

**PUBLIC INTEREST VS. PRIVATE LIVES—AFFORDING  
PUBLIC FIGURES PRIVACY IN THE DIGITAL ERA:  
THE THREE PRINCIPLE FILTERING MODEL**

*Shlomit Yanisky-Ravid\**  
*Ben Zion Lahav\*\**

“Any society that would give up a little liberty to gain a little security will deserve neither and lose both.”<sup>1</sup>

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\* Dr. Shlomit Yanisky-Ravid, Intellectual Property and Cyber Professor of Law, Professor Fellow, Information Society Project (“ISP”), Yale Law School; Visiting Professor, Fordham University School of Law (2012, 2014, 2017); Senior Faculty, Ono Academic Law School, Israel (“OAC”); Founder and Director, The Shalom Comparative Legal Research Center, OAC, Israel, Switzerland & U.S.A.

\*\* Dr. Ben Zion Lahav, Constitutional Professor of Law, Ono Academic Law School, Israel. The co-authors, equally contributing to the work, cherish the wonderful cooperation in preparing the article and the collegial friendship. We would like to thank Jack Balkin, Joel Reidenberg, Christine Jolls, Valerie Belair-Gagnon, Bonnie Kaplan, Christina Spiesel, Amichai Cohen, and Sivan Saban-Hacohen for their encouragement, insights and important contributions along the way. Special thanks to several institutes, who gave a stage for the discussions leading to this paper, such as Yale Law School; ISP; Fordham University School of Law; the World Intellectual Property Organization, Geneva; and to the OAC. We are also grateful to the Swiss Institute of Comparative Law, Lausanne for supporting the research, especially to their professional staff: Alberto Aharonovitz, Lukas Heckendorn Urscheler, Karen Topaz Druckman, John Curran, Sadri Saieb and Christiane Serkis. To the research assistants and gifted editors, Laura Lagone and Elizabeth Ledkovsky, Esq., gratitude for your wonderful assistance. Any errors are our own.

<sup>1</sup> This quotation, commonly attributed to Benjamin Franklin, derives from words he wrote for the Pennsylvania Assembly in its Reply to the Governor, dated Nov. 11, 1755: “Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.” Pennsylvania Assembly: Reply to the Governor, in *Votes and Proceedings of the House of Representatives*, 1755–1756 (Philadelphia, 1756), FOUNDERS ONLINE 19–21, <https://founders.archives.gov/documents/Franklin/01-06-02-0107>

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## INTRODUCTION

In the United States, because of the widely accepted belief in the “right to know” information of public concern, freedom of speech generally overrides public figures’ right to privacy. As a result, public figures have almost no right to privacy, even when the published information is false. The digital era brings new threats to public figures’ privacy and invokes the need to rethink this norm. We agree with the notion that public figures, by virtue of their position in society, waive a substantial part of their right to privacy when there is an important and legitimate purpose behind informing the public of certain information. However, we depart from the United States’ legal norm by maintaining that, under certain conditions, public figures should be able to enjoy a right to privacy similar to that afforded to private citizens. In support of this proposition, we have developed a Three Principle Filtering Model, to be used in determining whether or not the rationale

for publishing information about public figures is legitimate and hence should be allowed or prohibited. The Three Principle Model requires an analysis of (1) the relevancy of the private information to the public and (2) whether access to the information is necessary for imparting knowledge, and then the application of (3) a proportionality rule. We argue that the current legal norm in the U.S. is excessively permissive, allowing virtually any publication about public figures and too often resulting in the exposure of private information to an extent that is neither reasonable nor legitimate. Our model, while accepting the public right to know (unlike other models), better balances this right against competing values. It also sheds light on the debate surrounding the privacy of public figures from different angles than those examined by the U.S. Supreme Court. The Supreme Court's rulings on public figures were shaped by defamation cases and sound mainly in First Amendment issues, emphasizing freedom of expression and freedom of the press. This perspective sets the public and the press as protagonists, whereas our model, focusing on the issue of privacy, locates individuals at the center of the discourse. Moreover, the prevailing privacy norm is based on liberal conceptions, whereas our approach is more grounded in personality theories that enable a "balloon" of privacy, even within public domains, including cyberspace. The Supreme Court did not account for the digital era when shaping its tests. Our model is not based on any specific jurisdiction and can be implemented worldwide.

We argue that when the public's only interest is to invade privacy for the sake of curiosity (snooping, gossip or perverted behavior), where the information does not carry any valuable influence over the person looking for the information—publication of private information about public figures will not be justified. Further, the joy people obtain from invading someone else's private and intimate life does not justify the harm to that person's privacy, and allowing this kind of invasion contradicts the fundamental values of freedom, autonomy, and dignity.

Our proposed model may help policy makers in the process of filtering between justified and unjustified publications of private information about public figures, while preserving space in their balloon of privacy.

Part I addresses the problem that the digital era brings into the discussion of public figure privacy. Part II defines public figures and analyzes the varying definitions of private information as it pertains to this article's discussion. Part III offers a background on the right to privacy and its origins in the U.S. legal system. In particular, it describes U.S. privacy law in the context of the First and Fourth Amendments of the U.S. Constitution. This discussion includes a contrast with the European approach, which differs by focusing on personal dignity and, hence, personal control over one's public image. Part IV presents the new Three Principle Filtering Model for determining what information about public figures should be protected. Fi-

nally, Part V discusses the legal tools needed to implement the proposed Three Principle Filtering Model.

### I. PRIVACY OF PUBLIC FIGURES IN THE DIGITAL ERA

When movie star Jennifer Lawrence, who rose to fame for her portrayal of the heroine in the popular *Hunger Games* films, uploaded photos to her iCloud account, she never paused to consider that they could be considered fair game by a relentless media eager to capitalize on her fame. But in September, 2014, hackers targeted her account and, to their delight, found, and were able to download and republish, the actress's private photographs, including, to Ms. Lawrence's utter dismay, a number of private nude photos.<sup>2</sup> The incident sparked controversy, drawing attention not only to the vulnerabilities of Apple's virtual data storage service and the Internet in general,<sup>3</sup> but also to the old debate as to whether or not people whose fortunes are based on their fame and public image have any right to keep any part of their lives private.<sup>4</sup>

The conflict between the public's right to have access to information, on the one hand, and, on the other hand, individual privacy rights has been magnified in the digital age by the intensive use of the Internet. Its usage has emerged as a primary source of information for a tremendous number of people who interact daily on a massive scale via a variety of social media platforms.<sup>5</sup> These tools include wall posts, tweets, hash-tags, photo tagging, and the ability to share pictures, videos, and music.<sup>6</sup> During the past decade the ascendance of Big Data, tsunami of data security breaches, broad internet access, growth of Internet behavioral marketing, and proliferation

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<sup>2</sup> Andrea Peterson, Emily Yahr & Joby Warrick, *Leaks of Nude Celebrity Photos Raise Concerns About Security of the Cloud*, WASH. POST (Sept. 1, 2014), [http://www.mudesign.net/webdesign/stolen\\_photos.pdf](http://www.mudesign.net/webdesign/stolen_photos.pdf).

<sup>3</sup> See, e.g., Issie Lapowsky, *We'd All Benefit if Celebs Sue Apple Over the Photo Hack*, WIRED (Sept. 4, 2014, 6:30 AM), <http://www.wired.com/2014/09/law-apple-photo-hack/> (noting that some legal and cybersecurity experts have called for a lawsuit over the 2014 hack in order "to push Apple and other online companies to more aggressively protect the people using their services"); Susannah Guthrie, *Hack Job: JLaw and the Risks of iCloud*, THE NEW DAILY (Sep. 1, 2014), <http://thenewdaily.com.au/life/2014/09/01/hidden-risks-icloud-jennifer-lawrence/> (warning that "[e]veryone who uses the iCloud is vulnerable to . . . hacking"); Laurel O'Connor, *Celebrity Nude Photo Leak: Just One More Reminder That Privacy Does Not Exist Online and Legally, There's Not Much We Can Do About It*, GGU L. REV. BLOG, Paper 30 (2014), [http://digitalcommons.law.ggu.edu/ggu\\_law\\_review\\_blog/30](http://digitalcommons.law.ggu.edu/ggu_law_review_blog/30) (noting that the 2014 iCloud leak "was the largest leak of its kind to happen all at once").

<sup>4</sup> *Cover Exclusive: Jennifer Lawrence Calls Photo Hacking a "Sex Crime,"* VANITY FAIR (Oct. 7, 2014, 8:54 AM), [http://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-cover?mbid=social\\_twitter](http://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-cover?mbid=social_twitter).

<sup>5</sup> Millions, if not billions, interact online using social media every single day. JOSÉ VAN DIJCK, *THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA* 4 (2013).

<sup>6</sup> *Id.* at 3-4.

of tracking technologies have come to influence everyone's life—and, according to this paper, ordinally affect public figures, about whom the public is not just eager to swallow every detail but also has asserted a sense of entitlement, a right to know, especially in the U.S..<sup>7</sup>

“We are in the midst of an information revolution,” the implications of which “we are only beginning to understand.”<sup>8</sup> Once data is posted on the web it becomes eternal (despite the Google Spain court decision on the so-called right to be forgotten, which, technologically, cannot be fully implemented).<sup>9</sup> The fact that online publications can reach a virtually infinite amount of users all around the globe coupled with the possibility that data might be everlasting invites policy makers to consider finding a better balance between these two conflicting rights in general. More specifically, publications that remain for many years appear at the forefront of the conflict. In other words, we should reconsider traditional legal norms about the (almost) absolute right of the public to know as it conflicts with the personal privacy concerns of public figures by giving more deference to the latter. When doing so, we should think about new tools, recognizing and legitimating both conflicting interests and helping us distinguish between legitimate and illegitimate uses of private information (including photos) affording some semblance of privacy, even to public figures.

This article will suggest a model, based on modern tools, which challenges the existing court decisions and better balances the classically conflicting rights of privacy and free expression.

The Model goes along the justifications given in the Terry Gene Bollea (known publicly by the name Hulk Hogan) trial against Gawker Media, which provides an example of right to privacy case in an online context. In that case, the Sixth Judicial Circuit of Florida protected the right to privacy of Hogan—a well known public figure—and granted him more than 115 million dollars in damages following the publication of a sex tape on Gawker's website, even though Hogan had made his sex life public in many other

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<sup>7</sup> See Scott J. Shackelford, *Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures*, 49 AM. BUS. L.J. 125, 126 (2012) (noting that there has been “an increase in privacy violations, facilitated by new advanced surveillance technologies, which are feeding the appetites of people who want to know more about public figures of all types”); Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1881 (2013) (explaining that, given the volume of data-collection practices, it is impossible for individuals to effectively manage their own privacy).

<sup>8</sup> Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1394 (2001).

<sup>9</sup> Google Spain SL v. Agencia Española de Protección de Datos, Case C-131/12, E.C.R., ¶ 100(4) (May 13, 2014) [http://curia.europa.eu/juris/document/document\\_print.js?doclang=EN&docid=152065](http://curia.europa.eu/juris/document/document_print.js?doclang=EN&docid=152065).

instances. The court held the website liable for violating the public figure's privacy and publicity rights when posting the tape in the Internet.<sup>10</sup>

## II. A PUBLIC FIGURE – WHO ARE YOU?

### A. *Can Anyone Be a Public Figure?*

Recently, Rolling Stone Magazine published an interview by actor Sean Penn of a notorious drug lord known as “El Chapo,” calling him “the most wanted man in the world.”<sup>11</sup> Consider the similarities—and differences—between either the author or the subject of this interview and an innocent person who involuntarily was the victim of a crime or a happenstance bystander at a demonstration, accident site, or other newsworthy location. Despite the differences in choices made by each, all of them—the Hollywood film actor, the international criminal, and the involuntary victim of circumstance—are all equivalently considered public figures, subject to exposure of their public as well as personal lives in the eyes of the law.<sup>12</sup>

We find that the answer to the question, “Can anyone be a public figure?” is absolutely positive. This means that any one of us could suddenly be facing the consequences of exposed private details about our lives without any control.

