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Privacy and the Right of Free Expression

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ABSTRACT

Nobody likes to be talked about but everybody likes to talk. Trying to stop the dissemination of private information is, however, an impingement on free expression and the freedom to observe. A freestanding "right of privacy" that violates these interests is constitutionally permissible only if it can be justified using one of the standard bases for allowing restrictions on First Amendment rights. The three most likely possibilities are that the law in question: (1) can pass strict scrutiny, (2) falls within a recognized "categorical" exception, or (3) places only an "incidental" burden on First Amendment interests. Of these three, only the last would seem to support a broad protection for privacy in the face of a First Amendment challenge and, indeed, such protection has long been provided under the ordinary law of property. The exclusivity provided by ordinary property rights has long protected privacy in the places where most people spend most of their time, viz. privately owned spaces, and with respect to the objects that hold our personal information, including papers, digital equipment, and other such privately-owned chattels.

To the extent that privacy interests can be protected through ordinary property law (as most can), they should not encounter the serious constitutional objections that can be raised against laws that directly impinge on First Amendment interests. Any burdens on First Amendment interests imposed by property laws would qualify as merely "incidental" burdens, since the law of property (unlike many "privacy" laws) does not exist for the very purpose of limiting First Amendment interests such as the interest in free dissemination of truthful information. By contrast, rights of privacy that are divorced from property rights typically are meant to operate as direct impingements on the exercise of

First Amendment rights and they are, therefore, of dubious constitutional validity.

TABLE OF CONTENTS

I. INTRODUCTION

Last spring someone in suburban New York circulated a "Smut List" purportedly naming nearly 100 sexually-active high school girls.[1] The list, which appeared on Facebook and quickly attracted thousands of "likes," caused outrage among school officials, who denounced it as a "reprehensible act of cyber-bullying."[2] The local police chief promised "to prosecute to the fullest extent of the law."[3]

Meanwhile, criminal charges were pending in New Jersey against Dharun Ravi and Molly Wei for collecting and transmitting video images of Tyler Clementi as he engaged in intimate conduct with another young man.[4] The conduct occurred in the college dorm room that Ravi and Clementi shared.[5] The video was captured by a built-in camera on Ravi's laptop, which he had left in the room.[6] Tragically, Clementi committed suicide a few days after Ravi and Wei exposed his liaison.[7]

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1. Randi Weiner, *Area Schools Not Taking Internet 'Smut List' as a Joke*, THE JOURNAL NEWS (Westchester, NY), Mar. 19, 2011, at 3A, *available at* 2011 WLNR 5433566; *see also* Andrew Klappholz, *'Smut List' an Example of New Age of Cyberbullying Among Teens*, THE JOURNAL NEWS (Westchester, NY), Mar. 23, 2011, at 1A, *available at* 2011 WLNR 5738186.

2. Weiner, *supra* note 1.

3. Klappholz, *supra* note 1.

4. *See* Tamer El-Ghobashy, *Suicide Follows a Secret Webcast,* WALL ST. J. (Sep. 30, 2010), at A27, *available at* Proquest, Proquest Document ID 755920686; Richard Pérez-Peña, *More Complex Picture Emerges in Rutgers Student's Suicide*, N.Y. TIMES, Aug. 13, 2011, at A17. Reportedly, Wei has accepted an arrangement under which the charges against her may eventually be dismissed in exchange for, among other things, her testimony against Ravi. *See* Aman Ali, *Plea Deal Means Student to Testify Against Rutgers Roommate*, REUTERS, (May 6, 2011, 12:58 PM), http://www.reuters.com/article/2011/05/06/us-rutgers-suicide-idUSTRE7454JS20110506. It is not clear what deficiencies the prosecutors see in the case against Ravi that have led them to offer leniency to his co-defendant.

5. *See* Pérez-Peña, *supra* note 4.

6. Yamiche Alcindor, *Lesson of Rutgers Case: Online Actions Carry Consequences,* USA TODAY, Mar. 19, 2012, *available at* http://www.usatoday.com/news/nation/story/2012-03-16/rutgers/53574554/1.

7. *See* Pérez-Peña, *supra* note 4. Apparently, Clementi's sexual orientation was already generally known. *See id.* (stating that Clementi was "worried about his

In each of these cases, the dissemination of private information was outrageous and highly offensive; but outrageousness and offensiveness are not valid reasons for suppressing speech under the First Amendment.[8] In each case, too, the dissemination revealed information about people without their consent. But most important communications protected by the right of free expression consist of information about people, their lives and doings, and consent is rarely obtained. Cases like these raise the question: To what extent may government constitutionally prohibit people from disseminating truthful information about other people without their consent?

It is easy to say that the information Ravi and Wei so brutally revealed was none of their business and that it was none of the business of the people to whom they revealed it. The same can be said of the information on the "Smut List." People's sex lives are usually viewed as private. But can we generalize from the particularized facts of cases such as these to a constitutional principle?

Suppose a mother remarks to a neighbor that her fourteen-year-old daughter is starting to spend a lot of time with an older classmate named Robby, and the neighbor happens to have heard from her own daughter that "everybody says" Robby is, to put it diplomatically, very sexually active. The mother of the fourteen-year-old may or may not think that a sexually active boyfriend is "right" for her child, but let's suppose she does not. Would we say that this information is none of the business of either mother? Should the neighbor who passes on the information about Robby be prosecuted "to the fullest extent of the law"?[9] More generally, is information about the sex lives of high school

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mother's acceptance of his orientation, but was not particularly concerned about who else knew").

8. Snyder v. Phelps, 562 U.S. __, __, 131 S. Ct. 1207, 1219 (2011); Boos v. Barry, 485 U.S. 312, 322 (1988); Hustler Magazine v. Falwell, 485 U.S. 46, 55–56 (1988); FCC v. Pacifica Found., 438 U.S.726, 745–46 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."). *See also* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

9. Klappholz, *supra* note 1. The hypothetical in the text implies that the neighbor's motivation is different from that of the "Smut List" authors but, after all,

students, such as the information on the "Smut List," of legitimate interest to parents and classmates who might avoid harm by being aware of it?[10] Issues like these are not easy to resolve in the abstract and that is, no doubt, one of the reasons why it is a fundamental presupposition of the First Amendment that no organ of government is qualified to decide for us what is important for us to know.[11]

Unfortunately, people often do things they are not proud of or do not want others to know about. Often, however, these are precisely the

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even the malicious may have valuable information and, indeed, an urge to strike a blow at the contemptible conduct of others may be among the most common motivators of socially valuable exposés. It is doubtful that, in general, whistleblowers risk their livelihoods and futures out of pure public spirit, but their disclosures are no less valuable, in First Amendment terms, merely because they are prompted by anger or hate.

10. The risks in dating sexually active classmates, of either sex, are not entirely fanciful. For example, according to researchers at the Centers for Disease Control and Prevention, "at least one in 4 American girls has a sexually transmitted disease." *1 in 4 Teen Girls has Sexually Transmitted Disease*, NBCNEWS.COM, (Mar. 11, 2008, 12:32 PM), http://www.msnbc.msn.com/id/23574940/ns/health-kids_and_parenting/t/teen-girls-has-sexually-transmitted-disease/. *See also* Sara E. Forhan, Sami L. Gottlieb et al., *Prevalence of Sexually Transmitted Infections Among Female Adolescents Aged 14 to 19 in the United States*, 124 PEDIATRICS 1505 (2009).

11. *See* Sorrell v. IMS Health Inc., 564 U.S. __, ___, 131 S. Ct. 2653, 2672 (2011) ("Some . . . ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented."); First Nat'l Bank v. Bellotti, 435 U.S. 765, 784–85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."). The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). In a somewhat different context, one of the reasons the Supreme Court rejected the "public interest" criterion for requiring a showing of actual malice in defamation cases is that it would force judges "to determine …'what information is relevant to self-government.'" Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974) (quoting Rosenbloom v. Metromedia, 403 U.S. 29, 79 (1971) (Marshall, J. dissenting)). Justice Thurgood Marshall also noted that "all human events are arguably within the area of 'public or general concern.'" Rosenbloom, 403 U.S. at 79. *See also* Brown v. Entm't Merchs. Ass'n, 564 U.S. ___, ___, 131 S. Ct. 2729, 2733 (2011) ("[W]e have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.").

things that others want or need to know. Each of us, for our own protection and well-being, is better off being aware of the negative or less-than-flattering qualities of the people with whom we deal and of the activities—sexual and otherwise—that may evidence character. Parents want to know about the people who interact with their children, business people want to know about their business counterparts, people in dating relationships want to know about their romantic partners, and so on.[12]

The value of such "daily life"[13] information would, however, be seriously compromised if dissemination were legally permitted only on a need-to-know basis. For one thing, it is hard to know in advance exactly which particular bits of personal information may later turn out to be relevant or useful. Besides, a person should not have to wait until actually in the danger zone before having a legitimate right to information pertinent to well-being. Need-to-know limits on dissemination of personal information can impair the information's value, and therefore there is good reason to think that government should not be in the business of suppressing *any* truthful information that people have learned about each other. Because such information is potentially relevant and useful, the question arises whether it can be consistent with good legal policy, not to mention the constitutional protection of speech, to make the dissemination of *truthful* personal information punishable—a risky activity that one does at one's peril. Should the disclosures that people make about other people without the latters' consent be subject to after-the-fact governmental determinations that the disclosures were not justified, unnecessary, or even that they were a crime?[14]

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12. Notably, perhaps, there may be no general "public" interest in these kinds of "daily life matters," as Professor Eugene Volokh dubbed them in his excellent analysis. But, for most people, most of the time, conversational topics like these are the ones that really count—the ones that supply the information that people need most. *See* Eugene Volokh, *Freedom of Speech, Information Privacy and the Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1092–95 (2000); *see also infra* notes 175–201 and accompanying text.

13. Volokh, *supra* note 12, at 1092–99.

14. It should be stressed that the discussion in this Article is focused on *truthful* disclosures and the conflict that exists between the right of privacy and First Amendment interests. Obviously, very different concerns are raised by disseminations of *false* information, as in defamation. *See generally* authorities cited *infra* notes 182 & 190.

The basis for prosecuting Ravi and Wei was title 2C, chapter 14 of the New Jersey Statutes.[15] This statute prohibits making or disclosing a recording or other reproduction of an image of another person "whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact."[16] This statute is a content-based regulation of expression because it prohibits disclosures involving only certain kinds of content (intimate exposure, sexual penetration, or sexual contact). Regulations that discriminate based on content are normally invalid, unless they can pass strict scrutiny.[17] The strict-scrutiny standard requires that a content-based regulation "be narrowly tailored to promote

15. *See* Pérez-Peña, *supra* note 4.

16. N.J. STAT. ANN. § 2C:14-9 (b) & (c) (West 2010). The statute states in relevant part:

> b. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person's consent and under circumstances in which a reasonable person would not expect to be observed.
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> c. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure. For purposes of this subsection, "disclose" means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer.

Id. § 2C:14-9 (b) & (c). *See also* 18 U.S.C. § 1801 (2010) (video voyeurism).

17. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. ___, ___, 131 S. Ct. 2729, 2738 (2011); United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid. . . ."). *See also* United States v. Stevens, 559 U.S. ___, ___, 130 S. Ct. 1577, 1584 (2010) ("'[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'") (quoting Ashcroft v. ACLU, 535 U.S. 564, 573 (2002)).

a *compelling* Government interest," and there must not be a "less restrictive alternative [that] would serve the Government's purpose."[18]

Whether New Jersey's sex-focused statute serves a "compelling" governmental interest, or whether a similar statute could be crafted to serve such an interest, appears questionable at present.[19] Sex-focused statutes like the one in New Jersey are, however, by no means the only kinds of privacy laws that discriminate on the basis of content. On the contrary, it seems to be part of the inherent nature of the "invasion of privacy" tort to impose content-based restrictions on expression. For example, according to the Second Restatement of Torts, an actionable invasion of privacy consists of giving "publicity" to "a matter concerning the private life of another."[20] As so defined, the "invasion of privacy"

18. *Playboy*, 529 U.S. at 813–15 (emphasis added) (citations omitted). The "strict scrutiny" standard applies even if the material in question is sexually-themed material. *See id.* Although there is a categorical exception to the First Amendment for regulations of obscenity, *see* Roth v. United States, 354 U.S. 476, 482–84 (1957), the New Jersey statute does not even purport to limit its prohibition to the sort of "specifically defined" sexual conduct that meets the Supreme Court's restrictive test for constitutionally regulable "obscenity." *See* Miller v. California, 413 U.S. 15, 23–24 (1973).

19. *See infra* text accompanying notes 42–80. One factor that may have made the disclosures in the Ravi-Wei case so painful for Clementi is the fact that there is still invidious discrimination against persons who are gay. *See* Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CAL. L. REV. 1711, 1716 (2010). In view of that discrimination, it would be wrong to understate the interest that some "LGBT plaintiffs understandably assert in . . . 'selective disclosure' of their sexual orientations or identities." *See id.* Apart from the First Amendment concerns discussed here, however, the tort of invasion of privacy has proved unreliable in supporting the interest in selective disclosure. *Id.* at 1746–50. But even if the courts were entirely supportive, it does not seem likely that the possibility of civil lawsuits would actually stop people from talking about one another's sexual interests, meaning that keeping such disclosures "selective" is probably not a realistic goal in any case. Nonetheless, an argument can be made that, as long as people invidiously discriminate, government has an interest in forbidding dissemination of information they can use in doing so. Whether the governmental interest in suppressing truthful information to such an end would be sufficiently compelling to pass First Amendment muster is an open question.

20. RESTATEMENT (SECOND) OF TORTS § 652D (1977) ("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.").

tort is plainly a content-based regulation of expression since it selectively imposes restrictions on speech concerning a single class of subject matter (information about others' private lives).[21] This does not mean, of course, that all such privacy laws are necessarily invalid; but it does mean that a basis needs to be specified for exempting them from the Constitution's protection of free expression.[22]

In addition to the possibility of passing the strict-scrutiny standard, there are at least two other recognized exceptions to First Amendment protection that might, depending on the circumstances, serve as a basis for upholding laws that seek to protect private information by suppressing free expression.[23] The second possibility is that a law restricting privacy-invasive speech falls within one of the

21. Boos v. Barry, 485 U.S. 312, 321 (1988). That is to say, the restriction's "justification focuses only on the content of the speech" and its effect on listeners. *Id. See also* Turner Broad. Sys. v. FCC, 512 U.S. 622, 645 (1994) ("Our cases have recognized that even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys.").

22. The Second Restatement explicitly recognizes this need with its constitutional caveat:

> The case of Cox Broadcasting Co. v. Cohn (1975) 420 U.S. 469, . . . leaves open the question of whether liability can constitutionally be imposed for other private facts that would be highly offensive to a reasonable person and that are not of legitimate concern. Pending further elucidation by the Supreme Court, this Section has been drafted in accordance with the current state of the common law of privacy and the constitutional restrictions on that law that have been recognized as applying.

RESTATEMENT (SECOND) OF TORTS § 652D (1977) (Special Note).

23. The protections of the First Amendment reach wide, but they are not absolute. Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961) ("At the outset we reject the view that freedom of speech and association . . . are 'absolutes,' . . . in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment."). *See also* Virginia v. Black, 538 U.S. 343, 358–59 (2003) (true threats); United States v. O'Brien, 391 U.S. 367, 376 (1986) (subject to "incidental" burdens); Cohen v. California, 403 U.S. 15, 19 (1971) (recognizing rule); Roth v. United States, 354 U.S. 476, 482–84 (1957) (categorical exception for obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (categorical exception for fighting words).

"categorical exceptions" to First Amendment protection,[24] such as the exception for speech that is "integral to criminal conduct."[25] A third possibility is that the law in question imposes a burden on speech that is merely incidental to furthering a valid legislative purpose unrelated to suppressing free expression.[26] The three standard exceptions to First Amendment protection do not exhaust the possibilities, but they seem to be the most promising bases for upholding laws that restrict free expression for the sake of privacy.

The next part of this Article, Part II, will briefly review the tension between privacy interests and free expression, noting the very significant constitutional difference between the two. In Parts III through V, the possibilities of upholding privacy laws will be considered in light of the three most promising standard exceptions to First Amendment protection (laws that pass strict scrutiny, laws that restrict speech integral to illegal conduct, and laws that impose a merely "incidental" burden on speech). Part V will also discuss how most of the interests generally thought of as "privacy interests," in both information and seclusion, have been, and can continue to be, protected by the normal operation of ordinary property laws, which impose only incidental burdens on speech and which create rights that are, in themselves, entitled to the protection of an enumerated constitutional right.

There are, it should be noted, two related topics that the discussion in this Article does *not* concern. First, this Article is not

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24. United States v. Stevens, 559 U.S. ___, 130 S. Ct. 1577, 1584–86 (2010); *Cohen*, 403 U.S. at 19–20; *Chaplinsky*, 315 U.S. at 571–72.

25. *See infra* Part IV.

26. Incidental burdens on speech that result from otherwise valid laws do not have to satisfy strict scrutiny. *See O'Brien*, 391 U.S. at 376. For further discussion, see *infra* Part V. In addition to the three possibilities to be discussed here, there are at least two other conceivable bases for upholding regulations of First Amendment freedoms in the interest of privacy. Most importantly, perhaps, is the exception for restrictions on the "time, place, or manner" of speech. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Frisby v. Schultz, 487 U.S. 474, 481 (1988). Another, less plausible possibility is the exception for restrictions on speech that aim only to control certain "secondary effects" of the expression. *See, e.g.,* Renton v Playtime Theatres, 475 U.S. 41 (1986). It is believed, however, that the three possibilities mentioned in the text are the only ones that might have such broad applicability to uphold laws that aim specifically at protecting the privacy of personal information.

concerned with *defamatory* false statements or communications. Defamation is, of course, the subject of a specific categorical exclusion from First Amendment protection,[27] and that exclusion gives lawmakers appreciably greater flexibility in regulating defamatory content.[28] Second, this Article is not concerned with the extent to which government is required to respect privacy interests in carrying out its own governmental functions (for example, complying with the Fourth Amendment).[29] Instead, the focus will be on the constitutional limits on government's power to confer private individuals with privacy rights that limit the First Amendment liberties of other private persons.[30]

II. PRIVACY VS. FREE EXPRESSION

The interests in privacy and in free expression are both important,[31] but they are in fundamental tension with one another. For

27. *See*, *e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (discussing group defamation). *See also Stevens*, 130 S. Ct. at 1584 (citing *Beauharnais* as, apparently, still good law on, at least, broad points); *Chaplinsky*, 315 U.S. at 571–572.

