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**CALIFORNIA'S CONSTITUTIONAL
RIGHT TO PRIVACY:
CAN IT PROTECT PRIVATE FIGURES FROM THE
UNAUTHORIZED PUBLICATION OF
CONFIDENTIAL MEDICAL INFORMATION?**

Gary Williams *

I. INTRODUCTION

Consider the following hypothetical. The Editor-in-Chief of the fictional *Los Angeles Herald Express* ("*Express*") decides her paper should print something to increase public awareness about HIV and AIDS.¹ Her purpose is to reduce the "public ignorance and hysteria" about the disease. She directs her staff to do a series of stories about "ordinary people coping with AIDS or HIV."

The staff members do an excellent job. They produce a series of ten articles. Each article describes one person and his or her daily struggle to cope with HIV. Accurate, sensitive, and moving, the articles were a tremendous success and generated favorable public reaction.

At the end of the series, the *Express* runs an editorial urging people to learn more about HIV and AIDS. The editorial encourages people to replace their superstitions and fears with knowledge about the disease, its effects, and how it can be contracted. It suggests people write letters to California's governor urging him to sign legislation prohibiting housing and employment discrimination against persons infected with HIV or

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1. I have used this hypothetical as part of a moot court exercise in my class, *Libel, Slander and the First Amendment*, for the past three years. I thank the members of those classes, whose creative ideas and passionate input on the issue of privacy have greatly enhanced my thoughts on the subject.

suffering from AIDS. After the editorial appeared, the governor's office received over 5,000 letters urging him to sign the legislation (which he signed).

Seven subjects from the series agreed the *Express* could publicize their stories. Dr. Susan Eldridge, a popular pediatrician favorably profiled in the series, did not consent.² Dr. Eldridge contracted HIV through an accident in an operating room. She had carefully concealed her illness, revealing it only to her spouse and her personal physician. While researching the series, the *Express* received a call from a confidential source. The source stated "I think people should know their children's doctor has AIDS." The source then identified Dr. Eldridge and provided sufficient corroborating information to lead reporters to believe the story might be true.

The Editor instructed a reporter to verify the accuracy of the information from the confidential source. The reporter contacted Dr. Eldridge and asked if she had AIDS. Dr. Eldridge informed the reporter she had not authorized the release of her medical records or information to anyone, and that she would not discuss her physical condition or the contents of her records. She told the reporter she would consider any publication of her medical condition, history, or records a violation of her privacy.

Informed of this exchange, the Editor told the reporter the *Express* would not run the story without verification. The reporter then told the confidential source the story would not be published unless there was some reliable confirmation of the allegation. The source produced a copy of Dr. Eldridge's blood test report stating she was HIV-positive, along with copies of her personal physician's medical records showing Dr. Eldridge was receiving treatment for the HIV infection. The reporter verified that the report and records were authentic. The newspaper never encouraged the source to acquire Dr. Eldridge's records, nor did it pay the source for the information or the records.

The Editor-in-Chief, after lengthy discussions with her staff and attorneys, decided to publish the Eldridge story. She reasoned that the information was true, and that the *Express* obtained it lawfully. The Editor decided that publishing the information about Dr. Eldridge was in the public interest; Dr. Eldridge was a beloved physician and a community asset who had contracted HIV through no fault of her own. Publishing the story, the editor believed, would counteract some of the homophobia

2. The ninth and tenth persons will be discussed in future articles exploring the right to privacy of public figures and public officials.

surrounding HIV and AIDS because Dr. Eldridge was a heterosexual, married woman. The Editor concluded publication of the Eldridge profile would enhance the emotional impact and educational value of the *Express* series.

After the *Express* published the article, Dr. Eldridge immediately sent a letter to her patients' parents. The letter acknowledged Dr. Eldridge was HIV-positive, and explained she had always taken the precautionary measures recommended by the Centers for Disease Control to prevent accidental transmission of HIV to her patients. Unfortunately, Dr. Eldridge's practice quickly withered away. The majority of her patients' parents refused to bring their children to her. Four parents sued her for "concealing" the information about her illness. Eventually, Dr. Eldridge sold what remained of her practice to a friend at a severely discounted price. Dr. Eldridge has no job and no other immediate prospects.

May Dr. Eldridge sue the *Express* for publicizing her HIV-positive status? Professor Erwin Chemerinsky notes that the Supreme Court has not confronted the Eldridge scenario: where recovery is sought because the press has published confidential information obtained from private sources.³ This Article explores that possibility.

Part II of this Article sets up the *Express*' argument: publication of lawfully-obtained, truthful information about HIV, a matter of paramount public importance, is protected by the First Amendment. Part II also summarizes the inherent tension between the right to privacy and the constitutional guarantee of freedom of the press. Further, Part II explains that each time the Supreme Court has heard a case involving a clash between privacy and freedom of the press, the Court has ruled against the right to privacy. The majority and concurring opinions in *Florida Star v. B.J.F.*⁴ have led many legal commentators to conclude that a claim of a violation of the right to privacy can never succeed because of the First Amendment guarantee of freedom of the press.

Part III of this Article considers the clash between privacy and freedom of the press through the prism of California's constitutional right to privacy. California's constitutional right to privacy creates an independent cause of action with its own standards for violation and recovery. California courts have an extensive history of interpreting the scope and meaning of the constitutional right to privacy, and balancing that right against federal constitutional rights, other state constitutional

3. "The issue that the Supreme Court never has faced is whether liability for invasion of privacy is permissible when the information is obtained from private sources." ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 865 (1997).

4. 491 U.S. 524 (1989).

rights, and competing compelling interests.⁵ Part IV discusses how California's treatment of the constitutional right to privacy satisfies the criteria outlined by the majority opinion in *Florida Star*. It also explains why protection of the right to privacy is especially appropriate and important where medical information is involved.

Finally, Part V explains why California courts should continue to strike a balance between the right to privacy and freedom of the press, allowing Dr. Eldridge to recover damages for the publication of her confidential medical information. California's constitutional standard for identifying information protected by the right to privacy establishes a clear boundary where the right to privacy begins. This clear boundary removes any argument that California's protection of the right to privacy has an impermissible chilling effect on freedom of the press.

II. THE STATUS OF THE RIGHT TO PRIVACY IN THE UNITED STATES SUPREME COURT

Two United States Supreme Court cases have directly addressed the clash between the right to privacy and freedom of the press.⁶ The first case to come before the Court was *Cox Broadcasting v. Cohn*.⁷ A reporter attended court proceedings for the six defendants accused of raping and killing Cynthia Cohn.⁸ The reporter obtained the name of the victim by

5. CAL. CONST. art. I, § 1. While this Article discusses California law, it has potentially wider application. Eight other states have elevated the right to privacy to constitutional status. See ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 7; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7. The principles discussed and analyzed here are potentially applicable in each of these states. Moreover, the sources from which the principles of privacy are drawn are common to most other states pursuant to their common law or statutory protection of privacy.

6. The Court discussed in passing the right to privacy and the First Amendment in *Time, Inc. v. Hill*, 385 U.S. 374 (1967). In note seven to the Court's majority opinion, Justice Brennan observed that the common law protection of reporting on "newsworthy persons" is not unlimited. *Id.* at 383 n.7. He noted that cases have held that revelations may be so intimate and unwarranted that they outrage the community's notions of decency. *Id.* In considering that possibility, Brennan declared, "This case presents no question whether truthful publication of such matter could be constitutionally proscribed." *Id.*

In *Oklahoma Publ'g v. District Court*, 430 U.S. 308 (1976), the Court briefly touched on this issue in a *per curiam* decision. There the press learned the identity of a juvenile defendant while attending a detention hearing for the minor, with the knowledge and acquiescence of the juvenile court. *Id.* Pictures of the minor, and his name, were widely published and broadcast following that hearing. *Id.* Before the trial, the trial court ordered the media not to publish the name or photograph of the minor. *Id.* The Court held that the state could not prohibit the publication of the name of a juvenile under these circumstances. *Id.* at 311-12.

7. 420 U.S. 469 (1975).

8. *Id.* at 472.

examining the indictments, which were made available by the clerk of the court.⁹ The reporter also heard the victim's name during the court proceedings.¹⁰ The reporter then broadcast the victim's name on the television news.¹¹

A Georgia statute made publication or broadcasting the name or identity of a rape victim a misdemeanor.¹² Cynthia Cohn's father sued the reporter and the station, claiming that the broadcast violated his right to privacy.¹³ The plaintiff's claim relied in part upon the Georgia statute. The publisher admitted broadcasting the name, but claimed the broadcast was protected under the First Amendment.¹⁴

The trial court granted summary judgment in favor of the plaintiff on liability, and reserved the issue of damages for a jury. On appeal, the Georgia Supreme Court upheld the decision, concluding that the right to privacy and freedom of press could coexist.¹⁵

The defendants appealed to the United States Supreme Court. The Court acknowledged the importance of the right to privacy, stating that "powerful arguments can be made . . . that . . . there *is* a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity."¹⁶

At the same time, the Court noted the inherent tension between privacy and freedom of the press. In discussing the private facts tort asserted by the plaintiff and vigorously defended by the State of Georgia, the Court observed this tort most directly confronts the freedoms of speech and press.¹⁷ The Court declined an invitation from the press to decide whether the states could "ever define and protect an area of privacy free from unwanted publicity in the press."¹⁸ The Court explained its reluctance was due to the fact that interests on both sides are "plainly rooted in the traditions and significant concerns of our society."¹⁹

Instead, the Court decided the states may not impose sanctions on the accurate publication of information obtained from public records.²⁰ In

9. *Id.*

10. *Id.*

11. *Id.* at 473-74.

