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PERSPECTIVE

Are politicians' sex lives a 'matter of public concern'?

By Krista L. Baughman

In 2018, California created a private right of action in connection with the nonconsensual distribution of sexually explicit materials. Colloquially referred to as the "revenge porn" statute, Civil Code Section 1708.85 was enacted to supplement existing tort laws that protect against invasions of an individual's privacy. The revenge porn statute includes an exception to liability where the distributed material "constitutes a matter of public concern."

In a 2020 revenge porn lawsuit by former congresswoman Katie Hill, Hill alleged that her privacy was violated when her ex-husband, journalists, and the media distributed two redacted nude photographs of her to the public. One photograph appeared to depict Hill violating federal law, and the other appeared to depict Hill engaged in a sexual affair with a paid subordinate. Hill described her lawsuit as a "public plea for the right to privacy and the right to be left alone," and argued that "everybody, even publicly elected officials and celebrities, is owed the right to sexual privacy."

In striking Hill's claims, the Los Angeles County Superior Court found that the images of Hill qualify as a "matter of public concern," exempting their publication from liability. Hill decried the ruling, warning that it would "exclude a generation of young women from ever seeking public office" because of the risk that their nude pictures would be "up for public consumption," without the protections afforded by privacy laws.

Yet, the inability of elected officials and aspiring politicians to sue for privacy violations is nothing new. The "public concern" exemption is deeply rooted in First Amendment jurisprudence, and in fact is a key feature — not a bug — of traditional privacy torts. Such torts are subject to a balancing act between the need to protect an individual's privacy and the competing interest of the public in "newsworthy matters." If something is deemed "newsworthy," a broad privilege applies to shield its truthful publication from liability. *Kapellas v. Kofman*, 1 Cal. 3d 20, 36-37 (1969); *see also, e.g.*, Restatement (Second) of Torts, Section 652D (1977) (exemption to liability for publication of private facts claim where matter is "legitimate concern to the public").

The 'public concern' exemption is deeply rooted in First Amendment jurisprudence, and in fact is a key feature — not a bug — of traditional privacy torts. Such torts are subject to a balancing act between the need to protect an individual's privacy and the competing interest of the public in 'newsworthy matters.'

Modern revenge porn laws are no different: Whether criminal or civil in nature, these statutes routinely include an exception to liability for matters of public concern, including but not limited to the reporting of unlawful conduct. See, e.g., Cal. Civ. Code Section 1708.85 (exception for "matter of public concern"); Wash. Rev. Code Section 9A.86.010 (2015) (exception for "disclosures made in the public interest"); Minn. Stat. Section 617.261 (2016); and 720 Ill. Comp. Stats. 5/11-23.5 (2015) (exception for reporting on unlawful conduct).

But what content is "newsworthy"? This is a case-by-case question that "depends upon contemporary community mores and standards of decency." *Diaz v. Oakland Tribute, Inc.*, 139 Cal. App. 3d 118 (1983). In addressing newsworthiness, courts have applied a three-part test that considers: (1) the social value of the facts published, (2) the depth of the matter's intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily acceded to a position of public notoriety.

As applied to private citizens, this test is nuanced and fact-intensive. But where elected and aspiring public officials are concerned, the answer is simpler: "[a]lmost any truthful commentary on public officials or public affairs, no matter how serious the invasion of privacy, will be privileged" (*Alim v. Superior Court*, 185 Cal. App. 3d 144 (1986)), because "[p]ublic discussion about the qualifications of those who hold or who wish to hold positions of public trust presents the strongest possible case for application of the safeguards afforded by the First Amendment." *Aisenson v. ABC*, 220 Cal. App. 3d 146, 154 (1990). It doesn't matter whether criticism of a politician pertains to her private life or to action she took in her capacity as public officer — given the constitutional interests involved, "anything which might touch on an official's fitness for office is relevant." *Garrison v. State of Louisiana*, 379 U.S. 64 (1964); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

As such, there are countless cases in which a politician's privacy claims are eviscerated by the newsworthiness exception. This is particularly true where accusations of criminal activity by the politician are involved. *See, e.g., Garrison* (accusations of crime and personal attacks on judges' integrity and honesty in their private lives were "germane for fitness for office" and thus newsworthy); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) (accusations of criminal conduct by public official in his personal life was newsworthy).

But the newsworthiness exception applies much further than just criminal conduct accusations about a politician. For example, the *Kapellas* court held that facts published about the conduct of a city council candidate's children were matters that bore on the candidate's character and fitness for office. The court noted that although "in many cases" such

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conduct "may not appear particularly relevant" to a politician's qualifications for office, "normally the public should be permitted to determine the importance or relevance of the reported facts for itself." *Kapellas*; *see also Thibault v. Spino*, 431 F. Supp. 3d 1 (D. Conn. 2019) (statements about an elected official's parenting when child engaged in bullying bore on "character and fitness for office").

The end result is that privacy claims of any type are largely unavailable to politicians. An exception is found in *Diaz*, where the court found no newsworthiness in an article disclosing that a student political leader in community college was a transsexual, holding that there was "little if any connection" between the student's sexual identity and her fitness for office because "[t]he fact that [plaintiff] is a transsexual does not adversely reflect on her honesty or judgment." Notably, the court acknowledged that the public arena entered by the student was "concededly small," which suggests that a different result may occur where a larger political stage is in play.

So how can a state or national politician's revenge porn claim be expected to fare in light of the public concern exception? The outcome is likely to be uncontentious regarding the second and third elements of the newsworthiness test: (2) the publication of nude photographs without the politician's consent is arguably a deep intrusion into her private affairs, but (3) the politician voluntarily acceded to a position of public notoriety by throwing her hat into the ring for public office. The question will boil down to element (1) — what is the social value of the nude photograph, or put differently, what conduct does society deem to "bear on the character and fitness" of our politicians, such that the elected public is entitled to know and see it?

As held in Hill's case, if a nude photograph of a politician depicts potential criminal activity or conduct implicating a potential abuse of power or violation of House ethics rules, there is social value to the publication. Decades of First Amendment jurisprudence support this result. But what about closer questions, such as where nude photographs of politicians do not implicate such behavior? For instance, would a photograph of a politician having conventional sex with her husband in the marital bedroom have "social value," or would that fall outside the realm of information necessary to make a "character and fitness" determination? What about the same photograph, but depicting less conventional sexual activity (for instance, sadomasochism) — does that conduct constitute something the public has a right to know, or not?

As the Supreme Court has noted, "it is by no means easy to see what statements [or here, conduct] about a candidate might be altogether without relevance to his fitness for the office he seeks," *Monitor Patriot*. Yet given the longstanding and paramount First Amendment interests in play, it seems likely that courts assessing a politician's revenge porn claim will err on the side of disclosure in close cases. Which means that, for better or worse, the price of admission for running for office may include accepting that one's nude photographs (perhaps, other than the "plainest vanilla" among them), will be released with impunity. ■