28. This Article also does not discuss the limits, still ill-defined, on the governmental power to ban non-defamatory falsehoods, such as portraying other persons in a false light. *See* RESTATEMENT (SECOND) OF TORTS § 652E (1977). For a further discussion, see generally Nat Stern, *Implications Of Libel Doctrine For Nondefamatory Falsehoods Under The First Amendment*, 10 FIRST AMEND. L. REV. 465 (2012).

29. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). *Cf. infra* notes 56–62 and accompanying text.

30. Thus, for example, the extent to which government may choose to withhold or disclose private information in its possession is not a topic of this Article. *See*, *e.g.*, U.S. Dep't. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (upholding statute limiting rap sheet disclosure); Paul v. David, 424 U.S. 693, 694 (1978); Lillian R. BeVier, *Information About Individuals in the Hands of Government*, 4 WM. & MARY BILL RTS. J. 455 (1995); Elaine M. Chiu, *That Guy's A Batterer!: A Scarlet Letter Approach To Domestic Violence in the Information Age*, 44 FAM, L.Q. 255 (2010).

31. *See*, *e.g.*, Florida Star v. B.J.F., 491 U.S. 524, 533 (1989) ("[P]ress freedom and privacy rights are both 'plainly rooted in the traditions and significant

most of us, the character, qualities, propensities, and conduct of those who live around us are matters of great interest. At the same time, however, most people want to keep at least some aspects of their lives out of the view and knowledge of others. Despite the nearly universal practice of discussing the doings and personal characteristics of other people, there likewise seems to be a nearly universal drive to remain, at least in some respects, private. Nobody likes to be talked about, but everybody likes to talk.

The fact cannot be avoided that, at bottom, a right of "information privacy," such as the one described in Restatement § 652D,[32] is at its core a right to not be talked about—a direct restriction on free expression. Due to this close, "zero-sum" relationship between privacy and free expression, conflicts between them are inevitable. There is, however, a very basic legal distinction between the interest in free expression and the interest in privacy, namely, the interest in free expression is protected by the Constitution whereas the privacy interest, except against government, is not.[33] As against other private persons, the

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concerns of our society. . . .'"). *See also* Bartnicki v. Vopper, 532 U.S. 514, 518 (2001) (describing "the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy" as "interests of the highest order"). While *Bartinicki* spoke of the "interest in individual privacy," it should be stressed that what the Court explicitly had in mind was not the general right of privacy, but "more specifically, [the interest] in fostering private speech." *Id.* at 518. Thus, for *Barnicki*, the privacy interest "of the highest order" was the one that supported, not restricted, free speech. *Id.*

32. RESTATEMENT (SECOND) OF TORTS § 652D (1977), *supra* note 20. In addition to the right of "information privacy" described in § 652D, there is a complementary privacy right of "seclusion," described in RESTATEMENT (SECOND) OF TORTS § 652B (1977), *infra* note 91.

33. *See* Katz v. United States, 389 U.S. 347, 350–51 (1967) ("[T]he protection of a person's general right to privacy – his right to be let alone by other people – is, like the protection of his property and of his very life, left largely to the law of the individual States."). In discussing the "constitutionally protected 'zone of privacy,'" the Court has recognized that "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests," viz. "the individual interest in avoiding disclosure of personal matters," and "the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 598–600 (1977). However, all of the examples that the Court gave in *Whalen* seem to involve the privacy right as against government. *Id.* at 599 n.24, 600 n.26. The Court did not give the slightest hint that the constitutional right of privacy would, in any of its facets, protect the individual's privacy interest as against other

right to remain obscure in our lives and activities is protected only by ordinary laws, mostly state statutes and common law.[34]

This fundamental legal difference between the interests in free expression and in privacy is, of course, highly important. Whenever the two interests collide, as they frequently do, there is an inevitable question of priority. However, by enshrining the protection of free expression in the Constitution and not doing the same for privacy, except as against government, the Framers appear to have settled the priority between the two.[35] The enumerated protection of speech and press in the First Amendment is a clear statement of the Framers' judgment that free expression is meant to trump competing non-constitutional interests, which would include the interest in privacy. As the Supreme Court has noted:

> The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really* worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood

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private individuals. *See generally id.* and *particularly* at n.24. Even against government, the constitutional right of privacy, outside the search-and-seizure context, is extremely limited. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65–66 (1973) ("Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included 'only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' . . . This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.") (citations omitted). Although *Roe v. Wade*, 410 U.S. 113 (1973) (abortion), and *Lawrence v. Texas*, 539 U.S. 558 (2003) (gay sex), clarify and amplify the list in *Paris Adult Theatre*, they do not add any distinctly different items to it.

For a good synopsis of the Supreme Court's decisions declining to find a constitutional protection for information privacy, see Chiu, *supra* note 30, at 282–89.

34. *See, e.g.*, *Florida Star*, 491 U.S. at 530 (using the term "state-protected privacy interests").

35. *Cf., e.g.*, Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104 (1979) (affirming, in relation to privacy, "that the State's policy must be subordinated to" a constitutional right, and the "constitutional right must prevail over the state's interest").

> to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.[36]

The enumeration of a right, in other words, elevates the right "above all other interests,"[37] and any later determination that the enumerated right is outweighed by other interests should be quite extraordinary, if not off the table entirely.[38] Some earlier statements by members of the Court suggest the possibility that ordinary privacy interests might be balanced against free expression,[39] but the Court has since declared "startling and dangerous" the notion that deciding whether "a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."[40] The Framers' constitutional choice means there is not supposed to be an ongoing, more-or-less neutral balancing of First Amendment interests against mere "state-protected privacy interests."[41]

Thus, the interests in free expression and in privacy are not to be regarded as "competing constitutional concerns."[42] While the interest in free expression may itself justify a degree of privacy protection in order

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36. District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008). Though the Supreme Court made the quoted statement in reference to the Second Amendment, the Court left no doubt that it applies equally to the First. *Id.* at 635. ("Like the First, [the Second Amendment] is the very *product* of an interest-balancing by the people," which the courts should not conduct anew.).

37. *Id.*

38. *Id.* at 636.

39. *Florida Star*, 491 U.S. at 547 n.2 (White, J., dissenting) ("The Court's concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society."). The term "ordinary" is used here in contradistinction to privacy interests that are specifically in the interest of "fostering private speech." *See supra* note 31.

40. United States v. Stevens, 559 U.S. ___, ___, 130 S. Ct. 1577, 1585 (2010) (quoting Brief for the United States at 8).

41. *Florida Star*, 491 U.S. at 530 (majority opinion); *see also* Snyder v. Phelps, 562 U.S. ___, ___, 131 S. Ct. 1207, 1219 (2011) ("[I]n public debate [we] must tolerate insulting and even outrageous speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment.") (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)). *Cf. supra* note 31.

42. To borrow the words, though perhaps not the meaning, of Justice Stephen Breyer in *Bartnicki v. Vopper*, 532 U.S. 514, 536–37 (2001) (Breyer, J., concurring).

to further the "interest . . . in fostering private speech,"[43] to go further and talk of a "competing" constitutional privacy right, independent of fostering free expression, is to go beyond the authorities: "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."[44]

In sum, the laws that protect private information and the Constitution's protection of free expression both serve important societal concerns, but the two are in fundamental conflict. The law can protect private information only at the expense of others' expressive liberty. When conflicts arise, the protection of free expression has clear constitutional priority. The interest in free expression is protected by an enumerated constitutional right, but the interest in privacy is not.[45] The Framers' determination of priority reflected in that enumeration is neither open to legislative revision nor to a general balancing of interests in which privacy ranks as the equal of expression.

III. CAN PRIVACY LAWS PASS STRICT SCRUTINY?

When a law discriminates on the basis of content, such as by singling out speech "concerning the private life of another,"[46] it is presumptively unconstitutional.[47] Nonetheless, content-based restrictions on speech can still be upheld as long as they survive strict scrutiny.[48] In order to pass strict scrutiny, the law must first and foremost be "justified by a *compelling* Government interest,"[49] and the burden is on the state to

43. *Id.* at 518 (majority opinion); *see also id.* at 536 (Breyer, J., concurring).

44. *Stevens*, 130 S. Ct. at 1585.

45. Except, again, as against government. *See supra* note 31.

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

47. United States v. Playboy Entm't Grp., 529 U.S. 803, 817 (2000) ("When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed."); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

48. *See supra* text accompanying note 18.

49. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. ___, ___, 131 S. Ct. 2729, 2738 (2011) (emphasis added); *Playboy*, 529 U.S. at 813; *R.A.V*, 505 U.S. at 385.

show that a compelling interest exists.[50] This burden on the state is, moreover, "not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[51] As the Supreme Court has recently stated: "The State must specifically identify an 'actual problem' in need of solving . . . and the curtailment of free speech must be actually necessary to the solution."[52]

Because privacy laws come in many varieties and take many forms, the question of whether they can survive strict scrutiny is not one that can be answered in the abstract. Each law and application has to be considered on its own to determine whether the interest in keeping the particular information secret is a *compelling* governmental interest, and this determination would presumably depend, at least in part, on the content of the information in question.

To take an obvious example, preserving secrecy would be a compelling interest in cases where disclosures would threaten national security.[53] Another such example would be situations in which

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50. *Brown*, 131 S. Ct. at 2738–39. The burden is on the state because "content-based regulations are presumptively invalid." *R.A.V.*, 505 U.S. at 382. *See also Playboy*, 529 U.S. at 817; Cincinnati v. Discovery Network, 507 U.S. 410, 416 (1993) (where city failed to show reasonable fit between its regulation and a its alleged interest, the Court struck down the city's ban on news racks containing commercial handbills on public property); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984) ("[I]t is common to place the burden upon the Government to justify impingements on First Amendment interests.").

51. Edenfield v. Fane, 507 U.S. 761, 770–71 (1993). The *Edenfield* case specifically concerned commercial speech, which is subject to intermediate scrutiny. Presumably the "strict" standards for non-commercial speech are as high or even higher. *See* Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 456 (1978) ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection . . . .").

52. *Brown*, 131 S. Ct. at 2738 (citation omitted).

53. *See* Near v. Minnesota, 283 U.S. 697, 716 (1931) (stating that the First Amendment would not protect the "publication of the sailing dates of transports or the number and location of troops"). *But see* N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (disallowing prior restraint in the "Pentagon Papers" case).

information has to be suppressed in order to permit a fair trial, which, of course, the state and federal governments are constitutionally obliged to provide.[54] In both of these kinds of cases, the expressive interest is countervailed by interests that are rather obviously weighty in themselves and are also subjects of constitutional prioritization. Still other situations of compelling interest may arise (for example, to prevent imminent death and destruction)[55] but, as the Supreme Court has recently cautioned, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible."[56] The question is whether laws that regulate speech for the purpose of protecting a freestanding right[57] of personal privacy would ever be among them.

As a threshold matter, it seems safe to say that government could have a constitutionally compelling interest in protecting individual privacy only where there is, at a minimum, a *reasonable expectation* of privacy. Indeed, it seems unlikely that government could have much interest at all in protecting *un*reasonable expectations, much less that such protection would entail the "high degree of necessity"[58] required to justify impingements on First Amendment liberties.

The concept of "reasonable expectation of privacy" is most often associated with the jurisprudence of the Fourth Amendment.[59] While Fourth Amendment cases on what constitutes "reasonable" expectations

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54. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991) ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.").

55. *Cf.* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (incitement). While, strictly speaking, the *Brandenburg* rule applies only to cases of "imminent *lawless* action," presumably any action that threatens imminent death and destruction could fall within its ambit as long as government has a compelling interest in preventing it. *Id.* at 447 (emphasis added).

56. *Brown*, 131 S. Ct. at 2738 (quoting United States v. Playboy Entm't Grp., 529 U.S. 803, 818 (2000)).

57. That is to say, a right of privacy that is, in the original words of the Restatement, "not dependent upon conduct which, aside from the invasion of privacy, would be tortious, such as trespass to land or chattels, or defamation." RESTATEMENT (FIRST) OF TORTS § 867 cmt. d (1939).

58. *Brown*, 131 S. Ct. at 2741.

59. U.S. CONST. amend. IV (unreasonable searches and seizures). *See, e.g.*, California v. Greenwood, 486 U.S. 35, 39–41 (1988) (upholding warrantless search of garbage put out for collection).

of privacy may not be conclusive for First Amendment purposes,[60] it seems plausible to treat those cases as being at least evidence of which privacy expectations are and are not reasonable.[61] This is because the Fourth Amendment conceptions of "reasonable" expectations are based, at least ostensibly, on the understandings about privacy possessed by "society as a whole."[62] Under the Supreme Court's reading of those understandings, a person is deemed to have a reasonable expectation of privacy only with respect to "what he seeks to preserve as private."[63] A person does not, for instance, have a reasonable expectation of privacy in

60. Arguably, the courts should not allow the Fourth Amendment cases to define the outer limits of "reasonable" expectations of privacy for other purposes because, notably, many Fourth Amendment cases seem to have relied on the "understandings of society as a whole" standard in an apparent effort to give freer reign to law enforcement. For example, the Supreme Court's "open fields" doctrine, which, in denying privacy expectations for fenced, secured open areas, seems to have ignored genuine expectations of privacy. *See* Oliver v. United States, 466 U.S. 170 (1984). Some of the state cases are even more startlingly at variance with probable public understandings of privacy. *See, e.g.*, Smayda v. United States, 352 F.2d 251 (9th Cir. 1965) (finding no reasonable expectation of privacy inside a restroom stall); Moore v. State, 355 So. 2d 1219 (Fla. Ct. App. 1978) (declaring that the happenings in a restroom stall are "in plain view" because of the half-inch crack between the stall door and its wall); *accord* State v. McClung, 1982 Ohio App. LEXIS 14675 (Ohio Ct. App. 1982). It is surprising to learn that "any member of the public," *Moore*, 355 So. 2d at 1220, would be within his rights peering through the cracks around the partitioning in restroom stalls, but there it is.

61. The courts and commentators have not, however, necessarily limited its application to the Fourth Amendment context. *See e.g.,* Digirolamo v. D.P. Anderson & Assocs., Civ.A. 97-3623, 1999 WL 345592 (Mass. Super. May 26, 1999); Tagouma v. Investigative Consultant Servs., 4 A. 3d 170 (Pa. Super. Ct. 2010); RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1979) (discussing expectations of an "ordinary reasonable man"). As discussed in the text that immediately follows, the meaning of the concept for other purposes should not necessarily be limited by the Fourth Amendment cases.

62. *Greenwood,* 486 U.S. at 39–40, 43 ("An expectation of privacy does not give rise to Fourth Amendment protection . . . unless society is prepared to accept that expectation as objectively reasonable.").

63. Katz v. United States, 389 U.S. 347, 351 (1967)*; see also Greenwood*, 486 U.S. at 40–41.

what he "knowingly exposes to the public, even in his own home or office . . . ."[64]

Even if the courts should not let the Fourth Amendment cases woodenly define the outer limits of "reasonable" expectations of privacy for other purposes, the core appeal in those cases to "our societal understanding"[65] must surely be instructive. In light of the Supreme Court's reading of that understanding, it seems to follow that government has no *compelling* interest in protecting privacy with respect to information or activities that people have knowingly made accessible to the view of other people whom they have no right to control.

Even in cases where a reasonable expectation of privacy exists, however, there are still several reasons why it may be inappropriate to conclude that there is a *compelling* governmental interest for restricting speech.

First, though the interest in privacy is undoubtedly an important one, it is still open to question how much harm actually results when privacy interests are violated by a non-consensual dissemination of personal secrets. Commentators are far from a consensus on this point.[66] As important as personal privacy may be, normal invasion-of-privacy harms are generally less momentous in kind and degree than the harms that clearly do raise compelling interests, such as those that result from invading other constitutional interests[67] or, presumably, that involve or threaten imminent death and destruction. It may be embarrassing, humiliating or even economically disadvantageous to have people find out the truth about you, but the harm is not likely to be seriously debilitating (and certainly not likely to be fatal), at least not for people in sound mental health.

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64. *Katz*, 389 U.S. at 351; *see also* Smith v. Maryland, 442 U.S. 735, 743–44 (1979) (holding that, under *Katz*, it would be unreasonable to expect a list of dialed telephone number to remain private).

65. Oliver v. United States, 466 U.S. 170, 178 (1984).

66. *Compare* Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967 (2003), *with* Heidi Reamer Anderson, *The Mythical Right to Obscurity: A Pragmatic Defense of No Privacy in Public*, 7 J.L. & POL. FOR INFO. SOC'Y 543 (2012); Quin S. Landon, Note, *The First Amendment and Speech Based Torts: Recalibrating the Balance*, 66 U. MIAMI L. REV. 157 (2012). *See also* Chiu, *supra* note 30.

67. *See supra* text accompanying notes 50–52.

Even when a non-consensual truthful disclosure results in measurable economic harm, it cannot be forgotten that the harm consists, in its essence, of being denied the benefit of a false reputation. Thus, if a person with pedophiliac tastes in literature publicly revealed and, as a result, is refused a job at a youth facility,[68] he may incur significant economic harm. But is that a harm government has a *compelling* interest in preventing?[69] The core problem with treating the interest in privacy as a *compelling* interest is that it is the direct antithesis of the interest everyone has in knowing the truth—the truth about qualities, character, conduct, and propensities of those around us and, to put it bluntly, the adverse ways in which they might affect us. The strength of the interest in privacy is, in other words, at least somewhat offset by the strength of the interest in knowing the truth about the people with whom we interact.[70]

68. According to a Bureau of Justice Statistics special report, "[a]n estimated 12% of youth in state juvenile facilities and large non-state facilities . . . reported experiencing one or more incidents of sexual victimization" in the previous 12 months, mostly committed by staff. ALLEN J. BECK, PAIGE M. HARRISON, & PAUL GUERINO, *Special Report*, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008–09 1 & 3 (Jan. 2010).

69. Recently, the actress Huong "Junie" Hoang brought suit against Amazon for revealing her age, a revelation that she claimed tended to deprive her of employment opportunities that, apparently, would have been available to her if potential employers remained misinformed as to her true age. *See* Gene Johnson, *Actress Who Sued Amazon Over Age Ids Herself*, CBSNEWS.COM (Jan. 6, 2012, 9:37 PM), http://www.cbsnews.com/8301-207_162-57354341/actress-who-sued-amazon-over-age-ids-herself.

