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Prisoners of Fame: How an Expanded Use of Intrusion Upon Psychological Seclusion Can Protect the Privacy of Former Public Figures

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PRISONERS OF FAME: HOW AN EXPANDED USE OF INTRUSION UPON PSYCHOLOGICAL SECLUSION CAN PROTECT THE PRIVACY OF FORMER PUBLIC FIGURES

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Abstract: Public figures who no longer receive attention in the public sphere have had enormous difficulty regaining the privacy rights they once had. When it comes to limiting the discussion of their personal affairs, both the First Amendment and the common law invasion of privacy torts make no distinctions between former public figures and those currently involved in public affairs. This Note proposes an expanded use of the invasion of privacy tort for unreasonable intrusion upon seclusion to protect the privacy of these "prisoners of fame." Although the tort is primarily understood to protect individuals from intrusions into physical spaces, this cause of action also protects intrusions into psychological spaces. Former public figures, therefore, must be empowered to bring this claim when offensive public discourse concerning their most private, intimate affairs intrudes upon their psychological seclusion.

Introduction

At the 2013 Golden Globe Awards, Jodie Foster was honored with a lifetime achievement award for her forty-seven-year film career.[1] Accepting her award in front of Hollywood's elite and a television audience of nearly twenty million, the fifty-year-old actress publicly ad-

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[1] Alessandra Stanley, *The Lifting of a Veil, Discreetly*, N.Y. Times (Jan. 15, 2013), http://www.nytimes.com/2013/01/15/movies/awardsseason/jodie-foster-lifts-a-veil-at-golden-globes.html?_r=1&. The Golden Globe Awards are given out annually by the Hollywood Foreign Press Association ("HFPA") to honor the year's best achievements in television and film. *History of the Golden Globes*, Golden Globes, http://www.goldenglobes.org/history/ (last visited May 20, 2013). At its annual awards ceremony, the HFPA also presents the Cecil B. Demille Award to an individual who has made an outstanding contribution to entertainment. *Id.* Foster won this award in 2013. Julie Miller, *Ten Wildly Varying Interpretations of Jodie Foster's Golden Globes Speech*, Vanity Fair (Jan. 14, 2013, 3:00 PM), http://www.vanityfair.com/online/oscars/2013/01/jodie-foster-golden-globe-speech-coming-out-reviews.

dressed the question of her sexuality.[2] In her speech, Foster vigorously defended her right to privacy in a society in which "every celebrity is expected to honor the details of their private life with a press conference, a fragrance, and a primetime reality show."[3] Foster followed that quip with her strongest argument for her right to privacy, stating, "But seriously, if you had been a public figure from the time that you were a toddler, if you'd had to fight for a life that felt real and honest and normal against all odds, then maybe then you, too, might value privacy above all else."[4] Whether interpreted as inspiring, passionate, or even hypocritical, Foster's speech captured the societal and emotional pressures she and other public figures face.[5]

Public figures like Jodie Foster face enormous legal hurdles when trying to protect their sense of privacy.[6] Constitutionally, the First Amendment affords "breathing space" for false speech about public figures by placing higher burdens of proof on plaintiffs who bring defamation and false light invasion of privacy claims.[7] The freedom of the

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[2] Stanley, *supra* note 1. Although she had never addressed her sexuality to such a large audience, Foster had previously acknowledged her relationship with a female partner in a 2008 speech at the Women in Entertainment luncheon. *Id.*

[3] *Jodie Foster's Extraordinary Cecil B. Demille Speech*, Golden Globes, http://www.goldenglobes.org/2013/01/i-will-continue-to-tell-stories-to-move-people-by-being-moved-jodie-fosters-extraordinary-cecil-b-de-mille-speech/ (last visited May 20, 2013).

[4] *See id.*

[5] *See* Miller, *supra* note 1 (providing various commentary on Foster's speech from celebrities and public figures).

[6] *See, e.g.*, Hustler v. Falwell, 485 U.S. 46, 56 (1988) (barring a public figure from recovering for intentional infliction of emotional distress absent a showing of actual malice); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (holding that a plaintiff could not recover for a claim of publication of private facts based on publication of information obtained from court records); Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974) (justifying an actual malice standard for public figure plaintiffs in defamation cases because public figures have access to self-help in the media and voluntarily expose themselves to the risk of injurious falsehoods).

[7] *See* U.S. Const. amend. I (providing that "Congress shall make no law . . . abridging the freedom of speech, or of the press"). Defamation is a state common law cause of action that protects individuals from the publication of a false statement of fact that tends to injure the reputation of those individuals in the community. Restatement (Second) of Torts §§ 558–559 (1977) (detailing the elements of a defamation claim and defining a defamatory statement); *see* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72, 279–80 (1964) (holding that public figure defamation plaintiffs must prove by clear and convincing evidence that false materials were published with actual malice—knowledge of falsity or reckless disregard of the truth—rather than simply negligence). False light invasion of privacy occurs when a defendant gives false or misleading publicity to a plaintiff that tends to injure the plaintiff's reputation in the community. Restatement (Second) of Torts § 652E (detailing the cause of action for publicity placing a person in a false light); *see* Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967) (holding that constitutional protections of speech and

press and the public's "right to know" have also limited the utility of the common law invasion of privacy claim for the publication of private, truthful facts.[8] Moreover, legislation attempting to target offensive newsgathering methods, such as antipaparazzi statutes, falls short when trying to address privacy concerns that conflict with First Amendment principles.[9] Similarly, the common law invasion of privacy claim for intrusion upon seclusion has been mainly understood to prohibit offensive intrusions into private, physical spaces.[10]

Notwithstanding these problems, the U.S. Supreme Court has defined degrees of public figure status under the First Amendment that correspond with plaintiffs' burden of proof when trying to recover for the publication of false information.[11] In 1974, in *Gertz v. Robert Welch Inc.*, the Court established three classes of public figures in the context of defamation.[12] First, all-purpose public figures are those individuals, like Jodie Foster, who have reached levels of "pervasive power and influence" in society.[13] Second, limited-purpose public figures are individuals who voluntarily enter into a specific public controversy in order to influence the outcome of that particular issue.[14] Finally, involuntary

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expression preclude recovery under New York's privacy statute for publishing false statements about matters of public concern unless accompanied by actual malice).

[8] *See Cox*, 420 U.S. at 494–95; Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993); Sidis v. F-R Publ'g Corp., 113 F.2d 806, 809 (2d Cir. 1940); Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1204 (1990) (suggesting that the freedom of the press has been extended to protect the publication of information gathered by any means short of criminally sanctioned action). The publication of private facts cause of action allows individuals to recover for publicity given to private facts that would be highly offensive to a reasonable person. RESTATEMENT (SECOND) OF TORTS § 652D (detailing the cause of action for the unreasonable publication of private facts); *infra* notes 91–104 and accompanying text.

[9] *See* A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1536–37 (2000); Camrin L. Crisci, Note, *All the World Is Not a Stage: Finding a Right to Privacy in Existing and Proposed Legislation*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 207, 214 (2002) (describing the newsworthy defense for the publication of private facts tort as the greatest impediment to antipaparazzi legislation).

[10] *See infra* notes 43–65 and accompanying text.

[11] *Gertz*, 418 U.S. at 345, 351. The Court has arguably defined public figure status for all First Amendment purposes and not just defamation. *See* Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976) (suggesting that the U.S. Supreme Court's definition of "public figure" in the 1974 case, *Gertz v. Robert Welch, Inc.*, controls for purposes of the First and Fourteenth Amendments).

[12] *Gertz*, 418 U.S. at 345, 351.

[13] *See id.*

[14] *Id.*; Pendleton v. City of Haverhill, 156 F.3d 57, 69 (1st Cir. 1998) (holding the plaintiff was a limited-purpose public figure regarding a city's public school hiring policies because he publicly lobbied for a teaching position and consented to be interviewed by a local newspaper prior to the defendants' alleged defamation); *see also* Wells v. Liddy, 186

public figures are individuals who are drawn into a public controversy through no intentional action of their own.[15] Generally speaking, limited-purpose and involuntary public figures are required to present a clear and convincing showing of actual malice—knowledge of falsity or the reckless disregard of the truth—for establishing defamation only if the defamatory material relates to the matters that make them public figures.[16] Conversely, all-purpose public figures must prove actual malice in all defamation cases.[17]

When it comes to the publication of truthful information, however, there is no common law distinction between the treatment of all-purpose, limited-purpose, and involuntary public figures.[18] Courts have ruled that voluntary public figures (i.e., all-purpose and limited-purpose individuals) waive their privacy rights by seeking prominence in the public forum.[19] Instead of consenting to the loss of privacy, involuntary public figures are deemed to have simply lost their privacy rights due to the "newsworthiness" of their lives.[20]

More disconcerting is the treatment of *former* public figures— individuals who had once been involved in a particular public controversy but have since receded from the public sphere—because there is cur-

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F.3d 505, 534–37 (4th Cir. 1999) (applying a five-factor test to determine whether the plaintiff qualified as a limited-purpose public figure).

[15] *Gertz*, 418 U.S. at 345; *see also Wells*, 186 F.3d at 539–41 (developing a multifactor test to determine whether a plaintiff qualifies as an involuntary public figure).

[16] *See Gertz*, 418 U.S. at 346.

[17] *See id.*

[18] *Compare* Restatement (Second) of Torts § 652D cmt. e (1977) ("[T]he legitimate interest of the public in[voluntary public figures] may extend beyond those matters which are themselves made public, and to some reasonable extent may include information as to matters that would otherwise be private."), *with id.* § 652D cmt. f ("As in the case of the voluntary public figure, the authorized publicity [of an involuntary public figure] is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private.").

[19] *See, e.g.*, Carafano v. Metrosplash.com, Inc. 207 F. Supp. 2d 1055, 1070 (C.D. Cal. 2002) (noting that individuals who voluntarily create and seek public attention relinquish their privacy rights); Bilney v. Evening Star Newspaper Co., 406 A.2d 652, 660 (Md. Ct. Spec. App. 1979) (finding that the plaintiffs did not have a legitimate expectation of privacy in their academic records because they voluntarily accepted membership on an NCAA basketball team); Restatement (Second) of Torts § 652D cmt. e.

[20] *See, e.g.*, Kapellas v. Kofman, 459 P.2d 912, 922–23 (Cal. 1969) (en banc) (suggesting that individuals closely associated with voluntary public figures lose privacy rights through no choice of their own); Harris v. Horton, 341 S.W.3d 264, 273–74 (Tenn. Ct. App. 2009) (holding that the plaintiff lost privacy rights in the publication of his deceased son's photographs because his son became an involuntary public figure after his fatal automobile accident), *overruled on other grounds by* Rogers v. Louisville Land Co., 367 S.W.3d 196, 205 n.6 (Tenn. 2012); Restatement (Second) of Torts § 652D cmt. f.

rently no way for them to regain the privacy rights they once had as private citizens.[21] Someone like Jodie Foster will never become a former public figure due to her pervasive status in society and the public's continuing curiosity with her life and films.[22] A person like Dolores Hart, however, presents a different situation.[23] Hart, a young starlet who was the recipient of Elvis Presley's first on-screen kiss, famously left Hollywood in 1963 to become a cloistered nun, only to reappear in a 2012 documentary depicting her transformation into "Mother Dolores."[24] If she had wanted to protect her privacy and stop the dissemination of her life story, she would have had extreme difficulty bringing a viable claim for publication of private facts.[25] Similarly, private individuals who become public figures even for mere minutes—whether they are YouTube sensations, bloggers, or other social-media participants—may never be able to regain the privacy rights they once had.[26]

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[21] *See, e.g.*, Street v. Nat'l Broad. Co., 645 F.2d 1227, 1229, 1236 (6th Cir. 1981) (ruling that the plaintiff, who had been a public figure in rape trials forty years prior to defamation and false light claims for historical reproduction of trials, was still a public figure); *Sidis*, 113 F.2d at 809–10 (denying recovery for the publication of a truthful news story about a child prodigy thirty years after he became a public figure); Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 35 (Idaho 2003) (holding that a newspaper that published a story recounting a forty-year-old sex scandal could not be held liable for invasion of privacy when using the plaintiff's name in a photographic representation of a public court document); Roshto v. Hebert, 439 So. 2d 428, 429, 431 (La. 1983) (ruling that a plaintiff who had been convicted of a crime twenty-five years prior to his invasion of privacy claim based on a reprinted news article about his trial was still a public figure); *see also* Jasmine E. McNealy, *The Emerging Conflict Between Newsworthiness and the Right to Be Forgotten*, 39 N. Ky. L. Rev. 119, 128 (2012) (recognizing that a right to be forgotten is most at odds with the notion in American privacy law that the public's interest in particular news stories and individuals does not diminish over time). *But see* Melvin v. Reid, 297 P. 91, 93–94 (Cal. Ct. App. 1931) (granting a reformed prostitute privacy protection after a publication focused on incidents that were damaging to her character and social standing) Although courts have continued to call these individuals simply public figures, this Note refers to them as "former public figures." *See infra* notes 22–270 and accompanying text.

