AN ACCOMMODATION OF PRIVACY INTERESTS
AND FIRST AMENDMENT RIGHTS
IN PUBLIC DISCLOSURE CASES

I. Introduction

In the eighty-six years since Warren and Brandeis, in "that most influential law review article of all,"\(^1\) first argued that the right of privacy was protected at common law, the right has been dissected,\(^2\) reconstituted,\(^3\) and analyzed in great detail.\(^4\) The twentieth century has seen an increasing acceptance of this right,\(^5\) one aspect of which involves the publication of true but "private" information about an individual.\(^6\) Today a large major-


\(^3\) Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U.L. REV. 962 (1964) [hereinafter cited as Bloustein, Privacy as an Aspect of Human Dignity].


\(^5\) Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the housetops." . . . [T]he question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt.

Warren & Brandeis, supra note 1 at 195.

This facet of the privacy right is the subject of this Comment, although Prosser has analyzed the right of privacy as involving "four distinct kinds of invasion of four different interests of the plaintiff." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 804 (4th ed. 1971). In addition to public disclosure of private facts about the plaintiff, they are: (1) "the appropriation, for the defendant's benefit or advantages, of the
ity of states provide protection against at least some forms of invasion of privacy, including public disclosure of private facts; this state law protection has been based variously on the common law, state constitutional provisions, and the precedents of other jurisdictions.

On the other hand, recent decades also have seen increased emphasis on the protection of the first amendment rights of free speech and press. In particular, the early 1950's saw the development of a general first amendment theory built around an approach that has been called "ad hoc balancing"; any speech could be regulated on the basis of content if the state's interest in such regulation, which was presumptively given great weight, was found to be more important than the interest promoted by the type of speech regulated. Since that time protection under the first amendment has increased under more fragmented

plaintiff's name or likeness," id.; (2) "intrusion upon the plaintiff's physical solitude or seclusion" or by physical interference, eavesdropping, wiretapping, or the like, id. 807; and (3) "publicity which places the plaintiff in a false light in the public eye," id. 812. Bloustein, who maintains that the right of privacy protects a single interest in self-determination, see note 64 infra & accompanying text, has written that Warren and Brandeis' object was to prevent public disclosure of private facts. Bloustein, Privacy, Tort Law, and the Constitution, supra note 4, at 616.


Recent surveys show the right to be "recognized and accepted in all but a very few jurisdictions," and explicitly rejected in only four states. W. Prosser, supra note 5, § 117, at 804.

That some states have not had the opportunity to recognize all forms of invasion is not critical, because state courts have routinely used decisions protecting against one form of invasion as precedents in decisions protecting against another. See, e.g., Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1945), second appeal, 159 Fla. 31, 30 So. 2d 635 (1947); Cox Broadcasting Corp. v. Cohn, 231 Ga. 36, 200 S.E.2d 127 (1973), rev'd, 420 U.S. 469 (1975). The state court in Cox traced Georgia's right to privacy back to a 1905 precedent, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), an appropriation and false light case in which the plaintiff prevailed on a claim that the insurance company had used his photograph and a fabricated endorsement in an advertisement. For a similar New York development, see note 91, infra.


E.g., Reed v. Real Detective Publishing Co., 63 Ariz. 294, 303-05, 162 P.2d 133, 198 (1945).

See Nimmer, supra note 4, at 938-41.

theories which permit the states to protect only what the Supreme Court finds are particularly strong interests, such as those furthered by libel and obscenity statutes. Speech which the states may constitutionally regulate has sometimes been classified as "unprotected." Even in cases of permitted state regulation, the protected interest and the permitted infringement on speech must be precisely defined; speech not falling within the area of permissible state regulation, that is, speech which is not "unprotected," must have sufficient "breathing space" so that it is not "chilled." These developments in the law have produced a direct conflict between a state's right to protect individuals from public disclosures of private facts and the press' first amendment right to publish truthful information.

Until recently, the question whether the first amendment restricts a state's power to protect individuals from public disclosures of private facts was very rarely raised in explicit constitutional terms. From the beginning, however, Warren and Brandeis, recognizing the possible conflict between a right to such protection and the press' reporting function, theorized that the privacy right did not extend to prohibition of "matter which is of public or general interest." Courts recognizing a privacy right against public disclosure adopted this qualification that the state's protection of the right to privacy did not extend to matters which were "newsworthy" or of "public interest."

The extent of this privilege to report matters of public interest varied, however. Warren and Brandeis, certainly, put little stock in the press' ability to determine what were legitimately matters of public interest; they intended that the right of privacy would protect against the "overstepping" of the press in printing

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15 Although it has been stated that as of 1973 no public disclosure case had raised the first amendment as a defense protecting the press' right to disclose publicly "private" facts, Comment, Privacy in the First Amendment, 82 YALE L.J. 1462, 1469 n.36 (1973), at least one earlier case does discuss the press' rights under the first amendment. Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942). Before Cox Broadcasting Corp., 420 U.S. 469 (1975), however, nearly all cases focused on the press' protection under state law rather than the first amendment.

16 Warren & Brandeis, supra note 1, at 214.


18 See, e.g., Smith v. Doss, 251 Ala. 250, 37 So. 2d 118 (1948); Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344 (1956).
"unseemly gossip" rather than in restricting itself to "matters of real interest to the community." The early cases, however, tended to find a more generous privilege, essentially allowing the press to determine what was in the public interest by what it chose to print or broadcast. A more sophisticated state law test has also developed under which the court finds a privilege to invade privacy not where the event or even the private facts disclosed are of public interest, but only where linking the disclosures to the specific identified individual is of public interest.

During its 1974-75 Term the Supreme Court, in Cox Broadcasting Corp. v. Cohn, for the first time decided a case involving public disclosure of truthful but "private" facts. Plaintiff's daughter was raped and did not survive the incident; six youths were arrested and indicted for rape and murder. The details of the attack and the arrests received heavy coverage in the local news media, but the victim's name was not disclosed by the press, perhaps because of a state statute prohibiting publication of the name of a rape victim, but also perhaps because of the defendant's internal policy against such disclosure. At trial eight months later the murder charges were dropped and five of the six youths pleaded guilty to rape or attempted rape. The broadcasting company's reporter, seeing the victim's name on the copy of the indictment made available to him at the trial by the court clerk, broadcast the name in his report of the trial.

19 Warren & Brandeis, supra note 1, at 196:
The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.

20 Some courts held that the privilege extended to all details of a generally newsworthy event, without analyzing whether all of the details, such as the identities of participants, were themselves newsworthy. Actions for invasion of privacy were barred in cases in which photographs were printed of an identifiable grieving husband at the scene of his wife's suicide and of an identifiable shocked wife after she had witnessed the murder of her husband, on the grounds that the suicide and murder were events of public interest. Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939); Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929).


23 Id. at 471-72.


25 420 U.S. at 473-74.
The Georgia Supreme Court held that the defendants' public disclosure of the name of plaintiff's daughter gave rise to a cause of action for invasion of privacy under the state's common law. The defendants contended that the disclosure was privileged at common law because it concerned a matter of public interest and, further, that it was protected by the first amendment. In response to the common law defense the court held that the state criminal statute prohibiting disclosure of a rape victim's name was a conclusive statement of state policy that such a disclosure was not a matter of public interest. On the constitutional issue the court held: "There simply is no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection."