70. None of this is to say, of course, that people should not have a First Amendment right to try, by means of free expression, to define and shape the contours of their own public personas. *See* David S. Han, *Autobiographical Lies And The First Amendment's Protection Of Self-Defining Speech*, 87 N.Y.U. L. REV. 70 (2012). In this regard, I tend to agree with Chief Judge Alex Kozinski and Professor David Han that such expression should come within the protection of the First Amendment. *See id.*; United States v. Alvarez, 638 F.3d 666, 673–74 (9th Cir. 2011) (Kozinski, C.J., concurring in denial of rehearing en banc), *aff'd*, ___ U.S. ___, 132 S.Ct. 2537 (2012). We all have complex personalities, a mix of aspects that are lovable and of others that are not, and it would strike to the core of liberty and autonomy for the law to regulate which aspects of ourselves we are allowed to stress, to downplay, to distort or even to fabricate. To recognize and support this form of self-defining expression decidedly does not, however, justify suppressing the expression of other persons who might want to present additional or alternative interpretations of an individual's personality. I discuss the latter issue at greater

Closely related to these considerations is the futility argument; that government cannot have a compelling interest in protecting false reputations because they cannot really be protected anyway. At best, the law can only postpone nearly inevitable future revelations. In this respect, privacy laws are in sharp contrast with the laws against defamation: If a law can stop a lie, it might be stopped forever, but if the law stops the truth, the truth will still be there. A law that forbids speaking the truth has little hope of long-term success because, as long as the underlying truth exists, it will tend to spawn new statements that reveal it. The only question is how many people will be hurt by the falsehood before the truth comes out.[71]

Another reason to doubt that the interest secured by the right of privacy is compelling is the very newness of the right compared with the undoubted ancientness of the privacy *interest*.[72] Could government really have a compelling interest in creating a fundamental personality right that no one had even heard of, as a freestanding right, until the late 1800s? Perhaps, but nonetheless the very newness of the freestanding right of privacy is at least some indication that it protects little that the law has not long protected anyway. Indeed, as will be described below,

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length in my paper, John A. Humbach, *Privacy Rights: The Virtue of Protecting a False Reputation*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2071227.

71. To be sure, truth has its downsides. In this digital age, particularly, hurtful truths such as criminal records are becoming virtually inescapable, creating a permanent "semi-outlaw" class of economically and socially disadvantaged citizens. *See* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 754 (2011). For this reason, Ms. Love insists that we must make legal provision to "acknowledge and forgive the crime rather than attempt to conceal and deny it." *Id.* at 759.

72. The right of privacy in its modern understanding is usually traced to the seminal 1890 article by Mr. Samuel Warren and Justice Louis Brandeis. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). In 1938, the First Restatement of Torts included a section stating that "[a] person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." RESTATEMENT (FIRST) OF TORTS § 867 (1938). For a summary of the history of right of privacy in its present Prosserian form, see Paul M. Schwartz & Karl-Nikolaus Peifer, *Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?*, 98 CALIF. L. REV., 1925, 1937–42 (2010).

practically all *reasonable* expectations of privacy have long received substantial legal protection as a by-product of property and complementary contract-type rights,[73] which, incidentally, further other valid governmental interests and, therefore, do not need to be "compelling."[74] While the newness factor is not of course dispositive, it does give additional reason for suspicion that, whatever interests are *uniquely* protected by freestanding privacy rights, they are not, as such, compelling.

Finally, there is the question of how the state could have a "compelling" interest in protecting a purely private concern that, in modern times, so many people seem to care little about and are so willing to give up. With the advent of online social media sites and other technological innovations, millions have opened up their lives to the Internet, putting on display mountains of personal data and imagery, all of which suggests that the general interest in privacy may not be as strong as some make it out to be. Beyond that, people seem, on the whole, to be willing to let government adopt unprecedented capacities and policies to spy on the private lives of individuals,[75] to see them naked and grope them at airports, to break into their homes without warrants,[76] and to monitor their telephone conversations and Internet activities.[77] The ease with which the government eavesdrops on business communications, as revealed at the recent Raj Rajaratnum trial, should leave no one with the belief that ordinary business telephone calls are reliably private.[78] The point here is not whether such developments are

73. *See infra* Part V.

74. Incidental burdens on speech that result from otherwise valid laws do not have to satisfy strict scrutiny. *See generally* United States v. O'Brien, 391 U.S. 367 (1968). For further discussion, see *infra* text accompanying notes 206–11.

75. *See, e.g.,* Charlie Savage, *F.B.I. Agents Get Leeway to Push Privacy Bounds*, N.Y. TIMES, June 13, 2011, at A1.

76. *See, e.g.,* Kentucky v. King, 563 U.S. ___, 131 S. Ct. 1849 (2011) (upholding a warrantless police break-in of a private home after smelling what was thought to be marijuana).

77. *See, e.g.,* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts: Secret Order to Widen Domestic Monitoring*, N.Y. TIMES, Dec. 16, 2005, at A1.

78. According to the Electronic Privacy Freedom Center, during the investigation of Raj Rajaratnum for insider trading:

good or bad, but only that, as a matter of fact, there is practically no political pushback as the sphere that the law considers "private" is becoming narrower and narrower in scope. On the contrary, the bulk of the public appears fully willing to accept a vast and growing range of surveillance and intrusiveness, strong evidence that the interest in privacy, though not completely passé, is not ranked all that highly in the larger balance of interests. It is not, in practice or the popular mind, treated as anything like an interest whose protection carries the "high degree of necessity" that a compelling state interest requires.[79]

In sum, few regulations of speech ever pass strict scrutiny.[80] Restrictions on free expression solely in the interest of privacy are unlikely to do so either.

> The government intercepted over 18,000 telephone conversations and communications involving more than 550 individuals from ten different telephones over a sixteen-month period. While the SEC alleges that the communications reveal Rajaratnam and other defendants' involvement in insider trading, the wiretaps unquestionably also include private communications. Some of the telephone calls consist of conversations between Rajaratnam and his wife, his daughter, other family members and his doctor.

Electronic Privacy Freedom Center, *SEC v. Galleon Management*, ELEC. PRIVACY FREEDOM CTR., http://epic.org/amicus/sec_v_galleon.html (last visited Sept. 12, 2012).

79. Brown v. Entm't Merchs. Ass'n, 564 U.S. ___, ___, 131 S. Ct. 2729, 2741 (2011) (striking down restrictions on the sale of violent videogames to minors). The trend toward practically unbridled government intrusion, at its discretion, into the private lives of individuals is viewed by many, including myself, as lamentable. The point is, however, that such enhanced intrusion seems largely acceptable both within government as well as to the general public, leading one to doubt that there could be a "compelling" interest in preserving actual privacy. At the same time, the government's recent history of showing little respect for individual privacy provides, one might think, good reason why it might be such a bad idea to enhance the role of government in making new rules in this area.

80. *Id.* at 2738 ("It is rare that a regulation restricting speech because of its content will ever be permissible.") (quoting United States v. Playboy Entm't Grp., 529 U.S. 803, 818 (2000)).

IV. EXPRESSION INTEGRAL TO OTHERWISE UNLAWFUL CONDUCT

Although laws that discriminate on the basis of content are normally subject to strict scrutiny, the strict-scrutiny standard does not apply when restricted speech falls into one of the "well-defined and narrowly limited classes of speech" to which First Amendment protection does not extend.[81] Examples of these "categorical exceptions" to First Amendment protection include obscenity, defamation, fraud, incitement, and "speech integral to criminal conduct."[82] Of these, the categorical exception for speech integral to criminal conduct—or, more broadly, to unlawful conduct[83]—seems more likely than the others to provide a plausible basis for upholding restrictions on free expression for the sake of privacy. The Constitution does not prevent government from banning disclosures of information by persons who commit criminal acts, such as theft or illegal wiretapping, in order to get it.[84] The underlying

81. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942). *But cf.* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (stating that strict scrutiny may nonetheless be required if the purpose of the content discrimination is unrelated to the reason that the particular speech has been placed within the categorical exception).

82. United States v. Stevens, 559 U.S. ___, ___, 130 S. Ct. 1577, 1584 (2010) (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)). How, it might be asked, can a law make conduct, such as trespass, unlawful and still be constitutional if it impinges on First Amendment interests? The answer would seem to be that the "integral" exception can only apply to restrictions on speech that can meet the test for upholding "incidental" burdens on expression. The "incidental" burdens test is discussed *supra* at text accompanying notes 26–30 & *infra* text accompanying notes 212–18.

83. The principle behind the exception for "speech integral to criminal conduct" plausibly extends as well to speech that is integral to *any* unlawful conduct and, indeed, even to speech integral to conduct that is not, strictly speaking, unlawful at all but that is nonetheless at odds with public policy. *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. __, 130 S. Ct. 1324, 1336 (2010) (upholding ban on advice that promotes "misconduct designed to manipulate the protections of the bankruptcy system"). While the Supreme Court has not yet elaborated this rather obvious extension of "speech integral to criminal conduct," for purposes of discussion, it will be assumed here that First Amendment protection might plausibly be withheld from *any* speech integral to any otherwise unlawful conduct.

84. "It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on

policy reason seems to be, logically, that protecting disclosures of illegally obtained information would tend to incentivize the criminal conduct in question.[85] However, the problem with trying to rely on this exception to protect privacy over a wide range is identifying constitutionally valid crimes or unlawful conduct to which particular privacy violations can be deemed "integral."

Consider, for example, the New Jersey statute under which Ravi and Wei were charged.[86] The same statute also contains a prohibition on non-consensual *recording* of another person in specified sexual circumstances.[87] In addition, the statute even contains a prohibition on merely *observing* another person in such circumstances without the person's consent.[88] These statutory prohibitions on recording and observing present the possibility that the statute's prohibition on dissemination could be upheld on the theory that the actions prohibited are speech "integral" to the criminal conduct of illegal observing or recording. As long as the prohibitions on recording and observing are valid, information acquired in violation of those provisions would not

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either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news." Bartnicki v. Vopper, 532 U.S. 514, 532 n.19 (2001) (quoting Branzburg v. Hayes, 408 U.S. 665, 691 (1972)).

85. *See* New York v. Ferber, 458 U.S. 747, 761–62 (1982); *see also* Osborne v. Ohio, 495 U.S. 103, 109–10 (1990). For instance, the Supreme Court in *New York v. Ferber*, supported a new categorical exception for child pornography by pointing out that the market for such materials tended to promote the child abuse that is required in order to create the material: "The advertising and selling of child pornography provide an economic motive for and are *thus* an integral part of the production of such materials. . . ." *Ferber*, 458 U.S. at 761 (emphasis added). *See also* United States v. Williams, 553 U.S. 285, 298 (2008). By contrast, child pornography material that is created without the abuse of children (e.g., "virtual" child pornography) cannot be constitutionally banned. Ashcroft v. Free Speech Coal. 535 U.S. 234 (2002).

86. *See supra* note 15 and accompanying text.

87. *See supra* note 15 and accompanying text.

88. N.J. STAT. ANN. § 2C:14-9(a) (West 2010) ("An actor commits a crime of the fourth degree if, knowing that he is not licensed or privileged to do so, and under circumstances in which a reasonable person would know that another may expose intimate parts or may engage in sexual penetration or sexual contact, he observes another person without that person's consent and under circumstances in which a reasonable person would not expect to be observed.").

come within the range of constitutionally protected expression. Obviously, though, the soundness of this line of reasoning depends on the key threshold question: Can government constitutionally make it a crime to observe or record the actions of other people without their consent?

A. The Fundamental Right to Observe

Historically, there has been but little impingement by the law, criminal or otherwise, on the basic right to observe the world around us. Very rarely has the law imposed obligations on individuals to avert their eyes or stuff up their ears in order to avoid seeing or hearing other people or observing their belongings.[89] In the relatively few court decisions involving the right to observe other people or their belongings, the courts seem generally to recognize such a right.[90] That situation could, however, change with the stroke of a legislative pen enacting new laws to protect "privacy." The question is whether there are constitutional limits on the legislative power to enact laws that impinge on the right to observe?

89. One of the longstanding but rare examples would be the so-called "peeping Tom" laws, which, for example, forbid a person to "peep secretly into a room occupied by a female person." *In re* Banks, 244 S.E.2d 386, 388 (N.C. 1978) (quoting N.C. GEN. STAT. § 14-202 (1932), which was one such example of a "peeping Tom" law). *See* Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo's Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393, 1420–24 (2002). A more recent example would be the expansive incarnations of so-called "wiretap" statutes, which are not at all limited to actual wiretapping but also, for example, make it a serious felony merely to *overhear* other peoples' conversations, with or without wires, under various circumstances. *See, e.g.*, 18 U.S.C. §§ 2510–2522 (2006) (applying to utterances "by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation").

90. *See, e.g.*, Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011) (denying qualified immunity for wrongful arrest of a citizen recording police activity in public); I.C.U. Investigations, Inc. v. Jones, 780 So. 2d 685, 689–90 (Ala. 2000) (upholding the right to observe happenings in front yard of home); Digirolamo v. D.P. Anderson & Assocs., Civ.A. 97-3623, 1999 WL 345592 (Mass. Super. May 26, 1999) (upholding the right to observe happenings on the balcony of an apartment); Venzen v. Abraham, 18 V.I. 385, 389 (1981) (concluding that a man photographed against his will on the street had no right to privacy); *see infra* note 155 for additional cases.

The right to observe and rights of privacy are crucially interrelated. Laws to protect the privacy interest in "seclusion," such as those described in the Second Restatement §652B[91] or the New Jersey statute in the Ravi-Wei case,[92] impose civil and criminal liability on observation. In other words, the enforcement of these privacy laws is necessarily at the direct expense of the right to observe. Just because the rights to privacy and to observe are substantially conflicting, however, does not mean that the interests they serve are constitutionally co-equal or that, in balancing one against the other, they are entitled to equal weight.

In *Stanley v. Georgia*,[93] the Supreme Court unanimously declared that an individual has a "fundamental" right under the First Amendment "to . . . observe what he pleases."[94] This holding was the major premise of *Stanley*, and it was on this premise that the Court based its other—and perhaps better remembered—conclusion, namely, that there is a constitutional right to view obscenity in one's own home.[95]

Although *Stanley*'s "obscenity-at-home" right may be the one that is better remembered, the structure of the *Stanley* opinion leaves no doubt that the obscenity right was not just plucked out of the air, but was rather, based on the more general "fundamental" right to observe. This basis is clear from the Court's line of reasoning, which first acknowledged the fundamental right to observe as a general matter and then, only *after* doing that, did it go on to recognize the much narrower right to view obscenity at home. It was only after saying there is a fundamental right to observe that the Court continued: "*Moreover*, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right [to

91. RESTATEMENT (SECOND) OF TORTS § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."). Although the section says "intrudes," the examples given in the comment all seem to contemplate or presuppose that the intrusion includes observation.

92. *See supra* notes 16, 86–89 and accompanying text.

93. 394 U.S. 557 (1969).

94. *Id.* at 568 ("Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws.").

95. *Id.*

observe] takes on an *added* dimension."[96] Clearly, the Court saw the right to view obscenity in the home as rooted in a right that is far broader and more fundamental, namely, the right of the individual to "observe what he pleases."[97]

What is more, nothing in the *Stanley* opinion indicates that the fundamental right to observe is limited to any particular object, such as media, or to any particular location, such as the home.[98] Nor does anything in the opinion even hint that the right is limited to observations that might somehow be valuable to the public interest. On the contrary, the Court stressed, that the "right to receive *information* and ideas, regardless of their social worth is fundamental to our free society."[99] And given the purposes of the First Amendment, it could hardly be otherwise.

Obviously, the "free trade in ideas"[100] and "competition of the market"[101] for truth could never get very far if government could freely restrict or forbid the observations of the world on which ideas are ultimately based.[102] "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."[103] What better way to squelch debate about

96. *Id.* at 564 (emphasis added).

97. *Id.* at 568.

98. *Id.* at 564. As to obscenity, which is *unprotected* speech, later cases have confined the right to observe to non-public venues. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66–68 & 67 n.13 (1973). But the Court has never indicated that there is any locational restriction on the fundamental right to observe things *other than* obscenity.

99. *Stanley*, 394 U.S. at 564 (emphasis added) (citation omitted).

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

101. *Id.*

102. *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576–77 (1980) ("The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily."). The same can be said more generally: The rights to speak and to publish concerning whatever takes place *anywhere* would lose much meaning if access to observe were foreclosed.

103. Sorrell v. IMS Health Inc., 564 U.S. ___, ___, 131 S. Ct. 2653, 2667 (2011). Even if the Supreme Court had not declared observation to be a "fundamental" right, it might still be constitutionally protected as *conduct that is an integral part of communication*. The only observation that might arguably be mere

some government abuse than by forbidding people to observe it, even when it occurs in plain sight? Without a fundamental right to observe, the constitutional right to free expression would be a hollow vanity, and this is why, no doubt, the Court has analogously affirmed that there is "an undoubted right to gather news from any source by means within the law."[104] This does not mean, of course, that governmental bodies have to give unlimited public access to their inner workings or facilities.[105] A right to observe is not, for example, a right to physically intrude.[106] But it does mean, however, as the Supreme Court has made clear, that once information is out and in public hands, it is fair game for public observation and communication.[107]

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conduct as opposed to being a part of "speech" would be an observation that occurs with no view to or possibility of ever being communicated (e.g., of a dying man on a desert island). All normal observation with a view to or potential for communication is, however, another matter. The collection of information for the purpose of communicating it is conduct that is an essential prerequisite to any intelligent or informed expression, and the right to free expression would be near meaningless if government could impose whatever restrictions it wanted on the observations on which virtually all communications depend.

104. Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (internal quotation marks omitted). While *Houchins* involved the rights of the press, the Court's statement should apply with equal force to the rights of individuals because, as the Court has made clear, "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." Branzburg v. Hayes, 408 U.S. 665, 684 (1972); *see also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 782 (1978) ("[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten.").

105. *E.g.*, *Houchins*, 438 U.S. at 9–11 (denying that the press has "a special privilege of access to information as distinguished from a right to publish information which has been obtained"); Pell v. Procunier, 417 U.S. 817 (1974) (upholding denial of press access to prisons); Zemel v. Rusk, 381 U.S. 1, 16–17 (1965) (saying, by way of example, that a citizen does not have a right of "entry into the White House . . . to gather information he might find relevant to his opinion of the way the country is being run").

106. *E.g.*, *Houchins*, 438 U.S. at 9–11; *Pell*, 417 U.S. at 827; *Zemel*, 381 U.S. at 16–17.

