CHAPTER 10

Privacy, the First Amendment, and the Internet

GEORGE R. STONE

There is a lot of talk these days about the nasty nature of the discourse on the Internet. As the film critic David Denby notes in his recent book, *Snark*, there is a new “strain of nasty, knowing abuse spreading like pinkeye through the national conversation.” Discussion threads on websites are often free-fire zones “of bilious, snarling, resentful, other-annihilating rage.” The Internet, Denby observes, has allowed “a degeneration of invective” to “metastasize” through our culture, and once such material is there, “it’s there forever, since it’s easily Googled out of obscurity.” The Internet “provides universal distribution of what had earlier reached a limited number of eyes and ears,” and “the knowing group has been enlarged to an enormous audience that enjoys cruelty as a blood sport.” The result, he predicts, will undermine the quality of public discourse and leave everyone “in a foul mood.”

To what extent may the government regulate such expression, consistent with the First Amendment? As the Supreme Court made clear in New York Times v. Sullivan, the First Amendment embodies “a profound national commitment” to the principle that public discourse “should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp” speech. Indeed, the Court has declared that the freedom of speech may “best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger.” The Court has therefore long and consistently held that the First Amendment generally forbids restrictions of speech in public discourse on the ground that it is offensive, unsettling, insulting, demeaning, annoying, snarling, bilious, rude, abusive, or nasty. As the Court held some sixty years ago, free speech is generally protected unless, at the very least, it is “likely to produce a clear and present danger of a serious substantive evil.”

This does not mean that speech can never be regulated on the Internet. The Court has recognized that there are “certain well-defined and narrowly limited classes of speech” that can be restricted even in the absence of a “clear and present danger of a serious substantive evil.” These include, for example, false statements of fact that defame individuals, fighting words, threats, obscenity, commercial advertising, express incitement of unlawful conduct, and child pornography, all of which can be restricted in certain circumstances. Moreover, such speech can be regulated on the Internet in the same way and to the same extent it can be regulated in any other setting. Thus, bloggers who make false and defamatory statements of fact or threaten others with violence can be punished for their speech just as they could if they conveyed such messages in a newspaper, a leaflet, or a public speech.

Indeed, as a general matter speech on the Internet should be no more or less protected than in any other venue. There are, of course, differences between the Internet and leafleting, in the same way that there are differences between newspapers, pamphlets, movies, radio, television, loudspeakers, and soapboxes. But, for the most part, the core First Amendment principles apply in the same manner, regardless of the means of communication.

It is sometimes said that the harm from speech on the Internet is potentially greater than the harm from speech in other media, because the potential audience is much larger, the speech remains indefinitely discoverable, and information can be easily located through search engines like Google. All of this is true. A false and defamatory statement can cause more harm to its victim if it is conveyed on the Internet than if it is communicated over a backyard fence or in a local newspaper, and this is certainly relevant in determining damages or punishment, if the speech is unprotected by the First Amendment. But none of this is relevant to whether the speech should be protected in the first place.

If speech is sufficiently valuable to merit First Amendment protection when it is spoken over a backyard fence or published in a local newspaper, then (at least presumptively) it is also sufficiently valuable to be protected when it is disseminated on the Internet. This is so because just as the harm caused by the speech may be magnified by the power of the Internet, so too is the value of the speech. As a general proposition, as speech reaches a larger audience, its cumulative value will increase in the same proportion as its cumulative harm. Thus, as a matter of first approximation, the fact that speech on the Internet can cause more harm than speech in a local
newspaper is not a reason to accord it any less protection under the First Amendment. The balance between value and harm remains more or less constant.

In this essay, I focus on a category of expression whose status under the First Amendment is unclear—non-newsworthy invasions of privacy. As already noted, the general principles that govern such expression are not unique to the Internet. They apply without regard to whether the speech takes place on the Internet, in a newspaper, in a leaflet, or in any other form of public discourse.

General Principles

In what circumstances, if any, may the government penalize an individual for communicating "private" information about another person? The First Amendment forbids the government to abridge "the freedom of speech, or of the press." On its face, the First Amendment would seem to prohibit any effort of government to punish or censor an individual for communicating private information about another person. Any such penalty or censorship would seem literally to abridge "the freedom of speech, or of the press." This was essentially Justice Hugo Black's view of the First Amendment. The First Amendment says what it means and means what it says. The First Amendment is an absolute. The government "shall make no law abridging the freedom of speech, or of the press." End of discussion.7

This view of the First Amendment has not carried the day. The First Amendment cannot plausibly give individuals an unlimited right to say anything, at any time, in any place, in any manner. Justice Oliver Wendell Holmes made this point succinctly with his famous hypothetical of the false cry of fire in a crowded theatre.8 To make sense of the First Amendment, we must define the "the freedom of speech, or of the press" that may not be "abridged."