The United States Supreme Court, recognizing the confrontation between the privacy right protecting against public disclosure of private facts and the press' first amendment right to publish accurate reports, reversed the Georgia court on the narrower ground that the reporter's source for the victim's name was an official record kept in connection with a judicial proceeding and available for public inspection. Relying on the press' privilege to report judicial proceedings and the presumed public interest in all official records made available for public inspection by the state, the Court held that the first amendment, operating through the fourteenth, prohibits a civil action for

26 Cox Broadcasting Corp. v. Cohn, 231 Ga. 60, 62, 200 S.E.2d 127, 130, rehearing denied, 231 Ga. 67, 200 S.E.2d 133 (1973), rev'd, 420 U.S. 469 (1975). The Georgia court, reversing summary judgment for plaintiff on the question of liability, remanded the case for a jury determination whether defendants "invaded [plaintiff's] privacy with willful or negligent disregard for the fact that reasonable men would find the invasion highly offensive." Id. at 64, 200 S.E.2d at 131.

27 GA. CODE ANN. § 26-9901 (1972) provides:
It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

28 231 Ga. at 61, 68-69, 200 S.E.2d at 129, 134.

29 Id. at 68, 200 S.E.2d at 134.

30 "Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent ...." 420 U.S. at 489.
invasion of privacy based on the dissemination of information obtained from official public records.\textsuperscript{31}

This Comment will address the broader question left open in Cox; that is, the general accommodation of the individual's right under state law to be protected from public disclosure of private facts and the press' right under the first amendment to publish or broadcast truthful information. These two sets of conflicting interests will be analyzed, and their crucial components extracted and placed in the framework of a new test designed to afford maximum protection to both sets of interests. To achieve this accommodation, however, it will first be necessary to examine the current status of the state law public disclosure tort and of constitutional protection of the press.

\section{General Aspects of the State-Protected Right}

The public disclosure tort, according to Dean Prosser's analysis, has three elements. First, the disclosure must be "public"; that is, there must be exposure to the public at large.\textsuperscript{32} If a friend of the putative plaintiff, knowing a "private" fact about him, merely told another friend, there would be no cause of action; but if the friend disclosed the fact to a reporter and the reporter published it, there would then be a public disclosure.

Second, the facts disclosed must be "private" ones. Prior disclosure to a wide enough audience, by the affected individual or by another with his consent, bars an action for a subsequent public disclosure, because the information would no longer be private at the time of the later disclosure.\textsuperscript{33} One need not keep a fact secret from everyone to maintain its "privateness."\textsuperscript{34} An individual confiding to a friend that he is a homosexual does not

\textsuperscript{31}Id. at 494-95.

\textsuperscript{32}See W. Prosser, supra note 5, § 117, at 810. Warren and Brandeis suggested a distinction between oral and written disclosures, partly on the ground that, "as long as gossip was oral, it spread, as regards any one individual, over a very small area, and was confined to the immediate circle of his acquaintances. It did not reach, or but rarely reached, those who knew nothing of him. It did not make his name, or his walk, or his conversation familiar to strangers." Warren & Brandeis, supra note 1, at 217 n.4 (quoting Godkin, The Rights of the Citizen: To his Reputation, SCRIBNER'S MAGAZINE, July, 1890, at 66). With the birth of the broadcast media the requirement that the disclosure be public can now be met by radio or television broadcast as well as by publication in print. See W. Prosser, supra note 5, § 117, at 810.

\textsuperscript{33}See W. Prosser, supra note 5, § 117, at 810-11. "The right to privacy ceases upon the publication of the facts by the individual, or with his consent." Warren & Brandeis, supra note 1, at 218.

\textsuperscript{34}[A] private communication of [sic] circulation for a restricted purpose is not a publication within the meaning of the law." Warren & Brandeis, supra note 1, at 218 (footnote omitted).
make that fact other than "private"; but if he announces it at a rally open to the public the information is no longer "private," and subsequent disclosure by the press, therefore, is not actionable.

Third, the fact disclosed "must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities." Liability has therefore been predicated on public disclosure of details of sexual activities or of a sordid or criminal past, but

[any one who is not a hermit must expect the more or less casual observation of his neighbors and the passing public as to what he is and does, and some reporting of his daily activities. The ordinary reasonable man does not take offense at mention in a newspaper of the fact that he has returned from a visit or gone camping in the woods, or that he has given a party at his house for his friends . . . . The law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive about such publicity.]

A showing of all three elements of the public disclosure tort, however, is not conclusive as to liability. Once the elements of the tort are made out, the press may still assert the affirmative defense that the disclosure is privileged because it concerns a public figure or a matter of public interest. The danger in this approach is that sole reliance on the public interest test can lead to either a lack of protection for individual privacy interests or a lack of protection for the press, depending on how "public interest" is defined, and who is charged with defining it.

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35 W. Prosser, supra note 5, § 117, at 811. "[I]t is only the more flagrant breaches of decency and propriety that could in practice be reached, and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn." Warren & Brandeis, supra note 1, at 216.


37 See Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931).

38 Prosser, supra note 2, at 396-97 (footnote omitted).

39 See, e.g., Cason v. Baskin, 155 Fla. 198, 216, 20 So. 2d 243, 251 (1945), second appeal, 159 Fla. 31, 30 So. 2d 635 (1947); W. Prosser, supra note 5, § 118, at 823-24.

40 See, e.g., Jones v. Herald Post Co., 230 Ky. 227, 229, 18 S.W.2d 972, 973 (1929); W. Prosser, supra note 5, § 118, at 823, 824-26. The public interest and public figure privileges turn out to be equivalent in the case of the public disclosure tort. See text accompanying notes 188-90 infra.

41 See text accompanying notes 100-05 infra.
Some courts, possibly attempting to formulate tests that could take more equal account of the conflicting press and privacy interests, have allowed recovery even where the subject matter of the disclosure was of public interest. They have done so either by applying a stricter-than-usual test for the public interest defense, requiring that the identification of the plaintiff be itself of public interest, or by balancing the two conflicting sets of interests against each other.

An example of the first type of case is *Melvin v. Reid*, in which the plaintiff, a former prostitute, had been acquitted in a trial for murder, married, and was "entirely rehabilitated." Seven years after the trial a movie was produced depicting the plaintiff's former life, including the murder allegation and trial, and using her actual maiden name. The court held that, absent the use of the name, the movie would be absolutely protected because the public had a right to know of such occurrences; that right could have been equally well fulfilled without the use of the plaintiff's name, however, and therefore its use was "not justified," and the movie not privileged.

The balancing approach was illustrated in *Briscoe v. Reader's Digest Association*. The defendant had published an article concerning the substantial losses to American business caused by truck hijacking. One paragraph of the article described a typical hijacking which had taken place eleven years earlier. It identified the plaintiff, who had been convicted and had since reformed, as one of the hijackers. Although finding that "reports of the facts of past crimes are newsworthy," the court held that the article was not privileged because "identification of the *actor* in reports of long past crimes usually serves little independent public purpose." In determining public interest the court "consider[ed] [1] the social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety."

These two examples of deviation from the absolute public interest standard are encouraging signs of the courts' recognition that some privacy interests are important enough to war-

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43 Id. at 286, 297 P. at 91.
44 Id. at 290-92, 297 P. at 93.
45 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).
46 Id. at 537, 483 P.2d at 39-40, 93 Cal. Rptr. at 871-72 (emphasis in original).
47 Id. at 541, 483 P.2d at 43, 93 Cal. Rptr. at 875.
rant protection even in the face of countervailing first amendment interests. But the danger of unjustifiably infringing on the rights of the press is not to be trifled with. If a test for liability in public disclosure cases is to allow recovery even where some public interest in the disclosure is present, such a test must be very carefully constructed. It must encompass only those narrowly defined privacy interests that truly require strict protection, and at the same time meet the constitutional requirements of adequate first amendment protection for the press. In order to determine the ideal structure for such a test, and before attempting to create a framework which will accommodate both sets of interests, it will be necessary to determine just what narrowly defined privacy interests are important enough to receive protection, and then to determine the current requirements of the first amendment.

