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THE BATTLE OF DISCLOSURE VERSUS PRIVACY: CORPORATE EXECUTIVES' PERSONAL, PRIVATE FACTS

*Thomas Lair**

I. INTRODUCTION

Executive officers of public corporations ("executives")[1] are faced with a decision to either disclose information about his or her private life to the public ("private fact disclosures") or withhold such information due to his or her privacy right. Regarding serious health issues, many executives or their corporations have opted to disclose. In 2009, Steve Jobs announced that he was taking medical leave of absence from Apple

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1. Use of the term, "executive," in this Article refers to an officer or executive of a public company.

due to his cancer diagnosis.[2] More recently, in 2015, United Airlines disclosed that its Chief Executive Officer (CEO), Oscar Munoz, suffered a heart attack.[3]

Executives' private fact disclosures are not limited to health matters. For example, the *Sun Valley* magazine published an article that detailed the divorce of Steve Wynn, CEO of Wynn Resorts, and his affair with a woman "25 years his junior."[4] Additionally, the *USA Today* reported that former Tyco CEO, Dennis Kozlowski, spent $6000 on a shower curtain.[5]

Investors might start considering these disclosures the norm. If an executive fails to disclose a cancer diagnosis, but the media discovers the diagnosis and publishes it, then investors may argue the executive violated a disclosure duty by not publicizing the information earlier. To support that argument, investors may claim that executives have a duty to disclose certain private facts under securities laws[6] or antifraud provisions.[7] Additionally, investors may argue that the policy behind the securities laws justifies disclosure.[8]

Investors' motives to obtain these disclosures may not be so innocent. "[T]he public's thirst for more and detailed information about a broader range of public personalities seems almost unquenchable."[9] In the wake of corporate scandals, such as Enron's accounting scandal in 2001,[10] General Motors' ignition switch scandal in 2014,[11] or Volkswagen's emission scandal in 2015,[12] investors may use executives' private fact

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2. Dan Childs & Kevin Dolak, *Steve Jobs' Pancreatic Cancer: A Timeline*, ABC NEWS (Oct. 6, 2011), http://abcnews.go.com/Health/CancerPreventionAndTreatment/steve-jobs-pancreatic-cancer-timeline/story?id=14681812.

3. Everett Rosenfeld, *United Continental CEO Oscar Munoz Hospitalized*, CNBC (Oct. 16, 2015, 1:35 PM), http://www.cnbc.com/2015/10/16/united-ceo-oscar-munoz-had-a-heart-attack-in-hospital-dj-citing-source.html.

4. Steve Friess, *At Home with Elaine Wynn*, SUN VALLEY MAG. (Fall 2012), http://www.sunvalleymag.com/Sun-Valley-Home-and-Design/Fall-2012/At-Home-with-Elaine-Wynn/.

5. Exeter, *Report: Tyco CEO Spent $6,000 for Shower Curtain*, USA TODAY (Aug. 7, 2002), http://usatoday30.usatoday.com/money/industries/manufacturing/2002-08-07-tyco-ceo-money_x.htm.

6. *See* 17 C.F.R. § 229.401(b), (f) (2015); 17 C.F.R. § 229.103 (2015).

7. *See* 17 C.F.R. § 240.10b-5(b) (2015).

8. Alison B. Miller, *Navigating the Disclosure Dilemma: Corporate Illegality and the Federal Securities Laws*, 102 GEO. L.J. 1647, 1652 (2014) (stating Congress enacted securities laws to promote transparency in the market).

9. Patricia S. Abril & Ann M. Olazabal, *The Celebrity CEO: Corporate Disclosure at the Intersection of Privacy and Securities Law*, 46 HOUS. L. REV. 1545, 1551 (2010).

10. *Enron, The Real Scandal*, ECONOMIST (Jan. 17, 2002), http://www.economist.com/node/940091.

11. Tom Hays & Tom Krisher, *GM Will Pay $900 Million Over Ignition Switch Scandal*, YAHOO! NEWS (Sept. 17, 2015, 11:10 PM), http://news.yahoo.com/gm-said-settle-criminal-case-over-ignition-switches-043342233--finance.html.

12. Karl Russell et al., *How Volkswagen Got Away with Diesel Deception*, N.Y. TIMES (last updated Mar. 24, 2016), http://www.nytimes.com/interactive/2015/business/international/vw-die

disclosures as a means to obtain more corporate information.

Executives may desire to keep these private facts confidential for many reasons. A *Forbes* article reported that stock prices tend to drop immediately following a disclosure of bad news about a company executive.[13] Thus, one reason to not disclose may be to protect the corporation's stock price. Additionally, an executive may seek to uphold his or her privacy right.[14] Depending on the circumstances, an executive may rely on a constitutional or statutory right to privacy.[15] And if a private individual unlawfully discloses the private fact, an executive may utilize various tort-based claims to prevent further disclosure or seek damages.[16]

Yet, privacy rights are subject to limitations. It is unclear whether an executives' privacy right will overcome the public's right to know the information. An executive's public figure status may preclude a privacy claim.[17] Scott McNealy, former CEO of Sun Microsystems, may not have been too far off when Scott said, "You already have zero privacy. Get over it."[18]

This Article illustrates the uncertainty executives face regarding private fact disclosures. Greater clarity is needed to appropriately balance executives' privacy right against the public's right to know investment information. Under the current laws, this Article suggests that executives should not disclose private facts that are not explicitly required by law unless the private fact directly relates to the executive's ability or fitness to hold the position, such as a terminal illness.[19] Part II describes current securities laws and discusses the potential arguments for a duty to disclose.[20] Part III explores the various types of private facts an executive may disclose.[21] Part IV discusses executives' privacy right and tort

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sel-emissions-scandal-explained.html.

13. Davia Temin, *Announcing CEO Illness – Best Practices from Buffett to Jobs*, FORBES (Apr. 18, 2012), http://www.forbes.com/sites/daviatemin/2012/04/18/announcing-ceo-illness-best-practices-from-buffett-to-jobs/; *see, e.g.*, Rosenfeld, *supra* note 3 (stating United's stock price dropped after the disclosure).

14. *See infra* Part IV.

15. *See* Whalen v. Roe, 429 U.S. 589, 598-600 (1977).

16. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652D (1977). *See generally* JON L. MILLS, PRIVACY THE LOST RIGHT 17 (2008) (describing tort-based claims such as false light, defamation, public disclosure of private facts, and intrusion upon seclusion).

17. *See generally* Victoria Schwartz, *Disclosing Corporate Disclosure Policies*, 40 FLA. ST. U. L. REV. 487, 495-96 (2013) (Persons who . . . willingly become involved in public affairs waive their right to privacy of matters connected with their public conduct.").

18. Edward C. Baig, *Privacy: The Internet Wants Your Info. What's In It for You?*, BLOOMBERG BUS. (Apr. 5, 1999), http://www.bloomberg.com/news/articles/1999-04-04/privacy.

19. *See* Schwartz, *supra* note 17, at 494-95.

20. *See infra* Part II.

21. *See infra* Part III.

actions.[22]

II. CLAIMED REASONS FOR A DUTY TO DISCLOSE UNDER THE SECURITIES LAWS

Under the current securities laws, there is no explicit duty for an executive to publicly disclose his or her private information regarding matters such as health concerns, family issues, or personal expenditures.[23] Yet, corporations, executives, and the media have been disclosing these private matters to the public.[24] A corporation and its executives are subject to a general duty to disclose material information,[25] and if either violate that duty then a private individual, the Securities and Exchange Commission (SEC), or the U.S. Justice Department may bring a securities fraud action.[26] Additionally, both the SEC and Congress have indicated that the public interest in corporate disclosures is to provide transparency in the securities market.[27] Should these private fact disclosures become the norm, a foreseeable consequence of an executive's failure to disclose is a spike in securities litigation.