Three inquiries have framed the Supreme Court's analysis of this inquiry. First, is the challenged law directed at the content of speech? If the law is neutral with respect to content, that is, if it restricts expression without regard to what is being said, then the Court generally balances the state interest against the speech interest to decide whether the restriction is constitutional. Under this approach, a law prohibiting all public speeches in public places is unconstitutional, whereas a law prohibiting the use of loudspeakers after midnight in residential neighborhoods is constitutional.9 Insofar as the government penalizes an individual for communicating private information about other persons, the restriction is clearly directed at the content of the communication, so content-neutral analysis is irrelevant.

Second, if the restriction is directed at content, does it regulate only "low-value" speech? The Court has held that there are several categories of expression, such as false statements of fact, obscenity, commercial advertising, fighting words, express incitement of unlawful conduct, and threats, that do not appreciably further the central purposes of the First Amendment. If a challenged restriction is directed at low-value speech, the Court employs a form of balancing to determine whether the state interest is sufficiently weighty to justify the restriction. We will return to this doctrine shortly.

Third, if the law is directed at content, and the speech restricted is not of low First Amendment value, then the restriction ordinarily will be upheld only if it is necessary to prevent a clear and present danger of a very grave harm, such as a threat to the national security.10 No one seriously argues that laws prohibiting the publication of non-newsworthy private information address a sufficiently grave harm to meet this standard. Thus, the central issue with respect to invasion of privacy is whether such expression is low-value speech.

Protecting Privacy at the Source

Before turning to the issue of defining a category of expression as low-value speech, however, it is important to note there are many ways in which the government can constitutionally protect individual privacy without directly forbidding the publication of "private" information. For example, in order to protect the interest in privacy, the government often restricts particularly intrusive means of gathering information about others, such as wiretapping, unauthorized mail opening, and burglary. Such laws protect privacy not by directly restricting expression, but by enabling people to shield actions, communications, and information they deem private from prying eyes and ears. Laws forbidding such invasions of privacy generally do not violate the First Amendment, because they are not only content-neutral, but are not even directed at speech. Rather, they have only an incidental effect on free expression. As a general proposition, the First Amendment does not give individuals a constitutional right to violate laws
of general application merely because doing so would enable them to speak or to gather information more effectively. A reporter, for example, has no First Amendment right to break into a public official’s home or to wiretap her phone calls in order to learn whether she has taken a bribe. 11

An important twist on this method of protecting privacy is whether the government can constitutionally prohibit not only the wiretapping, burglary, or unauthorized mail opening, but also the publication of the unlawfully obtained information. A reporter who burgles a public official’s home in order to obtain evidence that she has taken a bribe can clearly be punished for the unlawful break-in, but can the reporter’s newspaper also be punished for publishing the fact that the politician took a bribe? The argument for restricting the newspaper’s speech in this situation is not that the publication itself violates the politician’s right to privacy but that punishing the publication helps to deter the unlawful burglary.

The Supreme Court has wavered on this question. In some instances, the Court has held that the publication can be prohibited in order to reduce the incentive for the underlying illegality. For example, in the context of child pornography, which involves the depiction of actual sexual acts by real children, the Court has held not only that the government can punish the producer of child pornography for the underlying child sexual abuse, but that it can also punish those who knowingly exhibit or disseminate the images, both to eliminate the incentive for the underlying illegality and to protect the child from the continuing harm that would be caused by the ongoing distribution of the speech. 12

In other situations, however, the Court has separated the punishment of the person who commits the underlying crime from the right of the press to disseminate the information. In Bartnicki v. Vopper, for example, the Court held that the government could not constitutionally punish a radio commentator for broadcasting an unlawfully wiretapped telephone conversation, where the information related to a matter of public concern. The Court left open the question whether the government could constitutionally have punished the commentator if the broadcast had involved only a matter of “domestic gossip of purely private concern.” 13

The law also protects individual privacy by recognizing and enforcing a broad range of confidential relationships. Some of these relationships are created by private contract, others by statute, regulation, or common law. For example, the law generally protects the confidentiality of client-lawyer, patient-doctor, penitent-priest, source-journalist, and inter-spousal com-

munications, as well as the confidentiality of tax, financial, medical, educational, and psychiatric records. 14

To the extent these relationships are created by private contract, the general understanding is that such contracts are binding even though one of the parties has agreed to contract away what otherwise would be a First Amendment right to disclose information. As the Supreme Court has observed, in the contractual context the “parties themselves determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed.” Thus, if X, a public official, tells Y, a friend, that he took a bribe, Y ordinarily is under no legal obligation not to disclose this information to others and cannot be held legally accountable for doing so. But if X reveals this information to Y, an author, as part of a contractual agreement in which Y promises not to disclose the information, then Y can be held liable for violating the contract. This is so because the law of contract, like laws against burglary and wiretapping, is not directed at speech and has only an incidental effect on free expression. 16

