

POLICING PRIVACY

How U.S. Law Navigates the Boundary Between Free Speech and Private Facts

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With the birth of the Internet and its instant globalization of news distribution, U.S. media entities feared that British libel law would be applied to chill the speech of publishers worldwide. Now, even as Article 10 of the European Convention on Human Rights is pushing British courts to temper their historic, plaintiff-friendly defamation rules,¹ a new concern has emerged—the possibility that European notions of privacy will come to rule the Internet. British courts that historically eschewed any broad common law right of privacy have readily embraced an expansive interpretation of the privacy protections in Article 8 of the Convention.² The result is a burgeoning new law of privacy in Britain that is limiting the reporting of entirely true information in ways that most U.S. journalists would consider to violate press freedoms.

Consider the decision last year in *CC v. AB*, [2006] EWHC 3083 (QB), where the High Court of England and Wales addressed a privacy action by an unidentified public figure, who “conducted an adulterous relationship for some months” with the wife of the defendant, *id.* ¶ 1, and then sought an injunction to prevent the cuckolded husband from talking to the press.³ The Court viewed its obligation as a subjective weighing of the plaintiff’s Article 8 right of privacy against the defendant’s Article 10 right of free speech, taking into account “the justification for interfering with each right and the issue of proportionality.” *Id.* ¶ 14. In the Court’s view, it was free to issue an injunction restraining speech so long as the relief could be seen as “appropriate, proportionate and absolutely necessary” to protect privacy. *Id.* ¶ 17. Because it found no “real” public interest in “celebrity tittle-tattle” to weigh against the potential impact of disclosure on both the plaintiff’s family and the defendant’s own suicidal wife, and factoring in the defendant’s bad motives for speaking (revenge and money from the sale of the story), the court readily entered the injunction requested.

It is hard to imagine the same result on similar facts in a U.S. court. While several of the factors considered by the British court in entering the injunction might well find their way into the analysis, the reasoning of a U.S. court—both the legal framework for deciding the issue and the range of relief

¹ Article 10 provides in pertinent part:

Everyone has the right to freedom of expression. This shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

² Article 8 states:

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.

³ While the opinion does not say so expressly, it is apparent the plaintiff is a well-known public figure and that disclosures concerning his sexual affair would readily have been published by the tabloids if the court did not act to prevent it.

available to the court—would follow a different path and end in a different place. In *Gilbert v. National Enquirer, Inc.*, 51 Cal. Rptr. 2d 91 (Cal. App. 1996), for example, a California appeals court reviewed a similar injunction entered against a well-known television actress’s former husband who was revealing private information from their marriage to the *National Enquirer*. Notwithstanding arguments about the impact of the disclosures on the privacy of both the actress and the couple’s child, and despite claims that the ex-husband’s motivation for speaking was extortion, the court found injunctive relief flatly unacceptable:

We hold, as a matter of law, that [the actress’s] right to privacy does not outweigh [her former husband’s] right to express his uncensored opinion about her use of drugs and alcohol and her sexual relationships, or the *Enquirer*’s right to publish that information subject, of course, to possible civil liability for the abuse of those rights.

Id. at 99.

The divergence of U.S. and U.K. privacy law is further evident in the recent holding of the House of Lords recognizing a public figure’s right to privacy on a *public street*. In *Campbell v. MGN Ltd.*, [2004] UKHRR 648, the Court held that the privacy of a public figure (internationally known “super model” Naomi Campbell) was violated when a British newspaper published a photograph taken of her on a public street as she departed a meeting of Narcotics Anonymous. The paper was held to have violated Campbell’s right to privacy by disclosing, among other things, that she attended drug counseling sessions at Narcotics Anonymous.

Compare that result to the treatment by U.S. courts of the publication of photographs of *private figures* similarly taken in public places. When a magazine published a photograph of two young women attending an outdoor concert—held on private property—adorned by festive tattoos and body paint on their exposed breasts, a Florida court dismissed their privacy claim out of hand because “there is no liability for giving further publicity to what plaintiff himself leaves open to the public eye.” *Mayhall v. Dinneis Stuff, Inc.*, No. 01-8932 CI, 2002 WL 32113761, at *2 (Fla. Cir. Ct. June 7, 2002) (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977)). The same result was quickly reached in the case of the unfortunate football fan captured on film with his trousers’ zipper open—no claim existed because a photo taken in a public place presents no “private fact.” *Neff v. Time, Inc.*, 406 F. Supp. 858, 861 (W.D. Pa. 1976).

Or consider the decision by a British court in *McKennitt v. Ash*, [2006] EWCA 1714, that enjoined publication of a book describing the author’s experiences as a friend and part-time employee of well-known folk singer Loreena McKennitt. Because the author and singer had a close, twenty-year friendship, the court found a “pre-existing relationship of confidence” that made it improper for the author to disclose information about the celebrity’s health, diet, feelings—even their own conversations—without taking steps “to discuss with Ms. McKennitt or her advisors what it was acceptable to reveal and what was not acceptable.” *Id.* This decision seems impossible to reconcile with the view of the Pennsylvania Supreme Court in *Corabi v. Curtis Publ’g Co.*, 273 A.2d 899 (Pa. 1971), that a public figure “has no exclusive rights to . . . her own life’s story,” so absent some express contractual obligation of confidentiality, “others need no consent or permission of the subject to write a biography of a celebrity.” *Id.* at 918-19.

How do U.S. courts reach such different conclusions than their British counterparts about the scope of protectable privacy interests and the judicial remedies available to enforce them? This paper

seeks to advance the dialogue on the differing approaches to privacy protection on opposite sides of the Atlantic by presenting an overview of the legal framework within which U.S. courts police the uncertain boundary between private facts and news.⁴ While privacy law in the U.S. is neither uniform nor clear,⁵ our objective is to identify some of the concepts and theories that U.S. courts have generally embraced when asked, through a claim for public disclosure of private facts, to separate “news” that the press may freely report from “private” information it may not.

In the discussion that follows, we consider three broad topics in the search for factors that distinguish the U.S. approach to the public disclosure tort from that in Britain:

1. The legal source of the privacy “right.” In most areas of the U.S., privacy is protected as a common law—not a constitutional—right, a distinction that has shaped the approach taken by U.S. courts to resolve the news/privacy conflict.
2. The legal standards used to distinguish “news” from private facts. The framework widely used by U.S. courts poses a series of discrete questions designed to minimize subjective balancing of the “importance” of the speech against the severity of the privacy invasion.
3. The remedies available to the court. Injunctions against speech are highly disfavored, raising high hurdles for U.S. privacy plaintiffs to block publication of true speech, and rendering privacy actions less inviting for such plaintiffs.

While a comprehensive comparative analysis of the privacy laws of the U.S. and Britain is beyond the scope of this paper, we hope that the following discussion of these aspects of U.S. privacy law will stimulate discussion about ways to resolve the inevitable conflict between privacy and news.

I. THE SOURCE OF PRIVACY PROTECTION UNDER U.S. LAW

Privacy receives only limited constitutional protection in the United States. The U.S. Constitution contains no explicit recognition of a general right of privacy at all. The Fourth Amendment protects certain privacy interests through its prohibition against unreasonable searches, and the Supreme Court has recognized other “zones of privacy” rooted in the “penumbras” of the Bill of Rights and in the concept of “liberty” guaranteed by the Fourteenth Amendment.⁶ This constitutional protection of privacy has been held to limit governmental intrusion into sexual, marital and reproductive decisions and child-rearing and educational choices,⁷ and to safeguard against inappropriate public disclosures of certain personal information in the hands of the government.⁸

⁴ Our discussion is limited to the tort of “public disclosure of private facts” and does not examine the other aspects of privacy recognized in many U.S. jurisdictions, such as liability for intrusion upon seclusion or commercial misappropriation of one’s name or likeness.

⁵ Liability for public disclosure of private facts is an issue of state law rather than federal law. Not all states recognize this tort, and those that do are not in agreement on its proper scope or application. *See generally* Robert D. Sack, SACK ON DEFAMATION (3d ed.) § 12.4 at 12.33 (hereinafter “SACK”).

⁶ *See Roe v. Wade*, 410 U.S. 113, 152 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965).

⁷ *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning state law prohibiting intimate sexual contact between persons of the same sex); *Roe*, 410 U.S. at 164-67 (invalidating state law banning abortions); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down state ban on interracial marriage); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (declaring

These constitutional privacy protections, however, limit only the actions of *government*. The sole provision in the U.S. Constitution that directly regulates the conduct of individuals and private entities is the Thirteenth Amendment's prohibition of slavery; in other respects the Constitution protects an individual only from actions taken by the state.⁹ Several state constitutions provide explicit privacy rights for their citizens, but more often than not they, too, regulate only the conduct of state actors.¹⁰

As a result, privacy in the United States is protected primarily as a matter of common law. The widespread recognition of a common law right to privacy in the United States had its genesis in the 1890 publication of the now famous Warren and Brandeis Harvard Law Review article, *The Right to Privacy*,¹¹ which made the case for the vindication of the "right to be let alone" and "the right to an inviolate personality." The Warren and Brandeis privacy theory initially was met with skepticism by the courts, but is now recognized in one form or another in the vast majority of states.¹²

The tort now known as the "public disclosure of private facts" inherently raises concerns about free speech—everything the law gives to privacy it takes away from free speech, in a classic zero-sum game. Warren and Brandeis acknowledged the tension between freedom of the press and the privacy protection they advocated, and they suggested that an enforceable privacy right should not apply to matters of "public or general interest." 4 HARV. L. REV. at 214. This solution was easier to conceive than to accomplish. Courts ever since have struggled with how to define a matter of "public interest," and how to differentiate it from a purely "private" concern, in a manner that is objective, precise and consistent with the goals of a system of free expression.

