2000

Protecting Privacy and Free Speech in Cyberspace Symposium: The Unwanted Gaze, by Jeffrey Rosen

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Recommended Citation
89 Geo. L.J. 2103 (June 2001)

Protecting Privacy and Free Speech in Cyberspace

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I. INCREASING TENSIONS BETWEEN PRIVACY AND FREE SPEECH IN CYBERSPACE

The last time Jeff Rosen and I participated in a symposium together—in May of 2000—the topic, significantly, was the same as that I was assigned in this program—to comment on the relationship between privacy and free speech. The earlier symposium, sponsored by the Columbia Journalism School, was entitled *When Rights Collide: Privacy & the First Amendment.* It is an honor and a challenge to revisit my thoughts about the complex and important relationship between privacy and First Amendment rights after having read Jeff Rosen's insightful book.

As indicated by the title of the Columbia program, there can be difficult conflicts between privacy and First Amendment rights, but the relationship between these two sets of rights is more complicated and variable. For many years now, this interrelationship has been the focus of occasional attention in the context of particular situations that have raised tensions. With the advent of cyber-communications, this interrelationship has escalated in importance. It has become a matter of constant, urgent concern, as indicated by the increasing number of laws and lawsuits in which it is a focal point. For example, this interrelationship underlay two Supreme Court cases that were decided during the last Term,[1] and was again at stake in a major case on the Court's docket for the present Term.[2]

As *The Unwanted Gaze* so vividly illustrates, our new technologies have dramatically increased the ease of retrieving, compiling, and disseminating

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1. Reno v. Condon, 528 U.S. 141 (2000) (upholding federal Driver's Privacy Protection Act of 1994, which restricts disclosure of information collected by state departments of motor vehicles); Los Angeles Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32 (1999) (rejecting facial First Amendment challenge, brought by a publishing company, to a state statute barring law enforcement agencies from disclosing information about arrested individuals to anyone who would use the information to sell a product or service). In *Condon*, the Supreme Court rejected the State's argument that the Act violated federalism principles; the Court did not address arguments, which had been asserted by intervenor media organizations in the lower courts, that the Act violated First Amendment principles. Because the district court held the statute unconstitutional under the Tenth Amendment, *see* Condon v. Reno, 972 F. Supp. 977, 979 n.3 (D.S.D. 1999), the Court did not address the First Amendment issue. The appellate court declined to address the First Amendment issue because the district court had not considered it. *See* Condon v. Reno, 155 F.3d 453, 456 n.1 (4th Cir. 1998).

2. Bartnicki v. Vopper, 121 S. Ct. 1753 (2001) (holding that media defendants who disclosed a cell phone conversation that had been illegally intercepted could not be subject to civil liability consistent with the First Amendment, when the media defendants had obtained the communications lawfully and the intercepted conversation concerned a matter of public interest).

information that many people regard as highly personal, and therefore want to preserve as private. This change is so dramatic that many consider it to be a change not just in degree, but also in kind. Many privacy advocates see this as a technological revolution that calls for a corresponding legal revolution to provide new protection for personal data.

Just as cyberspace at least arguably has transformed privacy concerns regarding personal data, the same is true for the corresponding free speech concerns. Privacy advocates have argued that the right to disseminate information—including personal, sensitive information—has been premised on a concept of a responsible, professional press, exercising self-restraint as a matter of journalistic ethics. Now, however, literally anyone and everyone can "Drudge" up (so to speak) the most intimate information—or *dis*information—and spread it worldwide instantaneously.[3] And, the argument goes, these Internet gossips do not deserve the First Amendment protections that previously had been extended to, say, the *New York Times*.

In sum, some privacy proponents maintain that previous Supreme Court cases pitting the press versus privacy, in which the press consistently has prevailed,[4] should not necessarily govern cyberspace. These cases might have come out differently if the defendant had not been an established, traditional media outlet. Regardless of whether one agrees that this should be so, it certainly is true that each of the pertinent Supreme Court rulings concerning press versus privacy is intensely fact-specific, carefully limited to the particular circumstances, and an ad hoc weighing of the competing privacy and free speech concerns under those specific circumstances.[5] Therefore, it surely is possible that any change in the underlying facts presented by the earlier cases—including the changes wrought by cyberspace—could well change the legal analysis and outcome.

