

2015

## The Uneasy and Often Unhelpful Interaction of Tort Law and Constitutional Law in First Amendment Litigation

George C. Christie

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### Repository Citation

George C. Christie, *The Uneasy and Often Unhelpful Interaction of Tort Law and Constitutional Law in First Amendment Litigation*, 98 Marq. L. Rev. 1003 (2015).

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## MARQUETTE LAW REVIEW

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Volume 98

Spring 2015

Number 3

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# THE UNEASY AND OFTEN UNHELPFUL INTERACTION OF TORT LAW AND CONSTITUTIONAL LAW IN FIRST AMENDMENT LITIGATION

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*There are increasing tensions between the First Amendment and the common law torts of intentional infliction of emotional distress, defamation, and privacy. This Article discusses the conflicting interactions among the three models that are competing for primacy as the tort law governing expressive activities evolves to accommodate the requirements of the First Amendment. At one extreme there is the model that expression containing information which has been lawfully obtained that contains neither intentional falsehoods nor incitements to immediate violence can only be sanctioned in narrowly defined exceptional circumstances, even if that expression involves matters that are universally regarded as being of no public interest. At the other extreme is the model that some expression which, though lawfully obtained, reveals to a wider audience intimate private information about another should be subject to sanction, as should verbal abuse of a private figure even if there is no implicit threat of physical violence. Some provisions of the American Restatement adopted with scant attention to constitutional developments have taken, and to some extent continue to take, that position. Finally, there is an intermediate model—now gaining wide-spread support in Europe and to some extent in America, even among some members of the United States Supreme Court—that expression which does not concern matters of “public concern” can be subject to public sanction even if it has been lawfully acquired and involves no threats of physical aggression*

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*against others. This Article sets out how this confusing impasse has come about and the dangers that this lack of clarity present for freedom of expression.*

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## I. INTRODUCTION

In *Snyder v. Phelps*,<sup>1</sup> the Supreme Court upheld the right of members of the Westboro Baptist Church to picket near the funeral of a Marine killed in Iraq. The signs they displayed to express their contempt for the increasingly tolerant attitude of the United States military towards homosexuals were certainly vulgar and offensive. Snyder, the father of the deceased Marine, brought an action against Phelps, the pastor of the Westboro church, to recover for intentional infliction of emotional distress. The picketing was carried on silently at an area designated by the police approximately 1,000 feet from the Catholic church where the funeral was held. Although the funeral procession on its way to the church came within 200 to 300 feet of the demonstrators, Snyder did not notice the signs during the procession. He only became aware of the signs the picketers were carrying later while watching a television news broadcast of the event.<sup>2</sup> Snyder succeeded in the district court, but that judgment was overturned by the Fourth Circuit, whose decision was in turn affirmed by the Supreme Court.<sup>3</sup> Chief Justice Roberts, writing for the Court, accepted that the speech in question might meet the requirements for an action for intentional infliction of emotional distress but declared that, because the issue involved was a matter of public concern, it was protected by the First Amendment.<sup>4</sup> Justice Alito, the lone dissenter, noted that the

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1. 131 S. Ct. 1207 (2011).

2. *Id.* at 1213–14.

3. *Id.* at 1214.

4. *Id.* at 1217–19.

elements of the tort “are difficult to meet” but the respondents had “abandoned any effort to show that those tough standards were not satisfied.”<sup>5</sup> Since Phelps did not pursue the point on appeal and the majority had proceeded on the assumption that those requirements had been met,<sup>6</sup> Justice Alito thought that the common law tort of intentional infliction of emotional distress, as well as the doctrine of fighting words enunciated in *Chaplinsky v. New Hampshire*,<sup>7</sup> could be applied to provide Snyder a remedy without offending the Constitution. Although he concurred with the majority, Justice Breyer thought that there was some merit to Justice Alito’s view that the doctrine of fighting words enunciated in *Chaplinsky* could be used to justify an award of damages against Phelps and his followers and also that there might be some situations in which the common law doctrine of intentional infliction of emotional distress could be applied to public speech.<sup>8</sup>

That at least two Justices thought that there might be some life left in the “fighting words” doctrine is surprising. In the absence of a dramatic change of heart on the part of the Court, it is hard to believe that calling a law enforcement officer a “God damned racketeer” and a “damned Fascist,”<sup>9</sup> the words for whose utterance *Chaplinsky* was convicted, would now subject a person to criminal sanctions since a host of decisions post-*Chaplinsky* have made it clear that hate speech or any other kind of vituperation can only be punished if it amounts to a threat or incitement to imminent violence and is also likely to produce that violence.<sup>10</sup> These developments included decisions involving demonstrations in front of abortion clinics in which the Court, with some dissent, upheld injunctions and statutes that restricted the ability of anti-abortion groups or persons to demonstrate or attempt to engage in unwanted conversations in the immediate vicinity of an abortion

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5. *Id.* at 1223 (Alito, J., dissenting).

6. *Id.*

7. 315 U.S. 568, 572 (1942).

8. *Snyder*, 131 S. Ct. at 1221 (Breyer, J., concurring).

9. *Chaplinsky*, 315 U.S. at 569 (internal quotation marks omitted).

10. See, for example, *Virginia v. Black*, 538 U.S. 343 (2003), one of the many iterations of that position. A recent state court decision, *State v. Mitchell*, 343 S.W.3d 381 (Tenn. 2011), is informative on the need for a real threat of violence. See also *Bible Believers v. Wayne Cnty.*, 765 F.3d 578 (6th Cir. 2014). Indeed, there is even some authority that the speaker must also actually intend to produce that imminent violence. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

clinic,<sup>11</sup> but they all involved situations in which a reasonable person could believe that her access to a clinic was being physically blocked or that she was the victim of physical intimidation. More recently, all the members of the Court agreed on the unconstitutionality of a Massachusetts statute prohibiting members of the public who were “using the public sidewalk or street right-of-way adjacent to [a reproductive health care] . . . facility” to reach a destination “other than such facility” from coming within a radius of thirty-five feet of the facility during business hours unless they were entering or leaving the premises or employees, law enforcement officers, or persons with a business reason, such as contractors or utility workers.<sup>12</sup> There was no evidence in the record that the petitioners, who were trying to discourage abortions, had engaged in any acts of violence or harassment or had blocked or impeded access to the facility. For similar reasons, one might accept that, given the great number of people who might attend a funeral, a much larger temporary buffer zone could be justified in such situations.<sup>13</sup>

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11. See *Hill v. Colorado*, 530 U.S. 703, 707 (2000) (statute forbidding anyone within 100 feet of the clinic to approach a person within eight feet for the purpose of distributing a pamphlet or engaging in an unconsented conversation upheld); *Schenk v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357 (1997) (preliminary injunction prohibiting demonstrations within fifteen feet of the entrances, driveways, or parking lot entrances to the clinic upheld; a floating fifteen foot buffer zone around people entering or leaving the clinic struck down); *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753 (1994) (injunction prohibiting demonstrators to picket within 300 foot buffer zone around abortion clinic and residences of staff and from property within 36 feet of clinic struck down; 36 foot buffer around entrances and driveway of clinic upheld). In *Frisby v. Schultz*, 487 U.S. 474 (1988), all members of the Court agreed that picketing outside a particular residence could be prohibited. 487 U.S. at 483, 488. In dissenting, Justices Brennan and Marshall declared that such a prohibition would require a showing that the picketing was “intrusive or coercive.” *Id.* at 492–94 (Brennan, J., dissenting). Justice Stevens in his dissent declared that such a prohibition required a showing that the picketing “unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose.” *Id.* at 499 (Stevens, J., dissenting).

12. *McCullen v. Coakley*, 134 S. Ct. 2518, 2526 (2014) (internal quotation mark omitted). The Massachusetts statute in question was MASS. GEN. LAWS ANN. ch. 266, § 120E½(b)(4) (West 2012).