It was not until 1975 that the U.S. Supreme Court first entered the fray over the conflict between privacy and free speech in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The case involved a news report about a 17-year-old who had been raped and then died from the resulting injuries. During the subsequent prosecution of the alleged perpetrator, a television reporter inspected the indictment in the courtroom during a break. It contained the name of the rape victim, which the journalist

unconstitutional a state law requiring sterilization of habitual criminals); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) (invalidating law requiring all children to attend public schools).

⁸ In *Whalen v. Roe*, 429 U.S. 589 (1977), the Court recognized "the individual'[s] interest in avoiding disclosure of personal matters," *id.* at 599, but upheld a state law requiring the recording of names and addresses of individuals prescribed certain drugs without deciding the constitutional import of any unwarranted disclosure of private data.

⁹ Private individuals and non-governmental organizations can be subject to constitutional constraints if they become "state actors" by performing a function traditionally carried out by the government or jointly participating in government action. *See, e.g.*, Glenn & Norwalk, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 Sup. Ct. Rev. 221.

¹⁰ *See* Timothy O. Lenz, "Rights Talk" About Privacy in State Courts, 60 ALB. L. REV. 1613, 1615-16 (1997). For example, the Alaska Constitution provides that "[t]he right of the people to privacy is recognized and shall not be infringed," ALASKA CONST. art. I, § 22, but, like the U.S. Constitution, this provision applies only to state actors. *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1129-30 (Alaska 1989). California does not limit the constitutional protection of privacy to state actors. Its constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and property." CAL. CONST. art. I, § 1. This provision has been construed to apply to both governmental and non-governmental conduct. *Hill v. NCAA*, 865 P.2d 633, 641-44 (Cal. 1994). Louisiana is another state that does not limit its constitutional privacy protection to state actors. Its constitution provides that "[e]very person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy," LA. CONST. art. I, § 5, and this provision has been construed to apply to private actors as well as state actors. *Moresi v. Dep't of Wildlife & Fisheries*, 567 So. 2d 1081, 1092 (La. 1990).

¹¹ Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹² Four states, Nebraska, New York, North Carolina and Virginia, do not recognize a tort claim for public disclosure of private facts. The other 46 states and the District of Columbia all appear to recognize such claims, but the precise contours of the tort vary from state to state. *See* SACK, *supra*, § 12.2.2 at 12-8; *see also* John A. Jurata, Jr., *The Tort that Refuses to Go Away*, 36 SAN DIEGO L. REV. 489, 496-98 (1999).

subsequently used in his reporting, notwithstanding a Georgia law making it a criminal offense to disclose “the name or identity of any female who may have been raped.” *Id.* at 472. The rape victim’s father then brought a tort action for the public disclosure of his daughter’s identity, and the state court rejected a First Amendment defense on the ground that the criminal law was an authoritative declaration by the state legislature that the identification of a rape victim is never a matter of public concern.

In the Supreme Court, Cox Broadcasting took direct aim at the privacy tort, arguing in favor of a bright-line rule that the First Amendment protection of free speech necessarily bars the imposition of any liability for the publication of information that is neither false nor misleading. The Supreme Court declined to make a broad holding that true, accurate speech is absolutely protected, but reversed on the narrower ground that a State may not “impose sanctions on the accurate publication of the name of a rape victim obtained from public records – more specifically, from judicial records.” *Id.* at 491.

Just four years later, in *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979), the Court struck down as unconstitutional an indictment of a newspaper for publishing, in violation of state law, the name of a juvenile charged with murder. It once again stopped short of holding that all true speech is constitutionally protected, but held that the publication of information lawfully obtained by the press may not be punished except when necessary to further a state interest “of the highest order.” *Id.*

In *Florida Star v. B.J.F.*, the Court invalidated a Florida statute prohibiting the publication of the name of a rape victim, holding that the publication of truthful information lawfully obtained may be punished “*if at all*, only when narrowly tailored to a state interest of the highest order.” 491 U.S. 524, 541 (1989) (emphasis added). And in its most recent statement on the issue, the Supreme Court in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), barred a statutory claim for damages against a radio station for broadcasting an illegally intercepted wireless phone call that it received from an unknown source. The tape recording involved a conversation with a union leader during a highly contentious teacher’s strike and was plainly newsworthy. The Court reaffirmed that a state may not punish publication of true information, innocently obtained, without a need “of the highest order.”

Each of these cases involved the reporting of true, lawfully obtained, newsworthy facts in which someone had claimed a privacy interest. In each instance, the Court found the First Amendment to prohibit any sanction for the publication of those facts notwithstanding the compelling privacy interests presented.

This history reflects that claims seeking to punish the public disclosure of true facts must generally be fought on an uneven playing field. An individual’s “right” to protect against the public disclosure of private facts is primarily a creature of the common law, not universally accepted and of relatively recent vintage, while the freedoms of speech and press are longstanding and guaranteed in the Constitution. In this framework, true speech may be punished, “*if at all*,” only to advance a “state interest of the highest order.”¹³

¹³ See generally Patrick J. McNulty, *The Public Disclosure of Private Facts: There is Life After Florida Star*, 50 DRAKE L. REV. 93 (2001) (hereinafter “MCNULTY”); Jonathan B. Mintz, *The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 442 (1996) (hereinafter “MINTZ”).

As noted above, see note 10 *supra*, some state’s constitutions do recognize privacy as a state constitutional right that can be enforced against private actors. Moreover, some jurisdictions view the common law privacy right to be as significant and protected as free speech. *Vassiliades v. Garfinckel’s*, 492 A.2d 580, 589 (D.C. Ct. App. 1985) (“[T]he right of privacy stands on a high ground, cognate to the values and concerns protected by constitutional guarantees.”) (citations and internal quotation marks omitted).

As a result of this unequal status of the rights of privacy and speech in the United States, the pre-existing constitutional mandate to protect free speech typically has been viewed by courts as a *limitation* on their ability to recognize a protectable privacy right rather than a *competing interest* to be balanced against privacy. In the first California case recognizing invasion of privacy as a tort, for example, a California appellate court took pains to note that it had no authority to extend liability to “the dissemination of news and news events.” *Melvin v. Reid*, 291 P. 91, 93 (Cal. App. 1931). Similarly, a federal court considering a privacy claim asserted by a Pennsylvania police officer and his wife based on a newspaper’s disclosure of facts concerning their marital quarrels, started from the premise that “First Amendment rights are fundamental” while privacy rights are viewed “more tentatively.” *Scheetz v. Morning Call, Inc.*, 747 F. Supp. 1515, 1532 (E.D. Pa. 1990). As a result, the court felt that it “must accord the First Amendment claims more deference than the privacy claims.” *Id.*

The relationship between free speech and privacy is thus viewed differently in the United States and Britain. In the United States, privacy is primarily a common law right that must be narrowly defined to conform to the constitutional mandate protecting speech and press, while the European Convention treats privacy and free speech as co-equal human rights. The unequal status of privacy and free speech in the United States has indisputably shaped the legal framework for protecting privacy, to which we now turn.

II. THE STANDARDS USED TO EVALUATE PRIVACY CLAIMS

To explore how the speech/privacy conflict generally is analyzed in the United States, we first review the framework in which the elements of the tort are placed and then address more specifically the two key definitional issues present in any privacy claim—what constitutes a protectable “private” fact, and what information is “newsworthy,” *i.e.*, of legitimate public concern.¹⁴ Recognizing once again that privacy law is not entirely uniform among the 50 states, the law nevertheless may be seen as generally embracing two objectives: limiting the scope of protectable privacy to avoid restrictions on the dissemination of news to the public, and doing so through legal standards that minimize to the extent possible the need for a direct, subjective judicial balancing of the public interest in disclosure of a specific fact against the privacy interest of a particular plaintiff.

A. Framework of the Public Disclosure Tort.

Section 652 of the Second Restatement of Torts seeks to distill the law of privacy as recognized in most U.S. jurisdictions. Published by the American Law Institute in 1977, the Restatement defines the public disclosure tort as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.¹⁵

¹⁴ We use the term “newsworthy” as shorthand for the notion that something is properly classified as a matter of “legitimate public concern,” as do the courts. *See, e.g., Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 497 (Cal. 1998).

¹⁵ RESTATEMENT (SECOND) OF TORTS § 652D (1977-2007). Some states have added an element of “reckless disregard” to the tort, requiring in addition a showing that the defendant acted “with reckless disregard of the private nature of the fact or facts disclosed.” *See SACK, supra*, § 12.4 at n.137.

As synthesized in the Restatement, the tort thus has five elements: (1) “publicity” given to (2) a private fact (3) about the plaintiff that is (4) “highly offensive” and (5) of no legitimate public concern, *i.e.*, not “newsworthy.” The first and third elements are straightforward—to assert a claim, information about an identifiable person must be communicated to the public at large (“publicized”).¹⁶ The other three factors (requiring publication of a “private” and “highly offensive” fact that is of no “legitimate public concern”) are more problematic, both in their meaning and in their interrelationship in determining liability.

The five-factor approach in the Restatement does not explicitly invite a court to engage in any “balancing” of the degree of the privacy intrusion (offensiveness) against the importance of the information to the public (newsworthiness). Rather, each of the Restatement factors is considered a separate element of the tort, and each independently must be established for liability to exist. Whether a fact is “private” and its disclosure “highly offensive” are separate considerations from whether the disclosure nonetheless was “newsworthy.” Each of the factors is susceptible to independent proof that does not explicitly require the significance of the information to the public (“newsworthiness”) to be weighed against the degree of the invasion of privacy (“offensiveness”). *See generally* SACK, *supra*, § 12.4.6.2 at 12-67.