[22] *See Sidis*, 113 F.2d at 809 (holding that the public's curiosity about the plaintiff was a matter of public concern, and therefore denying recovery for invasion of privacy); Scott J. Shackelford, *Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures*, 49 Am. Bus. L.J. 125, 145 (2012) ("Entertainers, professional sports figures, and corporate executives all fall into the voluntary public figure category and hold almost as limited a claim to a right of privacy as do public officials.").

[23] *See* Wendy Carlson, *A Nun Returns to the Red Carpet*, N.Y. Times (Feb. 26, 2012), http://www.nytimes.com/2012/02/26/nyregion/a-preview-of-god-is-the-bigger-elvis-starring-dolores-hart.html?pagewanted=all&_r=0.

[24] *See id.*

[25] *See, e.g.*, *Sidis*, 113 F.2d at 809; *Uranga*, 67 P.3d at 35; *Roshto*, 439 So. 2d at 431–32.

[26] *See* Linton Weeks, *Privacy 2.0, We Are All Celebrities Now*, NPR (Apr. 26, 2011, 11:27AM), http://www.npr.org/2011/04/27/135538176/privacy-inc-we-are-all-celebrities-now.

This Note argues that the common law invasion of privacy tort for intrusion upon seclusion, rather than the publication of private facts tort, provides a workable solution for certain limited-purpose and involuntary former public figures.[27] Because expectations of privacy extend beyond physical spaces, these plaintiffs are entitled to a remedy when offensive public discourse intrudes upon their psychological seclusion.[28]

Part I introduces the invasion of privacy torts for intrusion upon seclusion and publication of private facts, including a discussion of the policy and limitations surrounding psychological seclusion.[29] It also addresses the constitutional treatment of both types of invasion of privacy claims.[30] Part II then explains what happens when public figures bring invasion of privacy claims for intrusion upon seclusion and publication of private facts.[31] In addition, Part II describes the treatment of former public figures when bringing a publication of private facts cause of action, and discusses courts' tendency to overlook the amount of time between the end of an individual's "public" life and the offensive publication.[32]

Finally, Part III argues that former public figures can assert claims for intrusion upon psychological seclusion when an individual offensively disseminates information that reveals intimate personal information, including private sexual affairs.[33] Despite the challenging legal hurdles that would confront psychological seclusion claims, the number of public figures arising through social-media participation may provide the necessary policy justification for embracing this underutilized theory of recovery.[34]

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[27] *See infra* notes 35–270 and accompanying text.

[28] *See infra* notes 198–270 and accompanying text.

[29] *See infra* notes 35–129 and accompanying text.

[30] *See infra* notes 105–129 and accompanying text.

[31] *See infra* notes 130–196 and accompanying text.

[32] *See infra* notes 169–196 and accompanying text.

[33] *See infra* notes 198–270 and accompanying text. This Note does not consider the question of whether an all-purpose public figure could use this cause of action because, realistically, these individuals would have no means of recovering for emotional injuries caused by the publication of truthful information. *Cf. Hustler*, 485 U.S. at 56–57 & n.5 (holding that Jerry Falwell, a nationally syndicated television host and a founder of the Moral Majority, could not recover for intentional infliction of emotional distress because the publication did not contain a false statement of fact made with actual malice).

[34] *See infra* notes 225–270 and accompanying text.

I. Invasion of Privacy Torts: The Elements and Their Constitutional Limitations

The modern day invasion of privacy torts stem primarily from Professor William Prosser's 1960 article *Privacy*.[35] Recognizing the distinct privacy interests encompassed in a generalized right to privacy, Professor Prosser articulated four separate causes of action that would align with those specific interests.[36] For example, unreasonable intrusion upon seclusion was intended to protect a *mental* interest, whereas the tort for publication of private facts was meant primarily to protect an individual's *reputational* interest in truthful information.[37] All of the privacy torts, however, share the underlying interest of protecting an individual's "right to be let alone."[38]

This Part provides a thorough explanation of the common law invasion of privacy torts typically used by former public figures to recover for the acquisition and dissemination of truthful information—namely, intrusion upon seclusion and publication of private facts.[39] Section A provides the elements of the intrusion upon seclusion tort and introduces the concept of psychological seclusion—an intrusion into a men-

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[35] *See* William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960); *see also* Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 Calif. L. Rev. 1887, 1888 (2010) ("It is impossible to talk about privacy in American tort law without considering William Prosser.").

[36] *See* Prosser, *supra* note 35, at 389. Serving as chief reporter for the *Restatement (Second) of Torts*, Professor Prosser incorporated his own formulation of tort privacy into the *Restatement*'s language. Richards & Solove, *supra* note 35, at 1890. The four torts are now referred to as: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public. Restatement (Second) of Torts § 652A (1977).

[37] Prosser, *supra* note 35, at 392, 398; *see also* Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. Rev. 1341, 1412 (2011) (explaining that the publication of private facts and false light torts primarily aim to prevent the disclosure of true or misleading information that a plaintiff fears will harm his or her reputation).

[38] *See* Prosser, *supra* note 35, at 389; Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890).

[39] *See infra* notes 43–129 and accompanying text. This Note does not consider the invasion of privacy tort for misappropriation of name or likeness. *See* Restatement (Second) of Torts § 652C. Because this Note seeks to put forth a theory of recovery for publicly reexamining the lives of former public figures, it is not concerned with these individuals' "right to publicity" or their proprietary interest in the use of their name and likeness. *See id.*; Prosser, *supra* note 35, at 406–07. Moreover, due to this Note's focus on the revelation of new, truthful information never before publicized, it does not consider false light invasion of privacy claims, either. *See* Restatement (Second) of Torts § 652E; *infra* notes 40–270 and accompanying text.

tal, rather than a spatial or locational, place.[40] Section B then introduces the tort of publication of private facts.[41] Finally, Section C considers the constitutional limitations regarding claims for intrusion upon seclusion and publication of private facts.[42]

A. *Intrusion upon Seclusion: Protecting Physical and Psychological Solitude*

1. The Elements of an Intrusion upon Seclusion Claim

To establish a claim for intrusion upon seclusion, a plaintiff must show that the defendant intentionally interfered in his or her private affairs in a way that would be highly offensive to a reasonable person.[43] The injury lies in the intrusive act itself, rather than in some subsequent act by the defendant.[44] Accordingly, whether or not a defendant profits from invading the plaintiff's privacy is irrelevant.[45] Instead, courts generally look to the nature and pattern of a defendant's alleged intrusion to see whether an invasion of privacy has occurred.[46] Courts may also consider the circumstances surrounding the intrusion, the intruder's motives, the setting, and the plaintiff's own privacy expectations.[47]

Most jurisdictions recognize intrusions into a plaintiff's private affairs through physical, electronic, sensory, or other investigatory means.[48] Intrusions may include hacking e-mail accounts, eavesdrop-

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[40] *See infra* notes 43–90 and accompanying text.

[41] *See infra* notes 91–104 and accompanying text.

[42] *See infra* notes 105–129 and accompanying text.

[43] *See* Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., 306 F.3d 806, 812 (9th Cir. 2002) (adopting the *Restatement*'s definition of intrusion upon seclusion).

[44] *See* Froelich v. Adair, 516 P.2d 993, 997 (Kan. 1977) (stating that liability rests on the defendant's conduct); Burger v. Blair Med. Assocs., Inc., 964 A.2d 374, 379 (Pa. 2009) (holding that the defendant could not be held liable for intrusion upon seclusion when he legitimately obtained information that was publicly disclosed).

[45] *See* Restatement (Second) of Torts § 652B cmts. a & b (1977).

[46] *See* Fischer v. Mt. Olive Lutheran Church, 207 F. Supp. 2d 914, 927 (E.D. Wis. 2002); Jones v. U.S. Child Support Recovery, 961 F. Supp. 1518, 1521 (D. Utah 1997); Sanders v. Am. Broad. Cos., 978 P.2d 67, 77 (Cal. 1999).

[47] *See* Wolfson v. Lewis, 924 F. Supp. 1413, 1421 (E.D. Pa. 1997); Hill v. NCAA, 865 P.2d 643, 648 (Cal. 1994).

[48] *See, e.g.*, Russ v. Causey, 732 F. Supp. 2d 589, 608 (E.D.N.C. 2010); *Wolfson*, 924 F. Supp. at 1419 (quoting Restatement (Second) of Torts § 652B cmt. b). Comment b of the *Restatement (Second) of Torts* explains:

> The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into

ping on phone conversations,[49] or using hidden cameras.[50] Despite the evolving means of intruding into a person's privacy, the key legal question has remained constant: was the intrusion highly offensive to a reasonable person?[51]

Determining when an intrusion becomes highly offensive requires examining the type of seclusion that plaintiffs have established, and consequently, their basic expectations of privacy.[52] Plaintiffs have little difficulty establishing their expectation of privacy when an individual has intruded upon their home, mail, or bathroom.[53] Plaintiffs generally cannot, however, claim that an intrusion is highly offensive if the invasion occurred in view of the public, because in public, individuals have a very limited expectation of privacy.[54] In a similar vein, acquiring public records or documents that are readily accessible does not rise to a sufficient level of offensiveness.[55]

Although the standard for seclusion is limited in many jurisdictions, some states like California have tried using a multifactored approach for identifying seclusion.[56] For instance, in the 2009 case, *Hernandez v. Hillsides, Inc.*, the California Supreme Court confronted the issue of work-

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> his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents.

RESTATEMENT (SECOND) OF TORTS § 652B cmt. b.

[49] *See Fischer*, 207 F. Supp. 2d at 927–28 (finding that hacking an e-mail account and listening to a telephone conversation could constitute unreasonable intrusions).

[50] *See Sanders*, 978 P.2d at 77 (holding that a journalist's covert videotaping of an employee in the workplace could constitute an unreasonable intrusion).

[51] *See Med. Lab.*, 306 F.3d at 812 ("'There is likewise no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive . . . .'" (quoting RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (1977))).

[52] *See* Fletcher v. Price Chopper Foods of Trumann, Inc., 220 F.3d 871, 877 (8th Cir. 2000) (referring to the legitimate expectation of privacy as "the touchstone" of the intrusion upon seclusion tort).

[53] *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b.

[54] *See* King v. Metcalf 56 Homes Ass'n, 385 F. Supp. 2d 1137, 1146 (D. Kan. 2005) (dismissing an intrusion upon seclusion claim because the plaintiff's actions were readily viewable in public).

[55] *See, e.g.*, Trundle v. Homeside Lending, Inc., 162 F. Supp. 2d 396, 401 (D. Md. 2001) (acquiring public credit reports cannot form the basis of an intrusion upon seclusion claim); *Uranga*, 67 P.3d at 32 (acquiring public court documents cannot form the basis of an intrusion upon seclusion claim).

[56] Hernandez v. Hillsides, Inc., 211 P.3d 1063, 1078–82 (Cal. 2009); *see also* Andrew Jay McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1055 (1995) (discussing the lack of clarity and imprecise standards for seclusion under section 652B of the *Restatement (Second) of Torts*).

place surveillance within the context of an intrusion upon seclusion claim.[57] The *Hernandez* court framed its analysis of an intrusion upon seclusion claim according to the underlying aim of the cause of action: to recognize a measure of control over an individual's personal serenity and life choices.[58] This overarching concern helped link the concept of seclusion to circumstances and factors that impacted the plaintiff's level of autonomy when facing a situation implicating privacy concerns.[59] These factors for evaluating the expectation of privacy prong of an intrusion claim included: (1) the identity of the intruder; (2) the level of access to the place and the degree to which an individual could see and hear the plaintiff; and (3) the means of intrusion.[60] Taken in isolation or in conjunction, these factors can be used to determine when someone has an objectively reasonable expectation of privacy.[61]

In addition to factors addressing privacy expectations, California courts have also emphasized the objective context of any intrusion upon seclusion inquiry.[62] As such, when addressing the "offensiveness" prong of the cause of action, a court will examine all of the circumstances surrounding the intrusion.[63] These considerations include the degree and setting of the intrusion, as well as the intruder's conduct, motives, and objectives.[64] Combined with the factors that evaluate an individual's reasonable privacy expectations, this totality approach recognizes the fact-specific nature of any seclusion inquiry.[65]

2. Psychological Seclusion: Protecting a Person's Emotional Sanctum

Not only does intrusion upon seclusion protect individuals from intrusions into private, physical spaces, but it also protects a plaintiff from intrusions into psychological spaces.[66] The *Restatement (Second) of Torts* provides that liability exists when a defendant invades a private place, or when a plaintiff "otherwise has invaded a private seclusion

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[57] *See* 211 P.3d at 1072.

[58] *See id.*

[59] *See id.* at 1072–73.

[60] *Id.* at 1073.

[61] *Id.* at 1074.

[62] *See id.* at 1072–73; *Hill*, 865 P.2d at 648; Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 679 (Ct. App. 1987).