The U.S. courts have used a great many examples to define the category of “public figure,” including, but not limited to: (1) celebrities (i.e., people from the entertainment sector);<sup>13</sup> (2) those holding or formerly holding pub-

<sup>10</sup> *Bollea v. Gawker Media LLC*, No. 522012CA012447, 2016 WL 4073660, at \*1 (Fla. Cir. Ct. June 8, 2016) (declaring final judgment against Gawker). A few months after the decision, Gawker filed for chapter 11 bankruptcy, and the case subsequently settled. Sydney Ember, *Gawker and Hulk Hogan Reach \$31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), [https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html?\\_r=1](https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html?_r=1). Relatedly, consider the argument posed by President Donald Trump during his campaign that the U.S. should reform libel laws to make it easier to sue news organizations, a task that's at least a bit more difficult than the President made it sound. Adam Liptak, *Can Trump Change Libel Laws?*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html> (arguing libel law is a state-law tort, and the president cannot change them).

<sup>11</sup> Sean Penn, *El Chapo Speaks: A Secret Visit with the Most Wanted Man in The World*, ROLLING STONE (Jan 9, 2016), <http://www.rollingstone.com/culture/features/el-chapo-speaks-20160109>.

<sup>12</sup> See Jeffrey Omar Usman, *Finding The Lost Involuntary Public Figure*, 2014 UTAH L. REV. 951, 952 (claiming that “involuntary public figures” as category of individuals in American defamation and First Amendment jurisprudence “has become lost”).

<sup>13</sup> See, e.g., *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1141 (7th Cir. 1985) (“Entertainers can therefore be public figures for purposes of a publisher’s . . . First Amendment defense to a charge of false-light invasion of privacy.”); *Ann-Margret v. High Soc’y Magazine, Inc.*, 498 F. Supp. 401, 404 (S.D.N.Y. 1980) (“There is little doubt that the plaintiff, who has starred in numerous movies and television programs over the last decade or so, is, as the term has come to be understood, a ‘public figure.’”).

lic office, including politicians and other elected officials;<sup>14</sup> (3) criminals;<sup>15</sup> (4) inventors, researchers, and academics;<sup>16</sup> (5) war heroes;<sup>17</sup> (6) figures from the news;<sup>18</sup> and (7) unwilling or unexpected public figures (e.g., someone who was at the scene of a crime or in a demonstration),<sup>19</sup> amongst others.<sup>20</sup>

The definition of public figure is so broad that the group of public figures (who might suffer from being an open book to the public) includes not only *future public figures*, who one day after many years might be public figures but also *third parties*, such as relatives of people who might become public figures in the future. The case of *Friedan v. Friedan* is one of the best examples. In this case, Betty Friedan's husband was declared as public figure, retrospectively, regarding information from twenty-five (25!) years before she became famous as a feminist leader.<sup>21</sup>

The U.S. legal definition of "public figure" includes those involved in past and contemporary events that might capture the public interest.<sup>22</sup> Even after many years have gone by, one-time public figures "hold" their

14 See, e.g., *Gertz v Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (stating that politicians who have become household names are "deemed public figures for all purposes" because they "occupy positions of such persuasive power and influence"); *Biskupic v. Cicero*, 756 N.W.2d 649, 657 (Wis. Ct. App. 2008) (holding that a former Wisconsin district attorney remained a public figure after his term as a public official ended because of ongoing publicity surrounding his actions, both while he was district attorney and afterward).

15 See, e.g., *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1085 (3d Cir. 1985) ("Although the criminal activity, by itself, may not create public figure status, such activity may, nevertheless, be one element in a mix of factors leading to that classification."); *Rosanova v. Playboy Enters.*, 580 F.2d 859, 860–61 (5th Cir. 1978) (determining Plaintiff was a public figure in a case where an article referred to him as a "mobster").

16 See, e.g., *Thompson v. Curtis Publ'g Co.*, 193 F.2d 953, 954 (3d Cir. 1952) (holding that an inventor became a public figure after patenting an invention, analogizing to a playwright publishing a play); *Carlisle v. Fawcett Publ'ns, Inc.* 20 Cal. Rptr. 405, 414 (Cal. Dist. Ct. App. 1962) (labeling "actors and actresses, professional athletes, public officers, noted inventors, explorers, [and] war heroes" as public figures).

17 See, e.g., *Stryker v. Republic Pictures Corp.*, 238 P.2d 670, 672 (Cal. Dist. Ct. App. 1951) ("We think that men who are called to the colors subject their activities in that particular field to the public gaze and may not contend that in the discharge of such activities their actions may not be publicized."); *Molony v. Boy Comics Publishers*, 98 N.Y.S.2d 119 (N.Y. App. Div. 1950) (explaining that "plaintiff became a national figure in connection with" his heroic deeds as an "assistant pharmacist's mate in the United States Coast Guard").

18 See, e.g., *Flowers v. Carville*, 310 F.3d 1118, 1119 (9th Cir. 2002) (holding that public figure status could be achieved by inviting media attention in publicizing a purported affair with a prominent political leader). Gennifer Flowers, the plaintiff, held a press conference where she played audio recordings of intimate phone calls from then-presidential-candidate Bill Clinton that she had secretly taped. *Id.*

19 See *Gertz*, 418 U.S. at 345 ("Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.").

20 For a discussion of additional court decisions, see W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 117, at 860 (5th ed. 1984), and LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 873 (2d ed. 1988).

21 *Friedan v. Friedan*, 414 F. Supp. 77, 78–79 (S.D.N.Y. 1976).

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

status, enabling open access for the public to gain private information about one's life in patronage of U.S. law. The seminal 1940 case of James Sidis is a good example.<sup>23</sup>

Sidis was a gifted (genius) child raised up by his father to be so.<sup>24</sup> He spoke many languages before other children learned how to speak, lectured mathematicians on the topic of four dimensional bodies when he was eleven years old and graduated from Harvard when he was sixteen.<sup>25</sup> He suffered tremendously from public attention, leading to a nervous breakdown most likely caused by all the unwanted attention. He escaped publicity by moving away and starting a private simple life (working with adding machines and other simple tasks) instead of being the genius professor at Harvard and granting the world great scientific achievements.<sup>26</sup> However, the media kept on haunting him for many years and eventually published an article titled *Where Are They Now?* featuring Sidis as “the unwilling subject of a brief biographical sketch and cartoon printed in *The New Yorker* weekly magazine.”<sup>27</sup> Sidis brought suit against *The New Yorker*. The Supreme Court denied a writ of certiorari to review an opinion of the Second Circuit that set forth the doctrine of the permanent public figure, which has not dramatically changed over the years since.<sup>28</sup> In the Second Circuit opinion, Sidis was dismissed as a public figure with no right to challenge personal publicity. Judge Charles Edward Clark expressed sympathy for Sidis, who claimed that the publication had exposed him to “public scorn, ridicule, and contempt”<sup>29</sup> and caused him mental problems—but found that the court cannot give “all of the intimate details of private life an absolute immunity from the prying of the press” based on the high value placed on freedom of speech.<sup>30</sup>

The cases that address public figures have done little over the last century to change the problematic concept of the permanency of public figure status with its attendant lack of privacy protection. “One who has achieved public figure status finds it nearly impossible to shed. More importantly, the retention of public figure status presents incredible hurdles for defamation and privacy plaintiffs.”<sup>31</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> Samantha Barbas, *The Sidis Case and the Origins of Modern Privacy Law*, 36 COLUM. J.L. & ARTS 21, 26 (2012).

<sup>25</sup> Olympia R. Duhart, *When Time Stands Still: An Argument for Restoring Public Figures to Private Status*, 27 NOVA L. REV. 365, 365, 382 (2002).

<sup>26</sup> Barbas, *supra* note 24, at 21.

<sup>27</sup> *Sidis*, 113 F.2d at 807.

<sup>28</sup> *Sidis v. F-R Publ'g Corp.*, 311 U.S. 711, 711 (1940) (denying certiorari); *see also* Barbas, *supra* note 24, at 66–67.

<sup>29</sup> GINI GRAHAM SCOTT, *THE DEATH OF PRIVACY: THE BATTLE FOR PERSONAL PRIVACY IN THE COURTS, THE MEDIA, AND SOCIETY* 148 (2011) (citation omitted).

<sup>30</sup> *Sidis*, 113 F.2d at 809; Duhart, *supra* note 25, at 366–67, 384–85 (discussing the problem of privacy of one-time public figures and presenting a test for restoring them to private status).

<sup>31</sup> Duhart, *supra* note 25, at 384–85; *see also Sidis*, 113 F.2d at 809.

Over the years the U.S. Supreme Court has added to its definition of public figures. Starting with the *Gertz* case and in cases that followed, the Court considered several components to arrive at the definition of a public figure.<sup>32</sup> The Court construed the definition case by case with different figures, developing a few main components of its definition of a public figure:

*First, access and control over the media.*

Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.<sup>33</sup>

*Second, enrollment in a special role in the public eye.* “Public Figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport, or in any other domain.”<sup>34</sup>

An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society’s interest in the officers of government is not strictly limited to the formal discharge of official duties . . . . Those classified as public figures stand in a similar position.<sup>35</sup>

According to the Court’s analysis in *Gertz*, Gertz did not meet this second component of the test. Neither did he have access to media in the manner that public figures and officials usually enjoy, nor had he invited the risk of publication, associated with close public scrutiny. Being an attorney, he did not discuss the case with the media and therefore lacked the opportunity to rebut claims.<sup>36</sup>

32 *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 325, 344–45 (1974) (discussing 1968 case in which a Chicago policeman named Nuccio shot and killed a youth). Elmer Gertz, a famous Chicago attorney, had been hired by the victim’s family for their case against the police. *Id.* at 325. Gertz’s role in the civil suit against the police officer prompted an article in the American Opinion, which accused Gertz of being “an architect of [a] ‘frame-up’” of policeman Nuccio and stated that Gertz had a criminal record, labeled Gertz “Leninist” with longstanding communist affiliation, and claimed he was an official of the “Marxist League for Industrial Democracy.” *Id.* at 326. The statements contained serious inaccuracies and falsehoods. Gertz sued for libel. *Id.* at 327. For additional discussion of some of the Court’s considerations in *Gertz*, see also Ernest D. Giglio, *Unwanted Publicity, the News Media, and the Constitution: Where Privacy Rights Compete with the First Amendment*, 12 AKRON L. REV. 229, 238 (1978). And for explanation as to why injury to official reputation is not protected, as well as considerations weighing in favor of and against limiting liability of news outlets, see GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 139, 143 (1999).

33 *Gertz*, 418 U.S. at 344.

34 Eur. Parl. Ass., *Right to Privacy*, 24th Sess., Res. No. 1165 (1998); Shackelford, *supra* note 7, at 128.

35 *Gertz*, 418 U.S. at 344–345; Carol Anne Been, Note, *Public Status Over Time: A Single Approach to the Retention Problem in Defamation and Privacy Law*, 1982 U. ILL. L. REV. 951, 954–55 (“[A] public figure is one who has assumed a role of special prominence in society and thus invites public scrutiny and the accompanying risks.”).

36 *Gertz*, 418 U.S. at 352 (affirming the trial court’s refusal to characterize Gertz as a public figure.)

*Third, willingly (voluntarily) choosing to engage in a public role, inviting invasion of privacy risks.*<sup>37</sup> “[T]hose classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved,” thereby inviting “attention and comment.”<sup>38</sup>

The ethics code of professional journalists cautions: “Realize that private people have a greater right to control information about themselves than public figures and *others who seek power, influence or attention.*”<sup>39</sup> Consequently, media must weigh the consequences of publishing or broadcasting personal information.

Rape victims are an excellent example of figures that, although meeting the criterion of enrollment in a special role in the public eye, neither meet the criterion of *willingly (voluntarily) choosing the engagement in a public role* nor of having *control over the media* (like a president candidate). Therefore, a decision holding that a rape victim’s claim of invasion of privacy against a newspaper for publishing her name was barred by the First Amendment is, in our view, erroneous.<sup>40</sup>

*Fourth, public controversy.* Discussing a publication about the divorce of Russell Firestone, a member of one of America’s wealthiest families, the Court held that the issue of the dissolution of a marriage was not a type of “public controversy” and therefore would be considered a private rather than public figure.<sup>41</sup>

We claim that these definitions are too broad and in many ways lack legitimacy because they don’t distinguish between “true” public figures and any others. In the present scheme, everyone has potential to be considered, in one way or another, a public figure. Instead, we suggest that a person is a public figure if he or she meets the criteria as one who may influence the public in general or any group per se. General interest in a public figure is a measure of the potential influence this figure has, or might have, on the public.<sup>42</sup> A variety of reasons might arouse interest in the public figure,

<sup>37</sup> See *id.* at 345.

