Privacy in the First Amendment

In the exercise of its traditional freedom, the press often discloses information about individuals which those individuals would rather conceal. When the information, though true, is particularly embarrassing or intimate, the person has sometimes felt sufficiently injured to sue the offending publisher—even though the publisher committed no physical intrusion, fraud or larceny to get the story. The claimed legal injury in such cases therefore consists only in having private information become public without the consent of the person whom the information concerns. When, in 1960, the late William Prosser sifted some 300 cases having to do with privacy,[1] he found that enough of these suits had been successful to constitute a common law cause of action.[2] Prosser named the action "the public disclosure tort" and listed it as one of four American common law torts which protect personal privacy.[3]

Even as Prosser identified the public disclosure tort action, he recognized that its existence might well interfere with the First Amendment right of the press to report on matters of legitimate public interest.[4] In the intervening decade the definition of what is "of legitimate public interest" has rapidly expanded under a series of Supreme Court decisions,[5] to the point where it is difficult to say confidently that any item of information which the press decides to publish is outside the

1. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).
2. For examples of such suits, see note 20 & p. 1470 *infra*.
3. Prosser, *supra* note 1, at 392-98.

Prosser did not attempt an exact definition of the public disclosure tort in his analysis. He described the tort generally as requiring that "something secret, secluded or private pertaining to the plaintiff" be invaded and that the something be publicized, but not requiring that the publication be false, or be for the commercial advantage of the defendant. *Id.* at 407. However, the examples he offered are mostly cases which do not fit neatly into the public disclosure category; the exception is Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931). *See* Prosser, *supra* note 1, at 392-98. Except for California, therefore, one finds it hard to say which states explicitly recognize the public disclosure tort. Most courts which uphold a "right to privacy" refuse to specify their rationale. Prosser himself ventures to identify only those states which recognize a privacy tort action in general, without breaking the recognized action down into his separate categories. *Id.* at 386-88. *See also* W. PROSSER, THE LAW OF TORTS § 117, at 804 (4th ed. 1971). The four categories, each depending on a different rationale and each punishing different acts, are:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Prosser, *supra* note 1, at 389.

4. *Id.* at 410.
5. *See, e.g.*, Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See also* pp. 1463-65 *infra*.

protection of the First Amendment.[6] In all suits for public disclosure of private information, publishers may well enjoy a complete defense of privilege under the First Amendment. If this is true, then there can be no constitutionally acceptable remedy for the injury caused by publishing private, true facts, and the public disclosure tort is unconstitutional on its face—an inference some legal scholars have already drawn.[7]

However, the analytical premises of the Court do not lead necessarily to that conclusion. Using the same premises, a First Amendment interest can be shown in *preserving* the public disclosure tort remedy, based on a First Amendment interest in the particular form of privacy which the tort protects.

I

The starting point for constitutional arguments both for and against the public disclosure tort is a theory of the First Amendment which the Supreme Court has articulated over the last decade. Beginning with *New York Times Co. v. Sullivan*[8] in 1964, the Court in applying the free speech guarantee has stressed the integral role of free speech in a democratic political system, and has uncovered a First Amendment interest in protecting a "system of freedom of expression."[9] In deciding the constitutionality of an individual utterance, therefore, the Court has taken into account not only the merits of the specific utterance but also its place in a constitutional system of speech. The Court's theory rests on the premise that free speech provides citizens with that "access to social, political, esthetic, moral and other ideas and experiences"[10] which citizens require in order to perform "[s]elf-governance."[11]

6. *See* p. 1468 & notes 27-31 *infra.*

7. *See* Marc Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact,* 16 STAN. L. REV. 107 (1964). Others who have recognized the potential unconstitutionality of a public disclosure tort include T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 517 (1970); Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?,* 31 LAW & CONTEMP. PROB. 326, 336 (1966). *See also* Kapellas v. Kofman, 1 Cal. 3d 20, 35, 459 P.2d 912, 922, 81 Cal. Rptr. 360, 370 (1969).

8. 376 U.S. 254 (1964).

9. The phrase is the title of Professor Thomas Emerson's study of the Supreme Court's treatment of the First Amendment, T. EMERSON, *supra* note 7. Emerson posits that "[t]he root purpose of the First Amendment is to assure an effective system of freedom of expression in a democratic society." *Id.* at 17.

The Court itself has said that "[a] broadly defined freedom of the press assures the maintenance of our political system and an open society," Time, Inc. v. Hill, 385 U.S. 374, 389 (1967), and it has observed "a profound national commitment to the principle that debate on public issues should be uninhibited . . . ." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Justice Black has called First Amendment guarantees "the heart of the system on which our freedom depends." American Communications Ass'n v. Douds, 339 U.S. 382, 453 (1950) (dissenting opinion).

10. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969).

11. Rosenbloom v. Metromedia, 403 U.S. 29, 41 (1971).

As Mr. Justice Brennan has acknowledged, the Court has developed its self-governance rationale for protecting an integrated system of First Amendment freedoms in light of the work of the late Alexander Meiklejohn.[12] In Meiklejohn's classic formulation,

> The First Amendment does not protect a "freedom to speak." It protects the freedom of those activities of thought and communication by which we "govern." It is concerned, not with a private right, but with a public power, a governmental responsibility.[13]

In other words, free speech is protected not for some intrinsic value of speech but because it is a necessary condition for the making of informed decisions about matters of government, decisions which all citizens in a democracy are called on to make. Speech provides information, the raw material from which citizens can make self-governing choices.

Although the Court has never set out the elements of the free expression system, its operation would seem to require two separate stages. Transmission of information from speaker to listener is only the first; the second is the application of that information—in the mind of the person who receives it—to the individual decisions of self-governance.[14] Both stages of the process are needed to achieve what, in the Court's view, the Constitution envisions: free individual choice by each citizen.

