perma.cc/HGY4-3UD6>] (LGBTQ candidates); HIGHER HEIGHTS FOR AMERICA, <https://www.higherheightsforamerica.org> [<https://perma.cc/E967-R22Z>] (Black women); IGNITE, <http://ignite.org> [<https://perma.cc/H3U8-SHA9>] (young people); SHE SHOULD RUN, <https://www.sheshouldrun.org> [<https://perma.cc/FCH4-XUNH>] (women); MAGGIE’S LIST, <http://maggieslist.org> (last visited Feb. 15, 2020) (Conservative women).

13. The word “minority” as used here is intended to reference racial and sexual minorities as well as individuals belonging to other marginalized groups.

14. Jennifer Lawless & Richard Fox, *Men Rule: The Continued Under-Representation of Women in U.S. Politics*, AM. U. WOMEN & POL. INST. 11 (2012), <https://www.american.edu/spa/wpi/upload/2012-Men-Rule-Report-final-web.pdf> [<https://perma.cc/6V7B-PBGT>] (“[W]omen are significantly more likely than men to be deterred from running for office because of the potential loss of privacy . . . .”); *see also infra* section II.B.

Numerous women and minority candidates' experiences bear this out in the United States and around the world.<sup>15</sup> Take for example Kiah Morris, Vermont's only female African American member of the state legislature—until she resigned from office and dropped out of her reelection campaign in 2018. Morris experienced significant and severe harassment at her home and online: a home invasion, threatening and racist graffiti, and death threats.<sup>16</sup> Upon her resignation, Morris's bitterness was evident:

[T]o know that as an elected official and as a person of prominence that I couldn't even find the protection and the justice that my family deserves so that we can have a sense of peace—that we weren't able to access that, that the system was not there in the ways that we needed—that is stunning.<sup>17</sup>

Across the pond, instances of horrific online abuse targeted at female politicians in the UK Parliament have prompted many women to bow out of politics altogether.<sup>18</sup> On November 1, 2019, eighteen female members of Parliament announced they would not seek reelection. As one female lawmaker lamented upon sharing her decision, "I am exhausted by the invasion into my privacy and the nastiness and intimidation that has become commonplace."<sup>19</sup> A study of abusive tweets in Britain's 2017 general election revealed that Dianne Abbott, Parliament's first black female lawmaker, bore the brunt of nearly half of the abusive tweets

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15. The United States is currently experiencing a political environment in which overt misogyny and racism from the highest levels of our government toward sitting officials and candidates for office is common. *See infra* note 16.

16. Jess Aloe, *Attorney General: No Charges in Racial Harassment of Former Rep. Kiah Morris*, BURLINGTON FREE PRESS, (Jan. 15, 2019, 10:48 AM), <https://www.burlingtonfreepress.com/story/news/2019/01/14/racial-harassment-led-kiah-morris-resign-crime-bennington-tj-donovan-attorney-general-vermont/2547664002/> [perma.cc/FAW9-YCUE]; Meagan Flynn, *A White Nationalist's Harassment Helped Force a Black Female Lawmaker to Resign. He Won't Face Charges*, WASH. POST (Jan. 15, 2019), [https://www.washingtonpost.com/nation/2019/01/15/white-nationalists-harassment-helped-force-black-female-lawmaker-resign-he-wont-face-charges/?noredirect=on&utm\\_term=.979eae09d6a6](https://www.washingtonpost.com/nation/2019/01/15/white-nationalists-harassment-helped-force-black-female-lawmaker-resign-he-wont-face-charges/?noredirect=on&utm_term=.979eae09d6a6) [https://perma.cc/7LUM-E4LX]. A full report on extent of harassment is compiled on the state's website. *See* OFFICE OF THE VT. ATT'Y GEN., VERMONT ATTORNEY GENERAL'S OFFICE'S FINDINGS REGARDING THE INVESTIGATION OF REPORTED CRIMES AGAINST FORMER VERMONT STATE REPRESENTATIVE, KIAH MORRIS AND HER FAMILY, <https://ago.vermont.gov/wp-content/uploads/2019/01/Morris-Investigation-and-Legal-Findings.pdf> [https://perma.cc/37LF-Q26G].

17. Liam Stack, *Black Female Lawmaker in Vermont Resigns After Racial Harassment*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/kiah-morris-vermont.html> [https://perma.cc/E443-ZU9K].

18. Megan Specia, *Threats and Abuse Prompt Female Lawmakers to Leave U.K. Parliament*, N.Y. TIMES (Nov. 1, 2019), <https://www.nytimes.com/2019/11/01/world/europe/women-parliament-abuse.html> [https://perma.cc/ZC4F-YNKC] ("Sexually charged rhetoric has been prevalent in the online abuse of female [Members of Parliament] with threats to rape us and referring to us by our genitalia.").

19. *Id.*

leveled against all lawmakers.<sup>20</sup> Explicitly citing the abuse she received, Abbott decided against seeking reelection.<sup>21</sup>

While the bright glare of running for office shines on every candidate,<sup>22</sup> are certain kinds of candidates facing more and harsher privacy incursions than others? Will this result in a weakened, less diverse field?<sup>23</sup> What do we lose when strong candidates decide to not run because of cybermobs and targeted attacks?<sup>24</sup> Candidates have long faced intense scrutiny, but

20. See *Black and Asian Women MPs Abused More Online*, AMNESTY INT'L U.K., <https://www.amnesty.org.uk/online-violence-women-mps> [perma.cc/6XTY-MC5U].

21. Simon Murphy, *Diane Abbott Speaks Out on Online Abuse as Female MPs Step Down*, GUARDIAN (Oct. 31, 2019), <https://www.theguardian.com/politics/2019/oct/31/diane-abbott-speaks-out-on-online-abuse-as-female-mps-step-down> [https://perma.cc/YMZ9-SBYU].

22. There are countless examples of grievous privacy invasions of non-minority candidates today and reaching back across the decades. See Sabato, *supra* note 3, at 25–52 (chronicling the privacy-invasive nature of the press in reporting on candidates and politicians). Leadership figures in the private sector have commonly faced similar privacy incursions as a consequence of high-profile roles. See Victoria Schwartz, *Disclosing Corporate Disclosure Policies*, 40 FLA. ST. U. L. REV. 487, 505, 533 (2013) (examining privacy interests of corporate chief executive officer candidates during the vetting process).

23. Many groups advocating for increased minority and women's representation at all political levels believe that democracy is enhanced when traditional barriers to minority and women candidates are challenged. See *supra* note 12. In the case of women, studies bear this out. See, e.g., Lonna R. Atkinson & Nancy Carillo, *More is Better: The Influence of Collective Female Descriptive Representation on External Efficacy*, POL. & GENDER 3, 79 (2007) (noting that an increase in female representatives increases female citizens' belief that government is responsive); Susan B. Hansen, *Talking About Politics: Gender and Contextual Effects on Political Proselytizing*, 59 J. POL. 73 (1997) (women in congressional districts with female representation more willing to discuss politics); Caroline Hubbard, *Violence Against Women: A Threat to Participatory Democracy*, NAT'L DEMOCRATIC INST.: DEMOCRACY WORKS (June 27, 2016), <https://www.demworks.org/violence-against-women-threat-participatory-democracy> [perma.cc/3XRJ-H836] (“As half the world's population, women are a key part of any democracy and their full and equal participation is a human right, and a measure of democratic integrity.”).

24. What is a “good candidate”? The answer will vary with each voter. For present purposes, a good candidate is understood as an individual dedicated to serving the public interest over their own whose intellect, empathy, life experiences, and skills make them a capable and responsible representative of constituent needs and interests. Some organizations have posted guides to help voters determine what to look for. See, e.g., League of Women Voters Educ. Fund, *How to Judge a Candidate*, SMARTVOTER, <http://www.smartvoter.org/voter/judgecan.html> [https://perma.cc/553Q-9S33]. Scholars have long studied and documented the inverse relationship between media scrutiny and the quality of public officials. Larry Sabato, for example, writing in 1993, observed that “American society today is losing the services of many exceptionally talented individuals who would make outstanding contributions to the commonweal, but who understandably will not subject themselves and their loved ones to abusive, intrusive press coverage.” Sabato, *supra* note 3, at 211. In 2006, political scientist Daniel Sutter set out to test whether privacy costs lowered the quality of candidates who run for office. Daniel Sutter, *Media Scrutiny and the Quality of Public Officials*, 129 PUB. CHOICE 25 (2006). He found in part, “[g]ood [candidates] may experience more disutility from the distress of family and friends when private matters are exposed to public scrutiny. Concern for others may be a defining element of character. Zealots and megalomaniacs will bear any burden to secure office, including costs imposed on family members. If these indeed are negative character traits, [lower quality candidates] may well have lower privacy costs.” *Id.* at 35; see also TYLER COWEN, WHAT PRICE FAME? 130–61 (2000) (discussing how privacy invasion affects public figures).

the current information environment is unlike any in U.S. history.<sup>25</sup> Is it possible to enter a race for public office today without losing dignity? This Article explores privacy incursions candidates currently face and suggests that traditional refusals to protect candidate privacy be revisited.<sup>26</sup>

An important threshold question is whether “privacy” is the right label to affix to the challenges described.<sup>27</sup> Paradigmatic examples of invasions of candidate privacy are disclosures about their sex lives or medical ailments. Is the harassment Kiah Morris experienced a privacy invasion? Are barrages of anonymous online death and rape threats *privacy* harms? State and federal cyberstalking and harassment laws could address these problems, though they commonly fail to provide adequate protections—as evidenced by the experience of Kiah Morris.<sup>28</sup> Recent work on sexual

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25. The widespread practice of candidate “tracking” (for instance, hiring people to follow candidates and record them) as part of opposition research is now standard. See Peter Callaghan, *How the ‘tracker’ became strangest, most important job in campaign politics*, MINNPOST (Sept. 17, 2018), <https://www.minnpost.com/state-government/2018/09/how-the-tracker-became-strangest-most-important-job-in-campaign-politics/> [<https://perma.cc/FHM2-UFA3>]; Tim Reid, *Special Report: The Golden Age of Opposition Research*, REUTERS (Nov. 14, 2011), <https://www.reuters.com/article/us-campaign-opposeresearch/special-report-the-golden-age-of-opposition-research-idUSTRE7AD0M920111114> [<https://perma.cc/PE48-VBFZ>].

26. Why only candidates? Why not discuss the privacy interests of sitting public officials as well? Why not also weigh the privacy interests of all public servants, whether elected or appointed? The present effort leaves the interests of sitting officials for another day (unless, of course, the sitting official is running for reelection). As Victoria Schwartz suggests, privacy interests of candidates for office are in some ways more pressing than those of sitting officials. Schwartz, *supra* note 22, at 47 (“[T]he disclosure of personal information that could impact the performance of an elected official is more important during the campaign, when voters need to make an informed decision . . .”). For analytic clarity and because this Article’s focus is on democratic values underpinning U.S. elections, this effort addresses only the privacy interests of those running for office. Quite a lot has been written about government transparency and oversight and the need to access information about sitting officeholders and their decisions as a matter of government accountability. See, e.g., AKHLAQUE HAQUE, *SURVEILLANCE, TRANSPARENCY AND DEMOCRACY: PUBLIC ADMINISTRATION IN THE INFORMATION AGE* (2015); *TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION* (David E. Pozen & Michael Schudson eds., 2018); MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945–1975*, at 16 (2015) (describing the “transparency imperative and a new embrace of the right to know”).

27. Privacy as a concept is notoriously vague. Daniel Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 553 (2006) (discussing how elusive the concept has proved and providing a taxonomy for understanding the term). In the case of candidate privacy, the question of what is private can elicit a circular response: if disclosures about candidates traverse some cultural boundary, a violation occurs only once that boundary (however defined) is crossed. This circularity is a perennial problem in privacy law, particularly in the Fourth Amendment search and seizure realm which in part relies on subjective expectations of privacy determine whether privacy will be protected. *But see* Matthew B. Kugler & Lior J. Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. 1747, 1747 (2017) (arguing that “popular privacy expectations are far more stable than most judges and commentators have been assuming”).

28. See e.g., DANIELLE K. CITRON, *HATE CRIMES IN CYBERSPACE* 123–27 (2014) (describing the failure of traditional criminal law to address cyberharassment). A parallel instance of the law rising to address new forms of harm is the development of criminal revenge porn prohibitions—a new form of legal protection for victims of nonconsensual pornography. Cyberstalking and harassment laws fell short of fully protecting the interests of victims in those cases. Recognizing changed circumstances and new forms of harm, forty-six states now have revenge porn statutes on the books. See *Forty-Six*

privacy and cyber harassment demonstrates that the failure of the law to address these harms silences its victims and chills speech.<sup>29</sup> When victims are candidates for office, the injury broadens from an individual harm to one that threatens the democratic process. This Article suggests that protecting candidate privacy is about more than shrouding true, private facts about them. It takes an intersectional,<sup>30</sup> broad view of candidate privacy that includes non-libelous attacks on the dignity interests of candidates.<sup>31</sup> Protection of those dignity interests could come from many sources. Thus far, the law has weighed heavily against candidates looking to privacy law for redress for dignity-based harms.<sup>32</sup> But should it?

Traditional candidate privacy debates have focused on the disclosure question: whether the media should report on the private lives of candidates.<sup>33</sup> Legal scholars have written about candidate privacy using this frame.<sup>34</sup> But much of this commentary predates the rise of the internet

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*States and D.C. and One Territory Now Have Revenge Porn Laws*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> [perma.cc/WZ7K-NWJD]; Danielle K. Citron & Mary A. Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014); *infra* section III.B.

29. Danielle K. Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1915–16 (2019) (describing, inter alia, how sexual privacy invasions can operate to silence victims); Danielle K. Citron & Jonathon W. Penney, *When Law Frees Us to Speak*, 87 FORDHAM L. REV. 2317, 2319 (2019) (“Online abuse has a ‘totalizing and devastating impact’ upon victims . . . . Because online abuse disproportionately impacts women and marginalized communities, so does the silencing that it produces.” (quoting CITRON, *supra* note 28, at 29)).

30. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243 (1991) (describing violence against women as often the product of intersecting patterns of racism and sexism).

31. Defamation law provides an avenue for candidates to remedy a certain class of dignity harms—when lies about them are told. See *infra* section I.C (distinguishing defamation and privacy claims). Politicians routinely call for changes to defamation law to make it easier for them to go after defendants. Adam Liptak, *Justice Clarence Thomas Calls for Reconsideration of Landmark Libel Ruling*, N.Y. TIMES (Feb. 19, 2019), <https://www.nytimes.com/2019/02/19/us/politics/clarence-thomas-first-amendment-libel.html> (last visited Jan. 17, 2020) (quoting President Trump as saying, “I am going to open up libel laws so when they write purposefully negative and horrible and false articles, we can sue them and win lots of money”). Acknowledging that a higher standard of proof is appropriate for defamatory speech about candidates and officials, the present effort explores how best to calibrate privacy protections when information is true.

32. See *infra* Part I.

33. See, e.g., Dorota Mokrosinska, *How Much Privacy for Public Officials?*, in SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES 181, 181 (Beate Roessler & Dorota Mokrosinska eds., 2015); Clark, *supra* note 3, at 3 (noting that journalists are “still struggling to write their ethical rulebook”); Louis W. Hodges, *The Journalist and Privacy*, 12 SOC. RESP.: JOURNALISM L. MED. 5 (1983); Stanley A. Renshon, *Some Observations on Character and Privacy Issues in Presidential Campaigns*, 13 POL. PSYCHOL. 565, 583 (1992).

34. Those weighing in generally conclude that the law does not protect candidate privacy. See, e.g., Allen, *supra* note 7, at 1170; Teneille R. Brown, *Double Helix, Double Standards: Private Matters and Public People*, 11 J. HEALTH CARE L. & POL’Y 295 (2008) (providing a comprehensive discussion of legal rules governing disclosure of presidential candidates’ health information); Levinson, *supra* note 7, at 263; Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 259 (1961) (If a “verbal attack is made in order to show the unfitness of a candidate



and the current degradation of public discourse it has engendered.<sup>35</sup> This Article contributes to legal scholarship on candidate privacy by taking the present context into account. Part I chronicles the democratic mainstay of the “informed citizen” as the basis for the right of access to information about candidates for office. It discusses the durability of this principle among early privacy theorists and by courts routinely protecting the public’s right to know. Part II lays out a set of changed circumstances, namely a radically transformed information environment and a changing makeup of who runs for political office in the United States. It argues that these fundamental shifts warrant rethinking the reflexive denial of candidate privacy interests. Part III starts with a comparative analysis of lawyer vetting, suggesting a set of core principles that support a more nuanced approach to protecting the privacy interests of candidates. It next applies a framework drawn from this comparison, showing examples of how candidate privacy might be revisited. Finally, it demonstrates how weighing candidate privacy in a more nuanced way does not inevitably inhibit voters’ informed choices at the ballot box. Acknowledging that the public right to know is rightly the default, it examines whether privacy law might assist candidates in defending their dignity while still ensuring that information about them circulates to voters.

## I. DEMOCRATIC TRADITION AND CANDIDATE (NON) PRIVACY

### A. *The Informed Citizen*

That privacy enhances democracy is a well-settled principle. As Justice Brennan famously framed, without privacy “the hazard that as a people we may become hagridden and furtive is not fantasy.”<sup>36</sup> Yet when it comes

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for governmental office, the act is properly regarded as a citizen’s participation in government. It is, therefore, protected by the First Amendment”).

35. See generally Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a Post-Truth World*, ST. LOUIS L. REV. 7 (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3430588&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3430588&download=yes) (last visited Jan. 17, 2020) (describing the “post-truth era” in politics).

36. *Lopez v. United States*, 373 U.S. 427, 470 (1963) (Brennan, J., dissenting); see also P. ALLAN DIONISOPOULOS & CRAIG R. DUCAT, *THE RIGHT TO PRIVACY: ESSAYS AND CASES 2* (1976) (“[I]n a free and democratic society, public affairs are usually marked by openness and private affairs are normally shielded from view, while, in totalitarian states, the reverse is generally true.”); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 546 (1970) (“[A] system of privacy is vital to the working of the democratic process.”); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1003 (1964) (“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.”); Charles Fried, *Privacy*, 77 YALE L.J. 475, 483 (1968) (noting that “privacy has a . . . defensive role in protecting our liberty”); Hodges, *supra* note 33, at 10 (“Indeed [privacy] lies

to candidates for public office, it is an equally settled democratic value that citizens must be adequately informed about candidates.<sup>37</sup> Early democratic theorists reasoned that the ability to adequately vet candidates is the cornerstone of democracy.<sup>38</sup> John Locke suggested two core pillars in a democracy: first, that government cannot exist without the consent of the governed, and second, that adults must be free to exercise informed consent.<sup>39</sup> The Framers tied the legitimacy of government to an informed citizenry: the people must have in some meaningful sense chosen the government and its policies. James Madison wrote that the right to elect members of government “depends on the knowledge of the comparative merits and demerits of the candidates for public trust; and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.”<sup>40</sup> John Adams took this right to the heavenly realm, writing that the people had a divine right to know the “characters and conduct” of their rulers.<sup>41</sup>

The concept of an informed citizenry drove post-revolutionary leaders to establish institutions that would ensure that citizens could actively participate in democracy, including the free press, schools, colleges, libraries, and learned societies.<sup>42</sup> Over time, especially as voting rights expanded, the importance of an informed citizenry became even more firmly rooted, establishing to not just the right to make informed decisions at the ballot box, but also to information about the machinations of government and officials managing it.<sup>43</sup>

As the next section describes, when legal theorists first began to frame the “right of privacy,” the concept of an informed citizenry proved durable in exempting candidates from the privacy protections sought.