<sup>38</sup> *Id.*

<sup>39</sup> *SPJ Code of Ethics*, SOC’Y PROF. JOURNALISTS (Sept. 6, 2014, 4:49 PM), <https://www.spj.org/ethicscode.asp> (emphasis added).

<sup>40</sup> See *Fla. Star v. B. J. F.*, 491 U.S. 524, 535–36 (1989). It is also wrong based on the proportionality test.

<sup>41</sup> *Time, Inc. v. Firestone*, 424 U.S. 448, 450–55 (1976) (holding that *Time* magazine erroneously reported that the divorce was granted on the grounds of adultery). Mrs. Firestone sued the magazine for libel. *Id.* at 452. Part of the final judgment alluded to wild allegations that surfaced during divorce proceedings: testimony given on the defendant’s behalf described the plaintiff’s “extramarital escapades” that “were bizarre and of an amatory nature which would have made Dr. Freud’s hair curl.” *Id.* at 450; see also Duhart, *supra* note 25, at 374–75 (noting that the *Time, Inc.* Court “rejected the public status of the plaintiff, applying the controversy standard”).

<sup>42</sup> For different definitions, see *KEETON ET AL.*, *supra* note 20, at 859–60 (“A public figure . . . includes . . . anyone who has arrived at a position where public attention is focused upon him as a person.”).

such as his or her achievements, reputation, lifestyle, profession, and position or role in the public eye. These facts can give the public a legitimate interest in learning more details about the public figure, including his or her comments, omissions, activities, habits and behavior (or misbehavior).<sup>43</sup>

We contend that the interest in access to private information about public figures is legitimized by cumulative factors: (1) the public figure's potential influence (whether direct or indirect) on members of the public, and (2) the value and impact of the information on the public if exposed. We claim that when the data is relevant, the public has a legitimate right to know this information. We further argue that in the U.S., the "right to know" and freedom of speech generally override public figures' right to privacy. In the case of a conflict between the two, revealing more traditionally private information than one normally would have is justified. Still, one has to designate some limits to avoid publication of data regarding public figures that do not meet certain criteria, such as the relevancy of the information.

The broadest definition of a public figure identifies *everyone* as having the potential to become a public figure at any point in one's life.<sup>44</sup> Public figures include not only people with a high probability of becoming public figures, such as political candidates or party members, but potentially each and every one of us.<sup>45</sup> However, our discussion will focus only on currently existing public figures. We do so to differentiate among the norms which apply to true public figures versus those that apply to every person, as we think privacy should be adjusted to account for the special features of public figures and cannot be implemented on everyone in advance. We do claim that the status of an existing public figure compared to the status of an anonymous person that may or may not become a public figure one day is totally different from the privacy perspective. The protection of privacy, on the one hand, and the waiver of privacy for the purpose of public interest,

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43 *Cason v. Baskin*, 30 So. 2d 635, 638 (Fla. 1947) (en banc) ("It is true that a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, may be said to have become a public personage, and to that extent he thereby relinquishes at least a part of his right of privacy."). In *Cason*, the court found that Marjorie Kinnan Rawlings Baskin, author of *The Yearling*, "reasonably believed that the public would be interested in her autobiography," which covered the period of her life in rural Florida. *Id.* at 637.

44 See Aaron Larson, *Defamation: Libel and Slander*, EXPERTLAW.COM (Nov. 9 2014), [http://www.expertlaw.com/library/personal\\_injury/defamation.html#3](http://www.expertlaw.com/library/personal_injury/defamation.html#3) ("A person can become an 'involuntary public figure' as the result of publicity, even though that person did not want or invite the public attention . . . . A person can also become a 'limited public figure' by engaging in actions which generate publicity within a narrow area of interest.").

45 Ordinary people may become "involuntary public figures" when they take part in an event or occurrence of public significance, such as a crime, an accident, or a spontaneous act of heroism. See 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 141 (2005) ("An individual may achieve such pervasive fame or notoriety that he or she becomes a public figure for all purposes and in all contexts, provided that he or she has a pervasive involvement in the affairs of society.").

on the other hand, function differently for public figures and non-public figures, who might (or might not) become public figures in the future. Having said that, we welcome future discussions about anonymous people turning into public figures as a special category requiring different norms with respect to the matter of privacy in various cases.

As the next step toward understanding privacy within the context of the public interest or “right to know” private information about public figures, we need to define the term “private information.”

### B. *What Information Should Stay Private for Public Figures?*

The definitions of private information with respect to the discourse about the public figures’ right to privacy range from broad to narrow. At the broad end of the spectrum, “[i]nformation should be regarded as being ‘personal information’ if it is information about a natural person from which, or by use of which, the person can be identified,”<sup>46</sup> while the narrow end of the spectrum includes more specific data about a person that is not usually exposed to the public, such as credit history<sup>47</sup> or sexual information.<sup>48</sup>

All relevant definitions we use in this paper should comply with Parker’s threshold of the three criteria: true, simple, and useful.<sup>49</sup> They should also comport with the five tests Parker enumerated: “(1) whether a person *has* lost or gained privacy, (2) whether he *should* lose or gain privacy, (3) whether he *knows* that he has lost or gained privacy, (4) whether he *approves or disapproves* of the loss or gain, and (5) how he *experiences* that loss or gain.”<sup>50</sup>

While concerns about information privacy abound, this paper’s narrow focus is on the public interest in accessing private information about public figures. Accordingly, we refer to information that can be grouped into the following primary categories: medical information, criminal information, sexual information, financial information, identifying information (home address, family status, social activities), and misbehavior. The dissemination of any of these types of details about a public figure may violate his or her balloon of privacy, in favor of the public’s right to gain access to this information, which we define as private.

46 2 COMMONWEALTH OF AUSTRALIA LAW REFORM COMMISSION, PRIVACY, § 1198 (1983).

47 Fair Credit Reporting Act, 15 U.S.C. § 1681(a)(4) (2012) (“There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.”).

48 See *38 States + DC Have Revenge Porn Laws*, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited May 2, 2017) (listing 38 states that have revenge porn statutes).

49 See Richard B. Parker, *A Definition Of Privacy*, 27 RUTGERS U. L. REV. 275, 277 (1974) (prescribing characteristics that to which definitions of privacy should aspire).

50 *Id.* at 278.

This definition is important to our model, which aims to formulate a distinction between legitimate and illegitimate private information on public figures. Before addressing the model and applying it to cases, however, we must explain the origins of privacy law in the U.S. that gave rise to present legal rules about public figures, which, in our opinion, is not applicable as is in the current digital era.

### III. THE LAW OF PRIVACY FOR PUBLIC FIGURES

#### A. *The U.S. Attitude Toward Privacy—The Constitutional Roots*

##### 1. *The U.S. Constitutional Origin—First Amendment Freedom Of Expression*

Privacy as a legal concept has been recognized by many scholars as “elusive and ill defined.”<sup>51</sup> According to Daniel Solove, the multitude of definitions produced by scholars can be narrowed down to six basic conceptions of privacy, including: “(1) the right to be let alone; (2) limited access to the self; (3) secrecy; (4) control of personal information; (5) personhood; and (6) intimacy.”<sup>52</sup> The definition of privacy for the purposes of this Article focuses on the psychological aspects of the term and, more specifically, the perceived personal “balloon,” or sphere of a private zone, that centers on themes such as autonomy, freedom, and creating relationships.<sup>53</sup> Accordingly, this paper will conceptualize privacy in a unique way by relying on the conceptual balloon of privacy that surrounds each and every one of us, including public figures.

We claim that privacy as a right was first recognized by the U.S. in a case involving the publication of private details about public figures weighed against the public interest in exposure of this information. The focus of this U.S. approach to privacy in general and with respect to public figures’ publicity is based on the freedom of speech, the right to know and

<sup>51</sup> See, e.g., Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 393 (1978) (“The concept of ‘privacy’ is elusive and ill defined. Much ink has been spilled in trying to clarify its meaning.”); see also James Q. Whitman, *The Two Western Cultures Of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1154-55 (2004) (explaining that privacy is embarrassingly difficult to define and that it differs strangely from one culture, seemingly undermining the importance of keeping privacy as a goal to protect personhood).

<sup>52</sup> Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1094 (2002).

<sup>53</sup> See Shlomit Yanisky-Ravid, *To Read or Not to Read: Privacy Within Social Networks, the Entitlement of Employees to a Virtual “Private Zone,” and the Balloon Theory*, 64 AM. U. L. REV. 53, 80-86 (2014) (introducing balloon theory for the first time); see also PAUL BERNAL, INTERNET PRIVACY RIGHTS: RIGHTS TO PROTECT AUTONOMY 8-9 (2014) (claiming that individuals gain autonomy to the extent that they hold rights to control personal data and explaining that the internet poses challenges to individual control over such data) privacy in many ways but it can be controlled if we will be aware of the importance of); *infra* Part IV.A.

have access to information, the importance of the media and freedom of the press, a perspective favoring the public and democratic values against restricting discourse.<sup>54</sup> This aspect was not emphasized in the famous 1890 Harvard Law Review article, *The Right to Privacy* by Louis Brandeis and Samuel Warren.<sup>55</sup> What inspired that article remains unknown, but it has been suggested that Warren was particularly displeased by newspaper articles revealing details of his wedding to the daughter of a senator.<sup>56</sup> Following the famous article's publication, the U.S. legal system has recognized privacy as an enforceable legal right.

The general legal origin of privacy rights in the U.S. is grounded in the Fourth Amendment, which entitles people to the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."<sup>57</sup> The Fourteenth Amendment provided a different form of privacy when it served as the justification for women's rights to control their own bodies.<sup>58</sup>

The constitutional basis to privacy seems to conflict with another very important U.S. constitutional right—the freedom of expression. The U.S. cherishes the First Amendment, which protects freedom of expression, as fundamental to American liberty.<sup>59</sup> Freedom of expression permits free

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54 See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."); Shackelford, *supra* note 7, at 126 (positing that, as compared to Europe, the deep U.S. commitment to free speech, different understandings of the public interest, and varying legal cultures account for divergent understandings of privacy rights).

55 See Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193, 219–20 (1890) (arguing that individual Americans have an enforceable privacy right and that "the protection of society must come mainly through a recognition of the rights of the individual").

56 See Amy Gajda, *What if Samuel D. Warren Hadn't Married A Senator's Daughter?: Uncovering The Press Coverage That Led To The Right to Privacy* 2–3 (Ill. Pub. Law & Legal Theory Res. Papers Series, Research Paper No. 07-06, 2007) (explaining that coverage of Warren's marriage to his wife "may have . . . helped spark Warren and Brandeis's *The Right to Privacy*"); see also William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960) (describing journalists' interest in Warren's wife's personal affairs); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 966–967 (1964) (explaining that the source of Warren's frustration was "lurid newspaper gossip").

57 U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); see also JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 5 (2000) (proposing that Warren and Brandeis believed citizens' privacy right to not have their sex lives reported on by gossip columnists was an extension of the broader right to be let alone). *United States v. Johns*, 469 U.S. 478, 487–88 (1985) (holding that a law enforcement search of packages can be permissible so long as the individual's Fourth Amendment rights are not adversely affected).

58 See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (articulating that "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" involve "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment").

59 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

publication and (almost) free access to knowledge.<sup>60</sup> The First Amendment was the basis for many Supreme Court decisions enabling almost all publications about public figures.<sup>61</sup> At first glance, freedom of expression nearly overrides privacy rights and significantly minimizes the privacy regime.<sup>62</sup> In his book *Intellectual Privacy*, Neil Richards discusses the relationship between privacy and freedom of speech.<sup>63</sup> When these two are in conflict, freedom of speech will win because of the importance of free speech to open societies.<sup>64</sup> However, Richards suggests that speech and privacy are actually rarely in conflict. For example, while celebrity gossip might be a price to pay for free speech, the privacy of ordinary citizens can be upheld.<sup>65</sup>

## 2. *Diverse Attitudes and Different Sources of Privacy*

A different attitude with respect to privacy rights is reflected by European Law. Evidently, Continental Europeans and Americans perceive privacy quite differently. In fact, there is a significant conflict between the European personal dignity approach to privacy, which emphasizes a right to one's image, name, and reputation and a right to control one's public image and shield against unwanted public exposure, versus the liberal U.S. approach, emphasizing personal liberty (as it pertains to state control), and focusing on freedom of speech and freedom of expression.<sup>66</sup> The "prime enemy" of the

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right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

60 See Anupam Chander & Uy n P. e , *Free Speech*, 100 IOWA L. REV. 501, 508–24 (2015) (explaining how the constitutionally protected right to free speech has enabled the Internet to be a prominent source for free publication without censorship).