A. *Lack of Guidance Under Current Securities Laws*

The SEC has promulgated a list of required disclosures that an executive must include in the corporation's periodic or annual reports filed with the SEC.[28] Executives must disclose their age,[29] prior criminal convictions,[30] pending legal proceedings,[31] and compensation.[32] None of those explicitly required disclosures include the private facts at issue in this Article.

> The SEC requires that any public company disclose material information to investors so that they can include it in their calculation of whether to buy or sell a stock. But there are no

22. *See infra* Part IV.

23. *See infra* Part II.A.

24. *See supra* notes 1-5 and accompanying text.

25. *See generally* Chiarella v. United States, 45 U.S. 222 (1980).

26. *See, e.g.*, 17 C.F.R. § 240.10b-5 (2015); Securities Act of 1933, 15 U.S.C.A. § 77q (West 2011).

27. Miller, *supra* note 8, at 1652 (stating Congress enacted the 1933 Act and 1934 Act to promote transparency in the market).

28. *See* 17 C.F.R. § 229.103 (2015); 17 C.F.R. § 229.401(b), (f) (2015); 17 C.F.R. § 229.402 (2015).

29. 17 C.F.R. § 229.401(b).

30. 17 C.F.R. § 229.401(f).

31. 17 C.F.R. § 229.103.

32. 17 C.F.R. § 229.402.

specific guidelines governing health issues, and the SEC has never taken action against a company in this area.[33]

Unless Congress or the SEC promulgates a new rule requiring additional disclosures, investors must base a disclosure duty on an alternative theory. Investors will likely rely on Rule 10b-5[34] or other antifraud provisions to argue that the corporation, or its executive, had a duty to disclose the private fact.[35] Rule 10b-5 provides that it is unlawful "to make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statement not misleading" in the connection with the purchase or sale of securities.[36] Therefore, an investor's 10b-5 action can be premised on an executive's misstatement or omission.[37]

In *Chiarella v. United States*, the Supreme Court held that silence, which is considered an omission, is only fraudulent if either the executive or the company had a duty to disclose that information.[38] Therefore, investors will need to prove that the executive's failure to disclose a private fact was material and that the executive had a duty to disclose that private fact.

A fact is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[39] It will be even more difficult for an investor to successfully prove a fact is material when the fact is contingent or speculative in nature because "it is difficult to ascertain whether the 'reasonable investor' would have considered the omitted information significant at the time."[40]

Even if an investor can prove materiality, the investor must still prove the executive had a duty to disclose that fact, which will be a difficult task. A corporation, or its executive, has a duty to disclose if a statute or SEC rule requires the disclosure.[41] No current rule or statute requires

33. Tom C. W. Lin, *Undressing the CEO: Disclosing Private, Material Matters of Public Company Executives*, 11. U. PA. J. BUS. L. 383, 401 n.113 (2009).

34. 17 C.F.R. § 240.10b-5(b) (2015) (making it unlawful "to make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statement not mislead" in the connection with the purchase or sale of securities).

35. *See* Chiarella v. United States, 45 U.S. 222 (1980).

36. 17 C.F.R. § 240.10b-5(b).

37. *Id.*

38. *Chiarella*, 45 U.S. at 235.

39. Basic, Inc. v. Levinson, 485 U.S. 224, 232 (1988) (adopting the materiality standard stated in TSC Indus. v. Northway, 426 U.S. 438 (1976) for the Rule 10b-5 standard).

40. *Id.*

41. STUART R. COHN, SECURITIES COUNSELING FOR SMALL & EMERGING COMPANIES § 19:8 (2015) (stating a duty to disclose arises when an independent statute or regulation require such disclosure).

these private fact disclosures so this cannot serve as the basis for a duty.

Additionally, the Supreme Court indicated that a duty to disclose may arise out of an executive's fiduciary relationship with shareholders.[42] However, the duty only extends to information that the shareholders are entitled to know due to that relationship.[43] The Supreme Court reasoned that there is a duty if the disclosure is necessary to prevent an executive from "taking advantage of the uninformed minority stockholders."[44] It would be difficult for a shareholder to prove the executive withheld a private fact to take advantage of the uninformed shareholders rather than to uphold his or her privacy right. Even if an investor can prove the executive made a material omission and had a duty to disclose that private matter, the investor must still satisfy the four additional 10b-5 elements, which will be no easy task.[45]

Alternatively, an executive has a duty to correct a prior statement that has become misleading.[46] If an executive made a statement that was true at the time but it later became misleading due to a subsequent event, then the executive must disclose information to render that prior statement no longer misleading.[47] For example, if in March, a CEO of a public company stated, "I am healthy," but in June, the CEO learns she has cancer, then the CEO may be required to disclose that cancer diagnosis to make the March statement no longer misleading.[48]

This disclosure duty requires the executive to have made a prior statement. There is no duty if an executive always remains silent. Thus, if the CEO never made the "I am healthy" statement, then she may never need to disclose the subsequent cancer diagnosis.

B. *Policy Behind Disclosing Corporate Information*

Lacking a clear disclosure duty under the current securities laws, investors may resort to arguing that the policy and purpose of the securities laws justify expanding the disclosure duty to include executives' private facts. A primary purpose of the Securities Act of 1933[49] (1933 Act) and Securities Exchange Act of 1934[50] (1934 Act) is

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42. *Chiarella*, 45 U.S. at 228.

43. *Id.*

44. *Id.* at 228-29 (quoting Speed v. Transamerica Corp., 99 F. Supp. 808, 829 (D. Del. 1951)).

45. 17 C.F.R. 240.10b-5 (2015); *see also* COHN, *supra* note 41, § 19:8 (stating scienter is generally the most difficult element for a shareholder to successfully prove).

46. United States v. Schiff, 602 F.3d 152 (3d Cir. 2010).

47. *Id.*

48. *See id.*

49. Securities Act of 1933, 15 U.S.C.A. § 77a (West 1933).

50. Securities Exchange Act of 1934, 15 U.S.C.A. § 78a (West 1934).

to protect investors by implementing a philosophy of disclosure.[51] The securities laws were enacted for many purposes. The 1933 Act seeks to "prohibit deceit, misrepresentations, and other fraud in the sale of securities."[52] Additionally, the securities laws "promote transparency in the marketplace."[53] As stated in a House Report to the 1934 Act, "[T]here cannot be honest markets without honest publicity."[54] The disclosure obligations uphold those purposes and enable the investors to make informed investment decisions.[55]

Although the policy behind the securities laws promotes disclosure, this policy does not stand for an all-encompassing duty to divulge any and all information. Otherwise, there would be no need for Congress or the SEC to explicitly mandate certain disclosures.[56]

Investors may argue that withholding material private facts infringes the investors' ability to make informed investment decisions. However, the investors may be seeking the disclosure duty for another motive. A finance study on market participation concluded that investors desire more corporate information after learning of a company scandal.[57] The existence of corporate scandals did not end after the infamous Enron or WorldCom scandals.[58] In 2015, the public learned about Volkswagen's emission test scandal.[59] Due to the proliferation of corporate scandals,[60] investors may use executives' private fact disclosures to fill their need for more information.[61]

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51. Basic, Inc. v. Levinson, 485 U.S. 224, 230 (1988). *See also* Miller, *supra* note 8, at 1652 (stating Congress enacted the 1933 Act and 1934 Act to promote transparency in the market).

