Loyola of Los Angeles Entertainment Law Review

Volume 19
Number 2 *Symposium—The Right of Privacy versus the Right to Know: The War Continues*

Article 6

1-1-1999

On the QT and Very Hush Hush: A Proposal to Extend California's Constitutional Right to Privacy to Protect Public Figures from Publication of Confidential Personal Information

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"ON THE QT AND VERY HUSH HUSH": A PROPOSAL TO EXTEND CALIFORNIA'S CONSTITUTIONAL RIGHT TO PRIVACY TO PROTECT PUBLIC FIGURES FROM PUBLICATION OF CONFIDENTIAL PERSONAL INFORMATION

Gary Williams[*]

I. INTRODUCTION

In *L.A. Confidential*, a movie set in the 1940s, a character played by Danny DeVito works for a tabloid newspaper called *On the QT and Very Hush Hush*.[1] DeVito's newspaper runs stories about scandals affecting the rich and famous of Los Angeles[2] much like a variety of tabloid newspapers, television shows and magazines do today. One staple of the celebrity scandal trade is stories revealing confidential information about the health, relationships (marital and otherwise), physical appearance and financial affairs of well-known individuals. The practice of publicizing highly personal, confidential information is not limited to the "tabloid" press. Mainstream newspapers and news broadcasts have also engaged in the practice when it suits their needs. For example, in 1992, *USA Today* forced Arthur Ashe to reveal to the public that he had AIDS after threatening to publish this information.[3] The continued publication of such information

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1. L.A. CONFIDENTIAL (Warner Bros. 1998).

2. *Id.*

3. ARTHUR ASHE & ARNOLD RAMPERSAD, DAYS OF GRACE 7–17 (1993).

troubles many celebrities, as evidenced by the spate of lawsuits filed seeking damages for such revelations[4] as well as California legislation and a federal proposal sponsored by the Screen Actors Guild.[5] Additionally, public opinion polls indicate that these invasions of privacy trouble the general public as well.[6]

The law has responded to these concerns by recognizing a right of informational privacy, or the right to control who has access to confidential personal information.[7] By definition, the right of informational privacy conflicts with the constitutional guarantee of freedom of the press because it restricts the ability of the press to publish true information.[8] Nevertheless, California courts have held that public figures do retain a "zone of privacy,"[9] only with more circumscribed boundaries than those protecting private figures.[10] This Article proposes a method for defining a zone of privacy for public figures consistent with the federal and California constitutional guarantees of freedom of the press utilizing California's constitutional guarantee of privacy.

Using a hypothetical scenario, Part II of this Article illustrates the problems public figures face when they assert privacy claims. The hypothetical involves two public figures who are dismayed by the unauthorized public disclosure of their confidential medical history. Part III summarizes the constitutional and common law standards applicable to the privacy claims made by these two individuals. First, this Part discusses the inherent tension between the right to informational privacy as established under California law and the First Amendment guarantee of freedom of the press. This Part also explores the "newsworthiness" standard used by California courts to resolve questions posed by that tension. Next, this Part will out-

4. *See* discussion *infra* Part IV.B.

5. The Screen Actors Guild sponsored the Personal Privacy Protection Act which Senators Barbara Boxer, Diane Feinstein and Orrin Hatch introduced in the United States Senate. Personal Privacy Protection Act, S. 2103, 105th Cong. (1998). The California Legislature passed similar legislation in 1998 which the Governor subsequently signed into law. S.B. 262, 1997–98 Reg. Sess. (Cal. 1998) (codified at CAL.CIV. CODE § 1708.8 (West 1999)).

6. In 1997, 92% of respondents of one poll expressed concern over threats to their privacy. Mark Boal, *Spycam City*, THE VILLAGE VOICE, Oct. 6, 1998, at 40. According to a *Time/CNN* poll, 87% of Americans want to be asked for permission any time medical information about them is revealed. Statement of Solange E. Bitol, Legislative Counsel (visited Feb. 20, 1999) <http://www.house.gov./reform/reg/hearings/091798/bitol1091798.html>.

7. *See* S.B. 262, 1997–98 Reg. Sess. (Cal. 1998) (codified at CAL. CIV. CODE § 1708.8 (WEST 1999)); *see also* Hill v. National Collegiate Athletic Ass'n, 7 Cal. 4th 1 (1994); Dean Prosser, *Privacy*, 48 CAL. L. REV. 383, 392–98 (1960).

8. U.S. CONST. amend. I; CAL. CONST. art. I, § 1.

9. *See* Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 772–73 (Cal. Ct. App. 1983).

10. *See id.*

line the definition of a "public figure." Finally, this Part will catalogue some California cases addressing privacy claims filed by public figures applying the common law private facts tort to illustrate the newsworthiness and public figure standards used to evaluate these claims.

Part IV analyzes the problem faced by public figures in attempting to protect their privacy under California's constitutional guarantee of a right to privacy. This Part applies the standard proposed in my previous Article[11] to evaluate the informational privacy claims of public figures. I argue that limited classes of confidential information are so personal and sensitive that the state's interest in protecting informational privacy is compelling even where the individual is a "public figure."[12] For those classes of information, I argue that the right to privacy outweighs the right to publish personal information.

Finally, Part V details the major objections to recognizing a public figure's right to informational privacy. Further, Part V explains why the courts should continue to seek an appropriate balance between public figures' right to be left alone and the public's "right to know." In this Part, I argue that a limited, uniform "zone of privacy" applicable to private and public figures alike strikes an appropriate balance between the competing interests involved. As such, I propose a standard that will inform editors

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11. Gary Williams, *California's Constitutional Right to Privacy: Can It Protect Private Figures from the Unauthorized Publication of Confidential Medical Information?*, 18 LOY. L.A. ENT. L.J. 1 (1997).

12. For the purpose of this Article, I am limiting my definition of "public figure" to a person who does not hold an elected or appointed government position, but has achieved some level of public notoriety. *See* discussion *infra* Part IV.A.2.a.

I have deliberately omitted "public officials" from this definition. The public's right to receive information about people who are elected or appointed to public office presents especially difficult problems under both the First Amendment and California's constitutional guarantee of freedom of the press. U.S. CONST. amend. I (granting freedom of the press); CAL. CONST. art. I (granting freedom of the press). Limits on the right to publish information about public officials adversely impact the public's ability to make informed decisions about self-governance and affect core First Amendment values. These concerns give me greater constitutional pause than limits on the right to publish information about the lives, loves and medical history of movie stars, athletes, crime victims and people associated with public figures.