Yet the Court, in applying its concept of a free expression system, has concerned itself almost solely with the first stage of that system—the process of communicating information from speaker to listener. In

12. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). Justice Black cites Meiklejohn in his concurrence in New York Times Co. v. Sullivan, 376 U.S. 254, 297 n.6 (1964).

13. Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 255. Professor Emerson believes that a free expression system also serves the goals of individual self-fulfillment and the discovery of truth, independent of their relationship to governing process. T. EMERSON, *supra* note 7, at 6-7.

14. Although the Court has not hitherto viewed its system as involving two operative stages, Justice Douglas appeared to recognize an analogous division of First Amendment operation in his dissent in United States v. Caldwell, one of the three cases consolidated in Branzburg v. Hayes, 408 U.S. 665 (1972). After quoting from Meiklejohn, he argued:

> Two principles which follow from this understanding of the First Amendment are at stake here. One is that the people, the ultimate governors, must have absolute freedom of, and therefore privacy of, their individual opinions and beliefs regardless of how suspect or strange they may appear to others. Ancillary to that principle is the conclusion that an individual must also have absolute privacy over whatever information he may generate in the course of testing his opinions and beliefs . . . . The second principle is that effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and reexamination.

Id. at 714-15. Douglas' first principle is analogous to the second stage proposed here, and his second principle is analogous to the first stage.

the context of that first stage, the Court has recognized that participation of individuals in a free expression system can be inhibited, or chilled, in a variety of ways and that the result is to diminish the self-governing rights of at least those individuals.[15] It has therefore acted in the name of the First Amendment to forestall those potential inhibitory effects. But at the same time the Court has taken for granted the freedom from potential inhibition of the second stage—the listener's decision-making in light of received information—which begins after the communication between speaker and listener is complete. The Court's assumption seems to be that speech need only reach the listener's ear for the free expression system of democracy to operate successfully.[16]

Lamont v. Postmaster General[17] illustrates the distinction between inhibitions of the first stage and inhibitions of the second, and the Court's unwillingness to perceive the latter. In *Lamont,* the Court struck down a Post Office requirement that addressees of "Communist propaganda" had to request the "propaganda" in writing before it would be delivered. The Court's opinion focused on the hindrance to free speech which the written request represented: the hindrance to the successful act of communication between the person who mailed the "propaganda" and the intended recipient.[18] No mention was made of the effect on the addressees of knowing that the Post Office had identified them as recipients of subversive mail.[19] Knowing that they had been so identified, they might be inhibited from making a later self-governing choice, such as the choice to vote for a Communist political candidate. Under the *Lamont* facts, that chilling effect (an inhibition of the free expression system's second stage) seems a more likely and more worrisome possibility than the possibility that a written request requirement might impede the flow of speech (a first-stage inhibition). Yet the decision turns on the first-stage inhibition alone.

15. *See, e.g.,* Lamont v. Postmaster General, 381 U.S. 301, 307 (1965). *See also* note 26 *infra.*

16. The Court has often used the phrase "the right to receive information and ideas," *see, e.g.,* Kleindienst v. Mandel, 408 U.S. 753, 762-64 (1972); Stanley v. Georgia, 394 U.S. 557, 563 (1969). But it has invoked the right only to protect the act of communication between speaker and listener; the phrase has never been used to indicate any hearer's right to First Amendment protection in his subsequent decision-making. The "right to receive" appears to apply only to the same circumstances as the right to speak; the Court seems to use it as a substitute for the "right to speak" in cases where its sympathies do not lie with the speaker. In *Mandel,* for example, the speaker was a Belgian Marxist applying for permission to enter the United States; in *Stanley* the speakers were makers of pornographic films.

17. 381 U.S. 301 (1965).

18. *Id.* at 307.

19. At one point, the Post Office was keeping a central list of these recipients, although it claimed to have discontinued the practice before trial. 381 U.S. at 303.

A possible reason for the Court's disregard of the free expression system's second stage is that the threat of inhibition to the second stage is much harder to imagine than the threat of inhibition to the first. If inhibition stems from public disapproval of unpopular beliefs, the speaker in the first stage is obviously vulnerable. Many people know what he believes, because he tells them. He invites antipathy, and perhaps suppression. The second stage of the system, on the other hand, takes place entirely within the mind of the individual, and in performing it the individual attracts no attention; he is insulated from public knowledge and potential disapproval. Perhaps a hostile public might not like the decisions he was reaching and might want to inhibit him from reaching such decisions, if it could know; but how would it find out? The insulation of the individual against the chilling of his self-governing decisions is thus his ability to prevent public knowledge about himself.

Privacy is the name which the public disclosure tort cases give to the individual's ability to control information about himself.[20] And with those cases, this concept of the nature of privacy is introduced into the law. Privacy understood in this special sense—as control of information about oneself—is prerequisite to the operation of the free expression system's second stage, at least if that second stage is to operate with the freedom from inhibition which has been firmly guaranteed to the first stage.

One simple recognition of privacy's importance to self-governance is the curtain on the voting booth. But the shelter of privacy is needed for more than the casting of the formal vote, both because there are other ways of registering self-governing choices and because the process of reaching a decision does not take place only at the moment of formal choice-registering; it is a continuous process which extends from the receipt of each item of information from a speaker to each choice, formal or informal, which the citizen registers.[21] He who performs his listening and deciding functions in a glass house is coerced by public opinion, whether anyone is actually looking in or not. If every magazine

20. *See, e.g.*, Banks v. King Features Syndicate, 30 F. Supp. 352, 353-54 (1939) (x-rays of plaintiff's pelvis); Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845, 846 (1939) (plaintiff's experience as holdup victim); Cohen v. Marx, 94 Cal. App. 2d 704, 705, 211 P.2d 320, 321 (1949) (prizefighter's losing record); Melvin v. Reid, 112 Cal. App. 285, 289-90, 297 P. 91, 92-93 (1931) (plaintiff's former career as prostitute); Cason v. Baskin, 155 Fla. 198, 207-11, 20 So. 2d 243, 247-48 (1945) (biographical sketch of plaintiff); Trammel v. Citizen News Co., 285 Ky. 529, 531, 148 S.W.2d 708, 709 (1941) (plaintiff's debt to grocer). *See also* Prosser, *supra* note 1, at 392-98. For criticism of the public disclosure tort, see Kalven, *supra* note 7, at 333-39.

