Vanderbilt Law Review

Volume 60 | Issue 1 Article 6

1-2007

First Amendment Protection for the Publication of Private Information

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I. INTRODUCTION

Over one hundred years ago, Samuel Warren and Louis Brandeis wrote, "Of the desirability—indeed of the necessity—of some protection [of the right of privacy], there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and decency."[1] This observation rings even more true today than it did when it was made in 1890. In the past hundred years, members of the media have drastically revised the unwritten rules regarding what topics are fair game. While media outlets uniformly declined to publish photographs of Franklin Delano Roosevelt in a wheelchair while he was president, the press today rarely exercises any similar kind of restraint when reporting on the private lives of presidents or even ordinary citizens.[2] One would imagine that Bill Clinton would have been thrilled if the modern White House Press Corps had been willing to broker such a gentleman's agreement with regard to the publication of pictures or information that shed light on the intimate details of his personal life. As the Supreme Court of California recently observed, "While even in their day Brandeis and Warren complained that 'the details of sexual relations are spread broadcast [sic] in the columns of the daily papers,' today's public discourse is particularly notable for its detailed and graphic discussion of intimate personal and family matters."[3] Further, the media's technological capacity to invade the private sphere and to subsequently broadcast private facts quickly to a national and even global audience is unprecedented. [4] Today's press is more than willing to use this power to transgress a previously off limits zone of privacy.

Individuals have not sat idly by as the press has pushed the envelope regarding what sorts of information are appropriate subjects of public scrutiny. Private parties have fought back, using both

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1. Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

2. *See* Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1098 (1999) (arguing that while "portrayals of the common person have always been important" in hoth mass and elite culture, "[s]tories about ordinary people . . . appear to be increasing in quantity, in intensity, and in their degree of penetration into private lives," as "'[r]eality television' programs, talk shows such as Jerry Springer, and a greater emphasis on 'human interest' stories even in mainstream news reporting have all contributed to a dissolving of the line between public and private figures").

3 Shulman v. Group W Prods., Inc., 74 Cal. Rptr. 2d 843, 847 (Cal. 1998) (internal citation omitted).

4. *Id.* at 1098 ("What was once the high-tech exotica of spy movies is now readily available to the upscale mail-order customer: cameras that can fit within a pair of eyeglasses, microphones that hear through walls from afar to pick up the sighs and whispers of the bedroom, and telephone taps that can make anyone a fully-equipped Linda Tripp`.").

common law and statutory weapons, including rape shield laws, electronic privacy statutes, and the private facts tort. Each provides individuals with a right of action against the press for publishing private information. However, while these legal remedies may provide some relief to plaintiffs who have seen intimate and highly sensitive information about themselves revealed in the pages of newspapers or broadcast on the nightly news, they present a serious First Amendment problem. The right to privacy provided by these laws gives individuals, as Eugene Volokh has put it, "a right to stop people from speaking about you."[5] Such a right is, for obvious reasons, fundamentally in tension with the Free Speech Clause of the First Amendment, which provides that the state shall "make no law... abridging the freedom of speech, or of the press."[6]

The Supreme Court has addressed the tension between speech and privacy in a number of cases, but it has failed to establish a clear framework for dealing with it. The Court's decisions in this area have either rested upon narrow grounds unique to a specific statutory scheme or have been decided with only the most perfunctory analysis. The Court has adopted a completely ad hoc analytical approach that not only lacks elegance, but also fails to present a coherent approach to this area of the law or identify the fundamental theoretical and doctrinal tensions at work. This failure is all the more disappointing because the tension between privacy and speech is by no means a completely novel First Amendment issue; existing First Amendment theory and doctrine provide significant guidance regarding the proper analytic framework for dealing with privacy laws.

This Note argues that the Court's existing general free speech framework is perfectly capable of dealing with the tension between speech and privacy, and explains how this framework should be applied in cases that present a conflict between these two interests. The Note starts from first principles and situates this conflict in the context of the theoretical underpinnings of the Free Speech Clause, and examines how speech on private matters fits within this broader framework. Part II of this Note begins by discussing several competing conceptions of the First Amendment's underlying purpose and argues that the Court has correctly chosen to view free speech more as a systemic right than an individual right. Part III outlines a

5. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1049 (2000).

6. U.S. CONST. amend. I. The First Amendment's strictures have been held to apply to the states through the Due Process Clause of the Fourteenth Amendment. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 337 n.1 (1995) ("The term 'liberty' in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States.")

doctrinal approach to First Amendment cases that best supports the systemic model's vision of the purpose of free speech. This Part also illustrates how the Court's current framework closely mirrors the ideal framework under the systemic model. Part IV uses this theoretical and doctrinal framework to analyze various arguments that could be made for restricting speech to serve privacy interests, and concludes that none justify restricting the publication of private information. Part V reviews the Court's treatment of the tension between privacy and speech interests and critiques it in light of the framework developed in the prior Parts of this note.

II. THE VALUES UNDERLYING THE FREEDOM OF SPEECH

A number of different theories have been put forth regarding the fundamental values underlying freedom of speech. These different conceptions can be grouped into two general classes. First, a number of theorists see free speech as primarily serving individual interests in autonomy and self-fulfillment.[7] For example, Professor David Richards writes:

> [T]he significance of free expression rests on the central human capacity to create and express symbolic systems, such as speech, writing, pictures, and music, intended to communicate in determinate, complex and subtle ways. Freedom of expression permits and encourages the exercise of these capacities: it supports a mature individual's sovereign autonomy in deciding how to communicate with others; it disfavors restrictions on communication imposed for the sake of the distorting rigidities of the orthodox and the established. In so doing, it nurtures and sustains the self-respect of the mature person.[8]

Richards sees speech as an end in itself; any society-wide benefit that may accrue as a result of parties exercising their individual right to speak is simply icing on the cake.[9]

A competing vision of the Free Speech Clause of the First Amendment posits that the primary value of free speech lies not in the importance of speech to the individual, but in the wider societal benefits that accrue as a result of the free and open discussion of ideas within that society.[10] Under this view, the existence of a vigorous public debate is important not simply because it contributes to the abstract search for truth, but because it is essential to the very

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7. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 5 (1989); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 11 (1984); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 353-55 (1991).

8. David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

9. *Id.* at 62-63.

10. See ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25-26 (1948).

structure of democratic government.[11] The fundamental premise of democratic government is that political power ultimately lies in the hands of the people.[12] The only way that such a system can produce effective policies that represent the will of the people is if the public has access to all relevant information and is able to discuss and debate the relative merits of a given policy choice. If information and public debate is distorted or seriously restricted by the government, the public will not be able to effectively exert its power to bring about desired results. The success of any democratic exercise is thus dependant on the people's ability to comprehend fully the nature of a policy issue and the probable results of any particular course of action. As Owen Fiss argues, "The purpose of free speech is . . . the preservation of democracy, and the right of a people, as a people, to decide what kind of life it wishes to live."[13] Under this conception of the Free Speech Clause, protection of speech may incidentally benefit the individual speaker's interest in autonomy or self-fulfillment, but the Clause must primarily be interpreted as an integral structural component of democratic government.

Among those who advocate viewing speech primarily in terms of its systemic significance to democratic government, there are two competing theories of how best to preserve the right of the people "to decide what kind of life it wishes to live."[14] The "marketplace of ideas" theory posits that the collision of competing viewpoints in a robust and unregulated public debate is the most effective way to ensure the eventual triumph of the truth and the maintenance of an informed and vigilant public.[15] Under this theory, the most persuasive viewpoints will win the most adherents while unconvincing arguments

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11. *Id.* at 26-27.

12. *See, e.g.*, George J. Annas, *The Man on the Moon, Immortality, and Other Millennial Myths: The Prospects and Perils of Human Genetic Engineering*, 49 EMORY L.J. 753, 772 (2000) ("[I]t is a fundamental premise of democracy that all humans, even the poor, must have a voice in determining the future of our species and our planet."); Amy Gutmann, *What is the Value of Free Speech for Students?*, 29 ARIZ. ST. L.J. 519, 528 (1997) ("A fundamental premise of constitutional democracy (or what the founders called a 'republic' as distinct from a direct and constitutionally unconstrained democracy) is that citizens and their accountable representatives collectively make both better and more legitimate decisions than if self-appointed guardians control their speech and make decisions for them."); Louis M. Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1571 (1988) (The "ability of an elite corps of judges to wield enormous power that is unchecked by popular opinion and criticism seems to contradict liberal democracy's fundamental premise.").

13. OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 13 (1996).

14. *Id.*

15. *See* Reno v. ACLU, 521 U.S. 844, 885 (1997); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 831 (1995); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

and falsity fall by the wayside.[16] This vision of the First Amendment was famously articulated by Justice Oliver Wendell Holmes in his dissenting opinion in *Abrams v. United States*, in which he stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[17]

A number of theorists criticize the marketplace framework on the grounds that a completely unregulated public discussion will not necessarily provide all viewpoints with a fair hearing.[18] This school of thought is most closely associated with the work of Alexander Meiklejohn, who asserted that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."[19] For Meiklejohn and those who follow in his ideological footsteps, under some circumstances it may be necessary to "restrict the speech of some elements in our society in order to enhance the relative voice of others."[20] While a complete discussion of this debate is beyond the scope of this Note, the practical difficulties of instituting and effectively administering such a limited censorship model and the very high risk that such a theory could be used to justify undue suppression of ideas counsel against adopting such an approach even if it is sound in theory.[21]

The systemic and individual rights views of the underlying purpose of the Free Speech Clause are not mutually exclusive, but the Court has most often and most powerfully articulated the importance of the clause in terms of its systemic significance.[22] In fact, the Court appears to have recognized explicitly the subordinate position of the individual "self expression" model in observing that "speech

16. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

17. *Id.*

18. *See, e.g.*, FISS, *supra* note 13, at 30; CATHARINE A. MACKINNON, ONLY WORDS 72-73 (1993); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 61 (2d ed. 1960); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 385-86 (1991); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 176-77 (1982); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 467-68.

19. MEIKLEJOHN, *supra* note 18, at 26.

20. FISS, *supra* note 13, at 30.

21. *See infra* Part IV.A.4 (discussing in more depth the problems with suppressing some speech in order to further the larger goals of the systemic model).

22. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."); Roth v. United States, 354 U.S. 476, 484 (1957) (stating that the First Amendment's guarantee of freedom of expression "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

concerning public affairs is more than self expression; it is the essence of self government."[23]

This position makes eminent sense. The tremendous solicitude that the Court demonstrates when dealing with speech simply cannot be justified solely or primarily in terms of promoting individuals' interest in self expression. While the ability to express oneself freely may play an important role in promoting individual autonomy and self-fulfillment, any number of other individual interests could similarly be said to be necessary prerequisites for the attainment of these objects. For example, a good education, high-quality medical care, gainful employment, and a stable family life are all arguably necessary for the achievement of self-fulfillment. It makes little sense to read the First Amendment's prohibition on abridging the freedom of speech to be aimed primarily at promoting individual autonomy when so many other interests equally important to individual autonomy are not similarly protected. In contrast, the central position that freedom of speech holds in the constitutional framework is clearly justified if one views the free and open exchange of ideas as essential to the very structure of democratic government.

III. FIRST AMENDMENT DOCTRINE AS THE PRODUCT OF A SYSTEMIC VISION OF THE IMPORTANCE OF FREE SPEECH

Assuming that one accepts the systemic perspective on the underlying purpose of the First Amendment's Free Speech Clause, the clause should be interpreted in a way that ensures the realization of the thriving marketplace of ideas that the systemic view holds to be vital to the functioning of democratic government. The Supreme Court's current overarching doctrinal approach is perfectly constructed to address the two different categories of speech regulations that pose a problem under the systemic model: First, laws that censor specific content; second, laws that reduce the aggregate amount of speech in the marketplace.

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23. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). Occasionally, the Court's opinions seem to place the self-expression model alongside the systemic model as an equally compelling interpretation of the First Amendment, but this is belied by the actual analysis in these opinions, in which the Court focuses on the broader social importance of speech as opposed to the importance of speech to the individual. *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130, 149, 152 (1967) (stating that the First Amendment "is as much a guarantee to individuals of their personal right to make their thoughts public and put them before the community . . . as it is a social necessity required for the 'maintenance of our political system and an open society,'" but analyzing what areas of speech are theoretically deserving of First Amendment protection based upon "which are of significant social value and . . . which might be suppressed without serious social harm").