I recognize this distinction is problematic at its borders. Many "public figures" aspire to serve in public office or are public figures precisely because they seek to influence public debate. Jesse Jackson and Jerry Falwell are two examples of this phenomenon from opposite ends of the political spectrum. Other public figures regularly use their celebrity status to influence public policy. For example, actor and director Rob Reiner recently championed Proposition 10 in California. *See* Sabin Russell, *No on 10 Campaign Spending Revealed*, S.F. CHRON., Feb. 4, 1999, at A18.

The difficulty in drawing distinctions between public figures and public officials undoubtedly has influenced the United States Supreme Court, which treats public figures and public officials as equals for First Amendment purposes. *See* Curtis Publ'g Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

appropriately regarding where the public's right to know ends and the public figure's right to privacy begins.

II. THE INFORMATIONAL PRIVACY PROBLEM FOR PUBLIC FIGURES

In my first Article exploring California's constitutional right to informational privacy, I utilized a hypothetical where the Editor-in-Chief of the fictional *Los Angeles Herald Express* ("*Express*") directed her staff to publish a series of articles about people with HIV or AIDS.[13] The series was designed to educate people and to reduce the "public ignorance and hysteria" associated with the disease.[14] The fictional series successfully convinced over 5,000 people to write letters to the Governor urging him to sign legislation prohibiting discrimination against persons with HIV or AIDS.[15]

The hypothetical in my previous Article addressed the claim of Dr. Susan Eldridge, a physician who contracted HIV through an operating room accident.[16] Dr. Eldridge, a private figure, did not consent to the *Express'* disclosure of her illness and sued, claiming publication of the information about her illness violated her right to privacy under the California Constitution.[17]

This Article explores the previous hypothetical further by considering the plight of two other individuals whose status as HIV/AIDS patients the *Express* publicized without their consent. The first person is Jack Silvester, a high school physics instructor and formerly popular basketball player with the Los Angeles Lakers in the sixties and early seventies. After Silvester retired from professional basketball, he began a new life as a high school teacher. Silvester sought to live out his life as an ordinary teacher and citizen by shunning publicity and consistently refusing all press requests for interviews.

Mr. Silvester contracted HIV through a blood transfusion. *Express* reporters learned of Silvester's illness through a reliable source while working on the HIV/AIDS series. An *Express* reporter called Silvester to verify the information, but he refused to confirm his HIV status. Instead, Silvester asked the reporter not to publish the story about him out of respect for his privacy. Silvester told the reporter he had not authorized anyone to discuss or release his confidential medical history. Silvester explained to

13. *See* Williams, *supra* note 11, at 1–3.
14. *See* Williams, *supra* note 11, at 1.
15. *See* Williams, *supra* note 11, at 1–2.
16. Williams, *supra* note 11, at 2.
17. *Id.*

the reporter that publication of a story about his HIV status, whether true or not, would compromise his ability to teach effectively.

The reporter confirmed the information through other sources and the *Express* printed the story about Silvester as part of its series. The day after the story appeared, roughly half of Silvester's students began to boycott his classes. Parents circulated a petition demanding Silvester's termination or reassignment to a desk job. The Board of Education ("the Board") and the school principal allowed Silvester to remain in the classroom. One month after the story appeared, eighty–five percent of his students boycotted his class and the Board received a petition signed by ninety–percent of the parents of Silvester's students. As a result, the Board capitulated to the protests and directed the principal to reassign Silvester to an administrative position through the end of the semester. Subsequently, the Board issued a press release stating Silvester was transferred to minimize campus disruption.

The *Express* article also exposed the HIV status of Carla Fence, the infamous daughter of Darryl Fence. Darryl Fence is an ambitious police chief in Los Angeles County who plans to run for governor in the next election. Carla Fence, thirty-five, has been heavily involved in the local drug scene for many years. Fence has not lived with Chief Fence for twenty years and rarely speaks to him, partially as a result of her drug usage. After Chief Fence announced the formation of his gubernatorial election committee, the *Express* began a background check on him and his family. The *Express* reporters knew of Carla Fence's history of drug use from past reports from confidential sources. However, during its investigation, *Express* staff learned from another confidential source that Fence contracted HIV through the use of a contaminated hypodermic needle and subsequently developed AIDS. After receiving confirmatory medical records, the *Express* ran a story detailing Carla Fence's drug use and her illness. Shortly after the story appeared, Fence was laid off from her job as a receptionist and her month-to-month apartment lease was terminated.

Should Silvester and Fence be able to sue the *Express* for the damage to their careers and reputations caused by the unauthorized revelation of information about their medical condition? Their claims are more troublesome than Dr. Eldridge's in the previous Article because the common law recognizes that Fence and Silvester are public figures.[18] Cases interpreting the common law right to informational privacy have granted the press far greater latitude in publishing the otherwise confidential information of

18. *See supra* text accompanying note 12.

public figures.[19] The hypothetical illustrates the permanent effects of the designation as a "public figure" and how far reaching that definition extends.[20]

III. INFORMATIONAL PRIVACY AND PUBLIC FIGURES: AN OVERVIEW

In their action against the *Express*, Silvester and Fence will claim that publication of confidential information about their medical condition is actionable because they alone should have the right to decide whether to publicize that information. These claims present special problems under the First Amendment because the speech involved is true.[21] By allowing a remedy for publishing private facts, courts could punish editors for merely publishing certain true and lawfully obtained information.[22] Arguably, privacy remedies also interfere with the public's right to receive information—a right related to freedom of speech and freedom of the press.[23]

The United States Supreme Court has addressed the clash between the competing values of informational privacy and freedom of the press in two seminal cases, *Cox Broadcasting Corp. v. Cohn*[24] and *Florida Star v. B.J.F.*[25] In both cases, the Court held that the First Amendment does not allow states to protect privacy interests where the press publicizes true information lawfully obtained from public documents or proceedings about matters of public concern.[26]

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19. *See* discussion *infra* Part IV.A.2.

20. Ms. Fence is probably a public figure because of her father's status as a public official running for office. *See* discussion *infra* Part IV.A.2.a. Mr. Silvester will remain a public figure forever because of his past status as a public figure without regard to his desires or how he conducts his life. *See* discussion *infra* Part IV.A.2.c.

21. One prominent constitutional law scholar has noted that "the Court's rulings reflect the principle that the First Amendment must virtually always protect the publication of true information." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 864 (1997). I accept this proposition, but posit in this Article that protection of highly sensitive personal information that an individual has treated as confidential presents a rare instance where the First Amendment should not protect publication.

22. Generally, editorial control is the exclusive province of news editors. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

23. *See* Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965); *see generally* Lamont v. Postmaster Gen., 381 U.S. 301, 305–307 (1965) (finding that interference by a government official with an individual's ability to receive mail based on its content is a violation of the First Amendment). While its contours are in dispute, the existence of a constitutional right to receive information seems indisputable. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 944 (2d ed. 1988).