21. *Cf.* Meiklejohn, *supra* note 13, at 255-57.

he reads, every rally he attends, every person he speaks to might somehow become a matter of public knowledge, he would feel inhibiting pressure.[22] The pressure is the same as that felt by a member of the NAACP in Alabama when he fears that the fact of his membership will be publicized.[23] The Court itself, in discussing the threat to First Amendment freedoms which might result from the House Un-American Activities Committee forcing one admitted Communist sympathizer to identify others, has noted:

> [T]hose who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy. *Beyond that, there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate . . . .*[24]

The effect described is the response of a citizen uncertain of his privacy as he goes about making self-governing decisions within the system of freedom of expression. A more highly developed form of the same coercion can be found in a citizenry watched over by a thought police, where the threat—that the manifestations of an individual's thinking will be collected and examined—is made overt.[25] No curtailment of the first stage of that system is necessary to erode it; inhibiting the second stage is just as effective. And since the participants in the latter stage are more numerous and more timid than speakers in the former, effective methods of control can be less direct and less conspicuous than those which successfully inhibit the first stage of the system's operation. Not only the privacy of the decision-making process but also confidence in that privacy is at stake; pulling back the curtain on one voter

22. The most eloquent statement of the point occurs in Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1003 (1964) [hereinafter cited as Bloustein, *An Answer to Dean Prosser*]. The mere collection of such data may constitute an infringement of privacy even apart from the threat of inhibition. *See* Nader v. General Motors Corp., 25 N.Y.2d 560, 573, 255 N.E.2d 765, 773, 307 N.Y.S.2d 647, 658 (1970) (Breitel, J., concurring). *But see* T. EMERSON, *supra* note 7, at 556.

23. *See* N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958). In that case the Supreme Court said that

> compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] . . . effective . . . restraint on freedom of association . . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's association . . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

Id. at 562. *See also* Louisiana v. N.A.A.C.P., 366 U.S. 293 (1961).

24. Watkins v. United States, 354 U.S. 178, 197-98 (1957) (emphasis added).

25. For the effect on privacy of totalitarian government, *see, e.g.*, A. WESTIN, PRIVACY AND FREEDOM 23 (1967); Kalven, *supra* note 7, at 326.

threatens others.[26] Thus, if a free expression system is to be maintained, the First Amendment has an interest in protecting the privacy of the individual.

Assuming that privacy consists only in the individual's control of information about himself—his keeping it from the knowledge of others—then the First Amendment interest in that privacy will extend only to certain types of information: that information which, if released, would inhibit the individual's freedom to reach decisions of self-government. Perhaps this category is only a narrow one. But in free speech cases involving libel suits, the Supreme Court has discovered self-governing relevance in many kinds of information, not merely the small category of information which has obvious "political" relevance.[27] It has held that the First Amendment has an interest in protecting published information whether it be opinion or fact,[28] whether the fact be true or false,[29] whether the subject of the information be public official or private citizen,[30] and whether the subject be well-known or obscure.[31] If the inquiry is reversed and instead becomes the First Amendment (*i.e.*, self-governing) relevance of information *to the person whom it involves,* it is hard to see how the Court could take a narrower view. In both cases the question is what kinds of information—what content—might have an effect on the self-governing decisions of citizens, and the answer in both cases should be the same.

In *Time, Inc. v. Hill,*[32] for example, the Court held that publication of James Hill's name in connection with the play based on his experiences was privileged because, in effect, knowledge of that information might be useful to the members of the public in arriving at decisions of self-government.[33] But, James Hill should be able to claim, the *privacy* of that information is also important to *his* decision-making; when the information is exposed, he is inhibited. He might have planned to accept public office as a special prosecutor of organized

26. The threat that many citizens will be inhibited through the direct inhibition of only one is a well-established piece of First Amendment doctrine. *See, e.g.,* Baird v. State Bar, 401 U.S. 1, 6 (1971); Keyishian v. Bd. of Regents, 385 U.S. 589, 603-04 (1967); Lamont v. Postmaster General, 381 U.S. 301, 307 (1965). *But see* Laird v. Tatum, 408 U.S. 1, 10-11 (1972).

27. *See* note 15 *supra. See also* T. EMERSON, *supra* note 7, at 540-41. *But see* Bork, *Neutral Principles and Some First Amendment Problems,* 47 INDIANA L.J. 1, 27 (1971).

28. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 271-73 (1964).

29. *Id.* at 271-72.

30. Rosenbloom v. Metromedia, 403 U.S. 29, 31-32 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130, 155, 163-64 (1967).

31. Rosenbloom v. Metromedia, 403 U.S. 29, 31-32 (1971).

32. 385 U.S. 374 (1967).

33. "We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest." *Id.* at 388.

crime; now, the public's knowledge that his family has been held hostage once before makes him fear that a mobster might think to try it again. He might have been about to petition his elected representatives for lighter kidnapping penalties; now he would be ridiculed. He intended to see the play himself; now he would be the center of unwanted attention. Most important, his confidence in the privacy of his life in general is shaken; if the fact that he was held hostage can be told, what about his atheism, or his check to the Black Panthers?[34] The point is not that any item of news which is publishable is also necessarily a valuable part of someone's privacy; it is that any *type* of information has the potential to be either. The First Amendment has an interest in protecting a broad range of speech; it has also a parallel interest in protecting a broad range of privacy.