[63] *See Hill*, 865 P.2d at 648; *Miller*, 232 Cal. Rptr. at 679.

[64] *Hernandez*, 211 P.3d at 1073; *Miller*, 232 Cal. Rptr. at 679.

[65] *See Hernandez*, 211 P.3d at 1073; *Miller*, 232 Cal. Rptr. at 679.

[66] *See* McSurely v. McClennan, 753 F.2d 88, 112 (D.C. Cir. 1985) (quoting RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977)); Phillips v. Smalley Maint. Servs., Inc. (*Phillips I*), 711 F.2d 1524, 1536 (11th Cir. 1983) (same).

that [the] plaintiff has thrown about his [or her] person or affairs."[67] This language has given courts the necessary flexibility when evaluating a defendant who has engaged in highly intrusive behavior that does not fit neatly into any of the other invasion of privacy torts.[68] Some cases, however, demonstrate that psychological seclusion cannot protect against behavior that is otherwise offensive or harassing when defendants claim that the behavior was in public view.[69]

Psychological seclusion exists in those situations in which the investigation and examination of a person's private affairs breaches that person's deepest emotional spaces.[70] The clearest recognition of intrusion upon psychological seclusion occurred in the 1983 case, *Phillips v. Smalley Maintenance Services, Inc.*, when the U.S. Court of Appeals for the Eleventh Circuit sent certified questions on state privacy law to the Alabama Supreme Court.[71] In *Phillips*, the plaintiff, Brenda Phillips, had just begun working for the defendant, but within days of starting her job, she faced weekly closed-door questioning from her boss about her personal life and sexual proclivities.[72] Eventually, the defendant termi-

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[67] Restatement (Second) of Torts § 652B cmt. c.

[68] *E.g.*, *McSurely*, 753 F.2d at 112–13 (implying that the defendant intruded upon the plaintiff's psychological seclusion when he stood next to the plaintiff and pressured him to read aloud every page of his wife's private documents that disclosed her premarital relationship with her former boss); Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973) (holding that a defendant who shadowed and monitored the plaintiff was liable for intrusion upon seclusion); Van Jelgerhuis v. Mercury Fin. Co., 940 F. Supp. 1344, 1368 (S.D. Ind. 1996) (finding intrusion upon psychological seclusion based on the defendant's questioning and commenting about the plaintiff's appearance in a public work environment).

[69] *See, e.g.*, Swerdlick v. Koch, 721 A.2d 849, 858 (R.I. 1998); *Harris*, 341 S.W.3d at 271–72.

[70] *See Van Jelgerhuis*, 940 F. Supp. at 1368; Phillips v. Smalley Maint. Servs., Inc. (*Phillips II*), 435 So. 2d 705, 710–11 (Ala. 1983); Bennett v. Norban, 151 A.2d 476, 479 (Penn. 1959).

[71] *Phillips I*, 711 F.2d at 1532, 1536–37; *Phillips II*, 435 So. 2d at 706, 710–11. The plaintiff had originally filed her claim under Title VII of the 1964 Civil Rights Act in the U.S. District Court for the Northern District of Alabama. *Phillips I*, 711 F.2d at 1526; *see* 42 U.S.C. § 2000e-2(a) (2006). The invasion of privacy claims under Alabama tort law were pendent state law claims attached to this federal question. *Phillips I*, 711 F.2d at 1526; *see* 28 U.S.C. § 1367(a) (2006). Given the lack of precedent concerning the state law intrusion upon seclusion claim, the Eleventh Circuit certified the intrusion upon seclusion questions to the Alabama Supreme Court prior to ruling on the appeal. *Phillips II*, 435 So. 2d at 706; *see* 28 U.S.C. § 1367(c) (giving federal courts discretion to sever novel state law claims that stem from the same nucleus of operative fact).

[72] *Phillips II*, 435 So. 2d at 707. The interrogations escalated into weekly questions about her sexual preferences, as well as solicitations for sexual favors. *Id.* During one closed-door conversation, the plaintiff's boss demanded that she give him oral sex three times a week. *Id.* When the plaintiff forced her way out of the office, her boss hit her across the bottom with the back of his hand. *Id.*

nated Phillips's position.[73] At trial, Phillips's family practitioner provided expert testimony that the events surrounding her employment and subsequent firing caused chronic anxiety for months afterward.[74] Adopting the concept of psychological seclusion, the court ultimately held that the defendant's consistent interrogations into Phillips's sexual proclivities were actionable under Alabama privacy law.[75]

In recognizing the interest in a person's emotional stability, the *Phillips* court refused to narrow the concept of seclusion to physical spaces.[76] The defendant had argued that because solitude requires the absence of other people, the concept of seclusion assumes the presence of a physical place.[77] Consequently, the defendant reasoned that people cannot seclude themselves from others without removing themselves to a separate, isolated space.[78] In rejecting this argument, the Alabama Supreme Court declared that "[o]ne's emotional sanctum is certainly due the same expectations of privacy as one's physical environment."[79] Examinations or investigations into private affairs, the court reasoned, can constitute overly intrusive behavior.[80]

Rather than focusing on the setting of the intrusion, a breach into a plaintiff's psychological seclusion ultimately focuses on the specific emotional sanctuary the plaintiff needs to maintain psychological stability.[81] For example, in 1986, in *Russell v. Salve Regina College*, the U.S. District Court for the District of Rhode Island determined that the de-

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[73] *Id.*

[74] *Id.* at 708.

[75] *See id.* at 711. In the 1996 case, *Van Jelgerhuis v. Mercury Finance Co.*, which also concerned workplace harassment, the U.S. District Court for the Southern District of Indiana denied the defendant's motion to dismiss an invasion of privacy claim based on psychological seclusion. *See* 940 F. Supp. at 1368. Acknowledging the tort's "undefined parameters," the court found that the defendant's questioning of the plaintiff's appearance, coupled with him telling her about his sexual dreams and fantasies, crossed the threshold of highly offensive examination. *See id.* at 1351, 1368; *see also* Miller v. Edwards Jones & Co., 355 F. Supp. 2d 629, 645 (D. Conn. 2005) (finding that sexual questions in the workplace may be grounds for a claim of intrusion upon psychological seclusion).

[76] *See Phillips II*, 435 So. 2d at 711.

[77] *Id.* at 710.

[78] *Id.*

[79] *Id.* at 711.

[80] *See id.* For this discussion, the court relied heavily on key language within the comments of section 652B of the *Restatement (Second) of Torts*. *See id.* at 710–11. This analysis included emphasizing "other form" and "examination" in section 652B, comment (b), as well as "otherwise" and "affairs" in section 652B, comment (c). *See id.* at 710–11 (quoting Restatement (Second) of Torts § 652B cmts. b & c (1977)).

[81] *See* Russell v. Salve Regina Coll. (*Russell I*), 649 F. Supp. 391, 404 (D.R.I. 1986); *Phillips II*, 435 So. 2d at 711; David A. Elder, The Law of Privacy 42–43 (1991) (describing the privacy interest in seclusion as "psychic integrity").

fendant's examination of the plaintiff's weight problems was sufficient to establish an action for invasion of privacy for intrusion upon seclusion.[82] The plaintiff was a severely overweight nursing student who experienced, in her words, "torment" from her college as a result of her weight problem.[83] Viewing the tort as protecting intimate, personal matters, the court reasoned that, in the plaintiff's eyes, her weight issue was presumably one of the most private and intimate concerns of her life.[84] Accordingly, the court held that a reasonable jury could find the nursing faculty's preoccupation with the plaintiff's weight loss regimen and the continuous inquiries into her dietary habits constitute an unreasonable intrusion upon seclusion.[85]

Both *Russell* and *Phillips* also establish that claims for intrusion upon psychological seclusion do not require surreptitious behavior.[86] Because the tort is not necessarily limited to physical spaces, a plaintiff can experience intrusions into emotional spaces even when those actions are conducted in view of the public.[87]

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[82] *See Russell I*, 649 F. Supp. at 404. The Rhode Island legislature has codified the four invasion of privacy torts. R.I. Gen. Laws § 9-1-28.1(a) (2012). To recover for the right to be secure from unreasonable intrusion upon one's physical solitude or seclusion, a plaintiff must establish an invasion of something entitled to be private, and must show that the invasion was offensive or objectionable to a reasonable person. *Id.* § 9-1-28.1(a)(1)(i)(A)–(B).

[83] *Russell I*, 649 F. Supp. at 394–95.

[84] *See id.* at 404 ("[F]ew things are more personal or private to a young, single person than weight and one's efforts to control it.").

[85] *See id.* The court acknowledged that the plaintiff's obesity was not a private concern itself due to the fact that it was exposed to the public. *Id.* ("To be sure, there was nothing private or confidential about Russell's corpulence (it was there to be seen at the most casual glance), so drawing attention to her girth would not, in and of itself, be actionable as an invasion of privacy under Rhode Island law.").

After the plaintiff won on summary judgment, the court later ruled in the defendant's favor on a directed verdict. Russell v. Salve Regina Coll. (*Russell II*), 890 F.2d 484, 485 (1st Cir. 1989), *rev'd on other grounds*, 499 U.S. 225 (1991). On appeal, the U.S. Court of Appeals for the First Circuit upheld the verdict based on the statute's language of protecting only *physical* solitude. *Id.* at 488 ("The only area 'invaded' was Russell's psyche. We cannot lightly predict that the Rhode Island Supreme Court would interpret the statute contrary to its literal language . . . .").

[86] *See Russell I*, 649 F. Supp. at 404; *Phillips II*, 435 So. 2d at 709. For this question, the *Phillips II* court relied on the Supreme Court of Pennsylvania's decision in the 1959 case, *Bennett v. Norban*. *See Phillps II*, 435 So. 2d at 710 (discussing *Bennett*, 151 A.2d at 477, 479). In *Bennett*, the defendant had publicly blocked the plaintiff's walking path, ordered her to take off her coat, reached into her dress pockets, and examined her purse. *Bennett*, 151 A.2d at 477. The court held that although these actions were done openly, they substantially interfered with the plaintiff's desire for anonymity and constituted an intrusion beyond the limits of decency. *Id.* at 479.

[87] *See Russell*, 649 F. Supp. at 404; *Phillips II*, 435 So. 2d at 709–10; *Bennett*, 151 A.2d at 479; McClurg, *supra* note 56, at 1055 (arguing that the *Restatement (Second) of Torts*' defini-

Some courts, however, have not recognized the concept of psychological seclusion, especially when the factual setting somehow relates to the public sphere.[88] If intrusive, even offensive, behavior occurs in public view, plaintiffs cannot maintain a personal sphere of privacy when confronted with that behavior.[89] As a result, these courts have relied on objective elements, like the setting and nature of the intrusion, to deny claims for intrusions on psychological seclusion.[90]

B. *Invasion of Privacy Based on the Publication of Private Facts*

Like an invasion of privacy claim for intrusion upon seclusion, a cause of action for the publication of private facts also requires behavior that is highly offensive to a reasonable person.[91] Liability within this tort, however, rests on the offensiveness of the publication.[92] Thus, the context of the publication and its actual content are important considerations when evaluating whether the facts are sufficiently embarrassing to allow recovery.[93]

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tion of the intrusion upon seclusion tort is broad enough to include intrusions in public places).

[88] *See* Pospicil v. Buying Office, Inc., 71 F. Supp. 2d 1346, 1361 (N.D. Ga. 1999) (refusing to recognize psychological seclusion in this case because the defendant's language, jokes, and conduct occurred in a public workplace); *Harris*, 341 S.W.3d at 271–72 (rejecting the plaintiff's theory that she "threw a blanket of seclusion" around photographs of her deceased son's body since the pictures were taken in a public place).

[89] *See Pospicil*, 71 F. Supp. 2d at 1361; *Harris*, 341 S.W.3d at 271–72. For example, in the 1998 case, *Swerdlick v. Koch*, the Rhode Island Supreme Court declined to expand the concept of seclusion under its statutory intrusion upon seclusion cause of action. 721 A.2d at 858. *Swerdlick* involved a neighbor who had been photographing the outside of the plaintiff's private residence and logging the business activities taking place there over the course of a year to document violations of local zoning by-laws. *Id.* at 853–54. Despite the emotional distress and physical ailments that the plaintiffs experienced from being under constant surveillance, the court held that the defendant's actions did not disturb the plaintiff's mental sanctity. *Id.* at 858. In light of the statute's emphasis on protecting physical seclusion, the court would not expand the statute's meaning to also cover observations of behavior that occur in plain public view. *Id.* Not only was there no physical intrusion, but the court also indicated that the defendant had not personally harassed the plaintiffs when they appeared outside of their home. *Id.* Nevertheless, the court did acknowledge that the behavior, though outside the scope of the privacy statute, may have been offensive. *Id.*

[90] *See Pospicil*, 71 F. Supp. 2d at 1361; *Swerdlick*, 721 A.2d at 858; *Harris*, 341 S.W.3d at 271–72.