107. *See, e.g.*, Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979) (summarizing the Court's previous holding in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), as follows: "[O]nce the truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its dissemination."); *see also Houchins*, 438 U.S. at 10 ("[T]he government cannot restrain communication of whatever information the media acquire—and

Even though the First Amendment right to observe is "fundamental," it is presumably not absolute. It should presumably still be subject to the same standard limitations that apply to the right of free expression.[108] As such, the right to observe could, for example, be limited by laws that are able to pass strict scrutiny, such as those protecting military secrets in the interest of national security.[109] The right to observe would also be subject to the categorical exclusions from First Amendment protection, such as those for child pornography and obscenity.[110] Moreover, the right to observe can apparently—and logically—be "incidentally" burdened by laws of general application that serve substantial governmental purposes *other than* restricting First Amendment interests as such.[111] A foremost example of this latter kind of law is the law of property, which will be discussed below.[112]

Where the standard limitations on First Amendment freedoms do not apply, however, the Supreme Court has never questioned the basic principle in *Stanley* that an individual has a "fundamental" right "to . . .

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which they elect to reveal."). The Court later recognized that there might be possible exceptions where there is "a need to further a state interest of the highest order," Florida Star v. B.J.F., 491 U.S. 524, 533 (1989), though exceptions of that nature would seem to be readily subsumed under the doctrine of strict scrutiny. Most of the cases focus on the right to communicate rather than to observe confidential government information that gets out into the public sphere. However, the right to observe must be presupposed or else a right to communicate would not make any sense.

Again, as noted earlier, press cases like those cited in this footnote should apply with equal force to the rights of individuals. *See supra* note 103.

108. *See supra* text accompanying notes 20–23.

109. *See* Near v. Minnesota, 283 U.S. 697, 716 (1931) (stating that the First Amendment would not protect the "publication of the sailing dates of transports or the number and location of troops"); *cf.* Holder v. Humanitarian Law Project, 561 U.S. ___, 130 S. Ct. 2705 (2010) (upholding a law banning all material support for terrorist organizations even though the law was a content-based restriction on political speech and suggesting that there is a relatively broad national security exception to the First Amendment); Kleindienst v. Mandel, 408 U.S. 753 (1972) (stating that the right to receive information must yield to the apparently boundless power of Congress to exclude foreign nationals from U.S. territory).

110. *E.g.*, Osborne v. Ohio, 495 U.S. 103 (1990) (child pornography); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (obscenity).

111. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968); *see also infra* Part V.

112. *See infra* text accompanying notes 218–72.

observe what he pleases."[113] Government is, in other words, severely constrained by the Constitution in regulating what people can lawfully see and hear, just as it is constrained in limiting what people can say and write. Since people and their property comprise together just about everything there is, little would be left to see and hear if, in the name of privacy, laws could forbid persons from observing one another or one another's possessions that have not been concealed. In summary, it is very dubious that laws could constitutionally forbid persons who are otherwise acting lawfully from looking at other people or their possessions that are available to view.

B. Other Possible Illegality in Obtaining Information

Even though a fundamental right to observe may not allow laws that restrict observation as such, it is still possible that observations could involve independently unlawful means or ends that would put them within the categorical exception for speech "integral to criminal conduct."[114] There is, for instance, no general First Amendment right to violate property rights[115] even when the purpose of the property violation is to express information[116] or to gather it.[117] This principle, as applied to

113. Stanley v. Georgia, 394 U.S. 557, 568 (1969). For other cases recognizing the principle since *Stanley*, see Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866–67 (1982) ("[W]e have held that in a variety of contexts 'the Constitution protects the right to receive information and ideas.'"); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756–57 (1976) (acknowledging "a First Amendment right to receive information and ideas, and that freedom of speech necessarily protects the right to receive") (internal quotation marks omitted); Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (specifically involving the right to gather news); *Kleindienst*, 408 U.S. at 762–63 (upholding the "right to receive information" as a protected constitutional interest).

114. Or, more broadly, to unlawful conduct. *See supra* notes 80–84 and accompanying text.

115. *See* Virginia v. Hicks, 539 U.S. 113 (2003) (approving application of trespass law to entries without permission for the purpose of distributing leaflets); Hudgens v. NLRB, 424 U.S. 507 (1976) (denying that there is a First Amendment right to trespass in order to advertise a strike against the owner); Lloyd Corp. v. Tanner, 407 U.S. 551, 567–68 (1972) (denying that there is a First Amendment right to distribute political leaflets on private property without permission).

116. *See Hicks*, 539 U.S. at 122–23; *Hudgens*, 424 U.S. at 520–21; *Tanner*, 407 U.S. at 567–68.

the right to observe, would mean that, when private information is acquired by engaging in unlawful conduct such as trespass to land or to chattels, the illegality of the *means* of observation could support a ban on its disclosure. Such a ban, resting ultimately on ordinary property rights, would fall neatly within the broad categorical exclusion for "speech integral to unlawful conduct."[118]

Before discussing the "property rights" basis for protecting private information,[119] however, we will look at four other possible ways that illegality could arguably be invoked to make the observation and dissemination of private information regulable as acts integral to unlawful conduct. First, a law could make it illegal to gather private information by *recording*, either generally or under specified circumstances.[120] If such a law were valid,[121] then the dissemination of the recordings could be regulated as speech integral to unlawful conduct.[122] Another possibility is that a law could declare it a crime or

117. *See* Bartnicki v. Vopper, 532 U.S. 514, 532 n.19 (2001) (stating that there is no First Amendment right to steal information or conduct private wiretapping). *Cf. supra* note 103.

118. *See infra* text accompanying notes 205–09.

119. *See infra* Part V.

120. For example, the federal or state wiretap laws which, it should be stressed, do not confine themselves to "wiretapping" but also embrace forms of eavesdropping on ordinary mouth-to-ear communications. *See, e.g.*, 18 U.S.C. §§ 2510–2522 (2006) (prohibiting interception of "oral" communications); CAL. PENAL CODE §§ 631–632 (West 2012) (accord); 720 ILL. COMP. STAT. ANN. §§ 5/14-1–5/14-2 (West 2012) (accord); MASS. GEN. LAWS ANN. ch. 272, § 99 (LexisNexis 2010) (accord); N.Y. PENAL LAW, 250.05 (McKinney 2012) ("mechanical overhearing of a conversation").

121. Apart from First Amendment considerations, it is not clear why government could not constitutionally ban the use of recording devices altogether. *See* Texas v. Johnson, 491 U.S. 397, 407 (1989) (noting that the Court applies a "relatively lenient standard to those cases in which 'the governmental interest is unrelated to the suppression of free expression'") (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)). In any case, there seems to be no doubt that government can ban the use of recording devices selectively, such as under the federal or state wiretap laws mentioned in the preceding footnote.

122. This argument failed in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). However, the Court left open the possibility that, under different facts, a different outcome might be reached. *Id.* at 531–33 (stating that "this is the exceptional case" and that "the outcome of the case does not turn on whether [18 U.S.C.A.] §

tort to disseminate private information gathered without the *consent* of the persons referred to, which, again, would make the observation and dissemination of such information regulable as acts integral to unlawful conduct. Thirdly, and analogously, a law could make it unlawful to gather information about people *covertly*. Finally, there is the possibility that the Constitution does not fully protect the gathering or dissemination of information at all unless it relates to matters of public concern, allowing the states much broader latitude in outlawing the free flow of "non-pubic concern" information. However, each of these four possible ways to bring privacy laws under the "integral to illegality" categorical exception share the same problem: each of the possible predicate crimes is itself subject to serious First Amendment objections. The four possibilities will be discussed in turn.

1. The Right to Record

As advances in cell phone technology make handheld audio and video recording devices ever more widespread, people no longer have to rely on their memories to recollect what they see and hear. They need not rely solely on their personal powers of elocution to communicate their experiences to others. By simply pulling out a modern wireless phone, everything can be recorded reliably and completely,[123] dramatically enhancing mere unassisted memory. When the results are later shown to others who were not present at the actual event, these other persons are virtually present at the original scene. This newly enhanced technology of digitally assisted memory can, no doubt, cause considerable unease to those who do things they are not proud of or do not want others to know about. As modern digital devices provide incomparably persuasive accounts of the facts and events of the world, they can explode the most

2511(1)(c) may be enforced with respect to most violations of the statute without offending the First Amendment").

123. *See* Press Release, *Qumu Survey: 50% of Americans Say They Would Use Smartphones to Take Secret Videos*
(Oct. 10, 2011, 6:08 PM), http://www.qumu.com/news/446-qumu-survey-50-of-americans-say-they-would-use-smartphones-to-take-secret-videos.html; Steve Ragan, *Smartphones Are Handy Tools For Video Voyeurs*, THE TECH HERALD (Oct. 12, 2011, 10:10 AM), http://www.thetechherald.com/article.php/201141/7719/Smartphones-are-handy-tools-for-video-voyeurs.

carefully crafted false reputations and calculated efforts at misinformation. They destroy deniability.[124]

In recent times, there has been a flurry of attention and even litigation concerning the propriety of punishing the use of digitally assisted memory devices (such as mobile phone video cameras) particularly in the context of impromptu efforts to document dodgy police work.[125] Since the technological devices at issue have precisely the purpose of improving the dissemination of information—the very thing that the First Amendment exists to promote—it is surprising that

124. While the use of such devices could destroy false deniability, it could also tend to reinforce *truthful* denials, thus protecting the honest against the falsehoods and perjury of others. For the point that the First Amendment also supports a right to attempt, by free expression, to create a "false" reputation, see *supra* note 69.

125. *See, e.g.*, Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011) ("[T]hough not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment."); Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010) (granted qualified immunity to police on ground that "the right to videotape police officers during traffic stops was not clearly established" at the time); ACLU of Ill. v. Alvarez, No. 10C5235, 2011 WL 66030, at *4 (N.D. Ill. Jan. 10, 2011) (stating that there is no First Amendment right to record police), *rev'd*, ACLU of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2011); Allison v. Illinois, 2011 U.S. Dist. LEXIS 40490 (S.D. Ill. 2011) (prosecution for recording conversations with police), *aff'g* Allison v. Illinois, 2011 U.S. Dist. LEXIS 40019 (S.D. Ill. 2011); Commonwealth v. Hyde, 750 N.E.2d 963, 966 (Mass. 2001) (applying MASS. GEN, LAWS ch. 272, § 99); Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian's Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487 (2011); Seth F. Kreimer, *Pervasive Image Capture And The First Amendment: Memory, Discourse, And The Right To Record*, 159 U. PA. L. REV. 335 (2011); Michael Potere, *Who Will Watch The Watchers?: Citizens Recording Police Conduct*, 106 NW. U. L. REV. 273 (2012) (arguing that "prior restraint" doctrine disallows laws to ban citizen recording of police activity); Radley Balko, *The War on Cameras*, REASON MAGAZINE (Jan. 2011), *available at* http://reason.com/archives/2010/12/07/the-war-on-cameras; Jason Meisner & Ryan Haggarty, *Woman Who Recorded Cops Acquitted Of Felony Eavesdropping Charges*, CHI. TRIB., Aug. 25, 2011, at 1; Radley Balko, *Chicago District Attorney Lets Bad Cops Slide, Prosecutes Citizens Who Record Them*, HUFFINGTON POST (June 8, 2011), http://www.huffingtonpost.com/2011/06/08/chicago-district-attorney-recording-bad-cops_n_872921.html; *cf.* David Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357 (2010) (providing excellent insights on a somewhat different side of this issue).

there is any serious legal controversy about their use. Nonetheless, there is, and some excellent scholarship has already been done on the right to use devices, such as video recorders in public settings.[126] No attempt will be made to replicate or recite that work here. Instead, I will confine the present discussion to a few points concerning the right to record other persons in public.

First, while recording alone has elements that may be regarded as non-speech "conduct," it does not follow that recording bans should be assessed under the "relatively lenient standard" that the Supreme Court uses for conduct regulations that impose only "incidental limitations on First Amendment freedoms."[127] Undeniably, the real target of most laws that forbid recording is *communication*, precisely the activity that the First Amendment protects.[128] Whatever might be the government's power to "incidentally" regulate expressive conduct, it "may not . . . proscribe particular conduct *because* it has expressive elements."[129] And it is surely the communicative potential of recording that motivates the laws to restrict it. After all, no one could be sensibly concerned about recordings that are certain never to be seen or heard. In passing laws that target recording, there is only one kind of harm that lawmakers could plausibly have in mind, namely, the "harm" that might ensue from playback, actual or potential, i.e., *communicative* harm. However, the "guarantee of freedom of expression makes the communicative nature of conduct an inadequate basis for singling out that conduct for proscription."[130] In short, a recording ban, being "directed at the communicative nature of conduct[,] must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires."[131]

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126. *See, e.g.*, Lisa A. Skehill, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK U. L. REV. 981, 1009 (2009); Alderman, *supra* note 125; Kreimer, *supra* note 125; Potere, *supra* note 125.

127. Texas v. Johnson, 491 U.S. 397, 407 (1989). *See infra* text accompanying notes 211–15.

128. *Cf. Johnson*, 491 U.S. at 406–08.

129. *Id.* at 406.

130. *Id*. (emphasis omitted).

131. *Id.* (emphasis omitted). In the case of content-discrimination, the "substantial showing of need" means, in today's terminology, strict scrutiny. *Id.* at 412 (requiring "the most exacting scrutiny").

Second, just as recording cannot be regulated on the ground that the results might be seen or heard, the playback itself should be constitutionally protected. Indeed, it is hard to regard the playback of a recording as anything but "pure speech."[132] What else can one say of conduct that is engaged in for the *sole purpose* of communicating facts, opinion or emotive effect and that would otherwise have virtually no impact on the world?[133] As the Supreme Court has said, "if the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does . . . ."[134] Accordingly, delivering a recording is "the kind of 'speech' that the First Amendment protects,"[135] and if delivering a recording is protected "speech," then *playing* it must be. In short, the act of recording functions almost entirely and solely as an integral part of communication, and laws to regulate recording are regulations of speech, pure and simple. That being so, restrictions on recording presumably would have to be justified using one of the several standard grounds for allowing restrictions on First Amendment rights.[136]

Third, there is the question of whether restricting the use of digitally assisted memory devices can be justified as regulations on merely the "time, place, or manner" of speech.[137] Under certain conditions, reasonable "time, place, or manner" regulations are permissible even though they may impinge on particular First Amendment activity.[138] The argument for applying the "time, place or manner" justification to recording bans would rest on the fact that such bans do not absolutely prevent the information from being communicated but, rather, they merely restrict the *manner* of communication. Although, the argument would go, recording bans forbid a particular "manner" of communication, they still allow the information to be conveyed in other ways, such as by word of mouth. The argument

132. *See* Bartnicki v. Vopper, 532 U.S. 514, 526 (2001).

133. The only other thing that it does, one supposes, is to use up the recording materials, which, in the case of digital recording, is practically negligible.

134. *Bartnicki*, 532 U.S. at 527 (quoting Bartnicki v. Vopper, 200 F.3d 109, 120 (3d Cir. 1999)).

135. *Id.*

136. *See supra* text accompanying notes 22–25.

137. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

138. *Id.*; *see also* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

does not, however, work. For although the Supreme Court does indeed interpret the First Amendment to allow reasonable restrictions on the *manner* of expressing protected speech, such restrictions are permissible only under three conditions: The restrictions must be (i) "justified without reference to the content of the regulated speech," (ii) "narrowly tailored to serve a significant governmental interest," and (iii) "leave open ample alternative channels for communication of the information."[139] The problem with applying the "time, place, or manner" argument to privacy laws is that, when recording bans are enacted for the specific purpose of protecting private information, they raise issues under all three of these conditions.

The first of the three conditions, that the restrictions be justified without reference to content, runs into obvious difficulty when the recording prohibitions at issue apply only to recordings that communicate information about people in certain "private" situations—as does, for example, the New Jersey statute in the Ravi-Wei case.[140] Such a statute simply does not satisfy the Supreme Court's requirement of content-neutrality. A regulation of expression is considered to be content-neutral only if it "serves purposes unrelated to the *content* of expression."[141] It is hard to see, however, how New Jersey has any purpose *except* to prevent certain content from being disseminated. Essentially the same can be said when laws ban the recording of private activities tied to the protection of "seclusion," such as those contemplated by the Second Restatement of Torts § 652B.[142] Because the Restatement's ban extends only information about a single class of subject matter (others' private activities, affairs, or concerns),[143] they are anything but content-*neutral*.

The second of the three conditions, that the legal restrictions must serve a "significant governmental interest," may also encounter constitutional difficulty. It was earlier noted that there is already the question of defining a "compelling" governmental interest in protecting private information,[144] particularly insofar as what would really be

139. *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293).
140. *See supra* note 16.
141. *Ward*, 491 U.S. at 791 (emphasis added).
142. RESTATEMENT (SECOND) OF TORTS § 652B (1977).
143. *Id.*; *see also supra* note 19.
144. *See supra* text accompanying notes 45–79.

protected is calculated disinformation or a false reputation. For the same reason, one may legitimately wonder whether recording bans enacted for the purpose of protecting private information serve any "significant" governmental interest, as required by "time, place, or manner" restrictions. It is not completely obvious whether they do or not, though it should be observed that the standard used by the Court in "time, place, or manner" cases is a "relatively lenient" one.[145]

Perhaps the most problematic of the three "time, place, or manner" conditions is the one requiring the speech regulations at issue to leave ample alternative channels for communication of the information. The difficulty here lies with the concept of "ample." To be sure, even if the law forbids recording a person or event using technology, there are almost always alternative ways to register and express the content in question, such as by simply watching and then *telling* people what happened. There is, however, a serious problem with forcing people to fall back on that ultra-low tech alternative. The legal prohibition on presenting recorded documentation of an occurrence can reduce, sometimes drastically, the emotive impact of the information being conveyed. To "show" is almost always more powerful than merely to "say." If government could forbid people from delivering certain kinds of information in the most effective way they see fit—for example, with visual corroboration—it could easily circumvent the content-neutrality that the First Amendment requires.[146] Recordings make messages more believable by providing evidence and corroboration for their truth. If the government could prohibit presentation of proof of the facts asserted in a message, the impact of the message could easily be diluted and, indeed, it might not be believable at all. The idea that that government may

145. Texas v. Johnson, 491 U.S. 397, 407 (1989).

146. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) ("The government may not regulate [expression] based on hostility--or favoritism--towards the underlying message expressed."); *see also* Turner Broad. Sys. v. FCC, 512 U.S. 622, 643 (1994) ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content[-]based."). To take an extreme case, imagine a law providing that pro-government messages can be presented on TV in vivid color action clips with music and other sounds while anti-government messages could be presented only by silently scrolling text across an otherwise blank screen.

choose to allow certain ideas or information to be expressed only weakly or with muted impact is at odds with the cases.[147]

Consider, for example, the factual setting of *Bartnicki v. Vopper*.[148] During tense teachers union negotiations, an unknown person secretly recorded the union president as he was saying to the union's chief negotiator: "we're gonna have to go to their, their homes . . . [t]o blow off their front porches . . . ." (referring to the members of the board of education).[149] After a radio station played the recording on the air, the individuals who were recorded sued unsuccessfully for damages.[150] Although a verbal description of the conversation would have technically told the world what the union leader said, surely it was more credible, not to mention effective, to play his actual words spoken in his own

147. *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. ___, ___, 131 S. Ct. 2653, 2671 (2011) (rejecting the idea "that the force of speech can justify the government's attempts to stifle it"); Snyder v. Phelps, 562 U.S. ___, ___, 131 S. Ct. 1207, 1219 (2011) ("'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'") (quoting *Johnson*, 491 U.S. at 414); Boos v. Barry, 485 U.S. 312, 322 (1988) (rejecting idea that emotive foreign-affairs considerations of picketing an embassy justify suppressing the expression); *Johnson*, 491 U.S. at 406–07 (denying that emotive impact of flag burning is reason to ban it); Cohen v. California, 403 U.S. 15, 26 (1971) (discussing the "emotive function" of speech "which, practically speaking, may often be the more important element"). The upshot of these cases seems to be that the government may not restrict messages with which it disagrees, "dependent on the particular mode in which one chooses to express an idea." *Johnson*, 491 U.S. at 416. Indeed, a restriction that is imposed based on "the likely communicative impact of . . . expressive conduct . . . is content based." *Id.* at 411–12. "The emotive impact of speech on its audience is not a 'secondary effect' unrelated to the content of the expression itself," *id*. at 412, and accordingly, government "may not . . . proscribe particular conduct *because* it has expressive elements." *Id.* at 406–07. Thus, when a "restriction on expression cannot be 'justified without reference to the content of the regulated speech' . . . it must be subjected to 'the most exacting scrutiny.'" United States v. Eichman, 496 U.S. 310, 317–18 (1990) (quoting Boos v. Barry, 485 U.S. 312, 320–21 (1988)).