24. 420 U.S. 469 (1975).

25. 491 U.S. 524 (1989).

26. For a more thorough discussion of these rulings, *see* Williams, *supra* note 11, at 4–9.

While the Court was very solicitous of editorial discretion in those cases, it declined on both occasions to prohibit completely sanctions against the press for the publication of true information.[27] The Court explained that its reluctance to prohibit sanctions against the press stems from the recognition that claims of a right of privacy are "plainly rooted in the traditions and significant concerns of our society."[28] Indeed, in *Cox*, the Court acknowledged the existence of "a zone of privacy surrounding *every individual*, a zone within which the State may protect him from intrusion by the press."[29] Thus, despite dire predictions about the demise of the right to informational privacy in the wake of the *Florida Star* decision,[30] courts continue to find the press liable for violating the right to privacy in select cases.[31]

IV. THEORETICAL UNDERPINNINGS OF PRIVACY CLAIMS BY PUBLIC FIGURES

A. Legal and Constitutional Standards Applicable to Privacy Claims by Public Figures

1. Newsworthiness

The United States Supreme Court in *Cox*[32] and *Florida Star*[33] limited actionable privacy claims by imposing the "truthful" and "legally obtained" standards of review. However, these standards do not address the difference between the zones of privacy enjoyed by public versus private individuals. California courts have expanded these standards even further un-

27. *Cox*, 420 U.S. at 491; *Florida Star*, 491 U.S. at 533.

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

29. *Id.* at 487 (emphasis added).

30. In *Florida Star*, Justice White wrote in his dissent that the majority accepted "appellants invitation to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts." 420 U.S. at 550 (White, J., dissenting) (citation omitted). After the *Florida Star* decision, many legal commentators agreed that the private facts tort was dead. *See, e.g.*, 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).

31. In her Article, *The Hidden First Amendment Values of Privacy*, Sean M. Scott lists appellate cases decided after *Florida Star* where courts have upheld claims for invasion of privacy. *See* Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 696–698 (1996).

32. 420 U.S. at 495–97.

33. 491 U.S. at 530.

der common law by providing additional interpretations of California constitutional law. In an effort to reconcile protection of the freedom of the press with the common law right to informational privacy, California courts have utilized a "newsworthiness" standard to evaluate claims of invasion of privacy.[34] The newsworthiness standard holds that publication of confidential information is not actionable if the information is "newsworthy."[35] In California, plaintiffs asserting informational privacy claims must prove that an article lacks newsworthiness to succeed in their cause of action.[36]

The definition of newsworthiness is so broad that it appears impossible for a person to recover on a claim for invasion of informational privacy. In *Briscoe v. Readers Digest Ass'n*,[37] for example, the California Supreme Court held that a publisher need not intend to educate the public to render an item newsworthy.[38] The court concluded that the line between entertaining and educating is too elusive for courts to define because "[w]hat is one man's amusement teaches another's doctrine."[39] Theoretically, once an editor determines that an article contains an element of newsworthiness, the court will not second guess the editor's determination.

The California Supreme Court's most recent foray into the indeterminate nature of the "newsworthiness" standard is *Shulman v. Group W Productions, Inc.*[40] In *Shulman*, the plaintiffs were videotaped, without their knowledge or consent, as they received treatment for injuries suffered in a serious automobile accident.[41] The videotape subsequently appeared on the defendant's nationally syndicated "reality television show."[42] In declaring the broadcast newsworthy, a majority of the court concluded "a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it . . . . Thus, newsworthiness is not limited to 'news' in the narrow sense of reports of current events."[43]

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34. Shulman v. Group W Prods., Inc., 955 P.2d 469, 478–79 (Cal. 1998). Many other state courts adhere to the newsworthiness standard as well. *See id.* at 479; *see also* RESTATEMENT (SECOND) TORTS, § 652D cmt. g (1977).

35. *Shulman*, 955 P.2d at 479; *see* Times-Mirror Co. v. Superior Court, 244 Cal. Rptr. 556, 561 (Cal. Ct. App. 1988); Sipple v. Chronicle Publ'g Co., 201 Cal. Rptr. 665, 668 (Cal. Ct. App. 1984).

36. *Shulman*, 955 P.2d at 469.

37. 483 P.2d 34 (Cal. 1971).

38. *Id.* at 38.

39. *Id.* at 38 n.6 (citing Winters v. New York, 333 U.S. 507, 510 (1997)).

40. 955 P.2d at 475.

41. *Id.*

42. The documentary television show is called *On Scene: Emergency Response*. *Id.*

43. Quoting from the *Restatement (Second) of Torts*, the opinion continues, "[Newsworthiness] extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may rea-

At first blush, the elasticity of the court's definition might appear to make virtually any published information "newsworthy" so long as some entity is willing to print it.[44] However, the newsworthiness standard is not as malleable as the case law suggests. First, the paramount test of "newsworthiness" is determining whether the matter is of legitimate public interest according to "community mores."[45]

> The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he has no concern.[46]

Second, California courts have entrusted determination of newsworthiness to juries: "Whether a publication is or is not newsworthy depends upon contemporary community mores and standards of decency. This is largely a question of fact, which a jury is uniquely well-suited to decide."[47]

California courts continue to treat "newsworthiness" as a jury question after the *Florida Star* decision. In *Hood v. National Enquirer*,[48] a California Court of Appeal remanded the case to determine whether information published about Eddie Murphy's support of a child he fathered out of wedlock and the child's mother was newsworthy. The court reaffirmed that newsworthiness is a jury question when it stated:

> [C]ourts have repeatedly held that even when an event is generally newsworthy, the publication of certain facts may not be such . . . . We cannot say as a matter of law that the details of a celebrity's financial support of his child and Ms. Hood are newsworthy. While the fact of that support may be newsworthy, the financial details may not. A trier of fact could conclude that how much money Mr. Murphy gave plaintiffs, the price of their home, the amount of Ms. Hood's monthly support, and the size

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sonably be expected to have a legitimate interest in what is published." *Id.* at 485–86.

44. As one commentator observed, "Essentially, if an item has been printed it is deemed newsworthy by the courts." Scott, *supra* note 31, at 700.

45. Sipple v. Chronicle Publ'g Co., 201 Cal. Rptr. 665, 670 (Cal. Ct. App. 1984).

46. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1976)).

47. Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 772 (Cal. Ct. App. 1983) (citation omitted). *Diaz* relied on *Briscoe v. Reader's Digest Ass'n, Inc.*, where the California Supreme Court held that newsworthiness was a jury question. *Id.* (citing Briscoe v. Reader's Digest Ass'n, Inc., 483 P.2d 34, 43 (Cal. 1971).

48. Hood v. National Enquirer, 17 No. 9 ENT. L. REP. *3, *7 (Cal. Ct. App. 1995). This opinion was not officially published. I am indebted to Professor F. Jay Dougherty for providing this opinion.

> of Christian's trust fund, were private facts, the publication of which was unnecessary to the story told and not newsworthy.[49]

Although the California Supreme Court upheld a grant of summary adjudication dismissing the plaintiffs' privacy claims in the *Shulman* case, it implicitly agreed that newsworthiness can be a jury question.[50] The court stated that "an analysis focusing on relevance allows courts *and juries* to decide most cases involving persons involuntarily involved in events of public interest without 'balanc[ing] interests in an ad hoc fashion in each case.'"[51]

Unfortunately, limitations on the definition of newsworthiness do not provide sufficient guidance to editors considering news stories or plaintiffs pursuing privacy claims. In reality, the standards that guide a jury's determination of newsworthiness are surprisingly vague. Juries are instructed to consider the "[1] social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety."[52] When considering the depth of an intrusion, the jury must determine whether the revelation of the information was "grossly offensive" to most people.[53] As one court of appeal remarked, "If there is room for differing views whether a publication would be newsworthy the question is one to be determined by the jury and not the court."[54] Juries are invited, essentially, to substitute their differing judgments for that of editors on a case by case basis, applying the mores of their particular community. A publication deemed newsworthy in Los Angeles could be found to violate the right to privacy in Anaheim, San Marino or Redondo Beach. As such, one can only imagine the nervousness editors of the *Los Angeles Times*, or any major newspaper circulated to suburbs and beyond, experience because of the endless possibilities for liability this standard allows.

2. Newsworthiness and Public Figures

In applying the newsworthiness standard to the privacy claims of public figures, California courts raise the theoretical bar for recovery even higher.[55] When public figures sue for invasion of privacy under the com-

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49. *Id.* at *6–*7.

50. Shulman v. Group W Prods., Inc., 955 P.2d 469, 486 (Cal. 1998).

51. *Id.* (quoting *Briscoe*, 483 P.2d at 43 n.18 (emphasis added)).

52. *Briscoe*, 483 P.2d at 43 (citing Kapellas v. Kofman, 459 P.2d 912, 922 (Cal. 1969)).

53. *See id.*

54. Times-Mirror Co. v. Superior Court, 244 Cal. Rptr. 556, 562 (Cal. Ct. App. 1988).

55. All courts adhere to this standard. The California standard governing the privacy of public figures is drawn directly from the *Restatement (Second) of Torts*, section 652D.

mon law tort, they must contend with a lowered expectation of privacy because, as established by case law, those who are famous, notorious or just plain noteworthy lose some portion of their privacy.

> [T]here is a public interest which attaches to people who by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities. Certainly the accomplishments and way of life of those who have achieved a marked reputation or notoriety by appearing before the public such as actors and actresses, professional athletes . . . may legitimately be mentioned and discussed in print or on radio or television. Such public figures have to some extent lost the right to privacy, and it is proper to go further in dealing with their lives and public activities than with those of entirely private persons.[56]

a. Who Is a Public Figure?

In general, the law defines public figures as people who, by virtue of their position, activities, or happenstance, have become the object of public attention.[57] California courts have adopted the two-category treatment of public figures as provided in the *Restatement (Second) of Torts* which differentiates between voluntary and involuntary public figures.[58]

Voluntary public figures are people who have placed themselves affirmatively in the public eye by engaging in public activities or assuming a prominent role in institutions or activities of interest to the general public.[59] Actors,[60] professional athletes,[61] politicians,[62] prominent musicians, and singers and entertainers[63] are included in this category. The public may possess a legitimate interest in a wide range of information about voluntary public figures, "includ[ing] information as to matters that would otherwise be private."[64]

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56. Carlisle v. Fawcett Publications, Inc., 20 Cal. Rptr. 405, 414 (Cal. Ct. App. 1962).

57. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

58. *Id.* § 652D cmt. e, f.

59. *Id.* § 652D cmt. e.

60. *Carlisle*, 20 Cal. Rptr. at 414; O'Hilderbrandt v. Columbia Broad. Sys., 114 Cal. Rptr. 826, 830 (Cal. Ct. App. 1974).

61. Cepeda v. Cowles Magazines and Broad., 392 F.2d 417, 419 (9th Cir. 1968).

62. Miller v. Bakersfield News-Bulletin, 119 Cal. Rptr. 92, 94 (Cal. Ct. App. 1975); Yorty v. Chandler, 91 Cal. Rptr. 709, 712 (Cal. Ct. App. 1970).

63. Star Editorial v. United States District Court, 7 F.3d 856, 861 (9th Cir. 1993); Montandon v. Triangle Publications, 120 Cal. Rptr. 186, 191 (Cal. Ct. App. 1975).

64. RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (1977).

In contrast, involuntary public figures are persons who have not sought public attention, but who have become "news" as the result of their involvement in or association with an otherwise newsworthy event.[65] This category includes crime victims, accident victims, accused criminals,[66] and people who perform heroic acts.[67] A person can become an involuntary public figure, with the concomitant loss of privacy, simply by being related to a voluntary public figure.[68] As the court explained in *Carlisle*, "people closely related to such public figures in their activities must also to some extent lose their right to the privacy that one unconnected with the famous or notorious would have."[69]

The seminal case discussing this subcategory of involuntary public figures is *Kapellas v. Kofman*.[70] In *Kapellas*, a newspaper printed an editorial opposing the candidacy of Inez Kapellas for the Alameda City Council.[71] The editorial argued against the election of Mrs. Kapellas to the council because two of her sons had been arrested and one daughter "had been found wandering on the street several times."[72] Mrs. Kapellas filed suit on behalf of herself and her children arguing, *inter alia*, that publication of the information violated her children's right to privacy.[73] The court could have resolved the case based on the fact that the bulk of the information publicized in the editorial was contained in public records.[74] Instead, the California Supreme Court focused on the public figure status of the children, holding that the children lost their privacy as a result of their mother's candidacy.

