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Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet

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By Clay Calvert and Mirelis Torres***

ABSTRACT

This Article, which takes the July 2010 ruling by the Fourth Circuit in Ostergren v. Cuccinelli *as a point of departure, explores the growing tension between the First Amendment right of Free Speech and the nascent right to online informational privacy. The Article addresses the "shock value" in First Amendment jurisprudence, stretching from* Cohen v. California *and* Texas v. Johnson *through the recent ruling in* Ostergren. *The Article also examines the traditional watchdog function of the press increasingly performed on the Internet by so-called citizen-journalists akin to Betty Ostergren. The Article concludes that while the Fourth Circuit's decision in* Ostergren *is a victory both for the shock value in First Amendment jurisprudence and for the watchdog role played by citizen-journalists, the appellate court failed to adequately explore and distinguish between two strands within shock value cases. In particular, the Fourth Circuit failed to distinguish between speech that shocks because it violates norms of civil discourse–causing anger and emotional outrage (*Cohen *and*

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Johnson)—*and speech that shocks because it intrudes on financial security* (Ostergren).

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Pro-life demonstrators hoist photographs of aborted fetuses[1]—shocking images calling attention to a heartfelt viewpoint in a manner that a more dispassionate, sedate statement like "abortion is wrong," or even the more rhetorically charged assertion "abortion is murder," simply cannot. Indeed, in June 2010, the United States Court of Appeals for the Third Circuit observed that "no matter one's personal feelings about abortion, the images are jarring, their *shock value* unmistakable. Presumably, that was the point."[2]

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1. *See generally* Joseph Curl, *Lawmakers Play Hardball as Sotomayor Waits on Deck*, WASH. TIMES, July 14, 2009, http://www.washingtontimes.com/news/2009/jul/14/curl-senators-play-hardball-sotomayor-waits-deck (reporting that, during Sonia Sotomayor's confirmation hearings before the U.S. Senate, "about a dozen pro-life activists lined up to greet the nominee, some holding blown-up pictures of aborted fetuses"); Deborah Donovan & Freida Gad, *Graphic Anti-Abortion Protest Garners Complaints*, CHI. DAILY HERALD, July 17, 2009, at 3, *available at* http://www.highbeam.com/doc/1G1-203929200.html ("The Pro-Life Action League uses blown-up pictures of aborted fetuses, part of what organizers call the Face the Truth Tour."); Sandhya Somashekhar, *Rural Areas a Magnet for Deeds*, WASH. POST, Sept. 7, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2009/09/06/AR2009090602340.html (asserting that Covington, Va., is "home to stalwart antiabortion activists who write graphic letters to the editor and demonstrate outside the Wal-Mart carrying pictures of aborted fetuses").

2. U.S. v. Marcavage, 609 F.3d 264, 283 (3d Cir. 2010) (emphasis added).

Words, as well as images, possess the power to shock. As Justice Lewis Powell once wrote about comedian George Carlin's "Filthy Words" monologue, Carlin's profane language was "a sort of verbal shock treatment"[3] used "to satirize as harmless and essentially silly our attitudes towards those words."[4] Repetition of such words, however, may actually reduce their shock value, as one becomes accustomed to hearing them. Justice Clarence Thomas once wrote, regarding the use of vulgarities, that their "shock value diminishes with each successive utterance."[5]

Four decades ago in *Cohen v. California*, the Supreme Court underscored the close relationship between meaning and emotion involving the utterance of words.[6] While protecting Paul Robert Cohen's right to wear a jacket emblazoned with the words "Fuck the Draft" in a courthouse corridor "as a means of informing the public of the depth of his feelings against the Vietnam War and the draft,"[7] the Court observed:

> [M]uch linguistic expression serves a *dual communicative function*: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their *emotive* as their *cognitive* force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[8]

Responding to such cases, Professor Lili Levi wrote that "from flag burning to wearing expletives on one's jacket in a courtroom, the law has taken cognizance of the role of passion, shock, and confrontation in the context of political speech. *Shock value* may be an important way to begin a process of informing and mobilizing the public."[9] This reference to flag burning alludes to the 1989 Supreme Court opinion in *Texas v. Johnson*.[10] Justice William Brennan wrote for the majority that Gregory Lee Johnson's "politically charged expression"[11] of burning the American flag deserved protection, in large part because of "the uniquely persuasive power of the flag itself."[12]

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3. FCC v. Pacifica Found., 438 U.S. 726, 757 (1978).
4. *Id.* at 730.
5. Van Orden v. Perry, 545 U.S. 677, 696 (2005) (Thomas, J., concurring).
6. 403 U.S. 15, 26 (1971).
7. *Id.* at 16.
8. *Id.* at 26 (emphasis added).
9. Lili Levi, *The FCC, Indecency, and Anti-Abortion Political Advertising*, 3 VILL. SPORTS & ENT. L.J. 85 (1996) (emphasis added).
10. 491 U.S. 397 (1989).
11. *Id.* at 411.
12. *Id.* at 420.

But what happens when the First Amendment-protected power to shock through expression conflicts *not* with emotional anguish or explosive words and images, but rather with the right of informational privacy?[13] Could the invasion of this right lead to more tangible, pecuniary harms like identity theft?[14] This Article examines that question in the context of the July 2010 federal appellate court ruling in *Ostergren v. Cuccinelli*.[15]

Ostergren involved the online posting and disclosure of Social Security numbers (SSNs) by a Virginia privacy rights activist named Betty "B.J." Ostergren.[16] Ostergren found the SSNs in Virginia land records she lawfully obtained online after county clerks uploaded them to a public network.[17] Ostergren, who has "made a name for herself as a gadfly as she took on a lonely and sometimes frustrating mission,"[18] posted the land records with unredacted SSNs on her own website "to publicize her message that governments are mishandling SSNs and generate pressure for reform."[19] She primarily posted the SSNs of Virginia political figures.[20] As she told a *USA Today* reporter in 2006, "when you have state agencies putting this stuff online, you are spoon-feeding criminals valuable information."[21]

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13. Professors Daniel J. Solove and Paul M. Schwartz write that "information privacy concerns the collection, use and disclosure of personal information. Information privacy is often contrasted with 'decisional privacy,' which concerns the freedom to make decisions about one's body and family." DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY AND THE MEDIA 1 (Vicki Breen et al. eds., 1st ed, 2008). In contrast to informational privacy stands decisional privacy, which Professor Amy Gajda describes as "the right to make certain profoundly personal decisions, such as those concerning contraception, abortion, or marriage, free from government intrusion." Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039, 1045 (2009).

14. Identity theft takes many forms, "ranging from fraudulent unemployment claims to fraudulent tax returns, fraudulent loans, home equity fraud, and payment card fraud." Sasha Romanosky & Alessandro Acquisti, *Privacy Costs and Personal Data Protection: Economic and Legal Perspectives*, 24 BERKELEY TECH. L.J. 1061, 1065—66 (2009).

15. 615 F.3d 263 (4th Cir. 2010).

16. *Id.* at 266.

17. *See id.* at 268 ("Ostergren has posted numerous Virginia land records showing SSNs that she herself obtained through Virginia's secure remote access website.").

18. Damon Darlin, *Your Social Security Number is a Few Clicks Away*, N.Y. TIMES, Feb. 24, 2007, http://query.nytimes.com/gst/fullpage.html?res=9C05E3DF113EF937A15751C0A9619C8B63&pagewanted=all.

19. *Ostergren*, 615 F.3d at 269.

20. *See* Editorial, *Numbers Racket*, RICHMOND TIMES DISPATCH (Va.), Aug. 16, 2010, http://www.timesdispatch.com/news/2010/aug/16/ed-ssns16-ar-427353 ("Ostergren had drawn the wrath of the General Assembly by publishing on her own *website the Social Security numbers of public officials* she had culled from state and local government websites.") (emphasis added).

21. Jon Swartz, *Social Security Numbers Found on State Websites*, USA TODAY, Mar. 3, 2006, http://www.usatoday.com/tech/news/internetprivacy/2006-03-02-social_x.htm.

Why did Ostergren reveal the complete, nine-digit SSNs of individuals who might very well suffer identity theft and financial hardship as a result? "[S]eeing a document containing an SSN posted on my website makes a viewer understand instantly, at a gut level, why it is so important to prevent the government from making this information available on line [sic],"[22] she told the Fourth Circuit. She added that "merely explaining the problem lacks even 'one-tenth the emotional impact that is conveyed by the document itself, posted on the website.'"[23] There was a powerful *shock value*–an "emotive" force,[24] as the Supreme Court described it in *Cohen*–in the manner in which she conveyed the message that government entities failed to keep SSNs private.

But pitted against the shock value of speech was Virginia's concern with privacy. In particular, Virginia's worry manifested itself in the form of a statute–a statute that Betty Ostergren successfully challenged as it applied to her website–making it a crime for a person to "intentionally communicate another individual's social security number to the general public."[25] The law had previously exempted republishing SSNs gleaned from records open to the public, but the Virginia legislature closed that loophole in 2008, primarily as a result of Ostergren's actions.[26] The *Roanoke Times* observed:

> She got the attention of the General Assembly, but the reaction was not what one might expect. Lawmakers did not appropriate funds to help agencies and localities redact Social Security numbers from public records. Instead, they tried to make Ostergren the villain by outlawing sharing documents with people's Social Security numbers. It was OK for government to endanger citizens' privacy but not for a citizen to shame them with that.[27]

In ruling that the statute did not apply to Ostergren, the Fourth Circuit rejected Virginia's argument that requiring her to fractionally redact the SSNs before she posted the land records would strike an appropriate balance between free speech and informational privacy concerns.[28] The appellate court reasoned that "partial

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22. *Ostergren*, 615 F.3d at 269.