13. A number of states have adopted provisions prohibiting activity within specified limits that might disturb a funeral or impede access to the site of the funeral. Many of these statutes—often called “fallen hero acts” because many of the recent demonstrations had been at military funerals—are undoubtedly modeled on federal legislation that among other things limits certain activity for a period of 120 minutes from before and after a funeral within distances of 300 feet (noise or disturbance of the peace) and 500 feet (impeding access to the funeral site). See 18 U.S.C. §§ 1387–88 (2012); 38 U.S.C. § 2413 (2012). N.C. GEN. STAT. § 14-288.4(8)a (2011), amended by Act of Mar. 6, 2013, S.L. 2013-6, sec. 1, 2013 N.C. Sess. Laws 44, 45, which deals with “disorderly conduct,” prohibits, two hours before and after a

In accepting that a scarcely visible silent demonstration 1,000 feet from a funeral procession could not be forbidden because the demonstration concerned an important public issue, *Snyder* strongly suggests the implicit acceptance by all of the Justices that the common law tort of intentional infliction of emotional distress could be applied to expressive activities carried out in public if the expression in question involved neither a matter of public concern nor any hint of a threat of physical violence. This is a troubling development. It should be noted that the tort of intentional infliction of emotional distress is of relatively recent origin. It was first recognized by the American Law Institute in a 1948 supplement to the *Restatement of Torts*<sup>14</sup> without recognition of the constitutional issues that would arise if it were applied to expressive activities, and as we shall describe later in this article, it was retained in the *Restatement (Second) of Torts*<sup>15</sup> and now in the *Restatement (Third) of Torts*.<sup>16</sup>

Although, like most people, appalled by the behavior of Phelps and his followers, I believe that the result reached by the Court was the correct one. Nevertheless, I find the reasoning in Chief Justice Roberts's opinion for the majority, let alone the reasoning in the dissenting and concurring opinions, troubling. I find it puzzling that the Chief Justice attempted to make some accommodation to common law developments that, as I shall demonstrate in this Article, have occurred with surprisingly little effort made to anticipate even obvious constitutional trends. As we shall see, this almost conscious disregard of evolving constitutional trends is not limited to the relatively minor tort of intentional infliction of emotional distress. It has also been displayed in the modern development of the more publicly prominent torts of defamation and invasion of privacy. Might the Court now be signaling that it may be experiencing some qualms about having tilted the balance too strongly in favor of freedom of expression? I would find that unfortunate. What may in the long run be equally unfortunate is that, by breathing new life into the notion of "public" concern—a factor that

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funeral or memorial service, displaying within 500 feet and with intent to impede, disrupt, disturb or interfere with such service of "any visual image that conveys fighting words or actual or imminent threats of harm directed to any person or property" and the utterance of "loud, threatening, or abusive language, . . . or yelling" that would interfere with the service.

14. RESTATEMENT OF TORTS § 46 (Supp. 1948).

15. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

16. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 (2012).

for a time looked as if it had been thoroughly discarded as the criterion for deciding what speech can be legally proscribed—the Court is perhaps also unwittingly opening the door to the restrictions on even truthful expression concerning events which have clearly occurred in public space that have been imposed in Europe, including the United Kingdom. To fully appreciate the scope of what is at stake we must first describe the increasingly frequent and awkward interaction between constitutional law and the common law of torts. We shall start that discussion with defamation because it is not only by far the oldest of the three common law torts involving expressive activities but was also the area in which the conflict between the Constitution and tort law first arose. After we have laid the groundwork, we shall conclude by examining the important policy issues that, whether we like it or not, must be resolved in order to develop a coherent body of law delimiting the scope of freedom of expression.

## II. DEFAMATION

In the first 175 years of its existence, the Supreme Court of the United States made no attempt to apply the First Amendment of the United States Constitution to common law torts. In the pre-*Erie v. Tompkins*<sup>17</sup> era, in which the federal courts applied a federal common law in diversity cases, the Court of course did hear some defamation cases, but these were decided on the basis of accepted common law with no mention of the First Amendment. In the post-*Erie* period, when the typical common law case involving freedom of expression in diversity cases was to be decided under state common law, there was initially probably less reason to expect the Court to get involved. The Court nevertheless in 1942 did hear a case brought in the federal courts in which a congressman had brought a libel action against a newspaper that accused him of having opposed a judicial nomination because the nominee was Jewish. The Court split four-to-four in affirming, without opinion,<sup>18</sup> the Second Circuit's ruling that, under New York law, the congressman had stated a valid cause of action.<sup>19</sup> In its petition for certiorari and its brief on the merits, the newspaper's principal argument

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17. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

18. *Schenectady Union Pub. Co. v. Sweeney*, 316 U.S. 642 (1942).

19. *Sweeney v. Schenectady Union Pub. Co.*, 122 F.2d 288, 291 (2d Cir. 1941). Clark, J., dissented on the ground that the majority's reversal of the district court's granting of a motion to dismiss was based on an inaccurate reading of New York law and, moreover, was "disturbing law." *Id.* at 291 (Clark, J., dissenting).

was that the Court of Appeals had wrongly interpreted New York law.<sup>20</sup> It did, however, as did the two amici, also make a constitutional challenge, but not with specific mention of the First Amendment, which is perhaps not completely surprising since the few prior occasions in which the Court had held that the principles underlying the First Amendment were subsumed into the Fourteenth Amendment involved criminal prosecutions.<sup>21</sup> By the 1960s, however, some important changes had occurred in the legal and political universe. As far as the legal side was involved, the Court had increasingly begun ruling that some provisions of the Bill of Rights were word-for-word applicable to the states by incorporation in the Fourteenth Amendment, rather than merely expressing fundamental principles that were entitled to protection against state infringement by the Fourteenth Amendment's Due Process and Equal Protection Clauses.<sup>22</sup> More importantly perhaps from a practical perspective, the Court had by this time also expressly ruled that the enforcement of a state's common law, even in litigation between private parties, could sometimes be considered state action and thus subject to the prohibitions on state action imposed by the Fourteenth Amendment.<sup>23</sup> The stage was thus set for *New York Times Co. v. Sullivan*.<sup>24</sup>

The facts of the *Sullivan* case are too well known to require extensive rehearsal here. For present purposes it suffices to note that the case involved an action by the elected commissioner of public affairs of the City of Montgomery, Alabama, in overall charge of the city's public safety departments, who claimed he had been defamed by an advertisement published in the *Times* that criticized the actions of the

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20. *E.g.*, Petitioner's Brief at 9, *Schenectady Union Pub. Co. v. Sweeney*, 316 U.S. 642 (1942).

21. *See* *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); *cf.* *Gitlow v. New York*, 268 U.S. 652 (1925). Justice Stone's famous footnote 4 in his opinion for the Court in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), declared that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth," but made no mention of state common law. 304 U.S. at 152 n. 4.

22. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (right to exclude evidence obtained in violation of Fourth Amendment). *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), which could be interpreted as presaging that result even for civil litigation involving the First Amendment.

23. *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948).

24. 376 U.S. 254 (1964).



police in their dealings with Dr. Martin Luther King Jr. and others involved in civil rights demonstrations and activities.<sup>25</sup> Writing through Justice Brennan, the Court reversed the judgment of the Alabama courts, which had awarded Sullivan the full amount of the \$500,000 in damages he had sought from the *Times* and the people whose names had appeared in the list of the advertisement's sponsors.<sup>26</sup> As Justice Brennan noted, the Court was determining "for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."<sup>27</sup> Thus began the odyssey, which still continues today, to determine the extent to which the *Sullivan* case and its progeny have altered the traditional common law governing tort liability for expressive conduct. It continues, as we shall see, because the Court has been unable to muster a consistent majority over time as to what exactly are the broader principles underlying its post-*Sullivan* decisions nor exactly how much of the evolving common law governing other types of expressive activity might also similarly be affected by constitutional considerations. In *Sullivan* itself all the Justices agreed that a public official who sought to recover in a defamation action against his critics could not recover unless he could show with "convincing clarity"<sup>28</sup> that the defendant either knew that his statements were false or was recklessly indifferent to the truth or falsity of his statements. Justices Black, Douglas, and Goldberg thought there was even what Justice Goldberg termed "an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses."<sup>29</sup> Justice Goldberg, joined by Justice Douglas, opined, however, that the traditional common law of defamation still applied to defamatory statements concerning the private conduct of public officials.<sup>30</sup>

In the immediate aftermath of the *Sullivan* case, the Court labored to establish the extent to which the First Amendment limited the common law. In the course of that effort it gave some guidance as to how far down the hierarchy of public employees the notion of who was a

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25. *Id.* at 256–61.

26. *Id.* at 256, 292.

27. *Id.* at 256.

28. *Id.* at 285–86.

29. *Id.* at 298 (Goldberg, J., concurring in the result).