Viewing the elements of the tort this way, the “offensiveness” requirement can be considered to define the zone of “private” facts that are legally protectable—liability potentially can exist only if a disclosed fact is not generally known *and* is so intimate that its disclosure would be highly offensive to any reasonable person. At the same time, the “lack of newsworthiness” element further limits the tort’s reach by serving as a trump card: if a highly offensive disclosure is newsworthy, the cause of action fails because the lack of any legitimate public concern is an independent element of the tort.

This basic approach to a claim for invasion of privacy is reflected in the recent decision of the U.S. Court of Appeals for the Fifth Circuit in *Lowe v. Hearst Communications, Inc.*, 487 F.3d 246 (5th Cir. 2007). In this Could-Only-Happen-In-Texas litigation, the private facts disclosed by the *San Antonio Express News* concerned a blackmail scheme carried out by two attorneys who were married to each other. The newspaper described how the wife had engaged in a series of extra-marital affairs, which in each instance were followed by a letter from her husband to her lover claiming to have discovered the affair, demanding information needed to complete a petition for divorce and obscenity, and threatening to reveal the affair to the lover’s family and employer. Under these threats, at least five men entered into confidential settlement agreements with the supposedly-scorned husband, paying him between \$75,000 and \$155,000. *Id.* at 249. The documents describing this scheme became part of a sealed court record in a lawsuit between the husband and a former law partner who had discovered the extortion, and ultimately found their way into the hands of an *Express News* reporter.

The husband and wife schemers brought a claim against the paper for public disclosure of private facts once the sealed facts were reported. In affirming the dismissal of this claim, the Fifth Circuit considered only a single legal issue: whether the publicized matter was “of legitimate public concern.” *Id.* at 250. Citing its own precedent that “newsworthy” information broadly includes information concerning “interesting phases of human activity,” *id.*, the court readily dismissed the case. It did not weigh the intimate nature of the sexual activity disclosed, or the impact of the disclosure on the couple’s

¹⁶ “Publicity” in this context means that the disclosure must be “to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.” RESTATEMENT (SECOND) OF TORTS § 652D cmt. a. *See, e.g., Kuhn v. Account Control Tech.*, 865 F. Supp. 1443 (D. Nev. 1994) (disclosure to a few co-workers of plaintiff’s failure to repay student loan in course of debt collection activities not “publicity” for privacy purposes, even if it would constitute “publication” for defamation purposes); *Eddy v. Brown*, 715 P.2d 74 (Okla. 1986) (revealing plaintiff’s psychiatric condition to limited number of co-workers did not amount to “publicity” of private facts).

eight year-old son, against the importance of the disclosure to the public for the simple reason that “there can be no liability for invasion of privacy if the information is a matter of public concern.” *Id.* at 251.

This same approach is evident in *Morgan v. Celender*, 780 F. Supp. 307 (W.D. Pa. 1992), in which the court rejected a claim for invasion of privacy based on the publication of a photograph of a minor who allegedly was the victim of sex abuse by her father. Even though the complaint alleged that the reporter had obtained the photograph deceptively, and the court considered the disclosed facts “offensive to a reasonable person,” the privacy claim was dismissed because the prosecution of the perpetrator of the crime and the issue of child abuse were both legitimate “matters of public concern.” *Id.* at 310. See also *Wilson v. Grant*, 687 A.2d 1009, 1015 (N.J. Super. Ct. App. Div. 1996) (an accurate “disclosure is not tortious when connected with a newsworthy event, even though offensive”) (internal quotation marks and citation omitted).

The Restatement’s rigorous, step-by-step approach to liability reflected in these cases has not wholly eliminated judicial balancing of the magnitude of an invasion of privacy against the importance of a disclosure to the public, however. As Judge Richard Posner, one of America’s leading federal court jurists, has noted, the two concepts at some level become unavoidably interrelated:

An individual, and more pertinently perhaps the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger.

Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993). Given this interrelationship, some courts have understandably sought to compare the “news value” of a disclosure with its impact on privacy, and have done so through two routes. One approach imports into the definition of newsworthiness itself a balancing of the privacy interest; the other essentially treats the “offensiveness” element of the tort as a limitation on the right to publish newsworthy information, rather than a limitation on the universe of private facts the disclosure of which may be actionable.

The first approach is typified by the analysis in *Wilson v. Grant*, where a New Jersey court considered a privacy claim asserted by a plaintiff who had been orchestrating a public campaign to remove a local radio talk-show host. 687 A.2d at 1012. In retaliation for the campaign, the host disclosed on air that plaintiff had once been a patient at a psychiatric hospital. In analyzing whether this disclosure was “newsworthy,” the court tied the answer directly to the impact on plaintiff’s privacy:

[I]n determining whether the newsworthiness privilege applies, we should balance “the relative newsworthiness of the publication against its level of offensiveness and intrusiveness into private matters.” The factors to be considered in the balance are: “(1) the social value of the facts published; (2) the depth of the article’s intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily acceded to a position of public notoriety.”

Id. at 1016 (citations omitted). See also *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1068-69 (C.D. Cal. 2002) (to decide newsworthiness court must consider, *inter alia*, both the “social value” of the information and the “extent of the intrusion” into private matters); *Winstead v. Sweeny*,

517 N.W.2d 874 (Mich. Ct. App. 1994) (citing standard for determining newsworthiness that includes consideration of the extent of intrusion into private matters).

The alternative conceptual approach is reflected in an early ruling by the Second Circuit Court of Appeals in a case involving a “Where Are They Now” article published in the *New Yorker* magazine. See *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806 (2d Cir. 1940). In *Sidis*, the plaintiff had been a well-known child prodigy nearly three decades earlier, who received widespread publicity before World War I lecturing to mathematicians at the age of eleven and graduating from Harvard at the age of sixteen. He later sought to live a private life and affirmatively avoided public notice. The *New Yorker* article traced his evolution over 30 years from nationally-known child prodigy to insignificant clerk, in an unflattering portrayal the court described as “merciless.” The court concluded that the disclosed facts were of legitimate public concern, but refused to hold that their “newsworthiness” alone defeated the claim. Even when a matter is newsworthy, the court said, “[r]evelations may be so intimate and so unwarranted in view of the victim’s position as to outrage the community’s notions of decency.” *Id.* at 809. See SACK, *supra*, § 12.4.6.2 at 12-67 (describing the “*Sidis*” principle).

Under this approach, the “offensiveness” of a disclosure is essentially a limitation on the universe of true, newsworthy facts that can be published without fear of liability. In analyzing a false light invasion of privacy claim in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the U.S. Supreme Court left open the possibility that the First Amendment might permit such a result, allowing the disclosure of “newsworthy” information to be punished when the impact on a plaintiff’s privacy is entirely out of proportion to the news value. That case involved an article in *Life* magazine about a play and motion picture that were being developed based on the true life experience of the Hill family, who had been held hostage in their home for 19 hours by three escaped convicts. Photos in the magazine showed actors performing scenes from the play in the house where the original events had actually occurred. By a narrow majority, the Supreme Court dismissed the claim, holding that a privilege to comment on matters of public interest is protected under the First Amendment. In so doing, however, the Court indicated that the constitutional protection for information about newsworthy persons and events does not necessarily foreclose an action for damages “where ‘[r]evelations may be so intimate and so unwarranted in view of the victim’s position as to outrage the community’s notions of decency.’” *Id.* at 383 n.7 (quoting *Sidis*, 113 F.2d at 809).

In light of subsequent Supreme Court rulings in *Cox, Daily Mail*, and *Florida Star*, some commentators have concluded that the *Sidis* approach to the privacy tort would no longer be permitted by the Supreme Court. In their view the protection of privacy would not be considered a “state interest of the highest order” sufficient to sanction the publication of a fact deemed to be newsworthy. See SACK, *supra*, § 12.4.6 at 12-69 (the First Amendment protects all truthful publication about matters of legitimate public concern); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 362-64 (1983) (same).

While the proper meaning and application of the Restatement factors is not entirely settled, the Restatement approach itself seeks to separate the definition of protectable private facts from the determination of “newsworthiness” in a manner that minimizes the opportunity to impose liability upon a *post hoc*, subjective balancing of the importance of a fact against the perceived severity of the privacy invasion. Courts recognize a “strong constitutional policy against fact-dependent balancing of First Amendment rights against other interests” because “history teaches us that such a process leads too often to discounting society’s stake in First Amendment rights.” *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 483 (Cal. 1998). The impulse to weigh and balance the competing interests nevertheless continues to arise, both in defining the zone of legally protectable private facts and in defining the scope of protected newsworthy information.

B. Defining the Zone of Protectable Private Facts.

Deciding what “private” facts might give rise to liability can be viewed as encompassing two components of the Restatement analysis—whether a fact is “private” and whether its disclosure would be “highly offensive.” Because a precise definition of a “private, offensive fact” is not easy to state, courts often proceed by defining what facts are *not* protectable—by asking first whether a fact is “public.” Information that is “public” is necessarily not private and “[o]nce information is public, there is no liability for further publication,” regardless of how sensitive or embarrassing the information may be. SACK, *supra*, § 12.4.4 at 12-40; *see* RESTATEMENT (SECOND) OF TORTS § 652D cmt. b.