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3. *See, e.g.*, THE DRUDGE REPORT, *at* http://www.drudgereport.com (last visited Mar. 24, 2001).

4. Fla. Star v. B.J.F., 491 U.S. 524 (1989) (holding that the First Amendment does not permit Florida to punish a newspaper for publishing the name of a rape victim that the paper had obtained from a police report); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) (holding unconstitutional a West Virginia statute that made it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of a child charged as a juvenile offender); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (holding that Virginia could not constitutionally punish a newspaper for publishing truthful information regarding confidential proceedings of the state's Judicial Inquiry and Review Commission); Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308 (1977) (per curiam) (vacating as unconstitutional a pretrial order enjoining a newspaper from publishing the name or picture of an eleven-year-old boy on trial for second-degree murder); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (holding unconstitutional a civil damage award against a television station for broadcasting the name of a rape victim in violation of a law that prohibited the publication of the victim's name).

5. The Supreme Court has refused a media company's "invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment." *Fla. Star*, 491 U.S. at 532. The Court explained: "Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. . . . We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Id.* at 532-33.

On the other hand, some free speech advocates have argued that free speech concerns should continue to trump privacy concerns, and that increased legal protection for data privacy would violate fundamental First Amendment principles. They contend that any such protection could not be cabined to the particular facts of the online world, but instead would require a radical revision and evisceration of free speech rights in general. This perspective was powerfully advanced, for example, by UCLA law professor Eugene Volokh in yet another symposium in which Jeff Rosen and I both participated earlier this year (along with Peter Swire and others from this Symposium) at Stanford Law School.[6] Professor Volokh's analysis is well captured in the title of his *Stanford Law Review* article, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You.*[7] I should note that Volokh's analysis garnered some impressive critiques,[8] including one by Georgetown law professor Julie Cohen, a co-panelist today.[9] A few years earlier, the same perspective as Volokh's was advanced by Solveig Singleton, Director of Information Studies at the Cato Institute. The title of her piece phrases the pro-speech perspective even more starkly: *Privacy as Censorship: A Skeptical View of Proposals to Regulate Privacy in the Private Sector.*[10]

II. CONTINUING POSITIVE CONNECTIONS BETWEEN PRIVACY AND FREE SPEECH

Thus far, I have focused on the tensions between free speech and privacy. Before commenting further about that conflict, though, an offsetting observation is in order. In many situations, these two sets of rights are mutually reinforcing. Indeed, in some cases, First Amendment rights could not even exist without privacy rights. In fact, prominent champions of free speech rights have viewed privacy as the ultimate bedrock of all our civil liberties, including our First Amendment rights. Notable examples here include two Supreme Court Justices who were among the Court's foremost free speech absolutists: Justices Louis Brandeis and William O. Douglas.[11]

For example, Brandeis famously called privacy "the most comprehensive" and "most valued" right.[12] And, of course, along with Samuel Warren, Brandeis

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6. *See* Symposium, *Cyberspace and Privacy: A New Legal Paradigm?*, 52 STAN. L. REV. 987 (2000).

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

8. *See, e.g.*, Paul Schwartz, *Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence*, 52 STAN. L. REV. 1559 (2000).

9. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000)

10. SOLVEIG SINGLETON, PRIVACY AS CENSORSHIP: A SKEPTICAL VIEW OF PROPOSALS TO REGULATE PRIVACY IN THE PRIVATE SECTOR (Cato Inst. Policy Analysis No. 295, 1998), *available at* http://www.cato.org/pubs/pas/pa-295.html (last visited Mar. 24, 2001).

11. *See, e.g.*, Nadine Strossen, *The Religion Clause Writings of Justice William O. Douglas*, *in* HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF WILLIAM O. DOUGLAS 91, 94-95 (Stephen L. Wasby ed., 1990).

12. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

is the initiator of the whole modern concept of legally protected data privacy.[13] It is important to keep this positive relationship between free speech and privacy in mind. Despite specific situations where there is an apparent conflict between free speech and privacy rights, all of us who value free speech have a real stake in preserving a robust privacy right as well.

There are a number of important specific areas where these two sets of rights are directly reinforcing. I would like to mention a couple of these where the ACLU is very active right now. One example is the whole area of anonymous or pseudonymous communications, including those communications that take place online. The Supreme Court consistently has upheld the right to engage in such confidential communications, most recently in an Ohio case the ACLU won a few years ago, involving anonymous leaflets that our client distributed about a local school bond contest.[14] *McIntyre v. Ohio Elections Commission* is just the latest in a line of cases going back a half-century. In the 1950s and 1960s, the Court struck down several state and local laws that required the NAACP to disclose its membership lists.[15] In all these cases, the Court has recognized that without the cloak of anonymity, many individuals simply will not exercise their First Amendment rights. They will not freely associate with controversial organizations, nor will they express controversial ideas or discuss sensitive subjects. Consequently, the Court consistently has upheld the right to communications privacy, and it has expressly grounded that right in the First Amendment itself. In these contexts, far from being inherently antithetical to the First Amendment, privacy is to the contrary an essential aspect of, or predicate for, First Amendment freedoms. *The Unwanted Gaze* stresses that Jewish law recognizes this mutually supportive connection between privacy and free speech, noting that "[f]rom its earliest days, Jewish law recognized that . . . the uncertainty about whether or not we are being observed . . . forces us to lead more constricted lives and inhibits us from speaking . . . freely in private places."[16]

The ACLU is continuing to defend these longstanding combined privacy and First Amendment rights in the new setting of cyberspace across a range of circumstances. For instance, in *ACLU v. Miller*,[17] we persuaded a federal court to strike down a Georgia law that criminalized anonymous or pseudonymous online communications. The plaintiff individuals and organizations we represented all were concerned that the law would prohibit them, at risk of jail or fines, from using pseudonyms to protect their privacy, communicate sensitive information, and shield themselves from harassment that could likely result if their identities were known on the Internet. For instance, the Atlanta Veterans Alliance, a Georgia-based organization for gay, lesbian, bisexual, and transgen-

13. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

14. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

15. *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

16. JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 19 (2000).

17. ACLU v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997).

dered veterans, feared the law could lead to disclosure of the identity of its members who remain in active military service. Such disclosure would likely end their military careers.

Some plaintiffs expressed the further concern that loss of online anonymity would put others at risk, not only themselves. For example, plaintiff Community ConneXion, an Internet service provider, specializes in providing the highest level of privacy to online users. The group developed a service known as "Anonymizer," which enables any Internet user to browse and retrieve documents anonymously. According to its President, Sameer Parekh, organizations and individuals around the world use Community ConneXion's services to protect them online from oppressive governments, harassment, and invasive marketing databases. He feared that the Georgia law would force Community ConneXion to choose between shutting down its services or risking prosecution.[18]

In many other cases, the ACLU has defended anonymous online speakers against legal intimidation from those they criticize in cyberspace. For example, in February 2001, the ACLU (together with the Electronic Frontier Foundation) asked the federal court in Seattle, Washington to quash a subpoena that would force an Internet service provider to disclose the identity of a person who spoke anonymously on an Internet bulletin board. Moreover, in that same month, the ACLU submitted its appellate brief in *Melvin v. Doe*,[19] a challenge to a Pennsylvania judge's attempt to use the courts to try to ferret out the identity of an online critic.[20] The ACLU press release about these recent cases underscores the mutually reinforcing relationship between privacy—or anonymity—and free speech in much of our cyberliberties work, noting that "in many of the [online] defamation cases the ACLU has handled, individuals felt their speech was 'chilled' by the threat of a lawsuit—often brought by deep-pockets corporations or powerful individuals—and by the threat of disclosure."[21]

Another illustration of mutually interdependent privacy and free speech rights in cyberspace involves encryption. Absent secure cryptography, many individuals and organizations simply will not engage in many kinds of online communications involving sensitive information. In several cases, we have argued, and some judges have held, that encryption code itself constitutes a form of communication that is protected under the First Amendment.[22]

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18. Press Release, ACLU, Groups Challenge Georgia Law Restricting Free Speech (Sept. 24, 1996), http://www.aclu.org/news/n092496a.html (last visited Apr. 9, 2001).