[91] *Haynes*, 8 F.3d at 1232; Restatement (Second) of Torts § 652D(a) (1977).

[92] *Haynes*, 8 F.3d at 1232; Restatement (Second) of Torts § 652D(a).

[93] *See* Huskey v. Nat'l Broad. Co., 632 F. Supp. 1282, 1289 (N.D. Ill. 1986) (contrasting publicizing a photo of a couple kissing in public with a photo of a couple kissing in a hotel room); Restatement (Second) of Torts § 652D cmt. c ("The protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens.").

It must also be substantially certain that the embarrassing facts will become public knowledge.[94] This publicity requirement, therefore, is not satisfied when the facts are simply repeated to a person other than the plaintiff, or even to a threshold number of third parties.[95] Instead, the disclosure must be a sufficiently public communication given the facts and circumstances of each case.[96]

Even if the facts are deemed private and have been publicized, the facts cannot be "newsworthy" or a matter of legitimate public concern.[97] Accordingly, this element of the publication of private facts tort requires courts to determine whether the facts are "newsworthy" enough to preclude recovery for plaintiffs asserting this type of invasion of privacy claim.[98] For example, in 1998, in *Shulman v. Group W Productions, Inc.*, the California Supreme Court articulated several factors that should be assessed when courts make a determination of newsworthiness.[99] First, a court necessarily has to assess the social value of the facts published because the public interest in a certain matter must be legitimate.[100] Second, coupled with this assessment, a newsworthiness test also compares the publication's level of intrusion into a plaintiff's private affairs with the plaintiff's position in society.[101]

Third, courts also give substantial deference to the media to determine the newsworthiness of truthful publications.[102] As a result, matters of legitimate public interest are not just limited to "news," but may also extend to educational, historical, or entertaining publications that

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[94] Harris by Harris v. Easton Publ'g Co., 483 A.2d 1377, 1384 (Pa. Super. Ct. 1984); Restatement (Second) of Torts § 652D cmt. a (describing publicity as a required element of the publication of private facts tort).

[95] *E.g.*, Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371, 377–78 (Colo. 1997) (en banc) (holding that publicity, rather than publication, is a requirement of the publication of private facts tort).

[96] *Id.*, 940 P.2d at 377–78; *Harris by Harris*, 483 A.2d at 1384.

[97] Restatement (Second) of Torts § 652D(b).

[98] *E.g.*, *Haynes*, 8 F.3d at 1232; Shulman v. Group W Prods., Inc., 955 P.2d 469, 484–85 (Cal. 1998); *Uranga*, 67 P.3d at 35; *see also* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L. Rev. 291, 351–61 (1983) (articulating various tests used by courts for determining the newsworthiness defense to publication of private facts).

[99] 955 P.2d at 483–85.

[100] *Id.* at 483.

[101] *Id.* at 484. Part II of this Note discusses further the attention on the plaintiff's status in society—i.e., public figure status. *See infra* notes 130–196 and accompanying text.

[102] *E.g.*, *Sidis*, 113 F.2d at 809; *Shulman*, 955 P.2d at 485; *Uranga*, 67 P.3d at 35; *see* Zimmerman, *supra* note 98, at 353.

a news entity thinks would be appealing to its viewers.[103] Because the tort inherently targets the actions of publishers rather than private citizens, the discretion given to determinations of newsworthiness also acts as a countervailing interest to the media.[104]

C. *The Constitutional Dimension of Common Law Invasion of Privacy*

The First Amendment of the U.S. Constitution promotes the free flow of ideas and information by guaranteeing an "uninhibited, robust, and wide-open" debate on public issues.[105] Concerns about infringing on an individual's notions of privacy either through the dissemination of information or through offensive speech directly clash with the freedoms of speech and the press secured by the First Amendment.[106] Accordingly, the First Amendment provides a defense for state tort law suits, including invasion of privacy claims.[107]

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[103] *See Shulman*, 955 P.2d at 485 ("'[Newsworthiness] extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.'" (quoting Restatement (Second) of Torts § 652D cmt. j (1977))); *see also* Zimmerman, *supra* note 98, at 354 (noting that the economics of journalism makes the media arguably the best measure of what the public wants to know).

[104] *See Harris by Harris*, 483 A.2d at 1384; Restatement (Second) of Torts § 652D cmt. a ("On the other hand, any publication in a newspaper or a magazine, even of small circulation . . . is sufficient to give publicity within the meaning of the term as it is used . . . .").

[105] *N.Y. Times*, 376 U.S. at 270; *see* Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (concluding that "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate"); *Hustler*, 485 U.S. at 51 (recognizing the Court's role to be "vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions"); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503–04 (1984) ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.").

[106] *See Cox*, 420 U.S. at 489 (detailing the fundamental "face-off" between privacy rights and constitutional freedoms of speech and expression); *Hill*, 385 U.S. at 388 ("Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."); Scott Shackelford, *supra* note 22, at 145–47 (identifying the newsworthiness of information and the public's "right to know" as limitations to privacy rights of public figures). *See generally* Samantha Barbas, *Saving Privacy from History*, 61 DePaul L. Rev. 973 (2012) (tracing the historical development of privacy doctrines and their interplay with public figures, the rise of the media, and culture).

[107] *See, e.g.*, *Snyder*, 131 S. Ct. at 1215; *Hustler*, 485 U.S. at 56; *Cox*, 420 U.S. at 496.

1. *Cox Broadcasting Corp. v. Cohn* and Publication of Private Facts

Beginning in 1975, in *Cox Broadcasting Corp. v. Cohn*, the U.S. Supreme Court has consistently ruled in favor of the press and against the privacy interests of individuals and states aiming to protect their citizens.[108] In *Cox*, the family of a deceased murder victim sued a broadcast station for airing the victim's name, which the defendants had obtained from a public courtroom record.[109] The Court ruled, however, that the defendants could not be held liable under state privacy law when they publicized facts gathered from public records.[110] Notably, the Court avoided the larger question of whether a state has the power to protect the privacy of individuals from unwanted publicity concerning true facts *not* obtained from public records.[111]

Although the Court has continued to limit the utility of the publication of private facts tort since *Cox*, it has never gone so far as to rule the tort unconstitutional.[112] Instead, the Court has tailored its rulings to be as fact specific and narrow as possible so that no decision unreasonably intrudes on the competing constitutional interests of expression and privacy.[113] For example, in 1989, in *The Florida Star v. B.J.F.*, the Supreme Court refused to impose liability on a newspaper for violating a Florida statute that prohibited the publication of a rape victim's name through an "instrument of mass communication." [114] In so doing, the Court recognized that if a state wants to impose civil liability on the publication of truthful information, the statute imposing liability must be narrowly tai-

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[108] *See* Fla. Star v. B.J.F., 491 U.S. 524, 540–41 (1989) (holding that a Florida statute prohibiting the publication of a rape victim's name was unconstitutional); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104, 105–06 (1979) (holding that a West Virginia statute forbidding newspapers from publishing names of individuals charged as juvenile offenders was unconstitutional); Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 311–12 (1977) (per curiam) (overturning an Oklahoma court's trial order forbidding a newspaper from publishing a photo of a juvenile in a judicial proceeding); *Cox*, 420 U.S. at 496–97 (overturning a civil damages award in Georgia for publicizing a murder victim's name gathered from a public indictment); *see* Edelman, *supra* note 8, at 1197–98; Zimmerman, *supra* note 98, at 305–06.

[109] *Cox*, 420 U.S. at 472–74.

[110] *Id.* at 496–97.

[111] *See id.* at 491, 496–97.

[112] Edelman, *supra* note 8, at 1197–98.

[113] *See, e.g.*, *Fla. Star*, 491 U.S. at 533, 541; *Smith*, 443 U.S. at 106 (Rehnquist, J., concurring) ("While we have shown a special solicitude for freedom of speech and of the press, we have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented.").

[114] 491 U.S. at 526, 541.

lored to a state interest of "the highest order."[115] The court determined that the Florida statute—which was enacted to protect the privacy interests of sexual assault victims—was not narrowly tailored because it applied to mass media communications but not those of other sources (such as private individuals).[116] In addition, the Court reasoned that the newspaper's lawful obtainment of the rape victim's name in a government news release, as well as the statute's negligence *per se* standard, did not comport with the guarantees of the First Amendment.[117]

2. *Snyder v. Phelps*, Captive Audience, and Intrusion upon Seclusion

If the choice is between the government censoring offensive speech and the listener avoiding the speech, the First Amendment usually puts the burden on the listener to simply turn away.[118] There is, however, an exception to this general premise: from time to time, the Supreme Court has used the captive audience doctrine to shield unwilling listeners from otherwise protected speech.[119] A plaintiff must show that a defendant's offensive speech invades a substantial privacy interest in an "intolerable" manner.[120] Given the state interest in protecting the sanctity of the home and the refuge it provides from society, courts have used the doctrine primarily to restrict speech directed at an individual's residence.[121]

In 2011, in *Snyder v. Phelps*, the Supreme Court declined to expand the captive audience doctrine to allow recovery for an intrusion upon seclusion claim that had occurred in the public eye.[122] Underlying the

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[115] *Id.* at 541.

[116] *See id.* at 540–41.

[117] *See id.* at 538–40.

[118] *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975).

[119] *See* Frisby v. Schultz, 487 U.S. 474, 487 (1988) (applying the captive audience doctrine when upholding a city ordinance that prohibited picketing near the plaintiff's home); Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736, 738 (1970) (applying the captive audience doctrine when upholding a statute that allowed homeowners to limit deliveries of offensive mail). The captive audience doctrine involves situations in which speech intrudes on privacy because, as a practical matter, the offensive speech is unavoidable. *See generally* Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken To?*, 67 Nw. U. L. Rev. 153 (1972) (commenting on the theory of a captive audience in First Amendment jurisprudence); Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 Hastings Const. L.Q. 85 (1991) (defining the captive audience doctrine and its confusing understanding of substantial privacy interests under First Amendment jurisprudence).

[120] *See Snyder*, 131 S. Ct. at 1220.

[121] *See Frisby*, 487 U.S. at 484–85; *Rowan*, 397 U.S. at 736–38; Strauss, *supra* note 119, at 91, 95.

[122] 131 S. Ct. at 1220. In *Snyder*, the defendant was the founder of the Westboro Baptist Church, a congregation known for its intolerance of homosexuality in the United States

Court's reasoning for not expanding the captive audience doctrine in *Snyder* was the distinction between speech of public concern and speech of private concern.[123] Taking into account the content, context, and form of the speech, the Court determined that the defendants' signs, although offensive, invited comment on public matters, and therefore were constitutionally protected forms of expression.[124] In contrast, private speech, which addresses no public concerns, warrants far less constitutional protection.[125] Even though government evaluations regarding private speech are still policed for First Amendment violations, the risk of stifling public debate diminishes as the speech moves toward individual privacy interests.[126]

Thus, compared to the burden placed on plaintiffs bringing a publication of private facts tort, the burden on individuals bringing a claim for intrusion upon seclusion based on intrusive speech—though still substantial—is arguably less.[127] This is particularly true if a plaintiff can demonstrate that the speech is of private concern rather than public concern.[128] As a result, former public figures may be able to take advantage of this lesser burden of proof by asserting a claim for intrusion

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military. *Id.* at 1213. To demonstrate this vitriol, the defendant and other church members set up a picketing site several hundred feet from the funeral procession of a marine killed in Iraq. *Id.* The plaintiff, who was the father of the fallen marine, claimed that he was a captive audience at the funeral, and therefore, that he could not avoid the intrusive nature of the picketing. *Id.* at 1219–20. The Court disagreed, stating that the plaintiff could not see the actual words on the signs and that the protestors stayed far away from the actual memorial service. *Id.* at 1220.

[123] *See id.* at 1215–16 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985)); Dan Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 Harv. L. Rev. 1, 43–44 (2011) (characterizing the decision in *Snyder* as straightforward because the speech had a "communicative impact" on the public (citing Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 487 (1996))).

[124] *See Snyder*, 131 S. Ct. at 1216–17.

[125] *See id.* at 1215–16; *Dun & Bradstreet*, 472 U.S. at 760.

[126] *See Snyder*, 131 S. Ct. at 1216 ("As in other First Amendment cases, the court is obligated to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." (internal quotation marks omitted)); *Dun & Bradstreet*, 472 U.S. at 759–60 (determining that regulating speech of purely private concern does not raise significant constitutional concerns because such speech does not interfere with meaningful discussion of public issues).

[127] *Compare Snyder*, 131 S. Ct. at 1220 (suggesting that an intrusion upon seclusion claim based on offensive speech must invade a "*substantial privacy interest*") (emphasis added), *with Fla. Star*, 491 U.S. at 541 (finding that publication of lawfully obtained truthful information trumps individual's right to privacy unless doing so infringes on a state interest "*of the highest order*" (emphasis added)).