Both First Amendment interests are present in the paradigm public disclosure tort situation,[35] where a plaintiff's privacy claim will always face the claim of the defendant publisher that the information published is in the public interest and therefore is privileged.[36] Hence, such cases would seem to pose a rare constitutional dilemma: the need to choose between two opposing claims, both of which arise from the same constitutional provision. Each party can demonstrate an injury to the free expression system of self-government if the other is allowed his way, and apparently one claim can be upheld only at the expense of the other. The Court has not yet acknowledged this conflict; instead it has automatically upheld the claim of the publisher when that claim has substance.[37]

34. None of these inhibitions by itself is overwhelming, and it might be argued that they ought not to be taken into account at all in determining First Amendment freedoms. Mr. Justice Black appears to take this view in Time, Inc. v. Hill, 385 U.S. at 399-400 (concurring opinion). One can also deny that such inhibitions are possible, if one believes that "Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind." Jones v. Opelika, 316 U.S. 584, 618 (1942) (Murphy, J., dissenting), *adopted as the opinion of the Court in* Jones v. Opelika, 319 U.S. 103 (1943).

This Note does not argue that the inhibitions suggested should outweigh substantial free speech interests of the publishers, but only that consideration should be given to the inhibitory effect of allowing publication as well as to the inhibitory effect of punishing it. In cases where the free speech interest to the public is small, the privacy interest to the individual might be relatively large. *See* pp. 1471-72 *infra*.

35. *See* p. 1462 *supra*.

36. The discussion is hypothetical because in no public disclosure case to date has the constitutional defense been raised. The closest example is Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940), in which a newsworthiness privilege was successfully asserted; but because of the peculiarities of the New York "privacy" statute, that state cannot be said to have a proper public disclosure tort action. *See* note 83 *infra*. The most important defect of the New York law, from the standpoint of a public disclosure tort action, is that truth is a defense. The same confusion arose in Time, Inc. v. Hill and was discussed by Justice Fortas. His dissenting opinion stressed that the First Amendment should not preclude the protection of a right of privacy. 385 U.S. at 412. *See also* the concurring and dissenting opinion of Justice Harlan, *id.* at 404.

37. *See, e.g.*, Rosenbloom v. Metromedia, 403 U.S. 29, 48 (1971).

One possible accommodation of the conflicting First Amendment claims in the public disclosure case might be made by focusing on the issue of names and separating them from the news items in which they appear. The crux of an individual's privacy is not the disclosure of private information by itself, but the linking of that information to the individual in question, by name or otherwise. If it is possible that a piece of information is relevant to the self-governing choices of the public, but that the identity of the subject of that information is not, then at least in such cases both claims can be satisfied.

For example, publishing the fact that a young woman in Kansas City suffers from a disease of compulsive overeating does not infringe the privacy of the woman; publishing her name and a photograph showing her face certainly does.[38] On the other hand, the value of that news item to the self-governing public lies primarily in the fact of the disease and little if at all in the identification of the sufferer. The woman's condition is medically interesting and the fact of its existence might be relevant in reaching such decisions as whether to approve a hospital bond issue. But at the same time, the fact that the woman is Mrs. Dorothy Barber might not have any relevance to the self-governing decisions of the same public. Or, if it is somehow relevant, the relevance is of a much lower order of magnitude.

Of course, there are cases in which the identity of a person involved in a news event is itself relevant to the purposes of self-government, as when the person holds public office or a place in the public eye.[39] But in many cases, the identification of the subject of a published news item is not of significant value; it is unlikely to have any effect on the political choices which the reader will make. Most suits for injury caused by public disclosure of private facts have focused on the single issue of identification, conceding the public news value of a prostitute's life,[40] a genius' decline,[41] or schoolchildren's disruptive behavior,[42] but claiming that the privilege to publish does not extent to the name of the individuals involved when they are not themselves currently public figures.

In public disclosure cases in which the plaintiff is not well-known,

38. *See* Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942). For a general discussion, see Briscoe v. Readers' Digest Ass'n, 4 Cal. 3d 529, 537, 483 P.2d 34, 40, 93 Cal. Rptr. 866, 872 (1971).

39. *See* Kapellas v. Kofman, 1 Cal. 3d 20, 36, 459 P.2d 912, 922, 81 Cal. Rptr. 360, 370 (1969). *See also* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

40. Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931).

41. Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940).

42. Doe v. McMillan, 41 U.S.L.W. 4752 (U.S. May 29, 1973).

the First Amendment interest of the public, operating through the publisher, is satisfied by the publication of the fact or event; the First Amendment interest of the subject is satisfied if the publisher refrains from identifying him. Hence there is no constitutional objection to preserving a tort remedy for the plaintiff if the publisher does identify him and thereby injures his privacy. But this result can only be reached if the constitutional privilege to tell the public a piece of news is judged separately from the constitutional privilege to tell the public who was involved.[43]

Edward Bloustein has already suggested a similar method of accommodating the First Amendment and the public disclosure tort. He conceives of the relevance issue as a limit on the First Amendment, thus providing room beyond the boundaries of free speech for the operation of privacy tort law.[44] Privacy, in his view, takes up where the free expression system leaves off.[45] But in the context developed above, Bloustein's formulation is incomplete. It is not enough to say that protection will be allowed only in cases too trivial to enter the First Amendment arena. The difficult and important cases are those in which the First Amendment interests in privacy and speech compete. A court cannot dispose of the First Amendment issue by deciding merely that the name of an individual is "of legitimate public interest"; if it so decides, it must then balance the resulting First Amendment interest in publication of the name with the First Amendment interest in protecting the privacy of the individual.[46] In doing so, it should consider the net effect of allowing publication (or protecting privacy) on the free expression system at large. The Court has said in other contexts that the constitutional interest in unrestricted speech can be outweighed;[47] in some

43. To reach such decisions, of course, courts must overcome the misleading slogan that "names are news," which many have taken as a normative prescription. *See* Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722 (1963). That "names are news" is apt commercial description has been endlessly demonstrated, but commercial fact should be irrelevant to the constitutional decision at stake: Does the name of a given person, linked to some information, have value to those who hear or read the resulting news item, in that they will find it useful in arriving at the decisions of self-government?

44. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEXAS L. REV. 611, 626 (1968).

45. Though he deals with a privacy of broader definition, Emerson also suggests that First Amendment rights and privacy rights should apply in mutually exclusive areas. T. EMERSON, *supra* note 7, at 548. For him as for Bloustein, the problem then becomes one of drawing the boundary line.

46. Of course, if the court decides that the name is not "of legitimate public interest," the publisher has no defense of privilege and the plaintiff's cause of action in tort is good. *See, e.g.*, Briscoe v. Readers' Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

47. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). *Cf.* Wright, *Defamation, Privacy, and the Public's Right to Know*, 46 TEXAS L. REV. 630, 634 (1968).

cases it might well be outweighed by the First Amendment interest in privacy.

Evaluating the constitutionality of a given public disclosure suit should involve a calculation as to which result will best serve *the system* of which both claimants are a part and to which both appeal. The calculation may well come out in favor of publication, but it should be a calculation and not a blanket assertion that the First Amendment is always best served by the privileged publication of newsworthy items of information. At least in the area of identification, as suggested above, the calculation of effect on a free expression system might well produce an opposite result. If so, a public disclosure tort action addressed to the unauthorized use of names cannot be automatically invalidated under the First Amendment.[48]

II

The constitutional argument for the public disclosure tort suggests solutions to two major problems in current privacy law. First, the argument provides a conceptual definition of the privacy interest at stake; and second, it provides a doctrinal justification for protecting that interest in law. Common law privacy doctrine has failed to supply either of these. Prosser's definitive article on the common law of privacy established public disclosure as one of the four recognized categories of tort actions addressed to the protection of privacy.[49] But Prosser's classification, based on differences in the kind of injury involved, was only descriptive; it offered no justification for the different types of recovery. And though his categories have been widely influential, critics have complained that his most original category—the public disclosure action—lacks a conceptual foundation.[50]

Of Prosser's four categories of privacy actions, three rest on venerable tort doctrine. False light is a homologue of libel; appropriation uses the reasoning and damage measure of personal property law; and intrusion expands on the law of trespass *quare clausum fregit*.[51] In each cate-

48. The tort might well be held unconstitutional as applied in a specific case. In New York Times Co. v. Sullivan, for example, the Alabama libel tort was so held. But the tort was not and could not have been held unconstitutional on its face, and the same would apply to the public disclosure tort in a constitutional challenge.

49. Prosser, *supra* note 1.

50. *See, e.g.*, Kalven, *supra* note 7, at 331-32.

51. For the relationship of false light and libel, see Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962). *See also* Kalven, *supra* note 7, at 332, 339-41. For the use of property concepts in appropriation cases, compare the majority with the dissenting opinion in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). *See also* O'Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1941) (dissenting opinion). *See generally* Prosser, *supra* note 1; Bloustein, *An Answer to Dean Prosser*, *supra* note 22.

gory the central injury has long been recognized in law, and calling it an injury to "privacy" is a semantic, not a legal, innovation. The public disclosure tort, on the other hand, presents a true conceptual novelty: the idea that mere publication of accurate data about a person might cause him legal injury.[52]

The false light action protects against injuries to reputation only; and, as with libel, truth is a defense. It therefore gives the individual no right to control accurate information about himself. Any relationship of the tort action to a concept of privacy is tenuous.

The action for appropriation of name or likeness protects against the publication of true information about the individual, but it concerns only that information on which the individual might have capitalized himself. The injury is a commercial one; the action protects less a right to privacy than a right to publicity.[53] Since recovery under the appropriation tort depends on the economic injury suffered,[54] those who suffer the largest loss of privacy through publication of their names and faces—those who have been utterly unknown before the publication—stand to recover least.[55]

The intrusion tort comes closer than false light or appropriation to offering a satisfactory definition of privacy. It protects the individual's right to control access to his immediate surroundings, and thus defines

52. Before the famous article by Warren and Brandeis appeared in 1890, this was a suggestion virtually unheard in the law. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

Seventy-five years later, the law still often fails to recognize injury to privacy in the absence of trespass, bodily injury, theft, or money damages. *See* Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1185 (1965). *See generally* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 9.5, at 678-79 (1956).

53. Prosser, *supra* note 1, at 406-07. *See also* Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954); Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123 (1953).

54. There can be no economic measure of a genuine injury to privacy; the worth of a man's privacy cannot vary with the commercial value of his name or face in the marketplace. Yet just this distortion has crept into nearly all privacy tort recoveries because elements of appropriation actions have not been kept separate from those of other suits classed under the privacy heading. *See* Bloustein, *An Answer to Dean Prosser*, *supra* note 22, at 977-91.

Damage measure is a long-standing problem in privacy tort law which this Note does not purport to solve. Justices Harlan and Fortas have suggested an actual or compensatory damage measure. Rosenbloom v. Metromedia, 403 U.S. 29, 66 (1971) (Harlan, J., dissenting); Time, Inc. v. Hill, 385 U.S. 374, 420 (1967) (Fortas, J., dissenting). But for a discussion of the difficulty of measuring the extent of an injury to personality caused by publication, see Shapo, *Media Injuries to Personality; An Essay on Legal Regulation of Public Communications*, 46 TEXAS L. REV. 650, 658-67 (1968). For criticism of privacy damages as conjectural, see Kalven, *supra* note 7, at 334. For the observation that the injury for which privacy damages are supposed to compensate is irreparable, see Bloustein, *An Answer to Dean Prosser*, *supra* note 22, at 1002-03. *See generally* W. PROSSER, THE LAW OF TORTS § 117, at 815 (4th ed. 1971).