52. *Laws that Govern the Securities Industry*, SECURITIES AND EXCHANGE COMMISSION, (last modified Oct. 1, 2013), http://www.sec.gov/about/laws.shtml#secact1933.

53. *See* Miller, *supra* note 8, at 1665.

54. H.R. REP. NO. 73-1383, at 11 (1934).

55. *Laws that Govern the Securities Industry*, *supra* note 52.

56. *See* 17 C.F.R. § 229.401(b); 17 C.F.R. § 229.402.

57. Mariassunta Giannetti & Tracy Yue Wang, *Corporate Scandals & Household Stock Market Participation* 4 (European Corporate Governance Inst., Working Paper No. 405, 2014), *available at* https://www.bc.edu/content/dam/files/schools/csom_sites/finance/Giannetti102914.pdf.

58. *See Enron, The Real Scandal*, *supra* note 10; *see also* David Hancock, *World-Class Scandal at Worldcom*, CBS NEWS (June 26, 2002, 9:23 AM), http://www.cbsnews.com/news/world-class-scandal-at-worldcom/.

59. Russell Hotten, *Volkswagen: The Scandal Explained*, BBC NEWS (Nov. 4, 2015), http://www.bbc.com/news/business-34324772.

60. *See supra* notes 10-12 and accompanying text.

61. *See* Abril & Olazabal, *supra* note 9, at 1551.

III. THE DISCLOSURE DEBATE: WHAT PRIVATE FACTS MUST BE DISCLOSED?

If there is a duty to disclose, it remains unclear exactly what private facts an executive must disclose to the public. Should the duty be limited to health concerns? Or should an executive be required to disclose other private matters, such as personal spending habits? A law review article suggested that the disclosure duty extend to private facts that reflect on the executives' integrity or ability to serve their positions in the corporation.[62] Under this standard, an executive would not need to disclose a private fact that has no bearing on their integrity or ability to hold the position.[63]

That standard may serve as a sufficient starting point, but it does not define the necessary connection between the private fact and its impact on the executive's ability, integrity, or fitness to serve the position. A serious health ailment, such as a cancer diagnosis[64] or heart attack,[65] which can limit an executive's ability to serve the corporation, may evidence a sufficient connection to require disclosure. But the connection grows weaker as the facts become more private, such as mental health ailments, prescription medications, or personal addictions.[66] Those private facts start to implicate the privacy concerns discussed in Part IV.[67]

The media has started reporting on executives' personal expenditures, sexual relationships, and marital statuses.[68] For example, the *USA Today* reported that former Tyco CEO, Dennis Kozlowski, spent $6000 on a shower curtain.[69] A magazine described the adulterous affair between Steve Wynn, CEO of Wynn Resorts, and a woman "25 years his junior" while discussing Steve Wynn's divorce.[70] These disclosures by the media may cause investors to believe the disclosure duty should extend beyond an executive's health.

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62. *See* Schwartz, *supra* note 17, at 495-96.

63. *See id.* at 496 ("[I]nformation that has 'no bearing at all' on either ability or integrity/value of the executive has no disclosure interest.").

64. Maggie McGrath, *Goldman Chief Lloyd Blankfein Discloses 'Highly Curable' Cancer*, FORBES (Sept. 22, 2015, 8:47 AM), http://www.forbes.com/sites/maggiemcgrath/2015/09/22/goldman-chief-lloyd-blankfein-discloses-highly-curable-cancer/.

65. Joann S. Lublin et al., *United Continental CEO Oscar Munoz Suffers Heart Attack*, WALL ST. J. (Oct. 16, 2015, 7:23 PM), http://www.wsj.com/articles/united-continental-ceo-oscar-munoz-suffers-heart-attack-1445015488.

66. *See infra* Part IV.

67. *See infra* Part IV.

68. *See supra* notes 4-5 and accompanying text (discussing Tyco's CEO spending $6000 on a shower curtain and Steve Wynn's affair).

69. Exeter, *Report: Tyco CEO Spent $6,000 for Shower Curtain*, USA TODAY (Aug. 7, 2002), http://usatoday30.usatoday.com/money/industries/manufacturing/2002-08-07-tyco-ceo-money_x.htm.

70. Friess, *supra* note 4.

Executives may attempt to avoid disclosing more personal facts by claiming those facts lack a quantitative economic impact on the corporation.[71] In *United States v. Matthews*, Clark Matthews, an executive of Southland Corporation, was running for a position on the board of directors.[72] Prior to running for the position, Matthews was acquitted of conspiring to bribe a state tax official.[73] In the proxy statement, Matthews did not disclose that he had previously participated in a grand jury investigation for that bribery charge.[74] Under the securities laws, Item 401(f) requires a person running for a director position to disclose any criminal convictions or participation in pending criminal proceedings that are "material to an evaluation of the ability or integrity of any director."[75] The Department of Justice argued that Matthews violated Item 401(f) by not disclosing the prior grand jury investigation.[76]

However, the Second Circuit disagreed and held that Item 401(f) does not require Matthews to disclose uncharged criminal conduct, such as a grand jury investigation. [77] The Second Circuit held that Item 401(f) requires a disclosure of information that will have a quantitative impact on the company or its shareholders.[78] Matthews failed to disclose qualitative information, and the Department of Justice failed to prove that his non-disclosure had any quantitative economic impact.[79]

The *Matthews* holding is distinguishable if an investor proves the executive's omission had an adverse economic impact on the corporation or its shareholders.[80] Proving an adverse economic impact, such as a drop in stock price,[81] will be required under a 10b-5 action since a plaintiff must prove pecuniary harm.[82] If an investor can prove an economic harm due to the material omission then the *Matthews* holding is no longer a valid defense for the executive.

Lacking explicit securities laws or SEC guidance,[83] executives are left guessing what private facts they should disclose to avoid a potential securities fraud action. An executive may choose to disclose private facts that evidence a direct impact on his or her ability, integrity, or fitness to

71. United States v. Matthews, 787 F.2d 38, 49 (2d Cir. 1986).
72. *Id.* at 39-40.
73. *Id.* at 39. Matthews was acquitted of this charge. *Id.*
74. *Id.*
75. 17 C.F.R. § 229.401(f)(2) (2015).
76. 17 C.F.R. § 229.401(f); *Matthews*, 787 F.2d at 49.
77. *Id.* at 49-50.
78. *Id.* at 49.
79. *Id.*
80. *See id.*; *see also* Miller, *supra* note 8, at 1665.
81. *See, e.g.*, Rosenfeld, *supra* note 3 (stating United's stock price dropped after the disclosure); *see also* Miller, *supra* note 8, at 1665.
82. 17 C.F.R. § 240.10b-5 (2015).
83. Lin, *supra* note 33, at 401.

hold the position. Yet, some executives may desire to not disclose any private facts claiming that their privacy right protects that information.[84]

IV. NON-DISCLOSURE BASED ON EXECUTIVES' PRIVACY RIGHT

A privacy right may protect executives that do not wish to disclose these private facts. People have a right to control personal, sensitive information.[85] A privacy right is protected by the U.S. Constitution[86] and various federal or state statutes.[87] In *Whalen v. Roe*, the Supreme Court stated a person has a constitutional privacy interest in "avoiding disclosure of personal matters."[88] Additionally, an executive may utilize property-based privacy claims, such as confidential business information,[89] or tort-based privacy claims, such as public disclosure of private fact or intrusion upon seclusion.[90] Potential remedies for an executive include an injunction to prevent future disclosure or damages if a private party has already publically disclosed the information.[91]

An executive's privacy right is not so broad to include all private facts. Otherwise, executives would not be subject to the currently required disclosures, such as age, prior criminal convictions, or compensation,[92] which could all be considered private in nature.

