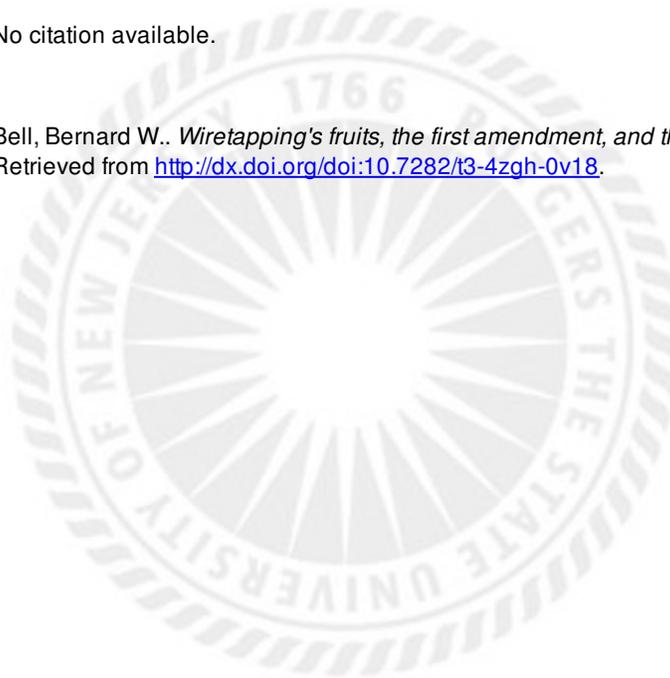


## Wiretapping's fruits, the first amendment, and the paradigms of privacy

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## **Wiretapping's Fruits, the First Amendment, and the Paradigms of Privacy**

**by Bernard W. Bell**

The Supreme Court's, and the legal system's, treatment of privacy can profitably be explored in terms of five paradigms. These paradigms focus on physical location, the means of communication, the means of intrusion, subject matter, and confidential relationships. The reliance on some, but not others in particular contexts serves to determine the results that the Court reaches (or that statutes ordain), and the Court has systematically favored particular paradigms in ways that often make privacy protections porous.

After setting forth the five privacy paradigms, I will examine the Supreme Court's decision in *Bartnicki v. Vopper*.<sup>1</sup> There the Court addressed the constitutional validity of statutes barring individuals who receive information derived from illegal wiretaps from disclosing that information. The Court took a law premised on one privacy paradigm, namely the means of communication paradigm, and introduced a test premised upon a competing paradigm, the subject matter paradigm. Privacy was defined not in terms of the "private" nature of the means of communication employed, but in terms of the "public" nature of the matters discussed. The choice the Court made between the two warring paradigms, one embodied in the wiretapping statutes and the other embodied in the Court's First Amendment doctrine, was significant in itself. In addition, the pre-eminence given to the subject matter analysis by *Bartnicki v. Vopper* threatens to remove any real constraint on use of information obtained from those who illegally intercept conversations, because of the limited conception of "private" matters in the Court's First Amendment doctrine. However, an alternative approach to distinguishing "public" and "private" matters offers more protection for those engaged in communications intercepted by miscreants and delivered to the press.

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<sup>1</sup> 532 U.S. 514, 542-43 (2001)

## **I. The Paradigms of Privacy**

The myriad federal, state, and local laws that protect “privacy” do not reflect any comprehensive definition of the concept. Instead they incorporate a variety of more limited privacy paradigms, each of which offers some protection based upon incomplete definitions of privacy. Each paradigm ultimately misses important aspects of our conception of privacy. Moreover, these paradigms differ radically and can often suggest conflicting resolutions of privacy questions. Courts or legislatures may tend to prefer some of the paradigms to others, with significant doctrinal consequences. The paradigms most useful in analyzing privacy law are those of: (1) location, (2) means of communication, (3) means of intrusion, (4) subject matter, and (5) confidential relationships. I will address each in turn.

### **A. The Location Paradigm**

The legal system sometimes defines the entitlement to privacy in terms of the location of an individual or a prospective intruder. Thus, a couple’s argument may be viewed as private if it occurs in an area from which others are excluded, but may be viewed as public if it takes place on a public sidewalk. In some senses then, people can determine whether particular matters are “private” or “public” by deciding where to locate themselves when engaging in certain activities.<sup>2</sup>

Thus, the first of the five privacy paradigms I will explore is the paradigm of location. This paradigm has dominated the Supreme Court’s conception of privacy in a number of respects. Location may help define privacy in two ways. First, the Court, and the legal system more generally, may enable citizens to limit others’ access to them or protect certain personal information by allowing the individual to exclude potential intruders from a particular physical space. Thus, the legal system might focus on defining “private” and “public” spaces based on legal and social norms. It may then protect privacy by precluding individuals from intruding into

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<sup>2</sup> See, e.g., HANNAH ARENDT, *THE HUMAN CONDITION* 38-78 (1958) (“The only efficient way to guarantee the darkness of what needs to be hidden against the light of publicity is private property, a privately owned place to hide in.”).

private spaces without substantial justification. Conversely, when an individual conducts his or her activities in a public place, the legal system may deem those activities “public” in the sense that those who view and discuss those activities breach no legally-recognized privacy interest.

The Supreme Court’s Fourth Amendment jurisprudence heavily focuses on the location paradigm; it protects privacy largely by protecting private property.<sup>3</sup> The Court’s definition of the “expectations of privacy” whose breach must be justified by probable cause, a warrant, or the equivalent (*i.e.*, some exception to the warrant and probable cause requirements) relies heavily on location.<sup>4</sup> For example, garage, store, and commercial warehouse interiors not visible from outside are considered locations in which their owners have a reasonable expectation of privacy (even though the activities that routinely take place on such premises might not be considered “private” in and of themselves). But that expectation of privacy exists solely because of the areas’ inaccessibility to the public.<sup>5</sup> A location can also be defined in terms of personal property; thus a person may have a reasonable expectation of privacy in the contents of a suitcase, so long as others cannot perceive the contents of the suitcase without opening it.<sup>6</sup>

More controversially, some matters are deemed public because they take place in locations the Court defines as public. For example, homeowners have no expectation of privacy in trash left in opaque bags at street curbs for collection by sanitation workers. The Court viewed such bags, and their contents, as “public” because any member of the public can take physical

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<sup>3</sup> See *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“[O]ur Fourth Amendment jurisprudence was tied to common-law trespass.”).

<sup>4</sup> Fourth Amendment analysis involves a two-step process. First, a court must determine whether law enforcement officers have breached any reasonable expectation of privacy — in other words, the court must determine whether the investigative target has any cognizable privacy interest at all. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). If the court concludes that the target did possess a legitimate expectation of privacy, the court must then decide whether the Fourth Amendment permits the breach of that privacy expectation — either because the police have secured a warrant after establishing probable cause, or because the breach fits within one of numerous judicially-recognized exceptions to the warrant and probable cause requirements. *Id.* at 367.

<sup>5</sup> *Taylor v. U.S.*, 286 U.S. 1, \_\_\_ (1932)(garage); *Amos v. U.S.*, 255 U.S. 313, \_\_\_ (1921)(store); See *v. City of Seattle*, 387 U.S. 541, \_\_\_ (1967)(warehouse); WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 3.2(a) (3d ed. 2000).

<sup>6</sup> See *U.S. v. Jacobson*, 466 U.S. 109, 123-24 (1984)(distinguishing opening suitcase without a warrant from having a trained dog sniff the suitcase from outside to determine the presence of contraband narcotics). See pages \_\_\_-\_\_\_ *infra* (discussing the human body as a protected “location”).

possession of the bag and rummage through it.<sup>7</sup> The homeowner, then, relinquishes any right to privacy in the information contained in such refuse, no matter how sensitive in terms of subject matter,<sup>8</sup> by taking the bag from a private place and leaving it in a public one.<sup>9</sup> Similarly, homeowners have no expectation of privacy in fenced-in back yards obscured from public view at street level. The yards are visible from publicly accessible space, namely airspace controlled by the Federal Aviation Administration (“FAA”), and thus law enforcement officers can use satellites, airplanes, or hovering helicopters to view and photograph such enclosed areas.<sup>10</sup>

The treatment of electronic tracking devices (like beepers or global positioning system (“GPS”) monitoring devices), provides a third example of the Court’s approach. Law enforcement officers may place such devices on items in an individual’s possession and monitor the device as long as the item to which the device is attached remains in a public place.<sup>11</sup> However, once the device reveals information about events in a private location, even trivial information such as opening a container of drug precursors, such monitoring violates an expectation of privacy.<sup>12</sup>

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<sup>7</sup> See *California v. Greenwood*, 486 U.S. 35,. For a contrasting approach, see *State v. Hemepele*, 120 N.J. 182 (1990)(search of opaque garbage bags without warrant or reliance on an exception to the warrant requirement violated the New Jersey Constitution).

<sup>8</sup> In fact, some courts have noted that residential refuse often contains information that we consider very private. *State v. Hemepele*, 120 N.J. 182, 201, 576 A.2d 793 (1990); *State v. Tanaka*, 67 Haw. 658, 662, 701 P.2d 1272 (1985).

<sup>9</sup> *Greenwood* illustrates another aspect of the Courts doctrine, namely that the Court independently defines expectations of privacy rather than incorporating legal entitlements established by statutes, regulations, or common law. Thus, in *Greenwood*, the Court accorded no significance to a local regulation prohibiting individuals from rummaging through other’s garbage. 486 U.S. 43-44. (Arguably, however, such regulations which are typical in many areas, were initially enacted more out of a concern for public health than privacy. *State v. Hemepele*, 120 N.J. at 808. The Court’s approach contrasts to its approach in determining which rights constitute “property” for purposes of the Due Process Clause. See *Board of Regents of State College v. Roth*, 498 U.S. 564, 577 (1972).

<sup>10</sup> See *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207, 215 n.3 (1986); *Dow chemical Co. v. United States*, 476 U.S. 227 (1986); CLIFFORD S. FISHMAN & ANNE T. MCKENNA, *WIRETAPPING AND EAVESDROPPING* § 29:16 (2d ed. 1995).

<sup>11</sup> *United States v. Knotts*, 460 U.S. 276, 281-83 (1983) (treating surveillance of a vehicle via a secretly planted transmitter as the equivalent of surveillance by actual people along the vehicle's route). For a contrasting view, see *State v. Jackson*, 76 P.3d 217 (Wash. S. Ct. 2003).

<sup>12</sup> *United States v. Karo*, 468 U.S. 705 (1984).

Note that in the Court's application of its location analysis, the location of the intruder, not of his or her subject, is critical. Thus, if the intruder is normally in a location considered private, in terms of an ability to preclude unwanted guests from entering, that person nevertheless lacks a reasonable expectation of privacy if he or she is visible from a public location (*i.e.*, a location accessible to others or the general public). For example, if a homeowner stands in front of an open window visible from the street dressed only in underwear, he or she has no expectation of privacy.

This approach has largely been adopted with regard to non-governmental intruders as well, though the Supreme Court's role in crafting legal doctrines in this context has been quite modest. The common law tort action for intrusion into seclusion reflects a narrow location based approach.<sup>13</sup> Thus, for instance, when journalists or private snoops breach private property, they will generally be held to have invaded the property owner's privacy.<sup>14</sup> When, however, an individual is either in a public place or observable from one, courts have generally held that he or she can assert no right of privacy.<sup>15</sup> Indeed, even when the information is not gained by

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<sup>13</sup> RESTATEMENT SECOND OF TORTS § 652B. While locational concepts are central in the text of the *Restatement* provisions (*e.g.*, "seclusion" and "solitude"), the privacy vindicated by the cause of action is not solely defined in terms of locations. In particular, the tort may result from intrusion into "private affairs or concerns." For a critique of the emphasis placed upon location in intrusion cases, see Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, \_\_\_ (1989) ("The privacy protected by the common law tort cannot be reduced to objective facts like spatial distance or information or observability; it can only be understood by reference to norms of behavior.")

<sup>14</sup> *Miller v. Nat'l Broad. Co.*, 232 Cal. Rptr. 668, 677-78, 684-85 (Cal. Ct. App. 1986) (allowing plaintiff's claim against a television crew who entered her home without permission to film emergency personnel attempting to revive her husband); see *Wilson v. Layne*, 526 U.S. 603 (1999) (holding that police with warrants may not invite third parties into searched premises).

The intrusion into seclusion cause of action may offer limited privacy protection because private areas may be somewhat accessible to people who remain in public areas and use their natural or mechanically enhanced powers of observation.

<sup>15</sup> See *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 490-92 (Cal. 1998) ("The tort [of intrusion] is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place ...."); see also *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1280-81 & n.20 (Nev. 1995); Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1036-41 (1995). See generally C. THOMAS DIENES ET AL., *NEWSGATHERING AND THE LAW* §§ 12-2, 12-4(c)(2) (2d ed. 1997).

Thus, the location-focused quality of common-law intrusion claims makes extremely difficult successful assertion of a privacy cause of action against extensive and intrusive monitoring that occurs in public places. See Bernard W. Bell, *Theatrical Investigation: White-Collar Crime, Undercover Operations, And Privacy*, 11 WM. & MARY BILL RTS. J. 151, \_\_\_ n.72 (2002).

observation from a public place, the fact that it could be so garnered is sufficient for the information to be considered “public.” Note that the Supreme Court’s expectation of privacy focuses on whether information is *exposed* to public view, not whether the information is *gained* from public view.<sup>16</sup> So, for example, one’s address is not private because it is exposed to the public, even if a person discovers one’s address by some other means.<sup>17</sup> A more privacy-protective location approach might reject such an approach.<sup>18</sup>

Location-based privacy approaches defining the scope of privacy need not exclusively turn on real property interests.<sup>19</sup> We may consider certain physical spaces as “private” ones in which occupants have some “expectation of privacy” even though they lack any ownership interest. For example, use of hidden cameras in public bathroom stalls constitutes a search requiring probable cause and a warrant (or the equivalent) because users of such facilities possess a reasonable expectation of privacy in the stall while they occupy it, despite their lack of any real property claim to dominion over the stall.<sup>20</sup>

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<sup>16</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection”).

<sup>17</sup> See, *Remsberg v. Docusearch, Inc.*, 816 A.2d 1001 149 N.H. 148 (2003) (holding that where a person’s work address is readily observable by members of the public, the address cannot be private and no intrusion upon seclusion action can be maintained, even if the intruder obtains the information from the plaintiff by deceit rather than by observing her in public places). See generally, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 855 (5th ed.1984); *Webb v. City of Shreveport*, 371 So.2d 316, 319 (La. Ct. App.1979). Note that in interpreting the privacy exemption to the Freedom of Information Act, the U.S. Supreme Court has treated addresses as private, but largely because it would enable intrusions, in the form of mass mailings, by mass marketers or labor organizers. *United States Department of Defense v. F.L.R.A.*, 510 U.S. 487 (1994); see, *Wine Hobby USA, Inc. v. United States I.R.S.*, 502 F.2d 133 (3d Cir. 1974).

<sup>18</sup> For example, while the United States Supreme Court held that the use of a beeper to track the movements of a car did not violate reasonable expectations of privacy, because law enforcement officers could lawfully follow the car to obtain the same information, the Washington Supreme Court prohibited the practice. The Court explained that even though it might theoretically possible to maintain such surveillance, the beeper (or, more specifically, the GPS tracking device), served as substitute for such demanding and labor-intensive surveillance. *State v. Jackson*, 150 Wash.2d 251, 262, 76 P.3d 217 (2003).

<sup>19</sup> See *Oliver v. United States*, 466 U.S. 170, 183-84 & n.15 (1984)(law enforcement officers may commit the tort of trespass by entering privately-owned open fields without violating the landowner’s reasonable expectation of privacy).

<sup>20</sup> See, e.g., *People v. Dezek*, 308 N.W.2d 652, 655 (Mich. Ct. App. 1981) (recognizing privacy interest in rest stop stalls during periods of occupation); *State v. Casconi*, 766 P.2d 397, 399 (Or. Ct. App. 1988) (“The final bastion of privacy is to be found in the area of human procreation and excretion’ and ‘[if] a person was entitled to any shred of privacy, then it is to privacy in these matters.”) (quoting *Sterling v. Cupp*, 607 P.2d 206 (Or. Ct. App. 1980)

Perhaps more controversially, we may have a small area around us that social custom defines as ours, and that we may ask others to keep inviolate.<sup>21</sup> Thus, by custom, we may view people as intruding when they stand too close in certain situations.<sup>22</sup> Perhaps such an insight would provide a different perspective on certain privacy issues even under a location based approach.

Under the standard property-based location approach, law enforcement officers' surreptitious use of facial recognition technology on streets and in sports stadiums raises no privacy interest, because anyone scanned in such a place is publicly visible.<sup>23</sup> But that conclusion seems counter-intuitive to many. (The conclusion is not necessarily counter-intuitive because such an intrusion should be considered unjustified, but only because the conventional analysis suggests the absence of *any* "intrusion" that even demands justification.) At least prior to September 11, 2001, a chorus of criticism greeted the use of video monitors and facial recognition technology to identify people on public streets.<sup>24</sup>

We might understand the opposition to such surveillance if we focus on the "means on intrusion" paradigm (as I will suggest below).<sup>25</sup> But a sophisticated "location" analysis might also explain the problematic nature of such surveillance techniques — such techniques invade individuals' "space." A camera operator using zoom technology could focus on details observable by the naked eye only if the observer were staring intently at a person from inches away. The camera operator might obtain information that could be gained only by breaching the

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(decided under Oregon state constitution).

<sup>21</sup> See generally Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 971-74 (1989) (discussing the role of the social construct of private space in shaping intrusion law).

<sup>22</sup> ERVING GOFFMAN, *RELATIONS IN PUBLIC* 29-32 (1971).

<sup>23</sup> See Dana Canedy, *Tampa Scans the Faces in Its Crowd for Criminals*, N.Y. TIMES, July 4, 2001, at A1.

<sup>24</sup> Ross Kerber, *Technology & Innovation: Face-Recognition Software Spurs Privacy Fears*, BOSTON GLOBE, Aug. 20, 2001, at C1; Miki Meek, *You Can't Hide Those Lying Eyes in Tampa: Street Cameras Spark a Privacy Debate*, U.S. NEWS & WORLD REP., Aug. 6, 2001, at 20; Rick Montgomery, *Face-Recognition Software Getting a Hard Look Since Sept. 11*, KANSAS CITY STAR, Nov. 25 2001, at A1; Robert O'Harrow Jr., *Matching Faces With Mug Shots; Software for Police, Others Stirs Privacy Concerns*, WASH. POST, Aug. 1, 2001, at A1.

<sup>25</sup> See text accompanying note 95 *infra*.

social recognized “space” individuals are entitled to as the move through public areas.<sup>26</sup>

A location-driven analysis has also strongly influenced the courts’, and the legal system’s, analysis of privacy rights conventionally considered autonomy rights.<sup>27</sup> The legal system may sometimes characterize conduct as public or private depending on the nature of the location in which that conduct occurs. Sometimes non-commercial conduct will more likely be considered

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<sup>26</sup> The same is true with regard to viewing a person in their front yard with binoculars, which under the Court’s analysis surely violates no reasonable expectation of privacy, see *U.S. v. Lee*, 274 U.S. 559 (1927)(dicta); *On Lee v. U.S.*, 343 U.S. 747, 754 (1952)(dicta); *FISHMAN & MCKENNA*, *supra* note 10, § 29:10; Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo’s Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393 nn. 43-44 (2002), but which many see as much more intrusive than some law enforcement actions the Court has recognized as violating a reasonable expectation of privacy. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society*, 42 DUKE L.J. 727, 763 (1993)(chart).

A well-known case, *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765 (N.Y. 1970), provides an example of judicial recognition of our intuition that individuals have a “private” space around them as they navigate the world. The case involved wide-ranging allegations that General Motors had harassed consumer advocate Ralph Nader. Nader alleged that General Motors “hired people to shadow [him] and keep him under surveillance.” One of Nader’s complaints has particular relevance to the current discussion, namely his assertion that his General Motors “shadow” followed him sufficiently closely to observe “the denomination of the bills he was withdrawing from his account.” *Id.* at 771. The court explained that

[a] person does not automatically make public everything he does merely by being in a public place, and the mere fact that Nader was in a bank did not give anyone the right to try to discover the amount of money he was withdrawing. On the other hand, if plaintiff acted in such a way as to reveal [the] facts to any casual observer, then, it may not be said that the appellant intruded into his private sphere.

*Id.* Granted, the court phrased its analysis in terms of the subject matter to which intruders may direct their attention. The passage above suggests that information regarding the amount a person withdraws from his bank account is a private matter. However, if the subject matter, withdrawal of money from a bank, were truly the crux of the court’s analysis, a casual observer who could see the denominations of the currency Nader was withdrawing because of Nader’s carelessness in failing to keep the currency from sight could neither stare at Nader to discover the denominations of the currency Nader held nor communicate information about Nader’s withdrawal of money (even that gained from casual observation). The Court probably did not intend to adopt such a position. Rather, the Court can be viewed as adopting a sophisticated location-based analysis. The Court’s conclusion really embodies the proposition that even in a public place we may have a small area around us that social custom defines as ours, and that we may ask others to keep inviolate. Such personal space enables individuals to access purses or wallets that contain personal, private matters without revealing those matters to others.