When these relationships are created by statute, regulation, or common law, the analysis is more complex. For example, the law may prohibit employees of the Internal Revenue Service from disclosing the contents of individual tax returns or it may prohibit doctors and other medical personnel from revealing the contents of confidential medical records. Such laws are directed at speech, but because they govern the conduct of individuals in a special relationship with government—public employees or licensees—who have knowingly agreed to limit their First Amendment rights in order to gain access to confidential information, they are generally upheld as long as they serve a substantial government interest. 17

In these situations, as in the wiretap and burglary situations, an issue can arise about whether the restriction on speech can be enforced not only against the party to the contract or the public employee or licensee, but also against third parties who obtain the information as a result of a breach of a confidential relationship. For example, suppose a doctor impermissibly discloses confidential medical information about his patient, a political candidate, to a reporter. As in the burglary and wiretap situation, the doctor could be held legally accountable for breaching the confidentiality requirement. But can the political candidate sue the reporter’s newspaper for publishing the information?

In decisions like the Pentagon Papers case, the Court has held that even if a reporter gains access to confidential information through an unlawful
leak, and even if the public employee who leaked the information can be punished for unlawfully disclosing it to the reporter, the government cannot constitutionally prohibit the publication of the information in order to deter the initial leak.\(^\text{18}\) Thus, as in Bartnicki, if a newspaper published the information leaked by the doctor about the political candidate, it would be constitutionally protected if the information involved a matter of public concern (for example, if the medical condition was relevant to the candidate's fitness for office). As in the burglary and wiretap situations, however, it is uncertain whether the publication would be protected if the information concerned only a matter of "domestic gossip of purely private concern" and the purpose of the restriction was to deter the underlying breach of confidence.\(^\text{19}\)

Thus, the law protects privacy in a variety of ways. It enables individuals to be reasonably confident that certain places, activities, communications, and relationships, such as one's home, one's phone calls, one's bank records, and one's private communications with doctors and lawyers, will generally be protected against public exposure. The underlying assumption is that individuals who are truly concerned about the privacy of certain information or activities will have a reasonable, though imperfect, way to safeguard their privacy by controlling how, when, where, and to whom they reveal such information. In this way, they can control their privacy at its source.

**Warren and Brandeis**

This brings me back to the central question, which is whether the government can constitutionally penalize the publication of private information about an individual in the absence of any underlying wrongdoing. To get at this question, suppose a law student writes on a law-related blog that one of her professors is gay. In fact, the professor is gay. He has generally been discreet about this fact, however, preferring to keep it to himself. But he has had several lovers, and he has discussed his sexual orientation with close friends. One of the professor's former lovers told his cousin about his affair with the professor, and the cousin then told the student, who published the information on the blog.

The professor sues the student for invasion of privacy. In this case, the student learned the information without any underlying illegality. Neither the student nor anyone else in the story line engaged in an unlawful wire-tap, rummaged through the professor's home or office, breached any contractual agreement with the professor, or did anything else unlawful or improper. Is the student liable to the professor for invasion of privacy?

Historically, Anglo-American law did not recognize a common law right of privacy that would cover this situation. It was traditionally assumed that people would guard—or not guard—their own privacy as they saw fit, and that they would assume certain risks, inherent in a free and open society. If they did certain things in public that were observed or if they chose to share certain information about themselves with others, they assumed the risk that the information might be disseminated to others. In this legal regime, those who wanted to preserve their privacy had to act carefully and with discretion. In what was predominantly a rural or small-town society, this was surely an imperfect protection of privacy. But, as with many risks in everyday life, the law generally assumed that individuals were responsible for their own choices and actions, including their decisions about how best and how much to safeguard their privacy.

The idea of a tort of invasion of privacy for the publication of non-news worthy information was first advanced by Samuel Warren and Louis Brandeis in an 1890 law review article.\(^\text{20}\) Warren and Brandeis's critique of the state of the media at the end of the nineteenth century is especially interesting, because it is strikingly similar to the contemporary critique of discourse on the Internet: \(^\text{21}\)

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip. ... In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in the lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. ... Triviality destroys at once robustness of thought and delicacy of feeling.

To remedy this state of affairs, Warren and Brandeis proposed the recognition of a new tort, based on the "right to privacy," that would protect individuals from the "ruthless publicity" caused by the "discussion by the
press” of their “private affairs.” The idea gradually took hold, and most states now recognize the tort, holding that an individual can be held liable for the public disclosure of even truthful facts about another if the information is “non-newsworthy” and the disclosure would be “highly offensive” to a reasonable person.