19. Brief for Appellant, Melvin v. Doe, No. 2116 WDA 2000 (Pa. Super. Ct. 2001), *available at* http://www.aclu.org/court/melvin_appeal.pdf (last visited Mar. 24, 2001).

20. Press Release, ACLU, In Two Significant Cases, ACLU Seeks to Protect Anonymous Online Speakers from Legal Intimidation (Feb. 26, 2001), http://www.aclu.org/news/2001/n022601b.html (last visited Mar. 18, 2001).

21. *Id.*

22. *See, e.g.*, Junger v. Daley, 209 F.3d 481 (6th Cir. 2000); Bernstein v. United States Dep't of Justice, 176 F.3d 1132 (9th Cir.), *withdrawn and reh'g granted*, 192 F.3d. 1308 (9th Cir. 1999). *But see*

The Unwanted Gaze discusses yet another context in which privacy and free speech rights are mutually reinforcing: when governments mandate blocking software to deny access to certain online material, requiring individuals who seek access to obtain special permission from government officials.[23] One especially egregious law of this sort was passed by the Commonwealth of Virginia, denying access to sexually explicit materials on any state-owned computer equipment. On behalf of professors at various state universities in Virginia, the ACLU challenged this law, contending that it violated free speech rights to access information pertinent to the professors' research, writing, and teaching on subjects ranging from anthropology to women's studies.[24] Moreover, we contended that this law violated privacy rights because it required anyone seeking access to the blocked material to obtain approval from the head of the pertinent governmental agency, and any such request was subject to public disclosure under the state freedom of information act. As the lower court judge concluded, this disclosure requirement certainly had the effect—and probably also the purpose—of deterring efforts to seek the blocked words and images. In short, the denial of privacy perpetuated and exacerbated the denial of First Amendment freedoms.[25]

In March 2001, the ACLU challenged a federal statute scheduled to go into effect in April 2001 that is similar to the Virginia blocking law, but with even more sweeping adverse consequences for both privacy and free speech rights.[26] The Children's Internet Protection Act (CHIPA)[27] mandates blocking software on all computers in all public libraries that receive certain federal support.[28] The statute permits librarians to temporarily disable blocking software during computer use by some patrons who can show a "bona fide research purpose."[29] However, as the ACLU's complaint alleges, our "library plaintiffs do not know . . . how the exception could be applied without violating our patrons' privacy and anonymity rights, contrary to the longstanding practices and policies of the library community."[30] Accordingly, the complaint alleges that "CHIPA violates the First Amendment right to communicate anonymously and privately

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Karn v. United States Dep't of State, 925 F. Supp. 1 (D.D.C. 1996), *remanded per curiam by* 107 F.3d 923 (D.C. Cir. 1997).

23. ROSEN, *supra* note 16, at 86-87.

24. *See* Urofsky v. Gilmore, 995 F. Supp. 634, 635 (E.D. Va. 1998), *rev'd en banc*, 216 F.3d 401 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 759 (2001).

25. *See id.* at 642. *See generally* Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996).

26. Complaint, Multnomah County Pub. Library v. United States, No. 01CV1322 (E.D. Pa. filed Mar. 20, 2001), *available at* http://www.aclu.org/court/multnomah.pdf (last visited Mar. 24, 2001).

27. Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (to be codified in scattered titles of U.S.C.).

28. Children's Internet Protection Act §§ 1712, 1721(b), 114 Stat. at 2763A-340 to -341, -346 to -347 (to be codified at 20 U.S.C. § 9134 and 47 U.S.C. § 254(h)).

29. §1712(a)(2), 114 Stat. at 2763A-341.