30. *Id.* at 301–02.

public official might extend.<sup>31</sup> The notion that the authority of a public employee to exercise discretionary powers was helpful but certainly did not provide definitive guidance. The Court also had to decide whether the *Sullivan* doctrine applied to public figures who engaged in discourse about political and other public issues. And then, after deciding that *Sullivan* did apply,<sup>32</sup> it faced the issue whether *Sullivan* should also apply if the plaintiff was neither a public official nor a public figure but the challenged statements concerned the plaintiff's involvement in what might be called "an event of public or general concern."<sup>33</sup> A plurality of the Court, in 1971, declared that it did in *Rosenbloom v. Metromedia, Inc.*<sup>34</sup> Justice White did not endorse this statement but agreed with the Third Circuit's reversal of the district court's judgment for the plaintiff in that case because the challenged statement was made in the context of reporting on official conduct.<sup>35</sup> Justice Black in his concurrence went even further than the plurality in asserting that "the First Amendment does not permit the recovery of libel judgments against the news media even when statements are broadcast with knowledge they are false."<sup>36</sup>

While the Court was wrestling with the ramifications of its decision in *Sullivan*, the American Law Institute was working on drafts of the defamation sections for the *Restatement (Second) of Torts*. The most controversial item in its drafts was its proposal to abandon the English doctrine that some damages were presumed in all libel actions, even if the challenged statements were not defamatory on their face.<sup>37</sup> The reporter, William L. Prosser, was seeking to move to what he claimed was the majority American position, namely that, in such cases, a plaintiff could not recover without proof of special damages for defamatory statements that were not defamatory on their face unless the

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31. See *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (former supervisor of county recreation area was a public figure); see also *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979) (recipient of federal research grant not a public figure).

32. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

33. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971).

34. *Id.*

35. *Id.* at 62 (White, J., concurring in the judgment).

36. *Id.* at 57 (Black, J., concurring in the judgment). Justice Douglas, who did not participate in the decision of the case, might possibly have agreed with Justice Black's statement. He certainly would have accepted the plurality's position.

37. The controversy is discussed in George C. Christie, *Defamatory Opinions and the Restatement (Second) of Torts*, 75 MICH. L. REV. 1621 (1977), and concerned revision of section 569 of the *Restatement of Torts* contained in tentative drafts eleven (1965) and twelve (1966) of the proposed *Restatement (Second) of Torts*.

defamatory statement fell within the categories that were actionable without proof of special damages in slander cases.<sup>38</sup> This proved quite controversial, and Prosser's position was challenged as in fact not accurately reporting the predominant American view on the subject.<sup>39</sup> The controversy only subsided after Prosser gave up the fight when an important decision of the New York Court of Appeals<sup>40</sup> reaffirmed the English common law doctrine, and section 569 of the *Restatement's* adoption of the English common law position was accordingly retained in section 569 of the *Restatement (Second)*.<sup>41</sup> What is remarkable is that while this argument was going on the drafters of the *Restatement (Second)* ignored the serious implications of the Court's decision in the *Sullivan* case on the future development of the common law of defamation. As late as April 27, 1966, more than two years after *Sullivan*, Tentative Draft No. 12 was released, which contained the following illustration to section 580 which was retained from the *Restatement* and dealt with "unintended defamation":

A publishes in his newspaper a news item saying that B has been arrested and charged with murder. A has received this information from police headquarters, from an official always found to be reliable in the past, and A honestly and reasonably believes it to be true. It is in fact false. A is subject to liability to B.<sup>42</sup>

This provision and the illustration just quoted were of course dropped from this portion of the *Restatement (Second)* when it was published in 1977. Nevertheless, even though the Court was then only beginning to work out the implications of its introduction of constitutional law into what had previously been considered the common law of tort, Prosser's failure to even mention the *Sullivan* case surely shows an extremely blinkered view of what is relevant in tort litigation and scholarship. The Court's decision in the *Rosenbloom* case was surely not a total surprise. In 1969, the Third Circuit, whose decision in the *Rosenbloom* case was affirmed by the Court, had no

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38. See Christie, *supra* note 37, at 1621-22.

39. *Id.*

40. *Hinsdale v. Orange Cnty. Publ'ns, Inc.*, 217 N.E.2d 650 (N.Y. 1966).

41. RESTATEMENT (SECOND) OF TORTS § 569 (1977).

42. RESTATEMENT (SECOND) OF TORTS § 580 illus. 3 (Tentative Draft No. 12, 1966).

difficulty in concluding that the implications of *Sullivan* had to be considered in that case.<sup>43</sup>

This reluctance to even consider possible constitutional issues in the discussion of tort questions continued through May of 1974, when the American Law Institute considered for final adoption a proposed section 567A which Prosser had first proposed in 1965.<sup>44</sup> That provision simply declared that “[a] defamatory communication may consist of words or other matter which ridicule another.”<sup>45</sup> Over some objection, an overwhelming majority of the Institute’s members at the May 1974 annual meeting in Washington adopted it for inclusion in the new *Restatement (Second)*, as well as a provision taken from section 566 of the *Restatement* that “a statement of opinion based upon facts known or assumed” was also actionable.<sup>46</sup> This decision to include both these provisions in the *Restatement (Second)* seems bizarre for two reasons. First, they fly in the face of section 558 of the *Restatement*<sup>47</sup> and section 558 of the *Restatement (Second)*<sup>48</sup> that expressly declare that “[t]o create liability . . . there must be an unprivileged publication of *false* and defamatory matter.” Secondly there is no consideration of the possible unconstitutionality of those proposed rules of law. As is well known, some six weeks later the Court, in *Gertz v. Robert Welch, Inc.*,<sup>49</sup> declared that there is “no such thing as a false idea” and that “[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”<sup>50</sup> As a consequence, unless an opinion could be reasonably construed to imply the existence of defamatory facts which form the basis for that opinion, there could be no liability in defamation. Not surprisingly the American Law Institute did not include section 567A in the final version and reworded section 566 to accord with the *Gertz* decision.

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43. *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892, 896 (3d Cir. 1969), *aff’d* 403 U.S. 29 (1971).

44. RESTATEMENT (SECOND) OF TORTS § 567A (Tentative Draft No. 11, 1965).

45. *Id.*

46. *Report of the Nominating Committee*, 51 A.L.I. PROC. 337, 339 (1974); *see also* RESTATEMENT OF TORTS § 566 (1938).

47. RESTATEMENT OF TORTS § 558 (1938) (emphasis added).

48. RESTATEMENT (SECOND) OF TORTS § 558 (1977) (emphasis added).

49. 418 U.S. 323 (1974).

50. *Id.* at 339–40. This statement was characterized as “dictum” in Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1239–40 (1976).

The most important contribution of *Gertz* to the body of constitutional law generated by the *Sullivan* case was its separation of the universe of defamation plaintiffs into two classes, public officials and public figures on the one hand, and private figures on the other.<sup>51</sup> The former, even if they had not engaged in political or other public controversies, were required to prove by clear and convincing evidence that the statements in question were false and that the defendant had made those statements either knowing that they were false or recklessly indifferent to their truth or falsity.<sup>52</sup> On the other hand, if the plaintiff were a private person all he would have to show is that the statements in question were false and that the defendant was at fault in some regard in ascertaining the truth or falsity of his statements.<sup>53</sup> Only if punitive or presumed damages were sought would a private figure be obliged to meet the *Sullivan* standard of showing with clear and convincing evidence that the defendant knew that his statements were false or was at least recklessly indifferent to their truth or falsity.<sup>54</sup> Writing for the Court, Justice Powell declared that making the necessary degree of fault depend on the status of the plaintiff was preferable to “forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of ‘general or public interest’ . . . . We doubt the wisdom of committing this task to . . . judges.”<sup>55</sup> Justice White, in his dissent in *Gertz*, understandably interpreted the Court’s decision as “requiring the plaintiff in each and every defamation action to prove not only the defendant’s culpability beyond his act of publishing defamatory material but also actual damage to reputation resulting from the publication”<sup>56</sup> and requiring all defamation plaintiffs to show knowledge of falsity or reckless disregard of truth in order to recover punitive damages.<sup>57</sup> The drafters of the final version of the *Restatement (Second)* certainly thought that this was the actual holding of *Gertz*.<sup>58</sup> This is an important point because it seemed to make clear that the Court was not about to authorize courts to decide what information that was neither false nor obscene nor an advocacy of imminent violence could still be subject to

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51. *Gertz*, 418 U.S. at 341–48.

52. *Id.* at 342.

53. *Id.* at 346.

54. *Id.* at 349.

55. *Id.* at 346.

56. *Id.* at 370 (White, J., dissenting).

57. *Id.*

58. RESTATEMENT (SECOND) OF TORTS § 580B (1977).

legal sanction because a judge might think that the subject matter involved did not concern a matter of public interest or concern.