The question is whether this tort can be squared with the First Amendment. Harry Kalven once suggested that the freedom of speech protected by the First Amendment is so broad and “overpowering as virtually to swallow the tort.” The Supreme Court has never directly addressed the question. As already noted, the critical issue is whether such expression can appropriately be deemed “low-value” speech within the meaning of the First Amendment.

Low-Value Speech

The Supreme Court has never offered a clearly defined theory of low-value speech. The case law, however, suggests that several factors are relevant to the analysis. First, categories of low-value speech (for example, false statements of fact, threats, commercial advertising, fighting words, incitement of unlawful conduct, and obscenity) do not primarily advance political discourse. Second, categories of low-value speech are not defined in terms of disfavored ideas or political viewpoints. Third, categories of low-value speech usually have a strong noncognitive effect on the audience. Fourth, categories of low-value speech have long been regulated without undue harm to the overall system of free expression.

A defining characteristic of speech that is actionable as an invasion of privacy is that it is “non-newsworthy.” In principle, this takes care of the first two criteria. That is, “non-newsworthy” information, by definition, presumably does not primarily advance political discourse and is not defined in terms of a disfavored idea or point of view.

The third and fourth criteria, however, are more problematic. Unlike, say, threats, fighting words, and obscenity, all of which arguably have a powerful noncognitive impact on the audience, non-newsworthy information does not have that characteristic. Some other low-value categories, however, such as false statements of acts and commercial advertising, also do not share this characteristic, so its absence should not be taken to be dispositive.

The fourth criterion is critical. A long tradition of regulating a particular category of low-value expression creates a shared understanding of the contours and definition of the category and demonstrates from experience whether the category can be regulated without doing undue damage to First Amendment interests. Every recognized category of low-value speech has long been subject to legal regulation, and most classes of low-value speech were regulated at common law even before the adoption of the First Amendment.

The importance of this criterion makes considerable sense, for the recognition of novel categories of low-value speech poses serious constitutional dangers. The very concept of low-value speech is inherently problematic. As Thomas Emerson once observed, the doctrine inevitably involves courts in “value judgments concerned with the content of expression,” a role that is awkward, at best, in light of “the basic theory of the First Amendment.” Placing great weight on experience and tradition in this context is therefore a reasonable way to capture the benefits of the low-value doctrine without inviting freewheeling judicial judgments about constitutional “value.” The Court has rightly been very reluctant to recognize new categories of low-value speech, and this reluctance has stood us in good stead.

There is no long-standing tradition of regulating the publication of non-newsworthy private information. Although the tort was first proposed in 1890 and has been adopted by most states, even now, 120 years later, there is no extensive case law defining the boundaries of the tort and no well-developed understanding of how to reconcile the tort with the First Amendment. For the most part, the tort has been enforced rarely and idiosyncratically. As Daniel Solove, a strong advocate of the privacy tort, has conceded, courts have “struggled when applying the newsworthiness test.” There is simply no track record to suggest that this category of expression can meaningfully be regulated without unduly impairing the freedom of speech more generally.

The central argument for treating this category of speech as low value is that it is said to be “non-newsworthy” and therefore does not meaningfully contribute to the sort of public discourse that the First Amendment was intended to promote. But the very concept of “non-newsworthy” is exceedingly slippery. Of course, it is easy to hypothesize specific examples of speech that most people would readily agree constitute non-newsworthy disclosures of private information, the publication of which would be highly offensive to reasonable people. Consider, for example, a nude photograph of an otherwise private individual that someone posts on the Internet for no reason other than to embarrass him. It is difficult to see how such an
image, standing alone, could be deemed “newsworthy,” or how it could be denied that the posting would be deemed highly offensive by reasonable people.

But identifying a few easy cases does not answer the vagueness concern, for it is just as easy to hypothesize a great many difficult cases. Consider a nude photograph of Sarah Palin. Suppose it reveals her sunbathing on a nude beach. Is that non-newsworthy? Suppose the nude photograph shows a professor naked in his backyard with a student. Or, to change the theme a bit, suppose the post reveals that a professor is gay. Is that non-newsworthy? What if the disclosure is part of an accusation that the professor favors gay students or discriminates against students who are Christian fundamentalists? Suppose a post on the Internet discloses that a student is gay. Is that non-newsworthy? What if the post is intended to inform other students about the student’s sexual orientation? Is this “none of their business”? What if some students prefer not to socialize with homosexuals? Don’t they have a right to make that choice?

Suppose the post reveals that a particular woman has had an abortion. Is that non-newsworthy? What if the woman is running for student body president? What if the woman is a babysitter and the information is posted on a website about prospective babysitters? Don’t parents have a right not to hire as a baby-sitter for their children a woman who, in their view, has murdered her own child? Is such information newsworthy or non-newsworthy?