148. 532 U.S. 514 (2001).

149. *Id.* at 518–19.

150. *Id.* at 515. The suit was brought under state and federal wiretapping laws which prohibited, among other things, the interception of "wire, electronic, and oral communications" and the disclosure of the contents of any such intercepted communication. *Id.* The Supreme Court held that it was unconstitutional to apply the wiretap laws to prevent the disclosures by the defendants in the case, i.e., persons who were not parties to the original illegal interception. *Id.*

voice. It would defeat the content-neutrality that the First Amendment requires if government could decide that people wanting to convey certain content are only allowed to state their case verbally but not to use recordings or similar documentation to back up their factual assertions.[151] If the right to communicate is to be real, then rights to provide evidence and corroboration by means of recording, like the right to observe, would seem to follow as a matter of course.

One last point, just to be clear: It is presupposed throughout the foregoing discussion that the recordings in question are made without violating any other person's independent, non-speech related,[152] rights, such as property rights. It is recognized, in other words, that laws protecting such independent rights, as further discussed below,[153] may be valid even though they impose "incidental" burdens on First Amendment freedoms so long as they are not aimed at restricting speech selectively on the basis of its content. Thus, the protected First Amendment status for recording would not apply, for example, to recordings that are made using taps violating valid federal and state wiretap laws or accomplished by means of trespasses to lands or chattels of others.[154] But laws to

151. *See Sorrell*, 131 S. Ct. at 2671 ("In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime.").

152. More broadly, "independent" rights is used here to refer to any rights other than a right, as such, not to be the subject of communication, viz. a "right of privacy."

153. *See infra* Part V.

154. *But cf. Bartnicki*, 532 U.S. at 529–30 (striking down the application of some parts of wiretap statutes), discussed *supra* text accompanying notes 148–51 and *infra* text accompanying notes 191–96.

In an interesting related vein, Professor Adam Kolber has recently considered (and essentially rejected) the idea that laws criminalizing device-assisted cognitive enhancement could be justified in the context of card counting at blackjack tables. Adam J. Kolber, *Criminalizing Cognitive Enhancement at the Blackjack Table*, *in* MEMORY AND LAW 307 (L. Nadel & W. Sinnott-Armstrong, eds., 2012), *available at* http://ssrn.com/abstract=2138358. However, blackjack games are quite possibly one of the exceptional places where cognitive device prohibitions actually *could* be justified on the ground, simply, that casinos are entitled to set the rules under which they are willing to play and, according to Kolber, the casinos' rules do, in fact, exclude the use by players of cognitive-enhancement devices that could assist in counting cards. Under these circumstances, for a player to pretend to comply with the casino's rule in order to secure a place at the blackjack table would be a form of larceny or false pretense. In most other circumstances of life, however, there are

restrict recording *because of its communicative capacity* raise, at the very least, serious constitutional questions.

2. Observing Without Consent

It is likely that most of us would find it offensive to be looked at or listened to against our will. People have an understandable desire to be able to say no to the observations of others. At the same time, however, for government to make it unlawful to see or hear others in plain sight would cut into individual autonomy at a most basic level and significantly impinge on people's other legitimate interests. Quite apart from the unparalleled intrusiveness that would attend laws forbidding observations of persons and possessions in plain sight, people have legitimate self-protection interests in knowing what is going on around them. Those who desire most fervently to not be seen or heard might, after all, be up to no good. To be sure, people may more typically want to go unobserved with no ulterior reason at all, but such desires may also reflect a realistic fear of legitimate disapprobation or intervention by others. When this may be the case, the others have a right to know.

One way to resolve the tension between the interest in observing and the interest in not being observed is to create some sort of presumption of consent, deeming observations to be consensual if certain conditions are present (for example, the observation occurs in a public location). On this theory, when persons put themselves or their possessions where they can be observed by others lawfully present, they are "deemed" to manifest consent to the others' observations.[155] Thus, a person would be deemed to consent to observations by others of such things as the photos on her laptop screen in a coffee shop, her conversions on public sidewalks, or her actions done while riding on a bus or subway. Such a presumption would probably be consistent with

neither any such anti-device "rules of play" to comply with nor "false pretense" of compliance. One person has as much right to use memory assistance in personal interactions as others have to refuse such interactions.

155. For example, consent could be presumed in public or semi-public places, i.e., privately owned locales that are generally open to the public, such as stores, malls, sports stadiums, movie houses, and other such venues. *See* Skehill, *supra* note 126, at 1009 (discussing the Massachusetts court's apparent embrace of "knowledge [as] consent" in *Commonwealth v. Hyde*, 750 N.E.2d 963 (Mass. 2001)).

the likely expectations of most people, not to mention with the existence of a fundamental right to observe and acquire knowledge about the world around us.[156] Indeed, a presumption that everyone consents to being seen and heard in public is practically a corollary to any genuine right to observe.

However, a legal fiction of consent is, in the end, an unneeded analytical contrivance. For how could anyone ever have a *reasonable* expectation of privacy in relation to actions done or possessions left in the plain view of others who are lawfully present?[157] Consider, for example, a couple asserting a right to engage, unobserved, in "heavy

156. *See supra* Part IV.A.

157. *See, e.g.*, Vaughn v. Drennon, 202 S.W.3d 308, 320 (Tex. App. 2006) ("One cannot expect to be entitled to seclusion when standing directly in front of a large window with the blinds open or while outside."); Baugh v. Fleming, No. 03-08-00321-CV, 2009 WL 5149928, at *2 (Tex. App. Dec. 31, 2009) (recognizing possibility of reasonable expectation of privacy when "the window of a home is not observable . . . in the normal course of non-intrusive activities . . ."); *see also* Fiorillo v. Berkley Adm'rs, No. CV010458400S, 2004 Conn. Super. LEXIS 1210, at *8 (Conn. Super. Ct. May 5, 2004) (covert videography was not an intrusion on privacy where person "was in plain view of the public and was not videotaped or viewed in a private place or in a manner that revealed her private affairs so as to be outrageous, highly offensive or unreasonable"); Cefalu v. Globe Newspaper Co., 391 N.E.2d 935, 939 (Mass. App. Ct. 1979) (appearing in a public place "necessarily involves doffing the cloak of privacy which the law protects"); Forster v. Manchester, 189 A.2d 147, 150 (Pa. 1963) ("[A]ppellant has exposed herself to public observation and therefore is not entitled to the same degree of privacy that she would enjoy within the confines of her own home."); Tagouma v. Investigative Consultant Servs., No. 2006 CV 1532 CV, 2009 WL 7165852, at *14–15 (Pa. D. & C. May 28, 2009) ("watching or observing a person in a public place, or taking a photograph of a person who can be observed from a public vantage point, is not generally an invasion of privacy"). Other cases include: Wehling v. Columbia Broad. Sys., 721 F.2d 506, 509 (5th Cir. 1983) ("[T]he broadcast provided the public with nothing more than could have been seen from a public street. Consequently, no invasion of privacy occurred."); Dempsey v. Nat'l Enquirer, 702 F. Supp. 927, 931 (D. Maine 1988) ("[T]aking a photograph of the plaintiff in a public place cannot constitute an invasion of privacy based on intrusion upon the seclusion of another."); Machleder v. Diaz, 538 F. Supp. 1364, 1374 (S.D.N.Y 1982) (accosting and filming a person "in a semi-public area [where he was visible] to the public eye"). *But cf.* Wolfson v. Lewis, 924 F. Supp. 1413, 1420 (E.D. Pa. 1996) ("Conduct that amounts to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi-public place, may nevertheless rise to the level of invasion of privacy based on intrusion upon seclusion.").

petting" or other such behavior on an airliner in flight, in a car parked on the street, on a public beach, or in their dinner host's dining room.[158] While persons may conceivably harbor expectations that others around them will avert their eyes and stuff up their ears, the expectations would hardly be reasonable. It serves no socially important interest to accord legal protection to expectations that are *un*reasonable. Stated differently, the absence of a reasonable expectation of privacy means it is *not* reasonable to impinge on others' freedom to see and hear what goes on in plain view.

It has already been noted that government would not likely have a compelling interest in prohibiting people from communicating personal information about others as to which there was no reasonable expectation of privacy.[159] Analogously, in the absence of reasonable expectations of privacy, there would be no compelling interest to justify cutting into the fundamental right to observe by persons lawfully present and in a position to do so. Quite apart from whether people being observed have "consented" to the observations, reasonable expectations of privacy should be a minimum pre-requisite before the observations can be declared illegal.[160] When a person does not want her words or deeds to be observed by others, the reasonable thing to do is to take care not to act or speak in others' sight and hearing.[161] A law that protects unreasonable privacy expectations could not likely survive strict scrutiny.

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158. Compare the prosecutions of people for trying to make video recordings of police conduct carried out in plain public view. *See supra* notes 124–26.

159. *See supra* notes 57–64 and accompanying text.

160. *Id.* Consider 18 U.S.C. § 2510(2) (2006), which extends legal protection against non-wiretap eavesdropping only to communications that are "uttered by a person exhibiting an expectation that such communication is not subject to interception *under circumstances justifying such expectation*." (emphasis added).

161. For these purposes, the idea of "plain" view should not, as either a semantic or logical matter, encompass perceptions that can be accomplished *only* by means of artificial enhancements such as telescopes, long-range microphones or other digitally-assisted perception devices. That is to say, the covert *acquisition* of private information is to be distinguished from the covert *recording* of information that one should reasonably know is on display. *See supra* text accompanying notes 123–53. This difference exists because expectations of privacy are fundamentally expectations about whether, under the circumstances, one is making personal information accessible to others lawfully present. Thus, it is only reasonable to expect to be seen or heard when doing acts or speaking in the sight or hearing of others but, since we do not normally expect to be subject to surveillance by

3. Covert Observation

Sneakiness never has good connotations, and one can easily detect in the law a distinct unfriendliness toward covert observations of others, even in the absence of artifice or trickery. In disciplinary proceedings, for example, lawyers who just simply record others without their knowledge are sometimes condemned for having engaged in a "deceptive" practice,[162] and federal law makes it an offense to manufacture devices that are "primarily useful for the purpose of the surreptitious interception" of communications.[163] One arguable ground for restricting covert observations is that they are, at least when

perception-enhancement devices, there is normally a reasonable expectation of privacy as long as there are no others in eye- or earshot. *See* Digirolamo v. D.P. Anderson & Assocs., Civ.A. 97-3623, 1999 WL 345592, at *3 (Mass. Super. May 26, 1999) ("[U]nenhanced vision from a location where the observer may properly be does not impair a legitimate expectation of privacy. However, any enhanced viewing of the interior of a home does impair a legitimate expectation of privacy and encounters the Fourth Amendment warrant requirement . . . ." (quoting United States v. Taborda, 635 F.2d 131, 139 (2d Cir. 1980)). *Compare* Kyllo v. United States, 533 U.S. 27 (2001) (finding a reasonable expectation of privacy from use of enhancement devices not in routine use), *with* Dow Chem. Co. v. United States, 476 U.S. 227 (1986) (finding no reasonable expectation of privacy from use of mapping cameras in aircraft). On the other hand, once a person makes an item of information accessible to reasonably anticipatable perceptions of others, the information ceases—absent a confidential relationship or agreement—to be "private" information and becomes "shared" information instead. The person who has made the information available can no longer exert autonomy over the information without impinging the autonomy of others over their own knowledge. She cannot, for example, control the means by which those who have acquired the information choose to register or store it.

162. Gunter v. Va. State Bar, 385 S.E.2d 597, 600 (Va. 1989) (affirming an attorney's suspension from practice); People v. Selby, 606 P.2d 45, 47 (Colo. 1979) (ordering disbarment), *followed by* People v. Wallin, 621 P.3d 330, 331 (Colo. 1981). *But cf.* Attorney M v. Miss. Bar, 621 So. 2d 220, 224 (Miss. 1992) ("Ethical complications arise not so much from surreptitious recordings *per se* as from the manner in which attorneys use them."); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001) (withdrawing an earlier blanket prohibition and limiting the ban on secret recording to "circumstances that make it unethical").

163. 18 U.S.C. § 2512(1)(b) (2006).

unexpected,[164] almost by definition without real consent. However, when the observations occur in the absence of reasonable expectations of privacy, this ground encounters the objections that were discussed in the previous subpart.[165] In any case, it is not so clear that a policy to discourage surreptitiousness in general can justify impingements on First Amendment interests.

To be sure, even a constitutional right to observe should not necessarily prevent laws that make it a crime to acquire private information by stealth methods. For example, a prohibition against surreptitious observations could, at least in some circumstances, serve ends similar to those served by the First Amendment's categorical exception for fraud.[166] There should not, for instance, be constitutional concerns about a law that forbids covert observations that are made after the observer has falsely represented that no such observations will occur.

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164. This qualification of unexpectedness is meant to put aside instances of semi-covert observation in which persons enter into a place, such as a bank lobby, gambling casino or airport security line, where it is a matter of common knowledge that surveillance often occurs. Such "customs of recording" can arguably have at least two different important effects on the analysis. First, if a person who enters a place where she know surveillance is likely to occur, she can reasonably be deemed to have consented to the surveillance. Second, if a person reasonably should know that a camera or microphone is likely to be in operation, that would seem to exclude the possibility of a "reasonable" expectation of privacy. The observation in such a situation would not, therefore, "invade" privacy. Note, however, that the converse is not necessarily true. Just because a person has no reason to know that a surveillance device is in operation, it does not follow that the person does have a reasonable expectation of privacy. There may be many other reasons why, in the particular location or situation, persons cannot reasonably expect to go unseen or unheard (e.g., a hidden camera in the lobby of a public bus station).

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

166. "'[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.'" Time, Inc. v. Hill, 385 U.S. 374, 390 (1967) (quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964)). *See also* Illinois *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 612 (2003) ("[T]he First Amendment does not shield fraud."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]he intentional lie" is "no essential part of any exposition of ideas."). The Court frequently lists fraud among the categories that are outside First Amendment protection. *See e,g,*, United States v. Stevens, 559 U.S., ___, ___, 130 S. Ct. 1577, 1584 (2010); United States v. Williams, 553 U.S. 285, 299 (2008).

In many situations, however, covert surveillance is not exactly "fraudulent" but simply unannounced. It simply happens, for example, that someone gathers information about others but does not, for reasons of convenience or otherwise, let them know about it. These situations range in intuitive dubiousness from things like data mining on the Internet[167] to sitting idly in a parked car and watching passers-by amble down the street.[168] Most "covert" observations consist, no doubt, of things as commonplace as the unobtrusive and unnoticed security cameras that are becoming ubiquitous in restaurants, department stores and other such semi-public locales. In many instances, however, covert observations may be the only means of getting vital information about others' bad behavior—information that may be highly valuable for one's own decisions or well-being.[169] Indeed, because it is a characteristic of bad behavior that it tends to be deliberately concealed, a degree of stealth is frequently necessary in order to obtain information, or to correct misinformation about it.[170] Covert observations raise, in other words, a problem of competing secrecies—the secrecy of the observer versus the secrecy desired by the person being observed. When both sides act "covertly," covertness *per se* hardly seems an apt prima facie ground for denouncing either side for the benefit of the other. Be that as it may, however, laws that ban covert observation, whatever their rationale, impinge unavoidably on the interests furthered by the fundamental right

167. *Cf.* Sorrell v. IMS Health Inc., 564 U.S. ___, ___, 131 S. Ct. 2653 (2011) (concerning data mining, but apparently not on the Internet).

168. Such an observation may be considered sensitive if, for example, the person walking down the street had just exited a Narcotics Anonymous drug treatment center. *See* Campbell v. MGN Ltd., [2004] U.K.H.L. 22 *available at* http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040506/campbe-1.htm.

169. For example, a supermarket plagued by shoplifting might install hidden cameras to observe customer activity in its aisles.

170. *Cf.* Gidatex v. Campaniello Imp. Ltd., 82 F. Supp. 2d 119, 122–24 (S.D.N.Y. 1999); Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 475–76 (D. N.J. 1998) (recognizing that deceit may be necessary to uncover wrongdoing). *See generally* Kathryn A. Thompson, *Legal White Lies: Courts and Regulators Strive to Identify When a Little Deception is Not So Bad*, 91 A.B.A.J. 34, 34 (2005) (discussing the circumstances under which the ABA Model Rules of Professional Conduct should permit the use of deceit in conducting investigations on lawyer misconduct).

to observe,[171] ultimately imposing burdens on the value of getting at the truth. The question is whether and when such laws can be constitutionally justified.