III. Privacy Interests Affected by Public Disclosure

Warren and Brandeis subsumed the right to privacy they contended had developed at common law under the broader “right ‘to be let alone’” and the right to an “inviolate personality.” These phrases have often been used since to describe the right protected by the public disclosure tort and the other forms of invasion of privacy. It has not been made clear, however, exactly what individual interests are affected by the various forms of invasion.

Warren and Brandeis began with the principle that “[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions

48 The two tests may sometimes be interchangeable and need not always result in liability for the press. In Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940), a magazine article’s detailed disclosure of a former child prodigy’s distant, and previously well-publicized, past was found not actionable. The court held that although Sidis had since sought obscurity, twenty-five years earlier he had been a public figure, thus making “his subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise . . . still a matter of public concern.” Id. at 809. The court’s decision could be based on the theory that the disclosure was related to an aspect of Sidis’ life as a public figure and therefore was a matter of public interest. See id. Alternatively, the court may have balanced the interests involved and found that the facts disclosed were not sufficiently offensive to outweigh the public interest in disclosure. See id. Either theory would exonerate defendant; which one the court relied on is not clear.

49 Warren & Brandeis, supra note 1, at 195.

50 Id. 205.

51 Prosser has described four separate classes of tort under the general heading of “privacy.” See Prosser, supra note 2, at 389-92, 398-407.
shall be communicated to others."52 This protection, they urged, rested on a more general right to privacy which extended similar protection "to the personal appearance, sayings, acts, and to personal relations, domestic or otherwise."53 In short, they championed a right which gave the individual dominion over how, to whom, and to what extent his likeness, his words, his description, and his history were to be disclosed.54

This right to control the release of information about oneself is broader than the set of interests affected by public disclosures. For example, if A discovers in B's desk a diary of personal information that B has shared with no one, A has violated B's right to keep information about himself secret from the whole world. If it is never made public, however, the interests specifically affected by public disclosures are not affected (although other "privacy" interests are, and may be protected by an action for trespass or intrusion). On the other hand, if B has shown his diary to a small circle of friends and one of them makes the diary public, then the public disclosure does affect a certain group of interests, even though other privacy interests are unaffected. The problem, then, is to analyze the general interest in controlling the release of information about oneself, in order to discover just what narrow group of interests is affected by the act of publicizing information about an individual without his consent.

It is suggested that three specific privacy interests affected by public disclosures can be identified: (1) an interest in retaining actual control over the release of information about oneself, for the sake of one's dignity and individuality; (2) an interest in preserving intact (or not, as one sees fit) one's relationships with others; and (3) an interest in how the public perceives one, or reputation.

The commentator who has done the most searching analysis of the privacy interests protected by the public disclosure tort55 suggests that the major interest protected by information-control is avoidance of the psychic and emotional damage caused by the very fact of public disclosure:

What is really at issue when, for instance, a magazine gives an account of the emotional crisis that a man faced

52 Warren & Brandeis, supra note 1, at 198 (footnote omitted).
53 Id. 213 (footnote omitted).
54 See Bloustein, Privacy as an Aspect of Human Dignity, supra note 3, at 970-71.
55 See id. 979, 1001-03.
in leaving his wife and children, is not merely the distress the individual suffers as a result of the reawakening of his agony, but the debasement of his sense of himself as a person that results because his life has become a public spectacle against his will. There is anguish and mortification, a blow to human dignity, in having the world intrude as an unwanted witness to private tragedy. The wrong is to be found in the fact that a private life has been transformed into a public spectacle.56

This interest relies on the concept that one element of individuality and personality is control of information about oneself, and that loss of that element, without reference to the effect the disclosure has on one's relations or on the public, can be damaging.57

Like an assault on the individual by the words of the disclosure, the disclosure itself inflicts emotional injury.58 There can be great damage when an individual's beliefs59 or facts about his distant past,60 shared with only a few intimates, are made public against his will.61 The information whose release would cause the gravest injury is that which an individual has kept secret from everyone,62 as the circle of those to whom the information has already been released widens, however, the impact of public disclosure upon the individual decreases, since he has to an increasing extent already exposed his individuality.

Beyond the interest in maintaining control over the release of personal information, another interest appears to have been identified as included within "the right to live as one will,"63 or "the right of the individual to be self-determining, to decide for himself where he shall go and who he shall be . . . ."64 This is the additional interest in avoiding the interference with one's

57 Cf. Bloustein, Privacy as an Aspect of Human Dignity, supra note 3, at 980-81; Warren & Brandeis, supra note 1, at 197-98. But see Prosser, supra note 2, at 398.
60 E.g., Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); cf. Fried, Privacy, 77 YALE L.J. 475, 485 n.18 (1968).
62 See Fried, supra note 60, at 485.
64 Bloustein, Privacy, Tort Law, and the Constitution, supra note 4, at 620.
personal relationships that a public disclosure can cause. These relationships range from the relatively distant ones between an employer and his employee, or between a hacker and his once-a-month golfing partner, to the most intimate kind, as between an individual and his spouse, children, or parents. In all of these relationships the individual retains an interest in deciding what to reveal about himself. Interference with that interest can destroy the relationship, either by providing information far more intimate than the closeness of the relationship warrants, or by providing information that causes the other party to change or terminate the relationship.

If as information becomes more private an individual discloses it to fewer of those with whom he has relationships, then the more intimate the information publicly disclosed against an individual's will, the more relationships the revelation will affect. Further, if certain information is so private that an individual does not share it with even some of his family and closest friends, disclosure of that information can interfere with his most important relationships.

In *Briscoe v. Reader's Digest Association*, for example, the defendant's public disclosure of the plaintiff's long-past crime severely disrupted Briscoe's relationship with his eleven-year-old daughter; she had not previously known of her father's criminal past. Similarly, it is not difficult to accept the allegation that the public disclosure of a man's homosexuality caused his theretofore uninformed brothers and sisters to shun him. On the other hand, in *Cox Broadcasting Corp. v. Cohn* the detailed circumstances of the rape of the plaintiff's daughter were known to many of plaintiff's friends and acquaintances and other members of the public long before the press disclosed the victim's

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62 [E]ven between friends the restraints of privacy apply; since friendship implies a voluntary relinquishment of private information, one will not wish to know what his friend or lover has not chosen to share with him. The rupture of this balance by a third party... thrusting information concerning one friend upon another might well destroy the limited degree of intimacy the two have achieved.

Fried, supra note 60, at 485 (emphasis in original).


69 Such was the allegation of Oliver W. Sipple, the ex-Marine credited with thwarting Sara Jane Moore's attempt on the life of President Ford, in his $15 million invasion-of-privacy suit against the press. N.Y. Times, Oct. 1, 1975, at 20, col. 1.

name. Consequently, the defendants' disclosure could not contribute significantly to the disruption of plaintiff's personal relationships. In addition, the disclosure interfered only minimally with the plaintiff's interest in preserving his dignity by maintaining personal control over the release of such private information; he had already suffered the loss of control of this information before the broadcast identifying his daughter. Although the disclosure here thus had no significant effect on either of the first two of plaintiff's three privacy interests, it did interfere with his third interest, that in not having his reputation tarnished without his consent.

Any public disclosure will affect an individual's reputation interest, because it will affect the public's perception of him. Current constitutional and state law doctrines, however, probably do not allow an individual to recover for damage done by a truthful statement to his reputation alone. It is, however, only in a case like Cox, where the reputation interest was the only one affected, that recovery should be barred because of the truth of the disclosure. In many disclosure cases the first two identified privacy interests—the interest in maintaining control over the...
release of personal information and the interest in avoiding the disruptive effect of public disclosure on one's personal relationships—will also be affected, and the court can grant relief for damage to those interests.\(^7\) Therefore, only the two privacy interests other than reputation should be weighed against the need for protection of the press.