Whatever the value of the distinction between public and private persons might be, the apparent clarity of the distinction enunciated in *Gertz* has been muddled by subsequent decisions of the Court that undoubtedly reflect the gradual change in the composition of the Court. After the retirement of Justice Stewart in 1981, the only remaining members of the Court that had decided the *Sullivan* case were Justice Brennan, who wrote the opinion for the Court, and Justice White who, after joining in the Court's opinion in *Sullivan*, dissented in *Gertz* and, as we shall soon see, from then on urged the Court to return as much as possible to something close to the traditional common law position.<sup>59</sup> In *Gertz* itself the Court spoke of the hypothetical defendants in defamation cases as publishers or broadcasters, suggesting that the abolishment of the strict liability of the common law of defamation when the plaintiff was a private figure only applied when the defendant was a member of the press or the broadcast media.<sup>60</sup> Not only was this confusing because, in legal parlance, one who utters a defamatory statement has "published" that statement, but also because whenever the precise issue has actually been raised, the Court has always ruled that the press has no greater freedom of expression than do individuals.<sup>61</sup> And were it to abandon this position, one wonders how the Court would decide whether a blog can be considered part of the press or explain why a book should not enjoy the same privileges of expression as does a tabloid newspaper.

Nevertheless, the Court continues to make statements that suggest that there is something to the distinction between what are called the media and everyone else. For example, in *Philadelphia Newspapers, Inc. v. Hepps*,<sup>62</sup> decided in 1986, the Court ruled in a five-to-four decision that, in an action for defamation brought by a private person against a newspaper on a matter of "public" concern, the plaintiff bore the burden of persuasion on the issue of falsity.<sup>63</sup> That this should be a contested issue seems surprising since even the *Restatement (Second)*, when it was finally officially published post-*Gertz*, took this for

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59. *Gertz*, 418 U.S. at 369–404 (White, J., dissenting). He felt that the way to accommodate the constitutional considerations was to focus primarily on limiting damages.

60. *Id.* at 332–50.

61. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972).

62. 475 U.S. 767 (1986).

63. *Id.* at 775–76, 778–79.

granted.<sup>64</sup> Even more surprising, the Court reserved the question as to whether this would also be true if the defendant were not a member of the media.<sup>65</sup> Justices Brennan and Blackmun, who otherwise joined the Court's opinion, disagreed with the reservation of that issue because "such a distinction is irreconcilable with the . . . First Amendment."<sup>66</sup> Possibly even more surprising was the dissenting opinion written by Justice Stevens, and joined by Chief Justice Burger and Justices White and Rehnquist, who argued that, as long as the plaintiff was a private figure, the defendant could constitutionally be saddled with the burden of proving truth in any defamation action.<sup>67</sup>

What is troubling in this process of legal evolution is not that it is merely one more illustration of Anthony D'Amato's observation that case-by-case development of the law, rather than producing clarity, often leads to greater confusion in legal doctrine,<sup>68</sup> or even that it reminds us that, in ideologically charged areas of the law, a change in the prevailing public mood as well as in a court's personnel can sometimes make a big difference. Rather, for present purposes, the most disturbing aspect of the *Hepps* case was the resurrection of the notion that the extent of constitutional protection of expression should depend on whether that expression concerns a matter of public or private concern. Such a move was prefigured by Justice Powell's opinion for the three-judge plurality in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>69</sup> declaring that presumed and punitive damages could be recovered in a defamation case brought by a private figure to recover for defamatory statements that did not concern a matter of "public concern" without any showing of aggravated fault.<sup>70</sup> The two other Justices who made up the majority, Chief Justice Burger

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64. RESTATEMENT (SECOND) OF TORTS § 581A cmt. b (1977) notes that this is what the logic of the Court's decisions suggests and refers the reader to § 613 cmt. j, which declares that "[r]ecent decisions of the United States Supreme Court hold that under the Constitution a plaintiff must show fault on the part of the defendant regarding the truth or falsity of the defamatory communication."

65. *Hepps*, 475 U.S. at 778–79.

66. *Id.* at 780 (internal quotation mark omitted), per Justice Brennan, who quoted from his dissent joined by Justice Blackmun and the two other dissenting Justices in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 781 (1985), which will be discussed shortly.

67. *Hepps*, 475 U.S. at 780–81 (Stevens, J., dissenting).

68. Anthony D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1 (1983).

69. 472 U.S. 749 (1985).

70. *Id.* at 757–61.

and Justice White, wanted to overrule most of *Gertz* and return to the traditional common law.<sup>71</sup> How Justice Powell could assert in *Gertz* that determining what was in the “public or general interest” should not be delegated to the “conscience of judges and juries” and then twelve years later make the issue of “public concern” one which judges, juries, or both must decide is beyond me.<sup>72</sup> Indeed, Justice White, who wanted to do more than uphold the judgment for the plaintiff rendered in the state courts, felt compelled to point out that he “had thought that the decision in *Gertz* was intended to reach cases that involve any false statements of fact injurious to reputation, whether the statement is made privately or publicly and whether or not it implicates a matter of public importance.”<sup>73</sup>

I am particularly concerned about the implications of these developments in the law of defamation for many other areas of American law concerned with expression. It is well-known that, even in the United Kingdom, it has been recognized that the strict liability normally imposed by the common law for defamatory statements is no longer always appropriate in a democratic society.<sup>74</sup> Rather than adopt the more radical approach taken by the United States Supreme Court in the *Sullivan* case, however, the House of Lords in the *Reynolds*<sup>75</sup> case broadened the common law privilege of “common interest,” which permits a person who had made a defamatory false statement to escape liability if he can show that he honestly believed in the truth of his statement and that he and the recipients of the statement shared a common interest to which the statement in question was germane.<sup>76</sup> Common interest could include business relations, membership in a family, or even joint membership in a religious or social organization.<sup>77</sup> *Reynolds* extended the so-called common interest to include what was called a common “public interest.”<sup>78</sup> In *Reynolds*, and the subsequent

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71. *Id.* at 764 (Burger, C.J., concurring in the judgment).

72. Compare *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 346 (1974) (internal quotation marks omitted), with *Dun*, 472 U.S. at 763.

73. *Dun*, 472 U.S. at 772 (White, J., concurring in the judgment); see *supra* text accompanying note 56.

74. See Christie, *supra* note 37, at 1627–28.

75. *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 (H.L.) (appeal taken from Eng.).

76. *Id.* at 192–94.

77. See *id.* at 194.

78. *Id.* at 195.



cases which have fleshed out its reach,<sup>79</sup> expression that might concern matters of public interest included political expression, scientific expression, educational expression, and artistic expression. In extending the notion of public interest to include a shared public interest, the courts of the United Kingdom recognized that this expansion of the common law of qualified privilege was more accurately described as a defense rather than a privilege because it was so much broader in scope.<sup>80</sup> Although Australia<sup>81</sup> and New Zealand,<sup>82</sup> in following the lead of *Reynolds*, gave political expression some greater importance, the courts of the United Kingdom have thus far refused to give political expression any such primacy. This partial softening of the cause of the common law's imposition of strict liability for defamatory utterances is welcome. It must also be noted, however, as we shall soon see, that, in construing the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>83</sup> the European Court of Human Rights and the courts of the United Kingdom have used the notion of public concern to impose limits on other types of expressive activity as well.

While the Court's decision in *Snyder v. Phelps* was ostensibly a victory for freedom of expression, there are, as we noted at the beginning of this Article, troubling hints that through the Court's continued reliance on American common law it might be prepared to adopt something like the European approach in a wide variety of torts litigation involving expressive activities. To clarify exactly what I am driving at, and why I find the possibility of such a development disturbing, I shall briefly describe the parallel evolution of the American common law of both intentional infliction of emotional distress and privacy, as presented in the American Law Institute's restatements of the law of torts—as well as developments during the last decade in the

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79. See *Flood v. Times Newspapers Ltd.*, [2012] UKSC 11, [2012] 2 A.C. 273 (appeal taken from Eng.); *Jameel v. Wall St. Journal Europe Sprl.*, [2006] UKHL 44, [2007] 1 A.C. 359 (appeal taken from Eng.).

80. See, e.g., *Jameel*, [2006] UKHL 44, [43] (Lord Hoffman). This development has now been incorporated in Defamation Act 2013. See Defamation Act 2013, c. 26, § 4 (1) (U.K); see also *infra* note 155. This Act has supplanted much of the common law of defamation in the United Kingdom.

81. *Lange v Australia Broad. Corp.* [1997] 189 CLR 520 (Austl.).

82. *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

83. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention*]. The European Convention has now been ratified by 47 nations.

European law of privacy—in order to show how the Court might possibly be indicating that it is open to considering adoption of restrictions on expression in the United States that are similar to those enforced in Europe.