> Those who seek elected public position realize that in doing so they subject themselves, and those closely related to them, to a searching beam of public interest and attention . . . . Although the conduct of a candidate's children in many cases may not appear particularly relevant to his qualifications for office, normally the public should be permitted to determine the importance of the reported facts for itself . . . . The children's loss of

65. *Id.* § 652D cmt. e (1977).
66. *Id.*
67. *See Sipple*, 201 Cal. Rptr. at 670.
68. *Carlisle*, 20 Cal. Rptr. at 415.
69. *Id.*
70. 459 P.2d 912 (Cal. 1969).
71. *See id.* at 915 n.2.
72. *Id.*
73. *Id.* at 914.
74. *See id.* at 924.

privacy is one of the costs of the retention of a free marketplace of ideas.[75]

b. Application of the Newsworthiness Standard and Public Figure Standards: Carla Fence

As a result of the *Kapellas* holding, Carla Fence is probably a public figure solely because she is the daughter of a police chief and an aspiring politician. The public may be interested in how well Chief Fence fared as a father and role model in evaluating his candidacy and qualifications for office.[76] While the Court has yet to address a privacy claim made by the adult child of a politician, the language of the *Kapellas* opinion quoted above suggests that the age of the child claiming privacy is immaterial in determining whether an actionable invasion of privacy has occurred.[77]

c. Public Figure Status Is Forever

Courts have held that once individuals become public figures, they can never regain the privacy that they lost due to their status.[78] In *Sidis v. F-R Publishing Corp.*, the plaintiff was a famous child prodigy who graduated from Harvard at the age of sixteen.[79] After his graduation, Sidis deliberately sought to live a life of anonymity.[80] However, twenty years later, a magazine printed an article chronicling his early achievements and contrasted them with his current life.[81] As the *Sidis* court explained:

> [T]he article is merciless in its dissection of intimate details of its subject's personal life, and this in company with elaborate accounts of Sidis' passion for privacy. . . . [I]t may be fairly described as a ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of a private life.[82]

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75. *Id.* at 923–24.

76. *See Kapellas*, 459 P.2d at 923–24.

77. *See id.* at 914. Despite the *Kapellas* holding, involuntary public figures do retain a bit more privacy than their voluntary counterparts. The press is allowed to publish otherwise private information about involuntary public figures if it bears a logical relationship to the reason the person is newsworthy, and the publication is not intrusive in great disproportion to its relevance. *See* Shulman v. Group W Prods., Inc., 955 P.2d 469, 486 (Cal. 1998).

78. *Sidis v. F-R Publ'g Corp.*, 113 F.2d. 806 (2d Cir. 1940).

79. *Id.* at 807.

80. *Id.*

81. *See id.*

82. *Id.* at 807–08.

Sidis sued the publisher claiming the article violated his right to privacy.[83] The Second Circuit held that the article did not violate Sidis' privacy because he remained a public figure.

> William James Sidis was once a public figure. As a child prodigy, he excited both admiration and curiosity. . . . In 1910 he was a person about whom the newspapers might display a legitimate intellectual interest, in the sense meant by Warren and Brandeis, as distinguished from a trivial and unseemly curiosity. . . . Since then Sidis has cloaked himself in obscurity, but his subsequent history, containing as it did the answer to the question of whether or not he fulfilled his early promise, was still a matter of public concern.[84]

The California Supreme Court adopted the *Sidis* principle in *Forsher v. Bugliosi*.[85] James Forsher, a minor figure in the Manson "family" saga, sued Vincent Bugliosi for naming him twice in Bugliosi's book *Helter Skelter*.[86] Both references to Forsher connected him to unsolved murders associated with the Manson "family."[87] Forsher sued alleging, *inter alia*, that the publication of his name in the book violated his right to privacy because his identity was not a matter of public interest.[88] His complaint stated that "at no time . . . did [Forsher] seek or in any way encourage the publication of his name" nor did he "attempt to solicit publicity" regarding his association with the Manson clan.[89] The court ruled against Forsher and distinguished its earlier holding in *Briscoe* adopting "the more general rule that once a man has become a public figure or news, he remains a matter of legitimate recall to the public mind to the end of his days."[90]

d. Application of the Newsworthiness and Public Figure Standards: Jack Silvester

A court analyzing Jack Silvester's claim would classify him as a voluntary public figure because of his former career as a professional basket-

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83. *Id.* at 807.

84. *Sidis*, 113 F.2d at 809.

85. 608 P.2d 716 (Cal. 1980).

86. *Id.* at 716–21.

87. *Id.*

88. *Id.* at 724.

89. *Id.*

90. *Id.* In adopting the *Sidis* approach, the California Supreme Court rejected in dicta the suggestion that a person loses his privacy for all time by virtue of being a public figure. Briscoe v. Reader's Digest Ass'n, Inc., 483 P.2d 34, 41 n.13 (Cal. 1971).

ball player.[91] As a result, the validity of his claim would turn on whether his public figure status endures despite his attempts to shun it. Unfortunately for Silvester, *Forsher* and *Sidis* demonstrate that no matter what he does or does not do, he may never enjoy any substantial expectation of privacy.[92] Due to Silvester's status as a former professional basketball player, the courts have determined that the public is entitled to know Silvester's subsequent history, if for no other reason than people often want to know "where are they now?"[93] Silvester, like Forsher, will remain a matter of legitimate recall for the rest of his days.[94] Because the *Express* article answered the question of what happened to Silvester, it was a publication discussing a matter of public concern.

B. Theory vs. Reality

The opinions addressing the clash between privacy and freedom of the press suggest that public figures do not possess a zone of privacy which they can insulate from public scrutiny. In reality, public figures have recovered judgments, successfully settled lawsuits, and even obtained restraining orders against the press concerning the publication of private and, in some instances, not so private information.

Perhaps the most notable example is a recent case involving Brad Pitt. *Playgirl* magazine printed an edition containing photographs of Pitt and his former girlfriend, Gwyneth Paltrow, on a private beach "au naturel."[95] Pitt sued the magazine alleging that publication of the photographs, apparently taken from long range via a telephoto lens, invaded his privacy.[96] In a surprising decision, a California superior court issued two orders mandating that *Playgirl* recall the issue.[97] The court issued these orders after the magazine was distributed to subscribers and appeared on newsstands despite the fact that the photographs were widely available on the Internet before the publication of the issue.[98]

A court awarded similar protection in *Hood v. National Enquirer*.[99] In *Hood*, the *National Enquirer* printed a story reporting the details of a

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91. Under this analysis, Carla Fence also suffers a permanent loss of privacy.

92. *See* discussion *supra* Part IV.A.2.c.

93. *See id.*

94. *See Forsher*, 608 P.2d 726–27.

95. The trial court's reasoning is not available because the judge ordered his opinion sealed. Ann W. O'Neill, *Judge Orders Recall of Magazine Over Nude Photos*, L.A. TIMES, Aug. 8, 1997, B3.