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at the very heart of the most cherished values of western civilization: freedom, the dignity of humankind, and individual autonomy.”).

37. The concept of an informed citizenry has its roots in British political thought as a bulwark against tyranny. *See generally* RICHARD D. BROWN, *THE STRENGTH OF A PEOPLE: THE IDEA OF AN INFORMED CITIZENRY IN AMERICA 1650–1870* (1996).

38. *Id.* at xiii (“For at least two centuries, Americans have believed in the idea that citizens should be informed in order to be able to exercise their civic responsibilities wisely.”).

39. *See generally* GILLIAN BROWN, *THE CONSENT OF THE GOVERNED: THE LOCKEAN LEGACY IN EARLY AMERICAN CULTURE 20–21* (2001) (citing John Locke, *The Second Treatise, in TWO TREATISES OF GOVERNMENT* 34, 84–85 (Peter Laslett ed., Cambridge Univ. Press 1988)).

40. JAMES MADISON, *THE VIRGINIA REPORT OF 1799–1800, TOUCHING THE ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIRGINIA RESOLUTIONS 227* (J.W. Randolph ed., 1850).

41. John Adams, *A Dissertation of the Canon and Feudal Law, No. 3, in PAPERS OF JOHN ADAMS* 118, 120–21 (Robert J. Taylor et al. eds., Harvard Univ. Press 1977) (Boston Gazette 1765).

42. BROWN, *supra* note 37, at 67–84.

43. *Id.* at 205–07. Historically, the concept of the informed citizen as a precondition of democracy excluded huge swaths of the population due to the widespread exclusion of women and African Americans from both voting and educational opportunity. *Id.* at 157–95.

B. *Privacy Theory Foundations and the Explicit Exclusion of Candidates from Privacy Protections*

In 1891, in their famed article *The Right to Privacy*, Samuel Warren and Lewis Brandeis situated the recognition of personal privacy in a natural progression of the civilizing effect of law.<sup>44</sup> Charting the urgency of protecting personal dignity in the face of an increasingly intrusive media and advancing technology (in their case the rise of instantaneous photography), Warren and Brandeis set the stage for courts to recognize the “right to be let alone.”<sup>45</sup> The pair are widely credited for advancing an actionable right to privacy in U.S. law.<sup>46</sup> As strident as they were in advocating for the right of privacy, Warren and Brandeis explicitly excluded candidates for public office from the privacy protections they championed:

Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for public office. . . . To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety.<sup>47</sup>

Warren and Brandeis have been criticized for their elitist approach to privacy protection:<sup>48</sup> i.e., that elites (like them) should be protected from the idle and prying eyes of the “indolent masses.”<sup>49</sup> Even still, they

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44. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890–1891) (“Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”).

45. *Id.* at 195. Warren and Brandeis understood privacy as very much a *dignity*-based right. They describe the tension protecting privacy entails as a line between “dignity and convenience of the individual” versus the “demands of the public welfare or of private justice.” *Id.* at 214.

46. Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 1 (1979) (“[The right to privacy] dates back to a law review article published in December of 1890 by two young Boston lawyers, Samuel Warren and Louis Brandeis. Roscoe Pound described this article as having done ‘nothing less than add a chapter to our law.’” (quoting Letter from Roscoe Pound to William Chilton (1916))); see also Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703, 703 (1990).

47. Warren & Brandeis, *supra* note 44, at 215.

48. ROBERT E. SMITH, BEN FRANKLIN’S WEB SITE: PRIVACY AND CURIOSITY FROM PLYMOUTH ROCK TO THE INTERNET 125, 135–36 (2000).

49. *Id.* at 196 (“To occupy the indolent, column upon column is filled with idle gossip. . . . [M]an, under the refining influence of culture, has become more sensitive to publicity.”); see also NEIL RICHARDS, INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE 19 (2015) (“Warren and Brandeis clearly wanted to protect the refined sensibilities of elites from the unwanted gaze of their social inferiors . . .”).

exempted one particular sort of elite from the privacy protections they sought: candidates.

Later privacy theorists echoed Warren and Brandeis's exemption. In his influential 1960 law review article *Privacy*, William Prosser categorized intervening judicial recognition of privacy rights since Warren and Brandeis's article into four distinct privacy torts.<sup>50</sup> In this categorization, Prosser mentioned candidates for office only once, in a section discussing the First Amendment limits of tort privacy.<sup>51</sup> As an example of an individual whose privacy torts should not protect, Prosser noted that "there is very little in the way of information about the President of the United States, or any candidate for that high office, that is not a matter of legitimate public concern."<sup>52</sup>

In his subsequent writing, Prosser underscored a common law privilege against recovery in tort for commentary on public figures, including, prototypically, candidates.<sup>53</sup> Still, Prosser did acknowledge that candidates may retain privacy interest despite their public status. Describing how courts generally approached the question of the personal lives of candidates, Prosser wrote:

One question upon which there has as yet been little discussion is the common law limitation that 'fair comment' extends only to matter bearing upon the . . . fitness of the . . . candidate, and not to his purely private life or character as an individual. It is obvious, of course, that in many instances the latter will have an obvious bearing upon the former; *but where it did not, it was held that the privilege did not extend to it.*<sup>54</sup>

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50. William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). Prosser served as chief reporter and codified his four privacy torts in the RESTATEMENT (SECOND) OF TORTS § 652B-E (2019); see also Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1888 (2010) (Prosser's four privacy torts are: Intrusion Upon Seclusion, § 652B; Appropriation of Name or Likeness, § 652C; Disclosure/Publicity Given to Private Life, § 652D; and False Light, § 652E). Richards and Solove describe criticism of Prosser's fossilized four-part characterization of tort privacy, noting Edward Bloustein's 1964 critique. *Id.* at 1914 ("Bloustein suggested that privacy invasions were not four distinct interests with little in common, for they all shared a similar trait: they were 'demeaning to individuality' and 'an affront to personal dignity.'" (citing Bloustein, *supra* note 36, at 973)).

51. Prosser, *supra* note 50, at 417–18 (The full sentence reads, "[p]erhaps there is very little in the way of information about the President of the United States, or any candidate for that high office, that is not a matter of legitimate public concern; but when a mere member of the armed forces is in question, the line is drawn at his military service, and those things that more or less directly bear upon it.").

52. *Id.* at 417. Prosser also cites disclosures of Grover Cleveland's alleged illegitimate child in 1884, presumably as an example of a private matter legitimately in the public interest. *Id.* at 417 n.282.

53. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 822 (4th ed. 1971).

54. *Id.* (emphasis added).

Prosser then signaled, however, that such recognition might be curbed under the First Amendment.<sup>55</sup>

Alan Westin, another “founding father” in the field of privacy law and author of the seminal 1967 book *Privacy and Freedom*, argued powerfully that privacy constituted a core pillar in democratic society in contrast with totalitarian states in which citizens have none.<sup>56</sup> Yet Westin too made exceptions for candidates for public office (and government transparency generally). He warned that “[p]ersons who venture into . . . civic life sometimes claim an unjustified right to privacy from fair reply or fair criticism.”<sup>57</sup> Westin acknowledged that there must be “enough privacy to nourish individual creativity and group expression; [but] enough publicity of government affairs to let the public know the facts necessary to form judgments in political matters.”<sup>58</sup>

Foundational privacy theorists, conscious of the democratic tradition of an informed citizenry and the voluntary nature of running for office, consistently carved candidates out of the privacy protections they promoted. As the next section demonstrates, courts faced with candidate assertions of privacy have done so as well.

### C. *Courts and Candidate Privacy*

Candidates have sought legal protection from violations of their privacy in numerous contexts, using numerous legal levers—from tort to

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55. *Id.* (“The rule appears to be an obviously reasonable one, and it may no doubt be expected to be taken over under the Constitution.”).

56. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 24–25 (1967).

57. *Id.* at 25. Voluntariness, or as Westin describes, “venturing into public debates or civic life,” is an animating feature of privacy theorists’ dismissal of candidate privacy. *Id.* It is a choice. Similarly, such agency has long been cited to brush away sexual privacy incursions. Citron, *Sexual Privacy*, *supra* note 29, at 1876 (“[S]aying that victims ‘asked for it’ is just another way that society has long trivialized harms suffered . . .”).

58. WESTIN, *supra* note 56, at 26. Part of the thread uniting privacy theorists’ traditional refusal to protect candidate privacy is the voluntariness of the decision to run for office. By choosing to step forward, one’s privacy interests are implicitly forfeited. This comports with the common privacy law principle that once information is voluntarily revealed in public, that information is by definition no longer private. In the Fourth Amendment context, this principle is known as the “third-party doctrine.” See Neil Richards, *The Third-Party Doctrine and the Future of the Cloud*, 94 WASH. U. L. REV. 1441 (2017) (describing the third-party doctrine and challenges in applying it in a digital age). In *United States v. Jones*, a Fourth Amendment case about long-term GPS tracking, Justice Sotomayor challenged the concept that information voluntarily disclosed in public loses all claim to privacy: “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. . . . This approach is ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties. . . .” 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring). Sotomayor cautioned against treating “secrecy as a prerequisite for privacy.” *Id.* at 418.

state and federal constitutional claims.<sup>59</sup> In cases dating from the early 1900s to present, courts have exhibited the same reflexive denial of protection for candidate privacy that privacy theorists forwarded, citing the value of an informed citizenry, waiver via the voluntary choice to run for office, and the status of information about candidates as paradigmatic “matters of public concern.”<sup>60</sup> Facing these formidable headwinds, the discussion below provides a sampling of privacy claims that candidates have attempted.

A first category of claims sound in tort.<sup>61</sup> In contrast to defamation claims to which truth is a defense, privacy torts remedy privacy and dignity interests that are harmed when true information is revealed.<sup>62</sup> Because torts are creatures of state law, claims and elements required to prove them vary. What does not vary is state courts’ routine unwillingness to hand candidates privacy tort victories.

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59. Though nowhere explicitly recognized in the Constitution, the U.S. Supreme Court has recognized a constitutional right of privacy located in the “penumbras” of amendments in the Bill of Rights. See *United States v. Griswold*, 381 U.S. 479, 484–86 (1965). Candidates have asserted constitutional claims of a right of privacy via the First, Fourth, Fifth, and Fourteenth Amendments. See, e.g., *Medina v. City of Osawatomie*, 992 F. Supp. 1269, 1270 (D. Kan. 1998) (First and Fourth Amendments); *Patrick v. City of Overland Park, Kan.*, 937 F. Supp. 1491 (D. Kan. 1996) (First Amendment); *Jones v. Palmer Media, Inc.*, 478 F. Supp. 1124, 1126 (E.D. Tex. 1979) (Fifth Amendment); *Chamberlin v. Missouri Elections Comm’n*, 540 S.W.2d 876, 880 (Mo. 1976) (Fifth Amendment); *State v. Morgan*, No. 2294, 1987 WL 11809 (Ohio Ct. App. May 28, 1987) (Fifth Amendment).

60. See, e.g., *Roberson v. Rochester Folding-Box Co.*, 65 N.Y.S. 1109, 1110 (N.Y. Sup. Ct. 1900) (“The moment one voluntarily places himself before the public, either in accepting public office, or in becoming a candidate for office, or as an artist or literary man, he surrenders his right to privacy, and cannot complain of any fair or reasonable description or portraiture of himself.”); *Marks v. Jaffa*, 6 Misc. 290, 292 (N.Y. Sup. Ct. 1893) (“Private rights must be respected . . . [but w]hen they transgress the law . . . or put themselves up as candidates for public favor, they warrant criticism, and ought not to complain of it.”). In one of the foundational cases in which a court recognized the right to privacy following the Warren and Brandeis article, *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905), the court, in dicta, left open the possibility that candidates for public office could retain some privacy interests:

The most striking illustration of a waiver is where one either seeks or allows himself to be presented as a candidate for public office. He thereby waives any right to restrain or impede the public in any proper investigation into the conduct of his private life which may throw light upon his qualifications for the office, or the advisability of imposing upon him the public trust which the office carries. *But even in this case the waiver does not extend into those matters and transactions of private life which are wholly foreign, and can throw no light whatever upon the question as to his competency for the office, or the propriety of bestowing it upon him.* *Id.* at 72 (emphasis added).

61. See Prosser’s four privacy torts cited above, *supra* note 50.

62. See RESTATEMENT (SECOND) OF TORTS § 652E cmt. B (AM. LAW INST. 1977) (“It is not . . . necessary to the action for invasion of privacy that the plaintiff be defamed. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position. When this is the case and the matter attributed to the plaintiff is not defamatory, the rule here stated affords a different remedy, not available in an action for defamation.”).

Some candidates tried generalized “invasion of privacy” tort claims.<sup>63</sup> A frequently cited example is *Kappellas v. Kofman*.<sup>64</sup> In *Kappellas*, the Supreme Court of California dismissed an invasion of privacy claim brought by a candidate for office on behalf of her children.<sup>65</sup> The plaintiff, Inez Kappellas, ran for a spot on the city council of Alameda, California. Prior to her decision to join the race, Kappellas had spoken out against the business interests of the publisher of two local newspapers. Once Kappellas became a candidate, the publisher-defendant allegedly warned her that if she did not withdraw from the race, he would print “all the ‘dirt’ he could find” about her personal life and family.<sup>66</sup> Kappellas did not withdraw, and the defendant followed through with his threats in a series of editorials detailing Kappellas’s children’s delinquency. Kappellas alleged, inter alia, invasion of her children’s privacy.<sup>67</sup> In denying her privacy claim, the California Supreme Court explained that

Because of their public responsibilities, . . . candidates for . . . office have almost always been considered the paradigm case of “public figures” who should be subjected to the most thorough scrutiny. In choosing those who are to govern them, the public must . . . be afforded the opportunity of learning about any fact of a candidate’s life that may relate to his fitness for office.<sup>68</sup>

The *Kappellas* Court’s reference to public figures derives from *New York Times Co. v. Sullivan*,<sup>69</sup> decided five years prior, in which the U.S. Supreme Court required—in service of protecting First Amendment rights—that defamation plaintiffs to prove a heightened standard (that defendants acted with actual malice) when the plaintiff is a public figure.<sup>70</sup> In 1967, the Court extended its public figure/actual malice rule to privacy torts.<sup>71</sup> As a consequence, courts routinely apply the public figure doctrine to candidate privacy tort claims to protect the First Amendment rights of

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63. See, e.g., *Krueger v. Austad*, 545 N.W.2d 205 (S.D. 1996) (candidate brought invasion of privacy claim for letter in newspaper alleging wife’s improper business practices); *Matson v. Dvorak*, 40 Cal.App.4th 539 (Cal. Ct. App. 1995) (candidate for public office brought libel and invasion of privacy claims against contributor to political organization that accused candidate of having hundreds of dollars in unpaid fines and citations); *Santillo v. Reedel*, 634 A.2d 264 (Pa. Super. Ct. 1993) (candidate for district justice brought action alleging invasion of privacy against police chief).

64. 459 P.2d 912 (Cal. 1969).

65. See *id.* at 914.

66. *Id.* at 916.

67. *Id.* at 914 (Kappellas filed suit on her own behalf and on behalf of her minor children).

68. *Id.* at 922–23.

69. 376 U.S. 254 (1964).

70. *Id.* at 283.

71. See *Time, Inc. v. Hill*, 385 U.S. 374, 390–91 (1967) (applying *New York Times Co.*’s public figure doctrine to the false light tort).

defendants. For example, in *Vogel v. Felice*,<sup>72</sup> involving online statements that allegedly placed a candidate in a false light, a California court of appeals found that a lack of actual malice absolved the defendant of false light liability.<sup>73</sup>

Aside from the public figure doctrine, privacy tort elements may require courts to weigh whether the relevant information is a matter of public concern.<sup>74</sup> In the tort of public disclosure of private facts, for example, even highly offensive disclosures are permitted if they are “of legitimate concern to the public.”<sup>75</sup> Already highly deferential to the traditional media’s concept of what constitutes “news,”<sup>76</sup> private matters relating to candidates for public office are virtually always newsworthy.<sup>77</sup> Thus, for example, in the 2011 New Hampshire Supreme Court case *Lovejoy v. Linehan*,<sup>78</sup> a candidate for county sheriff brought a public disclosure of private facts claim against a deputy sheriff and a reporter for disclosing his annulled assault conviction to the public.<sup>79</sup> The court

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72. 26 Cal. Rptr. 3d 350 (Cal. Ct. App. 2005).

73. *Id.* at 360. In *Palmer v. Alvarado*, 561 S.W.3d 367 (Ky. Ct. App. 2018), a candidate sued his opponent alleging that ads aired during the campaign placed him in a false light. *Palmer*, 561 S.W.3d at 373 (“While coming close to false light, this is still within the bounds of a legitimate political purpose and does not rise to the level of actual malice.”). The Restatement’s version of the false light tort does not contain a newsworthiness or matter of public concern defense. RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977) (stating that liability in a False Light claim arises “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”).

74. The Restatement (Second) of Torts § 652D defines the “[p]ublicity [g]iven to [p]rivate [l]ife” tort as against “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 (AM. LAW INST. 1977) (emphasis added).

75. *Id.*

76. *Shulman v. Grp. W. Prods., Inc.* 955 P.2d 469, 485 (Cal. 1998) (“In general, it is not for a court or jury to say how a particular story is best covered. The constitutional privilege to publish truthful material ‘ceases to operate only when an editor abuses his broad discretion to publish matters that are of legitimate public interest.’” (quoting *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981))); *see also* *Richards & Solove, supra* note 50, at 1918 (“A number of courts are very deferential to the media on newsworthiness, essentially concluding that if the media chooses to publish a story, then this is the most viable evidence of its newsworthiness. . . . Such an approach virtually nullifies the [public disclosure of private facts] tort in the media context.”). For a critique of the newsworthiness problem in the computer age, *see* Erin C. Carroll, *Making News: Balancing Newsworthiness and Privacy in the Age of Algorithms*, 106 GEO. L.J. 69 (2017) (“[E]ditors . . . no longer dictate to the same degree what news we actually read. That determination is ever more in the hands of computer engineers in Silicon Valley.”).

77. Numerous cases exhibit the broad nature of the newsworthiness test and courts’ deference to editorial decisions of publishers. *See* Danielle K. Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1828–29 (2010) (noting that courts often defer to the media’s judgment of newsworthiness and providing empirical support for that claim).

78. 20 A.3d 274 (2011).