<sup>27</sup> While subject to dispute among scholars, many view “privacy” as encompassing not only control of information about or access to persons but also the ability to engage in conduct free from the constraint of others, a type of “liberty” interest. See *Secrets & Lies* n.21; *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977)(“the cases sometimes characterized as protecting privacy have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions”).

private, in the sense of being free from public control, simply because it takes place in certain locations, most notably the home.<sup>28</sup> *Stanley v. Georgia*<sup>29</sup> provides the classic illustration. In *Stanley v. Georgia*, the Supreme Court precluded the government from enforcing laws prohibiting possession of obscene material against a man who held such proscribed obscenity within the confines of his home. The Court held that the government could generally prohibit possession of obscene materials outside the home and could punish acquisition of such materials — even if intended for use in the home — but could not prosecute the homeowner for possession once he had brought the contraband inside his home.<sup>30</sup> As the Court explained, "whatever may be the justification for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."<sup>31</sup>

As a second illustration of the relevance of location in defining spheres of autonomy, consider two United States Supreme Court cases from the 1960's. In *Robinson v. California*,<sup>32</sup> the Court found unconstitutional a California statute criminalizing narcotics addiction. Admittedly, the Court did not establish a constitutional right to use narcotics at home. The decision turned on the Court's conclusion that the Constitution precluded the state from criminalizing a "status" rather than "conduct." However, in *Powell v. Texas*,<sup>33</sup> the Court refused

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<sup>28</sup> However, when the conduct a resident engages in at home becomes commercialized, courts often consider the conduct to have been transformed from "private" to "public." *See, e.g., State v. Mueller*, 671 P.2d 1351, 1360 (1983) (holding that prostitution occurring within a private residence is not protected by Hawaii's constitutional right of privacy). *Compare Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975), *with Belgarde v. State*, 543 P.2d 206 (Alaska 1975) (commercial sale of narcotics to another in home not protected by the Alaska right of privacy). *See generally, United States v. Lewis*, 385 U.S. 206,213 (1966) (explaining that undercover officers' entry into homes, by using deception to obtain the homeowner's consent to enter, did not violate the homeowner's Fourth-Amendment-protected expectation of privacy because the residence had become a locus of commerce)("But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant.")..

<sup>29</sup> 394 U.S. 557 (1969).

<sup>30</sup> *Id.* at 568.

<sup>31</sup> *Id.* at 565.

<sup>32</sup> 370 U.S. 660, 676- 77 (1962).

<sup>33</sup> 392 U.S. 514, 532-37 (1968).

to extend *Robinson* to bar prosecution of a chronic alcoholic for *public* drunkenness. It pointedly noted that Texas had not “attempted to regulate appellant’s behavior in the privacy of his own home.”<sup>34</sup>

Even the Court’s location analysis does not focus merely on physical accessibility. Certain physical locations, like the home, receive special protection.<sup>35</sup> The decision to accord certain locations heightened protection often reflects a recognition that particular locations are intimately associated with certain types of information or activities or with means of communication (and thus reflect the influence of the subject matter and means of communications paradigms in judicial consideration of a particular location’s status).

For instance, Anglo-Saxon tradition has long held the home as particularly sacrosanct,<sup>36</sup>

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<sup>34</sup> *But see*, *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) (“Plainly enough, otherwise illegal conduct is not immunized whenever it occurs in the home. Victimless crimes, such as the possession or use of illegal drugs, do not escape the law where they are committed at home.”), *overruled*, *Lawrence v. Texas*, — U.S. —, 123 S.Ct. 2472, 2478 (2003) (holding that the right to privacy protects those who enter into homosexual relationships and engage in sexual intimacies, noting particularly that the conduct for which the parties were prosecuted occurred in the home, and that the statutory prohibition included sexual conduct “in the most private of places, the home”).

The controversial Alaska Supreme Court decision in *Ravin v. State*, 537 P.2d 494 (Alaska 1975), provides a more striking example of a judicial determination that otherwise illegal activity may become constitutionally protected private conduct because it occurs within the home. In *Ravin*, the court held that, even though the state may prohibit possession and the purchase and sale of marijuana in general, the government may not prosecute an individual for consuming marijuana at home. *Id.* at 511. The court based its decision on the Alaska Constitution’s right of privacy clause, finding that the clause protected consumption of marijuana so long as it occurred in one’s home. *Id.* at 504.

This principle that conduct more easily qualifies as private if it occurs within the home may explain the reaction, hyperbolically described as “global ridicule,” to a Friendship Heights, Maryland ordinance banning smoking at home if secondary smoke escapes the home and poses health risks to those outside. Jo Becker, *Global Ridicule Extinguishes Montgomery’s Anti-Smoking Bill*, WASH. POST, Nov. 28, 2001, at A1; Jo Becker, *Smokers Told to Fetter Their Fumes*, WASH. POST, Nov. 21, 2001, at A1.

<sup>35</sup> Indeed, sometimes a “location” is protected because of the information it is likely to contain, and thus, in a sense subject-matter concerns drive the location analysis. For example, the New Jersey Supreme Court’s rejection of the Supreme Court’s decision that there is no reasonable expectation of privacy in opaque bags of garbage, was based in part on the content of such bags, which often contain documents that say a lot about the individual who discarded them. *State v. Hempele*, 120 N.J. 182, \_\_\_ (“[c]lues to people’s most private traits and affairs can be found in their garbage”); *accord*, *People v. Edwards*, 71 Cal.2d 1096, 1104 (1969).

<sup>36</sup> Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1894 n.18 (1981); *Semayne’s Case*, 77 Eng. Rep. 194, 195 (K.B. 1604); WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 223 (1769).

and the Supreme Court has largely honored that tradition.<sup>37</sup> Indeed recently, in *Kyllo v. United States*,<sup>38</sup> the Court suggested that a more robust location analysis might apply to the home. In holding that warrantless use of a thermal imaging device to identify a dwelling's heat signature (for purposes of determining whether the occupant was cultivating marijuana), the Court recognized an expectation of privacy in an aspect of the home that could be detected from a lawful vantage point. Thus the key aspect of the case was the location of the conduct (the growth of marijuana), not the intruder.<sup>39</sup>

Not only has the Court accorded residences special consideration in the Fourth Amendment context, it has done so in the First Amendment context as well. For example, speakers ordinarily have a right to speak in public places even though their speech may disturb or offend to others.<sup>40</sup> Thus, in public, citizens must "avert their eyes" to avoid such disturbing or offensive speech.<sup>41</sup> However, when the speech enters the home, privacy interests ordinarily prevail over the First Amendment interest of speakers.<sup>42</sup> The home has also sometimes assumed

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<sup>37</sup> See *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (requiring a search warrant to support thermal scanning of a home); *Payton v. New York*, 445 U.S. 573, 589-90 (1980) (asserting that being arrested in your home is such a substantial invasion that a warrant is required, unless there are exigent circumstances); NELSON LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 13-15 (1970). See generally, LAFAVE ET AL., *supra* note 20, § 3.2(c); Jonathan L. Hafetz, "A Man's Home is his Castle?:" *Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 175- 183 (2002).

<sup>38</sup> 533 U.S. 27, 40 (2001).

<sup>39</sup> Granted the opinion may merely have been written in overly broad language, and the fact that thermal imaging technology are not in general use may have been dispositive. Perhaps the Court was merely holding that behaving in a way that exposes information to users of thermal imaging devices does not qualify as exposing those activities "to the public" because thermal imaging devices are not in general public use.

<sup>40</sup> See note 47 *supra*, and accompanying text.

<sup>41</sup> Thus nude scenes from a drive in movie theater are protected by the First Amendment. *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Cohen v. California* 403 U.S. 15 (1971)(First Amendment protected war protester's wearing a jacket saying "Fuck the Draft" in a courthouse, despite the fact that others were offended).

<sup>42</sup> Thus, the Federal Communication Commission can regulate the broadcast of indecent speech because broadcasts "confronts the citizen, not only in public, but also in the privacy of his home, where the individual's right to be let alone plainly outweighs the First Amendment right of intruders." *FCC v. Pacifica Found.*, 438 U.S. 736 (1978). Similarly, states may ban targeted picketing of a particular residence. *Frisby v. Shultz*, 487 U.S. 474, \_\_\_\_ (1988)("An important aspect of such privacy is the protection of unwilling listeners within their homes from the intrusion of objectionable or unwanted speech."). In *Rowan v. Post Office Department*, 397 U.S. 728 (1970), the Court upheld a Postal Service regulation permitting recipients of pandering advertisement to have the Postal Service

importance in the Court’s definition of the scope of decisional autonomy protected by the constitutional “right to privacy,” as we have seen above.<sup>43</sup> Indeed, more broadly, tort law has long recognized the home as special and thus moderated the standard duties that would require homeowners to make their residences safe for visitors.<sup>44</sup>

By contrast, commercial premises are protected by a much less robust conception of privacy.<sup>45</sup> Indeed, the more modest expectations of privacy associated with commercial activity may explain the more limited Fourth Amendment protection applicable in the regulatory environment.<sup>46</sup> However, even some commercial areas may receive special privacy protections, in part perhaps because they serve as a locus for activities viewed as private under other privacy paradigms — that is, they are the locus for confidential relationships (recognized under the confidential relationships paradigm), a means of communication (recognized under the means of communication paradigm), or certain “private” activities (as recognized under the subject matter paradigm).

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require the mailer to remove the addressee’s name from its mailing list. The Court acknowledged that outside our homes, we are often captives who must listen to objectionable speech, but that we need not be captives within our homes. *Id.* at \_\_\_\_\_. See also *Mainstram Marketing Services, Inc. v. FTC* slip op. at 19-20 Dkt No. 03-1429 (10th Cir. February 17, 2004)(upholding constitutionality of the national do not call registries).

<sup>43</sup> See note \_\_\_\_ *infra*.

<sup>44</sup> Thus, visitors to a commercial establishments' public areas and individuals invited onto premises for commercial purposes qualify as "invitees" and have a right to expect landowners to exercise reasonable care. RESTATEMENT (SECOND) OF TORTS § 332 (1977). Social guests to residences, however, must take the premises as they find them, and the host ordinarily must merely disclose dangerous conditions. *Id.* at § 342. Granted, several jurisdictions have jettisoned the rigidity of this traditional approach. Nevertheless, landowners' freedom to act on their own property despite the risk of injury to those who come onto their land is unusually pronounced when the property is a private residence. *Compare id., with id.* at § 332. Generally, the duty to avoid reasonably foreseeable harm to others is much greater than the duty the law imposes on landowners with regard to social visitors. *Id.* at § 342.

<sup>45</sup> See *Dow Chemical Co. v. U.S.*, 476 U.S. 227, 235-39, 237 n.4 (1986) (allowing aerial surveillance of large industrial complex, but suggesting that the result would be different as to "an area immediately adjacent to a private home, where privacy expectations are most heightened").

<sup>46</sup> See Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 389, 436 (2000)(“relational privacy” provides little shelter for “commercial transactions”).

Administrative searches, however, are not invariably limited to businesses. See *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Frank v. State*, 359 U.S. 360 (1959). (Border control searches often involve intrusions upon individuals not engaged in commercial enterprises.) Nevertheless, administrative searches of non-commercial premises are rare.

Medical facilities may receive heightened privacy protections for such reasons, particularly in the First Amendment context. Ordinarily, people in public places “must tolerate insulting, even outrageous speech in order to provide adequate breathing space for the freedoms protected by the First Amendment.”<sup>47</sup> The Supreme Court has said, however, that people in medical facilities, as well as those who enter and leave such facilities are entitled to special protections from the tumult produced by confrontational speech.<sup>48</sup> Thus, states possess enhanced powers to restrict protests near health care facilities, including facilities providing abortion services, to reduce the “potential trauma to patients associated with confrontational protests.”<sup>49</sup> Similarly, book stores and public libraries (or at least the records they maintain) are accorded heightened protection as locations, because they reveal much about the information a person receives. As I shall suggest below, receipt of information in such a context is a form of communication that, under the means of communication paradigm, may well warrant significant

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<sup>47</sup> *Boos v. Barry*, 485 U.S. 312, 322 (1988).

<sup>48</sup> While ordinarily “in public debate . . . citizens must tolerate insulting, even outrageous speech in order to provide adequate breathing space for the freedoms protected by the First Amendment,” *Boos v. Barry*, 485 U.S. 312, 322 (1988); *Cantwell v. Conn.*, 310 U.S. 296, 309 (1940)(citizens on street corners must, in the interest of fostering “enlightened opinion,” tolerate speech that “tempt[s] [the listener] to throw [the speaker] off the street”), states, in the exercise of their police powers, may take focus particularly “on access to health care facilities” and seek to prevent the “potential trauma to patients associated with confrontational protests.” *Hill v. Colorado*, 530 U.S. 703, 715 (2000); see *Madsen v. Women’s Health Center Inc.*, 512 U.S. 753, 772 (1994)(upholding noise restrictions around abortion clinics because noise control is particularly important around medical facilities during surgery and recovery periods).

One striking case in which such a perspective may have made a difference is *Howell v. New York Post*, 81 N.Y. 115 (1993). In that case a photojournalist seeking to photograph Hedda Nussbaum on the grounds of a private psychiatric hospital, the Four Winds Hospital, trespassed onto Four Winds’ grounds to photograph Nussbaum with a telephoto lens. Had New York recognized an “intrusion into seclusion” cause of action, plaintiff, a patient who happened to be near Nussbaum when the photo was taken, might have prevailed. Instead, the plaintiff had to seek to make out a claim for intentional infliction of emotional distress. Trespassing to take a photograph depicting a private person’s residence in a psychiatric facility might appear to qualify as “extreme and outrageous” conduct that would provide a basis for a claim of intentional infliction of emotional distress. However, the court used a location analysis in assessing the severity of the privacy invasion. The Court noted that mere trespass was not sufficiently outrageous to give rise to such a cause of action, and that the fact that plaintiff was photographed outdoors and from a distance weakened her claim. *Id.* at 126.

<sup>49</sup> *Hill v. Colorado*, 530 U.S. 703, 715 (2000); see *Madsen v. Women’s Health Center Inc.*, 512 U.S. 753, 772 (1994); Anita Allen, *Privacy in Health Care*, *ENCYCLOPEDIA OF BIOETHICS* 2064-73 (1995)(“norms of quietude surrounding hospitals reflects the sentiment that patients have heightened physical and psychological needs for solitude and peace of mind”).

privacy protection.<sup>50</sup>

Though I have tried to define location in terms of physical space that can be occupied, the human body could be viewed as a “location” entitled to heightened protection. As Justice Mosk observed, albeit in dissent, in *Moore v. Regents of the University of California*,<sup>51</sup> society’s recognition of individual’s legally protectible interest in his or her own body constitutes society’s acknowledgment of “a profound ethical imperative to respect the human body as a physical and temporal expression of the unique human persona.”<sup>52</sup> Thus, courts have been particularly protective when government seek to effectuate a significant invasion of the human body.<sup>53</sup> Moreover, one common law privacy cause of action focuses specifically upon vindicating people’s interest in preventing the public display of their physical likeness without their consent.<sup>54</sup> Even in the autonomy context, the right of privacy has been justified as essential to allowing individuals to control their own bodies.<sup>55</sup> Individual’s autonomy interests in their

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<sup>50</sup> *Tattered Cover, Inc. v. City of Thornton*, 44 P.2d 1044 (2002); David Streitfeld & Ann Gerhart, *Privacy Between the Covers: Stores Have their Defenders and Skeptics in their Bind Over Starr’s Subpoenas*, WASH. POST F01 (April 3, 1998); JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 4, 8-9, 20, 36, 61, 167-68, 230 (2001)(critical of subpoena); see note 68 *infra* (concerns about accessibility of public library records). The protection of bookstore and library records might also be viewed as reflecting the confidential relationship paradigm, in that the relationship between such institutions and patrons could be considered a confidential relationship.

<sup>51</sup> 793 P.2d 479 (Cal. 1990).

<sup>52</sup> *Id.* at \_\_\_\_.

<sup>53</sup> *Schmerber v. California*, 384 U.S. 757, 770 (1966) (holding that intrusion into human body is particularly offensive and may only be undertaken upon “a clear indication that in fact such evidence will be found”); *Winston v. Lee*, 470 U.S. 753, 767 (1985) (“A compelled surgical intrusion into an individual’s body for evidence implicates expectations of privacy and security of such magnitude that the intrusion may be ‘unreasonable’ even if likely to produce evidence of a crime.”); *Rochin v. California*, 342 U.S. 165 (1952) (holding that forcing a defendant to vomit two capsules of morphine that he had swallowed was a search in violation of his right to due process); see also Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment Reasonableness*, 98 COLUM. L. REV. 1642, 1649-50 (1998) (noting that courts have held that probable cause and warrants are not by themselves sufficient to justify a surgical search). See also, *Union Pacific Railway v. Botsford*, 141 U.S. 250 (1891)(holding that a court cannot compel a plaintiff in a civil action to submit to a surgical examination).

<sup>54</sup> RESTATEMENT (SECOND) OF TORTS § 652C (“One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy”).

<sup>55</sup> See, *Hodgson v. Minn.*, 497 U.S. 417, 462 (1990)(Blackmun, J., dissenting)(abortion) (“usurps a young woman’s control over her own body ”); *Planned Parenthood v. Casey*, 505 U.S. 833, 915-16 (1992) (Stevens, J., dissenting)(abortion); *Cruzan v. Director*, 497 U.S. 261, \_\_\_\_ (1990)(right to die); *Washington v. Glucksburg*, 521

bodies has also historically been protected by common law causes of action for battery and negligent failure to obtain informed consent.<sup>56</sup>

In short, the legal system often conceptualizes privacy in terms of defining physical locations as either “private” or “public.” While this focus on the location paradigm can be sensitive to the other privacy paradigms I discuss below, the Supreme Court’s failure in defining “reasonable expectations of privacy” stems in part from its focus on the potential for sensory access as the determinant of privacy expectations.

## **B. The Means of Communication Paradigm**

We may protect privacy by ensuring that individual’s ability to communicate with each other are secure. Because we must communicate confidences, if the means of communication are not secure, we cannot effectively guard our privacy. The federal and state wiretapping laws embody this impulse to protect privacy by protecting the means of communication.<sup>57</sup> Thus, in explaining the rationale for the enactment of the first federal wiretapping statute, in 1968, the Senate Judiciary Committee explained that technological developments in electronic surveillance had seriously jeopardized the “privacy of communication”: “Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an

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U.S. 702, \_\_\_ (1997)(right to die).

<sup>56</sup> DAN B. DOBBS, *THE LAW OF TORTS* § 28, at 54 (battery vindicates an individual’s right “to decide for herself how her body will be treated by others”); *Korman v. Mallin*, 858 P.2d 1145, 1149 (Alaska 1993) (quoting *Hondroulis v. Schuhmacher*, 553 So.2d 398, 411 (La. 1988)) (“The informed consent doctrine is based on the principle that every human being of adult years and sound mind has a right to determine what shall be done to his or her own body.”); *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914) (Cardozo, J.).

<sup>57</sup> Electronic Communications Privacy Act of 1986, Pub. L. 99-508 (codified, ad amended, at 18 U.S.C. §§ 2510-2522); e.g., 18 Pa. Cons. Stat. § 5702-5704; 5725. See generally, FISHMAN & MCKENNA, *supra* note 10, at §§ 4.41-4.92 (discussing state wiretapping statutes). Location-based privacy rules can partially protect the means of communication, particularly if the communication involves face-to-face contact. However, technological advances even erode location-based protections of face-to-face communications. More significantly, much of modern communication does not take place in person, but rather by means of communication that rely upon channels open to the general public. Most mail goes through a federal instrumentality itself. Telephonic and electronic communications are transmitted by common carriers.

unseen auditor and turned against the speaker to the auditor's advantage.<sup>58</sup> Indeed, Warren and Brandeis, in large measure conceived of privacy in terms of safeguarding the confidentiality of communication.<sup>59</sup> Even Richard Posner, who set forth a relatively limited view of privacy in his controversial *Georgia Law Review* article, argued for protecting the means of communication from intrusion.<sup>60</sup> While the predominant focus on protecting the means of communication has been intrusion from non-participants, some have argued that unconstrained recording of conversations by participants also threatens the privacy of communications.<sup>61</sup>

Historically, the legal system, either through common law or by legislation, has sought to protect the privacy of communications and considered third-party breaches of those communications as privacy invasions.<sup>62</sup> More recently, debate has raged with regard to “the

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<sup>58</sup> S. Rep. No. 1097, 90th Cong., 2d Sess. 67 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2154 (quoted in *Bartnicki v. Vopper*, 532 U.S. 514, 542-43 (2001). See *Bartnicki*, 532 U.S. at 523, 526; *id.* at 541-42 (Rehnquist, C.J., dissenting)(By conferring such protection, Congress sought to restore citizens' confidence in telephonic (and other) communications by reestablishing the integrity of communications over telecommunications devices.).

<sup>59</sup> Warren and Brandeis, viewed the essence of the right to privacy as the power to protect the expression of thoughts, beliefs, and emotions in any form, whether communicated to another or merely written for one's own purposes. Non-consensual publication of such thoughts, beliefs and emotions invaded privacy, even if the publisher had obtained access to those thoughts, beliefs, and emotions by legal means. Warren and Brandeis feared that technological advances threatened to strip individuals of the ability to keep their beliefs, thoughts, and emotions private— they complained that mechanical devices threatened to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.”

And indeed, Warren and Brandeis sought not merely to protect the content of “communications” to others, but peripheral information related to the communication, such as the identity of an individual's correspondents. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)( “A man writes a letter to a dozen people. No person would be able to publish a list of the letters written.”)

<sup>60</sup> Richard A. Posner, *The Right to Privacy*, 12 GA. L. REV. 393 (1978). Admittedly, he justified the protection because of the “transactions costs” of doing otherwise, namely that communications would become more formal and less informative even people assumed that others were always monitoring their conversations. Posner, 12 GA. L. REV. at 401-03.

One could object to Posner's whole effort, on the grounds that he essentially assumed away a fundamental element of the privacy problem before beginning his analysis, merely because it was not amenable to economic analysis. *Id.* at 394. (We could regard [“privacy” and “prying”] as pure consumption goods, the way turnips and beer are normally regarded in economic analysis, and we would then speak of a “taste for privacy or for prying. But this would bring the economic analysis to a grinding halt because tastes are unanalyzable from an economic standpoint.)

<sup>61</sup> E.g., *United States v. White*, 401 U.S. 745, \_\_\_ (1971)(Douglas, J., dissenting).