[128] *See Snyder*, 131 S. Ct. at 1216; *Dun & Bradstreet*, 472 U.S. at 760.

upon psychological seclusion rather than a claim for publication of private facts.[129]

II. Former Public Figures and Privacy: Trying to Avoid the Perpetual Spotlight

As hard as it is for private individuals to bring claims for invasion of privacy, public figures fare much worse.[130] Diminished privacy rights are appropriate for all-purpose public figures because they cannot expect to keep details about their lives free from public scrutiny when they choose to make their actions and opinions matters of public concern.[131] This rationale also applies to some limited-purpose public figures due to the legitimate public concern in the particular public controversy they are resolving.[132] The public's interest in some limited-purpose public figures and involuntary public figures, however, may involve public controversies that do not address significant political or societal issues, or perhaps last for only a brief moment of time.[133] Additionally, these individuals may live private lives for years before experiencing invasions of personal privacy.[134] With these factors in play, courts have had difficulty determining when, and if, the privacy rights

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[129] *See Snyder*, 131 S. Ct. at 1220; *Fla. Star*, 491 U.S. at 541.

[130] *See, e.g.*, Street v. Nat'l Broad. Co., 645 F.2d 1227, 1229, 1236 (6th Cir. 1981) (ruling that the plaintiff, a public figure in rape trials that took place forty years prior to her defamation and false light claims for the historical reproduction of those trials, was still a public figure); Sidis v. F-R Publ'g Corp., 113 F.2d 806, 809 (2d Cir. 1940) (denying recovery for the publication of truthful news story about a child prodigy thirty years after he became a public figure); Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 35 (Idaho 2003) (ruling that the plaintiff, who was featured in a news story forty years earlier, could not recover for invasion of privacy because his name was taken from a public court record); Roshto v. Hebert, 439 So. 2d 428, 429, 431 (La. 1983) (ruling that the plaintiff, who was convicted of a crime twenty-five years prior to an invasion of privacy claim based on a newspaper's reprinting of an article about the trial, was still a matter of public concern).

[131] *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975); Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967).

[132] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–46 (1974).

[133] *See* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 166 n.7 (1979) (declining to decide when an individual loses status as a public figure due to the passage of time in the context of defamation); Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (holding that the dissolution of a marriage through judicial proceedings involving wealthy individuals is not the type of "public controversy" that the First Amendment protects through its public figure doctrine).

[134] *See supra* note 21 (providing examples of public figures who have retreated into private life).

of *former* limited-purpose and involuntary public figures return, and to what degree.[135]

This Part examines how courts have treated public figures when asserting common law invasion of privacy claims for both intrusion upon seclusion and the publication of private facts.[136] Section A explains how courts rely on a plaintiff's public figure status when considering an invasion of privacy claim for the publication of private facts, but do not factor it into an intrusion upon seclusion analysis.[137] Section B then details how courts have treated former public figures who have brought invasion of privacy claims.[138]

A. *Public Figures and Invasion of Privacy Claims*

1. Public Figure Status Irrelevant to Intrusion upon Seclusion

Public figures will often assert multiple invasion of privacy claims in one lawsuit in the hopes of recovering under at least one claim.[139] When evaluating a claim for intrusion upon seclusion, a court will not typically consider a plaintiff's status as a public figure.[140] Even if the

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[135] *Compare Sidis*, 113 F.2d at 809–10 (denying recovery to a former child prodigy for the publication of a truthful news story written about the plaintiff thirty years after he became a public figure), *with* Melvin v. Reid, 297 P. 91, 93–94 (Cal. Ct. App. 1931) (granting privacy protection to a reformed prostitute after a publication focused on her life story damaged her character and social standing). *See generally* Jones v. New Haven Register, Inc. 763 A.2d 1097 (Conn. Super. Ct. 2000) (discussing public figure status and the legacies of the 1940 U.S. Court of Appeals for the Second Circuit case, *Sidis v. F-R Publishing Corp.* and the 1931 California Court of Appeals case, *Melvin v. Reid*); Stephen Bates, *The Prostitute, the Prodigy, and the Private Past*, 17 Comm. L. & Pol'y 175 (2012) (arguing that highly relevant facts in both *Sidis* and *Melvin*, if examined, may have caused the cases to turn out differently).

[136] *See infra* notes 137–196 and accompanying text.

[137] *See infra* notes 139–168 and accompanying text.

[138] *See infra* notes 169–196 and accompanying text.

[139] *See, e.g.*, Wolf v. Regardie, 553 A.2d 1213, 1217 (D.C. 1989) (denying claims for intrusion upon seclusion and publication of private facts against a magazine that published articles about a prominent businessman); Huskey v. Nat'l Broad. Co., 632 F. Supp. 1282, 1286, 1291–92 (N.D. Ill. 1986) (upholding claims for intrusion upon seclusion and publication of private facts against a news organization that had argued that the plaintiff, a prisoner, was a public figure); *Uranga*, 67 P.3d at 32, 35 (denying claims for intrusion upon seclusion, false light, and publication of private facts against a newspaper's publication of the plaintiff's name in a story recounting a forty-year-old sex scandal); Bilney v. Evening Star Newspaper Co., 406 A.2d 652, 654, 656, 659–60 (Md. Ct. Spec. App. 1979) (denying claims for intrusion upon seclusion and publication of private facts against a newspaper for acquiring and publishing grades of college basketball players).

[140] *See Huskey*, 632 F. Supp. at 1288; *Bilney*, 406 A.2d at 657; *see also* Zimmerman, *supra* note 98, at 344–47 (explaining that a plaintiff's status can be a gauge for whether facts are sufficiently private in a publication of private facts claim). *But see* McClurg, *supra* note 56,

plaintiff is deemed a public figure, there is no First Amendment protection for defendants who conduct highly intrusive behavior in the course of newsgathering.[141] For example, in the 1986 case, *Huskey v. National Broadcasting Co.*, the U.S. District Court for the Northern District of Illinois upheld a prisoner's claims for invasion of privacy based on intrusion upon seclusion and publication of private facts.[142] In *Huskey*, an NBC News crew gathered film about prison conditions featuring the plaintiff, Arnold Huskey, and subsequently aired that footage nationally on the *Today Show*.[143] The defendant, NBC, contended that Huskey's status as a prisoner made him a limited-purpose public figure, and as such, a person with a very narrow expectation of privacy.[144]

The *Huskey* court recognized that raising a public figure defense "muddies the waters" between the intrusion upon seclusion and publication of private facts causes of action.[145] Relying on this defense, NBC argued that an intrusion cannot be unlawful unless the publication amounts to an extraordinary revelation of a person's private life.[146] The court rejected this argument, stating that the plaintiff's alleged public figure status was irrelevant to an intrusion upon seclusion claim.[147] Turning instead to the nature of Huskey's seclusion, the court held that a person can still expect privacy in an area where he or she can be seen

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at 1078–79 (arguing that although a plaintiff's status is technically not a factor in an intrusion tort, it still enters the analysis of whether an intrusion is highly offensive).

[141] *See, e.g.*, Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973); Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971); *Huskey*, 632 F. Supp. at 1288.

[142] 632 F. Supp. at 1291–92.

[143] *Id.* at 1285. The footage captured Huskey sitting alone and shirtless for several minutes in a small prison exercise room. *Id.* He had not given consent to be taped, nor had he expected any persons besides prison personnel and inmates to be able to see him during his incarceration. *Id.*

[144] *See id.* at 1289–90. The defendant relied on comment f of section 652D of the *Restatement (Second) of Torts* regarding publicity of prisoners, which states:

> Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed. . . . As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private.

Restatement (Second) of Torts § 652D cmt. f (1977).

[145] 632 F. Supp. at 1288; *see also* Richards & Solove, *supra* note 35, at 1920 (explaining that courts tend to interpret the intrusion upon seclusion and publication of private facts torts narrowly and avoid nuanced interpretations).

[146] *See Huskey*, 632 F. Supp. at 1286–87.

[147] *Id.* at 1288.

by others, especially if that person, like a prisoner, is normally secluded from the outside world.[148] Furthermore, the court reasoned that filming a prisoner without consent does not come within the purview of a prisoner's crime and subsequent trial—those controversies that could make a prisoner a limited-purpose public figure.[149]

Even when plaintiffs would be considered public figures and assert both an intrusion upon seclusion claim and a publication of private facts claim, their public figure status still does not factor into the intrusion upon seclusion analysis.[150] If a defendant acquired and further publicized facts already in the public sphere, then plaintiffs—regardless of whether they are deemed public figures—cannot claim that their privacy has been invaded.[151] For instance, in the 2009 case, *Harris v. Horton*, the Court of Appeals of Tennessee dismissed the plaintiffs' claims for intrusion upon seclusion brought on behalf of their deceased family member who, because of his recent death in a car crash, was deemed an involuntary public figure.[152] The plaintiffs based their claim on the defendant's use of photographs, which depicted the deceased victim at the accident scene, in a driver's education class.[153] By having a closed casket funeral, the plaintiffs argued, they had "thrown a blanket of seclusion" on the photographs and the topic of the decedent's body, thereby creating a sufficient expectation of privacy.[154] Moreover, they argued that the photographs were private because the scene of the accident was closed to the public.[155] The court disagreed, however, stating that displaying photographs taken in a public place could not intrude on the plaintiffs' seclusion.[156] In so doing, the court

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[148] *Id.* at 1288–89.

[149] *See id.* at 1290.

[150] *See Wolf*, 553 A.2d at 1218; Harris v. Horton, 341 S.W.3d 264, 271–72 (Tenn. Ct. App. 2009), *overruled on other grounds by* Rogers v. Louisville Land Co., 367 S.W.3d 196, 205 n.6 (Tenn. 2012); McClurg, *supra* note 56, at 1031, 1033–34.

[151] *See Wolf*, 553 A.2d at 1218; *Harris*, 341 S.W.3d at 271–72; McClurg, *supra* note 56, at 1031, 1033–34 (noting that the level of privacy that the plaintiffs are entitled to can depend on factors such as the information already known about them and the level of obscurity they have from the public).

[152] *See* 341 S.W.3d at 271–72. Although Tennessee recognizes privacy as a personal right, the plaintiffs were able to bring a privacy claim based on the family's protected rights to a decedent's remains. *Id.* at 271 (citations omitted).

[153] *Id.* at 266–67, 271.

[154] *Id.* at 271.

[155] *Id.*

[156] *See id.* at 271–72. The court also found that the plaintiffs could not establish that the defendant had the requisite intent to intrude on their seclusion by displaying the photographs. *Id.* at 272.

reserved the plaintiff's public figure status for its analysis of the publication of private facts claim.[157]

2. Public Figure Status Relevant to Publication of Private Facts

A plaintiff's status as a public figure often precludes recovery for invasion of privacy based on the publication of private facts because the issues that make a plaintiff a public figure are inherently matters of public concern.[158] The importance society places on "newsworthy" information trumps an individual's privacy interest in keeping those matters secret.[159] Even for involuntary public figures, like the plaintiff's son in *Harris*, the public interest in the free flow of information will typically outweigh an individual's right to privacy.[160] Thus, if the private facts publicize matters of public concern, plaintiffs cannot claim that their privacy was improperly invaded.[161]

To preclude public figures, both voluntary and involuntary, from recovering for publication of private facts, there must be a logical nexus between the disclosed facts and the facts that brought the individual into the public eye.[162] Applying this principle, in 1979, in *Bilney v. Evening Star Newspaper Co.*, the Court of Special Appeals of Maryland held that six members of the University of Maryland (College Park) basketball team could not recover for invasion of privacy based on a newspaper's publication of information regarding their academic standing.[163]

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[157] *See id.* at 271–74. Similarly, in 1989, in *Wolf v. Regardie*, the District of Columbia Court of Appeals concluded that the plaintiff could not maintain a claim for intrusion upon seclusion based on a news magazine's acquisition of information about the plaintiff gathered from third parties and public records. 553 A.2d at 1220. Although the court described the plaintiff, a real estate mogul in Washington, D.C., as "newsworthy," it did not factor his status into its intrusion upon seclusion analysis. *See id.* at 1218–20, 1221.

[158] *E.g.*, *Hill*, 385 U.S. at 386–88; Kapellas v. Kofman, 459 P.2d 912, 922–23 (Cal. 1969) (en banc) (denying recovery based on the publication of private facts tort due to the plaintiff's status as a candidate for city council); *see* Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 Calif. L. Rev. 1805, 1828 (2010). A study conducted from 1974 to 1984 concluded that plaintiffs, regardless of their public figure status, succeeded in only 2.8% of publication of private facts claims against media defendants, and in only 12% of claims against non-media defendants. Citron, *supra*, at 1828 (citation omitted).

[159] *See Kapellas*, 450 P.2d at 922; Citron, *supra* note 158, at 1829.

[160] *See, e.g.*, Fla. Star v. B.J.F., 491 U.S. 524, 540–41 (1989); *Cox*, 420 U.S. at 494–95; *Harris*, 341 S.W.3d at 273–74.

[161] Restatement (Second) of Torts § 652D (b) (1977).