79. *Id.* at 275.



concluded that the “qualifications of a candidate for public office is an area of legitimate concern to the public and, therefore, a candidate loses his or her privacy right to this information.”<sup>80</sup> As *Lovejoy* shows, the legitimate public concern/newsworthiness test effectively precludes candidate disclosure claims.<sup>81</sup> Courts have thus been consistently protective of speech in the political realm as against candidate privacy tort claims.<sup>82</sup>

Aside from privacy tort claims, candidates have also asserted state and federal constitutional privacy claims against Watergate-era state mandates requiring them to file financial disclosures.<sup>83</sup> In *Klaus v. Minnesota State Ethics Commission*,<sup>84</sup> a candidate argued that the disclosure statute was an unconstitutional invasion of his right to privacy, the state lacked a compelling interest for requiring the disclosure, the statute infringed on his First Amendment rights, and that the statute violated the qualifications clause of the Minnesota Constitution (which states that “[n]o religious test or amount of property shall be required as a qualification for any office of public trust in the state”).<sup>85</sup> The Minnesota Supreme Court held that

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80. *Id.* at 278 (citing *Summe v. Kenton Cty. Clerk’s Office*, 626 F. Supp. 2d 680, 692 n.8 (E.D. Ky. 2009), *aff’d in part*, 604 F.3d 257 (6th Cir. 2010)); *see also* *Matson v. Dvorak*, 46 Cal. Rptr. 2d 880 (Cal. Ct. App. 1995) (holding that “whether a candidate for public office has refused or neglected to pay fines against him is a legitimate issue of public concern.”); *Fann v. City of Fairview, Tenn.*, 905 S.W.2d 167, 172 (Tenn. Ct. App. 1994) (holding “that the newspaper articles [disclosing expunged criminal records] clearly concerned a ‘matter of public significance’ as the truthful information concerned a candidate for public office”); *Santillo v. Reedel*, 634 A.2d 264, 266 (Pa. Super. Ct. 1993) (“[T]here is no question that the information [allegation of unwanted sexual advances against a minor] was of legitimate concern to the public . . . . As candidate for district justice, he sought a position that would enable him to judge the conduct of others and determine whether that conduct was in conformity with the law.”).

81. As commentators increasingly recognize, and will be explored more fully below, privacy torts’ shortcomings fail to address modern realities. Might other torts address candidate privacy concerns? For example, could a candidate faced with a highly offensive assault on their dignity seek redress for an intentional infliction of emotional distress (IIED)? RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1977). Given the U.S. Supreme Court’s reluctance to provide relief when the speech relates to a matter of public concern, candidates are hard-pressed to prevail under this tort theory as well. *See Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (holding that highly offensive picketing outside a service member’s funeral related to a concerned public matter and therefore entitled to First Amendment protection). Candidates asserting defamation and privacy tort claims often append IIED that generally rises and falls with those other claims. *See, e.g., Howell v. Am. Publ’g Co.*, 983 S.W.2d 79 (Tex. App. 1998). *But c.f. Miller v. Jones*, 970 P.2d 571, 577 (Nev. 1998) (denying a candidate’s IIED claim only because the candidate lacked sufficient evidence of emotional duress).

82. A good example is *Bartnicki v. Vopper*, 532 U.S. 514 (2001). In *Bartnicki*, an anonymous interloper recorded a cell phone conversation of two individuals involved in union negotiations in violation of wiretap statutes. *Id.* at 518–19. The Court denied relief to the plaintiffs in large part because the recorded discussion involved a matter of public concern: “a stranger’s illegal conduct [wiretapping] does not suffice to remove the First Amendment shield from speech about a matter of public concern.” *Id.* at 535.

83. *See supra* note 59.

84. *Klaus v. Minnesota State Ethics Comm’n*, 244 N.W.2d 672 (1976).

85. MINN. CONST. art. I, § 17; *Klaus*, 244 N.W.2d at 675.

disclosure provisions requiring those seeking public office to make available information regarding property interest holdings were reasonable and proper, and that whatever invasion of privacy may result does not deprive the candidate of a protected constitutional right.<sup>86</sup>

In response to a similar disclosure statute challenge, the Wisconsin Supreme Court made the following observation about the nature of privacy for candidates and public officials, focusing explicitly on the voluntary nature of running for office:

While public officials, of course, do not waive their constitutional rights, they are nevertheless set apart from other members of society in terms of certain rights, as the law on libel makes clear. One who willingly puts himself forward into the public arena, and accepts publicly conferred benefits after election to public office, is legitimately much more subject to reasonable scrutiny and exposure than a purely private individual.<sup>87</sup>

For the Wisconsin Supreme Court, the remedy to candidate privacy incursions is not to run.<sup>88</sup>

At the federal level weighing U.S. constitutional privacy claims, the Fifth Circuit made a distinction between constitutionally protected privacy interests in “intimate decisions” versus what it saw as a lesser right to financial privacy.<sup>89</sup> In the end, after careful review of the privacy interests of candidates against financial disclosure,<sup>90</sup> the court again cited the voluntary decision to run for office as dispositive:

Plaintiffs in this case are not ordinary citizens, but . . . people who have *chosen* to run for office. That does not strip them of all

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86. *Klaus*, 244 N.W.2d at 676–77; *see also* *Cty. of Nevada v. MacMillen*, 522 P.2d 1345, 1350 n.7 (Cal. 1974) (“The public’s right to know of matters which might bring about a conflict of interest between the public employment and the private financial interests of those holding public office is a laudable and proper legislative concern and purpose.” (quoting *Carmel-By-The-Sea v. Young*, 466 P.2d 225, 226 (Cal. 1970))).

87. *In re Kading*, 235 N.W.2d 409, 417 (Wis. 1975). Candidates attempting to shield their family members from mandatory disclosure requirements likewise found an unsympathetic ear. *See, e.g.*, *Hunter v. City of N.Y.*, 391 N.Y.S.2d 289, 299, 301 (N.Y. App. Div. 1976) (holding it not unreasonable to require disclosure of a spouse’s financial records, citing the requirement’s connection to the city’s permissible goal of fostering public confidence in the integrity of public service).

88. Or, as in the case of President Trump and his tax returns, attempt to refuse to disclose them. *See infra* section III.C.

89. *Plante v. Gonzalez*, 575 F.2d 1119, 1123 (5th Cir. 1978) (“The right to privacy extends only to intimate decisions, usually connected with the family; any right to financial privacy does not rise to constitutional significance.”).

90. Overturning an earlier, pre-Watergate decision, *City of Carmel-By-The-Sea v. Young*, 466 P.2d 225, 231–32 (Cal. 1970) (concluding that “the protection of one’s personal financial affairs and those of his (or her) spouse and children against compulsory public disclosure is an aspect of the zone of privacy which is protected by the Fourth Amendment and which also falls within that penumbra of constitutional rights into which the government may not intrude absent a showing of compelling need and that the intrusion is not overly broad”).

constitutional protection. It does put some limits on the privacy they may reasonably expect. . . . Financial privacy is a matter of serious concern, deserving strong protection. The public interests supporting public disclosure for these elected officials are even stronger. We join the majority of courts considering the matter and conclude that mandatory financial disclosure . . . is constitutional.<sup>91</sup>

In addition to bringing claims challenging financial disclosure requirements, candidates have also attempted to shield juvenile or expunged criminal records. In one such case, Judge Posner displayed his signature distaste for people shielding information about themselves. In *Willan v. Columbia County*,<sup>92</sup> local police searched the FBI's National Crime Information Center database and discovered that Thomas Willan, a candidate in Lodi, Wisconsin's 1999 mayoral race, had been convicted as a minor under Georgia's Youthful Offender Act.<sup>93</sup> Police then disclosed this information to the public.<sup>94</sup> Willan brought suit, arguing that the search of the database and disclosure of this juvenile felony conviction violated his Fourth Amendment right against unreasonable searches and constituted an invasion of his privacy in tort.<sup>95</sup> Judge Posner (who has long voiced concerns about privacy enabling fraud) was unmoved: "[s]erious constitutional issues . . . would arise if candidates for office could use the concept of privacy to conceal their criminal records from the electorate."<sup>96</sup> Other courts have reached similar conclusions on the question of whether a candidate's right to privacy extends to concealing past criminal convictions.<sup>97</sup>

In the one case<sup>98</sup> in which the U.S. Supreme Court appeared to protect the privacy interests of candidates, the Court's majority did so in a highly "perverse[]" way (to use dissenting Chief Justice Rehnquist's word).<sup>99</sup> In *Chandler v. Miller*,<sup>100</sup> the Court examined the constitutionality of a

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91. *Plante*, 575 F.2d at 1135–36 (emphasis added) (citation omitted).

92. 280 F.3d 1160 (7th Cir. 2002).

93. *Id.* at 1161.

94. *Id.* at 1162.

95. *Id.*

96. *Id.* Courts routinely deny similar efforts by candidates to seek remedy for disclosure of past felony convictions. *See, e.g., Medina v. City of Osawatomie*, 992 F. Supp. 1269, 1277 (D. Kan. 1998) ("Political candidates in today's society, for good or for ill, should expect information about their past behavior to come to light, and Mr. Medina had to recognize the possibility that his status as an ex-felon would become a campaign issue.").

97. *See Medina*, 992 F. Supp. at 1279.

98. *Chandler v. Miller*, 520 U.S. 305 (1997).

99. *Id.* at 325 (Rehnquist, C.J., dissenting).

100. 520 U.S. 305 (1997).

Georgia law requiring that candidates for designated public offices submit to drug testing.<sup>101</sup> Libertarian nominees for impacted offices challenged the statute's constitutionality, asserting that the drug tests violated their First, Fourth, and Fourteenth Amendment rights.<sup>102</sup> Proponents of the law argued that the public had every right to information about candidates for office.<sup>103</sup> The Eleventh Circuit relied on the familiar rationale that candidates for public office have purposely stepped into the limelight.<sup>104</sup> It reasoned, "candidates for high office must expect the voters to demand some disclosures about their physical, emotional, and mental fitness for the position."<sup>105</sup>

The U.S. Supreme Court saw things differently. It struck down Georgia's statute using a surprising rationale. The majority did not hold that drug testing proved too invasive of candidates' right to privacy,<sup>106</sup> nor did it attempt to draw a fine line between information about candidates that the public has a right to learn versus information it had no right to collect. Instead, the Court reasoned first that the state had failed to establish a sufficient need for drug testing candidates,<sup>107</sup> and second that candidates for public office are sufficiently under the microscope such that the public has less intrusive means of gathering information about potential illicit drug use.<sup>108</sup> The Court explained, "[c]andidates for public office . . . are subject to relentless scrutiny—by their peers, the public, and the press. Their day-to-day conduct attracts attention notably beyond the

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101. *Id.* The statute required candidates to present a certificate from a state-approved drug testing lab certifying "that the candidate [had] submitted to a urinalysis drug test within 30 days prior to qualifying for nomination" and that the results of that drug test tested negative for "marijuana, cocaine, opiates, amphetamines, and phencyclidines." *Id.* at 309. The "designated state offices" were "Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission." *Id.* at 309–10 (internal quotation marks omitted). When the case came down, similar laws had been proposed (though none had been enacted), in Louisiana, Maryland, and Washington State. See Richard Hill, Chandler v. Miller: *A New Standard for Evaluating State Statutes Requiring Disclosure of Information from Political Candidates*, 7 GEO. MASON L. REV. 453, 461 (1999).

102. See Chandler, 520 U.S. at 310.

103. *Id.* at 311–12.

104. *Id.* at 312.

105. *Id.* (quoting Chandler v. Miller, 73 F.3d 1543, 1547 (11th Cir. 1996)).

106. *Id.* at 318. The Court noted that the law's requirements were minimally invasive. *Id.* ("The State permits a candidate to provide the urine specimen in the office of his or her private physician; and the results of the test are given first to the candidate, who controls further dissemination of the report.").

107. *Id.* at 319 ("Nothing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity.").

108. *Id.* at 320–21.

norm in ordinary work environments.”<sup>109</sup> If a candidate uses drugs, the Court concluded, massive popular scrutiny of candidates for political office is bound to unearth it.<sup>110</sup> In his dissent, Justice Rehnquist wondered how the majority could at once protect the privacy interests of candidates while simultaneously acknowledging that candidates have none.<sup>111</sup>

As this brief survey of court reactions to candidate assertions of privacy reveals, candidates have largely been out of luck. Courts have echoed privacy theorists’ dismissal of candidates’ privacy interests.<sup>112</sup> Under virtually every legal theory attempted, candidates have voluntarily ventured into the public glare; they cannot then protest when it shines too brightly. As the next section describes, two shifts in the nature of political campaigning in the United States prompt rethinking this reflexive response.

## II. FOUNDATIONAL SHIFTS

Privacy theory and judicial precedent consistently deny candidates legal protections of their privacy interests. Two extreme shifts challenge this instinctive denial: a profoundly changed information architecture and the changing nature of who runs for office.

### A. *The New Campaign Environment*

The 2016 election threw into relief a deeply changed information landscape for political campaigns. For the vast majority of this country’s

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109. *Id.* at 321.

110. *Id.*

111. *Id.* (Rehnquist, J., dissenting) (writing, “the Court perversely relies on the fact that a candidate for office gives up so much privacy—[c]andidates for public office . . . are subject to relentless scrutiny—by their peers, the public, and the press—as a reason for *sustaining* a Fourth Amendment claim”) (citations omitted).

112. This is not to say that laws never ride to the rescue for privacy incursions candidates experience. For example, federal hacking laws have policed candidate privacy. In one instance, prosecutors convicted David Kernell, a former student at the University of Tennessee, for hacking into Sarah Palin’s personal email during her 2008 vice presidential bid. Kim Zetter, *Sarah Palin Email Hacker Sentenced to 1 Year in Custody*, WIRED (Nov. 12, 2010, 11:43 AM), <https://www.wired.com/2010/11/palin-hacker-sentenced> [perma.cc/BP7C-VNC7]. Kernell took photos from Palin’s account, including pictures of her children, and screen shots of email messages and posted them on 4Chan and Imageshack. *Id.* Prosecutors charged Kernell with a variety of federal crimes including wire and computer fraud, identity theft, and obstruction of justice (for destroying evidence). *Id.* Palin testified at trial that the hacking had caused her family emotional distress. *Id.* Hacking of political campaign email and social media platforms remains a continuing threat. See Lesley Clark & Tim Johnson, *Have Politicians Learned from the 2016 Email Hacks?*, MCLATCHY DC (June 18, 2018, 5:00 AM), <https://www.mclatchydc.com/news/nation-world/national/national-security/article213212239.html> (last visited Jan. 29, 2020) (quoting the advice from security experts that “we have no privacy anymore, zero” so candidates should assume their personal emails will be hacked).

history, information about candidates came from three principal sources: the candidates themselves, candidates' opponents, and the traditional media. While there is no question that opponents and even sometimes the media have engaged in trickery and misinformation during political campaigns throughout U.S. history,<sup>113</sup> the channels of mass communication in those contexts were relatively straightforward. The public largely trusted the comparatively few media outlets that reported on political candidates, providing candidates an opportunity to set the record straight when needed.<sup>114</sup>

Those days are over. Quite a lot has been written about the evolving media landscape since the rise of the internet.<sup>115</sup> Such changes seem to have accelerated as of late.<sup>116</sup> Interesting new scholarship is surfacing about the impact of these new realities on candidates and campaigns. Stanford Law Professor Nathaniel Persily, writing in the wake of the 2016 election, summed it up well in the aptly-titled *Can Democracy Survive the Internet?*:

[M]ost of the 2016 story revolves around the online explosion of campaign-relevant communication from all corners of cyberspace. Fake news, social-media bots (automated accounts that can exist on all types of platforms), and propaganda from inside and outside the United States—alongside revolutionary uses of new media by the winning [presidential] campaign—combined to upset established paradigms of how to run for [office].<sup>117</sup>

Arguably, the “legacy” media’s traditional gatekeeping role was in decline even before the rise of the internet.<sup>118</sup> Likewise, the

113. For a vivid account of this history, see Charles S. Clark, *Politicians and Privacy*, CQ RESEARCHER 6–8 (Apr. 17, 1992).

114. Richard L. Hasen, *Cheap Speech and What it Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 201 (2018) (“[T]he economics of cheap speech . . . have undermined mediating and stabilizing institutions of American democracy including newspapers and political parties, with negative social and political consequences.”).

115. See, e.g., Richards & Solove, *supra* note 50, at 1918–19 (“Warren and Brandeis worried about an overly-sensational press. . . . Today, in comparison, the ‘media’ consists not only of the mainstream press (as well as television and radio) but also of the hundreds of millions of people around the world who can disseminate text, images, and video from their mobile phones and personal computers. The privacy torts have not been able to deal with the traditional media, and this burgeoning new media is raising the stakes and posing even greater challenges.”).

116. Hasen, *supra* note 114.

117. Nathaniel Persily, *Can Democracy Survive the Internet*, 28 J. DEMOCRACY 63 (2017).

118. See AXEL BRUNS, GATEWATCHING AND NEWS CURATION: JOURNALISM, SOCIAL MEDIA, AND THE PUBLIC SPHERE 19 (Steven Jones ed., 2018) (describing other scholars’ accounts that citizen journalism predated the internet); Mary-Rose Papandrea, *The Missing Marketplace of Ideas Theory*, 94 NOTRE DAME L. REV. 1725, 1726–27 (2019) (“Our current communications environment feels like a marketplace, if not a very crowded and noisy street fair. We are blasted with information and different voices fighting for our attention (and, in many cases, financial support). The internet has

decentralization of campaign control over messaging to independent advocacy groups plays a role here too.<sup>119</sup> But there can be no escaping that the internet and digital media forms have drastically altered the campaign environment. As Persily describes it, “[a]ll the worry about shady outsiders in the campaign-finance system running television ads seems quaint when compared to networks of thousands of bots of uncertain geographic origin creating automated messages designed to malign candidates and misinform voters.”<sup>120</sup>

Professor Tim Wu describes how traditional First Amendment protections are no match for the new media environment. In a piece called *Is the First Amendment Obsolete?*, Wu writes:

[E]merging techniques of speech control depend on (1) a range of new punishments, like unleashing “troll armies” to abuse the press and other critics, and (2) “flooding” tactics (sometimes called “reverse censorship”) that distort or drown out disfavored speech through the creation and dissemination of fake news, the payment of fake commentators, and the deployment of propaganda robots.<sup>121</sup>

Professors Mary Ann Franks and Ari Waldman also argue that pre-internet assumptions about the First Amendment no longer hold true. Once, the marketplace of ideas led to the truth; in the past, harmful speech was best addressed by more speech; historically, even modest regulation of speech silenced minority or dissenting views.<sup>122</sup> But, they write,

[w]hatever merit these claims may have had in the past, they cannot be sustained in the digital age. Unbridled, unlimited free speech rights, especially in an era of technologically mediated

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lowered if not eliminated the barriers to entry so that everyone can have a voice, not just the most powerful or the very rich. The traditional media no longer has such a dominant gatekeeping role in determining what information makes its way into the public conversations.”)

119. “Super PACs” (independent expenditure-only groups) and “dark money” groups are fundamentally changing the campaign landscape thanks to decades of contorted campaign finance litigation. See “*What is a PAC/What is a Super PAC?*”, OPENSECRETS, <https://www.opensecrets.org/pacs/pacfaq.php> [perma.cc/6775-4RF2]. For a quick review of decades of campaign finance litigation, see Tom Goldstein, *An Explainer on Campaign Finance Litigation*, SCOTUSBLOG (May 20, 2014, 12:05 PM) <https://www.scotusblog.com/2014/05/why-campaign-finance-law-matters> [perma.cc/W42V-JZ8M].