### III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The *Restatement of the Law of Torts* published in 1934 limited liability for the intentional infliction of emotional distress, where there was no intention to cause bodily harm or to put another in fear of an imminent battery, to common carriers for the “insulting conduct of . . . [their] servants” to their passengers.<sup>84</sup> In 1948, however, section 46 of that *Restatement* was rewritten to declare that “[o]ne who, without a privilege to do so, intentionally causes severe emotional distress to another”<sup>85</sup> is liable to that person for any emotional and resulting physical harm he might sustain. Since expression is probably by far the most common way people intentionally inflict emotional distress on others, the constitutional implications of such legal doctrine would now seem obvious, but apparently in 1948 that was not perceived to be the case. By the time the portions of the *Restatement (Second) of Torts* covering this issue were published in 1965, section 46 was revised in a manner that perhaps reflected some of those concerns. The scope of liability was restricted by the requirement that the infliction of severe emotional distress must be caused “by extreme and outrageous conduct.”<sup>86</sup> At the same time, however, liability was extended by imposing liability not only on those who intentionally inflicted that distress but also on those who did so by their reckless behavior.<sup>87</sup> It was this provision that was the basis of Jerry Falwell’s initially successful action against *Hustler* magazine<sup>88</sup> for a spoof of him in which he was portrayed as saying that the “first time” he had Campari was during a tryst with his mother in an outhouse.<sup>89</sup> The jury ruled against him on his defamation claim on the ground that no one would take the suggestion of a drunken orgy with his mother seriously.<sup>90</sup> They did, however, award Falwell significant compensatory and punitive damages for the

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84. RESTATEMENT OF TORTS §§ 46, 48 (1934).

85. RESTATEMENT OF TORTS § 46 (Supp. 1948).

86. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

87. *Id.*

88. *Hustler Magazine, Inc., v. Falwell*, 485 U.S. 46 (1988).

89. *Id.* at 48 (internal quotation marks omitted).

90. *Id.* at 49.

intentional infliction of emotional distress.<sup>91</sup> The Court, however, overturned the Fourth Circuit's affirmance of this judgment<sup>92</sup> and held that a public figure could not recover for intentional infliction of emotional distress unless he could show, with clear and convincing evidence, that the statements about which he complained were made with knowledge of falsity or reckless indifference to truth or falsity.<sup>93</sup> Public concern or interest had nothing to do with the matter unless the Court was implicitly holding that all not knowingly false statements about well-known figures were *ipso facto* of public interest or concern.<sup>94</sup>

A decade or more after the *Falwell* decision, the American Law Institute began the process of producing a *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*. When it completed the process in 2011, it retained the *Restatement (Second) of Torts* provision with no significant change other than substituting "emotional harm" for "emotional distress." The complete text, finally published in fall of 2012, more than eighteen months after the *Snyder* decision, now reads as follows:

§ 46. Intentional (or Reckless) Infliction of Emotional Harm

An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm.<sup>95</sup>

There are of course many ways of inflicting severe emotional distress on others, but surely, as we have several times noted and was the situation in the *Falwell* and *Snyder* cases, infliction of severe emotional distress by verbal means is among the most common. The possible

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91. *Id.*

92. *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986).

93. *Falwell*, 485 U.S. at 56.

94. What has not been directly addressed is whether the intentional infliction of emotional distress by intentionally publishing false information about someone is actionable. For a recent case in which such a claim survived a motion for summary judgment, see *Holloway v. American Media, Inc.*, 947 F. Supp. 2d 1252 (N.D. Ala. 2013). The case is unusual in that the plaintiff did not have a privacy interest that would have been covered by the false light invasion of privacy action that was recognized in *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

95. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 (2012). Undoubtedly for the sake of consistency, this provision has for the moment been incorporated *verbatim* in RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 106 (Tentative Draft No. 1, 2015). It would be unfortunate if that decision were not reconsidered.

conflicts with the constitutional limits imposed by the First Amendment are obvious. Yet there is no clear recognition of these potential conflicts in the black letter. The comments of the *Restatement (Third)* do declare, citing *Falwell*, that “the First Amendment imposes limits on the extent to which state tort law . . . may impose liability for communicative conduct.”<sup>96</sup> The comments also declare that courts should play “a more substantial screening role on the questions of extreme and outrageous conduct and severity of the harm”<sup>97</sup> and should even take a more aggressive role in evaluating the sufficiency of the evidence in any particular case than they would normally do in a case tried to a jury, but that is hardly adequate. Statements that “an actor is liable only if the conduct goes beyond the bounds of human decency such that it would be regarded as intolerable in a civilized community”<sup>98</sup> do not adequately deal with the matter. Such language recalls Justice Frankfurter’s declaration in *Rochin v. California*<sup>99</sup> that the touchstone in Fourteenth Amendment criminal due process cases is whether the activities complained of “offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses”<sup>100</sup> or are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>101</sup> None of these vague and somewhat platitudinous expressions are adequate to take into account the Court’s decisions expanding the reach of the First Amendment.

#### IV. PRIVACY

If expression is perhaps the predominant basis for an action for intentional infliction of emotional distress, it should not come as a surprise that most actions for invasion of privacy likewise seek recovery for mortification and humiliation from the disclosure of embarrassing facts about the plaintiff. Indeed, claims for invasion of privacy were

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96. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. f (2012).

97. *Id.* cmt. g.

98. *Id.* cmt. d.

99. 342 U.S. 165 (1952).

100. *Id.* at 169 (quoting from Justice Douglas’ opinion for the Court in *Malinski v. New York*, 324 U.S. 401, 417 (1945)) (internal quotation mark omitted).

101. *Id.* (quoting from Justice Cardozo’s opinion in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), who in turn was quoting from his opinion for the Court in *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (internal quotation marks omitted).

alternate claims in both the *Falwell* and *Snyder* cases.<sup>102</sup> Our discussion would thus not be complete if we did not also refer to a series of decisions of the Supreme Court rejecting such invasion of privacy claims that culminated with *The Florida Star v. B.J.F.*,<sup>103</sup> decided in 1989, a year after *Falwell* but well before *Snyder*. That case involved a breach of privacy action against a newspaper that published the name of the plaintiff, the victim of a sexual offense, that its reporter saw posted in the press room of the local sheriff's office, which also contained, as noted in Justice White's dissent,<sup>104</sup> a posted notice that the names of the victims of sexual assaults were not matters of public record and were not to be published.<sup>105</sup> The judgment for the plaintiff rendered in the Florida courts was reversed by the Court.<sup>106</sup> While the Court was not prepared to hold that "truthful publication is automatically constitutionally protected . . . or even that a State may never punish publication of the name of the victim of a sexual offense," it nevertheless declared that "punishment may lawfully be imposed, if at all," on a newspaper that "publishes truthful information which it has lawfully obtained . . . only when narrowly tailored to a state interest of the highest order."<sup>107</sup> In his dissent, which was joined by Chief Justice Rehnquist and Justice O'Connor, Justice White declared that he doubted whether, if the information were true, there remained "any 'private facts' which persons may assume will not be published in the newspapers or broadcast on television."<sup>108</sup>

Here, again, drafters of the restatements did not take into account the implications of concurrent constitutional developments. In section 652D of the *Restatement (Second) of Torts*, published in 1977, the American Law Institute had declared that an action for invasion of privacy would lie against someone who gave "publicity to a matter concerning the private life of another . . . if the matter publicized . . . would be highly offensive to a reasonable person, and . . . is not of

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102. *Snyder v. Phelps*, 131 S. Ct. 1207, 1214 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 47–48 (1988).

103. 491 U.S. 524 (1989).

104. *Id.* at 546 (White, J., dissenting).

105. *Id.* at 527–28 (majority opinion). The plaintiff reached a settlement with the sheriff's department before her case against the newspaper reached the trial stage. *Id.* at 528.

106. *Id.* at 529.

107. *Id.* at 541.