Governmental regulations that punish the expression of particular content are deeply problematic because they seek to shape and manipulate the marketplace of ideas.[24] Such content distortion violates the most basic principle of democratic government by denying the public the opportunity to make a fair and reasoned assessment of a class of ideas that may alter its policy preferences.[25] Content-based regulations allow the government—not the people—to set the political agenda and dictate the scope of public debate, thereby depriving the public of the fundamental right to "decide what kind of life it wishes to live."[26] Such regulations are therefore suspect even if they are not necessarily hostile to the message conveyed by the banned content. Although deliberate censorship of certain viewpoints may present a particularly acute First Amendment problem, "viewpoint-neutral" content-based regulations still manipulate public discussion by declaring certain topics "off limits."[27]

Content regulations, however, are less problematic if they target expression that is not part of the ultimate marketplace ideal. The systemic model aims to create conditions under which an open and frank public dialogue can take place so that members of the voting public can make fully informed choices about how to exercise their political power. Under this model, the ideal marketplace is a participatory forum for discussion whose aim is to further greater understanding of the world in which the participants live. There are certain categories of speech that not only fail to add to this vision of public dialogue, but can substantively impair it. These categories include, among others, false statements of fact and speech that advocates the overthrow of the government or some other illegal act. False statements do not add to the aggregate amount of knowledge in

24. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198 (1983) ("[T]he [F]irst [A]mendment is concerned, not only with the extent to which a law reduces the total quantity of communication, but also - and perhaps even more fundamentally - with the extent to which the law distorts public debate.").

25. FISS, *supra* note 13, at 65-66.

26. *Id.* at 13.

27. Some writers argue that viewpoint-neutral, content-based regulations do not pose any greater threat to speech than content-neutral laws, and as a result all viewpoint-neutral speech regulations, including both content-based and content-neutral regulations, should be subject to tbe same level of scrutiny. *See* Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 544-46 (1980) (Stevens, J., concurring); Paul Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 *passim* (1982). Justice Stevens points out that some "content-based" restrictions, such as barring speecb about baseball in a law school class or regulating oral arguments in the Supreme Court, do not pose any serious threat to First Amendment values. *See Consol. Edison*, 447 U.S. at 544-46 (Stevens, J., concurring).

the marketplace.[28] They can only serve to mislead individuals, causing them to view the world based on faulty factual assumptions.[29] Speech that advocates revolution or other illegal acts is not logically protected under the systemic theory because its goal is to undermine the very system that the systemic theory seeks to preserve.[30] The purpose of free speech under the systemic model is to better enable the public to make informed choices about policy issues, including what sorts of binding legal obligations to establish.[31] Advocating for the violation of laws that are the product of that democratic process is, therefore, content that can be excluded from the marketplace without violating the underlying purpose of the First Amendment.

The Supreme Court takes account of this "low" value speech by employing a two-tiered approach in the content-based realm. This approach affords "core" First Amendment speech significant protection while providing "certain well-defined and narrowly limited classes of speech," which "are no essential part of any exposition of ideas" far less of a constitutional shield.[32] If the Court determines that the speech at issue is not of "low" value, it will review the regulatory interference with speech under a standard that approaches absolute protection, subjecting it to "the most exacting scrutiny."[33] This strict scrutiny approach reflects the Court's belief that "above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[34] To overcome strict scrutiny, the government must show that the regulation serves a "compelling interest" and that it has chosen "the least restrictive means" to further that interest.[35] The Court is particularly hostile to "viewpoint-based" regulations, a subcategory of content-based restrictions aimed solely at suppressing

28. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues.").

29. *Id. But see* John Stuart Mill, *On Liberty*, *in* ON LIBERTY AND OTHER ESSAYS 22 (1998) (arguing that even false statements of fact should not be censored).

30. Dennis v. United States, 341 U.S. 494, 545, 549 (1951) ("On any scale of values which we have hitherto recognized, speech of this sort ranks low . . . . Of course no government can recognize a 'right' of revolution, or a 'right' to incite revolution if the incitement has no other purpose or effect.").

31. *See* FISS, *supra* note 13, at 13.

32. Chaplinksy v. New Hampshire, 315 U.S. 568, 571-72 (1942), *superseded by statute*, ALA. CODE § 13A-11-8 (LexisNexis 2006).

33. Boos v. Barry, 485 U.S. 312, 321 (1988).

34. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

35. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

a disfavored message.[36] The Court appears to view such regulations as per se unconstitutional.[37]

The Court applies far less exacting standards of review to content-based restrictions on low value speech, including false statements of fact, advocacy of an illegal act, obscenity, commercial speech, and fighting words.[38] Of course, the Court may be wrong about exactly which classes of speech properly fall into the low value category, but, as discussed above, the idea of excluding some of these categories from the marketplace of ideas is at least sound in theory under the systemic model.[39]

The second category of government regulation that presents a First Amendment problem is content-neutral regulation that incidentally affects speech interests. Governmental regulations that do not single out particular content for unfavorable treatment but that nonetheless curb an individual's ability to express himself are problematic because they shrink the aggregate amount of information and opinion that reaches the marketplace.[40] The systemic model's vision of the marketplace of ideas is not concerned solely with preventing manipulation and distortion of the marketplace. This

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36. Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is any 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."). Although some writers have argued that the Court should *only* apply the compelling interest standard to viewpoint-based restriction on speech, *see* Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 544-46 (1980) (Stevens, J., concurring); Stephan, *supra* note 27, at 203, the Court has applied the compelling interest test to a number of viewpoint-neutral, content-based regulations. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (striking down a rule barring candidates for judicial office from discussing issues likely to come before the courts). However, the Court appears to apply a less-rigorous version of the compelling interest test to viewpoint-neutral, content-based regulations. *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding a restriction on political speech near polling places after applying strict scrutiny).

37. *Johnson*, 491 U.S. at 414

38. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 (1976) (commercial speech); Gertz v. Robert Welch Inc., 418 U.S. 323, 340 (1974) (defamation); Miller v. California, 413 U.S. 15, 36 (1973) (obscenity); Brandenberg v. Ohio, 395 U.S. 444, 447 (1969) (advocacy of an illegal act); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words), *superseded by statute*, ALA. CODE § 13A-11-8 (LexisNexis 2006).

39. The Court has been strongly criticized for including commercial speech and obscenity in the low value category. *See, e.g.*, 44 Liquormart v. Rhode Island, 517 U.S. 484, 519-28 (1996) (Thomas, J., concurring) (commercial speech); *Miller*, 413 U.S. at 37-47 (1973) (Douglas, J., dissenting) (obscenity).

40. *See* Stone, *supra* note 24, at 192-93 ("The Court's primary concern in the content-neutral realm is that such restrictions, by limiting the availability of particular means of communication, can significantly impair the ability of individuals to communicate their views to others. This is, of course, a central first amendment concern, for to the extent that content-neutral restrictions actually reduce the total quantity of expression, they necessarily undermine the 'search for truth,' impede meaningful participation in 'self-governance,' and frustrate individual 'self-fulfillment.' ").

model also aims to ensure the existence of an active public dialogue. The fact that a given regulation burdens all content equally is of little consolation if its practical effect is to completely or substantially prevent all speakers from engaging in open and vigorous discussion. Preventing targeted censorship and government manipulation accomplishes little if expression has been squeezed out by neutral regulation that incidentally burdens speech.

In contrast to content-based regulations, content-neutral regulations are not necessarily problematic under the systemic model of free speech.[41] While it is generally never permissible for the government to pick and choose what ideas or information to suppress, dampening expression in an evenhanded manner does not present a serious First Amendment problem unless the restriction limits the ability of an idea or piece of information to be effectively conveyed in the marketplace of ideas.[42] Even then, some reduction in the ability to express information may be palatable under the systemic rights theory if the government has an appreciable interest in the speech-restricting regulation and the speaker has alternative means of expressing that information.[43]

The Court has formulated several different tests that seek to address the speech concerns raised by content-neutral regulations that have an incidental impact on speech. When a law regulates "expressive conduct," such as burning a draft card, in which " 'speech' and 'non-speech' elements are combined in the same course of conduct", the Court has stated that the regulation will be sustained

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[44]

The Court has also articulated a standard for laws that regulate the time, place, or manner of expression on public property: in places that serve as traditional public forums or have been designated by the state as a place of expressive activity, the state may enforce time, place, or manner restrictions "which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[45]

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41. *Id.* at 193.
42. *Id.* at 193, 198.
43. *Id.* at 193.
44. United States v. O'Brien, 391 U.S. 367, 376-77 (1968).
45. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

The time, place, or manner standard appears to be substantially different from the expressive conduct standard, in that the former requires a consideration of the alternative channels left open to the speaker. However, in reality the burden on the government to demonstrate the existence of a substantial interest and the absence of less restrictive alternatives varies in the expressive conduct standard depending on the speaker's available alternative means of expression.[46] Further, the Court has stated that the expressive conduct test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions."[47] This makes sense, as both scenarios present essentially the same problem—the restriction on the use of a particular means of communication. The Court's various multi-pronged tests in this area of the law simply appear to be rather clumsy attempts to mask what ultimately is a simple exercise in balancing the weight of the interests on each side of the speech equation discounted by the available alternative means available to further these interests.[48]

IV. PRIVACY IN THE SYSTEMIC RIGHTS MODEL

If speakers choose to reveal intimate details about private parties, under what conditions, if any, can the state penalize them for doing so? Giving individuals "a right to stop people from speaking about you" presents an obvious First Amendment problem.[49] Such a right is fundamentally in tension with the concept of free and open debate that lies at the heart of the systemic rights theory of free speech. This Section discusses two categories of privacy statutes and evaluates various arguments for and against their constitutionality. First, rights of action that permit an individual to seek damages for the publication of defined private content are discussed.[50] Second, statutes that provide a right of action for the publication of "stolen" information, in which the individual can seek damages not because of the content of the published information but because of the means in which it was obtained, are considered.[51]

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46. Stone, *supra* note 24, at 191 & n.5.

47. Clark v. Cmty. for Creative Nonviolence, 468 U.S. 288, 298 (1984).

48. *See* Stone, *supra* note 24, at 210 (arguing that the Court's content-neutral approach is in reality far more flexible than one would think based on the language of the standard alone).

49. *See* Volokh, *supra* note 5, at 1069.

50. *E.g.*, FLA. STAT. § 794.03 (1987) (illegal to publish a rape victim's name); GA. CODE ANN. § 16-6-23 (2006) (same); S.C. CODE ANN. § 16-3-730 (2005) (same); W. VA. CODE ANN. § 49-7-3 (LexisNexis 2006) (illegal to publish a juvenile's name in connection with court proceeding); WIS. STAT. ANN. § 942.02 (West 1958) (same) (repealed 1976); RESTATEMENT (SECOND) OF TORTS § 652 (1977) (private facts tort).

51. *E.g.*, 18 U.S.C. § 2511(1)(c) (2006).

A. Content-Based Restrictions on the Publication of Private Information

There are two species of legal actions that provide for the punishment of speakers based upon their publication of private content: statutory prohibitions on the publication of specifically enumerated categories of information and the more general disclosure of private facts tort. Specific statutory prohibitions are very straightforward and provide for the imposition of either civil or criminal penalties for publishing a narrow designated class of protected information, such as the names of juvenile offenders or rape victims.[52] In contrast, the public disclosure tort is a broader right of action that applies to any information that may be considered "private."[53] The private facts tort is highly fact-sensitive and requires the application of principles that are somewhat vague and not easily defined or applied.[54] According to the Second Restatement of Torts's definition of the "publicity given to private life" tort, "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."[55]

Both statutory prohibitions on publishing certain information and the private facts tort are content-based interferences with speech. They represent a judgment that publicizing this sort of content is inherently bad or inappropriate. As such, these restrictions can only be justified under the systemic model of speech that underlies the Court's First Amendment jurisprudence if: (1) private information, or at least the private information that is suppressed by these restrictions, is not part of the marketplace ideal that the systemic model seeks to advance, (2) there is a competing constitutional right that must be balanced against free speech, (3) the government can satisfy the compelling interest test, or (4) privacy rights enhance rather than restrict speech. This Section considers the validity of each of these arguments in turn. It also considers the possibility that these "privacy rights" could be reconceptualized as "property rights," and as a result be viewed as content-neutral protections of property subject to

52. *E.g.*, FLA. STAT. ANN. § 794.03 (West 2006) (illegal to publish a rape victim's name); GA. CODE ANN. § 16-6-23 (2006) (same); S.C. CODE ANN. § 16-3-730 (2006) (same); W. VA. CODE ANN. § 49-7-3 (LexisNexis 2006) (illegal to publish a juvenile's name in connection with court proceeding); WIS. STAT. ANN. § 942.02 (West 2006) (same).

53. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

54. *Id.*

55. *Id.*

a significantly less searching standard of review, rather than as content-based restrictions on speech subject to strict scrutiny.

1. Private Information as "Low" Value Speech

Examples of facts that are generally considered private under the common law include information relating to sexual relations; family quarrels; unpleasant, disgraceful or humiliating illnesses; intimate personal letters; and details of a person's activities in his home.[56] While at first blush such information may seem to have no legitimate place in the marketplace of ideas, the idea that one can make a theoretical distinction between "newsworthy" and "non-newsworthy" information based upon the "privateness" of that information, or that independent of "privateness" one can make a principled distinction between newsworthy and non-newsworthy private information, is questionable in theory and unworkable in practice. Any inquiry into whether a piece of private information is "newsworthy" inevitably devolves into a value-laden subjective inquiry into what criteria "right thinking" members of society should consider when making decisions.[57] This is precisely the sort of manipulation of the marketplace of ideas that the First Amendment seeks to guard against.

There is no reason to think that "private" information does not add substantively to the marketplace of ideas. Information about other people's most intimate private affairs can fundamentally affect how we view the world and what we think about various public policies.[58] Indeed, the Second Restatement of Torts concedes that intimate private information pertaining to

> homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, a rare disease, the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal is newsworthy.[59]

The private lives of celebrities in particular have the capacity to cause major shifts in public opinion. For example, the well-publicized "coming out" of Ellen Degeneres and Rosie O'Donnell had a significant effect on the public debate over the morality of

56. *Id.* at § 652D cmt. b.

57. *See* Volokh, *supra* note 5, at 1089-95.

58. *Id.*

59. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977).

homosexuality.[60] Similarly, Magic Johnson's announcement that he was HIV-positive had a dramatic impact on the way a number of Americans viewed the AIDS epidemic.[61]

The Restatement tries to draw a line between newsworthy and non-newsworthy information "when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern."[62] However, speech that could be categorized as "morbid and sensational prying into private lives for its own sake" can affect public opinion just as much as speech on more "legitimate" topics. Information about our neighbors' sex lives, for example, informs our views about what is "normal" and socially-acceptable behavior. Discovering that a respected member of the community is gay might change public perceptions about the morality of homosexuality and the desirability of extending antidiscrimination laws to include sexual orientation or adopting a constitutional amendment banning gay marriage. Professor Volokh points out that speech on such "daily life matter[s] . . . indirectly but deeply affects the way we view the world, deal with others, evaluate their moral claims on us, and even vote; and its effect is probably greater than that of most of the paintings we see or the editorials we read."[63]

While one person may believe that a person's sexuality has nothing to do with their capacity to serve in public office, someone else

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60. *See, e.g.*, Stuart Elliott, *A Niche No More: Gay Celebrities are in Demand as Endorsers for Mainstream Campaigns*, N.Y. TIMES, Mar. 10, 2004, at C10 (discussing how the increasing visibility of gays and lesbians in popular culture through shows like "Queer Eye for the Straight Guy" and "Will and Grace," as well as "decisions by stars like Ellen DeGeneres and Rosie O'Donnell to openly discuss their sexuality," has led mainstream advertisers to feel more comfortable hiring gay and lesbian celebrities to endorse their products despite concerns that by doing so advertisers will expose themselves to complaints that "they are themselves endorsing what the critics describe as the homosexual agenda"); Alison Glock, *She Likes to Watch*, N.Y. TIMES, Feb. 6, 2005, § 2 (Television), at 26 (discussing how lesbianism has become "hip" as a result of a number of events and trends in popular culture, and stating "Reality dating shows revealed girls necking in hot tubs. Rosie O'Donnell came out. Girls went wild. Madonna planted one on Britney. Ellen DeGeneres's sexuality, once viewed as toxic enough to sink a sitcom, morphed into a nonissue benign enough for her to have her own daytime chat show").

61. *See, e.g.*, Nina Bernstein, *For a Promising but Poor Girl, A Struggle Over Sex and Goals*, N.Y. TIMES, Mar. 8, 2004, at A1 ("For an earlier generation, the safe-sex message may have come home when Magic Johnson announced he was infected with H.I.V. and retired from basketball in 1991."); Benoit Denizet-Lewis, *Double Lives On The Down Low*, N.Y. TIMES, Aug. 3, 2003, § 6, at 28 (stating that the fiction that AIDS was just a white disease "ceased to be viable when Magic Johnson told a national television audience that he was H.I.V.-positive. AIDS organizations were flooded with calls from panicked black men and women wanting to know more about the disease"); Tricia Rose, *The New AIDS Fight; Race, Sex and Stigmas*, N.Y. TIMES, Mar. 1, 2003, at A19 ("For African-Americans, Magic Johnson is the public face of AIDS.").

62. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

63. Volokh, *supra* note 5, at 1093.

may believe that it is a highly relevant criterion that reflects on the moral stature of a candidate. A court declaring a person's sexuality to be a relatively unimportant topic of public discussion essentially amounts to a court imposing its value judgment on the rest of society and usurping the public's right to make its own decision about what characteristics are pertinent to a candidate's fitness for office.[64] Volokh is particularly cogent on this point: "Judges are of course entitled to have their own views about which things 'right-thinking members of society' should 'recognize' and which they should forget; but it seems to me that under the First Amendment members of society have a constitutional right to think things through in their own ways."[65]

It is difficult to think of a piece of private information that in no way concerns a topic of public significance. The Court seems to recognize this, having held the name of a rape victim to be a matter of public concern. [66] While the name of a rape victim may seem to add relatively little to the marketplace of ideas, it does add something. Referring to a rape victim anonymously detracts from the narrative power of a news story; if a reader, listener, or viewer knows the actual name of a victim, this may better impress upon them the true seriousness of the crime, especially if they live in a small enough community that they know the victim either personally or by reputation. The Court has pointed out the narrative power of the "concrete and particular" in the context of a lawyer presenting evidence before a jury, a situation which can be analogized to a reporter telling a story to his reader, viewer, or listener:

> Evidence . . . has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them . . . . When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment.[67]

Both the lawyer in the courtroom and the journalist in the pressroom seek to accomplish the same objective—to create a powerful narrative that grabs the audience and forces them to actively engage the facts of a case or a story. Being able to employ the "persuasive

64. *Id.* at 1089-92.

65. *Id.* at 1091.

66. Fla. Star v. B.J.F., 491 U.S. 524, 536-37 (1989) (holding that the news article in which a rape victim's name was released concerned a "matter of public significance").

67. Old Chief v. United States, 519 U.S. 172, 187-88 (1997).

power of the concrete and particular" is essential for both "storytellers" to do this effectively.

The one category of private content that comes the closest to being absolutely devoid of any newsworthy value, either in enabling individuals to make decisions about political candidates or daily life issues, is graphic depiction of people in the most compromising situations, such as having sexual intercourse or using the bathroom.[68] It may seem questionable whether employing such a graphic depiction as opposed to a toned-down synopsis would truly enhance the narrative power of a news story. If a blogger wants to point out the hypocrisy of a politician having an extramarital affair while running on a family-values platform, does the blogger really need to upload a video of one of the politician's sexual rendezvous to make his point? At the level of pure abstraction, perhaps not. The video does not contain any additional facts—the sole aim of broadcasting it would seem to be to titillate and embarrass. But even in this scenario, while the broadcast may not contain any additional raw facts, seeing someone cheating on his wife as opposed to reading a sanitized account would undoubtedly leave a deeper and more lasting impression. Seeing a video or reading a very detailed written account makes the event more "real" than simply hearing a synopsis. A voter with a vague idea that a politician engaged in certain "sexual indiscretions" might be able to ignore or at least discount such behavior when choosing whom to support, but that same voter may be far less likely to forgive if he hears details about a cigar and stained dress. Such depictions can both humanize and demonize a person.[69] They are powerful narrative tools that can shape the way that individuals view the world.[70]

Even if it were possible to draw some theoretical line dividing newsworthy private information from that which is non-newsworthy, one could be forgiven for being skeptical of the institutional capacity of the courts to put aside personal biases about what information "right-thinking" members of society should consider in formulating their worldviews.[71] And with the private lives of the Justices' themselves

68. Volokh, *supra* note 5, at 1094-95.

69. *See, e.g.*, Serge Schmemann, *The Testing of a President: The Four Hours; Weighing Shame and Sympathy, A Weary People Watch Clinton*, N.Y. TIMES, Sept. 22, 1998, at A1 (describing how some viewers reacted with pity and others with disgust after watching Bill Clinton's taped testimony regarding his affair with Monica Lewinsky).

70. Judge Frank Easterbrook has pointed out the powerful effect of graphic pornographic speech on society's views of women. *See* Am. Bookseller's Ass'n v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985).

71. Justice Stevens's dissenting opinion in *Boy Scouts of America v. Dale*, which upheld the Boy Scouts right under the Free Speech Clause to express their disapproval of homosexuality by excluding an otherwise qualified scoutmaster from the organization because he was gay, provides a good example of a judge letting his personal beliefs about what right thinking

becoming a topic of public interest,[72] it would not be surprising if the Court became more and more sympatbetic to casting the "non-newsworthy" net over an increasingly wide area.

2. Privacy as a Competing Constitutional Interest

Even if a privacy law violated the First Amendment, the law might still be constitutional if it furthered a competing constitutional interest in individual privacy.[73] Under such circumstances the Court would be forced to balance these conflicting constitutional rights against each other. However, there are several fundamental problems with this analysis. First, sidestepping the contentious question of whether the Constitution should be read to provide a right to privacy,[74] the Court has carefully eschewed expanding the constitutional right of privacy established in *Roe* and *Griswold* beyond the right to abortion and the use of contraceptives.[75] The Court has never held that the Due Process Clause provides a fundamental constitutional right to private personal information.

Second, assuming that such a constitutional right to information privacy did exist, it would be a right against the

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members of society should think permeate his views on what speech is protected under the First Amendment. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 699 (Stevens, J., dissenting) (2000). Justice Stevens referred to unfavorable opinions about homosexuals as "atavistic," and his dissenting opinion seems to strongly imply that such views are so wrong and distasteful that they are simply undeserving of First Amendment protection. *See id.*

72. Jeffrey Toobin writes, "In the months since Sandra Day O'Connor announced her retirement, Americans have become obsessed with judge-watching. The new pastime practically eclipsed the World Series, with fans paying more attention to Harriet Miers's eye makeup than to Jermaine Dye's batting average." Jeffrey Toobin, *SCOTUS Watch*, THE NEW YORKER, Nov. 21, 2005, at 44. Toobin also remarks on the enormous popularity of an online blog, "Underneath Their Robes," in which the site's author "writes like a boozy débutante, dishing about the wardrobes, work habits, and idiosyncrasies of the 'superhotties of the federal judiciary' and 'Bodacious Babes of the Bench.' " *Id.*

73. See Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1224 (1990) (arguing that speech and privacy are competing constitutional values that must be balanced against each other).

74. John Hart Ely famously remarked that *Roe v. Wade* "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973).

75. *See* Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that the "right of personal privacy includes the abortion decision"); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that marriage falls within the right of personal privacy, and that a law prohibiting the use of contraceptives violated that right). The Court declined to find a constitutional right to privacy implicated in the decision to commit suicide or engage in private sexual relations. Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (no right to assisted suicide); Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (right to privacy does not extend to homosexual sodomy), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a sodomy law as unconstitutional, but not on the grounds that the law violated a fundamental constitutional right to privacy).

government and not against private publishers. The Constitution only limits government power, it does not operate as a restriction on the conduct of purely private parties.[76] There is no violation of a constitutional right when a private party abridges a person's freedom of speech, prevents his free exercise of religion, or interferes with any other right enumerated in the Bill of Rights. Such private interference may violate the person's legal rights as defined in state or federal law, but they do not violate the person's constitutional rights.

3. Privacy as a Compelling Governmental Interest

While a content-based restriction is presumptively unconstitutional under the Court's First Amendment jurisprudence, the restriction can still pass constitutional muster if the government can demonstrate both that the regulation serves a "compelling interest" and that the government has chosen "the least restrictive means" to further that interest.[77] The problem with this standard is that any determination that a particular interest is "compelling" will ultimately reflect little more than a subjective belief that the interest at issue is extremely important to the decisionmaker. Individuals with different life experiences and political views will undoubtedly differ on the import of any given interest. Every person likely has his own pet interest that he believes is just important enough to be considered "compelling." In light of this, one must be especially wary of conclusory compelling interest arguments. That is, such arguments should not be based on a simple visceral distaste for a particular category of speech. Instead, compelling interest arguments should be based upon a principled analysis of what interests legitimately warrant compromising an essential structural element of democratic government.