120. Persily, *supra* note 117, at 70.

121. Tim Wu, *Is the First Amendment Obsolete?*, KNIGHTS FIRST AMEND. INST.: EMERGING THREATS SERIES (2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete> [https://perma.cc/7E9W-Y9BH] (“[T]he use of speech as a tool to suppress speech is, by its nature, something very challenging for the First Amendment to deal with. In the face of such challenges, First Amendment doctrine seems at best unprepared. It is a body of law that waits for a pamphleteer to be arrested before it will recognize a problem.”).

122. Mary A. Franks & Ari Ezra Waldman, *Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions*, 78 MD. L. REV. 892, 892 (2019).

expression, have led to the disintegration of truth, the reign of unanswerable speech, and the silencing and self-censorship of women, queer people, persons of color, and other racial and ethnic minorities.<sup>123</sup>

The impact of these realities on candidates is profound. In many respects, candidates have not only lost the ability to control campaign messaging but have suffered acute and distressing changes in how people (and non-human actors) inflict harm on their campaigns and them personally.<sup>124</sup> And, unlike in the past, the harm is not localized to a particular day's newspaper that one would need microfiche to retrieve. These harms linger indefinitely at our fingertips.<sup>125</sup>

For candidates, the proliferation of anonymous activity online is one source of this destabilization. Anonymous tactics have been available to harm-doers since the invention of the mask. But the scale and scope with which digital technology enables tortious anonymous speech dramatically alters the experience of candidates. Legislative and judicial actions have stymied their ability to seek redress. In the early days of the internet, Congress acted to protect platforms that hosted anonymous speech from liability.<sup>126</sup> Even aside from online immunity, the U.S. Supreme Court has

123. *Id.*; see also Douglas O. Linder, *When Names Are Not News, They're Negligence: Media Liability for Personal Injuries Resulting from the Publication of Accurate Information*, 52 UMKC L. REV. 421, 424 (1984) (noting that “neither invasions of privacy nor injuries resulting from negligent true statements are the sorts of harms that can be cured by ‘more speech’”); *id.* at 424 n.24 (“[T]he extent to which the harm done by a statement is truly of the sort that ‘more speech’ could not possibly cure’ is a ‘helpful consideration’ in determining whether a statement is protected by the first amendment. . . .” (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 651 (1978))); Nabiha Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J.F. 337, 342 (2017) (“The internet—replete with scatological jokes and Prince cover songs— involves much more than political deliberation. And so any theory of speech that focuses only on political outcomes [i.e., that the marketplace of ideas cures false speech] will fail because it cannot fully capture *what actually happens* on the internet.”).

124. Wu documents the impact of troll armies and reverse censorship on journalists. See Wu, *supra* note 121 (describing horrific impact of troll armies and flooding techniques on dissenting journalists). Left out of his discussion but certainly implicated is the impact of such devices on candidates and real questions about whether such tactics will force otherwise qualified candidates out of the race.

125. VIKTOR MAYER-SCHÖENBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* 52 (2009) (“Modern technology has fundamentally altered what information can be remembered, how it is remembered, and at what cost. As economic constraints have disappeared, humans have begun to massively increase the amount of information they commit to their digital memories.”). Indeed, in a world where one’s youthful digressions are now memorialized in digital form, younger generations may face difficulties at a scale not previously experienced. Maureen Dowd, *Now Comes the Naked Truth*, N.Y. TIMES (Nov. 2, 2019), <https://www.nytimes.com/2019/11/02/opinion/sunday/katie-hill-resigns-millennials-boomers.html> [<https://perma.cc/YB6N-EJM7>] (quoting Representative Matt Gaetz (R-FL), “a lot of young people who grew up with a smartphone in their hands took pictures, sent them, share messages and materials that are now recoverable later in life”). This is discussed in greater detail at *infra* section III.B.

126. Communications Decency Act § 230, 47 U.S.C. § 230(c) (2012) (immunizing hosts of online content from liability in tort).



affirmed First Amendment protections for anonymous campaign speech.<sup>127</sup> The combined sanction of anonymous campaign speech and the removal of legal avenues to address tortious anonymous speech creates a toxic brew for candidates.<sup>128</sup>

Importantly, the nature of the media environment is not always relevant to candidate privacy interests. The public should arguably have access to certain kinds of information regardless of the information environment that produced it. For example, we may all agree that the public has a right to information about a candidate's criminal history—even when sophisticated data and search tools limit practical obscurity candidates may once have enjoyed.<sup>129</sup> Conversely, there may be information about candidates to which we as a society think the public should not access, irrespective of a changed media environment such as images of candidates in their bedroom.<sup>130</sup>

Whether or not we can agree on where the lines should be—what *types* of information about candidates the public should and should not have access to—the scope and scale of privacy harms now inflicted on candidates risk not only greater harm to candidates personally, but harm to democracy itself in the form of driving strong candidates away from running for office.<sup>131</sup> This is not a new fear. The rise of negative advertising, “attack journalism,” and the devolution in campaign civility have for decades led many to worry that otherwise qualified candidates would remain on the sidelines.<sup>132</sup> But the changed circumstances

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127. See, e.g., *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) (striking a Colorado requirement that petition circulators wear badges identifying themselves); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (striking an Ohio law prohibiting anonymous pamphleteering). *But cf.* Helen Norton, *Setting the Tipping Point for Disclosing the Identity of Anonymous Online Speakers: Lessons from Other Disclosure Contexts*, 49 WAKE FOREST L. REV. 565 (2014) (describing cases in which courts have required the unmasking of anonymous online speakers).

128. And indeed, other kinds of would-be plaintiffs, see CITRON, *supra* note 28 at 121–41 (discussing shortcomings in current law's ability to address cyber-harassment).

129. *But see* U.S. Dep't of Justice v. Reporters Comm., 489 U.S. 749, 780 (1989) (finding that a criminal defendant has an interest in retaining practical obscurity).

130. See Citron & Franks, *supra* note 28 (describing statutes criminalizing revenge porn); *infra* section III.B (discussing Katie Hill).

131. This form of silencing has been empirically documented outside the candidate context as disproportionately affecting women and minorities. See Citron & Penney, *supra* note 29, at 2331 (noting survey results demonstrated that tougher enforcement of cyberharassment “had a clear salutary impact on women's online contributions, sharing, and engagement. Female participants in the survey—the predominant targets or victims of cyberharassment—said that they were more likely to engage online in response to the cyberharassment law”).

132. In his 1991 book, political scientist Larry Sabato documents America's long history with dirt in politics and the rise of the modern “frenzy.” Sabato, *supra* note 3 at 1 (“It has become a spectacle without equal in modern American politics: the news media, print and broadcast, go after wounded politicians like sharks in a feeding frenzy.”); see also GLENN W. RICHARDSON, JR., PULP POLITICS: HOW POLITICAL ADVERTISING TELLS THE STORIES OF AMERICAN POLITICS (2003). Repeated themes

described here are not just of scale and scope. Whole new forms of harm are erupting. Deep fakes provide one example.

Deep fakes are video or audio clips created using cheap and accessible software that allows users to manipulate videos of candidates to make it appear that they are saying or doing something they have not in fact said or done.<sup>133</sup> This is not simply sophisticated “lip-synching” or crude editing.<sup>134</sup> Rather, it is the use of artificial intelligence and facial mapping technologies to create “digitally real” video or audio depicting the target saying or doing something they did not.<sup>135</sup> As I have argued elsewhere, deep fakes of candidates for public office constitute an assault on candidate dignity and a loss of control over one’s persona that harken back to some of the core harms that prompted the rise of privacy law in the first place.<sup>136</sup> In addition to dignity harms, deep fakes of candidates harm democracy in the form of misleading voters, contributing to voter mistrust and apathy, and reducing voter choice if good candidates refuse to run in an environment in which candidate deep fakes run amok.

For decades, candidates have accepted that a consequence of running for office is that lies about them will routinely circulate (with the slight consolation that knowing and malicious defamation is actionable).<sup>137</sup> But by stepping into the limelight, must candidates resign themselves to others faking their identities to make authentic-seeming video and audio of them without recourse? Should the law rise to protect candidates’ dignity interests against such falsifications of their identities?<sup>138</sup> The deep fake

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to change defamation laws to address this problem have surfaced. For a recent example, see Daniel J. Kornstein, *Political Defamation and Democracy*, N.Y. L.J. (July 20, 2016), <https://www.ecbalaw.com/wp-content/uploads/2016/07/Daniel-Kornstein.pdf> [<https://perma.cc/KCR9-A3R9>].

133. Deb Riechmann, *I Never Said That! High-Tech Deception of “Deepfake” Videos*, ASSOCIATED PRESS (July 2, 2018), <https://apnews.com/21fa207a1254401197fd1e0d7ecd14cb> [[perma.cc/94B3-VLXW](https://perma.cc/94B3-VLXW)].

134. Deb Riechmann, *Fears Grow Over Deceptive “Deepfake” Videos Made to Sway Elections*, TALKING POINTS MEMO (July 2, 2018, 10:10 AM), <https://talkingpointsmemo.com/news/deepfake-videos-adversaries-political-campaigns-national-security> [[perma.cc/HAH2-U5Y4](https://perma.cc/HAH2-U5Y4)].

135. See Bobby Chesney & Danielle K. Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1758 (2019) (describing how deep fake technology works); see also Natasha Lomas, *Lyrebird is a Voice Mimic for the Fake News Era*, TECH CRUNCH (Apr. 25, 2017, 10:16 AM), <https://techcrunch.com/2017/04/25/lyrebird-is-a-voice-mimic-for-the-fake-news-era/> [<https://perma.cc/D6Q8-6AA8>] (describing technology that enables realistic faked audio speech using algorithms derived from samples from recordings of speakers).

136. See Rebecca Green, *Counterfeit Campaign Speech*, 70 HASTINGS L.J. 1445, 1445 (2019) (arguing that a ban on counterfeit campaign speech should survive First Amendment scrutiny).

137. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

138. Carefully reviewing right to publicity cases since they arose in the early 1900s, Jennifer Rothman concludes that public figures have routinely brought successful right to publicity claims based on protecting dignitary interests in their identities. JENNIFER E. ROTHMAN, RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 110 (2018) (“Often it is claimed that the right of publicity addresses economic injuries while the right of privacy addresses dignitary and

example provides a window into how changing technological realities require a reevaluation of candidate privacy.<sup>139</sup> To cling to reflexive assumptions denying candidate privacy interests amidst dramatically changed campaign information environments involves risks.<sup>140</sup>

We are currently experiencing a highly destabilized information architecture. This shifting ground requires rethinking assumptions about candidate privacy previously taken for granted.

### B. *Who Runs*

A second major shift in modern campaigning is who runs for office. Throughout this country's history, women and minorities have struggled to achieve fair representation, starting of course with efforts to secure voting rights. But even after women got the vote and even after minority voters achieved legal protections sufficient to make their voices heard at the ballot box, female and minority candidates have not gained significant ground in elections. The United States stands at seventy-sixth place among democracies internationally in the percentage of female representatives in national legislatures—tying with Afghanistan and Cabo Verde.<sup>141</sup> In the 400-year history of Virginia's General Assembly, the oldest continuous legislative body in the United States, fewer than 100 women have been elected (compared to more than 9,000 men).<sup>142</sup> The

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emotional distress injuries. As I have revealed, such a division did not exist historically, . . . and makes little sense since injuries from the same harm of misappropriation can be economic, dignitary, and emotional.”).

139. See Wu, *supra* note 121 (arguing that the First Amendment is no match for current harms the internet inflicts).

140. Patrick J. Dobel, *Judging the Private Lives of Public Officials*, 30 ADMIN. & SOC'Y 115, 118 (1998) (“Privacy carves out a realm for intimacy, reflection, grace, or prayer to restore persons and anchor their moral lives. Strong private lives provide the moral resources for officials to make judgments that move beyond public opinion but still hold them accountable.”); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 455–66 (1980) (“Privacy is . . . essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy . . . [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.”).

141. See *Women in National Parliaments*, INTER-PARLIAMENTARY UNION (Feb. 1, 2019), <http://archive.ipu.org/wmn-e/classif.htm> [<https://perma.cc/6S5Y-WSBP>].

142. Editorial Board, Opinion, *Women Finally Have a Chance to Make History in Virginia. They Already Have.* WASH. POST (Nov. 20, 2019, 1:22 PM), [https://www.washingtonpost.com/opinions/women-finally-have-a-chance-to-make-history-in-virginia-they-already-have/2019/11/20/ef27cec6-0afd-11ea-bd9d-c628fd48b3a0\\_story.html](https://www.washingtonpost.com/opinions/women-finally-have-a-chance-to-make-history-in-virginia-they-already-have/2019/11/20/ef27cec6-0afd-11ea-bd9d-c628fd48b3a0_story.html) [[perma.cc/4GPG-EP88](https://perma.cc/4GPG-EP88)] (noting that of those one hundred, forty-one were elected in the November 2019 General Assembly election).

story is much the same for minority candidates.<sup>143</sup> L. Douglas Wilder became the first African American to be elected governor *in 1989*; only ten African Americans have served in the U.S. Senate.<sup>144</sup> Robert Menendez (D-NJ) has served in the U.S. Senate since 2007, but is only the sixth Latino ever to do so.<sup>145</sup>

What causes the underrepresentation of women and minorities (including sexual minorities) in elected office? The reasons are complex, relating to “generations of cultural identities and political stereotypes”<sup>146</sup> and, of course, access to money and pull. But if racist and sexist mores explained underrepresentation in earlier eras, research suggests that overt discrimination no longer fully explains the dearth of women and minority representatives.<sup>147</sup> Scholars have identified an important determinant:

143. IRIS M. YOUNG, INCLUSION AND DEMOCRACY 141 (2000) (“Minority cultural groups and those positioned in devalued racial positions usually also lack effective political voice.”).

144. To date, ten African Americans have served in the United States Senate: Hiram Revels of Mississippi (1870); Blanche K. Bruce of Mississippi (1875); Edward Brooke of Massachusetts (1967); Carol Moseley Braun of Illinois (1993); Barack Obama of Illinois (2005); Roland Burris of Illinois (appointed to fill Obama vacancy in 2008); Tim Scott of South Carolina (appointed to fill a vacancy in 2013, won special election in 2014 to complete the term and was elected to a full term in 2016); William “Mo” Cowan of Massachusetts (appointed in 2013); Cory Booker of New Jersey (2013); and Kamala Harris of California (2017). *See African American Senators*, U.S. SENATE [https://www.senate.gov/pagelayout/history/h\\_multi\\_sections\\_and\\_tasers/Photo\\_Exhibit\\_African\\_American\\_Senators.htm](https://www.senate.gov/pagelayout/history/h_multi_sections_and_tasers/Photo_Exhibit_African_American_Senators.htm) [<https://perma.cc/F33U-DF7V>].

145. *See 7 Things to Know About Senator Robert Menendez (D-NJ)*, NBC NEWS: PRESS PASS (July 6, 2013, 2:44 PM), <https://www.nbcnews.com/meet-the-press/7-things-know-about-sen-robert-menendez-d-nj-v19323059> [<https://perma.cc/EV8S-RZK9>] (noting that Senator Menendez was then “the third Hispanic currently serving in the Senate, and only the sixth Hispanic to ever serve in the body”).

146. JENNIFER L. LAWLESS, BECOMING A CANDIDATE: POLITICAL AMBITION AND THE DECISION TO RUN FOR OFFICE 52 (2012).

147. *Id.* at 53 (citing research on campaign fundraising receipts and vote totals of female and minority candidates as evidence that discrimination does not explain underrepresentation in contemporary campaigns). Some might point to the 2018 midterm elections as evidence that women have no such reticence to run. As has been reported widely, female candidates ran in record numbers in 2018. *See, e.g.,* Heather Caygle, *Record-Breaking Number of Women Run for Office*, POLITICO (Mar. 8, 2018, 5:04 AM), <https://www.politico.com/story/2018/03/08/women-rule-midterms-443267> [<https://perma.cc/R3QA-HY8Q>] (noting that “[in the 2018] election cycle, more women are signing up to run for the highest elected offices than ever before—so far, at least 575 women have declared their intention to run for the House, the Senate or governor”). Yet, studies of the 2018 midterms demonstrate that although the country witnessed a surge in women’s political activism following the election of Donald Trump in 2016, “[t]hat activism . . . was not accompanied by a broad scale surge in women’s interest in running for office. In fact, the overall gender gap in political ambition today is quite similar to the gap . . . uncovered throughout the last 20 years.” Jennifer L. Lawless & Richard L. Fox, *A Trump Effect? Women and the 2018 Midterm Elections*, 16 F. 665, 665 (2018). One might make a similar claim that the number of women who ran for the Democratic nomination in the 2020 presidential election was historic. However, women make up roughly 50% of the population; that six out of the twenty-four candidates originally in the running are women is far short of parity. Elizabeth Llorente, *Historic number of women aim for Madam President; experts credit #MeToo, recruitment efforts*, FOX NEWS (Jan. 24, 2019), <https://www.foxnews.com/politics/more-women-than-ever-eyeing-u-s-presidency-experts-cite-metoo-and-decades-of-grooming-female-candidates> [<https://perma.cc/RSA9-FXBG>] (“While the U.S. has reached a new milestone in terms of women

discrepancies in candidate ambition—that is, who throws their hat in the ring in the first place.<sup>148</sup> Political scientist Jennifer Lawless suggests numerous factors that prevent women and minorities from becoming candidates in the first place. High on her list are concerns about the loss of privacy.<sup>149</sup> Explained one research subject, “I would love to serve. But in order to do that, you need to run. And given the invasion of privacy you have to endure, you practically have to be a sociopath and not care at all about what anyone thinks or what they’ll find out.”<sup>150</sup>

Outside the electoral context, the disproportionate harassment of women and minorities is well documented.<sup>151</sup> The experiences of women

running for president and having a greater presence in Congress, the U.S. lags behind many other nations in female political power.”).

148. Lawless, *supra* note 146, at 57 (“Discrimination and structural obstacles certainly contribute, in varying degrees, to the gender and racial disparities in our political institutions over time. But the power of these explanations, even combined, is limited; neither focuses on the eligible candidates . . . or begins to tackle the fundamental question of whether women and racial minorities are as politically ambitious as white men to emerge as candidates.”).

149. *See* Lawless, *supra* note 146, at 171–74. Other factors included, for example, fundraising obstacles and negative campaigning. *Id.* at 166–72. Professor Patrick Dobel describes the impact of gender norms historically on women running for public office: “[t]he collapse of public and private [made] the excessive scrutiny of private lives especially perilous to women entering public office. . . . Often their very entrance into the public domain defined them as public women, an old term of insult as well as an imputation that they neglect their private obligations.” *See* Dobel, *supra* note 140, at 128. In the case of minorities, political scientist Raphael Sonenshein documents the long history of black candidates being discouraged from running for office. *See* Raphael J. Sonenshein, *Can Black Candidates Win Statewide Elections?*, 105 POL. SCI. Q. 219 (1990). *See generally* Judson L. Jeffries & Charles E. Jones, *Blacks Who Run for Governor and the U.S. Senate: An Examination of Their Candidacies*, 57 NEGRO EDUC. REV. 243, 243 (2006) (“We submit that because Whites are reluctant to vote for Blacks, especially Black high profile statewide candidates, Blacks will need to serve an appropriate apprenticeship, garner strong party backing, and implement an effective deracialized campaign strategy if they hope to offset White voter hostility.”).