Or consider the identity of an alleged rape victim. Is there anything newsworthy about the publication of her name? Wouldn’t the person accused of the alleged rape want the victim’s name broadly disseminated so people with relevant knowledge about her might come forward with information that would help prove his innocence? Perhaps she has made false accusations against other people in the past or told other people a different story about what happened. Is her identity non-newsworthy?

My point is not to deny that there are some hard-core situations that would surely qualify as non-newsworthy publications, or that their dissemination would be highly offensive to reasonable people. It is, rather, that “non-newsworthiness” is an extraordinarily vague and open-ended concept. Other categories of low-value speech, like express incitement of unlawful conduct, threats, fighting words, commercial advertising, and false statements of fact, although inevitably vague at the margins, are much more easily defined and identified than “non-newsworthy” speech, which is highly context and value dependent. Even the doctrine of obscenity, which has vexed the judiciary for decades, is at least limited to a relatively narrow category of expression encompassing only the explicit and patently offensive depiction of certain clearly defined sexual acts. The concept of non-newsworthiness embodies no objective limitations. As Randall Bezanson has aptly observed, the “standards of taste or propriety” that are necessarily embedded in the idea of non-newsworthiness are “simply unascertainable on a societal level” because contemporary society is “too pluralistic and culturally diverse.”

Even Warren and Brandeis acknowledged that there would be serious “difficulties” in the articulation of their proposed tort. They conceded, for example, that “the propriety of publishing the very same facts may depend wholly upon the person about whom they are published,” and that “no fixed formula” can be designed to separate the newsworthy from the non-newsworthy. Indeed, they acknowledged that any effort to enforce the invasion of privacy tort would necessarily require a “rule of liability” that “must have in it an elasticity which shall take account of the varying circumstances of each case,—a necessity which unfortunately renders such a doctrine not only more difficult of application, but also . . . uncertain in its operation.”

Warren and Brandeis recognized these obstacles long before the Supreme Court had explored the challenges of creating a truly robust system of free expression, a system in which concerns about vagueness, over-breadth, discretion, and chilling effect have come to play a central role. Ambiguity in the law governing the freedom of speech was commonplace in 1890. Today, in light of our constitutional experience, the Court has rightly insisted on a degree of precision in First Amendment doctrine that renders implausible the idea of holding people legally accountable for truthful publications because some court or jury later finds them to be “non-newsworthy.”

At this point, it might be useful for me to offer a brief aside on threats, both because they were much discussed, often rather casually, at the conference on which this volume is based, and also because the concept of a threat illustrates the necessity for a clear definition of low-value speech categories. A threat, for First Amendment purposes, is not a statement that is intended to frighten or intimidate another. For example, a statement by a doctor to a patient that if she does not quit smoking she will take years off her life is not a threat, even though it is intended to frighten and intimidate her into action she does not want to take. To constitute a threat, a statement must,
among other things, clearly suggest that the harm will be brought about by the speaker or his confederates. Thus, the statement “I will kill you if you don’t pay me what you owe me” is a threat. The statement “X deserves to die because he didn’t pay me what he owes me” is not a threat under the First Amendment, because the speaker is not suggesting that he or his accomplices will kill X. The specificity of the definition of a threat is necessary to avoid ambiguity that would otherwise chill constitutionally protected expression.

Similarly, incitement to commit unlawful conduct does not mean statements that might cause others to commit crimes or even statements that are intended to encourage others to commit crimes. The former would reach all sorts of criticism of the government (for example, speech criticizing the conduct of the war in Iraq might be thought to encourage terrorists); the latter would afford speakers who criticize the government inadequate protection against jurors who abhor their views and are therefore likely to find bad intent even when that intent was lacking. Thus, as Judge Learned Hand recognized more than eighty years ago, for speech to be punishable as incitement, it must expressly incite unlawful conduct. These examples underscore the fatal ambiguity of the “newsworthiness” concept.

**Private and Public Speech**

Having said all this, I must acknowledge that there are elements of First Amendment doctrine in which the law distinguishes between public and private speech, and that this distinction is, in some instances, somewhat similar to the distinction between newsworthy and non-newsworthy expression. Does this save the invasion of privacy tort from extinction?

At the outset, it is necessary to separate two different public/private distinctions. Some speech is “private” in the sense that it is not part of public discourse. An example might be a conversation between two friends about a mutual acquaintance over a cup of coffee. Although the Court has not embraced any overarching First Amendment principle for dealing with such nonpublic speech, the general assumption seems to be that a libelous statement, or a threat, or a bribe, or an effort to persuade someone to commit a crime in such circumstances would not necessarily be tested by the same First Amendment standards that govern public discourse. But this element of the public/private distinction is not relevant to speech on the Internet (except, perhaps, to private emails between two individuals), because blogs and most other forms of expression on the Internet are disseminated to a large audience and are therefore clearly on the “public” side of the line in terms of this aspect of the public/private distinction.