What disclosures that affect the two crucial interests are damaging enough to justify recovery? Disclosures of other than intimate information generally do not have a substantial effect on these interests. The facts of *Cason v. Baskin*\(^7\) illustrate this point. Marjorie Kinnan Rawlings, in an autobiographical book about her experiences in rural Florida, accurately—and in great detail—portrayed a woman from the area as superficially eccentric, brusque, and prone to profanity, though actually efficient, kind, and loving.\(^7\) The woman sued the author for invasion of privacy. Because the woman had been portrayed to the public and thus her right to control information about herself had been violated, the Supreme Court of Florida held in her favor; because she demonstrated no injury, however, the court awarded only nominal damages.\(^7\) A more useful analysis would have looked to the effect of the disclosure on the plaintiff's three privacy interests. First, there was some interest in reputation involved: The plaintiff's characteristics and probably her existence were disclosed to most of the world only by the book. In ascribing masculine characteristics to her,\(^7\) the portrayal might even have provided grounds for a defamation action, but the uncontested accuracy of the description would have precluded recovery.\(^8\) Second, because the report of the case mentions no characteristics described in the book that could not have been

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\(^7\) In *Cox*, Justice Powell recognized that while truth is a constitutionally required defense to a suit by a private person for damage to reputation, a different standard, involving a different analysis of the role of truth, could be applied to the protection of privacy interests "that are distinct from those protected by defamation actions." 420 U.S. at 500 (Powell, J., concurring). The majority's apparent failure to recognize the distinction between reputation and other privacy interests led to the statement in the Court's opinion that "truth is not necessarily a constitutionally required defense to actions for defamation of private individuals." *Id.* at 490. As Justice Powell pointed out, the negligent falsehood standard for liability in *Gertz* is meaningless if truth is not a defense. *Id.* at 499.

\(^7\) 155 Fla. 198, 20 So. 2d 243 (1945), *second appeal*, 159 Fla. 31, 30 So. 2d 635 (1947).

\(^7\) 155 Fla. at 202-07, 20 So. 2d at 245-47.

\(^7\) 159 Fla. at 40, 30 So. 2d at 640.

\(^7\) 155 Fla. at 202-03, 20 So. 2d at 245.

\(^8\) See note 74 supra & accompanying text.
observed by any local resident, there were no disclosures that could interfere with the plaintiff's close personal relationships. Finally, the disclosures did affect the plaintiff's interest in defining her individuality by controlling the release of information about herself, but the interference with the interest was inconsequential: As all the characteristics portrayed could be seen by an interested public observer, the facts were hardly private.

By contrast, Briscoe v. Reader's Digest Association involved substantial interference with the two paramount privacy interests. The disclosure of long-past criminality—information which plaintiff did not share beyond a narrow circle—could seriously affect the individuality interest because of the impact on the plaintiff of the public release of closely guarded facts. Further, disclosure of such intimate information could disrupt even the closest relationships, such as that between plaintiff and his daughter.

To this point only privacy interests affected by public disclosure, not protected rights, have been identified. At the extreme, the identified interests could support a general interest against all public disclosures, but an individual's right clearly does not extend so far. In fact, the damage to the interests becomes substantial, making a strong case for a right against public disclosure, only for information that an individual keeps

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81 155 Fla. at 202-07, 20 So. 2d at 245-47.
82 See id. The plaintiff's real motives in this suit might be inferred from her claim for a share of the profits the defendant received from the book, on the theory that the appropriation of the plaintiff's biographical sketch enriched the defendant unjustly. The court held that this latter claim, as distinguished from the invasion of privacy claim, stated no cause of action. Id. at 220-21, 20 So. 2d at 254.
84 In concrete situations and actual societies, control over information about oneself, like control over one's bodily security or property, can only be relative and qualified. As is true for property or bodily security, the control over privacy must be limited by the rights of others. And as in the cases of property and bodily security, so too with privacy the more one ventures into the outside, the more one pursues one's other interest with the aid of, in competition with, or even in the presence of others, the more one must risk invasions of privacy. Moreover, as with property and personal security, it is the business of legal and social institutions to define and protect the right of privacy which emerges intact from the hurly-burly of social interactions. . . . The delineation of standards must be left to a political and social process the results of which will accord with justice if two conditions are met: (1) the process itself is just, that is the interests of all are fairly represented; and (2) the outcome of the process protects basic dignity and provides moral capital for personal relations in the form of absolute title to at least some information about oneself.

within a small circle of intimates. Even where the damage is substantial, however, protection of the privacy interests must take account of the countervailing interest in freedom of the press. Before suggesting the elements of a test that gives adequate protection to both sides, this Comment will examine the current state of constitutional protection of the press.

IV. CONSTITUTIONAL PROTECTION OF THE PRESS IN PUBLIC DISCLOSURE ACTIONS

A. Swallowing the Public Disclosure Tort

Following the state law approach to protecting the press in public disclosure actions, the Supreme Court held in Cox Broadcasting Corp. v. Cohn that the disclosure of information appearing in public records is constitutionally protected. The Court based its decision on the press' right to report some matters of public interest, such as crimes, prosecutions, and judicial proceedings, which 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."87

Time, Inc. v. Hill, the Supreme Court's first foray into the invasion of privacy field, had suggested a broader "public interest" privilege. Three escaped convicts held the Hill family hostage in their home for nineteen hours. After the family was released unharmed, plaintiff stressed in statements to newsmen that there had been no violence and that no members of the family had been molested. Three years later a play about a family held hostage by escaped convicts opened on Broadway. In the play, "[T]he father and son are beaten and the daughter subjected to a verbal sexual insult."89 The defendant published a magazine article describing the play as a dramatization of the incident involving the Hill family; the article included pictures of "re-enacted" scenes of violence taken from the play, photographed using members of the cast in the Hills' former home.90

Hill brought suit for invasion of privacy in New York, a state that allowed recovery for public disclosure of newsworthy items about an individual if the items were false.91 The Supreme Court

85 See text accompanying notes 32-48 supra.
87 Id. at 492.
88 385 U.S. 374 (1967).
89 Id. at 378.
90 Id. at 377-78.
91 The New York Court of Appeals early rejected Warren and Brandeis' argument,
held that where the publication was newsworthy, mere falsity was not sufficient to strip it of first amendment protection: Time was liable only if it published the article with knowledge of its falsity or in reckless disregard of the truth. Although turning in part on peculiarities of New York law, this holding, when coupled with the Court's earlier recognition of a broad privilege protecting truthful statements of public interest, implied that all truthful disclosures of matters of public interest are constitutionally protected. Statements that are not of public interest, however, are not protected by this privilege, and are actionable if they fall within otherwise permissible state law proscriptions.

The public interest test used by the Court in Time, Inc. v. Hill was a broad one. The New York courts found that the article had sensational and promotional appeal and could not be "characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information in which the public had, or might have a proper interest." The Supreme Court, however, found the subject matter of the article to be of public interest, using a more inclusive standard that protected disclosures concerning "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period," interpreted broadly to include "entertaining" as well as "informing."