61 See, e.g., Amy Kristin Sanders, *Fast Forward Fifty Years: Protecting Uninhibited, Robust and Wide-Open Debate After New York Times Co. v. Sullivan*, 48 GA. L. REV. 843, 847–48 (2014) (profiling a number of cases where application of the First Amendment altered the standard for determining the privacy rights of public figures).

62 See AMY GAJDA, *THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS* 29–32 (2015) (highlighting the broad latitude given to news organizations to publish information).

63 NEIL RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* 95–108 (2015) (discussing the relationship between privacy and freedom of speech and arguing that the concept of "intellectual privacy" can make privacy and speech compatible).

64 See *id.* at 103 ("All Western societies share a foundational commitment to the freedom of speech on public matters—a belief that new ideas should be aired and given their say.")

65 See *id.* at 107–08 (arguing that restrictions on surveillance of private rights further free speech rights because they allow individuals to form new ideas without fear of publicity).

66 See Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092 (2001) (explaining the distinction between personal dignity and personal autonomy); Whitman, *supra* note 51, at 1155–56, 1160–61 (describing different habits that reflect the different attitudes toward privacy, such as the U.S. habit to share information about private matters with strangers and even ask questions about salaries, in a way which is "'difficult to imagine' for northern Europeans or Asians," and explaining that Continental law is avidly protective of privacy in many realms of life). For a

Continental conception is the media, whereas the media is the liberal Americans' most important tool for ensuring free expression.<sup>67</sup> "To people accustomed to the [Continental attitude toward privacy], American law seems to tolerate relentless and brutal violations of privacy in" many aspects of life.<sup>68</sup> Europe, in addition to many countries around the world, recognizes privacy as a firmly rooted fundamental right.<sup>69</sup> The different attitudes are reflected also with respect to posting information and pictures about public figures. For example, the circulation of nude photos of celebrities on the Internet has produced a conflict, with European courts alone acting to penalize Internet service providers.<sup>70</sup> Article 8 of the European Convention on Human Rights is one of the strongest milestones in protecting individuals' private information in Europe.<sup>71</sup> The differences between the European and American approaches to the right to be forgotten mirror of the differences between the European and U.S. approach to privacy.<sup>72</sup> To summarize this point, as Yale professor James Q. Whitman stated, "American privacy law seems, from the European point of view, simply to have 'failed.'"<sup>73</sup>

The right to privacy also appears in many international documents.<sup>74</sup> For example, Article 12 of the Universal Declaration of Human Rights states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."<sup>75</sup> Additionally, Article 8 of the European Convention on Human Rights states:

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comparative view of approaches to workplace privacy, see Yanisky-Ravid, *supra* note 53, at 96-99.

67 Whitman, *supra* note 51, at 1161.

68 *Id.* at 1156 ("Europeans grow visibly angry, for example, about routine American practices like credit reporting."). Grounding his argument in historical fact, Whitman explains that the dignity approach is the result of a revolt against the privilege of high status persons, who could protect their personal honor in Continental courts of the aristocratic and monarchical societies of old Europe. *Id.* at 1165-66.

69 See 2000 O.J. (C 326) 10, art. 7 ("Everyone has the right to respect for his or her private and family life, home and communications."). Article 8 of the EU Charter extends Article 7's right to privacy to the protection of personal data, which sets the EU Charter apart from other major human rights documents. *Id.* at art. 8 (1) ("Everyone has the right to the protection of personal data concerning him or her.").

70 See Whitman, *supra* note 51, at 1196-201 (describing European protection of individuals who appear nude in public).

71 The Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Article 8, (entered into force Sep. 3, 1953)(outlining the right to respect for private and family life for all Europeans).

72 See *supra* Part III.A.1.

73 Whitman, *supra* note 51, at 1157.

74 See, e.g., LEE A. BYGRAVE, DATA PRIVACY LAW: AN INTERNATIONAL PERSPECTIVE 99-107 (2014) (discussing international tools in Europe and comparing national data privacy laws around the world).

75 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 12 (Dec. 10, 1948).

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>76</sup>

And finally, Article 17 of the International Covenant on Civil and Political Rights, 1966, states: “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”<sup>77</sup>

As seen above, the right to privacy has different meanings, different sources and different definitions.<sup>78</sup> Starting more than 100 years ago with Warren and Brandeis’s “right to be left alone,”<sup>79</sup> the diverse features of privacy have been highlighted by the continued dialogue as to its meaning by courts and scholars alike.

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<sup>76</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 222, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf). For a discussion on the meaning of private life under the treaty, see IVANA ROAGNA, COUNCIL OF EUROPE HUMAN RIGHTS HANDBOOKS: PROTECTING THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS 12 (2012), [http://www.echr.coe.int/LibraryDocs/Roagna2012\\_EN.pdf](http://www.echr.coe.int/LibraryDocs/Roagna2012_EN.pdf) (“The Strasbourg Court has never offered a clear and precise definition of what is meant by private life: in its view it is a broad concept, incapable of exhaustive definition . . . [T]he notion of private life is much wider than that of privacy, encompassing a sphere within which every individual can freely develop and fulfil his personality, both in relation to others and with the outside world. Instead of providing a clear-cut definition of private life, the Court has identified, on a case-by-case basis, the situations falling within this dimension. The result is a rather vague concept, which the Court tends to construe and interpret broadly . . .”).

<sup>77</sup> International Convention on Civil and Political Rights art. 17, Dec. 19, 1966, 999 U.N.T.S. 171, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>.

<sup>78</sup> See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person . . .”); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (“[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.”); *Park Univ. Enters. v. Am. Cas. Co.*, 442 F.3d 1239, 1250 (10th Cir. 2006) (“[I]n layman’s terms, ‘[t]he plain and ordinary meaning of privacy includes the right to be left alone.’” (quoting *Park Univ. Enters. v. Am. Cas. Co.*, 314 F. Supp. 2d 1094, 1110 (D. Kan. 2004))); Patricia Sanchez Abril, *Selling Privacy*, in *THE INFORMATION ERA AND ADVANCED TECHNOLOGY: NEW CHALLENGES IN PRIVACY AND INTELLECTUAL PROPERTY LAW* (Shlomit Yanisky-Ravid ed., forthcoming 2018) (manuscript at 6), <http://www.alsb.org/wp-content/uploads/2015/01/NP-2014-Selling-Privacy-Abril.pdf> (“In general, privacy law can be defined as the government’s ability to restrict the penetration into one’s private space and the use, transfer, or disclosure of certain personal information.”).

<sup>79</sup> Warren & Brandeis, *supra* note 55, at 193.

Theoretical justifications of privacy can be divided into a few schools of thought: Law and Economics, Distributive Justice, Feminist Theory, and Personality and Psychological Reasoning.<sup>80</sup>

Whereas Professor Posner wrote about economic value, the importance of privacy rights, and avoiding misuse in order to maintain trust, other scholars have focused on psychological aspects of privacy.<sup>81</sup> The Balloon Theory, which we rely on, describes privacy as a psychological bundle of feelings and beliefs.<sup>82</sup> This psychological state creates a zone surrounding the person where one keeps and protects his thoughts, emotions, and acts from interference by others in the public domain. Among other risks and harms caused by an invasion of someone's privacy is the detriment to personality traits like autonomy, freedom, dignity, and mental health. People whose privacy has been invaded and who have had personal information used against them have often experienced mental injury and helplessness.<sup>83</sup>

American scholars have argued that the idea behind privacy is the control of one's public image, name, and reputation over public disclosure of information about oneself.<sup>84</sup> The media plays an important role. Whereas the Europeans consider the media the greatest enemy of privacy in the sense of keeping one's dignity and controlling one's public image – the media in the U.S. liberty regime is one of the most significant democratic tools for exposing information and for control and criticism of governmental acts and actors.

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80 See generally Sanchez-Abril, *supra* note 78; Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980); see also Judith DeCew, *Privacy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2015), <http://plato.stanford.edu/archives/spr2015/entries/privacy> (presenting several scholars' arguments on the theory of privacy in the law).

81 See DeCew, *supra* note 80.

82 See Yanisky-Ravid, *supra* note 53, at 83–86 (establishing a “balloon theory” of personal privacy as a private sphere—analogue to an “intangible ‘balloon’”—which bundles one's psychological perceptions and emotions, and constantly and permanently surround one's persona wherever one goes—including within the public domain and digital media).

83 See, e.g., Post, *supra* note 66, at 2087 (discussing the “sense of violation” Monica Lewinsky must have felt when her private sexual life was “forcibly made public”); see also James P. Nehf, *Recognizing the Societal Value in Information Privacy*, 78 WASH. L. REV. 1, 13–14 (2003) (describing the sense of helplessness that results when strangers collect and have the ability to use private information against an individual (citing Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1419–23 (2001) (invoking the story of Joseph K. in, FRANZ KAFKA, *THE TRIAL* (Willa & Edwin Muir trans., 1937), as a metaphor to conceptualize problems with collecting mass data about individuals))).

84 See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 51 (1995) (describing the origins of individual tort claims for the invasion of the right of privacy and that the modern tort has “evolved into . . . branches,” including “unreasonable publicity given to another's private life, appropriation of another's name or likeness, and publicity that unreasonably places another in a false light before the public”); see also THOMAS NAGEL, *CONCEALMENT AND EXPOSURE: AND OTHER ESSAYS* 4 (2002) (arguing that having control over the boundary between what people share and what they conceal is one of the most important attributes of humanity).

This notion is amplified significantly in the development and expansion of the Internet in our digital age and has become most relevant to online publications about public figures.<sup>85</sup>

*B. The Loss Of Privacy for Public Figures in the U.S.*

*1. Public Figures Have (Almost) No Privacy Rights in the U.S.: The History Of Supreme Court Decisions Establishing the Superiority Rule of Freedom of Expression*

In a jurisdiction based on free speech, free media, the right of the public to know and democratic legal norms protecting the citizenry from governmental interference, we should not be surprised that the legal system sanctifies the old and the new media. Unfortunately, when discussing privacy (within the privacy discourse) the media (and the public interest to know) have become the great enemy of the value of privacy. The more advanced the technology, the less privacy may flourish.<sup>86</sup> To understand the legal current situation in the digital era for the purpose of suggesting a new model, we first have to understand the legal ruling regarding public figures in general.

The first milestone in the discourse on public figures within the U.S. was the Supreme Court case *New York Times Co. v. Sullivan*.<sup>87</sup> The history of public figures and the law is rooted in the analysis of this landmark decision of 1964.<sup>88</sup> The ruling provided guidelines and set forth the legal norm addressing the conflict between the right to know, freedom of speech, and the right of publicity on the one hand and the rights to privacy and to recover compensation against defamation on the other hand.<sup>89</sup>

Sullivan was one of three elected Commissioners in charge of the police of the City of Montgomery Alabama. He brought a civil libel action against the New York Times. The circuit court of Montgomery awarded him damages of \$500,000, the full amount claimed, and the Supreme Court of

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<sup>85</sup> As Whitman argues, this amplification has been spurred on by the free market. Whitman, *supra* note 51, at 1171.

<sup>86</sup> See Shackelford, *supra* note 7, at 127 (claiming that technological advances are “causing societies . . . to rethink the bounds of privacy rights”).

<sup>87</sup> 376 U.S. 254 (1964).

<sup>88</sup> L. B. Sullivan, one of three elected Commissioners in Montgomery Alabama, and who was in charge of the police department, claimed that an advertisement in the New York Times titled “Heed Their Rising Voices,” which called attention to civil rights violations in the South, referred to him by the word “police.” *Id.* at 256–58. The publication did not mention Sullivan’s name but included descriptions of brutal violence against a peacefully protesting Dr. Martin Luther King, Jr., including the bombing of his home, which almost killed his wife and child, as well as claims that Dr. King was arrested seven times and was charged with a felony which carried a ten-year prison sentence. *Id.* at 257–58.