12. *Id.* at 471-72 (discussing GA. CODE ANN. § 26-9901 (1972)).

13. *Cox*, 420 U.S. at 474.

14. *Id.*

15. *Id.* at 475 (citing *Briscoe v. Readers Digest Ass'n*, 483 P.2d 34 (Cal. 1971)).

16. *Id.* at 487.

17. *Id.* at 489.

18. *Id.* at 491.

19. *Cox*, 420 U.S. at 491.

20. *Id.* at 469.

explaining its decision, the Court made a number of points about the importance to the public of the type of information released by Cox Broadcasting. First, the Court focused on the role of the press in informing the public of the workings of government.²¹ Specifically, the Court noted that when the press reports on criminal trials, it functions as a guarantor of fairness and brings to bear public scrutiny of the administration of justice.²² In reaching this conclusion, the Court declared: "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."²³

The Court next visited the clash between privacy and the First Amendment in *Florida Star v. B.J.F.*²⁴ This case, like *Cox*, involved a woman who was raped.²⁵ She reported the crime to the police, who inadvertently included her name in a report made readily available to the press.²⁶ A reporter from the *Florida Star*, a weekly newspaper serving Jacksonville, Florida, obtained the report and included the full name of the victim in an article.²⁷

A Florida statute made it unlawful to print the name of a victim of a sexual offense "in any instrument of mass communication."²⁸ B.J.F. filed suit against the newspaper and the police department, alleging they negligently violated the Florida statute.²⁹ The newspaper was found civilly liable for printing the name of the plaintiff, and the jury awarded her \$75,000 in compensatory damages and \$25,000 in punitive damages.³⁰

21. *Id.* at 487.

22. *Id.* at 491-92.

23. *Id.* at 492. The Court further declared:

Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

Id. at 495.

24. 491 U.S. 524 (1989).

25. *Id.* at 527.

26. *Id.*

27. *Id.* at 526-27.

28. *Id.* at 526 (citing FLA. STAT. ANN § 794.03 (West 1987)).

29. *Id.* at 528.

30. *Florida Star*, 491 U.S. at 528-29.

The newspaper appealed, claiming the judgment and the Florida statute upon which it was based violated the First Amendment.³¹ The Supreme Court agreed. Once again, the Court refused to declare that publication of true information can never be sanctioned consistent with the First Amendment.³² The majority explained it “continue[s] to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.”³³ Instead, the Court relied upon a principle announced in *Smith v. Daily Mail Publishing Co.*³⁴ to resolve the case. That principle is succinct: “[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”³⁵

The Court’s application of this standard in *Florida Star* is instructive. Its first inquiry was whether the information published was “lawfully obtained.”³⁶ The opinion explains that the government can forbid the nonconsensual acquisition of sensitive private information, thereby bringing publication of such information outside of the *Daily Mail* principle.³⁷ The Court said this power gives the government ample means to safeguard privacy interests without punishing publication.³⁸

31. *Id.*

32. *Id.* at 533.

33. *Id.*

34. 443 U.S. 97 (1979). *Daily Mail* is often mentioned as a right to privacy case. See, e.g., Lorelei Van Wey, Note, *Private Facts Tort: The End Is Here*, 52 OHIO ST. L.J. 225, 235–36 (1991); Peter B. Edelman, *Free Press v. Privacy: Haunted By the Ghost of Justice Black*, 68 TEX. L. REV. 247, 249 (1990). Indeed, Justice Marshall’s opinion refers to *Daily Mail* as one of a trilogy of Supreme Court cases presenting “the conflict between truthful reporting and state-protected privacy interests.” *Florida Star*, 491 U.S. at 530.

Daily Mail is not, strictly speaking, a privacy case. In *Daily Mail*, the Court ruled on a challenge to a West Virginia statute making it a misdemeanor to publish the name of a minor charged as a youthful offender. The interest advanced by the state in defense of its statute was to protect the anonymity of the juvenile in furtherance of his rehabilitation. *Daily Mail*, 443 U.S. at 104.

35. *Daily Mail*, 443 U.S. at 103, quoted in *Florida Star*, 491 U.S. at 533.

36. The “lawfully obtained” standard is cogently criticized by Professor Sean Scott in her article *The Hidden First Amendment Values of Privacy*, 72 WASH. L. REV. 683, 698–99 (1996). She points out that use of this broad standard in its most expansive guise could indeed be the death knell for the right to privacy. *Id.*

37. *Florida Star*, 491 U.S. at 534.

38. *Id.*

The second *Daily Mail* inquiry asks whether the published information concerns a matter of “public significance.”³⁹ In *Florida Star*, the Court found the article addressed a matter of “paramount public import[ance]:” the commission and investigation of a violent crime.⁴⁰

The third inquiry asks if the limitation furthers a state interest of “the highest order.”⁴¹ The State of Florida advanced three interests served by its statute: protecting the privacy of the victim of a sexual assault; protecting the physical safety of the victim; and encouraging victims to report sexual assault crimes without fear of public exposure.⁴² The Court agreed these were interests “of the highest order.”⁴³ It found, however, the statute failed to satisfy this prong because the method Florida chose to advance those interests was flawed.⁴⁴

The opinion singled out three failings that doomed the statute. First, the government itself was the source of the information published.⁴⁵ Even though release of the victim’s name was accidental,⁴⁶ the majority held allowing liability to be imposed where the press relied on a government news release would lead to self-censorship.⁴⁷ The second deficiency was the statute’s imposition of liability under a negligence *per se* standard. Liability could follow a finding of publication even if the plaintiff’s name was already known to the public.⁴⁸

39. *Id.* at 536 (quoting *Daily Mail*, 433 U.S. at 103).

40. *Id.* at 536–37.

41. See *supra* note 35 and accompanying text.

42. *Florida Star*, 491 U.S. at 537.

43. *Id.* (quoting *Daily Mail*, 433 U.S. at 103).

44. *Id.*

45. *Id.* at 538.

46. The dissent chronicled that the accident was mitigated by the police department, when they correspondingly posted signs in the press room, advising reporters that names of rape victims were not matters of public record and were not to be reported. *Id.* at 546. The reporter acknowledged she understood she was not supposed to take down the victim’s name. *Id.*

The failure of the majority opinion to address this distinction is dissatisfying. It cites the timidity and self censorship the press might exhibit if it can be punished for publicizing information the government has provided in a news release, then says: “The government’s issuance of such a release, without qualification, can only convey to recipients that the government considered dissemination lawful, and indeed expected the recipients to disseminate the information further.” *Id.* at 538–39. Given the facts noted in the dissent, it can hardly be argued that the Florida Star thought the police department considered dissemination of the victim’s name to be “lawful,” or that it expected the police department to report her name to the public.

47. *Id.* at 538.

48. *Florida Star*, 491 U.S. at 539.

The Court's final objection was that the Florida statute was underinclusive.⁴⁹ This undermined the State's claim that the statute served an interest of "the highest order."⁵⁰ This objection was forcefully voiced by Justice Scalia in his concurring opinion. His comments, which amplify the concerns of the majority on this point, bear repeating:

[A] law cannot be regarded as protecting an interest 'of the highest order,' and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited. . . . This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself.⁵¹

The decision in *Florida Star* prompted the dissent to eulogize the right to privacy. The dissenters argued that by invalidating the Florida statute in the face of the arguments made, "the Court accepts appellant's invitation to obliterate one of the most noteworthy legal inventions of the 20th Century: the tort of the publication of private facts. Even if the Court's opinion does not say as much today, such obliteration will follow inevitably from the Court's conclusion here."⁵²

III. PRIVACY AND THE CALIFORNIA CONSTITUTION

To paraphrase Mark Twain, the reports of the death of privacy have been greatly exaggerated. Professor Sean Scott has chronicled a series of cases decided post-*Florida Star* where courts have found publication of highly sensitive personal information actionable.⁵³ The judiciary is likely motivated by an innate sense that there must be some sphere of privacy to which people are entitled to protect themselves from public exposure. That sense was expressed by the Ninth Circuit in an opinion written before *Florida Star*. In *Virgil v. Time, Inc.*,⁵⁴ the court posed the question:

49. *Id.* at 540.

50. *Id.*

51. *Id.* at 541-42 (Scalia, J., concurring) (citation omitted).

52. *Id.* at 550 (White, J., dissenting) (citations omitted). Many legal commentators writing about the *Florida Star* decision agree. See Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195 (1990); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983); Lorelei Van Wey, Note, *Private Facts Tort: The End is Here*, 52 OHIO ST. L.J. 299 (1991).

53. Scott, *supra* note 36, at 696-98.

54. 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976), *cited in Florida Star*, 491 U.S. at 552 (White, J., dissenting).