92 385 U.S. at 387-88.
93 See id. at 391-92.
95 Truth appears to be an absolute defense in an action for injury to reputation only. See notes 74-75 supra & accompanying text.
96 See Time, Inc. v. Hill, 385 U.S. at 383 n.7; T. Emerson, supra note 84, at 552-54; cf. Bloustein, Privacy, Tort Law, and the Constitution, supra note 4, at 622.
98 385 U.S. at 388 (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)).
99 Id.
B. The Decline of *Time, Inc. v. Hill*

The public interest standard of *Time, Inc. v. Hill* leaves the courts with the two undesirable alternatives of allowing the press to define matters of public interest as whatever the media choose to cover, thus completely swallowing the public disclosure tort, or of embarking on the dangerous task of defining what matters are of "legitimate" public interest. The first alternative would eliminate liability for disclosure of even the most intimate information, regardless of the interference with privacy interests; the second would place the courts in a role that has been rejected as "surely in conflict with the whole idea of the First Amendment." A test of first amendment protection based on what the public may legitimately be informed of provides a most tempting opportunity for censorship by judges and juries. Not only is the test uncertain, but also there is the added hazard that in deciding whether content is legitimately public, judges and (especially) juries are unlikely to remain neutral.

Both deeper analysis of the privacy interests at stake and later case law, however, indicate that this public interest standard may not be applicable today in public disclosure actions. Because state law required that recovery be based on falsity, the Court in *Time, Inc. v. Hill* could only take account of the plaintiff's interest in reputation. Hill's other privacy interests, however, may well have been affected also: his individuality interest in preventing disclosure of at least partially private information, and his interest in not having a three-year-old incident disclosed to new and otherwise uninformed friends. In *Gertz v. Robert Welch, Inc.* the Supreme Court held that

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100 See Kalven, *supra* note 1, at 336.
105 The test, therefore, "holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' . . . which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." Id. at 277 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). *Cf.* Cohen v. California, 403 U.S. 15, 25-26 (1971). *But see* Bloustein, *The First Amendment and Privacy, supra* note 4, at 56-63.
a plaintiff who was not a public official or public figure could recover actual damages for publication of a defamatory falsehood even though publication was only negligent and without knowledge of falsity or reckless disregard of the truth. This holding was especially significant in its deviation from the trend of earlier cases, which had determined the level of constitutional protection of the press by the degree of public interest present. Gertz, by contrast, signaled the Court's new awareness that the importance of the individual interest being protected by state law—in this case a libel law—should be balanced against the interest of the press in immunity from liability:

[W]e believe that [the proper approach is] an accommodation between [the interest of the press] and the limited state interest present in the context of libel actions brought by private persons. . . . [W]e conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

The Court went on to explain why a state has a greater interest in protecting the reputation of a private person than that of a public official or public figure. Because private persons have less access to the media to “counteract false statements,” the Court said, they “are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.” Furthermore, by not seeking public office or notoriety, the private individual has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

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108 Id. at 347-49.
112 418 U.S. at 344.
113 Id. at 345. The Court recently indicated that its definition of “public figure” is
Thus, after Gertz, it appears that reliance on public interest as the sole test of constitutional protection of the press in defamation actions has been abandoned in favor of a test that considers the strength of the individual's interest in preserving his reputation. Although the Supreme Court has not yet applied this new approach in a privacy case, the rationale of the new test applies to public disclosures as well as to defamation. Gertz extended more protection in defamation actions to private persons than to public officials or figures to accommodate the greater state interest in compensating these "deserving plaintiffs." Where private plaintiffs are involved, the state interest was held to be great enough to allow somewhat less protection for the press because of the strength of any person's interest in preserving his reputation, because a private person has no access to the media to counteract the falsehood, and because a private person has not voluntarily exposed his reputation to public scrutiny.

In public disclosure actions, the argument is even stronger for using a test that focuses on the individual interests at stake, rather than the broad public interest test of Time, Inc. v. Hill. Not only is the reputation of the public disclosure plaintiff often affected, but his other two privacy interests are often affected as well. Furthermore, even if he were to gain access to the media, such a "self-help" remedy would be ineffective: Where the disclosure is true, further exposure can only make matters worse.

quite restrictive, holding that a well-known socialite did not meet the test. Time, Inc. v. Firestone, 96 S. Ct. 958, 965 (1976).

Gertz indicates that such a test would bar most recoveries in defamation actions. See 418 U.S. at 342. After Gertz it is also open to question whether Time, Inc. v. Hill remains applicable even to its own facts; under the Gertz test Hill would have been a private figure. See Cantrell v. Forest City Pub. Co., 419 U.S. 245, 250-51 (1974); N. Dorsen, P. Bender, B. Neuborne, 1 Political and Civil Rights in the United States 526-27 (4th ed. law school 1976).

418 U.S. at 342-43.


418 U.S. at 344-45.

See text accompanying notes 49-84, 106 supra.

Finally, even if a person engages in such activities as to "invite attention and comment," thus constructively opening his reputation to attack, he cannot be presumed to be voluntarily relinquishing his interests in maintaining his personal relationships intact and preserving his dignity by retaining control over the release of private information about himself.

The current state of constitutional protection for false, defamatory speech, and, by analogy, for speech publicizing truthful, private facts about individuals, therefore requires consideration of the importance of the precise individual interests in reputation and privacy that are at stake. This new approach is a departure from the *Time, Inc. v. Hill* standard, which determined constitutional protection of the media by a broad public interest test, regardless of the importance of the privacy interests involved. The cases indicate, however, that the public interest test is by no means entirely obsolete. *Gertz*, even while disclaiming a test based on legitimacy of public interest, implied that some conception of public interest figures into the distinction between private persons and public figures.

In its recent decision in *Time, Inc. v. Firestone*, the Court clearly relied on its finding of a lack of legitimate public interest in holding that the plaintiff was a private person rather than a public figure. The erstwhile wife of Russell Firestone, scion of the wealthy industrial family, sued Time for reporting that Firestone had been granted a divorce for his wife's "extreme cruelty and adultery." In spite of the national news coverage of the trial, the press conferences on the "cause célèbre" given by

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120 Id. at 345.
121 See text accompanying notes 86-99 supra.
122 318 U.S. at 346. Indeed, the Court went so far as to find "no constitutional value" in false disclosures. *Id.* at 340. That conclusion can mean either that first amendment principles simply do not apply to such disclosures or that the first amendment does not prohibit the enforcement of the privacy interest over the public interest in disclosure. The first reading would make false disclosure cases irrelevant to cases involving disclosure of true facts; true disclosures are clearly within the ambit of the first amendment. But the latter reading is more consistent with the rest of *Gertz*: The Court's emphasis on the need for a "strong" derivative state interest in protecting an individual's reputation, *id.* at 348, the restriction of the state interest to compensation for actual harm, *id.* at 349, and the need for some level of press culpability, *id.* at 347-48, would indicate that falsity, without more, does not strip a disclosure of first amendment protection. If that is so, falsity's role in the defamation calculus is to reduce the public interest in the disclosure. See N. Dorsen, P. Bender, and B. Neuborne, *supra* note 114, at 341-43, 524.
123 See *id.* at 343-45.
125 *Id.* at 973 n.8 (Powell, J., concurring).
126 *Id.* at 965.
the plaintiff,\textsuperscript{127} and the fact that her "appearances in the printed press were evidently frequent enough to warrant her subscribing to a press clipping service,"\textsuperscript{128} the Court did not find her a public figure within the meaning of \textit{Gertz}.\textsuperscript{129} Referring to \textit{Gertz}' recognition that an individual may "voluntarily [inject] himself or [be] drawn into a particular public controversy and thereby . . . [become] a public figure,"\textsuperscript{126} the \textit{Firestone} Court refused to characterize the divorce as a "public controversy" merely because the public was interested.\textsuperscript{131} As Justice Marshall pointed out, however, the plaintiff both had access to the media and easily could be considered to have "invite[d] attention and comment"\textsuperscript{132}—the two factors \textit{Gertz} found necessary for a finding that one was a public figure.

The result in \textit{Firestone} can best be explained by the hypothesis that the majority simply did not think the public interest at stake was one justifying a higher standard of protection for the press.\textsuperscript{133} Both the United States\textsuperscript{134} and Florida\textsuperscript{135} supreme courts distinguished public controversies that legitimated a higher standard for defamation from those undeserving of the increased first amendment protection. Where such a distinction results in a concomitant finding of a "public figure," it may be safely assumed that the protection of the first amendment thereby depends on the existence of a legitimate public interest.