108. *Id.* at 551 (White, J., dissenting).

legitimate concern to the public.”<sup>109</sup> That provision received some support from the Supreme Court of California’s decision in *Briscoe v. Reader’s Digest Ass’n, Inc.*<sup>110</sup> upholding a cause of action against the *Reader’s Digest* for republishing an article on the crime of truck hijacking disclosing that, eleven years previously, the plaintiff had been convicted and sentenced to prison for participating in a truck hijacking. The value of that authority, however, was questionable. First, the article in question was an abridgement of an article that had been previously published in Chicago.<sup>111</sup> Second, on remand from the Supreme Court of California, the case was removed to federal court, which dismissed the case on the ground that no private facts about the plaintiff had been revealed.<sup>112</sup> Third, and most importantly, in 1975 the Court had held that a father whose daughter had been raped and killed could not recover under a Georgia statute forbidding the publication of the name or identity of a rape victim.<sup>113</sup> The TV station’s reporter had learned the name of the victim when he was allowed to read the indictment at the courthouse. In short, the drafters of section 652D of the *Restatement (Second)* were certainly on notice, well before the Court’s more sweeping declaration in *The Florida Star v. B.J.F.*, that their attempts to state a general rule governing the publication of lawfully acquired true information about other people were subject to serious constitutional challenge. Nevertheless, even after the Supreme Court of the United States’s decision in *The Florida Star* case and the increasingly strict constitutional limits on privacy actions being imposed by the Court, section 652D was, in 2004, accepted by the House of Lords<sup>114</sup> as accurately expressing the privacy law of the United States and is perhaps another indication that the notion that courts are the appropriate bodies to decide what is of legitimate public interest or concern will simply not go away.

What prompted this interest in the American law of privacy by the courts of the United Kingdom, which had theretofore refused to recognize any general right to privacy, was the need to conform the law

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

110. 483 P.2d 34 (Cal. 1971).

111. *Id.* at 36 n.1.

112. *Briscoe v. Reader’s Digest Ass’n, Inc.*, No. LTL 71-2458, 1972 WL 7259, at \*2 (C.D. Cal. July 18, 1972).

113. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

114. *Campbell v. MGN Ltd.*, [2004] UKHL 22, [22], 2 A.C. 457 (appeal taken from Eng.) (Lord Nicholls).

of the United Kingdom to the requirements of its membership in the Council of Europe and then in the European Union.<sup>115</sup> Building on an expanded notion of confidentiality which did not arise out of any sort of pre-existing confidential or fiduciary relationship, its courts have ruled that someone who happens to learn, however innocently, of embarrassing information about another that is not generally known and would realize that a reasonable person would not want it to be generally known is under an obligation not to disclose that information to others.<sup>116</sup> Through this doctrinal shift it was possible, without much difficulty, to begin the process of adjusting the common law of the United Kingdom to the requirements of the European Convention of Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights construing that document.<sup>117</sup> In that process the courts of the United Kingdom have not had much difficulty in responding to the declarations of the European Court that even public figures and politicians enjoy some rights of privacy for activities that take place in the public sphere, particularly when some element of family life is involved.<sup>118</sup> For example, the Court of Appeal has held that a newspaper could not publish photographs of the nineteen-month-old son of J.K. Rowling that were taken as the child was being pushed by his father in a buggy as he accompanied his parents to and from a café.<sup>119</sup> There is, however, a New Zealand case practically on all fours in which a unanimous court reached the opposite conclusion.<sup>120</sup>

It has now also become accepted, as the law of the United Kingdom and the forty-six other nations that are members of the Council of Europe, that it is the task of the courts to decide what is a matter of public interest that can justify the disclosure of even lawfully obtained information about another. The European Convention guarantees both “the right to respect for [an individual’s] . . . private and family life” and the individual’s right to “freedom of expression.”<sup>121</sup> These rights as well as the right to “freedom of thought, conscience, and religion”<sup>122</sup> are,

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115. *See id.* at [11]; *id.* at [138] (Lady Hale).

116. *See id.* at [14] (Lord Nicholls).

117. *See id.* at [11]; *id.* at [86] (Lord Hope).

118. *Id.* at [20] (Lord Nicholls).

119. *Murray v. Big Pictures (UK) Ltd.*, [2008] EWCA (Civ) 446, [2009] Ch. 481.

120. *Hosking v Runting* [2005] 1 NZLR 1 (CA).

121. European Convention, *supra* note 83, at art. 8(1) (privacy); *id.* art. 10(1) (expression).

122. *Id.* art. 9(1).

however, expressly subject to derogation when it is necessary to do so “in a democratic society” for a number of important social, economic, and moral reasons including, for example, the public interest in “national security,” the “public safety,” “the protection of public order,” “health or morals,” and “the rights and freedoms of others.”<sup>123</sup> As written, all these rights recognized by the European Convention could be seen as protected only against the actions of the state, as in the Bill of Rights of the United States, but it was soon authoritatively determined that the states that are parties to the Convention were also required to protect these rights against invasion by private persons.<sup>124</sup> Accordingly, as difficult as it might be to determine when a state might derogate from such rights for important public reasons, it has now become necessary for the courts to deal also with what happens if the exercise of one right guaranteed by the Convention, say the freedom of expression of one person, was challenged by another person as a violation of his right to privacy, which is also guaranteed by the Convention.

How, then, is one to balance the conflicting value of these rights as well as all the other social, economic, and moral interests of the state that are likewise relevant in a world of expressly defeasible rights? If that were not enough, the task became even more difficult when, undoubtedly prompted by the tragic death of Princess Diana in 1997, the Parliamentary Assembly of the Council of Europe a year later adopted a resolution declaring that the rights of freedom of expression and privacy are of equal value,<sup>125</sup> a position that was subsequently embraced by the European Court of Human Rights.<sup>126</sup> It is the need to meet this challenge that has led European courts to resort to some kind of public interest or concern test. I have examined elsewhere at some length and in greater detail how European courts have sought to devise a method for deciding between two important interests of equal value.<sup>127</sup> There is accordingly no need to do more than summarize those developments

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123. *Id.* arts. 8–9.

124. *See, e.g.,* A. v. United Kingdom, App. No. 25599/94, 27 Eur. H.R. Rep. 611 (1998).

125. Eur. Parl. Ass., *Right to Privacy*, 1998 Sess., Res. No. 1165, ¶ 11 (June 26, 1998). The text of the resolution leaves no doubt that it was largely prompted by Princess Diana’s death.

126. *See, e.g.,* von Hannover v. Germany, App. No. 59320/00, 40 Eur. H.R. Rep. 1, ¶ 42 (2004).

127. *See* George C. Christie, *Freedom of Expression and Its Competitors*, 31 CIV. JUST. Q. 466 (2012), for a brief recent discussion. For a more detailed and far-ranging discussion, see GEORGE C. CHRISTIE, *PHILOSOPHER KINGS? THE ADJUDICATION OF CONFLICTING HUMAN RIGHTS AND SOCIAL VALUES* (2011).



here. To say that one must resort to a balancing process does not get one very far. How to get past the equipoise situation is the obvious difficulty, and it is to solve that problem that the public interest test has been adopted. Since all the cases thus far have involved someone who claims that his right of privacy has been invaded by another person's exercise of his right of freedom of expression, the European courts have constructed a jurisprudence under which, once the plaintiff has made a plausible privacy claim, the burden shifts to the defendant to justify the exercise of his freedom of expression. The inevitable effect, in any close case, is always to give some degree of primacy to the privacy interest and thus require the defendant to justify his expression by showing that his expressive activities further some public interest.

These European developments are of course in marked contrast to the historical primacy of freedom of expression that has long prevailed in common law countries in which, if the expression were true or merely opinion, or even just vitriolic, it would normally triumph over privacy so long as the expression in question concerned matters that occurred in public or involved information that was lawfully obtained.<sup>128</sup> The sweeping suggestion in section 652D of the *Restatement (Second) of Torts* that this might not now be the case in the United States because of the developing law of privacy was no longer plausible as the Supreme Court of California,<sup>129</sup> a leading advocate of the position taken by the *Restatement (Second)*, grudgingly admitted in the aftermath of *The Florida Star*.<sup>130</sup> I use the word grudgingly because, in accepting that several of its recent privacy decisions were clearly inconsistent with contemporary constitutional law, the Supreme Court of California indicated that, in its view, the constitutional limitations on the reach of privacy law only applied to the divulging to a greater public of matters recorded in public records or, if not contained in public records, were otherwise of public concern or interest.<sup>131</sup> Whether such a logically narrow construction of *The Florida Star* case can plausibly be supported is somewhat debatable. As indicated earlier,<sup>132</sup> the Court in that case ruled in favor of the newspaper despite the fact that it was agreed that the notice with the plaintiff's name that was posted in the pressroom of

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128. See Christie, *supra* note 12, at 466, 468.

129. Gates v. Discovery Commc'ns, Inc., 101 P.3d 552 (Cal. 2004).

130. *Id.* at 562.

131. *Id.* at 561–62.

132. See *supra* text accompanying note 103.

the sheriff's office was accompanied by another notice posted in the pressroom expressly declaring that the names of victims of sexual offenses were "not matters of public record"<sup>133</sup> and were not to be published.