The other variant of the public/private distinction is more relevant to the non-newsworthiness inquiry. In several areas of First Amendment law, the Court has held that speech will be protected from restriction if it concerns matters of public concern, even though similar speech might be regulated if it involves matters of only private concern. We have already noted one example of this phenomenon in the discussion of Bartnicki, in which the Court held that a radio commentator could not be held liable for broadcasting a tape recording of an unlawfully wiretapped telephone conversation, because the tape concerned a matter of public concern, while at the same time noting that the result might be different if the recording dealt only with “domestic gossip of purely private concern.” Similarly, in libel law, the Court has indicated that false statements of fact about “matters of purely private concern” are entitled to less First Amendment protection than false statements on “matters of public concern.” And in the regulation of speech by public employees, the Court has held that the government has greater leeway to restrict public employee expression that disrupts government activities when the speech concerns only matters of personal interest, rather than matters of “political, social, or other concern to the community.”

Thus, although the Court has generally expressed grave “doubt” about “the wisdom of committing” to judges and jurors the task of distinguishing “on an ad hoc basis” between matters of public and private concern in the interpretation and application of the First Amendment, it has, in at least some circumstances, recognized that such an inquiry may be necessary to strike the right balance between the freedom of speech and competing government interests. Put differently, inquiries into whether speech is relevant to matters of public concern have not been deemed so fundamentally incompatible with the basic premises of the First Amendment that they must be ruled out entirely. But it is important to note that the Court has authorized such inquiries only in very narrowly defined circumstances in which the expression at issue is already presumptively subject to regulation—even apart from the public/private distinction. In the Bartnicki situation, for example, the information was initially obtained unlawfully and would not have been available at all but for the underlying illegality. In the libel situation, the expression at issue consists of false statements of fact, which are
The Court therefore concluded that the
would allow a jury to impose liability on the basis of the jurors’
political and social discourse has an inherent subjectiveness which
figures may not recover for the tort of intentional infliction of emotional
distress as a result of even
outrageous
publication
as a result of even "outrageous" publications that insult, degrade, or
humiliate them, in the absence of proof of falsity. The Court explained that
although a "bad motive may be deemed controlling for purposes of tort li-
ability in other areas of the law," the "First Amendment prohibits such a
result in the area of public debate." The Court added that, like the concept
of non-newsworthiness, the concept of "outrageousness" in the realm "of
political and social discourse has an inherent subjectiveness about it which
would allow a jury to impose liability on the basis of the jurors' tastes." The
Court therefore concluded that the "outrageousness" standard "runs
afoul of our long-standing refusal to allow damages to be awarded because
the speech in question may have an adverse emotional impact on the
audience."45

Falwell dealt only with statements concerning public figures. It did not
address the constitutionality of the intentional infliction of emotional dis-
stress tort in the context of private individuals. As with the invasion of pri-
vacy tort, however, the argument for enforcing the intentional infliction
of emotional distress tort in the realm of public—as distinct from private—
discourse seems thin. Historically, the common law did not recognize such
tort, in the absence of physical harm. There was great skepticism about
such a tort because of the difficulties of proving mental injury, the risk of
fictitious claims, and the fear of a flood of litigation over trivial matters.
Although the Second Restatement of Torts recognized the tort in 1965, in
the years since most courts have continued to take a decidedly negative
approach to intentional infliction of emotional distress claims that involve
statements in public discourse. As the New York Court of Appeals observed
in 1993, it had rejected every such claim over the preceding quarter-century
because in no case was the alleged conduct sufficiently "outrageous" to
justify liability.46 Viewed in this light, it seems unlikely that the tort of inten-
tional infliction of emotional distress can be reconciled with the demands
of the First Amendment, even as applied to private figures, as long as the
speech is in the domain of public discourse.

The Interest in Privacy
Another difficulty with the invasion of privacy tort concerns the strength
of the state interest. Even when speech is deemed of low First Amendment
value, the Court generally insists that the state must have at least a substan-
tial interest to justify regulating the expression. This is so both because
even low-value speech usually has some First Amendment value and be-
cause any effort to regulate low-value speech usually has chilling effects
on high-value speech.47 Those problems are especially acute in the inva-
sion of privacy context, because the very concept of non-newsworthiness
is so elastic, subjective, fact dependent, and, in the words of Warren and
Brandeis, "difficult of application."

Of course, it is easy to romanticize the interest in forbidding the publication
of non-newsworthy information about individuals that causes them em-
barrassment and emotional distress. Warren and Brandeis waxed eloquent
Jeffrey Rosen has noted, "the right to be let alone," the right to "an inviolate personality," and the right to have one’s "social and domestic relations be guarded from ruthless publicity." Similarly, Paul Gewirtz has noted that privacy, in the sense of "the ability to control and to avoid the disclosure of certain matters about oneself," is "an important precondition for human flourishing." Indeed, there are quite clearly legitimate reasons for being concerned with privacy in this sense. The ability of individuals to engage in private conduct without having it broadcast to the world, the capacity of individuals to make mistakes without being haunted by them forever, and the freedom to live one's life without having to answer publicly for every choice, are unquestionably legitimate personal and societal interests.