Does the spirit of the Bill of Rights require that individuals be free to pry into the unnewsworthy private affairs of their fellowmen? In our view it does not. In our view fairly defined areas of privacy must have the protection of law if the quality of life is to continue to be reasonably acceptable. The public's right to know is, then, subject to reasonable limitations so far as concerns the private facts of its individual members.⁵⁵

A. California's Constitutional Right to Privacy

California voters endorsed the judiciary's belief that fairly defined areas of privacy must receive legal protection when they elevated the right to privacy to constitutional status. In 1972, California voters amended Article I, Section 1 of the California Constitution to declare privacy one of the inalienable rights of California citizens.⁵⁶

In *White v. Davis*,⁵⁷ the California Supreme Court observed that the primary purpose of the constitutional amendment was to provide protection against the encroachment on personal freedom caused by increased surveillance and data collection.⁵⁸ Citing the ballot argument in favor of the amendment as its legislative history, the court declared voters wished to give individuals the ability to control circulation of personal information.⁵⁹ The *White* opinion identified four principal problems the constitutional guarantee of privacy was created to solve.⁶⁰ Central to this discussion was the voters' desire to protect against the improper use of information properly obtained for a specific purpose.⁶¹

California's Supreme Court, relying on the ballot argument, recognized voters viewed the new constitutional right to be a "fundamental interest."⁶² The ballot argument in favor of the amendment declares: "The right of privacy is the right to be left alone. It is a fundamental and

55. 527 F.2d at 1128.

56. Article I, Section 1 of the California Constitution now reads: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy." CAL. CONST. art. I, § 1 (emphasis added).

57. 533 P.2d 222 (Cal. 1975).

58. *Id.* at 233.

59. *Id.* at 234.

60. *Id.*

61. *Id.* The other problems the amendment addresses are government snooping, the overbroad collection and retention of unnecessary personal information, and the lack of a reasonable check on the accuracy of those records. *Id.*

62. *Id.* at 233.

compelling interest.”⁶³ The *White* opinion noted that the amendment created a legal and enforceable right to privacy for every Californian.⁶⁴

Recently, the court expanded on the source and nature of the right to privacy in *Hill v. National Collegiate Athletic Ass'n*.⁶⁵ The court again stressed that a principal focus of the amendment was misuse and dissemination of information gathered by public and private entities.⁶⁶ After surveying the case law and commentary on the common law tort of invasion of privacy, the court concluded the constitutional right to privacy is far broader in scope:

Our reference to the common law as background to the California constitutional right to privacy is not intended to suggest that the constitutional right is circumscribed by the common law tort. The ballot arguments do not reveal any such limitation. To the contrary, common law invasion of privacy by public disclosure of private facts requires that the actionable disclosure be widely published and not confined to a few persons or limited circumstances. In contrast, the ballot arguments describe a privacy right that ‘prevents government and business interests from collecting and stockpiling unnecessary information about us or misusing information gathered for one purpose in order to serve other purposes or to embarrass us.’ Obviously, sensitive personal information may be misused even if its disclosure is limited.⁶⁷

The *Hill* opinion found that informational privacy—the right to control access to sensitive personal information—is a core value protected by the constitutional right to privacy.⁶⁸ The opinion reiterates that the constitutional right to privacy is self-executing, creating an independent cause of action available against private parties as well as the government.⁶⁹

Hill identifies three elements of a cause of action for violation of the constitutional right to privacy. The first element is a legally cognizable privacy interest.⁷⁰ One form of a legally cognizable privacy interest is the

63. *White*, 533 P.2d at 233. Subsequent California Supreme Court cases have referred to the right to privacy as “fundamental.” See *Robbins v. Superior Court*, 695 P.2d 695, 703 (Cal. 1985); *Adamson v. Santa Barbara*, 610 P.2d 436, 440 (Cal. 1980).

64. *White*, 533 P.2d at 234.

65. 865 P.2d 633 (Cal. 1994).

66. *Id.* at 645.

67. *Id.* at 648–49 (citations omitted) (footnote omitted).

68. *Id.* at 654.

69. *Id.* at 644.

70. *Id.* at 654.

right to preclude the dissemination or misuse of sensitive and confidential personal information.⁷¹ The court held information fits this description when “well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity.”⁷² These norms can be identified by referring to “the usual sources of positive law . . . common law development, constitutional development, statutory enactment, and the ballot arguments accompanying the Privacy Initiative.”⁷³

The second element of the constitutional claim is a reasonable expectation of privacy on plaintiff’s part.⁷⁴ An individual’s activities and the customs, practices and settings of particular activities may create or inhibit reasonable expectations of privacy. That expectation is determined using an objective standard. The presence or absence of opportunities to consent to an activity impacting privacy interests is a factor in determining reasonableness.⁷⁵

The final element of a claim for violation of the constitutional right to privacy is a showing that the invasion of privacy constitutes an “egregious breach of the social norms underlying the privacy right.”⁷⁶ The *Hill* opinion stresses the constitutional right to privacy is not absolute.⁷⁷ Where competing legitimate interests are present, they are balanced against the constitutional right to privacy. Thus, privacy claims are subject to one very important affirmative defense—invasions may be justified where a legitimate competing interest is present. Conduct alleged to be an invasion of privacy is evaluated based on the extent to which it furthers legitimate and important competing interests.⁷⁸

Thus, a defendant may defeat a constitutional privacy claim by negating any of the three elements, or by pleading and proving the invasion is justified by one or more countervailing interests. The plaintiff can rebut the defense of countervailing interests by showing there are feasible and effective alternatives to the defendant’s conduct that have a lesser impact on privacy.⁷⁹

71. *Hill*, 865 P.2d at 654.

72. *Id.* The court noted these norms create a threshold reasonable expectation of privacy.
Id.

73. *Id.* at 654–55.

74. *Id.* at 655.

75. *Id.*

76. *Id.*

77. *Hill*, 865 P.2d at 655.

78. *Id.* at 655–56.

79. *Id.* at 657.

B. Application of the California Constitutional Standard to the Publication of Confidential Medical Information

How would Dr. Eldridge fare making a claim that the *Express* story violated her state constitutional right to privacy? It is clear Dr. Eldridge would be able to prove the existence of a legally protected privacy interest. There is no question "established social norms," as defined by the California Supreme Court, safeguard confidential medical information. Two sources of positive law, constitutional development and statutory enactments, make clear that a patient has a constitutionally protected privacy interest in her confidential medical records.

California courts have long recognized the constitutional right to privacy protects a patient's interest in maintaining the confidentiality of medical records. In *Board of Medical Quality Assurance v. Gherardini*,⁸⁰ the court of appeal decided that the California Board of Medical Quality Assurance could not gain unfettered access to the medical records of patients of a physician charged with gross negligence and incompetence.⁸¹ Instead, the court ruled the Board could only have access to those records if it first produced a showing of good cause.⁸² The court imposed this limitation because "a person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected."⁸³

The court then held that any incursion into that privacy must be justified by a compelling interest.⁸⁴ The opinion acknowledged that a state's interest in insuring the quality of health and medical care available

80. 93 Cal. App. 3d 669 (1979).

81. *Id.* at 669-70.

82. *Id.* at 680.

83. *Id.* at 678. The *Gherardini* opinion later explains why the individual interest in protecting the privacy of a medical profile is so important:

The matters disclosed to the physician arise in most sensitive areas often difficult to reveal even to the doctor. Their unauthorized disclosure can provoke more than just simple humiliation in a fragile personality. The reasonable expectation that such personal matters will remain with the physician are no less in a patient-physician relationship than between the patient and psychotherapist. The individual's right to privacy encompasses not only the state of his mind, but also his viscera, detailed complaints of physical ills, and their emotional overtones. The state of a person's gastro-intestinal tract is as much entitled to privacy from unauthorized public or bureaucratic snooping as is that person's bank account, the contents of his library, or his membership in the NAACP. We conclude the specie of privacy here sought to be invaded falls squarely within the protected ambit, the expressed objectives of Article I, Section 1.

Id. at 679.

84. That portion of the holding is now in question, given some of the California Supreme Court's pronouncements in *Hill*. See *Hill*, 865 P.2d at 654.

within its borders was compelling, and that individual medical records may be relevant and material in furtherance of that purpose.⁸⁵ This meant disclosure could be compelled, but only upon a showing of good cause—“a factual exposition of a reasonable ground for the sought order.”⁸⁶

Subsequent cases reaffirm that medical records are a prototypical example of personal information protected by the constitutional right to privacy. In *Urbaniak v. Newton*,⁸⁷ the California Court of Appeal held that unauthorized disclosure of a patient’s HIV-positive status violated the constitutional right to privacy: “There can be no doubt that disclosure of HIV-positive status may under appropriate circumstances be entitled to protection under Section 1.”⁸⁸ In *Lantz v. Superior Court*,⁸⁹ the court summarized the law regarding medical records and the constitutional right to privacy: “Numerous reported decisions have recognized that a patient has a privacy interest in a doctor’s medical records pertaining to the patient’s physical or mental condition.”⁹⁰

Four statutory enactments demonstrate that “established social norms” protect the privacy of confidential medical records. In 1981, the California Legislature enacted the Confidentiality of Medical Information Act.⁹¹ In creating this protection, the Legislature made its intention clear:

The Legislature hereby finds and declares that persons receiving health care services have a right to expect that the confidentiality of individual identifiable medical information derived by health service providers be reasonably preserved. It is the intention of the Legislature in enacting this act, to provide for the confidentiality of individually identifiable medical information, while permitting certain reasonable and limited uses of that information.⁹²

To ensure individual medical information remains confidential, the statute precludes health care providers from disclosing medical information,⁹³ unless they receive permission from the patient.⁹⁴ A

85. *Gherardini*, 93 Cal. App. 3d at 679.