23. *Id.*

24. Cohen v. California, 403 U.S. 15, 26 (1971).

25. VA. CODE ANN. § 59.1-443.2 (2010).

26. *See* Daniel Wolfe, *Security Watch: Weekly Roundup of Data Security Developments*, AM. BANKER, Aug. 4, 2010, http://www.americanbanker.com/issues/175_148/security-watch-1023551-1.html (subscription required) ("Ostergren's site attempts to highlight security lapses on government websites by reposting sensitive material found online, especially personal information of the public officials empowered to remove this information. She has received some pushback from those officials – in particular, a 2008 Virginia law made Ostergren's activities illegal.").

27. Editorial, *Blame the Government, Not the Activist*, ROANOKE TIMES (Va.), July 29, 2010, http://www.roanoke.com/editorials/wb/255154.

28. Ostergren v. Cuccinelli, 615 F.3d 263, 272 (4th Cir. 2010).

redaction would diminish the documents' *shock value* and make Ostergren less credible because people could not tell whether she or Virginia did the partial redaction."[29] It added that "the unredacted SSNs on Virginia land records that Ostergren has posted online are integral to her message. Indeed, they are her message. Displaying them proves Virginia's failure to safeguard private information and powerfully demonstrates why Virginia citizens should be concerned."[30]

The decision, this Article argues, not only represented a remarkable victory for "the shock value" in First Amendment jurisprudence, but also signaled a triumph for the watchdog role over government affairs that individual citizen-journalists[31]–rather than professional reporters working for members of the institutional press–can play in a digital world. Indeed, Ostergren's website is even called The Virginia Watchdog.[32]

Significantly, the Fourth Circuit opined that "Ostergren's advocacy website cannot be distinguished from a television station or newspaper."[33] The appellate court thus applied the same test that federal courts use for traditional news media outlets when they disclose lawfully obtained information of public concern that allegedly violates privacy interests. In particular, the Supreme Court, in *Smith v. Daily Mail Publishing Co.* established the test that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[34]

Part I of this Article examines the shock value in First Amendment jurisprudence.[35] In particular, it identifies different levels of analysis and different types of harm caused by shocking speech, and contends that the *Ostergren* decision extends the shock-value cases of *Cohen* and *Johnson* in a very different direction.

Part II provides an overview of the watchdog role played by traditional news media organizations, as well as a primer on the growing role and importance of citizen-journalism in exposing government abuses and wrongdoings.[36] This Part also illustrates the magnitude and significance of Ostergren's website and her successful

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29. *Id.* (emphasis added).

30. *Id.* at 271—72.

31. *See infra* Part II.C (discussing citizen journalism).

32. *See* THE VIRGINIA WATCHDOG, http://www.opcva.com/watchdog/index.html (last visited Dec. 1, 2010).

33. *Ostergren*, 615 F.3d at 267.

34. 443 U.S. 97, 103 (1979).

35. *See infra* notes 39–74 and accompanying text.

36. *See infra* notes 75–160 and accompanying text.

efforts, acting without the institutional support of traditional news media, but capturing nationwide attention, to expose the government's failure to properly safeguard SSNs.

Part III examines the privacy concerns at stake in *Ostergren*, and critiques the Fourth Circuit's analysis of them under the *Daily Mail* test.[37] This Part also analyzes some of the different ways in which speech can "shock," and contends that courts should recognize the important differences between the various distinct forms of shocking expression.

Finally, Part IV concludes that *Ostergren* marks a twin victory: a triumph for the watchdog function, which the First Amendment safeguards, and a coup for the expanding role of the citizen-journalist in performing that function.[38] It also emphasizes that while the Fourth Circuit's opinion is a victory for shocking speech, courts should be wary of extending shock-value protection to factual expression that causes personal harm.

I. THE CONTRASTING EFFECTS OF SHOCKING SPEECH: DO DIFFERENT HARMS WARRANT DIFFERENT ANALYSES?

Ostergren succinctly explained her decision to post publicly available documents revealing SSNs on the Internet by stating, "I hate to do it, but I'm trying to get my point across."[39] Thus, she apparently wanted her speech to shock the government into action–a metaphorical wake-up call, to encourage public officials to better serve their constituents.

In the process, however, Ostergren's expression should have done far more than shock the state government into action. In particular, it should have caused many Virginians considerable concern that their own SSNs could be obtained by others through Virginia's online land-records system and used for nefarious purposes like identity theft.[40] Indeed, such fears are well-founded, especially considering the prevalence of identity theft in today's society. In fact, the Federal Trade Commission now "estimates that as many as nine million Americans have their identities stolen each year."[41] The FTC

37. *See infra* notes 161–200 and accompanying text.

38. *Infra* notes 201–218 and accompanying text.

39. Tom Zeller Jr., *Personal Data for the Taking*, N.Y. TIMES, May 18, 2005, at 2, *available at* http://www.nytimes.com/2005/05/18/technology/18data.html.

40. *See infra* notes 41–42 and accompanying text (explaining the dangers of identity theft).

41. *About Identity Theft*, FEDERAL TRADE COMMISSION, http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/about-identity-theft.html (last visited Dec. 1, 2010).

points out that SSNs are one of the key vulnerabilities exploited by identity thieves.[42]

Ostergren illustrates that shocking speech can evoke a response, both at the macro level of state government and at the micro level of the individual citizen. Furthermore, *Ostergren* demonstrates that the effects of shocking speech vary with the listeners' reactions. Ostergren's shocking speech, for instance, arguably influenced both public policy and law-making at the macro level, and citizens' concern over identity theft at the micro level.

This Part explores whether the posting of real estate documents–with unredacted SSNs–warrants the same First Amendment protection enjoyed by Paul Robert Cohen to wear a jacket with the words "Fuck the Draft"[43] and Gregory Lee Johnson to burn an American flag.[44]

Significantly, the Fourth Circuit specifically cited and relied upon *Cohen* to support its decision that Ostergren's posting of SSNs merited First Amendment protection as a form of shocking expression.[45] The appellate court quoted *Cohen*'s language regarding the dual cognitive and emotive functions of expression,[46] suggesting that the Fourth Circuit recognized the emotional power of expression beyond its denotative meaning. Like the Supreme Court in *Cohen*, the *Ostergren* court focused on Ostergren's mode of expression, not just the cognitive meaning of the speech, finding it "particularly significant just *how* Ostergren communicates SSNs"[47] and that another mode would "diminish the documents' shock value."[48]

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42. *See id.* ("Identity theft occurs when someone uses your personally identifying information, like your name, *Social Security number*, or credit card number, without your permission, to commit fraud or other crimes.") (emphasis added).

43. *See supra* notes 6–8 and accompanying text (discussing *Cohen v. California*).

44. *See supra* notes 10–12 and accompanying text (discussing *Texas v. Johnson*).

45. The Fourth Circuit wrote:

> Virginia argues that Ostergren could redact several digits from each SSN and still express her message. But the First Amendment protects Ostergren's freedom to decide how her message should be communicated. Although wearing a jacket bearing the words "Boo for the Draft" rather than "Fuck the Draft" may convey the same political critique, the Supreme Court found that the government cannot prohibit the more offensive version. *Cohen v. California*, 403 U.S. 15, 24, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (noting "the usual rule that governmental bodies may not prescribe the form or content of individual expression").

Ostergren v. Cuccinelli, 615 F.3d 263, 272 n.8 (4th Cir. 2010).

46. *Id.*

47. *Id.* at 272 (emphasis added).

48. *Id.* at 272 n.8 (emphasis added).

Conceptualizing the relationship between the message ("X") and its effect ("Y") as causative, rather than correlative, simplifies the analysis of this issue:[49]

Message X (Shocking Speech) →→→→→***Effect Y*** (Reaction to Speech)

As a point of departure, the shocking messages of Cohen, Johnson, and Ostergren all criticized government policies.[50] Political speech, as the Ninth Circuit recently reaffirmed, merits "the highest level of protection."[51] In fact, the Supreme Court in *Citizens United v. Federal Election Commission* emphasized this principle, noting that "political speech must prevail against laws that would suppress it, whether by design or inadvertence."[52] That the shocking speech of Cohen, Johnson, and Ostergren received First Amendment protection thus is not surprising because, at its core, the speech was political.

While Cohen's jacket expressed his disdain for the draft and the Vietnam War,[53] Johnson stated that he burned the flag during the renomination of President Reagan, "And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a [juxtaposition]. We had new patriotism and no patriotism."[54] Ostergren, in turn, was attempting to

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49. A correlation is:

> An empirical relationship between two variables such that (1) changes in one are associated with changes in the other or (2) particular attributes of one variable are associated with particular attributes of the other. Correlation in and of itself does not constitute a causal relationship between the two variables, but it is one criterion of causality.

EARL BABBIE, THE PRACTICE OF SOCIAL RESEARCH 90 (11th ed. 2007). A positive correlation, in turn, "means that two variables move, or change, in the same direction. If one variable goes up, the other tends to also; if it goes down, the other does too." LAWRENCE R. FREY ET AL., INVESTIGATING COMMUNICATION: AN INTRODUCTION TO RESEARCH METHODS 357 (2d ed. 2000).

50. In *Cohen*, the government policy was the draft and, by extension, the Vietnam War. *Infra* note 53 and accompanying text. In *Johnson*, the speaker was objecting to the policies of the Reagan administration. *Infra* note 54 and accompanying text. Betty Ostergren was objecting to the failure of Virginia's policies affecting the online posting of land records to keep concealed SSNs. *Infra* note 55 and accompanying text.

51. In re Anonymous Online Speakers., 611 F.3d 653, 657 (9th Cir. 2010).

52. 130 S. Ct. 876, 898 (2010).

53. Paul Robert Cohen "testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft." Cohen v. California, 403 U.S. 15, 16 (1971).