Most arguments in favor of viewing privacy as one of the most important human goods employ precisely the sort of "intuitionist" analysis that should viewed with heightened suspicion when deciding what constitutes a "compelling interest."[78] When stripped of the rhetorical flourishes that so often seem to accompany theoretical

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76. The state action doctrine can subject private actors to Constitutional obligations under certain conditions, but those conditions are not present here. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295-96 (2001) (discussing the state action doctrine generally).

77. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). Of course, as noted above, any viewpoint-based restriction will *per se* fail the compelling interest test. *See supra* notes 36-37 and accompanying text.

78. See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1154 (2004) (stating that privacy advocates overwhelmingly rely on "intuitionist" arguments).

inquiries into the importance of privacy[79] and distilled down to its most basic logical structure, the argument for viewing privacy as a compelling governmental interest is that people intuitively grasp that invasions of privacy are horrible[80] and "threaten our very integrity as persons."[81] It is difficult to directly counter such arguments because they rely more on feeling than logic: Privacy is a fundamental right *because it just is and everybody knows it is.* It would surely be a pointless exercise to try to convince someone that he is mistaken about the depth of his own visceral distaste for invasions of privacy.

However, the intuitionist argument that privacy is one of the most important human goods is grounded not only in the subjective impressions of a handful of legal scholars but also on the objectively verifiable position that these subjective impressions are universally shared. Indeed, the primary persuasive force of the intuitionist argument lies in its assertion that a deep visceral revulsion to invasions of a defined private space is inherent in all human beings. If such feelings are not common to all human societies and fixed over time, the argument that privacy is fundamental to "our very integrity as persons"[82] seems somewhat farfetched. If privacy preferences do vary significantly over time and across societies, then the most that could reasonably be asserted is that privacy is a very strong cultural preference, as opposed to a prerequisite for "personhood."

Anthropological and historical evidence strongly suggests that privacy preferences are indeed largely the product of cultural influences and that ideas about what must be kept private differ dramatically depending on the cultural context.[83] For example, in some societies, individuals feel comfortable defecating or having sex in

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79. Volokh, *supra* note 5, at 1110-16. Volokh discusses and dismisses some of the more hyperholic arguments that have heen made about the importance of privacy rights, such as one author's claim that:

> The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different .... Such a heing, although sentient, is fungible; he is not an individual.

Id. (quoting Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1003 (1964)).

80. *See* Whitman, *supra* note 78, at 1153-55 (summarizing and critiquing the "intuitionist" argument in favor of strong privacy rights, and singling out Charles Fried in particular as a writer "with a real literary gift" who was able to craft a particularly powerful intuitionist argument about the necessity of privacy).

81. Charles Fried, *Privacy*, 77 YALE L.J. 475, 477 (1968).

82. *Id.*

83. *See* Whitman, *supra* note 78, at 1153-55.

public.[84] Views about what subjects are "private" even differ substantially among modern western societies.[85] Americans and Europeans have very different opinions about what topics are properly considered part of the private sphere, disagreeing over issues as diverse as the propriety of public nudity and the revelation of personal financial information.[86] Professor James Whitman argues that this is not simply the product of disparate superficial or aesthetic preferences, but of fundamentally distinct political values.[87]

The primary value in protecting privacy, therefore, is not to promote something necessary for humans to maintain "our very integrity as persons,"[88] but rather to satisfy strong personal preferences that are the product of a particular social milieu. This is not to disparage the importance of privacy in American life; the fact that privacy preferences are culturally determined does not mean that privacy is not an important interest. However, if privacy is not essential for "personhood," then the argument for finding privacy to be a "compelling interest" is reduced to preventing the emotional distress that results from severe embarrassment and a perceived loss of esteem in the eyes of others. While this may be a substantial interest, it should not be prized above or alongside an institution that comprises an essential structural element of democratic government.

Admittedly, human dignity itself is one of the foundational values of liberal democracies like the United States.[89] Liberal democracy, however, seeks to preserve human dignity in a particular way—by allowing the people as autonomous individuals to make choices about their collective future through the mechanism of representative government, guaranteeing certain basic civil and political rights, and providing equal access to courts of law to seek redress for wrongs.[90] Political choice, individual rights, and the rule of

84. *Id.* at 1153-54.

85. *Id. passim* (contrasting American and European views on privacy).

86. *Id.* at 1155-57.

87. *Id.* at 1219. Whitman argues that Europeans value privacy rights primarily because they contribute to human dignity, while Americans value privacy rights more because they act as a hulwark against government intrusion. *Id.*

88. Fried, *supra* note 81, at 477.

89. *See* Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 467 (2005) ("[A]lthough not uniquely a democratic value, the idea of human dignity undergirds liberal democracy—the system of government in which political coercion can only be justified and exercised when consistent with respect for the free and equal nature of all human persons."); Miriam Rokeach & John Denvir, *Front-Loading Due Process: A Dignity-Based Approach to School Discipline*, 67 OHIO ST. L.J. 277, 288 (2006) (stating that a fundamental principle of democratic government is the dignity of the individual).

90. *See* Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 511 (1995) ("Liberal democracy . . . . denotes some form of representative

law are the means employed by liberal democracies to preserve human dignity. The democratic project would fail if the people's ability to make informed political choices was circumscribed by speech codes that prized self-esteem and emotional tranquility above free expression. While in the short term this may seem like a trade-off between free speech and dignity, it is the product of a sound judgment that, in the long run, human dignity is best preserved by the maintenance of a vigorous public discussion and an informed citizenry.

Further, deciding that preventing severe emotional distress is a proper ground for curbing speech in the privacy context would lead one down a dangerously steep slippery slope.[91] Speech on private matters is by no means the only category of expression that could be said to deeply offend those who hear it. For example, some party could legitimately claim to be severely upset and offended by another burning the American flag, expressing a belief in the superiority of a given race or culture, or derisively referring to a public official as a communist. If free expression ended where emotional distress began, the outer bounds of the right to speak one's mind would be determined primarily by the ebb and flow of prevailing cultural sensitivities. A shift in the public mood against a certain type of "offensive" speech would very quickly result in increased restrictions on the offending content. Such a result is inconsistent with the spirited public debate that is the lifeblood of democratic government. While some speakers may use their First Amendment right to disseminate content that is deeply distressing to other member of the community, this is one of the costs of living in a free and open society. As Salman Rushdie has observed, "[D]emocracy is not a polite business."[92]

It might be argued that invasions of privacy cause emotional distress and embarrassment on a completely different scale than that which results from the display of highly offensive images, the expression of hateful viewpoints, or the making of vicious insults. Subjecting the most private acts of an individual living in contemporary America to constant scrutiny does not simply cause that individual discomfort, so the argument would go, but causes them serious psychological trauma by depriving them of any sanctuary from

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government secured by the separation of powers, constitutional guarantees of civil and political rights, juridical equality, and a functioning judicial system dedicated to the rule of law.")

91. *See* Volokh, *supra* note 5, at 1113 ("The more courts conclude that avoidance of disrespect or emotional distress is a 'compelling interest' that justifies restricting the speech we find worthless, the more likely they will be to accept the same arguments for restricting the speech we value.").

92. Ashutosh Varsney, *The Political Rushdie*, 10 J. INT'L INST. (2003), http://www.umich.edu/~iinet/journal/vol10no3/rushdie.htm (last visited Nov. 4, 2006).

the stresses of the outside world. While it may be true that being forced to live one's life in front of a camera would be a stressful experience for most Americans, it is not clear that being barraged with racial epithets would be a substantially less traumatizing experience.

In any case, this sort of extreme deprivation of privacy is not what is at stake when newspapers publish private information about a person. Such publications expose private facts, but they certainly do not subject the person to the kind of constant observation that could be said to deprive them of any sanctuary from the stresses of the outside world. Even in the most egregious disclosure of private facts hypotheticals, such as the broadcast of a tape of a person having sex or going to the bathroom, the intrusion only invades a fixed slice of time in that person's life. Such a broadcast would undoubtedly embarrass the person in the tape. However, the great majority of this person's private life, including every other time that person had sex, used the bathroom, or engaged in any other intimately private activity, remains shielded from the public eye. Thus, whether the law restricts the publication or broadcast of private information does not determine the extent to which individuals are able to maintain a sanctuary from the stresses of the outside world. The rights of action that actually do provide substantive protections for this private sphere, such as trespass, pose no First Amendment problems. [93]

4. Privacy as Speech Promoting

In some sense the privacy versus speech debate may be said to be a false conflict: A reasonable expectation of privacy is necessary in order for people to be willing to participate in the marketplace of ideas.[94] Without such an expectation of privacy, individuals may be

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93. *See* Volokh, *supra* note 5, at 1111. Volokh argues that even if all restriction on the publication of private information were unconstitutional:

> [W]e'd still have a world where much of our privacy can be protected by legal rules that restrain private trespass, wiretapping, and electronic eavesdropping; by constitutional restraints on government searches; by statutory restraints on government collection and revelation of personal information; by contractual obligations on the part of people to whom we must reveal data; by market pressure on many businesses not to reveal data about their customers; by technological self-protection that can hide our identity in many online transactions; and by social norms. Some might still think that this world permits undue intrusions on privacy, but it hardly seems to risk the actual destruction of dignity, integrity, freedom, and independence, or the impossibility (not just difficulty, but impossibility) of intimacy and even personhood.

Id.

94. *See* Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1607, 1651, 1701-02 (1999) (discussing how internet privacy should be protected in order to further democratic deliberation); Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 687, 710 (1996) (discussing that the privacy versus speech debate as it is

less willing to voice their opinions in the public sphere for fear of others retaliating against them by publicizing embarrassing personal information. As discussed above, such an argument for the constitutionality of privacy protections cannot be based on a notion of competing constitutional interests—that one person's First Amendment right to speak about another's private life conflicts with that other person's First Amendment's right not to be intimidated into remaining silent—because as long as the person speaking about another's private life is not a state actor, the First Amendment does not bar him from restricting others' speech. Rather, one would have to argue that promoting speech by timid speakers who would otherwise not contribute to the marketplace of ideas in the absence of privacy protections constitutes a compelling governmental interest. This compelling interest inquiry differs from that explored in the previous section because the asserted compelling interest is not privacy but the promotion of speech itself.

Because the primary underlying purpose of the First Amendment is to promote the existence of a robust marketplace of ideas, the notion that promoting speech by timid speakers is a "compelling interest" has a great deal of appeal. After all, truth cannot "get itself accepted in the competition of the market" if the only person who knows the truth is intimidated into remaining silent.[95] Promoting speech by timid speakers could greatly enrich the diversity of views expressed in the marketplace by equalizing parties' abilities to effectively disseminate their ideas. If a handful of the loudest and most shrill voices dominated public debate because of their bullying tactics, this result would not seem to embody the vision of democracy and civic discourse that the systemic theory seeks to promote.

However, there are several reasons why the argument that privacy protections promote the quantity and quality of speech in the aggregate and are therefore constitutional should ultimately be rejected. As discussed in the previous Section, a similar rationale could be used to justify cutting wide swathes through other protected areas of speech.[96] Speech that may cause some people to be uncomfortable, embarrassed, or offended may also act to stifle speech. The fear of being insulted, subjected to ridicule, or simply shown to be wrong or ignorant no doubt keeps a number of potential speakers out of the public debate. A rule against such "intimidating" speech would give the most sensitive member of the community a listener's veto on

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generally construed is too simple because oftentimes protecting one can promote values protected by the other).

95. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

96. Volokh, *supra* note 5, at 1107-08.

discussion that for whatever reason makes them more reticent to speak up. Public debate is often, perhaps by necessity, a rough and tumble affair. As such, the systemic vision underlying First Amendment theory prizes an informed and vigilant populace over preventing the embarrassment of the more thin-skinned members of the community. As Judge Posner has written, "By publishing your views you invite public criticism and rebuttal; you enter voluntarily into one of the submarkets of ideas and opinions and consent therefore to the rough competition of the marketplace."[97] Achieving a greater participation rate in public debate would be a pyrrhic victory if the debate were completely sanitized because speakers' primary concern was not effectively advocating an idea but avoiding offending the squeamish. While it may be regrettable that more timid speakers shy away from contributing to the marketplace of ideas, this is a relatively small price to pay in order to have an uninhibited and robust public discussion. Indeed, the Supreme Court has explicitly rejected the idea that the First Amendment permits the government to engineer equality of access in the marketplace.[98] In *Buckley v. Valeo*, the Court stated,

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired hy the people.' " [99]

Further, even if one were to accept the argument that abridging some individuals' speech in order to encourage others' was permissible and desirable in theory, such a regime would be unworkable in practice. A policy of equal participation would require the state to constantly police the marketplace of ideas to protect timid speakers. It would also require the government to set a level for the "acceptable" level of "intimidating" speech in the marketplace. Such an arbitrary target and pervasive enforcement apparatus would undoubtedly result in the undue suppression of ideas. It is simply unimaginable that any regulatory agency would possess the near-omniscience and unfailing good faith that would be necessary to effectively administer this regime.