86. *Id.* at 681.

87. 226 Cal. App. 3d 1128 (1991).

88. *Id.* at 1140.

89. 28 Cal. App. 4th 1839 (1994).

90. *Id.* at 1853. The court then cites eight cases supporting this proposition. *Id.*

91. 1981 Cal. Stat. 782, § 1 (codified as amended at CAL. CIV. CODE §§ 56–56.37 (Deering 1990)).

92. 1981 Cal. Stat. 782, § 1.

93. “Medical information” is defined broadly. It encompasses “any individually identifiable information in possession of or derived from a provider of health care regarding a patient’s medical history, mental or physical condition, or treatment.” CAL. CIV. CODE §

medical care provider who discloses medical information without permission is subject to civil and criminal penalties.⁹⁵ California Civil Code section 56.35 provides that a patient who suffers physical injury or economic loss due to an unauthorized disclosure of medical information is entitled to recover compensatory damages, limited punitive damages and attorneys' fees.⁹⁶ The language of this statute does not limit the scope of the remedy to the health care provider. Damages are arguably available against any person who uses medical information in violation of the Act.⁹⁷ Civil Code section 56.36 makes any violation of section 56.10 that results in personal injury or economic loss to the patient a misdemeanor.⁹⁸ The statutes carefully provide for the form of authorization for release of information.⁹⁹ Specifically, they provide that third parties who receive medical information through authorized release are also bound by the confidentiality provisions.¹⁰⁰

California also has a statutory scheme protecting against the release of test results for AIDS or HIV. Health and Safety Code section 120975 provides generally that "no person can be compelled, in any state, county, city or other local, civil, criminal, administrative, legislative or other proceeding to identify or provide identifying characteristics that would identify any individual who is the subject of a blood test to detect antibodies to the probable causative agent of AIDS."¹⁰¹

The Health and Safety Code law also provides that any person who *negligently* discloses the results of an HIV test to any third party without permission is subject to a civil penalty of \$1,000, plus court costs, to be

56.05(b) (Deering 1990).

94. *See id.* § 56.10. This prohibition is subject to several exceptions, largely having to do with litigation. *Id.* § 56.10(b)-(c). Those exceptions, and the treatment of them, will be addressed more fully in the section on the California constitutional right to privacy. *See* discussion *infra* Part IV.

95. *See generally id.* § 56.35.

96. *Id.*

97. The relevant language reads:

In addition to any other remedies available at law, a patient whose medical information has been used or disclosed in violation of Section 56.10 or 56.20 or subdivision (a) of 56.26 and who has sustained economic loss or personal injury therefrom may recover compensatory damages, punitive damages not to exceed three thousand dollars (\$3,000), attorneys' fees not to exceed one thousand dollars (\$1,000), and the costs of litigation.

Id. § 56.35.

98. California Civil Code section 56.36 provides: "Any violation of the provisions of this part which results in economic loss or personal injury to a patient is punishable as a misdemeanor." CAL. CIV. CODE § 56.36 (Deering 1990).

99. *Id.* §§ 56.11-56.12.

100. *Id.* §§ 56.13-56.26.

101. CAL. HEALTH & SAFETY CODE § 120975 (Deering 1990).

paid to the subject of the test.¹⁰² Any person who *willfully* discloses the results of an HIV test to a third party in a manner that identifies the tested person is subject to a civil penalty *and* is guilty of a misdemeanor.¹⁰³

California law prevents the unauthorized disclosure of medical records during litigation. Section 1985.3 of the California Code of Civil Procedure provides that a party seeking access to personal records of a "consumer,"¹⁰⁴ maintained by his or her physician¹⁰⁵ must take steps to notify the consumer that those records are being sought.¹⁰⁶ The statute allows the consumer to move to quash or modify the subpoena *duces tecum*, and the person in possession of those records is not required to produce them until the court has ruled on the motion to quash, or some agreement has been reached on the production of the records.¹⁰⁷

An additional statutory source recognizing the importance of maintaining the confidentiality of medical information is the physician-patient privilege.¹⁰⁸ The privilege is currently found in Evidence Code sections 990–1007.¹⁰⁹ Expressed briefly, the physician-patient privilege allows a patient to refuse to disclose, and to prevent any third party from disclosing, any confidential communication between the patient and her physician.¹¹⁰

1. Application of the California Constitutional Standard to the Dr. Eldridge Hypothetical

These constitutional interpretations and statutory enactments make clear that "well established norms" recognize the need to maximize individual control over confidential medical information.¹¹¹ Under *Hill*,

102. *Id.* § 120980(a).

103. *Id.* § 120980(b)–(c).

104. "Consumer" is defined to include any individual. CAL. CIV. PROC. CODE § 1985.3(a)(2) (Deering 1990).

105. The statute also covers records kept by accountants, attorneys, bankers and other fiduciaries. *Id.* § 1985.3(a)(1).

106. *See id.* § 1985.3(b).

107. *Id.* § 1985.3(g).

108. This privilege was first codified in California in 1872. MCCORMICK ON EVIDENCE § 98 (John William String ed., 4th ed. 1992). The original statute provided: "A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." *Id.*

109. CAL. EVID. CODE §§ 990–1007 (Deering 1986).

110. This privilege is subject to some exceptions. *See id.* §§ 996–97, 999–1007. The most notable exception is that there is no privilege in a criminal proceeding. *Id.* § 998.

111. *Hill v. National Collegiate Athletic Ass'n*, 865 P.2d 633, 654 (Cal. 1994).

that means there is a legally cognizable privacy interest in confidential medical information.

The second *Hill* inquiry asks whether the claimant has a reasonable expectation of privacy.¹¹² In the Eldridge hypothetical, it is clear that she had a subjective expectation of privacy, and that her expectation of privacy was objectively reasonable. Dr. Eldridge is a private figure, who had not in any way thrust herself into the public arena. She had not revealed her illness to anyone except her spouse and her physician. The preceding constitutional and statutory discussion¹¹³ shows that the customs and practices surrounding consultation with a physician create a reasonable expectation of privacy.

Finally, under *Hill* the court inquires whether the invasion of privacy is sufficiently serious in its nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.¹¹⁴ *Gherardini*, an early case holding confidential medical records are protected by the constitutional right to privacy, recognized that unauthorized public disclosure of medical records can have a devastating personal impact.¹¹⁵ The *Gherardini* opinion declared that a "patient should be able to rest assured with the knowledge that 'the law recognizes the communication [with his physician] as confidential and guards against the possibility of his feelings being shocked or his reputation tarnished by their subsequent disclosure.'"¹¹⁶

The deleterious impact of disclosing confidential medical information spreads beyond the shame, humiliation, and loss of trust felt by the patient. California courts have noted that protection of confidential medical information serves important public interests as well. In *Gherardini*, the court supported its ruling by noting that the physician-patient privilege exists, in part, to encourage patients to disclose to their physician all information necessary for diagnosis and treatment.¹¹⁷

The goal of full disclosure is especially a matter of public interest in the case of AIDS/HIV and other communicable diseases. In *Urbaniak v. Newton*,¹¹⁸ the patient revealed to a physician's nurse that he was HIV-positive.¹¹⁹ The physician later revealed that information to the lawyer

112. *Id.* at 655.

113. *See supra* Part III.A-B.

114. *Hill*, 865 P.2d at 655.

115. Board of Medical Quality Assurance v. *Gherardini*, 93 Cal. App. 3d 669, 679 (1979).

116. *Id.* (citations omitted).

117. *Id.* at 678-79.

118. 226 Cal. App. 3d 1128 (1991).

119. *Id.* at 1128.

representing the insurer handling plaintiff's workers' compensation case. In turn, the lawyer sent copies of the report to the insurer, where it was seen by at least seven of the insurer's employees.¹²⁰ The lawyer also sent a copy of the report to the plaintiff's chiropractor.¹²¹ Urbaniak sued, claiming, among other things, that the disclosure of this information violated his constitutional right to privacy.¹²²

The court of appeal held that while a tortious invasion of privacy requires a "public disclosure," the constitutional guarantee allows a cause of action where there is an improper use of information properly obtained.¹²³ In holding that unauthorized disclosure would violate Urbaniak's constitutional right to privacy, the court declared there is an important public interest in encouraging confidential communications within a professional relationship.¹²⁴ The court noted the special significance of those communications:

In the field of health care, disclosure of information about a patient constitutes "improper use" when it will subvert a public interest favoring communication of confidential information by violating the patient's reasonable expectations of privacy. We find such a public interest here in a patient's disclosure of HIV-positive status for the purpose of alerting a health care worker to the need for safety precautions. . . . [D]isclosure of a patient's HIV-positive status has undoubted importance for safety precautions in treatment.¹²⁵

It is clear that Dr. Eldridge could make out a prima facie case that the *Express'* decision to publicize her medical condition invaded a sphere protected by her constitutional right to privacy. The publication of information about her medical condition invaded a legally-cognizable privacy interest. She had an objective and subjective expectation of privacy in her medical information, and its revelation caused an egregious breach of the social norms underlying the right to privacy. Publication of such information caused tremendous personal suffering, and also inflicted a societal harm by adversely affecting patient confidence that their personal medical information would not be publicly revealed.

Under *Hill*, the *Express* would assert the affirmative defense that freedom of the press and the corresponding right of the public to know are

120. *Id.* at 1134.