54. Texas v. Johnson, 491 U.S. 397, 406 (1989). In 1986, a Texas appellate court explained and summarized Johnson's intended meaning:

> Johnson was convicted of burning the United States flag during a public demonstration protesting the policies of President Ronald Reagan and the Republican Party during the 1984 Republican National Convention. The record reflects that Johnson and his fellow protesters participated in anti-Reagan chants and "die-ins," as well as burning the flag in front of Dallas City Hall. This suggests that *Johnson intended to convey a particularized message, his dissatisfaction with the Reagan Administration's policies*, and that this message was very likely to be understood by those who viewed it.

improve government policies to better protect citizens' privacy interests.[55]

But while the messages of all three protagonists–antagonists, perhaps, given the edginess of their speech–were political, they shocked their intended audiences in distinct ways. In particular, the messages at issue in both *Cohen* and *Johnson* were shocking because they offend basic notions of civil discourse, by violating social and cultural mores about proper modes of expression for political discussion. Their speech, however, warrants protection because, as Professor Robert Post has observed, the First Amendment shields "speakers from the enforcement of community standards"[56] that torts like intentional infliction of emotional distress[57] and defamation[58] otherwise attempt to preserve. Post has written that "the First Amendment extends special constitutional protection to public discourse by insulating it from the enforcement of community norms."[59]

Although the First Amendment protects acts such as displaying the word "fuck" in a courthouse in front of women and children or burning a revered symbol, such as the American flag, in a public space outside of a political convention, the speech is nonetheless shocking. Professor Post has explained that "our conception of rational reflection and deliberation itself depends upon the observance of civility rules. Speech inconsistent with these rules is easily seen as irrational or valueless."[60] He added that "speech inconsistent with

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Johnson v. State, 706 S.W.2d 120, 123 (Tex. App. 1986) (emphasis added).

55. Ostergren v. Cuccinelli, 615 F.3d 263, 269 (4th Cir. 2010) ("In posting records online, Ostergren seeks to publicize her message that governments are mishandling SSNs and *generate pressure for reform.*") (emphasis added).

56. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 638 (1990).

57. Post argues that:

> The tort of intentional infliction of emotional distress is one of a family of actions, which include defamation and invasion of privacy, that are designed to protect the respect to which the law believes persons are entitled. In serving this function, however, these torts also enforce those "generally accepted standards of decency and morality" that define for us the meaning of life in a "civilized community."

Id. at 616.

58. As Professor Post writes:

> Defamatory communications may be defined as those whose content is not civil, because their meaning violates the respect which we have come to expect from each other. They thus threaten not only the self of the defamed person (causing, among other things, symptoms of "personal humiliation, and mental anguish and suffering"), but also the continued validity of the rules of civility which have been violated.

Id. at 618.

59. *Id.* at 667.

60. *Id.* at 641.

civility rules is likely to be experienced as violent and coercive."[61] Under Post's logic, the word "fuck" and flag burning are shocking forms of expression, inconsistent with the rules of civility that promote rational reflection and deliberation.

Cohen's speech probably offends some listeners because it violates collective notions about the proper use of language, while Johnson's speech likely offends on-lookers because it violates the American flag–the national symbol of the United States.[62] Those who encounter such expression may be angry that certain mores and values concerning the use of language and the sanctity of a national symbol are being denigrated and destroyed to convey a political opinion. However, the harm an audience suffers by observing shocking speech is only emotional, not fiscal or physical.

The First Amendment protects such emotionally offensive speech because, as Justice Brennan wrote for the majority in *Johnson*, "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."[63] Furthermore, the Court reasoned more than sixty years ago in *Terminiello v. Chicago* that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging."[64]

In contrast, Ostergren's speech is shocking in different ways. Publishing the SSNs of public figures does not violate collective norms about either the misuse of language or the abuse of a symbol. Rather, shocks because it misuses factual information about individuals and, in turn, creates long-term concerns about the security of personal financial information and individual identity. As Ken Paulson, the former editor-in-chief of *USA Today* wrote, "new technology and the Web have spurred understandable anxiety from people concerned about having the details of their lives shared with strangers."[65] In *Ostergren*, sharing of SSNs with millions of strangers on the World Wide Web can negatively impact financial security, credit, and identity. In contrast to Cohen and Johnson, who made their points by abusing language and degrading a venerated symbol, Ostergren made

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61. *Id.*

62. In *Texas v. Johnson*, Texas asserted "an interest in preserving the flag as a symbol of nationhood and national unity." Texas v. Johnson, 491 U.S. 397, 410 (1989).

63. *Id.* at 414.

64. 337 U.S. 1, 4 (1949).

65. Ken Paulson, *Privacy vs. Public Right to Know*, USA TODAY (Mar. 18, 2010, 6:11PM), http://www.usatoday.com/news/opinion/forum/2010-03-18-column18_ST_N.htm.

hers by publishing data that can harm something far more tangible–personal identity and financial security. Using abusive language or burning pieces of cloth have no such impact. Thus, while the Supreme Court arguably is correct in *Texas v. Johnson* "that the government may not prohibit the expression of an *idea* simply because society finds the *idea* itself offensive or disagreeable,"[66] Ostergren, by conveying personal, factual information about individuals, expressed more than just an idea about privacy. The resulting harm, which threatens individual financial security and credit records, does more than shock sensibilities or induce anger.

This Part concludes by recalling the Supreme Court's language from *Cohen* about the dual communicative functions of speech–one cognitive, one emotive–that the Fourth Circuit cited in *Ostergren*.[67] In particular, Ostergren could have made her cognitive point through an emotionless statement such as, "The government of Virginia is posting land records on the Internet that include Social Security numbers. People can lawfully access this information, find your Social Security number and, in turn, possibly misuse it to invade your privacy and misappropriate your identity."

Instead, she posted the actual documents bearing the SSNs. In a 2005 study on photographic coverage in three major newspapers during the Persian Gulf and Iraq Wars, Cynthia King and Paul Martin Lester observed that "pictures often affect a viewer emotionally more than words alone."[68] Indeed, viewing an actual document with a person's SSN printed on it packs a similar emotional wallop that mere words cannot.

As the saying goes, "seeing is believing." Using the actual documents lent credibility to Ostergren's message: Visitors to Ostergren's website can see for themselves the veracity of her claim.[69] Indeed, "a powerful photograph can tell a story as no words can. Yet, because photographs have greater impact on people than do written words, *their capacity to shock exceeds that of language*."[70] As suggested in the next Part of this Article,[71] Ostergren served her

66. 491 U.S. 397, 414 (1989) (emphasis added).

67. *See* Ostergren v. Cuccinelli, 615 F.3d 263, 272 n.8 (4th Cir. 2010) (quoting Cohen v. California, 403 U.S. 15, 24 (1971), regarding the "dual communicative function" of speech).

68. Cynthia King & Paul Martin Lester, *Photographic Coverage During the Persian Gulf and Iraqi Wars in Three U.S. Newspapers*, 82 JOURNALISM & MASS COMM. Q. 623, 626 (2005), *available at* http://www.informaworld.com/smpp/content~db=jour~content=a908994483 (subscription required).

69. THE VIRGINIA WATCHDOG, http://opcva.com/watchdog (last visited Dec. 1, 2010).

70. Jennifer E. Brown, *News Photographs and the Pornography of Grief*, 2 J. MASS MEDIA ETHICS 75, 75 (1987) (emphasis added).

71. *See infra* Part II.D.

community as a citizen-journalist and played a watchdog role in telling the public a story about privacy–a story told with visual images, not just words.

The Fourth Circuit's decision in *Ostergren* seemingly extends First Amendment shock-value jurisprudence in the realm of political expression far beyond offensive speech. In particular, the appellate court's decision reaches speech that invades privacy interests and harms the financial well-being of individuals.[72] It expands shock-value jurisprudence beyond the protection of political opinions–opinions about the merit of the draft or Reagan politics–to the disclosure of personal, factual information. Ostergren thus could express her political opinion–that Virginia's lawmakers failed to protect the privacy of the state's citizens–through the disclosure of personal information.[73]

With this in mind, the next logical issue is whether the effect of her shocking speech at the macro-level (causing a change in Virginia law and policy regarding protection of SSNs)[74] justified the effects of her shocking speech at the micro-level (causing individuals to suffer either actual identity theft or mental anguish that such theft could occur). In other words, did the policy ends sought justify the privacy-invasive means? Part III analyzes how the Fourth Circuit attempted to weigh such micro-level financial privacy concerns against macro-level policy interests. Before addressing that issue, however, the next Part examines watchdog journalism and positions Ostergren's speech within that framework as a citizen-journalist.

II. THE WATCHDOG ROLE OF THE PRESS: FROM INSTITUTIONAL MEDIA TO CITIZEN JOURNALISM

"We live at a time in American history in which the watchdog role of a free and aggressive press is more vital than ever."[75] Watchdog journalism pivots on "(1) independent scrutiny by the press of the activities of government, business, and other public institutions, with an aim toward (2) documenting, questioning, and investigating those activities, in order to (3) provide publics and officials with timely

72. That speech, of course, is a person's SSN as explained above throughout this Part of the article.

73. Ostergren v. Cuccinelli, 615 F.3d 263, 269 (4th Cir. 2010) ("In posting records online, Ostergren seeks to publicize her message that governments are mishandling SSNs and *generate pressure for reform.*") (emphasis added).

74. *See supra* note 26 and accompanying text (noting that Ostergren's actions helped to influence the Virginia legislature to close a loophole in its law).

75. Rodney A. Smolla, *The First Amendment, Journalists, and Sources: A Curious Study in "Reverse Federalism"*, 29 CARDOZO L. REV. 1423, 1430 (2008).

information on issues of public concern."[76] Today, however, changes in the journalism profession, including the threshold question of whether bloggers are journalists[77] are affecting this watchdog role.[78] Mainstream journalism in the United States sometimes is criticized for acting more like a "sleeping watchdog,"[79] while everyday citizens increasingly assume roles traditionally played by journalists.[80]

This Part provides a brief overview of the watchdog role of the press, initially addressing Professor Vincent Blasi's seminal call for courts to recognize what he called the "checking value" provided by the First Amendment's strictures when considering issues affecting freedom of press–rather than speech.[81] It then examines the institutional role of the press as a separate entity protected under the Free Press Clause,[82] including whether that clause affords the news media any special protections above and beyond the freedom of speech and other rights bestowed on citizens generally. As Timothy Gleason, Dean of the University of Oregon School of Journalism and Communication, wrote two decades ago, "[t]he watchdog role of the press is based on the press's function as an institution serving a collective good."[83] Finally, this Part considers the relationship between the watchdog role of the press and "citizen journalism." In particular, it argues that individual government watchdogs like

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76. W. Lance Bennett & William Serrin, *The Watchdog Role*, *in* THE PRESS 169, 169 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).