Regardless of whether the California court's narrow reading of *The Florida Star* case is truly plausible, its attempt to narrow the reach of *The Florida Star* by preserving some restrictions on the publication of lawfully acquired true but embarrassing information about another is certainly clear evidence of the continuing pressure to force some types of challenged expression to meet a public interest or concern test. We have seen that possibility arguably supported in the area of intentional infliction of emotional distress by *Snyder v. Phelps* when the plaintiff might be said to be a private figure. We also saw that possibility in the defamation area in the statements of those Justices who are unhappy with the extension of the reach of *New York Times v. Sullivan* and wish to reinstate many of the aspects of the common law of defamation. And finally, as we have just noted, the California Supreme Court has opined that there still are situations where true statements can be challenged on privacy grounds if they do not touch on matters of "public concern." Here again there is some support for that view, quite possibly unintended, in the United States Supreme Court's own decisions. In *Bartnicki v. Vopper*,<sup>134</sup> the Court refused to allow a tort remedy against someone who had lawfully obtained and then broadcast the tape of a conversation between two union officials engaged in a contentious labor dispute with a local school board that had been illegally recorded by a third party because the conversation involved an issue of public concern.<sup>135</sup> While the Court has never recognized that someone who illegally obtained information about another can escape liability for disclosing it to the world and has recognized that confidentiality agreements even regarding matters of obvious public concern are enforceable,<sup>136</sup> *Bartnicki* leaves open some extremely important as well as interesting questions. To what extent can one publish to the world information he has obtained legally even if he knows it has been initially illegally acquired by (unknown) third parties? Only if it concerns a matter of public concern? Regardless of whether it concerns a matter of

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133. *The Florida Star v. B.J.F.*, 491 U.S. 524, 546 (1989) (White, J., dissenting).

134. 532 U.S. 514 (2001).

135. *Id.* at 525.

136. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–71 (1991).

public concern? Or should he be prevented from publishing it at all? Even to his spouse?

What we do know with some degree of certainty is that someone who lawfully acquires information that has been illegally acquired by an independent third party can publish it to the world barring the most exigent circumstances. The *Pentagon Papers*<sup>137</sup> case and the dicta in *The Florida Star* strongly support that view. That conclusion is supported by the traditional doctrine that, even if the publication of information may be punishable, there may not be a “prior restraint” on the initial publication of that information.<sup>138</sup> It is also supported by the Court’s decision that someone who accidentally overhears a conversation containing confidential financial information may legally disclose that information to the world.<sup>139</sup> In *Barnicki*, however, the Court, as we have seen, left open the question not only of whether there might be some sort of tort remedy for the republication of illegally acquired information if the information did not pertain to a matter of public concern but also the question of whether the publisher might be liable to criminal sanction as well. In point of fact, the intentional disclosure of any intercepted wire, oral, or electronic communication by someone who knows that the information has been illegally obtained is now ostensibly subject to criminal prosecution.<sup>140</sup> There does not seem to be any case law on what happens if there are no intellectual property issues involved nor any connection with any criminal activities, but rather it is merely the embarrassing private content of the alleged wrongful publication that is the basis of the complaint. Perhaps even more germane is the 2006 amendment to the interstate stalking statute to cover the causing of “substantial emotional distress” not only by physical stalking, which has often been treated as an invasion of privacy,<sup>141</sup> but also by the use of the mail or interactive internet services.<sup>142</sup> In *United States v. Cassidy*,<sup>143</sup> a criminal prosecution seeking to apply the amended stalking statute to postings on Twitter and internet websites was dismissed on constitutional grounds. Unlike the

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137. N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

138. *Id.* at 714.

139. *Dirks v. SEC*, 463 U.S. 646, 661–64 (1983).

140. 18 U.S.C. § 2511(1)(c) (2012).

141. *See, e.g., Galella v. Onassis*, 487 F.2d 986, 994–95 (2d Cir. 1973).

142. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 107, § 2261A(2), 127 Stat. 54, 77 (codified as amended at 18 U.S.C. § 2261A(2) (2012)).

143. 814 F. Supp. 2d 574 (D. Md. 2011).

*Cassidy* case, however, in which the “victim” was a well-known figure, the statute was held to be applicable in a subsequent case in which not only was the victim a private person but the messages in question could easily be considered to be attempts to extort money from her as well as threats of violence.<sup>144</sup> One would think that an attempt to prosecute someone for using the mail or the internet to inflict emotional distress on a private figure, where there was neither any threat of violence nor other criminal behavior, would certainly fail.

The battle between freedom of expression and privacy is an inevitable one. It becomes increasingly important legally because, in the modern world, many thoughtful people believe not only that the state should itself avoid infringing the recognized legal rights of its citizens but also that it must protect the emotional tranquility of private people from trauma inflicted by other people’s exercise of their freedom of expression. One can say that in the United States, at least at present, primacy is given to expression when it comes in conflict with privacy or other interests involving emotional tranquility.<sup>145</sup> How great that primacy will continue to be or should be is the matter in dispute. As we have noted, in Europe this preference is reversed.<sup>146</sup> If expression receives considerable legal primacy in the United States, it is not because expression is a more important social or moral value than is privacy or emotional tranquility but rather because, for the body politic, the political importance of expression is a more important concern. It is said that, in contrast, expression does not get the same primacy in the civil law countries of Europe as it does in the United States because, in Europe, notions of personal honor have historically often trumped

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144. Decision and Order on Defendant Sayer’s Motion to Dismiss Count One of the Indictment and Defendant Thomas’s Motion to Dismiss Count Eight of the Superseding Indictment at 3–6, *United States v. Sayer*, No. 2:11-CR-47-DBH (D. Me. May, 15 2012), ECF No. 94; *see also* Memorandum Opinion and Order, *United States v. Shrader*, No. 1:09-cr-00270 (S.D. W. Va. Feb. 8, 2010), ECF No. 42, 2010 WL 503092.

145. It is this primacy to freedom of expression that gave rise in 2010 to federal legislation that no foreign judgment for defamation shall be recognized in United States courts if the defamation law of the foreign jurisdiction does not provide “at least as much protection for freedom of speech and press . . . as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located.” Securing the Protection of Our Enduring and Established Constitutional Heritage Act, Pub. L. No 111-223, sec. 3, § 4102(a)(1)(A), 124 Stat. 2380, 2381 (2010) (codified as amended at 28 U.S.C. § 4102(a) (2012)).

146. *See supra* note 127 and accompanying text.

freedom of expression.<sup>147</sup> A recent extension of that perspective is the decision by a Grand Chamber of the Court of Justice of the European Community that a person could require Google to delete links to material in the public domain produced by Google's search engine.<sup>148</sup> In that case the complainant wanted Google to delete, in its response to a search using his name, links to articles published twelve years earlier in a large circulation newspaper reporting that his name had appeared in connection with "attachment proceedings for the recovery of social security debts."<sup>149</sup> That right could be overridden if "it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question."<sup>150</sup> While it is troubling that someone could be punished for the publication of information not generally known but already published and discoverable by anyone willing to take the trouble of accessing governmental or private archives open to public access, the decision of the European Court of Justice is unfortunately certainly compatible with the California Supreme Court's application of section 652(D) of the *Restatement* (Second) of *Torts* in the *Briscoe* case that we have discussed earlier.<sup>151</sup>

#### V. THE CASE FOR THE STRONGEST POSSIBLE PROTECTION OF FREEDOM OF EXPRESSION

The strongest policy argument for according the greatest practically possible freedom to expression that is not false is that, without freedom of expression, a truly democratic free society cannot exist. That necessity is conceded by the people who would prefer a more restrictive approach by their agreeing that "political speech" should be given

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147. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004).

148. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos* (May 13, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN>, archived at <http://perma.cc/VV7B-6CQX>.

149. *Id.* ¶ 98. The court acknowledged that the article could still be publicly accessible through the newspaper's website. *See id.* ¶¶ 85, 87.

150. *Id.* ¶¶ 97, 99. According to Google's website, as of April 14, 2015, it had received 239,337 requests for removal, and it had evaluated 867,930 URLs that had been requested to be removed, of which it had removed 41.5% and not removed 58.5%. *European Privacy Requests for Search Removals*, GOOGLE, <http://www.google.com/transparencyreport/removals/europeprivacy/> (last updated Apr. 14, 2015), archived at <http://perma.cc/Z5NP-P3CP>.