<sup>89</sup> See Duhart, *supra* note 25, at 367 (stating that *N.Y. Times Co. v. Sullivan* “set the framework of media law unique to public officials and, subsequently, public figures”).

Alabama affirmed. The New York Times appealed.<sup>90</sup> The case was about a paid advertisement, entitled “Heed Their Rising Voices.”<sup>91</sup> Names were not mentioned but the word “police” identified Sullivan as the head of the police department. Sullivan, however, made no efforts to prove that he suffered actual damages or loss as a result of the alleged libel.<sup>92</sup>

Although the Court admitted that some of the statements were inaccurate,<sup>93</sup> it reversed the lower courts’ decisions, holding that the First Amendment provides safeguards for freedom of speech and the press.<sup>94</sup> The Court held that the need to criticize public officials should be protected and that journalists should not give pause for fear of defamation lawsuits. Free speech as a national interest hence prevailed, placing a limitation on defamation cases brought by officials.<sup>95</sup> According to the Supreme Court, “debate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include . . . unpleasantly sharp attacks on government and public officials.”<sup>96</sup> Therefore, public officials could not recover damages “for a defamatory falsehood relating to [their] official conduct [without proof] that the statement was made with ‘actual malice,’” meaning that the statement was made (1) “with knowledge that it was false,” or (2) “with reckless disregard of whether it was false or not.”<sup>97</sup> This means that simple negligence is not enough for public officials to recover from defamation by the press. Therefore, with such a high burden “the Court made it extremely difficult if not impossible for such officials to prevail in libel actions against media defendants.”<sup>98</sup> The result is that critics of public officials are

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<sup>90</sup> *Sullivan*, 376 U.S. at 256–58.

<sup>91</sup> *Id.* at 257–58 (quoting the advertisement, which stated: “Again and again the Southern violators have answered Dr. King’s peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for ‘speeding,’ ‘loitering’ and similar ‘offenses.’ And now they have charged him with ‘perjury’—a *felony* under which they could imprison him for *ten years*. . . .”). The advertisement cost about \$4,800 to publish. *Id.* at 260.

<sup>92</sup> *Id.* at 262.

<sup>93</sup> *Id.* at 258–59 (“It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery . . . Dr. King had not been arrested seven times, but only four.”); see also Duhart, *supra* note 25, at 368 (explaining that although the Court knew inaccurate statements had been made, it based its decision on more important policy considerations).

<sup>94</sup> *Sullivan*, 376 U.S. at 264.

<sup>95</sup> Usman, *supra* note 12, at 951–52 (describing the balancing process the Supreme Court used to construct the constitutional framework for adjudicating defamation actions).

<sup>96</sup> *Sullivan*, 376 U.S. at 270.

<sup>97</sup> *Id.* at 279–80 (Which states, “The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”).

<sup>98</sup> Elsa Ransom, *The Ex-Public Figure: A Libel Plaintiff Without a Class*, 5 SETON HALL J. SPORT L. 389, 392 (1995); see also Usman, *supra* note 12, at 961, n.76 (quoting *Sullivan*, 376 U.S. at 271–72 (quot-

not threatened by defamation cases, even when the publication contains lies.<sup>99</sup> Journalists were given extra leeway with respect to coverage of public officials, the main takeaway of this decision about defamation cases being that simple negligence in journalism—even that which resulted in false statements—does not give rise to liability in a defamation suit brought by public officials.<sup>100</sup>

There are some justifications behind this generosity towards journalists, among them: principles of free speech and press; the public's right to know and the need to criticize the government; fear of a chilling effect or self-censorship by the media;<sup>101</sup> and promotion of racial equality. However, voices against the decision expressed concerns about the promotion of journalistic abuse and misconduct; the exposure of public officials to blackmail; and the risk of exposure creating a deterrent to people considering public service.<sup>102</sup>

To those critics, we would add that the *New York Times* decision harms the right of privacy for public figures by nullifying their legitimate balloons entirely.

After *Sullivan*, public figures simply lost their privacy in the U.S. Many cases have shown how very far courts are willing to go without finding “reckless disregard.” Just four years after *New York Times*, the Supreme Court found that failure to investigate or seek any corroboration before publishing an allegation does not rise to the level of reckless disregard for the truth.<sup>103</sup> The first cases to follow *New York Times* were all about public officials. However, it did not take long for courts broaden the norm to include also public figures in the broader sense. Among many others are *Cur-*

ing *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (showing that the *New York Times Co. v. Sullivan* Court's ruling utilized language from the opinion in *NAACP v. Button*).

<sup>99</sup> See Usman, *supra* note 12, at 961 (quoting *Sullivan*, 376 U.S. at 280).

<sup>100</sup> See Duhart, *supra* note 25, at 368 (explaining that this resulted from the Supreme Court giving priority to the existence of a robust free press).

<sup>101</sup> See Kermit L. Hall, *Justice Brennan and Cultural History: New York Times v. Sullivan and Its Times*, 27 CAL. W. L. REV. 339, 351 n.67 (1991) (stating that lawsuits against the *New York Times* “represented a threat to the paper's balance sheet and, even more important, a chilling of its coverage of the civil rights movement,” and noting that plaintiffs sought, in total, \$5,600,000 in damages).

<sup>102</sup> See, e.g., Richard A. Epstein, *Was New York Times v. Sullivan Wrong?* 53 U. CHI. L. REV. 782, 817 (1986) (“On balance, the common law rules of defamation (sensibly controlled on the question of damages) represent a better reconciliation of the dual claims of freedom of speech and the protection of individual reputation than does the *New York Times* rule that has replaced it.”); see also Duhart, *supra* note 25, at 369–70 (stating that some critics of the *New York Times* decision claimed it “invites journalistic misconduct” and “will drive capable persons away from government service”).

<sup>103</sup> *St. Amant v. Thompson*, 390 U.S. 727, 732–33 (1968); see also *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (holding that the First Amendment protects deliberate alteration of quotes so long as “the alteration [does not] result[] in a material change in the meaning conveyed by the statement”); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 658 (1989) (reiterating that “a public figure plaintiff must prove more than an extreme departure from professional standards . . . [in order to] provide a sufficient basis for finding actual malice”).

*tis Publishing Co. v. Butts*.<sup>104</sup> This time the Court discussed a figure who did not necessarily meet the criterion of a public officials (unlike Sullivan). *Firstly*, the plaintiff was a famous football coach, James Wallace Butts Jr. (Wally Butts). *Secondly*, he was a Georgia University athletic director and as such was paid from private funds; therefore, he was a private employee and not a state one.<sup>105</sup> Butts filed a libel suit against Curtis Publishing after an article published in *The Saturday Evening Post* falsely accused him of “fixing” a football game.<sup>106</sup> The ultimate outcome of this case, and others to follow, was that First Amendment law as to public officials was extended to public figures who play no role in government.<sup>107</sup>

U.S. courts explicitly went on, expanding the *N.Y. Times v. Sullivan* case to public figures. In *Associated Press v. Walker*, a libel claim was brought by a man accused of inciting a riot against federal marshals.<sup>108</sup> The plaintiff, who was a national military figure with his own following (the “Friends of Walker”), was still not deemed a public official at the time the false news dispatch was released about him. According to the dispatch, Walker led opposition to federal efforts to enforce court ordered desegregation at the University of Mississippi.<sup>109</sup> Walker sued the publisher for libel, claiming the publication was false.<sup>110</sup>

In deciding *Butts* and *Walker*, the Supreme Court expanded the already broad definition of public official stated in *New York Times v. Sullivan* to an even broader one, expanding press protection to its coverage of any public figure. The borders between governmental and private sector thus gradually blurred.<sup>111</sup>

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104 *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 161 (1967) (Harlan, J., plurality opinion, announcing the judgments of the Court), *aff'g* 351 F.2d 702, *aff'g* *Butts v. Curtis Publ'g Co.*, 242 F. Supp 390 (N.D. Ga. 1964).

105 *Id.* at 135–36; Usman, *supra* note 12, at 962.

106 *Butts*, 388 U.S. at 135–37. Butts sued for 10 million dollars, but the initial jury award was for \$3,060,000. *Id.* at 137–38.

107 Duhart, *supra* note 25, at 372–73.

108 *See Butts*, 388 U.S. at 140. The Supreme Court combined the *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker* cases and issued a single opinion. *Id.* at 130 n.\*.

109 *Id.* at 140 (“[A] massive riot erupted because of federal efforts to enforce a court decree ordering the enrollment of a Negro, James Meredith, as a student in the University. The dispatch stated that respondent Walker, who was present on the campus, had taken command of the violent crowd and had personally led a charge against federal marshals sent there to effectuate the court’s decree and to assist in preserving order. It also described Walker as encouraging rioters to use violence and giving them technical advice on combating the effects of tear gas.”); Duhart, *supra* note 25, at 371–372.

110 *Butts*, 388 U.S. at 140.

111 *See Butts*, 388 U.S. at 140, 155; Duhart, *supra* note 25, at 372 n.42 (“Today, public figures and public officials are nearly impossible to distinguish. With presidential candidates routinely appearing on late-night entertainment shows, it seems there is almost no difference at all between officials and celebrities.”).

The distinction made between a public figure and private figures is critical to the outcome of a case sounding in libel.<sup>112</sup>

The many decisions of the U.S. Supreme Court regarding public figures have established a rule in which the right of privacy has become a subordinate right to competing rights, such as freedom of expression, freedom of speech, and the right to know. However, as will be discussed below, our approach is different and calls for undermining the total superiority of these rights against the privacy right even within the discourse on public figures.

## 2. *Rethinking Supreme Court Privacy Subordinate Standpoint*

This article offers a new angle on privacy in trying to find the private figure (with its balloon of privacy) within the public figure, claiming the distinction is not a “black and white” decision.

Our approach to the issue of reasonable publication about public figures differs from the U.S. norm for several reasons. *First*, the Supreme Court rules on public figures were shaped according to defamation law and the expansive freedoms given by the First Amendment; we would analyze those cases from the perspective that prizes the value of privacy. The justifications to the U.S. rulings do not, most of the time, address privacy rights. *Second*, because the rulings are based on the First Amendment, emphasizing freedom of expression and freedom of the press, we would impose *strict liability* and demand *accuracy* by the press, although it might lead to self-censorship, which is counter to the purposes of the First Amendment.<sup>113</sup> *Third*, where the rulings put the public and the press as the protagonists, our model looks at the issue of privacy with the individual at the center. Therefore, the price of false or inaccurate publication is too high to pay. *Fourth*, where privacy is based on a liberal conception, our approach is more toward personality theories that enable a balloon of privacy in public domains. *Fifth*, and most importantly, the Supreme Court did not imagine much less consider the Internet when shaping its tests, finding that “the instances of truly involuntary public figures must be exceedingly rare.”<sup>114</sup> We think the digital era has changed the concept of privacy and the rules of the game, hurtling society towards a total loss of privacy.<sup>115</sup> The right to be

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112 Duhart, *supra* note 25, at 372.

113 See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (“The First Amendment requires that we protect some falsehood in order to protect speech that matters.”).

114 *Id.* at 345.

115 See Shackelford, *supra* note 7, at 126 (claiming that our traditional understandings of privacy are changing as a result of “an increase in privacy violations, facilitated by new advanced surveillance technologies”). *But see* Iryna Ievdokymova, *ACTA and the Enforcement of Copyright in Cyberspace: The Impact on Privacy*, 19 EUR. L.J. 759, 762 (2013) (describing Article 27(3) of the European Unions’ Anti-Counterfeiting Trade Agreement (ACTA), which “provides that cooperative efforts are to

forgotten, given the difficulty of erasing digital publication, compared to old-fashioned kinds that disappeared when old journals and newspapers were gone – make us rethink the rulings.

An interesting illustration of our arguments about different approaches to privacy (than the U.S. norms), can be partially found in the European approach which we will discuss briefly below.