77. *See* Gregg Leslie, *Who is a "Journalist?" and Why Does it Matter?*, 33 NEWS MEDIA & L. 4, 4, *available at* http://www.rcfp.org/news/mag/33-4/who_is_a_journalist_4.html ("As journalism undergoes a profound shift toward the electronic, it is difficult to figure out who is covered by the term.").

78. *See* Bennett & Serrin, *supra* note 76, at 178 (noting how changes in the press at the start of the twenty-first century have left most observers agreeing that "the present period is not a time of rich watchdog reporting in any media").

79. *Id.* at 180.

80. Seungahn Nah & Deborah Chung, *Rating Citizen Journalists Versus Pros: Editors' Views*, 30 NEWSPAPER RES. J. 71, 71 (2009), *available at* http://aejmc.org/topics/wp-content/uploads/2009/06/nah.pdf (citing a Knight Citizen News Network study showing that "as of December 2008, there [were] 800 citizen media sites that [had] emerged in America, and a growing body of ordinary citizens is working as citizen journalists or reporters through these new information and communication technologies").

81. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

82. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, *or of the press*." U.S. CONST. amend. I (emphasis added on the Press Clause). The Free Speech and Free Press Clauses were incorporated eighty-five years ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. Gitlow v. New York, 268 U.S. 652, 666 (1925).

83. TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH CENTURY AMERICA 7 (1990).

Ostergren and traditional news organizations can function in a collaborative fashion, precisely as they did in her case.

A. The Checking Value

In 1977, Professor Vincent Blasi proposed that the courts should consider the press's role as a watchdog in analyzing First Amendment freedom of the press issues.[84] The "checking value," as he called it, espouses the role of the press as a watchdog against government malfeasance. The free press "serve[s] in checking the abuse of power by public officials."[85] The watchdog role raises the press's value to a democratic society, and should be considered a supplement to, rather than a substitute for, the values that, prior to 1977, had been central to First Amendment analysis.[86]

Blasi's view of the press, as Professors Cathy Packer and Johanna Cleary recently observed, pivots on "the assumption that government officials will perform their duties more honestly if they are being watched by the media, and, if they do not perform their duties honestly, the watching media can alert the public."[87] In other words, "press freedom is especially important in a democracy because only a free press can check the abuse of official power."[88]

The checking value, as Professor Lucas Powe observed, "is bottomed in neither truth nor rationality, but rather in distrust."[89] This distrust arises out of the maxim that individuals placed in power positions, if not held accountable for their actions, will inevitably abuse that power in a hypocritical fashion.[90] The abuse of power by public officials is, as Professor Blasi wrote, "an especially serious

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84. Blasi, *supra* note 81, at 528.

85. *Id.* at 527.

86. *Id.* at 528. For example, another long-standing First Amendment value of speech is the truth-seeking function of expression embraced by the marketplace of ideas theory. The marketplace of ideas theory of free expression "represents one of the most powerful images of free speech, both for legal thinkers and for laypersons." MATTHEW D. BUNKER, CRITIQUING FREE SPEECH 2 (2001). It is perhaps "the dominant First Amendment metaphor." LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 237 (1991). *See generally* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353 (2000) (providing an excellent overview of the history and goals of the theory of the marketplace of ideas).

87. Cathy Packer & Johanna Cleary, *Rediscovering the Public Interest: An Analysis of the Common Law Governing Post-Employment Non-Compete Contracts for Media Employees*, 24 CARDOZO ARTS & ENT. L.J. 1073, 1113 (2007).

88. *Id.*

89. POWE, JR., *supra* note 86, at 238.

90. *Cf.* Clay Calvert, *Democracy & The Discourse of Distrust: Explicating the Hypocrisy Exposition Value in First Amendment Jurisprudence*, 32 T. JEFFERSON L. REV. 177 (2010) (discussing politicians who abuse power and act in hypocritical fashion).

evil."[91] The government is the only entity that can legitimately use violence; there is no other "concentrated force available to check the government in the way the government is available to check even the most powerful private parties."[92] The electoral process provides the public with the only means to combat government malfeasance. The public then becomes the "ultimate judge"[93] of government-endorsed actions and decides whether to re-elect or reject those officials responsible for misconduct.

Checking value theory thus assumes that investigative, or watchdog reporting, will have two basic consequences: (1) the public will react and hold its public officials accountable for their misconduct;[94] and (2) the courts will grant the watchdog press specific protections–even beyond those enjoyed by individuals–under the auspices of the Free Press Clause.[95] Although instances of positive public reaction to watchdog stories exist,[96] the legal community has not reached a consensus as to the extent of freedom provided by the Press Clause.

B. Controversy Over the Meaning of the Press Clause

In *The Watchdog Concept*, Gleason noted that "[t]he development of the watchdog concept did not take place in the quiet, thoughtful environment of theorists and philosophers, but in the heat of courtroom battles over the legal protections given to newspapers."[97] In the nineteenth century, newspaper editors and publishers invoked the watchdog role of the press as a defense to libel suits brought

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91. Blasi, *supra* note 81, at 538.

92. *Id.*

93. *Id.* at 542.

94. *See id.* at 552 (writing that one of the consequences of checking value theory is that "systematic scrutiny and exposure of the activities of public officials" leads to "more good in the form of prevention or containment of official misbehavior than harm of various forms such as diminution in the efficiency of the public service or weakening of the trust that ultimately holds any political society together"); *cf.* JAMES S. ETTEMA & THEODORE L. GLASSER, CUSTODIANS OF CONSCIENCE: INVESTIGATIVE JOURNALISM AND PUBLIC VIRTUE 3 (1998) (contending that the work of investigative journalists "calls us, as a society, to decide what is, and what is not, an outrage to our sense of moral order and to consider our expectations for our officials, our institutions, and ultimately ourselves," and asserting that "their stories implicitly demand the response of public officials").

95. *See* Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975), *available at* http://jpm.syr.edu/documents/course/Potter%20Stewart%20Or%20Of%20the%20Press.pdf (noting that to him "the Court's approach to all [freedom of the press] cases [have] uniformly reflected its understanding that the Free Press guarantee is, in essence, a *structural* provision of the Constitution.").

96. *See generally* Bennett & Serrin, *supra* note 76, at 176.

97. GLEASON, *supra* note 83, at viii.

against them by government officials.[98] This watchdog role, publishers argued, should entitle the press to "a unique position in society."[99] The nineteenth-century watchdog concept thus arose from the common law of defamation, and not the Free Press Clause.[100] In fact, the Supreme Court did not consider the meaning and reach of the Free Press Clause until the twentieth century.[101]

The main debate over the Press Clause, as Professor Erick Ugland has recently written, now turns on the extent to which it entitles the institutional press to First Amendment rights separate and apart from those guaranteed to individuals.[102] In 1975, Justice Potter Stewart first publicly advocated for constitutional recognition of the press as a separate, independent entity.[103] He argued that the Free Press Clause and the Free Speech Clause entitled the press and individual citizens to different sets of rights, namely the right to newsgathering privileges and the right to free speech, respectively.[104] Critics of Justice Stewart's position argued that any constitutional recognition of the press as a separate and distinct entity "would authorize a tiered system of rights, would require judges to define who is a journalist, and could potentially lead to public demands that the press abide by certain ethical standards."[105]

The Supreme Court has neither fully adopted Justice Stewart's view nor fully rejected it.[106] Rather, the Court has inconsistently

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98. *Id.* at 4 ("[P]ublishers argued that newspapers required special protections under the freedom of the press because the institution of the press had a duty to gather and report information about the operation of government and other matters of public interest.").

99. *Id.*

100. *See id.* at 53 (observing that "debate over the meaning of freedom of the press took place in civil and criminal libel litigation.").

101. *See id.* at 6 (noting that the "first major freedom-of-the-press case decided by the Supreme Court of the United States" was *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931)).

102. *See* Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 113, 121—122 (2008) (posing two of the relevant questions involving the Press Clause, namely: 1) whether it should "be interpreted as having a separate meaning apart from the Speech Clause" and "be read as bestowing a set of special rights on the press not possessed by the public generally?" and 2) "[t]o the extent that any unique protections are provided to the press, how should 'the press' and 'journalist' be defined?").

103. *See* Stewart, *supra* note 95.

104. *See id.* at 633—34 (arguing that freedom of the press is not limited to freedom of expression because that guarantee already is protected by the Speech Clause, and that the Press Clause was meant to "create a fourth institution outside the Government as an additional check on the three official branches").

105. Ugland, *supra* note 102, at 127.

106. *See* Jon Paul Dilts, *The Press Clause and Press Behavior: Revisiting the Implications of Citizenship*, 7 COMM. L. & POL'Y 25, 27 (2002) (citing cases in which the Press Clause has been interpreted as protecting press conduct as opposed to expression, thus implicitly recognizing that the press, under certain circumstances, is entitled to unique rights under the Press Clause, such

interpreted the Press Clause depending on the legal context.[107] It generally has held, however, that the Press Clause does not distinguish between the press and the individual.[108]

For instance, in *Cohen v. Cowles Media Co.*, a narrow majority of the Court held that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[109] The Court added that enforcement of "general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations."[110] The Court is willing to confer certain rights on individual citizens performing the duties or functions of the press, but not on the institution of the press itself.[111] This does not mean that the Free Press Clause confers rights on citizen-journalists, but rather that the Court will only confer special rights to individuals working *within* the press – just not the press itself.[112]

According to Professor John Paul Dilts, "[f]rom a constitutional point of view, press conduct is not distinct from citizenship."[113] Press conduct shares the same values as the conduct of an "engaged citizen: truthfulness, loyalty, justice, and courage."[114] If, constitutionally speaking and in light of Dilts' opinion, any engaged citizen can be considered part of 'the press', then no problem of a privileged class arises. Any citizen willing to assume the functions of the press would be entitled to the rights already established under the Free Press Clause.[115] A conscious choice to "engage[] in the political process of

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as "rights of access to judicial proceedings, protection against governmental harassment and protection against discriminatory taxation.").