121. *Id.* at 1135.

122. *Id.* at 1133.

123. *Id.* at 1138.

124. *Urbaniak*, 226 Cal. App. 3d at 1139.

125. *Id.* at 1140.

compelling interests that outweigh Dr. Eldridge's right to privacy.¹²⁶ Three areas of law suggest that these interests, while compelling, would not outweigh Dr. Eldridge's interest in maintaining the privacy of her medical information.

The first area acknowledges the clash between the right to privacy and freedom of the press or the public's right to know. For example, the California Supreme Court case *Briscoe v. Reader's Digest*¹²⁷ involved publication of a story about a man who had been convicted of a felony eleven years earlier. As a result, the plaintiff, who had since led an exemplary life, became estranged from his daughter and his friends, who had no knowledge of his past criminal history. The plaintiff sued the magazine, alleging the publication of his name in the article was a tortious invasion of his right to privacy.¹²⁸ The magazine defended the publication, arguing for First Amendment protection because the publication was a truthful account of a past crime.

The California Supreme Court noted the right to privacy is "bound to clash with the right to disseminate information to the public."¹²⁹ The *Briscoe* case required the court to consider the competing interests of the rehabilitated felon's right to anonymity and the magazine's right to identify him.¹³⁰ The court acknowledged the strong social interest in reports on crimes, past and present. In fact, it held that the bulk of the article, including the specific description of the defendant's crime, was newsworthy.¹³¹

126. The majority opinion in *Hill* held that where an invasion of privacy is caused by a private party, the compelling interest standard does not always apply. *Hill*, 865 P.2d at 654. However the opinion also held that "[w]here the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a 'compelling interest' must be present to overcome the vital privacy interest." *Id.* at 653.

Because unauthorized disclosure of confidential medical information is an obvious invasion of an interest vital to personal autonomy, it is assumed that the compelling interest standard would be applied to the publication of Dr. Eldridge's medical information. See generally *Gherardini*, 93 Cal. App. 3d at 669; *Urbaniak*, 226 Cal. App. 3d at 1128. This assumption is supported by *Susan S. v. Israels*, 55 Cal. App. 4th 1290 (1997), a case decided after *Hill*. In *Susan S.*, the court of appeal concluded that the unauthorized reading and dissemination of mental health records by a stranger is "a serious invasion of [the person's] privacy." *Id.* at 1299.

127. 483 P.2d 34 (Cal. 1971).

128. *Id.* at 35.

129. *Id.* at 37.

130. *Id.* at 43-44.

131. *Id.* at 39. The "newsworthiness" defense is problematic for the right to privacy. As Professor Scott notes, it is so broad that virtually anything the press decides to print is, by definition, "newsworthy." Scott, *supra* note 36, at 699-700.

Nevertheless, the California Supreme Court held the plaintiff's complaint stated a cause of action for invasion of privacy. Concluding publication of the plaintiff's name could be tortious, the court explained that identification of the defendant in long past crimes serves little public purpose.¹³² Indeed, the court opined that the only "public interest" served by such identifications was "curiosity."¹³³ The court then proceeded to explain the balance it struck in resolving the case:

In a nation built upon the free dissemination of ideas, it is always difficult to declare that something may not be published. But the great general interest in an unfettered press may at times be outweighed by other great societal interests. As a people we have come to realize that one of these societal interests is that of protecting an individual's right to privacy. The right to know and the right to have others *not* know are, simplistically considered, irreconcilable. But the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other.¹³⁴

2. Balancing the Constitutional Right to Privacy Against the State Interest of Ascertaining the Truth in Other Areas of the Law

Another California case addressing the balance between the guarantee of freedom of the press and an individual's interest in keeping confidential information private is *Diaz v. Oakland Tribune*.¹³⁵ In that case a newspaper revealed that the student body president of a local college was a transsexual who had undergone a sex-change operation.¹³⁶

132. *Briscoe*, 483 P.2d at 39.

133. *Id.* at 42.

134. *Id.* It must be noted that *Briscoe* in some ways appears to be limited to its facts. The Supreme Court also discussed a concomitant interest of the State in rehabilitating criminals and encouraging to become productive law-abiding citizens. *Id.* at 43. In a subsequent case, *Forsher v. Bugliosi*, 608 P.2d 716 (Cal. 1980), the California Supreme Court observed:

Most important to our decision [in *Briscoe*], however, was the fact that the state has a compelling interest in the rehabilitative process and that a continuing threat of media disclosure of the identity of past criminals is counterproductive to this process. This additional interest, when pooled with the privacy and First Amendment interests, swung the pendulum in privacy's favor.

Id. at 726. The opinion goes on to describe with approval lower court cases refusing to apply *Briscoe* to other fact situations.

135. 139 Cal. App. 3d 118 (1983).

136. *Id.* at 124.

The plaintiff had scrupulously endeavored to keep information about her medical status secret.¹³⁷

While the court of appeal reversed and remanded the case due to faulty jury instructions, it confirmed the right to privacy can outweigh the press' right to publish true facts in an appropriate case.¹³⁸ After articulating that some reports invading an individual's privacy are protected if they are newsworthy, the court of appeal held this privilege is not unlimited: "Where the publicity is so offensive as to constitute a 'morbid and sensational prying into private lives for its own sake, . . . ' it serves no legitimate public interest and is not deserving of protection."¹³⁹

The second area where a California court has balanced a federal constitutional right with the right to privacy involves a criminal defendant's Sixth Amendment right to confront witnesses against him. In *Susan S. v. Israels*,¹⁴⁰ a criminal defense attorney representing a defendant charged with sexual battery read the confidential mental health records of the alleged victim.¹⁴¹ Subsequently, the attorney forwarded those records to the defense psychiatrist and used the information in the records to cross examine the victim, knowing the records were confidential.¹⁴²

The victim sued the attorney and his client, alleging the review and use of her confidential mental health records violated her constitutional right to privacy.¹⁴³ In determining whether the criminal defendant was entitled to review the victim's records, the court of appeal balanced his Sixth Amendment right of confrontation against her right to privacy.¹⁴⁴ To prevail, the court held, the criminal defendant must first show good cause for the discovery of the records.¹⁴⁵ Even with a showing of good cause, the plaintiff's constitutional right to privacy would be overridden "only if

137. *Id.* at 123.

138. *Id.* at 127-33.

139. *Diaz*, 139 Cal. App. 3d at 126 (quoting *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975)). *Diaz* does not address the constitutional right to privacy. The opinion proceeds under the principles of the common law tort. *Id.* Thus, the limitations discussed in that opinion should not be applied to the constitutional protection of privacy.

140. 55 Cal. App. 4th 1290 (1997).

141. The mental health agency mistakenly sent the alleged victim's records directly to the attorney in response to a subpoena *duces tecum*. *Id.* at 1294. Because the appeal came before the court from demurrers sustained without leave to amend, the court of appeal assumed the truth of the facts alleged in the complaint. *Id.* This discussion shall do likewise.

142. *Id.*

143. *Id.*

144. *Id.* at 1295.

145. *Id.*

and to the extent necessary to ensure defendants' constitutional rights [sic] to confrontation."¹⁴⁶

In a third area of law, California courts have balanced the constitutional right to privacy against the state interest of ascertaining the truth. In civil cases, facilitating the "ascertainment of the truth" is a compelling interest.¹⁴⁷ The right of discovery, including the right of access to any information "reasonably calculated to lead to the discovery of admissible evidence,"¹⁴⁸ is the tool designed to facilitate the ascertainment of truth in civil proceedings.

California courts have consistently held that the right to privacy restricts the right to discovery.¹⁴⁹ On at least three occasions the California Supreme Court has ruled that discovery must be limited where it conflicts with the constitutional right to privacy. Initially, in *Valley Bank of Nevada v. Superior Court*,¹⁵⁰ the California Supreme Court applied the newly enacted constitutional right to insulate the bank records of third parties against an otherwise valid subpoena *duces tecum*.¹⁵¹ Although the California Supreme Court acknowledged the subpoenaed records were "relevant" to claims in the litigation, it held that the new constitutional right compelled recognition of a limited form of protection for confidential information given to a bank by its customers.¹⁵² Because the constitutional right to privacy was implicated by the discovery request, the court announced that there must be a "careful balancing of the right of civil litigants to discover relevant facts . . . with the right of bank customers to maintain reasonable privacy regarding their financial affairs . . ."¹⁵³

Later, the California Supreme Court held that the waiver of privacy occasioned by the filing of a lawsuit is limited by the constitutional right to privacy.¹⁵⁴ Subsequently, the court explained that the waiver of privacy caused by the filing of a lawsuit applied only to those psychiatric conditions directly relevant to the plaintiff's claims. In so holding, the

146. *Susan S.*, 55 Cal. App. 4th at 1295 (quoting *People v. Reber*, 177 Cal. App. 3d 523, 532 (1986)).

147. *In re Lifschutz*, 467 P.2d 557 (Cal. 1970); *Garstang v. Superior Court*, 39 Cal. App. 4th 526, 532 (1995).

148. CAL. CIV. PROC. CODE § 2017(a) (Deering 1990).

149. See *Valley Bank of Nevada v. Superior Court*, 542 P.2d 977, 979 (Cal. 1975) (citations omitted).

150. *Id.*

151. *Id.* at 979.