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97. Dilworth v. Dudley, 75 F.3d 307, 309 (7th Cir. 1996).

98. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976). *But see* MEIKLEJOHN, *supra* note 18, at 26 (arguing that under the First Amendment, "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said.").

99. *Buckley*, 424 U.S. at 48-49 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964); Roth v. United States, 354 U.S. 476, 484 (1957); Associated Press v. United States, 326 U.S. 1, 20 (1945)).

5. Property Rights in Private Information

One possible way to sidestep the strict scrutiny test's stringent requirements would be to attempt to recast content-based restrictions on the publication of private information as efforts to protect individuals' property interests in intimate private details regarding their personal lives.[100] For example, a legislature could enact a statute giving all individuals a property interest in information about their private sexual encounters, and individuals could assert common law property rights against third parties who tried to "steal" or "appropriate" this property by publishing it. Because property law is a content-neutral regulatory regime whose purpose is to protect property rights, such a regime would not seem to trigger strict scrutiny.

The Supreme Court's decision in *Cohen v. Cowles Media Co.* provides strong support for this approach. In *Cowles*, a newspaper breached its promise of confidentiality to a source by publishing the source's identity.[101] The Court held that the First Amendment did not bar the source from collecting damages under the contract doctrine of promissory estoppel, explaining 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."[102] Under *Cowles*, private enforcement of property rights in private information against third parties should be perfectly acceptable. Instead of enforcing contract law to prevent publication, the proposed framework involves property law to prevent publication.

The problem with this property-law based framework is that while the Court's holding in *Cowles* may have been correct, the majority opinion's sweeping statement 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" conflicts with the Court's existing First Amendment jurisprudence.[103] The *Cowles* opinion made two major analytical

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100. A number of commentators have argued in favor of creating property rights in private information. *See, e.g.*, Vera Bergelson, *It's Personal But is it Mine? Toward Property Rights in Personal Information*, 37 U.C. DAVIS L. REV. 379, 443-50 (2003) (arguing for an "opt-in" model associated with treating private information as a property right); Lawrence Lessig, *The Architecture of Privacy*, 1 VAND. J. ENT. L. & PRAC. 56, 63 (1999) (arguing for a linkage between private property rights and market incentives); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2383-84 (1996) (discussing how private information such as sexual identity and eye color is one's property and how the law must deal with the question of who owns these property rights).

101. Cohen v. Cowles Media Co., 501 U.S. 663, 666 (1991).

102. *Id.* at 669-70.

103. *Id.*

mistakes. First, while contract law as a whole may be a content-neutral regulatory regime, in *Cowles* it was enforced in a way that banned the publication of speech based on its content. This restriction on speech was not merely "incidental": the plaintiff employed a body of law that is neutral on its face but applied it in a content-based manner. The defendant was punished because it published specified content—the source's identity. This does not present a problem when that neutral legal regime being enforced in a content-based manner is contract law because the standard First Amendment concerns about content-based restrictions are simply not implicated when the person whose speech is abridged consented to the abridgment. If a person cannot speak his mind because of a private contract that he agreed to, that person has no one to blame but himself. This scenario does not involve the government suppressing dissent or picking and choosing what ideas may enter the market. This is not true, however, when the neutral body of law being enforced in a content-based manner is tort law or property law.

Second, even if *Cowles* did involve the application of a generally applicable law, the Court mistakenly framed the issue as whether the press, as distinct from all other speakers, had a special right to gather and report the news. The Court has ruled on numerous occasions that the press does not have any special privilege by virtue of the free press clause of the First Amendment to ignore generally applicable laws, such as labor, antitrust, and antidiscrimination statutes, and that incidental burdens on the press produced by these laws therefore do not present any First Amendment problems. [104] However, in *Cowles*, the enforcement of contract law affected the newspaper as a speaker, not just as a member of the press, and incidental burdens on speech *do* raise a First Amendment problem.[105]

Granting property rights in private information is unconstitutional because it abridges speech based on content when the censored party has not consented to the censorship. Although property law as a whole may be a content-neutral regulatory regime, when it is applied in a particular case to protect ownership interests in private information the assertion of the property right becomes a content-based interference. While such a regulatory regime may seem to have an ostensibly neutral purpose, this so-called neutral purpose is merely a fig leaf. One of the constitutive elements in the "bundle" of property

104. Citizen Publ'g Co. v. United States, 394 U.S. 131, 135 (1969) (Sherman Anti-Trust Act); Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 192-93 (1946) (Fair Labor Standards Act); *Associated Press*, 326 U.S. at 7 (Sherman Anti-Trust Act); Associated Press v. NLRB, 301 U.S. 103, 130 (1937) (National Labor Relations Act).

105. Again, though, the application of contract law at issue in *Cowles* was by no means an incidental interference with speech.

rights is the right to exclude third parties from making use of one's property.[106] Repackaging an explicit ban on certain speech as the establishment of property rights in the underlying information that the speech is based on does not change a content-based restriction into a content-neutral one. The fact remains that, under this law, a private individual could assert his or her property rights to prohibit speech about a particular topic. Simply calling this right to prohibit publication a property right does not change the fact that it is a content-based interference with free speech.

B. Content-Neutral Restrictions on the Publication of Private Information

Statutes that provide a right of action for the publication of illegally-intercepted electronic transmissions protect private information without targeting the content of the information and are thus appropriately characterized as "content-neutral."[107] Laws that prohibit the publication of such "stolen" information enhance the security of private communication by removing an incentive for those who deliberately intercept information for the purpose of disseminating it to a wider audience.[108] This rationale is generally referred to as the "dry up the market" theory.[109] Those who intercept information may do so either for pecuniary gain or for some other reason, such as causing embarrassment to a political opponent, and the dry up the market theory is equally applicable to scenarios in which the interceptor is motivated by pecuniary or some sort of ideological or psychological gain.[110] Also, "stolen" speech bans act to

106. Dolan v. City of Tigard, 512 U.S. 374, 384 (1994).

107. *See* Bartnicki v. Vopper, 532 U.S. 514, 526 (2001) ("We agree with petitioners that [18 U.S.C. § 2511(1)(c)], as well as its Pennsylvania analog, is in fact a content-neutral law of general applicability."); *id.* at 544-45 (Rehnquist, J., dissenting) ("The Court correctly observes that these are 'content-neutral law[s] of general applicability' . . . [h]ere, Congress and the Pennsylvania Legislature have acted 'without reference to the content of the regulated speech.' There is no intimation that these laws seek 'to suppress unpopular ideas or information or manipulate the public debate' or that they 'distinguish favored speech from disfavored speech on the basis of the ideas or views expressed.' The antidisclosure provision is based solely upon the manner in which the conversation was acquired, not the subject matter of the conversation or the viewpoints of the speakers. The same information, if obtained lawfully, could be published with impunity." (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1968))).

108. *Bartnicki*, 532 U.S. at 550-51 (Rehnquist, J., dissenting).

109. *Id.* at 550 ("The 'dry-up-the-market' theory . . . posits that it is possible to deter an illegal act that is difficult to police by preventing the wrongdoer from enjoying the fruits of the crime . . . .").

110. In *Boehner v. McDermott*, a Republican Congressman sued a Democratic Congressman for leaking an intercepted electronic communication between Republican Congressmen that

limit the harm done to individuals who have already been the victims of illegal interceptions.[111]

Because laws that bar the publication of illegally intercepted communications do not ban publication based on content but rather based on the means by which the information was obtained, they would necessarily fail to prevent the publication of a wide array of private information that is not obtained illegally. At the same time, such laws would also bring within their scope a good deal of mundane information whose content could by no means be characterized as private. However, even if the content of a conversation itself is not inherently private, protecting individuals' expectation of privacy when having a conversation on the phone itself serves privacy interests.[112] Further, such laws would actually have the effect of protecting a significant amount of inherently private content by virtue of the simple fact that people communicate a good deal of personal information in phone conversations, email, and other electronic communications.

Professor Volokh argues that regardless of the privacy interests served by such content-neutral laws, there are both functional and doctrinal reasons why "[s]peech by people who have never promised to remain quiet about something may not be suppressed simply because someone else wrongfully revealed the information to them."[113] On the functional side, he asserts that punishing third party speakers for publishing illegally obtained information would "dramatically undermine newspapers' ability to report."[114] Volokh is especially concerned about the "dry up the market" and mitigation rationales outlined above justifying punishing the publication of leaked information, asserting that "[l]eaks of confidential information are a staple of modern investigative journalism and have helped break many important stories."[115] Doctrinally, Volokh points out that such regulations are problematic because they don't leave open "ample alternative channels"—a speaker is completely barred from releasing intercepted or leaked information.[116]

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revealed then-House Speaker Newt Gingrich might have violated an ethics agreement. Boehner v. McDermott, 191 F.3d 463, 465-66 (D.C. Cir. 1999).

111. *See Bartnicki*, 532 U.S. at 533 ("[T]he disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself.").

112. *Id.* at 553-54 (Rehnquist, J., dissenting).

113. Volokh, *supra* note 5, at 1072.

114. *Id.*

115. Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts Aftcr* Eldred, 44 Liquormart, *and* Bartnicki, 40 HOUS. L. REV. 697, 741 (2003).

116. *Id.* at 741. Volokh makes this argument specifically regarding trade secret law, but the point is equally applicable to any content-neutral law that bans publication because of some impropriety in how it was originally obtained.

Volokh's functional critique is certainly not without foundation. Simply listing some of the news stories that would not have seen the light of day without leaked information—Watergate, the Pentagon Papers, warrantless wiretapping—provides powerful evidence that the ability to print leaked information contributes substantially to the Press's capacity to effectively perform its role as the "fourth branch" of government. However, there are several points that seriously weaken the potency of this argument in the privacy context. First, while *leaked* information, particularly from government sources, may have played a key role in breaking some of the biggest stories of the past fifty years, there is much less evidence that *illegally intercepted* communications are currently or will be a similarly fertile source.[117] Second, even if illegally intercepted communications were such a fertile source for reporters, Volokh's functional critique does not present a standard by which to judge how much interference with the press is too much. He seems to subject these regulations to a rough "smell" test and then declare by fiat that they simply go too far. While he may be right, his "know it when I see it approach" leaves something to be desired. Third, Volokh frames his functional argument as an argument for a special privilege for the press, and the Court has been extremely reticent to carve out special protections for the press beyond those enjoyed by normal speakers.[118]

Volokh's doctrinal critique may be on point, but it fails to acknowledge the unique complexity of the problem. Regulations that ban the publication of illegally intercepted information are very different from the regulations that the Court has encountered in the symbolic speech or time, place, or manner context. Stolen information statutes raise unique concerns that at least at first glance do not seem to fit perfectly into the Court's existing analytical framework. It is important to understand whether the current framework can appropriately be applied to these types of regulations and, if so, why that might be.

The concept of a content-neutral regulation that limits the publication of information based on the manner in which the information was obtained presents a unique doctrinal problem. In the

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117. *But see Bartnicki*, 532 U.S. at 517, 535 (upholding the media's right to broadcast "an illegally intercepted cellular telephone conversation about a public issue" when the media was not a participant in the interception); Boehner v. McDermott, 191 F.3d 463, 465-66, 478 (D.C. Cir. 1999) (upholding a law limiting a congressman's ability to disclose intercepted electronic communication revealing then-House Speaker Newt Gingrich may have violated an ethics agreement).