30. Complaint ¶ 130, *Multnomah County* (No. 01CV1322).

because it requires adults to prove to government officials that they have a 'bona fide research purpose' before accessing protected speech."[31]

Another interconnected set of privacy and free speech rights that CHIPA violates is illustrated by another ACLU client in our challenge to that new blocking law, fifteen-year-old Emmalyn Rood. Ms. Rood is a patron of the Multnomah County Public Library in Portland, Oregon. The complaint explains why her intertwined privacy and free speech rights—and those of similarly situated individuals—are violated by government-imposed blocking software, which would likely block websites concerning gay and lesbian sexual orientation:

> Within the last two years, [Ms. Rood] began conducting research at the Multnomah County Library in order to explore her sexual orientation after thinking she might be a lesbian. Although her family has Internet access at home, she did not want to perform this sensitive and personal research from her family computer, for fear her mother would discover her private research. She . . . used . . . web sites . . . and interactive Internet resources such as e-mail. Through these resources . . . , Ms. Rood was able to learn more about her sexual orientation, and connect with a friendly, welcoming queer community on line. Due to the information and support she received, Ms. Rood has since come out as a lesbian to her family and community.[32]

As I stated at the outset, the relationship between privacy and First Amendment rights is complex. In that vein, I recognize that even the situations I have just described, involving mutually reinforcing relationships between privacy and free speech rights, do not involve simply or exclusively reinforcing relationships. To the contrary, even in these situations, the relationships among free speech and privacy concerns is more complex. So far, in describing these scenarios, I have only stressed the speakers'—or potential speakers'—concern with confidentiality as an incentive for encouraging their communicative activities. Of course, though, there are other, countervailing First Amendment concerns—namely, access to information and disseminating that information. The public and journalists acting on the public's behalf have a legitimate concern in finding out who is distributing handbills in connection with an election, who is joining and supporting a controversial organization, and who is communicating sensitive information online or off. Accordingly, even in these situations, there is at least some tension between First Amendment and privacy concerns. Moreover, we are witnessing many other situations where the tension between these rights is even more pointed—and painful. The tension is painful because I—and the ACLU—have an absolutist view of both sets of rights. We have an institutional mission to maximally defend both.

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31. *Id.* ¶ 129.
32. *Id.* ¶ 199.

III. BALANCING THE COMPETING CONSIDERATIONS IN EACH CONTEXT

The interrelationship between privacy and free speech is very challenging for yet another reason: It encompasses so many different specific questions, each at least arguably calling for a somewhat varying analysis. Let me list just some of these questions, many of which are discussed in *The Unwanted Gaze* and have been raised by recent news events, public debates, laws, and lawsuits:

- When are sexual and other personal matters legitimate topics of public inquiry? How about health? Mental health?
- When may the press fairly cover the personal lives of those who are related to public figures?
- What about "outing" closeted gay men and lesbians in public positions?
- Should there be different standards for celebrities who are not public officials?
- What about someone who is involuntarily thrust into the limelight—for example, the survivor of a disaster?
- What about someone who is suspected of a crime, but not yet charged?
- What are the privacy rights of a crime victim (or alleged victim)? What are the privacy rights of crime victims in sensitive cases—for example, sexual assaults or when the victims are juveniles?
- How do we protect ourselves against unwanted intrusions into our homes and lives through such means as "spam" e-mail, without unduly restricting speech?
- Should we allow websites to post home addresses, telephone numbers, and other personally identifying information about abortion providers? What about information concerning their children?[33]
- What about similar information concerning former sex offenders?
- What restrictions should be imposed on the collection and dissemination of personally identifying information by journalists or other private sector actors?
- What if the information has been collected by the government—for example, drivers' license information or census data? What restrictions, if any, should be imposed on private actors' access to such government-compiled records?
- Should different access rights and restrictions apply for, say, journalists or academic researchers, as opposed to marketers? If so, what about marketers of legal services—in other words, lawyers?[34]

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33. *See, e.g.*, Planned Parenthood, Inc. v. Amer. Coalition of Life Activists, 2001 WL 293260 (9th Cir. Mar. 28, 2001), *aff'd*, 41 F. Supp. 2d 1130, 1156 (D. Or. 1999).