For purposes of the privacy tort, information may be considered public—and thus not protectable—as a matter of fact or a matter of law. Information that already is widely known as a matter of fact cannot sustain a claim for privacy; information in official records is deemed public as a matter of law so that its dissemination equally cannot sustain a claim for privacy, regardless of how widely the information actually was known. While the status of a fact as public or private is not free from doubt in all contexts, there are certain settled standards to guide this inquiry.

1. Public Records. The Supreme Court ruled in *Cox Broadcasting* that the First Amendment bars punishment for the accurate publication of information contained in judicial records lawfully obtained by the press. 420 U.S. at 496. The only proper approach to protecting privacy interests in such official records, the Court explained, is for the State to maintain the records’ secrecy from the public in the first place; once information is disclosed in a public record, the constitutional protection of speech precludes any effort to punish those who publish it. *See also Florida Star v. B.J.F.*, 491 U.S. at 534 (government can seal files where appropriate and punish employees for mishandling information, but cannot punish reporting about true information in government files made available to the press).

State courts have applied this same principle to reject privacy claims based on facts contained in court files and other public records. In *Kapellas v. Kofman*, a candidate for city counsel sued over a newspaper’s disclosure about her children’s run-ins with the law. 459 P.2d 912 (Cal. 1969). Because the newspaper only reported information contained in the “police blotter” (a public record of arrests maintained at the station house), the court found that disclosure does not violate any right to privacy—the reported matters were “matters of public record.” *Id.* at 924. *See also, e.g., Morgan v. Celender*, 780 F. Supp. at 310 (name and age of rape victim not private because “part of the public record in state court”); *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1290 (D.D.C. 1981) (no privacy claim exists for republication of matters in the public record of a trial, no matter how intimate or sensitive); *Ayers v. Lee Enters., Inc.*, 561 P.2d 998 (Or. 1977) (no claim for disclosure of facts obtained from police records); *Aquino v. Bulletin Co.*, 154 A.2d 422 (Pa. Super. Ct. 1959) (no claim for publication of information in divorce decree).

In *Kapellas*, the court left open the possibility that information in the public record could become “private” with the passage of time. 459 P.2d at 924. This proposition, however, has been rejected by the lower courts in light of the constitutional constraint recognized by the Supreme Court in *Cox* and its progeny. In *Gates v. Discovery Communications, Inc.*, 101 P.3d 552 (Cal. 2005), for example, the California Supreme Court rejected a privacy claim based on a TV documentary about a murder that had occurred a dozen years earlier. Because the plaintiff’s involvement in the crime was reflected in the record of his conviction as an accessory to murder, he had no claim for disclosure of private facts as a matter of law, despite the passage of time. A privacy claim based on “facts obtained from public official records ... is barred by the First Amendment.” *Id.* at 562.

Similarly, in *Uranga v. Federated Publications*, 67 P.3d 29 (Idaho 2003), the Idaho Supreme Court rejected a privacy claim based on the repetition of a forty-year old statement from the records of a criminal prosecution indicating the plaintiff had engaged in homosexual conduct. “There is no indication that the First Amendment provides less protection to historians than to those reporting current events.” *Id.* at 35. And again, in *Romaine v. Kallinger*, 537 A.2d 284 (N.J. 1988), the New Jersey Supreme Court rejected a claim that facts surrounding a murder that had occurred eight years earlier at the home of the plaintiff were no longer newsworthy. Citing *Cox Broadcasting*, the court held that any requirement to assess the (continuing) “newsworthiness” of information in public records “would invite timidity and self censorship.” *Id.* at 292-93. Under this approach, no claim exists for publication of private facts contained in public records, no matter how “old” the information becomes. See *Dresbach v. Doubleday*, 518 F. Supp. at 1290 (no claim for disclosure of facts from trial nineteen years earlier); *Montesano v. Donrey Media Group*, 668 P.2d 1081, 1085-26 (Nev. 1983) (no claim for disclosure of hit and run conviction twenty-three years earlier).

2. Public Information. No claim will lie for information that is actually known to the public already, whether or not it is contained in an official public record. In *Lee v. Penthouse International*, for example, the prior publication in three magazines of photographs depicting the plaintiff in various states of undress was fatal to her claim for invasion of privacy:

[A] fact is no longer private even if it is only published in a newspaper or magazine of local or regional circulation. ... Any publication in a newspaper or magazine, even one of limited circulation, places a private fact into the public domain.

No. CV 96-7069SVW, 1997 WL 33384309, at *6 (C.D. Cal. Mar. 19, 1997). It is not just a prior publication in the media that will defeat a privacy claim, but previous disclosure to any significant number of individuals. In *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665 (1984), the disclosure that the man who saved President Ford’s life was homosexual did not violate his privacy because he had marched in gay parades and acknowledged his sexual orientation to a large circle of friends.

3. Public Places. Courts have widely accepted the principle that there generally can be no liability for publishing information about matters that occur in a public place—“[w]hat goes on in a public place is, by definition, public, not private.” SACK, *supra*, § 12.4.4 at 12-40. Thus, for example, the photograph of the fan at a football game with the zipper of his trousers open, *see p. 32 supra*, provided no basis for liability. “[A] photograph taken at a public event which everyone present could see, with the knowledge and implied consent of the subject, is not a matter concerning a private fact.” *Neff v. Time, Inc.*, 406 F. Supp. at 861. And the photograph of two young women at a rock concert with body paint on their exposed breasts, *see p. 32 supra*, was not actionable even though the concert occurred on private property. The women’s activities were “open to the public eye, and cannot form the basis of liability for invasion of privacy.” *Mayhall v. Dinneis Stuff, Inc.*, 2002 WL 32113761, at *3. See also *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901 (Tex. App. 1991) (photo of male high school soccer player that revealed his genitals while he chased a ball was not an invasion of privacy); *Gill v. Hearst Publ’g Co.*, 253 P.2d 441 (Cal. 1953) (photo of couple kissing in a sidewalk cafe not an invasion of privacy).

4. Public Figures. The status of a plaintiff as a voluntary or involuntary “public figure” is also relevant to a determination of whether a particular fact is “private” such that it may give rise to liability if disclosed. In the early development of the tort, it was considered that “public figures,” by virtue of their notoriety, had a much more restricted zone of privacy that the law would protect. Indeed,

a California Appellate Court flatly exclaimed in 1931 that a right of privacy for such persons “does not exist” at all: “Where a person has become so prominent that by his very prominence he has dedicated his life to the public,” he has “thereby waived his right to privacy.” *Melvin v. Reid*, 297 P. at 93. U.S. law recognizes “virtually no right of privacy” for a public figure, at least “as the facts may relate, even remotely, to the plaintiff’s public life.” SACK, *supra*, § 12.4.5.1 at 12-46. See, e.g., *Gilbert v. Nat’l Enquirer, Inc.*, 51 Cal. Rptr. 2d at 98 (narrow privacy interest for a “well-known actress” who “has sought media attention”). A similar approach is taken with respect to the public life of public officials. See, e.g., *McCall v. Oroville Mercury*, 142 Cal. App. 3d 805 (1983) (criminal record of public official is publishable “no matter how remote in time or place”).

While this approach limits the zone of protectable “private” facts that may be the basis of a privacy claim, many courts instead consider a celebrity’s status as a public figure more properly relevant to deciding whether a fact about him or her is “of legitimate public concern,” rather than in the determination of whether a fact is “private” and “highly offensive.” For example, one court held that Pamela Anderson Lee could not pursue a claim for invasion of privacy based on a television news program’s brief airing of excerpts from a videotape of her engaged in sex with her boyfriend because “[p]urported romantic involvements of celebrities are matters of public concern.” *Michaels v. Internet Ent’mt Group, Inc.*, No. CV 98-0583 DDP, 1998 U.S. Dist. LEXIS 20786, at *12 (S.D. Cal. Sept. 10, 1998) (citation omitted). See also *Wilson v. Grant*, 687 A.2d 1009 (N.J. Supr. Ct. App. Div. 1996) (finding a private fact newsworthy due to plaintiff’s status as a voluntary public figure who thrust himself into a controversy); *Jacova v. S. Radio & Television Co.*, 83 So. 2d 34 (Fla. 1955) (bystander in gambling raid on a cigar store became an involuntary actor in a newsworthy event and thus had no claim for invasion of privacy).

5. Private Information. Courts limit the scope of actionable facts by according protection only to sensitive or intimate facts, the disclosure of which can be considered highly offensive to a person of ordinary sensibilities. In *Green v. Chicago Tribune Co.*, 675 N.E.2d 249 (Ill. App. 1996), for example, a mother sued for invasion of privacy after a newspaper published a page-one story on Chicago’s record homicide rate illustrated with a photograph of her dead son taken in a hospital room. The photo of the young boy, who had fallen victim to gang violence, was accompanied by statements made at the hospital by the boy’s mother. The trial court concluded that no private facts had been disclosed because a hospital is a public place, but the appellate court disagreed. Although the hospital was a public building, the court concluded it was not a “public place” for purposes of the privacy tort because the “general public surely had no right to resort in [the boy’s] private hospital room, nor did the public have an interest in that room that affected their safety, health, morals or welfare.” *Id.* at 252. The court further found that speaking to a reporter was “not dispositive” as to whether the mother’s statements were public or private. Because she had made clear her intention not to make a public statement regarding her son’s death, her statements to the reporter could be considered “private.” The disclosed private facts were potentially actionable because a jury could find their disclosure “highly offensive,” given that they concerned “an extraordinary painful incident in plaintiff’s life, when she first set eyes on her minor son after he had been shot to death,” and were published despite her telling the reporter she did not wish to make a public statement. *Id.* at 255.