152. *Id.* at 978.

153. *Id.* at 979.

154. *In re Lifschutz*, 467 P.2d at 557.

court explained that while "other aspects of the [plaintiff's] personality . . . may . . . be 'relevant' to the substantive interests of litigation," compelled disclosure of those aspects *cannot be required because* "the patient is not obligated to sacrifice all privacy [in order] to seek redress for a specific mental or emotional injury."¹⁵⁵

The recent case of *Tylo v. Superior Court*¹⁵⁶ illustrates the balancing courts perform when confronted with a conflict between the right of discovery and the constitutional right to privacy. Tylo, seeking damages for emotional distress, sued a television producer alleging she was terminated from a role in the television program *Melrose Place* because she became pregnant.¹⁵⁷ During Tylo's deposition, defendant's counsel posed questions about the physical health of Tylo's husband, the "health" of Tylo's marriage, and whether Tylo sought psychiatric or psychological treatment because of marital problems.¹⁵⁸ Tylo objected to these questions, claiming they violated her and her husband's constitutional right to privacy.¹⁵⁹ In response, defendants' counsel asserted they were entitled to ask the questions because Tylo was seeking damages for emotional distress.¹⁶⁰ Defendants reasoned that, because of the claim of emotional distress, they had a right to discover any other "stressors" that might have caused or contributed to Tylo's alleged emotional injuries.¹⁶¹

In rejecting the defendants' argument, the court of appeal held that defendants' discovery rights were limited to information about those injuries resulting from termination of the contract.¹⁶² Because the information defendants were seeking was protected by the constitutional right to privacy, they bore two burdens before they could obtain the information. First, defendants had to identify the specific injuries the plaintiff claimed were caused by termination of the contract.¹⁶³ Second, they had to demonstrate a nexus between the injuries caused by the contract termination and those caused by the marital relationship.¹⁶⁴ Only

155. *Britt v. Superior Court*, 574 P.2d 766, 779 (Cal. 1978) (quoting *In re Lifschutz*, 467 P.2d at 570).

156. 55 Cal. App. 4th 1379 (1997).

157. *Id.* at 1382-83.

158. *Id.* at 1385.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Tylo*, 55 Cal. App. 4th at 1388.

163. *Id.*

164. *Id.*

then could defendants compel disclosure of the information regarding emotional distress resulting from the marital relationship.¹⁶⁵

The California courts have developed a principle where the right to privacy conflicts with rules of discovery. The principle was succinctly summarized in the recent case of *Gallo v. Conigliaro*:¹⁶⁶ "Even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must be a careful balancing of the compelling public need for discovery against the fundamental right of privacy."¹⁶⁷

IV. CAN THE CALIFORNIA CONSTITUTIONAL RIGHT TO PRIVACY SURVIVE FIRST AMENDMENT SCRUTINY?

This Article advances the proposition that the California constitutional right to privacy does allow a private figure to recover damages for publication of confidential medical material obtained from private sources. This section discusses whether this result can coexist with the freedom of the press guaranteed by the First Amendment.

A. *Is Confidential Medical Information Obtained From Private Sources "Lawfully Obtained?"*

Under the *Daily Mail/Florida Star* standard, the first question asked is whether the information published was "lawfully obtained." In *Florida Star*, Justice Marshall stated, "To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, *thereby bringing outside of the Daily Mail principle the publication of any information so acquired.*"¹⁶⁸

California's constitutional and statutory scheme protecting privacy and the confidentiality of medical information arguably brings publication of that information outside of the *Daily Mail* principle. The argument is that confidential medical information cannot be "lawfully obtained" without the patient's permission.¹⁶⁹ California's constitutional guarantee

165. *Id.*

166. 33 Cal. App. 4th 592 (1995).

167. *Id.* at 597 (quoting *Davis v. Superior Court*, 7 Cal. App. 4th 1008, 1014 (1992)).

168. *Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (emphasis added).

169. The *Florida Star* and *Daily Mail* opinions do not define "lawfully obtained." Such definition was unnecessary in *Daily Mail*, because there was no dispute that the information at issue was "lawfully obtained." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 99-100, 103-04 (1978).

In *Florida Star* there was some dispute over that issue. The dissenters noted the reporter admitted she knew she was not supposed to record or report the victim's name. *Florida Star*,

of privacy and its statutory provisions—prohibiting the release of confidential medical information generally and AIDS/HIV information specifically—all forbid nonconsensual acquisition.¹⁷⁰ In California, possession of confidential medical information without authorization is a misdemeanor,¹⁷¹ a civil wrong,¹⁷² and a violation of the duty of confidentiality.¹⁷³ Whether California can punish publication of information that was not “lawfully obtained” without violating the First Amendment is a question the United States Supreme Court has deliberately left open to conjecture.¹⁷⁴

B. Is the Medical Condition of Private Individuals a Matter of Public Significance?

The second *Daily Mail/Florida Star* inquiry is whether the medical condition of a private figure is a matter of public significance. In two senses, both illustrated by the Dr. Eldridge hypothetical, the publication of private medical information about a private figure may concern matters of public significance.

Publication of the information about Dr. Eldridge educated the public that HIV can be contracted through circumstances that are not the fault of the patient. An article about a respected physician in that unhappy position would enhance the emotional impact and the educational value of a series seeking to reduce public ignorance about HIV/AIDS and its causes. Writing a lead sentence stating “A prominent pediatrician recently contracted HIV” does not have the same resonance as “Dr. Louise Eldridge, a prominent and well-loved pediatrician, recently learned she contracted HIV through an operating room accident at Children’s Hospital.” By adding the name and personal information about the

491 U.S. at 546 (White, J., dissenting). Based on that admission, the dissenters argued the posting of the incident report “did not convey to the *Star*’s reporter the idea that ‘the government considered dissemination lawful.’” *Id.* The majority opinion simply does not address this point.

170. CAL. CONST. art. I, § 1.

171. *See supra* notes 95–99 and accompanying text.

172. *See supra* notes 96–97 and accompanying text.

173. *See supra* notes 99–101 and accompanying text.

174. The majority opinion in *Florida Star* declares:

The *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well. This issue was raised but not definitively resolved in *New York Times v. United States*, 403 U.S. 713 (1971), and reserved in *Landmark Communications [Inc. v. Virginia]*, 435 U.S. 829, 837 (1978)]. We have no occasion to address it here.

Florida Star, 491 U.S. at 535, n.8.

physician so afflicted, the story became more "real" for the *Express*' readers.¹⁷⁵

In this sense publication of information about Dr. Eldridge's illness fits comfortably within traditional First Amendment jurisprudence. It is generally agreed that a primary *raison d'être* for freedom of speech and freedom of the press is to facilitate self-governance.¹⁷⁶ The *Express* story, by educating the public and influencing public attitudes, ultimately resulted in beneficial legislation on the subject of AIDS/HIV. Therefore, the story concerning Dr. Eldridge contributed to discussion of an issue of public importance, fitting neatly within the self-governance paradigm.

The second way publication of confidential medical information involves a matter of "public significance" is illustrated by the parental

175. Michael Gartner, the President of NBC News, said this about his decision to name the alleged victim in the Joseph Kennedy Smith rape case:

Names and facts are news. They add credibility, they round out the story, they give the viewer or reader information he or she needs to understand issues, to make up his or her own mind about what's going on. So my prejudice is always toward telling the viewer all the germane facts that we know.

Michael Gartner, *Naming Rape Victims: Usually, There Are Good Reasons to Do It*, USA TODAY, Apr. 22, 1991, at 6A.

176. "The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 9 (1960). "It is the enlightenment function which constitutes the foundation upon which the First Amendment edifice largely rests." MELVILLE NIMMER, *NIMMER ON FREEDOM OF SPEECH* 23 (1984). The United States Supreme Court has, in several opinions, ascribed the same importance to the "enlightenment function." In one of the key privacy cases, the Court declared:

[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. *Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.*

Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491-92 (1975) (emphasis added).

The enlightenment function played a critical role in the Court's resolution of the issues presented in *New York Times Co. v. Sullivan*. 376 U.S. 255 (1964). In explaining why defamation actions against public officials had to proceed under a higher standard for recovery, the Supreme Court declared:

The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. . . ." [Thus.] we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Id. at 270.

reaction to the knowledge of Dr. Eldridge's illness. Parents have the right and responsibility to choose the physician treating their children. Before publication of the story about Dr. Eldridge, those decisions were, arguably, based on incomplete information. Armed with the information provided by the *Express*, some parents undoubtedly would make the decision to change physicians. While their reaction might be condemned as hysterical or ignorant, their decision indicates the information published by the *Express* was important. The Supreme Court has recognized, in commercial speech cases, that one function of the First Amendment is to provide consumers access to the information necessary to make decisions about where they shop, what they buy, and with whom they do business.¹⁷⁷ The *Express* article provided consumers with truthful information about Dr. Eldridge, a person offering a professional service for a fee. It supplied those consumers with information permitting them to make informed decisions regarding whether to allow Dr. Eldridge to treat their children. In this sense, the publication of the information about Dr. Eldridge's medical condition involves a matter of "public concern."