There are many barriers to privacy in personal information. The first barrier is a person loses a right to privacy in information that he or she communicates to the public.[93] As the Warren & Brandeis article states, "[t]he right is lost only when the author himself communicates his production to the public, -- in other words, publishes it."[94] Thus, an executive cannot personally publicize or disclose the private fact, or

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84. *See infra* Part IV.

85. MILLS, *supra* note 16, at 16 (discussing the personal-information sphere).

86. *See* Griswold v. Connecticut, 381 U.S. 479, 483-84 (1965) (explaining that the Bill of Rights has penumbras that create a zone of privacy that is protected from governmental intrusion); *see also* Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (holding an individual has an interest in avoiding disclosure of personal matters).

87. MILLS, *supra* note 16, at 311-38 (discussing federal privacy statutes, such as the Health Insurance Portability and Accountability Act of 1996, the Fair Credit Reporting Act of 1970, the Video Privacy Protection Act of 1998, the Communications Decency Act of 1996, and the Privacy Protection Act of 1980).

88. *See id.* at 17 (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).

89. Carpenter v. United States, 484 U.S. 19, 25-26 (1987) (holding a company has a property right in its confidential business information).

90. RESTATEMENT (SECOND) OF TORTS § 652D, *supra* note 16.

91. MILLS, *supra* note 16, at 16.

92. 17 C.F.R. § 229.401(b), (f) (2015); 17 C.F.R. § 229.402 (2015).

93. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 199-200 (1890).

94. *Id.*

consent to its disclosure, and then seek to recover for its disclosure.[95]

As a second barrier, a person has less privacy over information located in a public record.[96] Thus, the magazine that published an article on Steve Wynn's divorce[97] would likely not be held liable since a divorce is a public record.[98] For a third barrier, under the tort-based claims, an executive will have to overcome First Amendment challenges claiming that the disclosed private fact is newsworthy.[99]

A. *The Constitutional Privacy Right*

If the government, or a state-actor, forces an executive to disclose highly private facts, the executive can argue that disclosure infringes his or her constitutional privacy right. In *Griswold v. Connecticut*,[100] the Supreme Court held that the First, Third, Fourth, Fifth, and Ninth Amendments cast a penumbras of rights creating a constitutional privacy right.[101] This privacy right protects an individual's decisional privacy and informational privacy.[102]

Decisional privacy protects an individual's right of autonomy to make important decisions,[103] but it only protects "the most intimate aspects of human affairs."[104] As such, decisional privacy is limited to autonomy relating to marriage, family, procreation, and child rearing.[105] Executives' private fact disclosures will likely not involve his or her autonomy to make those decisions.[106]

The Supreme Court also recognized that the constitutional privacy right incorporates informational privacy, an "individual interest in avoiding disclosure of personal matters."[107] This right "includes the right

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95. *See id.* (arguing the right to privacy is lost "when the author himself communicates his production to the public"); *see also* Jeffrey F. Ghent, Annotation, *Waiver or Loss of Right of Privacy*, 57 A.L.R. 3d 16, § 3 (1974).

96. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 494-95 (1975) ("[I]nterests in privacy fade when the information involved already appears on the public record."); *see also* MILLS, *supra* note 16, at 50-56 (describing the privacy issues when information is obtained in a public record).

97. Friess, *supra* note 4.

98. *See Public Records*, STATEOFFLORIDA.COM (last visited Nov. 30, 2015), http://www.stateofflorida.com/public-records-check.aspx.

99. DAVID A. ELDER, PRIVACY TORTS § 3:17 (2015).

100. Griswold v. Connecticut, 381 U.S. 479 (1965).

101. *Id.* at 484-85.

102. *See* MILLS, *supra* note 16, at 119.

103. *See Griswold*, 381 U.S. at 485; *see also* MILLS, *supra* note 16, at 6.

104. MILLS, *supra* note 16, at 124 (quoting Eagle v. Morgan, 88 F.3d 620, 625 (8th Cir. 1996)).

105. *See Griswold*, 381 U.S. at 485; *see also* MILLS, *supra* note 16, at 6.

106. J. THOMAS MCCARTHY, 1 RIGHTS OF PUBLICITY & PRIVACY § 5:57 n.4 (2d ed. 2015); *see also* MILLS, *supra* note 16, at 16.

107. Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

to be free from the government disclosing private facts about its citizens and from the government inquiring into matters in which it does not have a legitimate and proper concern."[108] This right is afforded less protection and subject to rational-basis scrutiny.[109]

Ultimately, an executive may bring a constitutional privacy right claim against the government or state-actor.[110] A claim based on informational privacy is unlikely to succeed because it is subject to rational-basis review.[111] If instead a claim is based on decisional privacy, then the executive has a better chance of success since the government must then offer a compelling interest to intrude upon this freedom.[112] Decisional and informational privacy only protect against the government or state-actor. If a private individual violates an executive's privacy right, then the executive must rely on tort-based or property-based private actions.[113]

B. *The Company's Confidential Business Information*

A corporation can argue that disclosing its executive's private facts violates the corporation's right to exclude others from its confidential business information. Corporations' stock prices tend to drop after a negative disclosure about an executive.[114] Thus, the corporation may seek to recover some of those losses against the publisher that violated the company's property right in confidential business information.[115]

In *Carpenter v. United States*, the Supreme Court held the *Wall Street Journal* (WSJ) had a property interest in the contents of its columns.[116] The WSJ published a column called "Heard on the Street," which discussed stock investment opportunities and news.[117] A reporter for "Heard on the Street" disclosed confidential stock information to two investors before the information was published in the column.[118]

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108. Ramie v. City of Hedwig Vill., 765 F.2d 490, 492 (5th Cir. 1985) (citing Whalen v. Roe, 429 U.S. 589, 600-02 (1977)).

109. *Id.* at 492 (considering whether the invasion of privacy outweighs the government's legitimate interest); *see also* MILLS, *supra* note 16, at 17.

110. *See Ramie*, 765 F.2d at 492.

111. *See Whalen*, 492 U.S. at 599-600.

112. *See* MILLS, *supra* note 16, at 16.

113. *See infra* Part IV.B.

114. Temin, *supra* note 13; *see, e.g.*, Rosenfeld, *supra* note 3 (stating United's stock price dropped after the disclosure).

115. *See* Carpenter v. United States, 484 U.S. 19, 26 (1987) ("Confidential business information has long been recognized as property."); *see also* United States v. Grossman, 843 F.2d. 78, 85-86 (2d Cir. 1988).

116. *Carpenter*, 484 U.S. at 26.

117. *Id.* at 22.

118. *Id.* at 23.