150. Lawless, *supra* note 146, at 173. Commenters have voiced concerns about privacy-invasive reporting preventing otherwise qualified candidates from running. *See, e.g.*, Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 713 (1996) (discussing the potential chill of the First Amendment rights of those who would otherwise step forward in public debate but for the cost of over-exposure); *see also* Anthony Lewis, *Opinion, Abroad at Home; Sex and Leadership*, N.Y. TIMES (Feb. 23, 1998), <https://www.nytimes.com/1998/02/23/opinion/abroad-at-home-sex-and-leadership.html> [<https://perma.cc/S67G-5AK6>] (“The zeal to learn about bedroom behavior has essentially ended the privacy of anyone who aspires to office. Is that a good way to attract intelligent, sensitive Americans to public life?”). Scholars have also highlighted additional harms of reporting on the personal lives of candidates. *See, e.g.*, ANDREW B. HALL, WHO WANTS TO RUN 66–67 (2019) (describing how moderate candidates choosing not to run because of excessive media scrutiny drives polarization); SABATO, *supra* note 3 at 23 (citing “damage [to] the political fabric of America by cheapening public discourse, trivializing the campaign agenda, breeding cynicism and discouraging people from seeking public office”); DENNIS F. THOMPSON, RESTORING RESPONSIBILITY: ETHICS IN GOVERNMENT, BUSINESS, AND HEALTH CARE 233 (2005) (noting that coverage of candidates’ personal affairs detracts from public attention to issues that matter).

151. *See* CITRON, *supra* note 28 at 13–16 (describing how cyber harassment disproportionately impacts women and minorities (including sexual minorities) and noting studies showing that nonwhite females face cyber harassment more than any other group); Citron, *supra* note 29, at 1870 (describing sexual privacy abuses and noting that “[m]ost often, women, nonwhites, sexual minorities, and minor shoulder the abuse”). The Southern Poverty Law Center reports that 2018 witnessed a 50% increase

and minorities online set this issue into particular relief.<sup>152</sup> Much like courts' admonishing candidates who assert privacy interests that they can simply choose not to run, victims of online harassment are regularly advised to "toughen up or go offline."<sup>153</sup> Indeed, exposure to disproportionate harassment causes women and minorities to opt out of life online, to the detriment of opportunities they would otherwise enjoy.<sup>154</sup> Professor Danielle Citron explains,

[b]ecause online abuse disproportionately impacts women and marginalized communities, so does the silencing that it produces. As online abuse continues apace, women and marginalized groups are forced offline. This endangers deliberative democracy, which depends upon contributions from diverse voices and perspectives—particularly groups historically excluded from the 'marketplace of ideas.'<sup>155</sup>

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in White Nationalist groups, see Maeve Duggan, *1 in 4 Black Americans Have Faced Online Harassment Because of Their Race or Ethnicity*, PEW RES. CTR. (July 25, 2017), <https://www.pewresearch.org/fact-tank/2017/07/25/1-in-4-black-americans-have-faced-online-harassment-because-of-their-race-or-ethnicity> [<https://perma.cc/E3EF-URBP>]; Mark Potok, *The Year in Hate and Extremism*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/intelligence-report/2017/year-hate-and-extremism> [<https://perma.cc/7ECV-HMJJ>] (noting that "[b]y far the most dramatic change was the enormous leap in anti-Muslim hate groups, from 34 in 2015 to 101 last year—a 197% increase").

152. Working to Halt Online Abuse, an organization that tracks online harassment charted 4,043 cases of online abuse between 2006 and 2013. Of those, 70% of victims were women. Minorities made up 16% of victims. See *Working to Halt Online Abuse Comparison Statistics 2000–2013*, HALTABUSE.ORG, <http://www.haltabuse.org/resources/stats/Cumulative2000-2013.pdf> [<https://perma.cc/PZ3L-WDYS>]; see also Danielle K. Citron, *Law's Expressive Value in Combatting Cyber Gender Harassment*, 108 MICH. L. REV. 373, 374 (2009) ("The harassment of women online is a pernicious and widespread problem. It can be severe, involving threats of sexual violence, doctored photographs of women being suffocated, postings of women's home addresses alongside the suggestion that they should be raped, and technological attacks that shut down feminist blogs and websites.").

153. CITRON, *supra* note 28, at 19 (discussing the pattern of trivializing online harassment). Before laws arose to address cyberharassment, Citron writes that "[t]he choice was theirs—that was the deal." See Danielle K. Citron, *Addressing Cyber Harassment: An Overview of Hate Crimes in Cyberspace*, 6 CASE WESTERN J.L. TECH. & INTERNET 1, 1 (2015).

154. See generally BAILEY POLAND, *HATERS: HARASSMENT, ABUSE AND VIOLENCE ONLINE* 89–122 (2016) (describing the professional, psychological, and personal effects of gender-based online harassment). Scholars are honing in on the flip-side of free speech—the idea that First Amendment protections of hate speech serve to deny the free speech rights of its victims through a chilling effect. See, e.g., Adrienne LaFrance, *When Will the Internet be Safe for Women?*, ATLANTIC (May 20, 2016), <https://www.theatlantic.com/technology/archive/2016/05/when-will-the-internet-be-safe-for-women/483473/> [<https://perma.cc/Q9W7-PKN7>] (describing "swatting" attack on the home of female politician).

155. Danielle K. Citron & Johnathon W. Penney, *When Law Frees Us to Speak*, 87 FORDHAM L. REV. 2317, 2319–20 (2019).

This silencing effect has obvious parallels to the decision not to seek public office.<sup>156</sup>

Mounting evidence suggests that women and minority candidates do in fact bear the brunt of harassment. Misogynist and racist attacks are as old as democracy (and then some),<sup>157</sup> but technology is being leveraged at a scale never previously possible to intimidate and harass women and minority candidates. The impact of physical and non-physical abuse in the political realm has given rise to an international focus on violence against women in politics.<sup>158</sup> Notes political scientist Mona Lena Krook, “both quantitative and qualitative data indicate that violence [including psychological violence] against politically active women is prevalent and has a devastating impact on democratic institutions and practices.”<sup>159</sup> She continues, “[w]omen who are younger or who belong to racial or ethnic minorities seem to be particularly susceptible to attack.”<sup>160</sup> Nonphysical attacks on women in politics are often purposefully dignity-based, for example circulating nude or doctored photos.<sup>161</sup> Such attacks on candidate

156. Empirical evidence points to privacy concerns driving away minority voices. One study concluded, for example, that LGBTQ individuals are three times more likely to cite privacy and increased scrutiny as a reason against running for office than heterosexual individuals. See Angelia Wagner, *Avoiding The Spotlight: Public Scrutiny, Moral Regulation, and LGBTQ Candidate Deterrence*, 1 POL., GRPS. & IDENTITIES 1 (2019). Today, an online presence is a critical component of running for office. Cynthia L. Bauerly, *The Revolution Will Be Tweeted and Tmbl'd and Txd: New Technology and the Challenge for Campaign-Finance Regulation*, 44 U. TOL. L. REV. 525, 526 (2013) (noting that “candidates’ online presence mirrors the range of activities that have previously primarily occurred in person”).

157. DALE SPENDER, WOMEN OF IDEAS AND WHAT MEN HAVE DONE TO THEM (1982), cited in Mona L. Krook & Juliana R. Sanin, *The Cost of Doing Politics? Analyzing Violence and Harassment against Female Candidates*, PERSPS. ON POL. 3 (2019), [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/997569433135FA170B2789C88A48DD17/S1537592719001397a.pdf/cost\\_of\\_doing\\_politics\\_analyzing\\_violence\\_and\\_harassment\\_against\\_female\\_politicians.pdf](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/997569433135FA170B2789C88A48DD17/S1537592719001397a.pdf/cost_of_doing_politics_analyzing_violence_and_harassment_against_female_politicians.pdf) [https://perma.cc/CRN7-42ZH] (noting that “maligning a woman’s character, often by reference to her sexuality, has been a recurring strategy historically to discredit women’s ideas and inhibit their participation in traditionally male-dominated spaces”).

158. For example, in 2016 the National Democratic Institute campaign #notthecost focuses attention on stopping violence against women in politics. See #NotTheCost: *Stopping Violence Against Women in Politics*, NAT’L DEMOCRATIC INST., <https://www.ndi.org/not-the-cost> [https://perma.cc/S7HA-U3GS]. In October 2018, the United Nations Special Rapporteur on Violence Against Women issued a report on violence against women in politics to the 73rd Session of the United Nations General Assembly. See *Statement by Dubravka Siminovic Special Rapporteur on Violence Against Women, Its Causes and Consequences*, UNITED NATIONS HUM. RTS. SPECIAL PROC. (Oct. 5, 2018), [https://www.ohchr.org/Documents/Issues/Women/SR/SR\\_VAW\\_GA73\\_2018.pdf](https://www.ohchr.org/Documents/Issues/Women/SR/SR_VAW_GA73_2018.pdf) [https://perma.cc/SEU5-AW3].

159. Mona L. Krook, *Violence Against Women in Politics*, 28 J. DEMOCRACY 74, 83 (2017); see also Krook & Sanin, *supra* note 157, at 2 (describing how political violence “poses a challenge to democracy when one side gets ‘its way through fear of injury and death’ rather than ‘through a process in which individuals or groups recognize each other . . . as rational interlocutors’”).

160. Krook, *supra* note 159, at 83.

161. As Krook and Sanin describe, “[s]exual objectification is one strategy of [political violence through degrading images and sexist language]. . . . After the election of Croatian president Kolinda Grabar Kitarovic in 2015, national news outlets published stills from an alleged sex tape of her; in

dignity impair democracy. As former U.S. Secretary of State Madeleine Albright wrote on the occasion of International Women’s Day in 2016, “[w]hen a woman participates in politics, she should be putting her hopes and dreams for the future on the line, not her dignity . . . .”<sup>162</sup>

There can be no doubt that troll armies, bots, and other disruptors of online democracy regularly target non-minority male candidates with brutal and unrelenting regularity. Yet evidence is mounting that women and minorities who are otherwise eligible to run are disproportionately targeted for reasons that have nothing to do with their qualifications for office.<sup>163</sup> When strong, qualified candidates turn away from seeking public office, the marketplace of ideas shrinks and voter choice is reduced, as is the strength of democracy.<sup>164</sup>

American law stands rigidly against providing an affirmative leg up to any political candidate based on gender or minority status (unlike other democracies which use proportional representation and/or gender quotas to ensure minority and female representation).<sup>165</sup> The American democratic system operates from the premise of a level playing field.<sup>166</sup> But the law (and courts) recognize voters’ interest in access to diverse viewpoints.<sup>167</sup> If the current campaign environment disproportionately

2016, photos supposedly of her wearing a bikini went viral.” Krook & Sanin, *supra* note 157, at 5. Krook and Sanin also reference the tactic of employing “highly negative, gendered language to characterize female politicians and their behaviors,” citing President Trump’s misogynistic merchandizing featuring slogans like “Trump that Bitch!” in the 2016 election. *Id.* at 6.

162. Madeleine Albright, *A Hidden Reality: Violence Against Women in Politics*, CNN (Mar. 8, 2016), <https://www.cnn.com/2016/03/07/opinions/madelaine-albright-protect-women-in-politics/index.htm> [<https://perma.cc/4H2Y-P2NP>].

163. See Mariana Spring & Lucy Webster, *A Web of Abuse: How the Far Right Disproportionately Targets Female Politicians*, BBC NEWSNIGHT (July 15, 2019), <https://www.bbc.com/news/blogs-trending-48871400> [<https://perma.cc/BKV4-FAYT>] (describing the singling out of female candidates and politicians with misogynistic threats).

164. The U.S. Supreme Court has generally not recognized the right of candidates to run for office. See *Bullock v. Carter*, 405 U.S. 134, 142–43 (1974) (framing the protection as a means of safeguarding the rights of voters to exercise the franchise).

165. Mona L. Krook, *Reforming Representation: The Diffusion of Candidate Gender Quotas Worldwide*, 2 POL. & GENDER 303 (2006) (describing parliamentary gender quotas in democracies throughout the world). See *e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) (noting that “minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics”).

166. Some exceptions exist. For example, Congress enacted the historic Voting Rights Act in 1964 to address systemic racism preventing minorities from exercising political choice. See Voting Rights Act § 2, 52 U.S.C. § 10301 (Supp. III 2016) (protecting the ability in limited circumstances of minority voting groups’ ability to elect the candidates of their choice).

167. See *e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) (“Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.”). While the struggle of women and minority candidates to achieve office and minority party ballot access present distinct



silences women and minority candidates, can the law be mobilized in response? Certainly part of the solution involves invoking existing harassment and other criminal statutes to protect candidates.<sup>168</sup> But can privacy law play a role?

When the internet first rose to prominence in American social and political life, commenters and courts touted its potential for increased democratic participation—a virtual town square.<sup>169</sup> The Supreme Court’s reverence for its potential seems to endure.<sup>170</sup> But the 2016 election sounded the alarm and raised awareness of the many ways in which the internet inhibits and distorts public discourse.<sup>171</sup> Privacy theorists have

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challenges, both seek participation in the political realm. Democratic theorists have long argued that diversity in representation improves democracy. *See e.g.*, Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes,”* in WOMEN, GENDER, AND POLITICS: A READER 201, 205, 208 (Mona L. Krook & Sarah Childs eds., 1999) (arguing that descriptive representation “facilitates vertical communication between representatives and constituents,” allows members in a “subordinate group” to “forge bonds of trust based specifically on the shared experience of subordination,” and increases the “empirical . . . legitimacy of the polity”); Sveinung Arnesen & Yvette Peters, *The Legitimacy of Representation: How Descriptive, Formal, and Responsiveness Representation Affect the Acceptability of Political Decisions*, 51 COMP. POL. STUD. 868, 892 (2017) (finding in a Norwegian survey that descriptive representation “increases the willingness to accept public decisions.”); *id.* at 889 (“When decision-making bodies are descriptively representative, they serve as a ‘legitimacy cushion,’ mitigating the negative effects of unfavorable outcomes.”); Claudine Gay, *Spirals of Trust? The Effect of Descriptive Representation on the Relationship Between Citizens and Their Government*, 46 AM. J. POL. SCI. 717, 731 (2002) (finding that “constituents are more inclined to contact legislators who share their racial group membership.”). *Cf.* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1562 (2018) (“Faced with the stark cartographical evidence of the State’s attempt to effectuate descriptive representation under the ostensible guise of the [Voting Rights Act], the Court recoiled.”).

168. *Supra* note 28; *see also* Erin Coyle & Eric Robinson, *Chilling Journalism: Can Newsgathering Be Harassment or Stalking?*, 22 COMM. L. & POL’Y 65, 98 (2017) (describing criminal stalking and harassment claims against reporter for aggressive questioning of candidates).

169. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) (“[A]ny person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1648 (1999) (“Cyberspace has the potential to emerge as an essential focal point for communal activities and political participation.”); Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1669 (1998) (describing the internet as “First Amendment manna from heaven”).

170. *See e.g.*, *Packingham v. North Carolina*, 582 U.S. \_\_\_, 137 S. Ct. 1730, 1735 (2017) (“While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ . . .”). The Court continued, “[w]hile we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.” *Id.* at 1736.

171. Danielle K. Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won’t Believe #3!)*, 95 WASH. U. L. REV. 1353, 1385 (2018) (“Even when the First Amendment is properly translated to the digital context, we need to make sure that its values are advanced against private power in digital environments. . . . If we are committed to ensuring that our expressive traditions

long recognized the potentially distortive impact of the internet, suggesting that its democratic promise would not be realized if privacy is inadequately protected.<sup>172</sup>

Is it time to reevaluate the exclusion of candidates from the privacy protections given these dramatically changed circumstances? What might such a reexamination look like? The following section takes up these questions.

### III. RETHINKING CANDIDATE PRIVACY

What would a more nuanced approach to protecting candidate privacy look like? To answer this question this section first examines vetting practices for other positions of public trust—lawyers and judges—drawing out privacy-protective aspects of those processes that shed light onto how to think about candidate privacy. Next, it applies those principles to a sampling of hypothetical cases in which the privacy interests of candidates arise, demonstrating that courts can protect candidate privacy without diserving either voters or the democratic process. Finally, this section ends with a discussion of instances in which denying candidate privacy may remain appropriate.

#### A. *Vetting Practices: Basic Principles*

Candidates for public office are not the only aspirants to positions of public trust who face privacy intrusions in the course of their ascent. While the process of electing candidates to public office is unique in many respects, parallels to other vetting practices are instructive. This section examines core principles that inform vetting of applicants for admission

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survive the translation to the digital age, nurturing the capacity of free speech in privately-controlled online environments will be essential.”).

172. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1386–87 (2000) (arguing that strong data privacy protection regimes promote important democratic values, including the “protection of individual dignity, promotion of personal autonomy, and development of the capacity for meaningful participation in the social and political life of the community”); Schwartz, *supra* note 169 at 1651 (“In the absence of strong rules for information privacy, Americans will hesitate to engage in Cyberspace activities—including those that are most likely to promote democratic rule.”). Most commentary focuses on digital technology’s impact on the common man. Very few privacy scholars have worried about candidate privacy, except in fleeting reference. See e.g., Jeffrey Abramson, *Full Court Press: Drawing in Media Defenses for Libel and Privacy Cases*, 96 OR. L. REV. 19, 52 (2018) (touching on privacy incursions candidates suffer given the current media environment). This could in part be because they share the reflexive exemption of candidates from the privacy canon that persist. See e.g., Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1010 (2003) (critiquing the public figure doctrine and its impact on democratic discourse in the Information Age, Solove echoes the exemptions of candidates: “A candidate’s socioeconomic background can shed light on that candidate’s beliefs, values, and biases. Information about politicians’ health can be relevant to how vigorously they can carry out their duties and whether they can live out a term in office”).

to state bar associations. Like a vet examining a horse before a race,<sup>173</sup> those who vet would-be lawyers typically examine all aspects of aspirants' history and circumstances to determine whether they are qualified for this position of public trust, whether any aspect of their lives might expose them to bribery or conflict of interest, and whether they possess the characteristics worthy of the legal profession (honesty, good judgment, and so forth).