107. *See generally* Ugland, *supra* note 102, at 125—136 (outlining instances in which the Supreme Court has applied different interpretations of the Press Clause in defamation cases, newsgathering cases, and press immunity or shield law cases).

108. *See* Dilts, *supra* note 106, at 35 ("It is . . . commonplace to assert that the press is subject to the laws of general applicability and that the Press Clause confers no special press privileges. . . . The duties and rights afforded to all citizens also are the duties and rights afforded citizens behaving as press.").

109. 501 U.S. 663, 669 (1991).

110. *Id.* at 670.

111. *See* Dilts, *supra* note 106, at 35—36 ("What the cases have in common is a judicial understanding of the press as a distinctive kind of citizen performing a public duty.").

112. *See* Leslie, *supra* note 77, at 4 ("The divide between areas of the law that distinguish journalists from others and the areas of the law that don't can be bridged by recognizing journalism as a public-interest function, not necessarily a particular profession.").

113. Dilts, *supra* note 106, at 46.

114. *Id.* at 47.

115. *See id.* (writing that equating the press functions with that of citizenship "is to claim no special privileges for the press that are different from those of other citizens, but rather it is to identify all citizens who are profoundly engaged in the democracy as the press").

gathering information for public dissemination" distinguishes the press from other citizens.[116]

C. Institutional Watchdog Journalism and the Rise of Citizen Journalism in the Twenty-First Century

During the many reform movements of the early 1900s, the press played an essential role in galvanizing public opinion, by publishing watchdog stories that succeeded in mobilizing public support for child-labor, food-and-drug, and election-law reforms.[117] In the 1960s and 1970s, the press again effectively assumed its role as watchdog, directing the public's attention to the Civil Rights Movement, the anti-war movement, and the Watergate scandal.[118] However, by the end of the 1970s, the watchdog went dormant, only emerging every now and then to cover certain events that would lead to "sexy" stories.[119]

As in the late twentieth century, watchdog journalism has been largely dormant in the early twenty-first century. Professors Bennett and Serrin have noted that "the present period is not a time of rich watchdog reporting in any media."[120] They argued that, while not in complete remission, the watchdog press has "scattered unevenly across the media."[121] Moreover, a recent Gallop poll indicates that the American public believes the press is shirking its watchdog role.[122] The public may just be correct, as suggested by a 2010 article in the *American Journalism Review* observed that:

> [I]nvestigative reporters are a vanishing species in the forests of dead tree media and missing in action on Action News. I-Teams [investigative teams] are shrinking or, more often, disappearing altogether. Assigned to cover multiple beats, multitasking backpacking reporters no longer have time to sniff out hidden stories, much less write them. In Washington, bureaus that once did probes have shrunk, closed[,] and consolidated.[123]

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116. *Id.* at 49.

117. Bennett & Serrin, *supra* note 76, at 176.

118. *See id.*

119. Jodi Enda, *Capital Flight*, AM. JOURNALISM REV., June—July 2010, http://www.ajr.org/Article.asp?id=4877 (writing that journalists do not engage in watchdog reporting as much anymore because "[m]any have little interest in what they consider to be "unsexy" process stories that take a lot of time to report, require research and source-building, and don't necessarily pan out or land on the front page.").

120. Bennett & Serrin, *supra* note 76, at 178.

121. *Id.*

122. *See* Matt Kelley, *Poll: Better Economic Coverage Desired*, USA TODAY (Jan. 27, 2010, 2:24 AM), http://www.usatoday.com/news/washington/2010-01-26-press-poll_N.htm.

123. Mary Walton, *Investigative Shortfall*, AM. JOURNALISM REV., Sept. 2010, http://www.ajr.org/Article.asp?id=4904.

The effect of this consolidation on watchdog journalism is open to debate. Some high-profile figures, including Senator John Kerry, fear that the diminishing role played by institutionalized press in American society also signifies the end of the watchdog.[124] However, Arianna Huffington, editor-in-chief of the *Huffington Post*, believes that the watchdog role of the press will be passed on to citizen-journalists and "foundation-supported investigative" reporters.[125]

Indeed, citizen-journalism increasingly deliver meaningful news because, with the advent of the Internet, citizens are gradually assuming more journalistic functions.[126] But what is citizen journalism and, more specifically, what journalistic functions are citizen-journalists assuming?

The merits of citizen-journalism has divided institutional journalists, as Mark Glaser, executive editor of PBS's *MediaShift*, explained in 2006:

> [M]any professional journalists believe that only a trained journalist can understand the rigors and ethics involved in reporting the news. And conversely, there are many trained journalists who practice what might be considered citizen journalism by writing their own blogs or commentary online outside of the traditional journalism hierarchy.[127]

Generally, the term citizen-journalism refers to the increasingly frequent activity among common citizens–amateur journalists–of gathering news and disseminating information to the general public,[128] and contrasts with what might be called old journalism.[129] Davis "Buzz" Merritt, a veteran reporter and editor,

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124. *See* Todd J. Gillman, *Newspaper Advocates Address Senate on Industry's Struggles*, DALLAS MORNING NEWS, May 7, 2009, http://www.dallasnews.com/sharedcontent/dws/bus/stories/050709dnbusnewspapers_.37e76de.html.

125. *Id.* In the authors' view, such foundational-supported journalism is problematic because it means that a foundation or other organization pays for or supports the research, with such a foundation or organization possibly holding a viewpoint that will bias the reporting.

126. *See* Nah & Chung, *supra* note 80, at 71 ("Ordinary citizens have become citizen reporters or journalists who deliver news and information to other members of the community through various citizen media sites.").

127. Mark Glaser, *Your Guide to Citizen Journalism*, MEDIASHIFT (Sept. 27, 2006), http://www.pbs.org/mediashift/2006/09/your-guide-to-citizen-journalism270.html (emphasis added).

128. *See* Alan Knight, *Who is a Journalist? Journalism in the Age of Blogging*, 9 JOURNALISM STUD. 117, 126 (2008) ("The argument of whether there is such a thing as citizen journalism is long past" and that "what is needed now is a much clearer understanding by professional journalists of how their role differs from that of bloggers and *citizen journalists – the amateur journalists*.") (emphasis added).

129. As Ann Cooper wrote in 2008:

> These days it's more the act of journalism that gets you entry into the tent, not whether you're doing it every day, or doing it for pay. There are still distinctions, though. "Old" journalists are called professional, traditional, mainstream, or institutional; "new" ones are amateur, nontraditional, nonprofessional, or citizen *journalists*.

Ann Cooper, *The Bigger Tent*, 2008 COLUM. JOURNALISM REV. 45, 47 (emphasis added).

describes citizen journalism as an activity engaged in by "people motivated to tell other people about facts and events they believe are important [to] exchange thoughts about the meaning of the facts and events."[130] In a study conducted on the discourse of citizen journalism, Elspeth Tilley and John Cokley observe that "the term[] arose when individuals or groups who were not aligned with publishers as 'professional journalists' began to collect, edit and provide publishers with (or publish directly) news material that was out of publishers' reach."[131] They note, however, that no set definition of what citizen journalism exists; the generic term is simply used to describe the "colossal phenomenon"[132] that is independent citizens producing information for mass dissemination.[133]

The types of coverage arising out of citizen journalism run the gamut of human experience. It may take the form of "hyperlocal" coverage, focusing on issues in the immediate community.[134] Commonly, citizen journalism covers natural disasters, accidents, and any other instantaneous events that can only be reported on by those who contemporaneously observe them.[135] However, some citizen journalists are making mainstream headlines uncovering issues involving community, state, and federal governmental officials and agencies.[136]

In a 2010 article, Professor Stephen Lacy and his colleagues observed that "online citizen journalism might evolve and develop to the point of compensating for declining community coverage resulting from decreased newspaper reporting resources."[137] Indeed, sometimes citizen journalism not only complements the work of the institutional

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130. Davis "Buzz" Merritt, *What Citizen Journalism Can Learn from Public Journalism*, PUBLIC JOURNALISM 2.0: THE PROMISE AND REALITY OF A CITIZEN-ENGAGED PRESS 21, 28 (Jack Rosenberry & Burton St. John III eds., 2010).

131. Elspeth Tilley & John Cokley, *Deconstructing the Discourse of Citizen Journalism: Who Says What and Why it Matters*, 14 PAC. JOURNALISM REV. 94, 94—95 (2008).

132. *Id.* at 96.

133. *See id.* at 103 ("Tomorrow's newsreporting and production will be more of a conversation, or a seminar," and adding that "any person who participates in such a conversation in a way that . . . [is] helpful . . . [is] a 'citizen reporter'.").

134. *See* Mark Potts, *Journalism: Its Intersection with Hyperlocal Web Sites*, NIEMAN REP. (Winter 2007), http://www.nieman.harvard.edu/reports/article/100130/Journalism-Its-Intersection-With-Hyperlocal-Web-Sites.aspx (discussing hyperlocal citizen journalism).

135. *See* Tilley and Cokley, *supra* note 131 (writing that material reported on by citizen journalist is characterized as "sudden events such as fires, crashes, floods and other 'disasters', which desk-bound reporters could not attend due to time constraints").

136. This includes Betty Ostergren, whose efforts received attention in the mainstream news media.

137. Stephen Lacy et. al., *Citizen Journalism Web Sites Complement Newspapers*, 31 NEWSPAPER RES. J. 34, 34—35 (2010), *available at* http://www.scribd.com/doc/32167374/Newspaper-Research-Journal-Study.

press, but even fills the vacuum a retreating press leaves behind. Professor Claire Serant noted in 2009 "a growing trend that has citizen journalists working with non-profit organizations to become frontline communicators in towns that lost newspapers recently."[138] Ultimately, citizen-journalists, in light of economic factors plaguing the institutional press and professional journalism today, may increasingly need to play the role of watchdog.