Generally speaking, laws that make it a crime to covertly obtain private information would presumably have to be justified on one of the several standard grounds for allowing restrictions on First Amendment interests.[172] One possibility, already mentioned, is that a ban on covert observation could be fit into the First Amendment's categorical exception for "fraud."[173] Another categorical exception, for conduct integral to a crime, should allow bans on covert observations that are accomplished by criminal intrusions on property interests—whether the target's or others'—such as by hacking into a computer over the Internet.[174]

Passing strict scrutiny provides another basis for upholding laws that impinge on First Amendment interests, but it seems somewhat unpromising that laws against covert acquisition of information could, as a general matter, pass strict scrutiny.[175] In particular, it is difficult to see how such a law could serve a "compelling" governmental interest in light of the competing secrecies and the competing, but prima facie legitimate, private autonomy interests that are typically involved.

In any case, short of some draconian ban on the possession and use of what has become everyday technology, any legal effort to stem the burgeoning practice of covert information acquisition is almost certainly

171. *See supra* Part IV.A.

172. *See supra* text accompanying notes 23–26.

173. *See supra* text accompanying note 166.

174. *See, e.g.,* 18 USC § 1030 (2006) (forbidding accessing a computer and obtaining information from it either without authorization or exceeding authorized access). The "property" argument would be, in short, that addressing the violation of property interests is a valid governmental purpose and has only an "incidental" impact on First Amendment interests. On this theory, there should be little difficulty in concluding that a content-neutral prohibition on covert computer intrusions would pass constitutional muster under the *O'Brien* rule. *See infra* text accompanying notes 211–15. Content-neutral restrictions that impose an incidental burden on First Amendment interests will pass intermediate scrutiny as long as they are in furtherance of a substantial state or governmental interest in protecting property interests. *See* Virginia v. Hicks, 539 U.S. 113 (2003) (content-neutral rules forbidding trespass on private property do not violate the First Amendment).

175. *See supra* Part III.

doomed to fail. With today's modern cell phones and other such electronics, not to mention the increasingly widespread use of inexpensive surveillance gadgets, the act of recording what others say and do is simple, cheap and becoming ubiquitous. It is easy to imagine that, within five years, people will be readily able to buy devices the size of tiny in-the-ear hearing aids that can digitally record or transmit everything that the wearer hears for later reference as necessary. It is hard to imagine that such devices will not quickly come into widespread use. Who, for example, would want go into an important business negotiation or a sensitive personal discussion without one? The ancient "he said/she said" imponderables will soon be a thing of the past.

Thus, as technology makes covert observation not only easier but also more useful, the original hostility toward it may whither away and, looking back, it will one day seem like a quaint technophobic reaction to a valuable technique that was simply new.[176] Indeed, as micro-scale monitoring technologies become more commonplace, their use may even cease to be seen as "surreptitious" at all and, instead, may even be taken for granted. For the present, acquiring information covertly is indubitably under a public-relations cloud. But, notably, in the leading Supreme Court case on the subject, the Court decided *not* to permit the suppression of information that had been gathered surreptitiously.[177]

4. Outlawing Disclosures of Information of Purely Private Concern

One other possible theory for validly outlawing gathering and dissemination of private information rests on the idea that the First Amendment gives a lesser level of protection with respect to information that does not relate to matters of public concern. If "private-concern"

176. Technophobia is timeless and need not be documented here. Many still remember the fears generated by inventions such as movies, television and, perhaps still, the Internet. Earlier the printing press generated similar fears and, 2500 years ago, Socrates anguished over the evil effects to be wrought by the invention of writing. Plato, *The Phaedrus* 117 (1st World Library ed. 2008) (in which Socrates asserted that writing would give "not truth, but only the semblance of truth," with the result that people will become "hearers of many things and will have learned nothing; they will appear to be omniscient and will generally know nothing; they will be tiresome company, having the show of wisdom without the reality").

177. Bartnicki v. Vopper, 532 U.S. 514 (2001).

information enjoys a lesser measure of constitutional protection, then states would have a freer hand in adopting laws to regulate both the gathering and the dissemination of such information. In the Second Restatement of Torts § 652D, for example, public disclosure of a matter concerning the private life of another is said to be unlawful if the matter disclosed is "not of legitimate concern to the public."[178] Speech that conveys such information, once validly declared to be "speech integral to illegal conduct," would then be within a categorical exclusion from constitutional protection. The question is whether such laws would be insulated from First Amendment objection under the categorical exclusion. The answer is probably no.

To begin with, there is to date no case actually holding that the First Amendment gives a lesser level of protection for information not relating to matters of public concern. Nonetheless, there is some inferential authority for the idea, offering at least some succor to it. When, for example, the Supreme Court upheld the right to disclose the private information at issue in *Bartnicki v. Vopper*,[179] it laid considerable stress on the fact that the disclosure was about a "matter of public concern."[180] In thus differentiating between speech on public concerns and on non-public concerns, the *Bartnicki* opinion echoed a line of late twentieth-century defamation cases in which the Court dialed back the "breathing space"[181] that is accorded to non-malicious defamatory utterances.[182] Similarly, and even more strikingly, the Court offered the

178. RESTATEMENT (SECOND) OF TORTS § 652D (1977), *quoted in full supra* note 20. To be actionable, the matter disclosed must also be one that would be "highly offensive to a reasonable person." *Id.* It is, of course, well established that offensiveness alone is not a sufficient ground for removing First Amendment protection. *See* cases cited *supra* note 8.

179. *See supra* text accompanying notes 148–51.

180. *Bartnicki*, 532 U.S. at 535.

181. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964) (citation omitted). The "breathing space" concept is not limited to the defamation context. *See, e.g.*, Hustler Magazine Inc. v. Falwell, 485 U.S. 46, 52, 56 (1988) (barring recovery for intentional infliction of emotional distress); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (barring recovery for invasion of privacy).

182. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (plurality indicating that, absent a matter of public concern, presumed and punitive damages could be allowed without proof of actual malice); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (stating that, absent a public figure, no showing of actual malice is required); *see also* Wolston v. Reader's Digest Ass'n, 443 U.S. 157

obiter dictum in *Snyder v. Phelps*[183] that "restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest."[184] There are, however, several reasons why the Court's stress on "public concern" in *Bartnicki* and *Snyder* might not be properly understood to mean that the states are free in the privacy context to curtail truthful speech on matters that are not of public concern.

First, when the Court in *Bartnicki* spoke of protecting "privacy," the interest in question was not just ordinary privacy. As the Court took pains to point out, the case also involved the interest in *private communication*, a First Amendment interest that deserves protection for the purpose of "fostering private speech."[185] In other words, *Bartnicki* was a case that had First Amendment interests on *both* sides of the "constitutional calculus."[186] In the more general privacy situation, however, where the First Amendment interest in "fostering private speech" is not present, the usual First Amendment interest in free

(1979) (stating that in libel action no showing of actual malice is required for recovery); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (pointing out that the actual malice standard does not apply to non-public figures). Note that, as defamation cases, the above cases are not, strictly speaking, direct precedents for cases that involve impingements on First Amendment interests that are not justified or bolstered by any categorical exclusion from First Amendment protection. They are not, that is to say, direct precedents for cases in which the opposing interest to be served is privacy.

183. 562 U.S. __, 131 S. Ct. 1207 (2011).

184. *Id.* at 1215. Even though the Court in *Snyder* said at one point that "this case *turns largely on* whether that speech is of public or private concern," *id.* at 1215 (emphasis added), the Court cautioned later that "the reach of our opinion here is limited by the particular facts before us." *Id.* at 1220. Thus, while the Court clearly said that the public-concern nature of the speech in *Snyder* meant that the First Amendment was required, it did not ever say—and it seemed to expressly exclude—any holding that private-concern speech was not protected. Indeed, on a fair reading of the case, the arguments for and against protecting purely private interest speech were not even considered by the Court—quite properly, moreover, because the record did not raise the question. *Id.*

185. *Bartnicki*, 532 U.S. at 518. *Cf.* Doe v. Reed, 561 U.S. ___, 130 S. Ct. 2811 (2010) (rejecting the contention that disclosures of speech (signing petitions) would "in general" violate the First Amendment rights of those who sign referendum petitions).

186. *Bartnicki*, 532 U.S. at 533.

communication would weigh unequivocally on the side of protecting the right to disclose.

Second, the only place where the public/private distinction has really made a difference to the Court's *holdings* is in cases, such as defamation cases, that already involve established exceptions to First Amendment protection.[187] These cases fall, therefore, into a distinguishable little genre of their own because the speech they involve is presumptively not protected by the Constitution in the first place.[188] By contrast to the defamation context, however, the Court's First Amendment jurisprudence has never included a categorical exception for *truthful* communications of private information. There is no reason in the Court's holdings to think, therefore, that such communications are anything other than presumptively protected as speech. If that is so, then laws aiming to restrict such communications should only be valid if one of the standard grounds for suppressing protected speech can be shown to apply.[189] This distinction between defamatory falsehoods and truthful statements is not, moreover, merely an arid technical legalism. "There is no constitutional value in false statements of fact."[190] Revelatory statements of *truth* are an entirely different matter.

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187. *See* cases cited *supra* notes 181–82. Another exceptional kind of case, mentioned by the Court in *Snyder*, is one involving control of employee speech by a governmental employer. *See Snyder*, 131 S. Ct. at 1215–16 (citing Connick v. Myers, 461 U.S. 138 (1983)).

188. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 266 (1952). *See also* United States v. Stevens, 559 U.S. ___, ___, 130 S. Ct. 1577, 1584 (2010) (striking down a statute prohibiting certain depictions of animal cruelty for being a content-based regulation did not pass strict scrutiny); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (establishing oft-repeated concept that there are "certain well-defined and narrowly limited classes of speech" that are not constitutionally protected). The substantial protection given certain defamatory speech is, in effect, an exception to an exception.

189. *See supra* text accompanying notes 23–26.

190. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). Actually, the *Gertz* dicta stating that there is no "constitutional value" to false statements is contestable, and it has not necessarily been consistently followed by the Court itself. *See generally* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 70–131 (2012) (providing an excellent précis of this general topic). If the dicta were in fact entirely true, then its fullest force should presumably apply to the institution that the Constitution constituted, namely, the government itself, and government untruthfulness should

Third, although the *Bartnicki* Court suggested that the interest in disclosing information of purely private concern, such as "gossip,"[191] might not overcome the privacy interests affected by such disclosure, that was certainly not part of its *holding* in the case. On the contrary, the Court expressly left the question open, just as it had done in the earlier case of *Time, Inc. v. Hill*.[192] The Court still has not decided a case with facts that required the issue to be considered.

Finally, even if the "core purposes of the First Amendment"[193] center on information of public concern, the Court has left no doubt that freedom of expression is not solely "the preserve of political expression or comment upon public affairs."[194] There are good policy reasons why communications about matters of non-public concern should also be treated as protected speech. After all, most of the information that is most important to most people does *not* relate to matters of public concern. To be sure, people's lives are affected by what governments do, but ordinary men and women are vastly more likely to be affected by the actions of the ordinary people around them, the people with whom they live and directly interact. The average person's interest in information about the qualities, character, conduct, and propensities of her nearby neighbors is

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accordingly be forbidden or, indeed, probably punishable. This, no doubt, cannot be right. What is wrong with the *Gertz* proposition is not merely its impracticality (for example, government as we know it could not function without lies). What is really wrong is, at bottom, the very notion that false statements are necessarily bad. At any rate, the Court drastically qualified the *Gertz* dicta last spring in the "Stolen Valor" case, holding that laws punishing false statements must pass strict scrutiny in order to be constitutionally valid. United States v. Alvarez, ___ U.S. ___, 132 S. Ct. 2537 (2012) (striking down a federal law that made it a crime to claim falsely to be a recipient of military decorations or medals).

191. *Bartnicki*, 532 U.S. at 533.

192. 385 U.S. 374 (1967).

193. *Bartnicki*, 532 U.S. at 533–34.

194. *Time*, 385 U.S. at 388 ("The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government."). *See also* Brown v. Entm't Merchs. Ass'n, 564 U.S. ___, ___, 131 S. Ct. 2729, 2733 (2011) ("[W]e have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try."); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) ("[C]ases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full *First Amendment* protection.") (emphasis added).

not only legitimate but, typically, the most relevant informational interest of all. "'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'"[195] Any realistic theory of the First Amendment must take into account the fact that a large part of the communication that people consider important does not concern matters of wide public interest but, rather, concerns the qualities, character, conduct and propensities of other ordinary human beings.[196]

At any rate, while it may have seemed for a time that the Court might demote information of non-public concern to an inferior constitutional status,[197] the Court in more recent years has recognized explicitly that most of what we say to each other lacks serious value and, yet, it is sheltered from government regulation. Even "'[w]holly neutral futilities,'" the Court has pointedly said, "'come under the protection of free speech as fully as do [John] Keats' poems or [John] Donne's sermons.'"[198] "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."[199] "Even if we can see in them 'nothing of any possible value to society, . . . they are as much entitled to

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195. *Time*, 385 U.S. at 388 (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)).

196. Eoin Carolan makes the interesting argument that communications of private information in individual chit-chat should actually have a *preferred* status compared with disclosures in the media. Eoin Carolan, *The Concept of a Right to Privacy, in* THE RIGHT TO PRIVACY: A DOCTRINAL & COMPARATIVE ANALYSIS 28 (2008). A problem with this argument is that it is hard to distinguish what might be meant by "media" in the era of highly distributed communication brought about by the Internet. Moreover, the First Amendment values that can be achieved through disclosing truthful information do not depend on who does the disclosing.

197. The plurality opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755–61 (1985), perhaps represents the high point of this hierarchization of protected speech, but it was after all only a plurality and the context of the case was defamation, which traditionally falls within a categorical exclusion from First Amendment protection. *But cf.* Snyder v. Phelps, 562 U.S. ____, ____, 131 S. Ct. 1207, 1216 (2011) (elevating the *Dun & Bradstreet* plurality opinion to the status of "our opinion").

198. United States v. Stevens, 559 U.S. ___, ___, 130 S. Ct. 1577, 1591 (2010) (alteration in original) (quoting Cohen v. California, 430 U.S. 15, 25 (1971)).

199. *Id.* at 1585.

the protection of free speech as the best of literature.'"[200] Therefore, government cannot ban speech just because it "is deemed valueless or unnecessary."[201]

We may bemoan the fact that people find juicy gossip to have such compelling interest, and there are surely good arguments as to why, in general, our neighbors' private lives should be none of our business. But free speech is not just a constitutional right of politically active elites but of ordinary people as well. "Some . . . ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented."[202] If "the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.'"[203] For ordinary people in their ordinary daily lives, knowing about the activities, choices and, ultimately, the character of those who live around them can have enormous personal consequence for both their private and "public" decisions and, therefore, be a matter of utmost concern, even if not a government-recognized "public" concern.[204] The Constitution simply does not permit laws that suppress speech on particular topics on the theory that the "speech is not worth it."[205]

It seems unlikely, in sum, that the Supreme Court will ever actually hold that the First Amendment gives a lesser level of protection to expressions of information that happen not to relate to a public

200. Brown v. Entm't Merchs. Ass'n, 564 U.S. ___, ___, 131 S. Ct. 2729, 2737 n.4 (2011) (quoting Winters v. New York, 333 U.S. 507, 510 (1948)) (*Winters* involved police-story magazines, and *Brown* involved videogames that depict violent action scenarios).

201. *Stevens*, 130 S. Ct. at 1586. *See also* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (stating that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

202. Sorrell v. IMS Health Inc., 564 U.S. ___, ___, 131 S. Ct. 2653, 2671–72 (2011).

203. Consol. Edison Co. of N.Y. v. Public Serv. Comm'n, 447 U.S. 530, 537–38 (1980) (quoting *Mosley*, 408 U.S. at 96).

204. For a further thoughtful elaboration on arguments of this sort, see Volokh, *supra* note 12, at 32–39. Professor Volokh suggests, plausibly, that information about the lives and doings of the people immediately around us may be more important than speech of public concern even in determining how most people vote. *See id.*

205. *Stevens*, 130 S. Ct. at 1585.

concern. Therefore, laws declaring such expressions illegal could not bootstrap themselves to validity by making such expressions into "speech integral to illegal conduct."

5. Summarizing the Exception for Speech Integral to Unlawful Conduct

The First Amendment does not restrain the state's power to regulate speech that falls into one of the Amendment's categorical exceptions, such as the exception for speech that is integral to unlawful conduct.[206] The First Amendment should, therefore, offer no impediment to privacy laws that prohibit the acquisition or communication of private information when it is done by resort to unlawful conduct or creates incentives for such conduct. However—and this is a key caveat—"crimes" or "torts" that themselves impinge unconstitutionally on First Amendment interests cannot count as the predicate "unlawful conduct." Thus, for example, a state might define a crime or tort of "unlawful observation" and then try to use "unlawful observation" as a predicate for restricting speech that discloses what has been observed. The problem with this strategy is that the restriction on the individual's fundamental right to "observe what he pleases"[207] would itself be a constitutionally invalid restriction. Because observation is a fundamental right protected by the Constitution, laws that restrict it must presumably satisfy one of the several standard bases for restricting First Amendment freedoms.[208]

Similarly a legislature might enact a law that prohibits observations made under certain circumstances, such as by the use of digitally assisted memory devices, e.g., a ban on recording conversations either covertly[209] or without the consent of the persons being recorded.[210] Some of these laws—e.g., laws that include an element prohibiting

206. *See id.* at 1584 (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)).

207. Stanley v. Georgia, 394 U.S. 557, 565, 568 (1969) ("Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws.").

208. *See supra* text accompanying notes 23–26.

209. *See* N.J. STAT. ANN. § 2C:14-9 (b)–(c) (West 2010); *supra* note 16.

210. *See* Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001) (applying MASS. GEN. LAWS ch. 272, § 99 (2001)).

fraudulent deception—might conceivably pass constitutional muster but, on the whole, it seems unlikely that valid restrictions on the fundamental right to observe would suffice to support broadly sweeping privacy rights. This is especially so with respect to personal information that the person claiming privacy has exposed to the plain view of others, in public or otherwise.

In short, insofar as the right of privacy means a right not to be observed or communicated about, it is simply too directly at odds with First Amendment interests to be itself the subject of a valid legal right. The best way to keep secrets is not to let them out in the first place.