"Confidential business information has long been recognized as property" when a corporation acquired the confidential information through the course or conduct of its business.[119] The WSJ's property right included the right to use its business information at its discretion and the right to keep business information confidential.[120]

Under this property-based claim, a corporation may seek to exclude others from disclosing a private fact about its executive or seek damages if the fact has already been disclosed.[121] The protected business information does not have to create a commercial value for the corporation.[122] However, a corporation may have a difficult time proving its executive's private fact is the corporation's confidential business information. A court might consider the private fact as confidential business information if the executive regularly discloses his or her private facts to the corporation for business purposes.[123] Additionally, executives can enter into disclosure contracts with their corporations to further support a finding that the private fact is confidential business information.[124]

C. *Public Disclosure of Private Facts*

If a private individual, such as the media, publishes an executive's private fact without the executive's consent then the executive may bring a claim against that individual for the public disclosure of private fact.[125] Under this tort claim, the executive has a cause of action "if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."[126]

Whether the disclosure would be highly offensive to a reasonable person is an objective determination.[127] For example, the Court of Appeals for the Federal Circuit held that disclosing a wife's premarital affair to her husband was highly offensive.[128] Similarly, the magazine

119. *Id.* at 26; *see also* MILLS, *supra* note 16, at 205 (explaining privacy rights under a property theory).

120. *Carpenter*, 484 U.S. at 26.

121. *See id.*

122. *See* MILLS, *supra* note 16, at 216 n.1162 (stating courts will recognize a property interest in information without a commercial value through John Locke's labor theory).

123. *Carpenter*, 484 U.S. at 26.

124. *See* Schwartz, *supra* note 17, at 490 (proposing that executives contract with their company to determine a privacy disclosure policy).

125. RESTATEMENT (SECOND) OF TORTS § 652D, *supra* note 16.

126. *Id.*

127. ELDER, *supra* note 99, § 3:17.

128. McSurely v. McClellan, 753 F.2d 88, 113 (1985). The Circuit Court concluded that disclosure to her husband satisfied the publicity requirement for the public disclosure of private fact claim due to the special relationship between the husband and wife. *Id.* at 112.

article discussing Steve Wynn's affair with a younger woman might satisfy the highly offensive element.[129] Furthermore, the following disclosures have similarly been found to satisfy the highly offensive requirement: disclosing that a person is taking the depression medication Prozac,[130] disclosing a person's eating disorder,[131] disclosing a person's psychiatric hospitalization,[132] disclosing an employee's sexual preference and orientation through a management application process,[133] and disclosing a person receives substance abuse counseling.[134] Many of the potential private fact disclosures listed in Part III would seemingly satisfy the highly offensive requirement.

An executive must also prove that the private fact is not a legitimate public concern.[135] A private fact that is newsworthy will be a matter of legitimate public concern.[136] "A newsworthy story that is true will virtually always fall under the First Amendment's protection of free speech, even if the story is private and offensive."[137] To avoid liability, a publisher, the individual disclosing the private fact, will often argue that the private fact is newsworthy because it either involves a public figure or the fact is one the public has a right to know.

Not all private fact disclosures are newsworthy.[138] But newsworthiness is not uniformly defined.[139] Courts have considered a variety of factors, including whether the activity occurred in public, whether the information is already publicly available, whether the disclosure violates community standards and is intrusive, whether someone is a public figure, and whether the information is relevant to

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129. *See* Friess, *supra* note 4.

130. Stratton v. Krywko, No. 248669, 248676, 2005 WL 27522, at *1-5 (Mich. Ct. App. Jan. 6, 2005).

131. Barber v. Time, Inc., 348 Mo. 1199, 1207-08 (Mo. 1942).

132. Wilson v. Grant, 297 N.J. Super. 128, 140 (N.J. Super. Ct. App. Div. 1996).

133. Karraker v. Rent-A-Center, Inc., 411 F.3d 831, 838 (7th Cir. 2005) (sharing of the test results would likely be highly offensive to a reasonable person).

134. Warren v. Connecticut Cmty. for Addition Recovery, Inc., No. CV095005416S, 2010 WL 4342283, at *6-7 (Conn. Super. Ct. Sept. 15, 2010) (holding Plaintiff's amended complaint sufficiently states a claim for the public disclosure of private fact).

135. RESTATEMENT (SECOND) OF TORTS § 652D, *supra* note 16.

136. *See id.*

137. *See* MILLS, *supra* note 16, at 228 ("A newsworthy story that is true will virtually always fall under the First Amendment's protection of free speech, even if the story is private and offensive."); *see also* Taus v. Loftus, 40 Cal. 4th 683, 717 (Cal. 2007) (holding newsworthiness precludes a public disclosure of private fact claim because the disclosure is of legitimate public concern).

138. *But see* Bartnicki v. Vopper, 532 U.S. 514, 525 (2001) (holding that a news source that lawfully obtained information regarding a public matter and later disclosed it is protected under the First Amendment).

139. *See* MILLS, *supra* note 16, at 231-40 (describing four different approaches to define newsworthiness).

society.[140]

Courts use one of four different approaches to evaluate whether a disclosed fact is newsworthy.[141] The first approach utilizes the Second Restatement of Torts standard.[142] This approach considers the morals, values, and customs of the community to determine a legitimate public interest.[143] If a reasonable person in that community would say that he has no concern for the private fact then the private fact is not newsworthy.[144]

The second approach expands the definition of newsworthy and it is more deferential to publishers. Under this approach, information that is true and lawfully obtained will be newsworthy.[145] Regardless of the objectively offensive nature of a disclosure, a truthful disclosure that is lawfully obtained may be protected under the publisher's First Amendment right.

The fourth approach is the minority position,[146] but it is the standard that this Article offers as the most likely to properly balance an executive's privacy interest against the public's right to know the private fact. Under this approach, California courts have adopted a three-part test to determine whether a private fact is newsworthy.[147] In *Diaz v. Oakland Tribune, Inc.*, a California appellate court stated that to determine whether a private fact is newsworthy, the trier of fact will consider "[1] the social value of the facts published, [2] the depth of the [disclosure's] intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety."[148] Furthermore, that court held the determination is a question of fact for the jury.[149]

Diaz was the first woman elected student body president of the College of Alameda.[150] The *Oakland Tribune*, a local newspaper, published a column stating that Diaz is transgender,[151] a fact that Diaz

140. *See id.* at 231.

141. *Id.*

142. RESTATEMENT (SECOND) OF TORTS § 652D, *supra* note 16, cmt. h.

143. *Id.*

144. *Id.*

145. *See* Florida Star v. B.J.F., 491 U.S. 524, 530 (1989) (noting that courts must balance a person's privacy right against the publisher's right to publish lawfully obtained information).

146. *See* MILLS, *supra* note 16, at 236.

147. *See id.* at 235 (describing the California Approach's three-part test for newsworthiness).

148. Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 132-33 (Cal. Ct. App. 1983) (alteration in original).

149. *Id.* at 133.

150. *Id.* at 123.