In some respects, comparing elections to vetting procedures for lawyers suffers from an apples-to-oranges problem. Elections are unwieldy, public processes in which voters have the ultimate say. Lawyers are vetted via far more controlled and scripted methods—often behind a veil of confidentiality.<sup>174</sup> The voting public is messy and disparate—incomparable to careful and deliberate state boards of bar overseers. Still, they share important goals. Both are concerned with establishing whether a person is qualified and desirable for a public position of trust; the vetting process acts as a deterrent to those undeserving; the process (ideally) weeds out people who might abuse their position; and both help reveal information to decision makers about a person's qualifications.<sup>175</sup>

Noting these distinctions and similarities between elections and the processes of vetting lawyers, the discussion below highlights three features of attorney vetting. First, lawyer vetting practices focus on gathering information relevant to qualifications and fitness for the position sought. Second, lawyer vetting takes affirmative measures to protect the dignity and safety of those being vetted, thereby ensuring qualified candidates will pursue the role in sufficient number. And third, the lawyer vetting process ties the degree of invasiveness of the process to the degree of public responsibility. These principles are helpful, albeit imperfect, overlays for framing a more nuanced view of candidate privacy in the modern age.

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173. See *Vet*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/search?q=vet> [<https://perma.cc/U8LK-755N>]; *Vet*, THE OXFORD ENGLISH DICTIONARY (1933 ed.) (defining “vet” as “to submit an animal to examination or treatment by a veterinary surgeon”). The Oxford University Press defines ‘vetting’ as “[t]he process of investigating someone thoroughly, especially in order to ensure that they are suitable for a job requiring secrecy, loyalty, or trustworthiness.” See *Vetting*, LEXICO, <https://www.lexico.com/en/definition/vetting> [<https://perma.cc/X7WV-N3JB>].

174. Also, lawyers must pass a state bar exam in order to be admitted to the state bar; for better or worse, politics requires no entrance exam.

175. Mitchell M. Simon, *Limiting the Use of Expunged Offenses in Bar and Law School Admission Processes: A Case for Not Creating Unnecessary Problems*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 79, 83 (2014) (describing the attorney character and fitness vetting process).

### 1. *Is It Relevant?*

A first feature of vetting processes for lawyers is that they seek information relevant to the qualifications of the position sought. Each state has its own formulation of the qualities lawyers should possess.<sup>176</sup> Bar applicants have successfully refused to provide information on the grounds that the information sought is not relevant to their qualifications or fitness. In *Cord v. Gibb*,<sup>177</sup> the Virginia Board of Bar Examiners rejected a woman's character and fitness application because she lived with a man while unmarried. Writing in 1979, the court found that, "[w]hile [Plaintiff's] living arrangement may be unorthodox and unacceptable to some segments of society, this conduct bears no rational connection to her fitness to practice law."<sup>178</sup> In another example, an applicant refused to answer questions related to her mental health history. A court concluded that although the question asked on the character and fitness questionnaire was indeed too broad as worded, mental health information was relevant to the task of vetting lawyers and could be explored.<sup>179</sup> As these examples demonstrate, there is at least some check on the scope of information the vetting entity can access. And, in these instances, courts have undertaken a review of whether the information sought is relevant to the qualifications required of the position.

Journalists tackling the problem of how much personal information about candidates should be reported to the public have commonly concluded that there should be some nexus between the information and the candidate's qualification for office.<sup>180</sup> But scholars like Frederick Schauer point out that virtually all information about candidates is relevant to *some* voter.<sup>181</sup> And if that is so, it becomes impossible to cabin

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176. Each state develops rules governing character and fitness criteria, many relying on the National Conference of Bar Examiners to conduct character and fitness investigation. Twenty-one states and the District of Columbia use the National Conference of Bar Examiners to conduct character and fitness investigations (Alabama, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wyoming). See *Character and Fitness Investigations*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/character-and-fitness> [<https://perma.cc/Z2M8-6GPN>].

177. 254 S.E.2d 71 (Va. 1979).

178. *Id.* at 73.

179. *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 436 (1995) ("The Court accepts that an attorney's uncontrolled and untreated mental or emotional illness may result in injury to clients and the public. This conclusion is supported by the recent cases of acute mental disability among lawyers which have resulted in license suspensions by the Virginia State Bar. . . . Thus, it is clear from the facts before the Court that, at some stage in the application proceeding, some form of mental health inquiry is appropriate.").

180. Taylor, *supra* note 1.

181. Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 908 (1984) (describing "the special political need for virtually total [press] freedom to question the . . . qualifications of political

what information voters are entitled to know. This quandary has led courts to err on the side of disclosure. As argued here, information's relevance to a candidate's qualifications for office should reemerge as at least one factor in balancing a candidate's right to privacy.

## 2. *Dignity and Safety of Candidates*

A second feature is that state bar vetting procedures are designed to ensure the dignity and safety of aspiring lawyers. To do so, the vetting process features confidentiality protections.<sup>182</sup> Attorney vetting processes are invasive, requiring investigation into sensitive personal topics such as financial, medical, and mental health history.<sup>183</sup> But unlike elections for office, candidates for the bar enjoy explicit confidentiality protections that keep significant portions of the process from public view.<sup>184</sup> When it comes to elevating lawyers to federal judgeships, these protections become even more stark. While parts of federal judicial nominations are public, portions of investigation records remain confidential. The Senate Judiciary Committee's questionnaire for judicial nominees contains

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officials"); see also Ralph G. Elliot, *The Private Lives of Public Servants: What is the Public Entitled to Know?*, 27 CONN. L. REV. 821, 826–27 (1995).

182.

See e.g., *Rule 402: Confidentiality*, PA. BOARD L. EXAMINERS (2018), [https://www.pabarexam.org/bar\\_admission\\_rules/402.htm](https://www.pabarexam.org/bar_admission_rules/402.htm) [<https://perma.cc/2Y5E-N76U>] (noting how Rule 402 governs the confidentiality of bar application materials and provides for only limited exceptions: “[e]xcept as otherwise prescribed in these rules, the actions and records of the Board are confidential and shall not be disclosed or open to inspection by the public”).

183. See NAT'L CONFERENCE OF BAR EXAM'RS, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENT 2019, at viii, <http://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf> [<https://perma.cc/J2NM-2AWG>] (listing investigations for neglect of financial responsibility, evidence of mental or emotional instability, and evidence of drug or alcohol dependency under “Relevant Conduct”).

184. See e.g., VA. CODE § 54.1-108 (2020) (providing exemptions from the Virginia Freedom of Information Act for named boards, including the Virginia Board of Bar Examiners (Title 54.1); exemptions apply to the bar exam itself as well as any other applications for licensing in the profession which encompasses character and fitness materials); *id.* § 54.1–3925.2 (providing the Board of Bar Examiners access to criminal history records from any state or federal law enforcement agency, but providing that such information “shall not be released to any other person or agency except in furtherance of the investigation of the applicant or with the authorization of the applicant or upon court order”); *id.* § 54.1–3925.3(C) (“Information furnished to and testimony given before the Board or the character and fitness committee in the course of an investigation or hearing shall be privileged, and any person furnishing information or giving testimony shall be immune from civil liability therefor, unless it is shown that such person was motivated by actual malice.”). *But see* *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 52 (1961) (holding that state bar applicant's refusal to answer questions related to Communist Party membership did not unconstitutionally impinged upon rights of free speech and association protected by the Fourteenth Amendment, stating, “we regard the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented”).

public and confidential portions. The confidential portion includes questions such as home address and phone number to protect nominees' safety.<sup>185</sup> The confidential portion also contains questions on sensitive matters such as bankruptcy and tax information, health history, and past investigations and complaints, presumably to protect the dignity interests of nominees while still making this information available to the Committee.<sup>186</sup> In the case of federal judicial nominations, confidentiality rules protect to the greatest extent possible the safety and dignity interests of those being vetted.<sup>187</sup>

Confidentiality protections in vetting processes serve an important goal: ensuring that qualified candidates will step up. Becoming a lawyer or a judge requires diligence, self-sacrifice, and a degree of self-exposure. The vetting process itself serves as a winnowing, ideally weeding out unfit or unqualified candidates who know they would not make the cut. Yet

185. See S. COMM. ON THE JUDICIARY, QUESTIONNAIRE FOR JUDICIAL NOMINEES, <https://www.casey.senate.gov/download/questionnaire-judicial-nominees> [https://perma.cc/VA2E-QE56]. In the Kagan, Gorsuch, and Kavanaugh nominations, the Senate agreed to keep certain documents "committee confidential." See Press Release, U.S. S. Comm. on the Judiciary, Old Process, New Nominee: Committee Confidentiality and Supreme Court Nominations (Sept. 4, 2018) [hereinafter Press Release, Old Process, New Nominee], <https://www.judiciary.senate.gov/press/rep/releases/committee-confidentiality-and-supreme-court-nominations> [https://perma.cc/4GMD-9JF]. Keeping judicial nominees' home addresses and phone numbers is a measure intended to protect their safety. This practice is consistent with the federal judiciary norm of keeping home addresses and phone numbers of judges from public view. Protecting judge's home address in state courts has long been a concern states have legislated in the face of violence against judges at their homes at the hands of litigants. See *Gavel to Gavel*, NAT'L CTR. ST. CTS. (Jan. 7, 2011), <https://www.ncsc.org/~media/Microsites/Files/Gavel%20to%20Gavel/archived%20pdfs/G%20to%20G%205-2.ashx> [https://perma.cc/N3TP-949R] (describing violence against judges and state efforts to protect release of their home addresses, in part by passing laws prohibiting publication).

186. S. COMM. ON THE JUDICIARY, *supra* note 185.

187. Not all nominees emerge with their dignity intact. In the context of federal judgeships, recent cases abound in which successful (and unsuccessful) candidates emerge from the process with diminished dignity. See e.g., Jack Crowe, *Kavanaugh: My Family's Reputation Has Been 'Permanently Destroyed.'* NAT'L REV. (Sept. 27, 2018, 3:39 PM), <https://www.nationalreview.com/news/brett-kavanaugh-my-familys-reputation-has-been-permanently-destroyed/> [https://perma.cc/2BPU-LAF3] ("The consequences will extend long past my nomination. The consequences will be with us for decades. This grotesque and coordinated assassination will dissuade competent and good people of all political persuasions from serving our country."); Derek Hawkins, *Trump Judicial Nominee Fumbles Basic Questions About the Law*, WASH. POST (Dec. 15, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/12/15/trump-judicial-nominee-fumbles-basic-questions-about-the-law/?utm\\_term=.275a011a219a](https://www.washingtonpost.com/news/morning-mix/wp/2017/12/15/trump-judicial-nominee-fumbles-basic-questions-about-the-law/?utm_term=.275a011a219a) [https://perma.cc/EC37-UC9B] (describing Matthew Spencer Petersen's failed judicial nomination). That said, judicial nominees are subject to privacy invasion. See Josh Lederman, *The Intrusive Investigation Behind Supreme Court Nominations*, PBS NEWS HOUR (Feb. 16, 2016), <https://www.pbs.org/newshour/nation/the-intrusive-investigation-behind-supreme-court-nominations> [https://perma.cc/R8X2-ABKG] (stating that Robert Kelner, partner at Covington & Burling LLP who advises judicial appointees on Senate confirmation, explained, "I always tell clients that they should think long and hard about whether they want to go through the process at all . . . You give up any semblance of privacy. Your name may be floated, but then it might become publicly known that the White House backed away because of something embarrassing.").

those designing vetting procedures understand that the process cannot be too invasive; otherwise qualified candidates will refuse to subject themselves. Admission to the bar is a difficult process, yet judging by the high numbers of applicants seeking to fill these roles, the degree of invasiveness has been calibrated reasonably.<sup>188</sup> If aspects of bar admission were perceived as overly invasive or dignity-demolishing, state bars would (and do) make changes to ensure enough qualified candidates sought these positions.<sup>189</sup>

In bar admissions, the admission decision is delegated to a state institution; in elections, the delegee is the voting public. As a result, there is no obvious mechanism for preserving candidate dignity. In the past, many relied on the institutional press for this gatekeeping role. It no longer functions as one. As a more nuanced application of privacy law might recalibrate protections for candidates to accommodate countervailing democratic principles—like ensuring strong and qualified candidates remain interested in running.<sup>190</sup>

### 3. *Degree of Responsibility*

A final characteristic of lawyer vetting is a connection between the degree of privacy invasion of the vetting process and the importance of the position sought. Lawyers carry great public responsibility to administer justice with integrity. The proper functioning of our justice system is a pillar of a functioning democracy. Lawyers make decisions that directly impact the livelihoods and safety of members of the public. As such, vetting processes for admission to the bar require a privacy-

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188. That said, in the case of attorneys, approximately 45,000 people sat for the bar in the United States in 2018, down from almost 84,000 in 2013. See THE BAR EXAM’R, FIRST-TIME EXAM TAKERS AND REPEATERS IN 2018 (2018), <https://thebarexaminer.org/wp-content/uploads/2019/880119/First-Time-Exam-Takers-and-Repeaters-in-2018.pdf> [<https://perma.cc/8JWF-8Z3S>]; THE BAR EXAM’R, 2012 STATISTICS (2014), <https://thebarexaminer.org/wp-content/uploads/PDFs/2013-Statistics-Corrected030917.pdf> [<https://perma.cc/C77E-H67Y>]. Since, there have been no major changes to privacy protections in the bar admissions process during that time, the sharp reduction likely has more to do with the highly publicized law school student debt crisis that dramatically reduced law school application rates. See The Editorial Board, *Law School Debt Crisis*, N.Y. TIMES (Oct. 24, 2015), <https://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html> [<https://perma.cc/WG7H-ASS7>].

189. As an example, the Virginia Board of Bar Overseers recently changed its Character and Fitness process to exclude questions about mental health after law students voiced concern that otherwise qualified candidates would not step forward. See Justin Mattingly, *Virginia Panel Scraps Mental Health Question After Law School Student Push*, RICHMOND TIMES DISPATCH (Feb. 8, 2019), [https://www.richmond.com/news/local/virginia-panel-scraps-mental-health-question-after-law-school-student/article\\_36ece9b3-078c-5e12-b748-762555b8f081.html](https://www.richmond.com/news/local/virginia-panel-scraps-mental-health-question-after-law-school-student/article_36ece9b3-078c-5e12-b748-762555b8f081.html) [<https://perma.cc/MBX6-SC5P>].

190. René Reyes, *Do Even Presidents Have Private Lives?*, 17 KAN. J.L. & PUB. POL’Y 477, 481 (2008) (arguing that qualified candidates may refrain from stepping forward even with no skeletons in their closets).

invasive process (despite, as noted, confidentiality provisions that limit exposure). When lawyers become judges—with even greater responsibilities for preserving the public trust—vetting processes become more invasive and rigorous.<sup>191</sup> Generally speaking, those designing vetting processes for various public roles understand that the more authority and responsibility a position of public trust entails, the more privacy-invasive the vetting process must be.<sup>192</sup>

This “sliding scale” approach has seldom played out in electoral vetting. When analyzing candidate privacy claims, the degree of responsibility of the office only rarely plays a role.<sup>193</sup> More commonly, courts have reflexively denied candidate privacy interests without regard to the office for which the candidate was running.<sup>194</sup> A good example is *State v. Morgan*,<sup>195</sup> an opinion from 1987 at the Court of Appeals in Ohio.<sup>196</sup> In that case, an unsuccessful candidate for Clark County Commissioner refused to complete a financial disclosure citing, *inter alia*, constitutional privacy protections.<sup>197</sup> The court denied Morgan’s assertions, holding that,

Morgan had available to him the simple and not very onerous option of not running for office. Candidates for elective office cannot reasonably expect the same degree of privacy enjoyed by

191. Federal judgeship vetting procedures provide one example. *See* S. COMM. ON THE JUDICIARY, *supra* note 185. In the Kagan, Gorsuch, and Kavanaugh nominations, the Senate agreed to keep certain documents “committee confidential.” *See* Press Release, Old Process, New Nominee, *supra* note 185.

192. In the security sector, for example, generally the “greater access to classified information or sensitive physical locations a position provides, the stricter (and costlier) the vetting process is likely to be.” *See* GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES, DCAF BACKGROUNDER, VETTING AND THE SECURITY SECTOR 4 (2006), [https://www.files.ethz.ch/isn/26080/12\\_bg\\_security\\_vetting.pdf](https://www.files.ethz.ch/isn/26080/12_bg_security_vetting.pdf) [<https://perma.cc/CWT5-K895>].

193. *Jones v. Palmer Media, Inc.*, 478 F. Supp. 1124, 1129 (1979) (“Because the Plaintiff was a candidate for [the U.S.] Congress, the public had a right to know every aspect of Plaintiff’s life.”).

194. *See, e.g.*, *Matson v. Dvorak*, 40 Cal. App. 4th 539, 550 (Cal. Ct. App. 1995) (holding, with respect to a candidate for city council, that “[i]n choosing those who are to govern them, the public must, of course, be afforded the opportunity of learning about any facet of a candidate’s life that may relate to his fitness for office”); *McCall v. Oroville Mercury Co.*, 142 Cal. App. 3d 805, 807 (Cal. Ct. App. 1983) (holding that, without weighing the nature of the office sought, a “candidate for public office has usually been considered a ‘public figure’ who has waived much of his right to privacy. Almost any truthful comment on his qualifications for office, no matter how serious an invasion of privacy, will be privileged.”); *Fann v. City of Fairview*, 905 S.W.2d 167, 172 (Tenn. Ct. App. 1994) (involving candidate for city commissioner, holding that “newspaper articles [disclosing expunged criminal records] clearly concerned ‘a matter of public significance’ as the truth information concerned a candidate for public office”); *see also Beruan v. French*, 56 Cal. App. 3d 825, 828 (Cal. Ct. App. 1976) (holding that with respect to a candidate for secretary-treasurer of the International Association of Machinists and Aerospace Workers Union, “by volunteering his services for office, a candidate waives much of his right to privacy, and almost any truthful comment on his qualifications for office . . . will be privileged”).

195. No. 2294, 1987 WL 11809 (Ohio Ct. App. May 28, 1987).

196. 1987 WL 11809, at \*4.

197. *Id.* at \*1.



non-candidates. The recent demise of Senator Gary Hart's presidential candidacy is an extreme example of the lowered privacy expectations of candidates for public office.<sup>198</sup>

The court made no distinction between Morgan's run for local office and the privacy interests of a candidate for the U.S. presidency. In numerous other cases, the reflexive denial of candidate privacy described throughout this discussion has applied equally despite real differences in the level of responsibility and impact of the office sought.<sup>199</sup>

Weighing the relevance of information to a position sought, the impact on dignity and safety of potential candidates, and the degree of responsibility the position holds are key considerations taken into account when state bar associations vet lawyers. Might these factors have an application when it comes to evaluating the privacy interests of candidates for office?

### *B. Applying a More Nuanced Take on Candidate Privacy*

Although the comparison between elections and vetting processes in other contexts are imperfect at best, core principles help distill factors that might inform a new perspective on candidate privacy.<sup>200</sup> A more nuanced assessment of candidate privacy claims might require courts to do more than immediately discount candidate privacy interests. Rather, courts might balance factors such as: (1) information's relevance to qualifications for office; (2) the impact on the dignity interests of candidates and undue deterrence of qualified candidates from seeking office; and (3) the degree of public trust entailed in the office sought. Such

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198. *Id.* at \*11.

199. This approach has its limitations. Less "important" public offices may be weighty in terms of impact on constituents. Yes, a small-town mayor may have less responsibility and power than the president of the United States, but the power a local official exerts can be great in relative terms.