V. PRIVACY PROTECTION INCIDENTAL TO SOME OTHER VALID PURPOSE

Under the "incidental burdens," or *United States v. O'Brien*[211] rule, the First Amendment permits laws of general applicability to impose incidental burdens on speech as long as the law is meant to serve an important governmental interest unrelated to suppressing free expression.[212] As the Supreme Court has explained, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[213] The incidental burdens rule provides a third possible basis for upholding laws that impinge on free expression in the interest of privacy. The seminal case is *United States v. O'Brien*,[214] which upheld a law prohibiting the destruction of government-issued draft cards despite the fact that the destruction was done as a way to express a political viewpoint.[215]

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211. United States v. O'Brien, 391 U.S. 367 (1968) (upholding a ban on draft card burning, even when it was done as a way of expressing a political viewpoint).

212. *See id.* at 377; *see also* Cohen v. Cowles Media Co., 501 U.S. 663, 669–70 (1991) (cataloging many examples of how the press receives no particular immunity from the law); Branzburg v. Hayes, 408 U.S. 665, 682 (1972) ("It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.").

213. *O'Brien*, 391 U.S. at 376.

214. 391 U.S. 367 (1968).

215. *See id.* at 383.

When the government defends a law on the ground that it has only incidental burdens on speech, the law is subject only to "intermediate" scrutiny.[216] Under this lesser level of scrutiny, the government can justify a law restricting speech by showing show that: (i) the law furthers an "important or substantial governmental interest," (ii) the law is "unrelated to the suppression of free expression," and (iii) the incidental burden on First Amendment freedoms is "no greater than is essential to the furtherance of that interest."[217]

Because of the requirement that the law be "unrelated to suppression of free expression," the incidental burdens rule could not justify laws, such as privacy laws, whose very purpose is to restrict the kinds of information that persons may disseminate.[218] Privacy laws would fail this "unrelated to suppression" requirement of intermediate scrutiny whenever they seek to achieve their purpose by banning the expression of one or more classes of content (*e.g.,* information about private lives). By contrast, the traditional law of property provides substantial protection to privacy interests while meeting all three of the criteria of the *O'Brien* incidental burdens rule. Indeed, ordinary property laws have played a large and continuing role in protecting the interest in privacy.

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216. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 641–43 (1994) ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny.").

217. *O'Brien*, 391 U.S. at 377. A closely related line of authorities upholds the validity of laws that regulate the time, place or manner of expression. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). In terms of the scrutiny employed, the primary difference between "incidental burden" cases and the "time, place, or manner" cases is that the latter do not require that the speech regulations in question be unrelated to the suppression of free expression. What the time, place, or manner exception requires instead is that the restrictions on expression "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293).

218. *See supra* note 146.

A. Privacy and Property[219]

Even though the freestanding "right of privacy"[220] is a comparatively recent invention, the privacy *interest* has long received strong legal protection in the places where most people spend most of their time, namely, in privately-owned spaces. What is not accessible cannot be observed, and property rights are the most ancient and basic rights to restrict the accessibility of places and the people who are in them. Indeed, in a large fraction of the situations in which unwelcome observation would intrude on privacy interests, the acts required to make the observations would be violations of ordinary property rights.[221]

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219. It should be stressed that no suggestion is made in the discussion here that privacy protection can or should be accomplished by recognizing a new kind of "ownership" rights that one has in information about oneself. *See* JULIUS C. S. PINCKAERS, FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA 242 (1996). In this respect, along with Jane Baron, I agree such an approach is neither practical nor, probably, desirable. *See* Jane B. Baron, *Property as Control: The Case of Information*, 18 MICH. TELECOMM. & TECH L. REV. 367 (2012). Rather, the argument here is that *ordinary* property rights in land and chattels, extended by ordinary contracting activity, confer a substantial measure of the privacy protection that we are reasonably entitled to expect.

However, it should be noted in this regard that laws conferring persons with property rights in information about themselves would not be entitled to treatment as "incidental" burdens on speech because the governmental interest that they serve, if any, cannot be said to be "unrelated to suppression of free expression." *O'Brien*, 391 U.S. at 377. On the contrary, laws enacted to prevent the dissemination of personal information are *designed for the very purpose* of suppressing expression and, therefore, they manifestly do not satisfy the "unrelated to suppression" requirement.

As Professor Volokh has aptly observed: "Calling a speech restriction a 'property right,' though, doesn't make it any less a speech restriction, and it doesn't make it constitutionally permissible." Volokh, *supra* note 12, at 1063. Therefore, in order for the *O'Brien* analysis to apply, the property right being protected by the law in question must be something *other than* a putative "property right" not to be observed or talked about, or some sort of "property right" not to have the communication occur. Property rights in land and chattels clearly meet this criterion. A freestanding "property right" to personal information about oneself would not. A proprietization of persona is simply an indirect way of creating on restriction on First Amendment interests. *See* Volokh, *supra* note 12, at 1062–76.

220. A "freestanding" right of privacy means one that is not derived from or derivative from other torts or wrongs. *See supra* note 57.

221. For example, in most of the illustrations of protected privacy in § 652B and § 652D of the Second Restatement of Torts, the invasion of privacy is

Centuries before anyone ever thought of freestanding privacy rights, ordinary property law was already serving effectively to exclude intruding eyes and ears from the private spheres of life.

Not only have ordinary property rights long provided a large measure of protection for privacy interests, it is also worth noting that they are themselves protected in the Bill of Rights, just as First Amendment interests are.[222] The primary focus of this constitutional protection is not economic[223] but on the very aspect of property rights that is most relevant to privacy, namely, the right to exclude others.[224] In describing the constitutional protection of property, the Supreme Court has stressed that "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[225] While the right of free expression takes priority over ordinary torts, such as "invasion of privacy,"[226] First Amendment rights do not necessarily trump a property right to exclude others.[227] Both, after all, are enumerated rights.

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accomplished by invasion of a property right. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D (1977).

222. *See, e.g.,* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). This clause limits, as further explained in the text immediately below, the extent to which government can authorize private persons to invade or intrude upon the private spheres of others.

223. A primary issue in the Supreme Court's Takings Clause jurisprudence is determining precisely which economic interests are, and are not, property rights for "only those economic advantages are 'rights' which have the law back of them. . . . We cannot start the process of [just-compensation] decision by calling such a claim . . . a 'property right'; whether it is a property right is really the question to be answered." United States v. Willow River Power Co., 324 U.S. 499, 502–03 (1945).

224. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). The core meaning of "possession" is defined as the intentional exclusion of others, and the right to possession enjoyed by owners is, more importantly, the right to exclude.

225. *Kaiser Aetna*, 444 U.S. at 176. *See also Nollan*, 483 U.S. at 831.

226. *See supra* Parts II–IV.

227. *See, e.g.*, Virginia v. Hicks, 539 U.S. 113 (2003) (regarding trespass); Hudgens v. NLRB, 424 U.S. 507 (1976) (discussing how First Amendment rights interact with trespass); Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 568 (1972) ("[T]his Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only."). *Cf. Nollan*, 483 U.S. at 831–32;

Even apart from their status as enumerated rights, however, property rights have another major constitutional advantage over freestanding rights of privacy: Any burden that property rights might impose on First Amendment interests would qualify as a mere "incidental" burden under the *O'Brien* rule.[228] Thus, whereas freestanding "privacy" torts are, essentially, pure and simple impingements on the fundamental rights to communicate and observe,[229] the law of property exists primarily to serve interests that are utterly unrelated to First Amendment concerns. They are a paradigmatic example of laws "unrelated to the content of speech [which] are subject to an intermediate level of scrutiny."[230] Because the burden that property rights might impose on speech is only "incidental" to serving other valid governmental interests, privacy protection rooted in property rights should have no trouble passing constitutional muster.

The close connection between ordinary property rights and privacy is sometimes overlooked, but it has long existed. It is not likely a coincidence that actions in trespass, unlike most torts, do not require proof of actual dollars-and-cents damages but can be maintained based solely on the fact of intrusion alone.[231] And, perhaps even more significantly, the extensive protections given to property in the criminal law neither make economic damage a precondition nor its absence a defense. In short, the laws that protect property rights, civil and criminal,

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Loretto, 458 U.S. at 433. In *Lloyd,* the Court made clear that property rights under the Fifth and Fourteenth Amendments do not automatically bow to First Amendment rights but, rather, that "accommodations between the values protected by these three Amendments are sometimes necessary." *Lloyd*, 407 U.S. at 567–68. *See also* Burson v. Freeman, 504 U.S. 191, 198 (1992) (explaining the conflict between assuring the right to vote freely and First Amendment rights, forcing the Court "to reconcile our commitment to free speech with our commitment to other constitutional rights."); Sheppard v. Maxwell, 384 U.S. 333 (1966) (discussing the conflict between the right to freedom of press and assuring the accused receives a fair trial).

228. *See supra* text accompanying notes 211–15.

229. *See supra* text accompanying notes 31–32.

230. Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994).

231. *See* Jacque v. Steenberg Homes, 563 N.W.2d 164 (Wis. 1977) (upholding a $100,000 punitive damages award for a brief trespass that did no economic harm); Merest v. Harvey, (1814) 128 Eng. Rep. 761 (C.P) (discussing how awarding punitive damages can remedy the claimant's harm); RESTATEMENT (SECOND) OF TORTS § 163 (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 75–77 (5th student ed. 1984).

are at least as much about preserving what we call "privacy" as they are about the protection of wealth.

The connection between property and "seclusion" privacy becomes readily apparent when we consider the kinds of places where people are likely to have reasonable privacy expectations.[232] First and foremost, of course, privacy is expected in the home where, under ordinary property principles, the owner's right of possession creates a legal protection from outsiders that every resident enjoys. "Possession" in its core meaning refers to a kind of conduct, specifically, the conduct of exerting dominion and control over a place or thing by taking action to exclude others from it.[233] By merely engaging in the act of possession, a person traditionally acquires a legal *right* to exclude others.[234] Indeed, even wrongful possessors have a right to be free from others' intrusions,[235] even including intrusions by the actual owners who have better "rights" to possession but who cannot simply invade possession by self-help and must instead resort to proceedings at law.[236] In the home, the owner enjoys the exclusionary benefit of possession as a direct legal right[237] while others in the household enjoy privacy protection

232. *See supra* text accompanying notes 59–64.

233. The possession referred to in the text is "actual" possession, as distinguished from constructive possession. An example of constructive possession is the "possession" that an owner is deemed to have of unoccupied lands, so long as the land is not in the possession of an adverse possessor. *See, e.g.*, Gillespie v. Dew, 1 Stew. 229, 229–30 (Ala. 1827); RAY ANDREWS BROWN & WALTER B. RAUSHENBUSH, THE LAW OF PERSONAL PROPERTY § 2.6, at 19–23 (3d ed. 1975).

234. *See, e.g.*, *Gillespie*, 1 Stew. at 229–30; Dieterich Int'l. Truck Sales, Inc. v. J.S. & J. Serv., Inc., 5 Cal. Rptr. 2d 388 (Cal. Ct. App. 1992); Illinois & St. Louis R.R. & Coal Co. v. Cobb, 94 Ill. 55, 57–60 (Ill. 1879) (involving trespass); Tapscott v. Cobbs, 52 Va. (11 Gratt.) 172 (Va. 1854) (regarding ejectment); W. PAGE KEETON ET AL., *supra* note 231, § 13, at 77–78 (5th ed. 1984); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 139, 160–64 (ABA Classics 2009) (1881). *See also* RESTATEMENT (SECOND) OF TORTS §§ 158, 216 (1965) (stating that liability for trespass lies when one person "enters land in the possession of the other"). Indeed, technically, it is not "ownership" that confers the right to exclude others but, rather, it is possession, actual or constructive, that confers the right—i.e., it is the possessor that has the standing to bring and prevail in trespass and ejectment actions. *Id.*

235. *See* RESTATEMENT (SECOND) OF TORTS § 895(1) (1965).

236. *See* Jordan v. Talbot, 361 P.2d 20, 24 (Cal. 1961). Apparently, the original law adopting this rule was enacted in the year 1381. *See id.* at 23 n.2.

237. Owners generally hold a possessory estate in fee simple absolute; possession may also be held under a leasehold estate, such as a term of years.

derivatively, from the property rights of the owner.[238] Similarly, in the typical employment situation, employees at work derive substantial privacy protection from the fact that their employers, as possessors of the workplace, have the legal right to exclude others.[239] By parity of reasoning, there are also many other places where a person might, as a practical matter, derive privacy protection from the property rights of others—though usually on a more transitory basis. Obvious examples include the restrooms at a movie theater and the fitting rooms in a department store.

Admittedly, the analytical basis for this sort of "derivative" protection for privacy is not well theorized in the cases.[240] Theory or no, however, people confidently assume that they enjoy privacy protection wherever, under the circumstances, having an expectation of privacy would be reasonable based upon the understandings that "society as a whole possesses."[241] And almost invariably, the crucial circumstance that makes these privacy expectations reasonable is the fact that the place in question has an owner who is exercising dominion and control in such a way that reasonable expectations of privacy can arise.[242]

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238. *Cf.* RESTATEMENT (SECOND) OF TORTS § 162 (1965) (stating trespass liability is to the owner and to "members of his household"). Derivative protection can potentially apply in other areas as well, as described in the text immediately following.

239. *See supra* note 234.

240. *See, e.g.*, Pate v. Mun. Court, 89 Cal. Rptr. 893, 894 (Cal. Ct. App. 1970) (applying derivative privacy protection based on a trespass on another's premises); Digirolamo v. D.P. Anderson & Assocs., Civ.A. 97-3623, 1999 WL 345592 (Mass. Super. May 26, 1999) (recognizing that the right to observe does not confer a right to trespass).

241. To borrow wording from the Supreme Court's Fourth Amendment jurisprudence. *See supra* note 62. Note, however, that the Fourth Amendment cases do not necessarily protect privacy as extensively against government as the law of property does against other persons. *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 91 (1998) (stating that merely being present in another's home with the owner's consent does not necessarily confer a "legitimate expectation of privacy" for purposes of the Fourth Amendment). Probably, cases like *Carter* are best understood as examples of situations in which owners can confer privacy protection as against other private persons (by limiting the scope of the latters' licenses), but they are not permitted to confer privacy protection as against government. *See also* Hester v. United States, 265 U.S. 57 (1924) (holding that Fourth Amendment protection does not extend to items found in open fields).

242. *See supra* note 219.

Consider, for example, the situation where an owner of a department store, as part of exercising dominion and control over the store premises, undertakes to provide privacy to customers using the store's fitting rooms. Under ordinary principles of contract or promissory estoppel, such an undertaking (whether inferred from words, acts or the circumstances) could afford a legal right to privacy protection not only against the store's owner but also as against third persons. As against the owner, the shopper's right to privacy can easily be understood as resting on an ordinary contract "implied in fact."[243] As against third persons the privacy right can be understood as resting on the store owner's right to exclude, which includes a legal power to grant licenses of limited scope

243. *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 1.8(c) (5th ed. 2003); ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 18 (One vol. ed. 1952). *See also* RESTATEMENT (SECOND) OF CONTRACTS §§ 4 cmt. a, 19 cmt. a (1981) ("Conduct may often convey as clearly as words a promise or an assent to a proposed promise."). To avoid issues of lack of consideration, the theory of promissory estoppel could be invoked to support the implied agreement to provide privacy. *See* PERILLO, § 6.3(a).

Incidentally, the law of contracts and promissory estoppel, like that of property, provide another paradigmatic example of laws having general applicability that impose only an "incidental" burden on First Amendment freedoms while furthering other important governmental interests. *See* Cohen v. Cowles Media, Co., 501 U.S. 663, 669–71 (1991). In any case, it is well established that the enforcement of contract rights can impinge on free expression without running afoul of the First Amendment. *Id.* at 671 ("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."). Just because the Constitution guarantees a right—including the rights to speak and observe—does not mean that people cannot make contracts about those rights. A consideration of the outer limits of this principle is beyond the scope of this Article but an excellent discussion can be found in Volokh, *supra* note 12, at 1057–63.

One final point: there is no reason why the state could not exact criminal penalties for privacy invasions that are rooted in contract rights. *See, e.g.*, N.Y. PENAL LAW § 250.45 (McKinney 2008) (unlawful surveillance where there is a reasonable expectation of privacy). While breach of contract is not normally a crime, there is certainly precedent for attaching criminal penalties to contract breaches that are considered to be criminally blameworthy—for example, in the law of actus reus where violating a contract duty can be a criminal "omission," discussed at greater length in John A. Humbach, *Criminal Prosecution for HMO Treatment Denial*, 11 HEALTH MATRIX 147, 148 (2001). The main point in the text is, however, that even without criminal penalties, an invasion of privacy could be a legal wrong under ordinary rules of property and contract law.

to visitors, customers, and other invitees.[244] Department stores admit shoppers under licenses of limited scope, and it is reasonable to infer that one of the limitations on those licenses is that shoppers are not permitted to enter or make "observations" into fitting rooms being used by other shoppers.[245] If someone in the store exceeds the scope of this limited license by, for example, peeping into an occupied fitting room, that act would be a trespass under the law ordinarily applicable to property[246] and, it seems reasonable to infer, a breach of a third-party beneficiary contract, implied in fact, for the benefit of the other shoppers.[247] That is to say, given the conventions of our times, it seems perfectly reasonable to say that every customer coming into a department store impliedly agrees not to intrude or "observe" in the fitting rooms occupied by others, and that all of the store's patrons are meant to be the beneficiaries of this understanding. Under ordinary applications of property law and complementary applications of contract law, the shoppers who come in the store thus derive legal rights of privacy from the owner who, based on the owner's property right to exclude others, is in a legal position to confer such privacy.

Similar reasoning can apply to protect privacy interests in private information except that, in the case of information, the basis for the protection would more normally be *personal* property law—primarily, the law with regard to chattels. The law of personal property provides a fertile source of controls that can be used in protecting information

244. In property law, a "license" is generally understood to be a revocable privilege for freedom to make certain limited use of land that is in the licensor's possession (dominion and control). 2 THOMAS E. ATKINSON ET AL., AMERICAN LAW OF PROPERTY § 8.110 (A. James Casner ed. 1952). *See also* RESTATEMENT (SECOND) OF TORTS §§ 167 cmt. a–h, 168 (1965). Because the land is by definition in the possession of another, the uses permitted by the license would, in the absence of the license, be trespasses. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 50 (Walter Wheeler Cook ed., 1964).

245. All of this understanding is normally tacit, of course—being implicit in the widely accepted conventions applicable to situation of that same general kind, much like contracts implied in fact. *See* RESTATEMENT (SECOND) OF TORTS § 892 cmt. c (1979); *see also* PERILLO, *supra* note 243.

246. *See* Mangini v. Aerojet-General Corp., 281 Cal. Rptr. 827, 837 (Cal. Ct. App. 1991); RESTATEMENT (SECOND) OF TORTS §§ 167 cmt. a–h, 168 (1965).