<sup>62</sup> Even before the American Revolution, the common law made eavesdropping actionable. Blackstone reported that the common law protected against eavesdropping, which he defined as “listening under walls or windows, or the eaves of a house, to harken after discourse, and thereupon to frame slanderous and mischievous

privacy of communication” accomplished by means of Internet transmissions. Encryption has provided a technological means of protecting the privacy of communications, and in part the debate has been over whether the government should have any power to breach the confidentiality of such communications.<sup>63</sup> In effect, then, some have argued that given the characteristics of the Internet, communications over that medium should enjoy a heightened level of privacy.

More broadly, the means of communications can be conceptualized as including more than conventional conversations.<sup>64</sup> Thus, a person’s documentation of his or her own thoughts might also warrant protection as a “means of communications,” allowing individuals to freely express themselves even when they do not seek to communicate with anyone else. For a short time in the late 1800’s, Fifth Amendment doctrine reflected this approach. In *Boyd v. United States*,<sup>65</sup> the Supreme Court treated the government-compelled production of documents as analogous to compelling the writer’s oral testimony. The Court opined that “any forcible and

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tales. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 168 (1769).

The mail has likewise long been protected from breach. During the colonial period, the mails were subject to breach by postal clerks. Benjamin Franklin, administrator of the colonial mail system, required clerks to take an oath that they would not open the mails. Subsequently, Congress enacted several statute protecting the security of the mail. ROBERT ELLIS SMITH, BEN FRANKLIN’S WEB SITE: PRIVACY AND CURIOSITY FROM PLYMOUTH ROCK TO THE INTERNET 23-25, 49, 50, 56-57, 50-51 (2000); *Ex Parte Jackson*, 96 U.S. 727 (1877)(Court found a privacy interest in the contents of letters, but adopted more of a locational analysis in doing so).

Similar controversy arose with regard to the security of communication by telegraph. Smith, *supra*, at 69; DAVID J. SEIPP, THE RIGHT TO PRIVACY IN AMERICAN HISTORY 30 (1978); *Ex Parte Brown*, 72 Mo. 83, 95 (1880).

<sup>63</sup> AMITAI ETZION, THE LIMITS OF PRIVACY 91-92 (1999); see also A. Michael Froomkin, *Cyberspace and Privacy: A New Legal Paradigm? The Death of Privacy?*, 52 STAN. L. REV. 1461, 1484, 1487 (2000); A. Michael Froomkin, *The Metaphor is the Key: Cryptography, the Clipper Chip, and the Constitution*, 143 U. PENN. L. REV. 709(1995); Eben Moglen, *So Much for Savages: Navajo I, Government 0 in Final Moments of Play*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 51 (1999); Maricela Segura, *Is Carnivore Devouring Your Privacy*, 75 S. CAL. L. REV. 231 (2002).

<sup>64</sup> The actual transfer of information from one person to another can be distinguished from the long-term retention of the communication. Indeed, the Electronic Communications Privacy Act affords much greater protection to the act of communication than to the storage of communications. Thus Title I of ECPA, which governs interception of communications while in progress, provides stronger privacy protection than Title II of ECPA, which governs access to stored communications. Indeed, ECPA even gives greater protection to communications that the recipient appears to be storing temporarily than those which the recipient stores indefinitely. In particular, Title II offers more protection for communications stored for 180 days or less than it does for those stored in excess of 180 days.

<sup>65</sup> 116 U.S. 616 (1886).

compulsory extortion of a man's own testimony *or of his private papers* to be used as evidence to convict him of a crime" invades the infeasible right of personal security, personal liberty, and private property, and thus, in a sense, "the Fourth and Fifth Amendments run almost into each other."<sup>66</sup> While the Court has jettisoned *Boyd*, some forms of self-expression that individuals do not intend to reveal to others, like diaries, may be considered particularly private.<sup>67</sup>

The means of communications might also be conceptualized to include individuals' reading of the works of others. Thus persons may receive another's thoughts by purchasing their works from a bookstore or borrowing them from the library. The legal system has been particularly protective of records of public library borrowing and book purchases.<sup>68</sup>

The Supreme Court has struggled to reconcile the predominant location paradigm with

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<sup>66</sup> *Id.* at 630 (emphasis added). William Stuntz has persuasively argued that the Court could not maintain that position without undermining the regulatory state. William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1017-18, 1029-34 (1995).

Currently, the Fourth and Fifth Amendments are not considered co-extensive, and regulators have far more power to subpoena documents than to searches for them. (Previously, in *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924), the Court had suggested that the Fourth Amendment limited the government's power to issue subpoenas, as well as its power to conduct searches. *Id.* at 305-06.) The contrasting approaches to searches and subpoenas might reflect an assessment based on the means of intrusion involved. Perhaps subpoenas cause less alarm than searches because subpoenas have a passive quality that searches lack. The citizens whose papers are subpoenaed identify the relevant papers and produce them. Contrastingly, during searches, law enforcement officers peruse large quantities of material, much of which may be irrelevant, to identify the material relevant to the investigation. See *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 194-96 (1946); *PIERCE ET AL.*, *supra* note 19, § 8.2, at 408-09 (3d ed. 1999). The difference might also be explained by (or is at least consistent with) the location mode of analysis. A search would invariably require intrusion into a private location, a subpoena does not.

<sup>67</sup> For example, diaries may receive greater protection than other documentary records. See *United States v. Doe*, 465 U.S. 605, 619 n.2 (1984) (Marshall, J., concurring) ("[T]he documents at stake here are business records which implicate a lesser degree of concern for privacy interests than, for example, personal diaries."); *Couch v. United States*, 409 U.S. 322, 350 (1972) (Marshall, J., dissenting) ("Diaries and personal letters that record only their author's personal thoughts lie at the heart of our sense of privacy."). See generally, Senate Select Committee on Ethics v. Packwood, 845 F. Supp. 17, 22 (1994) (recognizing precedent according "personal papers such as diaries" the "greatest respect" and the "broadest of constitutional protections" and noting "the peculiarly sensitive nature of personal diaries," yet ordering Senator to turn over diaries pursuant to Senate investigation of sexual harassment charges). Granted this distinction can also be justified by a subject-matter or location analysis (ordinarily, diaries would not be voluntarily exposed to another).

<sup>68</sup> See, e.g., *Tattered Cover, Inc. v. City of Thornton*, 44 P.2d 1044 (2002). Public library records, which record the materials borrowed, and thus presumably read, might also be given heightened protection. E.g., Conn. Gen. Stat. Ann. § 11-25 (West 1986); N.J. Stat. Ann. § 18A:73-43.2 (West 1989); N.Y. C.P.L.R. 4509 (McKinney 1989); see also Ulrika Ault, *The FBI's Library Awareness Program: Is Big Brother Reading Over Your Shoulder?*, 65 N.Y.U. L. REV. 1532 (1990). This concern about records documenting individual's reading matter may also explain the privacy concerns raised about the use of Internet "cookies."

the means of communications paradigm. The Fourth Amendment's applicability to wiretapping has been the seminal question that has forced the Court to confront the conflict between the two. The court's location-focused analysis lies at the root of its historically inadequate analysis of wiretapping. If analyzed employing a location-focused perspective, wiretapping may not constitute a "search or seizure" if the wiretapper merely breaches the telephone company's property.<sup>69</sup> This approach lay at the root of the Court's initial decision with regard to wiretapping, *United States v. Olmstead*,<sup>70</sup> finding that wiretapping did not constitute a "search" and thus was not subject to the Fourth Amendment's strictures. While the *Olmstead* majority relied on a classic location analysis, Brandeis's noted dissent focused on wiretapping's threat to a means of communication. In particular, Brandeis argued that telephone calls should receive no less protection than sealed letters, which the Court had already declared protected from breach by the Fourth Amendment.<sup>71</sup> Indeed, he argued that wiretapping was the more egregious privacy invasion — it revealed the speech of not just one person (as in the case of a sealed letter), but that of numerous persons who might communicate with the investigative target by telephone.<sup>72</sup> To him, the location of the physical connection to the wires leading to the defendant's home was immaterial.<sup>73</sup>

The Court ultimately revisited the issue forty years later in *Katz v. United States*. In *Katz*,

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<sup>69</sup> *Olmstead v. United States*, 277 U.S. 438 (1928). Thus, for example, the government does not breach any reasonable expectation of privacy, and thus does not conduct a search or seizure, if it convinces the telephone company to install a pen register on a subscriber's line. *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>70</sup> 277 U.S. 438 (1928).

<sup>71</sup> *Id.* at 475 (Brandeis, J., dissenting).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 479 (Brandeis, J., dissenting). Indeed, Brandeis is particularly partial to a means-of-communication analysis, since he is so intent on treating as private, and thus according protection to, thoughts, sentiments, and emotions. Thus, for example, in the article he co-authored with Samuel Warren, many of the examples focus on expressions of thought, sentiments, and emotions, either to oneself or to a select group of others. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) ("The common law secures to each individual the right of determining ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others"); see also *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting) ("The makers of our Constitution ... recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.")

the government had monitored a conversation the defendant made from a telephone booth, by placing a recording device on the outside of the booth. Had the Court employed its traditional location-focused analysis, it would have rejected Katz's Fourth Amendment claim because the telephone booth from which Katz placed his call was not a protected location under traditional Fourth Amendment analysis. A law enforcement officer, or anyone else, could view Katz through the glass of the phone booth, and any person could have attached an item to the side of the telephone booth. Until *Katz*, the Court had focused on delineating constitutionally protected areas.<sup>74</sup> Indeed, Katz' attorney formulated the question before the Court as "whether a public telephone booth is a constitutionally protected area . . .?"<sup>75</sup> (Granted, the Court could have designated telephone booths as constitutionally protected places because of the nature of the activity that customarily occurs therein — namely personal telephone conversations that the speaker expects to remain private.)

But the breakthrough that made *Katz* a seminal case was the Court's focus on the means of communication — in particular, whether telephone communications deserved protection, rather than on the location of the participant engaged in the phone conversation (or the location of the third-party intruder). As the Court explained: "To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."<sup>76</sup> Though the phone booth Katz had used was not itself a constitutionally protected place, Katz could assert a legitimate expectation of privacy in the contents of his conversation because the conversation had taken place over the telephone.<sup>77</sup> The Court dramatically asserted its extrication

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<sup>74</sup> LAFAVE ET AL., *supra* note \_\_\_, § 3.2(a), at 133; RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* 94-95 (2d ed. 2002).

<sup>75</sup> *Katz v. United States*, 389 U.S. 347, 349 (1967). Admittedly, the second question focused on whether the existence of a trespass was of critical Fourth Amendment importance.

<sup>76</sup> *Katz*, 389 U.S. at 352; see *United States v. United States District Court*, 407 U.S. 297, 313 (1972)(discussing Katz's significance).

<sup>77</sup> Another example of a dramatically different conclusions the location and means of communications paradigm can produce involves the law enforcement technique know as the "mail cover." In a "mail cover," postal employees record the information on the outside of envelopes mailed by a particular patron. A location analysis would suggest that, at least with respect to the postal service, a mail cover does not breach any reasonable expectation of privacy: the patron has certainly voluntarily exposed the address of the letter to view. A means of communication approach may well suggest that such a privacy interest exists, a person should be able to

of itself from exclusive reliance on the location paradigm in one of the most quoted phrases of the opinion: the Fourth Amendment “protects people, not places.”<sup>78</sup>

As we shall see later in this paper, the means of communications paradigm differs from the subject matter paradigm in ways that have significance for the focus of this paper, the Court’s decision in *Bartnicki v. Vopper* with regard to the use of information a third-party gained by the use of an illegal wiretap. In effect, *Bartnicki* engrafts a subject-matter based definition of privacy onto the paradigmatic statute that defines privacy in terms of the means of communications. In particular, the Court holds that participants in a conversation may not ensure that a conversation remains private, by precluding public disclosure of the contents of the conversation made possible only by illegal wiretapping, despite the fact that the conversation takes place over the telephone. The conversation must satisfy a second test focused on the subject matter of the conversation, namely the conversation must be one that does not relate to a matter of public importance.

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communicate with others without third parties systematically identifying each person with whom he communicates. Indeed, Warren and Brandeis themselves expressed exactly such a concern. Warren & Brandeis, *supra* note \_\_, at \_\_ ( “A man writes a letter to a dozen people. No person would be able to publish a list of the letters written.”).

The courts seem to take a location approach to mail covers when analyzing the constitutionality of mail covers. Shirley M. Hufstедler, *Invisible Searches for Intangible Things: Regulation of Governmental Information Gathering*, 127 U. PA. L. REV. 1483, 1510-11 (1979) (quoting *United States ex rel. Milwaukee Social Democratic Publ'g Co. v. Bursleson*, 255 U.S. 407, 437 (1921))(Lower courts have rarely perceived that any interest protected by the fourth amendment is implicated by mail covers. In part, this is due to recurring attacks of Olmsteadism: no trespass is involved, no search or seizure occurs when the eye registers the impressions from the outside of an envelope or the hand records the information .... Equally rare is recognition that "the mails [are] almost as much a part of free speech as the right to use our tongues ....") ; *see also*, Sandy D. Hellums, Note, *Bits and Bytes: The Carnivore Initiative and the Search and Seizure of Electronic Mail*, 10 WM. & MARY BILL RTS. J. 827, 837-39 (2001) (discussing the Supreme Court's upholding of mail covers as constitutional in *United States v. Jacobson*, 466 U.S. 109 (1983)) Postal regulations, however, take a means of communications approach, recognizing that “mail covers” violate a legitimate privacy interest and therefore must be justified by a belief that the mail cover will either provide evidence of a serious crime or lead to the apprehension of a fugitive. See 39 C.F.R. § 233.3 (2002).

A similar divergence in the paradigms is evident in the protections accorded communications attributes. Communications attributes are peripheral information about a communication, such as the original and destination of the communication and the duration of the communication. The Court found communications attributes unprotected because subscribers willingly exposed such information to telephone companies. *Smith v. Maryland*, 442 U.S. 735 (1979). Indeed, the Electronic Communications Privacy Act reflects this kind of locational bias — affording greater protection to the “contents” of communications than to communications attributes. However, the distinction could also be explained by the relative sensitivity of the two types of information. Moreover, ECPA certainly protects both communications attributes and the contents of communications. Compare 18 U.S.C. § 2703(a) with 18 U.S.C. § 2703(c)(2).

<sup>78</sup> *Katz*, 389 U.S. at 351. However, so pronounced is the Court’s focus on location, that the Court has felt compelled to repeatedly reiterate this appellation.

Perhaps the most disturbing aspect of the Court's opinion in *Bartnicki* is the Court's comment that the disc jockey (who received a copy of the illegally recorded conversation) could publish the information derived from the illegal interception of a wire communication because the statements made in the course of the private call would have been newsworthy had they been made in a public setting.<sup>79</sup> In effect, the majority treated the means of communication, namely a private phone conversation rather than a public statement, as irrelevant to the speakers' legitimate expectation of privacy. The Court did so even though the wiretap laws it was addressing specifically focuses privacy protection on the means of communication (not subject matter considerations).<sup>80</sup>

In sum, a second important means of guarding privacy involves protecting the means of communications, and both the jurisprudence of the United States Supreme Court and various statutes and regulations have consistently focused on ensuring that communications are not breached except for substantial cause.

### **C. The Means of Intrusion Paradigm**

Sometimes we can seek to protect privacy by forbidding particular means of intrusion that are especially destructive of privacy. On the most basic level, the Fourth Amendment, as interpreted by the United States Supreme Court, embodies a special concern about “general

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<sup>79</sup> *Bartnicki*, 532 U.S. at 525 (“If the statements about the labor negotiations had been made in a public arena -- during a bargaining session, for example -- they would have been newsworthy. That would also be true if a third party had inadvertently overheard Bartnicki making the same statements to Kane when the two thought they were alone.”).

<sup>80</sup> ECPA, and its judicial construction, also at times reflects the influence of two competing paradigms, the paradigms of location and confidential relationships also have a factor in considering the sanctity of telephone communication. The judicially-created a domestic exception to the wiretap laws provides an excellent example of the influence of both competing paradigms. *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert denied*, 419 U.S. 897 (1974)(one spouse recording another’s conversation from marital home) ; *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977) (parent monitoring child’s telephone call in their residence); *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991)(same); Hearings on the Anti-Crime Program Before Subcomm. No. 5 of the House Judiciary Comm., 90th Cong., 1st Sess. 901 (1967)(testimony of Herman Schwartz) (“Now, we can see in certain circumstances where [allowing a person to monitor a call on an extension] makes some sense. I take it nobody wants to make it a crime for a father to listen in on his teenage daughter . . .”).

Similarly, under ECPA ownership of a location, namely the computer system that stores and transmits messages, gives the employer a legal right to monitor its employees’ e-mail.

searches.”<sup>81</sup> A “general search” is an unfocused search, not directed toward discovering any particular item, conducted to uncover possible criminality. Such searches reveal many irrelevant matters, even if they also reveal relevant ones.<sup>82</sup> The entitlement to privacy captured by the prohibition on the “general search” focuses on the technique used to intrude, rather than the location of the intruder, the subject of the intruder’s attention, or the existence of a communication or confidential relationship (the focuses of the other four privacy paradigms).

*Dietemann v. Time, Inc.*,<sup>83</sup> a classic torts case, provides another illustration of the principle that privacy may be defined in terms of the means of intrusion. The case arose out of journalists’ attempts to investigate Dietemann, a homeowner who offered clay, mineral and herbal remedies for various medical maladies. Journalists entered Dietemann’s home under false pretenses, alleging that they sought treatment from Dietemann at a friend’s recommendation. While in Dietemann’s home, they used hidden audio and video recording equipment to document their interaction with Dietemann. Dietemann asserted a common law cause of action for “intrusion into seclusion” against the journalists. The Court found that the journalists had wrongfully invaded Dietemann’s privacy, but not because the reporters’ had entered Dietemann’s home under false pretenses or proven themselves unfaithful confidants (*i.e.*, false friends), who had willingly disclosed the observations made while in Dietemann’s home. The Court concluded that members of society must accept such a risk. But the Court distinguished the risk of being

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<sup>81</sup> See *Payton v. New York*, 445 U.S. 573, 583 n.21 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971); William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 1494-1508* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with the University of Michigan Dissertation Information Service).

<sup>82</sup> The precision of dog sniff searches of luggage in uncovering only contraband was one of the reasons the Supreme Court upheld such searches against constitutional attack. *U.S. v. Jacobson*, 466 U.S. 109, 123-24 (1984). In this regard, the argument of the *Kyllo* majority in finding warrantless use of thermal imaging devices unconstitutional is illuminating. In part, the majority based its determination on a fear that advances in thermal imaging technology would allow users of such devices to uncover legal activity inside the home (such as when occupants of the dwelling took showers), *Kyllo*, even though, as currently used by law enforcement thermal imaging devices generally reveal no more than probative evidence of illegal activity — they merely indicate the presence of lights so intense that they could only be used in growing marijuana.

The minimization requirements of federal wiretap statutes are also intended to restrict interceptions to relevant material. 18 U.S.C. § 2518(5); *see generally*, *Deal v. Spears*, 980 F.2d 1152 (8th Cir. 1992)(finding indiscriminate monitoring of employee conversation as not in the “ordinary course of business” and thus impermissible under ECPA); *FISHMAN & MCKENNA, supra* note \_\_, at §§ \_\_\_\_.

<sup>83</sup> 449 F.2d 245, 249 (9th Cir. 1971).

electronically recorded within one's home from the risk posed by tattling "false friends," and concluded that members of society should not be expected to assume such a risk.

While the United States Supreme Court has, in applying the Fourth Amendment, concluded that undercover agent's use of electronic equipment to record conversations with an investigative target infringes upon privacy no more than an undercover agent's repetition of that conversation unaided by recording devices,<sup>84</sup> several state courts have disagreed.<sup>85</sup> Thus, even in the criminal context, some courts have noted that use of electronic equipment raises privacy questions even when repeating a conversation does not.<sup>86</sup>

Computerization provides a third example of type of privacy breach that can perhaps best be defined in terms of the means of intrusion. Our intuitions may well suggest that computerization of records constitutes an independent intrusion upon privacy. Thus, while "public" court records may intrude upon privacy by making certain "private matters" accessible, that privacy invasion is magnified when those court records are made available in computerized form. With the advent of the computerization of court records, state and federal courts have had

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<sup>84</sup> *White v. United States*, 401 U.S. 745 (1971); *Lopez v. United States*, 373 U.S. 427, 439 (1963). Perhaps one of the Supreme Court's most serious failings defining reasonable expectations of privacy is its failure to recognize that the use of undercover techniques can breach reasonable expectations of privacy. *United States v. White*, 401 U.S. 745 (1971) (holding that evidence obtained through a government informant and the use of a radio transmitter did not violate the Fourth Amendment); *Hoffa v. United States*, 385 U.S. 293 (1966) (upholding the validity of evidence obtained through use of a paid government informant); *Lee v. United States*, 343 U.S. 747 (1952) (holding that evidence obtained by an undercover agent with a concealed radio transmitter was valid and not obtained by trespass); *see also*, *Lopez v. United States*, 373 U.S. 427 (1963); *see generally*, Slobogin & Schumacher, *supra* note 26, at \_\_\_ (survey showing that many regard the use of undercover techniques as more intrusive than techniques that the Court has classified as searches because they breach reasonable expectations of privacy). Granted, in some instances, the Court has limited the use of undercover techniques. *Weatherford v. Bursey*, 429 U.S. 549, 554-56 (1977).

<sup>85</sup> *State v. Glass*, 583 P.2d 872, 881 (Alaska 1978); *State v. Hayes*, 752 A.2d 16 (Vt. 2000); *State v. Blow*, 602 A.2d 556 (Vt. 1991).