118. *See* Branzburg v. Hayes, 408 U.S. 665, 709 (1972) (declining to establish a special press privilege against disclosing confidential sources). *But see* Minneapolis Star & Tribune Co. v. Minneapolis Comm'r of Revenue, 460 U.S. 575, 592-93 (1983) (finding a special press privilege against burdensome taxation).

classic content-neutral scenario, a regulation limits only a means of expression.[119] This scenario lends itself to a balancing analysis because speakers generally have a variety of avenues through which to express themselves, and barring a speaker from pursuing one particular avenue does not prevent him from pursuing another. For example, a speaker prohibited from using a sound truck in a residential area can still hand out flyers or possibly use the sound truck in a more commercial area. Some means of expression may be more effective than others, thus the question presented in the classic content-neutral scenario is not *whether* the speaker can speak, but *what means* can the speaker employ to communicate his message. Prohibiting one method of expression may lessen the effectiveness of the speaker's message, but it would not outright prevent the speaker from contributing a particular piece of information or opinion to the marketplace of ideas.

In contrast, a content-neutral regulation that limits the publication of information based on the manner in which the information was obtained completely excludes that information from the marketplace. What is so unique about this sort of regulation is that, while it bans an entire category of speech, the category is defined in a neutral way (stolen information). Because it is defined in a neutral way, the limitation does not raise concerns that the government is trying to shape and manipulate the substance of the marketplace. However, such a law still results in the complete exclusion of certain information from the marketplace of ideas, a result which is fatal to the restriction under the standard content-neutral analysis. Therefore, even assuming that a regulation banning the publication of illegally intercepted information was narrowly tailored and justified by a substantial government interest, the fact that the regulation completely bars individuals from speaking about a particular subject would seem to be unacceptable under the systemic rights model.

However, because such a regulation presents unique doctrinal problem, it is not immediately apparent that the standard content-neutral framework can appropriately be applied to these types of regulations. The standard content-neutral analysis assumes that the total exclusion of a given category of information is deeply problematic. However, on a purely visceral level, information that has

119. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 299 (1984) (sleeping in park as part of protest against homelessness); Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984) (posting signs on state-owned property); United States v. O'Brien, 391 U.S. 367, 385-86 (1968) (burning draft card); Kovacs v. Cooper, 336 U.S. 77, 96-97 (1949) (sound trucks); Schneider v. New Jersey, 308 U.S. 147, 165 (1939) (leafleting).

been "stolen" seems like it simply seems like it does not belong in an arena for the free exchange of ideas. Ripping information from its original holder in order to disseminate it just does not match up with the spirit of free and open debate that the First Amendment seeks to protect, so it might be argued that it is acceptable to censor such "stolen" information. This argument ultimately misses the mark because it mistakenly conceives of the First Amendment as giving speakers not only a right to speak freely but also a right to control information. Yet it is worthwhile to run through the argument in order to understand fully why this is the case.

While a ban on the publication of stolen information may shrink the aggregate amount of information and opinion that reaches the marketplace, such a decrease is not problematic if the lost expression is not part of the marketplace ideal that the systemic model seeks to advance. A version of this rationale was provided above to justify the exclusion of certain content from the marketplace.[120] Unlike the "low" value speech exclusion, the rationale for a stolen information exclusion could not be based on content because such laws are by definition content-neutral. The stolen information category can include any conceivable piece of information, including information that may be relevant to a major policy debate.

However, the content of speech is not the only ground on which it may permissibly be excluded under the systemic model. Illegally intercepted information can arguably be excluded from the marketplace of ideas. Such information is excludable not because of the inherent "low" value of the intercepted information, but because publishing such information violates the participatory nature of the marketplace. Disclosing stolen information intuitively seems to violate the spirit of the marketplace model. Under the systemic theory, the primary value of free speech is that furthers democratic self-rule, and the essence of self-rule is voluntary participation. The very definition of democracy is that the power to choose lies with the people. It would make little sense for the marketplace of ideas to operate in a way that undermined this power to choose by allowing the marketplace to operate in a coercive manner.

The Court's rhetoric about the vital importance of the "free exchange of ideas" provides strong support for the proposition that it envisions the First Amendment as embodying a participatory market ideal. The Court has, on several occasions, spoken of a "profound national commitment to the free exchange of ideas" that is "enshrined in the First Amendment."[121] An "exchange" is a voluntary act in which

120. See *infra* Part III.

121. *See, e.g.*, Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 686 (1989).

a party willingly participates in a transaction.[122] If a party uses coercion to achieve the same result, the interaction can no longer be characterized as an "exchange."

The fundamentally democratic and participatory nature of the marketplace ideal is well illustrated by one court's discussion of how the Internet serves as a paradigm of the public forum that the First Amendment seeks to further:

> It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen. The plaintiffs in these actions correctly describe the "democratizing" effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fishermen.[123]

As this passage makes clear, participation is an essential element of the First Amendment's vision of the marketplace of ideas. That vision is one of many active participants coming together in a widely accessible forum to debate and perhaps at times angrily hurl barbs at one another. While etiquette may not be a basic rule of the game,[124] voluntary participation is.

Accordingly, publishing stolen information seems to violate the participatory nature of the marketplace by coercing the contribution of information that an individual does not want to disclose. The publisher has used illegal and invasive methods to drag information out of the private sphere and reveal it to the world. As a result, the publisher's expression is not entitled to First Amendment protection because it acts to coerce another person to speak, and speech which is itself coercive is not part of the marketplace ideal that the systemic model seeks to advance.

The problem with this argument is that publishing stolen information does not coerce any individual to speak. If X intercepts a private electronic communication by Y and then publishes facts gleaned from that intercepted communication, Y has not been forced to speak. While information that Y may previously have kept carefully

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122. *See, e.g.*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 432 (1987) (defining "exchange" in terms that suggest voluntary action, e.g., "to part with, give, or transfer in consideration of something received as an equivalent")

123. ACLU v. Reno, 929 F. Supp. 824, 881 (E.D. Pa.1996).

124. *See* Buckley v. Valeo, 424 U.S. 1, 49 (1976) (referring to the aim of the First Amendment as the "widest possible dissemination of information from diverse and antagonistic sources" (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964))).

guarded in the private sphere has been forced out into the light of day, this has not occurred through Y being forced to speak. X may have forcibly wrenched information from Y, but this forcible wrenching and any subsequent publication does not compel Y to communicate or express anything. X has forcibly deprived Y of Y's exclusive control of the information, but Y has not spoken or expressed anything simply by virtue of the fact that information formerly in his control has been released to the public. Therefore, the anti-coercion principle embodied in the First Amendment has not been violated. The First Amendment gives individuals a right to speak (or not speak); it does not give them a right to control information.

V. THE SUPREME COURT'S TREATMENT OF THE PRIVACY/SPEECH CONFLICT: THE RIGHT HOLDINGS FOR THE WRONG REASONS

The Supreme Court has decided a number of cases that have implicated both speech and privacy rights, but in each case the Court has explicitly declined to examine the fundamental underlying tension between the two. Rather, the Court has asserted that it "continue[s] to believe that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."[125] The Court's reticence to confront the broader doctrinal and theoretical issues presented by the conflict between speech and privacy would be understandable if overarching First Amendment doctrine were in a state of flux or had been rendered obsolete by the emergence of a novel and unanticipated scenario, but this is not the case. As discussed in Parts II, III, and IV, the Court has established a comprehensive and nuanced approach to speech cases that is well grounded in the underlying purpose of the First Amendment and that is perfectly capable of dealing with the tension between speech and privacy. Under this approach, laws that restrict the publication of private information do not pass constitutional muster.

This Part reviews the Supreme Court's treatment of the tension between privacy and speech interests and critiques it in light of the framework developed in the prior Parts of this note. While at the end of the day the Court has always reached the conclusion suggested by the above analysis, namely that both content-based and content-neutral privacy laws are unconstitutional, it has not analyzed cases that present a conflict between privacy and speech interests

125. Bartnicki v. Vopper, 532 U.S. 514, 529 (2001) (quoting Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989)).

under the established First Amendment doctrinal framework. Instead, the Court has adopted a completely ad hoc analytical approach and avoided examining the fundamental relationship between privacy and speech in the Constitutional order. In the content-based realm, the Court's application of a high level of scrutiny to privacy statutes and its repeated invalidation of such laws provides strong circumstantial evidence that it would never find such a law to be constitutional. Nonetheless, there is some language in these opinions suggesting that under the right circumstances the Court might uphold a content-based law. The Court invalidated the one content-neutral law that it has confronted, and the majority's opinion in that case evinced a strong hostility towards such laws. Still, it is unclear what standard of scrutiny the Court applied in that case, and the opinion demonstrated a troubling willingness to evaluate the relative value of public and private speech.

A. Content-Based Regulations: Florida Star, Daily Mail, Oklahoma, *and* Cox Broadcasting

Most of the cases in which the Court has dealt with the tension between speech and privacy have involved content-based restrictions, specifically laws that ban the publication of the names of juvenile offenders[126] and rape victims.[127] In the first several cases in which it confronted laws that banned speech based upon its private content, the Court struck down the restrictions. However, it did so primarily on the narrow grounds that reporting on the contents of official court records open to public inspection implicated especially strong First Amendment interests.

The Supreme Court first dealt with the question of whether imposing liability on a media outlet for the publication of private information violated the First Amendment in the 1975 case *Cox Broadcasting Corp. v. Cohn*.[128] In *Cox Broadcasting*, a reporter learned the name of a rape and murder victim by examining indictments that were public records made available for his inspection in the courtroom.[129] The reporter broadcast a report regarding the court proceedings that named the victim on a television news program.[130] The Court held that a state may not impose sanctions on the accurate publication of the name of a rape victim obtained from

126. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 97-98 (1979); Okla. Publ'g Co. v. Okla. County Dist. Court, 430 U.S. 308, 310-11 (1977).

127. *Fla. Star*, 491 U.S. at 526; Cox Broad. v. Cohn, 420 U.S. 469, 471 (1975).

128. *Cox Broad.*, 420 U.S. at 491.

129. *Id.* at 472-73.

130. *Id.* at 473-74.

judicial records maintained in connection with a public prosecution and that are open to public inspection.[131] The Supreme Court expressed doubt that information that appeared in the public record was even "private" at all, stating that "the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record."[132] The Court found that the interest in allowing the press to report on the contents of official court records open to public inspection outweighed any diminished privacy interest that existed. [133] The Court stressed the special importance of the press being able to report on public records, stating, "The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business."[134]

The *Cox Broadcasting* Court was also troubled by the ease with which the state could have pursued alternative means to protect the identity of the victim that were not as problematic from a First Amendment perspective. Noting that the states could avoid the public dissemination of private information released to the public in court documents by simply not releasing the private information, the Court stated, "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information."[135]

Two years after *Cox Broadcasting* was decided, the Court reaffirmed the principle that the First Amendment barred any prohibition on the publication of information obtained from a judicial hearing or record open to the public in order to protect an individual's privacy in *Oklahoma Publishing Company v. Oklahoma County District Court*.[136] In *Oklahoma Publishing*, despite a state law providing that juvenile proceedings were to be held in private "unless specifically ordered by the judge to be conducted in public," and that juvenile records were to be made open to public inspection "only by order of the court to persons having a legitimate interest therein," reporters were in fact present at a detention hearing for a juvenile accused of second degree murder and as a result learned and later published the juvenile's name along with a photograph of him leaving

131. *Id.* at 491.
132. *Id.* at 494-95.
133. *Id.* at 495.
134. *Id.*
135. *Id.* at 496.
136. Okla. Publ'g Co. v. Okla. County Dist. Court, 430 U.S. 308, 310 (1977).

the courthouse.[137] Because, as in *Cox Broadcasting*, this private information was "publicly revealed in connection with the prosecution of the crime," the Court unanimously found that a pre-trial order enjoining members of the news media from "publishing, broadcasting, or disseminating, in any manner, the name or picture of [a] minor child in connection with a juvenile proceeding involving that child then pending in that court" was an unconstitutional abridgement of the freedom of the press. [138]

Shortly after *Oklahoma Publishing*, the Court began to issue more sweeping statements about the protections that would be afforded speech about private matters. In *Smith v. Daily Mail Publishing Co.*, the Court handed down another unanimous opinion. This time it reversed the criminal conviction of a newspaper for publishing the name of an alleged juvenile murderer.[139] In *Daily Mail*, reporters had obtained the identity of the alleged offender from various witnesses, the police, and an assistant prosecuting attorney at the crime scene.[140] After reviewing its prior decisions, the Court observed, "None of these opinions directly controls this case; however, all suggest strongly 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."[141] The *Daily Mail* Court found that the asserted state interest of protecting the anonymity of the juvenile offender in order to "further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense," did not constitute a state interest of the highest order. [142] The Court went on to say, "If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here."[143] Even if a state interest of the highest order were present, the Court continued, the statute at issue did not accomplish its stated purpose because it only restricted newspapers, not electronic media.[144] Finally, the Court pointed out that there was no evidence that the extreme measure of

137. *Id.* at 310-11.
138. *Id.* at 308-09, 311 (citing *Cox Broad.*, 420 U.S. at 471).
139. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104-06 (1979).
140. *Id.* at 99.
141. *Id.* at 103.
142. *Id.* at 104.
143. *Id.*
144. *Id.* at 104-05.

imposing criminal penalties was necessary to protect the confidentiality of juvenile proceedings.[145]

In the next case dealing with the conflict between privacy and speech, the Court again announced that laws seeking to protect private information would be subject to a very high level of scrutiny. In *Florida Star v. B.J.F.*, the Court held that a newspaper could not be held civilly liable for publishing the name of a rape victim it had obtained from a police report.[146] The Court analyzed the case under the principle that it had first (somewhat tentatively) suggested[147] in *Daily Mail*: "[I]f 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."[148] Applying the *Daily Mail* principle, the Court held that subjecting the Florida Star to civil liability for publishing B.J.F's name violated the First Amendment.[149] The Court found that the heightened scrutiny of the *Daily Mail* principle was triggered because the newspaper had "lawfully obtain[ed] truthful information about a matter of public significance."[150] While, under Florida law, the names of sexual assault victims are not matters of public record and police departments have a duty not to "cause or allow" them to be published, the *Florida Star* majority pointed out that there was no law that made the *receipt* of such information illegal.[151] The Court also concluded that it was "clear" the news article satisfied the test's public significance requirement because "the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities."[152] In other words, if an event is

145. *Id.* at 105.