The different attitude of the European approach to privacy has inspired us to think differently, even though this approach was not adopted in our proposed model.<sup>116</sup> In Continental jurisdictions, such as Germany and France, the philosophy of personality theory prevails and values like dignity and honor inform legal tools in which individuals, including public figures, have the right to control their image and exposure to the public, either by traditional publications or by cyberspace tools. Therefore, even if a public figure appeared nude in public, she has the legal right to restrict publication of this appearance. This is true even in cases where a public figure *sold* her nude picture. The control over the public image invalidates publication after the sale of the image. The fact that a public figure *agreed* to be photographed in an intimate pose is *insufficient* to validate the publication of this image.<sup>117</sup> In the digital age, Continental courts impose restrictions against Internet publication of public figures in any way that can harm their image (e.g., nude photographs) and they impose liability on Internet providers.<sup>118</sup> Even when, technically, the photographs spread and could be found on many Internet sites the European courts still felt obliged to forbid the circulation of the pictures in order to express the importance of private life in cases of those who, according to our definitions, are public figures.<sup>119</sup> Public figures who appear nude still have the right to control their public image

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‘preserve fundamental principles such as . . . privacy’” (quoting Margot E. Kaminski, *An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement*, 21 ALB. L.J. SCI & TECH 385, 412 (2011)).

116 See Megan Richardson & Lesley Hitchens, *Celebrity Privacy and Benefits of Simple History*, in *NEW DIMENSIONS IN PRIVACY LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 250–51 (Andrew T. Kenyon & Megan Richardson eds., 2006) (providing examples of the European approach to the privacy of celebrities). For descriptions and examples of the European system, mainly Germany and France about public figures, as well as for court decisions of the European Court of Human Rights (ECHR), see Shackelford, *supra* note 7, at 171–98, 207.

117 Whitman, *supra* note 51, at 1198–1201 (2004) (discussing examples of famous figures, which we would consider public figures, such as French actress Florence Bouvard, whom a French court “permitted to suppress movie scenes in which she had willingly appeared naked,” because “[o]ne’s nude image is simply not definitively alienable under continental norms;” and stating that German and French courts “feel obliged to penalize the persons responsible, be they Internet service providers or delinquent ex-boyfriends”).

118 *Id.* at 1998–99.

119 See Whitman, *supra* note 51, at 1198–99 (describing a case in which a German court “imposed liability on [an] Internet service provider[] that housed nude images of celebrities” when Steffi Graf, a famous former tennis star, “successfully sued Microsoft for its refusal to . . . prevent dissemination of a ‘fake’ . . . picture of her head superimposed on the nude body of another woman,” showing that sometimes relief can be granted when public figures are involved).

and determine when and under what circumstances they may be seen, in the nude or otherwise.

Looking at the different approaches of the U.S. and Continental European countries, it seems that American law regarding public figures is caught in a gravitational orbit of liberty values, while European law is caught in an orbit of personal dignity. As was claimed about the different approaches to privacy on the two sides of the Atlantic, “There are certainly times when the two bodies of law approach each other more or less nearly. Yet they are consistently pulled in different directions . . . .”<sup>120</sup>

In our view, neither of the approaches can prevail in the other jurisdiction because of the different theoretical origins (personal dignity vs. freedom of expression). The model we offer in this paper follows neither approach, but rather tries to develop reasonable criteria within the arena of the public right to know to decide in which cases it would be legitimate for public interest to prevail versus other cases in which the skimpy balloon of privacy available to public figures may prevail. Accordingly, this paper discusses the appropriate relationship between public interest and the right to privacy regarding public figures. More specifically, we will address the question of when public figures have the right to keep information away from the public. In the next Part, we will focus on our proposed new filtering model, which is more applicable in the digital era, and which addresses this question differently and proposes a way to manage which information should be published about public figures and which information, if any, should be kept private, offering a contrast to the traditional U.S. legal norm that grants superiority to the public interest/right to know, resulting in an extreme lack of privacy for public figures.

#### IV. A FILTERING MODEL: THE PUBLIC INTEREST TO KNOW VS. PRIVACY PROTECTION

##### A. *Public Figures and the Balloon of Privacy*

Ideas for redefining the legal norms regarding public figures have been offered by some scholars. Scott Shackelford, for example, proposed to narrow the category of public figure by limiting the legal concept of the public figure in the U.S. to four categories: permanent public figures, celebrities, temporary public figures, and private citizens. Following the German rule, each category would receive a different degree of privacy and duration of

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<sup>120</sup> Whitman, *supra* note 51, at 1162–63 (citing *Lawrence v. Texas*, 539 U.S. 558, 576–78 (2003)) (analyzing Justice Kennedy’s opinion for the Court in *Lawrence v. Texas*, as an example of the sometimes mutually influential relationship between the liberty and dignity approaches).

protection from the minimum to the maximum.<sup>121</sup> Our model works differently, without following any specific jurisdiction, but it could be adopted by all jurisdictions as general criteria in the digital era.

One of the most sensitive questions in the discourse of privacy rights of public figures is in which cases should information about them not be published. We argue that public figures should also enjoy the “balloon” of privacy on the Internet to a certain level in any of the following situations: (1) the information is private in the sense that it describes intimate personal details, which do not contribute to or are irrelevant to the fulfillment of his or her public role;<sup>122</sup> (2) the information serves mainly (if not solely) as voyeurism; and (3) the information is not of a kind that the public figure exposes to the public by his or her own will (without regret).

We claim that every person should have a right to privacy. Even a public figure at the end of the day has the right to private premises.<sup>123</sup> The Balloon Theory describes privacy as a sphere that can change in size and exists even in public arenas to protect personal privacy.<sup>124</sup> The metaphorical balloon symbolizes our psychological perception of private information and feelings. The word “balloon” reflects the way we understand and feel the need for privacy.<sup>125</sup> According to the theory, the balloon of privacy also exists in cyberspace around public figures, subject to two exceptions. *First*, the public figure’s balloon size is smaller compared to that of a “regular,” anonymous person. *Second*, the mechanisms targeting the size of the balloon and activating the scope of protection are controlled by different rules. We believe that the controlling rules should be flexible and correspond with different situations. Thus, defining public figures according to a rigid list or claiming that public figures have no right to privacy every time a publication about them is justified does not lead to a reasonable solution. In other words, a public figure’s balloon of privacy can shrink and expand depending on the situation. Furthermore, it would be inappropriate to predetermine a permissible degree of severity regarding the harm caused by a privacy violation, as the assessment of such harm is unique to a specific individual, and ought not be predetermined and uniform for each and every person within the definition of “public figure,” especially in the digital era.

### B. *The Three Principle Filtering Model*

Our proposed Three Principle Model consists of three elements: (1) the relevancy of the private information to members of the public, and (2)

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<sup>121</sup> Shackelford, *supra* note 7, at 200–03.

<sup>122</sup> For example if he or she was pictured naked in his or her private home.

<sup>123</sup> David Kretzmer, *Demonstrations and the Law*, 19 ISR. L. REV. 47, 120 (1984).

<sup>124</sup> See Yanisky-Ravid, *supra* note 53, at 83–86.

<sup>125</sup> *Id.* at 82–84.

whether access to the information is necessary for learning about our world, and (3) proportionality.

*1. The Relevancy of Private Information*

Our stance is that exposing public figures' private lives is justified to the extent the information exposed is relevant to the public. Accordingly, this article recognizes that the privacy rights of public figures will vary in scope according to the relevance of the information about them and the benefit its publication would have on the public as compared to the impact it will have on the public figure himself or herself. The results will undoubtedly differ from case to case; therefore, we avoid creating bright line rules but instead recommend guidelines for addressing each unique case. Ultimately, we argue that any information relevant to one's functional duties as a public figure or information that might influence the public should be published, even if it reduces the public figure's privacy. In other words, we argue that public figures waive their right to privacy as long as the circumstances meet certain criteria.

According to our guidelines, the more influential the figure is to the public, the smaller his/her privacy balloon is and the more we can publish about this person. For example, prime ministers, according to the balloon theory, have the smallest balloon around them and enjoy only a small amount of privacy. In the case of a prime minister and according to the criteria suggested in this paper, we can justify almost all publications about him or her on a wide range of public and private topics in a way that almost all information can be released to the public. A prime minister is elected by the public to a role defined by law as having a wide range of influence on each and every citizen. Any information about a leader of a country who possesses more power and authority than any other individual would therefore have an important value to the public. As a result, the right for the public to have access to this information overrules the prime minister's right to privacy. Even "private" information about a spouse, vacation habits, the way s/he treats his/her children, and personal health conditions may be important according to the criteria we suggest, as they might influence his actions and, hence, the public. Therefore, Internet publications of this kind might be justified.

The wider and the deeper a political figure's influence is, the wider and deeper the range of private information that would be legitimate to publish according to our model. However, we do claim that a limited amount of private information can and should be kept within the privacy premises. In other words, there is a limited scope of behavior with a high level of intimacy within private places, such as the private homes or even private bathrooms, which should remain private. These premises have no connection to the public or influence on the public and should be kept private even

when it belongs to a public figure. For example, the intimate relationship of the prime minister with his family or naked pictures of the prime minister would be covered within his right to privacy. In many other cases, behavior that can reveal to the public his or her suitability for office, such as past experience, drinking habits or stress habits, should be published. If any doubt about whether to publish certain information exists, it is better to err in favor of the public's right to knowledge.<sup>126</sup> We recognize that the harm of avoiding publication and maintaining a large balloon might outweigh the benefits of protecting privacy in certain cases.

A journalist, for example, will have more privacy (a larger privacy balloon) than a prime minister. It would still be important to the public to know private information about the journalist that relates to the fields he or she is covering, as a means of judging her reliability. For example, news anchor Brian Williams recently lost his job after it became public that he had embellished a story from his coverage of the Iraq war in 2003. Had the lie been related to his private life and not his work, which influences the millions of viewers who watched the NBC Nightly News, that information probably would have been subject to his right to privacy.

This rule is also applicable in regard to anonymous - innocent people who have become involuntarily public figures.

An anonymous, innocent person can become a public figure and lose some of his right to privacy. For example, someone who takes part in a demonstration that ends up being covered by the news can have information about him and his private life rightfully published when it is relevant to the purpose of the demonstration.<sup>127</sup>

The relevancy of the private information is a dominant criterion of controlling the publication of private data in the digital era, but it is not the sole factor. The next Sub-Part will address an additional criterion controlling the size of the privacy balloon of public figures: access to necessary information.

## 2. *Access to Necessary Information for Learning Important Knowledge about Our World and Being Part of Society*

Information is a survival tool. Access to knowledge and learning about the world is another justification for publishing information instead of using the right to privacy as an excuse to avoid publication. In almost every

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<sup>126</sup> See RICHARDS, *supra* note 63 (arguing that privacy is valuable in large part *because* it facilitates development and expression of knowledge to the public).

<sup>127</sup> See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644-45 (2000) (describing James Dale, an assistant scoutmaster who was expelled from the Boy Scouts of America after a newspaper published an interview identifying him as the copresident of the Lesbian/Gay Alliance at Rutgers University).

moment, people make judgments about their next action or decision based on the existing information that is available to them. The more a person knows about the world, the better his or her decisions will be. Information on websites can be critical to someone's integration into society and even to one's survival.<sup>128</sup> This principle is distinguished from the first one (relevancy), although they may partially overlap. Whereas the relevancy principle focuses on the role of the public figure, this principle focuses on the public access to knowledge—including access to information that may lead to better health and education decisions, increased safety and efficiency, and overall improvement of individuals' lives. The information itself, rather than the figure, is placed in the center. The attention public figures usually attract may justify this kind of publication. The Internet plays an important role when implementing this principle.

Consequently, this factor, which can help us differentiate between information that falls under public interest and should be published rather than hidden behind the right to privacy, concerns access to necessary knowledge about the world. If the information teaches us important knowledge about "handling" life, it should be exposed to the public. How we determine whether certain private information provides us with tools to handle life's challenges should, therefore, be included under the public interest justification.<sup>129</sup>

People who become the center of news will not only be exposed to the public as public figures, but publication of relevant private information about them would be justified. When information is designated to public records, publication is also justified.<sup>130</sup> Therefore, identifying public figures as the ones who are suffering from diseases, especially when those public figures suffer from contagious diseases, might be justified as a tool to learn about the disease. However, if the medical condition of a public figure,

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128 See generally Craig Calhoun, *The Infrastructure Of Modernity: Indirect Social Relationships, Information Technology, and Social Integration*, in *SOCIAL CHANGE AND MODERNITY* 205 (Hans Haferkamp & eds., 1992) (explaining how information technology facilitates indirect relationships, which are a pivotal component of modern society); Jack Balkin, *What is Access to Knowledge?*, *BALKINIZATION* (Apr. 21, 2006), <http://balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html> (explaining the impact access to information has on social, political, and economic influence).