151. *Id.* at 124.

had sought to remain unknown and private.[152] Specifically, the newspaper published, "students at the College of Alameda will be surprised to learn that their student body president, Toni Diaz, is no lady, but is in fact a man whose real name is Antonio."[153] The column further stated, "I suspect his female classmates in P.E. 97 may wish to make other showering arrangements."[154] Diaz sued the *Oakland Tribune* for public disclosure of private fact.[155] At trial, the jury found the private fact was not newsworthy under the three-part test.[156]

Under the first element of the *Diaz* test, the social value of the disclosed private fact must be viewed in context and it cannot be based on an alternative, hidden purpose, such as humiliation.[157] Considering the words published by the *Oakland Tribune*, the disclosure had little public purpose other than to embarrass Diaz.[158] Those hostile intentions do not provide any social value.[159] Therefore, if a publisher only intends to embarrass the executive or to harm the executive's reputation then the disclosure should not be newsworthy.[160]

Diaz's third element, the extent an individual assumes a position of public notoriety, is likely to be the most troubling for executives.[161] "Persons who . . . willingly become involved in public affairs waive their right to privacy of matters connected with their public conduct."[162] This privacy limitation provides the public with a right to know information relating to a public figure's role.[163] Therefore, an executive with a prominent role in a well-known corporation may not be able to claim a right to privacy regarding the activities connected with their position.[164]

Admittedly, some executives are appropriately regarded more akin to celebrities in the public eye.[165] For example, Warren Buffett, Martha Stewart, and Bill Gates would likely be public figures due to their

152. *Id.* at 123.
153. *Id.* at 124.
154. *Id.*
155. *Id.* at 122.
156. *Id.* at 125.
157. *Id.* at 135.
158. *See id.* at 124.
159. *Id.* at 132-33.
160. *See generally id.* at 135.
161. *Id.* at 132 ("[T]he extent to which the party voluntarily acceded to a position of public notoriety.").
162. *Id.* at 134.
163. *Id.*
164. RESTATEMENT (SECOND) OF TORTS § 652D, *supra* note 16, cmt. e. A person that voluntarily assumes a prominent role in an institution or activity that has a general economic, social, or public interest cannot complain when his appearances or activities regarding that role are publicized. *Id.*
165. *See* Lin, *supra* note 33, at 423-24 (stating executives of public companies as considered akin to celebrities and public officials).

prominent roles in well-known corporations. Therefore, they may appropriately be afforded a lower expectation of privacy regarding private facts that reflect upon their role in their corporations.[166]

But certainly not every executive is a public figure; therefore, *Diaz*'s third element should not act as a complete barrier. Certain executives may be able to successfully argue that they are not public figures and have not assumed a role of public notoriety.[167] A Michigan Appellate Court recognized that a person is not considered a public figure for all activities that garner general public interest.[168] That court held:

> The fact that [persons] engage in an activity in which the public can be said to have a general interest does not render every aspect of their lives subject to public disclosure. Most persons are connected with some activity . . . as to which the public can be said as a matter of law to have a legitimate interest or curiosity. To hold as a matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view.[169]

Executives should not automatically be public figures. A blanket finding that executives are public figures will likely deter qualified people from holding such positions because they will not want the public to be entitled to know any and all of their private facts. This Article instead suggests that public figure status and newsworthiness should be viewed on a sliding scale that considers the particular executive and disclosure on a case-by-case basis.

Even executives generally known by the public are not without hope. To evade a finding of newsworthiness, these executives can argue the disclosed private fact has no, or an attenuated, connection with the executives' integrity or ability to hold the position.[170] In *Taus v. Loftus*, the California Supreme Court held a newsworthy disclosure requires a "logical nexus exist between the complaining individual and the matter of . . . public interest."[171] To determine the logical nexus, courts assess the relationship "between the events or activities that brought the person into the public eye and the particular facts disclosed."[172] For example, in *Diaz*, the California appellate court acknowledged that Diaz was a public

166. *Id.* at 424.

167. *See Diaz*, 139 Cal. App. 3d at 132, 134.

168. *See* Doe v. Mills, 536 N.W.2d 824, 830 (Mich. Ct. App. 1995).

169. *Id.* (quoting Winstead v. Sweeney, 517 N.W.2d 874, 878 (Mich. Ct. App. 1994)).

170. *See* Taus v. Loftus, 40 Cal. 4th 683, 718 (Cal. 2007); *see also* Schwartz, *supra* note 17, at 495-96.

171. *Taus*, 40 Cal. 4th at 718.

172. *Id.* (noting that this approach is in line with the Restatement view that a legitimate public interest does not include a morbid and sensational prying into private lives).

figure for some purposes since she was the student body president.[173] However, the court ultimately held the *Oakland Tribune*'s disclosure had little, if any, connection to Diaz's fitness as student body president.[174] If the private fact disclosure does not have a strong connection to the executive's fitness for the position then the executive can argue that the disclosure is not protected under the newsworthiness doctrine.[175]

To strengthen the lack of nexus argument, an executive can also claim the disclosed private fact is so offensive that it shocks the community's notion of decency.[176] In *Baugh v. CBS, Inc.*, Baugh reported domestic violence to the police.[177] A Crisis Intervention Team followed the police into Baugh's house and filmed her during the police investigation.[178] The Crisis Intervention Team told Baugh that the video would only be used for the District Attorney's Office.[179] Although Baugh said that she did not want the video to be public, CBS televised the video.[180] During the trial, CBS moved to dismiss the public disclosure of private facts claim and argued the video was newsworthy since it was a matter of legitimate public interest, but the federal district court denied CBS' motion.[181]

The district court held "a truthful publication is constitutionally protected if (1) it is newsworthy *and* (2) it does not reveal facts so offensive as to shock the community's notions of decency."[182] The district court acknowledged that certain disclosed private facts do not provide information that the public is entitled to know but instead serve as "a morbid and sensational prying" into the individual's private life.[183] Assuming the private fact was not obtained legally through a public record,[184] an executive can argue that the disclosure cannot be a matter of

173. Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 134 (Cal. Ct. App. 1983).

174. *Id.*

175. *See Taus*, 40 Cal. 4th at 718; *see also Diaz*, 139 Cal. App. 3d at 134.

176. *See* Baugh v. CBS, Inc., 828 F. Supp. 745, 755 (N.D. Cal. 1993).

177. *Id.* at 751.

178. *Id.* at 750-51.

179. *Id.* at 751-52.

180. *Id.* at 752.

181. *Id.* at 750, 753, 755.

182. *Id.* at 755 (emphasis added) (quoting Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 541 (Cal. 1971)). In *Briscoe*, the California Supreme Court also held that a news source may be liable in tort for disclosing true but not newsworthy facts obtained lawfully from a public record. *Briscoe*, 4 Cal. 3d at 543. Later, the California Supreme Court stated that the *Bartnicki* and the *Florida Star* decisions have undermined the *Briscoe* holding regarding the private facts obtained from a public record. Gates v. Discovery Commc'ns, Inc., 34 Cal. 4th 679, 692 (Cal. 2004).

183. *Baugh*, 828 F. Supp. at 755.

184. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (holding a State may not impose sanctions on the accurate publication of the name of a rape victim obtained through a public record); *see also* Oklahoma Publ'g Co. v. Dist. Court of Okla., 430 U.S. 308, 308-09, 311-12 (1975) (holding a court may not punish a newspaper for disclosing the name of an eleven-year-old boy charged with murder after learning the boy's name during a court detention hearing).

legitimate public concern because the disclosure reveals private facts that have no bearing on his or her fitness for the position and the disclosure is merely a morbid and sensational prying into the executive's life.[185]

The newsworthiness doctrine and First Amendment barriers do serve an important purpose, which is to allow the media to keep the public apprised of newsworthy information so that the public may make informed decisions.[186] However, courts must ensure that those barriers do not exceed their intended purpose.[187] A newsworthiness determination should be made on a case-by-case basis, and this Article suggests that the three-part *Diaz* test[188] properly balances an executive's privacy against the publisher's First Amendment's guarantee.[189] To potentially defeat a finding of newsworthiness under the three-part *Diaz* test,[190] executives can argue (1) that they are not public figures,[191] (2) the disclosed private fact has either no nexus or an attenuated nexus with their fitness for the position,[192] and (3) the disclosed private fact is a "morbid and sensational prying" into their personal lives.[193]

D. *Intrusion Upon Seclusion*

The intrusion upon seclusion tort provides a cause of action against a person who "intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person."[194] If a person unlawfully intrudes into an executive's private affairs to obtain personal information, then the executive can bring an intrusion upon seclusion claim against the intruder. This tort seeks to punish the intrusion itself[195] and protects a person's right to be left alone.[196] Unlike a public disclosure of private facts tort claim, an intrusion upon seclusion tort claim does not require the individual disclose or publicize the private matter.[197]

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185. *See Baugh*, 828 F. Supp. at 755; Taus v. Loftus, 40 Cal. 4th 683, 718 718 (Cal. 2007); *see also* RESTATEMENT (SECOND) OF TORTS § 652D, *supra* note 16.

186. Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 126 (Cal. Ct. App. 1983).

187. *See* RESTATEMENT (SECOND) OF TORTS § 652D, *supra* note 16.

188. *Diaz*, 139 Cal. App. 3d at 132-33.

189. *See* Florida Star v. B.J.F., 491 U.S. 524, 530-31 (1989) (noting that the tension of the press and the right of privacy must be assessed based on the factual consideration of each case).

190. *Diaz*, 139 Cal. App. 3d at 132-33.

191. *See id.* at 132, 34; *see also* Lin, *supra* note 33, at 423-24.

192. *See* Taus v. Loftus, 40 Cal. 4th 683, 718 (Cal. 2007); Baugh v. CBS, Inc., 828 F. Supp. 745, 755 (N.D. Cal. 1993); *see also* Schwartz, *supra* note 17, at 495-96.

193. *See Baugh*, 828 F. Supp. at 755; *see also Taus*, 40 Cal. 4th at 719.

194. RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

195. *Id.* cmt. a; *See also* MILLS, *supra* note 16, at 177 ("[N]o publication of the private intrusion is necessary.").

196. ELDER, *supra* note 99, § 2:1.

197. RESTATEMENT (SECOND) OF TORTS § 652D, *supra* note 16.

An executive would utilize this claim against a person who intruded into the executive's private affairs to discover a personal fact. A physical intrusion includes situations such as using deception to enter into a private room,[198] investigating a person in a frightening manner,[199] or surreptitiously following a person.[200] However, this tort is not limited to unlawful trespasses or physical invasions.[201] Non-physical intrusions include filming an individual in their home from neighboring land,[202] using a wiretap or monitoring device,[203] or hacking into another's personal e-mail.[204] For example, an executive may bring an intrusion upon seclusion claim against an individual who intentionally overheard, with or without mechanical aids, the executive's private conversation within a protected area.[205]

An executive must have a legitimate expectation of privacy in the area intruded.[206] An executive must prove he or she had an objectively reasonable expectation of privacy in the source of their personal information, such as an e-mail account.[207] Generally, a person does not have a reasonable expectation of privacy in "matters which occur in a public place."[208] Thus, an individual intentionally overhearing or overseeing an executive's private affairs is not alone sufficient if done in a public place.[209]

Additionally, the intrusion must be "highly offensive to a reasonable person."[210] Courts consider a variety of factors to determine whether the

198. Noble v. Sears, Roebuck & Co., 109 Cal. Rptr. 269, 271–73 (Ct. App. 1973); *see also* RESTATEMENT (SECOND) OF TORTS § 652B, *supra* note 194, cmt. b.

199. *Noble*, 109 Cal. Rptr. at 272 ("A Georgia court also has held that an investigation done in a frightening manner may provide a cause of action.").

200. *Id.* ("The Florida Supreme Court recognized that an investigation done by trailing and shadowing a claimant could amount to an actionable invasion of privacy.").

201. ELDER, *supra* note 99, § 2:6 (describing non-physical intrusions).

202. *See* Egan v. Schmock, 93 F. Supp. 2d 1090, 1092, 1094-95 (N.D. Cal. 2000).

203. *See, e.g.*, Pemberton v. Bethlehem Steel Corp., 66 Md. App. 133, 164 (Md. Ct. Spec. App. 1986) (concluding that a person commits an intrusion by placing a detection device on the door of an individual's room).

204. Coal. for an Airline Passengers' Bill of Rights v. Delta Air Lines, Inc., 693 F. Supp. 2d 667, 675 (S.D. Tex. 2010).

205. RESTATEMENT (SECOND) OF TORTS § 652B, *supra* note 194, cmt. b; *see, e.g.*, Benitez v. KFC Nat'l Mgmt. Co., 305 Ill. App. 3d 1027, 1033 (Ill. App. Ct. 1999) (providing examples of actionable intrusions, such as "eavesdropping by wiretapping, peering into the windows of a private home, or making persistent and unwanted telephone calls").

206. *See* 62A AM. JUR. 2D *Privacy* § 39 n.3 (2016) ("A legitimate expectation of privacy is the touchstone of the tort of intrusion [upon seclusion]."); *see* ELDER, *supra* note 99, § 2:7.

207. 62A AM. JUR. 2D *Privacy* § 39 n.3 (2016) ("A legitimate expectation of privacy is the touchstone of the tort of intrusion [upon seclusion].").

208. ELDER, *supra* note 99, § 2:7 (quoting Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1087 (E.D. Pa. 1980)).

209. RESTATEMENT (SECOND) OF TORTS § 652B, *supra* note 16.

210. *Id.*; *see also* MILLS, *supra* note 16, at 171 n.890.

intrusion would be highly offensive to a reasonable person.[211] Some factors include the degree of the intrusion, the context, conduct, and circumstances of the intrusion, the intruder's motive, and the expectation of the person whose private matters were intruded upon.[212]

Voluntary consent to the intrusion is a complete defense.[213] However, the consent must occur either before or during the intrusion itself.[214] After the intrusion occurs, any acquiescence by an executive would not preclude a valid claim.[215]

An advantage of this tort claim is that the First Amendment[216] does not provide the media with an "unrestrained right to gather information."[217] Since the focus of this tort is on the intrusion,[218] the First Amendment does not always shield members of the media when they unlawfully acquire information.[219] The press has "no greater right to intrude to obtain information than each citizen."[220]

However, the First Amendment does protect a person who lawfully obtained another's personal information from a third party despite the person knowing that the third party unlawfully acquired it.[221] In *Bartnicki v. Vopper*, an unidentified party illegally recorded labor union negotiations.[222] Thereafter, a man found the tape recording in his mailbox and delivered it to Vopper.[223] Vopper then aired the recorded negotiations on his talk show.[224] The Supreme Court acknowledged that the original interception was unlawful.[225] The Court further acknowledged that Vopper knew, or at least should have known, that the unidentified party's original recording was unlawful.[226] Yet, the Court held Vopper lawfully obtained the information and the First Amendment protected Vopper's

211. Sanchez-Scott v. Alza Pharm., 86 Cal. App. 4th 365, 377 (Cal. Ct. App. 2001).

212. *Id.*

213. *Id.* at 376-77; *see also* ELDER, *supra* note 99, § 2:12 (stating consent to an intrusion negates the tort).

214. ELDER, *supra* note 99, § 2:12 ("[C]onsent must exist at the time of the tort.").

215. *Id.* ("[L]ater acquiescence does not vitiate defendant's liability.").