Countervailing arguments on this question persist. The Supreme Court carefully noted in both *Cox* and *Florida Star*, decisions favoring freedom of the press over the right to privacy, that the material suppressed involved operation of government, and more specifically the operation of the criminal justice system.¹⁷⁸ In *Cox*, the Court delineated the special role the press plays: "With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."¹⁷⁹

That special role is not present where the press is reporting confidential facts about a private individual, concerning a matter where the individual is not involved in some governmental function. Thus, the First Amendment interest in protecting publication is not as strong in the Dr. Eldridge hypothetical as it was in *Florida Star* or *Cox*.¹⁸⁰ If that is true, then the *Daily Mail* standard should not be applied in the Dr. Eldridge scenario, because the report does not concern the operation of government.

177. See, e.g., *Bates v. State Bar*, 433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

178. See *Cox*, 420 U.S. at 492; *Florida Star*, 491 U.S. at 536-37.

179. *Cox*, 420 U.S. at 492 (citation omitted).

180. Professor Chemerinsky has noted the distinction: "First Amendment values are lessened because there is not the important interest of ensuring that the press feels free to publish what it learns in public records. Reports on what the government is doing are at the very core of the First Amendment." CHEMERINSKY, *supra* note 3, at 865.

In *Florida Star*, the Supreme Court balked at the notion that publication of the *name* of a rape victim is necessarily a matter of public interest: “[T]he article generally, *as opposed to the specific identity contained within it*, involved a matter of paramount public import”¹⁸¹ Likewise, one can question whether the publication of the name of a victim of HIV, as opposed to general information about how the infection can be contracted, is protected by the First Amendment.

C. Does California’s Constitutional Protection of the Privacy Interests of Its Citizens Satisfy the Florida Star/Daily Mail Standard?

The foregoing discussion reveals that questions remain whether publication of confidential medical information about private figures is protected by the First Amendment. Absent patient consent, acquisition of confidential medical information is “unlawful” in California; therefore publication of that information may fall outside the *Daily Mail* principle. Even if publication falls within that principle, it may not be constitutionally protected because the name of a private figure, or the fact she has a disease, is not necessarily a matter of public interest. Because these questions remain unanswered,¹⁸² it will be assumed for purposes of this discussion that publication of confidential medical information about a private figure is protected by the First Amendment. Given that assumption, does California’s constitutional right to privacy violate the First Amendment because it would allow that individual to collect damages from the press for invasion of privacy? In short, can California’s constitutional guarantee survive the kind of scrutiny given the statute in *Florida Star*?

California’s constitutional right to privacy is, at a minimum, a state interest “of the highest order.”¹⁸³ California has elevated the right to

181. *Florida Star*, 491 U.S. at 536–37 (emphasis added).

182. These questions beg for resolution. Should the state be allowed to punish the media where the information published is unlawfully obtained? Does the First Amendment protect the media should they choose to reveal private facts about a private figure? The holding in *Gertz v. Robert Welch*, 418 U.S. 323 (1974), might be read as suggesting the answer to this last question is “no.”

However, *Gertz* involved false speech, which is not protected by the First Amendment. *Id.* The Supreme Court has steadfastly refused to hold that the press can never be punished for publishing true information. See *Cox*, 420 U.S. at 491; *Florida Star*, 491 U.S. at 532. The possibility of doing so, however, is especially unlikely under current First Amendment jurisprudence: “[T]he Court’s rulings reflect the principle that the First Amendment must virtually always protect the publication of true information.” CHEMERINSKY, *supra* note 3, at 864.

183. *Florida Star*, 491 U.S. at 533 (quoting *Daily Mail*, 443 U.S. at 103).

privacy to the highest status by enshrining it in the state constitution.¹⁸⁴ In so doing, voters declared that the ability to control dissemination of confidential personal information is a fundamental interest. California courts, through their holdings restricting discovery, the introduction of evidence at trial, and the publication of confidential information, have made it clear that they view the constitutional right to privacy as fundamental.¹⁸⁵ Clearly, protection of privacy is an interest more important than a state's interest in protecting a person's reputation.

The third and final *Hill* inquiry is whether the method California has selected to protect constitutional privacy solves the problems with the Florida statute identified by the Court in *Florida Star*. In *Florida Star* the majority faulted the statute because it utilized a negligence *per se* standard.¹⁸⁶ Under that structure, the Court observed, liability could be imposed "whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern"¹⁸⁷

California does not use a negligence *per se* standard in privacy cases. Indeed, one cannot state a cause of action for invasion of constitutional privacy where the published information is matter of public record or widely known.¹⁸⁸ California's privacy right does not allow imposition of liability upon the press for the publication of information where the plaintiff has called public attention to himself.¹⁸⁹ The *Hill* opinion makes that clear, discussing with approval the common law invasion of privacy standard that "the plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy"¹⁹⁰ Finally, the state constitutional protection

184. CAL. CONST. art. I, § 1.

185. See *supra* Part II.

186. *Florida Star*, 491 U.S. at 533.

187. *Id.* at 539.

188. In *Hill*, the California Supreme Court held that an essential element of a state constitutional cause of action is "a reasonable expectation of privacy." *Hill v. National Collegiate Athletic Ass'n*, 865 P.2d 633, 654 (Cal. 1994). There can be no such expectation where the information revealed is a matter of public record. In *Kapellas v. Kofman*, 459 P.2d 912 (Cal. 1969), the court held plaintiffs could not state a cause of action for tortious invasion of privacy where the information published came from a police blotter. The court observed that "such events would already have been matters of public record. . . . Thus we are not faced with an article which intrudes deeply into the children's privacy by revealing incidents of a wholly private or confidential nature." *Id.* at 924 (citations omitted). It is unlikely the court would find a reasonable expectation of privacy can exist in situations where the matters published are obtained from public records.

189. *Hill*, 865 P.2d at 648.

190. *Id.*

of privacy offers no relief where the published information concerns a person who has "become a reasonable subject of public concern."¹⁹¹

The United States Supreme Court also faulted the statute in *Florida Star* because it applied only to instruments of "mass communication."¹⁹² Unlike the Florida statute, California's constitutional right to privacy is not underinclusive, because it applies to anyone who releases confidential medical information without authorization.¹⁹³ In *Hill*, the California Supreme Court ruled that California's constitutional right to privacy restricts the rights of private parties as well as government.¹⁹⁴ The court held that Article 1, Section 1 of the California Constitution creates a right of action against private as well as government entities.¹⁹⁵ In reaching this conclusion, the court made clear that *any* person who publishes confidential information protected by the California constitutional guarantee is liable.¹⁹⁶

The *Hill* opinion observes that the common law invasion of privacy tort requires the disclosure to be widely published and not confined to a few persons or limited circumstances.¹⁹⁷ In contrast, the California constitutional guarantee prevents *any* misuse of information gathered for one purpose in order to serve other purposes.¹⁹⁸ Under that rubric, "sensitive personal information may be misused even if its disclosure is limited."¹⁹⁹ A declaration in a footnote to the *Hill* opinion is especially relevant to the protection of Dr. Eldridge's confidential medical information: "Particularly when professional or fiduciary relationships premised on confidentiality are at issue (such as doctor and patient or psychotherapist and client), the state constitutional right to privacy may be invaded by a less-than-public dissemination of information."²⁰⁰

191. *Florida Star*, 491 U.S. at 539.

192. *Id.* at 540, 541-42.

193. CAL. CIV. CODE § 56.10(a) (Deering 1990).

194. *Hill*, 865 P.2d 633, 633-44 (Cal. 1994).

195. *Id.* at 644.

196. To paraphrase Justice Marshall, California's constitutional protection applies to the small time disseminator as well as the media giant. See *Florida Star*, 491 U.S. at 540.

197. *Hill*, 865 P.2d at 648-49.

198. *Id.* at 649.

199. *Id.*

200. *Id.* at n.7. Later in that note, the Court does intimate it is most concerned about widespread dissemination: "Although the Privacy Initiative reveals no voter intent to extend the common law to create a cause of action for mere gossip, in an age of oral mass media (e.g., radio), widespread oral disclosure may tread upon our state constitutional right to privacy as readily as written dissemination." *Id.* This part of the California court's opinion, if it is indeed incorporated in the constitutional guarantee, might be susceptible to the charge that it is underinclusive. The opinion declares the constitutional guarantee applies only to mass

Subsequent lower court cases demonstrate that the California constitutional tort applies its "prohibition evenhandedly, to the smalltime disseminator as well as the media giant."²⁰¹ In *Susan S. v. Israels*,²⁰² a case decided after *Hill*, the California Court of Appeal concluded that dissemination by a single lawyer to a defense expert could constitute a violation of the constitutional right to privacy.²⁰³ The court held that the plaintiff stated a valid cause of action under the California Constitution where she alleged a defense attorney read her confidential mental health records, transmitted those records to a defense expert psychiatrist, and used the information to cross examine the plaintiff in criminal trial.²⁰⁴ Among other things, defendants argued there was no violation because they did not "broadcast" the information.²⁰⁵ In response to that contention, the court noted that "Susan S.'s cause of action for invasion of her constitutional right of privacy does not depend on the 'publication' or 'broadcast' of her mental health records but rests on Israels' conduct in reading those records."²⁰⁶ The court held that a stranger's unauthorized reading and dissemination of a person's mental health records is a serious invasion of the person's privacy.²⁰⁷

In an earlier case, *Cutter v. Brownbridge*,²⁰⁸ the California Court of Appeal held that publication of confidential mental health information in a declaration used only in a court proceeding violated the constitutional right

publication, not small time dissemination. *Id.*

There are three responses to that charge. First, the distinction drawn under article I, section 1 differs markedly from the statute stricken in *Florida Star*. This is not a prohibition that, in the words of Justice Scalia, society is prepared to impose upon the press but not upon itself. *Florida Star*, 491 U.S. at 542 (Scalia, J., concurring). The constitutional guarantee of privacy applies to the press and anyone who publishes private information in a manner that results in widespread distribution. *Id.* Second, a limitation to widespread publication would represent the California court's insistence that a constitutional violation involve the likelihood of serious harm to the emotional sensibilities of the victim. Third, it is important to note that this limitation is set out in a footnote and is clearly dicta. The California court was deciding whether the NCAA, a private entity, could violate the privacy guarantee. The NCAA was not the "small time disseminator" referenced by Marshall and Scalia. The clear mandates of the statutes regarding the confidentiality of medical records are that individuals can violate the right to privacy concerning those records. Given the importance the California courts have attached to that right over the years, it is quite possible the California high court would hold an individual discussing confidential medical information with a plaintiff's neighbors and acquaintances could be sued under the constitutional guarantee.