34. *See* Los Angeles Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32 (1999). In *United Reporting*, the Supreme Court overturned an injunction against enforcement of a state statute barring law enforcement agencies from disclosing information about arrested individuals to anyone who would in turn use that information to sell a product or service, but did allow disclosure of addresses of

With respect to all of the foregoing situations, or any others posing competing free speech and privacy concerns, some advocates and analysts automatically or presumptively prefer one set of rights. For example, some media organizations automatically advocate the free speech concerns in each of these situations—and that is appropriate, consistent with their organizational mission. Conversely, some pro-privacy organizations automatically—and appropriately—advocate the countervailing privacy concerns in every such situation.

The ACLU is caught in the middle because we consider both sets of rights to be equally compelling. We are therefore forced to do what the courts are also forced to do in each of these situations—to engage in a careful, fact-specific analysis and weighing of the competing rights in each particular context. When it comes to civil liberties, I—and the ACLU—usually oppose ad hoc balancing tests because they can easily degenerate into letting the rights be balanced out of existence.[35] However, I cannot conceive of any alternative when it comes to conflicts between two compelling sets of rights. Any categorical approach that presumptively preferred one set of rights would lead to presumptive violations of the other set of rights.

Let me list some of the factors that should be considered in weighing the competing privacy and free speech concerns in each specific situation:

- the subjective expectations of privacy about the information involved;
- the objective expectations of privacy about the information involved;
- the degree of public interest in the information;
- any explicit or implicit assurances of confidentiality concerning the information;
- whether any important purpose that disclosing the information could serve could instead be served through alternative measures that would impinge less on privacy;
- how effective any restrictions on disclosing the information actually are in protecting privacy; and

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arrestees and crime victims "for a scholarly, journalistic, political, or governmental purpose, or . . . for investigation purposes by a licensed private investigator." *Id.* at 35. The challenge was brought by a publishing company that had provided names and addresses of recently arrested individuals to attorneys, drug and alcohol counselors, and driving schools. The district court and the Ninth Circuit had held this selective disclosure an unconstitutional restriction on commercial speech. *Id.* at 36-37. The Court, however, treated the case as presenting only a facial challenge to the law, thereby sidestepping the issue of the law's allegedly discriminatory application. *See id.* at 37. But note Justice Stevens's dissent: "A . . . likely, rationale that might explain the restriction is the State's desire to prevent lawyers from soliciting law business from unrepresented defendants. This interest is arguably consistent with trying to uphold the ethics of the legal profession. Also at stake here, however, are the important interests of allowing lawyers to engage in protected speech and potentially giving criminal defendants better access to needed professional assistance. . . . Ultimately, this state interest must fail because at its core it relies on discrimination against disfavored speech." *Id.* at 47 (Stevens, J., dissenting).

35. *See generally* Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988).

- any alternative privacy-protecting measures that would infringe less on free speech rights.

In some cases, the balancing is quite straightforward, and one set of concerns—either free speech or privacy—is clearly predominant over the other. In other cases, the balancing process is very difficult, and reasonable civil libertarians can, and do, disagree with each other (and even remain conflicted ourselves, within our own minds!). To illustrate this balancing process, I will describe the ACLU's analysis and resulting positions in several recent situations.

In 1999, the ACLU won a case in the Supreme Court in which, unusually, many media companies filed briefs on the other side. In *Wilson v. Layne*,[36] the ACLU sued law enforcement officials who brought a *Washington Post* reporter and photographer along with them when they executed a search warrant in our clients' home. The Supreme Court unanimously agreed with us that this violated our clients' privacy rights under the Fourth Amendment. I want to stress that we did not sue the *Washington Post*, nor did we claim that the journalists themselves had violated our clients' legal rights.[37] (In contrast, in similar situations, other litigants have sought to hold the media directly accountable.) Still, the media companies opposed our position—as well as the Court's ruling—because they did not want police to be deterred from inviting media to observe their law enforcement activities, including the execution of search warrants.[38] While *The Unwanted Gaze* does not extensively discuss the tensions between privacy and free speech, its two references to that topic are consistent with both the general balancing approach that the ACLU has followed (along with the Supreme Court), as well as with the specific outcome in *Wilson v. Layne*.[39]