As Judge Posner has explained, the tort of public disclosure is intended to protect only “those intimate physical details the publicizing of which would be not merely embarrassing and painful but deeply shocking to the average person subjected to such exposure.” *Haynes*, 8 F.3d at 1234-35. The Restatement defines the areas protected by the tort as the aspects of one’s life that are kept entirely to one’s self, or revealed “at most” to family and close friends. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b. It provides as examples sexual relationships, family quarrels, “disgraceful or humiliating

illnesses,” personal letters and details “of a man’s life in his home, and some of his past history that he would rather forget.” *Id.* One commentator has surveyed the case law and developed his own checklist of “quintessentially intimate” matters that might be protected by the tort:

1. Mental and emotional condition, including grief;
2. Physical health;
3. Love and sexual relations, including sexual orientation;
4. Decisions concerning procreation, including the decision to have an abortion;
5. Family relationships;
6. Victimization, including whether the person has been a victim of violent or sexual assault;
7. Intense and close-knit associational memberships and affiliations;
8. Deep personal beliefs, such as religious conviction; and
9. Personal financial matters.

Rodney A. Smolla, *FREE SPEECH IN AN OPEN SOCIETY* 128 (1992). When liability otherwise cannot be excluded on other grounds, courts have found each of these areas, in certain contexts, to give rise to liability for invasion of privacy. *See generally* MCNULTY, *supra*, at 135. While not exhaustive, the list is an effort to create some clarity about the type of information that is potentially problematic if included in a news report.

On the privacy side of the equation, the Restatement approach thus seeks to define the universe of protectable private facts initially through bright-line, objective definitions of “private” information. Only *after* these filters have been applied is it necessary to consider whether a fact is sufficiently sensitive that its disclosure may be deemed “highly offensive.” If so, a separate and independent analysis of the newsworthiness of the fact is required.

C. Defining “Newsworthy” Information.

The determination of what constitutes a “newsworthy” disclosure is the most problematic and unsettled aspect of the privacy tort in the United States. The confusion exists at two levels: First, there are differing views about what criteria should properly be considered by a court in deciding that something is newsworthy. Second, there is disagreement about the level of granularity at which this analysis occurs—is it enough that a story concerns a newsworthy topic, or must each specific disclosed fact independently be newsworthy?

On the first issue, the Restatement suggests that matters of legitimate public concern encompass everything that is “customarily regarded as ‘news’” as “publishers and broadcasters have themselves defined the term.” RESTATEMENT (SECOND) OF TORTS § 652D cmt. g. Moreover, “[p]rotection is not limited to publication of ‘news’” in a narrow sense, but rather “is afforded for dissemination of anything

within the boundaries of legitimate public interest or concern.”¹⁷ The notion that matters of “legitimate public concern” include much more than “hard news” is long-standing in the evolution of the privacy tort. The U.S. Court of Appeals for the Third Circuit explained in an early case the reason for the reluctance to define such matters more narrowly:

A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. Still others are entertained by news which has an incongruous or ironic aspect . . . [I]t is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which the publication is privileged.

Jenkins v. Dell Publ’g Co., 251 F.2d 447, 451 (3d Cir. 1958). See also *Lowe v. Hearst Commc’ns, Inc.*, 487 F.3d at 250 (newsworthiness extends broadly to “information concerning interesting phases of human activity”) (citation omitted).

Many courts, however, balk at the notion that information is necessarily of “legitimate public concern” just because it is of intense public interest. Since the first recognition of the privacy tort, courts have thus searched for objective ways to define what is considered “newsworthy” more narrowly. Quite often this effort has led to a linkage of the definition of “newsworthy” to some consideration of the degree of the invasion of privacy involved—the very balancing of public and private interests that the elemental structure of the Restatement seeks to minimize.

The instinct to define “newsworthiness” by balancing the public interest in the disclosure of a fact against the severity of the privacy invasion is fully evident in the efforts of the California Supreme Court to grapple with this issue over the years. In *Kapellas v. Kofman*, 459 P.2d 912 (Cal. 1969), the California court addressed the meaning of “newsworthiness” in considering a privacy claim by a candidate for City Council who challenged a newspaper editorial opposing her candidacy on the ground that her time would better be spent taking care of her six children. The editorial disclosed that plaintiff’s children had been in trouble with the law and that neighbors had complained about foul language coming from plaintiff’s house. In addressing the claim that the children’s privacy had been violated by the editorial, the court identified three factors as relevant to the “newsworthy” determination: “[1] the social value of the facts published, [2] the depth of the article’s intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety.” *Id.* at 922. The court then dismissed the privacy claim outright because of “the importance of public access to all relevant information about candidates for public office” and the “non-confidential nature of the reported

¹⁷ SACK, *supra*, § 12.4.5 at 12-43 (footnote omitted). As one commentator has described it, the scope of the exception for information of “legitimate public concern” is intended to be “nearly all encompassing”:

It extends to publicity about public figures who invite public attention to their activities, those who are involuntarily placed in the public eye such as crime victims, information as hard news and information as entertainment. All are subject to the general right of the press “to satisfy the curiosity of the public as to their leaders, heroes, villains and victims.”

MCNULTY, *supra*, at 107 (quoting original RESTATEMENT OF TORTS § 867 cmt. c (1939)). Under this approach, reports on “arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of [every] nature, . . . rare disease[s], . . . and many other similar matters of genuine, even if more or less deplorable, popular appeal” are within the realm of legitimate public interest. RESTATEMENT (SECOND) OF TORTS, § 652D cmt. g.

conduct.” *Id.* at 924. The three factors it identified, however, plainly invite a weighing of the public and private interests at stake in defining information of “legitimate public interest.” *Id.* at 922.

A few years later, the California Supreme Court took another stab at the same definitional issue in considering the privacy claim of an individual who had a passing connection to the criminal prosecution of mass murderer Charles Manson and objected to his portrayal in a book written several years later by one of the prosecutors. The Court refined the factors relevant to identifying “newsworthy” information in light of the intervening holdings of the U.S. Supreme Court in *Cox, Daily Mail*, and their progeny, indicating that the publication of true information cannot be punished absent a state interest of the highest order—rulings that had led many commentators to conclude the public disclosure tort could not survive constitutional scrutiny. *See* pp. 35-36 *supra*. The Court did not reject the tort altogether, but it expanded the definition of “newsworthy” information to include additional considerations:

the depth of the intrusion into the plaintiff’s private affairs, the extent to which the plaintiff voluntarily pushed himself into a position of public notoriety, the exact nature of the state’s interest in preventing the disclosure, and whether the information is a matter of public record. Additionally, we look to any continued public interest in the event so that the passage of time does not per se extinguish the privilege of the publisher

Forsher v. Bugliosi, 608 P.2d 716, 727 (Cal. 1980). The California Court thus added to the “newsworthiness” analysis a consideration of whether the item disclosed is a “matter of public record” and the impact of the passage of time, further limiting the disclosures that could be used as a predicate for a tort claim. But this approach only confuses the fundamental division embraced by the Restatement, importing into the definition of “newsworthiness” concepts that more accurately concern whether information is considered “private” in the first place.¹⁸

Most recently, in *Shulman*, the California Supreme Court revisited the definition of “newsworthy” information but did little to clarify the situation. First, the Court candidly concluded that “the analysis of newsworthiness does involve courts to some degree in a normative assessment of the ‘social value’ of a publication.” *Shulman*, 955 P.2d at 484. Second, it held that newsworthiness “depends on the degree of intrusion and the extent to which plaintiff played an important role in public events.” *Id.* Under this approach, the court explained, “[s]ome reasonable proportion” must be maintained between the events or activity of public interest and the private facts to which publicity is given. *Id.*

Other courts have not widely embraced California’s decision to balance the public and private interests expressly as part of the initial assessment of whether a fact is newsworthy. They have instead adopted an approach more true to the Restatement’s elemental, objective framework. These courts accept a broad definition of newsworthiness tied to notions of the public’s interest and limit its scope only when information is not truly reported for any purpose other than “prying” into private facts:

In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper

¹⁸ The Court later limited *Forsher*, holding that the passage of time cannot nullify the newsworthiness of information that had been a matter of public record. *See Gates v. Discovery Commc’ns, Inc.*, 101 P.3d 552 (Cal. 2004) discussed at p.19 *supra*.

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

Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975). See also *Winstead v. Sweeny*, 517 N.W.2d at 877 (privilege to publish newsworthy information does not extend to prying into privacy “for its own sake”) (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. h).

This definitional approach, denying newsworthy status only to “morbid” information published “for its own sake,” also has within it the seeds of the solution to the second key definitional issue—whether each specific fact in an article must independently be evaluated by the court for its news value. To avoid judicial second-guessing of editorial decisions about how to report a story and what facts to include, courts have adopted a two-step analysis. The first step inquires into whether a report overall deals with a newsworthy topic, and the second step then restricts analysis of any particular private fact to a determination of whether there exists a nexus between that fact and the newsworthy topic—in other words, whether the fact was included “for its own sake” and not to advance the point of the report.

In *Gilbert v. Medical Economics Co.*, the Tenth Circuit articulated this two-step analysis as a necessary step to avoid a constitutional conflict, because the First Amendment protects truthful reporting so long as the information disclosed has “some substantial relevance to a matter of legitimate public interest.” 665 F.2d 305, 308 (10th Cir. 1981). Under this approach, “every private fact disclosed in an otherwise truthful, newsworthy publication” is protected so long as it has “some substantial relevance to legitimate public interest.” *Id.* See also *Lee v. Calhoun*, 948 F.2d 1162, 1166 (10th Cir. 1991) (disclosure that a patient had tested positive for AIDS is not actionable where disclosure was “sufficiently related” to a matter of legitimate public concern—a \$38 million malpractice claim brought by the patient); *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980) (Constitution bars privacy claim if there is a “logical nexus” between the disclosure and a newsworthy topic); *Romaine v. Kallinger*, 537 A.2d 284, 294 (N.J. 1988) (“once a matter is found to be within the sphere of public interest,” private facts “related to the subject” are also considered newsworthy).