151. *See discussion supra* notes 110–14.

greater leeway. But who is to determine what are the outer limits of political speech? Other types of expression that it has been accepted might, as a general matter, qualify as topics of “public interest” include scientific expression, educational expression, and artistic expression.<sup>152</sup> These terms are not self-defining. Determining what expression is actually scientific expression or what is legitimate educational expression or really artistic expression is not an easy task. The criterion of contribution to “a debate of general interest” enunciated by the European Court of Human Rights is hardly more helpful.<sup>153</sup> The problem of who decides is fraught with difficulties. If one is trying to be as objective as possible, one might try to find out by empirical research what the “public” is actually interested in or concerned about. Presumably that is what Justice Powell was driving at in *Gertz* when he separated the universe of defamation plaintiffs into public officials and public figures on the one hand and private figures on the other.<sup>154</sup> Surely he was assuming, with some justification, that the concept of public notoriety was a more objective criterion than what was a matter of public interest or concern.

One might also say that, in the world in which we live, the fact that someone goes to the trouble of engaging in public discourse with people who he believes might be interested in what he may say is evidence that he thinks that there is a public demand for the information that he is providing, especially if he is seeking compensation for his efforts. In Europe, including the United Kingdom, that objection has been preempted by the judicial declaration that the fact that the public, however defined, is interested in some information does not mean that the publication of that information or the expression of those ideas is in fact in the public’s interest.<sup>155</sup> It is for the courts to determine what is “really” or “truly” in the “public” interest.<sup>156</sup> It is hard to believe that

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152. *Campbell v. MGN Ltd.*, [2004] UKHL 22, [148], 2 A.C. 457 (appeal taken from Eng.) (Lady Hale).

153. *See von Hannover v. Germany*, App. No. 59320/00, 40 Eur. H.R. Rep. 1, ¶¶ 65, 76 (2004).

154. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341–48 (1974).

155. *Jameel v. Wall Str. Journal Europe Sprl.*, [2006] UKHL 44, [49], [2007] 1 A.C. 359 (appeal taken from Eng.) (Lord Hoffman). Insofar as defamation is concerned, the public interest and the entrusting of that issue to the judiciary has now been incorporated in section 4 of Defamation Act 2013. Defamation Act 2013, c. 26, § 4 (U.K.). The Act also eliminated the requirement that actions for defamation should be tried with a jury unless “the court orders otherwise.” *Id.* § 11.

156. *See, e.g., Jameel*, [2006] UKHL 44, [49]. *See also von Hannover v. Germany*, App.

the courts are adequate to the task and particularly so in a modern nation state that is constantly becoming more and more diverse. It is certainly abundantly clear that the content of what are considered to be matters of scientific, educational, or artistic interest or of “legitimate” public interest, taken in its broadest sense, changes over time, sometimes over a relatively short period of time. In upholding the confiscation of “obscene” paintings, in 1981, that the European Court of Human Rights agreed might no longer be considered obscene at the time it rendered its decision in 1988, it noted that “the requirements of morals var[y] from time to time and from place to place, especially in our era.”<sup>157</sup> This changing public and judicial notion of what is obscene is only one instance. As noted at the very beginning of this Article, it is hard to believe that someone could be sent to jail for making the statements for which Chaplinsky was convicted.<sup>158</sup>

The most that even the most conscientious judges, in large part drawn from the “respectable” elites of society, can do is reflect the

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No. 59320/00, 40 Eur. H.R. Rep. 1, ¶¶ 76–77 (2004), where the Court rejects the German courts’ evaluation and made its own categorical evaluation. In that case the Court held that photographs of Princess Caroline of Monaco taken in public places, such as while she was on vacation, invaded her privacy. In *von Hannover v. Germany* (No. 2), App. Nos. 40660/08, 60641/08, 55 Eur. H.R. Rep. 15 (2012) (Grand Chamber), photos of her taken while she was skiing on vacation in Switzerland escaped condemnation because they were published as part of a story about what the children of Prince Ranier, the ruler of Monaco, were doing while he was ill. One daughter stayed home with the prince while Caroline and her brother went on vacation.

157. *Müller v. Switzerland*, App. No. 10737/84, 13 Eur. H.R. Rep. 212, ¶ 35 (1988). The painters had been convicted, and the confiscation of the paintings upheld, by a court in Fribourg in 1982, despite the fact that similar paintings had already been exhibited in Basel. The European Court also noted that some four months before its judgment in May, 1988, the paintings had been returned to the artists. This changing notion of what amounts to “art” is also illustrated by *Vereinigung Bildender Künstler v. Austria*, App. No. 68354/01, 47 Eur. H.R. Rep. 5 (2007). The dissent of Judge Loucaides is a good illustration of the subjective nature of the decision-making process of these cases. The law in the United States is more favorable to the defendant in the sense that to succeed the prosecution must prove to a jury beyond a reasonable doubt (1) that the challenged work appealed to prurient interest, (2) that it was patently offensive, and finally (3) that a reasonable person would find such works, taken as a whole, without literary, artistic, or scientific value. That many or a majority of people would find that the work did not possess such value is not the issue. *Pope v. Illinois*, 481 U.S. 497, 500–01 & n. 4 (1987). I for one would agree with Justice Brennan, who dissented in part, “that any regulation of such material with respect to consenting adults suffers from the defect that the concept of ‘obscenity’ cannot be defined with sufficient specificity and clarity.” *Id.* at 507 (Brennan, J., dissenting) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 103 (1973) (Brennan, J., dissenting)) (internal quotation mark omitted).

158. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942); see also text accompanying note 9.

mores of the social classes from which they are drawn and in which they are educated and spend their professional and social lives. What they would most likely be doing, despite their best intentions, is imposing a certain notion of political correctness on society at large, something like, but hopefully less corrosive than, the frequent attempts in the not too distant past to impose college speech codes.

There is a final and perhaps more telling practical objection. With the rise of the internet it will become increasingly difficult and very often truly impossible to prevent the distribution of offensive expression. Notions such as the exalted function of the press as the public watchdog to whom some greater privilege of expression might be given are not only unwise but are likely to be inadequate to prevent distribution. Moreover, such distinctions require the courts to decide whether blogs or “chat rooms” are really media. It is chimerical to believe that they could accomplish that task without making some extremely arbitrary distinctions. In this regard one should note that there are social sanctions that can discourage offensive speech, sometimes even more effectively than legal sanctions. Attempts by Phelps to promulgate his “crusade” by displaying vulgar signs at funerals have increasingly been rendered ineffective by counter demonstration, as when his group tried to demonstrate at Elizabeth Edwards’ funeral in Raleigh, North Carolina.<sup>159</sup> Although the self-described Nazi march in Skokie was given permission to proceed, as it should have been, the march was canceled when it became clear that a much larger counter-demonstration would make the Nazis look ridiculous.<sup>160</sup>

I agree that there must be some restrictions on public expression even of information that is not false and has not been illegally acquired. Most people in advanced societies take it for granted that the state should prohibit threats of immediate violence that are coupled with an apparent ability to carry out that threat. There are likewise strong moral and other policy reasons to protect children from severe emotional distress caused by outrageous behavior, including verbal behavior. There are likewise good reasons to prohibit outrageous verbal behavior towards an adult that the speaker knows is mentally handicapped, just as would be the case if a person, knowing that a

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159. Andrea Weigl, ‘Line of Love’ Overwhelms Tiny Turnout of Protestors, NEWS & OBSERVER, Dec. 12, 2010, at 7A.

160. Douglas E. Kneeland, *Nazis Call Off March in Skokie; Leader Says Drive Was a Success*, N.Y. TIMES, June 23, 1978, at A10.



person is handicapped, tried to defend his carelessly injuring that person by asserting that his conduct would have been reasonable if the injured person had not been physically handicapped. Furthermore, the fact that the expressive activities take place in public space does not mean that there may not be reasonable time, place, and manner for regulation of that expression. All people have the right to use public space and to observe what goes on there, but no one has the right to monopolize public space. We also do and should punish the unauthorized publication of information that someone has obtained illegally or through a confidential or fiduciary relationship. Material about an individual contained in public records, if it has been obtained under an implied promise of confidentiality, should not be open to the world, and public employees who are responsible for public disclosure are quite properly subject to sanction.<sup>161</sup> In a rapidly changing world, it is hard to say much more at a general level beyond, to paraphrase and broaden Justice Thurgood Marshall's declaration for the Court in *The Florida Star*, that "punishment may lawfully be imposed, if at all," on someone who "publishes truthful information" (or matter that is not false) which has been "lawfully obtained" "only when narrowly tailored to a state interest of the highest order."<sup>162</sup>

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161. In this regard it should be noted that the sheriff's department responsible for allowing B.J.F.'s name to be made public settled her action against it. See *supra* note 105.

162. *The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989).