But there is another side to the issue. As Richard Posner has observed, if as is often the case "what is revealed is something the individual has concealed for purposes of misrepresenting himself to others, the fact that disclosure is offensive to him and of limited interest to the public at large is no better reason for protecting his privacy than if a seller advanced such arguments for being allowed to continue to engage in false advertising of his goods." In many situations, in other words, those who assert an interest in privacy can reasonably be seen as trying to deceive others about themselves. They would rather that other people believe that they are "better" than are they, that they not know that they once had an affair or an abortion, or cheated on a test, or have an embarrassing illness, or drink to excess, or strike their children, or sunbathe in the nude. There may be good reasons for wanting to keep such information private, but Posner is surely right that in many cases people invoke the right of privacy because they want to mislead others into thinking better of them than they would if they knew the truth. In such circumstances, they are engaged in a form of fraud, and we should be careful not to see that claim for more than it really is.

There is at least a partial answer to Posner's insight, for in many cases people who learn negative things about others may exaggerate the significance of the fault and overreact in their judgment about the person. As Jeffrey Rosen has noted, "when intimate knowledge" is taken out of context, and "revealed to strangers, we are vulnerable to being misjudged on the basis of our most embarrassing, and therefore most memorable, tastes and preferences." Moreover, as Daniel Solove argues, in at least some instances the "law protects against disclosures of private information because society believes that such information is not appropriate for making public judgments about people." Thus, the real trade-off may not be between truth and falsity, but between fair and unfair evaluations of individuals. We recognize this danger in other areas of the law. In the law of evidence, for example, we routinely make evidence of a party's bad character inadmissible, because we know that jurors tend to overvalue the importance of the evidence. The invasion of privacy tort can be understood as an application of the same basic insight about human nature. But, at least in the realm of public discourse, for the government to deny people access to information because they may overvalue it reflects a form of paternalism that is directly incompatible with the basic assumptions of First Amendment theory.

Defenders of the right of privacy in this context will argue further, however, that whether or not the invasion of privacy tort sometimes enables people to deceive others about themselves, the publication of non-newsworthy information serves no legitimate First Amendment purpose, and that the Constitution is therefore simply irrelevant to the social policy question of whether people should be able to know or not to know such information about others. In Edward Bloustein's words, there is no First Amendment right "to satisfy public curiosity and publish . . . gossip about private lives." But this assumes a distinction between legitimate matters of public concern and "gossip about private lives" that is not so easily sustained. Not only, as we have seen, is the concept of "non-newsworthy" speech exceedingly vague and difficult of application, but it is not at all clear that, even if we "know it when we see it," such speech is in fact of low First Amendment value.

Eugene Volokh argues, for example, that speech about "daily life" is "worthy" of full First Amendment protection, and Diane Zimmerman insists that contemporary society uses "knowledge about the private lives of individual members" to "preserve and enforce social norms." Indeed, by providing people with a rich way "to learn about social groups to which they do not belong, gossip increases intimacy and a sense of community among disparate groups and individuals." Speech that is seen by some as unfairly invading privacy constitutes "a basic form of information exchange that teaches about other lifestyles and attitudes, and through which community values are changed or reinforced." Indeed, "perceived in this way," such expression "contributes directly" to the First Amendment's "marketplace of ideas." Beyond all this, though, the practical reality is that changes in technology may have largely made moot the very idea of the tort of invasion of privacy.
In 1890, when Warren and Brandeis first promulgated the tort, the notion that the law could meaningfully distinguish between newsworthy and non-newsworthy publications and could effectively regulate those that were non-newsworthy seemed plausible, although difficult even then. Today, however, with the advent of the Internet, the very idea of attempting to regulate such invasions of privacy is beyond the reasonable capacity of the law. Perhaps the professional press that was the principal target of Warren and Brandeis’s legal innovation could reasonably have been expected to conform their publications to professional and legal standards of newsworthiness. With a medium like the Internet, however, in which every individual can disseminate information to the world, the concept of the professional press is largely irrelevant. The private conversations that Warren and Brandeis would themselves have exempted from their tort now occur in a forum that instantly reaches everyone in the world with access to a computer.