These developments in the Supreme Court's approach to defamation suggest that the broad public interest test of \textit{Time, Inc. v. Hill} is no longer viable in public disclosure cases. Rather, to be congruent with current constitutional doctrine, a test for the permissibility of recovery in public disclosure cases must incorporate two stages. First, the precise individual interest being protected by the state must be important enough to survive initial scrutiny by a court. Second, even where this interest rises to the threshold level of legitimacy, there must be a further inquiry to determine whether there is a legitimate public interest which requires protection for the press.

\textsuperscript{127} \textit{Id.} at 981-82 n.1 (Marshall, J., dissenting).
\textsuperscript{128} \textit{Id.} at 980 (Marshall, J., dissenting).
\textsuperscript{129} \textit{Id.} at 965. \textit{See} text accompanying notes 107-13 \textit{supra}.
\textsuperscript{131} 96 S. Ct. at 965.
\textsuperscript{132} \textit{Id.} at 981 (Marshall, J., dissenting) (quoting \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 345 (1974)).
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.} at 965.
\textsuperscript{135} \textit{Id.} at 981-82 n.1 (Marshall J., dissenting).
V. PROTECTION FROM PUBLIC DISCLOSURE AS A RIGHT SUPERSEDING THE FIRST AMENDMENT

A. The Rationale for the Right

State legislation protecting privacy interests against media intrusion clearly tends "to stifle, penalize, or curb the exercise of First Amendment rights" and as such must reflect a "compelling state interest." If the state law narrowly circumscribes both the privacy interests and the infringement on freedom of the press, however, the requirements of the first amendment will be satisfied.

To this end, simply making actionable the disclosure of matters outside some definition of the "public interest" is unsatisfactory. Instead, it is proposed here that the states may protect against only the narrow class of public disclosures revealing particularly intimate details. Analogies to cases protecting privacy interests against the press' news-gathering rights and governmental disclosure support this proposal.

1. Privacy and the Press' Right to Gather News

Although the press apparently has a first amendment right to gather news, an individual's right to privacy gives a state a strong enough interest to prohibit the press from gathering news by entering a person's home without permission, by using electronic listening devices, or by conducting surveillance of

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139 See text accompanying notes 85-105 supra.
140 Harm emanating from the release of less intimate information simply must be expected by members of society, and cannot realistically be considered actionable. See text accompanying notes 76-84 supra.
an individual with such harassing, persistent, and intrusive methods that she fears for her physical safety. It may well be that the press' right to print what it knows is more firmly anchored within the limits of first amendment protection than is the news-gathering right. Nonetheless, even if the actual dissemination of news is affected, a strong enough state interest can prevail. A similar regulation of public disclosures would impose a more direct burden on the first amendment rights than would a restriction on news gathering. But if the state can show that the interference caused by certain disclosures is great enough, and if the infringement of first amendment rights is narrowly confined, the privacy interest should outweight the press' right to make the disclosure.

2. Privacy and Government Disclosure

Recent cases indicate that the same privacy interests protected by the states through the public disclosure tort have been given constitutional recognition in protecting individuals against government disclosure. In Doe v. McMillan, a congressional committee investigating disciplinary problems in District of Columbia schools ordered the publication of its report, which included disclosures of absenteeism, failing grades, and disciplinary problems of named students. Parents of the schoolchildren filed suit to enjoin the public distribution, alleging "that such publication had caused and would cause grave damage to the children's mental and physical health and to their reputations, good names, and future careers."

The Supreme Court held that, although members of the committee and their aides were protected by the speech or debate clause, other government functionaries, including Government Printing Office officials, could be enjoined from allowing further public distribution, on the ground that such distribution went "beyond the apparent needs of the 'due function of the [legislative] process.'"
More illuminating, however, was Justice Douglas' concurrence, joined by Justices Brennan and Marshall. It suggested that Congress could not be prohibited from distributing the report publicly unless publication "infringes upon the constitutional rights of petitioners and therefore is subject to scrutiny by the federal courts."\textsuperscript{152} The concurring Justices concluded that the students' constitutional rights were violated by such disclosures "for the sake of exposure"\textsuperscript{153} which "exceeded the 'sphere of legitimate legislative activity.'"\textsuperscript{154} Thus, the petitioners' interest in keeping certain personal information private was considered to be of constitutional dimensions, at least where direct infringement by the government was present.

On similar constitutional grounds courts have protected against government disclosure of arrest records,\textsuperscript{155} a policeman's personnel file,\textsuperscript{156} and records regarding health and medical treatment.\textsuperscript{157} On the other hand, government disclosure of motor vehicle registrations\textsuperscript{158} or teachers' salaries\textsuperscript{159} has been permitted on the theory that such information was not private enough to warrant protection against disclosure.

Of course, the scope of the state-protected right enforceable against the press is not necessarily the same as that of the constitutional right protecting against government disclosure. First, the government's interest in disclosure in a given case may be weaker than the press', for only the latter is protected by the first amendment.\textsuperscript{160} Second, although government disclosure af-

\textsuperscript{152} Id. at 328 (Douglas, J., concurring).
\textsuperscript{153} Id. at 330 (quoting Watkins v. United States, 354 U.S. 178, 200 (1957)); cf. id. at 316 (majority opinion).
\textsuperscript{154} Id. at 330 (Douglas, J., concurring) (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)).
\textsuperscript{157} Cf., e.g., Roe v. Ingraham, 480 F.2d 102 (2d Cir. 1973).
\textsuperscript{160} Although the government might be prohibited from making certain disclosures without reference to the information's intimacy, but merely on the grounds that the disclosure is not a legitimate governmental function, compare Paul v. Davis, 96 S. Ct. 1155 (1976) \textit{with} Doe v. McMillan, 412 U.S. 306, 317, it is more likely that the intimacy of the information disclosed does play a role in a judicial decision to prohibit disclosure. This is so because if no privacy interests were infringed by the disclosure there would be no grounds for judicial scrutiny of the government's interest. Doe v. McMillan, \textit{supra} at 328 (Douglas, J., concurring). Furthermore, the government would seem to have less of a legitimate function in selling lists of motor vehicle registrants to the highest bidder for
ffects the interests protected by the public disclosure tort, it can also affect other individual interests, such as the ability to engage freely in chosen activities. But the right against government disclosures can reach constitutional dimensions where the privacy interests protected by the public disclosure tort are implicated.

The federal system and the fourteenth amendment state action doctrine leave to the states the primary responsibility for protecting privacy interests from private infringement. Both the government disclosure and the newsgathering cases strongly indicate that the first amendment does not prevent the states from regulating disclosures by private persons, where particularly private information is involved and privacy interests are seriously infringed.

B. The Scope of the Right Enforceable Against the Press

This Comment has suggested that public disclosure of information that an individual releases to only the narrowest circle of intimates will be the most damaging to his privacy interests, and that the dissemination of information already released beyond a very narrow circle will result in little damage.

This analysis must be applied with some care, for a seemingly innocuous disclosure can unexpectedly result in serious interference with a person’s privacy interests. For instance, a newspaper’s “innocent” restaurant review, accompanied by a photograph showing a couple pleasurably dining, might in fact reveal a married person out with his or her illicit lover. Such a disclosure could very well result in serious damage to the individuals’ privacy interests. Holding the press liable for such disclosures, however, would have a serious chilling effect on reporting, since virtually any article or feature could, by chance,

purposes of merchandise solicitation than in disclosing arrest records to other governmental agencies. Yet the latter has been prohibited—at least where the privacy interest was seen to outweigh the governmental, Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971), modified sub nom. Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974)—and the former permitted, Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y.), aff’d, 885 F.2d 41 (2d Cir. 1997), cert. denied, 391 U.S. 915 (1968).