96. *Id.*

97. *Id.*

98. *Id.* Playgirl is appealing the decision granting the injunctions. *Id.*

99. Hood v. National Enquirer, Inc., 17 No. 9 ENT. L. REP. *3 (Cal. Ct. App. 1996).

relationship between actor Eddie Murphy and a child he fathered out of wedlock.[100] Not only did the story report that Murphy paid child support to and purchased a house and car for the mother of the child, it revealed several intimate details of the child's life, including pictures of him, identification of the mother and child by name, photographs of their home and car, identification of the community where they lived, and the amount of money Murphy provided to support the mother and child.[101] The mother sued on behalf of herself and her son alleging the story violated their right to privacy.[102] The trial court dismissed the complaint on the theory that both plaintiffs were public figures and did not enjoy an expectation of privacy.[103] However, the California Court of Appeals reversed and remanded the case for trial on the merits despite the fact that it agreed that mother and child were public figures.[104]

Finally, the most infamous recent case of public figures gaining compensation for the revelation of private information concerned actress Pamela Anderson Lee and her estranged husband Tommy Lee. Ultimately, the couple settled a lawsuit against an Internet publisher who sold unauthorized copies of a videotape of the couple having intercourse in a car and on a boat.[105] Settlement of the lawsuit is intriguing because the Lees made the privacy claim despite having discussed the contents of the videotape, in some detail, on Howard Stern's radio show.[106]

V. THE PUBLIC FIGURE PROPOSAL

These celebrity cases reinforce the *Diaz* court's finding that "[p]ublic figures . . . are entitled to keep some information of their domestic activities and sexual relations private."[107] The challenge is to decipher the boundaries of the "zone of privacy" that protects public figures.

The current status of the right to informational privacy for public figures is unsatisfactory for public figures, publishers and courts alike. Public figures—and those closely associated with them—must live forever with the constant fear that every aspect of their personal lives may be exposed for public consumption and titillation no matter what steps they take to

100. *See id.* at *3.

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.* The case was subsequently settled. Telephone Interview with Paul Hoffman, Plaintiffs' counsel (June 30, 1998). However, the terms of the settlement are confidential. *Id.*

105. Ann O'Neill, *Fly in the Getty Punch Bowl*, L.A. TIMES, Dec. 7, 1997, at B1.

106. *See id.*

107. Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 773 (Cal. Ct. App. 1983).

protect that private information. Having the details of intimate information about one's physical or mental condition, financial affairs, or sexual or other personal relationships laid bare for all the world to see merely requires the collaboration of one mercenary friend,[108] a persistent and enterprising photographer,[109] a larcenous worker,[110] and a single editor willing to publish the information. This burden becomes particularly onerous to bear in those instances where the person whose private information is revealed is an involuntary public figure.

In his critique of this Article, *Los Angeles Times* editor Craig Matsuda intimates that privacy concerns are largely the domain of the wealthy and privileged classes.[111] He shares this opinion with distinguished company. Several scholarly and lay critics argue that the right to privacy, as imagined by Warren and Brandeis and enforced by the courts, is merely an elitist invention and protection.[112]

An initial look at the reported cases on privacy appears to support those contentions. However, the involuntary public figure category largely concerns people who are neither wealthy, powerful nor privileged. While the concerns discussed here certainly extend to Arthur Ashe, Collin Powell, and their families, those concerns are equally shared by Oliver Sipple, Ruth Shulman, and their families.

For these "common folk" thrust into the public spotlight, the involuntary and permanent loss of privacy is a serious and often painful deprivation. Howard Rosenberg, a columnist for the *Los Angeles Times*, described one recent example where "ordinary people" found their private grief invaded.[113] The syndicated television show *Life on the Beat* video-

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108. In *Hood*, a relative of a "friend" of the mother took the photographs of Ms. Hood and her child that appeared in the *National Enquirer*. *Hood*, 17 No. 9 ENT. L. REP., at *8. The "friend's" relative sold those photographs to the Enquirer. *Id.*

109. Mr. Pitt and Ms. Paltrow were on a private, secluded beach at the time they were photographed. O'Neill, *supra* note 105, at B3. The same thing happened to President and Hillary Clinton, who were photographed in an intimate moment of togetherness on a private beach without their knowledge or consent. Times Wire Services, *Life's a Beach for Vacationing Clintons*, L.A. TIMES, Jan. 3, 1998, at A16. The resulting photographs were published nationally. *Id.*

110. It is suspected that a person working on the renovation of the Lees' home stole a copy of the videotape of their sexual escapades. O'Neill, *supra* note 105, at B1.

111. Craig Matsuda, *An Editor's Dissent to Professor Gary Williams's Privacy Plan for A Priori, Statutory Curbs on Press Scrutiny of Key Information About Public Figures*, 19 LOY. L.A. ENT. L.J. 363 (1999).

112. *See, e.g.*, James H. Barron, *Warren and Brandeis, The Right to Privacy: Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875 (1979); Franzen, *Imperial Bedroom*, NEW YORKER MAG., Oct. 12, 1998, at 48; *see also* Linda McClain, *Inviolability and Privacy: The Castle, The Sanctuary and The Body*, 7 YALE J.L. & HUMAN. 195, 207–15 (1995) (cataloguing a host of feminist critiques of privacy as an instrument of male dominance).

113. Howard Rosenberg, *Pleas for Privacy Left Unheeded*, L.A. TIMES, Nov. 30, 1998, at

taped the discovery of Michael Marich's body in his apartment and the notification to his family of his death.[114] Despite repeated requests by the Marich family not to broadcast the footage, the segment, featuring the call and shots of the apartment and the corpse, aired nationally.[115] When the family filed suit alleging the broadcast invaded their privacy, the trial court dismissed the Marich's invasion of privacy claim against the production company because the broadcast was "newsworthy."[116] The standards I propose in this Article would provide some measure of protection for the private grief of members of the Marich family, for Oliver Sipple's sex life, and for Ruth Shulman's medical treatment, in addition to protecting the personal confidences of the rich, powerful and privileged.

The current state of the law is no easier for publishers. Editors must live with the uncertainty generated by legal standards applied to these cases which, although heavily tilted in their favor, allow juries to award damages if they find publication of confidential information to be "a morbid and sensational prying into private lives for its own sake."[117] Moreover, if the person is an involuntary public figure, the editor must attempt to locate a more elusive boundary than that applicable to voluntary public figures.[118] Thus, publication of private information about public figures remains a high-risk, high-stakes venture for the press as evidenced by the settlements in the *Hood* and *Lee* cases, and the judge's order in the *Pitt* case.

Similarly, courts applying the newsworthiness standard must uneasily toe the line between allowing the press carte blanche and serving as censors of editorial discretion. The *Shulman* opinion evidences the California Supreme Court's uneasiness about the ephemeral character of that line.