201. *Florida Star*, 491 U.S. at 540.

202. 55 Cal. App. 4th 1290, 1293 (1997).

203. *Id.* at 1293.

204. *Id.* at 1294.

205. *Id.* at 1299.

206. *Id.*

207. *Id.* at 1298.

208. 183 Cal. App. 3d 836 (1986).

to privacy.²⁰⁹ In that case, the patient Cutter brought a lawsuit against his psychotherapist. The complaint alleged the psychotherapist executed a written declaration describing his diagnosis of the plaintiff and revealing damaging personal details learned as a result of his treatment of Cutter.²¹⁰ That declaration was used in a motion by Cutter's former wife to terminate his visitation privileges.

The court held that a psychotherapist's diagnosis and other details of his professional relationship with a patient are protected by the constitutional right to privacy.²¹¹ The court then found that voluntary unauthorized disclosure of mental health information by a psychiatrist, even if done only in a court proceeding, violates the right to privacy.²¹²

Thus, it is clear California's constitutional right to privacy is not an underinclusive remedy. California has anticipated and answered Justice Scalia's criticism of the Florida statute. California's constitutional guarantee of privacy is a prohibition society has applied to itself as well as the press. It is indeed a statue protecting an interest of "the highest order."

V. CONCLUSION

California's constitutional right to privacy would allow Dr. Eldridge to recover damages for the publication of her confidential medical records. This Article has argued that awarding damages to a private individual does not violate the First Amendment because the constitutional right to privacy is a fundamental interest, and a state enforces that right in a manner consistent with the concerns expressed by the Supreme Court in *Florida Star*, *Cox*, and *Daily Mail*.

Thus far, this Article has confined its discussion to an analysis of the case law. But what of the important First Amendment concerns underlying that case law? It is fair to say the primary concern of the United States Supreme Court in addressing the clash between privacy and freedom of the press is avoiding strictures that will chill the ability and willingness of the press to print true information about matters of public interest. This was the case in *Cox*, where the Court confronted a rule

209. *Id.*

210. *Id.* at 840.

211. *Id.* at 843.

212. *Id.* at 847. The court held that a psychotherapist who voluntarily reveals confidential information does so at his or her peril. *Id.* It held that where information is sought from a psychotherapist, an individual should first invoke the statutes extending an evidentiary privilege to confidential communications between a patient and his or her psychotherapist. *Id.* This would allow the courts to strike a proper balance between the patient's constitutional right to privacy and the state's interest in ascertaining truth in judicial proceedings. *Id.* at 845-46.

making information available to the press but forbidding its publication if offensive to the sensibilities of a reasonable person:

Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and *that should be made available to the public.*²¹³

The same concern underlies the decision in *Florida Star*, where the Court said one consideration mandating invalidation of the statute was the timidity and self-censorship that might result from punishing the media for publishing "certain truthful information."²¹⁴

This concern about chilling the press from publishing information that should be made available to the public is minimized by California's constitutional privacy provision. First, the right to privacy only protects information where there is a reasonable expectation of privacy.²¹⁵ Hence, publication of information already in the public domain, or of information gathered from public documents, cannot violate the right to privacy.²¹⁶

What remains is the argument that protection of privacy will unduly chill the press because it allows punishment for publication of true information. The chilling effect of California's constitutional protection of privacy will be minimal. The constitutional right to privacy only protects information when "well established norms recognize the need to maximize individual control over its dissemination and use . . ."²¹⁷ This standard creates a limited universe of protected information. If information is not protected by common law, constitutional law, or statutes, it is not protected by the right of privacy.²¹⁸ These are sources of law readily available and accessible to editors, publishers, and their advisors in cases where questions concerning publication arise. Thus, editors can easily ascertain

213. *Cox*, 420 U.S. at 496 (emphasis added).

214. *Florida Star*, 491 U.S. at 535.

215. *Hill*, 865 P.2d at 655.

216. *Id.* In *Kapellas v. Kofman*, 459 P.2d 912 (Cal. 1969), the California Supreme Court held an editorial disclosing information from police records about the arrests of a politician's children did not violate the common law right to privacy. *Id.* In so holding, the court said the editorial did not intrude into the children's privacy because the events were "already matters of public record." *Id.* at 924. *Kapellas* cites several California cases concluding that reporting about matters of public record does not violate the common law right to privacy. *Id.* Given this long history, there can be no reasonable expectation of privacy with respect to matters of public record.

217. *Hill*, 865 P.2d at 654.

218. *Id.* at 654-55.

whether confidential information about private figures involves a “legally cognizable privacy right.”

Under the California Constitution, whether a legally cognizable privacy right exists is a question of law committed to the court.²¹⁹ This addresses two important constitutional concerns. First, determination of this question will not be left to the vagaries of jury determination. A consistent theme in press freedom jurisprudence generally is a concern that juries will punish the press with damage awards for publicizing unpopular views or attacking popular figures.²²⁰ The lack of clear standards to guide jury deliberations contributes to this concern.

By making the determination of a legally cognizable privacy interest a question of law, the California Supreme Court has eliminated this concern. Juries do not determine whether a legally cognizable privacy interest is involved. Judges, who are presumably more attuned to the important constitutional concerns posed by privacy litigation, make that determination. If they are wrong, their judgments are subject to independent review on appeal, insuring proper respect for the constitutional guarantee of freedom of the press.

A second concern about the chilling effect arises from the costs associated with defending litigation. These costs can be substantial. California’s standard promises quick resolution in those instances where no legally cognizable privacy interest exists. Those cases can and should be disposed of through demurrers and motions for summary judgment—tools that minimize the financial burden imposed on the press by litigation. Discovery, and the financial costs it imposes on the press, will be limited by the speedy resolution of this threshold question. Because this is a question of law, a conscientious judge could delay discovery until she has made that initial determination, further reducing the potential for chilling effect.²²¹

219. *Id.* at 657.

220. *See, e.g.,* *New York Times Co. v. Sullivan*, 376 U.S. 255 (1964).

221. Two California Supreme Court cases have followed the lead of the United States Supreme Court, favoring quick resolution of speech related litigation. In *Good Gov’t Group v. Superior Court*, 586 P.2d 572 (Cal. 1978), the California Supreme Court held that summary judgment is a favored remedy where First Amendment rights are implicated by a lawsuit. *Id.* at 578. The court stated a trial court is obligated, in public official libel cases, to determine whether there is a sufficient showing of malice before allowing submission of the issue to a jury. *Id.* at 576. *See also* *Desert Sun Publ’g Co. v. Superior Court*, 976 Cal. App. 3d 49 (1979).

In *Okun v. Superior Court*, 629 P.2d 1369 (Cal. 1981), the California Supreme Court held a trial court can, and should, sustain a demurrer without leave to amend to avoid the chilling effect of lawsuits on the exercise of First Amendment rights. *Id.* at 1380. The demurrer is an even more effective antidote to the chilling effect of lawsuits because it is resolved based solely on the allegations contained in the pleadings. In those cases where courts grant demurrers

Obviously, this Article cannot claim that the right to privacy under the California Constitution carries no threat of chilling speech. Litigation will result, and the mere threat of litigation might chill some press activity. However, California voters, with the assistance of the courts, have struck an appropriate balance between the right to privacy and freedom of the press. Governmental intrusion on editorial discretion is minimal, and the scope of that intrusion is limited to a discrete, readily ascertainable class of information.

Perhaps most importantly, the information protected by California's constitutional right to privacy is not the kind of information that "should be made available to the public."²²² The right to privacy does not protect information emanating from public proceedings, nor does it extend to information gleaned from public records.²²³ Privacy protection is extended only to confidential, intimate personal information, which most people feel should not be made available to the public absent the subject's consent. Given the important, fundamental interests advanced by recognition of a right to control dissemination of intimate and confidential personal information, and the measures that protect those interests, this Article demonstrates that California's constitutional right to privacy strikes an appropriate accommodation with the right to freedom of the press.

without leave to amend, little or no discovery will take place.

Any informational privacy claim potentially conflicts with the right of freedom of the press. Whether the information published involves a legally cognizable privacy interest is a question of law. Application of the principle and remedies announced in *Good Gov't Group* and *Okun* is both appropriate and necessary where informational privacy claims are made.

222. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975).

223. *Id.* at 495.