55. Perhaps in recognition of this problem, California has recently imposed a minimum liability of $300 for commercial use of a person's name, photograph, or likeness. CALIF. CIVIL CODE § 3344(a) (West Supp. 1972). The appropriation tort is the only one of the four privacy torts to be codified in state statutes. *See* W. PROSSER, *supra* note 54, § 117, at 805.

privacy as control of physical space. Physical space is an important and well-recognized element of privacy, and spatial metaphor dominates legal thinking about the subject; for example, we most commonly refer to any infringement of privacy as an "invasion." Yet on the basis of its definition of privacy, the intrusion tort draws distinctions which seem to have nothing to do with privateness. In *Nader v. General Motors Corp.*,[56] for example, "mere gathering" of private information was held not punishable unless the gatherer was "unreasonably intrusive." Though Nader claimed that he was shadowed by detectives, that a dossier on his private life was compiled through observation and interviews with acquaintances, and that his bank accounts and tax returns were pried into, only wiretapping and eavesdropping were held to give rise to a cause of action for intrusion.[57]

The public disclosure tort, by finding legal injury in the mere act of publishing accurate data about a person, protects something which is farther from traditional tort theory, and perhaps closer to a satisfactory concept of privacy. The actual content of a person's privacy is a subjective matter over which people inevitably disagree, but even as they disagree they can share a common concept of how privacy works and what purpose it serves. Scholars who have sought a conceptual definition of privacy have not been unanimous, but a common theme appears in many of their efforts: that privacy reflects a psychological need of the individual to keep some core of personality to himself, outside the notice of society.[58] The ultimate value at stake has been variously described—human dignity, individuality, and autonomy have been suggested—but in each description the point is that it is kept from the awareness of others at the will of the individual.[59] Nor is privacy simply rigid secrecy; it is essential that the individual be free to reveal parts of his selfhood to chosen others.[60] Charles Fried considers this gift of selfhood to be the essence of relationships of love, friendship, trust, and respect, and argues that these intimate relationships cannot exist without the confidence of the individual that only his chosen intimates will possess intimate knowledge of him; in other words, intimacy depends on the inaccessibility of one's private self to society at large.[61]

56. 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).
57. 25 N.Y.2d 560, 564-71, 255 N.E.2d 765, 767-71, 307 N.Y.S.2d 647, 650-56 (1970).
58. H. ARENDT, THE HUMAN CONDITION 22-78 (1958); E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959); A. WESTIN, *supra* note 25, at 8-63; Bloustein, *An Answer to Dean Prosser*, *supra* note 22, at 1002-03; Arnold Simmel, *Privacy is Not an Isolated Freedom*, 13 NOMOS 71, 72-74 (1971); Warren & Brandeis, *supra* note 52, at 205. *See also* Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).
59. *See* note 58 *supra*.
60. Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROB. 281, 281-83 (1966).
61. Fried, *Privacy*, 77 YALE L.J. 475 (1968).

Control of information about oneself is thus the essence of privacy: "the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others."[62] The public disclosure tort action—which punishes the unjustified exposure through mass publication of the data of an individual's life—contains the only direct recognition which the law has given to that non-libel, non-territorial, non-commercial claim.[63]

III

Constitutional law shares the conceptual weakness of common law in the privacy area. The Supreme Court has declared that the Constitution protects a right to privacy, but the supporting analysis offers no hint as to how that protected privacy might be defined. Other constitutional grounds which have been set forth present better possibilities of definition, but the rights so defined are far too narrow and qualified to serve as a satisfactory "right to privacy."

As the opinions in the recent abortion cases[64] confirm, the Court's primary analytical model of privacy is that which appears in the plurality opinion of Mr. Justice Douglas in *Griswold v. Connecticut*.[65] In *Griswold,* Justice Douglas collected the various existing constitutional doctrines which might be considered to protect some specific interest in privacy—including the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments—and, rather than relying on any one of them, declared that their sum resulted in a constitutional interest in privacy in general.[66] Justice Douglas' argument, though in form an argument by analogy to existing constitutional rights,[67] in effect contended for the establishment of a new and independent constitutional right. The protection of privacy is incident to several constitutional goals; therefore it should be a goal itself. The formula reflects the belief of Pro-

62. A. WESTIN, *supra* note 25, at 7. Similar definitions are offered in Ruebhausen & Brim, *supra* note 52, at 1189-90, and Shils, *supra* note 60, at 282.

63. If courts come to accept the separate doctrinal underpinning of the public disclosure tort, they can begin to untangle some of the confusions of privacy law in general, an area whose state of organization one judge has likened to "a haystack in a hurricane." Ettore v. Philco Television Broadcasting Co., 229 F.2d 481, 485 (3d Cir. 1956) (Biggs, C.J.). Plaintiffs would be able to seek relief directly for injuries to their privacy without having to claim injury to reputation or pocketbook as they often must at present. *See* note 52 *supra.* Hybrid privacy actions would cease to distort libel law. *Cf.* Wade, *supra* note 51. *See also* Kalven, *supra* note 7, at 335. Finally, courts would be able consistently to separate economic injury from injury to privacy and relegate them to separate causes of action. *Cf.* note 54 *supra.*

64. Roe v. Wade, 93 S. Ct. 705 (1973); Doe v. Bolton, 93 S. Ct. 739 (1973).

65. 381 U.S. 479 (1965).