<sup>86</sup> Note that the United States Supreme Court's approach treats deception and coercion differently, and, by doing so, undermines the dominant location paradigm. The entry into a protected area, such as a home, by deceitfully obtaining the occupant's consent does not, in the Court's view, violate any legitimate expectation of privacy. *United States v. Lewis*, 385 U.S. 206 (1966). State courts have disagreed with this approach, at least with respect to the intruders using recording or transmitting devices. Some state courts have demanded that law enforcement officers make some showing justifying their intrusion before undercover operatives carrying recording equipment enter residences. *See, e.g.*, *Commonwealth v. Blood*, 400 Mass. 61, 507 N.E.2d 1029 (1987); *Commonwealth v. Pratt*, 407 Mass. 647, 555 N.E.2d 559 (1990); *Commonwealth v. Brion*, 539 Pa. 256, 652 A.2d 287 (1994); *Commonwealth v. Rekasie*, 566 Pa. 85, 778 A.2d 624 (2001).

to revisit privacy issues. They have considered differentiating between computerized access to court records and access to physical court records themselves, as well as placing new limits on the material contained in court records.<sup>87</sup> Amatai Etzione has discussed the implications of computerization of medical records for medical privacy.<sup>88</sup> Professor Yochai Benkler has made a similar point with regard to records of consumer transactions.<sup>89</sup>

Computerization of records removes the “practical obscurity”<sup>90</sup> of records that are “available” but difficult to acquire and compile. Federal law has recognized this concern, at least with regard to the use of computer matching. Congress has imposed special restrictions on federal agencies' use of computer matching.<sup>91</sup>

The Supreme Court discussed the constitutional significance of the computerization of government records in *Whalen v. Roe*.<sup>92</sup> Citizens who took prescription drugs challenged New York's requirement that physicians report on the pharmaceuticals they had prescribed for patients and the State's computerization of those reports,<sup>93</sup> asserting that the State had thereby violated

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<sup>87</sup> *In re Committee on Privacy and Court Records* (Amended Administrative Order dated Feb. 12, 2004); Policy Statement of the Justices of the Supreme Judicial Court Concerning Publication of Court Case Information on the Web (May 2003); Gary Blankenship, *Supreme Court Restricts Online Access to Information*, FLA BAR NEWS 1 (Dec. 15, 2003); Kate Marquess, *Open Court?: As Courthouses Rush to Put Filing Online, Easy Access to Legal Documents Has Many Worrying About Privacy Rights*, A.B.A.J., Apr. 2002, at 54; see also JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT. REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (2001), available at <http://www.privacy.uscourts.gov/Policy.htm>; MARTHA WADE STEKETEE & ALAN CARLSON, NAT'L CTR. FOR STATE COURTS & JUSTICE MGMT. INST., DEVELOPING CCJ/COSCA GUIDELINES FOR PUBLIC ACCESS TO COURT RECORDS: A NATIONAL PROJECT TO ASSIST STATE COURTS (2002), available at <http://www.courtaccess.org/modelpolicy/18Oct2002FinalReport.pdf>.

<sup>88</sup> AMITAI ETZIONE, THE LIMITS OF PRIVACY 142-43 (1999).

<sup>89</sup> Yochai Benkler, *How (If at All) to Regulate the Internet: Net Regulation: Taking Stock and Looking Forward*, 71 COLO L. REV. 1023, \_\_\_\_ (2000).

<sup>90</sup> U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 762 (1989)

<sup>91</sup> Computer Matching and Privacy Protection Act of 1988, Pub. L. 100-503, 102 Stat. 2507 (codified at 5 U.S.C. § 552a(o) (2000)).

<sup>92</sup> 429 U.S. 589 (1977).

<sup>93</sup> The State argued that the new law was no more intrusive than the existing requirement that pharmacists keep the same information available for inspection by state officials. The trial court rejected the argument, explaining: “The intrusion here is not only more immediate, its impact is greater. A name on a prescription in the files of one of many thousands of pharmacists in the state of New York is entirely different from one's name on a

patients' Due Process Clause's right to privacy. While the majority specifically expressed concern about the privacy implications of "the accumulation of vast amounts of personal information in computerized data banks and other massive government files," it largely found the problems to be resolved by the stringent state restrictions on access to the computerized records. Justice Brennan, in a separate concurrence, focused squarely on computerization as peculiarly invasive practice. He explained:

What is more troubling about this scheme, however, is the central computer storage of the data thus collected. Obviously, as the State argues, collection and storage of data by the State that is in itself legitimate is not rendered unconstitutional simply because new technology makes the State's operations more efficient. However, as the example of the Fourth Amendment shows the Constitution puts limits not only on the type of information the State may gather, but also on the means it may use to gather it. The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.<sup>94</sup>

Perhaps the source of at least some commentators' disagreement with the Supreme Court's conception of the expectation of privacy in the Fourth Amendment context, is a dispute over the appropriate paradigms that should be employed to delineate legitimate private interests. While the Court's account of privacy focuses largely on location (and perhaps to some extent the means of communication), many commentators' accounts of privacy make the means of intrusion significant as well. For example, Alan Westin views an important aspect of privacy as the right to anonymity. Jeffrey Rosen (relying upon the work of Erving Goffman and others) focuses on "civil inattention" as an important aspect of privacy. Neither of these approaches assume that only location matters in defining legitimate expectations of privacy. Indeed, both argue that one can have a legitimate expectation of privacy even when one is accessible to others. The Westin

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form in Albany which is transferred to computerized records and stored for instant retrieval." *Doe v. Ingraham*, 403 F. Supp. 931, 938 (1975).

<sup>94</sup> *Id.* at 606-07.

and Rosen approaches might provide a different perspective on cases that courts have resolved (or will probably resolve) by applying a location-based analysis.

For example, reconsider the aerial surveillance cases discussed earlier. The Court has held that because aircraft operate in public space — namely the airways controlled by the Federal Aviation Administration (the "FAA") — and because any passenger may freely observe an enclosed backyard as he travels past it, law enforcement officers may photograph enclosed backyards (using detail-enlarging enhancements if necessary) or hover over such yards for extended periods, examining their contents or any activities occurring therein. But we might well conclude, as Professor Jeffrey Rosen has recently suggested, that an invasion of privacy may sometimes consist merely of focusing undue attention upon others.<sup>95</sup> Such an insight suggests that the conduct of an airplane passenger or law enforcement officer who happens to observe incriminating activity as she goes about her business is distinguishable from that of the law enforcement officer, journalist, or private citizen who hovers over the same yard and concentrates on the activity occurring therein. The former do not pay undue attention to the yard; the latter violate the rules of "civil inattention." However, recognizing the distinction is possible only if we view privacy as not turning exclusively on physical location, but, in addition, occasionally turning on the potential means of intrusion.

Alan Westin's focus on anonymity suggests that there is a privacy intrusion to use of cameras in public places, with or without the concomitant use of facial recognition technology.<sup>96</sup> Westin asserts that one of four important states of privacy is anonymity. Often even when an individual is in a "public" place and can be observed by others, the individual does not expect to be "identified and held to the full rules of behavior and role that would operate if he were known to those observing him."<sup>97</sup> The knowledge, or even apprehension, that one is under systematic observation in public places "destroys the sense of relaxation and freedom that men seek in open

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<sup>95</sup> JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 16-18 (2001) (discussing "civil inattention" — an expectation of a zone of privacy among strangers).

<sup>96</sup> Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1006-09 (1966); ALAN WESTIN, *PRIVACY AND FREEDOM* (1967).

<sup>97</sup> Cite needed.

spaced and public arenas.”<sup>98</sup> Such practices rob us of our ability to blend into the crowd and frustrate a privacy interest Westin identifies.<sup>99</sup> The location-based analysis sees such constant surveillance as raising no privacy issue.<sup>100</sup>

The Supreme Court has, at times, relied on a means of intrusion analysis to find no invasion of privacy where one might ordinarily have been found. *Wyman v. James* deserves particular note as an example of this proposition.<sup>101</sup> In *Wyman v. James*, the Court confronted a Fourth Amendment challenge to social service agency caseworkers' inspections of the homes families receiving financial assistance under the Aid to Families with Dependent Children ("AFDC") program. The home, as a location, receives paramount privacy protection, and citizens generally have a reasonable expectation of privacy in their dwellings.<sup>102</sup> And indeed, the dissenter emphasized the location paradigm in asserting that the aid recipients' right to privacy

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<sup>98</sup> Cite needed. (Westin relates this proposition to Simmel's phenomenology of the stranger.) Posner makes this same observation, but ascribes it to a cynical desire to manipulate others. Posner, *supra* note \_\_\_\_, at \_\_\_\_.

<sup>99</sup> State courts have found such a privacy interest in cases involving "rough shadowing," cases in which a person not only constantly follows another in public places, but does so in such a conspicuous manner as to ensure the target's constant awareness of the surveillance. See, e.g., *Galella v. Onassis*, 487 F.2d 986, 994 & n.11, 995 (2d Cir. 1973) (implied right of action under criminal law of harassment); *Pinkerton Nat'l Detective Agency, Inc. v. Stevens*, 132 S.E.2d 119, 122-23 (Ga. Ct. App. 1963) (tort action); *Schultz v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 139 N.W. 386, 389-90 (Wis. 1913) (finding "rough shadowing" to be defamatory); RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (1977) (tortious intrusion into seclusion may arise from a "course of hounding" another).

<sup>100</sup> Another means of intrusion theory might explain the discomfort of many with face scans or general surreptitious video surveillance in public street. One troubling aspect of such techniques is the asymmetry in positions of the various actors involved. The watched, *i.e.*, citizens using the streets, cannot observe the watcher. If an actual person is doing the watching, individuals using a public place may at least determine when the watcher has focused upon them. In addition, the watcher runs the risk that the object of his interest may subject him to the same treatment. Finally, individuals being watched by an actual person may confront the watcher and seek an explanation for his conduct; if such a confrontation occurs in a sufficiently public place, the subject of observation might even successfully enlist the help of bystanders. A concern for symmetry between actors might also provide a partial explanation of our intuition that listening to another during a conversation with intent to repeat the conversation is less troubling than recording that conversation. See Bernard W. Bell, *Theatrical Investigation: White Collar Crime, Undercover Investigations, and Privacy*, 11 WM & MARY BILL RIGHTS L. REV. 151, 184 (2002). See generally, Jeremy Friedman, *Prying Eyes in the Sky: Visual Aerial Surveillance of Private Residences in Tort*, 4 COLUM. SCI. & TECH. L. REV. 1, \_\_\_\_ & nn. 22-24 (2002-2003)(identifying the privacy invasion that results from aerial surveillance as the asymmetry of information between observe and subject).

<sup>101</sup> 400 U.S. 309 (1971).

<sup>102</sup> See note \_\_\_\_ *supra*.

precluded such inspections without the issuance of a warrant and probable cause.<sup>103</sup> The Court found, nevertheless, that state officials, in making home inspections, had breached no expectation of privacy of the aid recipients.

Had later doctrinal developments been available to the Court, it might have held that such visits breached an expectation of privacy, but qualified as non-law-enforcement “special purpose” searches that state officials could conduct without probable cause or a warrant.<sup>104</sup> The Court also sought to uphold the visiting program on the ground that aid recipients consented to the search by accepting benefits,<sup>105</sup> and some have focused on this aspect of the holding. But the Court provided a further and more detailed justification for its holding. In doing so it not only argued that the conditions in the recipient's home became a matter of public concern once she began receiving aid under the AFDC program (which I will discuss later in considering the subject-matter paradigm), but also explicitly focused on the means of intrusion used,<sup>106</sup> characterizing them as “gentle.”<sup>107</sup> The Court noted that social workers had engaged in no snooping, provided the recipient advanced written notice of the inspection, and used no deception in conducting the home inspection.<sup>108</sup>

Similarly, in *Whalen v. Roe* the means of intrusion proved critical. As noted above, the

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<sup>103</sup> *Id.* at 327-38, 332-33, 334-35 (Douglas, J., dissenting); *id.* at 338-47 (Marshall, J., dissenting). Justice Douglas opined: “Isolation is not a constitutional guarantee; but the sanctity of the sanctuary of the home is such--as marked and defined by the Fourth Amendment. . . . What we do today is to depreciate it.” *Id.* at \_\_\_\_.

<sup>104</sup> The special needs exception allows the government to conduct a search without warrant and probable cause when the “special needs” of a non-law-enforcement program outweigh the privacy rights of individuals. *See*, *Ferguson v. City of Charleston*, 532 U.S. 67, \_\_\_\_ (2001)(prohibiting hospitals requirement that pregnant women on public assistance provide urine samples for testing because the program was in conjunction with a law enforcement initiative, but suggesting that the result would have been different had there been no law enforcement involvement); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-653 (1995).; *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (plurality opinion); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). The term “special needs” apparently first appeared in Justice Blackmun's opinion concurring in the judgment in *New Jersey v. T.L.O.*, 469 U.S. 325, 351(1985). Cite needed.

<sup>105</sup> *Id.* at 317-18, 321-22.

<sup>106</sup> *Id.* at 320-21 (“The means employed by [the state agency] are significant.”).

<sup>107</sup> *Id.* at 319-21.

<sup>108</sup> *Id.*

case involved a challenge to creation of a centralized computer database containing certain information about every prescription for a pharmaceutical written in New York State, including the drug and dosage as well as the name, address, and age of the patient. In part, plaintiffs challenged the statutory scheme based on a concern about the potential disclosure of the data to the general public. The court found maintenance of the database permissible in large part because of the strict controls on the dissemination of the information gathered.<sup>109</sup> Thus, the Court, and the plaintiffs, focused on the means of intrusion, considering collection of information by itself less intrusive than collection and dissemination of information.<sup>110</sup>

The *Whalen v. Roe* Court's approach is consistent with that of several noted scholars. Many have suggested that the prospect of dissemination should be considered in judging an intrusion, and that "reasonableness" under the Fourth Amendment should include consideration of the potential dissemination of information. For example, William Stuntz notes that the degree of intrusion might reasonably be said to differ "depending on whether the information is subsequently spread."<sup>111</sup> Harold Krent has propounded the thesis that "the reasonableness of a seizure extends to the uses that law enforcement authorities make of property and information

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<sup>109</sup> Cite needed. See *Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate*, 519 F.2d 1335, \_\_\_ (3d Cir. 1975)(distinguishing *Laird v. Tatum* because material obtained from government surveillance of dissident groups was held without lack of safeguards for further dissemination and in fact were disseminated to others); *Alliance to End Repression v. Chicago*, 627 F. Supp. 1044 (N.D. Ill. 1985)(distinguishing *Laird v. Tatum* and finding a cause of action for disseminating governmental surveillance information).

<sup>110</sup> Granted, because of the subject matter of the information as well as the existence of a confidential relationship (between patient and doctor), the Court recognized a privacy interest in the information even though the patient "voluntarily" shared the information with others, such as insurance companies. In the ordinary case, the sharing of the information with others, even in circumstance in which the person has no real choice to do otherwise, might defeat any assertion of a "reasonable expectation of privacy" altogether. Even so, the privacy protective means of intrusion was sufficient to override the Court's analysis under the subject-matter and confidential relationship paradigms. (Note that the District Court Judge had found the program unconstitutional precisely because it breached a confidential relationship — the doctor-patient relationship, *Roe v. Ingraham*, 403 F. Supp. 931, 936-37 (1975), and because of the sensitive nature of the subject matter of the disclosures, *id.* at 937).

<sup>111</sup> William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1041-42 (1995). He notes, correctly, that prohibitions of further disclosure do not completely obviate privacy concerns, and also that the Court's interpretation of the Fourth Amendment does not reflect such an approach and would indeed have to be drastically re-oriented in order to do so.

even after a lawful seizure,” including the dissemination of information gained from a search.<sup>112</sup> Indeed, such an approach might justify the courts’ tendency to treat warrantless law enforcement intrusions more favorably than media intrusions.<sup>113</sup> And indeed, statutes frequently couple authorization to obtain or compel disclosure of information with an obligation to keep the information derived from the use of such powers confidential.<sup>114</sup>

Perhaps surprisingly, the Court has relied upon a means of intrusion analysis rather than a subject matter analysis in addressing the scope of privacy when privacy is threatened by the publication of information. The Court has been reluctant to hold that the publication of truthful information can never give rise to a valid cause of action for invasion of privacy.<sup>115</sup> As the Court explained in *Florida Star v. B.J.F.*, “press freedom and privacy rights are both ‘plainly rooted in the traditions and significant concerns of our society.’”<sup>116</sup> While the Court has said that journalists must be free to publish “matters of public importance,” the Court has largely succeeded in leaving undefined the “matters of public importance” that journalists may publish

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<sup>112</sup> Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEX. L. REV. 49, 51-53, 63-92 (1995). See generally, Seth F. Kreimer, *Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991); Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1041-44 (1995)(relying on the problems of dissemination to distinguish observing a person in a public place and photographing a person in a public place).

<sup>113</sup> Bernard W. Bell, *Secrets and Lies: Mews Media and Law Enforcement Use of Deception as an Investigative Tool*, 60 U. PITT. L. REV. 745, 791-93 (1999). As between law enforcement and the news media, law enforcement is much less likely to disseminate information lacking relevance to a criminal prosecution. After all, journalists’ primary mission is disseminating information to the public. Indeed, the press is often accused of disseminating information more to titillate than inform. See, *id.* at 786 n. 180. (I am skeptical about whether this can serve as a complete or even significant justification of the difference attitudes toward law enforcement and media intrusions, because such an approach is at least in tension with the First Amendment. *Id.* at 793.) The Freedom of Information Act and its various state analogues may reduce the significance of this distinction because much data, once collected, can be obtained by the media (or any other member of the general public) by means of a Freedom of Information Act request.

<sup>114</sup> In the criminal investigation context one of the strongest forms of protection is the Federal Rules provision regarding the secrecy of grand jury materials. See Fed. R. Crim. P. 6(e)(2); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 8.12(b) (3d ed. 2000)§ 8.3(f), § 8.5 (“[P]ublic disclosure of the investigation may cause irreparable harm to his reputation even though the investigation eventually reveals no basis for prosecution.”). See also Right to Financial Privacy Act of 1978, 12 U.S.C. § 3412.

<sup>115</sup> *Id.* at 532; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

<sup>116</sup> *Florida Star v. B.J.F.*, 491 U.S. at 532 (quoting *Cox Broadcasting v. Cohn*).

despite the resultant harm to an individual's privacy. Rather, the Court has resorted to the means of intrusion paradigm to craft the constitutional doctrine protecting privacy.<sup>117</sup> A matter is "public" rather than "private" if a journalist obtains the information from a public official, without engaging in illegal activity to do so. Thus, in several cases the Court established the principle that the First Amendment protects a journalist's publication of information the government has divulged.<sup>118</sup> The government may protect various interests, including the interest in privacy, by ensuring that it does not divulge the information to the journalist.<sup>119</sup> One of the Court's seminal privacy cases addressing the publication of "private facts," *Florida Star v. B.J.F.*,<sup>120</sup> turns upon just such a means of intrusion analysis.

In *Florida Star v. B.J.F.*, a rape victim sought damages against a tabloid for publishing her identity, in violation of a Florida statute. The tabloid asserted that the statute contravened the Free Speech Clause, and the Supreme Court agreed. The Court explained that B.J.F. could assert no privacy claim because, *inter alia*, the *Florida Star* had obtained her identity from government officials. The Court also set forth a subject matter criterion — the matter published must be one of public significance — and easily concluded that B.J.F.'s identity was such a matter of public significance. However, the Court prohibited the state from setting aside a particular area as one

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<sup>117</sup> It is clear that this means of intrusion approach works in conjunction with other approaches, such as property laws reflecting a locational approach to privacy, and wiretapping laws, reflecting a means of communication protection of privacy, as well as laws enforcing confidentiality obligations, reflecting a confidential relations approach to protecting privacy. Thus, for instance, in *B.J.F.* the Court observed "To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle [i.e., that the press may publish any information it obtains] the publication of any information so acquired." *Id.* at 534.

<sup>118</sup> *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-96 (1975) (involving broadcasting of a rape-murder victim's identity that the broadcaster had obtained from courthouse records); *Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308, \_\_\_ (1977) (involving publication of the name or photograph of the 11-year-old subject of a juvenile proceeding which reporters had attended); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, \_\_\_ (1979) (involving attempted publication of name of juvenile defender whose identity journalists had determined by from witnesses, the police, and a local prosecutor); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 596 (1976).

<sup>119</sup> *Id.* at 534-35, 538 ("where the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech.").

<sup>120</sup> 491 U.S. 524 (1989).

unfit for public discussion, and suggested that there may be no category of “private” information inherently lacking in public importance.<sup>121</sup>

In dissent, Justice White vigorously disagreed with the majority’s conclusion. He certainly expressed disagreement with the breadth of the principle that the publication of information obtained legally from the government could not constitute an invasion of privacy, arguing that the principle should not apply when the government made the disclosure by mistake in violation of applicable law.<sup>122</sup> However, the difference in the respective paradigms White and the majority viewed as paramount provides a more cogent explanation of their disagreement. Unlike the majority, White focused on a subject matter inquiry — if anything can be considered private, it is one’s victimization at the hands of a sexual assailant. He wondered aloud how and plaintiff could prevail in on any publication of private facts claim when dissemination of information about such traumatic victimization could not constitutionally give rise to such a cause of action.<sup>123</sup> White, after starting his opinion by noting that, short of homicide, rape was the ultimate violation of self, began the last section of his opinion as follows:

At issue in this case is whether there is any information about people, which—though true—may not be published in the press. By holding that only "a state interest of the highest order" permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim's right to privacy is not among those state interests of the highest order, the Court accepts appellant's invitation . . . to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts. . . . Even if the Court's opinion

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<sup>121</sup> In *Whalen v. Roe*, as well, a means of intrusion analysis assumed a major role in the Court’s decision to uphold a regulatory scheme that appeared to breach privacy expectations under another paradigm, namely the confidential relationship paradigm.

<sup>122</sup> *Florida Star v. B.J.F.*, 491 U.S. at 547. Florida made state officials’ disclosure of such information a crime. Fla.Stat. § 794.03 (1983). B.J.F.’s name had mistakenly been included in a press release placed in a pressroom at a local courthouse.