146. Fla. Star v. B.J.F., 491 U.S. 524, 524-26 (1989).

147. The *Daily Mail* opinion had announced this principle less as a definitive governing standard and more as a principle that was merely suggested hy previous cases, stating "None of these opinions directly controls this case; however, all suggest strongly 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." 443 U.S. at 103.

148. *Fla. Star*, 491 U.S. at 533 (quoting *Daily Mail*, 443 U.S. at 103).

149. *See Fla. Star*, 491 U.S. at 536-37.

150. *Id.* at 536 (quoting *Daily Mail*, 443 U.S. at 103).

151. *Fla. Star*, 491 U.S. at 536. The Court skirted the issue of whether a law restricting the *receipt* of such information would pass constitutional muster, saying only, "Even assuming the Constitution permitted a State to proscrihe *receipt* of information, Florida has not taken this step." *Id.*

152. *See id.* at 536-37. The Court eschewed making a substantive distinction for the purposes of the *Daily Mail* principle between the public significance of the victim's name and the commission of the crime generally, stating "the article generally, as opposed to the specific

newsworthy, then the names of those involved in the event are also newsworthy.[153]

The *Florida Star* majority held that the state had not made the requisite showing that there existed "a need to further a state interest of the highest order," as required under the *Daily Mail* principle when the state seeks to impose liability for the publication of lawfully obtained truthful information about a matter of public significance.[154] Although the majority opinion acknowledged the "highly significant interests" that the state had in protecting the identity of rape victims, including "the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure," the

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identity contained within it, involved a matter of paramount public import; the commission, and investigation, of a violent crime which had been reported to authorities." *Id.* This is not the approach that most courts have taken in determining newsworthiness in the tort context, where the newsworthiness of identifying and other highly specific information in a news report is analyzed separately from the newsworthiness of the general underlying events in the tort context. *See, e.g.*, Veilleux v. NBC, Inc., 8 F. Supp. 2d 23, 38 (D. Me. 1998) ("While drug use among interstate truck drivers, because of the threat it poses to the safety of others on the highway, is clearly a matter of legitimate public concern, the identity of a single driver who tested positive is not, as a matter of law, an issue of legitimate concern to the public where there is nothing otherwise 'newsworthy' about the driver or the particular test."); Baugh v. CBS, Inc., 828 F. Supp. 745, 755 (N.D. Cal. 1993) (although domestic violence is of legitimate public concern, plaintiff's personal experience with domestic violence is not newsworthy as a matter of law); Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 38-44 (Cal. 1971) (although facts of past crime of hijacking were newsworthy, identifying plaintiff's name was not newsworthy because the hijacking had occurred eleven years previously and plaintiff had given up his life of crime), *overruled by* Gates v. Discovery Commc'ns, Inc., 101 P.3d 552 (Cal. 2004) (no claim arises from the publication of truthful information obtained from official public court records under *Cox Broadcasting*); Times-Mirror Co. v. Superior Court, 244 Cal. Rptr. 556, 558, 561-64 (Cal. Ct. App. 1988) (newsworthiness of the identity of witness to a rape and murder was a question of fact for the jury); Melvin v. Reid, 297 P. 91, 93-94 (Cal. Dist. Ct. App. 1931) (plaintiff successfully stated cause of action for invasion of privacy when newspaper identified plaintiff, who at the time of publication had "assumed a place in respectable society," by name as the real life inspiration for a movie about a prostitute); Doe v. Univision Television Group, Inc., 717 So. 2d 63, 65 (Fla. Dist. Ct. App. 1998) (although the subject of poorly performed plastic surgery in foreign countries is a matter of public interest, plaintiff's identity is not); Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 494-95 (Ga. Ct. App. 1994) (while topic of AIDS is of legitimate public interest, the identities of AIDS victims are not); Green v. Chi. Tribune Co., 675 N.E.2d 249, 256 (Ill. App. Ct. 1996) (focusing on the newsworthiness of specific photographs of a victim of gang violence and statements made by a grieving mother to her dead child, not the newsworthiness of the general topic of gang warfare, and finding that the newsworthiness for the former created a question of fact); Doe v. Mills, 536 N.W.2d 824, 830 (Mich. Ct. App. 1995) (while general topic of abortion is of public concern, plaintiff's identities are not); Winstead v. Sweeney, 517 N.W.2d 874, 877-78 (Mich. Ct. App. 1994) (although the subject of unique love relationships is of public concern, it is a question of fact for the jury whether the same can be said of specific details of how a woman participated in a surrogate parenting trio and was unable to have children due to previous abortions).

153. *Fla. Star*, 491 U.S. at 536-37.

154. *Id.* at 537.

Court found that "imposing liability for publication under the circumstances of this case is too precipitous a means of advancing these interests to convince us that there is a 'need' within the meaning of the *Daily Mail* formulation for Florida to take this extreme step."[155] Specifically, the Court pointed to the fact that the government could have used alternative means to safeguard the information at issue, such as not releasing it in the first place, that the sweeping negligence per se standard for the publication of a rape victim's name was not sensitive to the facts of a particular case, and that the statute only prohibited publication in an "instrument of mass communication," which raised "serious doubts" about whether the statute was actually serving its alleged purpose.[156]

B. Evaluating the Court's Content-Based Jurisprudence

The *Daily Mail* standard closely resembles the strict scrutiny approach that the Court employs in the content-based realm. Both require that the state assert a very strong reason for a speech suppressing regulation—a "compelling interest" under the traditional strict scrutiny test and a "highest order interest" under *Daily Mail*. The narrow-tailoring requirement of the traditional strict scrutiny test appears to be built into the *Daily Mail* standard's requirement that there be a "need" to further the asserted highest order interest—there is no "need" if a regulation is underinclusive, overly punitive, or ineffective, or if there are alternative means of accomplishing its purpose that do not offend the First Amendment.[157] The *Daily Mail* and traditional content-based standard thus both seem to apply a substantially similar strict scrutiny review.

Despite this similarity, there are several reasons why the Court's failure to use the traditional content-based standard is problematic. First, *Daily Mail* strict scrutiny review is not triggered by the nature of the regulation, but rather by the nature of the speech. Rather than being held presumptively unconstitutional on the grounds that it seeks to distort the substance of the marketplace of ideas, a content-based regulation is only unconstitutional under *Daily Mail* if it regulates a particularly worthy kind of speech. The *Daily Mail* strict scrutiny standard only applies if the information contained in the publication is (1) truthful; (2) lawfully obtained; and (3) about a matter of public significance. The truthfulness requirement for triggering *Daily Mail* strict scrutiny does not pose a problem because

155. *Id.*

156. *Id.* at 537-40.

157. *See id.* at 537-41; Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104-05 (1979).

false statements of fact are properly characterized as "low" value speech because they not part of the ultimate marketplace ideal.[158] However, the other two requirements do pose serious problems. As discussed above, publishing unlawfully obtained information cannot be viewed as violating the marketplace ideal that the systemic model seeks to advance. Speech that communicates stolen information cannot be banned on the grounds that it is of inherently "low" value or because it violates the participatory nature of the marketplace.[159] There is therefore no justification for categorically excluding "stolen" information from First Amendment protection. This Note has already offered an in-depth critique of inquiring into the "public significance" of private information in order to determine whether the constitution protects speech that communicates such information.[160]

The second reason why the Court's creation of a separate *Daily Mail* strict scrutiny standard problematic is that this creates a parallel body of strict scrutiny First Amendment jurisprudence that is not bound by traditional strict scrutiny precedent and in turn is not binding as precedent on traditional First Amendment strict scrutiny doctrine. While a "highest order" interest does seem to be of roughly the same weight as a "compelling" interest, the subsequent holdings could reveal that these categories only roughly overlap, and that an interest that is declared to be of the "highest order" in the privacy context would not be found to be "compelling" under the standard content-based analysis. Creating this two-headed monster accomplishes nothing and only risks confusion.

Despite these critiques, there is reason to believe that the *Daily Mail* test is sufficiently stringent that in practice it would lead to the same results as the traditional content-based strict scrutiny standard. While the *Florida Star*, *Daily Mail*, *Oklahoma*, and *Cox Broadcasting* opinions do not hold explicitly that content-based restrictions on private content are unconstitutional, they seem to imply it. Although tthe Court has taken pains to continually express its deep solicitude for privacy interests, emphasize the limited nature of its rulings barring liability for the publication of private information, and hold out the possibility that in a future case the First Amendment may have to bow to a pressing privacy concern, it is likely that the Court is simply being disingenuous. The Court has set the bar for overcoming the First Amendment so high that no plaintiff stands a realistic chance at collecting damages from a media defendant for disclosing lawfully obtained, truthful information about a matter of public

158. *See supra* notes 28-29, 150 and accompanying text.

159. *See supra* Part IV.B.2.

160. *See supra* Part IV.A.1.

significance. Professor Peter Edelman, who takes a starkly different view than this Note does on the desirability of upholding content-based restrictions on the publication of private information,[161] concurs in this *realpolitik* assessment of the *Florida Star* line of cases and asserts that the Court is simply paying lip service to privacy rights.[162]

The Court has found for the defendant in every case in which a plaintiff sought damages for the publication of private information. This provides some support for the proposition that the Court's dedication to privacy in content-based speech cases is merely rhetorical and lacks substance. Talk, after all, is cheap, and at the end of the day the actual outcomes of the cases are probably more indicative of the Court's true sympathies than noncommittal dicta and vaguely articulated standards. For example, the *Cox Broadcasting* Court's narrow emphasis on the First Amendment problems associated with punishing the publication of information made readily available by the state in public records would reasonably lead one to believe that punishing the publication of information not found in public records and which the state had taken measures to protect would not be similarly constitutionally problematic. As Justice White stated in his *Florida Star* dissent, "*Cox Broadcasting* stands for the proposition that the State cannot make the press its first line of defense in withholding private information from the public—it cannot ask the press to secrete private facts that the State makes no effort to safeguard in the first place."[163] The State of Florida likely believed that by not making the names of sexual assault victims matters of public record and by criminalizing the dissemination of this information, the state's rape shield law would not meet the same fate as the Georgia rape shield law that was struck down in *Cox Broadcasting*. As Justice White pointed out, "Florida has done precisely what we suggested, in *Cox Broadcasting*, that States wishing to protect the privacy rights of rape victims might do: 'respond [to the challenge] by means which *avoid* public documentation or other exposure of private information.' "[164] Florida's experience should give

161. Writing in the wake of the *Florida Star* decision, Edelman asserted that

> the Court's analysis reflects what may be a pervasive problem—that courts have little devotion to personal privacy interests, relative to most other important or worthy values. The Court's disrespect for the Florida rape-victim-anonymity statute may exemplify its underlying rejection of personal privacy, and, more particularly, the unique privacy interests of rape victims, as interests worthy of protection.

See Edelman, *supra* note 73, at 1195, 1223.

162. *Id.* at 1207. Edelman also refers to the Justices in the *Florida Star* majority as "absolutists in balancers' clothing." *Id.* at 1223.