D. Betty Ostergren: A Citizen-Journalist Watchdog?

Fred Brown wrote in 2005 that when the citizen journalism movement was first evolving, "a professional journalist has layers of editors checking his facts. A citizen journalist is usually a lone crusader."[139] That latter characterization certainly seems to fit Betty Ostergren. She was just such a lone crusader, who conducted her own investigation on a government policy and used the Internet to disseminate her story to the public.[140]

Betty Ostergren certainly does not belong to the institutional press. She lacks the educational background, the work experience, and the credentials that distinguish most professional journalists from citizen journalists. Not employed by any news organization, she instead runs her own website.[141] Ostergren's journalism, however, qualifies her as a citizen-journalist. Ostergren practices the old-fashioned, shoe-leather investigative reporting once generally associated with the mainstream news media, but now increasingly conducted by private citizens.[142] Like a newspaper journalist, she has a beat–hers is SSN privacy. She spends considerable time observing Virginia's and other states' public-records management practices, and "publishing" information identifying states that make available unredacted SSNs on online databases.[143]

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138. Claire Serant, *Citizen Journalists Starting Newspapers in Towns that Have Lost Their Weeklies*, GRASSROOTS EDITOR, Fall 2009, at 13, *available at* http://www.mssu.edu/iswne/grpdfs/fall09.pdf.

139. Fred Brown, *'Citizen' Journalism is not Professional Journalism*, QUILL MAG., Aug. 1, 2005, at 42.

140. *See supra* Introduction (describing what Betty Ostergren did).

141. *See supra* Introduction (describing Betty Ostergren's activities).

142. *See* Enda, *supra* note 120 (reporting that "citizen journalists are engaging in the "[g]ood, old-fashioned shoe-leather reporting," and adding that "beyond the professional journalists seeking refuge at Web sites are the now-ubiquitous citizen journalists and others, such as bloggers at nonprofits and advocacy groups").

143. *See* THE VIRGINIA WATCHDOG, http://www.opcva.com/watchdog/RECORDS.html (last visited Dec. 1, 2010).

Writing in the *Columbia Journalism Review*, Amanda Michel described the possibilities of what she calls a "pro-am model"[144] for journalism in which professional journalists and amateurs work together. She viewed such a model as having the "potential to radically extend the reach and effectiveness of professional journalism"[145] and to bolster "the role of the media as a pillar of democracy."[146]

Ostergren's role as a citizen journalist is perhaps unique, however, because professional journalism outlets extended the reach and effectiveness of her own amateur brand of journalism.[147] She was, to use Amanda Michel's fine phrase, "the pillar of democracy."[148] Newspapers, by covering her findings, allowed Ostergren's research to reach a much wider audience, serving as her metaphorical megaphones.[149] This relationship is symbiotic; Ostergren performed both newsgathering and background research while newspapers like *USA Today*[150] and the *New York Times*[151] gave her a stronger voice. The professional press exposed the public to Betty Ostergren's investigative story.[152] This collaboration between citizen journalists and the mainstream media may be the future of journalism.[153]

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144. Amanda Michel, *Get Off the Bus: The Future of Pro-Am Journalism*, COLUM. JOURNALISM REV., Mar.—Apr. 2009, at 42, 43, *available at* http://www.cjr.org/feature/get_off_the_bus.php.

145. *Id.*

146. *Id.*

147. The reference here by the authors to the extended reach provided by mainstream news media refers to the circulation and readership of the newspapers that covered her work.

148. Michel, *supra* note 144, at 43.

149. The reference here by the authors to the much wider audience provided by mainstream news media refers to the circulation and readership of the newspapers that covered her work that, it seems likely in the authors' opinion, would exceed that of the daily readership of Ostergren's website.

150. *See* Swartz, *supra* note 21, at 2B (covering Betty Ostergren's work).

151. *See* Darlin, *supra* note 18, at C1 (covering Betty Ostergren's work).

152. *See generally* Editorial, *There's No Crime in Privacy*, VIRGINIAN-PILOT (Norfolk, Va.), July 8, 2010, http://hamptonroads.com/2008/07/theres-no-crime-privacy-protest ("Betty Ostergren believes Social Security numbers should not be accessible on the Internet, but she has a peculiar way of making her point."); Darlin, *supra* note 18, at 1 ("Mrs. Ostergren, 57, has made a name for herself as a gadfly as she took on a lonely and sometimes frustrating mission to draw attention to the situation."); L. Lamor Williams, *Clerk Pulls Real-Estate Files from Web Site*, ARK. DEMOCRAT-GAZETTE, June 28, 2008 ("Betty Ostergren, a Virginia woman who has challenged online access to public documents across the country, had posted to her Web site - www.thevirginiawatchdog.com- the Social Security number of former North Little Rock Mayor Terry Hartwick.").

153. *See* JACK ROSENBERRY & BURTON ST. JOHN III, *Conclusion* to PUBLIC JOURNALISM 2.0: THE PROMISE AND REALITY OF A CITIZEN-ENGAGED PRESS 183, 186 (Jack Rosenberry & Burton St. John III eds., 2010) (proposing that professional journalists "have the responsibility of provoking a resurgence in meaningful, community-focused news by collaborating with citizen-contributors").

E. Do Courts Recognize Citizen Journalists as Members of the Press?

Ostergren v. Cuccinelli indirectly recognizes the potential impact of citizen journalism on First Amendment discourse. Although Ostergren is not an official member of the press, the *Ostergren* court in invoked the *Smith v. Daily Mail Publishing Co.* standard that courts traditionally reserve for cases dealing with the press's First Amendment rights and states' interest in their citizens' privacy.[154] The court seems to have assumed that Betty Ostergren merely resembles a journalist.

Research suggests that *Ostergren* is the only case that even mentions, if only implicitly, citizen journalism in the context of watchdog reporting. Searching both federal and state cases for any references to citizen journalism revealed two cases. In *Grijalva v. Gonzales*, the words "citizen" and "journalism" are not related.[155] In *Diaz v. Watts*, the two words are related, but appear only in the appendix of the case, as part of California's Department of Corrections Administrative manual.[156]

When legal scholars have examined the role of citizen journalism in a democratic society and within the context of First Amendment jurisprudence, their articles have focused primarily on one legal question: Whether citizen journalists (as well as others not employed by a traditional news media organization) should be afforded a reporter's privilege not to reveal confidential sources and information.[157] Practicing attorneys have noted that "citizen journalism raises questions regarding the protection of confidential sources. Indeed, one of the issues at the forefront of the legal debate concerning nontraditional journalists is determining whether they

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154. *See* Ostergren v. Cuccinelli, 615 F.3d 363, 274 (4th Cir. 2010) (introducing the *Smith v. Daily Mail Publishing Co.* standard: "If a *newspaper* lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information.") (emphasis added).

155. 212 Fed. Appx. 541, 550 (6th Cir. 2007).

156. 189 Cal. App. 3d 541, 668 (Cal. Ct. Appl. 1987). Similar searches in LexisNexis Academic retrieved few results, none of which referred to citizen journalism in the context of watchdog reporting.

157. *See, e.g.*, Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395, 395 (2006) (exploring "the status of 'blogs' and 'bloggers' as journalists in the context of journalistic privilege and other exceptions to legal obligations under U.S. and U.K. laws designed to accommodate freedom of expression"); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 591 (2007) (analyzing the concept of citizen journalism, and arguing that "any articulation of the reporter's privilege must account for this changing nature of journalism" and that because "the institutional press no longer has a monopoly over the dissemination of information to the public, all those who disseminate information to the public must be presumptively entitled to invoke the privilege's protections.").

should be afforded the protection of the reporter's privilege."[158] Other articles have examined the potential impact of anti-paparazzi legislation on cell phone-camera wielding citizen journalists,[159] while some have explored within the context of legal issues related to the production of so-called amateur content.[160]

The next Part argues that *Ostergren* implicitly confirmed and validated this increasingly vital role played by citizen journalists–the first appellate court to do so.

III. TREATING THE LONE WATCHDOG LIKE THE MAINSTREAM PRESS: THE FOURTH CIRCUIT'S ANALYSIS IN *OSTERGREN* AND HOW SHOCKING SPEECH TRIUMPHED OVER PRIVACY

The Fourth Circuit in *Ostergren* carefully framed the competing interests it needed to balance: Ostergren's right to engage in "political speech criticizing Virginia" on one hand, and the "right of privacy"[161] undermined by her publication of documents revealing SSNs on the other. In analyzing the case, the Fourth Circuit chose a rule generated over a thirty-five-year span in a string of cases that all involved traditional news organizations and the institutional press, rather than citizen journalists: (1) *Cox Broadcasting Corporation v. Cohn*,[162] involving the broadcast of the name of a deceased rape victim on an Atlanta television station; (2) *Oklahoma Publishing Company v. District Court*,[163] considering a challenge, to an injunction imposed on "members of the news media"[164] to stop them from publishing the name and photograph of a juvenile; (3) *Smith v. Daily Mail Publishing Company*,[165] involving a challenge to a West Virginia statute that criminalized publication without the written approval of the juvenile court, the name of any youth charged as a juvenile offender; and (4)

158. Adam J. Rappaport & Amanda M. Leith, *Brave New World? Legal Issues Raised by Citizen Journalism*, COMM. LAW., Summer 2007, *available at* http://www.lskslaw.com/publications/RappaportLeith.pdf.

159. Gary Wax, *Popping Britney's Personal Safety Bubble: Why Proposed Anti-Paparazzi Ordinances in Los Angeles Cannot Withstand First Amendment Scrutiny*, 30 LOY. L.A. ENT. L. REV. 133, 152 (2009) (analyzing proposed Los Angeles anti-paparazzi ordinances, and observing that "the proposed city ordinances may disproportionately target this type of important 'citizen journalism,' which should render the laws unconstitutional").