<sup>123</sup> Even assuming that the majority had really relied on a subject-matter analysis, White’s conclusion is probably unjustified. The Court has defined criminal activity as a matter of public concern, and thus some matters that do not involve criminal activity might be considered sufficiently sensitive to give rise to a publication of private facts cause of action. For instance, broadcasting the tape of two individuals engaged in love-making could perhaps give rise to a privacy cause of action, even if being identified as the victim of a sexual assault would not.

does not say as much today, such obliteration will follow inevitably from the Court's conclusion here. If the First Amendment prohibits wholly private persons (such as B.J.F.) from recovering for the publication of the fact that she was raped, I doubt that there remain any "private facts" which persons may assume will not be published in the newspapers or broadcast on television.<sup>124</sup>

Of course, this formulation of the majority's opinion completely disregarded the majority's resolution of the case based upon a completely different paradigm; the majority was quite explicitly not deciding whether information on certain subject matters were peculiarly sensitive.<sup>125</sup> As we shall see, the Court's repeated embrace of a means of intrusion analysis in cases where individuals assert that publication of information has violated their privacy is no mystery — other courts have done a poor job at consistently defining a sphere of privacy using a subject matter paradigm.<sup>126</sup>

In sum, the Court has not fully explored the means of intrusion paradigm as a basis on which to recognize rights to privacy that do not exist under other paradigms. In the First Amendment context, however, the Court has used a mode of intrusion analysis in an effort to avoid the need to define "privacy" in terms of subject matter paradigm (and, as a result, has largely doomed non-judicial efforts to define privacy in subject matter terms).

#### **D. The Subject Matter Paradigm**

Subject matter can be used to distinguish the private from the public. Some information is considered private because of the sensitivity of the subject matter it involves. We should not be asked to reveal the information, and publication of the information would seem to be of no

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<sup>124</sup> *Florida Star v. B.J.F.*, 491 U.S. at 550.

<sup>125</sup> Granted that the subject matter paradigm might never become the issue if the Court rigorously applies the means of intrusion principles that journalists may publish any information they lawfully obtain, but may not publish any information obtained by violating the law.

<sup>126</sup> See pages \_\_\_-\_\_\_ *infra*.

legitimate public concern.<sup>127</sup> Thus we could consider certain queries or publication of certain information out of bounds in virtually all contexts. Information about the kind of underwear a person prefers would fit into such a category.<sup>128</sup> We might consider other matters private depending on the context. For instance, genetic information might be considered private in the context of decisions by employers or insurers.<sup>129</sup> In the context of public discussion, courts have sought to vindicate the right to privacy using a subject matter paradigm in constructing the common law tort of publication of “private facts.”<sup>130</sup> As we will see, not only is the determination of whether a fact qualified as “private,” and thus actionable, highly contextual,<sup>131</sup> courts rarely find any fact “private,” even those one might ordinarily consider quite intimate.

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<sup>127</sup> Even Posner, who argues that individuals primarily wish to keep facts about themselves “private” in order to manipulate others, acknowledges that there are some non-discreditable matters that people do not want to reveal. These include a desire not to be seen naked, while performing excretory functions, or during sexual activities. See, Posner, *supra* note \_\_\_, at \_\_\_; *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229 (7th Cir. 1993). Thus, for example, a federal court in California could reasonably have held that broadcasting a tape of Pamela Anderson and her then-boyfriend Bret Michaels having sex gave rise to a cause of action for publication of private facts. See *Michaels v. Internet Entertainment Group, Inc.*, 27 Med. L. Rev. 1097 (C.D. Cal. 1998)(court held the tape was one of legitimate public concern because Anderson was famous as a “sex symbol”).

<sup>128</sup> The notoriety of the “boxers or brief” question directed to President Clinton during a 1994 appearance on MTV illustrates the point. See, e.g., Brian Balogh, *An Evolving Presidency*, L.A. TIMES, Aug. 2, 1998, at M1 ; Howard Witt, *Powell on MTV Show, Urges Condom Use to Prevent AIDS*, CHI. TRIB., Feb. 15, 2002. For an account of Clinton's MTV appearance, see *Clinton Gives Revealing Answers to MTV Crowd*, CHI. TRIB., Apr. 26, 1994, at 3.

<sup>129</sup> See note \_\_\_ *infra*.

<sup>130</sup> RESTATEMENT (SECOND) OF TORTS § 652D. (One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”).

On a scholarly level, Erving Goffman seeks in part to define privacy by subject matter, but theorizing that there are certain “informational preserves,” sets of facts about the individual that the individual expects to control access to. GOFFMAN, *supra* note \_\_\_, at 38-39.

<sup>131</sup> See Post, *supra* note \_\_\_, at 980 (discussing *Brents v. Morgan*). The disclosures about the intimate relations between husband and wife found to be matters of public importance in *Haynes v. Alfred A. Knopf, Inc.*, might surely have been considered private in some contexts. The fact that the details of the relationship allowed the author of the offending book to illustrate his thesis regarding a significant social movement, the Great Migration of African-Americans from the rural South to the urban North, was central to the court’s decision. Similarly in *Gaeta v. New York Daily News*, 62 N.Y.2d 340, 465 N.E.2d 802, 477 N.Y.S.2d 82 (1984), intimate facts about the family relationships appearing in the news story surely might not have been viewed as “matters of legitimate public concern” had not one of the family members provided an excellent illustration of the consequences of the de-institutionalization of the mentally ill. *Id.* at \_\_\_. (Granted, the question of whether the newspapers statements were matters of public concern, was analyzed in conjunction with a defamation claim, not a privacy claim.

States have also sought to define “private” information, by enacting statutes defining “private” information in terms of subject matter. The statute found unconstitutional in *Florida Star v. B.J.F.* was one effort to do so. Recently, in response to the coverage of the death of stock car driver Dale Earnhardt, the State of Florida has sought to define autopsy photos as “private,” such that journalists and others have no right to obtain them.<sup>132</sup> The privacy exemption to the Freedom of Information Act has to a large extent been defined in terms of subject matter.<sup>133</sup>

Other paradigms might effect our conclusions regarding the “private” or “public” nature of particular subjects. Our view of confidential relationships might shape our conception of the type of matters that are of legitimate public interest. For example, Warren and Brandeis, in their seminal article on the right to privacy, focused on two aspects of privacy. The first was individuals’ control over the expression of their thoughts, emotions and feelings, which, as we have seen, fits within the means of communication paradigm. The second concern was men’s ability to keep the “domestic” life within their household from becoming a subject of public discussion.<sup>134</sup> While Warren and Brandeis were not precise about defining the exact contours of “domestic life” that were not a fit subject for public discussion, but they did note that it encompassed, for example, whether a man dined with his spouse.<sup>135</sup>

Feminists, on the other hand, have attacked this conception of the private, at least to the

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<sup>132</sup> See *Campus Communications v. Inc. v. Earnhardt*, 820 So.2d 388 (Fla. App. 2002)(considering the constitutionality of Fla. Stat. 406.135); See also Mich. Laws Ann. Chap. 750, § 750.160a (criminalizing knowing photographing and public display of a decedent in a human grave).

<sup>133</sup> Exemption 6 of the list of exemptions authorizing the government to withhold information sought under the Freedom of Act, provides: “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552. See *Department of Air Force v. Rose*, 425 U.S. 352 370-73 (1976)(quoting House Report)[S. Rep. No. 813, at 9 (“a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information”); H.R. Rep. No. 1497, at 11 (“by excluding those kinds of files the disclosure of which might harm the individual.”); *Rural Housing Alliance v. United States Department of Agriculture*, 498 F.2d 73, \_\_\_ (D.C. Cir. 1974); *Wine Hobby USA, Inc. V. United States IRS*, 502 F.2d 133, (3rd Cir. 1974). The Supreme Court has not been as clear. *Promise of confidentiality does not mean information is private*, *Washington Post Co. V. HHS*, 690 F.2d \_\_\_, 263 (D.C. Cir. 19\_\_); *Robles v. E.P.A.*, 484 F.2d 843, 846 (4th Cir. 1973).

<sup>134</sup> Warren & Brandeis, *supra* note \_\_\_, at \_\_\_.

<sup>135</sup> Warren & Brandeis, *supra* note \_\_\_, at \_\_\_.

extent it seeks to shield from public scrutiny the interactions between husbands and wives.<sup>136</sup> Shortly after Warren and Brandeis penned their influential article, Charlotte Perkins Gilman noted that privacy in the home was, as a practical matter, more available for men than for women.<sup>137</sup> More recently, Katherine McKinnon has asserted that feminism has had to “explode” the private, which keeps some men out of other men’s bedrooms (that is, renders the relationship between spouses immune from scrutiny).<sup>138</sup> The relationship between men and women in families are the public’s business. Exploitation and oppression does not fall outside the public sphere simply because it takes place within a household or a family. Indeed, a spouse’s discussion of another’s intimate, but discreditable behavior might be considered unfit discussion by some, but is viewed by many as important for the public to hear.<sup>139</sup>

An Alabama Supreme Court case illustrates the divergence between the location and the subject matter paradigms, and demonstrates that a subject matter analysis may lead to the recognition of a privacy interest when a location analysis might suggest otherwise. In *Daily Times Democrat v. Graham*,<sup>140</sup> the Alabama Supreme Court considered a claim that a newspaper

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<sup>136</sup> Presumably, feminists would not take the same position with regard to public involvement in a pregnant woman’s decision in matters regarding her fetus or parents’ child-rearing decisions.

<sup>137</sup> CHARLOTTE PERKINS GILMAN, *WOMEN AND ECONOMICS* 255, 258-60 (1898)(“At present any tendency to withdraw and live one’s own life on any plane of separate interest or industry is naturally resented, or at least regretted, by other members of the family. This affects women more than men, because men live very little in the family and very much in the world.”)

<sup>138</sup> CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 92-102 (1987); JUDITH WAGNER DECEW, *IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY* 81-87 (discussing MacKinnon).

<sup>139</sup> While Ruby Lee Daniels told her story about her husband’s abusiveness for purposes of a sociological study of the Great Migration, there is no reason that she could not tell it as a part of explaining her life and background in ways that might prove helpful to other in a similar condition. Otherwise, Daniels might have been precluded from describing defining moments of her own life essential to the development of her own personality. See *Anonson v. Donahue*, \_\_\_ (Tex. Ct. App. 1993); *Winstead v. Sweeney*, \_\_\_\_\_ (Tex. Ct. App. 19\_\_).

A similar argument has arisen with regard to “hostile work environment” employment discrimination cases. Rosen believes that much of the behavior designed to attract or retain the romantic interest of others in the workplace should be viewed as “private” and left to the discretion of those involved. ROSEN, *supra* note 50, at 12-18, 23-24. McKinnon, on the other hand, would presumably see such conduct as highly relevant to a very “public” matter, women’s employment opportunities in the workplace. CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 182 (1979).

<sup>140</sup> 162 So.2d 474 (Ala. 1964).

has tortiously published a private fact when it published a photograph of a woman whose dress had been blown upward unexpectedly by an air vent, revealing her undergarments. At the time the picture was taken, both the woman and the photographer were in a public place — a county fair.<sup>141</sup> A conventional location-based analysis would have suggested that the *Daily Times Democrat* could publish the picture.<sup>142</sup> Instead, the Court focused on the subject matter of the picture, which it characterized as involving indecent exposure.<sup>143</sup> The Court thus found actionable the taking and distribution of photographs showing a person's underwear when the subject neither intentionally exposed her underwear nor consented to the publication of the photograph.<sup>144</sup> While the Court gave precedence to the subject-matter paradigm, that choice was not necessarily dispositive. The Court might have held that the photograph captured a “matter of public importance,” as the newspaper attempted to argue by adducing various definitions of newsworthiness.<sup>145</sup>

So far, except for the discussion of *Daily Times Democrat*, I have largely discussed use of

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<sup>141</sup> *Id.* at 381.

<sup>142</sup> *Id.* at 383. *See, McNamara v. Freedom Newspapers*, 802 S.W.2d 901 (Tex. Ct. App. 1991)(publication of photograph showing exposed genitalia of player participating in a high school soccer game does not give rise to a “publication of private facts” claim because individuals photographed in a public place for a newsworthy article”). The court acknowledged this but rejected it asserting: “To hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at the moment to be part of a public scene would be illogical, wrong, and unjust.” Of course, if the location at issue were viewed as plaintiff's body, see note \_\_\_ *supra*, perhaps plaintiff could have prevailed even under a location analysis.

<sup>143</sup> *Id.* at 383. (“We can see nothing of legitimate news value in the photograph. Certainly it discloses nothing as to which the public is entitled to be informed.”)(“Not only was this photograph embarrassing to one of normal sensibilities, we think it could properly be classified as obscene, in that 'obscene' means 'offensive to modesty or decency.' . . .or expressing to the mind or view something which delicacy, purity, or decency forbid to be expressed.”)

<sup>144</sup> *Id.* at \_\_\_\_\_. The Court could have focused on the means of intrusion. It might have found tortious either intentionally photographing a person in such a predicament or showing such a picture to others, but allowed an observer to describe the event. The permanence of the photograph could have been identified as the core privacy problem. Such an approach would have protected Graham, the subject of the photograph, had the photographer merely retained the photograph and shown it to a few friends rather than publishing the photograph in a newspaper.

<sup>145</sup> Though it did not do so, the newspaper might have argued that the photograph had captured an unusual event reminiscent of a popular image of then-widely acclaimed movie star Marilyn Monroe. *THE SEVEN YEAR ITCH* (20th Century Fox 1955) (scene in which Marilyn Monroe's dress blown upward as she stood over an air vent). Also the court, under an unconventional location analysis, might have considered the relevant location as the human body, which is generally entitled to privacy protection, see notes \_\_\_-\_\_\_ *supra*, and accompanying text, rather than as the physical milieu of the interaction, namely a “public” county fair.

the subject matter paradigm to resolve questions involving the publication of information. The legal system employs the subject-matter paradigm to constrain the acquisition of information as well. Subject matter constraints have been imposed upon law enforcement intrusions. The most central constraint is the underlying Fourth Amendment rule that police may breach expectations of privacy only if they can show probable cause to believe that the intrusion will reveal evidence of a crime. The other subject matter constraints on law enforcement tend to be quite modest, focusing mainly on minimal relevance<sup>146</sup> and law enforcement purpose.<sup>147</sup> On occasion, however, the requirement of law enforcement purpose can provide significant protection.<sup>148</sup>

The legal system structures some privacy protections in terms of subject matter constraints on employers or insurers, who could otherwise coerce individuals into providing information. Some statutes make certain matters irrelevant to decision-making and bar employers or insurers from asking prospective employees and policyholders about certain matters.<sup>149</sup> However, society generally need not address demands for information that involve

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<sup>146</sup> Thus, subpoenas may only request materials relevant to the criminal investigation. *United States v. R. Enters.*, 498 U.S. 292, 301 (1991) ("Where ... a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation."); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946) ("The requirement of 'probable cause, ...' applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry.").

<sup>147</sup> See note \_\_\_ *infra*. Occasionally, a statute will limit the use of certain intrusive techniques to investigations of only certain crimes, ECPA, 18 U.S.C. § 2516 (listing crimes that can be investigated by use of electronic interception); see Subcomm. On Civil and Constitutional Rights of the Comm. Of the Judiciary, FBI Undercover Operations, H.R. Doc 98-267, at 83-84 (1984) (recommending the same approach with regard to regulating the use of undercover techniques).

<sup>148</sup> *E.g.*, *Wilson v. Layne*, 526 U.S. 603, 611 (1999); *York v. Story*, 324 F.2d 450 (9th Cir. 1963); *Lauro v. Charles*, 219 F.3d 202, 213 (2d Cir. 2000) (holding staged "perp walk" unconstitutional in certain circumstances because it serves no law enforcement purpose).

<sup>149</sup> Subject matter restrictions can be particularly effective when defined in relation to particular activities. For instance, some statutes prohibit consideration of genetic information or HIV-positive status with regard to employment decisions. Some state courts have also prohibited mandatory drug testing unless it is essential to assessing an employee's initial or continuing qualifications for the job. *Borse v. Pierce Goods Shop, Inc.*, 963 F.2d 611 (3d Cir. 1992) (predicting Pennsylvania courts' application of the common law tort of intrusion into seclusion) ("It may be granted that there are some areas of an employee's life in which his employer has no legitimate interest"); *Twigg v. Hercules Corp.*, 406 S.E.2d 52 (W.Va. 1990) (mandatory drug test not based on individualized suspicion allowable only with respect to those employees whose job "involves public safety or the safety of others"); *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 23 (N.J. 1992) (mandatory drug testing must be confined to

neither coercion (such as "no information, no job" or "no information, no credit") nor deception.<sup>150</sup> Not only can individuals otherwise control their own disclosure of personal information in response to the information demands of others, but the ability to selectively provide such information is a necessary element of intimacy.<sup>151</sup> We may define our circle of friends by our willingness to share private information about ourselves with them. Perhaps it is for such reasons that the subject matter mode most often addresses dissemination of, rather than access to, information.

Privacy interests in autonomy are also often defined by subject matter. Thus, the constitutional right of privacy protects the rights of individuals to make decisions with regard to certain subjects: procreation, termination of pregnancies, and end of life decisions. Granted, many of the constitutional protections might be characterized as protecting locations, namely the human body, or confidential relationships, namely families and the roles families traditionally fulfill.

Reliance on a subject-matter paradigm may sometimes leads the legal system to reject a claim of privacy that could successfully be asserted under a competing paradigm. Both *Wyman v. James* and *Whalen v. Roe* illustrate this proposition. Recall that *Wyman v. James* involved a constitutional challenge to social workers' visits to the homes of AFDC recipients. Under a location paradigm, the aid recipient would unquestionably have possessed a privacy interest of the highest order, demanding that no entry be effected without either a warrant issued on

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jobs that posed a threat to co-workers, the workplace or the public at large). Similarly, some matters may be deemed irrelevant for purposes of compiling consumer credit histories. KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 202-03 (1988); TURKINGTON & ALLEN, *supra* note 108, at 351. And finally, in the criminal context, rape shield laws deem victim's sexual histories irrelevant in sexual assault prosecutions. *See, e.g.*, Fed R. Evid. 412; *see*, Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 86 (2002)Cites needed.

<sup>150</sup> Thus, much of the Federal Trade Commission's efforts to protect privacy on the Internet seeks to ensure that those who solicit information by way of the Internet comply with the privacy policies that they have adopted. In other words, the Commission seeks to ensure that those privacy policies are not deceptive, and brings actions against companies that violate their privacy policies for engaging in unfair and deceptive trade practices in violation of section 5 of the Trade Commission Act. 15 U.S.C. § 45 (authorizing the Commission to prevent "unfair or deceptive acts or practices in commerce"). [cite cases: Ely Lilly, Microsoft, Guess Jeans].

<sup>151</sup> Charles Fried, *Privacy*, 77 YALE L.J. 475, 484 (1968) (noting that love and friendship require different levels of disclosure; without the ability to differentiate the level of disclosure of facts about oneself, there can be no love or respect).

probable cause or the existence of circumstances establishing an exception to that requirement. While, as previously noted, the Court's relied upon a means of intrusion approach in analyzing James' expectation of privacy, the Court also invoked the subject matter paradigm as well. The majority concludes that aid recipients have greatly diminished expectations of privacy in their homes because the conditions within their homes became matters of public concern once they begin receiving aid under the AFDC program.<sup>152</sup> This subject-matter aspect of the Court's analysis suggests that aid recipients have no right of privacy in the condition of their homes given the relevance of those conditions to both their continued eligibility for AFDC aid and an assessment of the aid's efficacy.<sup>153</sup>

Similarly, in *Whalen v. Roe*, a strong norm of confidentiality would ordinarily prevent a physician from disclosing information relating to a patient's medical condition. Nevertheless, the Court did not find any privacy violation in the mandatory disclosure of drug prescriptions doctors ordered for patients, and indeed the plaintiffs did not really seriously argue that it did. The subject matter paradigm trumped the confidential relationship (much in the same way mandatory reporting statutes trump such relationships).<sup>154</sup> Patients had no expectation of privacy, at least vis-a-vis the government, with regard to medical prescriptions, because the narcotics laws make the ordering of prescriptions a matter of public importance (access to such information is an essential element of the regulation of both medical practice and pharmaceuticals).

The Supreme Court, as an interpreter of the Constitution, has not used subject matter to define any realm of privacy, at least insofar as individuals claim that their privacy has been

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<sup>152</sup> *Wyman v. James*, 400 U.S. at 318-19 ("The agency, with tax funds provided from federal as well as from state sources, is fulfilling a public trust. The State, working through its qualified welfare agency, has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses.").

<sup>153</sup> One commentator has argued that in the same era that Warren and Brandeis were arguing for a right to privacy that protected domestic matters and the Supreme Court began taking privacy seriously (see, *In re Boyd*), the poor, immigrants and single mothers were *losing* their ability to safeguard the privacy of their domestic affairs as a result of government programs reflecting a view that the welfare of children, the condition of urban habitats, and public health were matters of public concern. Jonathan L. Hafetz, "*A Man's Home is his Castle?: Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*," 8 WM. & MARY J. WOMEN & L. 175, 175- 183 (2002).

<sup>154</sup> For a discussion of "duty to report" statutes, see Sandra Guerra Thompson, *The White Collar Police Force: "Duty to Report" Statutes in Criminal Law Theory*, 11 WM & MARY BILL RIGHTS JOURNAL 3 (2003).

breached by the publication of information. The Court could have held that information obtained illegally is tainted, and that no one privy to such tainted information has a First Amendment right to further dissemination the information. Had it done so, the restrictions the other privacy paradigms impose on the acquisition of information would protect privacy quite effectively. For example, states could enforce prohibitions on wiretapping or trespassing by precluding publication of information gathered as a result illegal intrusions accomplished by such prohibited means.<sup>155</sup> However, the Court has not adopted this approach, because the First Amendment discourages prohibitions on publication of truthful information regarding matters of public importance. As a result, then, when publication of information is at issue, the subject matter paradigm, which recognizes no sphere of privacy, will generally trump other privacy paradigms effectuated by the laws violated in the process of obtaining the information.