[162] *E.g.*, Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980) (per curiam); Shulman v. Group W Prods., Inc., 955 P.2d 469, 485 (Cal. 1998); *Bilney*, 406 A.2d at 660; *see* McNealy, *supra* note 21, at 128 (noting that the logical nexus test may sweep too broadly because most people are involved in activities of public concern).

[163] 406 A.2d at 660.

Although the plaintiffs conceded that they were public figures due to their status as members of a prominent college basketball team that drew regional and national attention, they argued that their grades were purely private.[164] The *Bilney* court determined, however, that the players' academic standing formed a logical nexus with their membership on the basketball team because the players' academic performance could constitute grounds for exclusion from the team.[165]

What news entities, publishers, and individuals cannot do, however, is publicize private facts for the sole purpose of intruding on an individual's private life and thereby disseminating information that has no social value in any decent community.[166] *Bilney* is a good illustration of this community mores test for public figures: even though the publication of academic standing would likely infringe on a *private* student's right to privacy, no reasonable community would be offended by the publication of such information regarding a student whose academic standing is crucial to his membership on a major college basketball team.[167] Once this initial nexus threshold is satisfied, the press has every right to report on a story, whether it is for news, entertainment, education, or simple amusement.[168]

B. *Former Public Figures: Once Public, Always Public?*

Individuals who achieve public figure status lose some privacy rights due to the newsworthiness of their public activities.[169] Yet a person's public status may diminish significantly over time.[170] With the newsworthiness of their past activities, and, more broadly, the constitu-

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[164] *Id.* at 659.

[165] *See id.* at 660.

[166] *See Sidis*, 113 F.2d at 809 ("Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency."); *Shulman*, 955 P.2d at 485 (stating that some reasonable members of the community must have legitimate interest in a news story beyond voyeuristic motivations for its dissemination to be protected); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 1007 (1989) (stating that the protection of individual dignity must be weighed against the protection of community identity through the rules of civility when considering matters of legitimate public concern).

[167] *See Bilney*, 406 A.2d at 660.

[168] *See Shulman*, 955 P.2d at 485–86; *Bilney*, 406 A.2d at 660.

[169] *E.g.*, *Hill*, 385 U.S. at 386–88; *Kapellas*, 459 P.2d at 922–23; *Bilney*, 406 A.2d at 660.

[170] *See Street*, 645 F.2d at 1229 (describing a plaintiff who had been a public figure in a rape trials forty years prior to defamation and false light claims based on historical reproduction of trials); *Roshto*, 439 So. 2d at 429–30 (describing plaintiff who had been convicted of crime twenty-five years prior to invasion of privacy claim based on newspaper reprinting news article about trial).

tional restraints on the tort of publication of private facts, however, former public figures have substantial difficulty trying to sustain an invasion of privacy claim even when years have passed since they last were in the public spotlight.[171] According to Professor Prosser, "once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days."[172] Nevertheless, courts have considered the passage of time between the events that made a person a public figure and the alleged invasion of privacy.[173]

Courts typically have been reluctant to fully restore someone's private status by protecting the publication of facts that were once in the public forum, even if a long period of time has passed.[174] Even though an individual may no longer be involved in public affairs, there may be a legitimate public interest in educating and informing the community about past events involving that person.[175] This principle stems from the seminal 1940 case, *Sidis v. F-R Publishing Corp.*, in which the U.S. Court of Appeals for the Second Circuit decided that a former child prodigy could not recover for common law invasion of privacy for a publication made decades after the events occurred that made him famous.[176] After becoming famous for lecturing to prominent mathematicians at age eleven and graduating from Harvard at age sixteen, the plaintiff, William Sidis, attempted to live a quiet, obscure life away from the public eye.[177] In 1937, nearly thirty years after his childhood accomplishments, the *New Yorker* published a short biography and photo

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[171] *See Fla. Star*, 491 U.S. at 540–41; *Cox*, 420 U.S. at 495; Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1231–32 (7th Cir. 1993); *Sidis*, 113 F.2d at 809–10; Shackelford, *supra* note 22, at 146.

[172] Prosser, *supra* note 35, at 418.

[173] *See, e.g.*, *Sidis*, 113 F.2d at 809–10; *Melvin*, 297 P. at 93; *Uranga*, 67 P.3d at 35; *Roshto*, 439 So. 2d at 431–32; *see also* Restatement (Second) of Torts § 652D cmt. k (1977) ("Such a lapse of time is, however, a factor to be considered, with other facts, in determining whether the publicity goes to unreasonable lengths in revealing facts about one who has resumed the private, lawful and unexciting life led by the great bulk of the community.").

[174] *See, e.g.*, *Haynes*, 8 F.3d at 1231, 1235; *Street*, 645 F.2d at 1236; *Sidis*, 113 F.2d at 809–10; *Uranga*, 67 P.3d at 35 ("There is no indication that the First Amendment provides less protection to historians than to those reporting current events."); *Roshto*, 439 So. 2d at 431–32; *see also* McNealy, *supra* note 21, at 128 (explaining that, under American privacy law, the newsworthiness of information does not necessarily degrade over time).

[175] Restatement (Second) of Torts § 652D cmt. k ("Past events and activities may still be of legitimate interest to the public, and a narrative reviving recollection of what has happened even many years ago may be both interesting and valuable for purposes of information and education.").

[176] 113 F.2d at 809–10.

[177] *Id.* at 807.

of Sidis.[178] The article explained Sidis's life since his famed childhood, detailing his quirky hobbies and private lifestyle.[179]

Sidis is notorious for featuring one of the most sympathetic plaintiffs in all of privacy law.[180] Indeed, the *Sidis* court recognized that the *New Yorker* article could be interpreted as a "ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of private life."[181] Even so, the court found that the public's interest in his past affairs, especially concerning his potential for a bright future, was substantial enough to be considered newsworthy.[182] Therefore, the public's right to know precluded recovery for invasion of privacy.[183]

Like the issue of private facts falling outside the realm of affairs that make a person public, the lapse of time factor considers whether the publication is consistent with notions of decency in the community.[184] In most situations, merely seeking amusement or quelling curiosity about a public figure who has since retreated to private life would not offend reasonable members of the community.[185]

To cross the threshold from purely educational news to a privacy invasion, a publication cannot be newsworthy or publicize any legitimate public matter.[186] This was the case in the 1931 case, *Melvin v. Reid*, in which the District Court of Appeal for the Fourth District of California decided that the publication of a former prostitute's life story in a biopic several years after her murder acquittal constituted an invasion of privacy.[187] The court acknowledged the plaintiff's efforts to rehabilitate her life during the eight years following the murder trial, as well as the defendant's sole purpose in producing the movie—to gain commercial profit.[188]

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[178] *Id.*

[179] *Id.* Among Sidis's interests were his passion for collecting streetcar transfers, his proficiency with adding machines, and his fascination with the Okamakammesset Indians. *Id.*

[180] Zimmerman, *supra* note 98, at 323.

[181] *Sidis*, 113 F.2d at 807–08.

[182] *See id.* at 809.

[183] *See id.* at 809–10.

[184] Restatement (Second) of Torts § 652D cmt. k (1977) ("Again the question is to be determined upon the basis of community standards and mores.").

[185] *See Sidis*, 113 F.2d at 809–10; *Shulman*, 955 P.2d at 485–86.

[186] *See Haynes*, 8 F.3d at 1232; *Shulman*, 955 P.2d at 485–86; *Melvin*, 297 P. at 93.

[187] *See Melvin*, 297 P. at 91, 93–94.

[188] *See id.*; *see also* Restatement (Second) Torts §652D cmt. k & illus. 26 (suggesting that reformed criminals who live private lives for a number of years may have an actionable invasion of privacy claim for the publication of crimes long forgotten in the community).

Despite the decision in *Melvin*, modern courts have predominantly sided with the reasoning of the *Sidis* court.[189] The main force behind this shift has been courts' interpretations of the U.S. Supreme Court's 1975 decision in *Cox Broadcasting Corp. v. Cohn*, and its 1991 decision in *The Florida Star v. B.J.F.*[190] Read broadly, *Cox* and *Florida Star* stand for the proposition that once private facts become publicized, a defendant cannot be held criminally or civilly liable for the republication of those facts.[191] This is true even for cases involving rehabilitated criminals like the plaintiff in *Melvin*, notwithstanding the *Restatement (Second) of Torts*' cautioning in this area.[192] As an example, in 2004's *Gates v. Discovery Communications, Inc.*, the Supreme Court of California held that the publication of truthful facts regarding a former criminal obtained from public records did not constitute an invasion of privacy.[193] The court's opinion, relying heavily on *Cox* and *Florida Star*, illustrates that any state interests in protecting the anonymity of former criminals must yield to the First Amendment, at least when anonymity depends on facts contained within public court records.[194]

Former public figures are thus left in a bind when it comes to limiting a public reexamination of their lives through the use of the publication of private facts tort.[195] Accordingly, these individuals need an alternative common law solution for actions that invade personal privacy.[196]

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[189] *See Haynes*, 8 F.3d at 1231 (noting modern courts' movement toward the *Sidis* view of privacy and away from *Melvin*); *Jones*, 763 A.2d at 1101 (same).

[190] *See Fla. Star*, 491 U.S. at 540–41; *Cox*, 420 U.S. at 494–95; *Haynes*, 8 F.3d at 1232 (stating that the implications of the U.S. Supreme Court's holdings in *Cox* and *Florida Star* regarding the tort for publication of private facts are "profound"); Zimmerman, *supra* note 98, at 306 (arguing that a proper reading of *Cox* requires the constitutional protection of the publication of true statements).

[191] *See Fla. Star*, 491 U.S. at 540–41; *Cox*, 420 U.S. at 494–95; *Haynes*, 8 F.3d at 1232; Edelman, *supra* note 8, at 1202, 1204 (determining that *Florida Star* has established the "lawfully obtained" defense for the publication of private facts tort).

[192] *See* Gates v. Discovery Commc'ns Inc., 101 P.3d 552, 562 (Cal. 2004); *Jones*, 763 A.2d at 1101. *But see Roshto*, 439 So. 2d at 431 (describing a hypothetical situation in which a rehabilitated criminal could recover for publication of private facts); *supra* note 190 and accompanying text (explaining that rehabilitated criminals may be able to recover for invasion of privacy when an individual publicizes their criminal past).

[193] 101 P.3d at 555. The *Gates* court overruled the 1971 decision by the California Supreme Court in *Briscoe v. Reader's Digest Ass'n*, which barred the publication of truthful, but not newsworthy, facts regarding a rehabilitated criminal. Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 44 (Cal. 1971) (en banc), *overruled by Gates*, 101 P.3d at 555.

[194] *See Gates*, 101 P.3d at 556, 558–60, 562.

[195] *See supra* notes 158–194 and accompanying text.

[196] *See infra* notes 197–270 and accompanying text.

III. Fading into Privacy: Making the Case for Former Public Figures' Use of Intrusion upon Psychological Seclusion

Psychological seclusion provides an underutilized common law option for former public figures whose private lives have been exposed to the public sphere.[197] This Part argues for upholding claims for intrusions upon psychological seclusion brought by former public figures, whether limited purpose or involuntary, based on an offensive dissemination of information regarding their most private affairs.[198] Section A puts forth a prima facie case for intrusion upon a former public figure's psychological seclusion.[199] Section B then details the legal hurdles that would inevitably curtail a widespread use of this cause of action.[200] Finally, Section C argues that, notwithstanding these limitations, the growing number of former public figures and the changing notions of personal privacy in today's social media-driven culture provide the necessary policy justifications for expanding psychological seclusion.[201]

A. *Establishing Psychological Seclusion in Former Public Figures' Emotional Affairs: The Prima Facie Case*

Former public figures can establish a claim for intrusion upon psychological seclusion through the dissemination of information in the public sphere by demonstrating that disclosing the information was offensive and violated a reasonable expectation of privacy.[202] Reasonable communities recognize private spaces in the public sphere, including emotional spaces.[203] Moreover, because psychological seclusion protects the specific psychological well-being of each plaintiff, former public figures' fundamental yearning for privacy—in conjunction with

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[197] *See, e.g.*, McSurely v. McClennan, 753 F.2d 88, 112–13 (D.C. Cir. 1985); Phillips v. Smalley Maint. Servs., Inc. (*Phillips I*), 711 F.2d 1524, 1536–37 (11th Cir. 1983); Van Jelgerhuis v. Mercury Fin. Co., 940 F. Supp. 1344, 1368 (S.D. Ind. 1996); Russell v. Salve Regina Coll. (*Russell I*), 649 F. Supp. 391, 404 (D.R.I. 1986).

[198] *See infra* notes 202–270 and accompanying text.

[199] *See infra* notes 202–224 and accompanying text.

[200] *See infra* notes 225–252 and accompanying text.

[201] *See infra* notes 253–270 and accompanying text.