216. *See* U.S. CONST. amend. I.

217. 62A AM. JUR. 2D *Privacy* § 50 (2016).

218. RESTATEMENT (SECOND) OF TORTS § 652B, *supra* note 194, cmt. a; *see also* MILLS, *supra* note 16, at 177 ("[N]o publication of the private intrusion is necessary.").

219. MILLS, *supra* note 16, at 181 ("[T]his tort is not always negated by First Amendment protections.").

220. ELDER, *supra* note 99, at § 2:7 (quoting Rafferty v. Hartford Courant Co., 36 Conn. Supp. 239, 242 (Conn. Super. Ct. 1980)).

221. *See* Bartnicki v. Vopper, 532 U.S. 514, 528-29 (2001).

222. *Id.* at 518. Jack Yocum found a tape containing the illegally intercepted conversations. *Id.* at 519. Then Yocum delivered the tape to Vopper. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 525.

226. *Id.*

disclosure since it involved a public matter.[227] Under *Bartnicki*, an executive has a valid intrusion upon seclusion claim only against the party who unlawfully intrudes.[228] An executive would not have a valid claim against a subsequent party that lawfully obtains the information regardless of the subsequent party's knowledge of the originally unlawful intrusion.

Intrusion upon seclusion focuses on the means an individual uses to obtain private information.[229] It seeks to protect against a person intruding into another's private affairs.[230] The First Amendment might still be a barrier to this claim, but it does not provide absolute immunity to a person engaging in unlawful newsgathering activities.[231]

E. *Executives' Health Information Privacy*

An executive will likely seek to protect all types of private fact disclosures that have a weak nexus with the executive's fitness for the position.[232] Yet, an executive's health information might arguably have a sufficient bearing on the executive's fitness for the position since it may affect the executive's ability to hold the position in the long-term. In general, there are strong policy reasons behind protecting an individual's health information and therefore an executive should not automatically be required to disclose all health concerns to the public.

A major policy reason to protect health information is to ensure that individuals receive necessary health care and are candid with the health care professionals.[233] "If consumers need to trade their privacy right in order to obtain health care, they may be less likely to seek care or may be less honest with their health care practitioners."[234] An executive may be less likely to seek medical care if the executive knows that he or she will be required to disclose that information to the public. There are three detrimental effects that result when people are deterred from seeking health care:

> First, patients unaware that they have transmissible infections or unwilling to get treatment for those infections may contribute to the spread of disease. Second, medical research that could further

227. *Id.* at 517-19, 525.

228. *Id.* at 525.

229. *See* RESTATEMENT (SECOND) OF TORTS § 652B, *supra* note 194.

230. *See id.*

231. *See* ELDER, *supra* note 99, at § 2:18 (describing the application of intrusion upon seclusion claim to the press).

232. *See* Schwartz, *supra* note 17, at 495-96.

233. See Erin B. Bernstein, *Health Privacy In Public Spaces*, 66 ALA. L. REV. 989, 1011 (2015).

234. *Id.* at 1010.

> public health efforts may suffer if health privacy is insufficiently protected. Third, if patients refuse medical testing for fear of disclosure, public health agencies will be less able to track and respond to epidemiological trends.[235]

Additionally, federal statutes and state evidentiary laws seek to prevent the unlawful disclosure of an individual's health information. For example, the Health Insurance Portability and Accountability Act (HIPAA) seeks to protect as confidential an individual's health information.[236] Congress enacted HIPAA based on five principles.[237] First, a person should not need to exchange health privacy to obtain health care.[238] Second, a person's health information should only be disclosed for health care purposes.[239] Third, a person should be able to trust that his or her health information is protected when they seek medical treatment.[240] Fourth, improper use of health information should be punished.[241] Fifth, health information privacy should be balanced against the right to support law enforcement and medical research;[242] thus, providing a caveat for health information disclosure.

In addition to federal laws, such as HIPAA, many states have enacted physician-patient privileges to protect health information privacy.[243] For example, the New York physician-patient privilege seeks to promote three objectives:

> (1) to maximize unfettered patient communication with medical professionals, so that any potential embarrassment arising from public disclosure will not deter people from seeking medical help and securing adequate diagnosis and treatment, (2) to encourage medical professionals to be candid in recording confidential information in patient medical records, and (3) to protect patients' reasonable privacy expectations against disclosure of sensitive personal information.[244]

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235. *See id.* at 1011-12.

236. Press Briefing, Donna Shalala, Sec'y of Health & Human Servs. (Dec. 20, 2000), 2000 WL 1868717, at *3-4.

237. *Id.* at *2.

238. *Id.*

239. *Id.*

240. *Id.* at *2–3.

241. *Id.* at *3.

242. *Id.*

243. *See, e.g.*, Mary E. Moran, *Physician-Patient Privilege Prevents Disclosure of Patient's Identity to Grand Jury Homicide Investigation*, 58 ST. JOHN'S L. REV. 434, 434–42 (2012).

244. Jennifer Clark, *HIPAA as an Evidentiary Rule? An Analysis of* Miguel M. *And Its Impact*, 26 J.L. & HEALTH 1, 9 (2013).

There are many important societal purposes in protecting an individual's health information. This Article does not suggest that executives should be immune from disclosing certain health information. Instead executives should be required to disclose such information that is necessary to provide transparent corporate disclosures to allow the public to make informed investment decisions.[245] This disclosure requirement should be balanced against the need to ensure that individuals seek and receive health care.[246]

V. CONCLUSION

Under the current securities laws, executives have the discretion to either disclose a private fact or keep it confidential.[247] Greater clarity is needed to appropriately balance executives' privacy right against the public's right to know information affecting their investment decisions.[248] This Article suggests that an executive should consider disclosing a personal fact if it is not highly private and has a direct nexus with the executive's ability or fitness to hold the position.[249]

If an executive decides to not disclose, and a third party later discloses the private fact without the executive's consent,[250] then the executive can seek to recover from that individual based on the executive's privacy right to control personal information.[251] An executive utilize a constitutional privacy right claim[252] or a tort-based or property-based action.[253] However, if the private fact disclosure is newsworthy then the publisher's First Amendment guarantee may defeat the executive's privacy claim.[254]

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245. Basic, Inc. v. Levinson, 485 U.S. 224, 230 (1988). *See* Miller, *supra* note 8, at 1652 (stating Congress enacted the 1933 Act and 1934 Act to promote transparency in the market); *see also Laws that Govern the Securities Industry*, *supra* note 52.

246. *See* Bernstein, *supra* note 233, at 1010-11.

247. *See supra* Part II.

248. *See* Florida Star v. B.J.F., 491 U.S. 524, 530 (1989) (noting that courts must balance a person's privacy right against the publishers right to publish lawfully obtained information).

249. *See* Schwartz, *supra* note 17, at 495-96.

250. *See* Warren & Brandeis, *supra* note 93, at 199 (arguing the right to privacy is lost "when the author himself communicates his production to the public"); *see also* Ghent, *supra* note 95, § 3.

251. *See* MILLS, *supra* note 16, at 16 (discussing the personal-information sphere).

252. *See* Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

253. *See* RESTATEMENT (SECOND) OF TORTS § 652D, *supra* note 16.

254. *See generally* 62A AM. JUR. 2D *Privacy* § 53 (2016); MILLS, *supra* note 16, at 228 ("A newsworthy story that is true will virtually always fall under the First Amendment's protection of free speech, even if the story is private and offensive.").