Now I will turn from the foregoing privacy-versus-free-speech situation, in which the ACLU (along with the Supreme Court) struck the balance in favor of privacy, to another recent instance in which we struck a different balance. I am

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36. 526 U.S. 603 (1999) (holding that police violate homeowners' Fourth Amendment rights when police allow the media to accompany them during executions of search warrants).

37. *Id.*

38. *See* Brief Amici Curiae of ABC, Inc. et al, *Wilson* (No. 98-93), *available at* 1998 WL 901781.

39. *See* Rosen, *supra* note 16, at 41-42. Rosen states that

> [i]n a society that respects the freedom of the press, . . . the solution to . . . privacy invasions isn't to prohibit journalists from publishing information they have obtained from police or prosecutors. Instead, courts should prohibit police or prosecutors from sharing certain private information with the press. Some courts have recognized that the reasonableness of a search or seizure may turn on how widely the police publicize the information after they have obtained it.

Id. He also writes that

> despite the tragic personal consequences that often result from the disclosure of true but embarrassing private facts, it's appropriate, in a country that takes the First Amendment seriously, that invasion of privacy suits against the press rarely succeed, except in truly lurid cases of hidden camera investigations that transgress the bounds of civilized behavior.

Id. at 48.

referring to the debate about the Children's Online Privacy Protection Act.[40] During the summer of 2000, the Federal Trade Commission (FTC) implemented the proposed rules, which were ostensibly designed to protect children's online privacy,[41] but which we, along with the Center for Democracy & Technology, opposed because their actual impact was to stifle children's freedom to communicate over the Internet. In a nutshell, the law requires certain websites that intentionally collect personal information from young children to get parental consent before doing so.[42] We consider this an appropriate protection of children's—and parents'—privacy rights. The FTC's proposed regulations, however, go much further. They require websites to get verifiable parental consent before allowing children to engage in any online expression, even if the sites do not seek to collect personal information from the children.[43] In short, this rule has the effect of depriving children of the uniquely interactive features of online expression, relegating them to the role of passive viewer and converting the computer screen, in effect, to a TV screen.

I should note that the ACLU is also concerned about the rights of older minors to gain access to important online information they might not seek if they cannot maintain confidentiality vis-à-vis their parents—for example, information about contraception, abortion, safer-sex, or lesbian and gay sexuality. Moreover, some young people may well be deterred from seeking out certain political, religious, or cultural information if their parents are aware that they are doing so. In short, while laws requiring parental consent are billed as protecting minors' privacy, in some significant ways such laws actually undermine their privacy (as well as their free speech rights).

One more specific case pitting free speech against privacy is of special interest because the Supreme Court has agreed to review it during its 2000 Term. Factually, this case does not directly involve cyber-communications, but it does involve another relatively new communications technology—cell phones—and it has important implications for cyberspace. The case, *Bartnicki v. Vopper*,[44] involves an illegal interception of a cell phone conversation that was then broadcast by media outlets that did not participate in any way, even indirectly, in the illegal interception. *Bartnicki* raises essentially the same issues that are presented by a higher profile case that is still working its way through the lower courts, involving an illegal interception of a telephone conference call

40. 15 U.S.C. §§ 6501-6505 (2000).

41. Children's Online Privacy Protection Rule, 16 C.F.R. §§ 312.1-.12 (2001).

42. *See id.* § 312.3.