[202] *See McSurely*, 753 F.2d at 112–13; *Phillips I*, 711 F.2d at 1536–37; *Russell I*, 649 F. Supp. at 404; Melvin v. Reid, 297 P. 91, 93–94 (Cal. Ct. App. 1931); Roshto v. Hebert, 439 So. 2d 428, 431 (La. 1983).

[203] *See* Huskey v. Nat'l Broad. Co., 632 F. Supp. 1282, 1288 (N.D. Ill. 1986) (implying that individuals can establish seclusion in spaces viewable to the public); Sanders v. Am. Broad. Cos., 978 P.2d 67, 77 (Cal. 1999) (finding that a journalist's covert videotaping of an employee in the workplace could constitute an unreasonable intrusion); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477, 556 (2006).

the actions they have taken to protect their privacy—would bolster the expectation of privacy they have in their nonpublic affairs.[204] Once they have established this seclusion, former public figures would then be able to show that intruding into these zones of privacy can occur through highly offensive disclosures because their privacy interest in seclusion trumps the social value in recalling their lives.[205]

Recognizing an expectation of privacy in a former public figure's seclusion is reasonable because intrusions into emotional spaces can occur in public spaces and public forums.[206] These "territories of self," as one scholar has termed them, are defined and shaped by the community's customs and rules of social interaction.[207] Even more fundamentally, a community's sense of privacy stems in part from the individual experiences of its collective members.[208] Having seclusion in one's thoughts, emotions, and decisions not only promotes human dignity, but also self-autonomy.[209] Giving former public figures the choice to seclude to a deep emotional sphere and keep it free from public examination demonstrates both the individuals' expression to be left alone and the community's respect for that choice.[210]

Moreover, psychological seclusion emphasizes the specific emotional needs of the plaintiff that help maintain psychic integrity.[211] For those individuals especially troubled by their public past, like Sidis, the desire to retreat from the public eye is arguably their most important emotional need.[212] As a result, a community could conclude that an

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[204] *See Phillips I*, 711 F.2d at 1537; *Russell I*, 649 F. Supp. at 404; *Melvin*, 297 P. at 93–94. Bates, *supra* note 135, at 229–30 (arguing that it would be offensive to publish information knowing that the subject of the publication is hypersensitive to invasions of privacy).

[205] *See* Galella v. Onassis, 487 F.2d 986, 995–96 (2d Cir. 1973); Bates, *supra* note 135, at 229–30.

[206] *See Phillips I*, 711 F.2d at 1535–37; *Van Jelgerhuis*, 940 F. Supp. at 1368; *Russell I*, 649 F. Supp. at 404; *Melvin*, 297 P. at 93–94; Post, *supra* note 166, at 971–73.

[207] *See* Post, *supra* note 166, at 971–73 (discussing Erving Goffman, *The Territories of the Self*, *in* Relations in Public: Microstudies of the Public Order 28 (Transaction Publishers 2010) (1971)).

[208] *See id.*

[209] *See* Shulman v. Group W Prods., Inc., 955 P.2d 469, 498 (Cal. 1998) (Kennard, J., concurring) ("Preserving a sphere of private thought, speech, and action, and controlling who are to be let into that sphere and the conditions under which they may enter, is an essential part of human dignity and autonomy.").

[210] *See* Post, *supra* note 166, at 973–74; Amy Kristin Sanders & Natalie Christine Olsen, *Re-Defining Defamation: Psychological Sense of Community in the Age of the Internet*, 17 Comm. L. & Pol'y 355, 361 (2012) (noting that limiting individuals' ability to seek self-fulfillment through expression disrespects their dignity).

[211] *See* Elder, *supra* note 81, at 43.

[212] *See* Sidis v. F-R Publ'g Corp., 113 F.2d 806, 809 (2d Cir. 1940); Bates, *supra* note 135, at 216–17.

expectation of privacy exists in a public reexamination of the individual because that action intrudes on a former public figure's emotional sanctum.[213]

Once establishing a former public figure's privacy entitlement in psychological seclusion, these individuals could show that prying into that seclusion through a public reexamination that reveals new, private information could satisfy the offensive element of the tort.[214] Although piquing the public interest through the public examination of former public figures offers some educational and historical value, the offensive element in intrusion upon psychological seclusion has little to do with the community's need for public knowledge and more to do with reinforcing social barriers to human interaction.[215] Those social barriers do not necessarily dissipate in the public sphere because intrusions do not have to be surreptitious.[216] Courts will thus focus on all the circumstances surrounding the intrusion itself, including the degree of public examination and the context of the examination, to see whether it could be highly offensive to a reasonable person.[217]

Even still, it is unlikely that courts will avoid looking at the content of the intrusion when evaluating the degree of offensiveness in an alleged intrusion, thereby triggering a First Amendment analysis.[218] Within that analysis, a court would need to determine that the public discourse constituting a claim for intrusion upon psychological seclusion violates a substantial privacy interest in an "intolerable" manner.[219] Former public figures have a substantial privacy interest in preserving their regained anonymity and private lives in their communities.[220] If these individuals affirmatively seek and retain an obscure lifestyle, then trampling on that regained emotional sanctum of seclusion through public discourse that hounds and pries into that space could be viewed

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[213] *See Phillips I*, 711 F.2d at 1536–37; *Russell I*, 649 F. Supp. at 404; Post, *supra* note 166, at 973–74.

[214] *See Phillips I*, 711 F.2d at 1536–37; *Russell I*, 649 F. Supp. at 404.

[215] *See* Solove, *supra* note 203, at 554–56 (recognizing that solitude enhances social relationships and reinforces boundaries of social space and structure).

[216] *See Phillips I*, 711 F.2d at 1535; Bennett v. Norban. 151 A.2d 476, 477, 479 (Penn. 1959); McClurg, *supra* note 56, at 1055.

[217] *See* Hernandez v. Hillsides, Inc., 211 P.3d 1063, 1074 (Cal. 2009).

[218] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1219–20 (2011); *see also* Hustler v. Falwell, 485 U.S. 46, 57 (1988) (rejecting a public figure's intentional infliction of emotional distress claim based on the publication of a caricature in a national magazine).

[219] *See Snyder*, 131 S. Ct. at 1220.

[220] *See* McNealy, *supra* note 21, at 121 (recognizing an individual's interest in regaining a "clean slate" in society); Solove, *supra* note 203, at 555 (noting that solitude enriches public life by allowing individuals to rest from experiencing societal pressures).

as patently offensive because it thrusts these individuals back into the public spotlight and takes away their autonomy.[221]

Additionally, the U.S. Supreme Court's emphasis on avoiding broad holdings in First Amendment cases would not create such binding psychological seclusion precedent that could mark an unconstitutional abridgment of the free expression of ideas.[222] Determining the offensiveness element and distinguishing speech of public concern from private concern turn on similar factors, ensuring that the analysis fairly addresses competing rights to privacy and free speech.[223] Accordingly, the intrusive speech in one former public figure psychological seclusion case may not necessarily be grounds for liability in another case.[224]

B. *The Hurdles Facing a Former Public Figure's Use of Psychological Seclusion*

1. Constitutional Considerations

Because intrusions upon the psychological seclusion of former public figures require the use of offensive speech, the First Amendment limits the widespread use of this cause of action.[225] If the speech concerning the former public figure is a matter of public concern, the speech would gain the highest protection under the First Amendment.[226] Moreover, even if society finds the speech offensive, the First Amendment does not allow the prohibition of such speech solely based on the ideas that it expresses.[227]

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[221] *See Hernandez*, 211 P.3d at 1072 (stating that the intrusion upon seclusion tort "recognizes a measure of personal control over the individual's autonomy, dignity, and serenity"); Sanders & Olsen, *supra* note 210, at 361; Solove, *supra* note 203, at 555.

[222] *See Snyder*, 131 S. Ct. at 1220; Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989).

[223] *Compare Snyder*, 131 S. Ct. at 1216–17 (evaluating the question of public speech versus private speech according to context, content, and form of expression), *with Hernandez*, 211 P.3d at 1074 (evaluating the offensiveness of an intrusion upon seclusion claim according to several objective factors surrounding the intrusion, including the context and degree of intrusion).

[224] *See Snyder*, 131 S. Ct. at 1220; *Fla. Star*, 491 U.S. at 541.

[225] *See Snyder*, 131 S. Ct. at 1219–20; *Fla. Star*, 491 U.S. at 541; *Hustler*, 485 U.S. at 56–57; *McSurely*, 753 F.2d at 112–13; *Phillips I*, 711 F.2d at 1536–37; *Melvin*, 297 P. at 93.

[226] *See Snyder*, 131 S. Ct at 1215 (explaining that speech concerning matters of public concern must receive "special protection" under the First Amendment so that courts avoid censoring public debate); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) ("It is speech on matters of public concern that is at the heart of the First Amendment's protection." (internal quotation marks omitted)).

[227] *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

Along with speech of public concern, simply recalling information regarding a former public figure without revealing new, private details in an offensive manner also would not create liability for intrusion upon psychological seclusion.[228] Given the broad implications of the Supreme Court's 1975 ruling in *Cox Broadcasting Corp. v. Cohn*, as well as the attempts to establish psychological seclusion in the public eye, a court would likely not recognize an expectation of privacy in information that has previously entered the public forum.[229] For instance, in 2000, in *Uranga v. Federated Publications, Inc.*, the Supreme Court of Idaho held that the publication of a news story concerning the plaintiff, published forty years after the events for which the plaintiff was famous occurred, constituted neither intrusion upon seclusion nor publication of private facts.[230] The *Uranga* court declined to distinguish the case based on the period of time between the publication of court documents and the underlying public events.[231] Absent a standard that would give the media notice of when publicizing information could lead to state tort liability, allowing plaintiffs to recover for invasion of privacy may chill public debate and thereby decrease awareness of matters of public concern.[232]

Finally, former public figures would likely face a high degree of proof when bringing a claim for intrusion upon psychological seclusion.[233] In light of the broad reach of the First Amendment, the Supreme Court has limited the ability of public figures to recover for

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[228] *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975); Gates v. Discovery Commc'ns Inc., 101 P.3d 552, 562 (Cal. 2004); Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 32, 35 (Idaho 2003); Bilney v. Evening Star Newspaper Co., 406 A.2d 652, 657, 659–60 (Md. Ct. Spec. App. 1979); Harris v. Horton, 341 S.W.3d 264, 271–74 (Tenn. Ct. App. 2009), *overruled on other grounds by* Rogers v. Louisville Land Co., 367 S.W.3d 196, 205 n.6 (Tenn. 2012); Zimmerman, *supra* note 98, at 348–50.

[229] *See* 420 U.S. at 495; Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993); *Gates*, 101 P.3d at 559–60; Swerdlick v. Koch, 721 A.2d 849, 858 (R.I. 1998); *Harris*, 341 S.W.3d at 272–74; Richards & Solove, *supra* note 35, at 1919; *see also* Bridges v. California, 314 U.S. 252, 269 (1941) ("No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.").

[230] 67 P.3d at 32, 35. The front-page news story recounted the "Boys of Boise" scandal, an investigation involving adult gay men soliciting teenage boys for sex outside a YMCA. *Id.* at 30–31. Although the news story did not mention the plaintiff by name, it included a reproduced photograph of an affidavit submitted in conjunction with the investigation that included the plaintiff's name. *Id.*

[231] *See id.* at 35.

[232] *See id.*

[233] *See Hustler*, 485 U.S. at 53, 55–56; Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967).

state-based torts that involve emotional injuries.[234] In 1989, in *Hustler v. Falwell*, the Court held that an all-purpose public figure could not recover for intentional infliction of emotional distress without showing by clear and convincing evidence that the publication contained false statements of fact made with "actual malice."[235] Because psychological seclusion also involves damage to an individual's interest in emotional sanctity, a court following *Hustler* may hold former public figures with wide and pervasive notoriety to a similar burden.[236] A court may, however, view a former limited-purpose or involuntary public figure's effort to recover for emotional injury in a more favorable light if that person has made efforts to avoid media attention.[237]

2. Subject Matter Limitations

In addition to First Amendment considerations, former public figures would also have to confront some subject matter limitations regarding the content of a claim for intrusion upon psychological seclusion.[238] Just as reexamining topics already in the public sphere would fall short of creating liability, so too would issues that have a logical connection to what made the former public figures public in the first place.[239] Regardless of whether an individual would be considered a limited-purpose or an involuntary public figure, there is still a legitimate public interest in knowing how the issues in which they were involved were ultimately resolved.[240] This public interest would protect the disclosure of facts that were newly gathered and subsequently revealed if they are sufficiently related to the original matter of public concern.[241]

On the other hand, publicly prying into information regarding a former public figure's sexual relations, medical history, or other intimate private details that have never entered the public sphere would warrant a privacy expectation that intrusion upon psychological seclu-

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[234] *See Hustler*, 485 U.S. at 53, 55–56; *Hill*, 385 U.S. at 387–88.

[235] *Hustler*, 485 U.S. at 56.

[236] *See id.* at 53, 55–56; *Phillips I*, 711 F.2d at 1536–37.