66. Griswold, 381 U.S. at 480-86.

67. *See* Mitchell Franklin, *The Ninth Amendment As Civil Law Method and its Implication for Republican Form of Government:* Griswold v. Connecticut; South Carolina v. Katzenbach, 40 TULANE L. REV. 487, 490-91 (1966).

fessor Emerson, who argued the case for the *Griswold* plaintiffs before the Supreme Court, that only a newly declared constitutional right which "cuts across" other constitutional rights can adequately protect individual privacy.[68]

The First, Fourth, Fifth, Ninth and Fourteenth Amendment argument of *Griswold*—perhaps streamlined in *Roe v. Wade* to a Fourteenth Amendment argument alone[69]—presents the advantage of breadth. However, the definitions of privacy which the *Griswold* approach offers are at best descriptions of a widely shared emotional attitude.[70] Analytically, the reasoning of *Griswold* and *Wade* offers no guidance for separating what privacy is from what it is not; it offers no generalizable definition of the right it is used to protect. Indeed, the extreme breadth of the *Griswold* analysis has produced utmost caution in courts called on to apply it,[71] and even *Wade* extends the resulting right only within the area of intimate bodily conduct. Confining the right to privacy inside that area is sanctioned by custom, but not by anything in the reasoning of the decisions.

An alternative to the form of argument which identifies privacy as a wholly new constitutional right is one which discovers that privacy is incident to a constitutional right already well established. If that established right is to be fully realized, the argument runs, privacy in some form must be protected. Each of the doctrines which Douglas col-

68. T. EMERSON, *supra* note 7, at 556. Professor Emerson's brief in *Griswold* invoked the First Amendment in support of a constitutional right to privacy, but it did so only in a limited context. Brief for Appellants at 79-80, Griswold v. Connecticut, 381 U.S. 479 (1965). There is no suggestion that a constitutional right to privacy might rest on the First Amendment or its system of freedom of expression; indeed, the First Amendment was not included in the summary list of constitutional provisions from which a right to privacy was said to emanate. *Id.* at 12.

69. Roe v. Wade, 93 S. Ct. 705, 727, 733-36 (1973) (Stewart, J., concurring); *id.* at 755 (Burger, C.J., concurring). *But cf. id.* at 737-39 (Rehnquist, J., dissenting). Two of the *Griswold* opinions also located the right to privacy under the Due Process Clause of the Fourteenth Amendment. 381 U.S. at 499-500 (Harlan, J., concurring); *id.* at 502-03 (White, J., concurring).

70. The most familiar such definition of privacy is "the right to be let alone." *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 494 (Goldberg, J., concurring), *quoting* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Goldberg offers another in *Griswold:* "the integrity of [family] life." 381 U.S. at 495. *Cf.* Justice Black's attack in *Griswold* on the dangers of defining privacy too narrowly, 381 U.S. at 509 (dissenting opinion).

More usually, the Court's attempted definitions of privacy reflect only the Court's own sense that the subject is important. Examples of these include "the right most valued by civilized men," *Griswold,* 381 U.S. at 494 (Goldberg, J., concurring), *quoting Olmstead,* 277 U.S. at 478 (Brandeis, J., dissenting); "a right . . . older than the Bill of Rights," *Griswold,* 381 U.S. at 486; and "personal rights 'implicit in the concept of ordered liberty,'" Roe v. Wade, 93 S. Ct. at 726, *quoting* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

71. *See* T. EMERSON, *supra* note 7, at 557. *Cf.* Hufstedler, *The Directions and Misdirections of a Constitutional Right of Privacy,* 26 RECORD OF N.Y.C.B.A. 546, 559 n.59 (1971).

lected in *Griswold* offers such an analysis.[72] And though *Griswold* may stand for the proposition that no one of them alone is adequate to support a right to privacy,[73] one in particular has seemed promising.

In her 1971 Cardozo Lecture, Judge Shirley Hufstedler set out an argument for deriving a broad constitutional protection of privacy from the Fourth Amendment prohibition of unreasonable searches and seizures.[74] Judge Hufstedler argued that the Fourth Amendment (and to a lesser extent the Fifth as well) was drafted to prevent penetrations of individual privacy, and that to realize that goal a broad interpretation should be given to the words "searches and seizures."

> Were that course taken, any governmental probe, corporeal or incorporeal, designed to uncover or to disclose information about a person would be a "search." The question whether the search was permissible would turn on its reasonableness.[75]

In effect, Judge Hufstedler proposed a constitutional analogue to the torts of intrusion and appropriation.

A Fourth Amendment "right to privacy,"[76] however, does not protect the substance of one's privacy; it merely prevents certain methods of obtaining that substance.[77] A reasonable search or seizure would presumably be constitutional no matter what the content of the private information revealed, nor would the content of that information necessarily affect the judgment of what is reasonable. In other words, the Fourth Amendment offers no definition of the content of its right to privacy, other than a reflexive one: it is that which is violated by an unreasonable search or seizure. Although the Supreme Court has repeatedly denied that the Fourth Amendment protects the privacy of places rather than people, it has yet to produce a Fourth Amendment holding which does not depend on the nature of the place where the unreasonable search or seizure took place. To the extent that privacy

72. These include the types of privacy protected by the First, Third, Fourth and Fifth Amendments, 381 U.S. at 484. Douglas seems to gloss over the Due Process Clause of the Fourteenth Amendment. *Id.* at 482. He does not do more with the Ninth Amendment than to quote it. *Id.* at 484.

73. The First Amendment rights which Douglas recounts—freedom of schooling and freedom of association—are subordinate to the express free speech guarantee, and they act to secure it. The Third Amendment protects the privacy of the home, if at all, only against the specific threat of being forced to quarter soldiers in peacetime. The Fourth Amendment protects privacy only as an incident to the prohibition against unreasonable searches and seizures. The Fifth Amendment's "zone of privacy" is subordinate to the operation of the Self-Incrimination Clause.

74. Hufstedler, *supra* note 71.

75. *Id.* at 561-62.

76. *See, e.g.*, United States v. White, 401 U.S. 745, 751, 752 (1971).