160. John Quiggin & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT. L.J. 203, 222—24 (2008) (using the term "citizen journalism" in a discussion of legal issues raised by new modes of amateur content production).

161. Ostergren v. Cuccinelli, 615 F.3d 263, 273 (4th Cir. 2010).

162. 420 U.S. 469 (1975).

163. 430 U.S. 308 (1977).

164. *Id.* at 308.

165. 443 U.S. 97 (1979).

Florida Star v. B.J.F.,[166] centering on a challenge to a state statute that made it unlawful to print, publish, or broadcast in any instrument of mass communication the name of the victim of a sexual offense.

After reviewing this quartet of cases,[167] the Fourth Circuit applied the *Daily Mail* standard to evaluate Ostergren's constitutional challenge.[168] The *Daily Mail* test provides that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[169] As Professor William Lee recently noted, this is now referred to as the *Daily Mail* principle.[170]

Two points support the argument that the Fourth Circuit treated Ostergren as if she were a member of the press. First, the appellate court chose a standard fashioned from a series of cases involving the First Amendment rights of members of the institutional press, not lone individuals.[171] Second, the court specifically noted that the Virginia Attorney General conceded during oral argument that, under the *Daily Mail* standard, "Ostergren's advocacy website cannot be distinguished from a television station or newspaper."[172]

To support the proposition that Ostergren's website should be treated, at least for First Amendment purposes, as a news product generated by a traditional member of the press, the Fourth Circuit cited a Washington district court case.[173] *Sheehan v. Gregoire* involved the operator of the website JusticeFiles.org[174] who published personally identifiable information, such as phone numbers and addresses, about law enforcement officers.[175] Washington thereafter enacted a law prohibiting:

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166. 491 U.S. 524 (1989).

167. *See* Ostergren v. Cuccinelli, 615 F.3d 263, 273—76 (4th Cir. 2010) (describing the four cases).

168. *Id.* at 276.

169. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979).

170. *Id.*; William E. Lee, *Probing Secrets: The Press and Inchoate Liability for Newsgathering Crimes*, 36 AM. J. CRIM. L. 129, 161 (2009).

171. *See supra* notes 162—166 (describing the facts in this trail of cases, with the facts making clear that all involved mainstream news media organizations).

172. *Ostergren*, 615 F.3d at 276 n.11.

173. Sheehan v. Gregoire, 272 F. Supp. 2d 1135 (W.D. Wash. 2003).

174. *Id.*; JUSTICEFILES.ORG, http://nittygrittyfiles.org (last visited Nov. 16, 2010).

175. As the website in September 2010 explained the reason for publishing this information about law enforcement officials:

> The site's owner believes that only with a continuing and accurate data base of police officers, prosecutors and those that are part of the criminal justice system, can true accountability in government be achieved. Some of the material here you might find may be objectionable. You may find the publication of court records here tasteless.

> release [of] residential address, residential telephone number, birthdate, or social security number of any law enforcement-related, corrections officer-related, or court-related employee or volunteer, or someone with a similar name, and categorize them as such, without the express written permission of the employee or volunteer unless specifically exempted by law or court order.[176]

Both Ostergren and Sheehan published, on their own websites, privacy-invasive information that they had lawfully obtained and, in both cases, a state government responded by passing a law restraining the further publication of such speech.

Judge John Coughenhour concluded in *Sheehan* that Sheehan's "website, a vehicle of mass communication, is analytically indistinguishable from a newspaper. It communicates truthful lawfully-obtained, publicly-available personal identifying information with respect to a matter of public significance police accountability."[177] The court thus found the standard from *Florida Star* particularly relevant, even though *Florida Star* involved a traditional weekly newspaper rather than an individual's website.[178] The *Florida Star* test, in fact, tracks the *Daily Mail* test, as the high court in *Florida Star* applies the *Daily Mail* test.[179]

The Fourth Circuit applied the standard to the facts in *Ostergren* in a straightforward fashion. First, Virginia conceded the first two elements of the test–that Ostergren lawfully obtained truthful information.[180] Second, the court quickly concluded that the information Ostergren posted related to a matter of public significance, reasoning that "displaying the contents of public records and criticizing Virginia's release of private information convey political messages that concern the public."[181] The Fourth Circuit

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> You might find the publication of home addresses and phone numbers an invasion of privacy. You might even find shocking the amount of personal information we have been able to obtain. However, keep in mind that the same information we present here, is information that the police themselves have easily at their disposal when they "investigate" the rest of us, often without any probable cause (as some of the people associated with this site have learned). For this reason, we believe that this site is merely an attempt to "level the playing field" for the average citizen when they are confronted unfairly by the massive power of the criminal justice system.

JUSTICEFILES.ORG, http://nittygrittyfiles.org (last visited Nov. 16, 2010).

176. WASH. REV. CODE § 4.24.680 (2010) (amended 2006).

177. *Sheehan*, 272 F. Supp. 2d at 1145.

178. *See id.* at 1144 ("In considering plaintiff's overbreadth challenge, the Court finds *The Florida Star* particularly relevant.").

179. *See* Florida Star v. B.J.F., 491 U.S. 524, 533 (1989) (reasoning that "in our view, this case is appropriately analyzed with reference to such a limited First Amendment principle. It is the one, in fact, which we articulated in *Daily Mail* in our synthesis of prior cases involving attempts to punish truthful publication.").

180. *See* Ostergren v. Cuccinelli, 615 F.3d 263, 276 (4th Cir. 2010) ("Virginia concedes that Ostergren lawfully obtained and truthfully published the Virginia land records that she posted online.").

181. *Id.*

then turned its attention, in much more detail, to the final question under *Daily Mail*: whether "Virginia has asserted a state interest of the highest order"[182] advanced in a "narrowly tailored"[183] fashion by Virginia's statute prohibiting Ostergren from publishing SSNs on her website.

Virginia claimed that "its interest in protecting individual privacy by limiting SSNs' public disclosure" constituted an interest of the highest order, thus framing the case as a battle between privacy rights and speech rights. [184] To assess whether this amounted to a compelling interest, the Fourth Circuit initially observed that "objective criteria can be considered when deciding what constitutes a state interest of the highest order."[185] The court also noted that it need not accept or acquiesce in Virginia's mere assertion of a compelling interest, wryly writing that "although a state government might demonstrate a fervent, consistently applied policy of punishing people for not cleaning up after their dogs, we would not therefore be compelled to consider this a state interest of the highest order."[186]

The Fourth Circuit then conducted an extensive examination of the history and purpose of Social Security numbers, as well as the related privacy concerns.[187] It found "a broad consensus that SSNs' public disclosure should be strictly curtailed,"[188] but declined to decide the question because its holding on the narrow-tailoring issue resolved the constitutional challenge.[189] The court then analyzed whether enforcement of Virginia's statute, which criminalized the intentional communication of another person's Social Security number to the general public, "would be narrowly tailored to Virginia's asserted interest in preserving individual privacy by protecting SSNs from public disclosure."[190] The court assumed that Virginia possessed an interest of the highest order, and then focused its attention on the narrow-tailoring analysis.[191]

The court next drew a subtle, but important, distinction between two types of privacy–protecting the control of staid personal information (as in *Ostergren*) versus the embarrassing information at

182. *Id.*
183. *Id.*
184. *Id.* at 276—77.
185. *Id.* at 277.
186. *Id.*
187. *Id.* at 277—80.
188. *Id.* at 280.
189. *Id.*
190. *Id.*
191. *See infra* notes 198—200 and accompanying text (describing the Fourth Circuit's analysis of the narrow tailoring question).

issue in *Cox Broadcasting* and *Florida Star* that "involved a particular conception of privacy whereby 'private' matters are those one would prefer to keep hidden from other people because disclosure would be embarrassing or compromising."[192] The latter privacy interest "hinges upon whether information has been kept secret, and protecting privacy involves ensuring that people can keep personal matters secret or hidden from public scrutiny."[193] The privacy interest in SSNs, however, is not about secrecy or secret keeping, because "people do not feel embarrassed when asked to provide their SSN; nor do they fear that their reputation will suffer when others find out that number. People worry only about how their SSN will be used–more specifically, about whether some unscrupulous person will steal their identity."[194]

This privacy dichotomy compounds the difficulty wrought by the shocking-speech dichotomy described in Part I: political speech that shocks because it offends notions of civil discourse and discussion (as in *Cohen* and *Johnson*) versus political speech that shocks because it potentially causes personal harm to one's financial security (as in *Ostergren*). In other words, the privacy interest at stake in *Ostergren* is different from the privacy interest at stake in the *Daily Mail* forerunners; and the shocking expression at issue in *Ostergren* is different from the shocking expression at issue in *Cohen* and *Johnson*. Viewed in this light, the factual scenario in *Ostergren* tested both privacy and shocking-expression jurisprudence. In this case, privacy gave way to freedom of expression, as Betty Ostergren prevailed.[195]

The Fourth Circuit ultimately concluded that the Virginia law lacked narrow tailoring because "Virginia currently makes those same records available through secure remote access without having redacted SSNs. The record reflects that 15 clerks of court have not finished redacting SSNs from their land records, which are nonetheless available online."[196] The court explained that the government must redact SSNs from its online records before it can silence Ostergren's speech, writing that "the First Amendment does not allow Virginia to punish Ostergren for posting its land records online without redacting SSNs when numerous clerks are doing precisely that."[197]

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192. *Ostergren*, 615 F.3d at 282.

193. *Id.*

194. *Id.* at 282—83.

195. *See infra* notes 196—200 and accompanying text (describing why the Fourth Circuit ruled in favor of Betty Ostergren).

196. *Id.* at 286.