163. Fla. Star v. B.J.F., 491 U.S. 524, 544 (1989) (White, J., dissenting).

164. *Id.* at 547.

pause to those seeking to predict the future contours of the Court's privacy jurisprudence based on the subtle hints and hedged assertions of the Court's existing opinions.

However, while there is good reason to believe that the Court has endorsed the view of content-based privacy restrictions mandated by the systemic rights model of free speech, the Court has not foreclosed the possibility that a statutory scheme addressing all the Court's concerns could withstand constitutional muster. While it may be difficult to imagine a privacy interest greater than the one at stake in *Florida Star*, the Court did not necessarily find that protecting the privacy of a rape victim fell short of being a "highest order" interest. In explaining why B.J.F. had not satisfied the *Daily Mail* principle, the Court wrote that "imposing liability for publication under the circumstances of this case *is too precipitous a means of advancing these interests to convince us that there is a 'need'* within the meaning of the *Daily Mail* formulation for Florida to take this extreme step."[165] The opinion seems to have taken issue not so much with the gravity or importance of the interests at stake but rather the manner in which Florida proscribed truthful publication in order to effectuate those interests.[166] To put it another way, the Court did not necessarily find the *interests* at stake to be inadequate; it found the *means* adopted to pursue those interests to be inadequate.

Following in this vein, a number of courts have speculated that the firm establishment of the *Daily Mail* principle in *Florida Star* did not necessarily sound the death knell for restrictions on speech that provide a right of actions for the publication of private content. Writing for the Seventh Circuit in *Haynes v. Alfred A. Knopf, Inc.*, Judge Richard Posner asserted, "We do not think the Court was being coy in *Cox* or *Florida Star* in declining to declare the tort of publicizing intensely personal facts totally defunct."[167] The Eighth Circuit expressly agreed with Posner's assessment and stated that

> after reviewing Supreme Court precedent and the decisions of other circuits that have faced the tension between the First Amendment's protection of free speech and state-law actions in tort for the invasion of privacy, we conclude that speech that reveals truthful and accurate facts about a private individual can, consistently with the First Amendment, be regulated because of its constitutionally proscribable content.[168]

165. *Id.* at 537 (majority opinion) (emphasis added).

166. *See id.*

167. Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993).

168. Coplin v. Fairfield Pub. Access Television Comm., 111 F.3d 1395, 1404 (8th Cir. 1997).

C. Content-Neutral Regulations: Bartnicki

In the only case the Court has heard involving a content-neutral regulation that restricts the publication of private information, it struck down the statute as an unconstitutional abridgement of the freedom of speech. In *Bartnicki v. Vopper*, an unknown individual illegally intercepted and recorded a cellular phone conversation about contract negotiations between two teachers' union officials, in which one of the officials made a threatening remark about the school board.[169] The president of a local taxpayers' group found a tape of the conversation in his mailbox and gave it to a radio commentator who played it on the air.[170] Union officials sued the radio commentator under a federal law making it illegal to disclose the contents of an oral, wire, or electronic communication where the disclosing party knew or had reason to know that the information was illegally intercepted.[171]

In his majority opinion, Justice Stevens found that the wiretapping statute was a content-neutral restriction on speech:

> The statute does not distinguish based on the content of the intercepted conversations, nor is it justified by reference to the content of those conversations. Rather, the communications at issue are singled out by virtue of the fact that they were illegally intercepted—by virtue of the source, rather than the subject matter.[172]

The majority opinion also declared that fostering private speech by protecting private communications was an interest "of the highest order."[173] The Court discussed two ways that punishing publication would further this "highest order" interest: first, it would deter parties from intercepting private conversations in the first place; and second, it would "minimize[] the harm to persons whose conversations have been illegally intercepted" by preventing an even larger circle of people form learning the contents of the conversation.[174]

On the first issue, Justice Stevens's opinion asserted that punishing publication would not achieve the goal of deterring illegal interceptions since the state's ability to directly punish the

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169. Bartnicki v. Vopper, 532 U.S. 514, 518-19 (2001). One of the officials, the president of the union, stated that "[i]f they're not gonna move for three percent, we're gonna have to go to their, their homes . . . . To hlow off their front porches, we'll have to do some work on some of those guys." *Id.* (internal quotations omitted).

170. *Id.* at 519.

171. *Id.* at 523-24.

172. *Id.* at 526.

173. *Id.* at 518.

174. *Id.* at 529, 533.

intercepting party provided an adequate deterrence.[175] Although the intercepting party in *Bartnicki* actually remained anonymous, the majority opinion shrugged this off as a rare and "exceptional case."[176]

On the second issue the majority acknowledged that a "considerably stronger" argument could be made for the assertion that punishing publication would minimize the harm to those whose private conversations had already been intercepted, and Justice Stevens was not able to point to any other alternative means of furthering this interest.[177] Stevens acknowledged that "the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself."[178] However, ultimately the *Bartnicki* majority found that despite the fact that the law was narrowly tailored to serve a "highest order" interest, "[i]n these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance."[179]

D. Evaluating the Court's Content-Neutral Jurisprudence

The *Bartnicki* opinion is deeply flawed for a number of reasons. While the Court eventually came out on the right side of the issue, it did not get there for the right reasons. First, it is unclear exactly what standard the Court actually applied in striking down the statute. While the Court refers to the wiretapping statute as content-neutral and it "balance[s]" competing interests to determine the statute's constitutionality, the Court also cites the strict scrutiny standard of the *Daily Mail* test.[180] Justice Rehnquist believed that the Court was in truth applying the latter standard.[181] He criticized the majority in his dissent for its "tacit application of strict scrutiny."[182] This ambiguity in the Court's analysis perhaps reflects the Court's poor grasp of the novelty of the analytical problem posed by a regulation that limits the publication of information based on the manner in which the information was obtained.[183] Such laws are content-neutral and thus seem to merit only a balancing analysis, but at the same

175. *Id.* at 530-31. Justice Stevens explained that the identity of the intercepting party was generally known since he or she typically sought financial reward, public praise, or intercepted the communication in connection with a domestic dispute. *Id.*

176. *Id.* at 531.

177. *Id.* at 532-34.

178. *Id.* at 533.

179. *Id.* at 534.

180. *Id.* at 527-28, 533.

181. *Id.* at 544 (Rehnquist, J., dissenting).

182. *Id.*

183. *See supra* Part IV.B.1.

time they ban an entire category of speech from the market and as a result seem per se unconstitutional.[184] The appearance of a strict scrutiny application may simply be the product of a poor articulation of this analysis.

The second problem with the majority opinion is that it considers the relative value of public and private speech in its analysis. The Court found the fact that the speech at issue was of "public concern," as opposed to "information of purely private concern," such as "trade secrets or domestic gossip," to be a relevant factor in its analysis of whether speech was constitutionally protected.[185] As discussed in Part IV.A.1., there is no reason to think that "private" speech is any less newsworthy than other kinds of speech, and even if such a distinction were theoretically sound, many of the facts that the Court has classified as "not of public concern" are quite obviously just the opposite.[186] Further, assuming that the Court actually was applying a content-neutral balancing test, the importance or "public concern" of the speech plays no role in the analysis. Such an evaluation and balancing of the importance of content is exactly what First Amendment law seeks to avoid. Rather, the relevant inquiry on the speaker's side concerns what alternative channels are left open to the speaker and whether these alternative channels are as effective as the restricted means of expression. As discussed above, the outcome of such a balancing analysis must necessarily be that the regulation is unconstitutional, because there are no alternative channels—the statute completely banned the dissemination of the facts obtained through the illegal interception of electronic communication.

A third problem with the *Bartnicki* opinion is its cursory dismissal of the argument that punishing the publication of intercepted information was a necessary and effective way of disincentivizing interceptions. While even a finding that these interests were compelling or very substantial would not have ultimately saved the statute under a balancing analysis, the Court was wrong to pin its invalidation of the statute on the efficacy of the means employed by the statute to further privacy interests. The "dry-up the market theory" is a plausible mechanism for deterring upstream illegal conduct "that undergirds numerous laws, such as the prohibition of the knowing possession of stolen goods."[187] While, as the majority points out, the identity of the initial intercepting agent is

184. *Id.*

185. *Bartnicki*, 532 U.S. at 533-35.

186. Volokh, *supra* note 115, at 743 ("Every time the Court has decided that certain speech is not on a matter of public concern, it has erred.").

187. *Bartnicki*, 532 U.S. at 550 (Rehnquist, J., dissenting).

known in most wiretapping cases, and can therefore be punished directly, these few cases may represent a skewed sample.[188] Clearly there are some cases, most notably *Bartnicki* itself, in which the identity of the initial interceptor is not known, and thus the threat of direct punishment of the intercepting party may not provide a sufficient disincentive. The Court points out that "there is no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal interceptions,"[189] but this is an unfair criticism due to the inherent design difficulty of constructing a rigorous empirical study on the effectiveness of such a publication ban.[190]

VI. CONCLUSION

Vigorous dedication to the principle of free speech is most needed when it is easy to sympathize with those who would benefit from censorship. Free speech is an abstract concept, and the harm to a person who has had the most intimate details about their lives revealed in the pages of a newspaper or broadcast on the nightly news may seem to far outweigh the harm of a small amount of censorship in any particular case. Nonetheless, while the short-term tangible benefits of a vigorous marketplace of ideas at times may be difficult to see, free speech is a vital structural element of democratic government that holds a central position in the constitutional order.

Granting privacy rights that provide individuals "a right to stop people from speaking about you"[191] in specified circumstances may be appealing when a sympathetic victim seems to have been bullied and unnecessarily exposed by the press, but such a right is incompatible with the First Amendment. Restricting the publication of private information implicates the same First Amendment concerns that are raised whenever the government suppresses speech. The Court has developed an effective doctrinal framework for dealing with government regulation of speech, and under this framework both content-based and content-neutral restrictions on the dissemination of private information do not pass constitutional muster.

While the Supreme Court has addressed the tension between speech and privacy in a number of cases, it has failed to apply directly its overarching doctrinal framework for speech cases to this conflict. Rather, the Court's decisions in this area have either rested upon

188. *Id.* at 530 (majority opinion).

189. *Id.* at 530-31.

190. *Id.* at 552-53 (Rehnquist, J., dissenting).

191. Volokh, *supra* note 5, at 1049.

narrow grounds unique to a specific statutory scheme or have been decided with only the most perfunctory analysis. The Court has failed to adopt a coherent approach to this area of the law or identify the fundamental theoretical and doctrinal tensions at work. While the Court has always reached the right result, it has done so only after laying a poorly drawn roadmap to guide lower courts and after providing few concrete assurances that it will continue on its current tack.

However, the Court's failure to articulate a coherent approach to cases that present a conflict between privacy and speech must be placed in the proper context. The Court's discomfort with the real world implications of its decisions in some of these cases is almost palpable, yet each time at least a majority of the Court was willing to defend abstract principles of free speech despite the presence of strong personal sympathies tugging in the direction of censorship. A brief perusal of speech cases from the first half of the twentieth century reveals that the Court has not always been as able to resist the temptation to check its personal sympathies and biases at the door when evaluating a First Amendment claim.[192] Thus, while there is much to condemn in the Court's treatment of the conflict between privacy and speech, there is also something to celebrate.

*Jared Lenow**

192. *See, e.g.* Dennis v. United States, 341 U.S. 494, 516-17 (1951) (upholding a conviction for being a member of the Communist Party); Whitney v. California, 274 U.S. 357, 371-72 (1927) (upholding a conviction for being a member of an anarchist organization); Gitlow v. New York, 268 U.S. 652, 671-72 (1925) (upholding a conviction for distributing a socialist manifesto); Abrams v. United States, 250 U.S. 616, 624 (1919) (upholding a conviction for distributing pamphlets advocating a general strike during wartime); Debs v. United States, 249 U.S. 211, 216-17 (1919) (upholding the conviction of socialist leader Eugene Debs for criticizing the United States' entry into World War I and expressing support for those who did not register for the draft); Frohwerk v. United States, 249 U.S. 204, 210 (1919) (upholding a conviction for publishing articles criticizing the United States' entry into World War I and sympathizing with those who resist the draft); Schenck v. United States, 249 U.S. 47, 52-53 (1919) (upholding a conviction for distributing pamphlets criticizing military conscription).

* I would like to thank Professor Thomas McCoy for providing invaluable guidance and feedback throughout the Note-writing process, and the members of the *Law Review* editorial board who offered helpful comments and suggestions. I would also like to thank Kelly Gerhard, Anna Lazarus, and Lauren Webb for their constructive criticisms of, among other things, the arguments made in this Note.