In short, while subject matter constraints have some usefulness in limiting the acquisition and use of certain information, they have little with regard to the publication of information. Privacy could be defined in terms of the issues fit for public discussion, but, given the federal and state courts' current approaches, the prospect for the establishment of a robust definition of privacy in that context is not high. The lack of a subject matter definition of the "private" serves to undermine, though certainly not destroy, the use of other paradigm to protect privacy in terms of the information publicly disseminated about an individual.

## **E. The Confidential Relationship Paradigm**

For members of society, interaction with others is inevitable and necessary on both a personal and a commercial level.<sup>156</sup> Few have no need for the emotional or spiritual support provided by other human beings. And we can satisfy our material needs only by interacting with

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<sup>155</sup> This is essentially the approach that the D.C. Circuit majority took in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *vacated*, 121 S. Ct. 2190 (2001).

<sup>156</sup> There is virtually no fact that we do not expose to someone. See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989) ("In an organized society, there are few facts that are not at one time or another divulged to another."); e.g., Tracey Maclin, *Informants and the Fourth Amendment: A Reconsideration*, 74 WASH. U. L.Q. 573, 626-27 & n.291 (1996),.

banks, communications providers, public utilities, credit companies, and supermarkets.<sup>157</sup>

However, individuals must retain the power to be selective, to establish special relationships with some that they do not wish to have with others.<sup>158</sup> Various theorists characterize our interactions with others in terms of zones of intimacy.<sup>159</sup> A significant aspect of such special relationships, both personal and commercial, is the provision of information about ourselves. Thus, we need to engage in differential disclosure — revealing to some that which we withhold from others. We may disclose certain matters only to others in the same family, religious group, or alcoholics anonymous group. By safeguarding the means of communications from breach by outsiders, the legal system may protect information we divulge to such confidants. However, such “means of communications” protections do not protect us if the confidant can be forced to reveal the information, decides to reveal the confidence in the absence of compulsion, or forms a special relationship with us precisely to obtain confidences for disclosure to others.

Privacy protections could secure privacy by precluding people in whom citizens confide from divulging their confidences. For instance, society might impose upon medical personnel a duty keep confidential the information they obtain about patients in the course of rendering care.<sup>160</sup> Similarly, banking records could be, and indeed are,<sup>161</sup> protected by laws prohibiting bank officials from divulging account information to government or private individuals in all but limited circumstances. The scope of such privacy rights against prospective *private* intruders

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<sup>157</sup> *Suburban Trust Co. v. Waller*, 44 Md. 335, 340, 408 A.2d 758, 762 (1979) (“Modern society virtually demands that one maintain a banking account of some sort”).

<sup>158</sup> Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968)(essential aspect of privacy is ability to selectively reveal ourselves, a right which is essential to intimacy).

<sup>159</sup> ERVING GOFFMAN, *RELATIONS IN PUBLIC* 57-58 (Harper Colophon Books 1972) (1971); Dolores A. Donovan, *Informers Revisited: Government Surveillance of Domestic Political Organizations and the Fourth and First Amendments*, 33 BUFF. L. REV. 333, 357-60(1984); Fried, *supra* note 151, at 484 (noting that love and friendship require different levels of disclosure; without the ability to differentiate the level of disclosure of facts about oneself, there can be no love or respect); H.J. McCloskey, *The Political Ideal of Privacy*, 21 PHIL. Q. 303, 308-09 (1971) (noting the need to recognize different levels of privacy for different people); W.A. Parent, *A New Definition of Privacy for the Law*, 2 LAW & PHIL. 305, 306-07 (1983); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 989-95 (1989).

<sup>160</sup> Doctor-patient privilege, HIPAA.

<sup>161</sup> See note \_\_\_ *infra*.

does not turn on subject matter considerations like “relevance,” which plays a central role in the subject matter mode of privacy analysis outlined above. Even if a customer's account information has great relevance to the customer's fitness for a political office he seeks, the bank cannot divulge the information. Conversely, if a person obtains account information without breaching the protected bank-customer relationship (by, for example, finding the depositor's misplaced checkbook), he does not violate bank secrecy laws by publishing such information.<sup>162</sup> Neither, ordinarily, will the scope of legally enforceable privacy expectations associated with confidential relationships turn on issues of physical location, the means of intrusion, or the means of communication.<sup>163</sup>

Formal evidentiary privileges, such as spousal, attorney-client, priest-penitent, and doctor-patient privileges, do, of course, protect privacy by precluding the government from requiring the confidant to divulge the confidence imparted.<sup>164</sup> Most formal privileges have an accompanying professional or ethical obligation precluding the confidant from voluntarily disclosing the information.<sup>165</sup> These privileges and obligations of confidentiality have mostly been developed at the state level, but the federal courts have acted consistently with such developments.<sup>166</sup>

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<sup>162</sup> A separate common law cause of action for publication of private facts might lie. Such an action would probably fail if some legitimate reason for public disclosure exists, and, particularly when the depositor is a public official or public figure, such a legitimate reason can likely be established.

<sup>163</sup> Granted a court may consider such issues, but probably in the context of deciding whether the information imparted from one confidant to another was ever confidential in the first place. In particular, a court may consider such factors in determining whether the confider waived his right to confidentiality. The location of a conversation between priest and penitent might have relevance to the confidentiality of a the communication between the two. If the statements occurred in a public place within earshot of others, the penitent's statements to the clergyman would not qualify as confidential, because others were privy to it. *See generally*, JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 74, at 104 (4th ed. 1992) (“[M]ost modern decisions do no more than hold that a privilege will not protect communications made under circumstances in which interception was reasonably to be anticipated.”)

<sup>164</sup> Cite needed.

<sup>165</sup> The major one that does not, the privilege of spousal communications, assumes that ties of affection will lead to the confident keeping the confider's trust.

<sup>166</sup> Fed. R. Evid. 501 (evidentiary privileges “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience”).

Though the courts have generally held that individuals have no legitimate expectation, recognized by the Fourth Amendment, that their confidants will keep their confidences, the courts have exhibited some reluctance to extend that principle to matters confided in the course of a confidential relationship. In *Weatherford v. Bursey*,<sup>167</sup> an undercover police operative attended a meeting between a criminal confederate and his lawyer. Though the government did not attempt to introduce any statements made at the meeting into evidence, the defendant argued that the undercover operative's mere presence at the meeting impermissibly undermined his Sixth Amendment right to counsel.<sup>168</sup> The Court, concerned about adopting a prophylactic rule that might "for all practical purposes" unmask undercover operatives, ultimately found that the operative's attendance of the meeting was constitutionally permissible.<sup>169</sup> However, the Court did declare that in such situations the undercover operative must not report his observations during such attorney-client meeting to any of his law enforcement colleagues.

Courts have held that one spouse does not lose the marital communications privilege because the other surreptitiously allows a third party to eavesdrop, even though, ordinarily, spouses lose the privilege if third parties, even eavesdroppers, are privy to the conversation.<sup>170</sup> In *State v. Lively*,<sup>171</sup> the Washington Supreme Court held that a confidential informant could not attend alcoholics/narcotics anonymous meetings to identify drug addicts who continued selling

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<sup>167</sup> 429 U.S. 549, 554-56 (1977).

<sup>168</sup> Ordinarily, a law enforcement agent's attendance of a meeting between attorney and client, either surreptitiously or by invocation of the government's coercive powers, would violate the Sixth Amendment right to counsel — the ability to speak with counsel confidentially constituting a crucial aspect of that right. *See, e.g., Coplton v. United States*, 191 F.2d 749, 757-59 (D.C. Cir. 1951); *see also, Hoffa v. United States*, 385 U.S. 293, 306-07 (1966) (assuming *Coplton* was correctly decided).

<sup>169</sup> *Id.* at \_\_\_\_.

<sup>170</sup> *See, United States v. Neal*, 532 F. Supp. 942, 947-49 (D. Colo. 1982); *People v. Dubanowski*, 394 N.E.2d 605, 606-07 (Ill. App. Ct. 1979); *Hunter v. Hunter*, 83 A.2d 401, 403-04 (Pa. Super. Ct. 1951). *See generally, JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE* § 74, at 103-04 (4th ed. 1992) (stating that the general rule, allowing an eavesdropper to testify regarding privileged conversations, has rarely been extended to situations where a party to the conversation makes the eavesdropping possible).

<sup>171</sup> 921 P.2d 1035 (Wash. 1996).

illegal drugs.<sup>172</sup> Indeed, *Lively* involves a relationship that, while “confidential” in the sense I use that term in this paper, is not covered by a formal evidentiary privilege in most jurisdictions.<sup>173</sup> Except in the most critical circumstances, courts may well prohibit undercover operatives from breaching privileged relationships.<sup>174</sup>

The cost of such privileges and accompanying obligations can be quite high, as I have noted elsewhere.<sup>175</sup> Thus, the number of such privileges is greatly limited.

Outside the realm of evidentiary privileges and their accompanying confidentiality obligations, the common law generally does not impose confidentiality obligations on those entrusted with information.<sup>176</sup> Despite calls for a more generalized recognition of a common law cause of action for breach of confidentiality,<sup>177</sup> courts in the United States have yet to recognize

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<sup>172</sup> *Id.* at 1046, 1048-49. The case was decided on due process grounds rather than on Fourth Amendment grounds. *Id.* at 1049.

<sup>173</sup> Communications between participants in an alcoholics or narcotics anonymous program are not privileged in many jurisdictions. See Thomas J. Reed, *The Futile Fifth Step: Compulsory Disclosure of Confidential Communications Among Alcoholics Anonymous Members*, 70 ST. JOHN'S L. REV. 693, 700-01 (1996).

<sup>174</sup> Courts have allowed law enforcement officers to infiltrate churches, but the contested cases do not appear to have involved revelation of protected communications between penitent and cleric. See, e.g., *United States v. Aguilar*, 883 F.2d 662, 696-705 (9th Cir. 1989) (holding that undercover agents attending and recording church meetings did not need a warrant); see also, Michael F. McCarthy, Note, *Expanded Fourth Amendment Coverage: Protection from Government Infiltration of Churches*, 3 GEO. IMMIGR. L.J. 163, 170-71 (1989) (discussing Operation Sojourner, in which the INS used an informant to infiltrate a church and obtain evidence regarding alien smuggling activity).

<sup>175</sup> *Theatrical Investigations*, *supra* note \_\_\_\_, at 202. First, widely applicable confidentiality obligations would harm the public interest. See, e.g., *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 193-94 (1990); *Elkins v. U.S.* 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting). (Such concerns have recently led the American Bar Association to amend its model rules of ethics to give attorneys greater discretion to breach confidentiality when their client's conduct poses the risk of life-threatening injury to others.) Second, such confidentiality obligations place unfair strains on the confidant, who may have conflicting duties or who may merely wish to avoid becoming complicit in wrongdoing. See, *Morales v. Portuondo*, 154 F. Supp. 2d 706, 710 (S.D.N.Y. 2001) (stating that a priest and lawyer could not reveal the confession of a person to a crime for which two other individuals were being incarcerated).

<sup>176</sup> Banks are an exception. See, e.g., *Suburban Trust Co. v. Waller*, 408 A.2d 758, 764-65 (1979). Thus, the common law has long recognized that banks have a duty of confidentiality with respect to customers' account information, and the breach of that confidence is actionable in damages. See, *Suburban Trust* (discussing precedence); *Tournier v. Nat'l Provincial & Union Bank of Eng.*, 1 K.B. 461 (1923).

<sup>177</sup> Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 9-15 (1995); G. Michael Harvey, Comment, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2395-97 (1992); Alan B. Vickery, Note, *Breach of Confidence: An Emerging*

such a legal claim, and appear unlikely to do so.<sup>178</sup> Legislatures have been active in this area, enacting database protection statutes, and there is some judicial movement toward recognizing a limited common law right to seek redress for breaches of confidentiality.

The standard form that privacy legislation has taken in recent years is the database protection statute.<sup>179</sup> For example, over the last 40 years, Congress has enacted the Privacy Act of 1974,<sup>180</sup> the Federal Educational Rights and Privacy Act of 1974,<sup>181</sup> the Right to Financial Privacy Act of 1978,<sup>182</sup> the Video Privacy Protection Act of 1988,<sup>183</sup> the Driver's Privacy Protection Act,<sup>184</sup> and Title V of the Gramm-Leach-Bliley Financial Modernization Act.<sup>185</sup> Recently, the Department of Health and Human Services promulgated privacy regulations under

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*Tort*, 82 COLUM. L. REV. 1426, 1453-54 (1982).

<sup>178</sup> *But see*, Corliss v. E.W. Walker Co., 64 F. 280 (C.C.D. Mass. 1894). Gilles also notes that some breach of confidence actions have been recognized in California and New York, and decisions in other states have suggested possible receptiveness. These actions, however, have largely involved fiduciary relationships or commercial arrangements. Gilles, *supra* note 200, at 53-58. See generally, DAVID A. ELDER, PRIVACY TORTS §§ 5:-5:3 (2002).

<sup>179</sup> Posner, in his well-known article, criticized this trend.

<sup>180</sup> Pub. L. 93-579, 88 Stat. 1896 (codified at 5 U.S.C. § 552a). The Act not only constraints federal agencies' disclosure of individual records, but also provides citizens with a right to access and correct such records.

<sup>181</sup> Pub. L. 93-380, 88 Stat. 571 (codified at \_\_ U.S.C. §§ \_\_\_\_). The Act regulates federally-funded primary, secondary, and post-secondary educational institutions and restricts their disclosure of students' educational records and the financial information provided by the parents of students.

<sup>182</sup> Pub. L. 95-630, 92 Stat. 3697 (codified at 12 U.S.C. §§ 3401-3422). The Act overturns *U.S. v. Miller*, 425 U.S. 435 (1976), and recognizes a privacy interest in banking records, and accordingly limits compelled disclosure of banking information to governmental authorities.

<sup>183</sup> Pub. L. 100-618, 102 Stat. 3195 (codified at 18 U.S.C. §§ 2710). The Act imposes confidentiality obligations on businesses renting video entertainment, precluding them from disclosing certain information.

<sup>184</sup> Pub. L. 103-322, 108 Stat. 2099 (codified at 18 U.S.C. §§ 2721-25).

<sup>185</sup> Pub. L. 106-102, 113 Stat. 1338 (1999) (codified at \_\_ U.S.C. §§ \_\_\_\_). The Act requires the FTC and several regulatory agencies with jurisdiction over financial institutions to promulgate regulations insuring that financial institutions provide consumers with notice of their privacy policies and an opportunity to "opt out" of the secondary use of information pertaining to them. The Act was prompted by concerns about allowing financial institutions to engage in multiple services. Experts anticipated that the full-service financial institutions that were likely to prosper in the more relaxed regulatory environment would increasingly engage in secondary use of information collected from customers.

the Health Insurance Portability and Accountability Act.<sup>186</sup> Database protection statutes govern the conduct of database custodians, who obtain personal data from individuals in the course of providing a service or through use of their governmental authority to obtain information by compulsion.<sup>187</sup> Thus, generally these files result from a confidential relationship or the equivalent, in which an individual is providing access to information that he or she may not normally make public, often solely to secure a service needed in a complex society such as ours. The statutes impose a weak confidentiality obligation on the database custodian. The custodian has no obligation to turn away all inquiries seeking information in the database,<sup>188</sup> and many statutes provide standards that allow, or require, disclosure of confidential information once a requester makes a particular showing of need for the information.<sup>189</sup> Thus, often such information does not become totally unavailable to courts, as it does when information is protected by a traditional evidentiary privileges. At the same time, however, the statutes serve to recognize that the information is private, and in doing so establishes that individuals have a right to preclude the database custodian from disclosing the information solely at its discretion. Such statutes embody a legislative rejection of the principle that dominates the Supreme Court's Fourth Amendment jurisprudence, that those who confide in others have no legitimate expectation that their confidences will be disclosed. In other words, while the Court's Fourth Amendment jurisprudence establishes that the decision to disclose confidences lies within the confidant's discretion, data protection statutes severely limit confidants' discretion. These data protection statutes then, control confidants and specify both the uses to which those confidants can put individuals' information and the circumstances under which such information can be disclosed to others.

The Supreme Court has ignored this paradigm when addressing privacy. In perhaps its

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<sup>186</sup> Cite needed.

<sup>187</sup> This does not cover every database protection statute. For instance credit companies covered by the Fair Credit Report Act do not fit this mold.

<sup>188</sup> For example, a video rental store must provide information in response to a subpoena or court order, 2710(b)(2)(a) & (b), as does a covered entity under HIPAA, cite needed.

<sup>189</sup> Indeed, the standard that must be met for disclosure is often quite minimal.

most woeful lapse in defining legitimate expectations of privacy in the Fourth Amendment context, the Court has as a practical matter assumed that any information individuals' willingly disclose to one they willingly disclose to all. This failing is the consequence of the Court's refusal to recognize any limitation on a person's ability to disclose to others matters revealed to him in confidence.

The Court refused to recognize a reasonable expectation of privacy that one in whom a person confides will not reveal the information to law enforcement officers.<sup>190</sup> No only does this rule cover criminal confederates, but also entities such as banks and public utilities.<sup>191</sup> Thus, in *United States v. Miller*,<sup>192</sup> the Court held that acquisition of banking records did not constitute a "search," explaining that such conduct breached no legitimate expectation of privacy. In the Court's view, a depositor who shared financial information with his bank could have no legitimate expectation that law enforcement officials would not thereby gain access to the information. If a person exposes information to at least one other person, he assumes the risk of exposing that information to law enforcement. Such reasoning provided the basis for the controversial Terrorism Information and Prevention System (TIPS) program proposed by the Department of Justice. Law enforcement officers would encourage public utility employees to report suspicious items they observe during the course of their daily work-related routines.<sup>193</sup>

Indeed, at least on a theoretical level, Supreme Court doctrine is even more troubling. In cases like *United States v. Miller*, the Court purports to apply the principle that the police are entitled to any information available to the general public. The logic of the Court's holdings in

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<sup>190</sup> *United States v. White*, 401 U.S. 745 (1971); *Lopez v. United States*, 373 U.S. 427, 439 (1963); *Hoffa v. United States*, 385 U.S. 293 (1966); *Lopez v. United States*, 373 U.S. 427 (1963).

<sup>191</sup> *United States v. Miller*, 425 U.S. 435 (1976)(banks); *Smith v. Maryland*, 442 U.S. 735 (1979)(telephone records).

<sup>192</sup> 425 U.S. 435 (1976).

<sup>193</sup> U.S. DEP'T OF JUSTICE, OPERATION TIPS FACT SHEET (2002), available at <http://www.policeforum.org/tips.htm>. Congress explicitly banned the program when it established the new Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, § 880, 116 Stat. 2135, 2245. The controversy surrounding the program and Congress' swift reaction perhaps demonstrates the power of the physical location mode of privacy analysis. At least as the public understood the program, most of the reporting done under the TIPS program would regard private residences, which receives the highest protection under the traditional location-based analysis.

such cases suggests that once an individual provides information to a confidant, no legally enforceable privacy principle precludes that confidant from revealing that information to any member of the general public, a journalist, or to the public at large. Theoretically, the Court does not recognize any variation of a person's legitimate expectations of privacy based on the identity of the intruder.<sup>194</sup> Accordingly, citizens have no greater expectation of privacy against the police (operating without a warrant and/or probable cause or the equivalent) than they do against journalists or any member of the public who happens to take an interest in them.

In practice, the situation is far less grim. While the Court claims to refer to general expectations of privacy in determining the scope of legitimate expectations of privacy vis-a-vis law enforcement, it really defines the general expectation of privacy vis-a-vis law enforcement based on its own balancing of the needs of law enforcement and privacy.<sup>195</sup> The Court does not appear to take seriously any evidence indicating the public's actual judgment about the level of privacy expectations society should consider reasonable.<sup>196</sup> Moreover, the Court's holding that depositors lacked an expectation of privacy in their banking records did not leave citizens powerless to guard such records from private snoops. The Court would rarely, if ever, have occasion to apply its own anemic Fourth Amendment conception of the reasonable expectation of privacy to claims against private intruders.

A recognition that a confidential relationship may exist despite the absence of an evidentiary privilege need not require empowering individuals to preclude their confidants from testifying in all but a few limited circumstances, as is the case when an evidentiary privilege

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<sup>194</sup> *Secrets and Lies*, *supra* note \_\_\_\_, at 762-73.

<sup>195</sup> *Secrets and Lies*, *supra* note \_\_\_\_, at 773-74. Moreover, different members of the public have different levels of access to particular personal information. Banks, for example, have privileged access to account information that other lack. In actuality, then, the Court equates law enforcement's right to intrude (absent satisfaction of Fourth Amendment requirements) with that of the most privileged member of the public. In other words, law enforcement receives "most favored nation" status. *Id.* at 776.

<sup>196</sup> See Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society*, 42 DUKE L.J. 727, 774-75 (1993). Thus, in finding no reasonable expectation of privacy in garbage placed in opaque bags for disposal, the Court disregarded a municipal ordinance that made such snooping illegal. *See*, *California v. Greenwood*, 486 U.S. 35, 43-44 (explicitly rejecting the approach that expectations of privacy are determined by ordinance or other local positive law or custom).

applies. Rather, the Court need only recognize that a legitimate expectation of privacy exists and thus merely require law enforcement officials to either make the showing required to obtain a warrant or advance some regulatory exception to the warrant requirement before allowing government officials to breach those confidential relationships. Certainly law enforcement officers should be required to make a showing of either reasonable suspicion or probable cause before deceptively entering into a confidential relationship to obtain information from a suspect.<sup>197</sup>

Sometimes, reliance on the confidential relationship paradigm might defeat a privacy claim that would otherwise appear sound under another paradigm. The federal wiretapping statute provides an illustration. As we have seen, Congress declared, by statute, that citizens possess legitimate expectations of privacy in their telephone conversations, and thus that third parties may not intercept such conversation (except in unusual circumstances). However, parents may listen in on their minor children's telephone conversations by means of an extension phone.<sup>198</sup> Indeed, many courts hold that within the marital home, spouses may listen in on each other's phone calls by use of an extension phone.<sup>199</sup> In both circumstances, Congress, in drafting the statute, or the courts, in interpreting it in the context of broader legal norms, have recognized

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<sup>197</sup> Indeed, Congress essentially took steps in this direction in enacting the Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, §§ 1100-1122, 92 Stat. 3641, 3697-3710 (codified at 12 U.S.C. §§ 3401-3422 (2000)), governing confidential banking records, and the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified in scattered sections of 18 U.S.C.), governing the use of pen registers and similar devices used to obtain communications attributes. Of course, in those statutes Congress imposed a far less demanding standard than that suggested above.