163 See text accompanying notes 55-84 supra.
164 See text accompanying notes 82, 71, 76-82 supra.
infringe on an individual's privacy interests. The preferred approach would grant the press "breathing space" by permitting relief only for disclosures of the kind of information that the press reasonably should know an individual ordinarily reveals to his most intimate relations alone.

Allowing an action in tort for only these kinds of disclosures would still protect against the vast majority of genuinely damaging public disclosures. First, the cases and authorities are in substantial agreement as to which disclosures seriously infringe on the individuality interest by revealing "the inner core of personality." The area where public disclosures are genuinely damaging is marked by the details of one's sexual activities, health, distant past, and little else.

Second, society defines by convention some of the areas considered most private; there is a societal consensus that publication of a photograph of a person in the nude will seriously affect privacy interests whereas disclosures of a person's eating habits will not. The existence of such a consensus as to what matters are considered to be private per se enables the press to recognize these areas of symbolic privacy and gives it adequate notice not to expose these matters to public view.

Disclosure of one's criminal past, for example, or of the scholastic and disciplinary problems of one's childhood, are the kinds of disclosures that one would reasonably expect to be shared only with a small circle of intimates; public disclosures of such information can result in substantial damage to one's individuality and personal relationships. On the other hand,

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165 To hold the press liable in such cases would destroy the "breathing space" mandated by the first amendment. See New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964).

166 See generally id. at 278-80. The press, of course, has the additional protection of the Supreme Court's "public interest" doctrine. See text accompanying notes 180-99 infra.

167 T. Emerson, supra note 84, at 556.


169 See Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); cf. Fried, supra note 60, at 488.

170 See cases cited note 21 supra.

171 See Fried, supra note 60, at 477-88.

172 A standard requiring the press to exercise reasonable care in recognizing the kinds of information which an individual generally wishes to keep most private is no more inhibiting than a standard of liability for negligent falsehoods, which is a constitutionally permissible standard in defamation actions. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-50 (1974).

where information is readily available to friends, acquaintances, and even casual passers-by, an individual cannot have a reasonable expectation of privacy, and incremental exposure to a wider public should not be actionable. When, for example, a man and woman embrace in full view of complete strangers, the press cannot reasonably expect that they want to keep their actions private.\(^{174}\) Even if an individual becomes an unwilling actor in public events, as when a husband walking with his wife is attacked, and the wife's photograph is taken at the scene and published, the random public exposure at the time of the attack makes the further public disclosure relatively inconsequential.\(^{175}\)

The standard, thus, is generic; liability does not depend on the particular fact situation nor the harm shown in any given case, but on whether the type of information disclosed could be expected to infringe on core privacy interests. The press is thereby afforded far more protection than it would receive under a test examining the "reasonableness" of the disclosure on a given set of facts. Applied to *Time, Inc. v. Hill*,\(^{176}\) the latter test might well have permitted recovery against the magazine, since some privacy interests might in fact have been damaged;\(^{177}\) the press would risk a lawsuit with every disclosure of the name of a crime victim. But under the proposed standard, the Hills' alleged injury would be outside the scope of constitutionally permissible state protection.\(^{178}\)

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\(^{175}\) See Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929). See also Bloustein, *Privacy, Tort Law, and the Constitution*, supra note 4, at 628:

Contemporaneous reports of notorious incidents of personal life would seem less subject to restriction than reports of incidents long past because, in many instances, the contemporaneous publication seems hardly capable of further demeaning the individual. The very happening of some events—for example, a divorce involving a charge of adultery—is itself so destructive of the sense of privacy and dignity of the individual that the contemporaneous publication is simply not taken to be further demeaning of privacy, however great its tendency to cause further embarrassment. It can also be argued under some circumstances that an incident is so notorious that contemporaneous publication can hardly cause a further impairment of privacy.

In *Neff v. Time, Inc.*, 44 U.S.L.W. 2373 (W.D. Pa. Jan. 27, 1976), *Sports Illustrated* published a photograph of a football fan with the zipper of his trousers open. Relying on the fact that the fan was one of a group that had encouraged and posed for the photographer, the court held that the disclosure was "not a matter concerning a private fact." *Id.* at 2374.

\(^{176}\) 385 U.S. 374 (1967). See text accompanying notes 88-99 *supra*.

\(^{177}\) See Bloustein, *The First Amendment and Privacy*, *supra* note 4, at 60-62, 93-94.

\(^{178}\) See T. Emerson, *supra* note 84, at 556:

An individual caught up in a public event, even though no fault of his own, cannot expect to keep it private, either at the time or later. The injury to his
C. Public Interest or Public Figure Exceptions

In *Sidis v. F-R Publishing Corp.* a former child prodigy had sought and found obscurity, although he had been a public figure twenty-five years earlier. He unsuccessfully brought suit when a magazine disclosed his past. Because disclosures concerning one’s distant past fall within the narrow range of actionable privacy invasions under the test suggested here, the state could enforce them against the first amendment rights of the publisher who unearthed the facts of his youth. Although the court in *Sidis* left open the question whether the “news worthiness” of the disclosure would adequately defend the publisher against the privacy action, even under the narrowly circumscribed privacy standard proposed by this Comment a second requirement under the first amendment would prevent recovery by the public disclosure tort plaintiff where the otherwise actionable disclosure is of legitimate public interest.

The Supreme Court has indicated that disclosures are constitutionally unprotected only if they “are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Even where the state has a strong “social interest,” if there is a public interest in the disclosure of the identity of an individual, such a disclosure will be protected by the first amendment.

*feelings, like any other accident he meets with, is part of his life in society. Prohibition on discussion of matters such as those depicted in the play or in the magazine article is not compelled by either the psychological needs of the individual or the social needs for independent citizens underlying the privacy system.*

179 113 F.2d 806 (2d Cir. 1940). *See* note 48 *supra.*

180 *See* text accompanying note 170 *supra.*


Distinguishing between *Sidis* and Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931), the latter involving disclosures of a respectable woman’s past life as a prostitute and murder defendant, Prosser suggests a “mores” test apparently differentiating between merely pathetic disclosures and morally offensive ones. W. *PROSSER, supra* note 5, § 117, at 812. In view of the societal consensus on the privacy to be accorded one’s distant past, however, both cases fall on the same side of the line; both present situations in which the state could constitutionally provide a remedy for the disclosure.

182 113 F.2d 806, 809.

183 *See* text accompanying note 166 *supra.*


Such a test would protect the press whenever the identification of an individual in a public disclosure was in the public interest. It would require, if the press is not to become the final arbiter of public interest, that the courts determine which matters are "legitimately" of interest to the public. Granting the courts such quasi-censorship over speech in general would be most dangerous to first amendment values. But the proposed standard would require this inquiry only when the disclosure is in a very narrowly circumscribed area: where the information disclosed is of the type that the press can reasonably expect an individual to reveal only to his most intimate relations. The inquiry is thus less likely to endanger first amendment rights both because of the importance of the state interest and because its narrow operation will result in only a minimal "chilling effect" on the press.

186 See text accompanying notes 100-05 supra.

But cf. Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), cert. denied, 96 S. Ct. 2215 (1976) (Brennan & Stewart, JJ., dissenting), in which a magazine article on body surfing at a particularly dangerous California beach contained a photograph of the plaintiff together with personal information obtained in an interview with him. Suing for invasion of privacy, the plaintiff alleged that although he granted the interviews, which both he and the court conceded amounted to consent, id. at 1124, 1127, he later revoked his consent by objecting to publication. Id. He specifically objected to "a series of anecdotes about him that emphasize the psychological characteristics which presumably explain the reckless disregard for his own safety which his surfing demonstrates." Id. at 1124. Included were an incident in which the plaintiff extinguished a woman's cigarette in his mouth in response to her request for an ashtray, and another in which he won a small bet by burning a hole in a dollar bill that was resting on the back of his hand, in the process burning two holes in his wrist. Id. at 1124 n.1.