[237] *Cf.* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 171 (1979) (Blackmun, J., concurring) (concluding that the passage of sixteen years between the public controversy making the plaintiff a public figure and the alleged defamation restored the plaintiff to private figure status due to the decreased ability to counter false speech through the media).

[238] *See Sidis*, 113 F.2d at 809–10; *Shulman*, 955 P.2d at 485; *Bilney*, 406 A.2d at 659–60.

[239] *See Sidis*, 113 F.2d at 809–10; *Shulman*, 955 P.2d at 485; *Bilney*, 406 A.2d at 659–60.

[240] *See Sidis*, 113 F.2d at 809–10.

[241] *See id.*; Restatement (Second) of Torts § 652D cmt. h (1977).

sion would be able to protect.[242] Although the public may be curious about the intimate lives of former public figures, the investigation of an individual's sexual conduct intrudes on perhaps the deepest private emotional sphere a person can possess.[243] It may also indicate that the intruder is fulfilling a "voyeuristic thrill" of prying into a zone of privacy that a community would recognize is off-limits to public discourse.[244] Assuming that these intimate affairs were not what made an individual famous in the first place, a former public figure, whether limited purpose or involuntary, could show that examining these affairs would intrude on an inner emotional space that had no logical nexus to his or her public figure status.[245]

3. Offensive to Whom? Overcoming the Objective Elements

The objective nature of the intrusion upon seclusion elements creates a final hurdle for former public figures trying to establish psychological seclusion.[246] Determining that a privacy expectation is objectively reasonable and that an intrusion is highly offensive to a reasonable person naturally pits a former public figure's understanding of his or her sphere of privacy against what a community would consider to be private.[247] A community's understanding of what locations or subject

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[242] *See Phillips I*, 711 F.2d at 1536–37; *Russell I*, 649 F. Supp. at 404; Zimmerman, *supra* note 98, at 348–50; *see also* Bates, *supra* note 135, at 217 (suggesting that the public discussion of an individual's ongoing mental illness would be offensive to a reasonable person because it carries the label of society's "ultimate stigma").

[243] *See Phillips I*, 711 F.2d at 1536–37; RESTATEMENT (SECOND) OF TORTS § 652D cmt. h ("There may be some intimate details of her life, such as sexual relations, which even the actress is entitled to keep to herself.").

[244] *See Haynes*, 8 F.3d at 1232 (hypothesizing that a community would have been most offended if the questioned publication had detailed the plaintiff's sex life); *Phillips I*, 711 F.2d at 1536–37. *Russell I*, 649 F. Supp. at 404; Bates, *supra* note 135, at 217.

[245] *See Haynes*, 8 F.3d at 1232; *Phillips I*, 711 F.2d at 1536–37.

[246] *See, e.g.*, Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., 306 F.3d 806, 812–13 (9th Cir. 2002) (qualifying plaintiff's subjective expectation of solitude or seclusion according to whether that expectation is objectively reasonable); Wolfson v. Lewis, 924 F. Supp. 1413, 1421 (E.D. Pa. 1997); *Hernandez*, 211 P.3d at 1074; Citron, *supra* note 158, at 1828–30 (highlighting the problems with privacy's restrictive elements).

[247] *See* Fletcher v. Price Chopper Foods of Trumann, Inc., 220 F.3d 871, 878–79 (8th Cir. 2000); Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 694 (1996) (explaining that courts must determine entitlements to privacy within the context of community norms). As an example, in 2000, in *Fletcher v. Price Chopper Foods of Trumann, Inc.*, the U.S. Court of Appeals for the Eighth Circuit held that the threat posed by the plaintiff's communicable disease to her restaurant-industry workplace trumped her individual privacy expectation in her medical information. 220 F.3d at 878–79. As a preliminary matter, the court considered the plaintiff's subjective privacy expectations, but later determined that the plaintiff relinquished any entitlement to pri-

matters former public figures are entitled to keep in seclusion would act as a counterbalance against particularly "thin-skinned" former public figures who have strong subjective, but nonetheless unreasonable, feelings that their privacy has been invaded.[248]

Any inquiry into an intrusion claim, however, should look at all the circumstances involved, including a former public figure's own subjective sense of privacy and mental integrity.[249] Because psychological seclusion focuses on the intrusion into a particular plaintiff's emotional sphere, one factor that courts would have to examine is the impact of public discourse on a former public figure's own psyche.[250] A court could also look to affirmative steps taken by former public figures to seclude themselves in privacy.[251] Such actions, like changing a name, address, or career, avoiding contact with the media, or participating in public affairs would not only manifest an objective intent to secure a private life, but would also demonstrate that achieving such seclusion is critical to a former public figure's psychological well-being.[252]

C. *Social Media and the Need to Evolve Privacy*

Notwithstanding the hurdles described above, certain former public figures must be permitted to protect their emotional security by rely-

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vacy by telling her coworkers about her disease. *See id.* at 877–78. Regardless of the plaintiff's own privacy expectations, however, the court demonstrated that when a community demands the right to know—in this case, for public health reasons—a reasonable person cannot conclude that a person is entitled to privacy. *See id.* at 878–79.

[248] *See* Kim, *supra* note 247, at 689–90 (explaining that elements of privacy torts retain objective qualities to protect defendants from claims brought by mentally weak plaintiffs); *see also* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1035 (1936) ("Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be.").

[249] *See Phillips I*, 711 F.2d at 1536–37; *Van Jelgerhuis*, 940 F. Supp. at 1368; *Russell I*, 649 F. Supp. at 404; *Melvin*, 297 P. at 93–94; Post, *supra* note 166, at 969 (discussing the problems associated with understanding privacy through "neutral" criteria rather than normative considerations).

[250] *See* McClurg, *supra* note 56, at 1072–73 (noting that the dissemination of information, rather than the initial acquisition, is the most offensive part of an invasion of privacy).

[251] *See Roshto*, 439 So. 2d at 431; Barbas, *supra* note 106, at 1046–47 (proposing a more contextual and fluid approach to defining expectations of privacy); McClurg, *supra* note 56, at 1067–69.

[252] *See Roshto*, 439 So. 2d at 431 & n.6 (hypothesizing that a rehabilitated criminal's change in name and address, and concerted effort to maintain obscurity would all be factors for holding a defendant liable for an injury to mental anguish); Barbas, *supra* note 106, at 1046–47; McClurg, *supra* note 56, at 1067–69 (proposing factors such as whether a plaintiff consented to intrusion or manifested an intent to remain secluded in evaluating the offensiveness of an intrusion upon seclusion claim).

ing on a claim for intrusion upon psychological seclusion.[253] As this Note has put forth, several requirements must be met to establish a claim.[254] The offensive public discourse must be a matter of private concern and involve a degree of examination that reveals new, personal details that have no relation to what made these individuals public figures in the first place.[255] Higher degrees of proof may also be a necessary compromise to ensure adequate protection for defendants and curtail a rampant, misguided use of the tort.[256] Additionally, courts should recognize how former public figures have demonstrated their intent to seek seclusion to ensure that the analysis remains primarily objective.[257] Together, these considerations limit intrusion upon psychological seclusion to those compelling fact patterns where a former public figure's privacy interest is in accordance with what a reasonable community would tolerate, and, ultimately, what the First Amendment would not proscribe.[258]

Consider, though, that under the First Amendment formulation of public figures, social-media participation and the Internet have created countless limited-purpose, and arguably involuntary, public figures.[259] The current privacy paradigm cannot sufficiently accommodate the interest in secluding oneself from intrusive public comment.[260] Although there are aspects of an individual's life that are free from the public eye, there are also other aspects that are publicly accessible.[261] Moreover, because community members measure privacy expectations by their own individual experiences, the increasing number of public figures rising to prominence through social media may demand more

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[253] *See Phillips I*, 711 F.2d at 1536–37; *Galella*, 487 F.2d 986, 995–96; *Russell I*, 649 F. Supp. at 404; *Melvin*, 297 P. at 93–94.

[254] *See supra* notes 202–252 and accompanying text.

[255] *See Snyder*, 131 S. Ct. at 1220; *Fla. Star*, 491 U.S. at 541; *Haynes*, 8 F.3d at 1232.

[256] *See Hustler*, 485 U.S. at 56.

[257] *See Roshto*, 439 So. 2d at 431; Barbas, *supra* note 106, at 1046–47; McClurg, *supra* note 56, at 1067–69 (implying that explicit and implicit manifestations of a person's desire to remain private provide evidence that an intrusion is offensive).

[258] *See Snyder*, 131 S. Ct. at 1220; *Fla. Star*, 491 U.S. at 541; *Hustler*, 485 U.S. at 56; *Phillips I*, 711 F.2d at 1536–37; *Van Jelgerhuis*, 940 F. Supp. at 1368; *Russell I*, 649 F. Supp. at 404.

[259] *See* Jeff Kosseff, *Private or Public? Eliminating the* Gertz *Defamation Test*, 2011 U. Ill. J.L. Tech. & Pol'y 249, 271–72 (suggesting that the voluntariness element of the public figure test has made private individuals who use social media limited-purpose public figures).

[260] *See* Citron, *supra* note 158, at 1830.

[261] *See id.* at 1852; Richards & Solove, *supra* note 35, at 1920 (describing the inability of common law privacy to find an intermediate stage for public information that has not yet been aggregated and disseminated to a large audience).

respect for those who have chosen to leave the public sphere.[262] The current understanding of privacy does not fit neatly into the compartmentalized common law scheme.[263]

In this dimension, then, expanding the use of psychological seclusion for former involuntary and limited-purpose public figures would certainly "muddy the waters" of common law invasion of privacy, but it is not as if those waters are already crystal clear.[264] Common law invasion of privacy seeks to constantly reinforce social norms through the law.[265] Intrusion upon seclusion, in particular, was originally contemplated to fill the gaps between trespass and intentional infliction of emotional distress.[266] Psychological seclusion would just be a logical extension of the tort that adapts our understanding of seclusion to new social spaces and technologies.[267]

The social landscape is also changing our understanding of communities and the media, undermining some of the traditional defenses relied upon in common law invasion of privacy.[268] The newsworthiness defense, for example, may not rely so much on established media entities determining the news but rather on a collective societal understanding of public matters experienced through social media and blogging.[269] Therefore, it may be incumbent on courts to take a stand on what actually constitute matters of *legitimate* public concern, a step that would properly guide the scope of claims for psychological seclusion brought by former public figures.[270]

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[262] *See* Post, *supra* note 166, at 971–74; Solove, *supra* note 205, at 554–56. By not participating in social media, these individuals demonstrate their desire to retain privacy and form a social barrier between themselves and those who seek these types of interactions. *See* Post, *supra* note 166, at 971–74; Solove, *supra* note 205, at 554–56.

[263] *See* Solove, *supra* note 205, at 483.

[264] *See Huskey*, 632 F. Supp. at 1288; Restatement (Second) of Torts § 652A cmt. d (1977) ("It is possible and not infrequent for privacy to be invaded by the same act or by a series of acts in two or more of the ways stated in §§ 652B to 652E.").

[265] *See* Citron, *supra* note 158, at 1830; Kim, *supra* note 247, at 690–91; Richards & Solove, *supra* note 35, at 1918.

[266] *See* Prosser, *supra* note 35, at 392.

[267] *See* Citron, *supra* note 158, at 1830; Kim, *supra* note 247, at 690–91.

[268] *See* Barbas, *supra* note 106, at 1043–44 (explaining that free flow of information has reduced the need for news concerning the private lives of public figures).

[269] *See* Richards & Solove, *supra* note 35, at 1918–19.

[270] *See* Shackelford, *supra* note 22, at 199; *see also* Quin S. Landon, Note, *The First Amendment and Speech-Based Torts: Recalibrating the Balance*, 66 U. Miami L. Rev. 157, 181 (2011) (suggesting that a public concern test for speech-based privacy torts would provide the best balance between First Amendment and privacy interests).

Conclusion

It is hard to imagine that an individual like Jodie Foster will ever be a former public figure; her fame and notoriety stemming from her award-winning film career will make her, for better or worse, a public figure for the rest of her life. Nevertheless, the message she conveyed is clear: for those who become public figures, privacy becomes one of the most sought-after emotional needs. Using the concept of psychological seclusion to cover intrusive examinations of former public figures in the public sphere would provide these individuals an underutilized common law cause of action.

Seclusion is not just limited to physical spaces; individuals have a right to be free from intrusions into personal affairs that warrant an expectation of privacy. Prying into these affairs through a public reexamination of a former public figure who has taken numerous steps to recede from public life would be deemed offensive because it impedes the individual's pursuit of a fundamental emotional desire—privacy. Although there are significant constitutional hurdles facing this potential cause of action, limiting the subject matter and increasing degrees of proof could work to balance the competing interests of privacy and freedom of expression. Considering the movement of society's public spaces from the physical world to the world of constant online social interaction and the sheer number of public figures that this space creates, psychological seclusion provides a common law privacy solution for an individual who just wants to be left alone.