197. *Id.*

The court suggested that "suspending secure remote access until the redaction process has ended" might be one way to more narrowly tailor the law.[198] The Fourth Circuit, however, made it clear that Virginia need not redact all of the hardcopy land records currently available in its brick-and-mortar offices before it could legitimately punish Ostergren. It recognized a "critical difference between original land records available from courthouses and digital land records available through secure remote access[,]"[199] and concluded that "the [Supreme] Court's First Amendment jurisprudence does not necessarily require that Virginia redact SSNs from all original land records maintained in courthouse archives before someone like Ostergren may be prevented from publishing them online."[200] Thus, when it comes to privacy, the medium makes a difference.

IV. CONCLUSION

As more people devote time to the Internet,[201] commerce naturally migrates online.[202] In 2010, "Internet sales [] soared 12.4% over the past year."[203] On "Cyber Monday" in 2008–the Monday after Thanksgiving–online merchants sold goods worth approximately $846 million in the United States.[204]

Virginia took this transformation into account when it succumbed to the real estate industry's lobbying pressures to make its citizens' land records available online.[205] The online posting of such data facilitates commerce because:

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198. *Id.* at 286 n.20.

199. *Id.* at 286.

200. *Id.* at 285.

201. *See* Susannah Fox, *Four in Ten Seniors Go Online*, PEW INTERNET AND AM. LIFE PROJECT (Jan. 13, 2010), http://pewinternet.org/Commentary/2010/January/38-of-adults-age-65-go-online.aspx (noting that the overall rate of Internet adoption in the United States is 74 percent).

202. *See generally* Stuart Waldman, *California Must Update Its Outdated E-Commerce Laws*, LA DAILY NEWS, Sept. 28, 2010, http://www.dailynews.com/opinions/ci_16189644 (asserting that "[s]ince 2000, Web sales have more than tripled to achieve a 19 percent compound growth rate.").

203. Kathleen Madigan, *Winter Doesn't Freeze U.S. Retail*, WALL ST. J. (Feb. 12, 2010, 2:30 PM), http://online.wsj.com/article/SB10001424052748703525704575061561564529490.html.

204. Ylan Q. Mui, *Record Traffic Expected for 'Cyber Monday'; E-Commerce Event to Draw 100 Million Shoppers, Group Says*, WASH. POST, Dec. 1, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/11/30/AR2009113002730.html.

205. As the Fourth Circuit wrote:

> During the 1990s, many clerks of court began placing land records on the Internet. According to counsel for the Attorney General, the *impetus came mainly from the real estate industry because online access to land records facilitated numerous real estate*

> knowing who has legal title to property . . . is necessary for real estate transactions. The presence of a tax lien can also affect a person's ability to buy or sell property or other goods. In some circumstances, Social Security numbers can help distinguish between people with common names.[206]

This shift in recordkeeping has increased privacy concerns, as illustrated by the forty-four states that have enacted laws "requiring entities, particularly businesses that maintain computerized PII [personal identifying information] of state residents, to notify those residents if their PII has been disclosed through a data breach."[207] These concerns are not only reasonable but, arguably, also very real–imagine if some stranger released your name and social security number to millions of people. Scared much? Betty Ostergren certainly is.

The *Arkansas Democrat-Gazette* described Ostergren as "a privacy fanatic and aspiring muckraker."[208] Characterizing her as a muckraker actually is quite appropriate; it reflects the now judicially recognized value of her role as a citizen journalist who effected changes in government policies relating to online information.[209] As described by veteran journalists Bill Kovach and Tom Rosenstiel:

> At the dawn of the twentieth century, a new generation of journalists dubbed "muckrakers" gave voice to reform at the local, state, and federal levels. Their detailed investigation and exposure of corrupt power, ranging from child labor abuses to urban political machines and railroad and oil trusts, led to a progressive movement in national politics.[210]

Betty Ostergren, as a member of the rising class of citizen journalists, represents the new archetypal watchdog: a lone citizen, observing, investigating, and reporting on government

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transactions. The Virginia General Assembly encouraged this practice by allowing clerks to charge a fee for online access.

Ostergren v. Cuccinelli, 615 F.3d at 266—67 (empahasis added); *cf.* Christina Nuckols, *She Knows All About You and You and You*, VIRGINIAN-PILOT (Norfolk, Va.), Feb. 19, 2005, at 1 (reporting on Betty Ostergren's activities, and noting that "many [Virginia county] clerks are under pressure from real estate agents and lawyers, titling companies and land developers to adopt the new technology").

206. Jonathan Krim, *A Matter of Public Record; Activist Aims to Scare Officials into Protecting Personal Data*, WASH. POST, May 25, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/05/24/AR2005052401347.html.

207. Robert Sprague & Corey Ciocchetti, *Reserving Identities: Protecting Personal Identifying Information Through Enhanced Privacy Policies and Laws*, 19 ALB. L.J. SCI. & TECH. 91, 104—05 (2009).

208. Editorial, *Hide! It's the Internet, Who's Afraid of Public Access?*, ARK. DEMOCRAT-GAZETTE (Little Rock), July 23 2008.

209. *See* Susan Llewelyn Leach, *Privacy Lost With the Touch of a Keystroke?*, CHRISTIAN SCI. MONITOR, Nov. 10, 2004, http://www.csmonitor.com/2004/1110/p15s02-stin.html (noting that "public pressure from people like Ostergren has slowed the movement toward online access in some counties and forced a closer assessment.")

210. BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM 115 (Crown Publishers 2001).

inefficiencies.[211] While she may not belong to the press, she assumes the function of a responsible, civically engaged reporter. The need for a watchdog over government inefficiencies and abuses should factor into judicial consideration in any future balancing between the First Amendment interests of watchdog citizen journalists and the privacy interest of citizens.

The *Ostergren* scenario, in fact, may reappear in the near future. For instance, imagine a public university that, accidentally or otherwise, makes private personal data about its students available online in violation of the Family Educational Right to Privacy Act.[212] A privacy watchdog like Betty Ostergren finds the data, realizes the problem, and then posts snippets of such data on her website. This provocative demonstration would certainly call attention to the privacy issue at the university, but it would also subject students to possible identity theft. Under *Ostergren*, the First Amendment would probably protect the online posting of the student information. The burden would fall on the government–in this case, the public university–to first clean up its own act before the operator of the website could face an injunction or punishment under the law. Here again, the operator of the website would have played a watchdog role, acting as a citizen journalist, particularly if she also garnered the attention of the mainstream news media to reach a wider audience.

In addition, other states situated within different federal appellate court jurisdictions might adopt statutes similar to the one struck down by the Fourth Circuit in *Ostergren* targeting Social Security numbers. For instance, Betty Ostergren's work affected real-estate documents in Arkansas after she posted on her website the Social Security number of former North Little Rock Mayor Terry Hartwick.[213] That action prompted Pulaski County Clerk Pat O'Brien to "temporarily disable the real-estate section of his office's online archive after discussions with Attorney General Dustin McDaniel and his staff."[214] If Arkansas adopted a law like Virginia's statute, *Ostergren* would not bind the federal courts in Arkansas, which belong to the Eighth Circuit.

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211. The governmental inefficiency on which Betty Ostergren was reporting was Virginia's failure to efficiently and effectively serve the privacy interests of its citizens. *See supra* Introduction (describing what Ostergren did that gave rise to the case at the center of this Article).

212. 20 U.S.C. § 1232g (2010). This scenario certainly is not farfetched. *See* Joey Flechas, *Former Students' Personal Information Leaked*, INDEP. FLA. ALLIGATOR, Sept. 30, 2010, http://www.alligator.org/news/campus/article_552609d6-cc51-11df-b4cb-001cc4c03286.html (reporting that "the names, addresses and Social Security numbers of 239 former students were compromised from 2003 until" August 2010 at the University of Florida in Gainesville).

213. Williams, *supra* note 152.

214. *Id.*

A 2008 Government Accountability Office report found, in a survey of counties across the country, that only 12% had "completed redacting or truncating SSNs that are in public records . . . and another 26% are in the process of doing so."[215] In other words, plenty of work remains for Betty Ostergren and other citizen-journalist watchdogs in the immediate future, creating the possibility–even a probability–of future disputes pitting informational privacy against free speech in the context of Social Security numbers.

Whether the First Amendment's dual objectives in protecting shocking speech and safeguarding common citizens triumph over the informational privacy interest in SSNs in future cases depends on whether other courts will extend the Supreme Court's shock-value cases of *Cohen* and *Johnson*, as the Fourth Circuit did in *Ostergren*. Although the Fourth Circuit recognized a fundamental difference in the privacy interest asserted in *Cox Broadcasting* and *Florida Star* compared with the one at issue in *Ostergren*,[216] it apparently failed to draw a distinction between speech that shocks because it violates norms of civil discourse–causing anger and emotional outrage (*Cohen* and *Johnson*)–and speech that shocks because it intrudes on one's financial security (*Ostergren*). In summary, *Ostergren v. Cuccinelli* may be interpreted as a victory for freedom of expression, the watchdog function of the press played by citizen journalists, and the shock-value line of cases in First Amendment jurisprudence.

Finally, note that this Article examined privacy in the context of information held by government entities, not by corporations or individuals. As Professor Michael Froomkin recently observed, "private data held by the government is not the same as private data held by others."[217] While state governments are increasingly vigilant when it comes to requiring notification by businesses regarding security breaches of their data,[218] they must now be more vigilant with their own online storage and posting of private personal information.

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215. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1009R, SOCIAL SECURITY NUMBERS ARE WIDELY AVAILABLE IN BULK AND ONLINE RECORDS, BUT CHANGES TO ENHANCE SECURITY ARE OCCURRING 4 (2008), *available at* http://www.gao.gov/new.items/d081009r.pdf.

216. *See supra* notes 162—200 and accompanying text.

217. A. Michael Froomkin, *Government Data Breaches*, 24 BERKELEY TECH. L.J. 1019, 1019 (2009).

218. Priscilla M. Regan, *Federal Security Breach Notifications: Politics and Approaches*, 24 BERKELEY TECH. L.J. 1103, 1109 (2009) ("[A]s of June, 2009, forty-four states had passed a security breach notification law.").