Gilbert involved an article about an anesthesiologist who had been involved in two claims of malpractice. A magazine used her photograph and facts about her personal and professional life to illustrate an article titled “‘Who Let This Doctor In The O.R.? The Story Of A Fatal Breakdown In Medical Policing.’” Among other things, the article disclosed facts about the doctor’s psychiatric history and marital problems. See *Gilbert*, 665 F.2d at 306-07. The plaintiff doctor argued that publishing her “photograph, name and private facts about her psychiatric history and marital life add[ed] nothing to the concededly newsworthy topic.” *Id.* at 308. Instead of attempting to weigh the public interest in the truthful revelations about plaintiff’s “psychiatric and marital problems” against the severity of the invasion of privacy, the disclosures were held to be protected by the First Amendment because they were “substantially relevant to the newsworthy topic of policing the medical profession.” *Id.* at 309.

This same approach was taken in *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993), a case that arose out of a book documenting the social, political and economic effects of the immigration of African-Americans from the rural south to large northern cities after World War II. The book included the author’s personal life history, beginning as a sharecropper’s wife in Mississippi and following through her life in Chicago. The plaintiff in the privacy lawsuit was the author’s former husband, who objected to disclosures of events 30 years earlier that revealed him to have been a heavy

drinker who neglected their children, could not keep a job and was unfaithful. His privacy claim was rejected because the themes addressed by the book were undeniably of legitimate public interest, and all of the private details challenged in the lawsuit were “germane to the story that the author wanted to tell.” *Id.* at 1233. The court specifically rejected plaintiff’s effort to demonstrate that the point could have been made effectively without these specific facts, or by using a pseudonym that would preserve his anonymity. No such privacy protections were required, as a matter of law, because there was a direct linkage between the facts disclosed and the author’s themes.

Similarly, the Fifth Circuit in *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir. 1989), applied the nexus test to reject a claim that the disclosure of a rape victim’s name and a picture of her home in a documentary constituted an invasion of privacy. The documentary questioned the guilt of a man convicted of rape, and included the details of several rapes that were relevant to the theory supporting the man’s innocence. The court concluded that a “peculiarly strong” nexus existed between the disclosures of private facts and the publication’s goal of persuading the public “to a particular view of particular incidents”:

Communicating that this particular victim was a real person with roots in the community, and showing [the TV stations] knowledge of the details of the attack upon her, were of unique importance to the credibility and persuasive force of the story.

Id. at 274-75. In applying the nexus test, courts widely accept that the “impact and credibility” of an article is greatly enhanced with identifying information. *See, e.g., Gilbert*, 665 F.2d at 308 (publication of plaintiff’s name eliminates any impression that the issue is hypothetical); *Ross*, 870 F.2d at 274 (using rape victim’s name and residence provided “a personalized frame of reference that fosters perception and understanding”) (citation omitted).

Under this “nexus” approach, a fact is actionable only when it crosses the line from being significantly related to the newsworthy topic and instead constitutes a “morbid prying” into the private affairs of another for its own sake, or when the information “adds nothing” to the topic of public interest. As the leading treatise explains:

Courts seem to have come to something of a consensus that the privacy of a plaintiff is protected “by requiring that a logical nexus exist between the complaining individual and the matter of legitimate public interest.” The newsworthiness of an article about the Pentagon, for example, would not necessarily protect publication of intimate and embarrassing private facts about a clerical worker employed as a member of its staff.

SACK, *supra*, § 12.4.5 at 12-48 (footnotes omitted). Thus, for example, a privacy claim was allowed to proceed where the plaintiff objected to the use of “before” and “after” photos of her face lift to illustrate a television report on plastic surgery. While the public “undoubtedly has an interest in plastic surgery,” the court found that use of the particular photos of plaintiff “neither strengthened the impact nor the credibility of the presentations nor otherwise enhanced the public’s general awareness of the issues and facts concerning plastic surgery.” *Vassiliades*, 492 A.2d at 589.

In sum, the Restatement approach to privacy claims attempts to avoid a subjective weighing of the competing public and private interests in a number of ways. Chief among them is the framework

used to analyze such claims, separating the definition of protectable “private” facts from the definition of those areas of legitimate public concern the disclosure of which may not be punished, and not explicitly imposing any obligation to weigh the news value of the private fact at issue against the severity of embarrassment caused by disclosure. The definition of “newsworthy” information, in turn, involves a two-step process that broadly defines topics of legitimate public concern, and asks whether specific facts have a significant relation to that topic. This approach also avoids in many situations the need to weigh the privacy impact against the perceived public value of disclosure. It prevents a judicial weighing of the importance of each fact, asking instead whether the disclosure has a legitimate nexus to a newsworthy topic.

D. The Limited Role of the Judiciary.

Yet another aspect of American privacy jurisprudence also serves to limit the impact of the privacy tort on news organizations—the discretion courts afford editors to decide for themselves whether an item is newsworthy. Courts recognize that what is “newsworthy” for purposes of the privacy tort is more limited than “anything that might possibly be of interest to anyone,” but they also recognize that the concept encompasses more than simply those facts that a judge, in hindsight, might feel the public needs to know. The California Supreme Court explained the conundrum:

Newsworthiness – constitutional or common law – is . . . difficult to define because it may be used as either a descriptive or a normative term. “Is the term ‘newsworthy’ a descriptive predicate, intended to refer to the fact there is widespread public interest? Or is it a value predicate, intended to indicate that the publication is a meritorious contribution and that the public’s interest is praiseworthy?” A position at either extreme has unpalatable consequences. If “newsworthiness” is completely descriptive – if all coverage that sells papers or boosts ratings is deemed newsworthy – it would seem to swallow the publication of private facts tort, for “it would be difficult to suppose that publishers were in the habit of reporting occurrences of little interest.” At the other extreme, if newsworthiness is viewed as a purely normative concept, the courts could become to an unacceptable degree editors of the news and self-appointed guardians of public taste.

Shulman, 955 P.2d at 481 (quoting Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722, 725, 734 (1963)).

Faced with this dilemma, courts essentially hold editors to an “abuse of discretion” standard, giving them the benefit of the doubt that information reported in the press is generally newsworthy. Thus, in *Shulman*, the court rejected plaintiff’s argument that the private facts revealed were not “necessary”:

That the broadcast *could* have been edited to exclude some of [plaintiff’s] words and images and still excite a minimum degree of viewer interest is not determinative. Nor is the possibility that the members of this or another court, or a jury, might find a differently edited broadcast more to their taste or even more interesting. The courts do not, and constitutionally could not, sit as superior editors of the press.

Id. at 488 (emphasis in original). Applying a deferential standard, the *Shulman* court accepted the defendants' assertions that the images of an accident victim included in a news report had helped to illustrate that a flight nurse's job is "demanding and important," that it "involve[s] a measure of personal risk," and that it "requires not only medical knowledge, concentration and courage, but an ability to talk and listen to severely traumatized patients." *Id.* The images thus had a sufficient nexus to the newsworthy topic of the report such that liability could not be based on them.

In *Gilbert*, the court similarly accepted the contention that the facts disclosed about the anesthesiologist "strengthen[ed] the impact and credibility of the article." 665 F.2d at 308. And in *Ross*, the court concluded that the details of an attack upon a rape victim "were of unique importance to the credibility and persuasive force of the story," and cautioned that "judges, acting with the benefit of hindsight, must resist the temptation to edit journalists aggressively":

Reporters must have some freedom to respond to journalistic exigencies without fear that even a slight, and understandable, mistake will subject them to liability. Exuberant judicial blue-penciling after-the-fact would blunt the quills of even the most honorable journalists.

870 F.2d at 274-75; *see also Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 475 (Tex. 1995) (recognizing that excessive judicial intervention "foreseeably could cause critical information of legitimate public interest to be withheld until it becomes untimely and worthless to an informed public").

This discretionary approach goes hand-in-glove with the nexus test for deciding whether the inclusion of particular facts in a report constitutes an invasion of privacy. As explained in *Shulman*, 955 P.2d at 485, the nexus test itself "incorporates considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest."¹⁹ *See Lowe*, 487 F.3d at 251 (declining "to get involved in deciding the newsworthiness of specific details in a newsworthy story where the details were 'substantially related' to the story") (citation omitted); *Cinel v. Connick*, 15 F.3d 1338, 1346 (5th Cir. 1994) (refusing "to make editorial decisions for the media regarding information directly related to matters of public concern").