<sup>198</sup> 28 U.S.C. § 2510(5)(a) (establishing the extension phone exception the removes extension phones and similar telephone equipment from the definition of "electronic, mechanical, or other device" as that phrase is used to define the term "intercept" in section 2510(4)); Hearings on Anti-Crime Program Before Subcomm. No. 5 of the House Judiciary Comm., 90<sup>th</sup> Cong. 989 (1967)(testimony of Hermann Schwartz)("I take it nobody wants to make it a crime for a father to listen in on his teenage daughter . . . [b]ut this bill does not go to that"); FISHMAN AND MCKENNA, *supra* note 10, at § 7:15 (discussing cases involving parental monitoring of child's telephone conversations).

<sup>199</sup> *E.g.*, *Simpson v. Simpson*, 490 F.2d 803 (5<sup>th</sup> Cir.), cert. denied, 419 U.S. 897 (1974). In *Simpson*, even though the defendant in the case used equipment that precluded him from relying on the extension phone exception, the court found that the interception was not illegal, explaining that in its view, Congress, in passing the wiretapping statute intended to "abjure from deciding very intimate questions of family relations," namely "the extent of privacy family members may expect within the home vis-a-vis each other." *Id.* at \_\_\_; *contra*, *United States v. Jones*, 542 F.2d 661 (6<sup>th</sup> Cir. 1976)(refusing to recognize a "domestic conflict" exception to the wiretap statute). *See generally*, FISHMAN AND MCKENNA, *supra* note 10, at § 7:13.

that in the domestic context there may be no legitimate expectation of privacy in telephone conversations.<sup>200</sup>

Confidential relationships play an important role in defining the sphere of autonomous decision-making protected by the right of privacy as well. Private non-commercial associations play a critical role in individuals' mental health and enhance their freedom from government domination.<sup>201</sup> Indeed, perhaps much of the due process right of privacy may be explained not so much as an effort to protect individual decision-making with regard to certain matters, but as an effort to protect certain autonomous units, most notably families, from state interference.<sup>202</sup>

The Supreme Court has recognized the critical importance of private associations, even those that, unlike religious institutions, receive no explicit recognition in the Constitution. Perhaps most explicitly, the Court has done so in construing the Constitution to include a guarantee of the "freedom of association." The Court has observed: "[C]ertain kinds of personal bonds have played a critical role in the culture and tradition of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the state."<sup>203</sup> In several cases defining the First Amendment freedom of association, the Court has recognized private associations as valuable and acknowledged that they merit respect from government.<sup>204</sup> Courts have recognized associational rights even when doing so frustrates attainment of goals of the highest order, such

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<sup>200</sup> See Post, *supra* note \_\_\_, at 990-92. Post notes that concepts of confidential relationship serve to constrain the tort of publication of private facts. Thus while some fact might be viewed as presumptively "private," courts employ the requirement that to be actionable the plaintiff's private facts must be given publicity to limit liability when facts are shared among members of a group that have a confidential relationship in the sense I have used it, such as a religious congregation. *Id.* at 992 ("the publicity requirement, as defined by the Restatement, distinguishes communications which form part of the "allusive," affective, and primary interactions of a traditional group, like a church, from those which form part of the impersonal interactions of strangers who comprise a public").

<sup>201</sup> See C. Keith Boone, *Privacy and Community*, 8 SOCIAL THEORY AND PRACTICE 1, 6-24 (1983).

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<sup>203</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984); see also MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 93 (1996); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 513-17 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

<sup>204</sup> See, *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984); *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

as ending racial and gender discrimination.<sup>205</sup>

Moreover, even quite distinct constitutional rights subsumed under the right of privacy seem to arise out of judicial concerns about state intrusions into family life. Thus, the earliest privacy cases addressed parents rights to raise their children.<sup>206</sup> Even the right to use contraception recognized in *Griswold v. Connecticut* was initially grounded in a concern about government interference in family decision-making.<sup>207</sup> The right to privacy has protected family relationships in other ways.<sup>208</sup> The law in non-constitutional areas reflects similar concerns about government intrusion into the realm of family life. For example, tort law also reflects a concern about family as a private enclave, establishing parental immunity that serves to limit judicial intrusion into parental decision-making.<sup>209</sup>

In short, the confidential relationship paradigm underlies privileged relationships and

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<sup>205</sup> See, *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (19\_\_)(rejecting facial attack on statute prohibiting discrimination by private clubs, but acknowledging that some clubs might be able to establish that the law as applied to them breached their freedom of association). See also, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)(Boy Scouts right to exclude gay scout leaders upheld on free speech grounds).

<sup>206</sup> *Pierce v. Soc'y of Sisters*, 280 U.S. 510, 535 (1925) (striking down Oregon law requiring students to attend public schools because it “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control”); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (petitioners right to teach the German language, “and the right of parents to engage him to so instruct their children,” are within the liberty protected by the due process clause).

<sup>207</sup> *Poe v. Ullman*, 367 U.S. 497 (1961)(Harlan, J., dissenting)(“[i]t is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy”); *Griswold v. Conn.*, 381 U.S. 479, \_\_\_ (1965) (focus on protecting marital intimacies and the “sacred precincts of marital bedrooms”). Indeed, it was not until *Eisenstadt v. Baird*, 405 U.S. 438 (1972), that the Court divorced the constitutional right of privacy protecting the use of contraceptives from the marital relationship.

<sup>208</sup> *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Stanley v. Illinois*, 405 U.S. 645 (1972). And at times the protection of the autonomy of the family unit even supercedes that of particular individuals to have “familial” relations with children. *Troxel v. Granville*, 530 U.S. 57 (2000)(giving parents right to preclude child from seeing grandparents); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

Indeed, in *Lawrence v. Texas*, — U.S. —, 123 S.Ct. 2472 (2003), the Court explained that in *Bowers* the majority had demeaned the constitutional challenge to sodomy laws by characterizing it as raising a right to engage in certain sexual conduct, and re-characterized the issue as one protecting the ability of individuals to define for themselves interpersonal relationships of love and affection. *Id.* at 2478,

<sup>209</sup> See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* § 280 (2000); W. PAGE KEETON, ET AL., *PROSSER AND KEETON ON TORTS* § 122, at 907-10 (1984).

providers very robust protection to communications made in the course of such relationships. More generally, however, the paradigm has been underappreciated by American courts, and in the absence of a privileged relationship, duties of confidentiality are rarely recognized either in tort law or in the context of the Fourth Amendment. However, the political branches of government have, since the mid-1970's, regularly turned to a confidential relationship paradigm by enacting statutes to govern disclosure of confidences by various categories of confidants.

## **F. The Paradigms' Interrelationships**

As the above analysis suggests, the five privacy paradigms, while different, are certainly not mutually exclusive. Sometimes a court may resolve a case under one paradigm, but the manner in which it performs its analysis under the paradigm may reflect insights derived from a competing one. Thus, the Supreme Court's view of the home as a warranting heightened protection location under a location analysis, surely reflects its appreciation of the home as a locus of confidential relationships, namely familial relationships. Moreover, several paradigms may suggest the same result. The easy privacy cases are those in which all of the privacy paradigms suggest one result. *Desnick v. American Broadcasting Co.*<sup>210</sup> provides an extraordinary example of such a circumstance. (In part the case is extraordinary because the court adverted to each of the five privacy paradigms in analyzing the case.) *Desnick* involved journalists' hidden camera investigation of an eye clinic. The proprietor claimed that the use of hidden cameras violated his right to privacy. In rejecting the claim, Judge Posner offered the following explanation:

No embarrassingly intimate details of anybody's life were publicized in the present case. There was no eavesdropping on a private conversation; the testers recorded their own conversations with the Desnick Eye Center's physicians. There was no violation of the doctor-patient privilege. There was no theft, or intent to steal, trade secrets; no disruption of decorum, of peace and quiet; no noisy or distracting demonstrations.

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<sup>210</sup> 44 F.3d 1345, 1352 (7th Cir. 1995).

In the passage, Posner touches on virtually all of the paradigms of privacy I have outlined above. He analyzes the journalists' actions in terms of the means of communication paradigm, noting that they engaged in "no eavesdropping on private conversation." He discusses the means of intrusion, noting, among other things, that the journalist's activities involved "no disruption of decorum." He also found the subject matter paradigm relevant, noting that the journalists did not publicize "embarrassingly intimate details of anybody's life" and did not seek to steal any trade secrets. A confidential relationship mode of analysis also suggested no breach of a privacy interest, as Posner noted "there was no violation of the doctor-patient privilege." Moreover, Posner used a location analysis as well, he spent the most time resolving the claim that the journalists had engaged in a physical trespass, ultimately rejecting the claim because consent, even under false pretenses, constitutes a defense to a trespass cause of action. In short, the journalists had not gained any information by non-consensual physical intrusion upon a "private" location.

Nevertheless, as we have seen, the privacy paradigms often suggest conflicting results, and it is in such cases that the privacy issues are the most difficult to resolve. The next section will address one such case.

## **II. *Bartnicki v. Vopper*: Wiretapping's Fruits and Clashing Privacy Paradigms**

*Bartnicki v. Vopper* forced the United States Supreme Court to consider whether recipients of tape recordings containing illegally intercepted conversations can be prohibited from disclosing the contents of those conversations. In other words, the Court had to determine whether the Electronic Communication Privacy Act's prohibition on disclosing or using information resulting from an illegal wiretap violated the Free Speech Clause. *Bartnicki* thus required the Court to resolve a clash between competing privacy paradigms that could potentially suggest conflicting results. The subject matter paradigm might suggest that the First Amendment must protect the recipient's decision to disclose the contents of such a conversation, at least if the illegally intercepted conversation involved a matter of public concern. By contrast, the means of communications paradigm, as embodied in ECPA, would suggest that such a conversation must

be considered “private,” regardless of the public significance of the substance of the conversation, and must not be divulged, even by a third party not involved in illegally intercepting the conversation. The Court ultimately found the subject-matter analysis paramount, but once again failed to define the scope of “matters of legitimate public concern” with any precision. I will canvass the Court’s attempts to define the sphere of legitimate public concern, which, ironically it has addressed most extensively in developing the constitutionally-mandated “fault” requirements applicable to defamation actions. I will then suggest an alternative approach which may serve to place some limits on the concept.

*Bartnicki* arose out of contentious negotiations between a teachers’ union and a school board<sup>211</sup> that received substantial local media attention.<sup>212</sup> During the negotiations Gloria Bartnicki, the union’s chief negotiator, discussed the status of the negotiations with Anthony F. Kane, the president of the local union, by cell phone.<sup>213</sup> The conversation covered several aspects of the negotiations, including the timing of a propose strike, difficulties created by public comment on the negotiations, and the need for a dramatic response to the school board’s intransigence.<sup>214</sup> During the conversation, Kane said:

If they’re not gonna move for three percent, we’re gonna have to go to their, their homes . . . To blow off their front porches, we’ll have to do some work on some of those guys. (PAUSE). Really, uh, really and truthfully because this is, you know, this is bad news. (UNDECIPHERABLE).<sup>215</sup>

Several months later, the parties accepted a non-binding arbitration proposal. Unfortunately for Kane and Bartnicki, their cell phone call had been intercepted and recorded surreptitiously, in violation of federal and state wiretapping laws. The unknown interceptor placed a tape recording of the conversation in the mailbox of Jack Yocum, the head of a local

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<sup>211</sup> *Id.* at 518.

<sup>212</sup> *Id.* at 518.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 518-19.

taxpayer's organization critical of the union.<sup>216</sup> Yocum recognized Kane's and Bartnicki's voices on the tape. Yocum then played the tape for some members of the school board (who apparently did not publicly discuss the tape). The Board did, however, discuss the tape at the next board meeting and formally requested that law enforcement authorities conduct a criminal investigation.<sup>217</sup> Subsequently, Yocum delivered the tape recording to local radio commentator Frederick W. Vopper, another critic of the Union. Vopper broadcast the tape of the Bartnicki-Kane conversation.<sup>218</sup>

Bartnicki sought damages for Vopper's disclosure of the contents of the conversation, invoking the rights of action established by the Electronic Communications Privacy Act,<sup>219</sup> and its state counterpart, the Pennsylvania Wiretapping and Electronic Surveillance Act.<sup>220</sup> Not only do the statutes prohibit wiretapping, but to effectuate the prohibition, they impose liability on recipients of illegally wiretapped conversations, even if the recipients played no role in the interception of the conversation. In particular, such individuals are subject to liability for disclosing the contents of an intercepted conversation to others if they knew or should have known that the information had been obtained in violation of the wiretapping laws.<sup>221</sup> Vopper raised a First Amendment defense to the statutory liability, alleging that the prohibition unconstitutionally limited his First Amendment rights.

Justice Stevens, writing for the majority, held that the First Amendment protected Vopper from liability because the Bartnicki-Kane conversation had involved matters of public concern,

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<sup>216</sup> Cite needed.

<sup>217</sup> Brief for Respondents Frederick W. Vopper, Keymarket of NEPA, Inc. and Lackazerne, Inc. (hereinafter "Vopper Resps. Br.") at 8. Indeed, at least one board member had been informed about the existence of the tape while in a local tavern even before Yocum told Board members. *Id.* at 7.

<sup>218</sup> A second station then broadcast the content of the conversations, followed by the local newspapers publishing accounts of the tape's contents.

<sup>219</sup> Two other cases raised similar issues: *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *vacated*, 121 S. Ct. 2190 (2001), and *Peavey v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000).

<sup>220</sup> 18 Pa. Cons. Stat. § 5725.

<sup>221</sup> It also provides for liability for using or endeavoring to use the contents of an illegally intercepted conversation if the person knows or has reason to know that the information was obtained in violation of the section.

and also because both parties to the conversation were “public figures” who should expect public scrutiny. Justice Stevens noted two interests served by the statutory provisions aimed at disclosure of illegally-wiretapped conversations. First, such provisions remove the incentive for parties to illegally intercept communications, by drying up the market for the products of such illegal activity.<sup>222</sup> Second, the provision sought to minimize the harm to victims that would result from further dissemination of the information obtained in violation of the privacy rights of the participants in the telephone conversation.<sup>223</sup> The first objective, while laudable, was more appropriately pursued by imposing sufficiently serious sanctions against the eavesdropper. Indirectly discouraging the eavesdropper by limiting the speech of the citizens who received information from the eavesdropper, but had otherwise committed no crime, was impermissible.<sup>224</sup>

The majority found the second rationale for the prohibition against disclosure of the contents of conversations intercepted by illegal wiretaps more appealing. The Court noted that permitting unrestrained wiretapping might have a chilling effect on private speech, and that “the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself.”<sup>225</sup> The Court said, however, that the concern about aggravating the harm done by eavesdroppers could not justify precluding non-complicit recipients from disclosing it when the conversation regarded matters of public concern.<sup>226</sup> This forced the Court to explain its rationale for concluding that the Bartnicki-Kane conversation involved matters of public concern.

Stevens explained that “the subject matter of the conversation was a matter of public

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<sup>222</sup> See, *New York v. Ferber*, 458 U.S. 747, 760 (1982) (accepting the argument in upholding statutes outlawing possession of child pornography).

<sup>223</sup> 121 S. Ct. at 1762.

<sup>224</sup> *Id.* (Bartnicki). Moreover, with regard to the wiretapping statute, the eavesdropper could be punished because rarely was the identity of the eavesdropper unknown. *Id.* at 1763. (Bartnicki). In addition, there was little reason to believe that prohibiting recipients of the information from disclosing it to others would discourage eavesdroppers from plying their trade. *Id.* (Bartnicki). In any event, concluded the Court, the “drying up the market” theory rested on mere speculation about serious harms. *Id.* at 1763-64. (Bartnicki).

<sup>225</sup> *Id.* at 1764. (Bartnicki)

<sup>226</sup> *Id.* at 1764-65 (Bartnicki)

concern.”<sup>227</sup> He elaborated: “If the statements about the labor negotiations had been made in a public arena — during a bargaining session, for example — they would have been newsworthy. That would also be true if a third party had inadvertently overheard Bartnicki making the same statements to Kane when the two thought they were alone together.”<sup>228</sup> Stevens invoked Justice Brennan’s statement in *New York Times v. Sullivan* that the nation is committed to the proposition that debate on public issues must be “uninhibited, robust and wide open.” He also quoted *Time, Inc. v. Hill*: “[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”<sup>229</sup> He concluded that “[t]he months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public concern, and that respondents were clearly engaged in debate about that concern.”<sup>230</sup>

Justice Breyer, writing a bit more cautiously in a separate concurrence, declared that the First Amendment protected Vopper because Bartnicki and Kane could assert no legitimate private interest in conversations concerning criminal activity that posed a threat to public safety.<sup>231</sup> Breyer, like Stevens, also focused on Bartnicki and Kane’s public stature. They were

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<sup>227</sup> In doing so, he distinguished the substance of the Bartnicki-Kane conversation from trade secrets and domestic gossip. Presumably trade secrets fall outside the sphere of matters of legitimate public importance not because the public lacks a legitimate interest in such matters, but because trade secrets possess economic value that would be destroyed by unlimited disclosure. See generally, Posner, *supra* note \_\_\_, at \_\_\_.

<sup>228</sup> 121 S. Ct. at 1760. As noted above, this treats the fact that the means of communication Bartnicki and Kane used for their conversation was “private” rather than “public” as completely irrelevant, contrary to the rationale of the Electronic Communications Privacy Act and the Court’s own seminal ruling in *U.S. v. Katz*.

<sup>229</sup> 121 S. Ct. at 1765 (quoting *Time, Inc. v. Hill*, which in turn was quoting *Thornhill v. State of Alabama*, 310 U.S. 88 (1940)). This description, of course, is virtually unbounded, almost everything is of public concern. It is not clear whether this description limits public concern to government, regulations by government, or the potential need for government regulation.

<sup>230</sup> 121 S. Ct. at 1765.

<sup>231</sup> 121 S.Ct. at 1766, 1767 (Breyer, J., concurring). Moreover, even the passing of the danger by virtue of the passage of time does not mean that the participants in the conversation have a legitimate interest in the privacy of their conversation. In addition, Breyer continued, the Court should not require editors to assess the impact of the passage of time upon expressed criminal intentions, particularly because such assessments would have to be made quickly under deadline pressures.

not private figures in whose professional lives the public lacked any legitimate interest. Rather, Bartnicki, as chief negotiator, and Kane, as union president, were “limited public figures” who had voluntarily thrust themselves into a public controversy, namely the contract that was to cover public school teachers at the local public high school.<sup>232</sup> Breyer found critical the confluence of the minimal legitimate expectation of privacy in the subject of the conversation (criminal threats to the physical safety of others) and the legitimate public interest in public figures like Bartnicki and Kane. Emphasizing this confluence, he explained, would allow the Court to establish a constitutional privilege to publish unlawfully intercepted conversations like that between Bartnicki and Kane, without creating a “public interest” exception that would engulf the federal and state wiretapping statutes’ privacy protections.<sup>233</sup>

Justice Rehnquist wrote for the dissenters, and accorded paramount importance to the means of communication paradigm — the contents of “private” conversations could not be divulged merely because they concerned a “public” subject matter (*i.e.*, a matter of legitimate public interest).<sup>234</sup> Toward the end of his dissenting opinion, Rehnquist discussed the conclusion, reached by both sets of Justices in the majority, that the tape’s content involved a matter of public concern. Perhaps, he asserted, he could agree with the majority’s assertion that the union officials’ statements would have been newsworthy had they been made in a public arena, like a bargaining session. However, Rehnquist argued, the “private” setting in which those statements were made, a telephone conversation between the two, could not be ignored — Bartnicki and Kane had no intention of contributing to any public debate in the course of their telephone conversation. He argued that the Constitution should not protect the broadcast of private conversation without the consent of the participants, “[e]ven where the communications involve public figures or concern public matters.” Even in such circumstances personal conversations

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<sup>232</sup> 121 S.Ct. at 1768.

<sup>233</sup> 121 S.Ct. at 1768.

<sup>234</sup> As Rehnquist noted, *Bartnicki* did not merely involve a clash between a statute and the Free Speech Clause. Rather it required the Court to resolve a clash between two “free speech” rights, the right to communicate with others privately, which was vindicated by ECPA, and the right to contribute to debate on public matters, invoked by Vopper. The resolution of this clash between “free speech” rights turned on which of the competing paradigms definitions of “private” and “public” the Justices would consider paramount.

meant to remain confidential were private and worthy of protection. “Although public persons may have foregone the right to live their lives screened from public scrutiny in some areas, it does not and should not follow that they have abandoned their right to have a private conversation without fear of having them intercepted..”<sup>235</sup>

Perhaps the majority correctly concluded that the First Amendment required it to create a subject-matter-based exception to the liability ECPA imposes upon disclosing information obtained from another’s breach of a private “means of communications.” However, the realm of “private” subject matter, in the Free Speech Clause context, has long been quite narrow and ill-defined. As a result, the Court will find itself hard pressed to limit the disclosure of the fruits of illegally wiretapped conversations by third parties.<sup>236</sup> After *Bartnicki*, the definition of “matters of public concern” remains largely undefined, even in the context of the disclosure of information derived from illegally-intercepted conversations. Several potential definitions could be embraced by the Court. *Bartnicki* did not require the court to define the scope of matters of legitimate public concern with precision, there were a number of bases on which the Court could have concluded that the Bartnicki-Kane discussion was of legitimate public concern. The conversation involved potential criminal activity, the two participants in the conversation were public figures, and the conversation related directly to a highly public controversy. I will suggest a “subject matter” test that might be employed to determine when the fruits of illegal wiretaps may be disclosed. The test might perhaps be relevant in other circumstances.<sup>237</sup>

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<sup>235</sup> 121 S. Ct. at 1775-76 (Rehnquist, J., dissenting).