This makes the legal enforcement of the concept of non-newsworthiness staggeringly problematic. Consider, for example, a student who posts accurately on a blog dealing with her school that a teacher recently had an abortion or had cheated in college or was seen in a gay bar. Within the confines of the school community, it would be difficult to argue that this is non-newsworthy information or that the student could be punished for revealing it to others. But with modern technology, this information will be available not only to those in the particular school community, at that time and place, but to all Internet users and forever. With the availability of search engines like Google, a person thinking of hiring the teacher twenty years later will be able with just a few keystrokes to find this information. This expands profoundly both the potential value and the potential harm of the initial posting. The main point of the hypothetical, however, is that one person’s newsworthy information is another’s invasion of privacy, and in the world of the Internet it is no longer possible to segregate audiences based on the immediate relevance of information to the community. We are all now part of a universal audience for everything and forever. This may be liberating or it may be unnerving and unwelcome, but in no event is it a state of affairs that can meaningfully be addressed by the invasion of privacy tort. That approach to the issue, which was problematic, even in 1890, is no better than quaint today. It is an odd curiosity of an earlier and vastly simpler era.

A useful analogy is the law of obscenity. Through the 1950s and 1960s, the obscenity doctrine had a substantial impact (for better or worse) on the ability of individuals to gain access to sexually explicit expression. In 1973, the Supreme Court, concerned that such expression was becoming too readily available, and that it was increasingly exerting “a corrupting and debasing impact” on society, broadened the constitutional definition of obscenity.

Despite this effort to use the law to control sexually explicit expression, technological change simply swamped the capacity of the law. With the coming of video rentals, cable television, and the Internet, sexually explicit material became more easily available on an unprecedented scale. This, in turn, affected (some would say corrupted) community standards of “decency” in the depiction of sex, and over time almost no sexually explicit material could be found to violate “contemporary community standards.” The effort of government officials to prosecute the exhibition, distribution, or dissemination of obscene matter has effectively ended at the local, state, and federal levels. Put simply, the capacity of the law was overwhelmed by the forces of social and technological change. As a consequence, legal efforts have more recently been refocused on more specific problems posed by sexually explicit materials, problems that are both more serious and more plausibly subject to legal regulation, such as zoning and child pornography.

Just as the law can no longer effectively deal with obscenity because of social and technological change, so too can it no longer effectively deal with non-newsworthy invasions of privacy. This is not to deny that there are situations in which invasions of privacy can be harmful to individuals or that, in an ideal world, we might have some way to prevent that harm. It is to say, though, that even if the First Amendment itself is not sufficient in principle to “swallow the tort,” the combination of the First Amendment and social and technological change has, for all practical purposes, gobbled it up completely. To argue otherwise is simply to tilt at windmills.

Moreover, it is not clear that the importance Warren and Brandeis attached to this sort of privacy is relevant for the future. In the contemporary culture of Facebook, Friendster, and other social-networking websites, people increasingly seem to value transparency over informational privacy. In many ways, this may be a self-adjusting system. If one of the dangers of invasions of privacy by publication was the risk that people would seriously overvalue the importance of relatively minor instances of private misconduct that rarely came to light, the much greater visibility of human foibles in the modern era will likely lead people to learn how to put the mistakes of others in their larger context. In this sense, one might hope that the loss
of privacy will result in greater tolerance and understanding, which itself might be a major triumph of the First Amendment.

The most realistic way to protect privacy today is at its source. By prohibiting highly intrusive methods of gaining information that people want to keep confidential it is still possible to enable individuals who truly care about their privacy to preserve it, if they act carefully and with discretion. But once information is out of the bottle, once we share it with others, once others know it, we can no longer hope to put it back. If that era ever existed, it is now the past.

CHAPTER 11

Foul Language:
Some Ruminations on Cohen v. California

JOHN DEIGH

Great advances in technology sometimes directly increase the power of ordinary people. The invention of the telephone and that of the automobile are two obvious examples. The advance in information technology of the past twenty years is a third. Before the development of the Internet, only a small number of people commanded means of communication that could reach an audience larger than a few hundred. Now, however, anyone with access to a personal computer has the power to reach millions not only in his or her own country but around the world. The voices of ordinary people have thus gained a power to be heard that elites cannot ignore, and the benefits of this gain for democracy have been substantial.

At the same time, this gain carries significant costs. A great increase in the power of people’s speech brings a corresponding increase in the harm that can be done to people when that power is abused. As a result, cases at law that forty or more years ago expanded freedom of speech in ways that did not then appear to create opportunities for serious harm, that did not, in particular, portend of abuse that could cause severe injury to a person’s reputation or emotional stability, now have a different import. In view of this change, they invite renewed examination. One such case is Cohen v. California (USSC, 1971). This essay presents a set of reflections on the holding in this case.

Cohen extended the First Amendment’s right of free speech to words that evince the speaker’s emotions. The speaker in the case was one Paul Cohen. On April 26, 1968, he wore a jacket in a public place on the back of which were boldly inscribed the words “Fuck the Draft.” The public place