247. *See* PERILLO, *supra* note 243, § 17.3, 665–67; CORBIN, *supra* note 243, § 776.

privacy inasmuch as all information, except our memories, is embodied in physical objects (e.g., paper, digital equipment, or other recording media) which usually have owners. The owners of these information-bearing physical media have, by virtue of their ownership, rights to exclude others from the media themselves and they are, therefore, legally entitled to deny other people access to the information embodied in them.[248] In addition to the owners of the physical media, there also may be owners of the information itself (i.e., of the intellectual property); these owners may also have rights to control access to and use of the media (e.g., copying the information in it or playing it publicly).[249] Violations of privacy by unauthorized access to others' physical media or the information embodied in it constitute property torts which, quite apart from any possible freestanding rights of privacy, provide a legal basis for privacy protection.[250] And, most importantly for constitutional purposes, the burden on First Amendment interests occasioned by redressing these property-type torts would easily be considered only "incidental" to an important governmental purpose unrelated to expression (viz., the interest in protecting private property), and it should therefore easily pass "intermediate scrutiny" under the *O'Brien* rule.[251]

The "information privacy" interest in data-bearing chattels is, of course, entitled to receive its property law protection irrespective of where the chattels happen to be located—be it in a public place or on

248. Ebay, Inc. v. Bidder's Edge, 100 F. Supp. 2d 1058, 1066–67 (N.D. Cal. 2000). *Cf.* RESTATEMENT (SECOND) OF TORTS § 217 (1965). Unlike the tort of trespass to land, the tort of trespass to chattels does not allow for recoveries of merely nominal damages: "The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor." *Id.* § 218 cmt. e. As indicated by the *Ebay* case, however, intermeddlings with chattels that appropriate information embodied in them are not harmless. *See Ebay*, 100 F. Supp. 2d at 1066–67.

249. *See* RESTATEMENT (SECOND) OF TORTS § 217 cmt. d-e (1965). *See also* 17 U.S.C. §§ 101-810 (2006).

250. *See* RESTATEMENT (SECOND) OF TORTS §§ 217 cmt. d-e, 218, 218 cmt. b ("It is normally immaterial that the person in possession is not entitled to retain possession as against some third person, or that he has obtained his possession wrongfully.").

251. *See supra* text accompanying notes 211–18.

privately-owned real property.[252] A person does not lose her property right to exclude others from her purse, diary, or electronic media just because she takes them into the public square or on the premises owned by others. Property rights in chattels have long sufficed to protect privacy in information contained in media as long as the person seeking the privacy protection owns or contractually controls the media in question.

Concededly, a person's right to protect private information in physical media depends in part on maintaining careful control of the information in the first place.[253] Trying to control private information after it has been embodied in media owned by others can be decidedly problematic. The Supreme Court has said for example that, under the Fourth Amendment, bank customers cannot generally claim a "reasonable" expectation of privacy in the information that they turn over to their banks.[254] One can, of course, debate whether the Court was empirically correct in its factual surmise that privacy expectations are not "reasonable" in that situation (and the Court's holding has by now been so long in place that it may have become a self-fulfilling prophesy). Even so, however, the rule for banks should not necessarily apply in special situations such as those of, say, lawyers who are ethically bound to observe duties of confidentiality.[255] And, perhaps, the lawyer analogy may be extendible to other situations where, by statute[256] or contract, the owners of physical media that embody others' private information have

252. *Cf.* Katz v. United States, 389 U.S. 347, 351–52 (1967) (stating that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected"). Of course, the person must have a right or privilege to keep the particulars private—a person cannot, absent some very special facts, claim a right of privacy in the contents of another person's purse. *See* RESTATEMENT (SECOND) OF TORTS § 216 (1965). But a property right in chattels that contain or embody private information confers the requisite right. *See id*. § 217.

253. *See, e.g*., Emil Protalinski, *Online Identity Theft Up 200% Since 2010*, ZDNET (Jul. 19, 2012), http://www.zdnet.com/online-identity-theft-up-200-since-2010-7000001170/.

254. United States v. Miller, 425 U.S. 435, 443 (1976) (citing United States v. White, 401 U.S. 745, 751–52 (1971)) ("The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.").

255. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2012).

256. *See, e.g.*, 45 C.F.R. §§ 160.102, 160.103, 164.500, 164.502 (2011), under 42 U.S.C. § 1320d-6 enacted as a part of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. Law 104191 (1996).

bound themselves to use their dominion and control in ways that maintain the secrets entrusted to them.[257] For present purposes, however, only a limited point need be made: whatever privacy protection a person has in information embodied in physical media, the exclusivity rights held by the media owner play a crucial role. Owners of information-bearing media have rights, as a matter of property law, not to have their computers hacked, their files rifled, or communication lines tapped.[258] And in the absence of these property rights, it is hard to conceive how the protection of information privacy could be practically effective even *with* freestanding privacy rights.

In summary, it appears that most reasonable expectations of privacy, both in seclusion and information, enjoy protection as a normal consequence of long-established property rights to exclude. To the extent that people would have to commit property torts in order to intrude on seclusion or obtain private information, there is already legal protection against such wrongs. One reason this legal protection is important is that it does not exist as a result of direct bans on the creation and free flow of information but is, instead, a mere "incidental" impact of the right to exclude that is the essence of ownership, of both places and media. The property rights on which such protection is based enjoy, moreover, the status of enumerated constitutional rights. Thus, rather than trying to justify the freestanding privacy tort expressed as the direct antithesis of rights to express and observe, many or most reasonable privacy expectations can be protected as simply the normal consequences of the long-established property right to exclude.

257. Note that, in this regard, personal information provided to the government presents a special case. When government elicits or collects information either by coercing disclosure or by requiring it as a condition to obtaining government-monopolized services (such as a driver's license), there may be legitimate constitutional grounds for protecting the private information in the hands of the government or its transferees. *See* Mary D. Fan, *Constitutionalizing Information Privacy by Assumption*, 14 U. PA. J. CONST. L. 953, 969 (2012). The absence of a constitutional right of information privacy against private persons does not mean that there is not such a right as against government. *Id.*

258. *See supra* note 252. For an example of a criminal law protecting the property right, see *supra* note 174 and accompanying text.

B. Property and the Reasonableness of Privacy Expectations

The exclusivity that is provided by ordinary property rights provides substantial protection for privacy in the places where most people spend most of their time, viz. privately owned spaces, and in the objects that hold most of our personal information, including papers, digital equipment, and other such privately-owned chattels.[259] But what about protecting privacy in places where property exclusivity (direct or derivative) would not apply; for example, in public or semi-public places or on premises where the owner does not expressly or impliedly undertake to provide or allow privacy to persons who are present there? Does relying on property laws to protect privacy leave out important protection? Probably not. Where the shelter of property rights is absent, it is not likely that a person could have a reasonable expectation of privacy anyway.

Suppose, for example, someone is invited into a home or other premises and decides to establish, without the owner's approval, a secluded enclave or place of solitude of the sort that is seemingly contemplated by the Second Restatement of Torts, claiming a right to be free of the owner's prying eyes and ears.[260] To expect privacy in such a situation would be tantamount to expecting an entitlement to deprive another person of her property right.[261] Such an expectation of privacy is, of course, imaginable but, without a radical revision of the ordinary social and legal expectations associated with ownership, it could hardly be considered reasonable. Any law purporting to grant privacy rights based on such unilateral assertions of control of other persons' premises, i.e., to forbid a possessor of premises from observing an intruder or invitee, or from approaching a unilaterally established place of seclusion, would be at the expense of the basic right of dominion and control.[262] Indeed, depending on the details, a state's attempt to create such non-property based privacy rights without compensating owners may even be constitutionally forbidden.[263]

259. *See supra* Part V.A.

260. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977).

261. *Cf. supra* notes 239–42 and accompanying text.

262. *Id.*

263. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation"). *See* Loretto v. Teleprompter Manhattan

Similarly, one cannot very well go into a public square and credibly claim a right to be unobserved.[264] To recognize such a right of privacy would be in direct derogation of the rights of others to look around themselves and see their surroundings in public places. Unless the public owner of the public space authorizes unilateral assertions of control by individuals on their own initiative (for example, permissions to camp in a national forest), such impingements on the rights of others would be hard to regard as "reasonable."

This does not mean, of course, that enforceable privacy rights cannot exist in public areas or on premises belonging to others. On the contrary, the ownership of chattels confers property rights that protect privacy, especially information privacy, no matter where the chattels are located. As already noted, just because a person brings her purse into another's home or a public place, it does not follow that others are entitled to rifle through it.[265] As a matter of both law and social expectations, the right to keep other people off your chattels or person[266]

CATV Corp., 458 U.S. 419, 433–34 (1982) (taking away the right to exclude is compensable). A permanent physical intrusion is a per se taking, and a temporary occupation may be. *See* First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 315, 317–18 (1987); Kimball Laundry Co. v. United States, 338 U.S. 1, 10–12 (1949). See generally my earlier discussion in John A. Humbach, *A Unifying Theory for the Just Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 262–67 (1982).

264. *Cf.* Katz v. United States, 389 U.S. 347, 351-352 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

265. *See* RESTATEMENT (SECOND) OF TORTS § 217 (1965). The Restatement defines trespass to chattels as "using or intermeddling with a chattel in the possession of another" as well as dispossessing another. *Id.* Presumably, wrongful access for the purpose of invading information privacy would best be understood in Restatement terms as "dispossession," i.e., taking the chattel from the other's possession. *Id.* §§ 216, 221(a). Under the Restatement, one who "dispossesses" another of a chattel is liable for trespass. *Id.* § 218. *See also* Ebay, Inc. v. Bidder's Edge, 100 F. Supp. 2d 1058, 1066–67 (N.D. Cal. 2000).

266. As, for example, the pockets in your clothing. *Cf.* Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1099 (Cal. 2007) (holding that an attorney who discovered privileged work product could examine it long enough to determine it was privileged).

is not lost just because you enter into another person's proprietary space.[267]

The fundamental point is, however, that the existence of ordinary property rights and reasonable expectations of privacy are typically closely interrelated. It is rare to find the latter without the support of the former. What is more, there seems historically to have been little direct legal impingement on the general right to observe others in their private lives or activities other than in situations where property rights are also implicated.[268] The comments and illustrations under Restatement of Torts § 652B contain only one example of actionable intrusion on privacy that cannot be understood as flowing directly or derivatively from ordinary property rights.[269] Among the few circumstances in which the law has made mere observation a criminal act, the fact that the aggrieved party has a right to privacy in the first place seems to be pre-supposed. A

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267. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 217 (1965). The landowner can, of course, stipulate that a visitor consent to a search as a condition to entering on the land, and a person who refuses to submit can be legally obliged to leave. But absent such consent, there would be no *right* to conduct a search—at least not in the case of non-governmental actors. *Id.*

268. *See supra* note 90.

269. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b, illus. 2 (1977) (using binoculars or telescopic gear to peer into another's upstairs window and take photographs).

One privacy interest not covered by property protection in any obvious way is the interest in preserving personal modesty from people who attempt to peer under clothing or take pictures of sexual or other intimate areas. This reprehensible practice is apparently such a widespread problem that specific legislation has been enacted making it a felony. *See, e.g.,* N.Y. PENAL LAW § 250.45(4) (McKinney 2008). The privacy interest in question does not, however, easily fit within any theory of property protection. This is because it is possible to view under another person's clothing without ever touching it, and it would be an unprecedented, albeit not illogical, extension of property law to make a it trespass merely to *defeat* the use of a chattel (clothing) without actually interfering with it. There is also, however, the thorny question of reasonable expectation of privacy. Suppose, for example, a man goes around town with his fly open. Does such an individual have a reasonable expectation of privacy? Perhaps, it is not too much to expect people to be responsible for maintaining their own personal modesty.

Of course, machines capable of looking under people's clothing are another matter but, at the time of the writing, it is mostly only the government that is known to be operating such machines. *See, e.g.*, Anahad O'Connor, *Airports Start Body Scans Next Month*, N.Y. TIMES, Aug. 7, 2010, at A15.

"Peeping Tom" law, for example, might make it a crime to "peep secretly into a room occupied by a female person . . . ."[270] But it seems to be presupposed that the person observed already had an independent entitlement to privacy in the room—that is to say, presumably, no one thinks that the law would apply against those who might look if a "female person" were to decide to disrobe in the main cabin of an airliner in flight.[271] Micturition in a place open to public view is the crime of the one who does it, not the ones who see it.[272] To observe such acts in public does not make one a "Peeping Tom."

In sum, it seems that little is left out by rooting privacy protection in property law because, in order for there to be reasonable expectations of privacy, there needs to be a lawful basis to exert control over the locations or things in question and, by extension, over the eyes and ears of the persons lawfully there. Stated the other way, people who choose to engage in "private" activities in places open to the observation of others lawfully present do not likely have reasonable claims to control those others and, therefore, do not have a right not to be observed.[273] It is rare at any rate to find actual rights of privacy in which the right to exclude others' eyes and ears cannot be understood as predicated, either directly or derivatively, on property.

C. Isn't Privacy About People, Not Property?

Admittedly, rooting privacy rights primarily in property law is something that some may find unsatisfying. It may seem to get things

270. *In re* Banks, 244 S.E.2d 386, 388 (N.C. 1978) (citing N.C. GEN. STAT. § 14-202).

271. *See Woman Strips Naked On Delta Flight*, HUFFPOST TRAVEL (May 9, 2011, 6:53 PM), http://www.huffingtonpost.com/2011/05/09/woman-strips-naked-on-del_n_859689.html.

272. People v. Legel, 321 N.E.2d 164, 168 (Ill. App. Ct. 1974) ("[A] room in one's own home may be a public place under certain circumstances" and "[t]he duty lies with the deviate to keep his activities private.").

273. *Cf.* California v. Greenwood, 486 U.S. 35, 40 (1988) ("[P]lastic garbage bags left on or at the side of a public street are readily accessible to . . . other members of the public."); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 n.13 (1973) (giving the example of "marital intercourse on a street corner").

upside down, elevating laws that protect property over those that protect persons.[274]

In part, this feeling may stem from the idea that property rights are economic rights while privacy rights are about persons. But that idea itself rests on a basic misconception. Although property rights do protect economic interests, that is certainly not their only role.[275] On the contrary, in their normal operation and, perhaps, in their greatest importance to most people, property rights protect the important interest in having places to seek seclusion, places to get away from others, and a "retreat to which men and women can repair to escape from the tribulations of their daily pursuits."[276] So to assume that property rights are solely for the protection of economic interests is to misunderstand the aims and purposes of property law.[277] Trespass to land is, as already pointed out, one of the rare torts that does not require economic injury as a part of the cause of action.[278] Beyond that, most property owners today are homeowners and, while homeowners surely appreciate the economic significance of their property, it is unlikely that most of them see their home as mainly an economic commodity. Indeed, in the human psyche the economic value of "home" probably is the least of its significances.[279]

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274. Actually, I would not have thought this section necessary, but it is written to address the frank outrage that was, quite to my surprise, directed toward the property theory by "privacy rights" supporters at the international forum on privacy organized by Professor Russell Weaver (Louisville) at the Johannes Gutenberg University in Mainz, held on June 23-24, 2011. *See* Humbach, *supra* note 70. For some, apparently, using property exclusivity to protect privacy exclusivity does not seem at all to be a natural fit.

275. *See supra* note 227. *See also* Frisby v. Schultz, 487 U.S. 474, 484 (1988).

276. *Frisby*, 487 U.S. at 484 (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).

277. *See* RESTATEMENT (SECOND) OF TORTS § 163 (1965); *supra* note 226 and accompanying text.

278. *See supra* note 231 and accompanying text.

279. Of course, for many people home is a place that is rented, and renters are not conventionally thought of as owners. In legal contemplation, however, renters are "owners," holding ownership of an estate—and nearly absolute right to exclude—that differs only in duration from the estates held by those who own in fee simple. For renters, home does not have the economic significance that it has for owners in fee simple, but it is, as much as for anybody, "the last citadel of the tired, the weary, and the sick . . . the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits . . . ." *Frisby*, 487 U.S. at 484.

One possible reason why the non-economic (or "privacy") value of property is under-appreciated is that intrusions on the owner's privacy interest, on her right to exclude purely for exclusion's sake, are nearly always handled as criminal matters. The property foundation of crimes like unlawful entry, burglary and other trespass[280] is more or less implicit in penal statutes—essentially, it is taken for granted. In the case of such crimes, moreover, economics may be hardly a consideration at all. When someone calls the police to stop a purse-snatcher or to remove an intruder from her home, the situation is not normally thought of as an economic dispute. In dealing with such "property" crimes, courts rarely refer to the economics of the situation but focus their concern on the often highly personal underlying exclusivity interest that they are protecting—the "right to be left alone."[281]

Indeed, if property rights served only an economic function, the law would not need to attach anything like the thoroughgoing exclusivity to them that it in fact does. One need only consider, by contrast, the far less exclusivist interpretation of property rights that is given in parts of Europe. Under the *allemansrätt* in Sweden,[282] for instance, landowners are generally required to permit the public to walk freely on their land provided, among other things, that such access is not inconsistent with the uses being made. Most owners of property in the United States would find such an accommodation of others' freedom of motion to be very uncomfortable, even though it preserves the economic value of the property in question. But the right to privacy that the *allemansrätt* curtails is a crucial component of our conception of ownership, both in the United States and widely elsewhere. It is not for nothing that we call it "private" property.

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280. *E.g.*, N.Y. PENAL LAW §§ 140.00, 140.05, 140.20, 140.30 (McKinney 2010).

281. Stanley v. Georgia, 394 U.S. 557, 564 (1969) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

282. *See generally* Heidi Gorovitz Robertson, *Public Access to Private Land for Walking: Environmental and Individual Responsibility as Rationale for Limiting the Right to Exclude*, 23 GEO. INT'L ENVTL. L. REV. 211, 215–32 (2011). *Allemansrätt* literally means "everyman's right." *Id.* at 215.

VI. CONCLUSION

Nobody likes to be talked about, but everybody likes to talk. Trying to stop the dissemination of private information is, however, an impingement on free expression and the freedom to observe. A freestanding "right of privacy" that violates these interests is constitutionally permissible only if it can be justified using one of the standard bases for allowing restrictions on First Amendment rights. The three most likely possibilities are that the law in question: (1) can pass strict scrutiny, (2) falls within a recognized "categorical" exception, or (3) has only an "incidental" burden on First Amendment interests. Of these three, only the last would seem to support a broad protection for privacy in the face of a First Amendment challenge.