> Newsworthiness—constitutional or common law—is also difficult to define because it may be used as either a descriptive or normative term. "Is the term 'newsworthy' a descriptive predicate, intended to refer to the fact there is widespread public interest? Or is it value predicate, intended to indicate that the publication is a meritorious contribution and that the public's interest is praiseworthy?" A position at either extreme has unpalatable consequences. If "newsworthiness" is completely de-

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F1.

114. *Id.*

115. *Id.* A television crew accompanied members of the Los Angeles Police Department as they entered the victim's apartment. *Id.* The crew videotaped his apartment and his body, and recorded the call made by the police to the victim's parents notifying them of Marich's death. *Id.*

116. *Id.*

117. Sipple v. Chronicle Publ'g Co., 201 Cal. Rptr. 665, 670 (Cal. Ct. App. 1984); *see* RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

118. *See* discussion *supra* Part IV.A.2.a.

> scriptive—if all coverage that sells newspapers or boosts ratings is deemed newsworthy—" it would seem to swallow the publication of private facts tort, for it would be difficult to suppose that publishers were in the habit of reporting occurrences of little interest." At the other extreme, if newsworthiness is viewed as a purely normative concept, the courts could become to an unacceptable degree editors of the news and self-appointed guardians of public taste.[119]

A. The Proposed Standard

The standard I propose avoids the normative/descriptive conundrum of attempting to define "newsworthiness" in individual cases. It entails a two-prong test which prohibits publication of confidential information about anyone[120] under California's constitutional right to privacy if: 1) well-established social norms recognize the need to maximize individual control over dissemination of the information revealed, and 2) the person took reasonable steps to keep the information confidential. This standard is an amalgam assembled from two sources: California's general standard for state constitutional protection of informational privacy, and the standard for determining whether communications with an attorney, physician, or spouse are protected by the evidentiary privileges.

1. Determining Well-Established Social Norms

The first prong of the standard is derived from California's interpretation of its constitutional right to privacy. In 1972, California voters amended article I section 1 of the state constitution to declare privacy an inalienable right of California citizens.[121] In *White v. Davis*,[122] 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.[123]

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119. Shulman v. Group W. Prods., Inc., 955 P.2d 469, 481 (Cal. 1998) (citing Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722, 725 (1963)).

120. Excluding, for purposes of this discussion, public officials.

121. CAL. CONST. Art. I, § 1. Article I section 1 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." *Id.*

122. 533 P.2d 222 (Cal. 1975).

123. *Id.* at 234.

Using the ballot argument in favor of the proposition[124] as the amendment's legislative history, the court divined that voters desired to give individuals the ability to control circulation of confidential personal information.[125]

In *Hill v. National Collegiate Athletic Ass'n*,[126] the California Supreme Court built on the foundation laid in the *White* opinion by constructing the standards that govern claims of privacy under the constitutional amendment.[127] After surveying the case law and commentary on the common law tort of invasion of privacy, the court concluded that the constitutional right to privacy was far broader in scope than the tort.

> 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.[128]

The *Hill* court ruled that informational privacy—the right to control access to sensitive personal information—is a core value protected by the

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124. *Id.* The ballot argument represents the only available legislative history of the amendment:

> First, the statement identifies the principle "mischiefs" at which the amendment is directed: (1) "government snooping" and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by the government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records. Second, the statement makes clear that the amendment does not purport to prohibit all incursion into individual privacy but rather that any such intervention must be justified by a compelling interest. Third, the statement indicates that the amendment is intended to be self-executing, i.e., that the constitutional provision, in itself, "creates a legal and enforceable right of privacy for every Californian."

Id.

125. *Id.* at 234 n.11.

126. 865 P.2d 633 (Cal. 1994).

127. *Id.*

128. *Id.* at 648–49 (citations omitted).

constitutional right to privacy.[129] The court further identified the three elements which constitute the cause of action for violation of the constitutional right to privacy.[130] According to *Hill*, plaintiffs must prove that they possessed a legally cognizable privacy interest, which includes the right to prevent dissemination or misuse of sensitive and confidential personal information.[131] The court determined that information is private within this definition when "well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity."[132] The plaintiff can identify these norms by referring to "the usual sources of positive law governing the right to privacy—i.e., common law development, constitutional development, statutory enactment, and the ballot arguments for the Privacy Initiative."[133]

a. Advantages of the "Private Information" Standard Over the Current "Newsworthiness" Standard

The "private information" standard has several advantages over the newsworthiness standard. First, the protection afforded to private information is limited in scope. Only information protected by constitutional law, statutory law and common law development will be deemed "private." California case and statutory law reveals that the information clearly falling within those confines are financial information,[134] medical information,[135]

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129. *See id.* at 654.

130. *See id.* at 654–55. The elements of a state constitutional cause of action are: (1) the "identification of a specific, legally protected privacy interest;" (2) "a reasonable expectation of privacy on the plaintiff's part;" and (3) a serious invasion of the plaintiff's privacy by the defendant. *Id.*

131. *Id.*

132. *Hill*, 865 P.2d at 654. The court noted these norms create a threshold reasonable expectation of privacy. *See id.*

133. *Id.* at 654–55. The remaining elements of a cause of action for violation of the constitutional right to privacy require plaintiffs to prove that they possessed a reasonable expectation of privacy in the information revealed and that the revelation resulted in a serious invasion of their privacy. *Id.* at 655–58.

I argue that so long as the public figure takes reasonable steps to insure the confidentiality of their medical history, financial data and family relations as outlined in this section, they do have a reasonable expectation of privacy in that information. *See* Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 771 (Cal. Ct. App. 1983).

As to the third element, it is unquestionable that publication of confidential information from these categories without the subject's consent constitutes a "serious" invasion of those privacy interests. *See id.* at 773.

134. Valley Bank of Nev. v. Superior Court, 542 P.2d 9773 (Cal. 1975); Burrows v. Superior Court, 529 P.2d 590, 592–93 (Cal. 1974); City of Carmel-By-The-Sea v. Young, 466 P.2d 225, 231 (Cal. 1970).

135. Board of Med. Quality Assurance v. Gherardini, 156 Cal. Rptr. 55, 60 (1979).

information about intimate personal relationships,[136] and psychological and psychiatric information.[137]

Second, the private information category is clear-cut and the information covered is easily identified. Reference to readily available sources will reveal to editors and their attorneys whether confidential information is protected and therefore actionable. If a story depends upon confidential medical or financial records, or reveals confidential information about someone's personal life, editors and lawyers would quickly recognize that the story exceeds acceptable bounds.