200. Scholars have identified versions of these same principles when theorizing press coverage of candidate's personal lives. *See e.g.*, Louis W. Hodges, *The Journalist and Privacy*, 12 SOC. RESP.: JOURNALISM L. MED. 5, 14 (1983) (suggesting that "private information, [should be published,] even against their will, if their private activity might [have] significant[] [impact on] . . . their [official] performance"); Dan Meagher, *Freedom of Political Communication, Public Officials and the Emerging Right to Personal Privacy in Australia*, 28 ADELAIDE L. REV. 176, 188 (2008) (arguing that private information about candidates should be made public only "when the private facts . . . would compromise, undermine or contradict the integrity of [a candidate's] stated policy agenda or . . . capacity to properly discharge his or her public duties"); Stanley A. Renshon, *Some Observations on Character and Privacy Issues in Presidential Campaigns*, 13 POL. PSYCHOL. 565, 581-83 (1992) (arguing that the press should report on the private lives of candidates only when relevant to personal and interpersonal integrity, assessing a candidate's judgment, and leadership capacity and/or skills); Frederick Schauer, *Can Public Figures Have Private Lives?*, 293 SOC. PHIL. & PUB. POL'Y 293, 308-09 (2000) (arguing that from a democratic theory perspective, "[i]f there is such a right to vote, and if voting decisions are essentially individual decisions that embody an important dimension of individual autonomy, then it seems wrong to contend that the information that some voters require for making their voting decisions should be subject to majoritarian control").

an approach would by necessity be fact-specific and would require courts to weigh these factors to different degrees in different cases. Yet this framework might allow a more calibrated view of candidate privacy that could accommodate evolving campaign environments. The discussion below provides some examples of how such factors might weigh.

Pennsylvania resident Mel Marin decided to run for U.S. Congress in 2010.<sup>201</sup> When Mr. Marin refused to include his home address in his candidate filings, election officials declined to certify his candidacy citing a 1937 law requiring candidates to provide their home addresses on filing forms.<sup>202</sup> Mr. Marin argued that disclosing his home address violated his privacy rights. Specifically, he believed (without citing evidence) that “divulging his home address [would] subject him to threats of violence and potential physical assault or death, and that providing the information will ‘chill’ his speech and his efforts to become a candidate for public office because he [would] be afraid to speak out on issues of vital public importance.”<sup>203</sup> The court had little sympathy for Marin’s claim to privacy, noting that

there is a compelling reason to require candidates for elected office to provide their home address on their nomination forms as every candidate must be qualified for the position he seeks. If members of the general public are required to provide their home address information in order to register to vote and such information is generally available to the public for inspection in the voter rolls, why should a candidate for public office believe he is somehow above or exempt from disclosing such information?<sup>204</sup>

Without evidence of threats against his safety, Mr. Marin’s claim was rightly dismissed.

In an age of doxxing, a new and threatening phenomenon, one’s home address can be weaponized.<sup>205</sup> Suppose a candidate proffers evidence of credible threats against their safety? Should a candidate’s safety interests

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201. *Marin v. Sec’y of Commw.*, 41 A.3d 913, 914 (Pa. Commw. Ct. 2012).

202. *Id.*; 25 PENN. STAT. § 2870 (2019) (“Each candidate for any State, county, city, borough, incorporated town, township, ward, school district, poor district, election district, party office, party delegate or alternate, or for the office of United States Senator or Representative in Congress, shall file with his nomination petition his affidavit stating—(a) his residence, with street and number, if any, and his post-office address.”).

203. *Marin*, 41 A.3d at 914.

204. *Id.* at 916.

205. See Peace Chiu, *Government Scrambles to Protect Election Candidates from Doxxing*, SOUTH CHINA MORNING POST (Oct. 12, 2019), <https://www.scmp.com/news/hong-kong/politics/article/3032648/government-scrambles-protect-election-candidates-doxxing> [<https://perma.cc/LC2P-6YJ3>] (describing push to scrap requirement that candidates provide their home addresses when registering as candidates in order to protect their safety).

ever trump a required disclosure? The Supreme Court has weighed in multiple times on the question of whether individuals and organizations have rights against disclosure based on the presence of threats and harassment, answering that question in the affirmative when the facts support doing so. In *NAACP v. Alabama*,<sup>206</sup> the U.S. Supreme Court held that the civil rights organization did not have to disclose its membership lists, citing the right of association and also the privacy interests of members.<sup>207</sup> In *Doe v. Reed*,<sup>208</sup> a case involving whether petition signers could prevent Washington State from disclosing their names and addresses, the Court declined to protect personal information of petition signers, noting that petitioners had failed to prove that the release of their names and addresses would result in significant threat, harassment, or reprisals.<sup>209</sup> In both cases, the Court weighed the privacy interests against both the democratic values at stake and the safety interests involved.<sup>210</sup> Those same protections might be applied in some instances when candidates for office face toxic privacy incursions—particularly if failure to do so undermines the competing democratic value of ensuring qualified candidates are not deterred from seeking office.<sup>211</sup>

Looking at the other factors, a candidate's home address may or may not be relevant to a candidate's qualifications for office. If a candidate professed to be low-income but lived in a wealthy neighborhood, disclosing a home address may indeed be relevant.<sup>212</sup> Likewise, a court could examine the degree of responsibility of the office to weigh whether

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206. 357 U.S. 449 (1958).

207. *Id.* at 462 (“Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”).

208. 561 U.S. 186, 200 (2010).

209. *Id.* at 200.

210. In *NAACP*, the Court concluded that compelling the NAACP to disclose its membership list to the state of Alabama abridges “the rights of its rank-and-file members to engage in lawful association in support of their common beliefs.” 357 U.S. at 460. In *Doe*, the Court held that disclosing petition signatures “promotes transparency and accountability in the electoral process.” *Doe*, 561 U.S. at 186.

211. In the case of federal judgeships, keeping judicial nominees' home addresses and phone numbers is a measure intended to protect their safety. This practice is consistent with the federal judiciary norm of keeping home addresses and phone numbers of sitting judges from public view. *Infra* note 227 (describing confidentiality protections for judicial nominees). In state court systems, protecting judge's home address in state courts has long been a concern states have legislated in the face of violence against judges at their homes at the hands of litigants. See NAT'L CTR ST. CTS., *supra* note 185.

212. A home address could be important to confirm candidate residency requirements are met. That said, verifying a candidate's residence can be confirmed without revealing their home addresses to the public if competing factors compel protecting candidate privacy.

a candidate disclosing a home address is warranted.<sup>213</sup> Just as a candidate for a federal judgeship is not required to publicly release their home address,<sup>214</sup> perhaps fact-specific leeway should be provided to candidates for office.

A 1984 judicial election provides a second example of how candidate privacy claims might be reconsidered. Judicial candidate and then-sitting Judge David Aisenson filed suit against a local television network for filming him in the driveway of his home and then airing a segment on television depicting him unflatteringly.<sup>215</sup> Judge Aisenson alleged, among other claims, the tort of intrusion upon seclusion.<sup>216</sup> The court viewed Aisenson's intrusion claim unsympathetically, citing waiver.<sup>217</sup> The court predictably reasoned that "relevant to whether an intrusion is 'highly offensive to a reasonable person' is the extent to which the person whose privacy is at issue voluntarily entered into the public sphere."<sup>218</sup> The court further reasoned that "[w]hen the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned, especially if the individual willingly entered into the public sphere."<sup>219</sup>

Imagine the candidate for office in this case had been Kiah Morris, the embattled Vermont legislator subject to threats and racist attacks. Imagine further that the person filming in her driveway was not a local television news crew but instead one of the perpetrators of the harassment against her armed with a cell phone camera. Should the same reflexive denial of an intrusion upon seclusion claim (or a public disclosure of private facts claim) stand?<sup>220</sup> The "newsworthiness" or "matter of public concern" tests have historically immunized defendants from such claims.<sup>221</sup> But do the shifts described above warrant rethinking this immunization?

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213. That said, voters are more likely to have first-hand knowledge of candidates' address in local races in smaller localities. Likewise, as we see from, for example, the federal judicial vetting process, home addresses of federal judges are understandable of high privacy value.

214. *Supra* note 191.

215. *Aisenson v. Am. Broad. Co.*, 220 Cal. App. 3d 146, 152 (Cal. Ct. App. 1990).

216. *Id.* at 153. The plaintiff argued that the television crew filmed him as he walked from his home to his car in a manner which, "[made] it appear as if [he] were a criminal or the subject of some ongoing criminal investigation." *Id.*

217. *Id.* at 146; *see also* RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977) (stating that the elements of an intrusion upon seclusion claim are: (1) intentional intrusion by the defendant, physical or otherwise; (2) upon the solitude or seclusion of another or his private affairs or concerns; (3) that is highly offensive to a reasonable person).

218. *Aisenson*, 220 Cal. App. 3d at 162.

219. *Id.* (citing *Kapellas v. Kofman*, 1 Cal.3d 20, 36-37 (1969)).

220. *Supra* note 80 (citing cases in which tort remedies were unavailable to candidates because of the "legitimate public concern bar").

221. *Supra* section I.C.

Weighing the factors suggested here, information gleaned from filming the candidate in her driveway, depending on the specific facts, may or may not be salient. If this hypothetical defendant's action does not meaningfully inform the public about the candidate's qualifications for office,<sup>222</sup> this should factor into a court's decisionmaking. In addition, Kiah Morris's safety was most certainly at issue and it is exactly this type of harassment that pressured her, an otherwise qualified candidate, out of a reelection bid altogether. Finally, one might also conclude that the assault on her dignity and the inability of the law to adequately redress it does a disservice to the prestigious office she held, her supporters, and the democratic process.

In a further example, imagine that a deep fake video circulated, depicting a candidate engaged in controversial sexual activity that has been fabricated and that the candidate had not in fact engaged in. Suppose further that the deep fake was so realistic that neither the naked eye nor computer forensics could detect that it was fake.<sup>223</sup> If such a video were circulated widely during an election, should that candidate have legal recourse? For many practical reasons, they may not. Assuming the maker of the deep fake hides behind a veil of online anonymity, it would be difficult for the candidate to bring suit directly. And, section 230 of the Communications Decency Act would prevent recovery in tort against websites hosting the content.<sup>224</sup> But assuming these practical barriers fell away, could a privacy claim stand? How would it be framed?

A candidate could attempt a right of publicity claim, arguing that their name and likeness had been used without their consent.<sup>225</sup> Yet, right of publicity/appropriation claims (creatures of state law) typically require commercial gain not present in the campaign context.<sup>226</sup> And because tort and constitutional privacy claims can so easily be defeated when the subject is "newsworthy," candidates are out of luck.<sup>227</sup>

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222. Again, a fact-specific inquiry.

223. Drew Harwell, *Top AI Researchers Race to Detect 'Deepfake' Videos: 'We are Outgunned'*, WASH. POST (June 12, 2019), [https://www.washingtonpost.com/technology/2019/06/12/top-ai-researchers-race-detect-deepfake-videos-we-are-outgunned/?utm\\_term=.0e9283e0e588](https://www.washingtonpost.com/technology/2019/06/12/top-ai-researchers-race-detect-deepfake-videos-we-are-outgunned/?utm_term=.0e9283e0e588) [<https://perma.cc/Q6PU-W9FE>].

224. 47 U.S.C. § 230(e)(2) (2012) (providing immunity for internet content providers).

225. RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977).

226. See *Hill v. Pub. Advocate of the United States*, 35 F. Supp. 3d 1347 (D. Colo. 2014) (denying same-sex married couple appropriation actions against political advocacy organizations for use of their wedding photos in political ads); *Raymen v. United Senior Ass'n, Inc.*, 409 F. Supp. 2d 15 (D.D.C. 2006) (same); see also, Jesse Lempel, *Combatting Deep Fakes Through the Right of Publicity*, LAWFARE (Mar. 30, 2018), <https://www.lawfareblog.com/combatting-deep-fakes-through-right-publicity> [<https://perma.cc/S7K8-SBY3>].

227. Another option might be defamation and/or false light, though as a candidate for public office the First Amendment bar is set extraordinarily high. See Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV.

Still, compelling reasons merit enabling candidates to overcome First Amendment bars to recovery in tort for deep fakes aimed at confusing voters and distorting the electoral process.<sup>228</sup> The specter of harm deep fakes inflict on candidates and the democratic process suggests precisely the rethinking of reflexive denial of redress for candidates advocated for here. The factors suggested here weigh in favor of remedy: redressing deep fakes works *in service* of informing voters; the dignity interests of candidates in not having faked videos of them circulate is strong—the specter of rampant and unchecked deep fakes of candidates will almost certainly dissuade candidates from entering the race<sup>229</sup>; and, finally, the higher the office sought, arguably the greater public harm deep fakes can inflict.

As a final example, what about the circulation of non-consensual intimate imagery of candidates? Though not a candidate at the time, the experience of former U.S. Congresswoman Katie Hill is instructive. Katie Hill took office as one of 117 women elected to office in 2018, and one of the few openly LGBTQ women to win a seat in Congress.<sup>230</sup> As one commenter described, “Hill offered a radically different idea of what American government could look like—and a radically different voice than many of those that had come before her.”<sup>231</sup> Hill resigned shortly after several conservative news outlets circulated intimate images of Hill and her estranged husband’s consensual joint affair with a campaign staffer.<sup>232</sup>

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1753, 1791 (2019) (discussing possible tort remedies including defamation and right to publicity for the use of a person’s face in deep fakes); *see also* N.Y. Times v. Sullivan, 376 U.S. 254, 272–73 (1964) (requiring that public figure plaintiffs in defamation suits prove actual malice). Note that two justices’ concurrence made the distinction between press critiques of official conduct of public officials (as in *Sullivan*) and press critique public officials’ private conduct. *Id.* at 301–02 (Douglas & Goldberg, JJ., concurring) (“This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official. . . . Purely private defendant has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.”). *Id.* at 301–02. The majority expressly reserved this question. *Id.* at 283 n.23.

228. Green, *supra* note 136.

229. *See* Simon Parkin, *Politicians Fear This Like Fire: The Rise of the Deep Fake and the Threat to Democracy*, GUARDIAN (June 22, 2019), <https://www.theguardian.com/technology/ng-interactive/2019/jun/22/the-rise-of-the-deepfake-and-the-threat-to-democracy> [<https://perma.cc/KAR2-XB85>] (discussing the damage deep fakes of political figures could do to democracy).

230. Lux Alptraum, *Katie Hill Resigned Because of Revenge Porn. This Smear’s Success puts Many Women at Risk*, NBC NEWS (Nov. 1, 2019), <https://www.nbcnews.com/think/opinion/katie-hill-resigned-because-revenge-porn-smear-s-success-puts-ncna1075126> [<https://perma.cc/P7JE-G58T>].

231. *Id.*

232. Michael Calderone, *After Katie Hill, Media Grapples with Possible Onslaught of Nude Photos*, POLITICO (Oct. 31, 2019), <https://www.politico.com/news/2019/10/31/katie-hill-nude-pictures-media-063064> [<https://perma.cc/48VU-4KDG>].

Laws prohibiting the nonconsensual publication of intimate imagery are unlikely to protect candidates.<sup>233</sup> Even if such statutes did not exempt matters of public concern (which many do),<sup>234</sup> a court may look at the candidate's public status and decide this avenue of redress is unavailable due to First Amendment protections for such speech—candidates are quintessential matters of public concern.<sup>235</sup> But, as suggested here, a judge should think hard about competing democratic and First Amendment values at stake. Viewed through a privacy lens and using the factors proposed here, what happens in a candidate's bedroom is arguably irrelevant to a candidate's qualifications for office. In the case of Katie Hill, the assessment is complicated by the presence of her staffer, calling into question her judgment.<sup>236</sup> Were that not at issue, the relevance to a candidate's qualifications for office would be reduced. Likewise, publication of nude photos of a candidate for office certainly impairs that candidate's dignity and safety interests.<sup>237</sup> Harm to Katie Hill's dignity and safety interests drove her from office and has been widely cited as

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233. One of the arguments forwarded by those supporting revenge porn statutes is that they involve purely private speech. *See e.g.*, CITRON, *supra* note 28 at 210 (“Protecting against the nonconsensual disclosure of private communications . . . would inhibit a negligible amount of expression that the public legitimately cares about. . . . Revenge porn does not promote civic character or educate us about cultural, religious, or political issues.”).

234. According to the Cyber Civil Rights Initiative, of the forty-six states (plus Washington D.C. and Guam) that have passed laws prohibiting nonconsensual pornography, nine state codes do not include public interest exceptions (Arkansas, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin). *See Revenge Porn Laws*, CYBER C.R. INITIATIVE (2019), <https://www.cybercivilrights.org/revenge-porn-laws/> [<https://perma.cc/WZ7K-NWJD>].

235. This is certainly the position taken by First Amendment advocates. *See e.g.*, Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 662 (describing the First Amendment pushback).

236. Katie Hill herself questioned her judgment with respect to sexual involvement with a campaign staffer. *See* Emily Cochrane, *Katie Hill Will Resign from Congress Amid Ethics Investigation*, N.Y. TIMES (Oct. 27, 2019), <https://www.nytimes.com/2019/10/27/us/katie-hill-resigns.html> [<https://perma.cc/PKF7-SEAS>] (quoting Hill, “I still allowed it to happen despite my better judgment”). The disclosure of intimate photos of candidates for office may call into question candidate's judgment in other contexts. For example, the privacy protections argued for here are lessened in the case of Anthony Weiner's sending intimate photographs to young women in large part because it reflects poor (and ultimately criminally culpable) judgment on his part. Matt Zappatosky, *Anthony Weiner Sentenced to 21 Months in Federal Prison*, WASH. POST (Sept. 25, 2017), [https://www.washingtonpost.com/world/national-security/25onthony-weiner-sentenced-to-21-months-in-federal-prison/2017/09/25/ad4165f4-a1f4-11e7-ade1-76d061d56efa\\_story.html](https://www.washingtonpost.com/world/national-security/25onthony-weiner-sentenced-to-21-months-in-federal-prison/2017/09/25/ad4165f4-a1f4-11e7-ade1-76d061d56efa_story.html) [<https://perma.cc/XF6R-DH89>] (describing Weiner's sentence for transferring obscene material to a minor).

237. Upon leaving office, in her farewell speech on the House floor, Hill acknowledged fear for her safety: “I am leaving because of the thousands of vile, threatening e-mails, calls, and texts that made me fear for my life and the lives of the people that I care about. Today is the first time I've left my apartment since the photos taken without my consent were released, and I'm scared.” Masha Gessen, *The Terrorization of Katie Hill*, NEW YORKER (Nov. 5, 2019), <https://www.newyorker.com/news/our-columnists/the-terrorization-of-katie-hill> [<https://perma.cc/8Y73-K8HD>].

likely to dissuade young women from running for office in the future.<sup>238</sup> And finally, depending on the circumstance, a judge might find relevant the nature of the office in evaluating such claims.

As these examples demonstrate, it is possible to address the privacy concerns of candidates without sacrificing—and, in some cases, serving—democratic values that support transparency and openness. Given the current campaign climate and the kinds of privacy incursions candidates currently face, it is time to reevaluate the reflexive denial of candidate privacy rights.