129 See, e.g., *McNutt v. N.M. State Tribune Co.*, 538 P.2d 804, 806–08 (1975) (holding publication by a newspaper of private names and addresses of police officers who took part in a shootout between "Black Berets" gang and the police, in which two of the gang members were killed, was privileged, where the officers had refused to discuss the matter and their addresses were public record).

130 *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (holding that a state may not "impose sanctions on the accurate publication of the name of a rape victim obtained from public records"); *McNutt*, 538 P.2d at 808 ("The address of most persons appears in many public records . . . We, therefore, hold that an individual's home address is a public fact and that its mere publication, without more, cannot be viewed as an invasion of privacy.").

such as a singer or an actor, has no informative social function for society, the public figure should enjoy a right to privacy.<sup>131</sup>

Another example is when a new medical treatment is introduced to the public. The medical history of the people who are taking the treatment might be considered private information. However, as this data is important to the public for everyone's survival, it might justify publishing it rather than keeping the data private. The identity of organ or sperm donors should be exposed for the same reasons. These people find themselves to be public figures even if they were focused on other aspects of their activities. They have become public figures against their free will. However, exposing information about their medical condition to the public might play an important role to avoid future risks to persons within the public. In order to draw some boundaries around this unlimited access to private information and to control the level of exposure - we need to add a new cumulative factor of proportionality, as we will explain in the next Sub-Part.

Prosser and Keeton wrote:

Such individuals become public figures for a season; and "until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as their leaders, heroes, villains, and victims." The privilege extended even to identification and some reasonable depiction of the individual's family, although there must certainly be some limits to their own private lives into which the publisher could not go.<sup>132</sup>

Freedom of speech may justify the publication of many private details of public figures, even when they unwillingly have become famous, such as rape victims, adopted children, etc.<sup>133</sup> Medical information of rare diseases or infection transmitted by humans may justify publication of private details due to public interest in these people who have become unwilling public figures.<sup>134</sup>

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131 For example, actor Charlie Sheen revealed in 2015 that he contracted HIV four years prior and had kept it a secret until then. Emily Steel, *Charlie Sheen Says He Has H.I.V. and Has Paid Millions to Keep It Secret*, N.Y. TIMES (Nov. 17, 2015), [http://www.nytimes.com/2015/11/18/business/charlie-sheen-hiv-positive.html?\\_r=0](http://www.nytimes.com/2015/11/18/business/charlie-sheen-hiv-positive.html?_r=0). Unlike back in the 1980s or 1990s, when news about a celebrity being HIV-positive carried a social impact by debunking myths and creating awareness of the disease, the news about Charlie Sheen today carries no such value. The only reason he voluntarily sat for an interview was in order to put a stop to extortionists. *Id.*

132 Prosser & Keeton, *supra* note 20, at 861-62 (footnotes omitted) (quoting RESTATEMENT (FIRST) OF TORTS §867, Comment f (AM. LAW INST., 1934).

133 *See, e.g.*, Hall v. Post, 372 S.E.2d 711, 712 (N.C. 1988) (rejecting the claims of Susie Hall and her adoptive mother "for tortious invasion of privacy by truthful public disclosure of 'private' facts" against a newspaper that published an article about Susie's carnival-traveling parents' abandonment of her seventeen years prior); *see also* TRIBE, *supra* note 20, at 889-90 (explaining that the balancing publication of private individuals' information with individual privacy can be a judgment of degrees).

134 *See* RESTATEMENT (SECOND) OF TORTS § 652D, Comment g (AM. LAW INST. 1965) (citing "a rare disease" as a newsworthy exception to privacy based on a legitimate public concern).

An example of an innocent, unwilling, and young public figure where the information published about her is justified in terms of the second criterion of access to knowledge is the case of fourteen-year-old Elizabeth Smart. On June 5, 2002, Elizabeth was abducted from her bedroom in Salt Lake City, Utah. Elizabeth's parents worked with local and national media to increase visibility of the case; public interest in the kidnapping of the attractive, accomplished blonde teenager was immense.<sup>135</sup> The publication of these kind of cases, nowadays via the internet, although it involves private and intimate information, might help rescue the victim, track and punish the criminals, and prevent future crime. Therefore, exposing private details is justified under the second criterion of our proposed model: access to knowledge.

However, according to our model, we claim that freedom of speech is not an absolute unlimited right, even for public figures. Publishing private data (medical or other) about people may prevent them from taking part in certain activities or medical treatment because they fear that their private details and identities will be exposed publically. For example, on the one hand, taking an HIV test serves the public interest, which should be encouraged. On the other hand, publishing the details and results of the HIV tests might prevent people from taking the test in the first place. The harm from not taking the test and not detecting the illness might outweigh the benefit of publishing the details.<sup>136</sup>

The Three Principle Model proposed in this work can serve as a guideline for filtering information about public figures and deciding when the information should be open to the public or when public figures deserve the right to privacy. Activating the model in the digital era requires precautionary steps, which will be activated by the third cumulative principle of the proposed model, as will be discussed below. The level of privacy of public figures the model may achieve depends on the number of factors being used as a filter. The more factors that are activated in filtering private information, the more privacy we achieve.

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<sup>135</sup> See ELIZABETH SMART & CHRIS STEWART, MY STORY (2013); *Elizabeth Smart Fast Facts*, CNN (Nov. 2, 2016, 2:54 PM) <http://www.cnn.com/2013/04/14/us/elizabeth-smart-fast-facts/>; see also *SPJ Code of Ethics*, SOC'Y PROF. JOURNALISTS (Sept. 6, 2014, 4:49 PM), <https://www.spj.org/ethicscode.asp> (detailing the ethical responsibilities of journalists, particularly regarding the balancing of reporting private information of individuals). In this particular case, nine months after the abduction, Elizabeth's younger sister, who had witnessed the kidnapping, remembered that the abductor's voice sounded like that of a vagrant who had done some work for the family some months before the kidnapping. That detail ultimately led to Elizabeth's rescue, which was a major media story nationwide.

<sup>136</sup> See Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1019, 1030-31 (1991) (describing the trauma and stigma associated with being a victim of rape, illustrating that unwilling victims of criminal offenses especially must have some volume in their privacy balloons).

### 3. *The Proportionality Rule*

When applying rules on publication of private information about public figures, we can benefit from the rule of proportionality. According to the proportionality test, the relevant question is whether one can satisfy a legitimate public interest with a less invasive action, which avoids harming the rights of others involved.<sup>137</sup> In other words, proportionate publication must achieve the goals the private data serves without exposing all the details about the figure. For example, it may be proportionate to publish facts about medical diseases or a crime without pictures of the victims or other irrelevant identifiable information. If the information published about the public figure could have been obtained using less invasive means, exposing those details to the public harms their privacy and, therefore, is not justified.

Freedom of speech justifies as newsworthy “all events and items of information which are out of the ordinary humdrum routine, and which have ‘that indefinable quality of information which arouses [sic] public attention.’”<sup>138</sup> Freedom of speech and the right to privacy are generally seen as conflicting with one another; however, scholars such as Neil Richards and Mark Tunick have expressed that these two rights can peacefully co-exist.<sup>139</sup> Similarly, we assert that certain legal tools, such as the proportionality rule, can be used to adjust the current compromise between freedom of speech and protection of privacy.

For the purpose of understanding the rule of proportionality in regard to cases of publications of private information about public figures, consider the following two examples.

#### a. *Publishing Drunk Drivers’ Photos*

Consider the following excerpt from Elizabeth K. Hansen, for the “Society of Professional Journalists” in its *Ethics Case Studies* series:

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<sup>137</sup> Yanisky-Ravid, *supra* note 53, at 95; *see also* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 75 (2008) (“The core of necessity analysis is the deployment of a ‘least-restrictive means’ (LRM) test [in which the court] ensures that the measure does not curtail the right any more than is necessary for the government to achieve its stated goals.”); AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 245–378 (Doron Kalir trans., 2012) (exploring four components of proportionality, as applied to legislatures when balancing legislative action against individual rights: “proper purpose,” “rational connection,” “necessity,” and proportionality *stricto sensu* [or, ‘balancing’]); *id.* at 317 (discussing the proportionality principle in the context of general constitutional law from a legislative perspective).

<sup>138</sup> KEETON ET AL., *supra* note 20, at 860 (quoting *Sweeek v. Pathe News*, 16 F. Supp. 746, 747 (E.D.N.Y. 1936)).

<sup>139</sup> *See* RICHARDS, *supra* note 63, at 95 (“Instead of being conflicting values, privacy and speech can instead be mutually supportive.”); MARK TUNICK, BALANCING PRIVACY AND FREE SPEECH: UNWANTED ATTENTION IN THE AGE OF SOCIAL MEDIA 14 (2015) (contending that the values of free speech and privacy can exist hand in hand).

When readers of *The Anderson News* picked up the . . . issue of the newspaper, stripped across the top of the front page was a New Year's greeting and a warning. "HAVE A HAPPY NEW YEAR," the banner read. "But please don't drink and drive and risk having your picture published." Readers were referred to the editorial page where [it was] explained that . . . the newspaper would publish photographs of all persons convicted of drunken driving in Anderson County.

. . . .

. . . [The newspaper] limited the photos to residents of Anderson County or surrounding counties where the *News* circulates. [It] also began publishing the photos weekly rather than monthly.

After a person charged with DUI was convicted or pleaded guilty, the county jailer (who is elected in Kentucky) supplied the information and the photo taken at the time of the arrest to the newspaper. Under each photo the newspaper printed the person's name, age, place of residence, date and time arrested, charge, blood alcohol level and date convicted. The paper published the photos regardless of the age of the offender and made no distinction between first offenders and those who had been arrested before for DUI.

. . . .

Police told the newspaper representative one teenager tried to commit suicide after his DUI arrest because he feared his picture would be published. Some whose pictures appeared said the publication hurt their families, particularly their children . . . . The policy applied only to drunken driving convictions and not to any other misdemeanor or felony offenses [such as rape or robbery].<sup>140</sup>

According to the model, the information about driving under the influence meets two criteria: it is important and a value of access to knowledge about facts of life (teenagers, politicians, and actually everyone who drinks and drives). However, using the proportionality rule would have enabled posting, nowadays via the internet, the blurred photographs of images with important details such as age or status without any identifiable details. This rule enables solutions, which are not all or none (posting or avoiding), as the case reflects. "This issue is not black and white; it is a wide range of grays."<sup>141</sup>

#### *b. Naming Victims of Sex Crimes*

These cases also meet both criteria of relevant and legitimate information and access to knowledge in the digital era. However, again, using the rule of proportionality, in these cases, the best course of action might be to tell about

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<sup>140</sup> Elizabeth K. Hansen, *Publishing Drunk Drivers' Photos*, SOC'Y PROF. JOURNALISTS, <http://www.spj.org/ecs10.asp> (last visited Mar. 2, 2017); see also *SPJ Code of Ethics*, SOC'Y PROF. JOURNALISTS (Sept. 6, 2014, 4:49 PM), <https://www.spj.org/ethicscode.asp> (explaining that journalists have an ethical obligation to use "heightened sensitivity" when publishing materials regarding juveniles and to "show compassion" for those affected by news coverage)

<sup>141</sup> Amber Orand & Sara Stone, *Naming Victims of Sex Crimes*, SOC'Y PROF. JOURNALISTS, <http://www.spj.org/ecs11.asp> (last visited Mar. 2, 2017).

the case “but refrain from publishing graphic details about the abuse the child endured. Perhaps in other cases, there is no pressing public interest for the child’s identity to be released, and his or her privacy is the utmost consideration.”<sup>142</sup>

Applying the proposed Three Principle Filtering Model to court cases will be addressed in the next Part.

#### V. FROM THEORY TO PRACTICE—APPLYING THE PROPOSED THREE PRINCIPLE FILTERING MODEL

In this Part, we discuss the implementation of the model for protecting versus exposing private information about public figures based on some of the famous court decisions which have become foundation stones of the discourse on public figures.