On a certified interlocutory appeal under 28 U.S.C. § 1292(b) (1970), the court of appeals vacated and remanded for reconsideration the district court's denial of the defendant's motion for summary judgment. 527 F.2d at 1131. On reconsideration, however, if the facts disclosed were "private" at state law—that is, not actually disclosed to the public before the article, see notes 33-34 and accompanying text, supra—the only first amendment defense available to the defendant was newsworthiness defined as "legitimate public interest." Id. at 1128-30. The court rejected the defendant's proposed test of constitutional protection, which also focused solely on newsworthiness: whether as a matter of law a disclosure "constitutes a clear abuse of the editor's constitutional discretion to publish and discuss subjects and facts which in his judgment are matters of public interest." Id. at 1130.

Under either test first amendment protection for any disclosure would depend solely on the inquiry whether the public had a legitimate interest in knowing—precisely the approach which contains the greatest potential for abuse through judicial censorship of the press. This Comment proposes an approach that first would examine whether the interests protected under the label "privacy" are important enough to limit first amendment protection. In Virgil the cigarette incidents as described took place in the presence of others and were plainly not the type of information an individual would reasonably be expected to share with only his closest intimates. The dangerous question of "legitimate public interest," therefore, need not have been reached.
Current constitutional doctrine may make the press' privilege in public disclosure cases turn on the public figure-private person distinction, rather than on the presence or absence of public interest. Although the result of a defamation action could hinge on which of these tests is used, in public disclosure cases the choice of tests will not affect the result. One rationale of the public figure test is that the public figure has greater access to the media than the private person and can consequently counteract defamatory falsehoods by "more speech." In public disclosure cases, by contrast, where the damaging statements are true to begin with, "more speech" is of no use. The remaining rationale for use of the public figure test is that the public figure is presumed to "consent" to disclosure of private facts related to his public life. Thus, political candidates become public figures for public disclosure purposes for virtually all subjects. Truthful public disclosure that a candidate was a former bootlegger or that a presidential candidate fathered an illegitimate child is constitutionally protected. Similarly, although an individual convicted for hijacking a truck a decade ago would ordinarily be protected against disclosure of that fact, he could be held to "consent" to its disclosure, as related to his public life, if he were now manager of a truck freight transfer depot.

On the other hand, especially because an individual apparently may become a public figure merely by engaging in one isolated public activity, a public figure for one purpose should not lose his status as a private individual for all purposes. A

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188 See text accompanying notes 107-35 supra.
190 See text accompanying note 119 supra; Nimmer, supra note 4, at 961. It is true that reputation is one of the interests affected by true public disclosures; but, even where it is the only interest affected, as in Cox, the damage to reputation cannot be cured by further exposure in the media. Consequently, a public figure should recover for a public disclosure whenever a private person should, unless the general "public interest" exception dictates another result.
192 See id. at 277.
193 See Prosser, supra note 2, at 417 n.282.
194 Cf. Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).
previously obscure individual who grabs a would-be assassin's arm and thus helps to prevent an assassination "consents" to becoming a public figure for purposes of reports about the attempted assassination. He does not lose his status as a private individual, however, for other purposes. Thus, when the press discloses that he is a homosexual, he should not be barred from recovery.\footnote{\textit{See} \textit{N.Y. Times}, Oct. 1, 1975, at 20, col. 1.}

This concept of consent, however, is a legal fiction.\footnote{\textit{See} \textit{Rosenbloom v. Metromedia, Inc.}, 403 U.S. 29, 48 (1971).} A candidate with a criminal past does not consent to its disclosure; he hopes it will not be discovered. The real justification for allowing such disclosures is that the public has an overriding interest in knowing those facts so that, for instance, voters may have all relevant information about the candidate before they vote for or against him.\footnote{\textit{Cf. Monitor Patriot Co. v. Roy}, 401 U.S. 265, 274-75 (1971).} Similarly, the hero in the assassination attempt can recover, not because he did not consent to the disclosure of his homosexuality, but because the public, in learning about the assassination attempt, had no legitimate interest in learning about his homosexuality. If, on the other hand, he had been dishonorably discharged from the Secret Service ten years before, that fact could be of such public interest vis-à-vis his role in the abortive assassination as to justify disclosure.

\section*{VI. Conclusion}

The foregoing is an attempt to answer the question left open by \textit{Cox Broadcasting Corp. v. Cohn};\footnote{420 U.S. 469 (1975).} namely, what is to be the proper accommodation of an individual's right to privacy and the press' freedom under the first amendment. It has been suggested that the traditional state law approach to the public disclosure tort is deficient: it does not adequately identify the privacy interests that most require protection, and it uses an overly broad "public interest" test as an absolute defense. That approach is susceptible either to excessive license for the press, or to dangerous censorship by the courts.

This Comment has argued that the danger of too broad a privilege for the press can be avoided by using a court-defined (rather than press-defined) "legitimate public interest" test.\footnote{This Comment's major focus has been to suggest a two-step test for public disclosures which places analysis of the privacy interests affected and analysis of the public interest at stake in separate stages, insulated one from another. Under this approach
The danger of censorship by the courts can be mitigated in accordance with first amendment requirements by implementing, not an uncertain balancing test, but a more predictable two-step approach. First, the range of actionable disclosures is narrowed and objectified, thereby permitting the press to reasonably ascertain which disclosures are within the generally unprotected area, rather than forcing it to guess on subjective "privateness." Only after that threshold inquiry has determined that the privacy interests at stake are within the narrowly defined set of interests strong enough to permit some curtailment of first amendment rights is the question of "legitimate public interest" reached; the number of cases in which the courts will be called on to determine public interest is thereby reduced. Under this suggested approach, important privacy interests can be protected, while at the same time the freedom of the press is curtailed only enough to allow the necessary protection of privacy.

the two-step structure itself is intended to increase the protection of the press. However, some broad suggestions for the proper content of the public interest test, which remains an important, though no longer the sole, element of first amendment protection, can be made. First, the "absolutist" approach, which allows the press to determine public interest by what it chooses to publish, should be rejected as negating the whole idea of the two-step concept and swallowing the tort. Another possibility is the "public records" doctrine of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). That approach is acceptable as far as it goes, but it clearly does not cover many matters of real public interest which have not happened to be reported in public records. Also, it is unclear from the language of Cox whether the doctrine means that the actual source of the information disclosed must be a public record, or only that it is sufficient if the information is a matter of public record somewhere, regardless of the actual source. See id. at 494-95. Third, there is the theory that the first amendment protects speech that provides the audience with information necessary for making self-governing decisions. See Bloustein, The First Amendment and Privacy, supra note 4, at 59. Bloustein's theory limits self-governing decisions to those of a governmental and political nature. Id. 46. A more appropriate definition of legitimate public interest would also include matters of economic and commercial significance on the theory that economic decisions are at least as important to many individuals as political ones. See Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring). This list of possibilities is not exhaustive; the exact scope of the proper "legitimate public interest" test is not reached here.

One danger of such an approach, of course, lies in the fact that juries—and even judges—may allow the two analyses to run together, letting the privateness of the disclosure deflate the amount of public interest, or letting the nature of the public interest—perhaps titillation rather than information—inflate the degree of privateness. The danger of such commingling of the analyses, leading to a single balancing test, requires caution in the administration of the suggested approach.