Using this deferential approach, courts have upheld editorial decisions even as they voice personal views that a disclosure is inappropriate or ill-advised. In *Cinel*, for example, the Fifth Circuit rejected a private facts claim based on a television broadcast of portions of a homemade videotape showing a former priest engaging in homosexual activity. Even though the court disapproved of the "insensitivity" of the broadcast, it was "not prepared to make editorial decisions for the media regarding information directly related to matters of public concern." *Id.* Similarly, in *Neff v. Time*, the court opined "that art directors and editors should hesitate to deliberately publish a picture which most likely

¹⁹ Courts are more willing to examine editorial judgments where the plaintiff's connection to the general newsworthy subject matter is tangential, such as where private facts about a particular body surfer were published in an article about body surfing. *See Virgil*, 527 F.2d at 1131 (accepting the existence of a public interest "to know about some area of activity, it does not necessarily follow that it is in the public interest to know private facts about the persons who engage in that activity"); *see also, e.g., Green*, 675 N.E.2d at 255-56 (mother's private words over body of slain son non-newsworthy despite undisputed legitimate public interest in subjects of gang violence and murder); *Gill v. Curtis Publ'g Co.*, 239 P.2d 630, 632, 634 (Cal. 1952) (use of photograph of plaintiffs embracing to illustrate article about the "wrong kind of love," which is "founded upon 100% sex attraction," invaded plaintiffs' privacy because "the public interest did not require the use of any particular person's likeness nor that of plaintiffs without their consent").

would be offensive and cause embarrassment to the subject when many other pictures of the same variety are available,” but acknowledged that its role was not to “establish[] canons of good taste for the press or the public” and rejected a private facts claim because the embarrassing photograph of plaintiff was “connected with a newsworthy event.” 406 F. Supp. at 860-62 (citation omitted).

The willingness of the courts to apply an “abuse of discretion” standard to editorial decisions further safeguards free speech against privacy claims advanced in U.S. courts.

III. THE AVAILABLE JUDICIAL REMEDIES

The use of U.S. courts to enforce privacy rights is limited not only by the scope of the substantive right itself, but also through restrictions imposed upon a judge’s ability to issue injunctions barring publication of information.²⁰ A plaintiff seeking a preliminary injunction generally must demonstrate a likelihood of success; the existence of irreparable injury in the absence of relief; a balancing of equities in the plaintiff’s favor; and that an injunction would serve the public interest. *See, e.g., Minn. ex rel. Hatch v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 574 (Minn. App. 2005) (“a finding of irreparable harm and inadequacy of legal remedy” is a “threshold requirement” to obtaining injunctive relief on a tort claim for invasion of privacy).²¹ A plaintiff in a privacy case typically could establish “irreparable injury” because an award of damages cannot recapture the lost privacy and, to the contrary, litigation itself is likely to cause a further loss of privacy. A longstanding body of Supreme Court precedent, however, imposes a “heavy presumption against []the constitutional validity” of any injunction aimed at preventing speech. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

The doctrine of prior restraint that historically had been aimed at eradicating administrative licensing schemes was first used to invalidate a court injunction on speech in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). Prior restraints on the publication of news by the press have since become so constitutionally disfavored that a nearly total ban on them exists in the United States.²²

²⁰ Damage claims, of course, can be pursued. The injuries that can be compensated through an award of damages include, without limitation, personal humiliation, fear, emotional distress, physical manifestations of distress, and injury to reputation. *See, e.g., Diaz v. Oakland Tribune, Inc.*, 139 Cal. App. 3d 118, 137 (1983) (allowing plaintiff to recover for “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering” after her status as a transsexual was revealed by a newspaper) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); *Vassiliades*, 492 A.2d at 588 (a plaintiff “whose private facts are tortiously publicized may be awarded damages for the harm to his/her reputation in privacy resulting therefrom”); *see generally* David A. Elder, PRIVACY TORTS § 3:8 (2002) (cataloguing damages recoverable). Punitive damages are also generally available in an action for invasion of privacy if the defendant is found to have acted with ill will, spite or hatred. *E.g., Diaz*, 139 Cal. App. 3d at 135-36; *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9, 12 (5th Cir. 1962). However, damage awards are “scrutinize[d] strictly” to ensure that they are not used to “silence unpopular persons or speech and that it does not exceed the proper level necessary to punish and deter similar behavior.” *Diaz*, 139 Cal. App. 3d at 136.

²¹ The standard for a permanent injunction is substantially the same as for a preliminary injunction, except that the plaintiff must actually prove the merits of the claim rather than likelihood of success on the merits. *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987).

²² The presumption against prior restraints is considered so fundamental that a number of Supreme Court opinions have expressed the ban on injunctions against publication as an absolute. *See, e.g., Patterson v. Colo. ex rel. Attorney Gen.*, 205 U.S. 454, 462 (1907) (“the main purpose of such constitutional provisions is ‘to prevent all such previous restraints upon publications as had been practiced by other governments’”) (emphasis and citation omitted); *Grosjean v. Am. Press Co.*, 297

The Supreme Court's hostility toward prior restraints is based upon "the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976) (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring)). The U.S. approach to protecting the independence of the press generally does not permit judges the option of regulating the content of news, even to advance important ends. At various times, the Court has considered possible exceptions to the rule against prior restraints, but it has never yet found one sufficiently compelling to justify an injunction against publication.

In *dictum* in *Near*, the Court allowed the possibility of certain narrow exceptions in the national security context. See *Near*, 283 U.S. at 715-16 (in times of war "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops"). The Court again acknowledged the potential for a national security exception in *New York Times Co. v. United States*, 403 U.S. 713 (1971), but decisively rejected a prior restraint against publication of "The Pentagon Papers." In *Nebraska Press*, the Court allowed the possibility of narrow exception to protect a defendant's Sixth Amendment rights by enjoining the publication of certain information in advance of a trial, but again rejected the particular prior restraint being sought.

Thus, while the Court has acknowledged the possibility that a prior restraint might survive constitutional scrutiny in an "exceptional case," the test that must be met is extraordinarily high. In *New York Times*, for example, Justices Stewart and White framed the standard for an injunction to protect national security as requiring proof that publication would "surely result in direct, immediate, and irreparable damage to our Nation or its people." 403 U.S. at 730. In *Nebraska Press*, the Court was skeptical that any standard of proof could satisfy the proscription against prior restraints if a ban was sought to bar publication of lawfully obtained information about a pending trial to protect the defendant's fair trial rights.

The Supreme Court has yet to address the issue of whether an injunction to protect privacy is ever permitted under the First Amendment,²³ but its precedent leaves open the possibility that injunctions on speech "aimed at the redress of individual or private wrongs" may be permissible.²⁴ Any such request for an injunction based on the nature of the content of speech (a "content-based injunction") would be subject to a rigorous analysis ("strict scrutiny") to ensure that injunctive relief is not imposed for censorial purposes. Such injunctions "may be sustained only" if the injunction "is a precisely drawn means of serving a compelling state interest." *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 540 (1980); see also *Madsen v. Women's Health Center, Inc.*, 512

U.S. 233, 249 (1936) ("by the First Amendment it was meant to preclude the national government . . . from adopting any form of previous restraint upon printed publications, or their circulation").

²³ The Supreme Court twice was prepared to address the propriety of an injunction to protect privacy. In *Julian Messner, Inc. v. Spahn*, 393 U.S. 818 (1968), the Court was set to consider the issue in a case involving an unauthorized sports biography, but the parties settled the case. In *Roe v. Doe*, 417 U.S. 907 (1974), the Court agreed to address the issue in a case by a patient seeking to prevent publication of a book by her psychotherapist. After hearing argument, the Court dismissed its writ of certiorari as "improvidently granted" and declined to reach the merits. *Roe v. Doe*, 420 U.S. 307 (1975). The result of its action was to leave standing a state court injunction against publication.

²⁴ *Org. for a Better Austin*, 402 U.S. at 418-19 (declaring unconstitutional a speech injunction that "operate[d], not to redress alleged private wrongs," but to suppress anticipated speech) (citing *Near*, 283 U.S. at 709); see also *Lawson v. Murray*, 515 U.S. 1110, 1113 (1995) (Scalia, J., concurring in den. of pet. for cert.) ("a speech-restricting 'injunction' that is not issued as a remedy for an adjudicated or impending violation of law is . . . a prior restraint in the condemnatory sense") (emphasis omitted); *Neb. Press Ass'n*, 427 U.S. at 557-58 (emphasizing the "private wrongs" language of *Near*); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) (observing that the Court "has never held that all injunctions" on speech are "impermissible").

U.S. 753, 763-65 (1994) (suggesting that all content-based injunctions are subject to this level of scrutiny); *DVD Copy Control Ass'n v. Bunner*, 75 P.3d 1, 11 (Cal. 2003) (interpreting *Madsen* as requiring strict scrutiny for content-based injunctions). See also *Tomkins v. Cyr*, 995 F. Supp. 664, 678 (N.D. Tex. 1998) (“injunctions must be precisely drawn to avoid inordinately chilling potentially protected speech”); *Estate of Hemingway v. Random House, Inc.*, 268 N.Y.S.2d 531, 534 (N.Y. Sup. Ct.) (“[a] preliminary injunction is always a drastic remedy” and is “particularly acute” where speech interests are concerned, and “requir[ing] a showing by the movant of a right, both legal and factual, in most unequivocal terms”), *aff'd*, 35 A.D.2d 719 (N.Y. App. Div. 1966).

Only a handful of lower courts have granted injunctions in the media privacy context. For example, in *Commonwealth v. Wiseman*, the Supreme Court of Massachusetts upheld an injunction prohibiting widespread dissemination of a documentary that showed correctional mental institution patients in states of distress and nudity—situations the court believed “would be degrading to a person of normal mentality and sensitivity.” 249 N.E.2d 610, 615 (Mass. 1969). Notwithstanding that the conditions at the correctional facility were concededly “matters of continuing public concern,” the court concluded particular scenes significantly intruded upon patients’ privacy and were not necessary to convey the information regarding conditions at the institution. *Id.* at 616-17.²⁵ Because this was not a situation “where the public interest in reasonable dissemination of news” is “more significant than the private interests in privacy,” the court found injunctive relief to be appropriate. *Id.* at 617.²⁶ But see *Quinn v. Johnson*, 51 A.D.2d 391, 394 (N.Y. App. Div. 1976) (refusing to enjoin broadcast of documentary about conditions at a state institution for neglected children that included interviews of children about drugs and assaults, and distinguishing *Wiseman* as addressing breach of contract and not constitutional considerations).