77. *See* Katz v. United States, 389 U.S. 347, 350 (1967).

means something other than that which happens in private places, a Fourth Amendment rationale is inadequate to protect it.[78]

Both the *Griswold* doctrine and the narrower doctrines which go to make it up reflect the Supreme Court's concern with the protection of individual privacy, and all of them help to protect privacy to some extent. But each fails to provide an adequate concept of the nature of privacy: how it arises, and what its characteristics are. Until the Court can say what privacy is, at least in conceptual terms, constitutional protection of privacy will be haphazard.

IV

Although the First Amendment analysis of the public disclosure tort generates a conception of privacy which comes closer than the conceptions of current tort and constitutional law to describing what privacy is and to making it susceptible to the application of legal doctrine, the claim which results is limited. The analysis discovers only a constitutional *interest* in privacy, not a constitutional *right* to have it protected in all cases. It does not yield a "First Amendment right to privacy" which can be placed next to the constitutional privacy rights which already exist.[79]

The first drawback to asserting the interest as a "right" is the narrow boundary within which it can be applied. It arises only within the constitutional structure of a free expression system. And in every case of public disclosure, the publisher has access to free expression claims which also serve the system. Since the individual's privacy is secured only at the expense of the free speech right of the publisher, it cannot grow too large. The First Amendment privacy interest is only in preventing the identification of an individual with information published,

78. This proposition might appear to be contradicted by Katz v. United States, which extended protection to a public telephone booth. But the Court held that Katz was protected against being overheard in a public telephone booth because he "justifiably relied" on the booth to protect his privacy; in other words, he temporarily constituted a private space from an apparently public one. *Id.* at 352-53. The distinction is made clearer in United States v. White, 401 U.S. 745 (1971), in which the Court held that *Katz* did not apply to an informer who takes a concealed transmitter into a suspect's home. Though the suspect obviously relied on the privacy of his home in talking to the informer, the Court found his reliance unreasonable. *Id.* at 753. Under the Fourth Amendment, privacy seems to depend on what one ought to expect about the characteristics of one's surroundings. If, on the other hand, the Court in *White* was considering privacy to be the control of information about oneself, its holding means that limited dissemination of information about oneself is unprotected; if you tell one person, everyone has a right to know. But recall Fried's discussion of the value of being able to limit the sharing of private information, note 61 *supra*.

79. For a summary of the Court's many constitutional privacy rights, see Roe v. Wade, 93 S. Ct. 705, 726-27 (1973).

and even then only after weighing the net effect on the free expression system.[80]

The second drawback is a state action problem. Since it is a private publisher who most often threatens to infringe individual privacy through a publication, the individual probably cannot assert his constitutional claim against that publisher directly;[81] he must rely on the indirect protection of a common law tort suit,[82] after the offending publication.[83] Moreover, not all states recognize a public disclosure tort in their common law;[84] in those which do not, the individual would have no mechanism at all through which to assert his claim for protection. A "First Amendment right to privacy" would thus depend for its existence on state courts or legislatures, a situation which the Court—if it were to recognize the "right" at all—would be unlikely to find satisfactory.[85]

Though a First Amendment analysis does not by itself justify the enforcement of a constitutional right to privacy, it nevertheless underscores the weaknesses of existing constitutional privacy doctrine. The analysis directs attention to the one form of privacy which the law, both common and constitutional, has so far been unable to protect successfully: the non-corporeal, non-quantifiable right to control of information about oneself, based on the content of the information rather

80. *See* pp. 1470-72 *supra*.

81. If a state agency is the publisher, presumably the publication is state action. *See, e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715, 721-26 (1961). In that event, the individual could assert his First Amendment rights against the state directly, claiming state inhibition of his freedom of decision-making.

82. If the public disclosure tort were codified in state statute, it might be argued that a refusal by state courts to enforce the resulting state right of privacy might itself be sufficient state action to create federal jurisdiction. At present, however, the public disclosure tort exists only at common law. *See generally* W. PROSSER, THE LAW OF TORTS § 117, at 809-12 (4th ed. 1971).

83. Nothing in this discussion is intended to suggest the propriety of a prior restraint of the publisher. *Cf.* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Near v. Minnesota, 283 U.S. 697 (1931). *See also* New York Times Co. v. United States, 403 U.S. 713 (1971).

The individual's dependence on state laws to protect his federal constitutional rights is less startling than it seems; even the right to free speech depends to an extent on state laws prohibiting, for example, assault and battery. If a speaker were not protected by state law against being pummeled every time he opened his mouth, or if a newspaper or radio station could not use state law to prevent its equipment from being destroyed by a displeased audience, freedom of speech and of the press would be effectively curtailed.

84. The number of states which recognize something like a public disclosure tort is uncertain. *See* note 3 *supra*. Some states, however, explicitly refuse to do so. New York, for example, has consistently refused to recognize such a right since the decision of Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902); instead the state legislature passed a statute, N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1948), which more nearly fits the pattern of an appropriation tort. *See* Prosser, *supra* note 1, at 401. *Cf.* Time, Inc. v. Hill, 385 U.S. 374, 411-20 (1967) (Fortas, J., dissenting).

85. *Cf.* Rosenblatt v. Baer, 383 U.S. 75, 84 (1965), *citing* Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

than the circumstances of its escape from one's control. Furthermore, the analysis suggests how privacy in that form might be integrated into a system of constitutional rights. The focus on the importance for privacy of information *qua* information, without regard to whether its content is specifically sexual or not, is perhaps the distinguishing contribution to privacy analysis of the First Amendment approach.

A First Amendment analysis of privacy teaches that an application of First Amendment guarantees exclusively to speakers will not adequately protect a free expression system; decision-makers must be sheltered, too. For the protection of privacy, the analysis yields a constitutional interest which cannot always be vindicated because it must compete with conflicting constitutional interests arising from the same logic. Yet it is the nature of privacy to be entangled with other social interests and values;[86] privacy in law cannot be less entangled with and compromised by other legal goals. The First Amendment analysis of privacy makes these entanglements and compromises explicit.

86. *See, e.g.*, Simmel, *supra* note 58.