Third, the standard has the advantage of prior acceptance by society as an appropriate limitation on the availability of certain information because "private" information is already protected in contexts other than publication. For example, courts are precluded from inquiring into confidential communications between husbands and wives, doctors and their patients, or attorneys and their clients even where the information sought would assist in the determination of questions properly before the courts.[138] Similarly, although disclosure of personal financial information would assist voters in deciding how to cast their ballots and would help minimize the appearance of impropriety, government is not allowed to force politicians to reveal that information.[139] Therefore, recognition of the "private information" standard has the added advantage that it is a limitation which society would apply equally to itself as well as to the press.[140]

Finally, the "private information" standard has an added advantage over the "newsworthiness" standard because it would establish classes of

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136. The ballot argument accompanying the Privacy Initiative states that the measure would protect "our homes, [and] our families. . . ." Ballot Pamphlet, Proposed Amendments to California Constitution, General Election (Nov. 7, 1972), at 27; *see* Williams, *supra* note 11, at 13–16.

137. *See* In re Lifschutz, 467 P.2d 557 (Cal. 1970); Tylo v. Superior Court, 64 Cal. Rptr. 2d 731 (Cal. Ct. App. 1997).

138. These are examples of evidentiary privileges. *See* CAL. EVID. CODE §§ 950–62 (lawyer-client privilege), 970–87 (spousal privilege), 990–1007 (doctor-patient privilege) (West 1995).

139. *City of Carmel-By-The-Sea*, 466 P.2d at 228. Discovery of financial information is restricted as well, even though this affects the courts' search for truth. Valley Bank of Nev., 542 P.2d at 978.

140. In *Florida Star*, one cogent criticism leveled against Florida's statute was that it applied only to instruments of mass communication. Florida Star v. B.J.F., 491 U.S. 524, 542 (Scalia, J., concurring). Justice Scalia rightly questioned the importance of the privacy right advanced by Florida when the law did not prohibit private citizens from revealing the same information. *Id.* "This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself. Such a prohibition does not protect an interest 'of the highest order.'" *Id.* As I explained in my earlier piece, one advantage of California's constitutional guarantee is that it applies to anyone who wrongly disseminates confidential personal information that falls within the definition discussed above. *See* Williams, *supra* note 11, at 30–32.

information protected by the right to informational privacy that would remain constant without regard to the status of the individual discussed. This would eliminate much of the arbitrary character of the current method for determining "newsworthiness," because private figures and public figures would have the same clearly defined "zone of privacy." As a result, editors could publish information about people with more certainty because the information protected would remain constant. Similarly, the courts would have clear, readily identifiable standards to apply, as a matter of law, when evaluating claims for violation of the right to informational privacy.

b. Review of the "Private Information" Standard by the Court

To increase the protection of the press, and to reduce the potential chilling effect of lawsuits claiming an invasion of privacy, determining whether information is "private" should be a question of law decided by the courts. Such a rule would allow courts to dispose of many actions claiming that published information is "private" by preliminary motions.[141] This would reduce the costs associated with litigating dubious claims because demurrers and summary adjudication would eliminate illegitimate claims before discovery proceeds. Additionally, judges arguably are more attuned to the constitutional nuances involved in claims for violation of the right to privacy and less inclined than juries to punish a publisher because an article was unpopular.[142] Finally, because courts would make the determination of the private information standard as a matter of law, parties would have the additional protection of independent review of the trial court's decision by the appellate courts. Therefore, if a trial judge erred in determining that published information was protected, reversal on appeal would be swift and sure.

2. Reasonable Steps to Insure Confidentiality

The standard's second prong is based upon the laws governing evidentiary privileges. These laws allow the holder of the privilege to withhold from the courts the contents of confidential communications with her spouse, attorney, physician, or mental health professional if she takes reasonable steps to insure the confidentiality of the communication. The pertinent language is found in California Evidence Code section 952:

141. *See, e.g.*, Good Gov't Group v. Superior Court, 586 P.2d 572 (Cal. 1978); Desert Sun Publ'g Co. v. Superior Court, 158 Cal. Rptr. 519 (1979).

142. Bose Corp. v. Consumers Union, 466 U.S. 485, 499, 505 (1984).

> As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer . . . in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client . . . .[143]

Under the standard I propose, plaintiffs would have the burden of proving that they treated the information as confidential. They would have to prove that the information published was only made available to relatives, close friends, or professionals who required the information to provide services to these complaining parties. Plaintiffs would also have to prove that they admonished those persons to maintain the confidentiality of that information and not to share it with the general public.[144]

VI. CONCLUSION

The standard I propose presents a reasonable accommodation of the competing interests of the press, which seeks to publish confidential information about a "public figure," and the "public figure" who desires to keep that information away from the prying eyes of the press.[145] Essentially, the proposed test removes from the "newsworthy" classification certain highly private personal information without regard to the status of the subject. The information protected, confidential financial data, medical and psychological information, and information about interpersonal relationships, is so intensely personal that publication of that information without the subject's consent is intrusive in disproportion to its relevance.[146] Because the information is not newsworthy as a matter of law, actions to remedy the publication of that information should not violate the First Amendment be-

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143. CAL. EVID. CODE § 952 (WEST 1995). Similar language governs communications between physicians and patients, psychotherapists and patients, priests and penitents. *Id.* at §§ 992, 1012, 1032. The privilege for spousal communications applies if the communication "was made in confidence between him [sic] and the other spouse while they were husband and wife." *Id.* § 980.

144. Theoretically, "private" information should remain protected so long as the subject discusses it only with his/her spouse, members of his/her immediate family and close friends in confidence. "Immediate family" would include siblings, parents, children and spouses. Courts have properly recognized that a person does not waive his/her right to privacy because he/she discusses confidential information with family members and close friends. *See* Virgil v. Time, Inc., 527 F.2d 1122, 1127 (9th Cir. 1975), *cert. denied* 425 U.S. 998 (1976); *see also* Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 771 (Cal. Ct. App. 1983). The need to share one's fortunes, misfortunes, and adventures with those closest to you should not occasion a waiver of the right to decide whether the general public should have access to that personal information.

145. I have defined the term here as excluding public officials.

146. *See* Shulman v. Group W Prods., Inc., 955 P.2d 469, 486 (Cal. 1998).

cause of the state's compelling interest in protecting privacy, as expressed through its constitutional provision. While the public may lose access to some information about public figures it desires, that loss is minimal, particularly when compared to the harm caused by unfettered publication of confidential "private" information.[147]

147. *See, e.g.*, Williams, *supra* note 11, at 17–18 (discussing the public interests served by protecting the confidentiality of medical records).