<sup>236</sup> By contrast, note that privacy interests defined in terms of the location, means of communications, and confidential relationships paradigms are often subordinated based on a subject matter analysis in the criminal context. Thus, such privacy interests can be overridden if the intrusion is necessary to obtain evidence when there is “probable cause” to believe that the investigative target has committed a crime. However, the information that is considered “public,” in the sense that it justifies allowing use of information gained from breaching privacy expectations based on other paradigms, is more limited than in the Fourth Amendment context than in the First Amendment context.

<sup>237</sup> Previously, in *New York Times Co. v. United States*, 403 U.S. 713 (1971)(the “Pentagon Papers” case), the Court had held that a journalist could not be enjoined from publishing purloined Defense Department material. The case is rightly viewed as a Free Speech Clause icon. However, the decision in the *Pentagon Papers* case should not be viewed as controlling in a case like *Bartnicki*. Our attitude towards journalists’ publication of purloined secrets of private individuals (whether “stolen” from the government or from the private individual) should differ from our attitude toward journalists’ publication of purloined government secrets.

A court could adopt one of three major approaches, issue-focused, personality-focused, or institution-focused, in identifying matters of public importance. The issue-focused approach seeks to define particular facts or matters as “public” or “private” based on the subject matter to which they relate. Typically, courts that adopt an issue-focused approach seek to determine whether the issue in question is one of legitimate public concern.<sup>238</sup> Many courts employ such a test in tort cases alleging publication of private facts. Moreover, such a test has been proposed, and in at least one jurisdiction is used, in attempting to identify speech that merits the greatest protection in defamation actions.<sup>239</sup>

In the publication of private facts context, courts virtually never conclude that published facts are not matters of legitimate public concern.<sup>240</sup> And indeed, some courts have refused to recognize the cause of action precisely because of the difficulty of identifying “private” facts in which the public lacks a legitimate interest.<sup>241</sup> Similarly, in the defamation context, Justice Brennan urged his Brethren to adopt an issue-focused approach in seeking to determine when the heightened protections against defamation liability set forth in *New York Times v. Sullivan* would

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<sup>238</sup> RESTATEMENT (SECOND) § 652D (recognizing cause of action for giving publicity to the private life of another if the matter publicized “is not of legitimate concern to the public”); Warren & Brandeis, *supra* note \_\_\_, at 214-16.

<sup>239</sup> New York has taken such an approach. *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y. 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975) (“where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition,” a defamed party may recover damages only on a showing of gross irresponsibility); *Gaeta v. New York News, Inc.*, 62 N.Y.2d 340, 465 N.E.2d 802, 477 N.Y.S.2d 82 (1984). Other states have taken a similar approach. *Gay v. Williams* 486 F. Supp. 12 (Alaska 1979); California; *Journal-Gazette Co., Inc. v. Bandido’s, Inc.*, 712 N.E.2d 446, 452 (Ind. S. Ct.1999); *AAFCO Heating & Air Conditioning Co. v Northwest Publications, Inc.*, 321 N.E.2d 580, 590 (Ind. App. 1975); *Diversified Management v. Denver Post, Inc.*, 653 P.2d 1103 (Col. 1982); *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450 (1975).

<sup>240</sup> Harry Kalven, Jr., *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 336 (1966)(surely there is force to the simple contention that whatever is in the news media is by definition newsworthy, that the press must in the nature of things be the final arbiter of newsworthiness. The cases do not quite go this far, but they go far enough to decimate the tort”).

<sup>241</sup> See, e.g., *Anderson v. Fisher Broadcasting Cos.*, 300 Or. 452, \_\_\_ (1986)(rejecting the tort because “[t]he editorial judgment of what is ‘newsworthy’ is not so readily submitted to the ad hoc review of a jury as [the lower court] believed”). See Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 333-34 (1983)(arguing that “gossip” should be considered as addressing “matters of public concern” because from an anthropological and sociological perspective gossip serves as a form of “information exchange that teaches about other lifestyles and attitudes, and thus change or reinforce community values).

apply. In *Rosenbloom v. Metromedia, Inc.*,<sup>242</sup> writing for a three-Justice plurality, he asserted that the *New York Times* standard should apply to “all discussions and communications involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.”<sup>243</sup> A majority of the Court rejected that approach, fearing that virtually any matter in which the media took an interest could be considered one of legitimate public concern.<sup>244</sup> And the courts’ conclusions on the scope of matters of legitimate public importance appear to bear out the fears of the Justices who rebuffed Justice Brennan’s entreaties.<sup>245</sup>

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<sup>242</sup> 403 U.S. 29 (1971).

<sup>243</sup> *Id.* at 44. He asserted that focus on plaintiff’s status bore little relationship either to the values protected by the First Amendment or to the nature of our society . . . thus the idea that certain public figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is at best a legal fiction. *Id.* at 44.

<sup>244</sup> *Gertz v. Robert Welch*, 418 U.S. 323, 346 (1974)(adoption of the *Rosenbloom* test would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not— to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government.' . . . [;] [w]e doubt the wisdom of committing this task to the conscience of judges”); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 79-80 (Marshall, J. dissenting)(criticizing test because “all human events are arguably within the area of public or general concern and noting that the defense of newsworthiness to the publication of private facts cause of action “raises serious questions whether it has substantially destroyed the right of privacy as Warren and Brandeis envisioned it); *Troman*, 62 Ill.2d 196, 340 N.E.2d 292 (“whether a matter is one of public interest . . . depends to some degree on whether the media themselves have chosen to make it one”); *Rouch v. Enquirer & News*, 427 Mich. 157, \_\_\_, 398 N.W.2d 245, \_\_\_ & n.28 observing that “public interest is an elusive term, and may be said to encompass any matter reported by the press, and quoted Theodore H. White’s observation about “the power of the press to set the agenda of public discussion”); Harry Kalven, Jr., *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 336 (1966)(surely there is force to the simple contention that whatever is in the news media is by definition newsworthy, that the press must in the nature of things be the final arbiter of newsworthiness. The cases do not quite go this far, but they go far enough to decimate the tort”).

Ironically, after succeeding in rejecting an issue-focused test and adopting a personality-focused one, some Justices then suggested that in certain limited circumstances an issue-focused test might be workable after all. *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-60 (1985) (Powell, J.) (“[s]peech on matters of purely private concern is less of a First Amendment concern”).

<sup>245</sup> The scope of matters of public concern is quite broad. First, many of the activities in which private persons engage are regulated by the government in some manner and, therefore, may become a matter of public concern when there is a potential crime or regulatory violation. Even currently unregulated activity can be subject to regulation (or subsidization). Thus, even such activity may qualify as a matter of public concern, because the public needs information about such matters to consider whether the current regulatory regime needs expansion, contraction, or some other modification. Public servants' participation in government makes many aspects of their lives matters of public concern.

Moreover, though the Free Speech Clause serves to further self-government, the legitimate interests of the public encompass more than governmental affairs. Surely facts about society and social trends are matters of legitimate public interest. So are the personal ordeals that individuals must face, particularly when many members of

A second approach, one that is personality-centered, can be employed to distinguish newsworthy from non-newsworthy matters. Under such an approach, the question of whether a matter is public or private depends on the categorization of the individual to whom the information relates. Though Warren and Brandeis suggested such an approach,<sup>246</sup> and some publication of private facts cases appear to turn on the status of the individual discussed,<sup>247</sup> the courts appear not to have adopted this approach with regard to the cause of action for publication of private facts. However, the personality focused approach provides the basic mode of analysis in defamation cases. Thus, under U.S. Supreme Court doctrine, “public officials” and “public figures” may prevail on a defamation claim only if they establish the defamer’s “actual malice”;<sup>248</sup> others, *i.e.*, private figures, may prevail if they merely establish the defamer’s

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society will have to confront similar ordeals. *See*, *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967); *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980). For example, the ways in which individuals cope with the HIV infection or AIDS, including decisions about treatment and lifestyle, have significance for the substantial number of people who must face those same challenges and who might find comfort in knowing that they are not alone.

Moreover, some very personal matters may become matters of public importance merely because they illustrate some broader trend. For example, in *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993), very personal information regarding the relationship between two ordinary people, Ruby Lee Daniels and Luther Haynes, was found a matter of public interest, precluding Haynes from prevailing on his publication of private facts claim. During their marriage, Haynes had physically and emotionally abused Daniels. In the twenty years following the end of the marriage, Haynes had remarried and become an exemplary person, even becoming a deacon in his church. However, Haynes’ abuse of Daniels illustrated a larger trend that the offending book’s author had sought to describe — namely the widespread familial dysfunction attendant the migration of five million African-Americans from the rural South to the Northern cities between 1940 and 1970. *See id.* at 1232-33. Similarly, in *Gaeta v. New York News*, 465 N.E.2d \_\_\_, 802-06 (N.Y. 1984), a defamation case, information about a couple’s relationship and the death of their son was deemed a matter of public importance. The husband’s transfer from a mental institution to a nursing home illustrated a broader trend regarding the effects of a government de-institutionalization program, and thus his life was a matter of public concern. The cause of his initial institutionalization (which was falsely ascribed to his wife’s affair with another man and their son’s consequent suicide) was relevant to the story. *See Gaeta v. N.Y. News, Inc.*, 465 N.E.2d 802-06 (N.Y. 1984).

<sup>246</sup> Warren & Brandeis, *supra* note \_\_\_, at 214-16 (“there are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation. Matters which men of the first class may justly contend, concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow citizens.”)

<sup>247</sup> *See Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940); *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975); *Michaels v. Internet Entertainment Group*, 27 Med. L. Rptr. 1097 (C.D. Cal. 1998).

<sup>248</sup> *New York Times v. Sullivan* (“public officials” must establish “actual malice”); *Curtis Publishing v. Butts*, 388 U.S. 130 (1967)(extending *New York Times v. Sullivan* to “public figures”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)(defining general purpose public figures and limited purpose public figures).

negligence.<sup>249</sup> With respect to high public officials and private figures who wield enormous power or influence, even the most personal details of their lives are considered “public” for purposes of identifying the appropriate standards of defamation liability. While such a personality-focus test does treat many matters as “private,” unlike the issue-focused tests applied in the publication of private facts and defamation contexts, it might make “private” some matters that really are of public importance.<sup>250</sup> More significantly, the test may deem “public” matters than are quite private. The focus on the “public” status of the person to whom the information relates may, in effect, preclude public officials and public figures from having any “private” sphere protected from public scrutiny and “uninhibited, robust, and wide open” public debate. Thus, wiretapped marital conversations between an elected official and his or her spouse could be considered a “matter of public concern” by virtue of the public status of one of the parties to the conversation.<sup>251</sup>

A third approach for distinguishing “public” and “private” matters might be described as institution-focused. Because one purpose of the Free Speech Clause is allowing the citizenry to monitor the operations of government,<sup>252</sup> we might consider “public” any matter at issue in a government proceeding or involving any governmental institution. While the scope of “public” matters is likely to be quite broad under such an approach, given the pervasiveness of

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<sup>249</sup> *Id.* at \_\_\_\_ (Gertz)

<sup>250</sup> In part, the Court seeks to address this issue by creating the concept of an involuntary public figures. Ordinarily, a person becomes a “public figure” only by seeking to influence the public. However, involuntary public figures attain “public figure” status despite avoiding public attention, such persons are deemed public figures only because public events or public issues cannot be fully discussed without focusing public attention on them. Gertz, 418 U.S. at \_\_\_\_; *Dameron v. Washington Magazine*, 779 F.2d 736 (D.C. Cir. 1985)(only air traffic controller on duty when commercial jetliner crashed on approach to Dulles airport deemed an involuntary public figure).

<sup>251</sup> See *Michaels v. Internet Entertainment Group*, 27 Med. L. Rptr. 1097 (C.D. Cal. 1998)(dissemination videotape of actress engaging in intercourse is speech involving a matter of public concern because the actress is a sex symbol).

<sup>252</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523; Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, \_\_\_\_ - \_\_\_\_ (1975); see *Secrets and Lies*, *supra* note \_\_\_\_, at 788 & nn. 191-94.

government in our lives,<sup>253</sup> it would provide more robust limits than those supplied by the issue-focused tests the courts have used in the publication of private facts and defamation contexts.

This third, institution-focused approach has not been used widely, if at all, in publication of private fact cases. Justice Brennan advocated such an approach in defamation cases in *Time, Inc. v. Firestone*,<sup>254</sup> where a wealthy socialite sued over an inaccurate description of her divorce proceedings. While the Court used its newly-minted personality-focused test, and found the plaintiff a private figure,<sup>255</sup> Justice Brennan argued that plaintiff should have had to establish “actual malice.” He argued that citizen review of the operation of the judiciary is critical to democratic governance, and thus that the statements about the court proceedings were about “public” matters, not “private” ones.<sup>256</sup> Moreover, in cases involving First Amendment limitations on publication of facts about parties to judicial proceedings, a majority has arguably taken an institution-focused approach. Thus, the Court has repeatedly held that states cannot preclude publication of matters related to judicial proceedings.<sup>257</sup> I have previously

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<sup>253</sup> See Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964)(seminal article noting this trend and recommending recognition of property rights in certain government benefits and licenses); see also, Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 3 (1991)(“the night watchman state is dead in America, if indeed it ever lived . . . [i]n the late twentieth century, the bureaucrat --- who dispense benefits and licences, who hires and fires, who plans health care programs or fiscal policy --- has replaced the police officer, judge, or soldier as the icon of government”).

<sup>254</sup> 424 U.S. 448 (1976).

<sup>255</sup> *Id.* at 454-55. However, the Court has arguably taken such an approach with regard to private citizens who are candidates for office. *Monitor Patriot v. Roy*, 401 U.S. 265, 272 (1971)(extending *New York Times v. Sullivan* to candidates for elective office because “it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office”). Granted such a result can also be reached by the personality-focused approach set forth in *Gertz*.

<sup>256</sup> For instance, Brennan’s dissent in *Firestone* focused on exactly this point. Citizen review of the judicial system is essential to democratic government and, for that reason alone, the breathing room for error that *New York Times v. Sullivan* affords should apply anytime media entities reported on judicial proceedings. *Firestone*, 424 U.S. at 473-78 (Brennan, J., dissenting). His dissent in *Hutchinson v. Proxmire* did not address this issue in part because he viewed the immunity of a legislator under the Speech and Debate Clause as dispositive. See generally William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169, 182 (citing *Hutchinson* as an example of a case in which the personality-focus of the test for heightened protection for defamation defendants meant that “many reports on matters essential to an educated citizenry do not receive the highest level of scrutiny”).

<sup>257</sup> *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Landmark Commun. v. Virginia*, 435 U.S. 829 (1978)(“[t]he operation of the Virginia [Judicial Inquiry and Review] Commission, no less than the operation of the judicial system itself, is a matter of public interest, necessarily engaging the attention of the newsmedia”); *Nebraska*

characterized the approach as a means of intrusion approach,<sup>258</sup> but it could also be characterized as a subject-matter approach that makes the “public” nature of a fact turn on whether the fact is discussed in the context of government action.<sup>259</sup>

*Bartnicki* requires that the courts distinguish “public” from “private” matters, and none of the approaches outlined above is satisfactory. In the context of delineating the First Amendment protections for third-party disclosure of the fruits of illegally wiretapping, courts should protect the use or disclosure of such material only if the intercepted conversation involves the use of power. Such an approach will allow third parties to disclose particularly important information, but at the same time will impose important constraints upon the further disclosure of illegally wiretapped information, information obtained by violation of the norms of privacy established by a statute embodying the means of communication paradigm. Unlike, the issue-focused tests as applied by the courts, surely there will be many conversations that, while they may involve matters of legitimate public interest, will not involve the use of power that the citizenry has a legitimate interest in monitoring. Unlike the personality-focused test, it allows public officials and public figures to have some conversations that, if illegally wiretapped, may still not be disclosed. Certainly many of the private conversations in which public officials and public figures engage do not involve the use of power over others. The proposed test is somewhat similar to the institution-focused approach, except that not everyone who has some interaction with the government will have their interaction with the government subjected to public scrutiny.

Certainly the exercise of political power would qualify as the exercise of a type of power over a substantial segment of the public. Thus, conversations regarding the exercise of political power would qualify as those that concern a public matter such that third parties who receive information regarding the conversation would have a First Amendment right to disclose that

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Press Ass’n v. Stuart, 427 U.S. 539, 587 (1976); B.J.F. v. Florida Star, (the article generally . . . involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities”), *see generally*, Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979). (Similar arguments are made in the context of the right of access to trials.)

<sup>258</sup> See page \_\_\_ *supra*.

<sup>259</sup> See note 118 *supra*. Indeed, the rationale for the Freedom of Information Act is that the citizenry has a right to know of government activities. Cite needed.

information. The exercise of economic power should also qualify as a “public” matter, such that the contents of illegally-recorded private conversations could be disclosed by those not complicit in the initial interception. Thus conversations about the manner in which a corporate enterprise will make decisions would fit within such a rule. However, in some circumstances, the exercise of power over a substantial segment of the public should not be sufficient to give third-parties a First Amendment right to disclose the contents of an illegally-wiretapped conversation. Thus while a religious leader may exercise substantial authority over members of their congregations, the exercise of such power should not give rise to a right to disclose the contents of an illegally-wiretapped conversation between religious leaders or between religious leaders and members of their congregations. The autonomy of religious groups is so essential, that religious organization should retain some immunity from public scrutiny, even if at times this allows religious leaders to abuse their authority.

*Bartnicki* can serve to illustrate the approach suggested above. The conversation in *Bartnicki* did involve the exercise of power over a substantial segment of the public, and thus, arguably, if the Court will allow a “subject matter” inquiry to trump a privacy interest defined in terms of the means of intrusion, the case was an appropriate one in which to conclude that the conversation was in some sense a “public conversation.” *Bartnicki* and Kane, the participants in the illegally-intercepted conversation, could and did wield substantial power with regard to a major public contract in the school district. The public employees union that the two represented had been granted a special power by law, indeed a monopoly power,<sup>260</sup> to represent those employees in a matter that is of great public interest, namely, the terms and conditions of employment for the teachers in that school district. Moreover, the particular discussion that was intercepted was one in which *Bartnicki* and Kane were discussing strategies for using their resources to reach a favorable outcome in the contract negotiations with school authorities. As the respondents noted in *Bartnicki*, the case involved assertion of a privacy interest by

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<sup>260</sup> 43 Pa. Stat. Ann., tit. 43 § 211.7 (“Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment”).

“participants in a telephone conversation about the public’s business.”<sup>261</sup> <sup>262</sup>

## CONCLUSION

The legal system’s treatment of privacy can best be understood by recognizing that privacy has not been developed as a unitary, comprehensive concept, but instead in terms of several paradigms — the paradigms of location, means of communication, means of intrusion, subject matter, and confidential relationships. The legal system relies upon different paradigm at different times. While the paradigms sometimes suggest the same result, often they do not. Thus, as we have seen, the selection of the paradigm is a critical step in resolving privacy claims. Much of the judicial development of privacy law can justly be criticized for over-emphasizing the paradigm of location, and under-emphasizing competing paradigms, such as the confidential relationship and means of intrusion paradigms. Judicial doctrine can also be criticized for adopting a particularly privacy-destroying version of the location paradigm.

In *Bartnicki v. Vopper*, the Court has made a basic judgment to privilege the subject matter paradigm used in the First Amendment context in addressing the publication of information over the competing paradigms, in particular the means of communications paradigm,

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<sup>261</sup> See *Vopper Resps. Br.* at 32 (“this case involves the assertion of a privacy interest, not by the victim of a violent sexual assault, but by participants in a telephone conversation about the public’s business; [t]he fact that they hoped, or even expected, that their discussion would remain confidential does not constitute an ‘interest of the highest order’”).

<sup>262</sup> *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), provides a second illustration. In that case a member of the Republican leadership of the House of Representatives, John A. Boehner, spoke by cell phone with three other members of the Republican leadership regarding disposition of ethics complaints against then-Speaker Newt Gingrich that were then before the House Committee on Standards of Official Conduct. The participants discussed strategy regarding an expected Ethics Subcommittee announcement of Gingrich’s agreement to accept a reprimand and to pay a fine in exchange for the committee’s promise not to hold a hearing. The phone call was illegally intercepted by two private citizens, who forwarded the tape to James A McDermott, the ranking Democrat on the House Ethics Committee. McDermott then delivered copies of the tapes to the New York times, the Atlanta Constitution Journal, and Roll Call. After accounts of the conversation were published, Boehner sued McDermott for disclosing the contents of the illegally wiretapped information when he knew or should have known that the conversation had been intercepted illegally. McDermott asserted that imposition of such liability would deprive him of his First Amendment rights. The D.C. Circuit resolved the case by upholding the cause of action, thus giving precedence to the ECPA’s means of communication paradigm rather than the subject paradigm. However, if the subject matter paradigm is paramount, as the U.S. Supreme Court held in *Bartnicki*, surely *Boehner v. McDermott* is a case in which the conversation should be considered a matter of legitimate public interest. The proposed test would produce that result, the conversation clearly involved the exercise of power, political power, over others.

that protect privacy by placing legal constraints on the acquisition of information. Ultimately, however, the subject matter paradigm does not provide very robust privacy protections, and the Court has not seriously sought to define the realms of “public” and “private” in the context of the publication of information. In the context of the fruits of illegally wiretapped conversation, a subject matter test that focuses on whether the intercepted conversation involves the use of power over a substantial segment of the public provides a subject matter test that is protective of First Amendment interests while providing robust privacy protections.