### C. *Nuanced Candidate Privacy and the Informed Voter*

Nothing in the discussion above argues that embarrassing or discrediting information about candidates must necessarily be shielded from public view.<sup>239</sup> Candidates might prefer to shield quite a bit of embarrassing information from the public, but reassessing candidate privacy interests does not require protecting tender egos. The public right of access to information should be the default; candidate privacy protections should be hard won.

Take the increasingly relevant question of candidate tax privacy. Donald Trump became the first presidential candidate in the modern era to refuse to disclose his tax returns.<sup>240</sup> Given the controversial nature of his presidency and his pursuit of re-election, accessing Trump's tax returns has become the subject of litigation from sea to shining sea (even reaching the shores of the U.S. Supreme Court).<sup>241</sup> Litigants are seeking access to Trump's tax returns through a variety of levers ranging from

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238. Lisa Lerer, *The Revenge Porn Debate Reaches Washington*, N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/2019/10/28/us/politics/katie-hill-revenge-porn.html?searchResultPosition=1> [<https://perma.cc/4J4M-KW4V>] (quoting nonconsensual pornography lawyer Carrie Goldberg, "I fear the chilling effect the attack on Katie Hill will have on other ambitious daring women and members of the L.G.B.T.Q. community thinking about careers in politics").

239. Nor does it upset the longstanding protections that set a high bar for candidate redress of defamatory critique. As has been expected throughout the modern era, those who run for office must develop a thick skin; the First Amendment rightly protects political speech criticizing their actions unless it is a knowing or recklessly false representation of fact.

240. *Presidential Tax Returns*, TAX ANALYSTS, <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/VN4F-5FWK>]. Mitt Romney was reticent about doing so but ultimately relented. See Lori Montgomery et al., *Mitt Romney Releases His Tax Returns*, WASH. POST (Jan. 24, 2012), [https://www.washingtonpost.com/politics/2012/01/23/g1QAj5bUMQ\\_story.html](https://www.washingtonpost.com/politics/2012/01/23/g1QAj5bUMQ_story.html) [<https://perma.cc/84ZP-5MEM>]; see also, John Wihbey & Mike Beaudet, *Transparency, Corruption, and the Information Needs of Communities: The Case of Personal Financial Disclosure*, SSRN (Dec. 5, 2016) [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2880890](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2880890) [<https://perma.cc/3Z5V-SA4T>] (surveying fifty state personal financial disclosure laws required for candidates and public officials).

241. *Trump v. Vance*, No. 19-635, 2019 WL 6797730, at \*1 (U.S. Dec. 13, 2019). The Supreme Court is expected to rule in June 2020 on these cases.



Congressional investigative authority<sup>242</sup> to New York's state grand jury subpoena power<sup>243</sup> to California ballot access law.<sup>244</sup> The types of legal

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242. The House Ways & Means Committee has requested Trump's tax returns as part of its investigatory authority under 26 U.S.C. § 6103(f)(1) (2012) of the tax code. See Letter from Chairman Richard Neal to IRS Commissioner Charles Rettig, p.1 (Apr. 3, 2019) (invoking authority under section 6103(f)). With respect to the House Ways & Means request, the argument against allowing access, despite the clear mandate on the face of the statute itself, is that Congress must assert a legitimate purpose consistent with the House Ways & Means Committee's legislative and constitutional responsibilities. George K. Yin, *Preventing Congressional Violations of Taxpayer Privacy*, 69 TAX L. 103, 119 (2015) (arguing that section 6103(f)(1) is "best understood as permitting a tax committee disclosure of minimal information only if it serves a legitimate purpose, a minimal condition merely requiring the action to be consistent with the committee's legislative and Constitutional responsibilities").

243. In the case of the New York litigation, the question arises as part of a grand jury investigation surrounding Trump's alleged payment of "hush money" to two women during his 2016 campaign. Adam Liptak, *Supreme Court to Rule on Release of Trump Financial Records*, N.Y. TIMES (Dec. 13, 2019), <https://www.nytimes.com/2019/12/13/us/supreme-court-trump-financial-records.html> [<https://perma.cc/2WMM-5PU2>]. Trump's attorneys sought to invalidate the subpoena, claiming the President has sweeping immunity from state criminal process while in office. The Second Circuit unanimously rejected that claim. *Trump v. Vance*, 941 F.3d 631, 640 (2d Cir. 2019) ("We have no occasion to decide today the precise contours and limitations of presidential immunity from prosecution, and we express no opinion on the applicability of any such immunity under circumstances not presented here. Instead, after reviewing historical and legal precedent, we conclude only that presidential immunity does not bar the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President.").

244. Some states considered whether to require candidates to disclose their tax returns as a condition of candidacy. California became the first state to enact such a law in July 2019. Presidential Tax Returns, *supra* note 240. California Governor Gavin Newsom signed Senate Bill 27, the Presidential Tax Transparency and Accountability Act, into law on July 30, 2019. On August 6, 2019, President Trump and the Republican National Committee challenged the law in federal court. See John Wagner, *Trump, RNC File Legal Challenges to Calif. Law Seeking Release of the President's Tax Returns*, N.Y. TIMES (Aug. 6, 2019), [https://www.washingtonpost.com/politics/trump-rnc-file-legal-challenges-to-calif-law-seeking-release-of-trumps-tax-returns/2019/08/06/440f9e0c-b872-11e9-bad6-609f75bfd97f\\_story.html](https://www.washingtonpost.com/politics/trump-rnc-file-legal-challenges-to-calif-law-seeking-release-of-trumps-tax-returns/2019/08/06/440f9e0c-b872-11e9-bad6-609f75bfd97f_story.html) [<https://perma.cc/KDQ8-VNG6>]. The California Supreme Court struck the statute as violating the state constitution just over four months later. *Patterson v. Padilla*, 451 P.3d 1171, 1173 (2019) (citing CAL. CONST. art. II, § 5(c), which states, "[t]he Legislature shall provide for partisan elections for presidential candidates, and political party and party central committees, including an open presidential primary whereby the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation or throughout California for the office of President of the United States, and those whose names are placed on the ballot by petition, but excluding any candidate who has withdrawn by filing an affidavit of noncandidacy" (emphasis added)). The California case implicated federal constitutional issues such as the Qualifications Clause (U.S. CONST. art I, § 2 cl. 3) well outside the current project. See Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181 (2001) (describing constitutional challenges to ballot access laws); Derek T. Muller, *Weaponizing the Ballot*, SOC. SCI. RES. NETWORK (Sept. 9, 2019) (unpublished), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3450649](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450649) [<https://perma.cc/UYY8-JMMG>] (providing a careful analysis of the constitutionality of states adding financial disclosure ballot access requirements including discussion of the Qualifications Clause). If state and federal constitutional hurdles had not stood in the way, a court might have applied a so-called "Anderson-Burdick" balancing analysis. See Danielle Lang, *Candidate Disclosure and Ballot Access Bills: Novel Questions on Voting and Disclosure*, 65 UCLA L. REV. DISCOURSE 46, 57–61 (2017). The Anderson-Burdick test requires courts weigh the character and magnitude of the burden on rights protected by the First and Fourteenth Amendments against the interests set forth by the state in imposing the burden. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). If that burden is adjudged to be high, a court will require the state to assert a compelling justification for the requirement. *Id.* at 788. If a court

theories being advanced to support and oppose access vary depending on the actors and laws animating these quests. So far, defenses against access do not directly invoke candidate privacy themes—many are more closely associated with presidential immunity and separation of powers questions since the target for disclosure is a sitting U.S. President.<sup>245</sup> Still, their essence boils down to a core question: should privacy interests overcome voters' interest in accessing candidate Trump's tax filings?<sup>246</sup>

In addressing that distilled question for purposes of the project at hand, the factors suggested here weigh in favor of disclosure. First, sacrificing candidates' financial privacy interests in this instance serves to meaningfully inform the public about candidates' fitness for office. As Dean Erwin Chemerinsky explained in an op-ed during California's wrestle with these questions,

[a] candidate's tax returns include information about what a candidate owns, which can let voters know of possible conflicts of interest and whether there are entanglements with foreign businesses and foreign governments. They reveal whether a candidate owes money and to whom. Tax returns let voters know how much a candidate has paid in taxes and what kind of tax loopholes and shelters he or she has employed. The returns also can be used to verify a candidate's claim about wealth and income.<sup>247</sup>

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finds the burden on voters to be relatively low, the state's forwarded interest need only be reasonably justified. *Id.*

245. See e.g., *Vance*, 2019 WL 6797730, at \*1 (hinging the question of access on the degree of presidential immunity); *Trump v. Mazars USA, LLP*, 940 F.3d 710, 723 (D.C. Cir. 2019), cert. granted, No. 19-715, 2019 WL 6797734 (U.S. Dec. 13, 2019) (noting that the Committee has issued its subpoena to [an] . . . accounting firm with whom President Trump has voluntarily shared records from his time as a private citizen, as a candidate, and as President).

246. For example, in litigation concerning the statute authorizing the House Ways & Means Committee to access Trump's tax returns, his lawyers argue that the Committee must assert a "legitimate purpose." Complaint at 1, *Trump v. Comm. on Ways and Means*, U.S. H.R., No. 1:19-cv-02173, 2019 WL 3302724 (D.D.C. Jul. 23, 2019) [hereinafter *Trump v. U.S. H.R. Complaint*] (arguing that the "Treasury Department denied the Committee's request for the President's federal returns because it determined that the request had no legitimate legislative purpose"). In response, the United States Court of Appeals for the District of Columbia evaluated the public interest in obtaining Trump's returns, finding that the public interest was sufficiently high to overcome Trump's assertions of immunity. *Mazars*, 940 F.3d at 730 ("Whether current financial disclosure laws are successfully eliciting the right information from the sitting President, occupant of the highest elected office in the land, is undoubtedly 'a matter of concern to the United States.'").

247. Erwin Chemerinsky, *Requiring Candidate Tax Returns is Legal*, L.A. TIMES (July 31, 2019), [https://enewspaper.latimes.com/infinity/article\\_share.aspx?guid=05e5b57e-283b-4b8b-bb5f-b6f947024b21](https://enewspaper.latimes.com/infinity/article_share.aspx?guid=05e5b57e-283b-4b8b-bb5f-b6f947024b21) [<https://perma.cc/FV9P-ZPMU>]. Then again, a candidate's refusal to disclose tax information may be all the public needs to know. The specter that a candidate is hiding something itself provides the voting public with valuable information without harming the candidate's privacy interest via forced disclosure.

Second, one could be concerned that disclosure of personal tax information could harm the dignity or safety interests of President Trump.<sup>248</sup> Indeed this country has a history of politically-motivated tax investigations aimed at dissenting individuals and groups that should elevate such concerns.<sup>249</sup> Tax disclosure requirements—whether they come from courts or federal or state statutes—should consider dignity and safety interests of candidates for office and mitigate these concerns where possible. California’s (now-invalidated) statute addressed some of these issues in its text by limiting the disclosure rule to candidates for U.S. president and governor only<sup>250</sup> and mandating certain sensitive information like home addresses, Social Security Numbers, email addresses, and medical information be redacted before public release.<sup>251</sup> In the litigation involving the House Ways & Means Committee’s investigative authority to access Trump’s returns, section 6103(f)(1) of the Tax Code mitigates this concern by requiring review of the target tax information in closed session.<sup>252</sup> To the extent that financial disclosure provisions are found to target the politically powerless or attempt to

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248. See *supra* note 185. Even Judge Posner, as harsh a critic of privacy as they come, seemed open to the possibility that “the revelation of intensely private financial or medical information that was not a matter of public record or germane to [one’s] candidacy . . . might . . . [enable a candidate] to appeal to a concept of ‘privacy’ . . .” *Willan v. Columbia Cnty.*, 280 F.3d 1160, 1163 (7th Cir. 2002).

249. REPORT ON ADMIN. PROCEDURES OF THE INT’L REV. SERV. TO THE U.S. ADMIN. CONF., S. DOC. 94-266, 94TH CONG., 2D SESS. 967 (1975) (detailing various politically-motivated congressional requests for tax information into groups like the Black Panther Party, the Students for a Democratic Society, the New Mobilization Committee to End the War in Vietnam, and the Progressive Labor Party). Trump’s lawyers have raised the argument that subpoenas for his tax returns are politically motivated in the California, New York, and congressional litigation. See *e.g.*, *Trump v. U.S. H.R. Complaint*, *supra* note 246, at \*2 (arguing in the complaint, “[a]s Secretary Mnuchin explained after compiling a 42-page chronology of public statements from prominent Democrats: ‘The public record demonstrates that the animating purpose of [the Committee’s request] was and remains exposure of a political opponent’s private tax information’” (internal citations omitted)).

250. *SB-27 Primary Elections: Ballot Access: Tax Returns*, CAL. LEGIS. INFO. (2020), [https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill\\_id=201920200SB27](https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill_id=201920200SB27) [<https://perma.cc/EKJ7-MTXL>].

251. These provisions mirror impulses in related federal laws. For example, in the case of the famed Nixon tapes, the federal statute at issue (the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2111 § (2012)) mandated minimizing invasions into Nixon’s privacy. See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 464–65 (1977) (noting that “the Act’s screening process is designed to minimize any privacy intrusions, a goal that is further reinforced by regulations which must take those interests into account. The fact that apparently only a minute portion of the materials [relevant to Nixon’s impeachment] implicates [his] privacy interests also negates any conclusion that the screening process is an unreasonable solution to the problem of separating commingled communications”).

252. 26 U.S.C. § 6103(f)(1) (2012) (“[A]ny return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.”).

intimidate dissenting voices, dignity and safety concerns must be carefully considered.

As to the deterrence question, given that (until now) candidates for president have routinely disclosed their taxes for the past forty years, little evidence suggests that requiring tax disclosure dissuades qualified candidates from running for high office.<sup>253</sup> Since President Carter first voluntarily disclosed his taxes, no candidate for president has mounted significant resistance to the practice or complained that they would run but for the disclosure—until President Trump.<sup>254</sup> In fact, the norm of disclosing one’s taxes as a candidate for president arguably properly dissuades *unqualified* candidates from running (for example, those who have violated tax laws).

And finally, given the immense power concentrated in the U.S. presidency, the third factor suggested here—weighing the degree of public trust the office sought when balancing candidate privacy against the interests of informing voters—in this instance comes down heavily in favor of access.

Candidate privacy raises hard questions to which the answer should almost always be that voters have the right to know. Important values weigh against finding liability for candidate privacy violations.<sup>255</sup> Still, as argued here, the reflexive response of “no privacy” should yield to a more careful balancing for some candidates in some circumstances if we are to ensure that strong candidates remain willing to step up.

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253. In a footnote to its unanimous opinion, the Second Circuit in *Trump v. Vance* noted that release of tax returns had not impaired previous presidents from executing their duties. *Trump v. Vance*, 941 F.3d 631, 641 (2d Cir. 2019), *cert. granted*, No. 19-635, 2019 WL 6797730 (U.S. Dec. 13, 2019) (“We note that the past six presidents, dating back to President Carter, all voluntarily released their tax returns to the public. While we do not place dispositive weight on this fact, it reinforces our conclusion that the disclosure of personal financial information, standing alone, is unlikely to impair the President in performing the duties of his office.”).

254. See Presidential Tax Returns, *supra* note 240. Mitt Romney was reticent about doing so but ultimately relented. See Lori Montgomery et al., *Mitt Romney Releases His Tax Returns*, WASH. POST (Jan. 24, 2012), [https://www.washingtonpost.com/politics/2012/01/23/g1QAj5bUMQ\\_story.html](https://www.washingtonpost.com/politics/2012/01/23/g1QAj5bUMQ_story.html) [<https://perma.cc/84ZP-5MEM>]; John Wihbey & Mike Beaudet, *Transparency, Corruption, and the Information Needs of Communities: The Case of Personal Financial Disclosure* (Ne. Pub. Law & Theory Faculty Research Papers Series No. 278, 2016), [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2880890](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2880890) [<https://perma.cc/3Z5V-SA4T>]

(surveying fifty state personal financial disclosure laws required for candidates and public officials). See discussion in section II.C above and *supra* note 89.

255. See *e.g.*, Levinson, *supra* note 7, at 265 (“Even if we believe there are cognizable standards . . . [for protecting candidate privacy] and are absolutely confident that courts will always be correct in . . . [applying standards to police it] one can still believe that the costs would still be too high, for the fear of litigation might deter publication of even relevant materials.”).

## CONCLUSION

Justice Antonin Scalia was undoubtedly right: democracy takes courage.<sup>256</sup> Becoming a candidate for public office means stepping into the limelight and subjecting even private aspects of one's life to public inspection. There can be no getting around it if the ideal of the informed voter is to be realized. Yet the massive shifts in the modern campaign environment, combined with the need to ensure that strong, qualified candidates will throw their hat in the ring, requires a reevaluation of the dignity interests of candidates and their ability to protect their (and their families') safety, their personas, and their privacy when circumstances warrant. This may be accomplished in numerous ways in numerous contexts by acknowledging candidate privacy as worthy of protecting, by seeing violations of candidate privacy as a multifaceted harm not just to candidates but also to the democratic process, and by engaging in a balancing exercise when candidate privacy interests arise as opposed to a reflexive denial.

This is a desirable path to pursue even acknowledging that it is a very tough sell. We may be willing to curb First Amendment defenses when it comes to protecting privacy interests of private individuals.<sup>257</sup> We reflexively revert to First Amendment sanctity when the privacy invasion touches those most public of creatures: candidates. Still, an important and countervailing democratic value receives too short a shrift in the modern calculus: the silencing of would-be candidates who would run but for the onslaught against their dignity the modern campaign environment unleashes. This push-and-pull has been acknowledged in other contexts. As Owen Fiss suggests, on occasion it is necessary to lower the voices of those whose speech silences would-be participants in the democratic process.<sup>258</sup>

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256. *Doe v. Reed*, 561 U.S. 186, 228 (2010) (“Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”).

257. As a wild example, professional wrestler Terry Bollea, better known as Hulk Hogan, won a \$140 million jury verdict by claiming that, despite his public exploits, his non-public self suffered privacy harm upon the nonconsensual publication of a video of him having sex. See Len Niehoff, *Bankrupt Marketplace: First Amendment Theory and the 2016 Presidential Election*, 32 COMM. LAW. 1, 4 (2017) (describing how, at trial, Terry Bollea successfully made a distinction between the actions of his alter ego, Hulk Hogan, and himself as a private individual who he believed retained an “intact right of privacy regardless of what his Hogan character had said and done”). For more traditional acknowledgment that the state may constitutionally protect the privacy interests of private individuals, see *The Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (“We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press . . .”). RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977), *supra* note 74 (supporting the idea that law should protect private matters of people who are not “of legitimate concern to the public”).

258. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 786 (1987) (arguing that when speech silences others, “state regulation of speech is consistent with, and may even be required by, the [F]irst [A]mendment”).

Revisiting age-old candidate privacy assumptions will not fix the raft of challenges facing the current campaigning climate; inspecting other remedies—legal and otherwise—to address problems in modern campaigning is important work. But rethinking knee-jerk refusals to protect candidate privacy can and should play a role in advancing the interests of candidates, voters, and our evolving democracy.