A New York court reached a similar conclusion in *Doe v. Roe*, 345 N.Y.S.2d 560 (N.Y. App. Div. 1973) (per curiam), upholding an injunction prohibiting the publication of a book that contained allegedly confidential communications between the plaintiff patient and her analyst. The court summarily rejected the defendant’s prior restraint argument, contending that “under the circumstances here disclosed,” a preliminary injunction “would not constitute an invalid prior restraint.” *Id.* at 562. See also *Clayman v. Bernstein*, 38 Pa. D. & C. 543, 550 (Pa. Ct. Com. Pl. 1940) (enjoining doctor’s publication of photographs of patient because “[t]he remedy afforded must be such as to destroy the roots of the evil and this can only be done by mandatory injunction”).

In *Huskey v. NBC*, a federal court in Illinois denied a motion to strike a claim for injunctive relief, holding that a permanent injunction on future telecasts of the plaintiff prisoner in an exercise cage

²⁵ The court denied that it was engaging in editorial decision-making: “This is not an instance where judges or administrators may be regarded as attempting to be ‘arbiters of taste’ or to determine for a producer what is ‘unnecessary’ to his portrayal of particular scenes. Relief here is granted solely to afford protection to interests entitled to that protection.” *Wiseman*, 249 N.E.2d at 617 n.10 (citation omitted).

²⁶ The court narrowed the injunction, however, so that the documentary could be shown to those segments of society “with a serious interest in rehabilitation and with potential capacity to be helpful” because such showings “may be of benefit to the public interest, to the inmates themselves, and to the conduct of an important State institution.” 249 N.E.2d at 615, 618. The court thus invalidated the injunction to the extent it prohibited such persons from viewing the film (*id.*):

[T]he film gives a striking picture of life at [the facility] and of the problems affecting treatment at that or any similar institution. It is a film which would be instructive to legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity. The public interest in having such persons informed about [the facility], in our opinion, outweighs any countervailing interests of the inmates and of the Commonwealth (as *parens patriae*) in anonymity and privacy.

might be appropriate on sufficient proof of the elements of a privacy claim. 632 F. Supp. 1282, 1296 (N.D. Ill. 1986). The court reasoned that the private facts tort is “more analogous to a trespass than to libel,” and that an injunction preventing the public disclosure of a private fact does “not involve an injunction against publication of the communication of ideas,” but rather involves an injunction for “prevention of a private wrong: invasion of [plaintiff’s] privacy.” *Id.* at 1294-95.

And in *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998), the court enjoined an Internet pornography site from distributing without consent a videotape that Pamela Anderson Lee and her then boyfriend made of themselves having sex. The court noted that “the private matter at issue here is not the fact that Lee and Michaels were romantically involved,” but rather “the visual and aural details of their sexual relations, facts which are ordinarily considered private even for celebrities.” However, in another decision in the same case, the court held that Lee and Michaels had no privacy claim over a television news program that aired brief – and blurred – excerpts from the tape as part of a report on plaintiffs’ legal efforts to stop the release of the entire tape on the Internet.

Injunctions such as these to protect privacy are extraordinarily rare, however.²⁷ One possible reason for this is that “the notion of attempting to protect privacy through injunctions in civil cases is peculiarly unappealing” because “[i]t would be odd, indeed, to permit enjoining truth where enjoining falsity is forbidden.” SACK § 12.4.12. *See also Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (“It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.”).²⁸

Another is that an injunction on publication of private facts is not considered a very effective remedy for that tort. “[I]n the pure ‘private facts’ tort even success” in court “sacrifices rather than protects the plaintiff’s interest in the privacy of the wrongfully publicized facts, for litigation only breeds renewed and often wider publicity, this time unquestionably privileged.” *Anderson v. Fisher Broad. Cos.*, 712 P.2d 803, 809 (Or. 1986) (en banc). Thus, “[e]ven assuming that the more logical remedy against wrongfully publicizing private facts is to enjoin the defendant’s publication, . . . media reporting of the facts pleaded and presented in the legal proceedings undercut the effectiveness of that remedy.” *Id.* at 809 n.10. *See also* SACK § 12.4.12 at 12-73 (noting that the “the only way” proceedings to enjoin an invasion of privacy “could be effective . . . would be if they themselves were held entirely out of public view”).

²⁷ Sir Michael Tugendhat has posited three reasons why British courts are more willing than American courts to grant requests for injunctive relief in privacy cases. First, he suggests, “in England damages are generally modest” and thus injunctive relief is necessary because “[t]he prospect of paying damages for disclosure of confidential information may . . . not be a disincentive to the publication.” Second, breach of an injunction “carries with it a liability to pay a fine (and occasionally to imprisonment) in addition to any damages that may be payable,” thus “trigger[ing] a liability to pay something equivalent to punitive damages, which might not otherwise be available under English law.” Finally, he argues, an injunction “enables the parties to clarify the issues and to proceed with knowledge of what is involved.” Sir Michael Tugendhat, *The Development of Privacy Law in the UK*, MLRC Bulletin, Sept. 2003, at 10.

²⁸ *See also* Jonathan L. Entin, *Privacy Rights and Remedies*, 41 CASE W. RES. L. REV. 689, 695-96 (1991) (arguing that “relaxing the presumption against prior restraints” by permitting injunctions for protection of privacy interests “could have profound symbolic effects” that might even lead to “doubts about the vitality of many modern first amendment principles that remain controversial”); BEZANSON, *supra*, 64 IOWA L. REV. at 1084 (acknowledging that, given uncertainties such as the “precise audience to which private facts will be communicated and the presence or magnitude of distress that the plaintiff will feel upon publication,” an injunction for the protection of privacy “may be unjustifiable because it is overbroad, thus implicating first amendment concerns of the highest order, or under inclusive, thus making the injunction ineffective in avoiding the harm”); *id.* at 1087 (“The greatest constitutional difficulty posed in the privacy setting is the reconciliation of privacy injunctions with the first amendment requirement that prior restraints must rest firmly on clearly defined and causally proximate consequences of the prohibited expression.”).

The primary reason for the scarcity of prior restraints, however, is the high legal standard to enter one. Many courts, citing the law of prior restraint, have held that privacy interests are insufficiently serious to warrant the issuance of injunctions for their protection. In *In re Lifetime Cable*, No. 90-7046, 1990 WL 71961, at *1 (D.C. Cir. Apr. 6, 1990) (per curiam), for example, the court vacated a temporary restraining order prohibiting the broadcast of footage of a seven-year-old girl describing sexual abuse by her father. The court held that any rights that the father and child may have “must ... be redressed in legal actions that do not require a prior restraint in derogation of the First Amendment.” *Id.*; see also *Foretich v. Lifetime Cable, Inc.*, 777 F. Supp. 47 (D.D.C. 1991) (discussing underlying facts and adjudicating parties’ later lawsuit for invasion of privacy). Similarly, in *Quinn v. Johnson*, 51 A.D.2d 391, 394 (N.Y. App. Div. 1976), the court affirmed, on prior restraint grounds, the trial court’s denial of an injunction to prohibit the broadcast of a documentary about conditions at a state institution for neglected children.

Unlawful conduct by the press may justify injunctive relief aimed at the conduct,²⁹ but not an injunction seeking to prevent the publication of private facts allegedly obtained improperly. For example, in *In re King World Productions, Inc.*, 898 F.2d 56, 59-60 (6th Cir. 1990), the court invalidated as an unlawful prior restraint an injunction that prohibited a media defendant from broadcasting footage it had obtained by conduct that violated the federal wiretap law. And in *Berger v. Hanlon*, 129 F.3d 505, 518 (9th Cir. 1997), the court refused, also on prior restraint grounds, to enjoin the media defendant’s further broadcast of a film, even though it had been obtained during a police search that the court determined had violated the plaintiff’s constitutional rights against unreasonable searches and seizures.

In short, injunctions to protect privacy in the United States are destined to remain a rare exception to the rule so long as the doctrine of prior restraint remains firmly entrenched.

CONCLUSION

The First Amendment’s mandate for free speech undoubtedly has shaped the development of the common law privacy tort by U.S. courts. Their search for legal standards that protect privacy without compromising the public benefits that flow from a system of free expression are just as relevant, however, in regimes that treat privacy and free speech as co-equal human rights. The value of free speech to society is adequately protected only when the grounds for legal liability for speech are clear, precise and not dependent on a subjective judicial reconsideration of the importance of a particular statement.

The U.S. experience with privacy law may be seen as an attempt—not always successful—to develop objective standards for liability that do not rest upon a judicial weighing of the relative importance of a story against the intensity of the privacy interest at stake. U.S. courts also promote the public benefits of free speech by affording deference to the initial news judgments of editors, and exercising only limited authority to issue injunctions against speech in the most extreme situations. Maintaining this general orientation to the boundary between free speech and privacy is critical if a free press is to fully serve a democratic society.

²⁹ When unlawful conduct *itself* constitutes an intrusion on privacy, courts are willing to enter injunctive relief against the *conduct*, rather than against the dissemination of information. See, e.g., *Gallela v. Onassis*, 487 F.2d 986, 998-99 (2d Cir. 1973) (enjoining photographer from surveilling Jackie Onassis or her children, but rejecting restriction on taking and selling photos for “news coverage”); *Wolfson v. Lewis*, 924 F. Supp. 1413 (E.D. Pa. 1996) (enjoining conduct amounting to “harassment” of plaintiffs by photographers).