In *Briscoe v. Reader’s Digest Ass’n*, a former truck hijacker who was convicted and subsequently rehabilitated for more than ten years sued Reader’s Digest for invasion of privacy after it published an article about truck hijackings that mentioned his name. Despite having lived an honorable life for the past decade, the article’s publication of his private details caused the man’s friends and daughter to scorn and abandon him.<sup>143</sup>

In *Melvin v. Reid*, a former prostitute who had been charged with but acquitted of murder sued a film producer. Following her acquittal, she entirely rehabilitated her life by getting married and living an honest and respectable life. However, seven years later, a film was released called “The Red Kimono,” which presented her story using her real name and the unsavory details about her past from the record of her murder trial. The film, which was billed as a true story, ruined her new life.<sup>144</sup>

Using the Three Principle Model with the proportionality rule in both cases would have brought a different and a better solution. To implement the model with the proportionality rule test, one would have to start with identifying the purpose of exposing the information. Then the next step would be to check if there are alternative, less invasive means to satisfy the same purpose. If the alternative means serves the same purpose, it should be used because it will allow for at least some amount of privacy.

In *Melvin*, the purpose of the film was to: (1) present an incredible story using creative means and (2) present a true story. These two purposes could have easily been achieved by telling the audience it was a true story or that the film was based on a true story without using anyone’s real name. In the *Briscoe* case, however, because it was a criminal offence, we think

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<sup>142</sup> See *id.* (examining multiple cases of journalists’ treatment of juvenile sexual assault victims and providing guidance on how journalists should treat such subjects).

<sup>143</sup> *Briscoe v. Reader’s Digest Ass’n, Inc.*, 483 P.2d 34, 36 (Cal. 1971).

<sup>144</sup> *Melvin v. Reid*, 297 P. 91, 91, 93 (Cal. Dist. Ct. App. 1931).

there was no other way to achieve the purpose of warning the public besides exposing the details of the person.<sup>145</sup> Therefore, based on our proposed model, the publication was justified. We argue that when the common desire of the public is merely to learn intimate, private information about a person, but the information does not carry any valuable influence over the person looking for the information, publication of private information about public figures will not be justified. Instead, the public figure serves as an object to entertain the public with his or her most personal data. Within this category we can find mere curiosity, snooping, gossip, or perverted behavior.

Another case that might have reached a different decision had the court used the principles of our model is *Friedan v. Friedan*.<sup>146</sup> Our model, although not dealing with future public figures directly, does not void the possibility of exposing private information about future public figures as well as about third parties connected to future public figures. Applying our model to the facts of *Friedan*, being married to someone who would become a public figure in the future exposed the family member to the status of a public figure with risks of losing privacy with respect to the relationship, if the information contributes to the public knowledge and access to knowledge. However, a picture of a family is not information that should contribute to public welfare. On the other hand if, for example, past spousal violence against a feminist activist is involved, the information is important per the criteria of our proposed model.<sup>147</sup>

One more example of an analysis of the legitimacy of public exposure according to our model, which differs from the traditional views of the courts (even though reaching the same result), is the famous Supreme Court decision on the case of the Hill family.<sup>148</sup> In *Time, Inc. v. Hill*, the “public figures” at issue were one-time, past, temporary victims who unwillingly became public figures. Our model does not undermine the usual definitions, but our focus is different. Our model examines the relevancy and legitimacy of the private information. In this case, Time, Inc., as publisher of Life Magazine, was sued by the Hill family. The five children of the Hill family were involuntarily held as prisoners by three escaped convicts for nineteen

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145 One can claim that both *Briscoe* and *Melvin* were criminal offenses. The only difference is that he was found guilty and she was not.

146 414 F. Supp. 77, 79 (S.D.N.Y. 1976) (holding that the publication of a man’s name and picture in an article by his ex-wife is not actionable under the New York Civil Rights Act because matters of public interest “may and often do involve wholly private individuals”).

147 *See id.* at 78–79 (explaining that the husband of Betty Friedan was declared a public figure twenty-five years before she became famous as a feminist leader; therefore he lost a suit challenging an article she had published describing her life with him as connubial and posting a picture of him from the past).

148 *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

hours on September 11–12, 1952.<sup>149</sup> They were released unharmed, and became the subjects of front-page news. The drama and publicity caused them to suffer, so they moved away to another place. At about the same time (1953), Joseph Hayes wrote a novel titled *The Desperate Hours*, which was a bestseller and later was made into a Broadway play, which was the subject of a feature story in *Life Magazine*.<sup>150</sup> Mr. Hill brought a libel claim against *Life Magazine* arguing that *Time, Inc.* violated the family's privacy and falsely reported that the new play portrayed an experience suffered by Hill and his family. The article appeared in 1955, entitled "True Crime Inspires Tense Play," claiming that the play was based on the experiences of the Hill family during their period of captivity in their home.<sup>151</sup> The article included pictures of the play's main actor in the Hill's prior home. Hill won at the lower court and was awarded \$75,000 (later reduced to \$30,000).<sup>152</sup> *Time, Inc.* appealed to the Supreme Court, where Richard Nixon represented the Hill family.<sup>153</sup> The publisher claimed that the subject reflected a "legitimate news interest," meaning "a subject of general interest and of value and concern to the public." At the time of publication, the publisher claimed, it was "published in good faith without any malice whatsoever."<sup>154</sup> The Court wrote that

guarantees for speech and press are not the preserve of political expression or comment about public affairs . . . . We have no doubt that the subject of the *Life* article . . . is a matter of public interest. "The line between the informing and the entertaining is too elusive for protection of . . . [freedom of the press]."<sup>155</sup>

The Court concluded that errors by negligence are protected by freedom of expression.<sup>156</sup>

Justice Harlan—dissenting in part—noted that the members of the Hill family were not public officials but individuals that came to public attention through unfortunate circumstances, not by making voluntary actions, and thus cannot be considered as having waived state protection from irresponsible publicity. Justice Harlan contended that "the press should have a duty of making a reasonable investigation of the underlying facts and [should] limit[] itself to 'fair comment' on the material gathered . . . . [S]uch a rule

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149 *Id.* at 378.

150 *Id.*

151 *Id.* at 377.

152 *Id.* at 379.

153 *Id.* at 375.

154 *Id.* at 378–79.

155 *Id.* at 388 (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)).

156 See *id.* at 389 ("In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees.").

might slightly limit press discussion of matters touching individuals like Mr. Hill.”<sup>157</sup>

An analysis of the case according to our model raises different issues. The case does not meet the first test: the relevancy of the information of the public making decisions about the public figure, but meets the second test, in offering important life ideas of cultural merit. Implementing the third criterion of proportionality leaves us with the impression that too many private details were unnecessarily exposed beyond the data reasonably needed to justify the goals of our model.

The Supreme Court has not thought about the Internet when shaping its tests about public figures. “[T]he instances of truly involuntary public figures must be exceedingly rare.”<sup>158</sup> However, in the age of smartphones, Facebook, and YouTube, privacy on the one hand may seem like a thing of the past, but on the other hand, we see an amplified need for protection of privacy. In his book *Balancing Privacy and Free Speech: Unwanted Attention in the Age of Social Media*, Mark Tunick addresses the ethical and legal questions that arise when media technology is used to give individuals unwanted attention.<sup>159</sup> In many cases, privacy interests can outweigh society’s interest in free speech and access to information. Based on Jeremy Waldron’s political theory concerning tolerance, Tunick argues that we can “have a legitimate interest in controlling the extent to which information about us is disseminated.”<sup>160</sup> By addressing the debate about the right to be forgotten, Tunick discusses the cost of free speech and legal tools needed to develop new social attitudes towards privacy.<sup>161</sup> For example, he advises revising the code of ethics for professional journalists and the media, “to acknowledge the need to be more sensitive to the privacy [issues and] interests at stake when information that is [considered] public [because it is] accessible to some [people and] is [then] made readily . . . [available] to a much broader audience . . . [S]elf-regulation by . . . the media [alone] is unlikely to result in a fair balancing of interests.”<sup>162</sup> Technology today “makes it possible for anyone to share information [(whether true or false)] widely with a click of a button [and] little incentive to think about . . . consequences.” Legal remedies and punishments can make peo-

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157 *Id.* at 409 (Harlan, J., concurring in part and dissenting in part).

158 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

159 TUNICK, *supra* note 139.

160 *Id.* at i.

161 *See id.* at 193–207 (arguing that even in a society where a majority of people do not strongly value privacy, the majority should be sensitive to the interests of those who do).

162 *See id.* at 193 (“. . . self-regulation by journalists and the media is unlikely to itself result in a fair balancing of the interests.”).

ple think carefully before clicking the button.<sup>163</sup> The law in the U.S. could conceivably “be reformed to compel companies like [Google] or Facebook to remove offensive material when they are made aware of it, though that would create the problem of how one determines if a request is reasonable.” As another example, “Daniel Solove recommend[ed] modifying the Communication Decency Act (CDA) . . . [to provide an] incentive to remove offensive material[s] once they are [made known].”<sup>164</sup> Individuals can have legitimate privacy interests in remaining anonymous in public places unless there is a compelling interest to share information.<sup>165</sup>

### CONCLUSION

Professor Anita Allen contends that privacy is a “foundational human good[ ],” one that is essential for a free and democratic society. She argues that in certain instances, privacy must be mandated: “[F]or the sake of foundational human goods, liberal societies properly constrain both government coercion and individual choice . . . .”<sup>166</sup>

The discussion of privacy rights of public figures is currently highly influenced by the digital era for many reasons. Among them is the strong and wide impact of publication on the Internet as well as the inapplicability of the right to be forgotten, especially in the light of being a public figure—a category that was exempted from the right of deleting information even by the Google Spain Court decision.<sup>167</sup> “[D]ue to advancing technology facilitating the public’s fascination with celebrity, jurisdictions in the United States and Europe are reinterpreting privacy rights leading to divergent definitions of both public figures and the public interest.”<sup>168</sup> As technology be-

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163 See *id.* at 194 (discussing both the positives and negatives to how developments in technology impact the privacy of individuals outside of the public sphere, and noting that “it may be harder to promote compliance with norms if those norms are not supported by the force of law”).

164 See *id.* at 199–200 (citing DANIEL SOLOVE, *THE FUTURE OF REPUTATION* 149–60 (2007)) (recounting Daniel Solove’s reasoning for recommending a modification the CDA).

165 See *id.* at 200–201 (proposing changes to legislation in order to protect individuals’ privacy interests unless the challenged speech reaches a certain standard of newsworthiness to a specified audience).

166 ANITA L. ALLEN, *UNPOPULAR PRIVACY: WHAT MUST WE HIDE?* 13 (2011).

167 See *Google Spain SL v. Agencia Española de Protección de Datos*, Case C-131/12, E.C.R., ¶ 100(4) (May 13, 2014) [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&docid=152065](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065) (ruling that an individual has a valid privacy interest in having their personally identifying information removed from Internet search engines but that it may be overridden “if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having . . . access to the information in question”).

168 Shackelford, *supra* note 7, at 126 (“ . . . potential reasons for this divergence, including the United States’ deep commitment to free speech, different understandings of the public interest, and, most critically, varying legal cultures.”).

comes more advanced, the need to protect one's right to privacy become increasingly important.

In this paper we drew a model based on the balloon theoretical justification to privacy. The model was written about public figures but can be used in other cases, such as with women or children's privacy. Our model will allow privacy rights to be interfered with only when justified under the Three Principle Filtering Model.

Many questions remain open to future studies and discussions. One very important matter for policy makers to address will be the question of who will judge and decide.

A professional resource for journalists, when discussing issues of privacy and public interest, concludes that "there is often no clear-cut distinction between right and wrong. We can give some general guidance and suggest a few rules, but [the journalist] will have to decide what to do case-by-case."<sup>169</sup>

We hope that our Three Principle Filtering Model will help not only journalists but also judges and other policy makers to make structured, informed, and legitimate decisions when addressing publication of private information in regards to public figures.

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169 The News Manual, A Professional Resource For Journalists and Public Interest, Chapter 62: Privacy and Public Interest (2008), [http://www.thenewsmanual.net/Manuals%20Volume%203/volume3\\_62.htm](http://www.thenewsmanual.net/Manuals%20Volume%203/volume3_62.htm).