43. *Id.*

44. The Supreme Court issued its decision shortly before this Article went to press, Bartnicki v. Vopper, 121 S. Ct. 1753 (2001). Affirming the Third Circuit's ruling that the First Amendment immunized media defendants from civil liability for disclosing an illegally intercepted cell phone conversation, the majority stressed the fact-specific nature of its ruling, which turned on a balance between the particular privacy and free speech concerns at issue.

among Congressman John Boehner and other members of the Republican House leadership, including then-Speaker Newt Gingrich.[45]

The challenge of weighing the competing privacy and free speech concerns in these two cases is underscored by the fact that the lower court judges have been deeply divided in both cases, with votes of two-to-one on both appellate court panels. Moreover, in the case that the Supreme Court is reviewing, both the majority and dissenting opinions were written by staunch civil libertarians with solid track records in support of both free speech and privacy rights. The majority opinion, which came down in favor of the free speech concerns, was written by Dolores Sloviter, former Chief Judge of the Third Circuit. Specifically, she held that federal and state laws that impose damages for disclosure of illegally intercepted communications could not constitutionally be applied to media and other defendants who did not participate in or authorize the illegal interception. The opinion concluded that "the government's significant interest in protecting privacy is not sufficient to justify the serious burdens the damages provisions . . . place on free speech."[46]

Another respected civil libertarian, Louis Pollak, wrote the dissent.[47] In one sense, he concluded that the privacy concerns did justify restrictions on free speech. In another sense, though, he concluded that these privacy concerns could themselves be viewed as an integral aspect of free speech. Thus, Judge Pollak brings us back full circle to the point I made earlier about the extent to which privacy and free speech are mutually reinforcing, or complementary, rights. It is illuminating to quote the pertinent portion of Judge Pollak's opinion, which in turn quotes another respected jurist, Stanley Fuld:

> [T]he First Amendment values of free speech and press are among the values most cherished in the American social order . . . . In the case at bar, however, the First Amendment values on which defendants take their stand are countered by privacy values . . . that are of comparable—indeed kindred—dimension. Three decades ago the late Chief Judge Fuld of the New York Court of Appeals put the matter well . . . in words that the Supreme Court has quoted with approval: "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."[48]

Lest I sound too enthusiastic about Judge Pollak's dissenting opinion, I hasten to add that the ACLU filed an amicus brief in support of the *Bartnicki*

45. *See* Boehner v. McDermott, 191 F.3d 463 (D.C. Cir. 1999), *vacated and remanded*, 69 U.S.L.W. 3748 (U.S. May 29, 2001) (mem.).

46. Bartnicki v. Vopper, 200 F.3d 109, 129 (3d Cir. 1999).

47. *See id.* (Pollak, J., dissenting).

48. *Id.* at 136 (quoting Estate of Hemingway v. Random House, 244 N.E.2d 250, 255 (N.Y. 1968)).

media defendants in the Supreme Court. We argue that the prohibition on disclosure intrudes upon the press's editorial autonomy and also is a content-based restriction on speech, therefore triggering strict scrutiny. While preserving the privacy of confidential communications is clearly an interest of compelling importance, we maintain that two types of measures can adequately promote that interest while being less restrictive of free speech rights: first, more vigorous enforcement of the prohibition against illegal interception of communications; and second, the increasingly available technological solutions to the problem of wireless security.

Although the ACLU supports the *Bartnicki* media defendants, I should note that the ACLU lawyers and others who have participated in debates about this case all view it as difficult, and that there are differing opinions among us. While there is a consensus in terms of our bottom-line position in this particular case, in light of all the facts and circumstances, there is much less of a consensus about the appropriate analysis, rationale, and general governing principles concerning tensions between free speech and privacy in general, in similar but distinguishable situations. For example, some especially staunch free speech advocates think that there should be a bright-line rule completely exonerating any truthful publication, at least where the published material relates to a matter of public concern—even when the information is obtained through an illegal wiretap. On the other hand, because the ACLU always has opposed wiretapping as an inherent violation of fundamental privacy rights, some especially staunch privacy proponents believe that information obtained through illicit wiretaps should not be permitted to be published, in order to deter the interception of this material.

I welcome any guidance from this Symposium's participants about principled guidelines that might aid our future advocacy in favor of both cherished rights, privacy and free expression, to the maximum extent possible.